ARMENIAN "GENOCIDE": NOT A HISTORICAL FACT, RATHER POLITICAL MYTH

(ERMENİ "SOYKIRIMI": TARİHSEL BİR GERÇEK DEĞİL, SİYASİ BİR MASAL)

Dr. Farhad MAMMADOV
Director
Center for Strategic Studies under the
President of the Republic of Azerbaijan

Abstract: *The recognition of so-called Armenian "genocide" as a political campaign of Armenian Diaspora have went to great lengths to try and convince the world that there is a possibility to recognize historical facts and legal notions through the political "legalization" if one shall try hard enough. Indeed some of the recognitions made by the state institutions of different countries around the world have raised a question of the legality and implications of such actions. This article will look at the issue from the perspective of the case Perincek vs Switzerland and argue that the Armenian "genocide" cannot be considered a historical fact but a political mythology through the analysis of international law.*

Keywords: *genocide, legality, recognition, law, crimes, ECHR, Armenia, Azerbaijan, Switzerland, Turkey*

Öz: *Ermeni Diasporası tarafından bir siyasi kampanya olarak yürütülen sözde Ermeni soykırımının tanınması yolundaki gayretler, dünyayı tarihsel gerçeklerin ve hukuksal kavramların siyasi "meşrulaştırma" yoluyla tanınabileceği hususunda ikna etmek için her yola başvurmuştur. Nitekim, dünyadaki farklı devletlerin kurumları tarafından yapılan tanımalar bu tür hareketlerin meşruiyeti ve bunların ne gibi sonuçları olabileceği sorularını gündeme getirmiştir. Bu makale, konuyu Perinçek-İsviçre davası üzerinden değerlendirecek ve sözde Ermeni soykırımının tarihsel bir gerçeklik değil, ancak siyasi bir masal olarak kabul edilebileceği tezini uluslararası hukuk analizi çerçevesinde savunacaktır.*

Anahtar Kelimeler: *Soykırım, Tanıma, Hukuk, Suç, AİHM, Ermenistan, Azerbaycan, İsviçre, Türkiye*

Throughout the history mankind have sought to combat situations that could possibly lead to the ultimate annihilation of humanity and destruction of moral and humane values. Unfortunately history have seen such crimes as genocide, mass ethnic cleansings and other such horrific instances of human destruction that cast a shadow on the innate humane nature of peoples around the world.

Nonetheless, science and academia for the purposes of prevention and persecution of such horrific crimes as genocide, crimes against humanity, war crimes, mass murder, aggression, etc. have created a classifications and mechanisms that are supposed to bring justice to the situations and perpetrators. For example, establishment of the International Criminal Court in 2002 with entry into force of Rome Statute of 1998[1], have moved humanity to the new stage of development in this area. It have to be pointed out that international community as a whole is very and keenly interested in this process and its continuation.

Thus, as international community believes (which is evident from the structures that it has created, such as mentioned International Criminal Court (ICC) or European Court of Human Rights (ECHR) in the judicial classification and study of the international crimes, it is logical to assume that all of the classifications of the events and matters that are connected to atrocities and mass murders should get their reviews in the frameworks of existing or specially created (ad hoc) legal structures.

Unfortunately such is not always the case and affected groups and even communities, diasporas and arguably peoples themselves, strive towards the politicization of such situations to achieve leverage in the current state of international relations, seeking the answers not in the international courts and tribunals, but rather in political bodies of different states, that in truth cannot be competent to give neither legal, nor historical review of the atrocities believed to be falling under the classification of international crimes.

Such situation arose with the infamous case of Armenian “genocide” to which Armenian people and the widespread Armenian Diaspora of the world refers to as the “first genocide of XX century”.[2] For many years Armenians sought to recognize the atrocious events that took place in 1915 in Ottoman Empire as “genocide” in different political structures of many states around the world (parliaments, executive structures, municipalities, etc.) to gain the political leverage and to pressure the successor of Ottoman Empire – Republic of Turkey for reparations and official apologies. In some instances they were able

1 Matthew C. Weed, “International Criminal Court and the Rome Statute: 2010 Review Conference”, 10 March, 2011, CRS Report for Congress, http://www.fas.org/sgp/crs/row/R41682.pdf

2 For example, Armenian Church, “The Armenian Genocide 1915-1923”, http://www.armenianchurch-ed.net/armenian-heritage/armenian-genocide/remembering/

to succeed in formal political recognitions by some states in forms of resolution. In other cases certain provisions were introduced into legislation of such states as for example France, where the denial of Armenian "genocide" briefly became crime punishable by law (January 2012).[3] But in many occasions they simply failed.

This article will show the hypocrisy and weakness of such approach and prove that despite all the attempts of Armenians to force the recognition of the 1915 events as genocide upon the states in the world it is clear that despite all their claims it remains neither historical nor legal fact, but simply a political myth.

For many years Armenians sought to recognize the atrocious events that took place in 1915 in Ottoman Empire as "genocide" in different political structures of many states around the world (parliaments, executive structures, municipalities, etc.) to gain the political leverage and to pressure the successor of Ottoman Empire – Republic of Turkey for reparations and official apologies.

Only recently the ECHR have made a decision that has become a precedent that nullifies any of the arguments of Armenians concerning what their call "historical facts and reality". On 17 December 2013 in Strasbourg the Court made a ruling in the case of Perincek v. Switzerland.[4] Decision on that particular case has been expected by many around the world as some on the experts pointed out that it was crucial for the discourse that is present in all the matters of relations between Turkey and Armenia. Thus it was as important for lawyers in their jurisprudence as well as to the international relations scholars and analysts.

The case starting point relates to the March 9, 2007 when Dogu Perincek was found guilty and fined by the court of Swiss Lausanne in the case instigated against him by the "Switzerland-Armenia" Association and accused with that he had participated in three instances in conferences in Switzerland in 2005 where he denied that Ottoman Empire have conducted the genocide against Armenians in 1915. The idea of Armenian "genocide" itself he called an "international lie". When making judgment court of Lausanne held the accused guilty in racial discrimination in line with definition of the Criminal Code of Switzerland, due to the fact that his motives held racial tendencies and was negative for the historical discussion of the question. With that basically depriving Perincek from freely expressing his opinions.

3 "French Council Finds Bill Penalizing Denial Unconstitutional", *Armenian Weekly Staff,* 28 February, 2012, http://bit.ly/1ieA6kX

4 "Criminal conviction for denial that the atrocities perpetrated against the Armenian people in 1915 and years after constituted genocide was unjustified", *ECHR Registrar,* Press Release, 17.12.2013, http://hudoc.echr.coe.int/webservices/content/pdf/003-4613832-5581451.

Perincek appealed the decision of court of Lausanne to the higher court, but was not successful. On 19 June 2007 the court of appeals of francophone canton of Vaud ruled that the Armenian "genocide", just like Holocaust, was a proved "historical fact"[5] recognized by the Swiss legislative body falling under the provisions of the article 261bis of Criminal Code of Switzerland. The problem with the ruling is first of all that court of appeals of Vaud have referred in its decision not to any kind of international court or tribunal that reviewed the matter previously (due to the fact that such a body never existed and review never happened), but to the resolution of the lower chamber of Swiss parliament. Despite the fact that such resolution is non-legally binding document of political nature (not a law) and it was not adopted by the whole Swiss legislative body, but merely its lower chamber, the court of appeals ruled that the historical expertise should not be used during the trial as unnecessary. Nonetheless that court acknowledged that Perincek did not deny the fact of mass murder and deportations of Armenians, but merely the definition of such actions as "genocide".

That ruling led to the decision by the Perincek to exhaust all of the instances of legal defense as there clearly was a very weak legal ground in the decision of the court of appeals of Vaud. If we would take a look at the article 261bis of the Criminal Code of Switzerland it is evident that it is a general article that prohibits racial discrimination and in particular states that: "…any person who publicly denigrates or discriminates against another or a group of persons on the grounds of their race, ethnic origin or religion in a manner that violates human dignity, whether verbally, in writing or pictorially, by using gestures, through acts of aggression or by other means, or any person who on any of these grounds denies, trivializes or seeks justification for genocide or other crimes against humanity… is liable to a custodial sentence not exceeding three years or to a monetary penalty".[6] So the article does not refer to any particular group or ethnic identity. That is why to use such an article the court needs an appropriate justification, which it found in the form of aforementioned resolution. Unfortunately, the court freely used a political resolution on the Armenian "genocide" of one of the chambers of legislative body that does not carry the legal authority of the law to enact the article 261bis into action. Even on the scratch that looks like the court overstepped its authority in that matter.

Moreover drawing an equality sign between the Holocaust and Armenian "genocide" based only on some resolution of one of the chambers of Swiss parliament is it its turn a very shaky ground as the tragic event of Holocaust have been proved in the international criminal tribunal with the decision of

5 Ray Smith, "European Ruling Ignites Freedom Debate", *IPS,* February 15, 2014, Switzerland, http://www.ipsnews.net/2014/02/european-ruling-ignites-freedom-debate/

6 *Criminal Code of Switzerland,* article 216bis, http://www.admin.ch/ch/e/rs/311_0/a261bis.html

such a tribunal being a basis of the whole modern concept of international criminal law. The tragic events in Ottoman Empire of 1915 have never been reviewed by the international judicial body and to this day cannot be compared to the Jewish genocide confirmed in the international law itself.

It was not surprising then that such a decision have led to extended debates between international law scholars and experts that were very much doubting the possibility of putting the resolution of the political body of any given state on the same line with the decision of international criminal tribunal and thus equalizing Holocaust and Armenian “genocide” claims. That tendency spread not only in Turkey and Switzerland (for obvious reasons) but throughout the world where scholars debated the weak legal decision and later “nodded agreement” on the later decision of ECHR[7] that will be discussed later here.

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It has to be pointed out that trials of Perincek in Switzerland have been conducted in the specific atmosphere. It is possible that the decisions of the Swiss courts have been compromised by the work of Armenian propaganda, that during the whole process have used all its vast arsenal of informational offensive in media, street protests, personal threats, defamation, etc. Armenian propagandistic organizations are famous for their ability to manipulate the public opinions and directing the public pressure. It is very possible that the same trend followed the decision of the Federal Court of Switzerland that on 12 December 2007 have dismissed the appeal of Perincek.

With that Perincek have successfully exhausted all the instances in Switzerland; a requirement crucial to appeal to the European Court of Human Rights. Perincek have launched an application to the ECHR on 10 June 2008.

After the long five-year trial ECHR have finally ruled in favor of Perincek. The Court have held that the Turkish applicant was not in violation of the law of Switzerland when denying Armenian “genocide”. With that Switzerland itself was found in violation of article 10 of the European Convention on Human Rights that guarantees the freedom of expression. The Court also ruled

7 Ray Smith, “European Ruling Ignites Freedom Debate”, *IPS*, February 15, 2014, Switzerland, http://www.ipsnews.net/2014/02/european-ruling-ignites-freedom-debate/

that thought Perincek challenged the existence of Armenian "genocide" during multiple conferences in Switzerland, he was not by any means in abuse of his rights within the meaning of the article 17 of the European Convention on Human Rights. Moreover, the Court basically held the Switzerland responsible for the violation of one of the principles of freedom of expression, clearly underlining that one of the fundamental aspects of freedom of expression that distinguished a tolerant and pluralistic democratic society from a totalitarian or dictatorial regime was the free exercise of the right to openly discuss questions of a sensitive and controversial nature.[8]

ECHR also acknowledged that it was not called upon to rule on the characterization of the events of 1915 in Ottoman Empire. The fact of the matter was that the existence of "genocide" is described by ECHR as a precisely defined legal concept that cannot be easily proved. It has to be pointed out that "genocide" indeed not a political, historical, sociological or any other concept – but a legally proven fact. So any other claims that are not a legally proven facts (historical opinions, political decisions, etc.) are moot and reflect only the opinions of the groups of people and not objective reality. In line with that ECHR was skeptical towards the possibility of general consensus on the events described as Armenian "genocide", taking into account that historical research was by definition open to discussion and debate and it will not necessarily lead to final conclusions or assertion of absolute truth.

As it can be seen ECHR have distanced itself from the analysis and characterization of the events of 1915 in Ottoman Empire and concentrated on the matter at its hand. Moreover it has also pointed out that that those States which had in some way recognised the Armenian genocide had not found it necessary to enable legislation that imposes criminal sanctions on individuals challenging the official views, being mindful that one of the main objectives of freedom of expression was to protect minority views capable of contributing to a debate on questions of general interest which were not fully settled.[9]

In its decision ECHR assumes that the exact meaning of the term "genocide" in the rulings against Perincek is under doubt when article 10 of the European Convention on Human Rights in the second paragraph demands only clear and precise definitions of certain conditions.[10] At the same time ECHR recognized the validity of the argument of the Federal Court of Switzerland that Perincek through his statements on the conferences in Switzerland, where he called Armenian "genocide" an "international lie" was aware that he was making

8 "Criminal conviction for denial that the atrocities perpetrated against the Armenian people in 1915 and years after constituted genocide was unjustified", *ECHR Registrar,* Press Release, 17.12.2013, http://hudoc.echr.coe.int/webservices/content/pdf/003-4613832-5581451.

9 Ibid.

10 *European Convention on Human Rights,* article 10.2, http://www.echr.coe.int/Documents/Convention_ENG.pdf

himself vulnerable to the possible sanctions under Swiss law. With that said Swiss governments intentions were at protecting rights of others such as memory and honor of relatives of those victims of atrocities that happened in Ottoman Empire in 1915. However, the Court found that the argument of Swiss government that statements of Perincek posed a serious threat to public order the insufficiently substantiated. Thus it was for the court to weigh up on one hand the rights of others (memory and honor of victims) and the freedom of expression of Perincek on the other hand.

Moreover, the court stressed out that Perincek was engaged in historical, legal and political discussion that constituted the part of the heated debate and that the characterization of the events of 1915 in Ottoman Empire were of great interest to the general public, hence the public debates, where the authorities' margin of appreciation was limited.

ECHR have disagreed with the arguments of the Swiss courts that used in their decisions the notion that there was a general consensus, especially in the academic community, concerning the legal characterizations of the events of 1915 in Ottoman Empire. It stressed out that event the Federal Court of Switzerland have acknowledged that there were no unanimity in the community as a whole in regard of legal understanding of the atrocities. According to the applicants' statements with which the Court have agreed – it was very difficult, almost impossible to solidify general consensus.

Moreover court had to point out that the political bodies of the Switzerland themselves had views that varied from institution to institution. From all the states of the world only around twenty have had any kind of recognition of the events of 1915 in Ottoman Empire as genocide. Most of such "recognitions" have not originated in the governments though, but like in case of Switzerland in political bodies such as Parliament or one of their chambers.

ECHR have agreed with Perincek that "genocide" was a very narrow and clear legal definition. Example can be the judgment of International Criminal Tribunal for Rwanda, where the court have ruled that for the crime of genocide the atrocities must be perpetrated with clear intent not only to eliminate certain members of the given group, but all of that group or its particular part.[11] Such legal crime is always difficult to substantiate. Thus the ECHR have agreed that the consensus to which Swiss courts have referred relate to these very specific points of law.

That particular reasoning provided by the ECHR clearly denies any allegations

11 *Case Law of International Criminal Tribunal for Rwanda*, para. ii, http://www.hrw.org/reports/2004/ij/ictr/3.htm#_Toc62641390

of Armenians that there is a consensus in the world on the intent of Ottoman Empire to destroy its Armenian population as a whole or in part. It is a first time actually that such a lack of consensus was proven in the international judiciary. Moreover, ECHR clearly states that this case has nothing to do with cases of denial of crimes of Holocaust. Because in such cases perpetrator have negated the crimes perpetrated by Nazis that had a very solid legal grounds. ECHR also pointed out that, unlike in the case of so-called Armenian "genocide", the crimes of Holocaust had been found by an international court to be clearly established. Thus, the atrocities against Armenians cannot fall in the same line with such a narrow legal definition as "genocide", as it was in the case of Jewish Genocide proven in the international court of law.

Then, it has to be pointed out that the historical significance of this decision of ECHR cannot be overlooked. It is a first time that the issues of so-called Armenian "genocide" have got any kind of legal review on the international level.

The European Court of Human Rights has come to the conclusion that Switzerland failed to socially substantiate the need to prosecute a person on charges of racial discrimination for his mere disagreement with the use of term "genocide" towards tragic events in Ottoman Empire of 1915 and after. ECHR have also taken into account two very interesting cases. First one, the decision of the Constitutional Court of Spain of 2007, have found it unconstitutional to criminalize a denial of crimes of genocide as it cannot be seen as a direct incitement to violence.

In the second case, French Constitutional Council in 2012 has declared unconstitutional the law that criminalized the offense of negating existence of genocides recognized by law. Council has substantiated the decision by proving that such criminalization would be incompatible with freedoms of expression and research.

With all the other arguments in row backing Perincek's rightful position ECHR had no other choice but to declare that the basis for the conviction of Perincek by Swiss authorities were in fact insufficient, not to say unjust. With that ECHR had actually eliminated the possible censorship loophole to suppress the expression of criticism to matters of public debate.

Then, it has to be pointed out that the historical significance of this decision of ECHR cannot be overlooked. It is a first time that the issues of so-called Armenian "genocide" have got any kind of legal review on the international level. Though it was not for ECHR to decide on the legal characterization of the events of 1915 and in subsequent year that have taken place in Ottoman Empire, it has nonetheless clearly identified the differences of the situation

from proven genocide in case of Holocaust, pointing out that Armenian "genocide" is not a historical fact. In atrocities that happened to Armenians in 1915 the main components are lacking grounds to be able to identify such a narrow legal definition as genocide. Unlike the Rwandan genocide in case of the alleged Armenian "genocide" there is no clear legal basis or the judgment of the competent international judicial body, where the intent of Ottoman Empire aimed at destruction Armenians as a whole group or in part, could have been put to question.

It has to be pointed out that for now the decision of ECHR is not yet binding, due to the fact that according to the articles 43 and 44 of the European Convention on Human Rights the Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of ECHR. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.[12]

With that in line after the debates in the Swiss political and social circles and media Swiss government have finally decided to use its right to refer the case to the Grand Chamber of ECHR. As it is stated in the statement of the Swiss Federal Office of Justise: "Switzerland's primary interest is in clarifying the scope available to the domestic authorities in applying the criminal anti-racism provision laid down in the Swiss Criminal Code (Art. 261bis CC). Switzerland created this penal provision, which entered into force on 1 January 1995, to close loopholes in criminal law and enable the country to accede to the UN Convention on the Elimination of All Forms of Racial Discrimination".[13]

No doubt that though such a legalistic goal is set as primary target for Switzerland there is a lot of politics behind it and there are a lot of pressure points from the Armenian lobbying as it was backed by the official statements of the leaders of the Republic of Armenia as a reaction to the decision of Swiss authorities.[14] At the same time that decision provoked understandable disappointments from the Turkish side.[15]

Given the circumstances it is only left to hope that ECHR will not take the case under the consideration of Grand Chamber, and if still considered, ECHR will uphold the decision of the Chamber. With that the Court will truly show that it

12 *European Convention on Human Rights,* articles 43, 44, http://www.echr.coe.int/Documents/Convention_ENG.pdf

13 "Perinçek: Switzerland requests referral to Grand Chamber", *FOJ*, Press Release, 11.03.2014, http://bit.ly/1hrARoJ

14 "We welcome Swiss government decision of Perincek case – Armenian President", *News.am*, http://news.am/eng/news/198982.html

15 "Turkish anger as Swiss appeal Perincek decision", *Swissinfo.ch*, http://bit.ly/1omTtL8

is an independent and non-political judicial body that is immune to pressure from politicians and lobbyists when making its decisions.

Strikingly one other case comes to mind when analyzing the Perincek case. Such events as the massacres and other atrocities in Khojaly, Azerbaijan in 1992 perpetrated by Armenian armed forces with support of the Russian 366th infantry regiment during war in Nagorno-Karabakh have not yet had their characterization in the Court of law as well. Thought widely believed to be genocide, scholars nonetheless agree that the final characterization of the event should be given by the court of law on the international level.

While discussing massacre in Khojaly there are undoubtedly seen elements of the crime of genocide. It is quite clear that the murderous acts committed in Khojaly carry evidence that can be identified as *actus reus* of the crime of genocide. It has to be pointed out that such acts were not limited only to Khojaly that have taken place during the Nagorno-Karabakh conflict's active stage. *Mens rea* of the genocide is very hard to prove and less clear in case of Khojaly. However, such actions of the Armenians as setting up ambushes in advance, following refugees on helicopters and orders given by radio suggest that *mens rea* of genocidal acts have formed prior to the commission such acts. Moreover, it is quite evident that in the case of Khojaly Armenians chose the target group as "Azerbaijanis" and intended to destroy parts of this group.[16]

Precisely because there are clear elements of possible crime of genocide in the event there is –like in the case of Armenian "genocide" – a clear need for international judicial opinion to clarify the character of the event. It is a pity that so much time is passing by but there are no judicial decisions on Khojaly massacre and other tragic events of Nagorno-Karabakh conflict.

For some time there is a need for the *ad hoc* international criminal tribunal to be set up for the investigation of the international crimes perpetrated in Nagorno-Karabakh conflict using the models of International Criminal Tribunal for Former Yugoslavia and International Criminal Tribunal for Rwanda. These two institutions have proven themselves capable of delivering justice and setting up new horizons for the international criminal law. Moreover, calls for such a tribunal to be set up for Nagorno-Karabakh conflict have been there for some time already.[17]

Such an *ad hoc* tribunal will be able to address the issues of characterization

16 Kamal Makili-Aliyev, *Enforcement of International Law in Nagorno-Karabakh Conflict*. Tbilisi: UNIVERSAL, 2008, p. 75, http://bit.ly/Nw809V

17 Ibid., p. 89; Elkhan Mehtiyev, "Armenian-Azerbaijani conflict: Prague Process and Current Status of Negotiations", 2006, http://anl.az/el/q/qarabag_6/q-13.htm; Elchin Mehdiyev, "Special tribunal should be created for prosecution of Khojaly genocide perpetrators", *Trend*, 26 February, 2014, http://en.trend.az/news/karabakh/2246324.html; etc.

of Khojaly massacre as well and establish the just and objective facts to bring justice and honor of the victims of these horrible events. As for the Armenian "genocide" political lobbyists, they have to finally acknowledge that such categories can be characterized only in the judicial instances and through the implementation of international criminal law in an international court. One international justice body has already proven that Armenian "genocide" cannot be considered a historical fact. With their actions such political lobbyists are actually making matters worse for Armenian people, as such decisions of the international judicial bodies may actually convince international community that "genocide" claim is a political myth and nothing more. That may even force some state to nullify the resolutions they have already adopted and backtrack on "recognitions". It would be wise then for Armenians to seek justice in courts and not in parliaments.

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