AN ASSESSMENT OF ARMENIAN CLAIMS FROM THE PERSPECTIVE OF INTERNATIONAL CRIMINAL LAW

(ERMENİ İDDİALARININ ULUSLARARASI CEZA HUKUKU AÇISINDAN BİR DEĞERLENDİRMESİ)

Dr. Şükrü M. ELEKDAĞ
Ambassador Ret.
Former Undersecretary of the MFA of Turkey

Abstract: *This article argues that were the U.N. Genocide Convention to be retroactively applied to the Armenian genocide claim, the foregoing analysis leads us to conclude that the material and mental elements of the crime have not been constituted. Article shows that the claims accusing the Ottoman administration and its members of the crime of genocide are invalid and without sound or reasonable foundation. Consequently, it is argued that the relocation is a legally justifiable measure when taken by the state in order to protect its very existence.*

Keywords: *Genocide Convention, retroactivity, Armenians, Ottoman Empire*

Öz: *Bu makale Birleşmiş Milletler Soykırım Sözleşmesi geriye dönük uygulanabilir olsaydı, suçun maddi ve manevi unsurlarının oluşmamış olduğunu gösteren bir sonuca ulaşılacağını iddia etmektedir. Makale Osmanlı hükümeti ve üyelerinin soykırımı suçu işlemekle itham edilmesinin hiçbir geçerliliği olmadığını, sahih ya da mantıklı bir temeli bulunmadığını öne sürmektedir. Nitekim, tehcirin devletin kendi varlığını korumak üzere alındığında hukuki olarak meşru bir önlem olduğu iddia edilmektedir.*

Anahtar Kelimeler: *Soykırım Sözleşmesi, makabline şamil, Ermeniler, Osmanlı İmparatorluğu*

The 1915 events: An authentic historical controversy

Although a great many Western historians and genocide scholars, influenced by the zealously promoted one-sided historical narrative of the Armenian advocacy groups, have described the fate of Armenians in the events which occurred in World War One in the Ottoman Empire as “genocide”, there is also a fairly large number of reputable American and

European academics who flatly refuse to do so. For instance, in 1985 69 American scholars in a declaration addressed to the U.S. House of Representatives, stated that,

> *The undersigned American academics who specialize in Turkish, Ottoman and Middle Eastern studies are concerned that the current language embodied in House Joint Resolution 192 is misleading and/or inaccurate in several respects. Specifically. ... we respectfully take exception to that portion of the text which singles out for special recognition: '... the one and one half million people of Armenian ancestry who were victims of genocide perpetrated in Turkey between 1915 and 1923…'*[1]

The list of the signatories of the declaration, just to mention a few, included names of international standing such as: Bernard Lewis; J.C. Hurewitz; Standford Shaw; Tibor Halasi-Kun; Dankwart Rustow; Howard Reed; Franck Tachau; Philip Stoddart; Jon Mandaville; Roderick Davison; Walter Denny; Carter Findley; Avigdor Lewvy; Pierre Oberling; and, Justin McCarthy. There is also a host of European scholars such as Andrew Mango, Norman Stone, Giles Veinstein, Arend Jan Boekestijn, Paul Dumont and Philippe Fargues who reject the appropriateness of genocide label for describing the catastrophic events of 1915.

The statement of Bernard Lewis, the world famous and highly respected historian, illuminate why this matter of labeling is so fraught with controversy.[2] When Professor Lewis was asked: "The British press reported in 1997 that your views on the killing of one million Armenians by the Turks in 1915 did not amount to genocide … My question is, sir, have your views changed on this?" he responded in:

> *... in this particular case, the point that was being made was that the massacre of the Armenians in the Ottoman Empire was the same as what happened to Jews in Nazi Germany and that is a downright falsehood. What happened to the Armenians was the result of a massive Armenian armed rebellion against the Turks, which began even before war broke out, and continued on a larger scale. Great numbers of Armenians, including members of the armed forces, deserted, crossed the frontier and joined the Russian forces invading Turkey. Armenian rebels actually seized the city of Van and held it for a while intending to hand it over to the invaders. There was guerilla warfare all over Anatolia. And it is what we nowadays call the National Movement of Armenians against*

1 "Bernard Lewis denying the Armenian genocide" Last Access: June 11, 2012 http://www.youtube.com/watch?v=jZy27-x-_UM&feature=related

2 The New York Times, Sunday, May 19, 1985

Turkey. The Turks certainly resorted to very ferocious methods in repelling it. There is clear evidence of a decision by the Turkish Government, to deport the Armenian population from the sensitive areas. Which meant naturally the whole of Anatolia. Not including the Arab provinces, which were then still parts of the Ottoman Empire. There is no evidence of a decision to massacre. On the contrary, there is considerable evidence of attempts to prevent it, which were not very successful. Yes there were tremendous massacres, the numbers are very uncertain but a million may well be likely. The massacres were carried out by irregulars, by local villagers responding to what had been done to them and in number of other ways. But to make this, a parallel with the holocaust in Germany, you would have to assume the Jews of Germany had been engaged in an armed rebellion against the German state, collaborating with the allies against Germany. That in the deportation order the cities of Hamburg and Berlin were exempted, persons in the employment of state were exempted… This seems to me a rather absurd parallel.

According to the principle of legality crystallized by the maxims nullum crimen sine lege and nulla poena sine lege, no accusation can be validly leveled against the members of the government of the Ottoman Empire or the Ottoman State on the basis of the Genocide Convention.

Professor Lewis's cogent description of what happened during the tragic years of the First World War is equally espoused by many other historians who also reject the contention that there is persuasive evidence of genocide in the case of Armenians. Whether the fate of the Ottoman Armenians meets the definition of the crime of genocide, as provided by the United Nations Genocide Convention, remains an authentic historical controversy.

The U.N. Genocide Convention is not retroactive

In this context I hasten to underline that, according to the principle of legality crystallized by the maxims *nullum crimen sine lege* and *nulla poena sine lege*, no accusation can be validly leveled against the members of the government of the Ottoman Empire or the Ottoman State on the basis of the Genocide Convention. As is known, international law, as provided by Article 28 of the Vienna Convention of the Law of Treaties,[3] prohibits the retroactive application of treaties unless a different intention appears from the treaty or is otherwise established.

3 UN Vienna Convention of the Law of Treaties, Article 28, Last Access: June 11th, 2012 http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

The U.N. Convention for the Prevention and Punishment of the Crime of Genocide which entered into force on January 12, 1951, contains no provisions prescribing its retroactive application. Furthermore the Convention's *traveaux préparatoires* support the view that the negotiators' intention was to accept a prospective, not a retrospective obligation on behalf of the states they represented. Consequently, the Genocide Convention does not give rise to individual criminal or state responsibility for events which have occurred in 1915 in eastern Anatolia.

What would be the conclusions of a legal analysis in case the Genocide Convention was applied to the events of 1915?

Although this is the situation, my aim in this essay is to determine whether or not the events of 1915 meet the definition of the crime of genocide as provided by the United Nations Genocide Convention. To be clearer, what I will try to elaborate in this essay would be what would be the conclusions of a legal analysis if the Genocide Convention were retroactively applicable to the events of 1915.

For such an analysis we have to establish the essential legal ingredients necessary for incriminating a person or persons for the crime of genocide. We have to note, however, at the outset that the principle of individual criminal responsibility which existed until recently has been modified by a judgment of the International Court of Justice and now states also can be held responsible and prosecuted for failing to act to prevent genocide and for acts of genocide attributable to them.

The analysis for establishing the legal ingredients of genocide requires first a review of the constituent elements of the crime of genocide under the light of the U.N. Convention for the Prevention and Punishment of the Crime of Genocide, as well as the jurisprudence which evolved from the application of the said Convention by the ad hoc international criminal courts. As matter of fact, a rich jurisprudence grew from the decisions of the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).

Second, one has to examine how the 2007 landmark judgment of the International Court of Justice which, although it dealt primarily with the issue of state responsibility, also equally addressed perspectives on genocide law which had a deep impact on the jurisprudence of the two ad hoc international tribunals.

And finally seeks to establish whether in light of the provisions of the

Genocide Convention interpreted in accord with the established precedents and jurisprudence, the acts of the Ottoman government or its members can be validly characterized as genocide.

The essential elements of the crime

The essential elements requisite to incriminate a person of the crime of genocide are laid down in Article II, which is the key provision of the Genocide Convention.

> *Article II*
>
> *In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
>
> *(a) Killing members of the group;*
>
> *(b) Causing serious bodily or mental harm to members of the group;*
>
> *(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
>
> *(d) Imposing measures intended to prevent births within the group;*
>
> *(e) Forcibly transferring children of the group to another group.*

There are three main elements in this definition:

The first is the list of five prohibited acts the commission of which constitutes the objective/material element of the crime (*Actus Reus* of genocide).

The second element is a list of protected groups. Article II names four groups that are protected under the Convention, namely, national, ethnic, racial and religious groups. For genocide to occur under the Convention the actions must be aimed at such a group. It is of critical importance to note here that the list of the groups is exhaustive, for instance the political and cultural groups are not under the protection of the Convention.

The third element is the subjective/mental element: the commission of the enumerated acts with "the intent to destroy in whole or in part a national, ethnical, racial and religious group, as such." (*Mens Rea of genocide*).

The expression "as such"

Certain clarifications are necessary. In this context, the expression "as such" is of great significance as it qualifies the intent of the perpetrator. The perpetrator of genocide must have the purpose of destroying the group and his "victim is chosen not because of his individual identity, but rather on account of his membership in a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen "as such", which, hence, means that the victim of the crime of genocide is the group itself and not only the individual…[4]". In other words, victimization of human beings is committed with an intent that reflect a culpable state of mind imbued with the intent to destroy the group to which the victimized human beings belongs. It is this characteristic of the intent which distinguishes genocide from other international crimes that fall into the category of "crimes against humanity."

Special intent: Aggravated criminal intention

"Genocidal intent" is usually described as "specific intent" or "special intent" which corresponds to the *dolus specialis* of continental legal systems. William Schabas, a well known authority on international criminal law, notes that the degree of intent required by article II of the Genocide Convention is usually described as "specific intent" or "special intent". The concept of "specific intent" or *dolus specialis* in the context of the crime of genocide means an aggravated criminal intention, required in addition to the criminal intent accompanying the underlying crime.

The judgments of ad hoc international criminal tribunals ICTY and ICTR have contributed to the elucidation of *dolus specialis*. As a matter of fact ICTY stated in that respect stated that:

> *The special intent which characterizes genocide supposes that the alleged perpetrator of the crime selects his victims because they are part of a group which he is seeking to destroy. Where the goal of the perpetrator or perpetrators of the crime is to destroy all or part of a group, it is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide.*[5]

4 Prosecutor v. Akayesu, Case No. ICTR-95-4-T, Judgment, para. 521.

5 Prosecutor v. Jelisi, Case No. IT-95-10-T, Judgment, para. 67.

The term "in whole or in part"

The term "in whole or in part" also necessitates clarification. The drafting history of the Convention indicates that the rationale for the expression "in part" was simply that genocide does not require intent to destroy the entire group and that intent to destroy a group only "in part" also would be sufficient. However, the drafters did not discuss what should be the quantitative and qualitative significance of the part selected for destruction.

In that respect the ICTY underlined that the individuals selected for destruction must be important to the group as whole, as would be the group's leadership or all of its military-aged men. According to the Court's ruling, the intent may "consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such."[6]

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The International Court of Justice authoritatively interpreted "in part" as a "substantial part" in its ruling on the Bosnian application against Serbia by describing as "critical" the substantiality criterion:

> *In the first place, the intent must be to destroy at least a substantial part of a particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of the groups, the part targeted must be significant enough to have an impact on the group as a whole. That requirement of substantiality is supported by consistent rulings of ICTY and the International Criminal Tribunal for Rwanda (ICTR) and by the commentary of the ILC to its Articles in the Draft Code of Crimes against Peace and Security of Mankind.*[7]

Is genocidal policy or plan an element of the crime of genocide?

One of the most important issues in the law of genocide is whether a genocidal policy or plan is an element of the crime of genocide. The ICTY Appeals Chamber ruling in the *Jelisic* case that "the existence of a plan or

6 Prosecutor v. Jelisic, Case No. IT-95-10, Judgment, para. 49 (Appeals Chamber, July 5, 2001)

7 Application of the Convention on the Prevention an Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J., February 26, 2007. para. 198. [Hereinafter Bosnian Genocide].

policy is not a legal ingredient of a crime"[8] supported the view that, for incriminating a perpetrator of the crime of genocide, the existence of a plan or policy to destroy a group does not need to be proven. Nevertheless, the Appeals Chamber added that "in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases."[9] In a sense the Chamber's ruling does not discount the view that genocide can be committed by a lone *génocidaire*.

This view is strongly opposed by many scholars who think that the scope and organization of genocide requires "the acts of individual offenders within a collective enterprise"[10], and particularly by William Schabas who argues that it is nearly impossible to imagine genocide that is not planned and organized either by the state itself or a state-like entity or by some clique associated with it."[11]

According to Schabas, "Because of the scope of genocide it seems implausible that it can be committed by an individual acting alone. This is another way of saying that for genocide to take place there must be a plan, even though there is nothing in the Convention that explicitly requires this."[12]

To prove his point Schabas mentions the inconsistencies at the Jelicic trial to the effect that although the Trial Chamber stated that no plan was required, it equally said that "it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organization or a system."[13]

The usage of inference to prove specific intent

At the ICTY and ICTR trials, the difficulty in establishing specific intent necessary for a conviction of genocide has been brought up quite frequently. If the accused confessed or prior to the perpetration of the crime made a public speech or some statements of genocidal nature, the specific intent to

8 "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991" Case No.: IT-95-10-A

Date: 5 July 2001 Appeals Chamber Judgment, Item 48. Last Access: June 10, 2012 http://www.icty.org/x/cases/jelisic/acjug/en/jel-aj010705.pdf

9 Ibid.

10 C. Kress, (2005), "The Darfur Report and Genocidal Intent", 3 *Journal of the International Criminal Justice* pp. 572-573.

11 William Schabas (2008) "State Policy As an Element of International Crimes" *The Journal of Criminal Law and Criminology* Vol. 98, No.3, p. 966

12 William Schabas (2000) *Genocide in International Law: The Crimes of Crimes* Cambridge University Press, Cambridge, supra note 21, p. 207

13 Prosecutor v. Jelisec, Case No. IT-95-IO-A, para. 101 (App. Chamber, Int'l Crim. Trib. for the Former Yugoslavia, July 5, 2001) http://www.un.org/icty/jelisiJappeal/judgment

destroy a group can be demonstrated explicitly. Otherwise specific intent has to be inferred from the material evidence, including evidence which demonstrates a consistent pattern of conduct by the accused. It is important to note in this context that the level of proof which is sought by the courts in this process is standard of proof beyond a reasonable doubt.

The relevant facts and circumstances from which ICTR and ICTY held that specific intent can be inferred include are as follows: "physical targeting of the group or their property"; "the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups"; "the use of derogatory language toward members of the targeted group"; "the weapons employed and the extent of bodily injury"; "the methodical way of planning"; "the systematic manner of killing"; "the repetition of destructive and discriminatory acts"; "the general political doctrine which gave rise to the constituent acts of genocide"; "the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group"; "the scale of atrocities committed"; "the number of victims from the group".

The ICJ judgment on Bosnia's Genocide Case against Serbia

The judgment of the International Court of Justice (ICJ), delivered on 26 February 2007 in the case brought by Bosnia and Herzegovina against Serbia and Montenegro in which Bosnia charged that Serbia had committed acts of genocide against Bosnian Muslims, is regarded by a significant majority of scholars of having "momentous importance", "because it was the first time in history that an international interstate tribunal, and one endowed with the authority of the ICJ, had to establish the responsibility of a state for one of the most serious crimes of concern for the international community."[14] This is a decision of considerable substance which not only addressed and clarified for the first time the nature of state responsibility regarding genocide, but also made an important contribution on international criminal law.

Until the ICJ's ruling in question, the international practice in dealing with the crime of genocide was based on the individuality of the crime. According to this concept, only individuals could be held responsible for genocide crimes, whereas the state has only the obligation to punish those who have committed the crime of genocide. This practice was based on the 1946 judgment of the of the Nuremberg International Military Tribunal which espoused the principle that "crimes against international law are committed by men, not by

14 Paola Gaeta, "The ICJ Judgement on Genocide in Bosnia: A Missed Opportunity?", *Journal of International Criminal Justice*, 5 (2007), pp. 827-828.

abstract entities[15]"Article IV of the 1948 UN Genocide Convention, also reflecting this concept, prescribes that only persons commits genocide… "whether they are constitutionally responsible rulers, public officials or private individuals shall be punished for committing the crime of genocide." The said article does not cover legal persons or the states.

The ICJ, by reviewing the preparatory work of the Genocide Convention and interpreting its articles 1st and 9th, has ruled that, although as a matter of principle, international law does not recognize the criminal responsibility of the state, and the Genocide Convention does not provide a vehicle for the imposition of such criminal responsibility, the states however are obliged not to commit genocide and consequently they obliged to punish and prevent genocide.[16] The Court also observes that the States are also responsible for acts of genocide committed by organs or groups whose acts are attributable to them.

It should be noted that the ICJ's judgment on a dispute over a violation of the Genocide Convention is the first since the Convention was adopted in 1948. Equally it was also for the first time that a State was held responsible for violating the Convention, on grounds that it failed to take the necessary steps to prevent genocide.

Important concepts which emanate from ICJ's decision

Let us now examine certain aspects of the Court's judgment which are important for our analysis.

First, the establishment by the Court of the criterion of due diligence to appraise the responsibility of the state under its obligation to prevent genocide is a significant step. According to this criterion a state cannot be under the obligation to succeed in preventing the commission of genocide irrespective of the circumstances. However, a state incurs responsibility if it manifestly fails to take the measures which were within its means, and which might contribute to preventing genocide.

The salient observation of the Court in that respect is as follows:

> *... it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under the an obligation*

15 Judgment of the International Military Tribunal, Trial of Major War Criminals, 1947, Vol.11. p. 223.

16 Application of the Convention on the Prevention an Punishment of the Crime of Genocide *(Bosnia and Herzegovina v. Serbia and Montenegro),* 2007, I.C.J. 140 February 26, 2007. Para. 166. *[*Hereinafter *Bosnian Genocide]*.

to succeed, whatever the circumstances, in preventing the commission of genocide; the obligations of States parties is rather to employ all means available to them, so as to prevent genocide so far as possible. A state does not incur responsibility simply because the desired result is not achieved; responsibility however incurred if the State manifestly failed to take all the measures to prevent genocide which were within its power, and which might have contributed to preventing genocide. In this area the notion of "due diligence" which calls for an assessment in concreto, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one state to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of events, and on the strength of political links, as well as links of all other kinds, between the authorities of that State and the main actor of the events.[17]

For the state to be incriminated with genocide it is necessary to prove that the state by neglect manifestly failed its duty to undertake all timely measures which are reasonably available to it.

Clearly, the view of the Court is that when a state acts responsibly to prevent actions and events which threaten to turn into a genocide by earnestly taking materially and legally all measures which are within its power to prevent the perpetration of genocide, even if it does not succeed in stopping the dreadful event, it cannot be held responsible for events and acts the nonetheless occur despite the state's best efforts to avert them.

The corollary of this conclusion is that for the state to be incriminated with genocide it is necessary to prove that the state by neglect manifestly failed its duty to undertake all timely measures which are reasonably available to it.

In this context the Court also considered the capacity of a state to influence persons committing the acts to be crucial[18]. The Court also specified that the obligation to prevent arises "at the instant that the state learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.[19]"

17 *Bosnian Genocide,* para. 430.

18 İbid. Para. 430.

19 *Bosnian Genocide,* para. 431.

Second, the ICJ rejecting the ICTY standard of "beyond reasonable doubt" decided to follow the standard of "fully conclusive evidence" for proving specific intent. This is what the Court said on this matter:

> *The Court has long recognized that claims against State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf. Corfu Channel (United Kingdom v. Albania), Judgement, I.C.J Reports 1949, p. 17). The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.*[20]
>
> *In respect to the Applicant's claim that the Respondent has breached its undertakings to prevent genocide and to punish and extradite persons charged with genocide, the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.*[21]

The import of this particular ruling from the point of view of inferential evidence cannot be overstated. The Court openly rejects ICTY's evolved jurisprudence based on inference for proving genocidal intent in the absence of incontrovertible proof to incriminate the accused. The Court would not rely on inference to prove specific intent. The Court rules that only conclusive or smoking gun evidence is requisite for indictments of genocide.

Third, ICJ rejects the approach adopted by ICTY and ICTR that the genocidal intent could be inferred from cumulative analysis of circumstantial evidence endorsed by a pattern of similar conduct directed against the targeted group. The Court considers that specific intent should be demonstrated for each particular case:

> *Turning now to the Applicant's contention that the very pattern of the atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims and also Croats, demonstrate the necessary intent, the Court cannot agree with such a broad proposition. The dolus specialis, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.*[22]

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20 *Bosnian Genocide,* 2007 ICJ, para. 209

21 *Bosnian Genocide,* 2007 ICJ, para. 210

22 *Bosnian Genocide,* 2007 ICJ, para. 373.

Although the Court observed that the acts committed at Srebrenica were committed with the specific intent to destroy a part of the Bosnian Muslims and reiterated that these were acts of genocide, still imbued with an inexorable (unyielding) attitude on specific intent, it did not reach the same verdict for the other blood-curdling murders and atrocities committed all over Bosnia during the period 1992-1995.

Indeed the Court recognizes that it has been established by fully conclusive evidence that the Bosnians were systematically victims of massive killings and mistreatment, beatings, rape and torture during the conflict and in the detentions camps, and although these atrocities may amount to war crimes, and crimes against humanity, they cannot be characterized as genocide because it has not been established conclusively that they were committed with specific intent (*dolus specialis*) to destroy the Bosnians in whole or in part.

Fourth, the Court adopted an even higher standard when deciding on the question of attribution of the Srebrenica genocide to [Federal Republic of Yugoslavia? Or, Former Republic of Yugoslavia?] (FRY). With regard to the finding that Serbia had not committed genocide, the Court stated that the act of those involved could not be attributed to FRY, because they were not acting as its organs or agents nor under its command and control. On this matter the Court departing from the criterion of "overall control" applied by the ICTY's Appeals Chamber in the Tadic case, adopted the "effective control" criterion established by its judgment in Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*). According to the Appeals Chamber the appropriate criterion for imputing the acts committed by Bosnian Serbs to the FRY was "overall" control" exercised over the Bosnian Serbs by FRY without any need to prove that each operation was carried out on the FRY's instructions , or under its effective control.

However, the ICJ said that "Genocide will be considered as attributable to a state if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the state, or under its effective control. This is the state of customary international law, as reflected in the ILC articles on state responsibility."[23]

Thus, the ICJ refused to find FRY culpable for the actions of Bosnian Serb militias or VRS (Army of Republika Srpska), despite the existence of overwhelming evidence that Milosevic regime trained, armed and had powerful influence over the VRS. In finding that these bonds and

23 *Bosnian Genocide*, 2007, ICJ, para. 401.

accouplement were not sufficient to establish FRY responsibility for and complicity in the genocide perpetrated in Srebrenica, the ICJ imposed the "effective control" criterion which placed a considerable burden on Bosnia to prove that VRS had committed genocide in Srebrenica under the explicit instructions of FRY or that Srebrenica operations were carried out under the effective control of the FRY. These demands of the ICJ could only be satisfied if Bosnia was able to produce express and written evidence such as written instructions given by the General Staff of the FRY to the main staff of the VRS or documents proving the factual involvement and direction of the FRY organs in the Srebrenica operations.[24]

Conclusions

From the foregoing it is clear that establishment of guilt for the crime of genocide requires the proven existence of the two legal ingredients of the crime.

The first is that the objective/material element of the offence, constituted by one or several acts enumerated in Article II of the Genocide Convention. The material element is in reality twofold. The first relating to the execution of the prohibited acts, and the second relates to the targeted group which must be a national, ethnical, racial or religious group. The material element of the crime is satisfied when it is proven that the prohibited conduct was carried out by the perpetrator against one of these groups or members of such group.

The second is the subjective/mental element (*mens rea*) of the offense, consisting of the aggravated criminal intention or specific intent (*dolus specialis*) to destroy, in whole or in part, the targeted group as such.

In light of the views expressed in the ICJ judgment on the Bosnian genocide case, the application of these ingredients for establishing guilt of genocide on the part of a government or its members must take the following into consideration:

First the government or its members incur responsibility if they manifestly failed to take all the measures which were within their power in a timely manner to prevent genocide. If, however, the government and its members act

24 The Court also stated that, in order to ascertain whether FRY is responsible "for complicity in genocide" it needs to consider whether the organ or person furnishing aid or assistance to a perpetrator of the crime of genocide acted knowingly, that is to say, in particular, was aware of the specific intent of the principal perpetrator. The Court is not convinced by the evidence furnished by Bosnia that these conditions were met. (ICJ judgement, para. 422). Furthermore the Court noted that a point which is clearly decisive in this connection is that it was not conclusively shown that the decision to eliminate physically the adult male population of the Muslim community from Srebrenica was brought to the attention of the Belgrade authorities when it was taken. (ICJ judgment, para.423).

according to the criteria of due diligence established by the Court, it would not incur responsibility if its efforts failed.

Second, the ICJ ruling has heightened the threshold of the specific intent. Proof of specific intent of the alleged perpetrator requires fully conclusive evidence. Inference cannot be relied on to prove intent. Only conclusive or smoking gun evidence is valid to prove specific intent. There should be either a program or plan regarding the execution of genocide or there should be conclusive evidence indicating the existence of such a plan.

Third, genocidal intent cannot be inferred from the cumulative evidence endorsed by a pattern of similar conduct directed against the targeted group. The specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstance, unless a general plan to that end can be convincingly demonstrated to exist.

Fourth, the attribution of culpability to the State because of the genocidal actions committed by organs or persons other than the State's own agents, necessitates express written evidence such as written instructions to the said organs or persons or the States' or its organs factual involvement and direction of the genocidal actions in question.

Why the 1915 Events Cannot Be Considered As Genocide

In the light of the forgoing information and arguments, if the United Nations Convention on the Prevention and Punishment of the Crime of Genocide were to apply, albeit retroactively, to the 1915 events, the events nonetheless cannot be regarded as genocide and the Ottoman government or its members can neither validly nor reasonably be accused of committing genocide because of the following reasons:

►**In order to establish guilt on the part of the Ottoman government or its members of genocide, the objective/material element which is one of the two constituent elements of crime must exist**. As for this, the existence and the implementation of a plan or program to perpetrate the five criminal acts stated in the Article II of the Convention (killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about a group's physical destruction, preventing births and forcible transferring children to another group), credible evidence of the issuance by the Ottoman government or its members of orders and instructions to commit these crimes against Armenians or their encouragement for this purpose, or their complicity in these crimes or their attempt to commit these crimes is

necessary. Neither the existence of such a plan or program, nor the issuance of such orders nor have instructions, nor the encouragement and complicity of the Ottoman Government and its members been proven. Moreover, even if certain of the crimes specified in Article II were committed during the relocation process, all these took place beyond the will, intention and authority of the Ottoman government.

There are no documents or other evidence available to attribute these crimes to the government or its members. To the contrary, there is extensive credible evidence that the government and its members took all the necessary measures with outmost care and diligence for the prevention of these acts. When, in some remote areas, the laws enacted, orders issued and precautionary measures taken for this purpose were violated, the government using all the available means to its authority tried to prevent such violations promptly and also promptly punished the criminals. Various military tribunals set up in different areas tried and sentenced the civilians, government officials and military officers who were found guilty of violations of the relevant laws and instructions with very severe penalties including death sentences.[25] **Under these circumstances it is not possible to say that the objective/material element of the crime has been validly established.**

Neither the Ottoman administration nor the Ottoman officers planned or intended to massacre the country's Armenian citizens or to annihilate the Armenians. There are no declarations, orders or documents proving that such a plan or intent existed.

►**Neither the Ottoman administration nor the Ottoman officers planned or intended to massacre the country's Armenian citizens or to annihilate the Armenians. There are no declarations, orders or documents proving that such a plan or intent existed.** The research and investigations carried out for the last 95 years have revealed no such evidence in the Ottoman or foreign archives. Access to presumably relevant public and private Armenian archives has been restricted or denied to third-party researchers.

►**The decision on relocation was a military solution to a military problem.** Thus, as a result of enormous casualties resulting from the battles between the Russian Army and the Ottoman Third Army, the number of soldiers in the Third Army decreased from 168.608 –the number that existed on September 26, 1914- to 59.000 following the battles of Sarıkamış, Van, Malazgirt and Tortum valleys.[26] As of May 1915, the fact that the number of

25 Stanford J. Shaw, *The Ottoman Empire in World War I,* Vol.2, (Ankara: 2008) pp.1095-1099.

26 Edward J. Erickson, "The Armenians and the Ottoman Military Policy", *War in History,* Vol. 15 No. 2, (April 2008), p.145,148

soldiers in infantry divisions with an official strength set at 9.000 had declined to 2.000. The Third Army had suffered a devastating reduction of its practical effectiveness as a military organization. Furthermore, it was apparent that supplies and armament stocks at the front line diminished to such a critical point that any kind of a short-term interruption in logistical supply chain would create a deadly peril for the Ottoman Third Army. During this time period, Armenian guerrillas conducting hostile operations at the time in the area had the capacity to sever the logistic supply corridor of Sivas-Erzincan-Erzurum at any time. Moreover, the southern supply corridor of Diyarbakır-Bitlis-Van was also in danger due to armed Armenian insurgency. **The Third Army was not capable of diverting any military units from the front line for the purpose of securing and defending these vital lines of supply. This made relocation an existential necessity for the Ottoman Empire.** In this respect, it would be right to consider the relocation decision a military measure to a deal with a military problem.

► **The Ottoman Council of Ministers' Provisional Law on Replacement and Settlement, dated May 27, 1915, stated that "The Army, Army Corps, and Divisional Commanders are authorized to transfer and relocate the populations of villages and towns, either individually or collectively, in response to military needs, or in response to any signs of treachery or betrayal.**[27] This law, requiring certain Armenian local communities to relocate within the imperial territories, in addition to the aforementioned military necessities, resulted from the lethally belligerent acts of Armenians of these communities. These ranged from joining the ranks of the invading Russian army, cooperation with Russia, providing support to the enemy by setting up voluntary armed bands, to threatening and sabotaging the lines of defense and supply lines of the Ottoman army which was retreating before advancing Russian army,[28] revolting in many cities and attacking and massacring Turkish and Muslim people, and organizing armed attacks to Turkish and Muslim villages.[29]

►It **should be underlined that Ottoman Government acted with a full sense of responsibility to conduct the relocation in a safe and orderly manner.** Hence, there exist hundreds of formal archive documents such as codes, government decisions, decrees, regulations and directions, proving that the Government acted with the utmost attention and care in order to preserve the safety of the lives and property of the relocated and to take all the

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27 Stanford J. Shaw, *The Ottoman Empire in World War I,* Vol.2 p.1052. See also, Yusuf Sarınay & Hikmet Özdemir (eds.), Turkish-Armenian Conflict: Documents, (Ankara:2007), p.65

28 Edward J. Erickson, "The Armenians and the Ottoman Military Policy" pp.141-167.

29 Sydney Nettleton Fisher, *The Middle East: A History,* (New York: 1959) pp.365–66. Justin McCarthy, et al., *The Armenian Rebellion at Van,* (Salt Lake City, UT: 2006) pp. 176-257.

precautions for affording the nourishment and health needs of them during the relocation process.[30]

►**To secure the lives and property of the relocated, the government carefully supervised the relocation process to the maximum practicable extent possible and supported it with resources to the full limit of its capability under the extremely adverse war conditions that prevailed at the time.**

Government law enforcement resources were deployed to identify, try, and punish anyone, whether a member of the army, a public servant or civilian, for breaches of the laws and regulations enacted to protect the lives and property of the Armenians. Archival documents establish that the government delved into the events, investigated offences and crimes such as the extortion of properties and assassination of Armenians during the relocation, and sent instructions to provinces in order to ensure that offenders were held to account and duly punished. When violations continued, more radical measures were taken and inquiry commissions were sent to the regions where they occurred. Those who were accused as a consequence of investigations of the commissions were brought before the Military Courts. **The court records show that in the middle of 1916, 1673 persons were put in trial, of whom 67 persons were sentenced to death, 524 persons were imprisoned and 68 persons were sentenced to hard labor, condemned to galleys and exiled.**[31]

►Armenian advocates claim that peaceable and passive Armenians were attacked by Turks without any provocation whatsoever. They assert that Armenians enlisted in the Russian army as a legitimate self defense action against the implementation of the relocation law. Those claims do not stand up to examination, particularly in light of the unambiguous context of the history of the preceding years and decades. Beginning in the last quarter of the nineteenth century Armenians in Anatolia, prepared for a wholesale rebellion and came to see the impending First World War as an extraordinary opportunity to realize their aim of founding an independent Armenian national state on the Ottoman lands with the support of Russia. Thousands of Ottoman Armenians trained in Russian military training camps before the war, and, when Turkish-Russian war broke out, they enrolled in the Russian army in order to support Russian war power in Anatolia. Authenticated

30 A selection of these documents is now available in English, see Yusuf Sarınay & Hikmet Özdemir, *Turkish-Armenian Conflict: Documents,* (Ankara:2007).

31 Yusuf Sarınay, "Ermeni Tehciri ve Yargılamalar 1915- (Armenian Relocation and the Trials of 1915-1916) in *Türk-Ermeni İlişkilerinin Gelişimi ve 1915 Olayları Uluslar arası Sempozyumu Bildirileri,* (Ankara:2006), pp.263-264. For a somewhat different set of figures see, Stanford J. Shaw, *The Ottoman Empire in World War I,* Vol.2, pp.1098-1099.

archive documents clearly establish that under the leadership of Tashnak and Hinchak parties tens of thousands of Armenians were equipped with the weapons and munitions which were concealed in hidden depots in Anatolia. They set about to slaughter Turkish and Muslim people and cut the logistic and supply lines of the Turkish army.

►**Those historians and writers who assert that Armenians did not rebel but rather had no choice but to resist with guns once the relocation began do so without any benefit of supporting evidence. The great weight of evidence is unambiguously to the exact contrary. There are thousands of documents in Ottoman, Russian, American, French, English and German archives proving that Armenian rebellion and collaboration with the enemy began before the relocation and that with the outbreak of the war the Armenian rebels then openly engaged on the Russian side against the Ottoman state.** After Ottomans entered the First World War, the first organized Armenian-initiated violence commenced November 11, 1914, whereas the relocation law was enacted, May 27, 1915. In this context, Boghos Nubar Pasha's[32] (Head of Armenian National Delegation to Paris Peace Conference) and Hovhannes Katchaznuni's[33] (The First Prime Minister of the Independent Armenian Republic) declarations show that the claim that Armenians took part or the Russian side only after the relocation is untrue. They also show that the Ottoman Empire had an inarguable reason to transfer Armenian people to different regions outside of the Russian Army's theater of operations whom they supported.

►**It is true that the Armenians had suffered casualties during the clashes in Anatolia and relocation. However, it is not possible to prove or claim that it was the result of an intentional destruction act previously planned by the Ottoman administration.** On the contrary, the overwhelming preponderance of the hard evidence, and indeed the hard logic of the dire situation of the Ottoman government's forces in the region point to principal reasons for relocation causalities. The government's depleted resources were sadly inadequate to provide public order under the pressure of war conditions. The resulting disorder and lack of troops to protect effectively Armenians in the relocation process from armed marauders resulted in Armenian casualties. **The government already was helpless to protect its own vital military logistic and supply lines to the Third and Fourth Armies.** Protection of Armenian relocation convoys with full complements of regular military units was hopelessly beyond its means.[34] Acute shortages of vehicles, fuel, food

32 Memorandum by Boghos Nubar Pasha, 3 February, 1915. See Vatche Ghazarian (ed.), *Boghos Nubar's Papers and the Armenian Question 1915-1918,* (Waltham, MA: 1996) pp.3-5

33 Hovhannes Katchaznouni, *Dashnagtzoutiun has Nothing to Do Anymore,* (İstanbul: 2007) , pp.36-37

34 Edward J. Erickson, *Ordered to Die: A History of the Ottoman Army in the First World War,* (Westport, CT: 2001) p.103

and medicine under hard wartime conditions, along with bad weather and epidemic diseases such as typhus also took a heavy toll.[35] These woeful conditions wreaked terrible suffering on the Ottoman population as well.[36] However, naturally, a notable part of the Armenian casualties between 1914-1922 resulted from the hostile operations initiated and conducted by Armenian insurgents themselves, internal Armenian disputes and internecine wars.[37] Moreover, attacks by Armenians against Ottomans and the Muslim population provoked outrage and reprisals by survivors from traumatized and aggrieved local communities.[38]

►**The fact that different segments of the Ottoman Armenian people were subjected to very different treatments during relocation, makes implausible the assertion that Armenian people were targeted as a "national, ethnic, racial and religious group" to be "destroyed in whole or in part".** Indeed, the relocation decision was not applied to all Armenians living in all the cities and provinces. Armenians who were from certain sects, who had different positions and jobs and those who needed help and assistance were exempted from relocation. Armenians living in Istanbul, Izmir and Halep were excluded from relocation policy.[39] Equally those from Catholic and Protestant sects, those who were Ottoman Army officers and served at the medical services, those who worked in Ottoman Bank and some consulates were not subject to relocation, as long as they remained loyal to the Ottoman State. Moreover, the sick, handicapped, aged people, orphan children and widows were also not subjected to the relocation.[40] Such persons were taken under protection in orphanages and villages, and their expenses were met from Migratory Funds by the state.

The fact that different segments of the Ottoman Armenian people were subjected to very different treatments during relocation, makes implausible the assertion that Armenian people were targeted as a "national, ethnic, racial and religious group" to be "destroyed in whole or in part".

►The Armenians who revolted against the Ottoman Empire resorted to rebellion to achieve independence by the means of armed political

35 Hikmet Özdemir, *The Ottoman Army: Disease & Death on the Battlefield,* (Salt lake City, UT: 2008) pp.136-139

36 Justin McCarthy, *Muslims and Minorities: the Population of Ottoman Anatolia and the End of the Empire,* (New York: 1983), p.133. Hikmet Özdemir, *The Ottoman Army,* pp.142-145. Jeremy Salt, *The Unmaking of Middle East: A History of Western Disorder in Arab Lands,* (Berkeley, CA: 2008), pp.67-68.

37 Michael M. Gunter, *Pursuing the Just of their People: A Study of Contemporary Armenian Terrorism,* (Westport, CT: 1986), p.21.

38 Jeremy Salt, *The Unmaking of Middle East,* p.64

39 Guenter Lewy, *The Armenian Massacres in Ottoman Turkey: A Disputed Genocide*, (Salt Lake City, UT: 2005) pp.250-252.

40 Stanford J. Shaw, *The Ottoman Empire in World War I,* Vol. 2, pp.1076-1078

organizations (Tashnaks, Hincaks etc.). The leaders of the Armenian independence movement who fought in the ranks of the Russian Army sought participation in Paris Peace Conference as a belligerent power, and as a justification for their demand, they put forth through official documents, the dimensions of the roles that they had undertaken in the war against Ottomans and the "considerable sacrifices" they incurred Boghos Nobar Pasha openly claimed credit for Armenian war actions at the Conference by holding that it was Armenian participation in the war effort that led to what was asserted to be mistreatment by the Ottoman authorities.[41] However, political groups, as known, are not a "group" under the protection of the U.N. Genocide Convention.

► **In order to accuse the Ottoman Government or its members of having committed genocide, the existence of the subjective/mental element which is the second constituent element of the crime has also to be proven. For this purpose, it is necessary to prove that crime is committed with "special intent". That means that, it must be proven that the Ottoman Government or its members intended to destroy Armenians with a will and intent focused on their destruction in whole or in part—because they were Armenians—by means of the prohibited acts enumerated in Article II. The International Court of Justice in its judgment of February 26, 2007 on Bosnia-Herzegovina – Serbia and Montenegro case, has ruled that special intent can only be established by fully "conclusive evidence" and refused circumstantial evidence to prove genocidal intent. Consequently, for the purpose of establishing the special intent it is necessary that a plan which reveals that the Ottoman Government was moved with the intent to destroy the Armenians in whole or in part because they were Armenians and used relocation as a method for the achievement of this aim should exist. However, such a plan or document does not exist. Armenian advocates despite their efforts for the last 95 years were not able to produce a single document that proves the existence of such a plan. Consequently it is not possible to assert the legal validity of the Armenian claims.**

►In the aforementioned jurisprudence it is assumed that the existence of racial hatred and discriminatory and degrading treatment against the victims of the massacre in the culture of the country where the crime has been committed is considered as an element in proving genocide. In this context, it is required that the Armenian side prove that they were subjected to genocide, they have to prove that in the Ottoman state a discriminatory policy was administered to the Armenian people emanating from the feeling of hatred toward the Armenians, and consequently Armenians because of their

41 Guenter Lewy, *The Armenian Massacres in Ottoman Turkey,* p.108.

nationality, religion and ethnicity were degraded and excluded from the society. However, it is not possible to discern the existence in the Ottoman-Turkish culture of racial hatred, degrading attitudes and treatment against the Armenians. In reality from the historical perspective Turkish-Armenian relations present a most interesting and attractive picture. Indeed, it is underlined by many Turkish and foreign historians and writers maintain that "it is so hard to show such an example in world history that two people who speak different languages and have different religions lived together intermingled and within a peaceful atmosphere for such a long time". It should be emphasized that in the Ottoman Empire, there was no anti-Armenian posture in any way equivalent to, for example, traditional anti-Semitic attitudes as were seen in Germany, which paved the way to the Holocaust" Just to the contrary, the exact opposite stance was the main pillar of the Ottoman Empire. In 1914, for example, the Armenian leader Boghos Nubar Pasha was offered a place in the Ottoman Cabinet as a minister. **Referring to this, the British historian Norman Stone asks whether one could "imagine Hitler making Chaim Weizmann the same offer?"[42] Even as late as in February 1917, when Talat Pasha as the new Grand Vizier was about to form a new cabinet, the draft list he prepared included several Armenians as ministers in the new cabinet.[43]**

In conclusion, were the U.N. Genocide Convention to be retroactively applied to the Armenian genocide claim, the foregoing analysis leads us to conclude that the material and mental elements of the crime have not been constituted.

This shows that the claims accusing the Ottoman administration and its members of the crime of genocide are invalid and without sound or reasonable foundation. Consequently, it is clear that the relocation is a legally justifiable measure when taken by the state in order to protect its very existence.

42 Norman Stone, "Vote Turkey this Christmas", *Spectator*, 18 December, 2004. http://www.spectator.co.uk/print/politics/all/12979/vote-turkey-this-christmas.thtml. See also Tarık Zafer Tunaya, *Türkiye'de Siyasal Partiler* (Political Parties in Turkey), Vol.3, (İstanbul: 1989), p.396.

43 Murat Bardakçı, *Talat Paşa'nın Evrak-ı Metrukesi* (Talat Pasha's Remaining Documents), (İstanbul: 2008), p. 171.

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