SWITZERLAND-ARMENIA ASSOCIATION POSITION PAPER

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Category: Opinions

On the Protocols for the Establishment and Development of Diplomatic Relations Between the Republic of Armenia and the Republic of Turkey

Bern, 8 September 2009

Introduction

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The following items and clauses of the Protocols are to be disputed:

I. Protocol on the Establishment of Diplomatic Relations between the Republic of Armenia and Republic of Turkey

3rd point:

"Reconfirming their commitment, in their bilateral and international relations, to respect and ensure respect for the principles of equality, sovereignty, non intervention in the internal affairs of other states, territorial integrity and inviolability of frontiers."

• Armenia has already subscribed to these principles by signing the UN Charter at the time of independence.

• Armenia will no longer have the right to negotiate for Karabakh. Under international law, the region of Karabakh is currently, legally part of Azerbaijan territory. Karabakh runs the enormous risk of no longer being supported by its mother country (the Republic of Armenia), thus being left alone in its claim for self-determination, part of the Principles of Madrid.

• It is unclear as to why the Protocols expressly cite the principles of sovereignty, non intervention in the internal affairs of other States, territorial integrity and inviolability of frontiers, but do not make

any explicit or implicit reference to the principle of the right of self-determination. This right does not appear in this, or in any other paragraph within both this Protocol and the one on the Development of Relations Between the Republic of Armenia and the Republic of Turkey. In fact, the indirect reference to it, by citing the Final Act of Helsinki (which includes the right to self-determination, quoted in point 2 of the same protocol) does not imply that the Protocol could make reference to it. It implies that the issue of self-determination cannot be raised unless the Republic of Azerbaijan agrees to refer to it. If raised, the right of self-determination under these Protocols would be subordinate to territorial integrity.

• By not mentioning it separately, and not asking Turkey for a clear reference to it, the right to self-determination and the reaffirmation of this principle which has the value of an "imperative norm of international law" will loose its prevalence over any other principle; there is an acquiescence by the signatory, that this principle does not apply to the subject matter because the subject is not open for discussion. The reference to the final Act of Helsinki, whose dogma of territorial integrity prevails, is nothing more than a direct intention to undermine this willingness.

• Armenia will no longer have the right to raise concerns about the possible abuse of Armenian cultural patrimony in Turkey and as part of its claims in relation to its historical properties. It is indirect acknowledgement of the effective legislation applied by Turkey since the events of 1915 to render ineffective any claim on such properties.

• Directly related to this point is that as a signatory of the Protocols in question, Armenia will no longer have the right to hold Azerbaijan accountable in front of an international authority for the destruction of the Khatchkars (Cross-Stones) of Djougha (Nakhitchevan), the Armenian cemetery in Baku and many other Armenian monuments on Azerbaijani territory.

• In addition, the destruction of Armenian monuments and churches in Georgia, especially in Tiflis and in the Armenian populated Region of Samtkhe Djavaketi (Djavakhk), will never be subject to international condemnation. Moreover, by signing these protocols Armenia will not have the right to defend Armenians in Djavakhk, this is a direct reference to the Vahak Chakhalian case.

5th point:

"Confirming the mutual recognition of the existing border between the two countries as defined by the relevant treaties of international law,"

• This is a direct reference to the Treaty of Kars (1921) and the Treaty of Lausanne (1923), but not the Treaty of Sèvres (1920), which was signed by the Ottoman Empire on August 10, 1920, but has not been ratified by the Ottoman Parliament. Armenia was not present during the negotiations leading to the Treaty of Lausanne and could thus advance the reserve that it did not sign this treaty. Armenia could also make the point that Soviet Armenia was forced to sign the Treaty of Kars. It is vital to note that President Wilson got a Mandate from all of the Powers present in Sèvres in order to establish the new territorial boundaries for Armenians, the Kurds and the Turks. The definition of these

boundaries did not depend upon ratification. An international arbitration on these boundaries has been rendered, and as a judicial instrument, is still in force. If Armenia signs this Protocol, it will put an end to the existing judicial controversy and the Republic of Armenia will permanently loose all of its claims to land in Turkey.

• The recognition of borders would put an end to the debate; the victims of the Armenian Genocide were subject to a massive ethnic cleansing campaign and are entitled to reparations. Accepting these boundaries leaves by definition, the question of liability aside. Responsibility under international law leads by definition to appropriate reparations; this is what would have happened with recognition of the Genocide. Here Armenia recognizes the borders, recognizes the Treaty of Lausanne, and the crime is left in the hands of a "sub committee", whose decisions will not be considered a judgment having relevance under international law. At best, this committee will recognize a historical fact. Therefore, Armenian claims of any nature whatsoever, territorial, legal etc. will be waived and no longer considered.

6th point:

(…) Reiterating their commitment to refrain from pursuing any policy incompatible with the spirit of good neighborly relations." (…)

• This point is a direct intention, and Turkey's aim, to definitively block international recognition of the Armenian Genocide. Furthermore, this point would be used against any claim or issue Armenia should make concerning the destiny of Armenian cultural and architectural patrimony in Turkey, bilaterally or under international law. Although indirectly, this point could be used against Armenia's role in the Karabakh conflict, given the close ties between Turkey and Azerbaijan.

II. Protocol on the Development of Relations Between the Republic of Armenia and the Republic of Turkey

6th point:

"Reiterating their commitment to the peaceful settlement of regional and international disputes and conflicts on the basis of the norms and principles of international law,"

• The Karabakh conflict is directly implied here as is the issue of Armenian Genocide reparations. Clear reference is made to the Karabakh conflict, and implies that the Republic of Armenia is no longer entitled to support, help, or contribute to the defense of the Republic of Karabakh.

• Karabakh: what are the criteria under international law for defining the legitimacy of a region within an existing country, giving that region its independence? As mentioned previously, under international law the right of self-determination prevails over any other principle, including that of territorial integrity. However, by signing these Protocols where such criterion is not included, is a clear indication that this principle is to be excluded from this issue; it would therefore be impossible for the Republic of Armenia to make any reference to it, in relation to the conflict at stake.

• Reparations: As long as: Turkey will not sign a document recognizing the Genocide, or an international criminal court does not condemn Turkey (as successor of the Ottoman Empire) for the Armenian Genocide, the General Assembly of the United Nations will have no reason to condemn it; as a consequence, there will be no instrument under international law to pursue Turkey — as legal successor of the Ottoman Empire, for this crime (even only to require that moral reparations be met).

• Directly related to the former is a decision of a court case in the United States on 20 August 2009, where the absence of such an instrument, as well as the absence of legal recognition by the U.S. Government that the Armenian Genocide occurred, was fundamental in the ruling by a federal appeals court. The ruling found that Armenian American descendants of the victims of the 1915-18 massacres by Ottoman Turks, are not permitted to sue foreign insurance companies for unpaid claims. Amazingly, the appeals court did not take then US President Ronald Reagan's speech commemorating and recognizing the Armenian Genocide in 1981 into consideration, and did not take into consideration both joint resolutions passed by the US House of Representatives in 1975 and 1984, textually recognizing the Armenian Genocide. However, the recognition of this crime by more than 20 national Parliaments and five Governments (France, Greece, Argentina, Uruguay and Canada), the Swiss Supreme Court in condemning the denialist Dogu Perincek, and the Whitaker Report (on the prevention and punishment of the crime of genocide, approved by the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities) is tangible evidence of heightened sensibility and international law in this sense.

2nd agreement, 2nd paragraph:

"Implement a dialogue on the historical dimension with the aim to restore mutual confidence between the two nations, including an impartial and scientific examination of the historical records and archives to define existing problems and formulate recommendations;"

• This item is one of the most controversial points in this Protocol, and puts Armenia at great risk with respect to its relations with the Diaspora: Armenia does not have the right to speak on behalf of the entire Nation, which includes the Diaspora (this point in the Protocol specifies "Nations" and not Countries, and holds true for the remainder of the text).

• The SAA does not concur with following phrase in the Protocol: "to define existing problems". Is the Genocide an existing problem that needs to be redefined? Or is the problem in fact that the Genocide has not yet been recognized by the Republic of Turkey? Or is it that relations between the two Nations cannot move forward because of the unresolved issue of the Genocide? Mutual confidence between Armenia and Turkey on the "historical dimension" cannot be restored but by Turkish recognition of the Armenian Genocide. Affirming that an "impartial and scientific examination" is needed leaves the assumption that such work did not take place before the drafting of this Protocol — such an intention is flagrantly untrue.

• The conclusions by a Sub-Commission on the "historical dimension" will not be a binding resolution

for Turkey; only recommendations are foreseen. Given Turkey's track record, it would be highly unlikely that the Republic of Turkey will take any responsibility for the Armenian Genocide based on simple recommendations. Worthy of particular note however is that if the Protocols are ratified, it will be the first time that the Republic of Turkey has participated in a commission, at an international level in relation to the 1915 events. The following is certain: the commission's conclusions will have no impact or effect under international law; the objective of the commission being explicitly defined, is to study "the historical dimension". The SAA finds it evident that the commission shall not be allowed to deviate from this objective, nor entitled to conclude in a manner different from that of mere historical appreciation.

Press Release
Bern, 9th September 2009

Diplomatic Victory – Legal Capitulation

The Switzerland-Armenia Association (SAA) welcomes the rapprochement between Armenia and Turkey. The Association is pleased that Switzerland has made the rapprochement possible, but has also reservations. The SAA warns not to put into question the Armenian Genocide and Karabakh's right to self-determination. For the genuine reason of the Swiss initiated rapprochement lies with the interests of the United States, the European Union and Russia to use more effectively the region's oil and gas resources.
Swiss diplomacy has made the intent of a step-by-step rapprochement possible between Armenia and Turkey. The SAA welcomes this and is convinced that time has come for Armenia and Turkey to settle their bilateral problems. At the same time, the historical responsibility of Turkey for the Armenian Genocide the 1915 cannot be wiped under the carpet. Furthermore, there can be no preconditions with regards to the Karabakh conflict. However, the protocols between Armenia and Turkey which were published on 31st August 2009 and which will have to be ratified by the respective parliaments within a 6-week period, in addition to understandable declarations of intent contain precisely such preconditions (see enclosed Position Paper). These preconditions weaken Armenia's position considerably in the conflict with Azerbaijan. Also, the protocols contain statements on the genocide which are questionable and utterly disadvantageous for Armenia.

Armenia's Interests Are Insufficiently Represented
The pressure to resolve the conflict does not originate with the United States and the European Union only, but also with Russia. This is why a number of points in both protocols are fundamentally against Armenia's interests. Turkey acts upon her growing regional political position (natural gas contracts with Russia/South Stream and with the European Union/Nabucco). She is therefore engaged much more intensively, and with these protocols hopes to acquire the power and authority to neutralize any future demands. As a result, in addition to the rejected recognition of the genocide,

the rights of today's Armenian minorities and the maintenance of their historical architectural legacy in Turkey, Azerbaijan and Georgia are also endangered, to name only a few examples.

A Questionable Use of an Expert Commission with a „Historical Dimension"

The creation of a sub-commission for the analysis of the "historical dimension" and for the "definition of contemporary existing problems" acquires an international profile with direct Swiss participation. This commission cannot, however, present an appropriate solution for the most important international legal conflict. To the contrary, the commission plays with the legitimate expectations for justice of the Armenian people. Its objectives are highly problematic. The commission seems to be interested much more in a redefinition of the events—which would be tantamount to a simple questioning of the genocide —rather than an in-depth investigation of the real circumstances of the genocide. In addition, the commission's nature will be merely based on recommendations whose results will not be binding in any case. One gains the impression that this expert committee's sole purpose is to reestablish mutual trust. For this, the protocol uses the term "nations". The Armenian diaspora is the largest part of the Armenian people and the direct "product" of this genocide. This diaspora, however, is not mentioned in the protocols and has therefore no role within the framework of the complexity's solution.

The expert commission makes therefore little sense also from an historical and scientific perspective and its utility is very limited, if not damaging. For dozens of comprehensive expert investigations of the United Nations and other international organizations have repeatedly acknowledged that the "events" of 1915 constitute a genocide which claimed 1.5 million Armenian lives. Turkey, however, has a different view. She is the legal successor of the Ottoman Empire which carries the responsibility for the Armenian Genocide. Up until today, Turkey does not only refuse to recognize this crime, but uses all available means to deny it. For this reason, Turkey proclaims a willingness for dialogue which does, however, not exist in reality. The only concrete objective of Turkey is the neutralization of the international recognition of the Armenian Genocide.

Switzerland's Role

A more careful examination reveals that Switzerland's role as a mediator appears to have distanced herself from her own basic principles that are the foundation of the rule of law. For instance, the right to self-determination is hardly mentioned in these protocols. However, Switzerland gave his principle utmost priority in Kosovo's path towards independence. In addition, Switzerland's judiciary rewrote legal history in the negationist case against Dogu Perincek on 12th December 2007 by defining the internationally recognized nature of the Armenian Genocide. The SAA would welcome if Switzerland applied these core principles also in the Armenian question.

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