THE CONCEPT OF GENOCIDE IN INTERNATIONAL LAW: WILLIAM A. SCHABAS' VIEWS ON 1915 ARMENIAN INCIDENTS

(MİLLETLERARASI HUKUKTA SOYKIRIM KAVRAMI: 1915 ERMENİ OLAYLARI AÇISINDAN WILLIAM A. SCHABAS'IN GÖRÜŞLERİ

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Abstract: *The concept of genocide is a primary point of interest for Turkey, because of Armenia's chronic problem with implementation of that concept, with respect to the events of 1915. No consensus appears to exist, even in determining the proper context/s for having meaningful discussions in this regard: Law, history, politics and social sciences in general are "blended", and attempts are made to derive binding results -similar to a "res judicata" in law – from several selective and / or subjective arguments and attitudes of certain individuals and institutions. It is possible to observe a similar conceptual confusion in terms of treating historical events in the renowned book by William A. Schabas, entitled "Genocide in International Law", which is – rightfully- considered as one of most respectable treatise on genocide law. While one must pursue a proper methodological and functional analysis of historical events, attempts towards examination of historic events in terms of present laws, not applicable at the time of events, and attempts to extract binding effects from such efforts is difficult to understand. Moreover, this is being done, for example, without taking into consideration the counter claims - opposing views, or, without considering the whole picture. This article aims to draw attention to these contradictions.*

Keywords: *Schabas, genocide, law, politics, Armenian, 1915*

Öz: *Soykırım kavramı, Ermenistan'ın 1915 olayları bağlamında bu kavramla olan sorunu nedeniyle Türkiye'yi yakından ilgilendirmektedir. Tartışmaların hangi bağlamda yapılmakta olduğu konusunda bile tam bir karmaşa vardır. Hukuk, tarih, siyaset ve genel olarak sosyal bilimler "harmanlanmakta", kişi ve kurumların eğilimleri doğrultusunda, çeşitli iddialardan, hukuktaki "kesin hüküm" gibi, bağlayıcı birtakım sonuçlar çıkarılması çabaları bütün yoğunluğuyla sürmektedir. Soykırım hukuku alanında en saygın eserler*

arasında bulunan, William A. Schabas'ın "Genocide in International Law" isimli kitabında da, tarihi olaylar boyutunda benzeri bir fikir karmaşasını gözlemlemek mümkündür. Tarihi olayların, tarihin işlevine ve yöntemlerine uygun olarak değerlendirilmesiyle yetinilmesi gerekirken, güncel hukuk açısından incelenip, hukuki açıdan bağlayıcıymış gibi sonuçlara ulaşılmasına yönelik yaklaşımları anlayabilmek güç olmaktadır. Üstelik bu, karşı iddialar dikkate alınmadan, resmin bütünü görülmeden yapılmaktadır. Makale, bu gibi çelişkilere dikkat çekmeyi amaçlamaktadır.

Anahtar Kelimeler: *Schabas, soykırım, hukuk, siyaset, Ermeni, 1915.*

Introduction

It is necessary to analyze the concept of "genocide" thoroughly, because there is an ongoing campaign against Turkey, based on a strategy to create a political dispute, and if that proves to be successful, then continue the campaign by carefully designed follow up claims, based on exploiting 1915 Armenian incidents. The concept of genocide, on the other hand, actually has political, judicial, military, historical, social, philosophical, humanitarian, moral, etc., various aspects that should be addressed.

As a general observation, it is a true that genocide as a phenomenon is as old as the mankind. However, I think it is impossible to accept the comments and evaluations that put aside the function of this statement as being mere a legal ground for new treaty law (1948 U.N. Convention on Prevention and Suppression of Genocide), and take this observation as a rationale for retroactive implementation of a new – emerging concept; overlook the existing provisions of special package of treaty law on 1915 incidents; make historic events subject matter to ex post facto laws and pretend to produce cases in non-judicial environments with the aim of devising certain opinions that are presented to common public as if enforceable awards.[1]

In this article, William A. Schabas' book entitled "Genocide in International Law" which is a respectable treatise in legal field and is accepted to be a basic source on genocide law will be analyzed. While the topics of the book are indicated below, the article will focus more on elaborating remarks relevant to the 1915 events. Considering international law as the most

1 Thus, Schabas too is on the side of consensus supporters that the countries should be interested in their own issues in the context of genocide which help to develop human right law within the framework of state sovereignty in the previous period. (Schabas, page 2, 18). This dimension brings to mind another question about Armenian question: What could be the legal stance of Armenia and ground in the question of conflict within the Ottoman Empire between Muslim and Armenian population?

significant aspect; the legal, historical and political dimensions of the genocide concept will also be considered.[2]

Schabas' book mainly consists of these parts:

- Introduction,
- Origins of the legal prohibition of genocide,
- Drafting the (1948) Convention and subsequent normative developments,
- Groups protected by the Convention,
- The physical element or *actus reus* of genocide,
- The mental element or *mens rea* of genocide,
- 'Other acts' of genocide,
- Defences to genocide,
- Prosecution of genocide by international and domestic tribunals,
- State responsibility and the role of the International Court of Justice,
- Prevention of genocide,
- Treaty law questions and the Convention,
- Conclusion.

GENOCIDE CONTROVERSY: GENERAL FRAMEWORK

In many of the discussion platforms, the terms that participants use (law - history - politics...) are blurred, thus the related exchange of views may become irrelevant, mere an example of a dialogue of the deaf. In many circles, "genocide" terminology is used for political reasons and grounds, to influence a targeted audience.[3]

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2 Schabas, William A., *Genocide in International Law, the Crime of Crimes*, 2nd edition, Cambridge University Press, 2009, xviii-742 pages.

3 Although the reports of International investigation committee and the reporter of UN Human Rights Committee which attribute to the genocide activities on Tutsies in Rwanda, as the example of the term has been refrained to be used, not with the legal but political reasons, international society refrained from the usage of the genocide term and the record of this point is appropriate. (Schabas, page 9).

Applicable also to 1915 Armenian events, it is beneficial to highlight some points, which may serve as good guidelines for researches and discussions on genocide:

- Discriminating "the law in force" from "de lege ferenda"; and "res judicata" from an "opinion" or a new "bill", is important. These nuances will apply on any legal analyses relevant to the concept of genocide.[4]

- Tendencies to treat various individual or institutional, political or legal opinions as if binding resolutions – judgments, to bear legal consequences are unacceptable. It is necessary to refrain from such assessments, claims, rhetoric and considerations as long as they could not be based on positive law and a final judgment by a competent court.[5]

- Subject to above reservation, for the purpose of social science research activities, there is nothing wrong with accepting certain presumptions, to include taking basis, for example, definitions of modern laws and regulations, treaty law, in analyzing historic events.[6] It would be a problem, though, if historical findings or conclusions were presented to the public as if legally binding documents. Legal sphere should not be confused with political, humanitarian or other academic spheres - functions, attitude and procedures.[7]

ACADEMIC RESEARCH AND STUDIES

The author is not a historian. Acting on common sense, wisdom and general methodology of social sciences, he does not think it to be a correct course of action, categorically refusing anything that brings a different fact or perspective on 1915 Armenian events, with respect to Armenian or pro-Armenian claims. When some scholars turn a blind eye to the political

4 Eg: The rule on the submission of a citizen who is blamed for the crime of genocide to another country (see: Schabas, page 478). According to Schabas, the emergence of the understanding and term genocide in the context of law is 1948 charter; not the Charter of International Military Tribunal in Nuremberg (Schabas, page 12).

5 Indicated point is valid in terms of the researches and assessments relating to the 1915 events. (Compare, Schabas, page 19-20, 43, 48-50, 87-88, 192-193, 199-200, 286).

6 Eg: The phenomenon of enforcing people to live in hard life conditions with the intention of genocide (Schabas, page 190).

7 For example, the term genocide has never been used consciously during the events in Rwanda, with the reasons and justifications of the UN Security Council during the period. These kind of differentiations and differences should be taken into account during the investigations and solutions on the 1915 events. (Compare: Schabas, page 171, 529, 551).

strategies of the major powers of the time against the Ottoman State (known as "the Eastern Question" – partitioning of Ottoman territories- in political history), their manipulating, organizing and encouraging domestic rebellions, armed activities, insurgency, massacre against Muslim population and attacking Ottoman armies, in collaboration with invading enemy armies, and all these taking place in the course of a World War, those works loose their credibility and convincing effects.[8]

Unilateral and selective approach to scientific issues, practices of double standard and bias cannot be compatible with a genuine scientific effort.[9] These kinds of campaigns should better be called as "political activism".[10] Thus, 1915 Armenian events have been brought to the agenda in every opportunity as a matter of "hybrid" political-scientific (?) contention. I have experienced to observe examples of this, during some "scientific" gatherings.[11] Once the concepts "opinion" and "judgment"; "political perspective / scientific view" and "judicial verdict" are confused, it is impossible to come up with an accurate and an acceptable outcome.[12]

When some scholars turn a blind eye to the political strategies of the major powers of the time against the Ottoman State (known as "the Eastern Question" – partitioning of Ottoman territories- in political history), their manipulating, organizing and encouraging domestic rebellions, armed activities, insurgency, massacre against Muslim population and attacking Ottoman armies, in collaboration with invading enemy armies, and all these taking place in the course of a World War, those works loose their credibility and convincing effects.

GENOCIDE LAW: GENERAL OBSERVATIONS

Notwithstanding many other complex dimensions, solely legal dimensions of the concept of genocide are complicated enough. Specific legal areas of expertise are almost totally different from each other. Some areas of legal expertise that comes instantly to one's mind might be listed as indicated below:

8 Eg: I think that, in the context of the air operations by NATO against Yugoslavia, the situation of war should be differentiated from genocide activities. In other words, "the other side of the medallion" is tried to be disregarded and this is not reasonable. (See: Schabas, page 195-197).

9 Eg: An implementation relating to the prevention of the exile of the population and other elements, To take into account the implementations and results in terms of the 1915 events. (Compare: Schabas, page 226-228, 258, 261, 265).

10 Eg: Schabas, page 118, in footnote 11, genocide term of Vahakn Dadrian.

11 For an example from the field of Diplomacy: Schabas, page 555-560.

12 Eg: Schabas, page 573-577.

- Public International law (law of treaties, customary law, international torts and state responsibility, succession of states, settlement of international disputes, jurisdiction of states, sovereign immunity...),

- Human Rights Law (right to life, individual security, right to fair trial, citizenship, right to property, freedom of thought, freedom of expression...),

- Criminal law (international crimes, applicable law, jurisdiction, individual criminal responsibility, command responsibility, international judicial cooperation...).

CIVIL LAW - CRIMINAL LAW DISTINCTION

Civil law and criminal law distinction has a significant role on assessment of court decisions and in the study of genocide law, and in practice, even in cases where both branches of law may relate to the same event.[13] Here, one must be able to see the nuance between honoring a criminal court judgment as, for example, proof of relevant facts in a civil court, from assessing the responsibility of a state concerning the same incidents (planning / ordering / prevention / suppression…) by the same civil court, in the general context of international law and in the special context of the law of treaties.[14] The author considers International Court of Justice as a civil court, and in the context of genocide; for example, such a civil court may have no jurisdiction in establishing criminal responsibility of individuals or other entities. International Court of Justice's jurisdiction may cover such issues as state responsibility, relevant to genocide, and settlement of international disputes relevant to implementation or interpretation of the 1948 Convention. While the fundamental function of a criminal court is prosecution of crimes, a civil court's basic function is to determine tort liabilities. Subject matters of the both courts are of course inter-related, but their purposes, functions, legal concepts, principles and procedures are different.[15]

13 Eg: Srebrenitza events. The events that many Bosnian Muslims have been killed constitute a judgmental issue both in the International Criminal Tribunal for the former Yugoslavia and International Court of Justice. The first one of these is a penal court and the second one is the legal court. In the first oene criminal liability of the individuals, and in the second one state law liability is the subject of investiation. (See, Schabas, page 293, 315).

14 See: Schabas, page 192-193, 512-519.

15 It is possible to see some mental confusion in the work of Schabas; like other approaches the aim new crime by new interpretations. (Schabas, page xiii-xiv, 119, 491-492). In my opinion, the law of treaties, civil law adn criminal law should be identified. The usage of the terms of Civil Law and the Criminal Law and the terms of international law may lead some incorrect legal assessments.

DISCUSSIONS ON STATUTE OF LIMITATIONS

In order to discuss a case in terms of statute of limitations, firstly the core crime should have been defined as crime, and the related norms should have been put into effect, prior to, or at least at the same time with the procedural norms. Lifting the statute of limitations for a particular crime; for example, will not have a retroactive effect on the core crime itself. The author does not join some opinions that, after a statute of limitation have expired for a certain crime, due to a new treaty law, abolishing statute of limitations, will have bearing on the past cases.[16]

HUMAN RIGHTS LAW

When the aim, function and methods of science of history are considered, historic findings' probable legal consequences need to be carefully examined and comprehended.

The development level that the human rights law has reached is admirable. However, placing human rights law categorically above all other branches of law –in my opinion- is unrealistic and unnecessary. Example: Broadening of criminal law concepts and definitions of crimes, based on human rights perspectives or norms. [17]

It could also be misleading, making a legal analysis by "blending" concepts of human rights law, international law, criminal law and criminal procedure law.[18] It is the same when some branch specific concept or interpretation methodology is applied in the context of a different branch of law.[19] For example, examining the preparatory work of a treaty as an interpretation method is limited to support certain findings and interpretations already have been concluded by other means.[20]

16 Compare: Schabas, page 489.

17 Compare: Schabas, page 117-120, 122-123. Both the protection of individuals and certain groups are related with the human rights law. On the contrary, it is important to understand there are significant elements in the complementary to the Criminal law. (Compare: İsveç'in görüşü; Schabas, sayfa 157).

18 Eg: Schabas, [1948 As it is indicated in the Charter] the genocide crime always exists, regardless of looking at the local positive law; there will be no problems for the determined crimes that take part in international law.] (Schabas, page 483). Moreover, although there is no challenging decision in the 1948 Charter, it is impossible to implement the statute of limitations to the genocide crimes. (Schabas, page 486-487). I think this approach can only be implemented in the International Criminal Court [Rome] amendment.

19 For example, in the interpretation of treaties, unlike assumed, preparetory works has no importance. (See: Schabas, page 637. On the contrary, the author himself gave importance to the preparetory Works both in the dimension of History and legal.

20 Compare: Schabas, page 487-488.

HISTORY AND LAW

When the aim, function and methods of science of history are considered, historic findings' probable legal consequences need to be carefully examined and comprehended. Even if there were consensus on a certain claim, event; in the legal context, those findings or conclusions will not have any legally binding effect. Therefore, in social sciences for example, a commonly used phrase, "clearly established historical facts", will not have the legal effect of a judgment; but on occasions, it might serve as a proof, in settlement of a legal dispute, before a proper judicial forum. Again, one should not confuse a belief, opinion or assessment with a judgment. The first one refers to an individual – subjective conviction; the second one is significant in the field of law and is binding. [21]

Serving as a justification in the emergence and putting into force of a new law, by some phenomena (examples: energy theft, crimes and torts committed in cyber space environment) is different from the implementation of that new piece of law to its historic – justification grounds, previous examples. Nevertheless, during real life practices, sometimes this may not be taken into consideration, because of some political and other reasons, out of legal sphere. In legal sphere, elements of the reasoning, like its historical background, official justification, if any; formulation of the norm, its entry into the force as a whole process, is different from other scientific areas' (such as history, philosophy, sociology, anthropology, political science...) special concepts and practices. [22]

SCHABAS: HIS ATTITUDE TOWARDS THE 1915 EVENTS

Schabas, beginning with the preface of his work, describes the acts against the Armenians, the Jews, Roma people and the Tutsies, as three most dramatic cases of genocide and repeats this opinion in several other chapters. [23]

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21 Therefore, it is hard to defend the amendments which foresee the refuse of the undetermined phenomena by the the law competent authority and it does not comply with the freedom of expression and the freedom of speech. (Compare: Schabas, page 334.)

22 Compare: Schabas, page 17, 44, 86, 639-640. For example the "Holocaust" rhetoric is an incorrect qualification in terms of legally and technically. Thus, the claim, investigation and judgment in the period's law became "crime against humanity" (See: Schabas, sayfa 12, 583-584). Nevertheless, the basic phenomenon which is a ground qualification, the authorized international court and authorized local court the term "Holocaust" is appropriate. By taking into account the 1915 events, the intentions of transform the label of the "Armenian genocide" are vicious when international law and its implementations, strategic situations and the initiators of the mass destruction of the population in Anatolia are considered. (Ex: Vahakn N. Dadrian; Schabas, page 1, footnote 2).

23 Schabas, page ix, 15, 285.

We cannot see the legal basis of this general presumption in the treatise as to the legal assessment and qualification of those events; like reference treaty law, customary law, and a court decision. Considering large number of authors referenced, either Armenians or pro-Armenian individuals and entities who, to a greater extent, display bias, unilateral and selective attitude and base their examinations relating to a long series of events by only examining a small portion of intentionally selected events, appear having influenced the author.[24] His intensive participation in civil society activities deserves respect and appraisal. Such involvements, however, may often cause question marks as to the sensitive distinction of "scholarly work" and "political activism".[25]

Political attitudes and initiatives against the Ottoman State following the World War I, relating to 1915 events, must be evaluated in their special and exceptional contexts. If there is to be a legal discussion, then looking for some final judgments by competent courts should have a priority over any other considerations. [26]

The work by Schabas that we have focused here surely deserves highest respect, with its contribution in the field of genocide law. On the other hand, when the methodology is considered in examining historic events, like that of 1915 Armenian incidents, like many other researches, one may see that, without exhausting all major references, a categorical conclusion has been reached on 1915 events and subsequently, it has been introduced and accepted as one of the most three important genocides.

ASSESSMENT AND CONCLUSION

When researching or discussing a question relevant to cases of genocide, to see the nuances between political, legal, historical and other contexts, is important, including legal consequences and effect. The work by Schabas that we have focused here surely deserves highest respect, with its contribution in the field of genocide law. On the other hand, when the methodology is considered in examining historic events, like that of 1915 Armenian incidents, like many other researches, one may see that, without exhausting all major references, a categorical conclusion has been reached

24 Schabas, page 672-710. In order to have a different, scientific point of view, it would be beter if the author could reach more sources in English. Examples: Kamuran Gürün, *The Armenian File*, K. Rustem & Bro. And Weidenfelt & Nicolson Ltd., London – Nicosia – İstanbul, 1985, xvii-323 page; Yusuf Hikmet Bayur, *Armenians*, (editors: Kemal Çiçek – Pınar Eray), Turkish Historical Society, 2010, viii-308 page; *Turkish – Armenian Conflict – Documents* (editors: Hikmet Özdemir – Yusuf Sarınay), TBMM Kültür, Sanat ve Yayın Kurulu, Ankara, 2007, xxx-540 page. When the sources with different finding/aspect on the 1915 events, the scientific research considered as incomplete.

25 Schabas, page x-xi.

26 Compare: Schabas, page 24-26.

on 1915 events and subsequently, it has been introduced and accepted as one of the most three important genocides.

In this regard, in addition to the conceptual confusion between law, history and politics; different branches of law are also confused with each other from time to time. Analysis based on such confusion of terms may often be misleading. The assessments on 1915 events constitute an example of this type of mislead.

In order to minimize this kind of inadequacies and misunderstandings, in my opinion, international activities, which follow scientific research methods, should be supported, in a determined manner. I submit that, any inconsistent activities and initiatives will be supporting the Armenian / pro-Armenian political strategy, aiming forcing Turkey to accept the Armenian claims.

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