Switzerland – Armenia Association (SAA)

Position Paper

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

Protocols intended to be ratified by the Parliaments of Armenia and Turkey

Introduction:

If ratified by the respective Parliaments of the two Republics, these Protocols will have the value of an international treaty; they will be legally valid under international law, and the parties will assume obligations among themselves. It will not be possible to object to these obligations unless a new treaty, with different content is ratified.

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.

Bern, 8 September 2009