

THE ARMENIAN GENOCIDE:
INTERNATIONAL LAW AND THE ROAD TO RECOVERY

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This dissertation is entirely my own work and all material from other sources,
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ABSTRACT

The law of genocide is governed today by the Convention on the Prevention and Punishment of the Crime of Genocide 1948. However, the aim of this dissertation is to attempt to identify customary International Law which viewed genocide as a crime even prior to the enactment of the 1948 Convention which the Armenian Genocide of 1915-1922 saw the Ottoman state breach. If there is enough evidence to suggest that is the case, the author will examine the possibility for claiming compensation and restitution for the victims and descendents of this historic tragedy, which still carries a great deal of resonance today. All of this will be done with a backdrop of an analysis on the political and historical issues which are associated with the Armenian Genocide and its lack of recognition by Turkey. In turn, this dissertation will highlight the disparity between what actually is possible in terms of international law in providing justice to those who seek it and what is realistic given the issue's heavily politicised nature; an issue which continues to haunt Turkey and Armenians after ninety three years.

Neshan Minassian.

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INTRODUCTION

'In all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international cooperation is required'

General Assembly of the United Nations

December 9, 1948

The crime of genocide, or the '*ultimate crime*'¹ as it has been described, involves the '*planned and systematic attempted destruction in whole or in part of a particular racial, religious, national or ethnic group*'² and is certainly one of the most, if not the most, abhorrent acts which humanity is capable of committing. The 20th Century saw several instances of genocide with the most notable examples being those of the Jews of Europe, the Tutsis of Rwanda and Bosnian Muslims of Yugoslavia. However, these were all preceded by the Ottoman Turkish extermination of the Armenians, the first instance in the 20th century of what now has come to be known as genocide³. It remains to this day an extremely complicated issue with many layers and the subject of great historic contention between those who consider it genocide and those who deny it such status. Legally speaking, if it is factually accepted that the Armenian massacres were a pre-

¹ P. Akhavan, 'Enforcement of the Genocide Convention: A Challenge to Civilization', 8 Harvard Human Rights Journal (1995), 229. page 229;

² See R. Lemkin, *Axis Rule in Occupied Europe* (1944), page 79; Convention on the Prevention and Punishment of the Crime of Genocide 1948 78 UNTS 277

³ See generally T. Akcam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (2006)

meditated State sponsored genocide, then it leads to the question of whether there is any way in which it can be considered to be genocide *de jure* considering its perpetration prior to the enactment of the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*. Therefore, this dissertation intends to examine the possibility of alternative legal approaches to the contemporary '*Armenian Question*' to the extent of assessing whether customary international law which criminalised genocide and crimes against humanity existed at the time of the Armenian Genocide and was subsequently breached by Ottoman Turkey.

Despite the subject's multifaceted nature, the author does not intend to discuss or dispute various political or historical aspects associated with the Genocide. The author shall not indulge in a historical debate on whether or not a million and a half Armenians were killed as a result of a bureaucratically organised genocide but instead shall adopt the view that there was a State sponsored and pre-meditated genocide as this is supported by an almost insurmountable amount of evidence. That is not to say however that discussion on politics and history will be neglected all together as any analysis on the development of international law needs to take these factors into account; owing to the inextricable link between them. Therefore, any politic and historic analysis will be relegated to a predominately supplementary position.

With this in mind, the dissertation will fundamentally focus upon the issues from a legal perspective and the author will discuss only briefly the possible reasons for genocide in order to demonstrate some degree of '*motive*', which if supported by

evidence could strengthen a proposition that the State was responsible for the infliction of what today is understood as genocide. This dissertation aims to examine the issue's eligibility for being approached from the angle of International Law, if it is universally recognised that in fact the Ottoman Armenians were victims of genocide. The author will analyse the development of International Law in the early part of the 20th Century relating to the establishing of legal principles regarding crimes against humanity and consequently, the author shall normatively assess the possibility of Armenian claims for compensation and restitution against Turkey today. Such considerations shall comprise of whether current International Law can facilitate such a claim, and if not whether this issue is only capable of being addressed in the Turkish domestic courts if at all from a legal perspective. If it cannot be successfully demonstrated that some sort of International Criminal Law had been breached by Turkey's perpetration of the Genocide, the author will invite the suggestion that the resolution of the matter for Armenians will come in the form of diplomatic and political expediency as opposed to application of law.

1. THE ARMENIAN GENOCIDE: A CONTEMPORARY OVERVIEW

‘ In 1915 the Turkish Government began and ruthlessly carried out the infamous general massacre and deportation of Armenians in Asia Minor...There is no reasonable doubt that this crime was planned and executed for political reasons ’⁴

Winston Churchill

It is widely accepted that the premeditated and systemic extermination of the Armenian populace in the Ottoman Empire between 1915 and 1922 constitutes by definition genocide⁵. Mustafa Kemal, the father of modern Turkey would come to refer to it as a ‘*shameful act*’⁶ and President Theodore Roosevelt of the United States described it as “*the greatest crime*” of the First World War. For the last ninety three years it has been subject to great debate, especially with regards to being granted formal recognition as genocide. For millions of Armenians, it is and remains the darkest facet of their people’s history and one which has not been adequately addressed and for many modern Turks it represents an attempt to demonise and interfere in the sovereignty of their nation. Some, including President George W. Bush, suggest that revisiting history and opening up old

⁴ W. Churchill, *The World Crisis, volume 5. ‘The Aftermath’* (1929)

⁵ See generally T. Akcam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility*, (2006)

⁶ *Ibid.*

wounds through State and legal recognition is not conducive to progress and represents a backward step, however in rebuttal to this, this author proposes that addressing this dark chapter in history could constitute an important step towards reconciliation between the Armenians and Turkey in the long term. Currently reconciliation seems but a distant goal largely due to Turkey's steadfast dispute of certain historic facts supporting the assertion that the Armenians of the Empire were subjected to a bureaucratically orchestrated extermination. To suggest that the issue of the Armenian Genocide touches a nerve in contemporary Turkey would constitute somewhat of an understatement. For example, when the French Parliament decreed in 2007 that denial of the Armenian Genocide was punishable by criminal prosecution; Turkey proceeded to cut off military contact with France and severed some lucrative contracts. Similarly, when Resolution 106 was to put before Congress in the United States, which if passed would lead to US recognition of genocide, Ankara responded by threatening to make incursion into Northern Iraq to solve its problem of the Kurdish PKK. The problem, perhaps, for Turkey therein lays that recognising genocide may legitimise claims for restitution and compensation for victims and their descendents.

The Armenian Genocide remains a source of great political interest. Twenty-two countries and organisations such have officially recognised the massacres of the Ottoman Armenians as genocide, however many others remain to do so officially. Many commentators have attributed this reluctance to accept the events as genocide to several reasons, the one which stands out most is that Turkey is a key NATO ally for both the United States and the United Kingdom in the Middle East, and any steps made towards

recognition may serve to antagonise Turkey, which could possibly be detrimental to US military interests in the region, particularly the current campaign in Iraq. Most recently, President Bush refused to accept the massacres as genocide (despite the House of Representatives voting in favour of recognition by a majority of 27) stating instead that *“We all deeply regret the tragic suffering (sic) of the Armenian people... But this resolution is not the right response to these historic mass killings. Its passage would do great harm to our relations with a key ally in NATO and in the global war on terror”*⁷. This can be interpreted as favouring material interests over those of justice and indeed morality. Donald Bloxham in his book *The Great Game of Genocide* echoes this view by attributing the external acceptance of genocide denial to the fact that *‘Turkey simply mattered more in a material sense than Armenia or the Armenians’*⁸.

1.1 THE CONTEMPORARY IMPORTANCE OF THE ARMENIAN GENOCIDE

The question is perhaps, is the Armenian Genocide as significant from a contemporary legal perspective as it is from a political and historic one? Does its recognition’s importance stem further than romantic notions of morality and justice and would it benefit the international community to revisit history with legal driven intentions? The phenomenon of the Armenian Genocide’s denial has been described as *‘a*

⁷ Reported in The Guardian Newspaper in an article entitled ‘ Congress Rejects Bush’s plea on Armenian Killings’ by S. Goldenberg, Thursday October 11 2007

⁸ D. Bloxham, *The Great Game of Genocide: Imperialism, Nationalism and the Destruction of the Ottoman Armenians*, (2005), page 9

*litmus test of morality in Western foreign policy*⁹ and Donald Bloxham asserts ‘*if a crime that had considerable resonance in Europe and the USA at the time of its commission could be forcibly submerged, the prospects for recognition of and response to other crimes past and present with less geographical or cultural association are obviously dim*’¹⁰; the contested genocide in Darfur being a prime example of this. It is suggestible that recognising the Armenian Genocide potentially has great legal implications. It can set a precedent for the addressing of similar tragedies in the future, for example through the creation of new mechanisms in International Law for claiming compensation in a third party State, when claiming domestically is not possible. It could mark the source of origin for future routes to reparation, which is arguably the first step towards reconciliation.

From an anthropological and sociological perspective, the period from the genocide until now can be studied as a model which demonstrates the consequences of genocide denial by States guilty of its perpetration. Despite the passing of years, the majority of Armenians to this day feel aggrieved at the lack of universal recognition of the event which resulted in the death of approximately one and a half million people over a period of seven years. The Turkish perspective of history which underplays the number of casualties, involvement of the State and other significant issues exacerbates the situation and creates an obstacle to progress as far as the majority of Armenians are concerned. Addressing the Armenian Genocide from a legal as well as political perspective would send a clear message that States should not and will not escape

⁹ *Supra* at note 8

¹⁰ *Ibid.*

liability if they were to perpetrate acts similar to those of the Ottoman Empire by distorting facts and employing methods of deception. The passing of time should not be permitted to act as a means of erasing certain events from the scripts of history.

From an economic perspective, the Armenian Genocide can perhaps be traced as the source of why now Armenia has sealed borders with Turkey and oil and gas rich Azerbaijan. Having these borders sealed equates to the potential loss of millions of dollars worth of trade. Relations between Armenia and Turkic countries are, for want of a better word, tense not only due to the Genocide but also due to Armenia's long standing dispute with Azerbaijan over the ethnically Armenian populated Nagorno Karabakh. The possibility of having the border with Turkey opened has been a perennial topic of debate in Armenian national politics. In fact, in the recent 2008 national elections it was a key point of discussion and it was generally accepted that opening the border should not come at the expense of Turkey not formally recognising the Genocide. The impact of having its border with Turkey sealed is that Armenia has only one practical route into Europe via Georgia, thus stifling its trade and economic growth.

Another interesting dimension to this issue is that of Turkey's European Union aspirations. Along with its long running concerns over Northern Cyprus and poor human rights record, issues relating to the Armenian Genocide such as Article 301 of the Turkish Penal Code's ostracising free speech serve to act as buffers against Turkish accession into the EU. Although this will not be discussed in excessive detail on this instance, it is

interesting to note this as it perhaps forms another basis for regarding the Armenian Genocide as an important current issue of legal as well as political significance.

Therefore, addressing this problem does have contemporary significance. Its commission ninety three years ago still constitutes living memory and can still be subjected to legal scrutiny. Although few, there are still survivors and the memory of the Genocide is still at the forefront of the Armenian Diaspora's psyche who feel that it is a wound which has not been allowed to heal properly due to the lack of recognition by Turkey and refusal of compensation. In terms of what action can be taken now; realistically the only option is monetary compensation. Criminal action cannot be taken as virtually all if not actually all of the perpetrating members of the *Committee of Union and Progress* are dead as a result of assassination, natural death or execution following conviction by the Special Military Tribunal established in Istanbul at the end of World War I¹¹. Moreover, despite the returning of land appearing to be an option which is unfeasible and unimaginable in a contemporary Turkey, it is not an option which should be completely overlooked. In either case, it is important to note that reparation cannot be used as some sort of moral detergent which washes away the tragedies of history. What it can do is act as an appropriate pre-cursor to some sort of future relationship whether it be economic or diplomatic between the Armenians and Turkey.

¹¹ See generally, VN. Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications', (1989), 14 Yale Journal of International Law, page 221.

2. GENOCIDE IN INTERNATIONAL LAW

*'One of the most complete and glaring illustrations of the violation of international law and the laws of humanity'*¹²

Raphael Lemkin

In this chapter, this author will make a series of observations creating a clear understanding on how the law relating to the crime of genocide developed, thus attempting to highlight any distinction between genocide and other closely related crimes which fall under the mantle of '*crimes against humanity*'. The author shall carefully detail the crime of genocide with particular emphasis on its origins which will be analysed in the subsequent chapter and may or may not indicate whether there was any customary international law in existence at the time of the Armenian Genocide which was breached by Ottoman Turkey.

2.1 THE ORIGIN OF 'GENOCIDE' AS A 'CRIME AGAINST HUMANITY'

Principles of crimes against humanity find their origin in the post World War I¹³ period following the spirit of the concept of *The Martens Clause* of the Preamble to the Hague Convention of 1907 which can be considered as being one of the first points of

¹² R. Lemkin, *Axis Rule in Occupied Europe* (1944) page 94

¹³ See M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* (1992) (2d rev. ed. In print 1999) page 522

reference when exploring the origins of ‘*crimes against humanity*’ and ‘*genocide*’¹⁴. It provides that “[u]ntil a more complete code...had been issued...the inhabitants and the belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usages established among civilised peoples, form the laws of humanity, and the dictates of public conscience”¹⁵. The language used in this clause appears to reflect ‘*the international community’s recognition that there were evolving and transcendent principles of humanity which safeguarded individuals against the abuse of states*’¹⁶ and mitigated the interfering of States in affairs of others based on these principles.

2.2 THE ORIGIN OF THE TERM ‘GENOCIDE’

Raphael Lemkin, the Polish lawyer and scholar, was responsible for the coining of the term ‘genocide’¹⁷. He promoted the notion that International Law contains unarticulated laws of humanity in arguing for ‘*recognition of the new trans-national penal offence of genocide*’¹⁸. In his 1944 study ‘*Axis Rule in Occupied Europe*’ Lemkin proposed that the term genocide should be employed to describe “*the destruction of a nation or of an ethnic group*”¹⁹. The origin of the term ‘genocide’ can be traced to the

¹⁴ See M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law* (1992) (2d rev. ed. In print 1999) page 523

¹⁵ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 3 Martens Nouveau Recuei 461, 36 Stat. 2277, reprinted in 2 Am.J.Int’l L. 90 (Supp.1908), 1 Bevens 631, 1 Friedman 308.

¹⁶ M. Lippman, ‘Genocide’ in M. Cherif Bassiouni (2d ed) *International Criminal Law, Crimes Volume 1* (1999), 589.

¹⁷ R. Lemkin, *Axis Rule in Occupied Europe* (1944) 74 cited in M Lippman, ‘Genocide’ in M. Cherif Bassiouni (2d ed) *International Criminal Law, Crimes Volume 1* (1999), 589.

¹⁸ *Ibid*

¹⁹ *Ibid*

Greek words *genos* (race) and the Latin *cide* (killing). Lemkin noted that international jurisprudence had increasingly recognised the importance of preserving national groups²⁰, a sentiment which is supported by Shavarsh Toriguian who asserts that although ‘*International law is primarily a body of rules regulating conduct between States, as the years have progressed the international community has demonstrated an increasing interest in protecting individuals against the arbitrary actions of their State*’.²¹ The groups that Lemkin referred to were ones which contributed to the cultural and intellectual enrichment of global society, but often lacked the powers to defend themselves. The prevention of genocide therefore held great practical as well as humanitarian value as these large disastrous events often lead to large scale emigrations and internal disturbances requiring remedial international action²². In the present context, this would explain the large scale emigrations which have led to the creation of the Armenian Diaspora, which sees approximately 7 million of Armenian’s global population of 10 million living outside of what today is Armenia.

Following World War II which saw the Nazi extermination of six million of Europe’s Jews, there was no specific reference to the recently established term ‘*genocide*’ in the Nuremberg Charter of the Judgment of the Nuremberg Tribunal. However it did appear in the indictment and was occasionally referred to by the Prosecution²³. What is contemporarily known as genocide was in fact prosecuted under the guise of crimes against humanity at the Nuremberg Tribunal. This constitutes the only international

²⁰ *Supra* at note 17

²¹ See S Toriguian, *The Armenian Question and International Law* (1973) page 49

²² R Lemkin, *Axis Rule in Occupied Europe* (1944), pages 91-93

²³ *Supra* at note 17

prosecution of a crime of this type until the establishment of the ICTY (International Criminal Tribunal for the Yugoslavian atrocities) and ICTR (International Criminal Tribunal for the Rwandan genocide) almost fifty years later. Now, the prescription of the crime of genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948²⁴ has become part of customary international law and a norm of *jus cogens*²⁵ and although it is true to say that genocide as a crime can be subsumed under the broader title of ‘crimes against humanity’, Ilias Bantekas notes that ‘*there was a compelling reason, not necessarily related to any imperative legal justification, for the two offences to be differentiated. The drafters of the crime of genocide wanted to emphasise the particular gravity of targeting members of a specified group with a view to their intentional physical or biological extermination. Emphasis is therefore on the destruction of the group, whereas the victimisation of group members in their individual capacities takes second place.*’²⁶ This is the crucial difference between genocide and a crime against humanity and one which is fundamental to remember when assessing the Armenian Genocide, as classifying it as a crime against humanity as opposed to a genocide would remove the emphasis on the intention of having this group destroyed.

2.3 THE 1948 CONVENTION

The *Convention on the Prevention and Punishment of the Crime of Genocide* was adopted by the United Nations by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948. Its adoption almost thirty-three years after the

²⁴ 78 UNTS 277 cited in I Bantekas & S Nash, *International Criminal Law (3rd ed)* (2007), page 139.

²⁵ *Prosecutor v. Goran Jelusic*, Case No. IT-95-10, ICTY T. Ch. I, Dec.1999, para 60.

²⁶ See I Bantekas & S Nash, *International Criminal Law (3rd ed)* (2007), page 139.

perpetration of planned and organised extermination of the Ottoman Armenians means *prima facie* it would constitute a legal misfeasance if it were to be applied as it would breach a fundamental principle of law which prohibits the retroactive application of law. Despite this, had the convention existed at the time of these acts, then it would be applicable to the Armenian Genocide *par excellence*²⁷. The Convention defines genocide as the following:

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

- *(a) Killing members of the group;*
- *(b) Causing serious bodily or mental harm to the 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;*
- *(e) Forcibly transferring children of the group to another group.*

The question, however, is there evidence which would suggest that prior to the enactment of the 1948 Convention on Genocide; the act of genocide was recognised as a crime in international law and some sort of law existed to force its punishment?

²⁷ G. Mettraux, *International Crimes and the Ad Hoc Tribunals*, (2005), page 240

3. CUSTOM AS A SOURCE OF INTERNATIONAL CRIMINAL LAW

*'We might wish the law were otherwise but we must administer it as we find it'*²⁸

US Military Tribunal Sitting in Nuremberg 1948

Like Common Law, International Law develops gradually on the basis of States' practices, conventions and other manifestations of customary law.²⁹ Having described the development of the crime of genocide in the previous chapter, in this chapter the author shall scrutinise the way in which a rule gains status as customary law. This is the necessary first step when attempting to ascertain whether there is enough evidence to suggest that customary law existed prior to 1948 which intended to punish acts such as the genocide of the Armenians of the Ottoman Empire. Once the various tests for the identification of customary international law have been identified it will create a platform on which to subject any findings gained through researching a number of sources. If the author can show that there is enough evidence to suggest the existence of customary law, it will provide the basis and impetus for exploring the possibility of Armenian civil action against the Turkey for restitution and compensation. However, traversing *'les tenebres du*

²⁸ *United States v. von Leeb and others*, US Military Tribunal sitting at Nuremberg, Judgment of 28 October 1948, [TWC] 510; (1949) 1 ILR 376, cited in I Bantekas & S Nash, *International Criminal Law* (3rd ed) (2007), page 57

²⁹ See generally, A D'Amato, *The Concept of Custom in International Law* (1971) cited in M.Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2d rev. ed. 1999)

*droit coutumier*³⁰ and identifying customary rules in International Criminal Law is in no way an easy task as many instances of State practice and *opinio juris* will have occurred ‘*in juridical outer space*’.³¹ However despite this difficulty, it is important to remember that identifying customary international law is not an ‘*exact science*’³² and the finding that a norm does form customary law ‘*must merely be the most reasonable conclusion based on the best available evidence of the existence or non-existence of that rule.*’³³

3.1 TESTS FOR CUSTOMARY INTERNATIONAL LAW

Article 38.1(b) of the Statute of the ICJ lists ‘*international custom, as evidence of a general practice accepted as law*’, making it one of the sources of law upon which a Court can draw³⁴. For a rule to be regarded as a piece of customary international law and not merely something that is derived out of friendship, tradition or political expediency it needs to fulfil certain criteria that is a material element and a psychological element.³⁵ The material element refers to certain ‘behaviours’ or ‘actions’ which the state must carry out, and the psychological element consists of the state’s rationale and belief in a sense of a legal obligation. What one needs to do in order to ascertain whether or not a certain rule is in fact obligatory (in this case genocide being an act punishable under international law) is cross reference the information that exists about the rule, with the criteria that has been set out. If the event of State practice satisfies the criteria of the test, then the rule can

³⁰ V. Pella, *La Guerre-Crime et les criminels de guerre: Reflexions sur la justice penale international* (1949), page 82.

³¹ D Luban, *Legal Modernism* (1997), page 355

³² Supra at Note 19, page 14

³³ *Ibid.*

³⁴ See A. Cassese, *International Law*, (2001), page 119.

³⁵ *Federal Republic of Germany v Denmark and the Netherlands* ICJ Reports 1969, page 3, para 77

be attributed the status of customary international law.

3.2 THE MATERIAL ELEMENT, *DIUTURNITAS*

The material or objective element refers to the actual State practises themselves which imply that the rule is that of law. *The North Sea Continental Shelf*³⁶ cases act as the modern authority which state that for a rule to be regarded as customary law, its practice does not have to have taken place for a specified period of time before it is regarded as being customary international law. The length of time that a practise has taken place is of relatively little importance, however *'an indispensable requirement would be that during the period in question, short as it may be, State practice including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.'*³⁷ Therefore when assessing the act of genocide, if it is not required to show that there was state practice long before the Armenian Genocide which suggested that such acts should be punishable under International Law.

The State practice itself needs to demonstrate consistency and it has to be in accordance with a *'constant and uniform usage'*³⁸ not universal usage, the key here is to understand what is meant by *'constant and uniform usage'*. This author understands it to

³⁶ *Federal Republic of Germany v Denmark and the Netherlands* ICJ Reports 1969, p 3, para 77

³⁷ *Ibid*, at para 74.

³⁸ *Asylum case, Columbia v Peru, ICJ reports 1950, p266. at para 277.*

mean that all the States partaking in the action must display similar ways of application, and they cannot apply the rule with unfettered discretion, it has to be constant. What needs to be assessed when looking at the rule in question is the attitudes of the States who are affected by the rule, and not the number of states involved in the practise itself, so much so that it appears that *'the party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party'*³⁹. Therefore, the Armenians would have to be able to show that Turkey felt bound by the rule. Another essential prerequisite is that the contended rule has a favourable response from leading States, as these States and their attitudes carry more weight and for this reason the actual identity of the States involved is of importance.⁴⁰

The International Law Commission in 1950 compiled a list which included forms of evidence which could be scrutinised when trying to asses if a rule could be deemed as being customary international law⁴¹. These included:

- Treaties
- Decisions of national and international courts
- National legislation
- Opinions of national legal advisors
- Diplomatic correspondence

Looking through these various sources is imperative, as it is here that evidence of

³⁹ *Supra* at note 29

⁴⁰ *Federal Republic of Germany v Denmark and the Netherlands* ICJ Reports 1969 p.3 at 77

⁴¹ *Supra* at note 34

State practice should be present, and if it is not, then it can be deemed that the rule itself is not customary international law.

3.3 THE PSYCHOLOGICAL ELEMENT, *OPINIO JURIS SIVE NECESSITATIS*

The opinio juris sive necessitatis is the ‘psychological’ element which makes a state believe that it is obliged to carry out the action; however it is difficult to prove evidence of such an element. But without this element present, the rule would not be customary international law. As the ICJ stated in the *North Sea Continental Shelf Cases*, ‘*Not only must the acts concerned amount to a settled practise, but they must also be such, or be carried out in such a way, as to be evidence of such a belief that is practise is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the opinion juris sive necessitatis*’⁴². In essence, what must be demonstrated is that condemnation and any attempted action against Turkey and those implicated in the commission of the Armenian Genocide at the time was motivated by a sense of legal duty and not ‘*by considerations of courtesy, convenience or tradition.*’⁴³

Therefore what this author shall do is look at various national and international sources referring to the Armenian Genocide as an international crime and if there appears to be evidence satisfying the necessary requirement for something to be

⁴² Supra at note 40.

⁴³ *ibid.*

considered as customary international law in the sense that there is some form of consistent practice in bringing to justice those who perpetrated acts similar to those committed by the Turkish authorities in accordance with *opinio juris*, i.e. the conviction of States that the genocide of the Armenians was an international crime with universal jurisdiction then it would be fair to say that the 'rule' has acquired the status of customary international law.

4. CUSTOMARY INTERNATIONAL LAW AND THE ARMENIAN GENOCIDE

Having considered the aforementioned criteria for the establishing of customary international law, this author will examine the possibility of demonstrating the existence of customary international law relating to the punishment of genocide and crimes against humanity at the time of the Armenian Genocide and even if not completely successful in so doing, will make an attempt to interpret evidence in such a way that it could support such an assertion. Perhaps the various Hague Conventions and the humanitarian intervention on the part of the European Powers during the period could serve as an indication of a developing customary rule arising from state Practice to the effect that certain wrongs committed by a State against its own nationals were so odious in nature that the international community looked upon them as crimes against humanity.

As early 1904, there were certain articulations by Heads of State to the effect that certain crimes were so odious in nature that they could create a right to intervene in the affairs of another sovereign state. President Theodore Roosevelt State of Union address in 1904 is a persuasive example of such sentiment existing at the time. Roosevelt believed that:

“...there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by

it...in extreme cases action may be justifiable and proper. What form the action shall take must depend upon the circumstances of that case; that is, upon the degree of the atrocity and upon our power to remedy it. The cases in which we could intervene by force of arms as we interfered to put a stop to intolerable conditions in Cuba are necessarily very few. Yet...it is inevitable that such a nation should desire eagerly to give expression its horror on an occasion like that of the massacre of the Jews in Kishenev, or when it witnesses such systematic and long-extended cruelty and oppression of which the Armenians have been victims, and which have won for the indignant pity of the civilised world... ”⁴⁴ This clearly demonstrates the feeling of some sort of obligation to intervene beyond some moral determinant but does not necessarily go all the way in demonstrating some sort of legal obligation to intervene with such acts.

⁴⁴ T Roosevelt, ‘On Human Rights in Foreign Policy, state of the union message 1904’ ; republished in Walter Laquer and Barry Rubin (eds.) – The Human Rights Reader (penguin 1978); cited in G Robertson QC, *Crimes Against Humanity* (2002) page 15

4.1 DEVELOPMENTS DURING WORLD WAR I

During the course of and immediately following World War I, statements made by the Allies appeared to indicate an intention to pursue ‘*systematic reckoning for international crimes*’⁴⁵. The first of these statements were in relation to the Armenian Genocide, where on the 24th May 1915 Russia, France and the United Kingdom declared that ‘*the connivance and often assistance of Ottoman Authorities...[in the killing were] ...crimes of Turkey against humanity and civilisation*’⁴⁶, holding those implicated in the commission of such acts responsible. Such rhetoric was even more prominent in relation to German defendants. By 1918 and the end of the war, Allied rhetoric transformed into expectations for international criminal accountability⁴⁷. This led to the creation of the *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties* in January 1919 whose mandate it was to investigate the Central Powers’ and her allies’ ‘*barbarous or illegitimate methods in violation of the established laws and customs of war and elementary laws of humanity*’⁴⁸. The Commission suggested the creation of a tribunal which would apply ‘*the principles of the law of nations as they result from the usages of established among civilised people, from the laws of humanity and from the dictates of public conscience*’⁴⁹. The Commission therefore clearly affirmed liability under international law, rather than incorporation of

⁴⁵ R Cryer, *Prosecuting International Crimes; Selectivity and the International Criminal Law Regime*, (2005), page 31

⁴⁶ FO/371/2488/51010; cited in R Cryer, *Prosecuting International Crimes; Selectivity and the International Criminal Law Regime*, (2005), page 31

⁴⁷ *Supra* at note 36

⁴⁸ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, 14 AJIL. 95, page 115 (1970)

⁴⁹ *Ibid* at page 122

such offences under domestic law.⁵⁰ However, the Commission's proposals were never implemented and the first Allied peace Treaty with Turkey, the Treaty of Sevres⁵¹, which contained a provision obligating Turkey to hand over those who had committed atrocities, was never ratified. The Treaty of Lausanne⁵² replaced it inadequately by providing no equivalent provision and indeed giving amnesty to the architects of the Genocide.

Although the Treaty of Versailles and the *Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties* did not actually lead to the materialisation of much relating to the Armenian Genocide, it can be suggested that it manifests the consensus and intention of the international community to bring those responsible for armed aggressions, war crimes and violations of the laws of humanity before the bar of justice⁵³, thereby contributing to the development of customary international law. Also, The 1920 Peace Treaty of Sevres⁵⁴ which made provisions for the trials of those Turkish officials responsible for violating the laws and customs of war and engagement in the Armenian Genocide during the war, but excluding reference to the laws of humanity⁵⁵, was never ratified and was superseded by the 1923 Treaty of Lausanne which contained a declaration of amnesty for all offences committed between 1914 and 1922⁵⁶ by Turks irrespective of their status as State actors or non State actors.⁵⁷

⁵⁰ *Supra*, at note 36

⁵¹ *TS No. 11 (1920)*

⁵² *8 LNTS 11 (1923)*

⁵³ *See Treaty of Peace Between the Allied and Associated Powers and Germany (Treaty of Versailles), June 28, 1919, 11 Martens Nouveau Recueil (ser.3) 323*

⁵⁴ *Treaty of Peace Between the Allied Powers and Turkey, August 10, 1920, reprinted in 15 AJIL. 179 (Supp. 1921).*

⁵⁵ *Ibid.*

⁵⁶ *Treaty of Peace between the Allied Powers and Turkey (Treaty of Lausanne), 28 LNTS 12.*

However, as M. Cherif Bassiouni points out, '*the political motivations behind this compromise could not disguise the facts that amnesties are only granted for crimes, which even if not prosecuted does not negate their legal existence*'.⁵⁸ Therefore, although the Treaty of Lausanne gave amnesty to Turks from any subsequent criminal prosecution, it did not negate the original crimes themselves and indeed can be interpreted as an affirmation that the international community recognised that crimes had been committed in the first place. It is therefore submitted that the Treaty of Lausanne cannot be invoked as a defence or obstacle to claims of compensation or restitution for the crimes committed during the period in question. This proposition is strengthened by the fact that in Germany, a similar trial was being carried out in Leipzig for Germans who had also perpetrated atrocities during the war; thereby supporting the suggestion that there was some sort of customary international law developing at the time which prohibited '*crimes against humanity*' such as those committed against the Armenians, which can possibly be extended to include genocide, the ultimate crime against humanity.

4.2 THE ISTANBUL TRIALS

The Istanbul Trials of Turkish nationals for their involvement in the massacre of the Armenians have received much less attention and analysis than similar trials during the same period such as the Leipzig Trials of German that committed atrocities during

⁵⁷ JF. Willis, *Prologue To Nuremberg: The Politics And Diplomacy Of Punishing War Criminals Of The First World War* (1982)

⁵⁸ M. Cherif Bassiouni, *Crimes Against Humanity In International Criminal Law*, (1992) pages 175-176.

World War I who were tried before the *Reichsgericht* (German Supreme Court).⁵⁹ This author suggests that the Trials themselves can demonstrate some form of acknowledgment on the part of the then Turkish authorities for crimes committed by the members of the preceding administration. Historically and legally the trials carry significant importance as they formed the first instance in Turkey's history that Ottoman Turkish leaders were held accountable before a Special Military Tribunal for atrocities committed against a non-Muslim and a traditionally discriminated against minority⁶⁰. The Istanbul Trials consequently set an important historical precedent for the use of domestic courts and domestic law to try nationals of the State for their involvement in international crimes.⁶¹

In Istanbul many suspects who were accused of involvement in the massacres were tried but in actuality this number fell well short of the total number of suspects which had been identified in the report of the *Mazhar Inquiry Commission*⁶² which included the *Valis* (governor-general of the provinces), *Mutasarrifs* (governors of the provinces), and *Kaymakams* (governors of the districts); those responsible for the carrying out of the massacres. Notwithstanding this, many of those convicted were awarded severe penalties including the death sentence. It has been suggested that the reason why penalties of such severity were issued was because of the exercise of political

⁵⁹ See T. McCormack, 'Their Atrocities and Our Misdemeanours' in Mark Lattimer and Phillippe Sands (eds) *Justices for Crimes Against Humanity* (2003). Page 123

⁶⁰ See VN. Dadrian, 'Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications', (1989), 14 *Yale Journal of International Law*, 221, page 221

⁶¹ *Ibid.*

⁶² See VN, Dadrian, 'The Turkish Military Tribunal's Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series', (1997), *Holocaust and Genocide Studies VII* (1997) page 32.

expediency by the Turks in an attempt to placate the Allied Powers⁶³. Following the end of World War I, Turkey was a State in transition and many in the Sultan's Government viewed these trials as a golden opportunity to hold the *Ittihadist* (Committee of Union and Progress) Party Leadership responsible for the atrocities committed against the Ottoman Empire's Armenian subjects, thereby exculpating the Turkish people as a whole.⁶⁴ However, despite its political motivation, it is important to note that it was as a result of the Special Military Tribunal finding sufficient evidence of pre-meditated mass murder to convict many of the defendants that stood before it, thereby demonstrating a feeling of some degree of legal obligation on the part of the Turkish authorities to take action. On July 6, 1919, the Military Tribunal pronounced a guilty verdict, sentencing to death the leading perpetrators of the genocide Talaat Pasha, Enver Pasha, Jemal Pasha and Dr Nazim.

Prima facie the trials in Istanbul demonstrate historic evidence of Turkish willingness to hold those responsible for the massacres to account. Despite this, the trials themselves have received a great degree of criticism. Vahakn Dadrian provides a particularly vitreous analysis of the trials, describing them as being '*dismally abortive as far as justice is concerned*'.⁶⁵ His assessment is that : '*the most salient feature of the present case is the remarkable chasm between the determination of guilt and the indulgence through which so many of the guilty escaped retribution...a nation was murdered in its ancestral territories and the Tribunal could convict and condemn to death only fifteen men, of whom only three – indeed only the most insignificant of the*

⁶³ *Supra* at note 62.

⁶⁴ *Supra* at Note 52, at page 31.

⁶⁵ *Ibid* at page 50.

pack – were actually executed; the rest escaped, or were allowed to escape, and become ‘fugitives from justice’. As British Acting High Commissioner at Istanbul, Rear Admiral Webb, reported to London, *‘it is interesting to see...the manner in which the sentences have been apportioned among the absent and present so as to affect a minimum of real bloodshed’*⁶⁶. This indicates a lack of a real and effective legal addressing of the Armenian Genocide at the time, which could mean that the case can still be regarded as very much open today to assessment and action today.

This period saw The Sultan’s Government in Istanbul being replaced by that of Mustafa Kemal, the father of modern day Turkey, who brought about a change in regime on a nationalist foundation. Subsequently, the trials were precluded before proceedings were initiated in relation to alleged atrocities committed in the provinces of *Adana, Aleppo, Bitlis, Diarbekir, Erzerum, Marash* and *Van*⁶⁷ and indeed under Kemal, many of those who were already sentenced to imprisonment did not actually serve their full sentences.⁶⁸

From a legal perspective, can these Special Military Tribunals serve as some sort of evidence of acknowledgment and admission of the State’s involvement in committing a pre-meditated mass murder of a specific group of people? If accepted as such, it would strengthen the proposition that a route for restitution and compensation should be made available on the basis the Genocide was as a result of state organised policy and not as a

⁶⁶ See VN Dadrian, ‘The Turkish Military Tribunal’s Prosecution of the Authors of the Armenian Genocide: Four Major Court-Martial Series’, (1997), *Holocaust and Genocide Studies VII* (1997) page 50

⁶⁷ See generally A Hoss, ‘The Trial of Perpertrators by the Turkish Military Tribunals: The Case of Yozgat’ In Richard G Hovannisian (ed), *The Armenian Genocide: History, Politics, Ethics* (1999)

⁶⁸ *Supra* at note 55, at page 50.

result of civil unrest or war, an assertion supported by the trying of members of the government. It can be argued that the then Turkish authorities trying of members of the *Ittihadist* Party for pre-meditated murder can rebuke the integrity of Turkey's current position on the genocide, as the evidence appears to be slightly inconsistent with the Turkish interpretation of the facts. An example of such evidence includes the description by a Turkish Court Martial on the 7 August 1919 of the massacres which took place in the *Yozgad* province, which saw many Armenians slaughtered.⁶⁹

4.3 DEVELOPMENTS POST WORLD WAR II; THE NUREMBERG TRIBUNALS

Shavarsh Toriguian offers that perhaps the best source of evidence that customary international law contains a rule defining genocide as a 'crime against humanity' consequently making such crimes punishable under international law, is the judgment of the Nuremberg Tribunal in 1946, where Nazi war criminals were tried by the Allied powers for their involvement in the extermination of six million of Europe's Jews⁷⁰. Article 6(3) of the Charter of August 8, 1945, signed by the Allied Powers, as modified by the protocol of the October 6, 1945 and Control Council Law No 10 defined 'crimes against humanity' as '*Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, on racial or religious*

⁶⁹ *Takvim-I Vekayi*, no. 3617, pp 1-2, *Yozgad Tehcir ve Taktili Muhahemesi (Karar Sureti)*. The verdict was read into the record 8 April 1919 and published in the Supplement (*ilave*) of *Takvim-I Vekayi* 7 Aug 1919, cited in G. Mettraux, *International Crimes And The Ad Hoc Tribunals*, (2005) pages 239-240

⁷⁰ See S .Toriguian, *The Armenian Question and International Law*, (1973), page 54

grounds.⁷¹ However, in response to this, a view also exists that Article 6(3) was not an expression of existing customary international law relating to crimes against humanity, but was instead drafted to cover acts which had taken place during the War that were so atrocious and on such a large scale that they simply could not be ignored.⁷²

The Defence at Nuremberg invoked the suggestion that the application of the Charter constituted legal misfeasance through retroactive application and punishment without law, *nullum crimen sine lege, nulla poena sine lege*, the tribunal at Nuremberg stated that *'The charter is not an arbitrary exercise of power on the part of the victorious nations....but in the view of the tribunal it is the expression of the international law existing at the time of its creation'*⁷³. Justice Robert H. Jackson, the Chief Counsel for the US in the Nuremberg prosecution relied on these principles and wrote in his Report to the President of the United States on June 6, 1945: *'These principles [crimes against humanity] have been assimilated as part of International Law at least since 1907'*⁷⁴. Thus, as Bassiouni observes, *'the Charter's recognition of 'Crimes Against Humanity' as constituting violations of already existing conventional and customary international law, as well as general principles of law, is evidenced by previous efforts of the international community to prohibit conduct proscribed by Article 6(c) of the Charter'*.⁷⁵

⁷¹ The London Charter for the Nuremberg IMT (Nuremberg Charter) UKTS 4 (1945), Cmnd 6671; 5 UNTS 251; cited in I Bantekas & S Nash, *International Criminal Law*, (3rd edition 2007), page 502.

⁷² See I Bantekas & S Nash, *International Criminal Law*, (3rd edition 2007), page 502.

⁷³ IMT judgment, reprinted in 41 AJIL (1947), 172, page 217

⁷⁴ Report of R Jackson, United States Representative to the International Conference On Military Trials at x-xi (US Gov't Prtg. Off. 1949) at page 50; cited in M. Cherif Bassioni, *Crime Against Humanity In International Criminal Law* (2d rev. ed 1999), page 542

⁷⁵ See generally, M. Cherif Bassioni, *Crime Against Humanity In International Criminal Law* (2d rev. ed 1999)

Although this view was certainly true with regards to war crimes, which was acknowledged to be well ‘established’⁷⁶, it was not as applicable when it came to crimes against humanity as it is argued that prior to the trials at Nuremberg, the term ‘crimes against humanity’ had no fixed legal meaning.⁷⁷ This is frustrating for the Armenian case because as early as 1916 Great Britain, France and Russia had made declarations denouncing what had happened to the Armenians as ‘*crimes against humanity*’⁷⁸ but as this at the time appeared not to have status as an offence in international law, it resulted in a fundamental lack of practical action to go in hand with the rhetoric which the massacres produced.

Another possible example of evidence pertaining to the existence of customary law comes in the form of the General Assembly of the UN in its resolution 95(1) dated December 11 1946 declaring that ‘*Genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilised world....and punishable by international law*’⁷⁹. If sustained, the genocide committed by the Ottoman Turkish authorities constituted a crime under international law since it has been shown that the definition of genocide as a crime against humanity, punishable under International Law, is a long established rule firmly incorporated into the body of International Law.

⁷⁶ See I Bantekas & S Nash, *International Criminal Law*, (3rd edition 2007), page 502.

⁷⁷ *Ibid*, at page 126.

⁷⁸ R. Clark, *Crimes Against Humanity at Nuremberg* in G Ginsburg, VN Kudriavtsev (eds), *The Nuremberg Trial in International Law*, (1990) page 170

⁷⁹ See S. Toriguian, *The Armenian Question and International Law*, (1973), page 50

4.4 GENOCIDE *DE FACTO* & *DE JURE*

Despite the existence of serious doubt as to whether it is possible to talk of ‘genocide’ in relation to crimes committed before the adoption of the 1948 Convention⁸⁰, this author wishes to draw a distinction between genocide in fact and genocide in law. The Armenian Genocide is not necessarily genocide in law due to the 1948 Convention on Genocide being *ex post facto*; however this does not mean that the massacres can not be recognised as genocide in a factual sense⁸¹. Shavarsh Toriguian suggests that the Armenian Genocide can constitute genocide at law as well as doing so in fact. He asserts that the Preamble of the Genocide Convention and the Nuremberg Trials suggest that genocide is a crime under customary international law and therefore the Genocide Convention of 1948 is simply a declaration of existing law as opposed to the creation of new law⁸².

If this proposition can be sustained it circumvents the 1948 Convention’s incapacity at being applied to the Armenian Genocide. Although this proposition is very much susceptible to criticism, there are certain expressions used in the Convention which would support it. For example, the Convention states that ‘*The Contracting Parties, having considered the declaration made by the General Assembly of the United Nations in its Resolution 95 (1) dated December 11, 1946, that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilised world; recognising that in all periods of history genocide has inflicted*

⁸⁰ G Mettraux, *International Crimes And The Ad Hoc Tribunals*, (2005) pages 239-240

⁸¹ *Ibid.*

⁸² S Toriguian, *The Armenian Question and International Law* (1973), page 49.

great losses on humanity; *Being convinced that, in order to liberate mankind from such an odious scourge, international cooperation is required.*' The part highlighted in bold appears to acknowledge that the crime of genocide has been perpetrated throughout history and consequently can be interpreted as perhaps not barring acts which have constituted genocide from being recognised as so just because they occurred prior to the enactment of the Convention. Although this does not mitigate the retroactive application of the 1948 Convention to the Armenian Genocide in a legal sense, it can be used as a source of rebuttal against suggestions that the Armenian Genocide cannot be called genocide due to its timing.

Having considered the nature of customary international law, there does seem to be some evidence of its existence to create an argument that the act of genocide committed against the Armenians by Ottoman Turks was a violation of international law. Along with this, the suggestion that the Genocide Convention of 1948 is still relevant from a legal perspective to the Armenian Genocide is also persuasive, despite being open to interpretation and criticism, especially because thirty years later at the trials of Nazi war criminals in Nuremberg, genocide was not actually recognised as being a crime *sui generis*. To further support the suggestion that the Genocide was recognised as a crime, the trials in Istanbul of suspects accountable for the commission of atrocities against Armenians by the Turkish authorities (which is capable of being interpreted as some sort of recognition or acknowledgment by the Turkish Authorities at the time of the crime committed by the state against one of its minorities) creates a strong basis for claiming compensation today for a violation of law back then. All these factors combined make for

issue of the Armenian Genocide seem very much alive legally speaking. However, what cannot be ignored is the amount of evidence which suggests that crimes against humanity was not legally established until many years after the Armenian Genocide and that genocide as a legal concept itself was only established later still. In this author's view, the issue is very much contestable.

5. COMPENSATION AND RESTITUTION

Perhaps the most significant outcome to recognition of the Armenian massacres as genocide by Turkey for the victims and their descendents is the possible entitlement to compensation and restitution of land. This issue however cannot be conceptualised or over simplified. It is simple to perhaps assert that if a wrong has been done then there is a moral obligation for those who have been wronged against to be compensated. However careful assessment of the logistics and practicalities of awarding compensation is crucial. These considerations include the manner in which compensation should be determined; should it for example be determined by an international court or by domestic courts in the country in question, so in this case Turkey? Also, who exactly should be entitled to claim? In this chapter the author will examine the mechanisms available in granting compensation to the victims of the genocides in Yugoslavia and Rwanda by the *ad hoc tribunals* in order to gain ideas and asses whether any can be suitably replicated to deal with Armenian claims if it is agreed there is a legal basis for doing so.

5.1 THE ICTY AND ICTR

The ICTY⁸³ and the ICTR⁸⁴ do not themselves award reparations to victims of crimes within their jurisdictions. Article 24(3) of the ICTY Statute and Article 23(3) of

⁸³ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

⁸⁴ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994

the ICTR Statute permit the Trial Chambers to order restitution of property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners after convicting the perpetrator of that criminal conduct⁸⁵.

Rule 106 of the ICTY/ICTR *Rules of Procedure and Evidence* sets out compensation to victims. Under this Rule, *'the Registrar is to transmit to the competent authorities of the states concerned the judgment finding the accused guilty of a crime which has caused injury to a victim'*⁸⁶. The victim or persons claiming through that victim may then bring an action in a domestic court or other body to obtain compensation in line with relevant national legislation⁸⁷. If this approach was applied to the case of the Armenian Genocide, claimants would be required to seek compensation in the Turkish Courts, only if armed with some sort of judgment, but realistically the possibility of this even being an option seems unlikely due to several reasons including the rise in Turkish nationalism and current features of Turkish legislation, such as Article 301 of the Turkish Penal Code which criminalises the insulting of 'Turkishness' (which has led to the prosecution of writers and journalists who have discussed the Armenian Genocide).

5.2 THE INTERNATIONAL CRIMINAL COURT

The mechanism to provide remedies for victims under the Statute of the International Criminal Court⁸⁸ (ICC) is more direct in the sense that it does not require

⁸⁵ K Kittichaisaree, *International Criminal Law*, (OUP 2001), page 323

⁸⁶ *Ibid.*

⁸⁷ *Ibid* at page 324

⁸⁸ Adopted at the Rome Conference on 17 July 1998; United Nations Diplomatic Conference of

enforcement through a national court or other competent body.⁸⁹ Under Article 79 of the ICC Statute, *'the ICC may order money and other property collected through fines paid by a convicted person or forfeiture of that person's proceeds, property, and assets derived directly or indirectly from his crime, to be transferred to a Trust Fund established for the benefits of victims of crimes within the ICC's jurisdiction and their families'*.⁹⁰

According to Rule 98, entitled 'Trust Fund', as adopted finally by the PCNICC (Preparatory Commission for the International Criminal Court, 1999), individual awards for reparations are made directly against a convicted individual. However, the ICC may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of the order it is impossible or impracticable to make individual awards directly to each victim⁹¹. Such an award deposited in the 'Trust Fund' is separated from other resources of the 'Trust Fund' and is forwarded to each victim as soon as possible. Furthermore, *'where the number of victims and the scope, forms and modalities of reparations make a collective award more appropriate, the ICC may order that an award for reparations be made through the Trust Fund to intergovernmental, international, or national organisations approved by the Trust Fund'*⁹² The idea of a Trust Fund sounds appropriate for the Armenian case as it is difficult to identify individual victims due to numbers and passing of time.

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⁸⁹ K Kittichaisaree, *International Criminal Law*, (OUP 2001), page 324

⁹⁰ *Ibid*

⁹¹ *Ibid*

⁹² *Ibid*

Moreover, it is provided by Article 75 of the Statute that *‘the ICC may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation’*⁹³. Where appropriate, the ICC may order that the award for reparations be made through the Trust Fund. The PNICC has adopted Rule 97, entitled ‘Assessment of Reparations’, under Chapter 4 (Provisions Relating To Various Stages of the Proceedings), Section III (Victims and Witnesses), or the Rules of Procedure and Evidence of the ICC⁹⁴. Sub rule 1 provides:

“Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both”

In general, it is asserted that damages should be awarded on an individualised basis. However, in certain cases the number of victims may be so large that it is impractical or indeed impossible for the individual who is convicted to provide all with adequate compensation.⁹⁵ This seems to certainly be the situation that an Armenian claim would find itself in due to the potentially large number of people who may be entitled to claim as victims.

⁹³ *Supra* at note 88

⁹⁴ *Ibid*

⁹⁵ *Ibid*

5.3 ARMENIAN CLAIMS FOR COMPENSATION

In terms of the case of the Armenian Genocide, due to the time which has elapsed since it was committed, the criminal prosecution of individuals would be futile. It would also be inequitable as well as legally impossible to prosecute current individuals of the Turkey and its administration liable in a criminal sense for the acts committed ninety three years ago. Further more, the Treaty of Lausanne 1923 gave amnesty for all crimes committed during the World War I and it is due to this that criminal prosecution in a tribunal such as the ICTY, ICTR and ICC cannot perhaps be used to prosecute individuals. However the lack of an appropriate forum should not be a source of denying the existence of certain substantive rights. The creation of some form of international machinery for claiming reparations is ideally the best solution given the unlikelihood of domestic channels for compensation in Turkey.

Another issue which should be critically examined surrounds the criteria for claim, who is and who is not entitled to claiming. There is a potential ‘flood gates’ argument here whereby if claiming compensation is made possible then the number of claimants is potentially so high as to make the whole process impracticable. This is one of the consequences of this issue not having been addressed earlier. After ninety three years since the Genocide there have been several generations of Armenians who can claim that they have been directly affected. This is especially true of the Armenian Diaspora who can attribute their widely dispersed nature to the Genocide and having

been forcibly deported from their ancestral territories. This approach would entitle all Armenians who can trace their ancestry back to the genocide and Ottoman Turkey to making a claim. Alternatively, claims can be restricted to survivors of the Genocide exclusively resulting in a very low number of potential claimants due to the long period of time which has passed since the act itself. In either case the foreseeable problem is an evidential one. How would an individual prove their entitlement or that they had been subjected to atrocities or that their property has been illegally misappropriated? These are questions which need to be practically approached in order to make the possibility of reparations a reality.

One suggestion is that the current Republic of Armenia could be the embodiment and act to represent the Armenian nation as a whole as it possesses a legal personality and therefore full legal capacity under international law⁹⁶. But again, this would be oversimplification of the issue as there are great political considerations which need to be made before a state would be willing to file an action against another in international law thereby highlighting the disparity between what is possible and what is likely due to political nature of such an issue.

⁹⁶ S Toriguian, *The Armenian Question and International Law*, (1973), page 59

CONCLUSION

'Quand le devoir ordonne de parler, le silence est une lâcheté et le mensonge une trahison.'

Henry Beraud

Despite the political and historical conflicts which resonate on this issue, an attempt was made in this dissertation to investigate the existence of customary law preventing and punishing acts of genocide and crimes against humanity which could be directly applied to the Armenian Genocide. The author attempted to support the proposition that despite the Conventions on the Prevention and Punishment of the Crime of Genocide 1948 being *ex post facto*, there is evidence of customary international law which shows that genocide was still recognised as a crime before the conventions enactment. That is to suggest, that the Convention of 1948 can be interpreted as being the codification of existing customary international law, as opposed to the source of creation of new law. However, the author also considered evidence which suggested contrary in that genocide was not a crime *sui generis* at the time of the Jewish Holocaust let alone the Armenian genocide which preceded it by thirty years.

To strengthen the proposition above, evidence was included which attempted to demonstrate the existence of such customary law including the signing of the Treaties of Sevres, the Military Tribunals in Istanbul and Nuremberg, declarations made by Heads of State and the Genocide Convention of 1948 itself. On this basis, it was suggested that the victims of genocide, the Armenian people, were entitled to some sort of compensation

and restitution from the present day Turkish government.

Notwithstanding this, the majority of the evidence suggests that current international law as it stands cannot be applied to the Armenian Genocide. Despite the existence of sources eluding to the contrary, at the time of the Armenian Genocide, there did not appear to be any concrete established legal principles governing crimes against humanity and genocide in particular, in relation to a state exercising brutality against its own nationals. Customary international law did however exist at the time in relation to war crimes, but the Armenian Genocide was not perpetrated by an occupying force, but the State itself. It was not until the end of World War II and the Tribunal at Nuremberg that a legal significance was attached to the term crime against humanity. But as one author has noted uncovering custom is not necessarily a logical or neutral process, and what judges find to be customary may be what they are willing to find in the practice of states and their *opinio juris* so that customary law has been a matter of opinion and *coup de pousse*, rather than one of existing State practice.⁹⁷

The Armenian Genocide therefore finds itself in somewhat of a legal lacuna, a victim of its timing, as it would seem that if it was perpetrated today, or indeed even sixty years ago international law would be equipped and developed enough to be applied to it *par excellence*. It does however seem extremely inequitable that the first genocide of the 20th Century is circumvented by International Law due to the inadequacies in its development a century ago which in effect appear to negate the substantive rights of the victims and their descendants.

⁹⁷ G Mettraux, *International Crimes And The Ad Hoc Tribunals*, (2005), page 15

Without the benefit of International Law as it currently stands, the reality is that any legal outcome to this issue would stem from within Turkey and is reliant upon the application of Turkish domestic law. However, as things stand a modern Turkey accepting the genocide and therefore acknowledging some sort of obligation to provide compensation seems to be somewhat of an unfeasible expectation. Cases which have applied Article 301 of the Turkish Penal Code which criminalises the denigration of ‘Turkishness’ to the context of the publicising of the Armenian Genocide serves to act as just one of many indications of the State’s negative view on the subject. Currently, it would not appear as though Turkey would make some sort of drastic turn around on the Armenian Genocide and facilitate the claims of Armenians.

Despite the complexity of these issues, what can be seen as clear is the notion that if the Republic of Turkey is recognised to having committed an act equating to genocide then in principle here should be compensation of some description made available to victims. Once this is agreed in principle, then it could lead to careful formulations of new mechanisms which would be conducive to equity. It does appear however that the solution to this issue lies in diplomatic and political movements as opposed to current International Law. Just as it has always been, the issue of the Armenian Genocide appears to be dictated by *realpolitik* but, as has already been emphasised on a number of occasions, this author views international law as being the crystallisation of the intentions of the ‘Great powers’, marking an overlap between law and politics. In the view of this author, the recognising of the Armenian Genocide would act as a reaffirmation of the

international community's unequivocal condemnation of such acts.

With all these considerations, it is arguable that lacunae in international law should not stand in the way of justice for those who have been subjected to such atrocities as that of the Armenians of Ottoman Turkey. One cannot help but refer to the poignancy of Noam Chomsky's words when he said '*By entering the arena of argument and counter-argument, of technical feasibility and tactics, of footnotes and citations, by accepting the legitimacy of debate on certain issues, one has already lost one's humanity*'⁹⁸; a sentiment reflecting the current practical realities impeding the resolution of the this issue in legal terms. At the same time, the axioms of justice of legality and observance of the rule of law should never be played down as it is the transgression by offenders from these rules that ultimately lead to crimes against humanity such as the Armenian Genocide⁹⁹.

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⁹⁸ N Chomsky, *American Power and the New Mandarins*, (1969) page 11

⁹⁹ See Bassiouni, CM, *Crimes Against Humanity In International Criminal Law* (1992) (2d rev. ed. In print 1999), page 562

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