LAWFARE AGAINST TURKEY: A CASE STUDY ON ARMENIAN CLAIMS ON INSURGENCIES AND OTTOMAN COUNTER-MEASURES DURING THE FIRST WORLD WAR

(TÜRKİYE'YE KARŞI HUKUK SAVAŞI: BİRİNCİ DÜNYA SAVAŞI SIRASINDA YAŞANAN AYAKLANMALAR VE OSMANLI DEVLETİNİN ALDIĞI KARŞI-ÖNLEMLER İLE İLGİLİ ERMENİ İDDİALARI ÜZERİNE BİR VAKA ANALİZİ)

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Abstract: *As the centennial of the First World War is broadly observed and discussed, there is also a parallel and intensifying effort to revisit the fate of Ottoman Armenians during the same period. Mixing humanity with politics, law with history, and rule of law with lawfare,[1] a well-orchestrated campaign against Turkey is continuing to confuse the minds of common people who do not have clear information and understanding on relevant legal and historical facts.*

Such a course of action does not serve common good. Abusing legal concepts for political objectives does not foster harmonious relations between countries and peoples. Thus, it is necessary to outline the issue of 1915 Armenian insurgencies and their consequences.

Keywords: *Lawfare, Turkey, Armenian, insurgency, history.*

Öz: *Birinci Dünya Savaşı'nın yüzüncü yılı kapsamlı bir şekilde gözlemleniyor ve tartışılıyorken, Osmanlı Ermenilerinin aynı dönemdeki akıbetinin de yeniden tartışmaya açılması yönünde paralel ve yoğun girişimler var. Türkiye'ye karşı insaniyeti siyasetle, hukuku tarihle ve hukukun üstünlüğünü hukuk savaşı ile birbirine karıştıran, çok iyi yönetilen bir kampanya, ilgili hukuki ve tarihi gerçeklikler ile ilgili sarih bilgi ve anlayışa sahip olmayan toplumun aklını karıştırmaya devam ediyor.*

Anahtar Kelimeler: *Hukuk savaşı, Türkiye, Ermeni, ayaklanma, tarih.*

ARMENIAN INSURGENCIES

Following the French Revolution of 1786, all of the emerging concepts of "nation", "nation state", "nationalism" and "nationality principle" had widespread national and political effect on numerous peoples living in different parts of the globe. One major effect was dissolution of empires; such as Austria-Hungary (Habsburgs), Ottomans, and Great Britain. In this context, several peoples, living under the Ottoman rule, and starting with Greeks in as early as 1821, through rebellions, ethnic cleansing and massacre of local Muslim populations, managed to gain their independence to establish their own nation-states. In the process, one must not forget incitement and support provided by third party states to such struggles, which today, are some of the leading countries that accuse the targeted territorial states and / or their successors for all the negative consequences and tragedies, for example, Turkey.

In this overall context, Ottoman Armenians' rebellion against the Ottoman rule started with massacre of Ottoman Muslims, attacks on belligerent Ottoman Army units and especially their logistics lines, all of which was responded by Ottoman Government. As Ottoman counter-insurgency measures had been effective and initial Armenian successes ended, the rebellion was followed by another tragedy, this time for Armenians themselves. One wonders, even in purely historic context, if there is any kind of similarity between situation of peaceful Jews in Nazi Germany, and bellicose Armenians in Ottoman territory.

THE OTHER SIDE OF THE COIN: HOW TO TREAT COUNTER-CLAIMS?

In analysing such historic tragedies, first questions relate to the applicable law, and legal basis for legal standing of today's Armenia to intervene in such a strictly domestic jurisdictional (national security) issue of the Ottoman State. In time of an on-going World War, in which Ottoman State is a belligerent party, and has to counter insurgency.

Armenian or pro-Armenian opinions pretend to overlook the existence of such legal issues, to include prosecution of acts committed by the Ottoman Armenians against their Muslim neighbours, and their hostilities against belligerent Ottoman Armies. This tendency, from the very beginning, results in a zero-sum game and violates the basic minimum standards for a fair inquiry and prevents a sound historical examination of those events.

Such an attitude neglects any possible counter-claims, in other words, overlooks the *other side of the coin*. In fact, possible and equally valid *counter-claims* regarding crimes committed by Armenian rebels and other Armenian individuals – organizations against Ottoman Muslim population and against belligerent Ottoman Army should also have been considered and remedied.

LAWFARE[1] AGAINST TURKEY

In legal context, first of all, one must note that there was no such a crime defined as *genocide* before the well-known United Nations Genocide Convention of 1948. Had it been the case, under its Article IX, *any State Party* to that Convention, *unilaterally*, could bring its case before the International Court of Justice (ICJ). No such claim has been lodged at the ICJ.

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That is because, examination of those Armenian rebellions and collaboration with enemy, during the First World War, and their negative consequences all relate to history. And in my opinion, any discussion, any submission starting with "Armenian genocide" label, is out of academic sphere. And a legal opinion or a historic finding does not have the effect of a res judicata. History cannot create legal right; history only may provide evidence on related facts, for a valid claim. That is why, the basic Armenian or pro-Armenian strategy is based on building a *political dispute* against Turkey, via developing and / or fabricating political, historic, and –to the extent feasible- legal arguments, to launch a successful lawfare campaign against Turkey.

POLITICAL AND LEGAL LAWFARE

The first component of the lawfare has been invoking *appropriate* foreign parliaments to make a political declaration recognizing 1915 incidents as an act of genocide against Armenians; and, if possible, ensuring passing of a special - additional piece of legislation, to officially recognize 1915 incidents as genocide; and similarly, if possible, ensuring passing of a special piece of legislation *criminalizing and sanctioning* any acts of denial.

1 As part of a political stategy, political struggle, abuse of law against a targeted state or other entity.

Frequently, for example, some members of the U.S. Congress will submit draft resolutions (i.e., "H. Res. 277") to recognize and pronounce 1915 incidents as genocide.[2] In France, the French parliament had passed in 2001 a law that recognized the *Armenian genocide*.[3]

LEGAL OPINIONS

The second and complementary component of the lawfare has been to obtain legal opinions, rendered through private channels, to complement and support Armenian and pro-Armenian thesis. One typical example is the book by Alfred de Zayas: *The Genocide Against the Armenians 1915-1923 and the Relevance of the 1948 Genocide Convention*.[4] In the book, one would like to see applicable law issues, nuance between criminal and civil law issues, nuance between State and individual responsibility issues, dealt and elaborated in a convincing and objective manner.

Another example is the report prepared by the International Center for Transitional Justice ("ICTJ") on a request by the Turkish Armenian Reconciliation Commission ("TARC"), a joint civil – private initiative, submitted on 4 February 2003. Its mandate was defined as, "facilitate an independent legal study on the applicability of the 1948 Genocide Convention to events which occurred during the early twentieth century". The report concluded that, "the Genocide Convention does not give rise to individual criminal or state responsibility for events which occurred during the early twentieth century or at any time prior to January 12, 1951".

This was the answer to the question posed by the mandate. But, as such an attitude will not produce expected influence, resorting to *obiter dictum*[5] concept is yet another lawfare tactic applied to substitute direct legal challenges against Turkey. That's why, in the ICTJ case, the Group could not stop there and continued with an obiter dictum style, additional analysis: "Although the Genocide Convention does not give rise to state or individual liability for events which occurred prior to January 12, 1951, the term 'genocide', as defined in the Convention, may be applied to describe such events."[6]

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2 See: Ömer Engin Lütem, "ABD Kongresine Sunulan Yeni Soykırım Tasarısı", *Avrasya İncelemeleri Merkezi Bülteni*, Number: 1177, Date: 24.05.2013.

3 See: Gündüz Aktan, "Armenian Problem: Latest Developments", *Hurriyet Daily News*, 28 April 2005, <hurriyetdailynews.com /gunduz-aktan-armenian-problem-latest-developments.aspx>.

4 Alfred de Zayas, *The Genocide Against the Armenians 1915-1923 and the Relevance of the 1948 Genocide Convention,* Haigazian University, February 2010, 105pp.

5 Obiter dictum: "A judge's expression of opinion uttered in court or in a written judgement, but not essential to the decision and therefore not legally binding as a precedent."

6 See: <http://www.groong.com/ICTJ-analysis.html>.

OBITER DICTUM TACTIC

In practice, there are a number of ways to exploit this concept. First is to take legal actions in selected foreign courts, for example, in the U.S., against insurance companies to claim life insurance benefits of the victims and / or their heirs; and presenting those cases as if the case is against Turkey and that the court will decide on the merits of genocide claims against Turkey.

For example, Vazken Movsesian and others filed a class action against Victoria Verisherung AG ("Victoria"), Ergo Verischerungsgruppe AG ("Ergo"), and Munchener Ruckverischerungs-Gesellschaft Aktiengesellschaft ("Munich Re") to seek damages from these companies for breach of written contract and other reasons. At the end of the legal process, the U.S. Court of Appeals for the 9th Circuit ruled that Section 354.4 of the California Code of Civil Procedure, which extended the statute of limitations until 2010 for claims arising out of life insurance policies issued to Armenian Genocide victims "interfere[d] with the national government's conduct of foreign relations" and was therefore "preempted."[7]

Second is to complain any individual who does not serve or share Armenian and / or pro-Armenian perspectives, for prosecution, a common practice resorted in France, against Turkish nationals who, in public, oppose the Armenian claims.[8]

Another area, which is deemed appropriate for the lawfare against Turkey, is found in activities of the European Union, especially in a Framework Decision of 28 November 2008, on racism and xenophobia. Under the decision, the following intentional conduct will be punishable in all EU Member States: "Publicly inciting to violence or hatred … directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin ... Publicly condoning, denying or grossly trivializing … crimes of genocide, crimes against humanity and war crimes as defined in the Statute of the International Criminal Court … directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin, and … crimes defined by the Tribunal of Nuremberg … directed against a group of persons or a member

7 See: *ASIL Insight* on Movsesian et al. v. Victoria Versicherung AG et al., August 20, 2009, <http://www.asil.org/ilib090910.cfm#j1>.

8 This pillar also includes preventing those individuals in exercising their political rights, or right to education. Typical examples include asking a political party candidate of Turkish origin in elections to publicly support the Armenian case, or, asking a Turkish student to prepare homework or a dissertation in defence of Armenian claims.

of such a group defined by reference to race, colour, religion, descent or national or ethnic origin."

Some EU member States, to include Greece, prefer to abuse this peace of EU legislation as if it covers history, and with an open ended scope. Under the recently enacted Greek Law, dated 9 September 2014 (the date Izmir was liberated from Greek occupation in 1922), Turkish War of Independence is an act of genocide against Ottoman Greek and Pontus populations.[9]

Third is to put pressure on certain selected Turkish commercial enterprises and banking institutions, either as private entities, or, as organs of the Republic of Turkey. Municipal Courts are ideal for such initiatives, especially U.S. Courts. (See: Jeffrey Davis, Justice Across Borders – The Struggle For Human Rights in U.S. Courts, Cambridge University Press, 2008, passim).

Although the applicants, claimants are well aware that they will not be able to be awarded judgments as they wish; in all these initiatives, basic concept is perception-management of the common public, especially causing panic of Turkish authorities and people.

EUROPEAN COURT OF HUMAN RIGHTS

Lately, European Court of Human Rights has become a new lawfare-battleground. Traditionally, even res judicata is subject to any analysis and / or criticism. That is the way law progresses. But when it comes to 1915 events, Armenians and pro-Armenians do not feel a need for a decision or judgment of a proper court, with due jurisdiction. Furthermore, -as if all the facts have been determined- they hate to hear any argument that reflects other facts that are not complementing their claims. All such studies are –without any rationale- categorically rejected. This brings another question to forefront: Freedom of expression, also, academic freedom.

In this regard, Chamber Judgment of the European Court of Human Rights in the case of Perinçek v. Switzerland (17 December 2013) has been a turning point to clear the way for free discussion of the relevant issues. However, on requests by Armenia and later by France, the case is pending a final decision by the Grand Chamber. If approved, there will emerge a new atmosphere where like any other subject, relevant forums will have to be open for all conflicting opinions.

9 Ömer Engin Lütem, "Yunanistan'da Soykırım Kanunu", *Avrasya İncelemeleri Merkezi*, 19 September 2014, http://www.avim.org.tr/analiz_print/tr/3636

CONCLUSION

Notwithstanding the on-going and intensifying anti-Turkish lawfare in Armenian question, still, one must keep in mind that all such efforts will not have any legal consequences because as there is no legal dispute, there is no authority, no forum to make a legally binding determination on the issue.

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