

**THE GENOCIDE AGAINST
THE ARMENIANS 1915-1923
AND THE RELEVANCE
OF THE 1948
GENOCIDE CONVENTION**

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PREFACE

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The night of 24 April 1915 would mark the beginning of a tragic fate for the Armenian people. On this night, hundreds of Armenian political and intellectual leaders were arrested in Istanbul and assassinated, as the first stage of the first genocide of the twentieth century. Between 1915 and 1923, hundreds of thousands of Armenians would be systematically exterminated or deported; Armenian towns and villages would be erased from Ottoman geography; and every symbol of Armenian culture would be targeted for destruction. Most of the survivors would die of hunger or exhaustion during forced marches to exile. As historian Nelida Boulgourdjian-Toufeksian documents:

of the “2,100,000 Armenians in the Ottoman Empire in 1912, according to the Armenian Patriarch’s statistics in Istanbul, only 77,435 remained in 1927.”¹

Yet, these facts do not begin to sum up the depth and scope of the crimes committed against the Armenians. The Genocide of 1915 was part of a long-term state policy that had its antecedents in the centrally planned massacre of over 200,000 Armenians in 1894-1896 by the troops of Sultan Abdul Hamid II. In the name of Turkish nationalism, the government of the Young Turks, known as the Committee of Union and Progress (CUP), implemented an official policy of genocide. Dr. Nazim, one of the ideologues of the CUP, stated in a closed session of the Central Committee in February 1915: “It is absolutely necessary to eliminate the Armenian people in its entirety, so that there is no further Armenian on this earth and the very concept of Armenia is extinguished.”² The Ottoman state apparatus, including its military, intelligence services and administrative units, was the instrument of this crime.

Both the CUP’s crimes and the inherently hateful attitudes underlying its policies were widely denounced at the time. Many diplomats, consular agents and travelers witnessed and documented the horrors committed against the Armenians. The US Ambassador in Turkey, Henry Morgenthau, gave one of the most powerful

1-http://www.webislam.com/numeros/2003/215/noticias/ue_modelo_otomano.htm
2-G.S. Graber, *Caravans to Oblivion: The Armenian Genocide*, 1915 Ed. John Wiley & Sons Inc, New York, 1996, pp. 87-88.

descriptions of these massacres. In his report to President Woodrow Wilson, Morgenthau concluded: “I am confident that the whole history of the human race contains no such horrible episode as this. The great massacres and persecutions of the past seem almost insignificant when compared with the sufferings of the Armenian race in 1915.”¹

Even representatives of Germany, Turkey’s ally during World War I, sought to alert the world about the political decision of the Turkish government to exterminate the Armenian people. For instance, Baron Hans Freiherr von Wangenheim stated on 7 July 1915: “the [Turkish] government really aims at exterminating the Armenian race in the Ottoman Empire.”²

Even if by that time the concept of genocide was not yet invented, the criminal acts committed against the Armenian people were clearly considered crimes under international law. This was the conclusion France, Great Britain and Russia all reached in their joint Declaration on 24 May 1915, in which they confirmed that the massacres of the Armenians in the Ottoman Empire were “crimes against humanity and civilization for which would respond all the members of the Turkish government along with those who actually committed the massacres.” The Treaty of Sèvres, signed on 10 August 1920 between the Allies and Turkey, further confirmed the criminal nature

1-At <http://www.cilicia.com/morgenthau/Morgen24.htm>

2-Cited in Joe Verhoeven, “Le peuple arménien et le droit international”, in *Le crime du silence: le génocide arménien*, Ed. Champs Flammarion, Paris, 1984, p. 273 (Original in French, author’s translation).

of the massacres according to international law. This treaty obligated the Turkish government to hand over to the Allies those leaders who were responsible for the crimes in order for them to be tried before a court of law.¹ Though the Treaty was never ratified, it expressed, according to professor Verhoeven, “a conviction of unlawfulness independent of any subsequent ratification or non-ratification of the Treaty of Sèvres.”²

Under Allied pressure, the Turkish government recognized the crimes committed against the Armenians, but never characterized them as a crime against humanity. By the same token, some judicial procedures took place in Turkey and some of the perpetrators of the genocide were even sentenced.³ Yet, impunity for those responsible would soon be guaranteed with the substitution of the Treaty of Sèvres with the Treaty of Lausanne on 24 July 1923 - which included a Declaration of Amnesty.

Despite the fact that the Armenian Genocide was widely recognized and reported on when it was occurring, it slowly began to fade from the memories of those outside of Armenian circles in the years following World War I. Historian Roger Smith describes this as a process

1-Article 230 of the Treaty.

2-Joe Verhoeven, *op. cit.* p. 277.

3-See among others William A. Schabas *Genocide in International Law*, Cambridge University Press, 2000, p.20; Raymond H. Kevorkian. “la Turquie face à ses responsabilités.” *Le procès des criminels Jeunes-Turcs (1918-1920)*, in *Revue d'histoire de la Shoah - le monde juif - Ailleurs, hier, autrement: connaissance et reconnaissance du génocide des arméniens*. No. 177-178, janvier-août 2003, Ed. Centre de Documentation Juive Contemporaine, Paris 2003, p. 166.

of memory erosion.¹ As the majority of states and the International community gradually forgot about the Armenian Genocide, it became a subject of a campaign of denial on behalf of Turkey. The geopolitical calculations of the Cold War supported Turkey's desire to erase the Genocide from the pages of history. The impunity with which this crime was committed was compounded by the world's indifference; this silence, in turn, was further compounded by a hateful campaign to deny this crime.

The United Nations did not escape this process of memory erosion and denial. Under pressure and interference from Turkey, reference to the Armenian Genocide was vetoed in its chambers on several occasions. For instance, in the preliminary report on the Prevention and Punishment of the Crime of Genocide that the special rapporteur Nicodème Ruhashyankiko (Rwanda) presented to the Subcommission for the Prevention of Discrimination and Protection of Minorities in 1973, the Armenian massacres were initially characterized as “the first genocide of the twentieth century.”² The following year, upon the demand of the Turkish representative, the UN Human Rights Commission ordered the special rapporteur to omit every historical reference to the Ar-

1-Roger Smith, “The Armenian Genocide, Memory, Politics and Future” in R. Hovannissian (ed.). *The Armenian Genocide*, New York, St. Martin's Press, 1992, pp. 3-4.

2-UN Document E/CN.4/Sub.2/L 583, paragraph 30.

menian Genocide in the final report.¹ Austria, Ecuador, the United States, France, Iraq, Italy, Nigeria, Pakistan, Rumania and Tunis all supported the Turkish demand.² Only Great Britain, the Netherlands and the Soviet Union supported the inclusion of the reference to the Armenians. In 1978, the special rapporteur presented a revised version of his report in which the Armenian Genocide was not mentioned.³ However, the following year, in the Human Rights Commission, several diplomatic delegations advocated for the reinsertion of the mention of the Armenian Genocide, including Austria, the United States and France, each of which had previously supported the Turkish position in 1974. With Benjamin Whitaker as the new special rapporteur, the Armenian Genocide was finally mentioned again in 1985.⁴

Today, ninety years after the crime, the question of the Armenian Genocide still awaits resolution. This is not, however, a mere exercise of historical memory. As Alfred Grosser states, “memory should forbid us, forbid you ... [from] ignoring today’s crimes, especially when they look like the crimes of yesterday, when they are

1-See UN Documents E/CN.4/Sub.2/L.597, 17 June 1974, paragraph 7: E/564, paragraphs 165-167 and E/CN.4/Sr.1286. See also Théo van Boven “Note concernant la suppression de la référence aux massacres des arméniens dans l’étude sur la prévention et la répression du crime de Génocide”, in Tribunal Permanent des Peuples, *Le Crime de silence - le Génocide des arméniens*. Ed. Champs Flammarion, Paris 1984, pp. 289-294.

2-Théo van Boven “Note concernant la suppression de la référence aux massacres des arméniens dans l’étude sur la prévention et la répression du crime de Génocide”, in Tribunal Permanent des Peuples, *Le Crime de silence - le Génocide des arméniens*, Ed. Champs Flammarion, Paris 1984, p. 290.

3-UN Document E/CN.4/Sub.2/416.

4-UN Document E/CN.4/Sub.2/19885/57.

located within the prolongation of those committed in the past.”¹ How can one not think about Hitler’s reflection to his generals in Obersalzberg in 1939 when he reviewed the Nazi plans of extermination in Poland and asked, “Who ... speaks today of the annihilation of the Armenians?”²

The crime against the Armenian people still awaits a response from Turkey. The Genocide should be recognized and the damages repaired. These are not utopian aims. As the successor of the Ottoman Empire, the Turkish state has international juridical obligations. Responsibility for crimes under international law falls upon the state that commits them as well as its successor according to the principle of continuity and responsibility of states.

The issue of the juridical responsibility of the Turkish state for the Armenian Genocide is the source of growing interest today, particularly within the context of the ongoing debate about Turkey’s admission into the European Union. We should never forget, however, that the genocide perpetrated against the Armenian people is a crime against all humanity. It should be remembered, as Warsaw’s General Prosecutor in the VII Conference of Unification of Criminal Law (Brussels 1947) stated, genocide is “the most brutal and dangerous crime against humanity.”³ The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, as well as the UN Commission of International

1-Alfred Grosser, *Le crime et la mémoire*, Ed. Flammarion, Paris, 1989, p. 17 (original in French).

2-Cited in Norman Davies; *Europe, A History*, Ed. Pimlico, London 1997, p. 909.

3-See Quintano Ripollés, Antonio *Tratado de Derecho Penal Internacional e Internacional Penal*, Instituto “Francisco de Vitoria”, Madrid, 1955, Tomo I, p. 643.

Law, confirmed that genocide is a crime against humanity.¹ Indeed, genocide is a matter of concern for us all and it is to humanity as a whole to which Turkey must respond.

What are Turkey's international obligations and responsibilities for the Armenian Genocide? What are the norms and principles of international law that are applicable? Is the argument put forward by some deniers that it is not possible to talk about the Armenian Genocide because the concept was not yet defined at the same time according to international law a sustainable argument? Would the application of the Convention on the Prevention and Punishment of the Crime of Genocide to the case of the Armenian Genocide violate the non-retroactivity aspect of criminal law? Professor Alfred de Zayas provides an answer to these and other questions in his excellent juridical opinion - a thoroughly documented, clearly articulated and highly valuable juridical analysis that proposes a concrete and durable resolutions to this crime against humanity.

Federico Andreu-Guzmán
Senior Legal Advisor
International Commission of Jurists
April, 2005

¹See among others the *Fourth Report by the Special Rapporteur of the International Law Commission Mr. Doudou Thiam on the Draft Code of Offences Against the Peace and Security of Mankind*, Document A/CN. 4/398, 11 March 1986, p.10.

EXECUTIVE SUMMARY

By Professor Alfred de Zayas, Geneva

Genocide is a *jus cogens* crime. Its prosecution and punishment are subject to universal jurisdiction, as are piracy, slave-trade and other international crimes. It entails civil and penal consequences giving rise to personal penal liability and State responsibility for reparation to the victims and their descendants. Since the crime of genocide falls within the category of *delicta juris gentium* and crimes against humanity (as defined in the indictment and in the judgment of the Nuremberg trials), State responsibility and individual penal liability for genocide are not subject to prescription or to any statutes of limitation.

Genocide¹ and crimes against humanity² are the gravest international crimes and entail both civil and penal consequences. Because of the nature of the crimes, State responsibility for reparation to victims and descendants and individual criminal liability are not subject to prescription or statutes of limitation.

In the case of the Ottoman genocide against the Armenians and other Christian minorities before, during and after World War I, the perpetrators are dead and beyond the reach of criminal justice, but the Turkish State remains liable for the crimes committed by the Ottoman Empire.

Genocide and crimes against humanity also give rise to obligations of the perpetrating State toward the entire international community (*erga omnes* doctrine). Turkey's international obligations are thus not only those towards the Armenian victims and their heirs – but also toward the international community at large. Moreover, according to general principles of international law and international *ordre public*, States may not recognize as legitimate the consequences of *erga omnes* crimes. Thus, the international community must take appropriate measures to ensure adequate reparation to the victims and refrain from giving recognition to the consequences

1-William Schabas, *Genocide in International Law*, Cambridge University Press, 2000, p. 21. See also Revised and updated report on the question of the prevention and punishment of the crime of genocide, prepared by Special Rapporteur Mr. Ben Whitaker (E/CN.4/Sub.2/1985/6).

2-Egon Schwelb. "Crimes Against Humanity", 23 *British Yearbook of International Law* (1946), 178-226 at 181.

of genocide and crimes against humanity, including the wrongful acquisition of land, and of the personal property of the murdered victims.

The Genocide Convention of 1948 can be applied retroactively to the Armenian genocide, because most provisions of the Convention are declarative of pre-existing international law. There are numerous precedents for the retroactive application of treaties, including the London Agreement of 8 August 1945 establishing the Nuremberg Tribunal, and the Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes against Humanity of 1968. It should be remembered that the Genocide Convention did not “create” the crime of genocide, but was intended to strengthen the pre-existing claims of victims of genocide, including the victims of the Armenian genocide and the Holocaust.

According to article 31 of the Vienna Convention on the Law of Treaties, the principal rule of interpretation is “the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose”. The retroactive application of the Genocide Convention is not only compatible with the ordinary meaning of the terms used in the Convention, but also necessary in the light of the Convention’s *object and purpose*. Indeed, such retroactive application advances the important goal of deterring future acts of genocide (prevention) by way of condemning acts of genocide (suppression) that occurred prior to its entry into force, and rejecting the consequences of said acts of genocide. This analysis

supports the conclusion that the Genocide Convention can be applied retroactively to the Genocide against the Armenians.

The General Assembly can, pursuant to article 96 of the UN Charter, ask the International Court of Justice for an advisory opinion on the retroactive application of the Genocide Convention and its legal consequences in the form of reparations due to the heirs of the victims of the genocide. In this connection, Armenia and every State party to the Genocide Convention can invoke article VIII of the Convention and request the General Assembly “to take such action under the Charter of the United Nations as they consider appropriate”.

Even without such an advisory opinion by the ICJ, the Government of Armenia or any other State party to the Convention, could invoke article IX and submit a dispute to the ICJ, requesting a determination that the massacres against the Armenians constitute “genocide” within the meaning of the Convention. States parties to the Convention, including Turkey, are bound by Article IX which stipulates: “Disputes between the Contracting Parties relating to the interpretation, application, or fulfilment of the Present Convention, including those relating to the responsibility of a State for genocide or for any other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

Among the principles of general international law which any international tribunal would have to apply is the basic

principle of State responsibility stipulating that a State is liable for injuries caused by its wrongful acts and is bound to provide reparation for such injury.¹ The Permanent Court of International Justice enunciated this principle in the *Chorzow Factory Case*² as follows: “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.” This principle is also expressed in the Latin formula *ubi jus, ibi remedium*.

In 2002, the UN Sub-Commission for the Promotion and Protection of Human Rights appointed Paulo Sergio Pinheiro (Brazil) as UN Special Rapporteur on Housing and Property Restitution. In 2005, Pinheiro issued his report, now known as the “Pinheiro Principles”, reaffirming and strengthening the prior work of Special Rappor-

1-Malcolm Shaw, *International Law*, p. 481 “A breach of an international obligation gives rise to a requirement for reparation.”; Wladyslaw Czaplinski, “State Succession and State Responsibility”, in *Canadian Yearbook of International Law* 339 (1991): “State responsibility is a legal relationship created through the violation of an international legal obligation by a State; that violation gives rise to the duty to compensate for any resulting damage, one of the oldest principles of international law and universally recognized in international practice.” Karl Zemanek, “Responsibility of States: General Principles” in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 4, 2000, pp. 219-229; Mohammed Bedjaoui, “Responsibility of States: Fault and Strict Liability”, in Bernhardt (ed.), *op. cit.*, pp. 212-216, Irwin Cotler, «Confiscated Jewish Property: The Holocaust, Thefticide and Restitution: A Legal Perspective» in: 20 *Cardozo Law Review*, December 1998, pp. 601-624, p. 610.

2-*Chorzow Factory Case (Germany v. Poland)*, 1928 P.C.J.J. (ser. A) No. 17, p. 29, Ignaz Seidi-Hohenveldern, “German Interests in Polish Upper Silesia Cases”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. II, 1995, pp. 550-553.

teurs Louis Joinet, Théo van Boven and Cherif Bassiouni.¹ Particularly relevant to the Armenian claims is *Pinheiro Principle 2* which stipulates:

“2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.

2.2 States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution.”

In 1997 the UN Special Rapporteur Awn Shawkat Al Khasawneh (now Vice-President of the International Court of Justice) issued his famous final report on the Human Rights Dimensions of Population Transfers. Appended to his report is a 13-point Declaration. Article 8 stipulates:

1-U.N. Doc. E/CN.4/Sub. 2/2005/17 (2005) (“Pinheiro Principles”) endorsed Sub-Com, res. 2005/21, U.N. Doc. E/CN.4/2006/2 at 39 (2006), http://domino.un.org/pdfs/ocha_pinheiro_principles.pdf See also OHCHR/FAO/IDMC/NRC/OCHA/UN-Habitat/UNHCR: *Housing and Property Restitution for Refugees and Displaced Persons: Implementing the “Pinheiro Principles”* (2007). See also the Report of Special Rapporteur Awn Shawkat Al Khasawneh on the Human Rights Dimensions of Population Transfers, UN Doc E/CN. 4/Sub. 2/1997/23, including the appended Declaration, which affirms the right to restitution, and the pertinent Sub-Commission Resolutions 2002/30 and 2005/21.

“Every person has the right to return voluntarily, and in safety and dignity, to the country of origin and, within it, to the place of origin or choice. The exercise of the right to return does not preclude the victim’s right to adequate remedies, including restoration of properties of which they were deprived in connection with or as a result of population transfers, compensation for any property that cannot be restored to them, any other reparations provided for in international law.”

Article 10 stipulates further:

“Where acts or omissions prohibited in the present Declaration are committed, the international community as a whole and individual States, are under an obligation:

(a) not to recognize as legal the situation created by such acts; (b) in ongoing situations, to ensure the immediate cessation of the act and the reversal of the harmful consequences; (c) not to render aid, assistance or support, financial or otherwise, to the State which has committed or is committing such act in the maintaining or strengthening of the situation created by such act.”¹

Logical consequences of the application of the Genocide Convention to the genocide against the Armenians and other Christian minorities should be the return of monasteries, churches and other assets of historic and cultural

¹UN Doc. E/CN.4/Sub.2/1997/23.

See also <http://www.unher.org/refworld/pdfid/404350a94.pdf>

significance, as well as the granting of a measure of compensation to the descendants of the victims. The establishment of a general compensation fund would be a first step in the right direction. In this connection, the restitution and compensation schemes elaborated for the victims of the Holocaust provide useful precedents.

There is not only a legal but also a moral obligation on the part of the international community to take appropriate action in order to ensure that a measure of justice is achieved in respect of all victims of genocide and their descendants. A necessary precondition is the overdue recognition by Turkey of the historical reality of the genocide and of its responsibility as the successor State of the Ottoman Empire. For as long as Turkey persists on its official policy of “negationism”, it has no place in the community of European States. In a spirit of reconciliation, it would be highly desirable if Turkey would issue an official *apology* to the Armenian people. In this context it is worth remembering that great nations have recognized mistakes committed by prior governments in the past, and have issued formal apologies to the victims and their survivors, including Germany, Austria, Canada and more recently the United States¹ and Australia.²

1-On 23 November 1993 US President Bill Clinton signed Public Law 103-150, the “Apology Resolution”, a Congressional apology to the Hawaiian people because of the 1893 overthrow of the Hawaiian Kingdom, <http://www.hawaii-nation.org/acknowledges.html>, <http://www.hawaii-nation.org/publawsum.html>

2-On 13 February 2008 Australian Prime Minister Kevin Rudd issued an apology to the Australian Aborigines, <http://australianetwork.com/news/infocus/s216253.htm>. The apology was well received by the Aborigines and by a majority of the Australian population. “Australia PM’s popularity at record high after apology poll” <http://afp.google.com/article/ALeqM5jdxkxSMTpSel6P6YDDVg39R7bDSQ>

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“On doit des égards aux vivants; on ne doit aux morts que la vérité”
We owe respect to the living; to the dead we owe only truth.

François Marie Arouet (1694–1778), dit Voltaire¹

¹Œdipe (œuvres (1785) vol. 1, p. 15 n).

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I. HISTORICAL INTRODUCTION

For centuries, the Armenian population of the Turkish Ottoman Empire was subjected to mistreatment and despotism, particularly in the Armenian homeland. As a community, the Armenians maintained a precarious existence almost everywhere in the Empire and were able to survive and maintain their culture, at great sacrifice, through a variety of institutional and class-related accommodations and adjustments.

Despite these difficult conditions, the Armenian experience varies with time and geography. Especially in the

Ottoman capital, Istanbul, many Armenians were elevated to the ranks of the Empire's privileged and were recognized and rewarded for their talents in government administration and finance. Thus, institutionalised forms of ethnic discrimination and selective class favouritism existed side by side in the Empire for a long time, setting the stage, in the late 19th and early 20th centuries, for the last and the most tragic phase of the Armenian experience in Turkish Ottoman history.

The rivalries between European powers and Russia toward the end of the 19th Century, the accession to the Ottoman throne of Sultan Abdul Hamid II and the resulting ethnic and religious fanaticism deliberately fuelled by the Sultan's policies led to the persecution of all Christian minorities in the Ottoman Empire, particularly the Armenians, who were subjected to various forms of discrimination and abuse, culminating in many massacres and eventually in the mass-scale slaughter, in 1896, in the course of which more than 150,000 Armenians were killed.

This trend continued even after the Young Turks came to power in 1908, deposing the Sultan and promising an era of freedom and equality. The massacres of Adana and other towns of Cilicia in 1909, presumably beyond the control of the Young Turk government, claimed the lives of some 30,000 Armenians in the course of a few days. But it was under the cover of the First World War that the genocide of the Armenian communities in Turkey and of other Christian minorities took place, claiming

the lives of 1.5 million Armenians, 800,000 Pontos and Smyrna Greeks and 300,000 Assyro-Chaldeans.¹

¹Vahakn N. Dadrian, *The History of the Armenian Genocide*, Berghan Books, Providence, Rhode Island, 1995. Dadrian, "Armenians in Ottoman Turkey and the Armenian Genocide", in Dinah Shelton (ed.), *Encyclopedia of Genocide and Crimes Against Humanity*, Macmillan Reference, New York, 2005, Vol. 1, pp. 67-76. See also C. Fotiadis (ed.), *The Genocide of the Pontus Greeks by the Turks: Volume 13*, Thessaloniki: Herodotus, 2004; Norman Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth-Century Europe*, Cambridge and London: Harvard University Press, 2001; Alfred de Zayas, "The Istanbul Pogrom of 6-7 September 1955 in the Light of International Law" in *Genocide Studies and Prevention*, Volume 2, Number 2, Summer 2007, pp. 137-154. Edmond Schneider (ed.), *Les Persecutions antihelléniques en Turquie, depuis le début de la guerre européenne: D'après les rapports officiels des agents diplomatiques et consulaires* - Paris, Bernard Grasset, 1918. Sébastien de Courtois, *The Forgotten Genocide: Eastern Christians, the last Arameans*. Gorgias Press LLC., 2004. Salahi Ramadan Sonyel, *The Assyrians of Turkey: Victims of Major Power Policy*. Turkish Historical Society Printing House, 2001. See also sites: <http://www.armenian-genocide.org>
<http://www.greek-genocide.org/index1.html>

II. INTERTEMPORAL INTERNATIONAL LAW ON GENOCIDE

The punishment of the crime of genocide – whether called exterminations, evacuations, mass atrocities, annihilation, liquidations, massacres or ethnic cleansing – as well as the obligation to make restitution to the survivors of the victims, were envisaged by the victorious Allies of the First World War and included in the text of the Peace Treaty of Sèvres of 10 August 1920 between the Allies and the Ottoman Empire¹. This Treaty contained not only a commitment to try Turkish officials for war crimes committed by Ottoman Turkey against Allied

¹[1920] UKTS 11, Martens, *Recueil général des traités*, 99, 3e série 12, 1924, p. 720.

nationals¹, but also for crimes committed by Turkish authorities against subjects of the Ottoman Empire of different ethnic origin, in particular the Armenians, crimes which today would be termed genocide, and would also fall under the more broadly generic term “crimes against humanity”.

Pursuant to article 230 of the Treaty of Sèvres:

“The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on 1 August 1914. The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused and the Turkish Government undertakes to recognise such Tribunal...”²

The principle of just restitution for the victims also existed, and was reflected in article 144 of the Treaty of Sèvres:

“The Turkish Government recognises the injustice of the law of 1915 relating to Abandoned Properties (Emval-i-Metroukeh), and of the supplementary provisions thereof, and declares them to be null and void, in the past as in the future.

1-Particularly for violations of the Hague Regulations on Land Warfare, appended to the IV. Hague Convention of 1907.

2-*American Journal of International Law*, Volume 15, Supplement, 1921, Official Documents, p. 235.

“The Turkish Government solemnly undertakes to facilitate to the greatest possible extent the return to their homes and re-establishment in their businesses of the Turkish subjects of non-Turkish race who have been forcibly driven from their homes by fear of massacre or any other form of pressure since January 1, 1914. It recognises that any immovable or movable property of the said Turkish subjects or of the communities to which they belong, which can be recovered, must be restored to them as soon as possible, in whatever hands it may be found.... The Turkish Government agrees that arbitral commissions shall be appointed by the Council of the League of Nations wherever found necessary. .. These arbitral commissions shall hear all claims covered by this Article and decide them by summary procedure.”¹

Although Turkey signed the Treaty of Sèvres, formal ratification never followed, and the Allies did not apply the necessary political and economic pressure on Turkey so as to ensure its implementation.² Such failure was attributable to the international political disarray following the First World War, the rise of Soviet Russia, the withdrawal of British military presence from Turkey,³ the isolationist

1-*Ibid.*, p. 210.

2-André Mandelstam, *La Société des Nations et les puissances devant le Problème Arménien*, 2nd ed. 1970.

3-Paul Helmreich, *From Paris To Sèvres*, Ohio State University Press, Columbus, 1974, pp. 131 et seq.

policies of the United States,¹ the demise of the Young Turk regime and the rise of Kemalism in Turkey.

No international criminal tribunal as envisaged in Article 230 was ever established. No arbitral commissions as stipulated for in article 144 were ever set up.

A new peace treaty eventually emerged between Kemalist Turkey and the Allies (British Empire, France, Italy, Japan, Greece, Romania and the Serbo-Croat-Slovene state). The Treaty of Lausanne of 24 July 1923 abandoned the Allied demand for international trial and punishment of the Ottoman Turks for the genocide against the Armenians, the commitment to grant reparations to the survivors of the genocide, and the Sèvres recognition of a free Armenian State (Section VI, Articles 88-93), which had declared its independence on 28 May 1918, but in the end lost Western Armenia to Turkey and Eastern Armenia to a communist takeover (backed by Soviet Red Army units), which would ultimately lead to incorporation of the new Republic of Armenia into the Soviet Union as a

1-Although U.S. diplomats had condemned the genocide as early as 1915, the U.S. Government did not take any action to redress the injustices after the war. It is worth remembering that U.S. Ambassador Henry Morgenthau, Sr., had called the massacres “race murder” and that on 10 July 1915 he had cabled Washington with the following description of the Ottoman policy: “Persecution of Armenians assuming unprecedented proportions. Reports from widely scattered districts indicate systematic attempt to uproot peaceful Armenian populations and through arbitrary arrests, terrible tortures, whole-sale expulsions and deportations from one end of the empire to the other accompanied by frequent instances of rape, pillage, and murder, turning into massacre, to bring destruction and destitution on them. These measures are not in response to popular or fanatical demand but are purely arbitrary and directed from Constantinople in the name of military necessity, often in districts where no military operations are likely to take place.” Samantha Power, *A Problem from Hell. America and the Age of Genocide*, Basic Books, New York, 2002, p. 6.

Soviet Republic.

Notwithstanding the fact that the Treaty of Sèvres never entered into force, the text of the Treaty remains eloquent evidence of the international recognition of the crime of “massacres” against the Armenian population of Turkey.

Prior to the drafting and negotiation of the Treaty of Sèvres, on 28 May 1915, the Governments of France, Great Britain and Russia had issued a joint declaration denouncing the Ottoman Government’s massacre of the Armenians as constituting “crimes against humanity and civilization for which all the members of the Turkish Government would be held responsible together with its agents implicated in the massacres.”¹

After the war, on 18 January 1919, the British High Commissioner, Admiral Arthur Calthorpe, informed the Turkish Foreign Minister that “His Majesty’s Government are resolved to have proper punishment inflicted on those responsible for the Armenian massacres”.² In this context, the High Commissioner drew up a list of 142 persons whose surrender would be demanded from the Sultan once the peace treaty went into effect, 130 of whom

1-For an excellent discussion of Foreign and Commonwealth Office Documents concerning the Armenian Genocide, see the Legal Opinion by Geoffrey Robertson, QC, *Was There an Armenian Genocide?*, published in London, 9 October 2009, ISBN 978-0-9564086-0-0. See also Egon Schwelb, “Crimes Against Humanity”, 23 *British Yearbook of International Law* (1946), 178-226 at 181.

2-FO 371/4174/118377 (folio 253), cited in Vahakn N. Dadrian, “Genocide as a Problem of National and International Law. The World War I Armenian Case and its contemporary Legal Ramifications” (1989), 14 *Yale Journal of International Law*, pp. 221-334 at 282.

were specifically charged with massacring Armenians.¹ For nearly two years Great Britain held some 140 Turkish prisoners at Malta, awaiting trial, but the British government was ultimately blackmailed into releasing them in 1921-22 in exchange for British officers and men who had been taken hostage by the new Kemalist Turkish government.²

However, a few trials did take place before Turkish courts martial in Istanbul, on the basis of articles 45 and 170 of the Ottoman Penal Code. Several ministers in the wartime Turkish cabinet and leaders of the Ittihad party, including the main architects of the genocide, the Young Turk leaders Talaat Pasha,³ Minister of the Interior, and Enver Pasha,⁴ Minister of War, were tried *in absentia* and convicted. The trials provide further evidence of the various aspects of the genocide against the Armenians. The accused were found guilty in the judgment of 5 July 1919, of “the organization and execution of the crime of

1-James F. Willis, *Prologue to Nuremberg. The Politics and Diplomacy of Punishing War Criminals of the First World War*, Greenwood Press, Westport, Connecticut, 1982, p. 158.

2- Cf. the negationist view expressed by Bilâl N. Simsir, member of the Turkish Historical Society, in the brochure *The Deportees of Malta and the Armenian Question*, published by the Foreign Policy Institute, Ankara, 1992.

3-Vahakn Dadrian, “Talaat”, in Dinah Shelton (ed.) *Encyclopedia of Genocide*, *op. cit.*, Vol. III, pp. 1019-20.

4-Alfred de Zayas, “Ismail Enver”, in Dinah Shelton (ed.) *op. cit.*, Vol. I, p. 289.

massacre” against the Armenian population.¹ Further trials were conducted before other Ottoman courts, partly on the basis of article 171 of the Ottoman military code concerning the offence of plunder of goods, and invoking “the sublime precepts of Islam” as well as of “humanity and civilization” to condemn “the crimes of massacre, pillage and plunder”.² These trials resulted in the conviction and execution of three of the perpetrators, Mehmed Kemal, county executive of Bogazhyan, Abdullah Avni, of the Erzincan gendarmerie, and Behramzade Nusret, Bayburt county executive, and District Commissioner of Ergani and Urfa (Edessa).³

1-William Schabas, *Genocide in International Law*, Cambridge University Press, 2nd revised edition 2009, p. 19f. See also Revised and updated report on the question of the prevention and punishment of the crime of genocide, prepared by Special Rapporteur Mr. Ben Whitaker (E/CN.4/Sub.2/1985/6): “At least 1 million, and possibly well over half of the Armenian population, are reliably estimated by independent authorities and eye-witnesses to have been killed or death-marched. This is corroborated by reports in United States, German and British archives and of contemporary diplomats in the Ottoman Empire, including those of its ally Germany. The German Ambassador, Baron Hans von Wangenheim, for example, on 7 July 1915 wrote “the government is indeed pursuing its goal of exterminating the Armenian race in the Ottoman Empire” (Wilhelmstrasse archives). Though the successor Turkish Government helped to institute trials of a few of those responsible for the massacres at which they were found guilty, the present official Turkish contention is that genocide did not take place although there were many casualties and dispersals in the fighting, and that all the evidence to the contrary is forged. See, *inter alia*, Viscount Bryce and A. Toynbee, *The Treatment of Armenians in the Ottoman Empire 1915-16* (London, HMSO, 1916); G. Chaliand and Y. Ternon, *Génocide des Arméniens 1915-16* (Brussels, Complexe, 1980); H. Morgenthau, *Ambassador Morgenthau’s Story* (New York, Doubleday 1918); J. Lepsius, *Deutschland und Armenien* (Potsdam, 1921 ...” at p. 9, footnote 13; Samantha Power, *A Problem from Hell. America and the Age of Genocide*, Basic Books, New York, 2002, pp. 1-16.

2-Trabzon Verdict, Takvimi Vekayi, No. 3616, Aug. 6, 1919, at 1-3, No. 3617, Aug. 7, 1919, at 2. Vahakn N. Dadrian, “Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications”, in *Yale Journal of International Law*, Vol. 14, No. 2 (1989) pp. 221-334 at 308.

3-Dadrian, *op. cit.*, p. 309.

Although the first tentative step toward the creation of an international criminal tribunal to punish genocide failed because of Turkish nationalism and Allied indifference, consensus on the reality of the genocide had been largely achieved. Of all failures to punish the war criminals of the First World War, this one was the most regrettable and it would have terrible consequences.¹

¹James Willis, *op. cit.*, p. 163.

III. THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE DOES NOT CREATE A NEW OFFENCE IN INTERNATIONAL CRIMINAL LAW, BUT IS DECLARATORY OF PRE-EXISTING INTERNATIONAL LAW.

As reflected in the relevant provisions of the Treaty of Sèvres, the doctrine of State responsibility for genocide and crimes against humanity already existed at the time of the Ottoman massacres against the Armenians. Such State responsibility entailed both an obligation to provide restitution and/or compensation¹ and the personal criminal liability of the perpetrators. The norms were clear. Non-compliance with said norms by Turkey

¹For instance, in the context of international armed conflict, article III of the 1907 Hague Convention IV on Land Warfare stipulates: “A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”

does not mean that the norms were meaningless. It only means that effective international enforcement machinery did not exist yet. Even today international law is violated with impunity, because the enforcement mechanisms remain largely ineffective.

At the end of the Second World War, the victorious Allies, pursuant to the London Agreement of 8 August 1945,¹ adopted the Charter of the International Military Tribunal, which provided in Article 6 (c) for the prosecution of the crime of genocide (“murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population”) as international crimes within the newly formulated offence of “crimes against humanity”.

In the three-volume *History of the United Nations War Crimes Commission*, we discover that the genocide against the Armenians was very much in the minds of the drafters of the London Agreement:

“The provisions of Article 230 of the Peace Treaty of Sèvres were obviously intended to cover, in conformity with the Allied note of 1915 ... offences which had been committed on Turkish territory against persons of Turkish citizenship, though of Armenian... race. This article constitutes, therefore, a precedent for Articles 6 c) and 5 c) of the Nuremberg and Tokyo Charters, and offers an example of one of the categories of ‘crimes against

1-8 U.N.T.S. 279; Reprinted in 39 *American Journal of International Law*, 257 (1945) (Supp).

humanity’ as understood by these enactments.”¹

The term genocide itself was officially used in the Nuremberg indictment of 18 October 1945, charging under count 3 that the defendants had committed murder and ill-treatment of civilian populations, and, in particular:

“conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups ...”²

In his concluding statement, the British Prosecutor, Sir Hartley Shawcross, stated that:

“Genocide was not restricted to extermination of the Jewish people or of the Gypsies. It was applied in different forms to Yugoslavia, to the non-German inhabitants of Alsace-Lorraine, people of the Low Countries and of Norway. The techniques varied from nation to nation, from people to people. The long-term aim was the same in all cases ...”³

By Resolution 95 (1) of 11 December 1946, the UN General Assembly “affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and

1-United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, 1948, p. 45. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, The Hague: Kluwer Law International, (1999).

2-Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Nuremberg, 1947, Vol. I, pp. 43-44.

3-Ibid., vol. XIX, pp. 497-498.

the judgment of the Tribunal”, and in Resolution 96 (1) of the same date, the General Assembly confirmed “that genocide is a crime in international law, which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable”.¹

On 9 December 1948, the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide,² in which the parties “confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

In the classic Oppenheim/Lauterpacht textbook on *International Law*, Professor Hersch Lauterpacht noted that the Convention was not only forward-looking but that it had a primary retrospective significance:

“It is apparent that, to a considerable extent, the Convention amounts to a registration of protest against past misdeed of individual or collective savagery rather than to an effective instrument of their prevention or repression. Thus, as the punishment of acts of genocide is entrusted primarily to the municipal courts of the countries concerned, it is clear that such acts, if perpetrated in

1-Official Records of the First Session of the General Assembly, Fifty-fifth plenary meeting, 11 December 1946, pp. 188-189. See also Preamble of the Genocide Convention.

2-G.A. Resolution 260 A (III) of 9 December 1948, entry into force 12 January 1951. <http://www2.ohchr.org/english/law/genocide.htm>

obedience to national legislation, must remain unpunished unless penalized by way of retroactive laws. On the other hand, the Convention obliges the Parties to enact and keep in force legislation intended to prevent and suppress such acts, and any failure to measure up to that obligation is made subject to the jurisdiction of the International Court of Justice and of the United Nations. With regard to the latter, the result of the provision in question is that acts of commission or omission in respect of genocide are no longer, on any interpretation of the Charter, considered to be a matter exclusively within the domestic jurisdiction of the States concerned. For the Parties expressly concede to the United Nations the right of intervention in this sphere. This aspect of the situation constitutes a conspicuous feature of the Genocide Convention—a feature which probably outweighs, in its legal and moral significance, the gaps, artificialities and possible dangers of the Convention.”¹

In this context, it is useful to look once again at the language of the Convention, which does not purport to create a new crime, but recognizes in the preamble “that at all periods of history genocide has inflicted great losses on humanity” and in Article 1 “The Contracting Parties *confirm* that genocide, whether committed in time of peace or in time of war, is a crime under international law...” (emphasis added) It is important to note that the contracting parties do not “declare” or “proclaim” for the future, but “confirm” that genocide is already an

¹-Oppenheim/Lauterpacht, *International Law*, 8th edition, 1955, vol. I, p. 751.

international crime.

Moreover, in the view of leading publicists in public international law, the Genocide Convention of 1948 was not constitutive of a new offence in international law termed “genocide”, but was declaratory of the pre-existing crime;¹ in other words, the Convention merely codified the prohibition of massacres, which was already binding international law. In this sense, the Convention is necessarily both retrospective and future-oriented.

What the Genocide Convention added to the existing body of international law was an affirmative obligation on States parties to make provision for effective penalties for all acts punishable under the Convention (article V), a duty to prosecute (article VI) by a competent national tribunal or by an international criminal court to be established. The Convention also creates a preventive mechanism by urging States to call upon organs of the United Nations to take appropriate measures (article VIII), and confers jurisdiction on the International Court of Justice

1-Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960. Leo Kuper, *International Action Against Genocide*, London, Minority Rights Group, 1984. Hans Heinrich Jescheck, “Genocide” in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 4, 2000, pp. 541-544. Dieter Blumenwitz, *Rechtsgutachten über die Verbrechen an den Deutschen in Jugoslawien 1944-48*, Juristische Studien, München 2002, pp. 26-27, where Professor Blumenwitz affirms the retroactive application of the Genocide Convention to the killing of some 200,000 civilians, members of the ethnic German minority in Yugoslavia, by Tito partisans and militia in 1944-45. Christian Tomuschat, “Die Vertreibung der Sudetendeutschen. Zur Frage des Bestehens von Rechtsansprüchen nach Völkerrecht und deutschem Recht”, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 56, 1996, pp. 1-69. Felix Ermacora, *Die Sudetendeutschen Fragen*, Munich, 1992, p. 178, where Professor Ermacora affirms the retroactive application of the Genocide Convention to the killing of some 250,000 civilians, members of the German ethnic minority of Czechoslovakia, in 1945-46.

in all matters relating to the Genocide Convention, including determination of the responsibility of a State for genocide (article IX).

In its 1951 Advisory Opinion, the International Court of Justice stated that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on all States, even without any conventional obligation.”¹

Also in this sense, the UN Commission on Human Rights noted in 1969 that “It is therefore taken for granted that as a codification of existing international law the Convention on the prevention and Punishment of the Crime of Genocide did neither extend nor restrain the notion genocide, but that it only defined it more precisely.”²

Even though the Genocide Convention has not been universally ratified, the prohibition of genocide must be deemed to be *jus cogens*.³ As of December 2009, 141 of the 192 member States of the United Nations had ratified the Convention. Moreover, as the International Court of Justice elaborated in the *Barcelona Traction Case* (Second Phase), there are distinctions to be drawn between State obligations arising *vis à vis* another state and obligations

1-Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports (1951) pp. 15-69. See Diane F. Orentlicher, “Genocide” in Roy Gutman and David Rieff (eds.), *Crimes of War*, New York 1999, pp. 153-157. Joe Verhoeven, “Le Crime de Génocide”, in *Revue belge de droit international*, vol XXIV, 1991, pp. 5-26 at 13.

2-Report of the ad hoc working group of experts established under Resolution 2(XXIII) and 2(XXIV) of the Commission on Human Rights, Doc. E/CN.4/1984/Add.18.

3-Ian Brownlie, *Principles of Public International Law*, fourth edition, Clarendon Press, Oxford, p. 513.

erga omnes, or “towards the international community as a whole”. The Court stated:

“By its very nature, the outlawing of genocide, aggression, slavery and racial discrimination are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes* ...”¹

It is precisely because of its *erga omnes* quality that the crime of genocide cannot be subject to prescription, and that State responsibility for the crime, i.e. the obligation of the genocidal State to make reparation, does not lapse with time. This is independent of a determination whether or not the Genocide Convention applies retroactively to the Holocaust or to the genocide against the Armenians.

¹Barcelona Traction, Light and Power Co., Ltd (Belgium v. Spain), ICJ Reports (1970) 3 at 32.

IV. NON-PRESCRIPTION OF THE CRIME OF GENOCIDE

When the United Nations drafted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (adopted 26 November 1968, in force 11 November 1970), it clearly and deliberately pronounced its retroactive application. In Article 1 it stipulated “No statutory limitation shall apply to the following crimes, *irrespective of the date of their commission...* the crime of genocide as defined in the 1948 Convention... .” (emphasis added)

The principle of *nullum crimen sine lege, nulla poena sine lege praevia* (no crime without law, no penalty without

previous law), laid out in paragraph 1 of article 15 of the International Covenant on Civil and Political Rights is conditioned as follows in paragraph 2: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

Similarly, article 11, paragraph 2, of the Universal Declaration of Human Rights of 10 December 1948 stipulates that the prohibition of *ex post facto* penal sanctions does not apply if the offence was an offence under national or international law.

In this context it is relevant to recall the double vocation of the Genocide Convention, namely to prevent and to punish the crime of genocide. In order to prevent genocide, it is important to deter future offenders by ensuring the punishment of prior offenders. Indeed, the punishment of Nazi officials for participation in the crime of genocide has made the horrible reality of genocide visible and concrete, so that genocide can be perceived by all to be a heinous crime. One consequence of the universal recognition that genocide is a crime is that the criminal, besides being condemned and punished for the crime, is not allowed to keep the fruits of the crime. Confiscated Jewish properties have thus been returned to the survivors or to their heirs, or compensation schemes and funds have been established. This illustrates the principle that, together with the recognition of genocide as a crime under international law there is also an

international duty to undo its effects and to grant restitution and compensation to the victims and their heirs.

Although Turkey is not a State party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, international law is clear on the subject: There is no prescription on the prosecution of the crime of genocide, regardless of when the genocide occurred, and the obligation of the responsible State to make restitution or pay compensation for properties obtained in relation to a genocide does not lapse with time.¹

In its judgment of 6 October 1983 in the case concerning Klaus Barbie, the French Cour de Cassation rejected the jurisdictional objections of the defence and stated that the prohibition on statutory limitations for crimes against humanity is now part of customary international law.² France also enacted a law on 26 December 1964 dealing with crimes against humanity as “imprescriptibles” by nature (*Nouveau Code penal* of 1994, Arts. 211-1 to 213-5).³

1-General Assembly Resolutions 2538 (XXIV) of 15 December 1968; 2583 (XXIV) of 15 December 1969, 2712 (XXV) of 15 December 1970; 2840 (XXVI) of 18 December 1971, 3029 (XXVII) of 18 December 1972; 3074 (XXVIII) of 3 December 1973, etc.

2-*Fédération nationale des déportés et internés et patriots et al. v. Barbie*, 78 International Law Reports 125, p. 135. See Doman, “Aftermath of Nuremberg: The Trial of Klaus Barbie”, 60 *Colorado Law Review* 449 (1989).

3-Jacques Francillon, “Aspects juridiques des crimes contre l’humanité”, in *L’Actualité du Génocide des Arméniens*, Edipol, 1999, pp. 397-404 at 398.

V. INTERNATIONAL AND NATIONAL PROSECUTION OF GENOCIDE

The crime of genocide was one of the charges against the accused in three of the twelve successor trials held at Nuremberg pursuant to Control Council Law No. 10, before US military tribunals following the international military tribunal proceedings. In *United States v. Alstötter et al.*, the Court made repeated reference to General Assembly Resolution 96(I):

“The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime [in Resolution 96(I)]

is persuasive evidence of the fact. We approve and adopt its conclusions ... [We] find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed.”¹

In the *Einsatzgruppen* trial (Nuremberg Trial IX), the defendants were charged with participation in a “systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics”.²

The first national prosecutions specifically on the crime of genocide, but without reference to the Genocide Convention, which had not yet been adopted, were carried out by Polish courts. Thus, in July 1946, Artur Greiser was charged with and convicted of genocide.³

The leading prosecution by a national court, with reference to the Genocide Convention, was carried out by the State of Israel. In 1960 Adolf Eichmann, a Nazi official in World War II, was abducted from Argentina and taken to Israel for trial under Israeli law for his involvement in the genocide against the Jews during the war. Eichmann was prosecuted under the “Nazi and Nazi Collaborators (Punishment) law of 1951”, which was modelled on the

1-*United States of America v. Alstötter et al.* (1948) 6 LRTWC 1, 3TWC 1, pp. 983.

2-*United States of America v. Greifeldt et al.* (1948) 13 LRTWC 1, p. 2.

3-*Poland v. Greiser* (1948) 13 LRTWC 70 (Supreme National Tribunal of Poland).

genocide provision of the 1948 Genocide Convention.¹

He was charged on four counts of genocide corresponding to the first four subparagraphs of article II of the Convention: killing Jews, causing serious physical and mental harm, placing Jews in living conditions calculated to bring about their physical destruction, and imposing measures intended to prevent births among Jews.²

Eichmann challenged the jurisdiction of the Israeli Court with reference to article 6 of the Genocide Convention, which stipulates:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

In rejecting Eichmann’s objections, the Israeli District Court held:

“We must ... draw a clear distinction between the first part of Article 1, which lays down that ‘the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law’ – a general provision which confirms a principle of customary international law as ‘binding on States,

1-A-G *Israël v. Eichmann* (1961) 36 ILR 5 (District Court of Jerusalem), paras. 20-22. District Court Jerusalem, 11 December 1961 “*The Attorney General of the Government of Israël v. Eichmann* (case No. 40/61)” *American Journal of International Law*, 1962, p. 814.

2-Schabas, *op. cit.*, 426ff.

even without any conventional obligation’ – and Article 6, which comprises a special provision undertaken by the contracting parties with regard to the trial of crimes that may be committed in the future.”

Specifically on the issue of retroactivity, the Supreme Court of Israel endorsed the view of the District Court concerning the customary nature of the crime of genocide, and noted that “the enactment of the Law was not from the point of view of international law a legislative act which conflicted with the principle *nulla poena* [no penalty without previous law] or the operation of which was retroactive, but rather one by which the Knesset gave effect to international law and its objectives.”¹

A number of courts in the United States have dealt with the question of *ex post facto* legislation by relying on the judgment of the International Military Tribunal at Nuremberg to the effect that the Nuremberg Charter was declarative of international law and was not new law. In allowing the extradition to Israel of John Demjanjuk, the United States District Court for Ohio and the Circuit Court for the sixth Circuit held:

“The Nuremberg International Military Tribunal provided a new forum in which to prosecute persons accused of war crimes committed during World War II pursuant to an agreement of the wartime Allies, see The Nuremberg Tribunal, 6 F.R.D. 69. That tribunal consistently rejected defendants’ claims that they were being tried under *ex*

¹Attorney-General of Israël v. Eichmann (1962), judgment of the Supreme Court of Israel, 36 ILR 277, para. 11.

post facto laws. Id... the statute is not retroactive because it is jurisdictional and does not create a new crime. Thus, Israel has not violated any prohibition against the *ex post facto* applications of criminal laws which may exist in international law.”¹

There are many other precedents of retrospective application of international law in other countries in matters concerning genocide. For instance, in the case of *Regina v. Imre Finta* in Canada, a trial for “crimes against humanity” was carried out on the basis of a 1987 Canadian statute that permits retrospective application of international law. In its judgment the Court recognized the existence of “crimes against humanity” under international law before 1945.²

The practice of courts in other countries also vindicates the validity of the principles contained in the Genocide Convention. Although prosecution has not been based on the Genocide Convention itself but rather on German penal law, the Federal Republic of Germany has prosecuted more than sixty thousand Germans and other nationals for war crimes and complicity in the crime of genocide committed during World War II, prior to the entry into force of the Genocide Convention, and many judgments make reference to the Genocide Convention.

1-*In the Matter of the Extradition of John Demjanjuk*, 612 F. Supp. 544 (DC Ohio 1985), pp. 554-8.

2-*Regina v. Finta*, 50 C.C.C. (3d) 247; 61 D.L.R. 85 (4th 1989). See also Green, “Canadian Law, War Crimes and Crimes Against Humanity”, 59 *British Yearbook of International Law*, 217 (1988), Cherif Bassiouni, *Crimes Against Humanity*, 1992 Kluwer Academic Publishers, Dordrecht, pp. 144, 226-227.

The German Government has similarly recognized its international obligation to make restitution of property stolen from victims of genocide and to grant compensation to the survivors of the victims.¹

It is important to note, moreover, that whether or not the Genocide Convention itself applies in a concrete situation, State practice and, in particular the Eichmann case, show that the crime of genocide can be prosecuted on the basis of national law enacted following the commission of the offence. *A fortiori* civil liability for genocide can also be imposed on the basis of *ex post facto* legislation.

1-N. Sagi, *German Reparations. A History of the Negotiations*, Jerusalem: The Magnes Press, The Hebrew University, 1980, pp. 212–41.

VI. THE COMPETENT TRIBUNAL: UNIVERSAL JURISDICTION¹ AND “PROTECTIVE PRINCIPLE”

In the Eichmann case the Israeli Court took the view that crimes against humanity constitute *delicta juris gentium* (crimes against the law of nations) , to which the principle of universal jurisdiction has at all times been generally applicable. In rejecting Eichmann’s jurisdictional challenge, the District Court held:

“The abhorrent crimes defined in this Law are not crimes under Israel law alone. These crimes, which struck at the

¹-Cherif Bassiouni, “Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice”, 42 *Virginia Journal of International Law*, 2001, pp. 81- 160.

whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.”

It drew upon Article 6 of the Genocide Convention to explain that the purpose of the Convention could not be to limit prosecution only to the States where the offence had been perpetrated:

“Moreover, even with regard to the conventional application of the Convention, it is not to be assumed that Article 6 is designed to limit the jurisdiction of countries to try crimes of genocide by the principle of territoriality... Had Article 6 meant to provide that those accused of genocide shall be tried only by ‘a competent tribunal of the State in the territory of which the act was committed’ (or by an ‘international court’ which has not been constituted), then that article would have foiled the very object of the Convention to prevent genocide and inflict punishment therefore... .”

Accordingly, the District Court took the view that it was entitled to exercise jurisdiction under the “protective principle”, “which gives the victim nation the right to try any who assault its existence”. The Court cited Hugo

Grotius and other authorities:

“The State of Israel, the sovereign State of the Jewish people, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed its sons with intent to put an end to the survival of this people. We are convinced that this power confirms to the subsisting principles of nations.”¹

The Eichmann precedent illustrates the possibility for a State that did not exist at the time of the crime (Israel) to try and punish a foreign citizen for genocide, when it has a legitimate and fundamental link to the victims.

Similarly, a State that did not exist at the time of the genocide against the Armenians (Armenia) could represent the rights of the victims of the genocide against the Armenians and their survivors. Moreover, based on the theory of legitimate and fundamental links to the victims, other States like France, Canada and the United States could represent the rights of the descendants of the survivors of the genocide against the Armenians, who have become citizens of or currently reside in France, Canada, and the United States.

¹*Attorney-General of Israël v. Eichmann* (judgment of the District Court of Jerusalem 12 December 1961) 36 ILR 5, 5-27 para. 38.

VII. THE DOCTRINE OF STATE RESPONSIBILITY FOR INTERNATIONALLY WRONGFUL ACTS

A general principle of international law stipulates that a State is responsible for injuries caused by its wrongful acts and bound to provide reparation for such injury.¹

¹-Malcolm Shaw, *International Law*, p. 481 “A breach of an international obligation gives rise to a requirement for reparation.”, Wladyslaw Czaplinski, *State Succession and State Responsibility*, in *Canadian Yearbook of International Law* 339 (1991): “State responsibility is a legal relationship created through the violation of an international legal obligation by a State; that violation gives rise to the duty to compensate for any resulting damage, one of the oldest principles of international law and universally recognized in international practice.” Karl Zemanek, “Responsibility of States: General Principles” in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 4, 2000, pp. 219-229; Mohammed Bedjaoui, “Responsibility of States: Fault and Strict Liability”, in Bernhardt (ed.), pp. 212-216. Irwin Cotler, «Confiscated Jewish Property: The Holocaust, Thefticide and Restitution : A Legal Prespective» in : 20 *Cardozo Law Review*, December 1998, pp. 601-624, p. 610.

The Permanent Court of International Justice enunciated this principle in the *Chorzow Factory Case* as follows: “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.”¹

It should be stressed that the wrong in question is not just a mere violation of international law engaging interstate responsibility, but the gravest criminal violation of international law engaging, as the International Court of Justice has determined, international responsibility *erga omnes* – an obligation of the State toward the international community as a whole.

Thus, the international crime of genocide imposes obligations not only on the State that perpetrated the genocide, but also on the entire international community: (a) not to recognize as legal a situation created by an international crime, (b) not to assist the author of an international crime in maintaining the illegal situation, and (c) to assist other States in the implementation of the aforementioned obligations.² In a very real sense, the legal impact of the *erga omnes* nature of the crime of genocide goes far beyond the mere retroactivity of application of the Genocide Convention. It imposes an affirmative obligation on the international community not to recognize an illegal situation resulting from genocide. The mechanism of international mediation and conciliation can be

1-*Chorzow Factory Case (Germany v. Poland)*, 1928 P.C.I.J. (ser.A) No. 17. p. 29. Ignaz Seidl-Hohenveldern, “German Interests in Polish Upper Silesia Cases”, in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. II, 1995, pp. 550-553.

2-Karl Zemanek, *op. cit.* p. 226.

called upon to design appropriate schemes to redress the wrong.

VIII. CONTINUATION OF THE CRIME OF GENOCIDE: THE DESTRUCTION OF HISTORICAL MONUMENTS

A further argument against the notion of prescription with regard to the genocide against the Armenians is that whereas the killing stopped around 1923, after most of the Armenians in Turkey had been murdered or forced into exile, the destruction of their property and the *damnatio memoriae*, the destruction of their historical memory continued. Such acts were intended to perpetuate and secure the work of genocide by destroying memory – the historical proof of the presence of thirty centuries of Armenians in Asia Minor. Their churches and monasteries were burned by arson and destroyed by explosion. In all, 1036 churches or monasteries were destroyed.

The Khtzkonk monastery (11th century) was destroyed by dynamite after the Second World War. The Cathedral of Urfa was converted into a museum. The building of the Church of Christ Saviour at Ani was cut in two. The Church of Ordou was transformed into a prison and the inscriptions in Armenian were erased.. The Armenian inscriptions were removed from the Central School in Constantinople. Besides the deliberate destruction, the Turkish Government has contributed to the decay and destruction of Armenian buildings by denying building permits needed to carry out repairs.¹ The scale of destruction of the Armenian cultural heritage has been so widespread and systematic over the decades, that these few examples should not be misinterpreted as minimizing the severity and thoroughness of the continuation of the genocide.

Among the Turkish acts of memory-destruction can be listed the suppression of the name “Armenia” from official maps and the changing of the names of Armenian villages and towns in Asia Minor, which continued late into the 1950s. As University of California Professor Kouymjian elaborated to the *Tribunal Permanent des Peuples* in Paris in 1984, ninety per cent of the historical Armenian names

¹Christopher J. Walker (ed.), *Armenia and Karabagh*, Minority Rights Group, London. 1991, pp. 38-39.

have been modified.¹ Inscriptions in Armenian language continue to be removed from buildings and monuments. And this happened in contravention of articles 38 to 44 of the Treaty of Lausanne of 1923, which was intended to protect the rights of minorities, including the cultural rights of the Armenian minority.

The absurdity of the prevailing situation with regard to the non-restitution of Armenian properties can be illustrated by the following hypothetical situation: what would the reaction of the international community be, if the post-war German Government had converted Jewish synagogues into Christian Churches and kept the lands and houses of the victims of the Holocaust? Neither the world community nor the German people themselves would have tolerated this disgrace.

Another form of continuing the genocide is by rehabilitating the murderers. In March 1943 the mortal remains of the principal architect of the genocide, Ittihad Interior Minister Talaat Pasha, were ceremonially repatriated from Germany to Turkey, where he was re-interred on

¹Dickran Kouymjian, "Destruction des monuments historiques arméniens, poursuite de la politique turque de génocide" in *Tribunal Permanent des Peuples, le Crime de Silence*, Flammarion, Paris, 1984, pp. 295 et seq.; «La Confiscation des biens et la destruction des monuments historiques comme manifestation du processus génocidaire» in *L'Actualité du Génocide des Arméniens*, Edipol. 1999, pp. 219-230. See also: *Armenia*, Minority Rights Report, No. 32, London 1976.

the Hill of Liberty in Istanbul.¹ Subsequently at least two streets have been named after him.

Yet another form of continuing the genocide is by negating its historical reality, as if the 1.5 million Armenians of Anatolia had never existed. Negationism entails a denial of the right to one's identity and the right to one's history. Particularly outrageous is Article 301 of the new Turkish Penal Code (TPC), which is being frequently used to prosecute human rights defenders, journalists and other members of civil society who peacefully express their dissenting opinion on historical or other issues. Article 301, on the "denigration of Turkishness", the Republic, and the foundation and institutions of the State, was introduced with the legislative reforms of 1 June 2005 and replaced Article 159 of the old penal code. Amnesty International has repeatedly opposed the use of Article 159 to prosecute non-violent critical opinion and called on the Turkish authorities to abolish the article.² More specifically, Article 305 of the TPC criminalizes "acts against the fundamental national interest". The written explanation attached to the draft, when the law passed through Parliament, provided as examples of such acts "making

1-Walker, *op. cit.*, p. 37. David Marshall Lang quotes in his book *The Armenians. A People in Exile* London 1981, p. 27, the telegraph which Talaat, addressed to the Governor of Aleppo on 15 September 1915: "You have already been informed that the Government has decided to exterminate entirely all the Armenians living in Turkey. No-one opposed to this order can any longer hold an administrative position. Without pity for women, children and invalids, however, tragic the methods of extermination may be, without heeding any scruples of conscience, their existence must be terminated." Also reported in the *Daily Telegraph*, London 29 May 1922.

2-http://www.amnesty.org/en/alfresco_asset/c8f87ee9-a303-11dc-8d74-6f45f39984e5/eur440352005en.html

propaganda for the withdrawal of Turkish soldiers from Cyprus or for the acceptance of a settlement in this issue detrimental to Turkey... or, contrary to historical truths, that the Armenians suffered a genocide after the First World War.” Besides being an insult to the memory of the victims of the genocide, Turkish negationism entails a gross violation of article 19 of the International Covenant on Civil and Political Rights, which guarantees the right to seek and impart information, and which is the basis of the human right to truth.¹

1- The Right to Truth was affirmed by the United Nations General Assembly in Resolution 2005/66. In September 2009 the Human Rights Council discussed a report by the United Nations High Commissioner for Human Rights (UN Doc. A/HRC/12/19) at its twelfth session and adopted a relevant resolution A/HRC/12/L.27. On 10 October 2008 a number of prominent historians led by Professor Pierre Nora of the Académie Française proclaimed the “Appel de Blois”, which aims at ensuring the liberty of research of historians. <http://www.lph-asso.fr/>. A member of this pleiad *Liberté pour l'Histoire*, Professor Timothy Garton Ash (Oxford) published an article criticising Turkish “memory laws” in the *Guardian* of 16 October 2008: “*The Freedom of Historical Debate is Under Attack by the Memory Police*”. <http://www.guardian.co.uk/commentisfree/2008/oct/16/humanrights>

IX. DOCTRINE OF STATE SUCCESSION

In the report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights, Professor M. Cherif Bassiouni reiterated a basic principle of succession:

“In international law, the doctrine of legal continuity and principles of State responsibility make a successor Government liable in respect of claims arising from a former government’s violations.”¹

This applies *a fortiori* in the case of genocide and its

¹-Commission on Human Rights, Document E/CN.4/1999/65.

consequences for the survivors and their descendants, because State responsibility necessarily attaches to the State itself and does not allow for *tabula rasa*. Thus, it was consistent with international law for the Federal Republic of Germany to assume full responsibility for the crimes committed by the Third Reich. This has also been the case with regard to the responsibility of France to repair the wrongs committed by the Vichy Government during the German occupation, and of Norway to grant restitution for confiscations and other injuries perpetrated on Jewish persons during the Quisling regime.¹

Article 36 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 8 April 1983² provides that a succession of States does not “as such affect the rights and obligations of creditors”. Thus, the claims of the Armenians for their wrongfully confiscated properties did not disappear with the change from the Sultanate to the regime of Mustafa Kemal.³

The principle of responsibility of successor States has been held to apply even when the State and government that committed the wrong were not that of the successor State. This principle was formulated, *inter alia*, by the Permanent Court of Arbitration in the Lighthouse

1-Björn Westlie, *Coming to Terms with the Past: the Process of Restitution of Jewish Property in Norway* (Inst. of the World Jewish Congress, Policy Forum No. 12, 1996).

2-UN Doc A/Conf.117/14.

3-Kevork K. Baghdjian, *La confiscation, par le gouvernement turc, des biens arméniens... dits abandonnés*, Montréal, 1987.

Arbitration case.¹ There France claimed that Greece was responsible for a breach of State concessions to its citizens by the autonomous State of Crete, committed before Greece's assumption of sovereignty over Crete. The PCA held that Greece was obligated to compensate for Crete's breaches, because Greece was the successor State.

The principle of State succession undoubtedly applies to the Eastern European States, and, in particular, to Serbia-Montenegro for the crimes committed by the Federal Republic of Yugoslavia.² This is exemplified *inter alia* in the judgment of the international Court of Justice in the case *Bosnia and Herzegovina v. The Federal Republic of Yugoslavia*³, which addresses the issue of succession of States and holds Serbia and Montenegro responsible for events that occurred during the rule of the Federal Republic of Yugoslavia. State practice, decisions of international tribunals and decisions of domestic courts support this conclusion.

1-Lighthouses Arbitration between France and Greece , 23 *International Law Reports* pp. 659-676. C. Rousseau, «L'affaire franco-hellénique des phares et la sentence arbitrale du 24 juillet 1956», *Revue Générale de Droit International Public*, Vol. 63 (1959) pp. 248-292. J.P. Monnier, «La succession d'Etats en matière de responsabilité internationale», *AFDI*, vol. 8 (1962) pp. 65-90 at pp. 80-85.

2-For the question of the Federal Republic of Yugoslavia's status *vis à vis* the Genocide Convention, see Matthew Craven, "The Genocide Case, the Law of Treaties and State Succession", *British Yearbook of International Law*, 1997, pp. 127-163.

3-Initial submission against Yugoslavia, <http://www.icj-cij.org/docket/files/91/7199.pdf>, final Judgment of 26 February 2007 against Serbia <http://www.icj-cij.org/docket/files/91/13685.pdf>.

X. REMEDIES TO VICTIMS OF ETHNIC CLEANSING AND GENOCIDE: NOT LAPSED BECAUSE OF PRESCRIPTION

The principal remedies for victims of genocide and ethnic cleansing are 1) the right to return to their homes and property, 2) the right to restitution and compensation.

In his final Report to the Sub-Commission, Special Rapporteur Awn Shawkat Al Khasawneh concluded that forced population transfers violated numerous civil, political, economic, social and cultural rights and that States were obliged to provide reparation to the victims of expulsion and ethnic cleansing. Article 8 of the appended draft declaration on the illegality of forced population transfers stipulates:

“Every person has the right to return voluntarily, and in safety and dignity, to the country of origin and, within it, to the place of origin or choice. The exercise of the right to return does not preclude the victim’s right to adequate remedies, including restoration of properties of which they were deprived in connection with or as a result of population transfers, compensation for any property that cannot be restored to them, and any other reparations provided for in international law.”¹

Article 12 of the International Covenant on Civil and Political Rights guarantees the right of freedom of movement, including the right to return of refugees and expellees. The Committee’s general comment on article 12 stipulates: “The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one’s own country. It includes not only the right to return after having left one’s own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country (for example, if that country is the person’s State of

1-Special Rapporteur Awn Shawkat Al Khasawneh, *Final Report on the Human Rights Dimensions of Population Transfers*, Sub-Commission document E/CN.4/Sub.2/1997/23, Annex II. Pursuant to the Dayton Accords of December 1995, the Human Rights Chamber for Bosnia and Herzegovina was established. This Tribunal received some 15,000 cases concerning the right to return and the right to restitution, and contributed significantly to a growing jurisprudence in this field. See *Human Rights Chamber for Bosnia and Herzegovina, Digest of Decisions on Admissibility and Merits: 1996-2002*, with an Introduction by Manfred Nowak, N.P.Engel Publishers, Kehl am Rhein, 2004. See also Alfred de Zayas, “The Right to the Homeland, Ethnic Cleansing and the International Criminal Tribunal for the former Yugoslavia” in *Criminal Law Forum*, Vol. 6, 1995, pp. 257-314, and Alfred de Zayas “Forced Population Transfer” in the Max Planck Encyclopedia of Public International Law, Oxford University Press (online 2009).

nationality). The right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries.”¹ This means that the diaspora Armenians, in principle, have a right to return to the lands from which their ancestors had been expelled or from whence they had to flee to escape genocide.

In this context it is relevant to call to mind that Turkey ratified the ICCPR on 23 September 2003 and the first Optional Protocol thereto on 26 November 2006. In principle, diaspora Armenians who wish to return and settle in Turkey and who are denied their right to do so could invoke article 12 of the Covenant before the Human Rights Committee. It would be an interesting test case, especially when joined with considerations of continued violations of CCPR rights, including the right to identity and cultural heritage, affirmed by the Committee in its “Views” in case No. 549/1993 (*Francis Hopu and Tepoaitu Bessert v. France*).²

Because of the continuing character of the crime of genocide in factual and legal terms, neither the right to return nor the remedy of restitution has been foreclosed

1-Human Rights Committee, General Comment No. 27, CCPR/C/21/Rev.1/Add.9, para. 19. [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6c76e1b8ee1710e380256824005a10a9](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9) See also Manfred Nowak, *CCPR Commentary*, N.P.Engel Publishers, 2005; Jakob Th. Möller and Alfred de Zayas, *United Nations Human Rights Committee Case Law 1977-2008*, N.P.Engel 2009.

2-UN Doc. General Assembly Official Records, Fifty-second Session, Supplement 40 (A/52/40). Human Rights Committee, *Annual Report to the General Assembly*, 1997 Report, Vol. II, Annex VI, Sect. H. para.10.3. See also Möller/de Zayas, *op. cit.*, p. 335.

by the passage of time.¹ Accordingly, the descendants of the victims of the genocide against the Armenians, both individually and collectively, have standing to advance a claim for restitution. Such claims have been advanced by the Jewish survivors of the Holocaust and by their descendants, who have successfully obtained restitution and compensation from many States where their property had been confiscated.² Whenever possible *restitutio in integrum* (complete restitution, restoration to the previous condition) ought to be granted, so as to re-establish the situation that existed before the violation occurred. But where *restitutio in integrum* is not possible, compensation may be substituted as a remedy.

Restitution remains a continuing State responsibility also because of Turkey's current human rights obligations

1-A leading international law expert in Europe, the late Professor Felix Ermacora, member of the UN Human Rights Committee, member of the European Commission on Human Rights, and Special Rapporteur for Afghanistan and Chile of the UN Commission on Human Rights, maintained this view. In a detailed legal opinion on the continuing obligation to grant restitution to the expelled Germans from the Czech Republic and from Slovakia, some 250,000 of whom had perished in the course of their ethnic cleansing 1945-46, Ermacora wrote: "Ist die Konfiskation von Privatvermögen Teil eines Völkermordes, so ist auch ihre Rechtsnatur Teil eines Rechtsganzen. D.h. der Vermögensentzug hatte für sich selbst im vorliegenden Gesamtzusammenhang Völkermordcharakter. Er unterliegt auch der Beurteilung aufgrund der Völkermordkonvention, deren Partner sowohl die BRD als auch die Tschechoslowakei ist. Entsprechend den Regeln internationalen Rechts sind die Akte des Völkermordes – so auch die Vernichtung von Lebensbedingungen, wie sie durch einen totalen Vermögensentzug stattgefunden haben und mit der Vertreibung kombiniert waren, zumindest nach der Konvention über die Nichtverjährbarkeit von Verbrechen gegen die Menschlichkeit nicht verjährbar." Felix Ermacora, *Die Sudetendeutschen Fragen*, Munich, 1992, p. 178.

2-Irwin Cotler, *op. cit.*, p. 609. Sabine Thomsen, "Restitution" in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. 4, 2000, pp. 229-32. "Nuremberg 50 Years Later: The Restitution of Jewish Property and Norwegian Justice", *Nordic Journal of International Law*, 1998, No. 3, pp. 275-287.

under international treaty law, particularly the corpus of international human rights law.

The United Nations Sub-Commission on Promotion and Protection of Human Rights devoted much time to the need to formulate principles and guidelines on reparation for victims of gross violations of human Rights. Already in his 1997 report, Special Rapporteur Theo van Boven observed in Principle 6:

“Reparation may be claimed individually and where appropriate collectively, by the direct victims of violations of human rights and international humanitarian law, the immediate family, dependants or other persons or groups of persons closely connected with the direct victims.”

Principle 9 of his draft further stipulates:

“Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights or international humanitarian law. Civil claims relating to reparations for gross violations of human rights and international humanitarian law shall not be subject to statutes of limitations.”

and Principle 12:

“Restitution shall be provided to re-establish the situation that existed prior to the violations of human rights or international humanitarian law. Restitution requires, *inter alia*, ... return to one’s place of residence and

restoration of... property.”¹

UN Sub-Commission member Mr. Louis Joinet presented two reports containing comparable language:

“Any human rights violation gives rise to a right to reparation on the part of the victim or his beneficiaries, implying a duty on the part of the State to make reparation and the possibility of seeking redress from the perpetrator.”²

On 16 December 2005, based on a recommendation by the Commission on Human Rights and on the Sub-Commission reports of Theo van Boven, Cherif Bassiouni and Louis Joinet, the UN General Assembly adopted the “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross violations of International Human Rights Law and Serious Violations of

1-Commission on Human Rights, fifty-third session, Doc. E/CN.4/1997/104. Compare with the first report by Professor Theo van Boven C/CH.4/Sub.2/1993/8 of 2 July 1993, section IX, and the second report C/CN.4/Sub.2/1996/7 of 24 May 1996.

2-Special Rapporteur Louis Joinet, Principle 36 in document E/CN.4/Sub.23/1997/20 of 26 June 1997 and Principle 33 in Document E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997.

International Humanitarian Law.”¹ Principle IX lays down what is meant by reparation and stipulates in paragraphs 15 to 21:

“Para. 15. Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

1-General Assembly Resolution 60/147 of 16 December 2005. See also UN. Doc. E/CN.4/RES/2005/35. See also “Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law Prepared by Mr. Theo van Boven Pursuant to Sub-Commission Decision 1995/117” annex, UN Doc. E/CN.4/Sub.2/1996/17; “The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, Submitted in Accordance with Commission Resolution 1999/33” UN Doc. E/CN.4/2000/62. See also a publication of the Office of the UN High Commissioner for Human Rights: <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf> See also International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations*, Geneva, 2007, pp. 120 et seq. Susanne Malmström, “Restitution of Property and Compensation to Victims” in R. May et al., *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, Kluwer Law International, 2001, pp. 373-384. Dinah Shelton, *Remedies in International Human Rights Law*, Oxford University Press, Oxford, 1999.

Para. 16. States should endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

Para. 17. States shall, with respect to claims by victims, enforce domestic judgements for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgements.

Para. 18. In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Para. 19. Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration

of employment and return of property.

Para. 20. Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law, such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.

Para. 21. Rehabilitation should include medical and psychological care as well as legal and social services.”

An important provision of these Basic Principles and Guidelines is the over-arching principle of non-discrimination. Principle XI thus stipulates: “The application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or any ground, without exception.”

In the case of victims of forcible population transfer and ethnic cleansing another set of UN Principles was formally adopted by the UN Sub-Commission on Promotion and Protection of Human Rights in 2005, which could be invoked by the descendants of the victims of the Armenian genocide: the *Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons*. Principle 2 stipulates:

“2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.

2.2 States shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution.”¹

1-E/CN.4/Sub.2/2005/17. The Pinheiro Principles by Sub-Commission Special Rapporteur Paulo Sérgio Pinheiro, were formally endorsed by the UN Sub-Commission on Promotion and Protection of Human Rights in August 2005. See <http://ocha.unog.ch/drptoolkit/PNormativeGuidanceSpecificIssues.html#HousingAndProperty> <http://www.unhcr.org.ua/img/uploads/docs/PinheiroPrinciples.pdf> http://www.cohre.org/view_page.php?page_id=148

See also Resolutions of the Sub-Commission on Promotion and Protection of Human Rights 2005/21 of 11 August 2005 and 2002/30 of 15 August 2002; Alfred de Zayas “Enteignung und Vertreibung im Lichte des Völkerrechts” in Gilbert Gornig (ed.), *Eigentumstrecht und Enteignungsunrecht*, Duncker & Humbolt, Berlin 2009, pp. 19-32.

Principle 10 stipulates:

“10.1 All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity. Voluntary return in safety and dignity must be based on a free, informed, individual choice. Refugees and displaced persons should be provided with complete, objective, up-to-date, and accurate information, including on physical, material and legal safety issues in countries or places of origin.

10.2 States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so. This right cannot be abridged under conditions of State succession, nor can it be subject to arbitrary or unlawful time limitations.

10.3 Refugees and displaced persons shall not be forced, or otherwise coerced, either directly or indirectly, to return to their former homes, lands or places of habitual residence. Refugees and displaced persons should be able to effectively pursue durable solutions to displacement other than return, if they so wish, without prejudicing their right to the restitution of their housing, land and property.

10.4 States should, when necessary, request from other States or international organizations the financial and/or technical assistance required to facilitate the effective voluntary return, in safety and dignity, of refugees and

displaced persons.”

Admittedly, these principles are in the category of “soft law” and do not bind States. On the other hand, they do reflect the emerging international consensus that refugees and expellees and their descendants have both a right to return and a right to restitution.

This is also confirmed in the 1998 Statute of the International Criminal Court, established in July 2002. While the ICC does not have jurisdiction to examine instances of genocide having occurred prior to the entry into force of the Rome Statute in 2002, it does reaffirm the general principle of international law of providing reparation to victims. Article 75, paragraph 1, of the Statute stipulates that “The Court shall establish principles relating to reparations”, which it defines as restitution, compensation and rehabilitation.

In the context of reparation for gross violations of human rights, two other general principles of law are relevant: the principle *ex injuria non oritur jus* (from a wrong no right arises), that no State should be allowed to profit from its own violations of law, and the principle

of “unjust enrichment”.¹ It is a general principle of law that the criminal cannot keep the fruits of the crime.²

The lands, buildings, bank accounts and other property of the Armenian communities in Turkey were systematically confiscated. Should there be no restitution for this act of mass theft, accompanying, as it did, the ultimate crime of genocide?

A particularly macabre chapter of the massacres against the Armenians concerns the title to life insurances of the victims of the genocide. The United States Ambassador to the Ottoman Empire, Henry Morgenthau, noted in his memoirs a most revealing incident:

1-Peter D. Maddaugh and John D. McCamus, *Law of Restitution*, Aurora, Ontario, 1990, pp. 484-493. Even in the Old Testament we find an admonition against unjust enrichment, King James Version, 1 Kings, Chapter 21, verse 19: “Thus saith the Lord, Hast thou killed, and also taken possession?” The story is that Naboth, a man from Jezreel, had a vineyard on the outskirts of the city near King Ahab’s palace. The King coveted the land, because it was convenient to his palace, but Naboth did not want to sell, because the vineyard had been in his family for generations. Jezebel, Ahab’s wife, persuaded the King to have Naboth falsely accused of blasphemy and stoned to death. When King Ahab went to take possession of the vineyard, Elijah came to him and admonished the King: “Isn’t killing Naboth bad enough? Must you rob him, too? Because you have done this, dogs shall lick your blood outside the city just as they licked the blood of Naboth!” The Living Bible (new translation), Tyndale House Publishers, Wheaton, Illinois.1971.

2-J.W. Wade, “Acquisition of Property by wilfully killing another – A Statutory Solution”, 49 *Harvard Law Review*, pp. 715 et seq. (1936); W.M. McGovern, “Homicide and Succession to Property” (1969) 68 *Michigan Law Review*, p. 65 et seq. There is ample case-law stating that “it is against public policy for a person who is guilty of feloniously killing another to take any benefit in that other person’s estate” *Re Johnson*, (1950) 2 D.L.R. 69, at pp. 75-6 D.L.R., 1 W.W.R. 263. J. Lepsius estimated in 1919 in his book *Deutschland und Armenien*, p. 277 that the profits accruing to the Young Turk oligarchy and its hangers-on from the expropriation of the Armenians amounted to not less than a thousand million German marks. David Marshall Lang wrote in *The Armenians*: “The Ottoman Bank President showed bank-notes soaked with blood and stuck through with dagger holes. Some torn ones had evidently been ripped from the clothing of murdered people ...”, p. 28.

“One day Talaat made what was perhaps the most astonishing request I had ever heard. The New York Life Insurance company and the Equitable Life of New York had for years done considerable business among the Armenians. The extent to which this people insured their lives was merely another indication of their thrifty habits. ‘I wish’ Talaat now said, ‘that you would get the American life insurance companies to send us a complete list of their Armenian policy holders. They are practically all dead now and have left no heirs to collect the money. It of course all escheats to the State. The Government is the beneficiary now.’”¹ Ambassador Morgenthau did not comply with Talaat’s request.

In denying the applicability of statutes of limitation to restitution claims by survivors of the Holocaust, Professor Irwin Cotler argues:

“The paradigm here is not that of restitution in a domestic civil action involving principles of civil and property law, or restitution in an international context involving state responsibility in matters of appropriation of property of aliens; rather, the paradigm – if there can be such a paradigm in so abhorrent a crime – is that of restitution for Nuremberg crimes, which is something dramatically different in precedent and principles ... Nuremberg crimes are imprescriptible,² or Nuremberg law – or international laws anchored in Nuremberg Principles – does

¹Henry Morgenthau, *Ambassador Morgenthau's Story*, New York, 1919. Reissued by Taderon Press, Reading, England, 2000, p. 225.

²[sic] imprescriptible or indefeasible.

not recognize the applicability of statutes of limitations, as set forth in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.”¹

The same argument applies with respect to the survivors of the genocide against the Armenians and their descendants. It is an enduring challenge to international morality that Turkey continues to benefit from Armenian lands and buildings and that it even cashed in on the life insurance of some of the Armenians whom the Ottoman Government itself had exterminated.

In this context it is important to recall the obligations of States parties under the International Covenant on Civil and Political Rights (ratified by Turkey on 23 September 2003, entry into force 23 December 2003), in particular the obligations that result from article 1, which stipulates the rights of peoples to self-determination and their right to their natural wealth and resources, as well as the obligations resulting from article 27, which provides for special treatment of ethnic and cultural minorities. It would follow that “historical inequities” should be redressed, and that the Armenian people are entitled, both under articles 1 and 27 of the Covenant, to the return of their cultural heritage. Pertinent in this context is the decision of the United Nations Human Rights Committee in case No. 167/1984, *Lubicon Lake Band v. Canada*, where the Committee determined that there had been a violation of article 27 and commented: “Historical inequities,

1-Irwin Cotler, *op. cit.*, p. 621.

to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue.”¹ This judgment of the Human Rights Committee illustrates and reaffirms the application of the international law concept of “continuing situations” and “continuing effects” of gross violations of human rights and the justiciability of claims based on such “continuing effects”.

1-Selected Decisions of the Human Rights Committee under the Optional Protocol, Vol. III, p. 78. UN Doc CCPR/C/OP/3, New York and Geneva 2002.

XI. A RECURRING RED HERRING: THE GENOCIDE CONVENTION AND THE PRINCIPLE OF NON-RETROACTIVITY

Recently the debate on the genocide against the Armenians has experienced a new variant: It is argued that even if the Armenians were subjected to genocide, there is little that can be done about it today, because the Genocide Convention cannot be applied retroactively. This theory contains two fallacies: 1) that the Armenian claims are derived from the Genocide Convention, and 2) that the Convention cannot be applied retroactively.

It is clear from the above that the Armenian claims derive from the doctrine of State responsibility for crimes against humanity, and that this international liability pre-

dated the entry into force of the Genocide Convention. As shown above, the Turkish liability for genocide was reflected in Articles 230 and 144 of the Treaty of Sèvres of 1920. The German liability for the Holocaust was reflected in the London Agreement of 1945, both predating the Convention.

As to the general principle of non-retroactivity of treaties, however, it is important to note that this principle admits of many exceptions and, in any event, is not a peremptory norm of international law.¹ Admittedly, the positivist approach to international law relies on a presumption of non-retroactivity, as noted by Professor Charles Rousseau: “International law appears to be determined by the principle of non-retroactivity. This principle is the result of treaty, diplomatic and judicial practice.”²

Moreover, Article 28 of the Vienna Convention on the Law of Treaties provides that “Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.”

Yet, in his commentary on the Vienna Convention on the Law of Treaties, Sir Ian Sinclair refers to the commentary

1-Ian Sinclair, *The Vienna Convention on the Law of Treaties*, second edition 1984, p. 85. Vahakn N. Dadrian, “The Armenian Genocide and the Legal and Political Issues in the Failure to Prevent or Punish the Crime” 29 *U. West. L.A. L. Rev.* 43 (1998); John Shamsy, “Comment: 80 Years Too Late: The International Criminal Court and the 20th Century’s First Genocide” 11 *Journal of Transnational Law & Policy* 327 (Spring 2002).
2-Charles Rousseau, 1 *Principes généraux du droit international public* 486 (1944).

of the International Law Commission on the opening phrase of article 28, which explains that such language (instead of the more usual wording “unless the treaty otherwise provides”) was used “in order to allow for cases where the very nature of the treaty rather than its specific provisions indicates that it is intended to have certain retroactive effects.”¹ Sinclair goes on to refer to the famous *Mavrommatis Palestine Concessions case*, in which the United Kingdom had contested the jurisdiction of the Permanent Court of International Justice on the ground that the acts complained of had taken place before Protocol XII the Treaty of Lausanne had come into force. In rejecting this submission, the Court stated:

“Protocol XII was drawn up in order to fix the conditions governing the recognition and treatment by the contracting parties of certain concessions granted by the Ottoman authorities before the conclusion of the Protocol. An essential characteristic therefore of Protocol XII is that its effects extend to legal situations dating from a time previous to its own existence. If provision were not made in the clauses of the Protocol for the protection of the rights recognised therein as against infringements before the coming into force of that instrument, the Protocol would be ineffective as regards the very period at which the rights in question are most in need of protection. The Court therefore considers that the Protocol guarantees the rights recognised in it against any violation regardless of the date at which it may have taken

¹Yearbook of the International Law Commission (1966-II), pp. 212-13.

place.”¹

Sinclair also addressed the debate that accompanied the retention of the worlds “in relation to any ... situation which ceased to exist before the date of entry into force of the treaty”. Whereas the United States delegation unsuccessfully argued for deletion, the majority of the delegations insisted that a treaty may well apply to “situations” that continued, even if the facts giving rise to the situation had punctually occurred prior to the entry into force of the treaty.²

Among the many exceptions known to the principle of non-retroactivity is the inclusion in the London Agreement of 8 August 1945 of the new “crime against peace”, formulated *ex post facto* , and applied by the Nuremberg and Tokyo Tribunals . In this connection Professor Hans Kelsen commented:

“The rule against retroactive legislation is a principle of justice. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility, the typical technique of primitive law. Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely

1-(1924) P.C.I.J., ser. A, No. 2, at 34.

2-Sinclair, *op. cit.*, p. 86. The US proposal was defeated by a vote of 47 to 23, with seventeen abstentions.

incompatible with justice. ... In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the Second World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions.”¹

The general rule of non-retroactivity of treaties and conventions, which was abandoned in Nuremberg in connection with the new concept of “crimes against peace”,² is not, however, of relevance in the context of the crime of genocide, which has always been a crime under national penal laws, as a manifestation of multiple murder, and which, moreover, must be seen as an international crime under “general principles of law”.³

Reference to the “general principles of law” is found, for instance, in the famous “Martens Clause”, contained in the preamble of the 1899 and 1907 Hague Convention on

1-Hans Kelsen, “Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?” 1 *International Law Quarterly*, 153, 164-65 (1947). See also Hans Kelsen, “The Rule Against *Ex post Facto* Law and the Prosecution of the Axis War Criminals”, 2 *The Judge Advocate Journal* 8 (1945).

2-Alfred de Zayas, “Aggression”, in Dinah Shelton, *Encyclopedia of Genocide*, *op. cit.*, Vol. I, pp. 11-16.

3-In his opening Statement at the International Military Tribunal, the British Chief Prosecutor Lord Hartley Shawcross stated: “There is thus no substantial retroactivity in the provisions of the Charter. It merely fixes the responsibility for a crime already clearly established as such by positive law upon its actual perpetrators. It fills a gap in international criminal procedure. There is all the difference between saying to a man, ‘You will now be punished for what was not a crime at all at the time you committed it’, and in saying to him ‘You will now pay the penalty for conduct which was contrary to law and a crime when you executed it, although, owing to the imperfection of the international machinery, there was at that time no court competent to pronounce judgement against you.’”

Land Warfare:

“Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

Thus, the Genocide Convention of 1948 can be applied retroactively, because its key provisions are declarative of pre-existing international law. Among several precedents for the retroactive application of treaties, the following are particularly relevant in the context of genocide:

- * the London Agreement of 8 August 1945 (Charter of the Nuremberg Tribunal)

- * the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity of 1968

- * Similarly, there is precedent for the *ex post facto* drafting and adoption of international penal charters by the United Nations Security Council under its Chapter VII jurisdiction, such as the Statutes of the International Criminal Tribunal for the Former Yugoslavia,¹ the International

¹William A. Schabas, «Sentencing by International Tribunals : A Human Rights Approach», 7 *Duke Journal of Comparative and International Law*, 461.

Criminal Tribunal for Rwanda,¹ and the International Tribunal for Sierra Leone.

The language of the Genocide Convention neither excludes nor requires its retroactive application. In other words – there is nothing in the language of the Convention that would prohibit its retroactive application. By contrast, there are numerous international treaties that specifically state that they will not apply retroactively. For example, article 11 of the 1998 Statute of the International Criminal Court specifies that “the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute”.

And there are treaties that purportedly do not apply retrospectively, but in practice are so applied, as is the case with the Vienna Convention on the Law of Treaties of 1969, article 4 of which stipulates: “the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention”. Ever since the adoption of the Convention, however, international courts and tribunals have made reference to its provisions as being declarative of pre-existing law and practice, thus reflecting the customary international rules on treaties and the prevailing *opinio juris*.²

It is significant that the drafters of the Genocide Conven-

1-Reuel Cross, Case Western Reserve University School of Law, International War Crimes Project, International Criminal Tribunal for Rwanda, *Memorandum for the Office of the Prosecutor*. Issue I: The Relevance of the Eichmann, Barbie and Finta Trials for the ICTR, Spring 2003.

2-Rudolf Bernhardt, «Treaties» in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 4, Elsevier, Amsterdam, 2000, pp. 926-932.

tion did not stipulate that it should apply only in the future, although they could easily have done so, had they intended to limit its scope of application. Thus, the question arises as to the object and purpose of the Genocide Convention.

Pursuant to article 31 of the Vienna Convention on the Law of Treaties, the principal rule of interpretation is “the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose”. The retroactive application of the Genocide Convention is compatible with the ordinary meaning of terms in the light of the object and purpose of the Convention. Further, such retroactive application appears necessary, in order to serve the important object of deterring future acts of genocide (prevention) by way of establishing the precedent of punishing acts of genocide that occurred prior to its entry into force (suppression). According to article 32 of the Vienna Convention on the Law of Treaties, the use of the *travaux préparatoires* of any treaty or convention is deemed only a supplementary means of interpretation. The *travaux préparatoires* of the Genocide Convention, however, are inconclusive with regard to the issue of retroactive application. Whereas several delegations were future-oriented, others saw the problem more broadly, in the light of the retroactive application of the London Charter of 8 August 1945 to the Nazi crimes of genocide that had preceded it, e.g. the Polish representative, Professor Manfred Lachs, and the United

Kingdom Representative, Sir Hartley Shawcross.¹

While non-retroactivity is a principle that has pragmatic value, it is frequently abandoned in international treaties and in national legislation concerning intellectual property, copyright and taxation. Bearing in mind that there exists a higher legal regime for human rights and a *jus cogens* obligation to refrain from genocide, retroactivity is not only appropriate but also just and necessary as a matter of international *ordre public*.

In regard to private property confiscated in the context of the Holocaust, United States jurisdictions have not hesitated to apply laws retroactively. Thus, for instance, in affirming its jurisdiction in *Altmann v. Republic of Austria*, the United States Court of Appeals for the Ninth Circuit decided on 12 December 2002 that the 1976 Foreign Sovereign Immunities Act (FSIA) applied retroactively to the events of the late 1930s and 1940s. The US Court took jurisdiction and found that the property of Mrs. Altmann had been wrongfully and discriminatorily appropriated in violation of international law.²

Similarly, with regard to the restitution of Armenian

1-Official Records of the Third Session of the General Assembly, Sixth Committee, Sixty-fourth meeting, Palais de Chaillot, Paris, 1 October 1948, pp. 17-20. See also the statements of the Czechoslovak representative, Mr. Prochazka, stressing the need to connect the convention directly with the historical events which had proved the necessity for its existence, and to stress the relationship between genocide and the doctrines of nazism, fascism and Japanese imperialism.", Sixty-sixth meeting, 4 October 1948, pp. 29-30.

2-United States Court of Appeals for the Ninth Circuit: *Altmann v. Republic of Austria*, No. 01-56003 (December 12, 2002) . Affirmed on writ of *certiorari*, 7 June 2004, United States Supreme Court, 541 U.S. 677 (2004).

property, it is conceivable that in an action brought by Armenians against Turkey before a United States federal court, jurisdiction could be established pursuant to the United States Alien Tort Claims Act, which states that “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”.¹

¹-Alien Tort Statute, 28 U.S.C. §1350 (2004). For a discussion of the Act, see Jordan J. Paust, “the History, Nature, and Reach of the Alien Tort Claims Act” in 16 *Florida Journal of International Law*, Number 2, June 2004, pp. 249-266. See also Human Rights Watch 2003, “Background on the Alien Tort Claims Act” available at <http://www.hrw.org>. M. Bazylar, “Suing Hitler’s Willing Business Partners: American Justice and Holocaust Morality” See also, *Jewish Political Studies Review*, Fall 2004, No. 16.

XII. CONCLUSION: BRINGING THE GENOCIDE AGAINST THE ARMENIANS BEFORE THE INTERNATIONAL COURT OF JUSTICE

Since both Turkey (31 July 1950) and Armenia (23 June 1993)¹ are States parties to the Genocide Convention, it would be possible to invoke article VIII, which provides that any contracting party may call upon the competent organs of the United Nations to take such action as they consider appropriate for the “suppression” of genocide.

“Suppression” must mean more than just retributive

¹Armenia used to be a Soviet Republic. Thus, by principles of succession, the application of the Convention actually goes back to the date when the Soviet Union became a State party to the Genocide Convention, on 3 May 1954.

justice. In order to suppress the crime, it is necessary to suppress, as far as possible, its consequences. This entails, besides punishing the guilty, providing restitution and compensation to the surviving generations. Armenia may also invoke article IX of the Convention, which provides that:

“Disputes between the Contracting Parties relating to the interpretation, application, or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

Admittedly, the criminal law aspects of the Genocide Convention are of lesser relevance in the Armenian context, since none of the perpetrators of the genocide against the Armenians are still alive. On the other hand, the Armenian properties that were wrongfully confiscated have not been returned to the survivors of the genocide, to their descendants or to the Armenian Church, nor has compensation been paid to the survivors of the genocide or to their descendants. In this context it is worth noting the important restitution of many churches and monasteries in the ex-Soviet republics including Armenia, restitution that was effected in the 1990’s for confiscations that had occurred seventy years earlier,

following the Bolshevik Revolution.¹ Based on this precedent, restitution of Armenian churches and monasteries would appear not just morally mandated, but also entirely implementable in practice.

A determination of the crime of genocide by the International Court of Justice would facilitate the settlement of claims for restitution, including the identification of cultural and other properties confiscated and/or destroyed, such as churches, monasteries and other assets of historic and cultural significance to the Armenian people, that should be returned to their legal owners, the Armenian people and the Armenian Church.

An objection on the part of Turkey about the standing of Armenia to represent the rights of the descendants of the survivors of the genocide is countered by the fact that many descendants are citizens of Armenia; reference to the “protective principle” enunciated by the District Court of Israël in the Eichmann case (see section VI *supra*) can also be made in this context. Moreover, Armenia could offer Armenian citizenship to all Armenians in the diaspora, as Russia has done with respect to former citizens of the Soviet Union residing in the Baltic States and other former republics of the Soviet Union.

The most recent international prosecutions with regard to the crime of genocide have been conducted by the International Criminal Tribunal for Rwanda and by the

¹Dickran Kouymjian, «La confiscation des biens et la destruction des monuments historiques comme manifestations du processus génocidaire» in *L'Actualité du Génocide des arméniens*, op. cit., p. 227.

International Criminal Tribunal for the Former Yugoslavia. The indictments against Radovan Karadzic and Ratko Mladic charge the accused not only with war crimes and crimes against humanity, but also with genocide. In the ICTY Judgment on General Radislav Krstic, the Tribunal found that genocide had been committed in the context of the massacre of Srebrenica (*Prosecutor v. Krstic*, IT-98-33-T, judgment of 2 August 2001).

In the ICJ judgment in *Bosnia and Herzegovina v. Serbia* (case 91, Judgment of 26 February 2007), the International Court of Justice confirmed that genocide had been committed in Srebrenica. If a single massacre satisfies the criterion of Article 2 of the Genocide Convention, certainly many of the Ottoman massacres against the Armenian population before and during the First World War would qualify as genocide. But, far more than the individual massacres, it was the policy of exclusion, deportation and extermination that constituted the crime of genocide against the Armenians. By contrast, in the context of the armed conflict in the former Yugoslavia, the United Nations General Assembly in its Resolution No. 47/121 of 18 December 1992 declared that the Serbian policy of “ethnic cleansing” constituted “a form of genocide”. This resolution was confirmed in GA Resolutions 48/143, 49/205, 50/192, 51/115, etc. Thus, the concept of “genocide” as currently interpreted and understood by the International Court of Justice and by the United Nations General Assembly is clearly applicable in the context of the Armenian genocide 1915-23.

Besides the possibility of seizing the ICJ by way of a contentious case based on the Genocide Convention, it would further be possible to engage the ICJ jurisdiction by way of a request for an advisory opinion. Pursuant to article 96 of the UN Charter, the General Assembly or the Security Council could ask the International Court of Justice to formulate an advisory opinion on the legal question of the “Application of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide to the Armenian Massacres of 1915-1923” on the legal question: “Legal consequences of the continued possession of Armenian lands, properties and cultural heritage by the Turkish State”, and/or on the legal question: “State Responsibility of Turkey to make reparation to the descendants of the survivors of the Armenian Genocide”. Whereas a request for an advisory opinion would presumably not be forthcoming from the Security Council, it would appear entirely feasible to obtain a majority for such a request in the General Assembly.

Yet another important issue that the ICJ could pronounce itself on would be on the *erga omnes* obligation of States not to recognize the consequences of acts that violate international law, in particular the direct and indirect consequences of genocide. In this context it is pertinent to cite article 10 of the Al Khasawneh Declaration on the illegality of forced population transfers (1997):

“Where acts or omissions prohibited in the present Declaration are committed, the international community as a whole and individual States, are under an obligation: (a)

not to recognize as legal the situation created by such acts; (b) in ongoing situations, to ensure the immediate cessation of the act and the reversal of the harmful consequences; (c) not to render aid, assistance or support, financial or otherwise, to the State which has committed or is committing such act in the maintaining or strengthening of the situation created by such act.”¹

According to this doctrine, the world community has an obligation not to recognize the financial and territorial consequences of the genocide perpetrated by the Ottoman Empire and is entitled to demand that the cultural heritage of the Armenian people be returned to the Armenian people and to the Armenian Patriarchate, and that adequate compensation be paid to the descendants of the victims of the genocide. For this purpose an International Fund could be established, which could be administered by the Office of the United Nations High Commissioner for Human Rights, which has ample experience in the administration of Funds for victims of gross violations of human rights.

1-E/CN.4/Sub.2/1997/23, Annex II. In theory the doctrine of the *erga omnes* obligation of non-recognition has been gaining acceptance for decades, but the concrete application of this doctrine leaves a lot to be desired. See Article 41 of the Report of the International Law Commission on *Responsibility of States for Internationally Wrongful Acts*, adopted in 2001, which provides in paragraph 2 “No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.” The Commission’s report and commentary are reproduced in the annex to General Assembly resolution 56/83 of 12 December 2001 A/56/49 (Vol. I). See also Stefan Talmon “The Duty not to ‘Recognize as Lawful’ a Situation Created by the Illegal Use of Force or other Serious Breaches of a *Jus Cogens* Obligation: An Obligation without Real Substance?” Chapter VI, in Jean-Marc Thouvenin and Christian Tomuschat (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*. Martinus Nijhoff Publishers, Leiden, 2006, pp. 99-125.

An advisory opinion from the International Court of Justice could also contribute to the general recognition of the right to truth as a human right, inseparable from human dignity and from everyone's right to his/her culture and identity.¹ As Voltaire aptly wrote: We owe respect to the living; to the dead we owe only truth.²

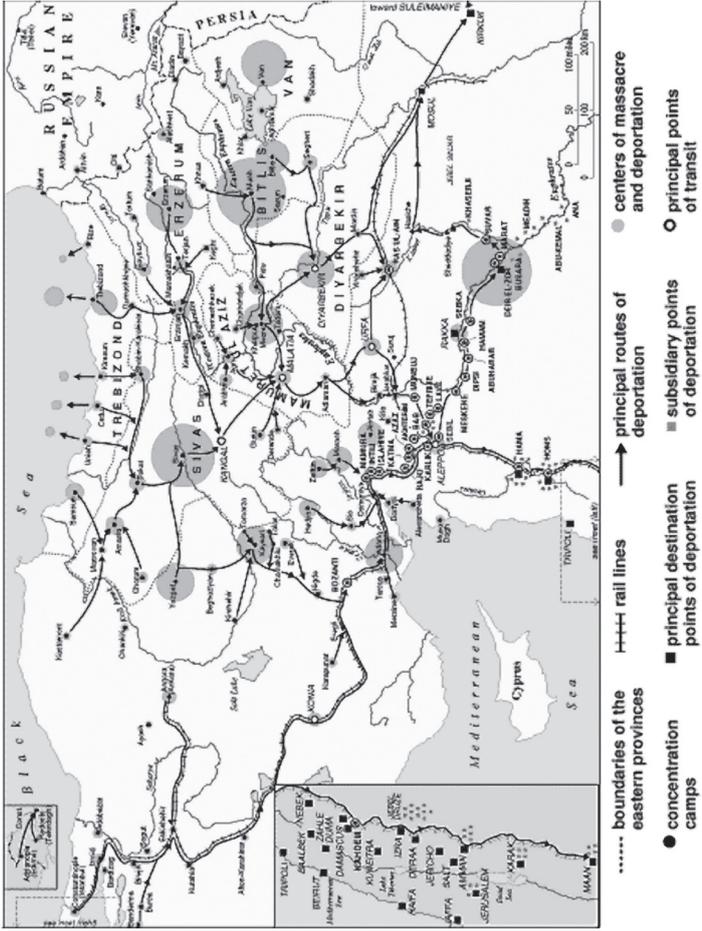
1-On 20 April 2005 the United Nations Commission on Human Rights adopted a relevant resolution entitled "The Right to Truth", UN Doc. E/CN.4/2005/66. See also Yasmin Naqvi, "The right to the truth in international law: fact or fiction?" *International Review of the Red Cross*, volume 88, June 2006, pp. 245-273.

2-François Marie Arouet (1694-1778), dit Voltaire, in his play *Œdipe*: "On doit des égards aux vivants; on ne doit aux morts que la vérité".

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The 1915 Armenian Genocide in the Ottoman Empire

The New York Times

THURSDAY, OCTOBER 7, 1915

(3:4)

800,000 ARMENIANS COUNTED DESTROYED

LONDON, Oct. 6.—Viscount Bryce, former British Ambassador to the United States, in the House of Lords today said that such information as had reached him from many quarters showed that the figure of 800,000 Armenians destroyed since May was quite a possible number. Virtually the whole nation had been wiped out, he declared, and he did not suppose there was any case in history of a crime "so hideous and on so large a scale."

"The death of these people," said Lord Bryce, "resulted from the deliberate and premeditated policy of the gang now in possession of the Turkish Government. Orders for the massacres came in every case direct from Constantinople. In some instances local Governors, being humane, pious men, refused to carry out the orders and at least two Governors were summarily dismissed for this reason."

"The customary procedure was to round up the whole of the population of a designated town. A part of the population was thrown into prison and the remainder were marched out of town and in the suburbs the men were separated from the women and children. The men were then taken to a convenient place and shot or bayoneted. The women and children were then put under a convoy of the lower kind of soldiers and dispatched to some distant destination."

"They were driven by the soldiers day after day. Many fell by the way and many died of hunger, for no provisions were furnished them. They were robbed of all they possessed, and in many cases the women were stripped naked and made to continue the march in that condition. Many of the women went mad and threw away their children. The caravan route was marked by a line of corpses. Comparatively few of the people ever reached their destination."

"The facts as to the slaughter in Trebizond are vouched for by the Italian Consul. Orders came for the murder of all the Armenian Christians in Trebizond. Many Muslims tried to save their Christian friends, but the authorities were implacable and hunted out all the Christians and then drove them down to the sea front. Then they put them aboard sail boats and carried them some distance out to sea and threw them overboard. The whole Armenian population, numbering 10,000, was thus destroyed in one afternoon."

The Lord Mayor at a meeting at the Mansion House on Oct. 15, will start a fund for the aid of Armenian refugees. Among the speakers will be Lord Bryce, Cardinal Bourne and T. P. O'Connor.



The Evacuation of 5.000 orphans from Kharpert/Harput orphanages to Syria/Lebanon, as part of the evacuation of 22.000 orphans from the Near East Relief orphanages in interior Turkey in 1922



Starvation to death

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FEBRUARY 28, 1920

Shall Armenia Perish?

By Henry Morgenthau

Former Ambassador to Turkey, and National Vice-Chairman of Near East Relief

TWO hundred and fifty thousand Christian Armenian women enslaved in Turkish harems call to the people of America for liberation! One hundred thousand women already rescued by Near East Relief agents from harems will perish unless support from America is continued! Two hundred and fifty thousand children, orphaned by the unspeakable Turks, are calling in the only English they know, "Bread, Uncle Sam." One million two hundred thousand destitute, homeless, clothless adults look to the giant in the West for the succor that will keep them from annihilation. What shall our answer be?

If they were good enough to fight and die for us when we needed their help so sorely, are they not good enough to be given some crumbs from our plenty?

Since the beginning of the war, the Turkish Armenians have been largely refugees. A simple, agricultural people, they have been exiled from their farms and deprived of all opportunity to support themselves. Now, more than a year after the armistice, they are still living the life of nomads, able to continue alive only by virtue of American philanthropy. If ever unmerited suffering called for succor the plight of the Armenians should be heeded now. A few months more and it may be relief will come too late for those myriads whom only we can save.

Let the American slogan now become—Serve Armenians for a little while longer with life's necessities that they may be preserved for the day of national freedom and rebirth, which no people more truly and greatly deserves.

The belief, held by some persons, that Turkey has repented and can do no further harm, is without foundation. The group that led Turkey into the war on the side of Germany is now in the saddle. The Turk has not been disarmed and these leaders are now aiding the Tartars, Kurds and Bolsheviks are urging them on to

kill and rob the surviving Armenians at every opportunity. The deportations and massacres during the war were not spontaneous uprisings of unorganized mobs, but were the working out of a well-plotted plan of wholesale extermination in which regular Turkish officers and troops took part as if in a campaign against an enemy in the field.

More than 2,000,000 persons were deported. The system was about the same everywhere. The Armenians, men, women and children, would be assembled in the marketplace. Then the able-bodied men would be marched off and killed by being shot or clubbed in cold blood at some spot which did not necessitate the trouble of burial.

Next the women were sorted out. Agents of the Turk officers picked the youngest and fairest for their masters' harems. Next the civil officials had their pick, and then the remainder either were sold for one medjidi—a silver coin valued at about 80 cents—or were driven forth to be seized by the lower class Turks and Kurds.

As a last step, those who remained, mothers, grandmothers, children, were driven forth on their death pilgrimages across the desert of Aleppo, with no food, no water, no shelter, to be robbed and beaten at every halt, to see children slain in scores before their eyes, and babies dashed to death against rocks or spitted on the bayonets of the soldier guards.

If America is going to condone these offenses, if she is going to permit to continue conditions that threaten and permit their repetition, she is party to the crime. These peoples must be freed from the agony and danger of such horrors. They must not only be saved for the present but either thru governmental action or protection under the League of Nations they must be given assurance that they will be free in peace and that no harm can come to them.

New York



So gruesome a picture as this would be taboo in The Independent if the seriousness of the situation in Armenia now did not demand forceful illustration. These victims of a Turkish massacre typify thousands of Christian Armenians slaughtered by the Turks since the signing of the armistice.



Armenian refugees in tents provided by the Near East Relief



The barren lands of the Aykesdan residential quarter in the city of Van

Map showing the boundaries of Armenia as awarded by PRESIDENT WILSON.



- Turkish-Armenian boundary
- Other international boundaries
- Unmarked international boundaries
- Old Turkish-Russian boundary
- Vilayet boundaries
- Sandjak boundaries
- Kaza boundaries
- Railways, broad gauges



ERZERUM..... Names of the vilayets of Erzerum, Trabzon, Van, and Bitlis and their constituent kaza

Map compiled under the direction of Major Lawrence Martin, General-Staff, U. S. Army, by the topographic branch U. S. Geological Survey, in cooperation with the Department of State, from field observations by the Harbord Mission and from maps of the Turkish General Staff, scale 1:200,000, German maps prepared during the war, scale 1:400,000, and British maps of Persian and Transcaucasian territory, scale 1:1,000,000

Woodrow Wilson



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