

EXECUTIVE SUMMARY :  
THE ARMENIAN GENOCIDE IN THE LIGHT OF THE GENOCIDE CONVENTION.

By Dr. Alfred de Zayas, Geneva

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

As a gross violation of peremptory norms of international law, genocide gives rise to obligations of the perpetrating State toward the entire international community (*erga omnes* doctrine). In the specific case of the Turkish genocide against the Armenians, Turkey's international obligations are not only those towards Armenia or the Armenian people, but also toward the international community as a whole. Moreover, according to general principles of international law and *ordre public*, the consequences of *erga omnes* crimes cannot be recognized or otherwise legitimised. Thus, the international community must refrain from recognizing the consequences of genocide, in particular the wrongful acquisition of the property of the murdered victims.

The Genocide Convention of 1948 can be applied retroactively, because it is declarative of pre-existing international law. There are numerous precedents for the retroactive application of treaties, including the London Agreement of 8 August 1945 establishing the Nuremberg Tribunal, and the Convention on the Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity of 1968.

The language of the Genocide Convention neither excludes nor requires its retroactive application. By contrast, there are international treaties that specifically state that they will not apply retroactively. For example, article 11 of the 1998 Statute of the International Criminal Court specifies that "the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute".

According to article 31 of the Vienna Convention on the Law of Treaties, the principal rule of interpretation is "the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose". The retroactive application of the Genocide Convention is compatible with the ordinary meaning of terms in the light of the object and purpose of the Convention. Further, such retroactive application appears necessary, in order to advance the important goal of deterring future acts of genocide (prevention) by way of punishing acts of genocide that occurred prior to its entry into force (suppression). This analysis is sufficient to conclude that the Genocide Convention can be applied retroactively. It is not necessary to draw on the *travaux préparatoires* of the Convention, which are inconclusive. Moreover, according to article 32 of the Vienna Convention, the *travaux préparatoires* of any treaty merely provide a supplementary means of interpretation.

The General Assembly can, pursuant to article 96 of the UN Charter, ask the International Court of Justice for an advisory opinion on the retroactive application of the Genocide Convention. In this connection, Armenia, as every State party to the Genocide Convention,

could invoke article VIII of the Convention and request the General Assembly “to take such action under the Charter of the United Nations as they consider appropriate”.

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

The dispute is thus *prima facie* justiciable. A general challenge to the jurisdiction of the Court is subject to a determination by the ICJ of its own competence. Pursuant to article 36, paragraph 6, of the ICJ Statute, “in the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.”

With regard to a *ratione temporis* challenge to the Court’s jurisdiction, the ICJ may rely on the declaratory nature of the Convention, and may also take into consideration the jurisprudence of the European Court of Human Rights in the *De Becker Case*<sup>1</sup> and of the United Nations Human Rights Committee, concerning the issue of “continuing situations”, bearing in mind that the substance of the Armenian claim entails a continuing attack on the human dignity of the Armenian people through a continuing denial of their historical identity and a denial of restitution of centuries-old cultural heritage. The dispute is thus justiciable, as the denial of restitution and compensation persists in the period following the entry into force of the Genocide Convention.

Logical consequences of the application of the Genocide Convention to the genocide against the Armenians should be the return to the Armenian people and to the Armenian Church of monasteries, churches and other assets of historic and cultural significance, as well as the granting of a measure of compensation to the descendants of the victims of the genocide. In this connection, the restitution and compensation schemes elaborated for the victims of the Holocaust provide a useful precedent.

There is not only a legal but also a moral obligation on the part of the international community to take appropriate action in order to ensure that a measure of justice be done in respect of the victims of the genocide against the Armenians and their descendants.

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<sup>1</sup> 2 Y.B.E.C.H.R. page 214, 1958-59.

# **The Genocide against the Armenians 1915-1923 and the application of the 1948 Genocide Convention**

by Alfred de Zayas

## **1. The Convention is declaratory of a pre-existing internationally wrongful act giving rise to both State responsibility and individual penal liability**

State responsibility for the crime of genocide did not begin with the adoption by the United Nations General Assembly of the Genocide Convention on 9 December 1948, or upon its entry into force on 12 January 1951.

At the time of the Ottoman genocide against the Armenians, State responsibility already existed for internationally wrongful acts, such as the crime of genocide, and entailed both a responsibility to provide compensation<sup>1</sup> and the personal criminal liability of the perpetrators.

The punishment of the crime of genocide – whether called exterminations, mass liquidations or massacres – as well as the obligation to make restitution to the survivors of the victims, were envisaged by the victorious Allies of the First World War and included in the text of the Peace Treaty of Sèvres of 10 August 1920 between the Allies and the Ottoman Empire<sup>2</sup>. This Treaty contained not only a commitment to try Turkish officials for war crimes committed by Ottoman Turkey against Allied nationals<sup>3</sup>, but also for crimes committed against citizens of Turkey of different ethnic origin, in particular the Armenians, crimes which today would be termed genocide or crimes against humanity.

Pursuant to article 230 of the Treaty of Sèvres:

“The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1<sup>st</sup> August 1914. The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused and the Turkish Government undertakes to recognise such Tribunal....”<sup>4</sup>

Pursuant to article 144 of the Treaty of Sèvres:

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

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

<sup>2</sup> [1920] UKTS 11, Martens, *Recueil général des traités*, 99, 3e série 12, 1924, p. 720.

<sup>3</sup> Particularly for violations of the Hague Regulations on Land Warfare, appended to the IV. Hague Convention of 1907.

<sup>4</sup> *American Journal of International Law*, Volume 15, Supplement, 1921, Official Documents, p. 235.

“The Turkish Government solemnly undertakes to facilitate to the greatest possible extent the return to their homes and re-establishment in their businesses of the Turkish subjects of non-Turkish race who have been forcibly driven from their homes by fear of massacre or any other form of pressure since January 1, 1914. It recognises that any immovable or movable property of the said Turkish subjects or of the communities to which they belong, which can be recovered, must be restored to them as soon as possible, in whatever hands it may be found.... The Turkish Government agrees that arbitral commissions shall be appointed by the Council of the League of Nations wherever found necessary. .. These arbitral commissions shall hear all claims covered by this Article and decide them by summary procedure.”<sup>5</sup>

Because of the post-World War I international political disarray, the rise of the Soviet Union, the withdrawal of British military presence from Turkey<sup>6</sup>, the isolationist policies of the United States,<sup>7</sup> the abdication of the Sultan and the rise of Kemalism in Turkey, the Treaty of Sèvres was never ratified<sup>8</sup>. No international criminal tribunal as envisaged in Article 230 was ever established. No arbitral commissions as stipulated for in article 144 were ever set up.

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

Notwithstanding the fact that the Treaty of Sèvres never entered into force, the text of the Treaty remains eloquent evidence of the international recognition of the crime of “massacres” against the Armenian population of Turkey. Prior to Sèvres, on 28 May 1915, the Governments of France, Great Britain and Russia had issued a joint declaration denouncing the Ottoman Government’s massacre of the Armenians as constituting “crimes against humanity and civilization for which all the members of the Turkish Government would be held responsible together with its agents implicated in the massacres.”<sup>9</sup>. Subsequently, on 18 January 1919, the British High Commissioner, Admiral Arthur Calthorpe, informed the Turkish Foreign Minister that “His Majesty’s Government are resolved to have proper

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<sup>5</sup> Ibid., p. 210.

<sup>6</sup> Paul Helmreich, *From Paris To Sèvres*, Ohio State University Press, Columbus, 1974, pp. 131 et seq.

<sup>7</sup> Although U.S. diplomats had condemned the genocide as early as 1915, the U.S. Government did not take any action to redress the injustices after the war. It is worth remembering that U.S. Ambassador Henry Morgenthau, Sr., had called the massacres “race murder” and that on 10 July 1915 he had cabled Washington with the following description of the Ottoman policy: “Persecution of Armenians assuming unprecedented proportions. Reports from widely scattered districts indicate systematic attempt to uproot peaceful Armenian populations and through arbitrary arrests, terrible tortures, whole-sale expulsions and deportations from one end of the empire to the other accompanied by frequent instances of rape, pillage, and murder, turning into massacre, to bring destruction and destitution on them. These measures are not in response to popular or fanatical demand but are purely arbitrary and directed from Constantinople in the name of military necessity, often in districts where no military operations are likely to take place.” Samantha Power, *A Problem from Hell. America and the Age of Genocide*, Basic Books, New York, 2002, p. 6.

<sup>8</sup> André Mandelstam, *La Société des Nations et les puissances devant le Problème Arménien*, 2d. ed. 1970.

<sup>9</sup> Egon Schwelb, “Crimes Against Humanity”, 23 *British Yearbook of International Law* (1946), 178-226 at 181.

punishment inflicted on those responsible for the Armenian massacres”.<sup>10</sup> In this context, the High Commissioner drew up a list of 142 persons whose surrender would be demanded from the Sultan once the peace treaty went into effect, 130 of whom were specifically charged with massacring Armenians.<sup>11</sup> Britain held some 120 Turkish prisoners at Malta for nearly two years, awaiting trial, but was blackmailed into releasing them in 1921-22 in exchange for British officers and men who had been taken hostage by the Turkish Government.

Further evidence of the genocide is provided by the prosecution, on the basis of articles 45 and 170 of the Ottoman Penal Code, of several ministers in the wartime Turkish cabinet and leaders of the Ittihad party, including the main architect of the genocide, the Young Turk leader Talaat Pasha, who were found guilty, many *in absentia*, by an Ottoman court martial, on 5 July 1919, of “the organization and execution of the crime of massacre” against the Armenian population.<sup>12</sup> Further trials were conducted before other Ottoman courts, partly on the basis of article 171 of the Ottoman military code concerning the offence of plunder of goods, and invoking “the sublime precepts of Islam” as well as “humanity and civilization” to condemn “the crimes of massacre, pillage and plunder”<sup>13</sup>. These trials resulted in the conviction and execution of three of the perpetrators, Mehmed Kemal, county executive of Bogazhyan, Abdullah Avni, of the Erzincan gendarmerie, and Behramzade Nusret, Bayburt county executive, and District Commissioner of Ergani and Urfa (Edessa).<sup>14</sup>

Although the first tentative step toward defining and punishing genocide failed because of Turkish nationalism and Allied indifference, consensus on the reality of the genocide had been largely achieved. Of all failures to punish the war criminals of the First World War, this one was the most regrettable and it would have terrible consequences.<sup>15</sup>

At the end of the WWII the victorious Allies, pursuant to the London Agreement of 8 August 1945<sup>16</sup>, adopted the Charter of the International Military Tribunal, which provided in

<sup>10</sup> FO 371/4174/118377 (folio 253), cited in Vahakn N. Dadrian, “Genocide as a Problem of National and International Law. The World War I Armenian Case and its contemporary Legal Ramifications” (1989), 14 *Yale Journal of International Law*, pp. 221-334 at 282.

<sup>11</sup> James F. Willis, *Prologue to Nuremberg. The Politics and Diplomacy of Punishing War Criminals of the First World War*, Greenwood Press, Westport, Connecticut, 1982, p. 158.

<sup>12</sup> William Schabas, *Genocide in International Law*, Cambridge University Press, 2000, p. 21. See also Revised and updated report on the question of the prevention and punishment of the crime of genocide, prepared by Special Rapporteur Mr. Ben Whitaker (E/CN.4/Sub.2/1985/6): “At least 1 million, and possibly well over half of the Armenian population, are reliably estimated by independent authorities and eye-witnesses to have been killed or death-marched. This is corroborated by reports in United States, German and British archives and of contemporary diplomats in the Ottoman Empire, including those of its ally Germany. The German Ambassador, Baron Hans von Wagnheim, for example, on 7 July 1915 wrote “the government is indeed pursuing its goal of exterminating the Armenian race in the Ottoman Empire” (Wilhelmstrasse archives). Though the successor Turkish Government helped to institute trials of a few of those responsible for the massacres at which they were found guilty, the present official Turkish contention is that genocide did not take place although there were many casualties and dispersals in the fighting, and that all the evidence to the contrary is forged. See, inter alia, Viscount Bryce and A. Toynbee, *The Treatment of Armenians in the Ottoman Empire 1915-16* (London, HMSO, 1916); G. Chaliand and Y. Ternon, *Génocide des Arméniens 1915-16* (Brussels, Complexe, 1980); H. Morgenthau, *Ambassador Morgenthau's Story* (New York, Doubleday 1918); J. Lepsius, *Deutschland und Armenien* (Potsdam, 1921 ...) at p. 9, footnote 13..

<sup>13</sup> Trabzon Verdict, Takvimi Vekayi, No. 3616, Aug. 6, 1919, at 1-3, No. 3617, Aug. 7, 1919, at 2. Vahakn N. Dadrian, “Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications, in *Yale Journal of International Law*, Vol. 14, No. 2 (1989) pp. 221-334 at 308

<sup>14</sup> Dadrian, op.cit., p. 309.

<sup>15</sup> James Willis, op.cit., p. 163.

<sup>16</sup> 8 U.N.T.S. 279; Reprinted in 39 *American Journal of International Law*, 257 (1945)(Supp).

Article 6 c) for the prosecution of the crime of genocide (“murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population”) as international crimes within the newly formulated offence of “crimes against humanity”.

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

“The provisions of Article 230 of the Peace Treaty of Sèvres were obviously intended to cover, in conformity with the Allied note of 1915 ... offences which had been committed on Turkish territory against persons of Turkish citizenship, though of Armenian... race. This article constitutes, therefore, a precedent for Articles 6 c) and 5 c) of the Nuremberg and Tokyo Charters, and offers an example of one of the categories of ‘crimes against humanity’ as understood by these enactments.”<sup>17</sup>

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

“conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups ...”<sup>18</sup>

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

“Genocide was not restricted to extermination of the Jewish people or of the Gypsies. It was applied in different forms to Yugoslavia, to the non-German inhabitants of Alsace-Lorraine, people of the Low countries and of Norway. The techniques varied from nation to nation, from people to people. The long-term aim was the same in all cases ...”<sup>19</sup>

By Resolution 95 (1) of 11 December 1946, the General Assembly “affirms the principles of international law recognized by the Charter of the Nürnberg Tribunal and the judgment of the Tribunal”, and in Resolution 96 (1) of the same date, it confirmed “that genocide is a crime in international law, which the civilized world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable”<sup>20</sup>.

Professor Hersch Lauterpacht wrote in his standard Oppenheim/Lauterpacht textbook on “International Law“:

„It is apparent that, to a considerable extent, the Convention amounts to a registration of protest against past misdeed of individual or collective savagery rather than to an effective

<sup>17</sup> United Nations, War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, p. 45

<sup>18</sup> *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946*, Nuremberg, 1947, Vol. I, pp. 43-44.

<sup>19</sup> *Ibid*, vol. XIX, pp. 497-498.

<sup>20</sup> Official Records of the First Session of the General Assembly, Fifty-fifth plenary meeting, 11 December 1946, ppe. 188-189. See also Preamble of the Genocide Convention.

instrument of their prevention or repression. Thus, as the punishment of acts of genocide is entrusted primarily to the municipal courts of the countries concerned, it is clear that such acts, if perpetrated in obedience to national legislation, must remain unpunished unless penalized by way of retroactive laws. On the other hand, the Convention obliges the Parties to enact and keep in force legislation intended to prevent and suppress such acts, and any failure to measure up to that obligation is made subject to the jurisdiction of the International Court of Justice and of the United Nations. With regard to the latter, the result of the provision in question is that acts of commission or omission in respect of genocide are no longer, on any interpretation of the Charter, considered to be a matter exclusively within the domestic jurisdiction of the States concerned. For the Parties expressly concede to the United Nations the right of intervention in this sphere. This aspect of the situation constitutes a conspicuous feature of the Genocide Convention—a feature which probably outweighs, in its legal and moral significance, the gaps, artificialities and possible dangers of the Convention.”<sup>21</sup>

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

Moreover, in the view of leading publicists in public international law, the Genocide Convention of 1948 was not constitutive of a new offence in international law termed “genocide”, but was declaratory of the pre-existing crime<sup>22</sup>; in other words, the Convention merely codified the prohibition of genocide, which was already binding international law. In this sense, the Convention is necessarily both retrospective and future-oriented.

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

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<sup>21</sup> Oppenheim/Lauterpacht, *International Law*, 8th edition, 1955, vol. I, p. 751. He adds: “It is clear that as a matter of law the Genocide Convention cannot impair the effectiveness of existing international obligations”.

<sup>22</sup> Nehemiah Robinson, *The Genocide Convention: A Commentary*, New York: Institute of Jewish Affairs, 1960. Leo Kuper, *International Action Against Genocide*, London, Minority Rights Group, 1984. Hans Heinrich Jescheck, „Genocide“ in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 4, 2000, pp. 541-544. Dieter Blumenwitz, *Rechtsgutachten über die Verbrechen an den Deutschen in Jugoslawien 1944-48*, *Juristische Studien*, München 2002, pp. 26-27, where Professor Blumenwitz affirms the retroactive application of the Genocide Convention to the killing of some 200,000 civilians, members of the ethnic German minority in Yugoslavia, by Tito partisans and militia in 1944-45. Christian Tomuschat, „Die Vertreibung der Sudetendeutschen. Zur Frage des Bestehens von Rechtsansprüchen nach Völkerrecht und deutschem Recht“, in *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht*, Vol. 56, 1996, pp. 1-69. Felix Ermacora, *Die Sudetendeutschen Fragen*, Munich, 1992, p. 178, where Professor Ermacora affirms the retroactive application of the Genocide Convention to the killing of some 250,000 civilians, members of the German ethnic minority of Czechoslovakia, in 1945-46.

In its 1951 Advisory Opinion, the International Court of Justice stated that “the principles underlying the Convention are principles which are recognized by civilized nations as binding on all States, even without any conventional obligation.”<sup>23</sup>

In this sense, the UN Commission on Human Rights noted in 1969 that “It is therefore taken for granted that as a codification of existing international law the Convention on the prevention and Punishment of the Crime of Genocide did neither extend nor restrain the notion genocide, but that it only defined it more precisely.”<sup>24</sup>

Even though the Genocide Convention has not been universally ratified, the prohibition of genocide must be deemed to be *jus cogens*<sup>25</sup>. As of February 2003, 134 of the 191 member States of the United Nations had ratified the Convention. Moreover, as the International Court of Justice elaborated in the Barcelona Traction Case (Second Phase), there are distinctions to be drawn between State obligations arising *vis-à-vis* another state and obligations *erga omnes*, or “towards the international community as a whole”. The Court stated:

“By its very nature, the outlawing of genocide, aggression, slavery and racial discrimination are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*....”<sup>26</sup>

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

## 2. The principle of non-retroactivity

The principle of non-retroactivity admits of many exceptions and, in any event, is not a peremptory norm of international law<sup>27</sup>. A positivist approach to international law, however, relies on a rule of non-retroactivity. As Professor Charles Rousseau stated, “International law appears to be determined by the principles of non-retroactivity. This principle is the result of both the treaties and the diplomatic and judicial practice.”<sup>28</sup>

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

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<sup>23</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports (1951) pp. 15-69.. See Diane F. Orentlicher, “Genocide” in Roy Gutman and David Rieff (eds.), *Crimes of War*, New York 1999, pp. 153-157. Joe Verhoeven, “Le Crime de Génocide”, in *Revue belge de droit international*, vol XXIV, 1991, pp. 5-26 at 13

<sup>24</sup> Report of the ad hoc working group of experts established under Resolution 2(XXIII) and 2(XXIV) of the Commission on Human Rights, Doc. E/CN.4/984/Add.18.

<sup>25</sup> Ian Brownlie, *Principles of Public International Law*, fourth edition, Clarendon Press, Oxford, p. 513.

<sup>26</sup> *Barcelona Traction, Light and Power Co., Ltd (Belgium v. Spain)*, ICJ Reports (1970) 3 at 32.

<sup>27</sup> Ian Sinclair, *The Vienna Convention on the Law of Treaties*, second edition 1984, p. 85.

<sup>28</sup> Charles Rousseau, *1 Principes Généraux du droit international public* 486 (1944).

In his commentary on the Vienna Convention on the Law of Treaties, Sir Ian Sinclair refers to the commentary of the International Law Commission on the opening phrase of article 28, which explains that such language (instead of the more usual wording “unless the treaty otherwise provides”) was used “in order to allow for cases where the very nature of the treaty rather than its specific provisions indicates that it is intended to have certain retroactive effects.”<sup>29</sup> Sinclair goes on to refer to the famous *Mavrommatis Palestine Concessions* case, in which the United Kingdom had contested the jurisdiction of the Permanent Court of International Justice on the ground that the acts complained of had taken place before Protocol XII the Treaty of Lausanne had come into force. In rejecting this submission, the Court stated:

“Protocol XII was drawn up in order to fix the conditions governing the recognition and treatment by the contracting parties of certain concessions granted by the Ottoman authorities before the conclusion of the Protocol. An essential characteristic therefore of Protocol XII is that its effects extend to legal situations dating from a time previous to its own existence. If provision were not made in the clauses of the Protocol for the protection of the rights recognised therein as against infringements before the coming into force of that instrument, the Protocol would be ineffective as regards the very period at which the rights in question are most in need of protection. The Court therefore considers that the Protocol guarantees the rights recognised in it against any violation regardless of the date at which it may have taken place.”<sup>30</sup>

Sinclair also addressed the debate that accompanied the retention of the words “in relation to any ... situation which ceased to exist before the date of entry into force of the treaty”. Whereas the United States delegation unsuccessfully argued for deletion, the majority of the delegations insisted that a treaty may well apply to “situations” that continued, even if the facts giving rise to the situation had punctually occurred prior to the entry into force of the treaty.<sup>31</sup>

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

“The rule against retroactive legislation is a principle of justice. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility, the typical technique of primitive law. Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. ... In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the Second World War may certainly be considered as more important

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<sup>29</sup> Yearbook of the International Law Commission (1966-II), pp. 212-13.

<sup>30</sup> (1924) P.C.I.J., ser. A, No. 2, at 34.

<sup>31</sup> Sinclair, *op. cit.*, p. 86. The US proposal was defeated by a vote of 47 to 23, with seventeen abstentions.

than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions.”<sup>32</sup>

The general rule of non-retroactivity of treaties and conventions, which was abandoned in Nuremberg in connection with the new concept of “crimes against peace”, is not, however, of relevance in the context of the crime of genocide, which has always been a crime under national penal laws, as a manifestation of multiple murder, and which, moreover, must be seen as an international crime under “general principles of law”.<sup>33</sup>

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

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

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

- \* the London Agreement of 8 August 1945 (Charter of the Nuremberg Tribunal)
- \* the Convention on the Non-Applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity of 1968

\* Similarly, there is precedent for the *ex post facto* drafting and adoption of international penal charters by the United Nations Security Council under its Chapter VII jurisdiction, such as the Statutes of the International Criminal Tribunal for the Former Yugoslavia<sup>34</sup>, the International Criminal Tribunal for Rwanda<sup>35</sup>, and the International Tribunal for Sierra Leone.

The language of the Genocide Convention neither excludes nor requires its retroactive application. In other words – there is nothing in the language of the Convention that would prohibit its retro-active application. By contrast, there are numerous international treaties that

<sup>32</sup> Hans Kelsen, “Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law?” 1 *International Law Quarterly*, 153, 164-65 (1947). See also Hans Kelsen, “The Rule Against Ex post Facto Law and the Prosecution of the Axis War Criminals”, 2 *The Judge Advocate Journal* 8 (1945).

<sup>33</sup> In his opening Statement at the International Military Tribunal, the British Chief Prosecutor Lord Hartley Shawcross stated: “There is thus no substantial retroactivity in the provisions of the Charter. It merely fixes the responsibility for a crime already clearly established as such by positive law upon its actual perpetrators. It fills a gap in international criminal procedure. There is all the difference between saying to a man, ‘You will now be punished for what was not a crime at all at the time you committed it,’ and in saying to him ‘You will now pay the penalty for conduct which was contrary to law and a crime when you executed it, although, owing to the imperfection of the international machinery, there was at that time no court competent to pronounce judgement against you.’”

<sup>34</sup> William A. Schabas, « Sentencing by International Tribunals : A Human Rights Approach », 7 *Duke Journal of Comparative and International Law*, 461.

<sup>35</sup> Reuel Cross, Case Western Reserve University School of Law, International War Crimes Project, International Criminal Tribunal for Rwanda, Memorandum for the Office of the Prosecutor. Issue I : The Relevance of the Eichmann, Barbie and Finta Trials for the ICTR, Spring 2003.

specifically state that they will not apply retroactively. For example, article 11 of the 1998 Statute of the International Criminal Court specifies that “the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute”.

And there are treaties that purportedly do not apply retrospectively, but in practice are so applied, as is the case with the Vienna Convention on the Law of Treaties of 1969, article 4 of which stipulates: “the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention”. Ever since the adoption of the Convention, however, international courts and tribunals have made reference to its provisions as being declarative of pre-existing law and practice, thus reflecting the customary international rules on treaties and the prevailing *opinio juris*<sup>36</sup>.

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

Pursuant to article 31 of the Vienna Convention on the Law of Treaties, the principal rule of interpretation is “the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose”. The retroactive application of the Genocide Convention is compatible with the ordinary meaning of terms in the light of the object and purpose of the Convention. Further, such retroactive application appears necessary, in order to serve the important object of deterring future acts of genocide (prevention) by way of establishing the precedent of punishing acts of genocide that occurred prior to its entry into force (suppression). According to article 32 of the Vienna Convention on the Law of Treaties, the use of the *travaux préparatoires* of any treaty or convention is deemed only a supplementary means of interpretation. The *travaux préparatoires* of the Genocide Convention, however, are inconclusive with regard to the issue of retroactive application. Whereas several delegations were future-oriented, others saw the problem more broadly, in the light of the retroactive application of the London Charter of 8 August 1945 to the Nazi crimes of genocide that had preceded it, e.g. the Polish representative, Professor Manfred Lachs, and the United Kingdom Representative, Sir Hartley Shawcross.<sup>37</sup>

While non-retroactivity is a principle that has pragmatic value, it is frequently abandoned in international treaties and in national legislation concerning intellectual property, copyrights and taxation. Bearing in mind that there exists a higher legal regime for human rights and a *jus cogens* obligation to refrain from genocide, retroactivity is not only appropriate but also just and necessary as a matter of international *ordre public*. Moreover, in regard to private property confiscated in the context of the Holocaust, United States jurisdictions have not hesitated to apply laws retroactively. Thus, for instance, in affirming its jurisdiction in *Altman v. Republic of Austria*, the United States Court of Appeals for the Ninth Circuit decided on 12 December 2002 that the 1976 Foreign Sovereign Immunities Act (FSIA) applied retroactively to the events of the late 1930s and

<sup>36</sup> Rudolf Bernhardt, « Treaties » in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 4, Elsevier, Amsterdam, 2000, pp. 926-932.

<sup>37</sup> *Official Records of the Third Session of the General Assembly*, Sixth Committee, Sixty-fourth meeting, Palais de Chaillot, Paris, 1 October 1948, pp. 17-20, See also the statements of the Czechoslovak representative, Mr. Prochazka, stressing the need to connect the convention directly with the historical events which had proved the necessity for its existence, and to stress the relationship between genocide and the doctrines of nazism, fascism and Japanese imperialism.”, Sixty-sixth meeting, 4 October 1948, pp. 29-30

1940s. The US Court took jurisdiction and found that the property of Mrs. Altmann had been wrongfully and discriminatorily appropriated in violation of international law.<sup>38</sup>

### 3. Non-prescription of the crime of genocide

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

The principle of *nullum crimen sine lege, nulla poena sine lege praevia* (no crime without law, no penalty without previous law), laid out in paragraph 1 of article 15 of the International Covenant on Civil and Political Rights is conditioned as follows in paragraph 2: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

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

In this context it is relevant to recall the double vocation of the Genocide Convention, namely to prevent and to punish the crime of genocide. In order to prevent genocide, it is important to deter future offenders by abundant precedent of *punishment* of prior offenders. Indeed, the punishment of Nazi officials for participation in the crime of genocide has made the horrible reality of genocide visible and concrete, so that it can be perceived by all as a crime. One consequence of the universal recognition that genocide is a crime is that the criminal, besides being condemned and punished for the crime, must not be allowed to keep the fruits of the crime. Thus, side by side with the recognition of genocide as a criminal offence is the necessity to undo its effects and the obligation to grant restitution and compensation to the victims.

### 4. The crime of genocide has been the subject of prosecutions based on *ex post facto* national laws with reference to the Genocide Convention.

Genocide was also charged in three of the successor trials held at Nuremberg pursuant to Control Council Law No. 10, before US military tribunals following the international military tribunal proceedings. In *United States v. Alstötter*, the Court cited General Assembly Resolution 96(I) on four occasions:

“The General Assembly is not an international legislature, but it is the most authoritative organ in existence for the interpretation of world opinion. Its recognition of genocide as an international crime [in Resolution 96(I)] is persuasive evidence of the fact. We approve and adopt its conclusions ...[We] find no injustice to persons tried for such crimes. They are

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<sup>38</sup> United States Court of Appeals for the Ninth Circuit : *Altmann v. Republic of Austria*, No. 01-56003 (December 12, 2002) .

chargeable with knowledge that such acts were wrong and were punishable when committed<sup>39</sup>

In the *Einsatzgruppen* trial, the defendants were charged with participation in a “systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups, in part by murderous extermination, and in part by elimination and suppression of national characteristics”<sup>40</sup>

The first national prosecutions specifically on the crime of genocide, but without reference to the Genocide Convention, which had not yet been adopted, were carried out by Polish courts. Thus, in July 1946, Artur Greiser was charged with and convicted of genocide.<sup>41</sup>

The leading prosecution by a national court, with reference to the Genocide Convention, was carried out by the State of Israel. In 1960 Adolf Eichmann, a Nazi official in World War II, was abducted from Argentina and taken to Israel for trial under Israeli law for his involvement in the genocide against the Jews during the war. Eichmann was prosecuted under the “Nazi and Nazi Collaborators (Punishment) law of 1951”, which was modelled on the genocide provision of the 1948 Genocide Convention.<sup>42</sup> He was charged on four counts of genocide corresponding to the first four subparagraphs of article II of the Convention: killing Jews, causing serious physical and mental harm, placing Jews in living conditions calculated to bring about their physical destruction, and imposing measures intended to prevent births among Jews.<sup>43</sup>

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

“The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in article III.”

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

“We must ... draw a clear distinction between the first part of Article 1, which lays down that ‘the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law’ – a general provision which confirms a principle of customary international as ‘binding on States, even without any conventional obligation’ – and Article 6, which comprises a special provision undertaken by the contracting parties with regard to the trial of crimes that may be committed in the future”.

Specifically on the issue of retroactivity, the Supreme Court of Israel endorsed the view of the District Court concerning the customary nature of the crime of genocide, and noted that “the enactment of the Law was not from the point of view of international law a legislative act

<sup>39</sup> *United States of America v. Alstötter et al.* (1948) 6 LRTWC 1, 3TWC 1, pp. 983.

<sup>40</sup> *United States of America v. Greifeldt et al.* (1948) 13 LRTWC 1, p. 2.

<sup>41</sup> *Poland v. Greiser* (1948) 13 LRTWC 70 (Supreme National Tribunal of Poland).

<sup>42</sup> *A-G Israel v. Eichmann* (1968) 36 ILR 5 (District Court of Jerusalem), paras. 20-22. District Court Jerusalem, 11 December 1961 “The Attoreney General of the Government of Israël v. Eichmann (case No. 40/61)” *American Journal of International Law*, 1962, p. 814.

<sup>43</sup> Schabas, *op. cit.*, 387.

which conflicted with the principle *nulla poena* [no penalty without previous law] or the operation of which was retroactive, but rather one by which the Knesset gave effect to international law and its objectives.”<sup>44</sup>

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

“The Nuremberg International Military Tribunal provided a new forum in which to prosecute persons accused of war crimes committed during World War II pursuant to an agreement of the wartime Allies, see *The Nürnberg Tribunal*, 6 F.R.D. 69. That tribunal consistently rejected defendants’ claims that they were being tried under *ex post facto* laws. Id.... the statute is not retroactive because it is jurisdictional and does not create a new crime. Thus, Israel has not violated any prohibition against the *ex post facto* applications of criminal laws which may exist in international law.”<sup>45</sup>

There are many other precedents of retrospective application of international law in other countries in matters concerning genocide. For instance, in the case of *Regina v. Imre Finta* in Canada, a trial for “crimes against humanity” was carried out on the basis of a 1987 Canadian statute that permits retrospective application of international law. In its judgment the Court recognized the existence of “crimes against humanity” under international law before 1945<sup>46</sup>

The practice of courts in other countries also vindicates the validity of the principles contained in the Genocide Convention. Although prosecution has not been based on the Genocide Convention itself but rather on German penal law, the Federal Republic of Germany has prosecuted more than sixty thousand Germans and other nationals for war crimes and complicity in the crime of genocide committed during World War II, prior to the entry into force of the Genocide Convention, and many judgments make reference to the Genocide Convention. The German Government has similarly recognized its international obligation to make restitution of property stolen from victims of genocide and to grant compensation to the survivors of the victims.<sup>47</sup>

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

## 5. The question of prescription in penal matters

<sup>44</sup> *Attorney-General v. Eichmann*, (1968) 36 ILR 277, para. 11.

<sup>45</sup> *In the Matter of the Extradition of John Demjanjuk*, 612 F. Supp. 544 (DC Ohio 1985), pp. 554-8.

<sup>46</sup> *Regina v. Finta*, 50 C.C.C. (3d) 247 ; 61 D.L.R. 85 (4th 1989). See also Green, Canadian Law, War Crimes and Crimes Against Humanity, 59 British Yearbook of International Law, 217 (1988), Cherif Bassiouni, *Crimes Against Humanity*, 1992 Kluwer Academic Publishers, Dordrecht, pp. 144, 226-227.

<sup>47</sup> William A. Schabas, *Genocide in International Law*, Cambridge University Press, 2000, p. 443.

It is proper to read the Genocide Convention in the light of the United Nations Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 26 November 1968 (in force 11 November 1970). Article 1(b) of this treaty specifically excludes the application of statutory limitation to “the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed” irrespective of the date of commission.

Although Turkey is not a State party to this Convention, it is generally accepted international law that crimes of genocide must be prosecuted regardless of when they occurred and that the obligation of States to make restitution of or pay compensation for properties obtained by means of genocide does not lapse with time.<sup>48</sup>

In its judgment of 6 October 1983 in the case concerning Klaus Barbie, the French *Cour de Cassation* rejected the objections of the defence and stated that the prohibition on statutory limitations for crimes against humanity is now part of customary international law.<sup>49</sup> France also enacted a law on 26 December 1964 dealing with crimes against humanity as “*imprescriptibles*” by nature (Nouveau Code penal de 19564, Arts. 211-1 to 213-5)<sup>50</sup>.

## 6. The competent tribunal.: universal jurisdiction<sup>51</sup> and “protective principle”

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

“The abhorrent crimes defined in this Law are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is universal.”

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

“Moreover, even with regard to the conventional application of the Convention, it is not to be assumed that Article 6 is designed to limit the jurisdiction of countries to try crimes of genocide by the principle of territoriality... Had Article 6 meant to provide that those accused of genocide shall be tried only by ‘a competent tribunal of the State in the territory of which

<sup>48</sup> General Assembly Resolutions 2538 (XXIV) of 15 December 1968 ; 2583/ (XXIV) of 15 December 1969, 2712 (XXV) of 15 December 1970: 2840 (XXVI) of 18 December 1971, 3029 (XXVII) of 18 December 1972; 3074 (XXVIII) of 3 December 1973, etc.

<sup>49</sup> *Fédération nationale des déportés et internés et patriots et al v. Barbie*, 78 *International Law Reports* 125, p. 135. See Doman, “Aftermath of Nuremberg: The Trial of Klaus Barbie”, 60 *Colorado Law Review* 449 (1989).

<sup>50</sup> Jacques Francillon, “Aspects juridiques des crimes contre l’humanité”, in *L’actualité du Génocide des Arméniens*, Edipol. 1999, pp. 397-404 at 398.

<sup>51</sup> Cherif Bassiouni, “Univesal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice”, 42 *Virginia Journal of International Law*, 2001, pp. 81- 160.

the act was committed' (or by an 'international court' which has not been constituted), then that article would have foiled the very object of the Convention to prevent genocide and inflict punishment therefor..."

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

"The State of Israel, the sovereign State of the Jewish people, performs through its legislation the task of carrying into effect the right of the Jewish people to punish the criminals who killed its sons with intent to put an end to the survival of this people. We are convinced that this power confirms to the subsisting principles of nations."<sup>52</sup>

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

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

## 7. The Doctrine of State Responsibility for Wrongful Acts

A general principle of international law stipulates that a State is responsible for injuries caused by its wrongful acts and bound to provide reparation for such injury.<sup>53</sup> The Permanent Court of International Justice enunciated this principle in the *Chorzow Factory Case* as follows: "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."<sup>54</sup>

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

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<sup>52</sup> Ibid, para. 38.

<sup>53</sup> Malcolm Shaw, *International Law*, p. 481 "A breach of an international obligation gives rise to a requirement for reparation."; Wladyslaw Czaplinski, *State Succession and State Responsibility*, in *Canadian Yearbook of International Law* 339 (1991): "State responsibility is a legal relationship created through the violation of an international legal obligation by a State; that violation gives rise to the duty to compensate for any resulting damage, one of the oldest principles of international law and universally recognized in international practice." Karl Zemanek, "Responsibility of States: General Principles" in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, Vol. 4, 2000, pp. 219-229; Mohammed Bedjaoui, "Responsibility of States: Fault and Strict Liability", in Bernhardt (ed.), pp. 212-216. Irwin Cotler, « Confiscated Jewish Property : The Holocaust, Theft and Restitution : A Legal Perspective » in : 20 *Cardozo Law Review*, December 1998, pp. 601-624, p. 610.

<sup>54</sup> *Chorzow Factory Case (Germany v. Poland)*, 1928 P.C.I.J. (ser.A) No. 17. p. 29. Ignaz Seidl-Hohenveldern, "German Interests in Polish Upper Silesia Cases", in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. II, 1995, pp. 550-553.

Thus, the international crime of genocide imposes obligations not only on the State that perpetrated the genocide, but also on the entire international community : (a) not to recognize as legal a situation created by an international crime, (b) not to assist the author of an international crime in maintaining the illegal situation, and (c) to assist other States in the implementation of the aforementioned obligations.<sup>55</sup> In a very real sense, the legal impact of the *erga omnes* nature of the crime of genocide goes far beyond the mere retroactivity of application of the Genocide Convention. It imposes an affirmative obligation on the international community not to recognize an illegal situation resulting from genocide. The mechanism of international mediation and conciliation can be called upon to design appropriate schemes to redress the wrong.

## 8. The remedy of restitution has not lapsed because of prescription

Because of the continuing character of the crime of genocide in factual and legal terms, the remedy of restitution has not been foreclosed by the passage of time<sup>56</sup>. Thus the survivors of the genocide against the Armenians, both individually and collectively, have standing to advance a claim for restitution. This has been also the case with the Jewish survivors of the Holocaust, who have successfully claimed restitution against many States where their property had been confiscated.<sup>57</sup> Whenever possible *restitutio in integrum* (complete restitution, restoration to the previous condition) should be granted, so as to re-establish the situation that existed before the violation occurred. But where *restitutio in integrum* is not possible, compensation may be substituted as a remedy.

Restitution remains a continuing State responsibility also because of Turkey's current human rights obligations under international treaty law, particularly the corpus of international human rights law.

The United Nations Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law provide in part:

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

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<sup>55</sup> Karl Zemanek, *op.cit.* p. 226.

<sup>56</sup> A leading international law expert in Europe, Professor Felix Ermacora, member of the UN Human Rights Committee, member of the European Commission on Human Rights, and Special Rapporteur for Afghanistan and Chile of the UN Commission on Human Rights, maintained this view. In a legal opinion on the continuing obligation to grant restitution to the expelled Germans from Czechoslovakia, some 250,000 of whom had perished in the course of their ethnic cleansing 1945-46, Ermacora wrote: “Ist die Konfiskation von Privatvermögen Teil eines Völkermordes, so ist auch ihre Rechtsnatur Teil eines Rechtsganzen. D.h. der Vermögenszug hatte für sich selbst im vorliegenden Gesamtzusammenhang Völkermordcharakter. Er unterliegt auch der Beurteilung aufgrund der Völkeremordkonvention, deren Partner sowohl die BRD als auch die Tschechoslowakei ist. Entsprechend den Regeln internationalen Rechts sind die Akte des Völkermordes – so auch die Vernichtung von Lebensbedingungen, wie sie durch einen totalen Vermögenszug stattgefunden haben und mit der Vertreibung kombiniert waren, zumindest nach der Konvention über die Nichtverjährbarkeit von Verbrechen gegen die Menschlichkeit nicht verjährbar.“ Ermacora, *die Sudetendeutschen Fragen*, Munich, 1992, p. 178.

<sup>57</sup> Irwin Cotler, *op. cit.*, p. 609. Sabine Thomsen, “Restitution” in R. Bernhardt (ed.), *Encyclopaedia of Public International Law*, vol. 4, 2000, pp. 229-32. “Nuremberg 50 years later: The restitution of Jewish Property and Norwegian Justice”, *Nordic Journal of International Law*, 1998, No. 3, pp. 275-287.

Particularly important are Principle 9:

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

and Principle 12:

“Restitution shall be provided to re-establish the situation that existed prior to the violations of human rights or international humanitarian law. Restitution requires, *inter alia*, ... return to one’s place of residence and restoration of... property.”<sup>58</sup>

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

“Any human rights violation gives rise to a right to reparation on the part of the victim or his beneficiaries, implying a duty on the part of the State to make reparation and the possibility of seeking redress from the perpetrator”<sup>59</sup>

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

In the context of reparation for gross violations of human rights, two other general principles are relevant. the principle *ex injuria non oritur jus* (from a wrong no right arises), that no State should be allowed to profit from its own violations of law, and the principle of “unjust enrichment”.<sup>60</sup> It is a general principle of law that the criminal cannot keep the fruits of the crime.<sup>61</sup>

<sup>58</sup> Commission on Human Rights, fifty-third session, Doc. E/CN.4/1997/104. Compare with the first report by Professor Theo van Boven C/CH.4/Sub.2/1993/8 of 2 July 1993, section IX, and the second report C/CN.4/Sub.2/1996/7 of 24 May 1996.

<sup>59</sup> Special Rapporteur Louis Joinet, Principle 36 in document E/CN.4/Sub.23/1997/20 of 26 June 1997 and Principle 33 in Document E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997.

<sup>60</sup> Peter D. Maddaugh and John D. McCamus, *Law of Restitution*, Aurora, Ontario, 1990, pp. 484-493. Even in the Old Testament we find an admonition against unjust enrichment, King James Version, 1 Kings, Chapter 21, verse 19: “Thus saith the Lord, Hast thou killed, and also taken possession?” The story is that Naboth, a man from Jezreel, had a vineyard on the outskirts of the city near King Ahab’s palace. The King coveted the land, because it was convenient to his palace, but Naboth did not want to sell, because the vineyard had been in his family for generations. Jezebel, Ahab’s wife, persuaded the King to have Naboth falsely accused of blasphemy and stoned to death. When King Ahab went to take possession of the vineyard, Elijah came to him and admonished the King: “Isn’t killing Naboth bad enough? Must you rob him, too? Because you have done this, dogs shall lick your blood outside the city just as they licked the blood of Naboth!” , *The Living Bible* (new translation), Tyndale House Publishers, Wheaton, Illinois.1971.

<sup>61</sup> J.W. Wade, “Acquisition of Property by wilfully killing another – A Statutory Solution”, 49 *Harvard Law Review*, pp. 715 et seq. (1936); W.M. McGovern, “Homicide and Succession to Property” (1969) 68 *Michigan Law Review*, p. 65 et seq. There is ample case-law stating that “it is against public policy for a person who is guilty of feloniously killing another to take any benefit in that other person’s estate” *Re Johnson*, (1950) 2 D.L.R. 69, at pp. 75-6 D.L.R., 1 W.W.R. 263. J. Lepsius estimated in 1919 in his book *Deutschland und*

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

A particularly macabre chapter of the massacres against the Armenians concerns the title to life insurances of the victims of the genocide. The United States Ambassador to the Ottoman Empire, Henry Morgenthau, noted in his memoirs a most revealing incident: “One day Talaat made what was perhaps the most astonishing request I had ever heard. The New York Life Insurance company and the Equitable Life of New York had for years done considerable business among the Armenians. The extent to which this people insured their lives was merely another indication of their thrifty habits. ‘I wish’ Talaat now said, ‘that you would get the American life insurance companies to send us a complete list of their Armenian policy holders. They are practically all dead now and have left no heirs to collect the money. It of course all escheats to the State. The Government is the beneficiary now.’”<sup>62</sup> Ambassador Morgenthau did not comply with Talaat’s request.

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

“The paradigm here is not that of restitution in a domestic civil action involving principles of civil and property law, or restitution in an international context involving state responsibility in matters of appropriation of property of aliens; rather, the paradigm – if there can be such a paradigm in so abhorrent a crime – is that of restitution for Nuremberg crimes, which is something dramatically different in precedent and principles. .. Nuremberg crimes are *imprescribable*<sup>63</sup>, or Nuremberg law – or international laws anchored in Nuremberg Principles – does not recognize the applicability of statutes of limitations, as set forth in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity”<sup>64</sup>

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

In this context it is important to recall the obligations of States parties under the International Covenant on Civil and Political Rights (ratified by Turkey on 23 September 2003, entry into force 23 December 2003), in particular the obligations that result from article 1, which stipulates the rights of peoples to self-determination and their right to their natural wealth and resources, as well as the obligations resulting from article 27, which provides for special treatment of ethnic and cultural minorities. It would follow that “historical inequities” should

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*Armenien*, p. 277 that the profits accruing to the Young Turk oligarchy and its hangers-on from the expropriation of the Armenians amounted to not less than a thousand million German marks. David Marshall Lang wrote in *The Armenians*: “The Ottoman Bank President showed bank-notes soaked with blood and stuck through with dagger holes. Some torn ones had evidently been ripped from the clothing of murdered people ...”, p. 28.

<sup>62</sup> Henry Morgenthau, *Ambassador Morgenthau’s Story*, New York, 1919. Reissued by Taderon Press, Reading, England, 2000, p. 225.

<sup>63</sup> (sic) imprescriptible or indefeasible.

<sup>64</sup> Irwin Cotler, op.cit., p. 621.

be redressed, and that the Armenian people are entitled, both under articles 1 and 27 of the Covenant, to the return of their cultural heritage. Pertinent in this context is the decision of the United Nations Human Rights Committee in case No. 167/1984, *Lubicon Lake Band v. Canada*, where the Committee determined that there had been a violation of article 27 and commented: “Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue.”<sup>65</sup>

### **9. Continuation of the Crime of Genocide: the destruction of historical monuments**

A further argument against the notion of prescription with regard to the genocide against the Armenians is that whereas the killing stopped around 1923, after most of the Armenians in Turkey had been murdered, the destruction of their property and the destruction of their historical memory continued. Such acts were intended to perpetuate and secure the work of genocide by destroying memory – the historical proof of the presence of twenty centuries of Armenians in Asia Minor. Their churches and monasteries were burned by arson and destroyed by explosion. In all, 1036 churches or monasteries were destroyed. The Khtzkonk monastery (11<sup>th</sup> century) was destroyed by dynamite after the Second World War. The Cathedral of Urfa was converted into a museum. The building of the Church of Christ Saviour at Ani was cut in two. The Church of Ordou was transformed into a prison and the inscriptions in Armenian were erased. The Armenian inscriptions were removed from the Central School in Constantinople. Besides the deliberate destruction, the Turkish Government has contributed to the decay and destruction of Armenian buildings by denying building permits needed to carry out repairs.<sup>66</sup> The scale of destruction of the Armenian cultural heritage has been so widespread and systematic over the decades, that these few examples should not be misinterpreted as minimizing the severity and thoroughness of the continuation of the genocide.

Among the Turkish acts of memory-destruction can be listed the suppression of the name “Armenia” from official maps and the changing of the names of Armenian villages and towns in Asia Minor, which continued late into the 1950s. As University of California Professor Kouymjian elaborated to the Tribunal Permanent des Peuples in Paris in 1984, ninety per cent of the historical Armenian names have been modified.<sup>67</sup> Inscriptions in Armenian language continue to be removed from buildings and monuments. And this happened in contravention of articles 38 to 44 of the Treaty of Lausanne of 1923, which was intended to protect the rights of minorities, including the cultural rights of the Armenian minority.

The absurdity of the prevailing situation with regard to the non-restitution of Armenian properties can be illustrated by the following hypothetical situation: what would the reaction of the international community be, if the post-war German Government had converted Jewish synagogues into Christian Churches and kept the lands and houses of the victims of the Holocaust ?

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<sup>65</sup> *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Vol. III, p. 78. UN Doc CCPR/C/OP/3, New York and Geneva 2002.

<sup>66</sup> Christopher J. Walker (ed.), *Armenia and Karabagh*, Minority Rights Group, London, 1991, pp. 38-39.

<sup>67</sup> Dickran Kouymjian, “Destruction des Monuments historiques Arméniens, poursuite de la politique turque de génocide” in *Tribunal Permanent des Peuples, le Crime de Silence*, Flammarion, Paris, 1984, pp. 295 et seq. ; « La Confiscation des biens et la destruction des monuments historiques comme manifestation du processus génocidaire » in, *L'Actualité du Génocide des Arméniens*, Edipol, 1999, pp. 219-230. See also: *Armenia, Minority Rights Report*, No. 32, London 1976.

Yet another form of continuing the genocide is by rehabilitating the murderers. In March 1943 the mortal remains of the principal architect of the genocide, Ittihad Interior Minister Talaat Pasha, were ceremonially repatriated from Germany to Turkey, where he was re-interred on the Hill of Liberty.<sup>68</sup> Subsequently at least two streets have been named after him.

## 10. Doctrine of State Succession

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

“In international law, the doctrine of legal continuity and principles of State responsibility make a successor Government liable in respect of claims arising from a former government’s violations.”<sup>69</sup>

This applies *a fortiori*, in the case of genocide and its consequences for the survivors and their descendants, because State responsibility necessarily attaches to the State itself and does not allow for *tabula rasa*. Thus, it was consistent with international law for the Federal Republic of Germany to assume full responsibility for the crimes committed by the Third Reich. This has also been the case with regard to the responsibility of France to repair the wrongs committed by the Vichy Government during the German occupation, and of Norway to grant restitution for confiscations and other injuries perpetrated on Jewish persons during the Quisling regime<sup>70</sup>.

Article 36 of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 8 April 1983<sup>71</sup> provides that a succession of States does not “as such affect the rights and obligations of creditors”. Thus, the claims of the Armenians for their wrongfully confiscated properties did not disappear with the change from the Sultanate to the regime of Mustafa Kemal<sup>72</sup>.

The principle of responsibility of successor States has been held to apply even when the State and government that committed the wrong were not that of the successor State. This principle was formulated, *inter alia*, by the Permanent Court of Arbitration in the *Lighthouse Arbitration* case<sup>73</sup>. There France claimed that Greece was responsible for a breach of State concessions to its citizens by the autonomous State of Crete, committed before Greece’s

<sup>68</sup> Walker, *op. cit.*, p. 37. David Marshall Lang quotes in his book “The Armenians. A People in Exile” London 1981, p. 27, the telegraph which Talaat, addressed to the Governor of Aleppo on 15 September 1915: “You have already been informed that the Government has decided to exterminate entirely all the Armenians living in Turkey. No-one opposed to this order can any longer hold an administrative position. Without pity for women, children and invalids, however, tragic the methods of extermination may be, without heeding any scruples of conscience, their existence must be terminated.” Also reported in the Daily Telegraph, London 29 May 1922.

<sup>69</sup> Commission on Human Rights, Document E/CN.4/1999/65.

<sup>70</sup> Björn Westlie, *Coming to Terms with the Past: the Process of Restitution of Jewish Property in Norway* (Inst. of the World Jewish Congress, Policy Forum No. 12, 1996).

<sup>71</sup> UN Doc A/Conf.117/14.

<sup>72</sup> Kevork K. Baghdjian, *La confiscation, par le gouvernement turc, des bien arméniens...dits abandonnés*, Montréal, 1987.

<sup>73</sup> *Lighthouses Arbitration between France and Greece*, 23 International Law Reports pp. 659-676. C. Rousseau, « L’affaire franco-hellénique des phares et la sentence arbitrale du 24 juillet 1956 », *Révue Générale du Droit International Public*, Vol. 63 (1959) pp. 248-292. J.P. Monnier, « La succession d’Etats en matière de responsabilité internationale », *AFDI*, vol. 8 (1962) pp. 65-90 at pp. 80-85.

assumption of sovereignty over Crete. The PCA held that Greece was obligated to compensate for Crete's breaches, because Greece was the successor State.

The principle of State succession undoubtedly applies to the Eastern European States, and, in particular, to Serbia-Montenegro for the crimes committed by the Federal Republic of Yugoslavia.<sup>74</sup> State practice, decisions of international tribunals and decisions of domestic courts support this conclusion.

## **11. Bringing the genocide against the Armenians before the International Court of Justice**

Since both Turkey (31 July 1950) and Armenia (23 June 1993)<sup>75</sup> are States parties to the Genocide Convention, it would be possible to invoke article VIII, which provides that any contracting party may call upon the competent organs of the United Nations to take such action as they consider appropriate for the "suppression" of genocide. "Suppression" must mean more than just retributive justice. In order to suppress the crime, it is necessary to suppress, as far as possible, its consequences. This entails, besides punishing the guilty, providing restitution and compensation to the surviving generations. Armenia may also invoke article IX of the Convention, which provides that

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

Admittedly, the criminal law aspects of the Genocide Convention are of lesser relevance in the Armenian context, since none of the perpetrators of the genocide against the Armenians are still alive. On the other hand, the Armenian properties that were wrongfully confiscated have not been returned to the survivors of the genocide, to their descendents or to the Armenian Church, nor has compensation been paid to the survivors of the genocide or to their descendants. In this context it is worth noting the important restitution of many churches and monasteries in the ex Soviet republics including Armenia, restitution that was effected in the 1990's for confiscations that had occurred seventy years earlier, following the Bolshevik revolution.<sup>76</sup> Based on this precedent, restitution of Armenian churches and monasteries would appear not just morally mandated, but also entirely implementable in practice.

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

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<sup>74</sup> For the question of the Federal Republic of Yugoslavia's status vis à vis the Genocide Convention, see Matthew Craven, *The Genocide Case, the Law of Treaties and State Succession*, British Yearbook of International Law, 1997, pp. 127-163.

<sup>75</sup> Armenia used to be a Soviet Republic. Thus, by principles of succession, the application of the Convention actually goes back to the date when the Soviet Union became a State party to the Genocide Convention, on 3 May 1954.

<sup>76</sup> Dickran Kouymjian, « La confiscation des biens et la destruction des monuments historiques comme manifestations du processus génocidaire » in *L'actualité du Génocide des Arméniens*, op cit., p. 227.

An objection on the part of Turkey about the standing of Armenia to represent the rights of the descendants of the survivors of the genocide is countered by the fact that many descendants are citizens of Armenia; reference to the “protective principle” enunciated by the District Court of Israël in the *Eichmann* case (see section 6 *supra*) can also be made in this context. Moreover, Armenia could offer Armenian citizenship to all Armenians in the diaspora, as Russia has done with respect to former citizens of the Soviet Union residing in the Baltic States and other former republics of the Soviet Union.

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