

The Twentieth Century's First Genocide: International Law, Impunity, the Right to Reparations, and the Ethnic Cleansing Against the Armenians, 1915-16

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Genocide is not an invention of modern times, nor is mass expulsion or what has come to be known as "ethnic cleansing." Many extermination campaigns against different ethnic or religious groups have taken place in the course of history.

The gradual recognition of human rights and the humanistic impetus of eighteenth century Enlightenment could have conceivably led to greater tolerance and understanding for other human beings whose culture, language, ethnicity or religion may be different. It did not. The nineteenth century saw mass extermination of indigenous peoples, notably the displacement, spoliation and annihilation of hundreds of thousands, if not millions, of the native population of the North American continent, wrongly referred to as "Indians," pursuant to the United States policy of "manifest destiny." European colonialism in Africa and Australia also led to the decimation of the native population of many territories, which Europeans curiously referred to as "terra nullius," as if the land had been unpopulated or had belonged to no one prior to the arrival of the Europeans.

The twentieth century has seen many more genocides. The first was perpetrated against the Armenians, a people who have inhabited the Caucasus and the Anatolian peninsula for thousands of years. As an ethnically and religiously different community in a frequently hostile environment, it has suffered various forms of persecution over the ages.

Already in the late nineteenth century an atmosphere of emerging nationalism and an obsession with achieving ethnic or religious homogeneity led to a number of pogroms against the Armenians in 1894-96 under Sultan Abdul Hamit. As many as 30,000 were killed in those early massacres.

¹ The views expressed in this article are those of the author in his personal capacity and do not necessarily reflect those of organizations with which he is associated.

The First World War provided the opportunity for a deliberate attempt by the Ottoman authorities to eliminate the Armenian minority. Arnold Toynbee lived through this period and studied the phenomenon. In 1969 he recalled: "the massacre of Armenian Ottoman subjects in the Ottoman Empire in 1896 ... was amateur and ineffective compared with the largely successful attempt to exterminate [them] that was made during the First World War in 1915."² The earlier massacres under Sultan Abdul Hamit had lacked planning and experience and thus were not carried out in genocidal scale.³

Before the term "genocide"⁴ was coined by the Polish jurist Raphael Lemkin during the Second World War, the international community had spoken of massacres, mass killings or exterminations, which, if occurring in time of war would necessarily violate the provisions of The Hague Regulations on Land Warfare, and give rise to State responsibility under article 3 of the Hague Convention (IV) of 18 October 1907, including an obligation to grant compensation in cases of breach.⁵

Decades of persecution and smaller massacres of Christian Armenians in the Ottoman Empire culminated in the systematic deportation and extermination campaign conducted by the Young Turk *Ittihad* Government⁶ in 1915-16. There are various estimates of the number of persons who directly or indirectly lost their lives in the wake of the genocidal campaign. At least one

² Arnold Toynbee, *Experiences* (London, 1969), 241.

³ Vahakn N. Dadrian, "The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice," *Yale Journal of International Law* 23 (1998), 503-559 at 508.

⁴ The label genocide was first used officially in the indictment of the Nuremberg Trials as one of the crimes covered under the general concept war crimes, which constituted point 6(b) of the indictment.

⁵ "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."

⁶ Union and Progress Party.

million Armenians, more probably one and a half million, were put to death, while Europe looked on.⁷

The massacres began on 24 April 1915, and already some five weeks later, on 28 May 1915, the Governments of France, Great Britain and Russia issued a joint declaration denouncing the Ottoman Government's massacre of the Armenian population in Turkey⁸ 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."⁹ This statement was also quoted in the Armenian Memorandum presented by the Greek delegation to the 1919 "Commission of Fifteen Members" at the Paris Peace Conference on 14 March 1919. The Commission's report contained an Annex I with a table of war crimes including the massacres of Armenians by the Turks and the deportation of survivors to concentration camps in Syria and Mesopotamia, where hundreds of thousands perished. The American Ambassador at Istanbul, Henry Morgenthau, kept careful diaries of his meetings with high government officials, including the Minister of Interior and Chief of the *Ittihad* party, Pasha Talat. In a note dated 4 November 1915 he reported to Washington that the *Ittihad* had "frightened almost everyone into submission.... There is no opposition party in existence. The Press is carefully censored and must obey the wishes of the Union and Progress Party... They have annihilated or displaced at least two thirds of the Armenian population."¹⁰

Punishing crimes against humanity and genocide were concerns of the international community at least since the Paris

⁷ Vahakn N. Dadrian, "Genocide as a Problem of National and International Law: The World War I Armenian Case and its Contemporary Legal Ramifications," *Yale Journal of International Law* 14 (1989), 221-334; Permanent Peoples' Tribunal, *A Crime of Silence: The Armenian Genocide* (Paris, 1985).

⁸ Cherif Bassiouni, *Crimes Against Humanity* (Dordrecht, 1992), 168-9.

⁹ Egon Schwelb, *Crimes Against Humanity*, 23 *British Yearbook of International Law* (1946), 178-226. at 181; Arthur Beylerian, *Les Grandes Puissances, L'Empire Ottoman et les Arméniens dans les archives françaises 1914-1918* (Paris, 1983), 29.

¹⁰ Vahakn N. Dadrian, *The History of the Armenian Genocide: Ethnic Conflict From the Balkans to Anatolia to the Caucasus* (Providence, R.I., 1995), 323-24.

Peace Conference of 1919. In the case of the Treaty of Sèvres between the victorious Allies and Turkey, which Sultan Mohammed V had signed on 10 August 1920, but which was never ratified by Turkey, the Allies announced in article 230 their intention to punish those responsible for the genocide against the Armenians.¹¹ However, the emergence of the Soviet Union, the geopolitical development after the war, coupled with the rise of the Turkish Nationalists under General Mustafa Kemal (later given the name *Atatürk*) and the abolition of the Sultanate in November 1922, eventually led to the abandonment of the Treaty of Sèvres and renegotiation between the Allies and the new Turkish Government under Kemal, at the Conference of Lausanne from 2 November 1922 to 4 February 1923 and from 23 April to 24 July 1923. The resulting Treaty of Lausanne abandoned the idea of ensuring punishment for the crimes committed against the Armenians, and the concept of an independent Armenia, which would have granted self-determination to a people as deserving as other ethnicities who did establish their own States pursuant to the treaties of Versailles, St. Germain, and Trianon.¹²

Some war crimes trials against Turkish Unionists and top leaders of the Young Turk *Ittihad* Party responsible for the genocide against the Armenians did, however, take place before Turkish courts martial in Istanbul.¹³ A parliamentary Committee

¹¹ "Le gouvernement ottoman s'engage à livrer aux Puissances alliées les personnes réclamées par celles-ci comme responsables des massacres qui, au cours de l'état de guerre, ont été commis sur tout territoire faisant, au 1er août 1914, partie de l'Empire ottoman. Les Puissances alliées se réservent le droit de désigner le tribunal qui sera chargé de juger les personnes ainsi accusées, et le gouvernement ottoman s'engage à reconnaître ce tribunal...." The Allies also reserved their right to bring the accused before a special tribunal of the League of Nations. See André Mandelstam, *La Société des Nations et les puissances devant le Problème Arménien*, 2nd ed. (n.p., 1970), chapter 4.

¹² J.F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, Conn., 1982); Henry Morgenthau, *Secrets of the Bosphorus* (London 1918), especially Chapter 24, "The Murder of a Nation," 198-214.

¹³ Dadrian, "Genocide as a Problem of National and International Law," 291-317.

conducted investigations, and an Inquiry Commission was established on 23 November 1918, which delivered to the prosecution separate dossiers concerning 130 suspects. The Key indictment focused on the Cabinet Ministers and the top leaders of the ruling *Ittihad* party, including former Justice Minister Ibrahim, the War Minister Enver, and Interior Minister (later Grand Vizier) Talat. The indictment sought to establish that “the massacre and destruction of the Armenians were the result of decisions by the Central Committee of the *Ittihad*.”¹⁴ The prosecution relied solely on the Ottoman Penal Code, in particular articles 45 and 170.

Most of the prosecution documents consisted of decoded telegrams sent to and from the Interior Minister, the Third and Fourth Army Commanders, the Deputy Commanders of the Fifth Army Corps and the Fifteenth Division from Ankara province. Documentary evidence was adduced to substantiate the charge that *Ittihad* party Chief Talat had given oral instructions to interpret the order for “deportation” as an order for “destruction.” On the basis of the documents, the Court martial established premeditation and intent. Two Turkish officers were convicted and executed, others were sentenced to long terms of imprisonment. Other members of the Young Turks were condemned to death in absentia. The trials were, however, discontinued after Kemal Atatürk came to power.

Meanwhile, Great Britain proposed the establishment of an International War Crimes Tribunal and proceeded to collect evidence for the trials, but the political developments after the First World War did not allow its establishment.¹⁵

¹⁴ Dadrian, *History of the Armenian Genocide*, 324.

¹⁵ The war crimes committed by the German armed forces during the First World War should also have been tried by international criminal tribunals, and the Allies demanded the handing over of nearly one thousand persons pursuant to articles 227 to 230 of the Treaty of Versailles with Germany. No international trials, however, were ever held, and only a handful of military persons were tried before the German Supreme Court at Leipzig in 1921. See Alfred de Zayas, “Der Nürnberger Prozess,” in Alexander Demandt, *Macht und Recht* (Munich, 1990), 247-270.

The Armenians were not the only victims of deportation and massacres at the hand of Ottoman forces, which committed grave crimes against other ethnic groups, notably the Kurds and the Greeks. Not only did these crimes go unpunished, they even received a measure of approval from the international community. A part of the Lausanne settlement of 1923 provided for the official approval of the compulsory population "exchange" between Greece and Turkey¹⁶ and the establishment of a bilateral Mixed Commission which was charged with the administration of the exchange. Some observers consider that this part of the settlement amounted to approval of ethnic cleansing, another form of genocide.

The Prosecution of Genocide Since the Nuremberg Trials

Many genocides have occurred in history. All have gone unpunished with the exception of the Nazi genocide against the Jews and more recently the genocide by the Hutus against the Tutsis in Rwanda. The military actions carried out by Serbian forces against Muslim Bosniacs and against ethnic Albanians of Kosovo are currently under examination by the International Criminal Tribunal for the Former Yugoslavia, before which former Yugoslav President Slobodan Milošević stands indicted on the crime of genocide.

The Nuremberg indictment established an important precedent in creating the notion of crimes against humanity, a concept that includes genocide. Moreover, in its statement of the offense, under Count III, War Crimes, the Nuremberg indictment charged the accused with conducting "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, particularly Jews, Poles, Gypsies and others."¹⁷

¹⁶ League of Nations, *Treaty Series* 32: 75.

¹⁷ *Trials of the Major War Criminals Before the International Military Tribunals* (Nuremberg, 1947), I: 43 (Indictment Count Three A).

Thus, the Nazi extermination of millions of Jews became the first genocide that was subject to international judicial scrutiny, and many of those who perpetrated it or were involved in aspects of its execution were held personally liable, tried and punished as common criminals. They were brought not only before international courts like the International Military Tribunal at Nuremberg or before the twelve American Tribunals at Nuremberg, but also before countless tribunals of the victorious Allies such as France and England, and even before the courts of States that did not exist at the time of the genocide, e.g. Israeli Tribunals, and before German and Austrian tribunals to our own day.

Genocide is not an ordinary crime subject to periods of statutory limitation for purposes of prosecution. Pursuant to the United Nations Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which was adopted by the General Assembly on 26 November 1968 and entered into force on 11 November 1970, no statute of limitations shall apply to genocide irrespective of the date of commission. The same principle of non-application of statutes of limitations to genocide was expressed by the General Assembly in its Resolution 2391 of 26 November 1968.

The provisions of the Convention apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, and to representatives of the State authority who tolerate their commission.

This Convention strengthens the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide, which was adopted by the General Assembly on 9 December 1948, one day before the adoption of the Universal Declaration of Human Rights, and which entered into force on 12 January 1951. As of 14 December 2001, there were 133 States parties, including Armenia and Turkey.

Article 2 of this Convention defines the crime of genocide as follows:

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.

As indicated before, Turkey is a State party to this Convention (accession 31 July 1950, in force 30 October 1950), but it has not acceded to the Convention on the non-applicability of statutes of limitation.

Among international lawyers there is consensus that genocide has always been a justiciable criminal offense and that the Convention on the Prevention and Punishment of the Crime of Genocide is declarative of international law in its core provisions and therefore has retroactive effect. Reference in this connection can be made to the Nuremberg prosecutions against the major war criminals of the Second World War, who were convicted of having committed crimes against humanity including genocide. The Nuremberg Trials took place prior to the adoption and entry into force of the Convention.

Also among historians there is consensus that in the years 1915 and 1916 the Armenian population of Turkey was subjected to measures which fall within the definition of genocide, and that approximately one and a half million Armenians perished as the result. Perhaps only half a million Armenians from Turkey survived, and it is thanks to the Armenians living in Russia and to the Armenian diaspora that the Armenian people, its language, music and culture have survived. The effects of genocide, however, cannot be erased.

Article VI of the Genocide Convention stipulates: "Persons

charged with genocide ... shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."

Article VIII provides: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide...."

Article IX provides: "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... , shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

Inter-State Complaints

Forty-five years would elapse since the adoption of the Convention until a State invoked article IX of the Convention before the International Court of Justice. On 20 March 1993 the Government of Bosnia and Herzegovina filed a case with the Court and demanded interim measures of protection against the Federal Republic of Yugoslavia and reparations for the damage already caused. Such measures were granted under article 41 of the Statute of the Court. In several subsequent decisions, the ICJ rejected the contentions of the Federal Republic of Yugoslavia according to which the Convention did not apply to the conflict. In further counter-claims the Federal Republic of Yugoslavia argued that it was the Government of Bosnia and Herzegovina that had committed acts of genocide against the Serbs in Bosnia. Claims and counterclaims were deemed admissible by the Court. However, on 20 April 2001 Yugoslavia withdrew its counterclaims, and the Court accepted the withdrawal on 10 September 2001.

The Convention against Genocide would also allow any State party to the Genocide Convention, e.g. Armenia, to file a case against another State party, e.g. Turkey, in order to obtain an

interpretation of the Convention and a determination that genocide had occurred. Such a determination would constitute a basis for a possible remedy, which could take the form of reparations for the destruction of Armenian churches and monasteries and the illegal confiscation of privately owned Armenian lands.¹⁸

Impunity

Is impunity for genocide acceptable under international law? Since the last decades of the twentieth century, it is clear that international law abhors the concept of impunity. This is why the Statute of the International Criminal Court was adopted in Rome in July 1998. It took less than four years for the required sixty ratifications to be received, the last three being deposited on 11 April 2002. The Statute has thus entered into force, but the Court itself has not yet been established. Armenia has signed but not yet ratified it. Turkey has neither signed nor ratified it. Nevertheless, the international community and many non-governmental organizations and human rights activists are committed to ensure that the Court does make a difference for future generations. The concepts of State immunity or personal immunity for acts of State are not available as a defense against charges of war crimes or crimes against humanity. In its article 6, the statute of the ICC defines genocide as an offense *erga omnes*, an offense which is subject to prosecution, even if the victims are a State's own population. In this context the Pinochet precedent is an example and at the same time a warning to other heads of state. But for Pinochet's advanced age and state of health, he could have been tried in the United Kingdom, Spain, or in any number of other States that sought his extradition.

The United Nations Human Rights Committee has repeatedly insisted on the right of victims of human rights violations to receive reparations and on the obligation of States parties to

¹⁸ Kévork K. Baghdjian, *La Confiscation, par le gouvernement turc, des biens arméniens* (Montréal, 1987).

punish perpetrators of human rights violations. In rejecting impunity and amnesty laws, the Committee stated in its "Views" in case No. 322/1988 Hugo Rodríguez v. Uruguay:

The Committee reaffirms its position that amnesties for gross violations of human rights and legislation such as Law No. 15,848, *Ley de Caducidad de la Pretensión Punitiva del Estado*, are incompatible with the obligations of the State part under the Covenant. The Committee notes with deep concern that the adoption of this law effectively excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State party from discharging its responsibility to provide effective remedies to the victims of those abuses. Moreover, the Committee is concerned that, in adopting this law, the State party has contributed to an atmosphere of impunity which may undermine the democratic order and give rise to further grave human rights violations.¹⁹

The ad hoc International Criminal Tribunal for the Former Yugoslavia was established 1994 at The Hague pursuant to Security Council Resolution No. 827. Several convictions for crimes against humanity have been handed down, including for the crimes of rape and enslavement.²⁰ On 2 August 2001 Trial Chamber I of the Tribunal rendered the first judgement convicting an individual of having committed the crime of genocide. General Radislav Krstić was sentenced to forty-six years of imprisonment for his involvement in genocide, forced transfer and deportation committed between July and November 1995, in particular for his responsibility for the crimes committed by Serbian forces in the town of Srebrenica.²¹ On 23 November 2001 the UN Tribunal indicted Slobodan Milošević for committing genocide against the Bosnian people. His trial for crimes against humanity committed during the Serbian

¹⁹ *Annual Report of the Human Rights Committee to the General Assembly, 1994 Report*, U.N. Doc. A/49/40, vol. 2, Annex IX B, para. 12.4 at p. 10.

²⁰ Judgement of Trial Chamber II in the Kunarac, Kovać and Vuković case, 22 February 2001.

²¹ "Prosecutor v. Radislav Krstić," *Chambre de 1ère instance, la Haye, 21 août 2001*.

crackdown on ethnic Albanians in Kosovo and during the war in Bosnia and Croatia opened in February 2002. He is the first head of state to stand trial for genocide.

The International Criminal Tribunal for Rwanda was established in 1995 at Arusha, Tanzania, pursuant to Security Council Resolution No. 955. On 2 September 1998 the first verdict interpreting the Genocide Convention was handed down by the Arusha Tribunal in the judgment against Jean-Paul Akayesu, who was held guilty on nine counts for his role in the 1994 Rwandan genocide.

Universal jurisdiction for certain crimes such as torture and genocide has also emerged. This is, *inter alia*, reflected in the Princeton Principles on Universal Jurisdiction, which were drafted and revised by a number of senior professors of international law, notably Cherif Bassiouni, Chair of the drafting committee of the Princeton Project on Universal Jurisdiction.

Ubi jus, ibi remedium

For the surviving victims of genocide and mass expulsion, the foremost right is the right to truth, which entails recognition of their suffering, of their status as victims, of the right to their history. These remedies may appear immaterial, but they are indispensable to one's identity and to the will to continue living. Other, more concrete remedies are the right to return to one's homeland and the right to restitution of or compensation for wrongfully confiscated property. Such remedies were stipulated in articles 142 and 144 of the Treaty of Sèvres, which the Sultan signed but Kemal Atatürk never honored.

Although the United Nations has adopted countless resolutions and decisions concerning the right of refugees and expellees to return, this right has been exercised only in a few cases, notably by some 300,000 Crimean Tatars and their descendants, who had been deported by Stalin to Uzbekistan and who have been returning to the Crimea with the help and blessing of the Office of the High Commissioner for Refugees, the European Union, and the Organization for Security and

Cooperation in Europe. This is a good precedent and not without relevance for Armenians.

Other examples of return are the voluntary repatriation of Hutus to Rwanda, under the auspices of UNHCR, and the voluntary repatriation of Bosnian Muslims pursuant to Annex 7 to the Dayton Accords of December 1995. The Human Rights Chamber established under Annex 6 of the Dayton Accords has examined thousands of cases and also ordered restitution and compensation to the victims of ethnic cleansing.²²

Reparations

It should be remembered that in addition to individual criminal responsibility for genocide, the 1948 Convention also establishes State responsibility, that is, international liability vis-à-vis other States parties to the Convention in cases of breaches of its provisions. Parties to the Convention can bring a case before the International Court of Justice in order that the Court make a determination of State responsibility for acts of genocide.

On the basis of such a finding and relying on general principles of international law, a State can demand reparations from another State, and, for instance, mixed compensation commissions could be established to determine the appropriate level of compensation.

In this context let us remember that whereas the non-ratified Treaty of Sèvres had demanded reparations from Turkey in 1920, the revised peace settlement contained in the Treaty of Lausanne of 1923 dispensed with reparations. Turkey was thus the only State among the defeated Central Powers and their allies not required to pay reparations. To this extent Turkey would not be able to escape current claims for reparation by reference to any prior reparations actually paid.

In the context of the Turkish invasion of Northern Cyprus in July 1974 and the expulsion of over 175,000 Cypriots of Greek ethnicity to the south of the island, the Government of Cyprus filed several claims with the European Commission on Human

²² Leif Berg and Ekkehard Strauss, *The Human Rights Chamber of Bosnia and Herzegovina* (Sarajevo, 2000).

Rights. In its first decision the Commission found in 1976 that "the transportation of Greek Cypriots to other places, in particular the excursions within the territory controlled by the Turkish army, and the deportation of Greek Cypriots to the demarcation line ... constitute an interference with their private life, guaranteed in article 8(1) which cannot be justified on any ground under paragraph 8(2)"²³ The Commission furthermore considered that the prevention of the physical return of Greek Cypriots who had been driven out from their homes in the north of Cyprus amounts to an infringement of their right to respect of their homes as guaranteed in article 8(1). The Commission further noted that the acts violating the Convention were directed exclusively against members of the Greek Cypriot community and concluded that Turkey had failed to secure the rights and freedoms set forth in the Convention without discrimination on the grounds of ethnic origin, race, and religion as required by article 14 of the Convention.²⁴

Individuals can also demand remedies, and over the past thirty years Human Rights Treaties such as the European Convention on Human Rights and the International Covenant on Civil and Political Rights and its Optional Protocol have created important jurisprudence granting remedies to victims of human rights violations. For instance, based on Protocol I to the European Convention on Human Rights, an individual like Mrs. Titina Loizidou could obtain a judgment in Strasbourg entitling her to compensation from Turkey for illegally confiscating her property during the invasion and expulsions of 1974. The Court held by eleven votes to six that the denial of access to the applicant's property and consequent loss of control thereof is imputable to Turkey.²⁵ In a further judgment of 28 July 1998, the

²³ "Cyprus v. Turkey," Application Nos. 6780/74 and 6950/75, Report of 10 July 1976, application No. 8007/77, Report of 4 October 1983.

²⁴ In 1983 the European Commission again dealt with the issue and found that the displacement of persons, separation of families and discrimination violated the European Convention. See Christa Meindersma, "Population Transfers in Conflict Situations," *Netherlands International Law Review* 41 (1994): 31-83 at 71-72.

²⁵ Case of Loizidou v. Turkey (Merits) 40/1993/435/514, Judgment of 18 December 1996.

Court ordered restitution. By fifteen votes to two, the Court rejected Turkey's claim that Mrs. Loizidou had no entitlement to an award under article 50 of the Convention. By fourteen votes to three it decided that Turkey was obliged to pay to Mrs. Loizidou within three months, 300,000 Cypriot pounds for pecuniary damage. By thirteen votes to four the Court held that Turkey had to pay to Mrs. Loizidou 137,084 pounds for costs and expenses.

It is important to note that Turkey formulated a preliminary objection *ratione temporis*, which the Court considered and rejected by a vote of eleven to six. Thus, a preliminary objection against a case presented by the Government of Armenia against Turkey or by an Armenian descendent of the genocide might have, by analogy, a chance of being considered, notwithstanding the principle that treaties cannot be applied retroactively. Moreover, there is an argument to be made concerning the continuing violation arising from the impossibility for Armenians today to return in safety and dignity to the homes and properties that were confiscated in connection with the genocide.

In matters of restitution and/or compensation for property confiscated arbitrarily and in violation of the principle of equality and non-discrimination, the United Nations Human Rights Committee has held in seven "Views" concerning many more applicants that the Czech Republic had violated the applicants' rights under article 26 of the International Covenant on Civil and Political Rights and that they were entitled to restitution and/or compensation.²⁶ It should be noted that whereas the International Covenant on Civil and Political Rights entered into force on 23 March 1976, most confiscations complained of took place in the years 1945-1950. Nevertheless, it was the arbitrariness of the restitution legislation itself and its discriminatory application that led the Committee to make a finding that the overarching principle of equality enshrined in article 26 of the Covenant had been violated.

The Human Rights Committee, however, would not be able to entertain a claim against Turkey, because Turkey has not yet become a party to the International Covenant on Civil and

²⁶ See *inter alia* Case No. 516/1992 *Simunek v. Czech Republic*, Case No. 586/1994, *Adam v. Czech Republic*, 857/1996 *Des Fours Walderode v. Czech Republic*.

Political Rights or to the Optional Protocol thereto. Armenia is a State party to both instruments.

Before examining a hypothetical case concerning the Armenian genocide, the European Court of Human Rights in applying the European Convention would have to address the *ratione temporis* obstacle, since the events occurred long before the entry into force of the Convention. However, there are continuing effects, including the trauma that has affected generations and the profound sense of loss of one's homeland,²⁷ bearing in mind that the Armenian community of Anatolia had lived and flourished in this land for some two thousand years. Let us also not forget that because of the destruction of the Armenian homeland in Eastern Anatolia, the survivors had to emigrate and their children and grandchildren gradually and irreparably lost part of their culture and language--i.e. their identity. There is also the aspect of cultural genocide in that monasteries, churches and other monuments attesting to the cultural heritage of the Armenians of Anatolia have been destroyed or allowed to decay. Indeed, there is an international moral obligation to make amends for crimes such as genocide, and a political imperative for the international community to remove sources of tension, so as to build peace on the foundation of just reconciliation.

From the strictly legal standpoint, it is worth stressing that when a State becomes a party to a Convention, it intends in good faith to take all necessary legislative, judicial and administrative measures to give life to the treaty and implement its provisions. Thus, one may ask, what has Turkey done since it acceded to the Genocide Convention in 1950 in order to make amends for the genocide against the Armenians? The general principle *pacta sunt servanda* would require Turkey not only to refrain from committing genocide in the future but surely implies that the victims of earlier genocides should be granted adequate reparations.

From the political standpoint, let us remember that after the collapse of the Soviet Union, the new democratic governments of

²⁷ Viz. Yael Danieli, *Differing Adaptational Styles in Families of Survivors of the Nazi Holocaust* (Washington, D.C., 1981); Abraham J. Peck, *The Children of Holocaust Survivors* (New York, 1983).

the successor republics returned countless confiscated churches and monasteries to the representatives of the respective Churches. In the case of the 451 Armenian monasteries and 2538 Armenian churches in Anatolia, the Turkish government should be persuaded by the European Union and NATO to return as many as were not destroyed and still exist, transformed into mosques, museums, prisons, sport centres, etc.²⁸ to the Armenian Patriarch at Istanbul. The Turkish government should also be persuaded to finance the reconstruction of other Armenian historical buildings.

In any event, alone the submission of a case to the European Court of Human Rights would focus media attention on the problem.

State Succession

Old States disappear and new States emerge as a result of wars, dismemberment, federation, secession, decolonization etc. The recent past has delivered numerous examples, e.g. as a result of the dissolution of the Soviet Union.

When States get cornered, they sometimes try to escape by reinventing themselves. Most recently we have seen that the Federal Republic of Yugoslavia ceased to exist and that a new Federal Republic of Yugoslavia was admitted into the United Nations as a new State on 1 November 2000.

What consequences, if any, does this have with regard to the liability of the new Yugoslav State for the obligations incurred by the prior State? The International Court of Justice did not accept the argument of the new Yugoslav State that for purposes of the Genocide Convention, it was not identical with the former Yugoslav State under Milošević and thus not responsible for the actions, which had led to the filing of the case Bosnia and Herzegovina against the Federal Republic of Yugoslavia in 1993.

After the Second World War the Nazi German government disappeared, the territory of the Reich was occupied by four

²⁸ Dickran Kouymjian, "La Confiscation des biens et la destruction des monuments historiques comme manifestations du processus génocidaire," in *L'Actualité du Génocide, Actes du colloque*, ed. Comité de Défense de la Cause Arménienne (Paris, 1999), 219-230.

victorious powers, and it was not clear whether and how a German state would be allowed to reemerge. Eventually the Allies gave a third of Germany's territory to neighbouring States and allowed two German States to emerge, which, however, were not absolved of the international liabilities of the Reich. In the fifty-seven years following the end of the war, the Federal Republic of Germany has set the example for other countries by fully assuming the moral and legal responsibility for the crimes perpetrated by the Hitler government, not only for the genocide but also for the forced labour of millions of civilians from occupied countries and for the confiscation of private property.

At the end of the First World War, the Ottoman Empire collapsed and the Sultanate was abolished. But the new leaders of Turkey assumed sovereignty over formerly Ottoman lands and successfully obtained the abandonment of the Treaty of Sèvres and its replacement by the Treaty of Lausanne. No serious international lawyer would contend that the Turkey that signed the Treaty of Lausanne was a new State free of the legal obligations of the Ottoman empire.

It is accepted international law that a revolution or any kind of overthrowing of a government does not result in the emergence of a new State devoid of inherited responsibilities. The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 8 April 1978,²⁹ like the Convention on the Prevention and Punishment of the Crime of Genocide, is only partly constitutive but rather essentially declarative of international law. New are provisions that reflect the emergence of many new States as a result of decolonization and the recognition of the right to self-determination.

But *tabula rasa* with regard to crimes against humanity and genocide would be wholly incompatible with the Vienna Convention and violate other general principles of international law. Moreover, the concept of automatic succession to human rights treaties has been espoused by an increasing number of international lawyers and the parallel principle of the continued applicability of human rights treaties to successor States is reflected in the General Comment No. 26 of the Human Rights

²⁹ UN Doc. A/CONF. 117/14.

Committee concerning "the continuity of obligations under the International Covenant on Civil and Political Rights."³⁰

Article 36 of the Vienna Convention 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 (Atatürk).

Negationists

The systematic annihilation of Armenians in 1915-16 was recognized by Ottoman courts martial shortly after World War I, which sentenced some of the Turkish perpetrators to death.³¹ Official Turkish policy since the 1920s has simply denied the genocidal intent of these mass murders.³²

No serious historian would today question the fact that there was a genocide against the Armenians in 1915-16. Some may argue that the number of victims exceeded one million and a half, while others might postulate the figure of one million, and others still might minimize it further. The facts, however, are known and have been known since 1915. Every history school book should reproduce the text of articles 142, 144, and 230 of the Treaty of Sèvres, which clearly show what the Allies believed and what the Sultan acknowledged in 1920. It is disgraceful that some politicians prefer to ignore these facts and pretend that the issue is open to serious historical doubt.

This reminds us of the way many politicians treated the murder of 15,000 Polish prisoners of war by Stalin's NKVD in 1940. All capitals knew who was responsible since 1943, and yet

³⁰ UN Doc. A/53/40, vol. I, Annex VII (1998).

³¹ Vahakn N. Dadrian, "Documentation of the Armenian Genocide in Turkish Sources," in *Genocide: A Critical Bibliographic Review*, ed. Israel Charny, vol. 2 (London, 1991).

³² Vahakn N. Dadrian, "Ottoman Archives and the Denial of the Armenian Genocide," in *The Armenian Genocide*, ed. Richard Hovannisian (New York, 1992), 280-310.

they preferred to remain silent, or even to lend credence to Stalin's brazen accusation that it was the Germans who had committed this particular crime. The British Government, for instance, refused to send any representative to the unveiling of the monument at Gunnesbury Cemetery in London in September 1976, so as not to compromise relations with the Soviet-bloc countries. The official British statement was that "it has never been proved to Her Majesty's Government's satisfaction who was responsible." The London *Times*, however, observed: "Enough has been published to convince anyone who is not a dedicated defender of the Soviets that the massacre did take place in 1940, when Katyn was under Soviet and not German control."³³ Only when in 1990 Gorbachev accepted Soviet responsibility and expressed regret to the Polish Prime Minister Jaruzelski did the last political diehards in the West publicly admit what everyone already knew.

Current Initiatives and Recommendations

*An important resolution adopted by the French Parliament on 18 January 2001 was followed by Law No. 2001-70 of 29 January 2001 which recognizes the historical fact that the Armenian people were subjected to genocide by the Ottoman Turks in 1915.³⁴ This is an important beginning that opens the way to political and legal developments.³⁵ This resolution should be given wide dissemination and be properly reflected in school curricula.

³³ *The Times*, 17 September 1976; Alfred de Zayas, *The Wehrmacht War Crimes Bureau* (Lincoln, Neb., 1989), 276.

³⁴ "L'Assemblée nationale et le Sénat ont adopté, Le Président de la République promulgue la loi dont la teneur suit: **Article unique:** La France reconnaît publiquement le génocide arménien de 1915. La présente loi sera exécutée comme loi de l'Etat."

³⁵ "Un entretien avec Louis Joinet"—"Lutte contre l'impunité: Le temps des questions," *Droits fondamentaux*, no. 1, (July-December 2001), www.revue-df.org.

*The decision of the European Court of Human Rights of 25 September 2001, declaring inadmissible *ratione personae* complaint No. 72657 by the Turkish lawyer Sedat Vural, claiming that the French law constituted defamation of the Turkish people and demanding reparation thereof, deserves wide dissemination.

*The reality of the genocide against the Armenians has been recognized by His Holiness Pope John Paul II (27 September 2001) and by many heads of state, including Konstantinos Stefanopoulos, President of Greece (10 July 1976), the Prime Minister of Canada Jean Chretien (24 April 1966), and the French President Francois Mitterrand (1984). Many national Parliaments have also adopted relevant resolutions, including the Canadian Senate (13 June 2002), Italian Chamber of Deputies (16 November 2000), the European Parliament (15 November 2000), the Lebanese Parliament (11 May 2000), the Swedish Parliament (28 May 1998), the Council of Europe Parliamentary Assembly (24 April 1998), the Belgian Senate (26 March 1998), the US House of Representatives (Resolution 3540, 11 June 1996), the Hellenic (Greek) Parliament (25 April 1996), the Canadian House of Commons (23 April 1996), the Russian Duma (14 April 1995), the Argentinean Senate (5 May 1993), the European Parliament (18 July 1987), the U.S. House of Representatives (Joint Resolution 247, 12 September 1984), the Cypriot House of Representatives (29 April 1982), the Uruguayan Senate and House of Representatives (20 April 1965), etc. Similarly, among the State and Provincial Governments that have recognized the genocide should be mentioned the Parliament of New South Wales (Australia), the Legislature of Ontario (Canada), the Consiglio Provinciale di Roma (Italy), the Alaska State Senate as well as the state legislatures of 26 states of the United States, including New York.

*A concerted effort is being made by a variety of non-governmental organizations and human rights activists to obtain recognition of the genocide against the Armenians through the Parliaments of other States, particularly European States and the United States. Most recently, on 10 December 2001, human rights day, the Conseil d'Etat de Genève issued a proclamation

recognizing the genocide against the Armenians in 1915.³⁶ Bearing in mind that Geneva is the seat of the European UN Office and, in particular, of the Office of the High Commissioner for Refugees and the High Commissioner for Human Rights, and headquarters of countless international organizations, this Geneva proclamation has the potential of placing the Armenian genocide on the agenda of many of them.

*The official recognition of the genocide against the Armenians by the French Parliament should be followed by the adoption of appropriate legislation in France e.g. to provide sanctions against negationists.

*The official recognition of the genocide against the Armenians by the Parliaments of many States should inspire Turkey to recognize its historical responsibility and to enact legislation to provide a measure of reparation to the descendants of the survivors of the genocide.

*An international collegium of experts in international law could be established in order to provide solid legal argument to support future initiatives in international fora. Such a collegium could draw upon the expertise of the participants in the Tribunal Permanent des Peuples, which on 13-16 April 1984 held its special session on the Genocide against the Armenians.³⁷

*Armenians should join forces with those international lawyers and scholars demanding a convention to protect the right to one's homeland, partly on the basis of the UN study of ICJ Justice Awn Shawkat Al-Khasawneh and its 13-point draft declaration.³⁸

³⁶ "En reconnaissant le génocide arménien de 1915, Genève se situe, en respect des textes internationaux sur le génocide, dans la lignée de la reconnaissance de ce crime par de nombreux pays, par l'Organisation des Nations Unies et par le Parlement européen."

³⁷ Tribunal Permanent des Peuples, *Le Crime de Silence: Le Génocide des Arméniens*, (Brussels, 1984).

³⁸ E/CN.4/Sub.2/1997/23.

*As mentioned above, a more recent victim of Turkish nationalism is the ethnic Greek people of northern Cyprus, subjected to a mass expulsion in 1974 and deprived of their lands. In today's world, such actions are condemned by the relevant organs of the United Nations, but unless the Security Council imposes sanctions, little happens by way of enforcement of the right of return of the Cypriots to their homes in Northern Cyprus, nor have they received any compensation for clearly discriminatory and illegal confiscations.

*The Government of Cyprus has filed and argued several cases before the European Commission and Court of Human Rights, which have repeatedly held that Turkey has violated several provisions of the Convention and is under an obligation to respect the right to return and to provide compensation. However, Turkey has consistently refused to implement the decisions of the European Commission and Court. The Committee of Ministers has followed up with resolutions urging Turkey to comply with the judgment without delay.³⁹

*There exists an obvious commonality of interests between the Armenians and the Cypriots, and their human rights claims would strengthen each other if advanced vigorously in all European and UN fora. In particular the European Parliament should follow-up on its 1987 resolution providing that recognition by Turkey of the genocide against the Armenians is a *sine qua non* to Turkish membership in the European Union. Moreover, the European Parliament should be again seized of the

³⁹ Résolution Intérimaire ResDH (2001)80 du 28 juillet 1998 dans l'affaire Loizidou, adoptée le 26 juin 2001. "Le Comité des Ministres ... déplorant très profondément le fait que, à ce jour, la Turquie ne se soit toujours pas conformée à ses obligations découlant de cet arrêt ... se déclare résolu à assurer, par tous les moyens à la disposition de l'organisation, le respect des obligations de la Turquie en vertu de cet arrêt, en appelle aux autorités des Etats membres à prendre les mesures qu'elles estiment appropriées à cette fin." Thus, States parties to the European Convention on Human Rights are encouraged to apply appropriate political pressure on Turkey, which may entail legitimate economic sanctions, to ensure compliance with the Court judgment.

question and some sort of reparation, at least symbolic, to the descendants of the victims should be offered.

*There exists also a commonality of interests between the descendants of the survivors of the Armenian genocide and the survivors of the expulsion of 15 million ethnic Germans 1944-1948 from East-Prussia, Pomerania, Silesia, East Brandenburg, Sudetenland, Hungary, Yugoslavia, etc., a form of "ethnic cleansing" carried out by the Soviet Union, Poland, Czechoslovakia, Yugoslavia, etc., in the course of which more than two million ethnic Germans perished.⁴⁰

*The issue of the genocide of the Armenians is a matter that should be mainstreamed in the relevant United Nations mechanisms. I should mention the famous study on genocide prepared by Mr. Ben Whitaker in 1985 for the Sub-Commission on Prevention of Discrimination and Protection of Minorities,⁴¹ referring in its paragraph 24 to the genocide against the Armenians. I have already mentioned the study of Justice Al Khasawneh on the right to one's homeland and should now mention the study of the French magistrate Louis Joinet for the U.N. Sub-Commission entitled "The question of impunity of authors of violations of human rights."⁴² As to UN supervisory mechanisms, mention should be made of the work of the Special Rapporteur on Freedom of Religion and Belief, Prof. Abdelfattah Amor, who has incorporated the Armenian concerns in his reports, most recently his report of 25 October 2000 submitted to the UN General Assembly on his visit to Turkey⁴³ specifically referring to the plans of the Young Turks concerning the

⁴⁰ Alfred de Zayas, *A Terrible Revenge: The Ethnic Cleansing of the East European Germans 1944-1950* (New York, 1994).

⁴¹ Report E/CH.4/Sub.2/1985/6.

⁴² E/CN.4/Sub.2/1997/20/Rev. 1.

⁴³ Report A/55/280/Add.2 available on the Internet: <http://www.unhchr.ch>.

elimination of the Armenian community in the Ottoman Empire and the widespread confiscation of their properties.⁴⁴

*More jurisprudence is needed on the subject. The European Court of Human Rights could, for instance, be seised with cases concerning aspects of the Armenian genocide including the negation of the genocide.

*Turkey should be urged to create a special fund to indemnify the descendants of victims of the genocide against the Armenians, as e.g. Germany has created several such funds and as countries such as Switzerland have created to return savings deposited in Swiss banks by Jewish persons who perished in the Holocaust.

*Although excellent scholarly publications have been produced on the subject of the genocide against the Armenians, there remain many issues to be researched and developed further. Professors of history, law, sociology should be encouraged to assign to their students dissertations based on aspects of this genocide.

*The implications of the Armenian genocide deserve public discussion and constitute a legitimate subject not only for scholarly but also for artistic expression. The 2002 film *Ararat* by the Oscar-nominated Canadian director/writer Atom Egoyan focuses on the historical event, its continued negation by Turkish officials, and the traumatic impact of the demographic catastrophe on subsequent generations of Armenians in the homeland and in the diaspora. The film merits a wide audience.

*The international organizations and mechanisms have not been sufficiently engaged. Certainly Armenian culture deserves international protection, and the UNESCO could give it greater attention, e.g. by financing the reconstruction of destroyed

⁴⁴ Jean-Marc Bernard, UN Rapport Officiel de l'ONU fait état pour la toute première fois dans les Annales Onusiennes de la Confiscation des Biens Arméniens en 1915 en Turquie, in Journal France-Arménie, novembre 2000.

Armenian monasteries and churches in Anatolia and the recognition of the old Armenian capital Ani as a common heritage of mankind.

*Finally, the 24th of April should be recognized world-wide as the day of remembrance of the genocide against the Armenians, the first genocide of the twentieth century. A resolution to this effect should be proposed to the UN General Assembly and accompanied by the requisite level of lobbying.

Conclusion

Although the Armenians can legitimately invoke many treaties and general provisions of international law to support their claims, political reality is such that progress often cannot be achieved by legal means alone. Even a judgment of the International Court of Justice is of limited value as long as it is not enforced.

Enforcement of international law, including international case law, depends on political will. Therefore, emphasis must be placed in creating the conditions that will reinforce a political will to do justice to the Armenians.

Surely the principles contained in the Convention Against Genocide and the rule of the non-applicability of statutes of limitations to genocide are binding not only on States parties, but on all countries, as a form of *jus cogens* or peremptory international law. Already the Advisory Opinion of the International Court of Justice in the 1951 case concerning Reservations to the Convention concluded that the principles underlying the Convention were part of customary international law and therefore binding all States.

The Law of Universal Conscience demands that the genocide against the Armenians be officially recognized and that the State responsible for this genocide make atonement and provide for the restitution of stolen properties to the descendants of the survivors of this great crime against all of humanity. In a sense, as long as the Turkish State has not officially asked for forgiveness for the genocide, as Gorbachev did with respect to Katyn, and as long as

no reparation has been offered to the survivors of the victims, the genocide continues.

Indifference and ignorance can be dangerous. As Hitler is reported to have remarked on repeated occasions, as early as 1931: "Who, after all, remembers the annihilation of the Armenians?"⁴⁵

⁴⁵Kevork B. Bardakjian, *Hitler and the Armenian Genocide* (The Zoryan Institute Special Report Number 3) (Cambridge, Mass., 1985), 1; W. Baumgart, "Zur Ansprache Hitlers vor den Führern der Wehrmacht am 22. August 1939," *Vierteljahrshefte für Zeitgeschichte* 16 (1968): 127-128, 139; Yves Ternon, "La qualité de la preuve," in *L'Actualité du Génocide des Arméniens*, 135-140; E. Calic, *Unmasked: Two Confidential Interviews with Hitler in 1931* (London, 1971), 11, 80, 81; Diane Orentlicher, "Genocide," in *Crimes of War: What the Public Should Know*, ed. Roy Gutman, David Rieff, and Kenneth Anderson (New York, 1999), 156.

Appendix – Two Poems

Literature can help survivors of ethnic cleansing to come to grips with the horror and to work for a renaissance of that which one loves most, looking toward the future, but without forgetting the past. This positive force—the love for one's homeland, of one's roots, and of one's family—is expressed in the following two poems. They are reproduced here with the kind permission of the authors.

The Uprooted

Nous les déracinés,
arrachés de nos terres
des siècles et des années,
refusons de nous taire.

Nous les déracinés,
implantés dans le Monde
partout où nous sommes nés,
nos racines sont profondes.

Nos racines arrachées
à nouveau s'enracinent
sans jamais se détacher
de nos vraies origines.

Des siècles et des années
nous qui savons souffrir,
bien que déracinées,
refusons de mourir.

—Shamiram Sevag

Arménie

C'est mon pays. Je l'aime
de telle sorte
qu'avec moi je l'emporte
où que j'aïlle. Il est tout petit,
en vérité,
comme une vieille mère épuisée par la vie,
comme un enfant qui vient de naître.
Et sur la carte,

il n'est pas plus gros qu'une larme ...
C'est mon pays. Il m'est si cher
que pour ne pas soudain le perdre,
j'ai fait de mon coeur son logis.

—Hovhannès Krikorian