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**A REVIEW OF THE EUROPEAN COURT'S FREEDOM OF EXPRESSION CASES
IN 2013**

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Introduction

The European Court of Human Rights issued 916 judgments on the merits during its 2013 term. While this number may seem quite high, half of these judgments concerned only five of the 47 member states of the Council of Europe, namely Russia, Turkey, Romania, Ukraine, and Hungary; and half of the court's docket involves straightforward fair trial violations, such as the excessive length of domestic court proceedings.

Of the total opinions issued during 2013, the European court handed down 59 merits opinions involving the right to freedom of expression, a right which is guaranteed by Article 10 of the European Convention on Human Rights.¹ The purpose our paper is to highlight what we consider to be the five most important judgments concerning free expression in 2013. And in order to explain our choices, we thought it helpful to give a snapshot of the court's docket.

The European Court's Free Expression Docket

The first point is that nearly half of the court's freedom of expression docket still involves defamation and damage to reputation, numbering 27 cases. Of these cases, 13 were complaints by the press over defamation convictions received in their home states, with the press winning nine of these cases,² but losing five,³ including a significant loss involving liability for online reader comments. We discuss two of these defamation cases below. In addition, there were six cases taken by non-press individuals over defamation convictions they had received, winning all but one of these.⁴

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¹ See generally, D. Voorhoof, "Freedom of Expression under the European Human Rights System," *Inter-American and European Human Rights Journal* 3 (2009); R. Ó Fathaigh and D. Voorhoof, "The European Court of Human Rights, Media Freedom and Democracy," in Price, Verhulst and Morgan (eds.), *Routledge Handbook of Media Law* (New York: Routledge, 2013); and D. Voorhoof, "The Right to Freedom of Expression and Information under the European Human Rights System," EUI Working Paper 2014 ([here](#)).

² *OOO Ipress v. Russia*, App. No. 33501/04 (2013), *Bugan v. Romania*, App. No. 13824/06 (2013), *Welsh v. Portugal*, App. No. 16812/11 (2013), *Soltész v. Slovakia*, App. No. 11867/09 (2013), *Ristamäki v. Finland*, App. No. 66456/09 (2013), *Ungváry v. Hungary*, App. No. 64520/10 (2013), *Mika v. Greece*, App. No. 10347/10 (2013), *Vakfi v. Turkey*, App. No. 28255/07 (2013), and *Belpietro v. Italy*, App. No. 43612/10 (2013).

³ *Novaya Gazeta v. Russia*, App. No. 14087/08 (2013), *OOO 'Vesti' v. Russia*, App. No. 21724/03 (2013), *Print Zeitungsverlag GmbH v. Austria*, App. No. 26547/07 (2013), *Błaja News v. Poland*, App. No. 59545/10 (2013), and *Delfi AS v. Estonia*, App. No. 64569/09 (2013).

⁴ *Niculescu-Dellakeza v. Romania*, App. No. 5393/04 (2013), *Reznik v. Russia*, App. No. 4977/05 (2013), *Sampaio e Paivade Melo v. Portugal*, App. No. 33287/10 (2013), *Stojanović v. Croatia*, App. No. 23160/09 (2013), *Morel v. France*, App. No. 25689/10 (2013), and *Morice v. France*, App. No. 29369/10 (2013) (referred to the grand chamber).

Of particular note is that a further seven of the defamation cases involved petitions by individuals complaining about failed defamation suits they had taken against the press in their home states. This is a consequence of a controversial 2004 judgment recognising an unenumerated right to reputation under the Convention's Article 8 which protects privacy. Three of these petitions were successful in 2013, including one where the court held that the failure of the Romanian courts to convict a newspaper for defamation violated the right to reputation of the allegedly defamed individual.⁵ But the European court did dismiss the four other claims, including one seeking to have a defamatory newspaper article removed from an online archive.⁶

Apart from the defamation cases, the court's remaining docket can be somewhat crudely divided into three categories: (a) cases taken by the press, (b) cases complaining about the press, and (c) non-press cases. First, in terms of successful press cases, there were two involving newspapers challenging search and seizure orders granted in Luxembourg and Latvia.⁷ The European court also overturned three convictions imposed on the press for publishing terrorist statements,⁸ and held that the suspension and confiscation of a number of newspapers in Turkey under the terrorism law violated press freedom.⁹ A suspended prison sentence imposed in Italy for the broadcasting of confidential information was also held to violate free expression.¹⁰

Second, in terms of complaints about the press, the court rejected an application arguing that a newspaper's refusal to carry an advertisement violated free expression.¹¹ The court also dismissed a complaint that pictures of a public figure published in the press violated privacy.¹² And additionally, the court rejected a claim that a newspaper article had violated a suspect's presumption of innocence.¹³

Third, of the remaining non-press cases, many were significant freedom of expression judgments. For instance, the court held that a number of convictions for incitement to violence violated free expression,¹⁴ and in a case against France, held that a conviction for insulting the president also violated free expression.¹⁵ Of note, the court considered the issue of copyright and freedom of expression for the first time, but rejected two applications over copyright-violation convictions.¹⁶

⁵ Ageyevy v. Russia, App. No. 7075/10 (2013), Popovski v. Macedonia, App. No. 12316/07 (2013), and Someşan v. Romania, App. No. 45543/04 (2013).

⁶ Mater v. Turkey, App. No. 54997/08 (2013), Pauliukienė v. Lithuania, App. No. 18310/06 (2013), Putistin v. Ukraine, App. No. 16882/03 (2013), and Wegrzynowski v. Poland, App. No. 33846/07 (2013).

⁷ Saint-Paul Luxembourg v. Luxembourg, App. No. 26419/10 (2013), and Nagla v. Latvia, App. No. 72469/10 (2013).

⁸ Belek v. Turkey, App. No. 36827/06 (2013), and Dicle v. Turkey, App. No. 9858/04 (2013).

⁹ Güdenoğlu v. Turkey, App. No. 42599/08 (2013).

¹⁰ Ricci v. Italy, App. No. 30210/06 (2013).

¹¹ Remuszko v. Poland, App. No. 1562/10 (2013).

¹² Von Hannover v. Germany (No. 3), App. No. 8772/10 (2013).

¹³ Krylov v. Russia, App. No. 36697/03 (2013).

¹⁴ Kaya v. Turkey, App. No. 52056/08 (2013), and Yavuz v. Russia, App. No. 12606/11 (2013).

¹⁵ Eon v. France, App. No. 26118/10 (2013).

¹⁶ Ashby Donald and Others v. France, App. No. 36769/08 (2013), and Neij and Sunde Kolmisoppi v. Sweden, App. No. 40397/12 (2013) (admissibility decision). See D. Voorhoof and I. Høedt-Rasmussen, "Ashby v France: Copyright versus Freedom of Expression," *Inform*, Jan. 26, 2013 ([here](#)), and D. Voorhoof and I. Høedt-Rasmussen, "The Pirate Bay v Sweden: Copyright versus Freedom of Expression II," *Inform*, Mar. 22, 2013 ([here](#)).

The court also handed down two seminal opinions, both of which are discussed below, concerning the conviction of a whistleblower in the Romanian intelligence service for disclosing secret information,¹⁷ and the conviction of a politician in Switzerland for genocide denial.¹⁸ Further, the court rejected three complaints over the banning and dissolution of various political groups.¹⁹ Notably, the court significantly contributed to its creation of a right of access to information in two important opinions.²⁰ The remaining cases involved a variety of issues, including the use of non-official languages in elections,²¹ convictions for engaging in protest and assemblies,²² a judge being sanctioned for comments made in the press,²³ a successful privacy complaint against the police for inviting the press to a police station,²⁴ an unsuccessful free expression complaint against dismissal from the army,²⁵ a contempt of court conviction, and a conviction for incitement to commit offences.²⁶

Finally, the court, sitting in a 17-judge grand chamber, handed down its long-awaited judgment on the UK's blanket ban on political advertising on television.²⁷ This political advertising case was the only case concerning freedom of expression which was considered by the grand chamber, and consequently we include a discussion below. And from the 2013 term, only two cases have now been accepted for review by the grand chamber during the 2014 term.²⁸

Belpietro v. Italy: Criminal Defamation

Given that nearly half of the European court's free expression docket is defamation cases, the first judgment we thought to highlight is *Belpietro v. Italy*, an important opinion concerning criminal defamation.²⁹ A majority of European states still maintain criminal defamation laws, and discussion of the *Belpietro* case can bring together a number of issues in the court's defamation jurisprudence.

Belpietro was editor of the Italian newspaper *Il Giornale*, which had published an Italian senator's op-ed discussing the lack of results in tackling the mafia in the Palermo region. The article described a "war" between the Palermo public prosecutors' office and the police, because of the political strategies being employed in mafia prosecution decisions, and

¹⁷ Bucur and Toma v. Romania, App. No. 40238/02 (2013).

¹⁸ Perinçek v. Switzerland, App. No. 27510/08 (2013).

¹⁹ EAE-ANV v. Spain, App. No. 40959/09 (2013), Kasymakhunov v. Russia, App. No. 262161/05 (2013), and Vona v. Hungary, App. No. 35943/10 (2013).

²⁰ Youth Initiative for Human Rights v. Serbia, App. No. 48135/06 (2013), and OVESS v. Austria, App. No. 39534/07 (2013). See D. Voorhoof and R. Ó Fathaigh, "The Press and NGOs' Right of Access to Official Documents," *Inform*, Dec. 6, 2013 ([here](#)), and D. Voorhoof, "Article 10 Includes a Right of Access to Intelligence Agency Data," *Inform*, July 9, 2013 ([here](#)).

²¹ Aydin v. Turkey, App. No. 49197/06 (2013).

²² Malofeyeva v. Russia, App. No. 36673/04 (2013), Gün v. Turkey, App. No. 8029/07 (2013), Cholakov v. Bulgaria, App. No. 20147/06 (2013), Kasparov v. Russia, App. No. 21613/07 (2013), and Kudrevičius v. Lithuania, App. No. 37553/05 (2013).

²³ Di Giovanni v. Italy, App. No. 51160/06 (2013).

²⁴ Khmel v. Russia, App. No. 20383/04 (2013).

²⁵ Jokšas v. Lithuania, App. No. 25330/07 (2013).

²⁶ Yalçinkaya v. Turkey, App. No. 25764/09 (2013).

²⁷ Animal Defenders International v. the United Kingdom, App. No. 48876/08 (2013).

²⁸ Morice v. France, App. No. 29369/10 (2013), and Delfi v. Estonia, App. No. 64569/09 (2013).

²⁹ *Belpietro v. Italy*, App. No. 43612/10 (2013). For a critique, see D. Voorhoof and R. Ó Fathaigh, "Belpietro v. Italy," 14 (12) *European Human Rights Cases* 2816 (2013) ([here](#)).

detailed how one police officer had committed suicide as a result. Two public prosecutors lodged criminal complaints for defamation against the senator and against the newspaper's editor.

Under the Italian constitution, senators enjoy a broad parliamentary immunity even for statements made outside of parliament. Consequently, the case against the senator was dropped, following a ruling by the Italian senate that the senator's article was covered by parliamentary immunity. Nonetheless, the case against the editor proceeded, but at first instance, the Milan city court acquitted the editor of defamation, holding that newspapers were entitled to publish a politician's harsh polemical piece on matters of public interest. However, on appeal, the editor was convicted, with the Milan court of appeal holding that some of the allegations lacked a sufficient factual basis, and sentenced the editor to a suspended four-month prison term, and a fine of 110,000 euro.

The European court reviewed the conviction, and came to two conclusions. First, the court held that the Milan court of appeal had not violated article 10 of the Convention in convicting the editor for defaming two public officials. The European court applied a minimal level of scrutiny, holding that it needed "strong reasons" to set aside the Milan court of appeal's decision, and would only ask itself whether the decision was "arbitrary or clearly erroneous." Even though the newspaper article concerned a matter of public interest, it did not have a sufficient factual basis. Moreover, the court refused to hold that making an editor criminally liable for a senator's defamatory article (where the senator was shielded by privilege) violated press freedom. The court reasoned that otherwise the press would have an absolute freedom to publish any defamatory or insulting statement written by a senator.

However, on the sanctions, the European court held that the suspended four-month prison sentence imposed on the newspaper editor violated Article 10. The court applied the near-absolute rule laid down in the landmark *Cumpănă and Mazăre v. Romania* opinion, that prison sentences for defamation are never justified under Article 10 where the defamatory statements concern a matter of public interest.³⁰ This rule against prison sentences includes pardoned, suspended, or conditional sentences, effectively removing from European legislatures and courts the ability to impose such sentences.

Belpietro's Importance

We have criticised *Belpietro's* main holding elsewhere, and we thought it one of the court's most important criminal defamation cases in 2013 for a number of reasons: first, the result in *Belpietro* is a vivid illustration of the consequence of the court having recently recognised an unenumerated right to reputation.³¹ This means that when the court reviews a defamation conviction, it can consider the question before it as a conflict between two equal Convention rights, resulting in a very light standard of review. Under previous doctrine, the court would normally have applied the "most careful scrutiny"³² and "strict scrutiny,"³³ where the press is convicted for having defamed public officials.

Second, and on a more positive note, the *Belpietro* opinion will be instrumental in helping to bring about criminal defamation reform in Italy, and in Europe generally. The Italian criminal

³⁰ *Cumpănă and Mazăre v. Romania*, App. No. 33348/93 (2004).

³¹ *Radio France v. France*, App. No. 53984/00 (2004).

³² *Bladet Tromsø v. Norway*, App. No. 21980/93 (1999).

³³ *Nilsen and Johnsen v. Norway*, App. No. 23118/93 (1999).

code still provides for possible prison sentences of three years for criminal defamation, and numerous Italian journalists have received prison sentences for defamation, even as recently as May 2013.³⁴ However, there is now a defamation reform bill before the Italian parliament which removes imprisonment as a sanction for defamation. *Belpietro* will have systemic importance in removing jail sentences for defamation throughout Europe.

Delfi v. Estonia: Liability for Online Reader Comments

While *Belpietro* can be grudgingly described as a win for the press in terms of ending the imposition of prison sentences on journalists in Italy, the second important case we wish to highlight is *Delfi v. Estonia*, which was an overwhelming loss.³⁵ Delfi is the largest news website in Estonia, and in 2006 it published an article about how a number of ice roads would be closed due the decision of a ferry company to change its routes. Under the article, a number of comments were posted which targeted the ferry company's director, accusing him of bribery, and many comments were highly offensive. Delfi allowed readers to post without pre-registration, and comments were not moderated. However, comments were automatically screened for obscene words, and Delfi operated a notice-and-take-down system allowing readers to flag objectionable comments, and request their removal.

A month after the article was published, the company director sent a request to Delfi to remove a number of comments on the article he found objectionable, and Delfi removed the comments immediately. A further month later, the company director then filed a civil defamation suit against Delfi, and at first instance, a county court dismissed the suit. The county court held that Delfi could not be considered a publisher of the comments. However, following an appeal, the Estonia courts found that Delfi should be held liable for the comments, and that the comment system Delfi had in place did not sufficiently protect reputation rights. The company director was awarded 320 euro.

Delfi made an application to the European court, arguing that imposing liability for reader comments violated its freedom of expression. However, a seven-judge chamber of the court unanimously upheld the Estonian courts' reasoning, holding that the non-moderated comment system in place did not effectively guarantee the protection of reputation. The court did accept that the article concerned a matter of public interest and was not defamatory; but the court considered that Delfi had substantial control over reader comments, even though it did not make use of it.³⁶

Delfi's Importance

The importance of the *Delfi* opinion cannot be overstated: there has been near-universal academic criticism of *Delfi* and its consequence for third-party content liability. Delfi announced it would appeal the ruling, but what made things difficult was that the judgment had been unanimous, and never before had a unanimous chamber judgment finding no violation of the Convention been successfully appealed to the 17-judge grand chamber of the European court. In response, an unprecedented coalition of news and free-expression organisations supported Delfi's petition to the grand chamber to review the decision. On

³⁴ See Article 19, "Italy: Urgent need to reform defamation laws", Jun. 25, 2013.

³⁵ *Delfi v. Estonia*, App. No. 64569/09 (2013). See D. Voorhoof, "Treating a news portal as publisher of users' comment may have far-reaching consequences for online freedom of expression," *Inform*, Oct. 29, 2013 ([here](#)).

³⁶ *Delfi*, para. 89.

February 18, 2014, the grand chamber panel announced that it had agreed to hear the case, and an oral hearing will be heard on July 9, 2014.

Unfortunately, *Delfi* continues a recent trend in European court jurisprudence of treating the modern-day press and internet with suspicion. The court in *Delfi* took a swipe at the internet, arguing that “the spread of the internet and the possibility - or for some purposes the danger - that information once made public will remain public and circulate forever, calls for caution.”³⁷ This follows another recent judgment from another unanimous opinion, arguing that because of the “ever growing number of players” in the traditional and electronic media, “monitoring compliance with journalistic ethics takes on added importance.”³⁸

Bucur v. Romania: Whistleblowers and National Security

The third case of particular importance is *Bucur v. Romania*, where a unanimous European court held that a whistleblower’s conviction for disclosing classified information to the press violated freedom of expression. Bucur worked in the surveillance department of the Romanian intelligence service. He noticed a number of irregularities in some surveillance operations, including tapping-authorisations not including the required information, and with a number of journalists, politicians and businessmen being tapped without sufficient justification.

Bucur made his concerns known to his superiors, but was reprimanded and advised not to pursue it. He then contacted a member of the parliamentary intelligence commission, but was told that it would be futile to disclose the information to the commission, given the close links between the commission’s chairman and the intelligence service. The parliamentarian advised Bucur to hold a press conference. Bucur then took eleven cassettes from an intelligence service faculty, containing conversations of a number of journalists and politicians, and made them available to the press at a press conference.

Following the press conference, a military prosecutor authorised a search of Bucur’s home, and he was charged with a number of offences including transmitting classified information. Bucur was convicted, and received a two-year prison sentence. The Romanian courts upheld the conviction on appeal, and refused to allow a public-interest-disclosure defence.

The European court agreed to review the conviction, and unanimously held that the conviction violated freedom of expression. The court applied the landmark 2008 grand chamber opinion in *Guja v. Moldova*,³⁹ which set out a six-part test for assessing a whistleblower’s actions: (a) did the applicant have alternative channels to disclose the information; (b) the public-interest value of the disclosure; (c) the authenticity of the information made public; (d) the damage done to the intelligence service; (e) the applicant’s good faith; and (f) the severity of the sanction.

The European court held that Bucur was justified in making the disclosure to the press, given the inadequacies of internal avenues within the intelligence service. There was an “undeniable” public interest in the information disclosed, as it concerned abuse of surveillance power, the information was authentic, and Bucur had demonstrated his good faith by first approaching a superior and parliamentarian. Finally, the court considered that

³⁷ *Delfi*, para. 92.

³⁸ *Novaya Gazeta v. Russia*, App. No. 14087/08 (2013), para. 42.

³⁹ *Guja v. Moldova*, App. No. 14277/04 (2008).

the damage done to the intelligence service did not outweigh the public's right to disclosure of illegal surveillance activity. The court concluded that the conviction and prison sentence violated Article 10, and would have a chilling effect on other intelligence officers disclosing other improper conduct.

Bucur's Importance

Bucur is an important case for a number of reasons: first, it was the first of the whistleblower cases decided by the European court which involved national security and classified information, with the court favouring free expression.⁴⁰ It demonstrates that the European court is prepared to question domestic courts' considerations in the sensitive area of classified information. Second, the court took particular issue with the Romanian courts' refusal to allow a public-interest-disclosure defence, and the *Guja* six-part test will now have to be applied by all European courts which face a similar whistleblower case in the future. It should also lead to legislatures enacting whistleblowing legislation based upon these six criteria.

Animal Defenders v. UK: Political Advertising Bans

The fourth case we wish to highlight is *Animal Defenders v. United Kingdom*,⁴¹ where the European court upheld the UK's blanket ban on political advertising on television. *Animal Defenders* was the only 17-judge grand chamber opinion concerning free expression handed down by the European court during the 2013 term, and it was also the most closely-divided opinion, resulting in a 9-8 vote.

Animal Defenders is an animal-rights group which had submitted a 30-second advertisement for broadcast. The ad was fairly innocuous, showing a human girl playing a primate in a cage, with a voice-over describing the ill-treatment of primates. The UK's communication act bans all advertisements "directed towards a political end," and the broadcast advertising authority ruled the ad could not be broadcast. The case reached the UK House of Lords (now the UK Supreme Court) in 2007, which unanimously upheld the political advertising ban. The law lords were chiefly concerned with deference to parliament in the regulation of political debate, the risk of public-debate distortion by wealthy advocacy groups, and a fear of broadcasting's power to influence.

Animal Defenders took their case to the European court, and the court's authority seemed to be on their side: in two previous unanimous opinions, *VgT v. Switzerland*⁴² and *TV Vest v. Norway*,⁴³ the European court had held similar bans on political advertising violated free expression. Indeed, *Animal Defenders* and *VgT* were near-identical: in *VgT* an animal-rights group had also wanted to broadcast a fairly innocuous ad targeting the meat industry in Switzerland. However, a majority of the European court grand chamber chose not to follow these cases, and issued a surprising opinion premised upon granting a high degree of deference to domestic legislatures in this area. The majority "attached great weight" to the

⁴⁰ For opposite rulings, see *Hadjianastassiou v. Greece*, App. No. 12945/87 (1992), and *Pasko v. Russia*, App. No. 69519/01 (2009).

⁴¹ *Animal Defenders International v. the United Kingdom*, App. No. 48876/08 (2013). See J. Rowbottom, "Animal Defenders International: Speech, Spending, and a Change of Direction in Strasbourg," 5 *Journal of Media Law* 1 (2013); and R. Ó Fathaigh, "Animal Defenders v UK, ban on political advertising does not violate Art. 10," *Inform*, May 1, 2013 ([here](#)).

⁴² *VgT Verein gegen Tierfabriken v. Switzerland*, App. No. 24699/94 (2001).

⁴³ *TV Vest v. Norway*, App. No. 21132/05 (2008).

“extensive pre-legislative consultation” before the ban’s continued authorisation, and accepted that relaxing the ban carried a “risk of distortion” for public debate by wealthy individuals and groups.

Animal Defenders’ Importance

The *Animal Defenders* opinion is another graphic example of certain European court judges using a new-found deference to domestic legislatures, in an area where the European court has historically applied strict scrutiny. The then-president of the court, Nicolas Bratza, cast the deciding vote in *Animal Defenders* upholding the ban, which is surprising, given that only nine months earlier he had written in his *Raelien v. Switzerland* opinion that “there is little scope under Article 10 for restrictions on political speech.”⁴⁴

Perinçek v. Switzerland: Genocide Denial

The final case we have highlighted is *Perinçek v. Switzerland*,⁴⁵ where the European court held that a conviction for genocide denial violated freedom of expression. Perinçek was chairman of a Turkish political party, and at a number of conferences in Switzerland, he argued that calling the Ottoman Empire’s ousting of Armenians in 1915 “genocide” was an “international lie.” A Swiss-Armenian advocacy group, which targets so-called genocide deniers, made a criminal complaint against Perinçek under the Swiss criminal code, which criminalises denying, grossly minimising or justifying genocide. The offence carries a maximum sentence of three years’ imprisonment.

Perinçek was prosecuted and convicted by a district court, and was sentenced to a fine of nearly 10,000 euro, substitutable for a 30-day prison term, and 850 euro payable in damages to the Swiss-Armenian group. The Swiss courts held that the Armenian genocide was an historical fact, referencing various international documents. The courts did recognise that Perinçek did not dispute the existence of massacres and deportation. But they ruled Perinçek had the requisite intent for committing the offence because he had stated that even if a neutral commission had determined there had been a genocide, he would not change his mind.

The European court agreed to review the conviction, and the Turkish government was also allowed to file an amicus brief arguing that the conviction violated free expression. In a 5-2 vote, the court held that the conviction violated Article 10 of the Convention. The majority disagreed with the Swiss court’s holding that there could be a “general consensus” on the existence of the Armenian genocide, and doubted there ever could. The offence was distinguishable from holocaust denial, because Perinçek had not denied single historical facts, such as the existence of the gas chambers. The majority also referred to the French constitutional court’s ruling invalidating a similar genocide denial law in France, and the UN human rights committee’s opinion that such laws are incompatible with freedom of expression under the International Covenant on Civil and Political Rights.

Perinçek’s Importance

Perinçek strikes a real blow to the proliferation of genocide denial laws throughout Europe. This is especially so, given that the EU had adopted a framework decision calling on member

⁴⁴ *Mouvement Raëlien Suisse v. Switzerland*, App. No. 16354/06 (2013) (Bratza J., concurring, para. 6).

⁴⁵ *Perinçek v. Switzerland*, App. No. 27510/08 (2013). See D. Voorhoof, “Conviction for denying Armenian ‘genocide’ breaches Article 10,” *Inform*, Jan. 11, 2014 ([here](#)).

states to criminalise condoning, denying or grossly trivialising genocide (and likely to incite violence or hatred).⁴⁶

Second, it is arguable that the court could have easily followed its holocaust denial jurisprudence, which has allowed most holocaust denial convictions stand. It is significant that the court chose not to apply the “abuse clause” of the European convention, and hold that genocide denial is not a valid exercise of free expression (as the court has previously done with holocaust denial).⁴⁷

Finally, it should be mentioned that there is a strong likelihood the Swiss government will petition the 17-judge grand chamber to review the *Perinçek* opinion, given that two judges dissented. Switzerland has until March 17, 2014 to submit such a request, and a five-judge panel will then decide whether to accept the case for grand chamber review.

Conclusion

We have also been asked to (a) identify overall trends in issues and decisions of the European court, and (b) suggest one characteristic that should be at the heart of a fit-for-purpose information regime for the twenty-first century. In terms of (a), we think four points are reflective of the court’s 2013 term:

First, defamation still stubbornly occupies the greatest proportion of the European court’s docket. Criminal defamation prosecutions are still being successfully used against the press by both public officials and public figures across Europe. And while the European court has dismantled many criminal defamation rules, we still have some European court judges delivering opinions such as *Belpietro*, effectively ignoring prior unanimous precedent such as *Raichinov v. Bulgaria*, which stand for the proposition that defamation prosecutions violate Article 10 unless the defamatory statements include hate speech or incitement.⁴⁸

Second, the deference the European court is paying domestic courts and legislatures is now a distinct feature of the court’s free expression docket. The court calls this deference a “margin of appreciation,” and allows certain European court judges reduce the standard of review they apply. The most blatant example of this “margin of appreciation” running wild was the *Animal Defenders* majority opinion, which threw precedent out the window, and gutted the strict scrutiny standard for interferences with political speech.

However, when we place the court’s opinions we disagree with within the court’s overall 2013 docket, we must acknowledge that the European court is, on the whole, coming out in favour of free expression in the vast majority of cases. The court’s 2013 term will be remembered for the landmark whistleblower-protection doctrine in *Bucur*, the continued strengthening of the right to protection of journalistic sources in the search and seizure cases (*Nagla* and *Saint-Paul*), and the incremental development of a right of access to information (*Youth Initiative for Human Rights*).

⁴⁶ Council Framework Decision 2008/913/JHA on combating certain forms and expression of racism and xenophobia by means of criminal law, Nov. 28, 2008.

⁴⁷ *Garaudy v. France*, App. No. 65831/01 (2003). See generally H. Cannie and D. Voorhoof, “The Abuse Clause and Freedom of Expression in the European Human Rights Convention,” 29 *Netherlands Quarterly of Human Rights* 1 (2011).

⁴⁸ *Raichinov v. Bulgaria*, App. No. 47579/99 (2006).

Moreover, rulings such as *Perinçek* are bold rulings by the European court, effectively saying to European legislatures that while they can continue to criminalise holocaust denial, any further expansion of denial laws will not be allowed. This begs the question of how we square our criticism of “deferential” rulings such as *Animal Defenders*, with rulings such as *Perinçek*. The answer is of course the composition of the court: with 47 judges on the European court, limited to nine-year terms, and wildly varying ideologies, this judicial mix can produce results such as the nine-judge group delivering *Animal Defenders* more concerned with deference, while at the same time a five-judge group in *Perinçek* applying strict scrutiny.

And finally, in terms of (b), if we had to choose one characteristic that should be at the heart of a fit-for-purpose information regime for the twenty-first century, we would suggest the European court follow the UN human rights committee’s recent opinion, that it will not apply a “margin of appreciation” when considering interferences with the right to freedom of expression.⁴⁹

⁴⁹ Human Rights Committee, *General Comment No. 34 - Article 19: Freedom of opinion and expression*, CCPR/C/GC/34 (2011), para. 36.