

ARMENIAN RELOCATION AND INTERNATIONAL LAW

(ERMENİ TEHCİRİ VE ULUSLARARASI HUKUK)

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Abstract: *Discussions on the Armenian incidents of 1915 relates to history and are not legal subject matters. Thus, any discussion on the matter should be considered and limited in the context of general social sciences research methodology. This is because the 1948 Genocide Convention is not applicable ex post facto. Armenian relocation also does not qualify as crime against humanity under the customary law because of the statute of limitations first, and also, because the relocation decision was taken under imperative military reasons.*

Keywords: *Armenian Relocation, international law, customary law, 1948 Genocide Convention, genocide, Ottoman Empire*

Öz: *1915 Ermeni olaylarına ilişkin tartışmalar hukukun konusu değil tarihsel tartışmalardır. Nitekim, konu hakkında herhangi bir tartışma yapılacaksa bu genel sosyal bilimler araştırma metodolojisi içerisinde düşünülmeli ve kapsamda ele alınmalıdır. Bunun sebebi 1948 Soykırım Sözleşmesi'nin geçmişe uygulanabilirliğinin (ex post facto) mümkün olmamasıdır. Ermeni tehciri, birinci olarak zamanaşımı kuralı, ve ikinci olarak tehcir kararının zaruri askeri sebeplerle alınmış olmasından dolayı teamül hukuku çerçevesinde insanlığa karşı suç olarak da görülemez.*

Anahtar Kelimeler: *Ermeni tehciri, uluslararası hukuk, teamül hukuku, 1948 Soykırım Sözleşmesi, soykırım, Osmanlı İmparatorluğu*

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I. INTRODUCTION

Between 1915 and 1916, during the First World War, severe hostilities from the Armenians compelled the Ottoman Government to transfer them away from their potential operation zones, to other – remote parts of the Ottoman Empire. During the transfer, many undesired and unexpected incidents occurred, resulting in the death of numerous Armenian subjects. The Ankara, Kars and Lausanne Treaties buried this tragic event into history. Thirty years later, after the adoption of the Genocide Convention, Armenians have continuously tried to revive this event and label it as genocide, on purely political grounds and in violation of international law. In the process, by also distorting facts, i.e., excessively inflating death figures, Armenians have started lobbying several parliaments, to put pressure on them, to pass a resolution recognizing the incidents as genocide. Their actual objective has been to put political pressure on the Republic of Turkey. The article briefly specifies events leading to the Armenian relocation and revisits the provisions of the relevant treaties, conventions, charters and statutes on the Armenian relocation, to elaborate that the relocation of Armenians could not be described as genocide or crimes against humanity. This article concludes that genocide, as a legal concept, cannot be used to label Armenian relocation & related incidents, because they occurred before the concept of genocide was defined by the Genocide Convention and as a matter of fact, international criminal law prohibits any retroactive application of such treaties and conventions. It has been stressed that the resolutions of the world parliaments which recognize Armenian relocation as an act of genocide are purely political, and are violations of international law. Finally, the position to be taken by the Republic of Turkey on the negative resolutions of some foreign parliaments on Armenian issue is suggested as a desire to end the ongoing controversy between the Republic of Armenia and the Republic of Turkey.

II. EVENTS LEADING TO THE RELOCATION OF ARMENIANS

Armenians in the Ottoman Empire

The indifference to government policies and rebellions of Armenians had started well before 1915. Before then, Armenians and Turks had lived in peace as subjects of the Ottoman Empire for about 600 years. The Empire, under Islamic law, granted to the peoples of the conquered territories the right to continue living according to their own religious rules and traditions, to include their local educational activities. The Armenians, as other non-Muslim subjects, were never compelled to convert to Islam. Through the years, the urban Armenian population, immune from obligatory military service, prospered,

becoming bankers, merchants, industrialists, doctors, lawyers, government officials, and even ministers. The Armenians in the rural areas were primarily farmers. In the Ottoman Empire many artisans and craftsmen were also Armenians. In general, Armenians were more educated and prosperous than Muslims. European merchants gave their agency functions to Ottoman non-Muslim subjects. Christians and Armenians benefited from the American missionaries' schools while Turks did not. Their economic and cultural superiority were largely due to Ottoman tolerance². Under these excellent circumstances, then, what caused Armenians to rebel against the Ottoman Empire?

Russian Imperialist Policy

The Russians invaded Caucasia in 16th century and began to expel Muslims from the lands they had conquered. After the Ottoman Empire was defeated in the Russo-Turkish War (1768–1774), the Ottoman Empire entered a treaty (Kuchuk Kaynarca) with the Russians. According to the terms of the treaty, Russia gained Southern Caucasia and the right to protect non-Muslims living in the Ottoman Empire. Russia seized Southern Caucasia from the Iranians in 1795 and annexed Georgia in 1801. In 1828 Russians forced the Iranians to leave the khanates of Erivan and Nahjivan, today's Armenian Republic. Thus, Armenians living in Southern Caucasia switched from Iranian to Russian rule. The Russians expelled Turks from the khanates and gave the lands to their allies, the Armenians.³

During the wars between 1827 and 1829 among the Russians, Persians, and Ottomans, a large population exchange began in the east. In these wars the Armenian armed units joined the Russian forces. In the khanates, the Russians massacred the Muslims (ethnic Turks) and forced them to leave, and gave the evacuated land to the Armenians. When Russians seized the Erivan Khanate, they drove nearly, 60,000 Muslims, two thirds of the population, from Erivan. In 1829 the Russian armies advanced to Erzurum and annexed the Caucasus. The Armenians in the area supported Russians in the wars. So when the war ended, the Russians left eastern Anatolia joined by 50,000 to 90,000 Armenians who replaced the exiled Muslims in Erivan and other territories. In addition, 40,000 Armenians joined them from Iran.⁴

2 Ömer Engin Lütem (editor), *Basic Knowledge and Documentation on the Armenian Question*, Center for Eurasian Strategic Studies, Institute for Armenian Research, 2007; Justin McCarthy, *Armenian Rebellions and Ottomans*, 1 at 1, available at <http://www.eraren.org/bilgibankasi/en/index5_1_3.htm>.

3 Kamuran Gürün, *The Armenian File, The Myth of Innocence Exposed* (2007), at 60-64.

4 Ömer Engin Lütem, *Basic Knowledge and Documentation on the Armenian Question*, Center for Eurasian Strategic Studies, Institute for Armenian Research, 2007; Justin McCarthy, *Let the Historians decide on so-called Armenian Genocide*, 1 at 2-3, available at <http://www.eraren.org/bilgibankasi/en/index5_1_2.htm>.

According to Justin McCarthy, "...by 1900, approximately 1,400 000 Turkish and Caucasian Muslims had been forced out by Russians. One third of these had died either murdered or victims of starvation and disease. Between 125,000- 150,000 Armenians emigrated from Ottoman Anatolia to Erivan and other parts of the Russian southern Caucasus."⁵

In the 1877-78 war, the Russians, with the help of many Armenians, advanced to Erzurum. After the conflict ended with the Berlin Treaty (signed July 13, 1878), Russia evacuated northeastern Anatolia. The Armenians who helped Russians feared revenge and fled.

Because the Ottoman Empire was disintegrating, the Armenians believed they would have a better life under Russians' rule. Emboldened by the hope of free land and ultimately an independent state the Armenians sought to ally with the Russians. The Muslims believed that when Russians attacked, their neighbors, the Armenians might again become their enemies and they could lose their lands and their lives. Thus, Russian imperialist policy created a hostile environment between Armenians and Muslims.⁶

The Armenian Rebellious Committees

At the Berlin Congress in 1878, the Armenians tried but failed to obtain autonomy for the six provinces, Sivas, Mamuretulaziz, Diyarbakir, Bitlis, Van, and Erzurum. In 1880 to gain the attention of European powers, the Armenians started to prepare for rebellion. In Russian Armenia they formed associations to gather and send weapons to eastern Anatolia.⁷ In the Ottoman Empire, other associations were founded, but they could not play an active role in rebellions. The three main associations that led the Armenian rebellions were Hunchak, Dashnak and Armenakan.

The Hunchak Party was founded in Geneva in August 1887 by Armenians mostly from Russia.

The second, the Armenian Revolutionary Federation, also called the Dashnaks, was formed in Tiflis in 1890 through a consolidation of various Armenian groups.

Both associations were communist and nationalist. Their goal was to free Armenia of Turkey and Russia. To gain this freedom, they advocated armed

5 Justin McCarthy, Let the Historians decide on the so-called Armenian Genocide, 1at 2-3.

6 *Id.*

7 Kamuran Gürün, The Armenian File, the myth of innocence exposed Türkiye İş Bankası kültür yayınları, (2007), at 151.

rebellion in the Ottoman Empire, provoked the government and terrorized the local populations. The terrorism included the murder of both Ottoman officials and Armenians who opposed them. The Hunchak Party declared that the most appropriate time for rebellion would be when Ottoman Empire was at war.⁸ Because Armenians were a small minority in the overall territory, the Armenian rebels believed that they could not win by themselves against the Ottoman government or against the Kurdish tribes. So, following a well considered strategy, they planned to attack the civilian Muslim population. If the Muslims retaliated or if the Ottoman government took the military action, the Armenians would claim that they are being persecuted and would induce the European powers (states) to intervene. The powers would force the Ottomans to make reforms in favor of non-Muslim population. These reforms would start with local administration rights and would ultimately bring independence to the Armenians. The Armenians were inspired by the Bulgarians to take this path to independence.⁹

Because Armenians were a small minority in the overall territory, the Armenian rebels believed that they could not win by themselves against the Ottoman government or against the Kurdish tribes.

The Armenian rebels believed that by emulating the Bulgarians, they could achieve the same result. But, there was one important thing they did not consider. In Bulgaria, the majority of the population was Bulgarian. In the region called Ottoman Armenia, only 17 percent of the population was Armenian. 78 percent was Muslim. Rebels would have to expel Muslims from the region to create Armenia.

Between 1890 and 1896 the Hunchak Party organized many rebellions in Istanbul and in several provinces of Anatolia. Major rebellions took place all over the eastern Anatolia from 1894 to 1896.¹⁰

In 1895 the Hunchak rebels came to Zeitun and prepared defenses for rebellion. On October 24, 1895 Armenians made a surprise attack on the barracks in Zeitun and killed soldiers and held 650 soldiers captive. Only 56 soldiers managed to escape.

On December 24, 1895 soldiers besieged Zeitun. Though nearly 5,000 rebels fled the town, most were captured. The six powers of Europe (Russia, England,

8 *Id.* at 151-162.

9 In 1876, Bulgarian rebels attacked Bulgarian Muslims. The Muslims retaliated by attacking the Bulgarian Christians. Then the Russians invaded Bulgaria to protect the Christians. In the end 260,000 Bulgarian Muslims died, 575,000 Muslims were expelled, and the Bulgarian Principality was founded: Justin McCarthy, Esat Arslan, Cemalettin Taşkıran, Ömer Turan, *The Armenian Rebellion at Van*, (Utah Press, 2006), at 60.

10 K. Gürün, *The Armenian File*, at 162-181

France, Italy, Germany and Austria) intervened. An agreement was reached, and the rebels had been disarmed and surrendered. Taxes had been reduced and taxes in default were all cancelled.¹¹

Between August 14 and 26, 1896 the Armenakans, Hunchaks and Dashnaks, raided and captured the Ottoman Bank to force the European powers to seize and occupy Istanbul. Out of 25 attackers, six were wounded, four died, and after an agreement was reached, the 15 surviving attackers evacuated the bank and were transported to Marseille for temporary exile in France.¹²

Because the Zeitun and other rebellions failed, their organizers, the Hunchak Party lost power leaving the Dashnak Party as the main rebellious party in Turkey.

By 1896 twenty-three rebellions occurred in the Eastern Anatolia. On June 3, 1896, the rebels planned to occupy and hold the Armenian sections of Van and await the arrival of the reinforcements from Iran, then entire city would be seized to provide positive conditions for an expected Russian intervention.

On June 3, the rebels fired on Turkish soldiers, and fighting continued until June 26 and rebellion failed. At the end of the conflict, 418 Muslims and 1715 Armenians died; 363 Muslims and 71 Armenians were wounded.¹³

The period of conflict from the 1890 Erzurum incident to the 1896 Van rebellion is known in the Europe as the Period of Massacres. It was asserted that during this period 50,000 - 300,000 Armenians were killed. However, the Ottoman government estimated the figure at 13,432. The difference between these figures shows the extent of disagreement on the number of Armenian casualties.¹⁴

World War I and the Armenian Rebellion in Van

Between June and July 1914 a congress was held in Erzurum attended by Papisijan and Viremijan, members of the parliament, and the Dashnak delegates from the Caucasus. According to Ottoman archive documents:

In this congress held in Erzurum, they have worked on the text of the agreement, the terms of which, were set with the Russians pertaining to Russians' handing the occupied regions over to the Armenians, and

11 *Id.* at 182-216.

12 Vahakn N. Dadrian, *The History of the Armenian Genocide*, (2004) at 142-143.

13 J. McCarty, E. Arslan, C. Taşkıran, Ö. Turan, *The Armenian Rebellion at Van*, at 60-70

14 Kamuran Gürün, *The Armenian File*, at 205.

Russians' guarantying a free Armenian state. Russian-Armenian agreement was approved by the congress and following articles were decided to be sent for the information of the committees.

1- To continue to show submission and keep silent until the declaration of war; but in the meanwhile to become well equipped with the weapons to be obtained from Russia and from the inner regions.

2- Should the war be declared, all the Armenians in the Ottoman Empire would join the Russian forces with their firearms.

3- To keep silent on, should Turkish army advances.

4- Should the Turkish army withdraws or comes to the point of standstill, all the gangs should start their activities behind lines in accordance with the plan they already have.

The 3rd Army revealed the decisions taken at the congress, and ordered and warned the governor and the commanders under their service to be full alert.

The following is the information, which was forwarded by the 3rd Army, upon the measures taken by the Armenians in Russia and Turkey, until the declaration of war.

1- The Muslim villages and towns on the eastern part of the border (in Russia) were being searched and the weapons found in the houses were distributed among the Armenians.

2- A large number of weapons, ammunition, and bombs were stored in Oltu, Sarıkamış, Kağızman and Iğdır in order to arm the Ottoman Armenians...

3- It has been understood that the Russian consuls in Iran having armed the Iranian Armenians especially the ones in Rumiye and Salmas, sending them into the inner regions of the border with the promise of foundation of Armenia on the lands to be occupied in Turkey.

4- Some of the leaders of the Dashnak Committee of Caucasus and Turkey were organizing Armenian gangs in the regions neighboring borders as follows;

(a) Six thousands Armenians were gathered mostly from Erzurum, Eleşkirt, Hınıs, Malazgirt and from among deserters in Kağızman, 3,500

of whom were sent to Azerbaijan with the arms provided by the Russian government.

(b) We are informed that an Armenian cavalry gang of 1,500 men most of whom fled from Oltu, Kars, Sarıkamış and from Trabzon have been formed. 1,000 of these have been sent to Iğdır region in order to pass over to Beyazıt, and 500 were sent to Oltu from where they were to pass over to the Hodigar region.

(c) ...6,000 Armenians- mostly composed of the Armenians from Beyazıt, Van, Bitlis, deserters, and of the Armenians from environs of Iğdır have gathered in Iğdır have been organized in groups and have been armed...

5-It is understood that the surplus of weapons and firearms brought over the borders are being kept in Karahisar, Sivas, and Kayseri.¹⁵

As indicated in the Ottoman Archive documents, the organization and arming of the Armenians in Eastern Anatolia had increased significantly in the pre-World War I period.

The Ottoman Empire entered World War I on November 1, 1914. Immediately, the Russian forces in Iran seized the Kotur Pass, and then they took Dir and Baskale.¹⁶ The Armenian soldiers, who were advanced units of Russians, forced the Armenian villagers to move to Russia and the ones capable of bearing firearms to join them. When they withdrew, the Armenian soldiers destroyed villages and massacred the Muslim (Turkish) population. The Armenian soldiers in the border units took their weapons and fled to the Russian side.¹⁷

The Armenian uprising started to spread in rural regions in February 1915. The rebels using guerilla tactics, attacked small groups of gendarmes or military units. Because the rebels were better organized, their attacks were more effective. They attacked the army's supply trains, cut the roads and communication lines, ambushed and killed gendarmes, and destroyed bridges and fortifications, to disrupt the logistics of the belligerent Ottoman Armed Forces.¹⁸

By March 1915, the Eastern Anatolian countryside became a war zone. Armenians attacked the Ottoman soldiers and soldiers, in reprisals, burned rebel villages. Both Muslim and Armenian civilians suffered. Armenians who

15 Armenian Activities in the Ottoman Archive Documents, 1914-1918 Volume I, Genelkurmay Askeri Tarih ve Stratejik Etüt Başkanlığı, (ATASE) (2005), at 109-111.

16 J. McCarthy, Esat Arslan, Cemalettin Taşkıran, Ömer Turan, 'The Armenian Rebellion at Van', at 178-179.

17 Armenian Activities in the Archive Documents, Volume I, at 117.

18 J. McCarthy, Esat Arslan, Cemalettin Taşkıran, Ömer Turan, 'The Armenian Rebellion at Van', at 188-189.

lived in mixed Muslim-Armenian villages left for Armenian villages and were forced to join the rebels. The conflict became civil war between Muslims and Armenians.

In April 1915, Governor Cevdet began to act against the three Dashnak leaders in Van, hoping to kill leaders and thereby suppress the rebellion. Out of three Dashnak leaders, Ishkhan and Vramian were killed April 16 through 17, but Aram Manukian escaped becoming the sole leader of the rebellion. In spite of the governor's efforts, the rebellion in south of Van city could not be suppressed. Troops sent from Iranian border were attacked on the roads on April 18, and could not reach Çatak.¹⁹

On April 18, the three Armenian parties, Hunchak, Dashnak and Armenakan, met and formed the "Military Committee of Armenian Self-Defense". Aram Manukian became the head of the ruling Military Committee in Van.

On April 20, Armenian forces closed most of the roads by fortifying them, but left the road from Van to Gevas open. The Armenian villages near Van joined in the general rebellion. A battalion from the mobile gendarme division was sent to Van. They arrived on April 23 and defeated the rebels in the Havasor District. Armenians in the area fled to Van city.

The Armenian rebels attacked Van city in a bid to occupy and hold Van until the conquest by the Russians. Armed with bombs, dynamite, and incendiary grenades, the rebels captured police outposts in the western section of Garden district in Van. The fight then continued on the border of the Armenian and the Muslim quarters. Armenians destroyed the Ottoman emplacements all along the line. The Ottomans seized the British Consulate. Rebels burned down the Hamid Aga Barracks, a center of the government forces, and the British Consulate. The Ottomans blasted the Armenian emplacements with cannon fire from the Citadel and from Toprak Kale. Both sides destroyed the city. The Ottoman forces kept their positions in the Garden District after the initial Armenian attacks. On April 20, the Ottoman soldiers and gendarmes were forced to withdraw first from Armenian districts in the western part of Old City. The Armenians burned the Post Office, the Ottoman Bank, the Tobacco Monopoly, and other official buildings. The Ottoman soldiers and gendarmes withdrew into the Citadel along with the Muslim civilians from the western part of the Old City. Armenian forces attacked the Citadel but were driven back. The Ottoman soldiers, unable to make a counterattack, kept open the roads to the west (to Lake Van) and the Gevas. "The highest possible number of Ottoman soldiers in and near Van was approximately 6,500 until May 3, and 6,300 (2,200 Kurds out, 2,000 regulars in) on May 9."²⁰ It can only be said that

19 *Id.* at 194-200.

20 *Id.* at 200 - 212

the Armenian forces must have outnumbered the Ottoman forces and the majority of them were better armed than the Ottoman soldiers, as they lacked only artillery.

Vahakn N. Dadrian, reflecting a typical selectivism, under the cover of academics, does not detail the Van rebellion in his book, “The History of Armenian Genocide”, where he only states the following:

*Wide spread governmental provocation, during which some Armenians clashed with gendarmes and soldiers who were harassing them... There were also sporadic acts of sabotage by isolated individuals and groups of Armenians. This unrest culminated in the interior ministry order of April 24, 1915, authorizing the arrest of all Armenian political and community leaders suspected of anti-ittihad or nationalistic sentiments.*²¹

Morgenthau, similarly, first stated the number of Armenians fought in Van, as: “The whole Armenian fighting force consisted of only 1,500 men; they had only 300 rifles and a most inadequate supply of ammunition, while Djevdet had an army of 5,000 men, completely equipped and supplied”.²² Later he refuted his statement by saying: “In the early part of 1915, therefore, every Turkish city contained thousands of Armenians who had been trained as soldiers and who were supplied with rifles, pistols and other weapons of defense”.²³ On April 24, 1915, the governor of Van informed the Ministry of Interior: “Until now approximately 4,000 insurgent Armenians have been brought to the region from the vicinity.”²⁴ Although Morgenthau disparaged the Turks, he had to accept: “So far as I can discover, the Ottoman Turks had only one great quality, that of military genius”²⁵ Thus, one must ask: how can 1500 Armenians with only 300 rifles overcome the 5,000-6,000 Turks completely equipped and having artillery?

To save the Van province, the Ottomans attacked the Russian forces in western Iran on April 29. Russian forces including the 1st Armenian Druzhiny took defensive positions north of Dilman. However, between May 1 and May 2, the Ottomans lost the battle and withdrew. If the Van Gendarme division, with its three thousand men, were available, the result of the battle would be different. Instead, the Gendarme Division was in Van Province fighting the Armenian rebels. As a result, Armenian rebellion was the main cause of this defeat.²⁶

21 Vahakn N. Dadrian, *The History of the Armenian Genocide*, Berghahn Books, Sixth, Revised Edition, (2004) at 221.

22 Henry Morgenthau, *Ambassador Morgenthau's Story*, (1918) at 299.

23 *Id.* at 301.

24 K. Gürün, *The Armenian File*, at 253.

25 H. Morgenthau, *Ambassador Morgenthau's Story*, at 277.

26 J. McCarthy, Esat Arslan, Cemalettin Taşkıran, Ömer Turan, *The Armenian Rebellion at Van*, at 212.

The End of Van Rebellion

On April 21, the Third Army Command sent a force, which included two gendarmerie battalions and a mountain gun unit, to reinforce the units in Van. They arrived Van city on May 9. They could only keep open the road from Van to Bitlis which was the only evacuation route available to the west for the Van Garrison and Van's Muslim population.

On May 8, with the newcomers from Hovasor District and elsewhere, the Armenian forces began a general attack on Van and neighboring Muslim villages. The Armenians set fire to the Muslim quarter of the city and the Muslim villages. To remove the Muslim citizens from danger, Cevdet began the transfer of officials and Muslim women and children from the city. Meanwhile, the Russians with the Armenian units advanced from Kotur to Van. On May 7, the Russian forces captured Baskale, and moved towards Van.

The Van province was lost, and the Ottoman forces withdrew to Bitlis province. From May 16 to May 17 the last Ottoman soldiers and civilians left Citadel and moved to Bitlis. Armenian forces took control of the city, burned the remaining Muslim houses and office buildings, and, except for the very old and young, killed the remaining Muslim men and a large number of the women. Armenian attacks to Muslims ended when the Russians arrived.

The Armenian forces established their administration in the city and designated Aram Manukian as its head. On May 20, Russians entered Van, and the Armenians welcomed General Nikolayev. Two days later Nikolayev announced the formation of the Van Province Armenian Government, and Aram Manukian was named governor.²⁷

Closing Down the Armenian Committees

The Armenian rebellions in eastern Anatolia were the most important cause for the Ottoman defeats in the wars in the Ottoman east. The Ottoman losses at Sarikamis, the Armenian rebellion, and the Russian invasion of 1915 should be evaluated together.

After the tragic defeat at Sarikamis, the Ottomans were able to reconstitute the Third Army and they had the advantage of an interior line of communication and transportation. But, the Armenian rebellion made these two Ottoman advantages ineffective. Throughout Van, Bitlis and Erzurum provinces on the Russian advance routes, Armenian rebels cut the telegraph lines and hindered

²⁷ *Id.* at 212-216.

the movement of troops. This allowed the Armenian spies and scouts to help the Russian advance significantly. The Van rebellion illustrated the most devastating effect of Armenian rebellion. The Ottomans were forced to dedicate 6,000 men to fight the rebellion in the city and unknown number to fight the rebels in other areas of the province. The Russians attacked Teperiz Pass and Bargiri with 5,500 men, 4,000 Armenians, and 1,500 Cossacks. Against them stood one Ottoman cavalry brigade of nearly 1,700. With superior numbers, the Armenian and Russian forces defeated and annihilated most of the cavalry brigade. Thousands of men at Van would certainly have been enough to defeat the invaders. Thus, “It is not an exaggeration to say that bloody civil war, Ottoman defeat, and awful mortality were directly, but not exclusively, caused by the Armenian rebellion in the province of Van.”²⁸

Given the urgent and precarious situation, Talat Pasha, acting without any decision from the council of Ministers, personally assumed the responsibility of transferring the Armenians to other parts of the empire, instead of driving them towards the Russian border and eventually to Russia.

On April 24, 1915, to suppress the hostile actions by the Armenians, the Ottoman government decided to close the centers of the Hunchak and Dashnak Committees and similar organizations in the capital and in other provinces. The government seized the committees’ documents and arrested the committee’s leaders and members as well as

anybody who had taken part in the committees’ activities.²⁹ In all, the government arrested 235 people in Istanbul. This is what actually took place on 24 April, 1915. “This day, 24 April, on which the Armenians hold demonstrations each year claiming it is the date of massacre, is the day when these 235 people were arrested.”³⁰ This action did not stop Armenian rebels’ attacks. In the end, the Deputy Commander in Chief, Enver Pasha, sent a telegram to the Minister of Interior, Talat Pasha, on May 2, 1915. He reported that the Russians drove the Muslims resident within their borders into the Ottoman lands under miserable conditions on April 20, 1915. He referred to the constant rebellions of the Armenians around Lake Van and other areas. To stop the hostile activities of Armenians, he suggested that Armenians should either be sent to Russia or dispersed within Anatolia. It was clear that Enver Pasha’s intention was limited to end the Armenian rebellions. “If the Armenians could be relocated in such a way that they would not form large communities, but would live in small groups far from each other, than the chance of organizing a rebellion would disappear.”³¹

28 *Id.* at 216-221.

29 Armenian Activities in the Archive Documents, Vol. I. at 128-129.

30 K. Gürün, *The Armenian File*, at 263.

31 *Id.* at 254-261.

Implementation of Relocation

Given the urgent and precarious situation, Talat Pasha, acting without any decision from the council of Ministers, personally assumed the responsibility of transferring the Armenians to other parts of the empire, instead of driving them towards the Russian border and eventually to Russia.

While the Interior Ministry was taking steps with regard to relocate the Armenians, the Allied Powers, Russia, Great Britain and France released a joint declaration on May 24, 1915 stating: “In view of those new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime-Porte that they will hold personally responsible for these crimes all members of the Ottoman Government and as well as those of their agents who are implicated in such massacres.”³² The Ottoman response to the joint statement was the following: “The Ottoman Government considers its principal duty to resort to any measure it deems appropriate for safeguarding the security of its borders, and feels, therefore, that it has no obligation whatsoever to give an account to any foreign government.”³³

Having realized the matter was likely to assume international dimensions, Talat Pasha, ensured the passing of an interim law on May 27, 1915 (adopted May 27 and published on June 1) for transferring and settling of the Armenians in the allotted quarters. “Although the Council of Ministers could put the relocation process by a government decree, an interim law passed in order that the military authorities, too, could be given the same authority. The law came after the action.”³⁴

The Law stipulated that the Armenians residing in the provinces bordering the area of military operations and near the Mediterranean Sea would be relocated for the protection of the state’s security and survival and to prevent the Armenian people’s cooperation with the Russian army and their rebellion in eastern Anatolia. All the basic needs and security of the relocated Armenians would be met. Their transfer would be made in comfort. Their wellbeing and possessions would be secured during their voyage. The expenses incurred during the relocation would be met by the immigrant funds. They would be given properties and land in proportion to their previous financial and economic assets. The needy would receive new houses built by the state, the farmers would be given seeds, and the artisans would be provided with necessary tools and implements. Their belongings and possessions left behind would be returned to their owners or their equivalent values would be paid in the same manner.³⁵

32 H. Res. 106 Finding (3), available at <<http://middleeast.about.com/od/turkey/a/me090318c.htm>>

33 V. N. Dadrian, *The History of the Armenian Genocide*, at 239.

34 K. Gürün, *The Armenian File*, at 266.

35 *Armenian Activities in the Archive Documents*, Vol. I at 134-135.

The government had taken all the necessary measures for the safest and easy transfer of the Armenians. Local administrators were responsible for transferring and relocating the Armenians. Authorities utilized railways and rivers wherever possible and selected safest and shortest routes. But, the transfer was not so easy. In time of an intensive military effort during an ongoing World War, most of the trains available were carrying soldiers, ammunition, and food. As a result, the government could not allocate sufficient train services to transfer the Armenians. Also, on numerous occasions, the Armenians were attacked by outlaws, during the relocation. For example, on June 14, 1915, 500 Armenians, a convoy departed from Erzurum, were killed by local tribesmen as they were travelling between Erzurum and Erzinjan. On June 26, 1915, the Armenian convoys sent under protection from Erzurum were also attacked and killed by the brigands of Dersim.³⁶

Around Meskene, near Aleppo, local tribesmen attacked the convoys and killed about 2,000 people. The same outlaws robbed another 2,000 Armenians on their way from Diyarbakir to Zor and Suruc to Menbic. Two thousand more Armenians travelling around Diyarbakir were taken to Mardin and killed by bandits and tribesmen.³⁷

The government at each incident ordered the authorities to take every possible measure to protect the Armenians against such attacks by tribesmen and bandits and to punish the attackers. The government set up commissions to investigate those atrocities, and referred to courts martial the perpetrators of acts of violence during the transferring the Armenians.³⁸

On August 23, 1915, the government by issuing a circular, asked the local authorities the number of people caught and brought to justice for crimes committed against the Armenian people. According to the circular, 1,673 people were court martialled. These people were found guilty of stealing money from the convoys, of failing to provide security for the convoys, of exposing the convoys to attacks, of acting contrary to orders, and of forcibly taking women from the convoys. On May 22, 1916, out of 1,673 people sent to court martial, sixty-seven were sentenced to death, and 524 were sentenced to prison.³⁹

Moreover, during the transfer, typhus and dysentery epidemics spread among the Armenian transfers, and probably killed more Armenians than the violent attackers did. In fact, members of the belligerent Ottoman Army themselves were not immune from such epidemics and were effected equally. The order

36 K. Gürün, *The Armenian File*, at 269-271.

37 Y. Halaçoğlu, *Facts on the Relocation of Armenians*, (2002), at 83.

38 *Armenian Activities in the Archive Documents*, Vol., I, at 234.

39 Y. Halaçoğlu, *Sürgünden Soykırıma Ermeni İddiaları*, (2007), at 93-95.

issued by the 4th Army Commander Cemal Pasha on September 22, 1915 showed the extent of care given to protect the Armenian citizens in Aleppo. After the Armenians relocated from Aleppo to Rayak, Cemal Pasha noted that despite the order dated September 2, 1915, 106 of the relocated Armenians were sick. Two of them were suffering from typhus and three were dead. Cemal Pasha ordered once more that the relocated Armenians would have medical examination, and the sick would be maintained and sent to the hospitals, and the healthy ones would continue with the transfer⁴⁰.

On November 25, 1915, relocation was halted because of large crowds at train stations and adverse winter conditions.⁴¹ On February 16, 1916, a message sent by Talat Pasha to Deputy Commander Enver Pasha, suggested to put an end to the relocation measure.⁴² On March 15, 1916, due to administrative, financial and military reasons, the government announced to provinces that the Armenian relocation had ended and that no Armenian was to be transferred to new areas. Those Armenians enroute to new destinations were resettled permanently where they were, mostly in city centers.⁴³ On December 18, 1918, the government gave the Armenians the option to return to their original homeland or live where they were.⁴⁴

Despite all the difficulties, poor transportation conditions, famine, attacks by bandits and tribesmen, epidemics of typhus and dysentery, and insufficient medical care, most of the transferred Armenians reached their new settlements.

The Number of Armenians Relocated

The number of relocated Armenians had been determined according to data in the census registries of the provinces. Census registries of the provinces depended upon Ottoman census statistics of the year of 1914.

Ottoman Census Administration was set up in Istanbul in 1892. First director of the administration was a Muslim (Turk), but later the administration was operated under a Jew, named Fethi Franco between the years 1893-1903, subsequently an Armenian, named Migirdich Shinopian, and as of 1908 an American.

Thus, the source of 1914 population figure is the 1914 census statistics of Ottoman territory published in 1920. Statistics of 1914 depended on the census

40 Armenian Activities in the Archive Documents, Vol., VIII, T.C. Genel Kurmay Başkanlığı, (2008) at 159.

41 Y. Halaçoğlu, Facts on the Relocation of Armenians, at 110.

42 Armenian Activities in the Archive Documents Vol., VIII, at 253.

43 Y. Halaçoğlu, Facts on the Relocation of Armenians, at 110.

44 Y. Halaçoğlu, Sürgünden Soykırıma Ermeni İddiaları, at 56.

made in 1905/1906. According to the Census Regulation, in 1905/1906 census, each person's gender and race were recorded and each person recorded in the census ledger could get an identity certificate (Teskere-i Osmani) in return of a small charge. Representatives of non-Muslim inhabitants controlled the census.

Copies of census lists were given to the districts' non-Muslim and Muslim religious representatives, and then the results of the census were published. After the census is complete, births, deaths and the individuals moving in and out of the district were recorded in the population ledger by the local civil servants of the district. Lists showing the three months' total of these changes were sent by local civil servants to the General Directorate of Census in Istanbul. General Directorate of Census recorded the changes written on the lists in the population registry of the territory with three months intervals. After 1905/1906 Census, at the end of each year the number of the population determined by the correction of the previous year's figure according to the population lists sent by the vilayets (provinces). The 1914 population figure had been determined in this way and published in 1920 when Istanbul was under occupation.⁴⁵

The Ottoman census statistics are a reliable source of population statistics because they depend on physical counting, not on estimation. Also, sound population statistics were needed for tax collection and military conscription. "It is known that unlike the Catholic and Protestant churches, the Greek Orthodox and Gregorian Armenian churches did not keep population records. For that reason, the exaggerated statistics put forth by the Armenians do not rely on a sound source."⁴⁶

According to the 1914 population statistics, The Ottoman population consisted of 1,161,169 Armenians, 67,838 Armenian Catholic, and 65,844 Protestants (included some other nationalities as well). Including the Protestants, the total number was 1,294,851. Ottoman archive documents showed the number of the Armenian population recorded in the population register (ledger) and the people who were to be relocated as of the beginning of the relocation (May 1915).⁴⁷

On May 25, 1915, the ministry of Interior instructed that the government record the name of the village and town the Armenians evacuate, the number of people

45 Orhan Sakin, *Osmanlıda Etnik Yapı ve 1914 Nufusu*, (2008), at 2-69.

46 G. Aktan, '*The Armenian Problem and International Law*', 1 at 7.

47 I personally compared these numbers with the numbers of the population census statistics of 1914 and I found these figures to be close. While the Armenian population figure in 1914 in 18 provinces (vilayets and sancaks) was 1,043,193, it changed to 987,569 in 1915. Approximately 5 percent fall in population is reasonably expected under the conditions of war, migration, and epidemics of disease. These documents proved the reliability of the Ottoman population census statistics of 1914 once more.

evacuated from the town, and the places in the Ottoman territory where they resettled.⁴⁸ Some records may have been kept for the Armenians relocated. Only one document in the ‘Armenian Activities in the Archive Documents’ (ATASE Documents), states the number of Armenians relocated from the provinces. The other document that lists relocated Armenians was given by Yusuf Halacoglu.⁴⁹

In a report submitted by the ministry of the Interior to the Grand Vizier on 7 December 1916, it was stated that about 702,900 individuals had been relocated; 25 million kurush had been spent in 1915 for this purpose; until the end of October 1916, 86 million kurush had been spent; and until the end of the year, 150 million kurush more would be spent.⁵⁰

Until now, no document from Ottoman Archives could be found showing the total number of Armenians resettled in their new places. The most reliable document on this subject appears to be the report of American Consul at Aleppo, J. B. Jackson to the American Ambassador Henry Morgenthau on aid provided to Armenians. In the report dated February 3, 1916, Jackson stated a rounded-up total of about 500,000 Armenian immigrants.⁵¹

On September 26, 1915, Zenop Bezjian, the vekil of Armenian Protestants reported American Ambassador Morgenthau that “over one half million Armenians had gotten Zawr.”⁵² Who knows the real number of Armenians better than the man who had given money to them one by one? For this reason, the number of Armenians who actually reached their new settlements may be, at minimum, 486,000, based on the J.B. Jackson’s report. The number of relocated Armenians was 610,491 according to my calculation. If the above-mentioned figure of 702,900 is accepted, the difference between 702,900 and 486,000 becomes 216,900. In evaluating this difference, the following factors should be considered:

- The 486,000 Armenians were the first to be relocated and arrived at their settlements by February 3, 1916. The relocation continued until March

48 *Id.*, Vol. VIII, at 155.

49 When I compared these two documents, I saw shortages and excesses in both. I decided to arrange another list by taking the higher figures (not exceeding the population figure recorded in the 1915 population register) from both documents, and completing the shortages. The ATASE Documents list has been used as a basis and shortages of this list have been completed according to the Halaçoğlu list. While the ATASE documented number of relocated Armenians as 413,06751 and Halaçoğlu’s number was 438,75852, my calculations resulted in 610,491. Because nearly 500,000 Armenians reached their allotted lands on February 3, 1916, this number of 610,491 seems more valid.

50 K.Gürün, *The Armenian File*, at 273, (source of Gürün), Genelkurmay, 1/2, KLS 361, File 1445, F. 15-22. This archive document also supports the figure that I conclude to be true.

51 Because, on the detailed list affixed to the report, the total number was written to be 486,000: Hikmet Özdemir, Kemal Çiçek, Ömer Turan, Ramazan Çalık, Yusuf Halaçoğlu, *Ermeniler: Sürgün ve Göç*, (2005), at 76. Affix 10/1, 10/2.

1916. Certainly some thousands' of Armenians had also reached their new places between February 3, 1916 and March 15, 1916.

- Because of the military dispatches between Aleppo and Zawr, the transfers were delayed for most of the Armenian convoys and the Armenians living in and around Adana and Maras. Because of the delay, relocation had been ended. The number of the Armenians from those convoys and Adana and Maras should be deducted from the difference. Those Armenians en transit were resettled permanently where they were, mostly in city centers.
- The Armenian deaths, which had occurred because of short rations and epidemics of typhus, dysentery, and cholera, must also be taken into consideration.

Many Armenian groups insist that 1,5 to two million Armenians were massacred during the relocation practices. However, after the elimination of the effects of the above-mentioned three factors from the difference of 216,900, probably most reliable number of Armenians killed by the bandits and tribes can be determined, and it will not exceed 10,000 to 20,000.⁵³

Armenian Losses during World War I

The above calculation of Armenian losses may be compared with the calculation of Armenian losses during World War I.

As stated above, the Armenian population as of 1914 was 1,294,851 according to the Ottoman census statistics. In a document, relying on information furnished by the British Embassy, Constantinople, and the agents of the Near East Relief Society in 1921, the approximate number of Armenians in the world as of November 1922 has been estimated as 3,004,000. Out of these 3,004,000 Armenians, 817,873 were refugees from Turkey and 281,000 were still living in Turkey. The total estimate does not include the able-bodied Armenians, who were retained by the developing new regime under the leadership of Mustapha Kemal, nor the women and children, approximately 95,000 who were forced to adopt Islam.⁵⁴ Thus, the total of Ottoman Armenians in 1922 becomes 1,193,873 if one includes those Armenians who were refugees from Turkey, those living in Turkey and women and children. Bogos Nubar's figure declared at the Paris Peace Conference regarding the Armenians living in

52 Heath W. Lowry, *The Story behind Ambassador Morgenthau's Story* (1990), at 50-51.

53 H. Res. 252 Finding 1.

54 H. Özdemir, K. Çiçek, Ö. Turan, R. Çalık, Y. Halaçoğlu, *Ermeniler: Sürgün ve Göç*, (2005) at 157-160. Affix 11.

Turkey at that time confirms these numbers.⁵⁵ If this total compared with the 1914 Armenian Population estimate of 1,294,851, one can extrapolate that the total of Armenians who died during these seven years is 100,978. This number includes deaths in mutual killings during the Armenian rebellions in 1915-1917. It was a bloody war between peoples in which both communities suffered deaths in great numbers. "According to the findings...of the 'Martyrs' Project launched in the early 1980s, mass graves abound in Eastern Anatolia, anthropological research helps to determine to which group each mass grave belongs. Although it is early to make a general assessment, one may conclude that the mass graves belonging to Muslims (Turks) are more numerous."⁵⁶

On the other hand, when the Ottomans retook much of the east, the Armenian population fled to Russia where they starved and died of disease. When the Russians retook the provinces of Van and Bitlis they did not allow the Armenians to return, leaving them to starve in the north.⁵⁷

III. ARMENIAN RELOCATION AND INTERNATIONAL LAW

International Law during the Relocation

During the Armenian relocation, the 1648 Westphalia Convention was in effect.

The principles of Westphalia convention were as follows:⁵⁸

- (1) The principle of the sovereignty of states and fundamental right of political self determination.
- (2) The principle of (legal) equality between states.
- (3) The principle of non-intervention of one state in the internal affairs of another state. In other words, states are equal and do not have the power to intervene into other states' domestic policy issues.

Although the matter of status and treatment of minorities was an internal affair of states, the European Powers supported non-Muslim minorities to dismember the Ottoman Empire after 1839.

55 G. Aktan, *The Armenian Problem and International Law*, at 13.

56 *Id.* at 14.

57 J. McCarthy, *The Armenian Rebellion at Van*, at 242.

58 Alena Ingvarsdottir, *Treaty of Westphalia 1648, milestone Documents 'The Fall of Westphalia? Sovereignty of States Post Globalization'* Skemman, 24 June 2009, available at <<http://hdl.handle.net/1946/3088>>.

The Joint Declaration and the Trials of Ottoman Officials

As stated above, immediately after the relocation started, the British, French and Russian Governments issued a joint declaration on May 24, 1915 claiming, for the first time another government, of committing a crime against humanity, alleging that the Kurd and Turkish population of Armenia had been massacring Armenians. At that point in time there was no such a crime as a 'crime against humanity' in international law. The joint declaration had been issued shortly after the relocation decision, most probably due to missionaries' reports. Allied Powers had totally ignored facts; with regard to both the Armenian rebellion and the massacre of Muslims, in the course of the very same incidents. The relocation of the Ottoman citizen Armenians was an internal matter of Ottoman Empire. Non-intervention of another state's internal affairs was one of the Westphalian principles. Thus, the Allied Powers had no legitimate authority to investigate or prosecute such alleged crimes. As a matter of fact, the Ottoman Government had given an adequate response to the purely political statement issued by the Allied Powers.

When the armistice was signed on October 30, 1918, and Istanbul was occupied beginning in November 14, 1918, the Allied Powers attempted to hold responsible the Ottoman leaders for wartime crimes, overlooking the fact that, the new Ottoman Government had already acted on.⁵⁹ On October 8, 1918, Talat Pasha's government resigned and a week later Ahmet Izzet Pasha formed a new government. The following statement was included in his government's mission statement: "We decided that the subjects (citizens) who were made to emigrate and resettle in other parts of the country due to necessities of wartime may return to their original places of residence and we have begun to carry out this decision."⁶⁰ On November 1, 1918, Enver Pasha, Talat Pasha, Jemal Pasha, Bahattin Shakir bey, Dr. Nazim Bey, Azmi Bey and Bedri Bey fled the country. Many thought that the escape was facilitated by the Government. When Sultan Vahdettin requested from Izzet Pasha that the ministers from the Union and Progress Party be dismissed, Izzet Pasha resigned on November 8, 1918, and Tevfik Pasha formed a new government on November 18, 1918. With an order from the Sultan, the Assembly was dissolved on December 21, 1918.⁶¹

As a result of pressure exerted by the British, Tevfik Pasha had established an extraordinary court, to try the individuals who would be prosecuted as war criminals. On January 30, 1919, 27 people, including members of the war time government and high ranking officials were arrested and imprisoned in the Bekir Agha Regiment. The British released the names of most of those who

59 K. Gürün, *The Armenian File*, at 291-294.

60 *Id.*

61 *Id.*

were arrested by the Ottoman authorities.⁶² The Sultan was not pleased with the Government and thus forced Tevfik Pasha to resign. Ferit Pasha, from the Liberty and Agreement Party, formed the new government on March 4, 1919. Ferit Pasha formed the court known as Nemrut Mustafa Pasha Martial Court and on March 10, 1919, sixty additional members of the Union and Progress Party were arrested.⁶³

Under the supervision of the British, the Nemrut Mustafa Pasha Martial Court commenced on April 27, 1919 to try the members of the Union and Progress Party. While this trial continued, the British who were not satisfied with the Ottoman tribunals took a group of the most important Ottoman leaders from Bekir Agha regiment and sent them to the island of Malta. The Nemrut Mustafa Pasha Martial Court sentenced Talat Pasha, Enver Pasha, Cemal Pasha and Dr Nazim Bey to death in absentia, but later, they were killed by Armenian assassins. Javit Bey, Mustafa Bey, and Sherif Bey were sentenced to fifteen years, on July 13, 1919. After this, the British interest in the trials in Turkey waned.⁶⁴

The government of Ferit and Vahdetin used all methods available to them to slander the Union and Progress Party. The British arrested and deported a total of 144 Ottoman officials to the island of Malta for trial. The Allied Powers accused these officials of four categories of offenses: (i) failure to comply with Armistice terms, (ii) ill-treatment of prisoners of war, (iii) outrages to Armenians or other races in Turkey and Transcaucasia, (iv) participation in looting, destruction of property, etc.⁶⁵

As stated above, the adoption and implementation of the interim law of 'Relocation of Armenians' was an internal matter of the Ottoman Government which did not affect other states. Since international law at the time did not cover internal matters of a state, the Allied Powers had no right to try the ranking Ottoman officials on these charges. However, despite complete access to the Ottoman documents given by the Treaty of Sevres, despite a thorough review of the British and U.S. Department of State documents, and despite all the documents and evidences gathered by the 1919-20 Ottoman tribunals, the British prosecutor could not find any worthwhile evidence with which to accuse the Malta detainees. At last, the Turks who were detained at Malta, without being charged, were exchanged with the British who were detained in Turkey.⁶⁶

62 *Id.* at 295.

63 *Id.*

64 *Id.* at 296.

65 *Id.* at 300-301.

66 *Id.* at 300-303.

The Situation in the Caucasus

In November 1917 Bolsheviks seized power and announced that they would be withdrawing troops from both the western and Caucasus fronts. Ottoman–Russian peace negotiations began one month later on December 4, 1917 in Erzurum and on December 18th the Erzurum Agreement was signed ending the armed conflict between Russia and the Ottoman Empire in the Caucasus campaign of World War I. After the Erzurum Agreement, the treaty of Brest-Litovsk was signed on March 3, 1918 and the Ottoman Empire regained the Eastern Anatolia, Batum, Kars and Ardahan.⁶⁷

The Conference reached the conclusion that the United States was the only potential mandatory, which would have been acceptable to all.

Under the terms of the Armistice of Mondros which was signed on October 30, 1918, Ottoman Empire armed forces were required to withdraw from all Caucasus territory belonging to Russia and to return to the West of the what had been the pre-war border with Russia. After the Ottoman armies retreated to the 1914 borders, Georgians occupied Ahiska

on March 1, 1919, Armenians took Kars on April 19, and Georgians entered Ardakhan on April 20.⁶⁸

The Armistice of Mondros was signed on October 30, 1918; but the treaty of Sevres, between Turkey and the Allied Powers was signed by the Ottoman representatives on August 10, 1920 after two years delay. The Paris Peace Conference opened on January 18, 1919 and included two delegations of Armenians that served as the representative of all Armenians, Bogos Nubar Pasha and the representative of the Democratic Republic of Armenia, Avatis Aharonian. Both Bogos Nubar Pasha and Avatis Aharonian spoke at the Council of ten of the Paris Peace Conference on February 26, 1919. Bogos Nubar Pasha, stating that the Armenians had sided with the Allied Powers during the war and he alleged that one of the motives behind “the massacre and deportation” of the Armenians was their allegiance with the Allied Powers; he then demanded that the Armenian Republic be recognized and claimed the union of the Democratic Republic of Armenia and that six provinces of the Ottoman Empire, including Cilicia with an outlet (Trabzon) to the Black Sea, be given to the mandate of one of the Powers and that those who had taken part in the massacres of Armenians be punished.⁶⁹

67 K. Gürün, *The Armenian File*, at 286-292.

68 *Id.*

69 Ömer Engin Lütem, *The Armenian Demands at the Paris Peace Conference of 1919*. *Review of Armenian Studies*, Number 11-12 Volume 4-2007 available at <<http://armenians-1915.blogspot.com/2008/01/2271-armenian-demands-at-paris-peace.html>> (visited May 11, 2010).

The Mandate over Armenia

The Peace Conference was of the opinion that Armenia, with its small population, could not stand alone against the Turks on the one hand and the Bolsheviks on the other. It was essential therefore that they should find a protective power, which would undertake as a humanitarian duty the protection of this Christian community. France, Britain, and Italy could not undertake that task. They were already overburdened with the weight of the mandates that they had accepted. Russia would have been the most fitting choice for a mandatory in Armenia. But the Russian Revolution had put Russia out of the question as a mandatory. The Conference reached the conclusion that the United States was the only potential mandatory, which would have been acceptable to all. President Wilson seemed to be inclined to accept this mandate and proposed that a joint allied commission go to Turkey to ascertain the true conditions, especially the desires of the people concerned. Since the British and French refused to send out commissions, the American commissioners (the King-Crane Commission which was official American Commission) went alone primarily to investigate the conditions in Syria.⁷⁰

King-Crane Commission Report

The King-Crane Commission emphasized the dangers of an inequitable division and the exploitation of the Ottoman Empire by the Allies and voiced the feelings of the Turkish people regarding the occupation of the Smyrna region by Greece. The establishment of a separate Armenian State was the deliberate intention of the Peace Conference. To this end first, Colonel Haskell was appointed as High Commissioner in Armenia on behalf of the four Great Powers and second, Major General Harbord was appointed by President Wilson to investigate conditions in Armenia.

Report of Major General James G. Harbord

In July (August) 1919 President Wilson sent the ‘American Military Mission to Armenia’ to Turkey headed by Major General James G. Harbord to investigate the status of Armenians in Turkey and Transcaucasia. The mission spent 30 days in Asia Minor and Transcaucasia, and interviewed government officials of that region as well as individual Turks, Armenians, Greeks, Kurds, Tartars, Georgians, Russians, Persians, Jews, Arabs, British and French and Americans for some time domiciled in the country. The report of the ‘American Military Mission to Armenia’ entitled ‘Conditions in the Near East’ was

70 K. Gürün, *The Armenian File*, at 309-312.

submitted to the Secretary of State on October 16, 1919. The mission described situation in Turkey as follows:⁷¹

Very alarming reports had been received from Transcaucasia for several months before its (the mission's) departure from France, particularly as to organized attacks by the Turkish Army impending along the old international border between Turkey and Russia. The itinerary of the mission through Turkey was planned with those reports before it and with the intention of observing as to their truth and if possible to exert a restraining influence. We practically covered the frontier of Turkey from the Black Sea to Persia, and found nothing to justify the reports. The Turkish Army is not massed along the border, their organization is reduced to a skeleton, and the country shows an appalling lack of people, either military or civilian...

On the Turkish side of the border, where Armenians have returned, they are gradually recovering their property, and in some cases have received rent for it, but generally they find things in ruins, and face winter out of touch with the American relief and with only such desultory assistance as the Turkish government can afford. Things are little if any better with the peasant Turks in the same region. They are practically serfs equally destitute, and equally defenseless against the winter. No doctors or medicines are available. Villages are in ruins, some having been destroyed when the Armenians fled or were deported, some during the Russian advance; some on the retreat of the Armenian irregulars and Russians after the fall of the Empire. Not over 20 percent of the Turkish peasants who went the war have returned. The absence of men between the ages of 20 and 35 is very noticeable. Six hundred thousand Turkish soldiers died of typhus alone, it is stated, and insufficient hospital service and absolute poverty of supply greatly swelled the death list...

In the territory untouched by war from which Armenians were deported the ruined villages are undoubtedly due to Turkish deviltry, but where Armenians advanced and retired with the Russians their retaliatory cruelties unquestionably rivaled the Turks in their inhumanity...

The Armenian is not guiltless of blood himself; his memory is long and reprisals are due, and will doubtless be made if opportunity offers... Kurds appealed to this mission with tears in their eyes to protect them from Armenians who had driven them from their villages, appealing to

71 Conditions in the Near East. Report of the American Military Mission to Armenia by Maj. Gen. James G. Harbord. Senate document No 266 66th Congress 2d Session (1920). available at <http://armenianhouse.org/harbord/conditions-near-east.htm> (last visit May 11, 2010).

be allowed to go back to their homes for protection against the winter now rapidly approaching on the high interior plateau. The Kurds claim that many of their people were massacred under cruel circumstances by Armenian irregulars accompanying the Russian Bolsheviks when the Russian Army went to pieces after collapse of Empire. Similar claim is made by the people of Erzerum, who point to burned buildings in which hundreds of Turks perished, and by the authorities of Hassan-Kala, who give the number of villages destroyed by the Armenians in their great plain as 43.

About the land claimed by Armenians General Harbord stated:

The events of the Greek occupation of Smyrna and the uneasiness produced by the activities and propaganda of certain European powers have so stirred the Turkish people in the long interval since the armistice... There is no wisdom in now incorporating Turkish territory in a separate Armenia no matter what the aspirations of the Armenians... In the proposition to carve an independent Armenia from the Ottoman Empire there is something to be said on the part of the Turk; that his people even when all the refugees shall have returned to their homes, will be in the majority in the region contemplated for a reconstituted Armenia and they were in the majority before the deportation.

General Harbord did not submit a recommendation as to the United States accepting a mandate in the Near East; he only outlined the reasons for and against the acceptance of said mandate. General Harbord's report emphasized the humanitarian duty of a mandate over the Near East, while stressing that America's first obligation was to its own people and its nearer neighbors. The report estimated that a total force of 59,000 including support units would be required and estimated total cost as \$756,014,000 for a five year period. These were powerful detractors of the mandate.⁷²

During the meeting of the Supreme Council held on January 19, 1920 the government of the Armenian State was recognized as a *de facto* government on the condition that the recognition in no way prejudged the question of the eventual frontier.⁷³ The report of the American Military Mission to Armenia was submitted to the Senate by President Wilson on April 13, 1920. On April 23, 1920 the secretary of State informed the Armenian Representative that the United States recognized the *de facto* government of the Armenian Republic.⁷⁴

⁷² *Id.*

⁷³ FRUS, Volume III (1920) at 775, United States Department of State, Papers relating to the foreign relations of the United States (1920), V. III. Available at <<http://digicoll.library.wisc.edu/cgi-bin/frus/frus.frus.1920v03>> (last visit May 11, 2010).

⁷⁴ *Id.* at 778.

At the San Remo Conference on April 26, 1920, the Supreme Council decided;

(a) to make an appeal to President Wilson that the United States of America should accept a mandate for Armenia... (b) that whatever may be the answer of the United States Government on the subject of the mandate the president of the United States should be asked to arbitrate on the boundaries of Armenia as set forth in the draft article below; (c) that an article in regard to Armenia should be inserted in the treaty of peace in the following sense: Turkey and Armenia and the other High Contracting Parties agree to refer to the arbitration of the President of the United States of America the question of the boundary between Turkey and Armenia in the vilayets of Erzerum, Trabizond, Van and Bitlis and to accept his decision thereupon as well as any stipulation he may prescribe...⁷⁵

On May 17, 1920 President Wilson's acceptance of the U.S. role as arbitrator for the Armenian boundaries was communicated by the Secretary of State to the Powers concerned.⁷⁶ President Wilson, on May 24, 1920, appealed the U.S. Senate to authorize the United States to assume a mandate over Armenia in response to the appeal of Supreme Council at its meeting in San Remo. President Wilson, almost simultaneously, expressed that he had agreed to demarcate the boundaries of Armenia within the Turkish Vilayets of Van, Bitlis, Trebizond, and Erzerum. On June 1, 1920, the United States Senate rejected Wilson's appeal that the United States undertakes a mandate over Armenia. No reasons were offered for this action, but the debate elucidated several fundamental objections, which were based for the most part on the report of General Harbord. These objections included objections to the number of forces needed to preserve internal order guarding against external aggression and the heavy cost of the mandate.⁷⁷

Arbital Award of President Wilson

At the San Remo Conference on April 26, 1920 the Supreme Council of the Allied Powers invited the president of the United States to arbitrate the question of the boundaries between Armenia and Turkey. Since it was not necessary to obtain the approval of the Congress for arbitration, President Wilson's acceptance of this invitation was telegraphed to the American Ambassador in

⁷⁵ *Id.* at 781-782.

⁷⁶ *Id.* at 783.

⁷⁷ Philip Marshall Brown, The Mandate over Armenia, *The American Journal of International Law*, Vol., 14, No. 3 (Jul. 1920). at 396, available at <<http://www.jstor.org/pss/2187661>> (last visit May 11, 2010).

Paris with the intention that it be conveyed to the Powers represented on the Supreme Council on May 17, 1920.⁷⁸

On September 18, 1920, the High Commissioner Bristol at Constantinople warned the U.S. Secretary of State;

The Nationalist movement was organized as a protest against the Greek occupation of Smyrna, and to resist any similar aggression of the Armenians in the eastern vilayets. This feeling against the Greeks has been increased, and is the only thing that could have held the Nationalists together so long. Therefore, it is safe to state that the feeling against Armenia gaining any territory in the eastern vilayets is most bitter and stronger than ever before. No one could believe that the Turks would evacuate any territory ceded Armenia without being forced to make such evacuation. The Nationalists, who represent practically the vast majority of the Turks, do not recognize the treaty signed by the Constantinople Government and it is most probable that they will have to be forced by the Allies, assisted by Greece, to recognize the treaty. The Turkish treaty gives to Armenia only such portions of the eastern vilayets as may be decided by the arbitration of the President. This would seem to impose upon him the responsibility for enforcing the evacuation of territory thus given to Armenia. Such regions are practically empty of Armenians to-day and repatriation from the Erivan Republic would result in disorder unless protection was assured.⁷⁹

The arbitral jurisdiction was assigned to President Wilson under Article 89 of the Treaty of Sevres. On August 10, 1920 the Treaty of Sevres was signed and an authenticated copy of the treaty was transmitted to Wilson through the U.S embassy in Paris on October 18, 1920 drawing attention to the Article 89, of the treaty.⁸⁰ President Wilson signed a document outlining his decision on November 22, 1920.⁸¹ On November 24, 1920 the Secretary of State sent the original text of the President's decision to the Ambassador in France (Wallace) to be conveyed to the President of the Supreme Council of the Allied Powers.⁸²

On November 30, 1920 the High Commissioner at Constantinople reported to the Secretary of State;

Reliable information received from Armenia by one just returning from Erivan. It is reported that Armenia is finished. The Armenian troops ...

78 FRUS. at. 783.

79 *Id.* at 788.

80 *Id.* at 789.

81 *Id.* at 795.

82 *Id.* at 789,790.

*were defeated and in many cases ran away... A second armistice is in effect and a treaty of peace is being negotiated. The Americans are reported all safe within the Turkish lines. Bolsheviks and Nationalist Turks are in accord.*⁸³

On December 4, 1920 the Consul at Tiflis (Moser) reported to the Acting U.S. Secretary of State;

*It is officially announced at Erivan December 2nd that Armenia is declared Soviet Republic... Russian action taken at the request of Armenian Bolshevik Committee at Baku met with no opposition. The new government will consist of five Bolshevik Commissaries and two members of the Dashnak Party. Soviet Russian Ambassador has announced Russia's recognition of the new Soviet Republic... During the peace conference between Turkey and Armenia local government at Alexandropol turned Bolshevik... Relief work in Armenia proper no longer possible, but [Director General] Yerrow hopes under the protection of Turks to continue relief of Armenians in Turkey and to obtain communication and supplies through Erzerum and Trebizond.*⁸⁴

On December 13, 1920 the Acting Secretary of State informed the Ambassador in France (Wallace) that the; "Department has decided that on Friday December 17, the President's boundary decision will be given out for publication by the press on the following day."⁸⁵ The Ambassador in France (Wallace) responded to the Acting Secretary of State on December 16, 1920; "I have received from the Foreign Office a pressing request that you be asked to delay making public the President's decision on the Armenian boundary until they have been afforded opportunity to submit certain considerations which are to be immediately communicated to you through me."⁸⁶

Leaders of the governments of the principal Allied Powers had deferred the Publication of the President Wilson's decision for an undetermined time, because Soviet Russia had annexed Armenia as part of its territory and the Democratic Republic of Armenia had ceased to exist. Therefore, President Wilson's boundary decision had been in vain.

Treaty of Alexandropol

After the American Congress rejected a mandate over Armenia, the Democratic

83 *Id.* at 805.

84 *Id.* at 806-807.

85 *Id.* at 807

86 *Id.* at 808.

Republic of Armenia in the Caucasus started to attack Turkey in June of 1920. On September 29, 1920 Turkish Army launched a counter-offensive military operation. Thus, Eastern Anatolia was retaken and order and security was re-established. The treaty of Gumru (Treaty of Alexandropol) was signed between the Grand National Assembly of Turkey and the Democratic Republic of Armenia on December 2/3, 1920 to end the Turkish-Armenian War. Both sides accepted the new boundaries and admitted that the provisions of the treaty of Sevres were null and ineffective. The Armenians also renounced all territorial claims against Turkey. The Treaty was to be ratified by the Armenian parliament. However this could not be done because Bolshevik Russia occupied Armenia on the same days. Later on, the Treaty of Moscow and the treaty of Kars took its place.⁸⁷

Treaty of Moscow

The Treaty of Moscow was signed between the Grand National Assembly of Turkey and Bolshevik Russia on March 16, 1921. According to Article I of the treaty: “The Government of the RSFSR hereby agrees not to recognize any international acts concerning Turkey, which have not been accepted by the Government of Turkey, currently represented by the Grand National Assembly of Turkey.” Additionally, in the same Article, the Treaty accepts Turkey; “as the sum of the territories included in the National Turkish pact of January 28, 1336 (1920) formulated and proclaimed by the Ottoman House of Delegates in Constantinople and communicated to the press and all foreign nations,” With Article XV of the Treaty; “Russia hereby promises to undertake the appropriate measures with regard to Republics located in the Transcaucasus area in order to ensure the necessary acceptance by said Republics of the Articles of the present treaty which concern them directly, by separate treaties to be concluded between these Republics and Turkey.”⁸⁸

Treaty of Kars

The Kars Agreement was the treaty stipulated in the Treaty of Moscow. It was signed on October 23, 1921 between the Government of the Grand National Assembly of Turkey and the Governments of the Socialist Soviet Republic of Armenia (SSRA), the Azerbaijan Socialist Soviet Republic (ASSR), and the Socialist Soviet Republic of Georgia (SSRG) and ratified by Yerevan on September 11, 1922.⁸⁹ Article 2 of the Treaty of Kars by stating: “In virtue of

87 Treaty of Alexandropol, available at <[http:// western-armenia.org/treatyofalexandropol.php](http://western-armenia.org/treatyofalexandropol.php)> (last visit may 11, 2010).

88 Treaty of Moscow, available at <http://western-armenia.org/treatyofmoscow.php> (Last visit May 11, 2010).

89 Treaty of Kars, available at < <http://groong.usc.edu/treaties/kars.html>> (last visit May 11, 2010).

this agreement, the Governments of the Socialist Soviet Republics of Armenia, Azerbaijan and Georgia agree not to recognize any international act concerning Turkey which has not been recognized by the National Government of Turkey, actually represented by its Grand National Assembly.” invalidated the other past treaties except Treaty of Moscow. With Article IV of the Treaty, the sanjaks of Ardahan and Kars were included in the borders of Turkey. With this Treaty Turkey’s eastern frontier has been definitely determined. The region of Nakhchevan became an autonomous territory under the protection of Azerbaijan (Article V). Turkey ceded to Georgia suzerainty over the town and port of Batum (Article VI).

According to Article XV, each of the Contracting Parties agreed to promulgate, immediately after the signature of the present treaty, a complete amnesty to citizens of the other party for crimes and offenses committed during the course of the war on Caucasian front. With this amnesty, Contracting Parties released their claim to anything for the crimes and offenses committed by the citizens of the other Party during the war on the Caucasian front.

The Treaty of Lausanne

The Turkish independence war ended with the Mudanya Armistice on 11 October 1922. The peace talks began in Lausanne on 20 November 1922.

The agreement had been reached on every position with Armenia with the ratification of the Kars Treaty. But Armenians attempted again to take part in the Lausanne peace talks. They submitted a note to the Conference demanding the land marked by President Wilson together with a part of Cilicia be ceded to them. Allied States asked for a national homeland from Eastern Anatolia for the Armenians. Ismet Pasha, during the meeting, which took place on 13 December, 1922 stated that “there was not one inch of land in the Turkish motherland”. And he added; “today there is no obstacle for the Armenians who are in Turkey to live comfortably, in harmony with their fellow citizens.”⁹⁰ After the meeting of the First Commission, on January 9, 1923, the Armenian issue was not talked about during the Lausanne Conference anymore.⁹¹

The Treaty of Lausanne was signed on July 24, 1923. There was not any clause in the agreement related to the Armenians. Articles 37-44 were about minorities. When the Turkish Civil Law was published the Armenian community officially declared that they preferred to live in Turkey like any other citizens.⁹²

90 K.Gürün, *The Armenian File*, at 368-379.

91 *Id.*

92 *Id.*, *Lausanne Treaty*, available at < www.hri.org/docs/lausanne/>.

IV. ICTJ'S LEGAL ANALYSIS ON APPLICABILITY OF UN CONVENTION ON EVENTS PRIOR TO 12 JANUARY 1951

Applicability of the UN Convention on Events prior to 12 January 1951

On 12 July 2002 the Turkish Armenian Reconciliation Commission (TARC) requested that the International Center for Transitional Justice (ICTJ) facilitate an objective and independent legal study on the applicability of the 1948 Genocide Convention to events which occurred during the early twentieth century.⁹³

In the memorandum submitted to TARC, under the heading of 'International Law generally prohibits the retroactive application of treaties' ICTJ has quoted article 28 of the Vienna Convention on the Law of Treaties and added;

The ICTJ with this statement refuted its aforementioned assertion regarding the application of the term genocide to events that pre-dated the adoption of the Convention.

... unless a contrary intention appears, a treaty provision stating that a treaty comes into force on a particular date "must mean all the provisions of the treaty" come into force on that date. The text of those provisions of the Convention imposing obligations on States Parties to the Convention almost universally obligate the States Parties to take action in the future.

And ICTJ has concluded as EXECUTIVE SUMMARY OF LEGAL CONCLUSIONS;

International law generally prohibits the retroactive application of treaties unless a different intention appears from the treaty or is otherwise established. The Genocide Convention contains no provisions mandating its retroactive application. To the contrary, the text of the Convention strongly suggests that it was intended to impose prospective obligations only on the States party to it. Therefore, no legal, financial or territorial claim arising out of the events, [which occurred prior to January 12, 1951] could successfully be made against any individual or state under the Convention.

Applicability of the Term Genocide to the Events that Pre-dated the Adoption of the Convention

93 ICTJ's Legal Analysis on Applicability of UN Convention on Genocides prior to January 12, 1951 available at <<http://groong.usc.edu/ICTJ-analysis.html>> (visited December 23, 2007).

The ICTJ reached the correct conclusion on the applicability of the Genocide Convention to the events which occurred prior to January 12, 1951. But subsequently, despite that it was not asked, the ICTJ going beyond its competence, applied the genocide label to the relocation,⁹⁴ and additionally asserted; “Although the Genocide Convention does not give rise to state or individual liability to the events, which occurred ... prior to January 12, 1951, the term “genocide” as defined in the Convention may be applied to describe such events.” In support of its baseless arguments the ICTJ has alleged; “It is clear from the text of the Convention and related documents and the travaux préparatoires, that the term genocide may be applied to events that pre-dated the adoption of the Convention.... The drafters of the Genocide Convention used the term genocide to refer to events that pre-dated the adoption of the Convention.”

It has been specified above by the ICTJ that, “the Genocide Convention contains no provision mandating its retroactive application.” The ICTJ with this statement refuted its aforementioned assertion regarding the application of the term genocide to events that pre-dated the adoption of the Convention.

Second, the drafters of the Genocide Convention may have reviewed events that pre-dated the adoption of the convention to define the crime of genocide. This does not mean that the term genocide may be applied to events that pre-dated the adoption of the Convention. Additionally the use of the term genocide by the drafters of Genocide Convention does not give permission for the violation of the general principles of international criminal law, namely ‘*nullum crimen sine lege*’ and ‘*non-retroactivity ratione personae*’ to apply the genocide term to the Armenian relocation in an unjust and illegal manner.

The ICTJ going further and exceeding its competence has defined the elements of the crime of genocide which was developed by the Preparatory Commission for the ICC, then stated; “It is important to note that these elements were developed in order to assess the guilt or innocence of individuals alleged to have perpetrated genocide, a task which is well beyond the scope of this memorandum.” But the ICTJ has refuted this statement with its subsequent statement; “...this memorandum therefore proceeds to analyze whether the events constituted genocide as defined in the Convention, using the elements of the crime of genocide outlined above as an analytical tool for this purpose.” The ICTJ’s analysis of whether the events constituted genocide as defined in the Convention using the elements of the crime of genocide as an analytical tool, is an application of the Convention or Statute of ICC retroactively. The assessment whether the events constituted genocide is the same as the assessment of guilt or innocence of individuals who were alleged to have

94 G. Aktan, ‘Yarı Hukuki’, Radikal Newspaper, 15.02.2003.

perpetrated genocide. If it was assessed that the events constituted genocide the alleged perpetrators of the events would automatically become guilty. Therefore, analyzing the events that pre-dated the adoption of the Convention, depending on the Convention's or Rome Statute's provisions, means the application of these conventions was done retroactively, so it violates the article 28 of Vienna Convention and the articles 22 and 24 of the Statute of the International Criminal Court.

Using 'genocides' instead of 'events' in the heading of the memorandum, the ICTJ illustrated its prejudice. Before analyzing the events thoroughly, it had already preemptively accepted the events as genocide. This conclusion is illustrating in the following statement: "Because the other three elements identified above have been definitively established, (without proving the existence of the special intent, intent to destroy) the events viewed collectively," (although the massacres occurred as individual events the ICTJ considered the events collectively). Can thus be said to include all of the elements of the crime of genocide as defined in the Convention, and legal scholars as well as historians, politicians, journalists and other people would be justified in continuing to so describe them.

The ICTJ, considering individual events collectively and without proving genocidal intent also violated paragraph 2 of the article 22 of the Statute of the ICC. (2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted.) Since it was not asked whether the genocide term be applied to the events, the ICTJ, going beyond its authority, submitted a false view and harmed Turks in a political and moral sense. Some of the parliaments may have been influenced in passing resolutions regarding recognition of genocide.

V. ASSERTIONS OF PRO-ARMENIANS

On January 12, 1951 the Genocide Convention entered into force. Pro-Armenians knew well that the provisions of the Genocide Convention could not be applied retroactively even to analyze or define the events occurred before the adoption of the Convention from the viewpoint of International Law. However they applied the genocide label to relocation retrospectively and unjustly. They launched the relocation as genocide, and tried to include the relocation into the definition of genocide to support their assertions. According to article 2 of the Convention, to constitute genocide one of the five cited acts should be committed with intent to destroy (*dolus specialis*). First they tried to prove that the Ottoman administration had the intent to destroy Armenians

through the relocation decision. Since no evidence of the existence of intent to destroy could be found they changed the basis of their assertion from paragraph (a) and (b) to paragraph (c) of Article 2 of the Genocide Convention, namely “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” They alleged;

Since the Ottomans could not openly destroy, they used the relocation as an opportunity to impose on the Armenians, the kind of living conditions that would cause them to perish. Through an “omission” of their duty to protect the Armenians from attacks during the “deportation”, to ensure safe transportation, no less than to provide food, medicine, medical treatment and shelter.⁹⁵

As mentioned above, from the text of the Interim Law it can be seen clearly that the Ottoman administration did not have such an intention. Provisions taking place in the Interim Law indicate that all the measures had been stipulated for the safe transfer and settlement of the Armenians. On the other hand, for military reasons, in the few months preceding the World War I, the Ottoman government relocated its Greek subjects from the coast of Anatolia to the safe places. As even Morgenthau accepted;

Greek inhabitants were actually removed to new places and were not subjected to wholesale massacre. It was probably for the reason that the civilized world did not protest against these deportations that the Turks afterward decided to apply the same methods on a larger scale not only to the Greeks but to the Armenians...The Turks adopted almost identically the same procedure against the Greeks as that which they had adopted against the Armenians.⁹⁶

But the War had changed the conditions. Ottomans lost 90 000-110 000 soldiers in Sarikamış battle and they were fighting in three fronts. For this reason it could not be possible to set aside sufficient gendarmerie to protect the Armenian columns at every time during the relocation. The Government could not control the armed bands, tribes and bandits effectively. Continuous wars had deteriorated the economic situation. Epidemics of disease a long road and poor transportation conditions made the relocation difficult. In spite of these severe conditions, as specified above, the losses of Armenians were limited. Therefore, they inflated pre-transfer Armenian population and started claiming that out of two million deported Armenians 1,500,000 were killed, and 500,000 survivors were expelled. (H. Res. 252) The reason for these excessively high figures was to assert indirectly the presence of the intent to destroy by way of

95 G. Aktan, *The Armenian Problem and International Law*, at 10.

96 H. Morgenthau, *Ambassador Morgenthau's Story* (1918), at 323-324.

deporting and thus to allege that genocide had been committed.⁹⁷ As stated above, the Ottoman government had to make the relocation decision to stop the Armenians from hitting the Ottoman army from behind, cutting the logistic communication lines and attacking Muslim settlements. Engagement in political and armed conflict for the purpose of independence makes the Armenians a political group. As a political group, Armenians cannot enter the definition of Article 2 of the Genocide Convention. Political groups have not been included in the definition of genocide but were included in the definition of the crime against humanity in Article 7 of the Rome Statute. In individual events local tribes for the purpose of revenge or some other ordinary reasons committed attacks on the Armenian columns when safeguards were not sufficient enough for protection. The Ottoman government as a result of these attacks of tribes had sent gendarmerie soldiers to capture those plunders and increase the safeguards.⁹⁸ Captured criminals were tried and sentenced. Leaving aside wide spread and systematic attacks, which are the required condition for the constitution of crime against humanity, there has never been any attack from any Ottoman military unit to the Armenian columns during the relocation. Moreover, Article 49 of Geneva Convention prohibits individual or mass forcible transfers but permits total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Therefore, the Armenian relocation cannot be described as genocide or crime against humanity from an international law point of view. Notwithstanding this fact, using inflated death numbers, the Armenians started lobbying to have parliaments to pass resolutions recognizing the relocation as genocide. Unfortunately, many parliaments passed resolutions applying the genocide term to relocation which violated international law. The aim of Armenians was and is to press on Turkey to admit that genocide occurred. This is obvious. If Turkey admits, that genocide occurred then the Armenians will make their lawless, unjust and unrealizable claims, namely reparation and the granting of six provinces of eastern Anatolia.

If it is accepted that treaties cannot be applied retrospectively it cannot be asserted that the preamble statement is sufficient warrant for applying the genocide label to pre-Convention events that satisfies its definition.

Geoffrey Robertson QC's Opinion about 'was there an Armenian Genocide?' may be a good sample to pro-Armenian assertions.⁹⁹ G. Robertson first accepts that treaties are not retrospective and adds;

97 G. Aktan, 'The Armenian Problem and International Law', at 10.

98 Armenian Activities in the Archive Documents, 1914-1918, Vol VIII (2008), at 162.

99 G. Robertson, QC's Opinion 'was there an Armenian Genocide?' 9 October 2009. Available at <<http://groong.usc.edu/Geoffrey-Robertson-QC-genocide.pdf>> (last visit may 12, 2010).

The Vienna Convention on the Law of Treaties sets up a presumption that treaties are not retrospective... I find nothing to rebut this presumption in the language of the Genocide Convention. But plainly the term “genocide” may be applied to massacres before the passage of the Convention; those who drafted and debated it spoke repeatedly of other historical events as “genocide” even though they had occurred centuries before. The preamble statement, which recognizes that “at all periods of history genocide has inflicted great losses on humanity”, is sufficient warrant for applying the label to pre-Convention events that satisfy its definition.¹⁰⁰

If it is accepted that treaties cannot be applied retrospectively it cannot be asserted that the preamble statement is sufficient warrant for applying the genocide label to pre-Convention events that satisfies its definition. Because the non-retroactivity principle means that the Genocide Convention does not exist for the events before the passage of the Convention. Therefore it is out of the question to apply the preamble or any provision of the nonexistent Convention to the events. Robertson quotes from Geoff Hoon;

The fact is that the legal offence of genocide had not been named or defined at the time that the actual atrocities were committed. The U.N. Convention on Genocide came into force in 1948 so it was not possible at the time of the events that we are considering; legally to label the massacres as genocide within the terms of the Convention...The common practice in law is not to apply such judgment retrospectively.¹⁰¹

Robertson gives an astonishing response; “the common practice in law applies to the rule against prosecuting for a crime that did not exist at the time it was committed, but nobody talking about prosecution.”¹⁰² But applying the genocide label to the relocation he condemns Turks for a crime they had not committed even without being tried and he acts as if he has been a prosecutor. Robertson indicates; “The Eastern department considers that it is not the work of HMG to decide what constitutes genocide: ‘investigating, analyzing and interpreting history is a matter for historians.’” Robertson argues; “Deciding what amounts to genocide is a matter for judgment according to international law, and not at all a matter for historians. Historians establish facts; lawyers must judge whether those facts amount to a breach of international law.”¹⁰³ I agree with Robertson. It is the business of jurists, not historians, to interpret the international law. Historians and scholars, who had applied the genocide label to relocation, have violated the international law. Without judgment of

100 *Id.*, 1 at 14.

101 *Id.*, 1 at 33.

102 *Id.*

103 *Id.*, 1at 24.

the competent courts, which are national competent courts and the International Criminal Court (ICC), no scholar has the right to apply the genocide label to the Armenian relocation. On the other hand, since the genocide Convention cannot be applied retrospectively, no competent national court, the ICC or any ad hoc international court could make a judgement on this issue.

Robertson indicates;

On 2 July 2007 a memorandum on HMG's position on the Armenian genocide restated the position that; 'there is an absence of unequivocal evidence to prove that at the top level the Ottoman administration took a specific decision to eliminate all Armenians under their rule.' It further added the misleading claim that; 'It is not common practice in law to apply judgments retrospectively.'

Robertson argues; “there can be no logical or legal objection to an authoritative judgment which decides whether the events of 1915 satisfy the 1948 definition.”¹⁰⁴ It is amazing to hear such an assertion from a member of the UN Justice Council like that Robertson makes.

As was specified above, to ascertain whether the events of 1915 satisfy the 1948 definition according to the provisions of the genocide Convention definitely means application of the Convention retrospectively. The legal objection to an authoritative judgment which decides whether the events of 1915 satisfy the 1948 definition comes from Article 6 and Article 9 of the Genocide Convention which indicate the competent tribunals. Therefore, from an International Law point of view, except these previously mentioned competent tribunals, no congress, parliament, government, scholar or any real or legal entity can give authoritative judgment on acts enumerated in Article 3 of the Genocide Convention. Since they are obliged to apply the general principle of International Criminal Law, ‘nullum crimen sine lege’, even competent tribunals cannot give any authoritative judgment on this subject.

Robertson points out Malcolm Yapp’s criticisms on Vahakn Dadrian’s “The History of the Armenian Genocide”;

He (Malcolm Yapp) accepts that the Ottoman Government ordered the deportations without adequate arrangements for the transport, food or security. He says that; 'although Dadrian produces many reports seeming to suggest that the members of the Ottoman Government wanted to destroy the Armenians, he fails to find any document which constitutes a definite order for massacre.'

104 *Id.* at 35.

Robertson asserts; “This failure, as I have pointed out, is not crucial.”¹⁰⁵ On the contrary, this failure is crucial. As it was specified above, intent to destroy, (*dolus specialis*) is a crucial element of the crime of genocide. If its existence cannot be proven the defendant could not be convicted. Robertson should have known this.

Robertson also indicates;

An FCO draft answer for Baroness Scotland to give to Lord Biffin in 2001 stated; ‘additionally, the government’s legal advisers have said that the 1948 UN Convention on genocide, which is in any event not retrospective in application was drafted in response to the holocaust and whilst the term can be applied to tragedies that occurred subsequent to the holocaust, such as Rwanda. It cannot be applied retrospectively.’

Lacking any legal base Robertson asserts; “Of course the term “genocide” can be applied retrospectively.

VI. U.S. H. RES. 252 AND RECOGNITIONS OF SO-CALLED ARMENIAN GENOCIDE

On March 4, 2010 the House of Representatives Foreign Affairs Committee passed the H. Res. 252 on ‘Affirmation of the U.S. Record on the Armenian Genocide Resolution’.¹⁰⁶ This resolution is the same of H. Res. 106 which had been withdrawn from the agenda of the House of Representatives. Since David Saltzman had made excellent sound study which began to analyze the factual and legal deficiencies of the U.S. H. Res. 106,¹⁰⁷ in this article only the most important legal deficiencies and the distortion of the facts have been emphasized.

First as specified above, since they are not competent tribunals mentioned in the Genocide Convention U. S. Congress, European Parliament and other parliaments have no jurisdiction to label the events that occurred some 95 years before, as genocide within the terms of the Convention. It was shown that relocation cannot be described as genocide and a crime against humanity under the provisions of international law. The crime of genocide was named and defined with the Genocide Convention. The Convention was adopted in 1948. At the time of the relocation of Armenians, the offense of genocide had not been

¹⁰⁵ *Id.* at 34.

¹⁰⁶ H. Res. 252 (111th) at <http://www.govtrack.us/congress/bills/111/hres252/text> (last visit May 10, 2010).

¹⁰⁷ D. Saltzman, U.S. H. Res. 106: Factual and Legal Deficiencies, April, 2008, Tusiad Publication, available at <<http://www.tusiad.us/content/uploaded/Saltzman%20report.pdf>>.

named or defined, so it was not possible at the time of the events legally to label the relocation as genocide within the terms of the Convention. After the Convention, the application of the definition of genocide from the Convention to the relocation that had occurred nearly 30 years before was unjust given that the standard was applied retroactively. Such an unjust application of the Convention provisions retrospectively violates the fundamental principle of international law: 'nullum crimen sine lege' as specified in Article 28 of the Vienna Convention and Article 22 of the Statute of the ICC. By describing the relocation as genocide unjustly, levels the accusation to the Ottoman leaders of the grave crime of genocide; this crime which they did not commit is hurting the Turks and harming the republic of Turkey politically.

Below, intentionally misleading assertions and distortions of facts included in the resolution.

The Period from 1915 to 1923. Relocation started in May of 1915 and ended on March 15, 1916. The years of 1915 and 1916 must be considered. It was also stated that; 'resulting in the deportation of nearly 2,000,000 Armenians, of whom 1,500,000...were killed 500,000 survivors were expelled'. As specified above (in the sectioned entitled 'The Amount of Armenians Relocated') the Armenian population in 1914 was 1,294,851. If this is true, how can 2,000,000 Armenians are relocated out of 1,294,851 Armenians? This shows clearly that facts were distorted. As mentioned above, the Ottoman sources support that the amount of Armenians relocated was around 700,000. Even H. Res. 252 accepted that 500,000 Armenians reached their homes. Thus, maximum losses of Armenians can only be 200,000. It is obvious that the number of Armenians that died during the relocation has been purposefully inflated to construe the relocation as genocide.

The Relocation must be considered together with the Armenian rebellion and the Russian invasion. It was a tragedy, but not a one sided affair. The Resolution has willfully ignored the Armenian massacres of Turks. Terrorist activities and massacres of Armenians during the advance and retreat of the Russians had turned the conflict into an intercommunal fight. Turks were massacred, expelled and forced to emigrate by Armenians who sided with Russians. Turkish people were more defenseless than Armenians because their men, between 20 and 45 years old, were fighting on the fronts. The loss of Turks, in World War I, amounted to two and a half million of which, 500,000 were war zone losses and the balance, and nearly two million were civilians. These deaths resulted from war, epidemics, scarcity of food and inadequacy of drugs, doctors and hospitals. It has been estimated that at least one million Muslim civilians perished in Eastern Anatolia at this time.¹⁰⁸ Not only was the

108 G. Aktan, 'The Armenian Problem and International Law', at 14.

relocation a tragedy, but so to as the Armenian rebellion and its resultant inter-communal war. The reason for this was the Armenians themselves.

Findings (4), (5) and (6) have mentioned the indictments and verdicts of the courts-martial. The accusations taken place in the indictment are not proof of guilt. Guenter Lewy specifies how the courts-martial is tried;

On May 6, 1919 at the third session of the main trial, defense counsel challenged the court's repeated references to the indictment as proven fact, but the court rejected the objection... Throughout the trials, the court heard no witnesses, and the verdict rested entirely on documents and testimony never subject to cross-examination... The most serious problem affecting the probative value of the 1919-20 military court proceedings is the loss of all their documentation. What is known of sworn testimony and depositions is limited to that related secondhand in selected supplements of the official gazette of the Ottoman government, Takvim-I Vekayi, and press reports. What is not known is the accuracy of the transcription and whether the newspaper reprinted all or only part of texts entered as evidence.¹⁰⁹

Given that the Empire with insolvent and disintegrating, and fighting on three fronts, was it be possible to provide sufficient security personnel, food, medicine, and health service for relocated Armenians?

In Findings (9) and (10) Ambassador Morgenthau's book, 'Ambassador Morgenthau's Story,' has been accepted as evidence. Heath W. Lowry compared Ambassador Morgenthau's Story with the 'Diary', his family 'letters' and his cabled

dispatches and written reports in the form of letters submitted to the U.S. Department of State during his twenty-six month stay in Turkey and reached a conclusion that only these documents, not the book, can be relied on.¹¹⁰

In Finding (14) the resolution took a passage from General James Harbord's report. As indicated above, the report also includes this passage; "...In the territory untouched by war from which Armenians were deported the ruined villages are undoubtedly due to Turkish deviltry, but where Armenians advanced and retired with the Russians their retaliatory cruelties unquestionably rivaled the Turks in their inhumanity... "

109 Guenter Lewy, 'Revisiting the Armenian Genocide', The Middle East Quarterly, Fall 2005, Vol., XII, Number 4 at 3-12. Available at <<http://www.meforum.org/748/revisiting-the-armenian-genocide>>.

110 H.W. Lowry, The Story behind Ambassador Morgenthau's Story (1990), at 79.

As a result David Saltzman concludes;

At its core it is dishonest, attempting to take advantage of a general and understandable lack of knowledge of this complex, contested history to deceive the public. Among other misleading aspects, the resolution is based on the faulty premise that there is a United States record on the "Armenian Genocide". The U.S. record on what is perhaps more accurately termed, the Armenian Revolt and the Ottoman Military Response, though rife with documents that reflect the U.S.' policies against the Ottoman Empire and promote the anti-Turkish prejudices of the day, includes ample evidence that the events in question, though undeniably dreadful, describe not one-sided affair. On the contrary, they clearly demonstrate that Muslims suffered from attacks by Armenian nationalist insurgents and that Muslim civilians suffered from war-induced deprivations alongside Armenians. Yet the resolution not only ignores such evidence that contradicts its glib, partisan view of history, it implies that such evidence must be discounted or dismissed out of hand. The resolution attempts to authenticate an historic narrative not warranted by the historic events that, a survey of the current literature on the matter demonstrates, remain the subject of genuine dispute. This constricted approach dishonors the pursuit of truth and impedes reconciliation between Turkey and Armenia.¹¹¹

VII. THE POSITION TO BE TAKEN BY THE REPUBLIC OF TURKEY ON UNJUST ARMENIAN GENOCIDE RECOGNITIONS

“Turkey’s long resistance and indifference is the primary reason why the Armenian lobbies have made progress in ensuring recognition of the alleged Armenian genocide.”¹¹² Recently, in Turkey, scholarly works on the relocation of Armenians and studies on Ottoman archives have increased. Unfortunately, there are very few works in foreign languages.

On Turkish side, it has been stated that the reason, the aim and the conditions of relocation of the Armenians had been expressed in the Interim law. The reason for the relocation decision was to prevent the Armenians from colluding with the Russian Army, the rebellion in Van; and their guerrilla activity in ethnic cleansing of the Turks and Muslims in Eastern Anatolia. The Interim Law envisages the measures for the safest and easiest transfer of Armenians. Since the relocation decision was, for military necessity, made and

111 D. Saltzman, U.S. H. Res. 106: Factual and Legal Deficiencies, April, 2008, Tusiad Publication, at 109.

112 Cenap Çakmak, 'ICJ and Armenian Genocide dispute', Global Politician, available at <<http://www.globalpolitician.com/24185-armenia-genocide>> (visited June 4, 2010).

implemented quickly, preparations for the transfer of Armenians to encampments was not made in advance. Given that the Empire with insolvent and disintegrating, and fighting on three fronts, was it be possible to provide sufficient security personnel, food, medicine, and health service for relocated Armenians? Considerable number of Armenians may have died, but as expressed above, not as many as pro-Armenians have asserted. Armenians were luckier than the Muslim emigrants who were expelled from the Balkans and escaped from Russian and Armenian forces. The Turkish civilian deaths that occurred in the same region, for similar reasons, were not less than the Armenian losses.¹¹³ Although it was not sufficient, the Ottoman Government supplied food, medicine, health services and encampments for Armenians. Additionally, Armenians benefited from the Near East Relief aid, especially, since the Ottoman authorities permitted Near East Relief to aid Armenians and helped their works. (J. B. Jackson's report, and Harbord's report). Under these conditions is it possible to assert that the Ottoman Government imposed these conditions of life on Armenians deliberately to bring about their destruction? Leaving aside a wide spread and systematic attack, since no unit of Ottoman security forces attacked Armenian columns, the relocation does not constitute a crime against humanity as specified in the Statute of Rome. Besides the relocation decision was taken for imperative military reasons which made the relocation permissible. These were the facts. That the republic of Turkey should tell the western world in their languages immediately using pamphlets (brochures) and any other instruments.

Turkey may take the following position regarding recognitions of alleged Armenian genocide:

The facts are announced:

(1) The relocation of Armenians was not genocide or a crime against humanity.

(2) With the Treaty of Kars, the Treaty of Sevres explicitly had become null and void, and the frontiers between Turkey and the republic of Armenia had been settled definitely. With the complete amnesty envisaged in Article XV of the Kars Treaty, files of crimes and offenses committed by the citizens of the other party during the War on the Caucasus front had been completely closed.

(3) The Convention on the Prevention and Punishment of the Crime of Genocide cannot be applied to events occurring in 1915-1916. Labeling the term of genocide to the relocation of Armenians is also an

113 G. Aktan, 'The Armenian Problem and International Law', at 13

application of the Genocide Convention retrospectively and as such is a breach of International Law. According to Articles 6 and 9 of the Genocide Convention, only the competent tribunal of the State in the territory of which the act was committed and International Criminal Court and International Court of Justice are competent tribunals to decide on genocide. For this reason, no congress, parliament, government, scholar or any other real or legal entity can give authoritative judgment on acts enumerated in Article 3 of the Genocide Convention. Since it is a matter of interpretation of the Genocide Convention, to investigate whether the 1915-1916 events satisfy the definition of genocide is not the business of historians, it is business of jurists. Historians are supposed to study these types of historical events in the historical context. The competent tribunals indicated in Articles 6 and 9 of the Genocide Convention cannot investigate the events occurred before the passage of the Genocide Convention as well. Because, they are obliged to implement the fundamental principles of International Criminal Law namely, 'nullum crimen sine lege' and 'non-retroactivity ratione personae'.

VIII. CONCLUSION

Rebellions and terrorist activities of Armenians made it compulsory for the Ottoman Government to transfer Armenians from their potential operation zones to other part of the country in 1915. During the transfer many unwanted and unexpected incidents happened and unfortunately some of the Armenians died. The file of this tragedy was closed with the Kars and Lausanne Treaties.

Implementation and interpretation of the 1948 Genocide Convention and relevant International Law is the business of jurists; not historians. The Genocide Convention and International Law cannot be applied retroactively to investigate whether the relocation of Armenians satisfies the definition of genocide of the Genocide Convention. Just to express the fact and refute the assertions of Armenians it may be said that in making the decision to relocate, the Ottoman government did not have the intent to destroy Armenians which is the crucial element in the crime of genocide. Also, since no unit of Ottoman security forces attacked Armenian columns, relocation is not a crime against humanity. Individuals who had attacked Armenian columns or done harm to the Armenians during the relocation were captured and punished.

In spite of the non-retroactive application of the Genocide Convention, Armenians, labeled the relocation as genocide and inflated death figures, and began lobbying to get parliaments to pass resolutions recognizing the Armenian

relocation as genocide. Many parliaments applied the genocide term to the relocation violating International Law without fully knowing what really happened. Members of the parliaments even do not care to learn. The Republic of Turkey has not acted as is due against this action up to now. The aim of Armenians is to create an opportunity to claim reparation and land. They want Turks to accept genocide crime that Turks did not commit to be able to make their lawless and unjust claims.

Non-retroactive application of the Genocide Convention means that at the time of the relocation, it is not exist with its preamble and the term genocide was unknown. It is impossible to label what happened as genocide, since the term would not be created until some 30 years later. Therefore, Armenians and members of the parliaments must know: first (1); the relocation of Armenians was not genocide and a crime against humanity, second (2); the application of the genocide term to the relocation is a breach of International Law, third (3); Parliaments are not competent Tribunals as mentioned in the Genocide Convention and they do not have jurisdiction to judge the crime of genocide; and fourth (4); the recognitions of parliaments are violations of International Law.

It is hoped that the Republic of Turkey will take the suggested position for recognitions of Armenian genocide. Thus the Western World learns the facts and, consequently Armenians would give up its unjust and untrue genocide assertions. This is essential so that good relations can be established between Turkey and Armenia.

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