The Armenian Genocide as a Dual Problem of National and International Law

Vahakn N. Dadrian
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VAHAKN N. DADRIAN*

I. THE ARMENIAN GENOCIDE AS A PROBLEM OF NATIONAL LAW

A. INTRODUCTION

The Armenian Genocide (1915–1916) is significant for having been the first major genocide of the twentieth century. Equally significant is the fact that, for more than eight decades, its occurrence has been denied by successive Turkish governments with defiance and often truculence. The conditions which helped create and sustain this culture of denial deserve special attention for they demonstrate how easily a nation can shift gears and reverse its position. Indeed, in the immediate aftermath of World War I, as the Ottoman Empire lay defeated and prostrate, the Turkish government,
media, and general public, were driven by a spirit of guilt over the wartime deportations and massacres of the Armenians. A sense of apprehension about the consequences of the crimes was often accompanied by a sense of guilt and contrition.

Without much exaggeration, one may state that this state of gloom and doom did not differ much from that prevalent in Germany in the aftermath of World War II. But, unlike the case of moribund Nazi Germany, defeated Turkey’s misfortune did not last very long. In post-war Istanbul, unlike in Nuremberg, the victorious Allies began to bicker among themselves for spoils and competing colonialists designs. The result was an almost crippling disunity on matters involving the punitive treatment of defeated Turkey. Through a dynamic insurgency deep in Anatolia, the emerging Kemalist movement succeeded in exploiting these discords, and, within a relatively short span of time, transformed a devastating military defeat into a spectacular military victory. The ultimate result was the rise of an assertive new Republic of Turkey, which fostered a new political culture marked by an abrupt dissociation from the legacy of the preceding Sultan’s regime. The cultivation of a collective amnesia and denial of the Armenian Genocide is intimately related with this posture.

The period between the end of World War I and the onset of the Kemalist movement is, therefore, a unique period. The Turkish Republic’s subsequent denial of the Armenian Genocide highlights the import of a study of the pre-denial official Turkish record of acknowledging, documenting, and prosecuting the centrally organized mass murder of the Armenians of the Ottoman Empire. It is indeed a record that, by its very nature and compass, may serve to dismantle the entire edifice of the Turkish culture of denial.

B. HERALDING THE CHARGE OF “CRIMES AGAINST HUMANITY”

In the immediate aftermath of the war, the highest authorities identified with the post-war Turkish Government, raised their voices to severely condemn the wartime treatment of the Armenians. In doing so, they remarkably used the term “crimes against humanity.” The Sultan, the highest authority, for example, used exactly these words when denouncing the crime (Kanuni insaniyete karşı ika edilen ceraim).1 When introducing a motion in the parliament for the purpose of launching an investigation of such crimes committed during the war, deputy Fuad, referring to the atrocities involved, invoked the principle of “the rules of humanity” (kavaidi insaniye).2 The preeminent Turkish statesman, Reşit Akif, the first

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2. Osman Selim Kocahanoğlu, İttihat-Terakki’nin Sorgulanması ve Yarglanması 52 (İstanbul 1918).
post-war president of the Council of State, a supreme Ottoman judicial
organ, in his speech in the Senate on November 21, 1918, likewise invoked
"the world's sense of humanity" (cihani insaniyeti) when decrying the
massacres perpetrated against the Armenians. In the Yozgat Court-Martial
verdict, the condemned perpetrators of the Armenian massacres were
accused of having violated the principle of "human sentiment" (hissiyatt
insaniye). Another senator, Damad Ferit, who four months later became
Grand Vizier, i.e., Prime Minister, on the same day, described the
massacres as a type of atrocity which makes "humanity and the civilized
world shudder, and shudder forever." As to Senator Ahmet Riza, the
president of that body, he on the same day proposed to launch through the
offices of the Public Prosecutor a criminal investigation of these series of
crimes "which remain unprecedented (emsali görülméndik) in the annals of
Ottoman history."

The significance of these decrials is that they exude a transnational, i.e.,
universal, ethos in the overall conception of criminal justice which
presently was, as will be seen later, administered strictly in terms of
Ottoman national rather than, international, penal codes. But they helped
serve the broader parameters of such justice. What stands out here is that
the authorities, identified with all three branches of the Turkish
government, the executive, legislative, and judicial, resolved to prosecute
and punish the authors of the wartime mass murder.

C. THE STIRRINGS IN THE PARLIAMENT

The members of both houses of that body initially were but jolted by
these developments. The partisans of the defeated and dislodged CUP
power-wielders, in particular the deputies of the Lower House, were at the
same time bewildered and defiant but also anxious. Notwithstanding, three
prominent members of the upper chamber of the parliament took the
initiative spearheading the condemnation of the massacres in question. In
doing so they were pursuing the ways and means to prosecute and punish
the perpetrators involved. Foremost among them was the above mentioned
Ahmet Riza, the newly appointed president of the Senate. In his inaugural
speech on November 19, 1918 he castigated the massacres by denouncing
them as "savage" acts (vahsiyan). When two days later he was challenged
by another senator, a retired general, who said the Armenians also
committed massacres, Riza explained the difference. He argued that the

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3. Meclisi Ayan Zabit Ceridesi [Transcripts of the Proceedings of the Ottoman Senate],
Ottoman S. 11th Sitting 123 (1918).
4. Takvimi Vekhi [Ottoman Parliament's Official Record Supplements covering the
proceedings of the courts-martial], no. 3617, 1 (1919).
5. Meclisi Ayan Zabit Ceridesi [Tr. of the Proceedings of the Ottoman S.] at 117, 122,
Ottoman S. 11th Sitting 123 (1918).
Armenians acted as individuals, and in retaliation for the antecedent empire-wide Armenian massacres. But he underscored the fact that, in contrast, they, the Armenians, were killed in a sweep on “political” grounds involving the application of an “official” (resmi), i.e., state, policy.6

On December 2, 1918, retired General Çürüksülü Mahmut, a former veteran cabinet minister, declared in the same Senate that the massacres were ordered by the ruling Committee of Union Progress Party (CUP) and that they were organized in Trabzon province, for example, by Governor-General Cemal Azmi.7

In the Chamber of Deputies, the lower chamber of the parliament, the statement of deputy Hafiz Mehmet, is most noteworthy as it comes from an eyewitness who perchance was also a high ranking government official. In his speech delivered on December 11, this deputy publicly declared that he “personally” witnessed one of the series of drowning operations on the Black Sea coast, at the port city of Ordu. He related that the province’s governor loaded the Armenian victims into a barge; they then were taken to the high seas and thrown overboard. He further declared that these drowning operations were carried out throughout province by the order of Governor-General Cemal Azmi.8

D. THE OFFICIAL PARLIAMENTARY INVESTIGATIONS

In an effort to mitigate the pressures resulting from a commonly felt need to initiate prosecution against the authors of the Armenian Genocide, the leaders of the Parliament began to consider launching a series of formal investigations. Their common goal was to eventually institute criminal proceedings. But there were certain procedural rules to abide by in this regard.

1. In the Senate

After several sessions of debate, the Senators decided to create, beyond the existing regular committees, a Special Committee (Encümeni Mahsus), to formally open an investigation of the misdeeds of the previous wartime authorities. Described formally, these misdeeds included “assaults” (tacavüz) and “shameful acts” (fezayih). It is most significant to note here that when condemning the same atrocities against the Armenians, Mustafa Kemal Atatürk, the co-founder of the modern Republic of Turkey, used just

about the same word, i.e., *fazahat*. When the committee completed its work, it denounced in Article 10 of its final report the perpetration of "terrible crimes" as it invoked "the basic principle of the laws of humanity" (*insanlığın esas hukuk kaidelerine*), which it said, the targeted perpetrators had violated.

2. In the Chamber of Deputies

The residual power of the Senate did not go beyond a mere investigation; at best it could transmit its recommendations to the Chamber of Deputies for further action. The Chamber of Deputies had, however, constitutional legislative power to apply concrete and specific punitive measures against those perpetrators who were either Cabinet Ministers or Deputies. Accordingly, in line with statutory provisions, it constituted its Fifth Investigative Committee to launch formal inquiry into the respective misdeeds of these high ranking officials. Nearly all wartime cabinet ministers plus two Seyhulislams, the highest religious authorities of the Empire, were subjected to prolonged interrogations by the approximately 25 members of that investigative body. Some stark revelations occurred in the course of these interrogations, which predicated on a list of ten questions that deputy Fuad had submitted on November 4, 1918. These revelations mainly resulted from answering two of the ten questions which directly and indirectly dealt with the wartime Armenian deportations and massacres.

Of foremost significance were the responses given by two officials. Ex-Justice Minister Ibrahim revealed, for example, that he was ordered by War Minister Enver to release from the prisons of the Empire "a sizeable" number of convicts (*mühim bir yekûna balig*) under the pretext of engaging them for front-line duties. It turned out, however, that these men were used for extra-military duties, i.e., massacring the Armenians. Equally, if not more, significant were the revelations of wartime Grand Vizier, Said Halim Paşa. He told the committee members that his cabinet had authorized only the deportation of the Armenians but that this order was misused to convert it into an order for "killing." He further revealed that when he learned of the atrocities against the Armenians, as Grand Vizier, he demanded an explanation from the War Minister. But his subordinate dared to defy and

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9. MUSTAFA KEMAL ATATÜRK, 1 ATATÜRK'ÜN Söylev ve Demecleri 49 (İstanbul 1945). The statement was made on April 24, 1920, on the occasion of the inauguration of the first parliament of the modern Republic of Turkey.


12. KOCAHANOĞLU, supra note 2 at 82.
ignore him.\textsuperscript{13}

These findings, carefully collected, recorded, and filed, failed to serve their actual purposes, however. They were meant to be submitted for consideration and judgment to the entire body of the Chamber for further processing. The ultimate goal was the final adjudication of the case through the constitutionally stipulated authority of the High Council (\textit{Divani Ali}). But the abrupt dissolving of that Chamber by the Sultan on December 21, 1918, aborted the consummation of that final stage of projected punishment.

3. \textit{The Military Tribunal and the Courts-Martial}

In launching the post-war Turkish efforts to effectively deal with the criminality of the problem of wartime Armenian deportations and massacres, the transition from legislative to executive initiative, proved far more productive. The goals of retributive justice via the channels of administration of criminal justice seemed to be more viable. Here, a combinative interplay of executive and judicial authority was a potent force to streamline the requisite operations. The Cabinet, often supported by the Sultan, the highest executive authority, synchronized its authority with that of the judiciary to prepare the groundwork for the investigation and prosecution of the twin crimes of “deportation and massacres” (\textit{tehcir ve taktil}). Thus, within weeks after the onset of the Armistice, the political, but more particularly, the legal, preconditions were met for instituting criminal proceedings against a whole gamut of perpetrators.

The ministries of the Interior and Justice were mobilized for the task. In addition, the military authorities, headed by the Ministry of Defense and its immediate representative in the Ottoman capital, the military commandant (\textit{muhafiz}), joined in this complex task. The resulting division of labor embraced two major levels of activity: pre-trial and trial-related.

\textit{a. The Pre-trial Investigations}

The central issue for the post-war Turkish government was not to determine if the set of crimes of organized mass murder was indeed committed, but rather how to prosecute the crime the evidence of which was rather ubiquitous. Following the rules of Ottoman criminal procedures, the authorities in the Justice and Interior ministries decided to institute a major Inquiry Commission in order to conduct the requisite pre-trial investigation. It bore the name of its head, namely, it was called the Mazhar Inquiry Commission. For about five weeks this commission, equipped with extensive powers, including subpoena, detention, and arrest, undertook a massive, multi-layered, and systematic investigation with the

\textsuperscript{13} \textit{Id.}, at 84.
help of many support personnel identified as judicial police and examining
magistrates. Its investigative arms extended beyond Istanbul, then the
Ottoman Empire’s capital, and reached into nearly all corners of the
Empire. The evidence thus gathered was classified and catalogued. In mid-
January 1919, the Commission was able to supply to the Court Martial
some 200 files arranged by such categories as locus of the crime, the
persons targeted for trial, and the type of charges.\textsuperscript{14}

As anticipated, the authorities concerned determined at the end that
there was enough evidence to warrant the institution of a criminal trial and
to proceed accordingly.

\textit{b. The Establishment of the Courts-Martial}

A number of successive Imperial Rescripts (\textit{Irade}), as required by
Ottoman law, authorized the formation of Courts Martial that would be
designated as Extraordinary or Special (\textit{Fevkâlade}). Initially, it was
designed to have panels of three high-ranking military officers and two
civilian judicial officials but within months the whole panel became
militarized. In its key indictment the court proposed to prosecute the crimes
of “deportation and massacres.” However, it added “profiteering” (\textit{ihtikâr})
in order to underscore the economic underpinnings of the crime, including
personal greed.

What is so remarkable about this key indictment is that it was
embedded with more than forty official, semi-official, and regular
documents appended to the text of that instrument. It contained, among
others, twelve cipher telegrams, four regular telegrams, and ten signed
statements secured at the end of pre-trial interrogatories, plus “several”
other documents. Exceeding in importance all other aspects of evidence-
gathering was a paramount fact attesting to the incontrovertible nature of
that evidence. Namely, each and every one of these documents was
legalized by competent officials of the Justice and Interior Ministries who
then appended on these documents the verification formula “it conforms to
the original.” In other words, as in Nuremberg, so in Istanbul, nearly every
document was authenticated before being introduced as evidence-in-chief.
In several sittings of the courts martial, the unexpected production of such
documents not only surprised many defendants playing the game of routine
denials, but compelled them to reverse themselves, and admit guilt.

For example, in the Yozgat trial series at the 9\textsuperscript{th} sitting (February 22,
1919), Colonel Şahabeddin, Commander of Kayseri’s 15\textsuperscript{th} Division and

\textsuperscript{14} Vahakn N. Dadrian, \textit{The Documentation of the World War I Armenian Massacres in the
Proceedings of the Turkish Military Tribunal}, 23 INT’L J. OF MIDDLE EAST STUDIES 4, 552–53
area military commander, kept denying his knowledge of the massacre of several hundred Armenians of a particular deportee convoy. When the Chief Judge surprised him, however, by producing ciphers with his signature on it, he fainted and had to be excused temporarily. There were several series of trials that culminated in death verdicts for both defendants who were present, as well as for others in absentia. Another significant feature of these trials was that, contrary to court-martial tradition, these trials were open to the public and defense counsel was allowed a role of challenging witness and court jurisdiction. But even more significant, witness testimony was almost entirely predicated upon Muslim testimony, thereby deliberately underplaying the role of Armenian survivors' testimony.

c. Jurisdictional Challenge

Several defense lawyers raised a number of issues thereby challenging both the competence of the courts and the legal-constitutional premises of the charges and the ensuing verdicts. Foremost among these was the matter of the constitutional legality of subjecting wartime Cabinet Ministers to court-martial. Arguing that Article 31 of the Constitution provides for their trial before the High Court, these counsel requested from the military court to declare itself incompetent. Moreover, they argued that even if the Military Court rejects this argument on the ground that these wartime Cabinet Ministers are being court martialed not for offences in connection with official duties but for non-official crimes such as murder and massacre, the venue for such trials should not be court-martial, they counter-argued, but ordinary criminal courts. The court rejected both these arguments. It held that because of the imposition of martial law "civil and judicial laws are entirely muted," i.e., inoperative (kavanini mülkiye ve adiye tamamile sakin). In this instance, courts-martial became the only penal recourse (mercii ceraim).

E. THE THRUST OF VERDICTS

Unlike in the Nuremberg case, the Istanbul trials were entirely based upon domestic penal codes rather than international law. Two aspects of the series of these verdicts stand out in terms of their ramifications for the legal

15. See RENAISSANCE, Feb. 21, 1919.
18. Id.
definition of genocide and international criminal law as well. The Turkish Military Tribunal citing authenticated documents declared that the crimes of massacre and deportation committed against the Armenians were premeditated. In the Key Indictment, for example, it states that Dr. Nazim, one of the architects of the Armenian Genocide, is on record saying that the measures applied against the Armenians were the result of “careful and prolonged deliberations” (ariz ve amik düşünülerek).\(^{19}\) Furthermore, in the Verdicts of Yozgat,\(^{20}\) Trabzon,\(^{21}\) and Erzincan\(^{22}\) the distinct word “premeditation” (taammiiden) is used to characterize the crime of mass murder against the Armenians. Accordingly the Court invoked Article 170 of the Penal Code that prescribes death for premeditation. The other and perhaps even more critical aspect is the issue of intent. In the Harput Verdict there is an allusion to “deportation” which, most significantly, is stated by one of the arch-perpetrators to mean “extermination” (imha).\(^{23}\) However, the most pungent and explicit confirmation of the genocidal intent of the wartime deportations comes from an authority renowned for “straight” and unambiguous talk. The reference is to General Mehmet Vehip, wartime Commander-in-Chief of the 3rd Army in eastern Turkey where the Armenian population was the heaviest, most concentrated, and genocidal operations most sweeping. In his authoritative and written testimony, provided to the Military Tribunal, Vehip, with emphasis, declared:

The deportation and massacres of the Armenians was carried out in a manner absolutely inimical with (the ideals of) humanity, civilization, and the honor of the government. The massacre and extermination of the Armenians (katl ve imha) was the result of the decision of the Central Committee of CUP . . . .This crime was based upon a decision and a program (mukarrer bir program), and a definite intent (mutlak bir kast tahtında) . . . .The entire program was carried out through oral orders and instructions (şifahi evamir ve talimat) and as a result no written proof or documents are left behind.\(^{24}\)

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20. Id. at No. 3617, p. 2.
21. Id. at No. 3616, p.3.
22. Id. at No. 3917, p. 5.
23. Id. at No. 3772, p. 5.
24. ATİ, Feb. 20, 1919 (containing full testimony); see also MUAMMER DEMIREL, BİRinci DÜNYA HARBINDE ERZURUM VE ÇEVRESİNDE ERMENİ HAREKETLERİ 1914-1918, 53-4 (containing abridged testimony).
F. CONCLUSION

In summary, it may be stated that before the factors of tractable power relations and shifting political currents could set in, defeated Turkey, just like defeated Germany in the wake of World War II, was not only prepared, but was even eager to recognize fully the reality of the Armenian Genocide and to deal with it through a massive undertaking of retributive justice. It is a fact that the proceedings of the Turkish Military Tribunal were not fully completed and many of its verdicts expediently were nullified by the successor Kemalist regime. Superseding this fact, however, is the massive documentary evidence generated and frequently used in the course of the trials. The compelling nature of that evidence provides a solid measure of validity for the trial records, while attesting to the lasting character of the facts of the Armenian Genocide. These facts are summed up by Henry Morgenthau, the wartime American ambassador to Turkey, as “the murder of a Nation”.

II. THE ARMENIAN GENOCIDE AS A PROBLEM OF INTERNATIONAL CRIMINAL LAW

A. INTRODUCTION

Part I of this study examined the domestic law aspects of the World War I Armenian Genocide, which call for further depiction. First, the constitutive elements of the crime of genocide were treated as an integral part of any domestic legal system. Taken separately, each of the crimes involved—such as murder, extermination, and forced deportation—are offenses proscribed by nearly every system of domestic penal law. Second, given the ample evidence of the criminal prosecution of the Armenian Genocide through a series of courts martial in post-war Turkey, the Armenian Genocide may well be considered as a settled matter in terms of both fact and guilt.

Also referenced in Part I was the link between domestic penal law and international criminal law in terms of the principle of crimes against humanity. This linkage was articulated by Sir Hartley Shawcross, the British Chief Prosecutor at Nuremberg, with reference to the general principle of crimes against humanity. In fact, that reference involved a specific condemnation of the massacres committed against the Armenians in the last decade of the nineteenth century, the antecedents of the wartime

Shawcross denounced these crimes as "cruel persecution," stating that "the right of humanitarian intervention is not a novelty in International Law." He explained the ensuing intervention on behalf of the Armenian victims as follows:

[n]ormally International Law concedes that it is for the State to decide how it shall treat its own nationals, it is a matter of domestic jurisdiction . . . Yet International Law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in the manner which outrages the conscience of mankind.

As noted in Part I, it is equally significant that when initiating criminal proceedings against the perpetrators of the Armenian Genocide, several authoritative figures including the Sultan—the supreme authority of the Ottoman Empire—parliamentarians, and court martial judges repeatedly referred to it as "a crime against humanity" when initiating criminal proceedings against the perpetrators. The significance of this cannot be sufficiently emphasized. It epitomizes the pre-existing roots of the post-World War II adoption and codification of the legal term "crimes against humanity."

These roots came to legal prominence on May 24, 1915. The Allies (Great Britain, France, and Russia) jointly warned Ottoman Turkey about the criminal consequences connected to the ongoing, wartime massacres of the Armenians. In doing so, they introduced the term "crimes against humanity." Equally significant, this norm of "crimes against humanity," promulgated by the victorious Allies in connection with the wartime Armenian massacres, was embedded as a matter of precedent in Article 6(c) of the Nuremberg Charter and Article 5(c) of the Tokyo Charter. Moreover, Article II of the Control Council Law no. 10, which applied to occupied Germany, includes "crimes against humanity" as a basis for prosecution of individual Nazis.

28. Id.
31. Id. at 221–334.
33. Id. at 36.
Likewise the Commission of 15, i.e., the Sub-Commission II on the Responsibility for the Violation of the Laws and Customs of War, in its final report of March 29, 1919, made a reference to the "customs of war, laws of humanity, and clear dictates of humanity." In doing so, it embraced the so-called "Martens Clause" that had become part of the Preamble of the 1907 Hague Convention IV. The Martens Clause, for the first time, formally applied the principle of the "laws of humanity" to civilian populations caught in the vortex of warfare.

B. THE NUREMBERG LEGACY

As indicated above, the adoption at Nuremberg of the new criminal code relating to crimes against humanity is directly traceable to the genocidal, wartime persecution of the Armenians and to the related response of the victorious Allies. Closely associated with this innovation was the discarding of a traditional legal defence against criminal liability. Namely, heads of state were no longer immune from prosecution on account of constitutional guarantees of inviolability. The international norm "act of state" was declared invalid. By the same token, the legal defences of "superior orders" and "mandatory obedience"—used by subordinates—were likewise discarded. The Nuremberg trials managed to introduce and legally enshrine the principle of "individual responsibility" under any and all circumstances, in wartime, as well as in times of peace. These aforementioned legal defences were offered by Ottoman-Turkish for the mass murder perpetrated under color of state law—as seen in the May 14/27, 1915 Temporary Law of Deportation—but were divested of their legal validity.

C. THE UNITED NATIONS LEVERAGE

Before the United Nations involved itself in the arena of international criminal law by promulgating the Convention on the Prevention and Punishment of the Crime of Genocide, it issued twin resolutions on the

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35. Laws and Customs of War on Land (Hague II), July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter Hague II].
36. Id.
38. Id. at art. 8.
39. Id.
issue of genocide. Resolution 95(1) of December 11, 1946 stated that the General Assembly "affirms the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal." In Resolution of 96(1) of the same date, the General Assembly asserted,

that genocide is a crime under 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 other grounds are punishable.

On December 9, 1948, the General Assembly of the United Nations adopted the Convention on Genocide. It entered into force on January 12, 1951. It is evident that the Genocide Convention does not purport to create a new crime. In the Preamble, the Genocide Convention recognizes "that at all periods of history genocide has inflicted great losses on humanity." Article I states that "[t]he contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law." The absence of a reference to a time frame (ratione temporis) as a condition for establishing liability for the commission of genocide is notable here. The Convention is not only prospective in its thrust, but it is, at least implicitly, retroactive as well, as Articles V and VI provide an opportunity for States to enact appropriately redesigned criminal codes and related procedures to prosecute crimes under the Convention. On the other hand, Article VIII confers jurisdiction upon the International Court of Justice (ICJ) over matters covered by the terms of the Genocide Convention, including the liability of a State for the crime of genocide.

D. THE ISSUE OF RETROACTIVITY

Paragraph 2 of Article 11 of the Universal Declaration of Human Rights, December 11, 1940, prohibited ex-post facto sanctions for offenses

45. Id. The relevant part of Article 9 of that U.N. Convention reads: "Disputes between the Contracting Parties... shall be submitted to the ICJ at the request of any of the parties to the dispute." The ICJ’s jurisdiction is warranted by the fact that both Turkey and Armenia have signed this Convention on July 31, 1950 and July 23, 1993, respectively, without reservations. See WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 566 (2000).
46. Genocide Convention, supra note 44.
47. Id.
48. Id.
49. Id.
falling under international law. However, Article 28 of the Vienna Conventions on the Law of Treaties provides as follows:

> 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 entry into force of the treaty with respect to that party.

Moreover, retroactivity has been resorted to in several instances in international law, especially with respect to aggression and crimes against peace. The Genocide Convention is in this category because it codified pre-existing international law, or at least underlying principles of international law, such as the Martens Clause.

This codification of international law can be seen in a revealing and detailed article by renowned international law expert M. Cherif Bassiouni. Bassiouni relates how, in an effort to deal with the problem of retroactivity, he researched and discovered a host of pre-existing components of the crime of genocide. The London Agreement of August 8, 1945 (i.e., the Charter of the Nuremberg Tribunal), the Convention on the Non-Applicability of the Statutory Limitations to the War Crimes and Crimes Against Humanity of 1968, and the Vienna Convention of 1969 on the Law of Treaties also demonstrate the codification argument. As a matter of fact, as stated above, the Genocide Convention does not stipulate or prohibit retroactive application. This is in contrast with the 1998 Statute of the International Criminal Court, which explicitly prohibits retroactive application of its clauses.

Even though the principle of crimes against humanity is not encompassed by the term "genocide," the reverse is also true. Remarkably, the Convention on the Non-Applicability of Statutory Limitations to War

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52. Hague II, supra note 35.
56. Vienna Convention, supra note 51.
Crimes and Crimes Against Humanity, in force since November 11, 1970, clearly and deliberately asserted its retroactive applicability. Article I(b) reads:

No statutory limitation shall apply to the following crimes irrespective of the date of their commission. Crimes against humanity whether committed in time of war or in time of peace...and 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 are committed.

Further, on this issue of retroactivity, the International Covenant on Civil and Political Rights (ICCPR, in paragraph 1 of Article 15, restates the Latin dictum *nullum crimen sine lege, nulla poena sine lege praevia* (no crime without pre-existing law, hence no punishment). However, this is conditional in the sense that,

[n]othing 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.

The reference in the latter part of the paragraph to general principles of law is significant. It is equally significant that Turkey ratified the ICCPR in September 2003, and it entered into force in December 2003.

E. THE LEGAL CHALLENGE OF THE EICHMANN CASE

The adjudication of *Israel v. Eichman* by the Israeli criminal justice system was novel in that it drew on Article I of the United Nations Genocide Convention to the detriment of Article VI. Article VI is future-oriented. Article I, on the other hand, outlines the general principle that the rules of customary international law are binding on States. Pursuing this line of argumentation, the Supreme Court of Israel upheld the position of Israel’s District Court of Law relative to the customary law aspect of the crime of genocide. As argued by Israel, the prosecution of Eichmann did

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58. *Non-Applicability Convention, supra* note 55.
59. *Id.*
61. *Id.*
63. *Genocide Convention, supra* note 44.
64. *Id.*
not rest on a legislative act contravening the principle of "no penalty without previous law," but on an act whereby the Israeli parliament codified international law.66 This kind of reasoning is in line with the assertion that the Nuremberg Charter did not enact new law but rather declared the existing international law; hence, it could be viewed as retroactive. The Israeli Court relied on the principle that crimes against humanity are violations of the law of nations and hence are subject to universal jurisdiction. Thus, the crimes in question were not only crimes under Israeli law, but were at the same time, grave offenses against the law of nations (delicta juris gentium).67

To sum up, by way of rendering inoperative the code on statutory limitations, genocide and its twin appendage, crimes against humanity, are now recognized as part of customary international law. Retroactivity is thus transposed to the level of norms and principles of international jurisdiction.

F. THE LEGAL PRINCIPLE OF STATE SUCCESSION

The cardinal question is this. Is the modern Republic of Turkey in any way responsible for the crime of the Armenian Genocide? The answer largely hinges on the issue of successor states. Under international law, the modern Republic of Turkey is heir and successor to the Ottoman Empire. Thus, the Republic of Turkey acquires all the rights of the Empire, while at the same time incurring all its liabilities. For example, when the matter of apportioning of the Ottoman Empire’s debt was being handled in 1952, Arbitrator Borel determined that Turkey continued the personality of the former Ottoman Empire.68

The Vienna Convention on Succession of States in Respect of State Property, Archives and Debts, declares that a succession of states does not, as such, “affect the rights and obligations of creditors.”69 This principle was formulated, inter alia, by the Permanent Court of Arbitration in the Lighthouse Arbitration case.70 The Court held that Greece was the successor state even though the charge was against the autonomous state of Crete.71 In Kolovrat v. Oregon, the United States Supreme Court considered whether Yugoslavia was the successor state to Serbia or an entirely new entity.72 The court held that Yugoslavia continued the personality of Serbia.

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66. ICCPR, supra note 60, at art. XV, ¶ 1.
67. Eichmann, supra note 65, at ¶ 38.
68. Ottoman Debt Administration, 1 R.I.A.A. 529 (1925).
71. Id.
and thus the Serbian treaty of 1881 was binding on Yugoslavia. In 1993, the ICJ refused the argument of the Yugoslav state that as a new governmental entity it was not to be confounded with former Yugoslavia under Milosevic, and hence it was not responsible for the latter's actions, which had led to the filing of the case of Bosnia and Herzegovina against the Federal Republic of Yugoslavia.

Even though the Ottoman Empire collapsed at the end of World War I and the Sultan's reign had ended, the Turkish Republic, as successor state, assumed sovereignty over the former Ottoman lands. Not being a new state, the Republic of Turkey was not free of the legal obligations incurred by her predecessor, the Ottoman Empire.

The practice of systematically disclaiming any legal connection to the Ottoman Empire relative to its legal and other obligations is in stark contrast, to the indulgent and recurrent avowals of the glories of Ottoman heritage by many contemporary Turkish public figures and authors. This practice is in stark contrast with the position of the first Foreign Minister of the emerging Turkish Republic, Dr. Ahmet Muhtar. Namely, on December 20, 1920, Dr. Muhtar declared to the Turkish parliament that a change of regime does not change or cancel the existing legal principles involved in international agreements and pacts; in fact, he argued that "it cannot change." Eight decades later, in 1999, İstemihan Talay, the Minister of Culture, declared, "[t]he Republic of Turkey is the continuation of the Ottoman Empire whose legacy is part of our history." In an essay, the veteran Turkish diplomat-historian, Kamuran Gürün, declared, "[t]he Turkish Republic is the continuation of the Ottoman Empire... The continuity involves the nation, the people." Turkish scholar Ahmet Insel stated in a French newspaper article that, according to certain protagonists, "the continuity of the state" was enshrined in the Treaty of Lausanne, especially with respect to the external debt of the Empire. A retired Turkish ambassador declared, "[t]he Turkish Republic is the heir of the

73. Id.
75. Alfred de Zayas, The Twentieth Century's First Genocide: International Law, Impunity, the Right to Reparations, and the Ethnic Cleansing Against the Armenians, 1915–16, in ETHNIC CLEANSING IN 20TH CENTURY EUROPE 171–72 (S.B. Vardy & T. Hunt Tooley eds. 2003). Prof. de Zayas is the principal source of many of the descriptions and comments offered in this part of the article.
77. TÜRKİYE (Turkish daily in Istanbul), Mar. 1, 1999.
78. Kamuran Gürün, Türkiye–Ermenistan İlişkileri [Turkish–Armenian Relations], 3 AVRASYA ETÜDLERİ 56 (1996).
Ottoman Empire.”\(^8\)

Hugh Poulton, a Western author, estimated that 85 percent of the Ottoman Empire’s civil servants and 93 percent of its staff officers retained their positions in the new republic, thus attesting to the state’s continuity.\(^8\) Finally, reference may be made to Atatürk, co-founder of the Republic.\(^8\)

Speaking in general about the problem of the settlement of accounts that accumulated during the past centuries, Atatürk said, “[i]t was our duty to bear the responsibility for them before the world.”\(^8\) It may be appropriate to end this segment with the following observation of Bassiouni:”[i]n 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.”\(^8\)

The massive procedures of German atonement and reparations to the new state of Israel were decisively influenced by the initiative of Konrad Adenauer, Chancellor of West Germany in 1949, and re-elected to that post three more times, in 1953, 1957, and 1961.\(^5\) A lawyer by profession, Chancellor Adenauer provided the following rationale for this initiative, as reported in the March 13, 1955 issue of *Paris-Match*:

> The crimes were committed by the [Nazi] regime... whose establishment was favoured or tolerated by the unforgivable blindness of one section of this people. That is why the German people as a whole is responsible. They ought to be made conscious of this responsibility. It is... the duty of each one to repair and to expiate.\(^6\)

### G. THE GENOCIDE CONVENTION REVISITED

In a recent development, the International Center for Transitional Justice in New York produced a legal brief in which the Armenian Genocide is examined in terms of its relevance and significance for the United Nations Genocide Convention.\(^7\) After some meticulous research, the International Center for Transitional Justice concluded that the events

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82. *Id.*
comprising the wartime treatment of the Armenians "viewed collectively, can thus be said to include all of the elements of the crime of genocide as defined in the [United Nations] Convention on Genocide and legal scholars as well as historians, politicians, journalists and other people would be justified in continuing to so describe them."\textsuperscript{88}

The key criterion in the United Nations Convention on Genocide's definition of the crime of genocide is the intent of the perpetrators.\textsuperscript{89} The proceedings of the Turkish Military Tribunal emphasised this matter.\textsuperscript{90} Several verdicts of the courts martial underscored the twin factors of premeditation and genocidal intent as key characteristics of the centrally organized mass murder of Armenians.\textsuperscript{91} In the proceedings of the International Criminal Tribunal for the Former Yugoslavia (July 5, 2001), several variations of intent were specified including special intent, particular intent, specific intent, and genocidal intent.\textsuperscript{92} As the prosecutor argued proof of specific intent, may, in the absence of direct, explicit evidence, be inferred from an array of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same victim group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, and the repetition of destructive and discriminatory acts.\textsuperscript{93}

There is need here to distinguish specific intent from motive. The prosecution explained that the existence of a motive other than genocide does not preclude the perpetrator from also having the specific intent to commit genocide.\textsuperscript{94} For example, the motive of a quest for economic gain may instigate the crime of genocidal murder. Understood thusly, motive emerges as a drive that is general in its thrust toward action, whereas intent is both goal-specific and goal-directed. The respective state of mind is clear, and the associated act is focused narrowly and decisively. In other words, both a specific target and a definite intent "to destroy in whole or in part, a national, ethnical, racial or religious group as such" is involved.\textsuperscript{95} The Chamber of the International Criminal Tribunal for Rwanda stated, "it is possible to infer the genocidal intention ... inter alia, from all acts or utterances of the accused or from the general context in which other

\textsuperscript{88.} Memorandum from the Int'l Ctr. for Transitional Justice on the Applicability of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide to Events which Occurred During the Early Twentieth Century to the Turkish Armenian Reconciliation Comm'n 17 (Feb. 10, 2003).
\textsuperscript{89.} Genocide Convention, supra note 44.
\textsuperscript{90.} See Takvimi Vekâyi, supra note 19.
\textsuperscript{91.} Id. at no. 3616, p.3; no. 3617, p.2; and no. 3617, p.5.
\textsuperscript{92.} Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 497 (Sept. 2, 1998) [hereinafter Akayesu].
\textsuperscript{93.} Id.
\textsuperscript{94.} Id. at ¶ 477.
\textsuperscript{95.} Id. at ¶ 497.
culpable acts were perpetrated systematically against the same group.”

The international law aspects of the Armenian Genocide, embracing the condition of intent in the process, have been most prominently expounded by Bassiouni in a series of articles and books on international law. These writings deserve depiction and emphasis. For example, referring to the May 24, 1915 declaration of the Allies, Bassiouni wrote, “This was the first time that crimes against humanity were given a substantive meaning which placed criminal responsibility on individuals as well as states, whether in time of war or peace.” In another piece, he wrote about “the Allies’ failure to pursue the killing” of the Armenians; he bemoaned how the notion of “crimes against humanity” became “a legal reality,” but these “atrocities, now commonly referred to as genocide, remained unpunished.” “The reluctance to recognize [these crimes] as prosecutable and punishable international crimes came back to haunt the very same Allies, and particularly the United States, after World War II.” In 1998, Bassiouni discussed the promulgation of the new Code of Crimes Against Humanity as it was applied to the case of the Armenian Genocide. In his massive international criminal law treatise, Bassiouni extensively tackles the problems surrounding the Armenian Genocide.

Mention should be made of William Schabas, another international law expert, who treats the Armenian Genocide in the same vein. With some detail, William Schabas examines the many aspects of the usage of the terms, “intent,” “specific intent,” and “premeditation” as those aspects preoccupied several of the United Nations’ bodies tasked with defining these terms. Noteworthy in this respect are the following two excerpts from the related proceedings. The International Criminal Tribunal for Rwanda declared:

[s]pecial intent . . . a well-known criminal law concept in the Roman-continental legal systems . . . is required as a constituent element of certain offenses and demands that the perpetrator have the clear intent to cause the offense charged . . . [there is to be] a psychological relationship between the physical result and the

96. Id.
99. Id.
101. Bassiouni, supra note 41, at 169, 175, 176, 541.
102. Schabas, supra note 45, at 17–21.
103. Id.
mental state of the perpetrator.\textsuperscript{104}

Furthermore, the International Law Commission focused on specific intent in genocide in its comments on the 1996 Code of Crimes against the Peace and Security of Mankind. It declared:

a general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act.\textsuperscript{105}

It should be parenthetically stated that, given the cataclysmic nature of genocide, no victim population can escape its horrendous economic dimensions. In fact, in the two major genocides of the twentieth century—the Armenian and the Jewish—massive transfers of wealth from the victim population to the perpetrators’ camps have been paramount.\textsuperscript{106}

The somewhat detailed exploration of the element of intent, embedded in the legal framework that defines genocide, is an integral part of the key argument that the fate inflicted upon the bulk of the Armenian population of Turkey was genocidal in the strictest meaning of that term. The Armenian Genocide was planned, organized and executed by the highest authorities and power-wielders of the state.\textsuperscript{107} The perpetrating regime used all available means to maintain utmost secrecy, including the optimal engagement of its informal network of select and high-ranking party functionaries.\textsuperscript{108} Nevertheless, the regime could not ultimately avoid occasionally and inadvertently betraying the top-secret scheme of genocide. The three documents cited below came from the two most powerful organizers of the genocide in question. Common to all three is their

\textsuperscript{104} Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Sentencing Judgment, ¶ 516 (Sept. 2, 1998).
\textsuperscript{105} SCHABAS, supra note 45, at 218–19 n.103.

It is generally accepted international law that the obligation of States to make restitution for properties gained by resort to genocide does not lapse with time. Both de Zayas and Bassiouni concur on this, with the latter declaring specifically that “there can be no doubt that their [the Armenians’] claim for reparations continues to exist and that this claim should continue to exist for their heirs.” Interview with Correspondent, France-Arménie (Nov. 2001) (discussing genocide and reparations).
\textsuperscript{107} ULRICH TRUMPENER, GERMANY AND THE OTTOMAN EMPIRE 1914–1918, 203 (1968).
expression of an explicit intent to destroy the victim population by using such terms as “radical solution,” “liquidation,” “destruction” and “decisive solution of the Armenian question.”

When formally announcing the decision to deport the Armenians en masse, Interior Minister Mehmet Talat prepared a memorandum laying out the reasons for, and objectives of, that radical decision. Before the cabinet could consider and debate that decision, as required by law, Interior Minister Mehmet Talat impelled – if not compelled – the rather submissive Grand Vizier (who was actually superior to him in rank) to hastily approve and sign it. That rather lengthy state document contains a passage which most Turkish historians, including Hikmet Bayur, in his time the doyen of Turkish historians, chose to delete when reproducing it in their respective works. Without mincing words, this architect of the Armenian Genocide sets forth the principal objective of the planned mass deportation of the Armenians. The decision to deport the Armenians, Talat declared, is meant to “fundamentally solve and eliminate this bothersome trouble” (bu gailenin esaslı bir suretde hal ve fashi ile külliyen izalesi). About one year later, when the genocide operations were in high gear, Talat gloatingly declared to a confidant that, through the scheme of deportations, “the Armenian question has been decisively solved” (Ermeni meselesinin sureti katiyede hål).

Finally, reference may be made to a Turkish court-martial document released in 1919 in which Dr. Bahalddin Şakir, the supreme taskmaster organizing the actual genocidal field operations in the Anatolian provinces, is quoted from one of his top-secret cipher telegrams. In the telegram, he orders one of his party commissars who was in charge of the province of Harput, to subject the deportee convoys to operations aimed at “liquidating” (tasfiye) and ultimately “destroying” (imha) the Armenian deportees—rather than just “deporting” (sevk) them.

III. CONCLUSION

Despite persistent denials put forth in the last eight decades by a
succession of Turkish governments, the World War I Armenian Genocide has been shown to be a prosecutable case of centrally organized mass murder. The significance of that case is further accented by the fact that the prosecution in question has dual tenets, namely, domestic penal law, on the one hand, and international criminal law, on the other.

Given the unique nature of the crime involved, one recognizes the organic linkages between the two penal systems. These linkages were evidenced in the public declarations made before, during and after the courts-martial by the highest authorities of the Ottoman Empire denouncing the crimes as offences that were seen as transcending national domains of justice and encompassing, instead, mankind at large.

By a remarkable coincidence, legal authorities prosecuting Nazi crimes in World War II at Nuremberg likewise depicted the antecedent Armenian massacres as grave violations of the laws of humanity. This became the Nuremberg doctrine. A doctrine that crafted the legal norm of "crimes against humanity" and identified the Armenian Genocide as the historical nexus between domestic and international criminal law domains. This is one avenue through which the legal norm "genocide" and "crimes against humanity" are rendered interdependent and hence interchangeable. Because the Genocide Convention is not time-specific in the matter of applicability relative to punishment, the matter of exercising retroactivity under certain conditions is not precluded from consideration. As to the key problem of "intent," the following three legal facts attest to the genocidal character of the wartime destruction of the bulk of the Armenian population of the Ottoman Empire: (1) the opinions and judgments evidenced in the precedential cases of former Yugoslavia and Rwanda, (2) the assessments of some prominent experts of international criminal law, Bassiouni, de Zayas and Schabas in particular, (3) and the proceedings and the series of verdicts in the Turkish courts-martial series, especially those of Yozgat, Trabzon and Erzincan, where the terms "premeditation" and "deliberate intent" were used.

perpetrated against the Armenian people has come to be accepted as established, incontrovertible fact. Such a process has overcome formidable obstacles, especially the well-orchestrated, shameful, as yet ongoing campaign by the Turkish government to impose silence by promoting a variety of co-opting devices, by disseminating various falsifications of the historical record, and through cajolery and intimidation.

Katherine Bischoping, Method and Meaning in Holocaust Knowledge Surveys, 12 HOLOCAUST & GENOCIDE STUD. 3, 463 (1998) ("The future of Holocaust denial may be foreshadowed by the persistent denial of the Armenian genocide.");

The newest successful example [of collective denial] in the modern era is the 80 years of official denial by the successive Turkish governments of the 1915-17 genocide against the Armenians in which 1.5 million people lost their lives. This denial has been sustained by deliberate propaganda, lying and cover-ups, forging documents, suppression of archives, and bribing scholars.