

# THE ARMENIAN GENOCIDE: INTERNATIONAL LEGAL AND POLITICAL AVENUES FOR TURKEY'S RESPONSIBILITY

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Résumé de l'article

La pertinence du Génocide Arménien ne peut être sous-estimée de nos jours. Mis à part son importance pour les Arméniens, le succès de la Turquie, en tant qu'État successeur de l'Empire Ottoman, à échapper à la punition pour sa responsabilité durant les 96 dernières années a été considéré comme précurseur pour les génocides subséquents, de l'Holocauste des Juifs au Génocide au Darfour. Nous examinerons les raisons pour lesquelles la règle coutumière du droit international, la Responsabilité de l'État, n'était pas respectée, et en particulier le rôle que la Realpolitik internationale a joué en exonérant la Turquie et les agents agissant pour elle. Des avenues légales et politiques viables sont proposées pour faire respecter le principe de la Responsabilité de l'État et les réparations qui en découlent en vertu des lois et des jurisprudences internationales.

## THE ARMENIAN GENOCIDE : INTERNATIONAL LEGAL AND POLITICAL AVENUES FOR TURKEY'S RESPONSIBILITY

par Aram KUYUMJIAN\*

*La pertinence du Génocide Arménien ne peut être sous-estimée de nos jours. Mis à part son importance pour les Arméniens, le succès de la Turquie, en tant qu'État successeur de l'Empire Ottoman, à échapper à la punition pour sa responsabilité durant les 96 dernières années a été considéré comme précurseur pour les génocides subséquents, de l'Holocauste des Juifs au Génocide au Darfour. Nous examinerons les raisons pour lesquelles la règle coutumière du droit international, la Responsabilité de l'État, n'était pas respectée, et en particulier le rôle que la Realpolitik internationale a joué en exonérant la Turquie et les agents agissant pour elle. Des avenues légales et politiques viables sont proposées pour faire respecter le principe de la Responsabilité de l'État et les réparations qui en découlent en vertu des lois et des jurisprudences internationales.*

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*The significance of the Armenian genocide on current affairs cannot be undermined. While it has undoubtedly made its mark on the Armenian people, this genocide has also had further reaching significance. Turkey, as the successor state of the Ottoman Empire, successfully avoided responsibility for its culpability for over several generations, and its example has been considered the foreshadowing for subsequent genocides spanning from the Holocaust to the present-day genocide in Darfur. This paper begins by examining why customary international law governing state responsibility has not been applied. It also analyses the role that international Realpolitik has played in exonerating Turkey and its agents. Viable international legal and political avenues, based on current legislation and jurisprudence, are proposed as a mechanism for enforcing the principle of state responsibility and for implementing reparation.*

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## Introduction

The world witnessed the first genocide of the twentieth century in Anatolia. The Ottoman Empire, which had previously managed to integrate and adapt to change with relative success and stability, was suddenly faced with new ideologies and strains<sup>1</sup>. Some contend that it "was plagued by numerous problems, including the rise of nationalism among both the Turks and their subject peoples as well as the pervasive influence of the European notions of egalitarianism and liberty"<sup>2</sup>. It is with these notions in mind that we can understand the Armenian position at the beginning of the First World War. The Armenian population was "caught between the two belligerent powers of Russia and Turkey"<sup>3</sup>. This situation gave the Ottoman Empire a justifiable motive to carry out the genocide, given that it could generalize the accusation that some Armenians collaborated with the Russians and it could disseminate generalized propaganda to incite hatred toward

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1. See, for a discussion of the Ottoman empire in the 19<sup>th</sup> century, Benjamin R. BARBER, « Global Democracy or Global Law : Which Comes First? » (1993) 1 *Ind. J. Global Legal Stud.* 119 : "The Ottoman...[Empire was] among the most inclusive associations of peoples the world has known, at least since the time of the Roman Empire. Whatever [its] depredations with respect to liberty, rights, and self-determination, [it] did inhibit the centrifugal instincts of the multiple tribes and factions they held together through a combination of coercion, civility, and economic interest, and they inoculated the nineteenth century against largescale war (if not revolution) in a manner that has been the envy of our own sanguine century." The assertion does not, however, consider that such imposed inclusion fuelled the conflicts in the twentieth century; See also John SHAMSEY, "80 Years Too Late : The International Criminal Court and the 20<sup>th</sup> Century's First Genocide" (2002) 11 *J. Transnat'l L & Pol'y* 327 for further details on the historical developments in the late nineteenth century which paved way for the "final solution".
  2. Joseph R. MASI, Robert O. KRIKORIAN, *Armenia : At the Crossroads*, 1<sup>st</sup> ed., Australia, Harwood Academic Publishers, 1999, xxvi.
  3. See Mark VON HAGEN, "The Great War and the Mobilization of Ethnicity in the Russian Empire" in Barnett. R. RUBIN & Jack L. SNYDER, *Post-Soviet Political Order : Conflict and State Building*, New York, Routledge, 1998, p. 34-40; See also J. MASI & R. KRIKORIAN, *prec.*, note 2, p. xxv : «The Armenian population found itself in a very precarious position, straddling the border between two states about to go to war against each other».

all of the Armenian population. The U.S. Ambassador to the Ottoman empire, Morgenthau, states that “[t]he conditions of the war gave to the Turkish Government its longed-for opportunity to lay hold of the Armenians<sup>4</sup>”. The history of the Armenian genocide does not lack documentation<sup>5</sup>. Given the scope of this paper, however, we will only focus on select key elements. Nearly 1.5 million Armenians were killed during the First World War, a genocide that was perpetrated by the Young Turk Ittihadist leaders of the Ottoman Empire<sup>6</sup>. The genocide was thus perpetrated under the guise of the “wholesale deportation of the Armenian population of the empire’s eastern and southeastern provinces... [masking] the planned execution of the Armenian population”<sup>7</sup>. On April 24, 1915, the Interior Ministry authorized the arrest of the Armenian community leaders that had been suspected of anti-Ittihad or nationalistic sentiments. To give legal effect to the ill-motivation, the Cabinet promulgated, for example, the Temporary Law of Deportation and the Temporary Law of Expropriation and Confiscation. This facilitated the deportation of the majority of the Armenian population, and subsequently to appropriate their belongings<sup>8</sup>. As expected, these laws incurred some intellectual and moral opposition but the resistance was quickly dismissed. For example, one Turkish Senator denounced the laws as unconstitutional, but his

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4. Vahakn N. DADRIAN, *The History of the Armenian Genocide : Ethnic Conflicts from the Balkans to Anatolia to the Caucasus*, 6<sup>th</sup> ed., Oxford, Berghahn Books, 1995, p. 207.
  5. See V.N. DADRIAN in general. Archives throughout the world are replete with documents including telegrams and eyewitness testimonies. They are located in many places including the German Foreign Office in Berlin, the Turkish Presidential Archives in Ankara, the U.S. National Archives in Washington, the National Archives of the UK in London, etc. They are easily accessible to the public wishing to consult them.
  6. See V.N. DADRIAN, *prec.*, note 4, p. 205; See also J. MASIH & R. KRIKORIAN, *prec.*, note 2, p. xxv; confirming that an estimated 1.5 million Armenians were killed between 1915 and 1923.
  7. V.N. DADRIAN, *prec.*, note 4, p. 219.
  8. *Id.*, p. 221, 222. The temporal and “necessitous” aspect of these laws served to mask their utter arbitrariness and lack of rationality. “Temporary” only meant that the laws would be in effect until what the state sought to accomplish was accomplished.

opponents were hasty to reject his ideas and ignore his objections<sup>9</sup>.

In response to the crimes committed, the international community did little to punish the perpetrators. Their initial efforts to hold those liable were successfully undermined by a favourable foreign policy towards the perpetrator, the nationalistic pride of the new Turkish Republic, coupled with its skilful use of political blackmail and denial. Despite the failure to acknowledge the magnitude of this atrocity, the classification of the severity of the crimes committed, which infringed human rights in the most extreme manner, was clear at the time and recognized under the provisions of the Hague Conventions on the Laws and Customs of War<sup>10</sup> (hereinafter "the Hague Convention"). Three key events contributed to the emergence of the legal notion of "crimes against humanity" : the Public Declaration of the Allies on May 24, 1915, the Paris Peace Conference in 1919 and the Treaty of Sèvres of August 10, 1920<sup>11</sup>. As such, there was an overall sentiment of shock and disdain expressed by many states asserting that such crimes were not to be tolerated. The massacres that were executed by the special organization – *teskilati mahsusa* through the delegation of the central government were only later tailored to the legal notion of "genocide" after the term was coined by Raphael Lemkin in 1943 and subsequently incorporated in the Convention on the Prevention and Punishment of the Crime of Genocide<sup>12</sup> (hereinafter "the Genocide Convention").

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9. *Id.*, p. 223. As stated, rationality and reason were quickly dismissed as an unworthy argument and the few who tried to instill intellectual reasoning in state policy were very staunchly opposed.
  10. *Hague Convention IV Respecting the Laws and Customs of War on Land*, 18 October 1907, (1910) Stat. 2277, T.S. 539. (enter into force on 26 January 1910)
  11. Jean-Baptiste RACINE, *Le génocide des Arméniens : Origine et permanence du crime contre l'humanité*, Paris , Dalloz-Sirey, 2006, p. 5.
  12. *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, (1951) , 78 U.N.T.S. 277 (enter into force on 12 January 1951)

Since then, we have seen a pluralistic system of international law with the birth of supranational courts created by treaties through the will of the nations which either emulate or are inspired by the provisions of the Genocide Convention. The Armenian Genocide is still fresh in the minds of the few remaining survivors. These memories and vivid images are passed on to the younger generations who now hold a questionable cultural identity as a result of their tarnished history, which has since been forgotten by the perpetrators. The insistence upon denial has permeated throughout the country to the extent that any mention or advocacy of the genocide is an infraction under Turkish criminal law<sup>13</sup>. The Interior Ministry instituted the firm denial of these crimes as policy at the very moment the massacres were taking place (when the government had already systematically and intentionally planned the exterminations) and this policy was perpetuated by subsequent Turkish governments by masking the massacres with the same groundless and illogical motives. Though international law has been progressing since the Armenian Genocide with the creation of international criminal tribunals and the prosecution of criminals, it has a long way to go. Many critics today rightfully argue for the uniformity of decisions rendered regarding genocide. This crime is a peremptory norm that cannot be derogated from, even by treaty<sup>14</sup>, and therefore a consistency of case law is required. As such, individuals and States have seized international courts to adjudicate on genocide and crimes against humanity through which international customary law finds application. Because there are occasionally inconsistent judgments rendered<sup>15</sup>, it is evident that the principles that relate to genocide have yet to be consolidated and uniformly applied.

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13. Article 301 of the Turkish Penal Code has been infamous for its countless exaggerated use by the lawyers working for the State to make cases against those who "denigrate Turkey". Many have been convicted under this article for speaking publicly about the Armenian Genocide.
  14. *Vienna Convention on the Law of Treaties*, 23 May 1969, (1980) 1155 U.N.T.S. 331, 8 I.L.M. 679, (enter into force on 27 January 1980) art.53
  15. See in general Pemmaraju Sreenivasa RAO, "Multiple International Judicial Forums : A Reflection of the Growing Strength of International Law or its Fragmentation" (2003) 25 Mich. J. Int'l L. 929.

Based on recent developments in international law, can Turkey, as the successor State of the Ottoman Empire, be held liable by international legal or political bodies, especially for its national policy of negating the Armenian Genocide? To answer this, first we will address the facts during the era of the massacres and the perpetual failure of international law to impose State responsibility or prosecute war criminals and its consequences. Second, we will set out the existing international institutions and courts that may have jurisdiction to decide on Turkey's legal responsibility for the crimes committed from 1915-1923. We will also critically analyze existing arguments and case law to provide for a comprehensive approach to the issue of responsibility for the Armenian Genocide, with the objective of finally ending the political rift between these two peoples and moving towards a policy of reconciliation.

### **1. The massacre of Armenians in 1915-1923 : legal consequences at the time**

The Armenian Genocide is distinct in that it is the emerging point of the legal notion of "crimes against humanity"<sup>16</sup>. International lawyers largely concur that the Genocide Convention is declarative of existing customary international law. Furthermore, genocide has been subsumed into its broader category of "crimes against humanity". What merits our particular attention is how this notion was conceived by nineteenth century philosophers like Kant, de Fichte, Hegel, Comte and Renan, Proudhon and Marx<sup>17</sup> before being incorporated into the Hague Convention. To understand genocide, we must first understand "crimes against humanity", a notion which itself has evolved from the Charter of

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16. J.B. RACINE, *prec.*, note 11, p. xxiii.

17. In effect, the great philosophers of the nineteenth century were inspired by Grotius, the XVII<sup>th</sup> century natural lawyer. See Albert DE LA PRADELLE, *Maîtres et doctrines du droit des gens*, 2<sup>e</sup> éd., Paris, Les éditions internationales, 1950, p. 88 cited in J.B. RACINE, *prec.*, note 11, p. 3 : «Comme Grotius en tant que précurseur de la future notion de crime contre l'humanité... ».



Nuremburg (article 6c.) to the Rome Statute of the International Criminal Court<sup>18</sup> (article 7)<sup>19</sup>.

Therefore, one might question whether this crime foresaw individual criminal responsibility and State responsibility, and if so, do such sanctions<sup>20</sup> flow from *jus cogens*, a customary law of the highest norm in world public order, and if it is an exception to the application of the *nulla poena sine lege* principle (no crime without law).

### **1.1 The emergence of the legal notion of “crimes against humanity” arising from the Armenian massacres**

Armenians lived under Ottoman rule since the fifteenth century. There was a strong concentration in Constantinople, as well as the central and eastern provinces, in cities such as Bitlis, Adana, Diyarbakir, Trabzon, Urfa, Harput, Sivas, Mus and Van, all of which were lands inhabited by their ancestors for over three thousand years. Many western scholars agree that the Armenian population before the genocide was estimated between 1.8 to 2.1 million. These estimations have been challenged by some experts on the basis of the unreliability of the Ottoman population census<sup>21</sup>. As the genocide unfolded and continues to linger by its

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18. *Rome Statute of the International Criminal Court*, 17 July 1998, (2002) 37 ILM 999 (enter into force on 1st July 2001).

19. J.B. RACINE, *prec.*, note 11, p. xxiii.

20. The use of this word will designate responsibility at both individual and state level in Part I of the paper and solely at a state level in Part II of the paper.

21. See Richard G. HOVANNISIAN, *The Armenian Genocide : History, Politics, Ethics*, New York, Edition Palgrave Macmillan, 1992, p. 309; See also Henry F.B. LYNCH, *Armenia. Travels and Studies*, Vol. II : the Turkish Provinces, London, Longmans, Green, and Co., 1901. The sundry reasons to diminish the actual figures in the Ottoman population census must take into account both Turkish and Armenian interests. For the former, they include the pressures of Turkish superiors towards the Armenian officials in charge to lower the Armenian figures and increase their contingents. For the Armenians, being regarded as "second-class citizens", they are said to have purposely undercounted themselves to

denial through the ages, its present mystery to the public at large is mostly due to the lobbying of diasporan Armenians with positions of influence in politics and media. Without the activism and education by these diasporan Armenians, the world would react with even less interest or possibly even apathy to the issue, preferring instead to fully focus on actual events. Despite the public's general ignorance to the genocide, its legal prevalence is far more blatant because it is arguably the starting point of internationally wrongful acts.

### **1.1.1 Political Declaration 1915**

The first declaration made by the Allied powers condemning the massacres of the Armenians contains the notion of "crimes against humanity" and as such became the first time that such a notion was encapsulated in an official document<sup>22</sup>. There is the idea that the massacres are against fundamental norms of international law and as such "all the members of the Turkish Government would be held responsible together with its agents implicated in the massacres"<sup>23</sup>. It appears that masking the gravity of the magnitude of the crimes by the Ottoman government became impossible as many missionaries, foreign officials and other military personnel dispersed and stationed throughout the cities, towns and villages of the Anatolian region reported and documented their consistent and unwavering observations. In spite of the blatant impact of the massacres, there was great difficulty implementing the appropriate sanctions, resulting from the Allies' inexperience prosecuting criminals in matters of world public order. Despite the presence of good faith, the enforcement of justice was simply impractical due to the absence of state practice.

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avoid paying military taxes (that Turkish subjects were exempt from) whereby the amount would be based on census results.

22. J.B. RACINE, *prec.*, note 11, p. 7.

23. Egon SCHWELB, *Crimes Against Humanity*, Oxford, O.U.P., 1946, p. 181, cited in Alfred DE ZAYAS "The Genocide against the Armenians 1915-1923 and the relevance of the 1948 Genocide Convention" online : <[http://www.armenica.org/material/paper\\_Zayas\\_Legal\\_opinion\\_ArmenianGenocide.pdf](http://www.armenica.org/material/paper_Zayas_Legal_opinion_ArmenianGenocide.pdf)> at 4 (29 July 2011).

### 1.1.2 Paris Peace Conference – January 1919

With the defeat of the Ottoman Empire in 1919, and within the context of the Paris Peace Conference, the Allied Forces set up a Commission on Responsibilities and Sanctions and its respective Sub-commission (also known as the Commission of Fifteen). This Commission examined, among other offenses, “barbarous and illegitimate methods of warfare”<sup>24</sup> with the purpose to prosecute those responsible for crimes identified in the Hague Convention. The Preamble reads :

*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.*  
 [emphasis added]

This is referred to as the Martens Clause and pursuant to the above, in its studies of interpretation, the Commission proposed the adoption of a new category of war crimes. As Bassiouni identifies, “humanity” is invoked as a general norm and “the laws of humanity” and the “dictates of the public conscience” are identified as a matrix of the “principles of international law”<sup>25</sup>. Consequently, in March of 1919, the following violations were specified in the Commission’s report : “systematic terror, murders and massacres, dishonoring of women, confiscation of private property, pillage, seizing of goods belonging to the communities, educational establishments, and charities; arbitrary destruction of public and private goods; deportation and forced labor; execution of civilians under false allegations of war crimes; and violations against civilians and military personnel”<sup>26</sup>, all of which are found

24. V. N DADRIAN, prec., note 4, p. 304.

25. M. Chefif BASSIOUNI, *Crimes Against Humanity in International Criminal Law*, Boston, 1992, 166-167 cited in V.N. DADRIAN, prec., note 4, p. 304.

26. V. N. DADRIAN, prec., note 4, p. 304.

in the Treaty's provisions<sup>27</sup>. The Turkish delegate acknowledged the existence of crimes committed against the Christian subjects of Anatolia. Turkish grand vizier, Damad Ferid Pacha, declared in a statement that during the First World War, the Ottoman territory suffered « des méfaits qui feront trembler pour toujours la conscience de l'humanité »<sup>28</sup>. As will be seen, initial efforts which sought an international tribunal lacked the perpetual international political will that was required to ensure justice. It thus seems adequate to conclude that the Armenian massacres constituted the first legal case of "crimes against humanity" as invoked during the Paris Peace Conference following the introduction of the concept in the Hague Convention. As such, it was starting to become clear that the prevention of crimes of this magnitude called for universal responsibility of *erga omnes* obligations concerning the laws of "humanity". Despite the recognition of need, however, the Treaty failed in establishing an international criminal court. Additionally, it is noteworthy that the Hague Conventions, open for signature and ratification, only represent a symbolic gesture by States as they "are considered as embodying rules of customary international law. As such they are also binding on states which are not party to them"<sup>29</sup>.

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27. J.B. RACINE, *prec.*, note 11, p. 11. The author mentions that article 46 was especially invoked in the Commission's Report which reads : "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice must be respected. Private property cannot be confiscated".
28. *Id.*, p. 12. To place one in the proper context of events, for a short time period, Turkish generals gave statements similar to this which not only evidences that such crimes had legal implications but also as we will see later, they also have implications on state actors and the nation-state through the principle of attribution of wrongful acts on the State : « Il y avait dans cette déclaration un aveu implicite de crimes commis d'une telle importance qu'ils concernaient l'humanité toute entière. Toutefois la délégation turque considérait que de tels crimes relevaient de la seule responsabilité du parti Ittihad ».
29. Treaties and Documents, International Committee of the Red Cross (ICRC) – International Humanitarian Law, online : <<http://www.icrc.org/ihl.nsf/INTRO/195?OpenDocument>>. Thus, it is of no relevance that Turkey was a signatory but did not ratify the Hague Convention IV of 1907. This was clear in international law at the time.

## **1.2 The role of international politics in the failure of the Treaty of Sèvres – 1920**

The Treaty of Sèvres was signed by the Allies and the Ottoman Empire one year after the Commission's efforts to define the atrocities that were committed in Anatolia. The Treaty aimed to partition the Ottoman Empire and hold the war criminals liable for crimes against humanity. For the purposes of this paper, we will examine two specific articles : article 144 which concerns restitution for the victims and article 230 which outlines the sanctions for criminal acts. Article 230 of the Treaty reads :

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 August 1, 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 recognize such tribunal. In the event of the League of Nations having created in sufficient time a tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertakes equally to recognize such tribunal<sup>30</sup>.

[emphasis added]

This treaty included a commitment to try Turkish officials for war crimes committed by Ottoman Turkey against Allied nationals, as well as those of a larger scale committed by Turkish authorities against subjects of the Ottoman Empire of different ethnic origins, particularly the Armenians.

Although article 230 does not expressly stipulate the extermination of the Armenians as a crime against humanity, it is implicitly referenced : « Le terme de “massacres” employé est

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30. V. N. DADRAN, *prec.*, note 4, p. 305.

sûrement un euphémisme désignant les 'crimes contre les lois de l'humanité' [...] En outre, ce traité contient une disposition spécifique aux crimes de guerres (article 226) ce qui permet de penser que la disposition de l'article 230 est, a contrario, ne fut-ce que de manière implicite, porteuse d'une incrimination de crime contre les lois de l'humanité<sup>31</sup> ».

It is conceivable that the crime's unprecedented nature and the evolution of the term "crimes against humanity" from a moral concept to a universal legal one, contributed to the unsuccessful first attempts of holding those liable. Racine elaborates that this article failed in defining the perpetrators ("the persons"), the type of action against the perpetrators and the rules of procedure. Although the Allies had a clear idea of criminal liability, legally there was no precedent or any clear law as a basis : « Dans ce traité, il y avait à la fois l'ébauche d'une juridiction internationale et d'une incrimination internationale...[l]e traité recèle une valeur indéniable en tant qu'expression de l'évolution des lois de l'humanité en tant qu'étape liminaire dans l'histoire des infractions internationales »<sup>32</sup>.

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

The Turkish Government recognizes 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. 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 recognizes 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*

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31. J.B. RACINE, prec., note 11, p. 17.

32. *Id.*, p. 18.

*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<sup>33</sup>. [emphasis added]

This serves as further evidence of the international recognition of the crime of “massacres” against the Armenian population of Turkey, but formal ratification of the Treaty never followed. Much like the omission to designate an international jurisdiction in the provisions of the Hague Convention, there was ultimately no creation of an international criminal tribunal as per the recommendation in article 230. Furthermore, no arbitral commissions were ever set up, thereby ignoring the order in article 144. Rather than implement the orders provided in the Treaty and increase protection, the Turkish government began issuing new laws of confiscation<sup>34</sup>. Subsequent international efforts to prevent the genocide wavered, and resulted in the gradual absence of international political and economic action to ensure that the perpetrators of the genocide would be brought to justice. In fact, “[t]he international efforts of the European Powers to bring the perpetrators of the Armenian genocide to justice fell victim to the overarching principle of national sovereignty and the machinations of international politics”<sup>35</sup>. Specifically, the rise of Mustapha Kemal Ataturk, the founder of modern Turkey, and nationalist sentiments due to the embarrassing new size of the former Empire, overrode any attempts of the European powers, which had grown increasingly interested in oil politics, to hold war criminals liable<sup>36</sup>.

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33. A. DE ZAYAS, *prec.*, note 23.

34. Dickran KOUYMJIAN, “Confiscation of Armenian Property and the Destruction of Armenian Historical Monuments as a Manifestation of the Genocidal Process” online : California State University <<http://armenianstudies.csufresno.edu/faculty/kouymjian/articles/confiscation.htm>>(29 July 2011), p. 3.

35. V.N. DADRIAN, *prec.*, note 4, p. 381.

36. See Peter BALAKIAN, *The Burning Tigris : the Armenian Genocide and America's Response*, 1<sup>st</sup> ed., New York, HarperCollins Publishers, 2003, p. 366. The author explains the political compromises that were made dur-

Even today, China hinders international efforts of holding Sudan liable for genocide in Darfur because of a similar foreign policy. Perhaps a complete shift in State practice is needed to establish a binding obligation on States to stop allowing effective impunity to perpetrators of international wrongful acts. Such State practice can only arise from political will, dialogue and negotiations among States.

### **1.3 Ineffectiveness of Turkish courts-martial (1919-1922) and consequential Armenian revenge acts**

#### **1.3.1 The Establishment of Turkish courts-martial and the rise of modern Turkey**

The British led initial efforts to hold those responsible for involvement in the massacres. Under their supervision, a defeated and demoralized Ottoman Empire opted to try her own citizens instead of submitting them to a foreign judicial body for indictment and prosecution. A number of Turkish deputies confessed during debates in the Ottoman Parliament<sup>37</sup>. Others, comprised of the majority of ministers belonging to the Ittihad party, denied the massacres and were quickly quelled by the Sultan with the dissolution of the Chamber of Deputies<sup>38</sup>.

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ing the First World War and set a precedent for the following century. "The politics of oil had assumed a priority, even a fixation, with those who were forging the new geopolitical power structure. 'Oleaginous diplomacy' became an inside epithet, and 'dollar diplomacy' went to a new level".

37. *Id.*

38. See Yves TERNON, *Du négationnisme, mémoire et tabou*, Paris, Desclée de Brouwer, 1999, p 20. The author notes that in spite of accusations of the Allied forces, the Ottoman government had already prepared their arguments of defense in advance : «...les Arméniens se sont révoltés; le gouvernement a dû les déplacer, car ils demeuraient près du front et ils collaboraient avec l'ennemi; en dépit de toutes les précautions prises pour protéger leurs biens et leurs personnes, il y eut, lors de ces transferts, des victimes turques au cours de cette guerre terrible où l'armée et les populations civiles ont tant soufferts. Ce système de défense vola en éclats lorsque, en 1919 et 1920, le gouvernement ottoman, alors sous contrôle allié, prouva au cours de procès, que le Comité avait organisé



Thus, once the peace treaty went into effect, Turkish authorities arrested many of the perpetrators including : “the members of the of Ittihad’s Central Committee, the two wartime Cabi-Cabinet Ministers, a host of provincial governors, and high-ranking military officers identified as organizers of wholesale massacres in their zones of authority”<sup>39</sup>. Although the court-martial trials were based on domestic laws, many Turkish lawyers invoked the laws of humanity to justify the prosecution and punishment of the Turkish war criminals. For example, in the Yozgat trials of 1919 that examined the deportations and massacres, the Attorney-General Sami described the crimes as crimes against humanity and identified that the objective of the trials was to “establish these crimes and punish the guilty”<sup>40</sup>. The charges against those accused were conspiracy, premeditation and intent of the massacres, murder and personal responsibility<sup>41</sup>. Given the limited scope of this paper, we will focus on the charge of premeditation and intent in the Ottoman Criminal Code. The prosecution invoked these charges pursuant to article 170, which holds that: “If a person’s being a killer with premeditation is proved according to law, sentence for his being put to death is passed legally”<sup>42</sup>.

As such, at the beginning of the trial series in January 1919, Ahmed Essad, the wartime head of the Ottoman Interior Ministry’s Department II, presented the British with a document labelled the “Ten Commandments”<sup>43</sup> (considered today to be an

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dans les moindres détails la suppression des Arméniens et qu’il devait seul en porter la responsabilité ».; See also J.B. RACINE, *prec.*, note 11 (who makes parallel observations) p. 25.

39. V.N. DADRIAN, *prec.*, note 4, p. 307.

40. Vahakn N. DADRIAN, “The Turkish Military Tribunal’s Prosecution of the Authors of the Armenian Genocide : Four Major Court-Martial Series” (1997) 11 O.U.P. 28 p. 34.

41. V.N. DADRIAN, *prec.*, note 4, p. 325-326.

42. *Id.*, p. 327.

43. See, for the circumstances in which the document was obtained which corroborate its authenticity, Vahakn N. DADRIAN, “The Secret Young-Turk Ittihadist Conference and the Decision for the World War I Genocide of the Armenians”, (1993) 7 O.U.P. 173, p. 176. The document reads : “1). Profiting by Arts : 3 and 4 of Comity of Union and Progress, close all Armenian Societies, and arrest all who worked against Government at any

authentic document attesting to the genocidal intent of the central government). The orders stipulated therein reflected the many testimonies of Turkish officials stationed throughout the Empire when the acts were committed. An example which illustrates the nature of secrecy of the orders is the testimony of Cemal, the Governor of the Yozgat district in Ankara province. Cemal :

testified that an informal secret order to exterminate the Armenians was given to him by Necati, Ankara's Responsible [a high ranking Ittihadist provincial boss], who called it "the will of Ittihad's Central Committee"; he showed the paper that allegedly contained the order, but would not permit Cemal to read it. When Cemal refused to take order under such circumstances, denouncing the idea of massacring innocent people, he was dismissed within two weeks<sup>44</sup>.

At the end of the proceedings in 1921, the main perpetrators, Talât, Enver, Djemal and Dr. Nazim were tried and sentenced to death in absentia pursuant to articles 45 and 170 of the Otto-

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time among them and send them into the provinces such as Bagdad or Mosul, and wipe them out either on the road or there.(2). Collect arms.(3). Excite Moslem opinion by suitable and special means, in places as Van, Erzeroum, Adana, where as a point of fact the Armenians have already won the hatred of the Moslems, provoke organised massacres as the Russians did at Baku.(4). Leave all executive to the people in the provinces such as Erzeroum, Van, Mumuret ul Aziz, and Bitlis, and use Military disciplinary forces (i.e. Gendarmerie) ostensibly to stop massacres, while on the contrary in places as Adana, Sivas, Broussa, Ismidt and Smyrna actively help the Moslems with military force.(5). Apply measures to exterminate all males under 50, priests and teachers, leave girls and children to be Islamized. (6). Carry away the families of all who succeed in escaping and apply measures to cut them off from all connection with their native place.(7). On the ground that Armenian officials may be spies, expel and drive them out absolutely from every Government department or post.(8). Kill off in an appropriate manner all Armenians in the Army - this to be left to the military to do.(9) All action to begin everywhere simultaneously, and thus leave no time for preparation of defensive measures.(10). Pay attention to the strictly confidential nature of these instructions, which may not go beyond two or three persons".

44. *Id.* p. 177.

man Penal Code<sup>45</sup>. Other trials were conducted before different Ottoman courts 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 those of "humanity and civilization" to condemn "the crimes of massacre, pillage and plunder"<sup>46</sup>. These trials resulted in the conviction and execution of three perpetrators at a low government level, pursuant to the aforementioned domestic criminal laws. For the first time in history, deliberate mass murder, designated "a crime under international law" was "adjudicated in accordance with domestic penal codes, thus substituting national laws for the rules of international law"<sup>47</sup>.

For nearly two years, Great Britain detained some 120 Turkish prisoners at Malta while 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<sup>48</sup>. Although the Turkish trials that followed the end of the war were generally successful in documenting the crimes committed against the Armenians, they failed to punish the rest of the perpetrators. The new Turkish government and the "nationalistic aspirations of unity and national pride were inconsistent with the internal impulse to fix blame and apportion responsibility for the Armenian genocide on Turkish leaders"<sup>49</sup>. Although the first attempt in creating an international criminal tribunal to punish genocide failed as a result of Turkish nationalism and Allied indifference, the world was convinced that a crime of unprecedented magnitude had occurred. In fact, due to the many eyewitness accounts of missionaries and

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45. Gérard CHALIAND, *Le Crime de silence : Le génocide des Arméniens*, Paris, Éditions Flammarion, 1984, p. 81; See also V.N. DADRIAN, *prec.*, note 4, p. 332.

46. 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 J. Intl L. 221, p. 308.

47. *Id.*, p. 292.

48. A. DE ZAYAS, *prec.*, note 23, p. 4.

49. V.N. DADRIAN, *prec.*, note 4, p. 317.

diplomats in Turkey<sup>50</sup> and the resulting media attention outside of Turkey<sup>51</sup> during and after the war, consensus that there had in fact been a genocide was largely achieved. Of all the failures to punish the war criminals of the First World War, the absence of sanctions for those who participated in the genocide bore terrible consequences and garnered the most regret<sup>52</sup>. Conversely, and on a positive note, these trials allow for a strong position to counter arguments of denial : « ils permettent en effet d'apporter une preuve supplémentaire du génocide émanant de documents officiels ottomans<sup>53</sup> ».

Ultimately, we argue that the evidence produced from Turkish archives is the most reliable source. Those in Turkey who vehemently deny the genocide blame the biased nature of the sources of the "Ottoman Empire's enemies". Although all evidence found in the archives of several countries leads to the same conclusion, those in Austria and Germany are said to be the most

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50. Missionaries stationed in the Ottoman Empire entered what they observed. Original documentation remains in their respective countries' archives. See e.g. Matthias BJORN LUND, "Scandinavia and the Armenian Genocide" 24-04-08 Armenian Weekly, p. 19 online : <[http://www.armenianweekly.com/wp-content/files/AW\\_Apr08.pdf](http://www.armenianweekly.com/wp-content/files/AW_Apr08.pdf)> (29 July 2011); Tacy ATKINSON, *The German, the Turk and the Devil Made a Triple Alliance, Harput Diaries, 1908-1917*, England, Taderon Press, 2000; Johannes LEPSIUS, *Bericht über die Lage des armenischen Volkes in der Türkei* ("Report on the situation of the Armenian People in Turkey"), Bad Schussenried, Hess, 2011.
51. For example, in 1915 alone, the New York Times published 145 articles on the Genocide. See e.g. Vincent YARDUM, "the Death of Armenia", 15-09-15 New York Times online : <<http://query.nytimes.com/gst/abstract.html?res=F10713FE395D16738DDDAE0994D1405B858DF1D>>; "Appeal to Turkey to Stop Massacres", 28-04-15 New York Times online : <<http://query.nytimes.com/mem/archive-free/pdf?res=9A07EFDE153EE033A2575BC2A9629C946496D6CF>>.
52. Theodore Roosevelt is quoted to say that the Armenian Genocide was "the greatest crime of the war"; See James F. WILLIS, *Prologue to Nuremberg : the Politics and Diplomacy of Punishing War Criminals of the First World War*, Sydney, Greenwood Pub Group, 1982 cited in A. DE ZAYAS, prec., note 23, p. 4.
53. J.B. RACINE, prec. note 11, p. 31.

compelling and reliable, thus it is impossible to refute their neutrality<sup>54</sup>.

The establishment of courts-martial was an experiment which illustrates the difficulty in prosecuting criminals for genocide and other crimes against humanity (such as pillage, rape and torture) through domestic processes without the complete commitment of the international community. The Leipzig trials, which took place simultaneously and aimed to prosecute war criminals, further corroborates this challenge.

### **1.3.2 Armenian Revenge Acts**

The negative impression of justice induced the Dashnak – “nationalist” party, under the mandate of Armen Garo and Chahan Natali, to organize “acts of vengeance”. The purpose was to kill those who were sentenced to death in absentia during the Ottoman court-martial trials<sup>55</sup>. The primary perpetrators were mostly assassinated by Armenian nationals between the years 1921-1923. Talât, the ex-Minister of Interior who had escaped to Berlin, was assassinated by Soghomon Tehlirian in 1921. Talât’s assassination is the most representative of the weight that is given to the crimes committed by the Ottoman Turks. As Tehlirian was apprehended by pedestrians, he shouted in broken German : “I foreign-

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54. See V.N. DADRIAN, *German Responsibility in the Armenian Genocide: A Review of the Historical Evidence of German Complicity*, Massachusetts, Blue Crane Books, 1996, p. 45, 73, 74. Austria-Hungary and Germany were allies to the Ottoman Empire. The morality of Austrian and German consuls of Anatolia transcended the custom of mutual trust between allies especially when such trust is of utmost importance during war-time. In a matter of weeks, many of them who routinely witnessed the atrocities befalling the Armenians could no longer bear to be complicit by covering up the crime. Therefore they reported back with their observations to their superiors, that is, the ambassadors in Constantinople, who in turn informed their governments in Vienna and Berlin via telegrams, all of which contain the equivalent word for “annihilation” or “extermination”. These writings, imprinted with “secret” or “highly confidential” show they were not meant for public consumption and therefore enhance the veracity of their content.

55. J.B. RACINE, *prec.*, note 11, p. 39.

er, he foreigner, this not hurt Germany... It's nothing to do with you". It was "national justice carried out in an international setting" <sup>56</sup>. In his trial before a German criminal court, his acquittal was not further explained and he was deemed temporarily insane pursuant to article 51 of the German criminal code. Perhaps this was due to the legal vacuum of "act of vengeance"<sup>57</sup>, particularly present in this case where an individual that had witnessed the atrocities committed against him and his family assassinated the person who ordered the extermination of 1.5 million Armenians<sup>58</sup>. The trial also provided the testimonies of many survivors and "extraordinary documents which disclosed Talât's official orders to exterminate the Armenians"<sup>59</sup>. Similar assassinations of Turkish diplomats continued to occur worldwide throughout the 1970s and 1980s<sup>60</sup>.

Was justice really served among the Armenian community? Did this ensure that a crime of the highest degree was recognized to the extent that it redefined Armenian history? The murders of high-ranking officials did not erase the intentional wrongful act and served no purpose in repairing the injury. The trauma of the survivors, a lost cultural identity on historic lands, the physical destruction of a people and the confiscation and expropriation of

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56. Samantha POWER, *A Problem from Hell : America and the Age of Genocide*, New York, HarperCollins, 2002, p. 1.

57. J.B. RACINE, prec., note 11, p. 41. It is also argued that this was a way in which to exonerate Germany for its complicity in the extermination of the Armenians; See V.N. DADRIAN prec., note 4, p. 256-260 for parallel observations.

58. See S. POWER, prec., note 56 for the gruesome details that Tehlirian witnessed before he was left for dead by Turkish gendarmes.

59. P. BALAKIAN, prec., note 36, p. 345.

60. See e.g. Thomas DE WAAL, *The Caucasus : An Introduction*, London, Oxford University Press, 2010, p. 30; See also "Terrorism : Long Memories", 08-08-83 Time, online : <<http://www.time.com/time/magazine/article/0,9171,955176,00.html>> (31 July 2011). The first, which set off a chain of subsequent killings, began in 1973 with an elderly survivor of the Genocide who assassinated two Turkish diplomats in Los Angeles. These isolated incidents occurred sporadically for over ten years by the ASALA (Armenian Secret Army for the Liberation of Armenia), a secretive and unpopular group whose demands were the recognition of the Genocide by Turkey and reparations.

their lands, property, churches, and schools continue to weigh heavily on the Armenian people.

#### **1.4 Consequences of the Treaty of Lausanne (1923) and the pursuit of sanctions based on State responsibility**

##### **1.4.1 The ineffective mechanisms to enforce sanctions and subsequent repercussions**

Ultimately, the pressure applied by the British on Turkey was utterly ineffective in implementing sentences in the Ottoman war crimes tribunals. The Allies' flagging efforts to implement an international criminal tribunal pursuant to the Treaty of Sèvres was equally disappointing. Turkey actually regained its reputation as a newly formed Western-backed democracy under Atatürk. The Allies' failure to follow through with the Treaty elicited considerable rancor with Armenians. The expectation of unifying Armenia to its western counterpart (eastern Anatolia) as envisioned by the Treaty dwindled with fresh fighting between Kemalists and Armenian nationalists and a new cycle of Armenian massacres hampered progress in implementing the land concessions from Turkey to Armenia. Most importantly, despite the lands it lost after the war, Turkey still partly controlled the oil reserves with the British in the Middle East. This therefore placed Turkey in a strong position at the bargaining table leading into the Treaty of Lausanne<sup>61</sup>. Furthermore, due to some ambiguities in the Treaty of Sèvres text, the absence of legal precedent to follow and a new foreign policy for Turkey in mind, the Treaty was never ratified. The Treaty of Lausanne, signed on July 24, 1923, abandoned the Allies' demands for an international trial and the punishment of the Ottoman government for the massacre against the Armenians, as the Treaty of Sèvres had provided for (article 230), the commitment to

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61. See Christopher SIMPSON, *The Splendid Blond Beast : Money, Law, and Genocide in the Twentieth Century*, New York, Grove Press, 1993, p. 36-37 : "The point was nonetheless clear. Western governments had discarded wartime promises of action against the Ittihadists who had murdered about a million people in order to help their political manoeuvring over oil concessions in the Middle East".

grant reparations to the survivors of the genocide (article 144), and the recognition of a free Armenian State (Section VI, articles 88-93)<sup>62</sup>. Thus, although the Allies would lay the building blocks for international tribunals and the concept of "genocide" by acknowledging the "new crimes of Turkey against humanity", the Armenians would not see true justice brought by the international community<sup>63</sup>. Many in the political arena condemned the concessions to the new Turkish republic which left the newly found State with impunity. For example, in the United States, the Democrats condemned the Treaty saying "it barter legitimate rights and betrays Armenia for the Chester oil concessions"<sup>64</sup>.

One of the three key leaders that planned the genocide, Talât, was quoted to say : "I have the conviction that as long as a nation does the best for its own interests, and succeeds, the world admires it and thinks it moral"<sup>65</sup>. The ensuing impunity enjoyed by the Turkish State thereby validates the statement. Today, "[n]ot only is the victim's quest for justice denied, but even more important, the perpetrator is encouraged to redefine the offense in such a way that the criminality of the act is either diluted or denied altogether"<sup>66</sup>. The repercussions and historical significance of impunity cannot be overestimated, especially in the analysis of subsequent totalitarian regimes. Hitler must have been fully aware of the genocide; when preparing for the invasion of Poland, he encouraged his officers to be "brutal and merciless", declaring "Wer redet heute noch der Vernichtung der Armenier?" – "Who af-

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62. A. DE ZAYAS prec., note 23, p. 3. Armenia incorporated in the Russian Empire "...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 Soviet Republic."

63. S. SHAMSEY, prec., note 1, p. 371.

64. P. BALAKIAN, prec., note 36, p. 372.

65. V.N. DADRIAN prec., note 4, p. 383.

66. *Id.*, p. 294, 287 : "Still in bondage to the shackles of obdurate atavism, and still profiting from the fruits of the negative reward, i.e., the impunity accruing to it, Turkey may continue for a while to deny any and all culpability."



ter all is today speaking of the destruction of the Armenians?" and further adding "Die Welt glaubt nur an den Erfolg" – "The world believes only in success"<sup>67</sup>. As such, the worship of success can only fuel denial, because success seems to cause the world to ignore the horrific lack of rationality and the brutality of the successful acts.

#### **1.4.2 The retroactive nature of jus cogens : an analytical framework**

Crimes against humanity and genocide are *jus cogens* crimes, peremptory norms for which there can be no derogation and for which there is universal jurisdiction. It gives the right for all States to seize international courts to bring the perpetrating party to justice<sup>68</sup>. As such, the prevention and prohibition of genocide has acquired an *erga omnes* status. Such crimes constitute the highest pedigree of customary international law<sup>69</sup>. Therefore, its *jus cogens* nature is not debatable and had not been debatable, we contend, when the crimes were committed<sup>70</sup>. In effect, the only

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67. *Id.*, p. 403-404. It is argued today among lawyers, that this statement provides one of the strongest evidences if ever to be used in a court of law as it was a motive by the perpetrator to justify impunity for subsequent genocides.

68. See Prosper WEIL, "Towards Relative Normativity in International Law" (1983) 77 Am. J. Int'l. L. 413, p. 429 cited in P.S. RAO, *prec.*, note 15, p. 931 : "Weil noted that a principle of international law becomes *jus cogens* or gets the status of peremptory norm, or becomes a principle whose violation is an international crime, not so much by virtue of the content of the principle, but by the recognition accorded to it by the international community. Further, he pointed out that once recognized and accepted by the 'essential components of the international community', the super norms would ipso jure be imposed on all States, including those who were against that recognition".

69. Francisco F. MARTIN, "Delineating a Hierarchical Outline of International Sources and Norms". (2002.) 65 Sask. L. Rev 333, p. 352.

70. Michael BRYERS, "Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules" (1997) 66 Nordic J. Int'l L. 211, p. 224 : "For instance, most international lawyers would accept that *jus cogens* rules have not always existed."; See also Jeffrey S. MORTON, "The International Legal Adjudication of the Crime of Genocide" (2000) 7 ILSA J. Int'l & Comp. L. 329, p. 330 : "To state that genocide is a twentieth century

precedent which is sufficient to highlight the legal aspects of this case is the only other genocide which predates the Genocide Convention's introduction -the Holocaust. In fact, the Armenian Genocide was still fresh in the minds of those who sought justice in the Nuremburg trials. The British Chief Prosecutor at Nuremburg took the Armenian example as the foundation of the Nuremburg law on crimes against humanity declaring : "The same view was acted upon by the European Powers which in time past intervened in order to protect the Christian subjects of Turkey against cruel persecution." He further submitted that with respect to the limits of state sovereignty in relation to international law : "the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon his rights in a manner which outrages the conscience of mankind"<sup>71</sup>. An attempt to bring the unity and sustainable commitment of the international community proves to be of utmost importance in achieving justice. In response to critiques about its nature, "the tribunal rejected the argument that the Nuremburg Charter was an arbitrary exercise of power on the part of the victors. It asserted instead that the Charter expressed international law already existing at the time the Charter was framed"<sup>72</sup>. Thus, the declarative nature of the Genocide Convention as existing law was generally established by international courts such as the Tokyo and Nuremburg Tribunals.

Additionally, in the case of the ex-post facto nature of the Armenian Genocide, the Vienna Convention is clear on how to interpret the Genocide Convention. The latter has no provisions regarding its retroactive nature, but article 31 of the Vienna Convention gives clarification on interpreting treaties: in light of their object and purpose. The Genocide Convention's objective of stopping such crimes from ever occurring ("prevention") allows for

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phenomenon is misleading; however, to label the 1900s the century of genocide is accurate".

71. H.M. STATIONERY OFFICE, "Speeches of the Chief Prosecutors at the close of the Case against the Individual Defendants, (1946), 63 Cmd. 6964 cited in V.N. DARDIAN, *prec.*, note 46, p. 325.

72. Vahakn N. DADRIAN, "The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust : From Impunity to Retributive Justice", (1998) 23 Yale J. Int'l L. 503, p. 550.

retroactive application as long as there is still a legal basis for an action<sup>73</sup>. Furthermore, the Martens Clause of the Hague Convention which reads "until a more complete code of the laws of war has been issued," must have made the legislator aware of the crimes that encapsulate the "laws of humanity", even if they were not yet put into words. Its literal sense would allow us to conclude that the legislator could foresee the later delineation of the different facets of the laws of humanity and until then its broader scope would receive application.

The difficulty today is the liability of modern-day Turkey in light of the principle of State succession. We must first establish the weight of reliable and compelling evidence of genocide by the Ottoman Empire before discussing the responsibility of Turkey. If so, what types of (State) sanctions are possible in case of a breach of the law?

## **2. The acceptance of the Armenian case as "genocide" today and possible legal vehicles against the State of Turkey**

The Genocide Convention was adopted following Raphael Lemkin's efforts in coining and defining the term. He espoused especially the Armenian case in his grasping of the notion. The acceptance of the term 'genocide' to describe the Armenian massacres is pursuant to article II of the Genocide Convention, which defines and delineates the notion from the other crimes against humanity it used to be subsumed in. In contrast to crimes against humanity, which require a "general intent", genocide is

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73. J. SHAMSEY, prec., note 1, p. 337; See also J.B. RACINE, prec., note 11, p. xxiii. The amnesty accorded to Turkey for the Genocide by the Treaty of Lausanne was, we argue, contrary to *jus cogens*. If the latter was indeed already existing customary international law, art. 53 of the Vienna Convention renders the amnesty annexed to the Treaty of Lausanne null and void. This leads us to the type of action to be brought and if there is any prescription. In effect, an action only exists insofar as the perpetrators are still alive as a criminal case is interrupted with death. Considering another scenario, the retroactive nature can only serve to attribute the responsibility on the State.

defined by "a specific intent to destroy in whole or in part a national, ethnical, racial or religious group"<sup>74</sup>. The definition lacks the inclusion of cultural genocide, part of the injury still suffered by diasporan Armenians. Does this concept have a legal status in international law as a *jus cogens* violation?

The consequences of genocide persist today. Survivors and their descendants remain affected by the events. In effect, the time frame has not yet lapsed to break the causal nexus between the fault and the injury<sup>75</sup>. The absence of formal recognition gives genocide its continuity and its present relevance<sup>76</sup>. Since the advent of the United Nations, international law has been in constant development, making it more feasible than it had previously been to both punish the perpetrators of crimes against humanity and remedy the consequences of the injury through various forms of reparation. What remains to be seen is whether these international legal and political bodies can hold a State liable for prior *jus cogens* violations.

## **2.1 The Legal Qualification of the Armenian Case as genocide and its implications in international law**

The establishment of the constituent elements of domestic criminal law, the *actus reus* (perpetrated acts) and the *mens rea* (special intent) are equally reflected in the crime of genocide. As

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74. See J. SHAMSEY, *prec.*, note 1, p. 339. The author argues the idea that the specificity aspect of genocide cannot be used against lower level perpetrators and this is explained by their level of knowledge about the broader scope of the crime : "...the crime of genocide is probably more applicable to high-level leaders, while [crimes against humanity and war crimes] could be used to try lower-level state actors...Genocide seems to make it possible to convict high-level officials who may be removed from the actual atrocities".

75. See generally the UN GAOR, Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its Fifty-third Session, 56<sup>th</sup> Sess., Supp. No.10, UN Doc A/56/10 (2001), available at <<http://www.un.org/law/ilc>> (31 July 2011); The text of the Draft Articles with commentary is reprinted in 37 ILM 440 (1998).

76. J.B. RACINE, *prec.*, note 11, p. xx.

anticipated by the Genocide Convention, this crime is deemed an offense under many States' domestic laws. The crime thus consists of establishing these elements.

### **2.1.1 Material Elements**

Article II of the Convention reads :

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

The provision encapsulates what happened during the First World War to the Armenians, a defined national, ethnic, racial and religious group from the Turkish people (Art. II a))<sup>77</sup>. An example of one of the gravest of crimes committed at the time is documented in the memoir of Leslie Davis<sup>78</sup>, American Consulate of Harput. Davis recounts his observations in which the focal point is on the horrendous massacres of the women and children in the province of Harput. His assistant, a Turkish employee in the American Consulate, told him that he had evidence that all the Armenians were being deprived of their property to be deported to Mesopota-

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77. See, for the nuances between these four notions, *The Prosecutor v. Akayesu*, [1996] ICTR 96-4-T, par. 512-515, online : ICTR <<http://www.ictor.org>> (31 july 2011). [hereinafter "Akayesu"]

78. See in general Leslie A. DAVIS, *The Slaughterhouse Province : An American Diplomat's Report on the Armenian Genocide, 1915-1917*, New York, A.D. Caratzas, 1989.

mia outside Harput city. As a guide, he took Davis to the sites of atrocities near Lake Goeljuk where the Consulate witnessed the naked corpses of women that had been violated to death. The remaining surviving women were forced into harems, were raped and forced to bear the children of their Muslim aggressors. Davis describes having spent over twelve hours inspecting the extent of the atrocities of Harput's Armenian population.

Due to the limited scope of this paper, we will resign ourselves to relying on the uniformity of these and other testimonies<sup>79</sup> (many of which are on film). Stories of survivors, official documents (letters, cipher-telegrams, newspaper articles, photographs) and the confessions of many government officials in the Turkish courts-martial as transcribed in *Takvim-i Vekayi*, the Ottoman Gazette, all demonstrate the veracity of the material facts.

### 2.1.2 Intentional Elements

The mental element reflects the psychological state of the author of the infraction. Within the framework of intentional infractions, the author must commit the infraction with the will to achieve a result prohibited by law<sup>80</sup>. In effect, it is the specific intention to destroy a protected group that determines the specificity of genocide.

The legal adjudication of the intent of genocide depends on a high threshold of burden of proof which is imposed on the plaintiff<sup>81</sup>. As such, the bulk of the prosecution's case is contingent upon the quality of evidence of special intent or *dolus specialis*<sup>82</sup>

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79. Missionaries stationed in the Ottoman Empire entered what they observed. Original documentation remains in their respective countries' archives. See e.g. M. BJORNLUND, *prec.*, note 50; T. ATKINSON, *prec.*, note 50.

80. J.B. RACINE, *prec.*, note 11, p. 63.

81. See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide; *Bosnia and Herzegovina v. Serbia and Montenegro*, [2007] ICJ Rep. [hereinafter "the Bosnian Genocide"].

82. See e.g. "Akayesu", *prec.*, note 77.

without which the massacres that occurred would not be labeled as genocide. This high threshold has been criticized by many lawyers for its unreasonable nature<sup>83</sup>. Unlike the Nazi regime, which openly revealed its plans, the Ittihad leaders focused on masking their intent through the guise of the irrational, albeit legal provisions for deportations which ultimately became extermination marches<sup>84</sup>. The evidence of the intentional nature of the massacres is apparent, even if the world did not witness the perpetrators openly denouncing their plans. As observed by one legal scholar: “[g]overnments less stupid than that of National Socialist Germany will never admit the intent to destroy a group as such, but will tell the world that they are acting against the traitors”<sup>85</sup>.

Under positive law, circumstantial evidence may serve the purpose of proving the required intent to support *dolus specialis*<sup>86</sup>. The few documents obtained by the British from Essad, including the “Ten Commandments”, are the only original signed papers emanating from high-ranking government officials. Most authentic documents were destroyed by Ittihad party members following the armistice of 1918. Circumstantial evidence, if offered in a way that leaves no doubt of *dolus specialis*, could corroborate the remaining authentic documents<sup>87</sup> (namely, the minutes taken by Turkish officials during the court-martial trials). Countless other

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83. Freda KABATSI, “Defining or Diverting Genocide : Changing the Comportment of Genocide” (2005) 5 Int’l Crim. L. Rev 387, p. 391.

84. See V.N. DADRIAN in general. These statements are largely substantiated in Turkey’s historical archives.

85. Georges A. FINCH, “The Genocide Convention”, (1949) 43 Am. J. Int’l Law 583 cited in V.N. DADRIAN, *prec.*, note 46. As mentioned earlier, the war gave the Ottoman government its long-awaited opportunity to exterminate the Armenians.

86. See “Akayesu”, *prec.*, note 77; See also *Prosecutor v. Tadic*, [1995] No.IT-94-1, (ICTY A.C.); J.B. RACINE, *prec.*, note 11, p. 60.

87. V.N. DADRIAN, *prec.*, note 4, p. 322. To refute denialist arguments today concerning authenticity, it should be stressed at this point that the dozens of cipher-telegrams used (as evidence) between military commanders on exterminating Armenians during the courts-martial were previously authenticated by a stamp as conform to the original, - (*aslina muvafik*) after careful scrutiny of the documents by the experts working in the Interior Ministry.

testimonies from Armenians and non-Armenians alike, and the historical and political circumstances preceding the intent to destroy the Armenian population of the Ottoman Empire all serve as viable circumstantial evidence<sup>88</sup>.

The vehement denial of the Turkish government in both the past and the present is an obstacle in having an international court or institution weigh such documents without reasonable doubt. Thus, to reinforce the proof of the intention to destroy the Armenian population, it is necessary to rely on corroborating elements. It is then possible to deduce the intention to destroy a human group by a certain number of circumstances that crystallize the facts certain of the specific criminal intention. This was an important factor in determining intent in the Bosnian Genocide Case<sup>89</sup>. We can identify a few other indicative factors that establish the intentional element.

Firstly, the number of victims is a strong indicator of the intent to destroy a given group ("a substantial part of the group" as established in the Bosnian Genocide Case, para. 242)<sup>90</sup>. The population censuses that were taken in most regions before and after the war indicate mass massacres. Of course, massacres and "genocide" are not necessarily connected. But as Jurovics notes,

[L]a répétition des actes criminels, c'est à dire leur commission systématique et généralisée, leur étendue géographique ou dans le temps, leur massivité, le nombre des victimes d'un même groupe, fournit une présomption simple mais claire de la présence d'une telle intention... plus le nombre de victimes est important et plus est sous

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88. Kevork BAGHDJIAN, "La confiscation, par le gouvernement turc, des biens arméniens...dits abandonnés", 1<sup>st</sup> ed., Montréal, 1987; « Les récits des témoins et des survivants, les rapports des diplomates, les enquêtes des journalistes, les minutes des procès, tout un ensemble documentaire apportait l'évidence de la volonté de détruire un peuple par le sabre et le couteau, par la faim, la soif, l'épuisement et la maladie ».

89. "The Bosnian Genocide", prec., note 81, par. 376.

90. "The Bosnian Genocide", prec., note 81; See also J.B. Racine, prec., note 11, p. 60.



tendue l'intention de détruire une collectivité nommée et désignée<sup>91</sup>.

For the murder of nearly 1.5 million Armenians, he explains : « Un tel nombre et de telles proportions, en ce qu'ils sont associés à une zone géographique étendue et à une répétition dans le temps, invitent naturellement à en déduire une intention de détruire l'ensemble des Arméniens de l'Empire ottoman<sup>92</sup> ».

Secondly, the premeditation and organization of massacres are other indicators<sup>93</sup>. There is no doubt that one of the longest lasting and successful empires in the world had hierarchically organized both its political and military spheres. With this in mind, it is irrational to think that large scale massacres from region to region are sporadic and disorganized in nature. The deportations of the Armenians were conferred to a Commission of Deportation and the orders were transmitted by the Minister of Interior to the *vali* (equivalent to governors). The orders were later executed on the territory through the sub-level organ, the Special Organization (*teskilati mahsus*)<sup>94</sup>. The orders, as laid down in the "Ten Commandments", were executed in various methods depending on the region<sup>95</sup>. There was thereby a hierarchical regimented administration where the purpose was to manage the process of exterminating the Armenians. There was a clear objective of the extermination, the destruction or devastation<sup>96</sup> (all these words

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91. Yan JUROVICS & L. HUSSON, "Le crime contre l'humanité" in *Jurisclasser Droit international*, fasc. 410, 2003, n. 105, p. 318-319; quoted in J.B. RACINE, *prec.*, note 11, p. 61.

92. *Id.*; *Prosecutor v. Goran Jelusic*, [2001] No.IT-95-10-A (ICTY A.C.), par. 47.; *Prosecutor v. Kayishema and Ruzindana*, [2001] No. ICTR-95-1-T (ICTY T.C.), par. 189-191.

93. J.B. RACINE, *prec.*, note 11, p. 62; *Prosecutor v. Kambanda*, [2000] No.ICTR-97-23-A, (ICTR A.C.), par. 61-62.

94. The Special Organization was comprised of Turkish and Kurdish prisoners released from prison specifically for the execution of the massacres.

95. See in general Vahakn N. Dadrian, "The Role of Turkish Physicians in the World War I Genocide of the Ottoman Armenians" vol.1, New York, Pergamon Press, 1986, no. 2 *Holocaust and Genocide Stud.* p. 169.

96. J.B. RACINE, *prec.*, note 11, p. 61.

are found in the different testimonies of the surviving Armenian diaspora as well as foreign diplomats in the Ottoman Empire).

Finally, with regards to the authors of the crime, as per articles III and IV ("the persons") of the Genocide Convention, there is no ambiguity that the orders stemmed from the ruling political party intending to homogenize the Empire by devising the "final solution" to achieve its goals.

The recognition of the Genocide by international legal or political institutions serves to bridge the gap for appeasement and justice, or in legal terms, to wipe out the injury caused by the continuous acts of denial. The large number of unpunished perpetrators and the absurd excuses invoked by the State to displace an entire people from their historic homeland by illegitimate laws should be firmly established.

It is important to reiterate<sup>97</sup> that both State responsibility and individual criminal liability<sup>98</sup> in the Armenian case predated the Genocide Convention. Despite this, at present only one of these two scenarios as expressed in the Genocide Convention, regarding State responsibility<sup>99</sup>, leaves the possibility for a political role in, or the legal adjudication against, the State of Turkey since most perpetrators of the crime are no longer living. Indeed, the purpose of international law is to hold the State which engaged in

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97. J. SHAMSEY, *prec.*, note 1, p. 337; See also J.B. RACINE, *prec.*, note 11, p. xxiii. As seen above, during the Paris Peace Conference, the Commission of Fifteen established liability against the Ottoman Empire for crimes against humanity and envisaged compensation as reparations through the Treaty of Sèvres which itself was inspired by the Hague Convention.

98. See e.g., A. DE ZAYAS, *prec.*, note 23, p. 1. The crime of Genocide entailed "...both a responsibility to provide compensation and the personal criminal liability of the perpetrators".

99. Convention on the Prevention and Punishment of the Crime of Genocide, *prec.*, note 12, art. IX : "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment 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*" [emphasis added].

a wrongful act liable by using any viable international legal avenue.

## **2.2 International judicial bodies which may have competence to decide on Turkey's liability**

Thus far, we have established a hypothetical framework in which Turkey could be legally responsible for genocide, even in the face of denialist propaganda. We will now attempt to analyze the possibilities of bringing such a case to the International Court of Justice, the European Court of Human Rights and the International Criminal Court in light of their constitutive laws, and establish the potential procedural and legal obstacles arising out of an action against Turkey which could hinder the process of accountability at any time.

### **2.2.1 The International Court of Justice as a legal avenue and obstacles**

The United Nations' judiciary organ, the International Court of Justice (hereinafter "the ICJ"), is perhaps the most relevant international legal court to hold Turkey liable for crimes committed against the Armenian population during the First World War. Indeed, we have laid the groundwork for the retroactive application of the Genocide Convention and as per article 38 (1) b) of the Statute of the International Court of Justice (hereinafter "the ICJ Statute")<sup>100</sup>, we confirm the Court's competence to adjudicate on "international custom". In effect, the ICJ has competence to rule on the issue of retroactive application of genocide or in its recognition, as well as the question of the attribution to Turkey of the massacres. In addition, similar to domestic law, the ICJ's judgments are subject to *res judicata* but without appeal<sup>101</sup>. As such, we have to be wary that this kind of judgment is binding on the parties, and, moreover would influence any other tribunal that seeks international recognition, as well as individual or mass

100. Statute of the International Court of Justice, annexed to the Charter of the United Nations, 26 June, 1945, Stat.1031, T.S. 993, 1 U.N.T.S. xvi

101. *Id.*, art.60.

compensations to the victims or the Republic of Armenia by other international courts or civil courts.

As this case has not come before the ICJ, we will base our approaches on a theoretical framework. Firstly, we will set out some potential procedural obstacles (or preliminary objections on the admissibility of the case) in light of case law following Turkey's assent to be bound by the ICJ's jurisdiction<sup>102</sup>. Secondly, we will assess the arguments of the Bosnian Genocide Case and how this sheds light on the Armenian Case. Indeed, the Bosnian Genocide Case is thus far the only one adjudicated by the ICJ on genocide.

The first procedural obstacle by Turkey to exempt itself from the ICJ's jurisdiction is its legal continuity from the Ottoman Empire. Does the case of Ottoman Empire/Turkey compare to that of the Federal Republic of Yugoslavia (Serbia and Montenegro)?

Some state practice after the Holocaust may provide insight on adjudication on the Armenian Case and Turkey's legal and moral responsibility based on the principle of State Succession. As there is no legislation in force on this principle and some inconsistent state practice<sup>103</sup>, the ICJ considers this principle as it arises

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102. *Id.*, art.36 (1), (2); See generally Stanimir A. ALEXANDROV, "The Compulsory Jurisdiction of the International Court of Justice : How Compulsory Is It?" (2006) 5 Chinese J. of Int'l L. 29. Any challenge presented to the Court's jurisdiction shall be decided by the Court as per art. 36(6) of the Rome Statute. Genocide, a crime backed by a "compromissory clause", that is, in Art. IX of the Genocide Convention, which directs it to the ICJ's jurisdiction, legally establishes the Court's competence to adjudicate on the matter. Turkey to this day has made no reservations with regards to this clause, which legally obliges her to consent to the Court's jurisdiction on genocide (Art. 36(1)). Even in spite of consent, Turkey could in practice refuse to adhere to the Court's judgment, if such a judgment is against its vital interests as a sovereign nation-state.

103. For example, when Czechoslovakia disintegrated into two States, it did so with both having a clean slate (*tabula rasa*) and neither purported to be the successor of the former State. At the other extreme, Serbia and Montenegro claimed they were the continuation of the Socialist Federal Republic of Yugoslavia (SFRY). Further discussion of this case will be found in subsection 2.2.1 "The International Court of Justice as a legal avenue and obstacles", below.

on a case by case basis<sup>104</sup>. Several legal questions arise from this principle.

First, the legal continuity of a successor State is of interest in the Armenian Case because Turkey would be liable for obligations under the treaties it had undertaken under its predecessor State. When compared to the Bosnian Genocide, the Socialist Federal Republic of Yugoslavia (hereinafter "the SFRY") disintegrated into six countries of which four became de facto independent. Thus, Serbia-Montenegro could not assume the continuity of the SFRY because there was no transition with the same legal personality and as such it would have no legal consequences. Consequently, its treaty rights and obligations became extinct, though in the Request for Revisions Case<sup>105</sup>, it became clear that even with a clean slate, certain treaties cannot be derogated from on the basis of customary international law. Those treaties concerning peremptory norms are such an exception to derogation. In such a case, the ICJ may also refer to the ECtHR judgment in the *Loizidou* case<sup>106</sup> with regards to jurisdiction *ratione temporis*, that is, an obligation to hear the case regardless of whether or not a State is party to a treaty or convention<sup>107</sup> at the time of the legal violation.

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104. See generally "The Bosnian Genocide", prec., note 81.

105. Application for Revision of the Judgment of 11<sup>th</sup> July 1996 in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections; *Yugoslavia v. Bosnia and Herzegovina*, [2001] I.C.J. Rep. (hereinafter 'the Application'). Much like the FRY (Serbia and Montenegro) attempted to exempt itself from treaty obligations, given Turkey's consistent denial, the country is perhaps expected as a last resort to absolve itself of liability.

106. Further discussion of this case will be found in subsection 2.2.2 "The European Court of Human Rights as a legal basis for individual or collective compensation and potential obstacles", below.

107. See e.g. in the case of the ICJ, Statute of the International Court of Justice, prec., note 100, art.35(1), (2).

In contrast, continuity from the Ottoman Empire to Turkey depends on the original territorial nucleus<sup>108</sup>, in this case, Anatolia. The Turks constituted the main power of the Empire in which other States were incorporated through military conquests and formed government through proxies. As such, they were :

the government and the power in the country, and the rule of the Sultan and his followers, as much as the rule of the Young Turks during the First World War, was basically Turkish rule. Many of the Young Turkish leaders later took part in the nationalist movement and became the founders of the Republic. The entire Turkish population was incorporated into the Turkish Republic, in accordance with the Turkish National Pact. It is therefore easy to see the matter of fact identity of the personality of the Turkish Republic with the personality of the Ottoman Empire<sup>109</sup>.

Thus, State continuity from the Ottoman Empire to the Turkish republic is legally straightforward. The principle provides that there are implications for establishing its legal personality *inter alia* to treaties. An appropriate example is Russia's continuity of the Union of Socialist Soviet Republic (hereinafter "the U.S.S.R.") with the ex-post facto rights and obligations that followed from treaties, such as its place in the United Nations and its respective treaties and resolutions. Therefore, it is important to confirm the continuity of the succeeding State of Turkey from the Ottoman Empire. In effect, the party which perpetrated the Genocide is the same ruling regime which founded modern-day Turkey on nationalist values, though its main proponent Kemal Ataturk, a former member of the Ittihad, was one of the few figures who condemned the criminal actions of his party. Furthermore, the Treaty of Lausanne, which aimed to resolve the new borders of the Empire after colonial powers took over the Middle Eastern countries,

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108. See e.g. Rein MULLERSON, *International Law, Rights and Politics : Development in the Eastern Europe and the CIS*, London, Routledge, 1994.

109. Shavarsh TORIGUIAN, *The Armenian Question and International law*, 2<sup>nd</sup> ed, California, University of La Verne Press, 1988, p. 111; See also K. BAGHDJIAN, *prec.*, note 88, p. 121.

was signed between Turkey and the Allied powers<sup>110</sup>. A consensus of Turkey as the successor of the Ottoman Empire has thus been largely established and very difficult to refute.

The second procedural obstacle is that Turkey may object because this case does not produce actual legal consequences and thus no State including Armenia has any sufficient interest to seek the ICJ's competence on the matter<sup>111</sup>. Our main argument is that the crime of genocide is a *jus cogens* violation and gives *erga omnes* rights to any State to bring the perpetrating State to justice<sup>112</sup>. In effect, the declarative nature of genocide is laid out in article I of the Genocide Convention (i.e. "The contracting parties confirm that genocide...is a crime under international law")<sup>113</sup>. Consequently, as a crime of world public order which had legal consequences at the time, we could argue for the retroactivity of the Convention. The second defending argument is that many Armenian survivors in Anatolia migrated to the Republic of Armenia before it fell into Soviet rule in 1922, and thus the Republic of Ar-

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110. J.B. RACINE, *prec.*, note 11, p. 110.

111. *Id.*; See also *Cameroon v. United Kingdom*, [1963] ICJ Rep., par. 34 : "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function."

112. Case Concerning the Barcelona Traction : *Belgium v. Spain*, [1962] ICJ Rep., par. 33-34; "[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former 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*...[S]uch obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination..."

113. Convention on the Prevention and Punishment of the Crime of Genocide, *prec.* note 12, art. I.

menia representing these people and their descendents has a legitimate right for justice<sup>114</sup>. In practice, an action by Armenia against Turkey is hardly conceivable when the two countries, after having brokered negotiations to reopen their borders in 2009, have started to normalize relations after nearly two decades of tension arising over this and the Nagorno-Karabagh conflict. The negotiation process is currently at a stalemate but relations have nonetheless improved in recent years. We therefore contend that countries that adhere to strict policies and adopt laws against genocide negation, such as the governments of Uruguay, Argentina and Switzerland<sup>115</sup>, all of which have active Armenian communities, are more likely to bring forward a case against Turkey. In legal terms, the injury of the Armenians is continuous, specifically from the Ottoman Empire's denial and indifference of Armenian identity (i.e. religion and culture) and historical injustices to present day Turkey's similar attitude. The negation of the historical reality and the existence of 1.5 million Armenians of Anatolia is essentially another way of perpetuating the genocide. Negationism entails a denial of the right to one's identity and the right to one's history<sup>116</sup>. Thus, as a secondary argument, those sovereign States which sheltered many of the Armenian diaspora of Anatolia have a legal interest, we contend, to bring an action to the Court.

With respect to the principle of State responsibility and the relevant provisions of the Genocide Convention, specifically article IX, the Bosnian Genocide Case brought before the ICJ shows how prudent and analytical the judges are in weighing evidence that attributed responsibility to the Serbian government. The ICJ ar-

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114. A. DE ZAYAS, *prec.*, note 23, p. 14.

115. *Code Pénal Suisse* (1937-) Art.261(4) C.pén. reads: "Celui qui aura publiquement, par la parole, l'écriture, l'image, le geste, par des voies de fait ou de toute autre manière, abaissé ou discriminé d'une façon qui porte atteinte à la dignité humaine une personne ou un groupe de personnes en raison de leur race, de leur appartenance ethnique ou de leur religion ou qui, pour la même raison, niera, minimisera grossièrement ou cherchera à justifier un génocide ou d'autres crimes contre l'humanité sera puni d'une peine privative de trois ans au plus ou d'une peine pécuniaire".

116. A. DE ZAYAS, *prec.*, note 23, p. 2.



gues that the evidence presented with regards to the level of effective control by the Serbian government in the crimes committed on Bosnian territory is insufficient to hold the former accountable for Genocide. Could this provide a useful analogy to the Armenian Genocide and Turkey's legal responsibility in light of the abundant evidence in Germany, the United States, Turkey, Great Britain, and Austria's archives<sup>117</sup>?

Our theoretical framework is conceivable and tangible in practice. Unfortunately, the procedural obstacles could prevent the ICJ from moving towards written and oral proceedings, which would be disappointing considering the insurmountable evidence to adjudicate on the matter. Even in presenting such evidence to the ICJ, the Bosnian Genocide shows the extreme precaution that the ICJ judges exercise in the attribution of responsibility and the weight the evidence presented bears. As such, in the Bosnian Genocide Case, it was deemed that there was insufficient evidence to hold Serbia liable for genocide. Perhaps an advisory opinion on the adjudication of the retroactive application of genocide pursuant to article IX of the Genocide Convention, an approach which does not have binding effects, could give clarity on the issue before taking larger strides<sup>118</sup>.

Thus far, the Turkish government has gone to great lengths to mask the genocide, providing a positive impression to the ICJ adjudicating on the matter and ordering reparations. Turkey is likely to request a revision on the basis of "new facts"<sup>119</sup>. The basis for the revision would be to present "newer" documents, such as written testimonies of a sample of Turkish survivors who were subject to torture by Armenian rebel groups at the time. The incentive would clearly be to sway the individuals who are firmly convinced that the genocide occurred towards a more sympathetic

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117. Further discussion on effective control will be found in subsection 2.3.3 "The International Law Commission and the Draft Articles on State responsibility for Internationally Wrongful Acts", below.

118. Préc., note 100, art. 65

119. *Id.*, art. 61; See also 'the Application', prec., note 105. In effect, the Court may revise a decision if the cumulative conditions of art.61 are met.

view and to induce them to reconsider their position. This practice is currently manifesting itself in many ways, such as documentaries, genocide-denying historians, and Turkish government officials' declarations in the United Nations. However, the nature of any fact or set of facts submitted to the ICJ after the final judgment is, we argue, unlikely to influence the ICJ's decision, as it is insufficient to cast a doubt on the Young Turk party's specific criminal intent to exterminate the Armenians of the Ottoman Empire. This tendency is likely to be ongoing until Turkey, through its domestic democratic processes, acknowledges the genocide. Signs of normalizing relations are slowly beginning to emerge, as Turkey has shown goodwill in recent years. For example, Turkey restored a tenth century Armenian church in Akdamar, eastern Turkey, and has tempered the use of article 301 of the Turkish Penal Code<sup>120</sup>, thereby reducing the number of cases brought against those who label what happened to the Armenians as genocide.

### **2.2.2 The European Court of Human Rights as a legal basis for individual or collective compensation and potential obstacles**

The Council of Europe is a regional intergovernmental organization of human rights that counts both Turkey and Armenia as members. The Council adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>121</sup> (hereinafter "the European Convention") and conferred upon its constitutive Court, the European Court of Human Rights (hereinafter "the ECtHR"), the competence to adjudicate on human rights issues in Europe. The objective of the Council is the democratization of European countries. The Council introduced a document regarding recognition of the genocide, thereby committing those who have signed it<sup>122</sup> with the expectation that Turkey will

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120. See Turkish Penal Code, prec., note 13.

121. European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, and Protocols thereto, 213 U.N.T.S. 221, Eur.T.S. 5 [ECHR].

122. COUNCIL OF EUROPE, Ordinary Session, P.A., 2001 Written Declaration No.320, Doc.9056. "Recognition of the Armenian Genocide".

eventually be persuaded to come to terms with its past if it wants to pursue its aspirations of joining the European Union, as well as gain the respect of the international community<sup>123</sup>.

The ECtHR and the European Convention which is at the heart of the Council of Europe reflect the same views of democracy and the respect for human rights<sup>124</sup>, particularly in this case, for the seized properties of the Armenian people. As such, pertinent provisions of the European Convention are sufficient for an individual or a State that is party to the European Convention to invoke State responsibility for past human rights violations against Turkey. At the outset, as a procedural requisite, one must ensure that all recourses have been exhausted in a Turkish tribunal before appealing to the ECtHR.

Due to the total absence of cases for the Armenian Genocide, the ECtHR could draw arguments from other supranational courts where it is encouraged to foment dialogue between the courts' judges. Indeed, "even functionally specialized tribunals remain part of an integrated and interconnected system and have recourse to the same basic sources of international law"<sup>125</sup>. For example, it could borrow arguments made by the ICJ in order to determine the appropriate remedies resulting from an international wrongful act in light of decisions such as the *Factory at Chorzow Case*<sup>126</sup>, the *Gabcikovo-Nagymaros Project*<sup>127</sup>, and the *Bosnian Genocide*.

Professor Bassiouni reiterates a basic principle of succession on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights in one independent report : "In international law, the doctrine of legal continuity and

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123. See J.B. RACINE, prec., note 11, p. 78-79.

124. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, prec., note 121, preamble, art.1.

125. William W. BURKE WHITE, "International Legal Pluralism" (2004) 25 Mich. J. Int'l L. 971.

126. *Chorzow Factory Case; Germany v. Poland*, (1928) P.C.I.J. ser A. No.17.

127. *Case Concerning the Gabcikovo-Nagymaros Project; Hungary v. Slovakia*, [1997] ICJ Rep.

principles of State responsibility make a successor Government liable in respect of claims arising from a former government's violations"<sup>128</sup>. In the Armenian Genocide, this principle applies because obligations flowing from treaties follow the succeeding State with the same legal personality and does not allow for a clean slate – *tabula rasa*. As such, in the scope of the property that was seized by the Ottoman Empire in the lands populated by the Armenians, we could envision individual lawsuits before the ECtHR to restitute by equivalent or to compensate for the confiscated, expropriated or destroyed property.

It is important to briefly mention the historical circumstances that would give a right for an Armenian victim or descendant to bring an action to the Court. The Temporary Law of Confiscation, replaced by another legal text, the Law of Reappropriation of Abandoned Property in May 1927<sup>129</sup> is problematic for such claims upon the relevant courts of Turkey. In effect, today, Armenian lands in Eastern Anatolia (where the bulk of Armenians lived) are mostly re-populated by Kurds and some Turks. Consequently, if a negative judgment were to be rendered in Turkey, the ECtHR would allow either Armenia or a second/third generation survivor having evidence of his ascendant's residence on Turkish soil to file a suit against Turkey and ask for compensation.

Legally speaking, the law of re-appropriation is an infringement on the protection of property pursuant to Protocol I (of article 1) of the European Convention. It is important to reiterate that the Treaty of Lausanne which permitted the spoliation and liquidation of Armenian property<sup>130</sup>, is contrary to *jus cogens*. In

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128. Commission on Human Rights, Document E/CN.4/1999/65 cited in A. DE ZAYAS, *prec.*, note 23, p. 14.

129. See D. KOUYMJAN, *prec.*, note 34, p. 4. The law of 1927 authorized the re-appropriation of "abandoned property" from those who "remained abroad" after the War until the adoption of the law in May 1927. Such incredulous laws show their irrational and illegal nature. Appeals by the Central Committee for Armenian Refugees from 1925 to 1928 were ignored by Turkey and the League of Nations.

130. Varoujan ATTARIAN, *Le Génocide des Arméniens devant l'ONU*, Bruxelles, Éditions Complexes, 1997, p. 43.

effect, the protection of one's property is an intrinsic human right (*erga omnes*, therefore a universal right common to all) and thus its arbitrary confiscation is enforceable against anybody infringing that right and is not subject to any prescription<sup>131</sup>.

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131. See Kevork BAGHDJIAN, *Le problème Arménien : Du négationisme turc à l'activisme Arménien*, 1<sup>ère</sup> éd., Montréal, 1985, p. 176 : « ...trois conditions essentielles de la *prescription acquisitive* sont unanimement admises par les spécialistes :

a) la possession doit être *nec clam et nec precario* c'est-à-dire *non clandestine et non-accomplie pour le compte d'autrui*;

b) la possession doit être *nec vi* en ce sens qu'elle *ne doit pas être accompagné de violence*;

c) la possession doit être *ininterrompue et non-contestée*.

La confiscation des biens arméniens s'est faite arbitrairement et unilatéralement par le Gouvernement turc qui *a redistribué ces biens aux ressortissants turcs de son choix*, donc la confiscation a été faite pour le compte d'autrui. Première infraction à retenir. La deuxième est que cette confiscation a été *accompagnée de violence* et la troisième réside dans le fait *qu'elle a été contestée depuis que le forfait a été commis*. Il appert donc clairement que les trois conditions essentielles requises pour une prescription légale ne sont pas remplies dans le cas de la confiscation des biens arméniens et de ce fait cette *confiscation est entachée d'illégalité*.

Cette confiscation comporte aussi *d'autres illégalités* et d'autres irrégularités comme, par exemple, la condition *sine qua non de dédommagement prescrite dans toutes les législations, en général, dans la Constitution de la République turque aussi (Art.74), même si cette confiscation était jugée d'intérêt public*. Mais pour revenir aux auteurs qui s'abritent derrière la théorie de la durée - non encore définitivement arrêtée - pour conclure à la prescription, nous devons signaler que le seul fait de la durée ne suffit pas à entraîner la prescription. La Juridiction arbitrale dans la sentence rendue le 15 juin 1911 entre les États-Unis et le Mexique (Chamizal Arbitration), a recherché si la possession invoquée par les premiers était « non troublée, paisible et ininterrompue. Elle constata, en particulier, que la possession n'était pas paisible et donc l'une des caractéristiques de base faisait défaut. Alors, elle prononça sa sentence en faveur du Mexique. [emphasis added]»; See also K. BAGHDJIAN, *prec. note 88*, p. 123. The acquisition of property through illegal means has a firm basis in customary international law. Prescription can only expire if there is no interruption in possession but Armenians have constantly addressed the violations that stemmed from the ill-motivated Law of Confiscation.

Indeed, there are cases brought to the ECtHR with regards to private property claims. One such case is *Loizidou v. Turkey*<sup>132</sup> where the plaintiff from Turkish-occupied northern Cyprus sued Turkey and successfully claimed damages for having been expelled of her land during the Cyprus invasion of 1974. Because the injury is continuous to date, she obtained the restitution of her land and the compensation for loss of profits from developing that land as damages awarded for her claim.

In another decision, *Cyprus v. Turkey*<sup>133</sup>, the ECtHR indicates the "continuing effects" of the injury suffered by displaced Greek Cypriots in Northern Cyprus (driven out by Turkish military forces) with property claims, and orders the restitution to its rightful people. Moreover, the criterion of "effective control" of Turkey in Northern Cyprus is consistent with other judgments<sup>134</sup>, thus this criteria is certainly met in the Armenian Genocide Case in attributing the responsibility of the wrongful act on the State. The responsibility of Turkey has been established in *Cyprus v. Turkey* and the ensuing remedies are still pending. Equally, Armenia has the sufficient interest to bring a similar action to the Court.

A secondary scenario which is currently in its first stages of development is reparations in front of the civil courts, Turkish and non-Turkish alike, on the basis of class actions<sup>135</sup>. In theory, such cases are on the more unrealistic side with the three main ob-

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132. *Loizidou v. Turkey*, (1996), no.15318/89, E.C.H.R. 23 E.H.R.R. 513.

133. *Cyprus v. Turkey*, no.25781/94, [2001] IV E.C.H.R. 1, 35 E.H.R.R. 731.

134. See e.g. "The Bosnian Genocide", prec., note 81; See also Case Concerning the Military and Paramilitary Activities in and Against Nicaragua; *Nicaragua v. the United States of America*, Judgment on the Merits, [1984] I.C.J. Rep.

135. Rob QUINN, "Armenian-Americans sue Turkey Over Century-Old Slaughter", (2010) Newser, online : <<http://www.newser.com/story/96841/armenian-americans-sue-turkey-over-century-old-slaughter.html>> (31 July 2011). For the first time, two Armenian-Americans have brought an action in a California Federal Court against the Turkish government and two Turkish banks asking compensation for property seized during the Genocide.

stacles: time, money and expected inconsistent judgments. For example, there are very few victims or descendants of survivors today with property acts as evidence. How do the rest prove their property rights in their ancestral homes? Perhaps the studies by many sociologists and historians<sup>136</sup> who have estimated the values of Armenian property of Anatolia (private or cultural) are convincing enough for a judge to adjudicate, although their credibility and neutrality should be underscored if such experts are of Armenian descent. This approach has not yet been fully developed and needs further studies but thus far seems to offer a viable solution.

As per some authors, there is no legal ground for reparations<sup>137</sup>. They submit that the material compensations are more of a moral responsibility because in such a case one cannot compensate, restitute or provide any other kind of reparation in an equivalent amount, and thus one is unable to satisfy the principle of *restitutio in integrum* or restoration status quo ante. In turn, this moral responsibility could be seen as an obstacle to bind Turkey of its moral obligations. However, state practice may still suggest a binding legal obligation for Turkey to make restitutions. For example, the compensation of the German Federal Republic for wrongs committed by the Third Reich, the Soviet restitution of Armenian cultural property after the dismantlement of the U.S.S.R., the responsibility of France to repair the wrongful actions committed by the Vichy Government during the German occupation and of Norway to grant restitution for confiscations and other injuries perpetrated on Jewish people during the Quisling regime<sup>138</sup>, all constitute State practice. With respect to this principle of customary international law, in the Nicaragua Case, the ICJ noted that it is not necessary to have a uniform general practice to establish a rule of customary international law<sup>139</sup>. Indeed,

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136. See K. BAGHDJIAN and D. KOUYUMJIAN in general for assessments.

137. See e.g., Taner AKCAM, J.B. RACINE.

138. A. DE ZAYAS, *prec.*, note 23, p. 19-20.

139. "The Nicaragua Case", *prec.*, note 134, par. 188 : "...The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with

in light of recent cases which are as of yet pending for the adjudication of individual and State responsibility and determination of damages, such as the Rwandan Genocide, it is too soon to establish a customary international rule on what constitutes just reparations<sup>140</sup> for such crimes.

However, if the judgments rendered against Turkey by the ECtHR on property rights infringements during the Cyprus invasion is subject to reparations, what prevents similar facts, such as the Armenian Case (i.e. with respect to confiscation and expropriation of property) to also be subject to reparations? The Nuremburg ideal and the ensuing damages paid to the State of Israel provides a beacon of hope for the surviving victims of a genocidal campaign. Perhaps the expected positive outcomes of the designated international tribunals such as Cambodia, Rwanda and Sierra Leone, among others, will empower Armenia or Armenian individuals to bring the case of property rights violations to the ECtHR.

### **2.2.3 The International Criminal Court and potential application of the Rome Statute**

The Genocide Convention has paved the way for other legal institutions, namely international criminal tribunals, to transpose similar if not the exact same provisions of the crime. The Rome Statute of the International Criminal Court (hereinafter "the Rome Statute")<sup>141</sup> has transposed article II of the Genocide Convention in article 6 of its text. The Rome Statute's aim is to prosecute crimi-

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such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

140. *European Convention for the Protection of Human Rights and Fundamental Freedoms*, prec., note 121, art.50.

141. *Rome Statute of the International Criminal Court*, prec., note 18.



nals accused of committing the gravest crimes<sup>142</sup>. In the case of the Armenian Genocide, because all of the perpetrators are since deceased, the Rome Statute is impossible as a legal avenue, and one might say even an impasse, in the use of most of its provisions against Turkey. However, in our theoretical framework on the retroactivity of *jus cogens*, we assessed that pursuant to article 53 of the Vienna Convention, it was possible to derogate from treaties contrary to peremptory norms. Based on this assumption, perhaps we can leave the door slightly open to derogate from article 11<sup>143</sup> of the Rome Statute. An obstacle to this, however, would be that the object and purpose of the Treaty is solely to try criminals<sup>144</sup>. But can we envision the use of the principle of State responsibility in the framework of the ICC? In order to do so, we must find continuity in the criminal activities of the State from Ottoman Turkey to the Turkish Republic. To extend the crime, in the case of the Armenian Genocide, a strategically positioned nation-state has been using politics to consistently lobby to deny that the events of 1915 took place. Furthermore, de Zayas contends that another form of continuing the genocide is by rehabilitating the murderers. In effect, in March 1943, the mortal remains of the principal leader of the genocide, Talât Pasha, were ceremonially repatriated from Germany to Turkey, where he was re-interred on the Hill of Liberty in Istanbul. There have since then been at least two streets named after him<sup>145</sup>. The Rome Statute provides certain provisions for reparations on the condition that Turkey accepts liability and the Court's jurisdiction<sup>146</sup>.

Articles 75 and 79 discuss possible reparations in the form of a trust fund for victims and their families, and other forms of

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142. *Id.*, preamble, art. 5.

143. *Id.*, art. 11 (Jurisdiction *ratione temporis*) reads : "The court has jurisdiction for crimes committed after the entry into force of this Statute".

144. J. SHAMSEY, *prec.*, note 1, p. 337 : "[T]he practicality of bringing a case of the Young Turks before the ICC would be more problematic. No matter how helpful a decision on such controversy might be, the Rome Statute of the ICC certainly did not intend to bring charges *post mortem* or *ex post facto*".

145. A. DE ZAYAS, *prec.*, note 23, p. 19.

146. *Rome Statute of the International Criminal Court*, *prec.*, note 18, art. 12(3).

restitution after finding a guilty verdict against the State. This latter scenario, in the case of the Armenian Genocide, is hardly conceivable because the Rome Statute is designed to make criminal proceedings in the absence of the State to implement such proceedings arising from its legal system. The thought of Turkey holding its predecessor liable is inconceivable, especially as we have seen, when international political pressure is absent. Nevertheless, the provisions on reparations could be influential for damages caused to the Armenian people or to the Republic of Armenia.

### **2.3 International political or non-judicial institutions**

The League of Nations, as a universal arena of political will, failed in pressuring the Turkish government to desist its wrongful acts of constant denial and infringing property rights of the country's inhabitants. After the Second World War, the League of Nations' counterpart, the United Nations, has overhauled its predecessor's institutions. The United Nations' contributions to the development of international law over the past fifty years have been positive, particularly with respect to the notion of genocide. The General Assembly resolutions, such as the Genocide Convention or those of the Security Council in establishing international criminal tribunals are binding on States (article 41 of the UN Charter) because they are not only resolutions, but treaties as well. In addition, the contributions of the International Law Commission are codified and applied in international courts. Are these international political organs capable of putting pressure on Turkey today?

#### **2.3.1 The United Nations' position on the Armenian case in the brief on the Prevention and Repression against the Crime of Genocide and Turkey's response**

Thus far, there is no formal recognition of the Armenian Genocide by any of the United Nations' organs. However, this question was brought up in the scope of a study on the Genocide Convention as a sign of hope for the victim. Indeed, contemporary practice shows that the "United Nations has seized a mandate to

intervene to uphold human rights when they are violated within a sovereign state"<sup>147</sup>.

The study of the Genocide Convention, at the end of the 1960s, was conferred to the Sub-Commission on the fight against discriminatory measures and the protection of minorities<sup>148</sup> (a Section of the Commission of Human Rights, which in itself was placed under the aegis of the Economic and Social Council of the United Nations).

In paragraph 30 of the preliminary report on the Genocide Convention, Nicomède Ruhashyankiko, special rapporteur in the 1970s, mentioned the Armenian Genocide as the first genocide of the twentieth century. In turn, this galvanized Turkey into challenging the draft of the brief<sup>149</sup>. In order to get its views across, the Turkish government exerted many diplomatic pressures in order to elevate their allegations above those made by Armenians. In effect, their approach in the international community was to always instill doubt on the genocide. This technique was effective, as many countries, especially influential ones such as the United States, France and the U.S.S.R. supported Turkey's position. Finally, the Turkish argument triumphed and in 1978, the Armenian community's efforts to have paragraph 30 re-inserted in the final version of the report did not convince the special rapporteur<sup>150</sup>. Thus, the argument invoked by the Turkish camp successfully pushed the idea that there were two versions of history<sup>151</sup>. In effect, the campaign of denial was deemed successful within the international community.

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147. Stephen J. TOOPES, "Does International Law Impose a Duty upon the United Nations to Prevent Genocide?" (2001) 46 McGill L. J. 187.

148. Now called Sub-Commission on the protection and promotion of Human Rights.

149. V. ATTARIAN, *prec.*, note 130, p. 59.

150. *Id.*, p. 66.

151. J.B. RACINE, *prec.*, note 11, p. 69.

Since then, regular dialogue between Turkey and the Armenian community<sup>152</sup> have occurred over the genocide. In 1982, a new brief came into fruition regarding the Genocide Convention with the purpose of updating the previous study and also validating the Armenian Genocide. A new special rapporteur, Benjamin Whitaker, submitted a new report on the genocide. The Whitaker report was a study on genocide as a phenomenon in an attempt to improve the system anticipated by the Genocide Convention<sup>153</sup>.

In the following years, other attempts of international recognition resurfaced but political influence transcended legal obligations. In the debates following the finalized report on the Genocide Convention, Whitaker indicated that he used irrefutable sources that demonstrate the nature of the massacres and the intention of eliminating the Armenians<sup>154</sup>. He cites official Turkish sources from the First World War era, as well as documents emanating from German and Austrian officials. He concludes with an implicit critique of historians or other experts who fabricate history because of governmental pressure. He synthesizes his reflections on the experts with the following statement : « Pour pouvoir clore ce chapitre de l'histoire, comme tout le monde le souhaite, il faut le clore dans l'honneur. Si les experts n'ont pas le courage de dire la vérité, alors il ne sert à rien de participer aux travaux de la Sous-Commission. Celle-ci a le devoir de protéger non pas les gouvernements, mais les victimes »<sup>155</sup>.

Thus far, the Whitaker report is the most significant element of the Armenian Genocide within the United Nations because it leads us to conclude that the genocide is implicitly recognized. Indeed, as Whitaker indicated, the failures within the UN Human Rights Commission are largely attributable to a failure of political will on the part of Member States<sup>156</sup>. The debates following the

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152. Subsequently the Republic of Armenia after the dismantling of the Soviet Union in 1991.

153. J.B. RACINE, *prec.*, note 11, p. 71.

154. V. ATTARIAN, *prec.*, note 130, p. 100.

155. See Doc.E/CN.4/Sub.2/1985/SR.12, 17-22 quoted in *Id.*

156. See S.J. TOOPE, *prec.*, note 147, p. 188.

Whitaker report should be a 'stepping stone' for a modern version that conforms to the challenges of the 21<sup>st</sup> century. First, the use of the word "genocide", where appropriate in the revised report, should not be questioned, but notions such as "ethnic cleansing" and "cultural genocide" should be further elaborated upon and ultimately codified by the International Law Commission (paragraph 344 in the Bosnian Genocide Case), especially delineating the former in cases in which it qualifies as genocide<sup>157</sup>.

### **2.3.2 The binding effect of General Assembly resolutions**

The General Assembly of the United Nations (a body of over 190 States) is the most representative forum for the expression of the will of the international community. In fact, "any resolution that it passes with near unanimity, on any subject with clear intent, content, and concrete focus on rights and obligations of States, or by way of clarification or elaboration of the various provisions of the Charter, could be a source of lawful and binding obligations for States"<sup>158</sup>. The fact that resolutions of the General Assembly are only recommendatory in nature does not negate this proposition because such resolutions can influence the crystallization of customary law<sup>159</sup>. Indeed, General Assembly resolutions have found more pragmatic ways in expounding on genocide with the aim of clarifying pre-existing customary international law. For example, in the context of the armed conflict in the former Yugoslavia, the General Assembly found that the Serbian policy of "ethnic cleansing" constituted "a form of genocide" in its Resolution No. 47/121 of 18 December 1992. This resolution was confirmed in GA Resolutions 48/143, 49/205, 50/192, 51/115, etc.<sup>160</sup> and subsequently reiterated in the ICJ's judgment in the Bosnian Genocide Case<sup>161</sup>.

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157. See "The Bosnian Genocide", prec., note 81, par. 190.

158. P.S. RAO, prec., note 15, p. 940.

159. *Id.*

160. A. DE ZAYAS, prec., note 23, p. 20.

161. See "The Bosnian Genocide", prec., note 81, par. 190.

Furthermore, in addressing the problem of liability for prior offenses, the General Assembly passed a resolution redefining the criminal liability of the offenders, whether individuals or representatives of State organs in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity<sup>162</sup>, adopted by resolution 2391 XXIII. Article 1(b) includes the crime of genocide, "even if it does not constitute a violation in the domestic law of the country in which [it was] committed"<sup>163</sup>. The effects of such a resolution, although perhaps legally non-binding, are influential at the very least<sup>164</sup>.

It thereby follows that the concept of "genocide" as currently interpreted by the United Nations General Assembly and the ICJ is clearly applicable in the context of the Armenian Genocide of 1915-23. Moreover, in theory, a General Assembly resolution on the recognition of the Armenian Genocide and the responsibility of Turkey in light of the Resolution on the Non-Applicability of Statutory Limitations would be regarded, at minimum, as influential to any competent court called upon to adjudicate on the matter, especially the ICJ. So far, no United Nations body has initiated a resolution on the recognition of the Armenian Genocide, perhaps for calculated reasons. It would require a simple majority to pass, and so far, twenty-one countries have officially recognized it. As an alternative recourse, any country with a strong Armenian diaspora having the required legal interest may wish to submit the issue to a third party dispute settlement headed by the UN Secretary-

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162. *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 November 1968, 754 U.N.T.S., 73, art. 2 [hereinafter "the Non-Applicability of Statutory Limitations"].

163. V.N. DADRIAN, prec., note 4, p. 423.

164. See e.g. the Nicaragua Case, prec., note 134, par. 188; See also *Legality of the Threat or Use of Nuclear Weapons Case*, [1996], Advisory Opinion, I.C.J. Rep., par.70 : In these two decisions, "...the Court notes that GA resolutions, even if they are not binding, may sometimes have normative value. They can in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption. It is also necessary to see whether opinio juris exists as to its normative character....".

General. Such ad hoc tribunals are viewed as a last resort as the ICJ has competence on such international cases. The parties to the dispute must expressly form an Agreement that obliges them to be bound by the rules of procedure they set forth and the decision of the arbitrator(s)<sup>165</sup>.

### **2.3.3 The International Law Commission and the Draft Articles on State responsibility for Internationally Wrongful Acts**

The International Law Commission (hereinafter "the ILC"), adopted by General Assembly resolution<sup>166</sup> has been instrumental in codifying customary international law especially in the past few years when it adopted the Draft Articles on the Laws of State Responsibility for Internationally Wrongful Acts (hereinafter "the Draft Articles") which have successfully clarified the law of State responsibility.

The weight given to the International Law Commission's commentaries on the Draft Articles is significant and theoretically narrows the international courts' discretion in assessing State responsibility. Given the limited objective of this paper, we will analyze the State responsibility of Turkey on the three legal bases we have thus far focused on : attribution of the wrongful act on the State (or State responsibility), State continuity and reparations. In effect, the commentaries of the International Law Commission paint a rather clear picture on the present relevance of the Armenian Genocide. In fact, the "wrongful act" of committing the geno-

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165. See e.g. *New Zealand v. France*, (1987), 26 I.L.M. 1346 (International Arbitration Reports). In this case, among other things, comparisons are made between individual responsibility and State Responsibility for acts committed by their agents as well as the reparations which derive from them.

166. *Statute of the International Law Commission*, November 21 1947, G.A. Res. 174(II), U.N. Doc. A/519.

cide fuelled by past and present day denial of the Turkish government has a causal nexus with the injury<sup>167</sup>.

First, one must set out under international law that the acts perpetrated by individuals are those who are acting on the instruction of, or under the direction or control of, the State in carrying out the act<sup>168</sup>. These criteria have been used by international courts<sup>169</sup> as well as political organs to justify the use of force<sup>170</sup>. When we look at the Nicaragua Case or the Bosnian Genocide Case, the threshold of control should direct responsibility to the accused State organs. Both cases fail to prove any level of control from the accused State. For our purposes, as already stressed, there are no ambiguities in the evidence of the Ottoman government's "instructions" or "control" over the acts of the *tesklati mahsusa* units in the case of the Armenian Genocide.

Second, the ILC has indicated in its commentaries that in the context of State responsibility, it is unclear whether a new State acquires any State responsibility from the predecessor State. However, it clarifies that if the successor State "faced with a continuing wrongful act on its territory, endorses and continues that situation, the inference may readily be drawn that it has assumed responsibility for it"<sup>171</sup>. To set the context for the genocide, the ILC defines wrongful act as "one or more actions or omissions or a combination of both". Indeed, one can argue the omission of recognition or act of denial perpetuates the injury caused to the Armenian people. Denial, we can say, has been comprised of a series

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167. See Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its Fifty-third Session, prec., note 75, art. 4, art. 31.

168. *Id.* art. 8.

169. See *Cyprus v. Turkey*, prec., note 133.

170. Use of force in Afghanistan was legally justified as there was enough proof that the Taliban government harbored Osama Bin-Laden and al-Qaeda, in other words the criteria of "effective control" as read in Article 8 gave legitimacy to self-defense intervention.

171. Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its Fifty-third Session, prec., note 75, p. 23.



of omissions of truth and justice throughout the years, through which the injury<sup>172</sup> to the Armenian community is perpetuated.

Finally, both the ICJ and the ECtHR have adjudicated on crimes against humanity and property rights infringements for which damages ensue, specified by the ILC as reparations for moral and material damages<sup>173</sup>. Once the causal nexus between the wrongful act and the injury is established, this gives rise to various forms of reparations : restitution, compensation or satisfaction<sup>174</sup>. In the case of the Armenian Genocide, satisfaction seems to be the top priority for the Armenian people in the form of a formal apology. However, whether or not further reparations could be envisioned is also relevant. Turkey's moral responsibility in the crime could set an effective precedent in achieving the objective of deterring such crimes. Compensation only seems just in light of the injury caused, but this is secondary. As such, a formal recognition with further straitjacket conditions would thereby allow Armenians and Turks to reconcile in due course and move towards better neighborly political and economic relations.

The remaining viable avenue lies in the will of nations through the political organs of the United Nations. Although the General Assembly or the International Law Commission do not exercise the legal powers to hold Turkey liable in light of State responsibility, the laws or resolutions passed by these political organs have been viewed as influential on the decisions of the ICJ. Alternatively, other political avenues such as delegation of international cases to ad hoc arbitration tribunals for establishing State responsibility and reparations are also viable solutions.

## Conclusion

Past *jus cogens* violations were expressed by the victors of the First World War and confirmed on many occasions by Turkish

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172. *Id.*, p. 62. Injury includes material and moral damage caused by an internationally wrongful act.

173. *Id.*, art. 31.

174. *Id.*, art. 34.

officials. In the Turkish Courts-martial, the intent of massacring the Armenian population of Anatolia and the confiscation and expropriation of their lands was particularly evident. Subsequent reparations under the principle of State responsibility for such acts were also envisioned by the Hague Convention and the Treaty of Sèvres. Today, the arguments of international courts and the commentaries or resolutions of international political organs on the principles of State continuity, State responsibility (or attribution of internationally wrongful acts by individuals on the State) and the non-applicability of statutory limitations on such crimes are all sufficiently substantial to hold Turkey responsible in front of international courts. In particular, depriving Armenians of their history is not only morally condemnable but also perhaps even illegal, as we have seen. It is through illegal means, that of denial, that the crimes occurred and persisted. Specifically, it is through this continuous spectrum of negationist policy, consolidated now by law (article 301 of the Turkish Penal Code) that Armenia could hold Turkey responsible today in front of international courts, as it is the main element which perpetuates the injury caused to the Armenian survivors and their descendents. In practice, these courts have thus far been shunned by Armenia or the Armenian community in hopes of resolving the matter through diplomacy.

Akcam contends that the Armenian Genocide is the last remaining taboo in Turkey<sup>175</sup> and that this taboo will eventually be lifted out in the process of negotiations with the European Union. Until then, the ties between Turkey and Armenia are precarious. Turkey currently holds an economic and political blockade against Armenia for the latter's territorial occupation of Nagorno-Karabagh, arbitrarily ceded by Stalin to Turkey's eastern brethren, Azerbaijan. It appears that the pressure of recognizing the genocide through international legal or political avenues could only

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175. See, for discussion on the taboos on which the Turkish Republic is founded, Taner AKCAM, *From Empire to Republic : Turkish Nationalism and the Armenian Genocide*, New York, Zed Books, 2004. The taboos that were gradually eliminated were the "nonexistence" of social classes and of Kurds (formerly perceived as "mountain Turks") in Turkey. The Armenian Genocide is the last remaining one.

further exacerbate diplomatic relations. The policy of recognition remains a priority on Armenia's political agenda. The country's relationship with Turkey, although incrementally progressing, is currently at an impasse and will so remain until there is strong pressure from the international community.

The sum of countries' governments in recognizing the genocide is seen as a stepping stone for pressuring Turkey to come to terms with its past, especially with its current aspirations of European Union membership. Yet, as the world's superpower, the United States is the only country that can set an impetus for more countries, beyond the current twenty-one, to join in recognizing the genocide. Turkey's strategic position as a crossroads between east and west, as well as its membership in the North Atlantic Treaty Organisation (NATO) as its second largest army, make it difficult today for the United States to put pressure on recognition. As such, there are vital interests at stake, particularly that of the Incirlik Air Base, which is used for refuelling tankers, the rotating of American troops for various purposes in the Middle East, etc. As a presidential candidate in 2008, Barack Obama committed to recognize the genocide and as the incumbent president, he has since reneged and is currently being pressured by lawmakers in the U.S. Senate to formally declare the events of 1915 as "genocide", even in the face of potential harmful aftermath by the Turkish government. Thus far, a perpetual sense of foreboding on the part of the superpower's leaders averts such a bold declaration. Instead, it has been acting as a mediating agent between Turkey and Armenia in assisting with conducive dialogue for negotiations of peace and a new beginning to international relations.

However, there is no just solution other than the international recognition of the genocide and the end to impunity and denial. Yet, the nature of realpolitik seems to override international legal obligations in establishing Turkey's responsibility.

The only short-term alternative in moving forward with the Armenian Genocide is fomenting dialogue between Turkey and Armenia and an affirmation of international political will. Certain

setbacks such as the murder of Hrant Dink, editor-in-chief of Armenian newspaper in Istanbul, Agos, and the continual lack of freedom to speak openly about this issue in Turkey seem to inhibit any productive dialogue. The domino effect of denial channeling the way for impunity for crimes affecting mankind will only persist unless the international community, through steadfast commitment, uses its legal or political powers to bring those committing these atrocious crimes to justice.