THE ARMENIAN GENOCIDE QUESTION & LEGAL RESPONSIBILLITY

(ERMENİ SOYKIRIMI SORUNU & HUKUKİ SORUMLULUK)

Derk Jan van der LINDE
Legal Advisor and Researcher
Institute for Turkish Studies, the Netherlands

Abstract: *This article aims to analyze the Armenian Genocide Question from an international law standpoint. Thus an answer to the two principal research questions – namely whether any form of direct state and/or individual responsibility can arise under the workings of the Genocide Convention and whether it is in fact legally correct to apply the terminology of genocide to the events of 1915 – will be provided. Additionally, in the course of this analysis three related international law dilemmas (firstly accurately defining 'crimes against humanity' vis-à-vis 'genocide', secondly differentiating legal requirements of individual responsibility versus state responsibility, and lastly the topic of retroactive working within treaty law) will be evaluated.*

Keywords: *international law, genocide, crimes against humanity, state responsibility, individual criminal liability, retroactivity*

Öz: *Bu makale Ermeni soykırımı sorununu uluslararası hukuk yönünden incelemektedir. Nitekim iki temel soruya – Soykırım Sözleşmesi çerçevesinde herhangi bir devlet ve/veya bireysel sorumluluktan sözedilmesinin mümkün olup olmadığı ve soykırım terminolojisinin 1915 olaylarına uygulanmasının hukuki açıdan doğru olup olmadığı- cevap verilecektir. Ek olarak, bu değerlendirme çerçevesinde üç uluslararası hukuk çelişkisi (öncelikle 'insanlığa karşı suçlar' vis a vis 'soykırım' tanımlarının doğru bir şekilde yapılabilmesi, ikinci olarak bireysel sorumluluk ve devlet sorumluluğun hukuki gerekçelerinin birbirinden ayrılması, son olarak da sözleşme hukuku çerçevesinde makeable şamil olma kuvveti) incelenecektir.*

Anahtar Kelimeler: *uluslararası hukuk, soykırım, insanlığa karşı suçlar, devlet sorumluluğu, bireysel cezai sorumluluk, makable şamil olma kuvveti*

1. Introduction

This article aims to present a clear overview of all legal issues involved in the "Armenian Genocide Question" and to make comprehensible to academic readers from different disciplines, interested in the field of international law, which exact international law doctrines and concepts underlie the controversy. However, it should be stressed at the outset of this article that, due to the complexity of the subject matter as well as the scope of legal issues involved, the present article by no means purports to offer an exhaustive analysis and therefore references to additional literature are provided. The author of the article has chosen to put the emphasis in his analysis on the substantive merits raised in the controversy. Thus leaving aside many of the procedural requirements of any legal claim (such as state succession, statute of limitations, sovereign immunity issues etc.).

A vigorous political debate erupted over legal interpretations when opposing sources started to lay and subsequently deny a claim in which it was asserted that the late Ottoman Empire had in effect committed genocide against the Armenian people.[1] It was argued that the events during the aftermath of the Ottoman Empire in 1915 and onwards, which had ultimately led up to the killing or massacres of Ottoman subjects of Armenian ethnicity, in fact constituted a 'genocide'; thereby invoking not only a moral but also a legal concept with possibly far reaching implications, such as individual criminal liability and/or state responsibility with possible financial reparations.

In this section, it will be investigated whether possible direct claims of any kind of state- or individual responsibility can be put forward based on the Genocide Convention and – what is more – whether the terminology 'genocide' is in fact applicable to the events of 1915. Yet, before doing so, first a conceptual framework of understanding is provided by comparing the concept of 'genocide' *vis-à-vis* the more general concept of 'crimes against humanity'. Secondly, the practical difficulties involved in attempting to assess legal responsibility (individual versus state) will be examined.

2. The Concept of Genocide within International Law

The term 'genocide' was first introduced in 1944 by the legal scholar Rapheal Lemkin, who created a new concept that combined the two words of the ancient Greek *genos* (race or tribe) on the one hand and the Latin verb of *caedere* or its conjugation *cide* (meaning to kill) on the other, thus creating

1 *Cf.* J. Kirakosyan, *The Armenian genocide: the Young Turks before the judgment of history* (University of Michigan: Sphinx Press, 1992) or M. A. Shaik, *Lies, Lies, and more Lies: Belying the Armenian Claims against the Turks* (Islamabad: Masud Publishers, 2007).

the new notion of genocide much like already existing notions as homicide or infanticide.[2] The definition of this notion clearly hints at the killing or murdering of a *genos* or group thereby making 'the physical protection of the group as a distinct identity the first and paramount factor' of the newly invented concept.[3] Consequently in the aftermath of the Second World War WWII and its Nazi atrocities, the notion quickly caught on to the international plane. In 1946 the newly formed General Assembly of the United Nations unanimously adopted Resolution 96 (1) on genocide, which was followed only two years later in 1948 by the drafting of the now famous Convention for the Prevention and Repression of the Crime of Genocide (or simply 'the Genocide Convention').[4]

The definition of genocide, as expressed in the original 1948 Genocide Convention, has been copied verbatim by the various statutes of the (ad hoc) International Tribunals (e.g. International Criminal Tribunal for the former Yugoslavia (ICTY) and for Rwanda (ICTR)) as well as by the Rome Statute of the more recently created International Criminal Court (ICC) (the first permanent international court that has the jurisdiction in matters of certain international crimes).

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2 R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Washington DC: Carnegie Endowment for International Peace, 1944), 79; *cf.* W. A. Schabas, *Genocide in International Law: The Crimes of Crimes* (Cambridge: Cambridge University Press, 2000), 24-30.

3 M. N. Shaw, *International Law: Sixth edition* (New York: Cambridge University Press, 2008), 282.

4 Convention for the Prevention and Repression of the Crime of Genocide, 78 *U.N.T.S* 277 [hereinafter 'Genocide Convention'] also made available at the website of the UN at http://www.un-documents.net/cppcg.htm.

5 *Cf.* Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other 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 Neighboring States, S.C. Res. 955, U.N. SCOR, 3453d Mtg. at 3., U.N. Doc. S/RES/955, Annex (1994) reprinted in *I.L.M.* 133 (1994), 1598 at 1602 [hereinafter 'ICTR Statute'];*Cf.* Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, U.N. Doc. S/25704, Annex reprinted in *I.L.M*. 32 (1994), 1192 [hereinafter 'ICTY Statute'];*Cf.* Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/CONF. 183/9 (1958) made available at the website of the ICC at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE940A655EB30E16/0/Rome_Statute_English.pdf [hereinafter 'ICC Statute'].

genocide into positive or codified law, genocide as a doctrine has also become part of customary international law as has been affirmed by the case law of the International Court of Justice (ICJ).[6] Today, the notion of genocide is even believed to have attained the special status of a rule of *jus cogens* or peremptory norm of international law (thus representing a norm of public international law of the highest category; a rule from which no state can derogate). [7] Thus the concept of genocide nowadays is firmly established within the corpus of public international law and in practical terms the prohibition on genocide entails an obligation on states to prevent and prosecute genocide even *vis-à-vis* non-affected states (the so-called *erga omnes* character of genocide).[8]

As to the interpretation of the actual crime, as has been elaborated by the case law of ICTY and the ICTR, it should be noted that in principle every crime consists of the two constitutive elements, namely the prohibited act (or *actus reus*) which in turn has to be committed by a person with a culpable mind (or *mens rea* component).[9] So the *actus reu*s or objective element of genocide is defined in Art. II of the Genocide Convention and basically prohibits the acts of killing or causing mental or bodily harm to a specific group or putting a targeted group in such conditions that the physical destruction of the group is a logical consequence. The article also outlaws any attempts to prevent childbirth within the group or transfer of infants from one group to another.[10] It should be noted though that cultural (i.e. language, cultural symbols etc.) as well as political and economic genocide were

6 *Reservation to the Convention on the Prevention of Genocide (Advisory Opinion)* , ICJ Reports (1951), 16, *cf. Legality of the Threat or Use of Nuclear Weapons (Request by the United Nations General Assembly for an Advisory Opinion)*, ICJ Reports (1996), 226 at para. 70.

7 *Democratic Republic of the Congo v. Rwanda*, ICJ Reports (2006), 6 at 31-32; *cf*. M. C Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', *Law and Contemporary Problems* 59 (4) (1996), 63-74. For a more detailed discussion on peremptory norms *cf.* H.A. Strydom, *Ius Cogens:* Peremptory Norm or Totalitarian Instrument?, *SAYIL* 14 (1988/9), 42-58.

8 *Belgium v Spain, Barcelona Traction Light and Power House Co Ltd,* ICJ Reports (1970), 3 at para 32-34; *cf.* J. Bantekas and S. Nash, *International Criminal Law: second edition* (London: Cavendish Publishing Limited, 2003), 358-359.

9 P. Gaeta, "Genocide" in: W.A. Schabas and N. Bernaz, *Routledge Handbook of International Criminal Law* (New York: Routledge 2010), 110.

10 *Convention for the Prevention and Repression of the Crime of Genocide*, 78 *U.N.T.S* 277.

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

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

purposely excluded from the Genocide Convention.[11] In addition case law has demonstrated that the targeted group has to be objectively identifiable, although also of importance is the subjective interpretation of the defendant of what he thinks constitutes a 'group'.[12] Under certain circumstances it is even possible that a "group that falls within a limited geographical area such as the region of a country or even a municipality" could also be categorized as genocide.[13] For instance in the *Krstic* case in the territory of Bosnia Herzegovina it was decided that the military aged men of the Srebrenica enclave (although geographically limited) still could be considered to constitute a part of the 'group' of the overall Bosnian Muslim population.[14] Furthermore, Art. III of the Genocide Convention confirms that a person is also culpable when aiding, participating, conspiring, or inciting to commit genocide.[15]

Now as to the *mens rea* component or the subjective element of genocide; this features as its main component the *intent* to destroy, in whole or in part, a specifically targeted group. Thus the judicial focus is concentrated on the malicious mental state or rather the personal intent of the perpetrator. It is precisely this aggravated form of intent also known as genocidal or special intent (*dolus specialis*) that sets genocide apart from all other crimes.[16]

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11 A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003)p. 96-97.*Cf. Prosecutor v Krstic´*, Case No. IT-98-33, A. Ch., ICTY (19 April 2004) para 580.

12 *Prosecutor v Jelisic´*, Case No. IT-95-10, T. Ch. I, ICTY (14 December 1999) [69–72]; *Prosecutor v Bagilishema*, Case No. ICTR-95-1A, T. Ch. I, ICTR (7 June 2001) [65]; *Prosecutor v Semanza*, Case No. ICTR-97-20, T. Ch. III, ICTR (15 May2003) [317] quoted in E. van Sliedregt and D. Stoitchkova, "International Criminal Law" in: S. Joseph and A. McBeth, *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar, 2010), 259; *cf* P. Gaeta, "Genocide" in: W.A. Schabas and N. Bernaz, Routledge Handbook of International Criminal Law (New York: Routledge 2010), 110.

13 *Prosecutor v Krstic´*, Case No. IT-98-33, A. Ch., ICTY (19 April 2004) para 589 quoted in A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 104.

14 Ibid.

15 Convention for the Prevention and Repression of the Crime of Genocide, 78 *U.N.T.S.* 277.

Article III: The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide.

More details on the requirements for incitement are found in the ICTR *Ruggiu* case, ICTR-97-32-I, 2000, para. 14 quoted in M. N. Shaw, *International Law: Sixth edition* (New York: Cambridge University Press, 2008), 431.

16 *Prosecutor v Jelisic´*, Case No. IT-95-10, T. Ch. I, ICTY (14 December 1999) [82] quoted in P. Akhavan, 'Contributions of the International Criminal Tribunals of the Former Yugoslavia and Rwanda to the Development of Definitions of Crimes Against Humanity and Genocide', *ASIL Proc*. 94 (2000), 279 at 282. For more details on the requirements of the *mens rea* component, *cf.* A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003),103-106.

For a better general understanding of the full legal dimensions of the "Armenian Genocide Question", it is submitted that it is important to keep in mind that the act of genocide merely forms part of a more overall group of international crimes.

Other categories of international crimes are for example the more classical group of 'war crimes'; crimes which have been codified in Art. 8 of the ICC Statute (bluntly put war crimes cover the wide range of most standard war atrocities as pillaging, attacks on open towns, killing of the wounded, what targets not to bomb etc.).[17] 'Crime of aggression' is another international crime which in practice comes close to yet another international crime, which is the 'crime against peace'. Both these crimes involve the planning, preparation, initiation of waging a war in violation of treaties, custom etc. or a war of aggression and is mostly concerned with the leadership behind this crime.[18] Another group of international crimes include 'crimes against the law of nations' (although it is debatable whether this specific crime is still valid in contemporary international law) as well as more general crimes which bear a clear international dimension such as slavery, piracy, drugs trafficking etc.[19] Now some of these international crimes pertain to the ambit of international humanitarian law (e.g. war crimes) and other crimes to the arena of international criminal law (e.g. drugs trafficking). However, a clear demarcation of the two different fields (humanitarian vs. criminal) is not always easy to make, and in fact, academic discussion on the ambiguity of their interplay as well as on the precise sources of (some of these) international crimes still lingers on.[20]

17 ICC Statute on the official website of the Court available at: http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf

18 B. V. A. Roling, 'Crimes against Peace', *EPIL* 1 (1992), 871-87; D. Oehler, 'International Criminal Law', *EPIL* 1(1992), 881. M. N. Shaw, *International Law: Sixth edition* (New York: Cambridge University Press, 2008), 439.

It should be noted however that some differences between the mentioned two crimes do remain clear; e.g. apartheid is a crime against peace and not an act of aggression.

19 D. Schindler, 'Crimes Against the Law of Nations', *EPIL* 1 (1992), 875-877.

20 E.g. on the ambiguity of sources of international crimes *cf.* A. Zahar and G. Sluiter, *International Criminal Law: A Critical Introduction*, (Oxford : Oxford University Press, 2008), 79-105. On the ambiguity of the humanitarian law scheme as opposed to the international criminal law one compare the liability issue when it comes to the leadership of the crime of aggression *cf.* M. N. Shaw, *International Law: Sixth edition* (New York: Cambridge University Press, 2008), 439. On the problem of the interplay of these two schemes (humanitarian vs criminal) when it comes to the crime of genocide *cf.* P. Gaeta, "Genocide" in: W.A. Schabas and N. Bernaz, *Routledge Handbook of International Criminal Law* (New York: Routledge 2010), 116.

3. Crimes against Humanity and Genocide

Leaving the academic discussion on this topic aside for the moment (although some of these inconsistencies in the legal determination of individual vs. state responsibility committed under the humanitarian law scheme as opposed to the international criminal law scheme bear upon underlying processes of thought in the Armenian Genocide Question), it is chosen to confine the debate on the legal details to the strictly necessary arguments. As stated for this purpose, it is far more valuable to take note of the international crime of "*crimes against humanity*". The crime of 'crimes against humanity' is next to the crime of 'genocide' (art. 6) enumerated in the Statute of the International Criminal Court (ICC under art. 7).[21] The legal definition of 'crimes against humanity' comes in practice very close to genocide especially when it comes to the *objective* element (*actus reus*) of these crimes. E.g. both crimes can involve the specific killing of members of an ethnic or religious group (although the category of 'crimes against humanity' has a broader purview since this crime in addition to the mutual component of targeting out a specific group also include more common crimes such as for instance imprisonment and torture which in turn do not pertain to genocide). It has therefore been suggested that genocide actually forms a 'subclass of the category of crimes against humanity'.[22]

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As said, the *objective* element of both crimes overlap and can involve the targeting of a distinct group; the principal difference then is specifically found within the *subjective* perspective of the *mens rea* component or simply the *intent* of the perpetrator. In fact the intent behind a crime is directly linked to the degree of the culpability of the perpetrator. Now within the ambit of culpability one can demark a 'hierarchy of culpable mental states such as *culpa, dolus eventualis, dolus generalis* and *dolus specialis*'.[23] Thus simply put, 'genocide' as opposed to the more general acts of 'crimes against humanity' is found on this slowly escalating scale of initially *culpa* or simple guilt sliding to *dolus eventualis* or recklessness etc. to the far outpost, namely *dolus specialis* or special genocidal intent.

21 Available at the website of the ICC at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf

22 A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 106.

23 P. Akhavan, 'Contributions of the International Criminal Tribunals of the Former Yugoslavia and Rwanda to the Development of Definitions of Crimes Against Humanity and Genocide', *ASIL Proc*. 94 (2000), 279 at 282.

To demonstrate the practical implications of the difference of the two crimes, let us take an example of the case law of the ICTY on the act of 'persecution'. The crime of persecution may encompass a variety of "discriminatory acts, involving attacks on political, social, and economic rights"[24] and, as such, pertains *prima facie* to the group of 'crimes against humanity'.[25] Nevertheless, in the *Kupreskic* case it was argued by the Tribunal that: "while in the case of persecution the discriminatory intent can take multifarious forms and manifest itself in a plurality of actions including murder, in the case of genocide … [it could be argued that] from the viewpoint of *mens rea* genocide is an extreme and most inhuman form of persecution".[26] The Tribunal went on to explain: "to put it differently, when persecution escalates to the form of willful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide".[27]

Thus, were the outside materialization of some acts can pertain to the category of 'crimes against humanity' (normal persecution), this same act can also, under certain circumstances in the subjective arena, turn to an act of 'genocide' (e.g. most inhuman form of persecution). Hence, although both international crimes share the same objective element i.e. the legal definition of a prohibited act, clearly it is the aggravated or genocidal special intent (*dolus specialis*) that provides the demarcation criterion in order to distinguish 'genocide' from the more general concept of 'crime against humanity', which in turn might account for the fact that genocide has often been termed as the 'crime of crimes'.[28] From a legal perspective, and perhaps a bit tentatively, one could argue (when drawing on a criminal municipal law analogy) that 'genocide' forms a *lex specialis* of the overall category of 'crimes against humanity' i.c. *lex generalis*. [29]

We can conclude from above that the crime "genocide" as opposed to "crimes against humanity" has (besides a difference in moral connotation perhaps) a practical implication on how to label certain acts within civil war and/or conflict situations. Hence, it is important to keep the distinction of these two

24 *Prosecutor v. Kupresckic et al*., Judgment, Case No. IT-95-16-T (14 jan. 2000) para. 615; quoted in P. Akhavan, 'Contributions of the International Criminal Tribunals of the Former Yugoslavia and Rwanda to the Development of Definitions of Crimes Against Humanity and Genocide', *ASIL Proc*. 94 (2000), 279 at 281.

25 Ibid.

26 Ibid. at para. 636.

27 Ibid.

28 *Prosecutor v Kambanda*, Judgment and Sentence, Case No. ICTR -97-23-S (4 Sept. 1998), para 16. *Cf. Akayesy* (ICTR-96-4-T) 2 Sept. 1998, para 16.

29 *Cf*. the lex specialis principle in (Dutch) criminal law where a more precise defined crime or i.c. procedural specific requirement replaces the more general rule. *Cf.* G.J.M. Corstens, *Het Nederlandse Strafprocesrecht*, 5de druk (Arnhem: Kluwer, 2005), 614, 695.

different concepts in mind when further exploring the legal dimensions of the Armenian Genocide Question.

4. Framework behind Legal Responsibility

Given the wide range of legal literature that can be found on the debated subject matter of the Armenian Genocide Question, it is sometimes hard to assess which international law concepts underlie which contention. [30] One could argue that the more logic and comprehensive scheme on the workings of international law has been clouded (not only by tentative standpoints but in great part by the complexity of the subject matter involved). So, in order to clarify some of this smoke screen, this section sets out to make understandable to readers from all different disciplines which legal concepts are involved.

The first logical question to examine is whether any direct legal obligation or rather individual liability or state responsibility arises out of the events of 1915. In other words, can Turkey, or any of its citizens be hold responsible in a courtroom for any of the acts (whether they be termed 'crimes against humanity' or 'genocide') that happened in 1915 and onwards?

Before we start to answer the above question, it should be stressed that - in legal terms - the question whether Turkey can even be regarded as the rightful 'state successor' to the Ottoman Empire (and thus could be held accountable) is a completely different discussion of which any answer would be highly debatable.[31]

In this respect, the international law dilemma of individual liability versus state responsibility arises, as well as the different international legal forum for possible redress. An important difficulty is the locus for redress; that is to say, where - according to which standard of rules – should the act of genocide be evaluated? On an individual level at the ICC or at the state level

30 International Center for Transitional Justice (ICTJ), 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* (Rapport Feb 2003) made available at official website of the ICTJ at http://www.ictj.org/images/content/7/5/759.pdf, G. Aktan, "The Armenian Problem and International Law" and S. Çaycı ,"The Armenian Question From The Standpoint of International Law" in Ö.E., Lütem, *The Armenian Question: Basic Knowledge and Documentation* (Ankara: Terazi Publishing, 2009), 131-179. V.N. Dadrian, *The history of the Armenian genocide: ethnic conflict from the Balkans to Anatolia to the Caucasus*: *4th rev. ed*. (Providence: Berghahn Books, 2004), 377-420.

31 As the Republic of Turkey did not exist during 1915, this question presupposes that present day Turkey is successor of the Ottoman State, and bears responsibility for the wrongful acts of her predecessor, notwithstanding the provisions of relevant treaty law, as being leges specialis (Lausanne, Ankara, Kars...).

by the ICJ? It is submitted that the interpretation of a multi dimensional crime as genocide requires a better general understanding of the basic international law institutions and concepts underlying the system.

International law, as opposed to the national law system, has no true supranational or Supreme Court that can exercise absolute jurisdiction over its subjects, given the fact that the traditional subject of international law has been the entity of the state and *not* the individual actor.[32] States in international law are defined by their sovereignty and in strict theoretical sense; any abhorrence from their absolute or sovereign power (such as the acceptance for court jurisdiction or the willingness to sign a human rights treaty) ultimately resides on their consent. Obviously this traditional state of affairs does not conform to the necessities or logic of today's interconnected world, but it remains its starting point, especially for international law purposes. Individuals, just as international organizations, have only slowly come on to this international plane to gain international legal personality and especially individuals have been able to claim only very limited human rights arising out of their states consent to certain specific human rights treaties or sometimes out of international customary law.)

International law, as opposed to the national law system, has no true supranational or Supreme Court that can exercise absolute jurisdiction over its subjects, given the fact that the traditional subject of international law has been the entity of the state and not the individual actor.

This is of vital relevance to the present section, as it explains why there are two types, or rather two schemes, of law at stake, namely; the international humanitarian law scheme on the one hand and, the international criminal law dimension on the other. Simply put, the international humanitarian law scheme (for simplicity taking humanitarian law and human rights law together)[33] originated out of the various layers of different human rights covenants (such as the Geneva Conventions on the protection of war victims as well as the more traditional human rights covenants as the ICCPR, OHCHR, etc.)[34] that were signed through time by different individual states.

32 It was decided not to determine the ICJ as a supranational court in a true domestic law context seeing as it does not have the same powers of *absolute* jurisdiction as a national court. For purposes of convenience and doctrinal clarity no reference has been made to the rather complex working of the European Court of Human Rights. More on the workings of the ECHR can be found in H.J. Steiner and P. Alston, *International Human Rights In Context: Law, Politics, Morals: Texts and Materials, 2nd edition* (Oxford: Oxford University Press, 2000), 797-801.

33 As to the doctrinal distinction between the two and sometimes their reciprocal character *cf.* P.J. Partsch 'Human Rights and Humanitarian Law'*, EPIL* 1 (1992), 910-912.

34 For more on these covenants and their working *cf.* G.C. Jonathan, 'Human Rights Covenants', *EPIL* 1 (1992), 915-922.

Human rights traditionally entail the right to freedom or the right to practice religion etc., but gradually evolved into incorporating more social, economic and political rights.[35] So from an international law standpoint, international humanitarian law entails obligations upon states to respect these individual rights. As its basic rationale, one could say that as its main feature, this scheme possesses the vertical relation of the individual *right* versus the state *obligation* and by logical extension is intertwined with the concept of state responsibility. Thus in the ambit of humanitarian law traditionally a state is held responsible for breaking its international obligation arising out of a treaty and hence the responsibility issue is judged by the legal forum open to the state level and not to the individual, i.e. first and foremost in the *present context* the ICJ.[36]

Yet, international criminal law evolved from the opposite spectrum on the international plane.[37] It was first initiated to enable prevention of transnational crime, such as early piracy, slavery, drugs trafficking etc. This body of law was mostly concerned with interstate jurisdiction issues as extradition matters between sovereign states (territorial as opposed to universal jurisdiction etc.), but it was nevertheless always more centered on individual criminal liability. Thus, in contrast to humanitarian or human rights law, this classical criminal system features a more opposite vertical relation of individual *obligations* to respect general law versus a state 'injured' *right* and entails more the notion of individual criminal liability. Thus according to the traditional criminal system, a state initiates ways of prosecuting an individual firstly through extradition schemes with other states (and only recently by possible imposition of the International Criminal Court), hence a different path for legal redress is followed.

Due to the increasing scale of violence in warfare in the First and Second World War, more civilians were exposed to military combat operations and cruel treatment. Hence, this fostered an increasing necessity to expand international humanitarian law as well as criminal law. In turn, by now the two previously more segregated law schemes started to fringe and overlap with each other. For example, whereas the right not to be tortured has long

35 E.g. International Covenant on Civil and Political Rights of 1966 easily accessible at the official web-site of the Office of the United Nations High Commissioner of Human Rights available at http://www2.ohchr.org/english/law/ccpr.htm.

36 Obviously this is an oversimplification stated for purposes of doctrinal clarity. Humanitarian law also contains a framework of regional and other international treaties (such as the ICCPR) which posses their own judicial bodies for recourse. For more on the different regional and international systems of human right protection mechanisms *cf.* H.J. Steiner and P. Alston, *International Human Rights In Context: Law, Politics, Morals: Texts and Materials, 2nd edition* (Oxford: Oxford University Press, 2000), 592 -938.

37 D. Oehler, 'International Criminal Law', *EPIL* 1 (1992), 877-881.

been acknowledged as a basic human right (e.g. ICCPR), it now also exists as an international crime (or an individual obligation) due to the fact that torture is listed as a 'crime against humanity' in the statute of the ICC (although one could argue it was already part of customary law). [38]

Thus in principle state responsibility is judged upon by the forum on the state level; i.e. the ICJ which has developed a certain standard to define the crime of genocide on state level.[39] The ICJ, conversely, has no true competence to rule on *individual* criminal liability given the basic principle in criminal law of the presumption of innocence.[40] The former indicates that every individual in criminal proceedings has the right to a fair trial with the adequate procedural safeguards of being heard, being in the position to cross examine the witness etc. (something impossible at the ICJ where *only* states and *not* individuals have a standing). Thus when it comes to individual criminal liability in turn national courts and mostly ad hoc Tribunals (e.g. ICTY, ICTR etc.) have ruled on the procedural requirements of 'international crimes' among which we find the crime of genocide and crimes against humanity. These judicial bodies have *also* set a different legal standard for defining genocide in this individual context.

This accounts for the fact that differences in the substantive dimension of international crimes, and the act of genocide in particular, can be seen in various ways according to which scheme it is interpreted by. At the same time, this might account for the fact that it is easy to lose a clear legal perception when evaluating the complicated historic claims. Basically present day legal notions are transposed to the events of 1915, yet at the same time these legal notions …). have part of their underpinnings in the interplay of two rapidly evolving law schemes. Although the full implications of these legal details vastly outrange the scope of this article, it is essential to present just a brief impression of what this means for the act of genocide as such.

On the interstate level the ICJ has had the opportunity to rule upon the requirements of genocide to invoke state responsibility against another state. As stated in the previous section the prohibition on genocide entails an

38 H.J. Steiner and P. Alston, *International Human Rights In Context: Law, Politics, Morals: Texts and Materials, 2nd edition* (Oxford: Oxford University Press, 2000), 1070-1074.

39 It should be noted that this clear demarcation between the ICJ case law as opposed to the ICTY and ICTR when it comes to genocide cannot always be upheld since international judicial bodies display a tendency to draw upon each other case law if the circumstances allow so. However these complex rules of complementarities between judicial bodies vastly outrange the scope of this article, it has nevertheless also been put forward that in the ruling of the ICJ in the *Bosnia and Herzegovina v. Serbia* case the Court drew substantially on the case law of the ICTY *cf* A. Gattini, 'Evidentiary Issues in the ICJ's Genocide Judgment', *Journal of international criminal justice*, 5 (4) (2007), 889 *et seq*.

40 P. Gaeta, "Genocide" in W.A. Schabas and N. Bernaz, Routledge Handbook of International Criminal Law (New York: Routledge 2010), 115.

obligation on states to prevent and prosecute genocide even *vis-à-vis* non-affected states (the so-called *erga omnes* character of genocide).[41] As a substantive requirement of genocide we can distill from the ICJ ruling on the *Bosnia Genocide* case that acts of 'genocide' need to be " committed *by [state] organs*, or persons or groups *whose acts are attributable to it [i.e. state..]"*.[42] As elaborated on in legal literature "there arises the need to establish that persons or groups acting *on behalf of the government* have indeed committed the crime of genocide to make the state internationally responsible for its perpetration".[43] A logical consequence since the rationale behind putting a serious label of state responsibility should not automatically follow from acts of a couple of individuals who might, under certain circumstances, have acted out of their own initiative rather than state encouragement. The ICJ has, next to this first element of state involvement, ruled that "claims against a state involving charges of exceptional gravity, such as genocide, must be proved by evidence that is *fully conclusive*..."[44] One could argue from the *Bosnia Genocide* case that the ICJ seems to set a rather high bar of evidence for genocide to actually amount to full state responsibility. E.g. the ICJ ruled that the presented evidence in the *Bosnia Genocide* case was not overall conclusive despite the many accusations of deportations, expulsions and killings of members of a group.[45]

Now as touched upon in the previous section; on a criminal law level the act of genocide principally separates itself in the arena of international crimes by its malicious intent. As such, under the *criminal law scheme*, genocide on the individual criminal responsibility level requires as its absolute

41 *Belgium v Spain, Barcelona Traction Light and Power House Co Ltd* (1970) ICJ Reports 3, p. 32, para 33-34; see also J. Bantekas and S. Nash, *International Criminal Law: second edition* (London: Cavendish Publishing Limited, 2003), 358.

42 *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, ICJ Reports (2007), para 181(emphasis added).

43 P. Gaeta, "Genocide" in: W.A. Schabas and N. Bernaz, *Routledge Handbook of International Criminal Law* (New York: Routledge 2010), 115(emphasis added).

44 M. N. Shaw, *International Law: Sixth edition* (New York: Cambridge University Press, 2008), 285 in n.116 quoting *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, ICJ Reports (2007) (emphasis added). According to Gattini the ICJ approach to examine genocide is reasonably similar to that of the ICTY. *Cf* A. Gattini, 'Evidentiary Issues in the ICJ's Genocide Judgment', *Journal of international criminal justice*, 5 (4) (2007), 889 *et seq*.

45 M. N. Shaw, *International Law: Sixth edition* (New York: Cambridge University Press, 2008), 285 in n.116 quoting *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, ICJ Reports (2007). Although in this particular case the ICJ did rule that the acts committed within the specifically defined area of Srebrenica had shown the existence of the necessary genocidal intent and therefore concluded that Serbia as a state had failed with its obligation to punish the perpetrators for genocide (thus *strictu sensu* the Court did not rule that the Federal Republic of Yugoslavia had actually committed genocide but rather that it had failed its obligation to punish such act).

prerequisite and principal feature the *dolus specialis* or special malicious state of mind of the perpetrator. The focus of judicial review is not so much centered on the materialization or outside elements of the act. Under the scheme of individual liability this can, under certain special circumstances, result in a situation in which "genocide as an act of individual criminality does *not* expressly require the existence of a *state plan or policy* of genocide". [46] Again, as explained in the literature, on the state level on the other hand "genocide always requires the existence of a genocidal policy and, hence, a pattern of widespread and systematic violence against a given group".[47] Conversely to pinpoint the differences, where the subjective element of special genocidal intent is detrimental in the legal evaluation of the act of genocide on an individual criminal level; this in turn is not always required on the state level. As described in the literature on the determination of the legal requirements of state responsibility: "there would be no need to demonstrate that the state as such - or one or more of its officials – harbored a *genocidal intent* in the *criminal sense*".[48] As seen from above it is clear that different legal standards apply to individual as opposed to state responsibility on the act of genocide.

As described in the literature on the determination of the legal requirements of state responsibility: "there would be no need to demonstrate that the state as such - or one or more of its officials – harbored a genocidal intent in the criminal sense".

This individual versus state responsibility interpretation of genocide becomes even more complicated when we realize that, at the same time, other international crimes (and especially 'crimes against humanity') can also overlap. When we return to the previously discussed act of 'persecution', this act of crime starts initially as an act of 'crimes against humanity'(discriminatory persecution), but can nevertheless in its most extreme form take on 'genocide' (genocide on individual as well as possible evidence for state level accountability). This same problem can be seen with the relation of genocide to yet another act of 'crimes against humanity' which is 'ethnic cleansing'. Thus as is explained in the literature "forced migration (or 'ethnic cleansing') as such does not constitute genocide but may account to a pattern of conduct demonstrating genocidal intent".[49] Again genocidal

46 *Akayesy* (ICTR-96-4-T) 2 Sept. 1998, para 521(emphasis added). *Cf* P. Gaeta, "Genocide" in W.A. Schabas and N. Bernaz, Routledge Handbook of International Criminal Law (New York: Routledge 2010), 116.

47 Ibid.

48 Ibid. (emphasis added).

49 M. N. Shaw, *International Law: Sixth edition* (New York: Cambridge University Press, 2008), 433. On the difficulty of the determination of ethnic cleansing as opposed to genocide. *Cf* A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), 99-100.

intent forms the absolute component in the legal determination of the act of genocide.

Thus when aiming to examine the claim of the Armenian Genocide Question, this presented framework is relevant, since it identifies the possible scope for classifying the 1915 events as 'genocide', as well as explains the accompanying difficulties that arise in the legal interpretation of the act of 'genocide'.

5. Legal Responsibility with regard to the 1915 Events

Within this broad framework that outlines the difficulties arising from the applicability of the term 'genocide' *vis-à-vis* the more general concept of 'crimes against humanity', and - related – the increasingly merging of the international humanitarian law scheme and the international criminal law scheme, questions regarding legal responsibility now arise. More specifically, returning to the subject matter at hand; can any direct responsibility on the individual criminal level arise out of the 1915 events?

As follows from the argumentation above -when it comes to individual responsibility for perpetrating international crimes – (apart from the national courts) the ICC is the key legal organ in the international arena. According to its statute, all state parties to the ICC have an obligation to actively prosecute international crimes.[50] This means that one state can request another state party or the court to prosecute one of its nationals. Again, it is still the state and not the individual that remains the ultimate actor to decide to do so.

States that are not a party to the ICC statute though can still be held liable.[51] According to the rules of the statute, other state parties, the Security Council of the UN, or the Prosecutor of the court can *proprio motu* decide to investigate an aforementioned situation.[52] As a precondition however, the rule of complementarity applies, meaning that the domestic court always has precedence over the ICC to decide whether or not to exercise jurisdiction. From a legal standpoint, there is a possibility that one state party might decide to prosecute the nationals of another non-state party. Yet it can only do so *only if* the prosecuting state has, according to its own domestic law, adopted

50 E. van Sliedregt and D. Stoitchkova, "International Criminal Law" in: S. Joseph and A. McBeth, *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar, 2010), 258.

51 Ibid. at 256-257.

52 Ibid. Art. 14,15 and 16 ICC Statute, 2187 *U.N.T.S.* 90 also made available on the official website of the UN at http://untreaty.un.org/cod/icc/statute/romefra.htm.

the specific crime including a universal jurisdiction clause.[53] Despite this matter, in the specific case of Turkey, no such claim can arise in front of the ICC. The Court is bound by its rules on the temporal jurisdiction, i.e. the Court is only competent according to its own statute to take note of possible crimes against humanity or genocide committed after 1 July 2002.[54]

In addition, as for the purely theoretical possibility of another state trying to prosecute a Turkish national in front of its own domestic court, this would seem virtually impossible for the two following reasons. First of all, today's record of state parties to the ICC that have already incorporated the necessary domestic law, are still in 'slow progress' and furthermore, the situation of non-state parties is even 'bleaker'.[55] Secondly, following the *nullum crimen sine lege* principle, necessary domestic law requirements back in 1915 form a prerequisite for such a domestically based claim.[56] Hence, given the absence of any of such requirements, prosecuting a Turkish national for the 1915 events, seems to be an impossible action.

This leaves us with the possibility of a claim of genocide arising on the state level. In theory, another state could try to invoke Turkey before the ICJ to claim genocide. As stated above, genocide has acquired the status of *jus cogens* and thus any state would have a legal interest (*erga omnes* character) to commence proceedings before the ICJ.[57] That being said though, from an academic perspective, one could seriously debate whether as a procedural requirement any state would be able to surpass the test of the doctrine of 'extinctive prescription'(or statutory limitations).[58]

53 Bluntly put universal jurisdiction denotes that a state adopts a law policy in which it sets out not only to exercise its jurisdiction based on its *own* territory or *own* nationals but instead claiming jurisdiction of certain offences at an international or universal level. See E. van Sliedregt and D. Stoitchkova, "International Criminal Law" in: S. Joseph and A. McBeth, *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar, 2010), 256-257. See also P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th rev. ed. (London: Routledge 1997), 112-117

54 Art. 11 ICC Statute, 2187 *UNTS* 90 also made available on the official website of the UN at http://untreaty.un.org/cod/icc/statute/romefra.htm

55 E. van Sliedregt and D. Stoitchkova, "International Criminal Law" in: S. Joseph and A. McBeth, *Research Handbook on International Human Rights Law* (Cheltenham: Edward Elgar, 2010), 257.

56 Nullum crimen sine lege-principle could be regarded as the international variant of the domestic law principle or rather the universal law principle of legality. One cannot be tried for acts that are unknown or insufficiently made cognizable through codification of law. For more on the notion:V. Ghareh Baghi and T.R. Mruthi, 'Nullum Crimen sine Lege in the International Criminal Court', *Acta Universitatis Danubius: Juridica,* 8 (3) (2010), 65 *et seq*.

57 *Democratic Republic of the Congo v. Rwanda*, ICJ Reports, 2006, pp. 6, 31-32, M. C Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', *Law and Contemporary Problems* 59 (4) (1996), 63-74.

58 *Certain Phosphate Lands in Nauru* case (1992) ICJ Rep. 240, p. 253-254. The ICJ stated: delay on the part of a claimant State may render an application inadmissible. It notes, however, that international law does not lay down any specific time-limit in that regard. For more on the doctrine of extinctive prescription see R. Higgins, 'Time and the Law: International Perspectives on an Old Problem' *ICLQ* 46 (1997), 501 at 514. B. Cheng, *General Principles of Law as applied by International Courts and Tribunals* (London : Stevens, 1953), 386.

But this rather academic discussion subtracts us from the real issue at stake, namely the legal question of whether the constituent treaty of genocide (popularly put the 'mother' treaty of genocide) can be invoked to judge events that happened prior to its very existence. In other words, can the 1948 Genocide Convention even be invoked for the events that happened three decennia ago in 1915?

As has been explained by the often quoted or cited rapport of the International Center for Transitional Justice (the ICTJ) titled "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"(hereinafter the ICTJ rapport),[59] in order to determine or interpret the possibility of the retroactive working of the Genocide Convention, it is necessary to first examine the constituent treaty on the working of treaty law. The famous international law document on the workings of treaty law (i.e. Vienna Convention on the Law of Treaties, hereinafter VCLT)[60] states in Art. 28 that "unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party" by any retroactive working.[61] Consequently the ICTJ rapport examines the drafting history of the Genocide Convention and concludes that "neither the text nor the *traveaux preparetoires* of the Convention manifest an intention to apply its provisions retroactively" and so no legal obligations can arise under the direct workings of the Genocide Convention. [62] This conclusion reached by the ICTJ seems very sound from an international law position and as such should be accepted. Thus we have persuasively been able to conclude that no direct legal claim of genocide can be asserted against Turkey for the 1915 events, neither on the level of state responsibility nor on the individual level.

5.1. The Applicability of the Term Genocide to the Events of 1915

After concluding, however, that is impossible to base a direct legal claim on the Genocide Convention, the ICTJ rapport nevertheless takes a second step and decides to pose an academic question whether it could be possible to use the *term* or notion of genocide -as it had originated from the 1948 Convention

59 International Center for Transitional Justice (ICTJ), 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* (Rapport Feb 2003) made available at official website of the ICTJ at http://www.ictj.org/images/content/7/5/759.pdf (hereinafter 'ICTJ Rapport (2003)')

60 Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969) made available at www.ilsa.org/jessup/jessup06/basicmats/**vclt**.doc

61 ICTJ rapport (2003), 5-6

62 Ibid. at 6-7.

(and thus separate from the legal claim) and whether this term or concept could now s be applied to evaluate the events as they happened in 1915 and onwards. The ICTJ rapport then subsequently concludes that the terminology of genocide can in fact be examined against the 1915 events arguing that such intent of retroactive working could be extracted from a textual interpretation of the Genocide Convention.[63] In fact the ICTJ rapport then goes on in great length to apply some of the substantive elements or rather legal requirements of the crime of genocide to the events of 1915. Thus the rapport starts to dissect the different elements of genocide (the specific group criteria, the destruction of the actual group - in whole or in part - description, the *mens rea* component of the special genocidal intent etc.).[64] At this point the ICTJ rapport undertakes the rather arduous task to try to apply all the complex technical terms of 'genocide' and subsequently starts to weigh these legal requirements against the disperse archives of the late Ottoman Empire and foreign eye witness accounts. Finally the ICTJ concludes that all the substantive requirements of 'genocide' (as a *term*) were met and consequently decides that 'genocide' (as a legal definition) had in effect been committed by the Ottoman Empire.[65]

It is submitted in this article that to follow instantly this second line of reasoning in the ICTJ rapport (i.e. applicability of the 'term' genocide) is to divert the eyes from some essential international law concepts that underlay the real issue at hand. In fact, there are three very important legal arguments or concepts overlooked that are crucial in properly evaluating this legal debate.

First an argument will be presented that outlines the doctrinal inconsistencies displayed in the actual application of the 'term' of genocide. This very argument at the same time compares the related international law difficulties in applying modern-day interpretations to past situations. Then a second legal argument will be provided that deals with the inconsistent treaty interpretation of the retroactivity clause. Finally the legal implications of the sometimes forgotten appointed Allied War Commission will be discussed.

5.2. Inconsistent Application of the Legal Terminology of Genocide

As has been amply demonstrated in the previous sections, the term or rather the notion of 'genocide' (as well as 'crimes against humanity') have multidimensional implications transcending various fields of law. Again, as

63 Ibid at 10-11.

64 Ibid. at 12-17.

65 Ibid. at 17.

elaborated above, within the ambit of direct state responsibility as interpreted through the case law of the ICJ (thus genocide's interpretation on interstate level) the Court seems to have set a rather high standard; especially as to the requirement of the need to be able to attribute committed acts to actual state organs, agents or to other groups / entities that have acted *on behalf* of that state. In addition there exists a strict requirement of providing 'fully conclusive evidence'. In the earlier discussed Bosnia conflict, only the zone of Srebrenica met this test.[66] On the other hand, from the international criminal law dimension, the notion of genocide has its own specific liability standard, which, at the same time, can overlap with crimes against humanity. As stated before on the individual level, the *mens rea* or special intent component forms the key point of judicial inquiry. Thus the legal difficulty of accurately determining special genocidal intent -as opposed to the more general category of crimes against humanity- arises. As demonstrated with the act of persecution, an act that starts out as a 'crime against humanity' yet in its 'most inhuman form' can turn into an act of genocide.[67] The same goes with ethnic cleansing or "forced migration". Again, "forced migration (or 'ethnic cleansing') as such, does not constitute genocide but may account to a pattern of conduct demonstrating genocidal intent".[68] Thus being aware of this legal framework we now take a closer look at the ICTJ rapport.

Apart from the confusing 'genocide' vs. 'crimes against humanity' issue, the ICTJ rapport also seems to have been succumbed to the interpretation of the various newspapers, foreign witness accounts, disperse archives etc. and thus seems to have overlooked and even lost the entire complex matter of the notion of genocide itself.

Returning to the rapport, it immediately surfaces from this rapport that the difficult interplay of 'genocide' next to the closely defined international crime of 'crimes against humanity' has been overlooked, or at least it has not been taken into account when evaluating the 1915 events since no mentioning to this crime has been made throughout the entire document. Apart from the confusing 'genocide' vs. 'crimes against humanity' issue, the ICTJ rapport also seems to have been succumbed to the interpretation of the various

66 M. N. Shaw, *International Law: Sixth edition* (New York: Cambridge University Press, 2008), 285 in n.116 quoting *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)*, ICJ Reports (2007).

67 *Prosecutor v. Kupresckic et al*., Judgment, Case No. IT-95-16-T (14 jan. 2000) para. 636; quoted in P. Akhavan, 'Contributions of the International Criminal Tribunals of the Former Yugoslavia and Rwanda to the Development of Definitions of Crimes Against Humanity and Genocide', *ASIL Proc*. 94 (2000), 279 at 281.

68 M. N. Shaw, *International Law: Sixth edition* (New York: Cambridge University Press, 2008), 433.

newspapers, foreign witness accounts, disperse archives etc. and thus seems to have overlooked and even lost the entire complex matter of the notion of genocide itself.

The rapport states that: "The Turkish government maintains that no direct evidence has been presented that any Ottoman official sought … [here the context of a policy and/or the accountability of the state is questioned]… The rapport then follows: "In light of the frequent references to the participation of Ottoman officials in the Events, we wish to highlight that a finding of genocide does not as a legal matter depend on the participation of state actors. On the contrary, the Genocide Convention confirms that perpetrators of genocide will be punished whether they are "constitutionally responsible rulers, public officials or private individuals".[69]

Thus at first sight the ICTJ seems to decide that the legal definition of genocide does not stem from the case law of the ICJ (since state responsibility would require a state policy) but instead a stricter interpretation of the 1948 Genocide Convention is followed. Now then since the rapport would appear *not* to involve the doctrine of *state responsibility*, instead we have to assume that the standard of individual criminal responsibility is applied and thus individual responsibility will be investigated. Yet in their final conclusion we read the following:

"The crucial issue of genocidal intent is contested, and this legal memorandum is not intended to definitely resolve particular factual disputes. Nonetheless, we believe that the most reasonable conclusion to draw from the various accounts [is]… [that] at least some of the perpetrators of the Events knew that the consequence of their actions [were to destroy] … and, therefore, possessed the requisite genocidal intent".[70] It then draws the conclusion that genocide has in fact been committed by the entire late Ottoman Empire.

69 ICTJ rapport, 14.

70 D. Conclusion

"The crucial issue of genocidal intent is contested, and this legal memorandum is not intended to definitively resolve particular factual disputes. Nonetheless, we believe that the most reasonable conclusion to draw from the various accounts referred to above of the Events is that, notwithstanding the efforts of large numbers of "righteous Turks" who intervened on behalf of the Armenians, at least some of the perpetrators of the Events knew that the consequence of their actions would be the destruction, in whole or in part, of the Armenians of eastern Anatolia, as such, or acted purposively towards this goal, and, therefore, possessed the requisite genocidal intent. Because the other three elements identified above have been definitively established, the Events, viewed collectively, can thus be said to include all of the elements of the crime of genocide as defined in the Convention, and legal scholars as well as historians, politicians, journalists and other people would be justified in continuing to so describe them". Made available at official website of the ICTJ at http://www.ictj.org/images/content/7/5/759.pdf

Evidently, the ICTJ rapport got caught in the contention of the historical sources and so side stepped the complex underpinnings of the doctrine on 'genocide'. First it seems to have overlooked the difficult interplay of crimes against humanity as opposed to the more aggravated crime of genocide since nowhere the distinctive acts of crucial importance such as ethnic cleansing are discussed. E.g. when or at what point during the ICTJ rapport does the act of forced migration/ethnic cleansing (a prima facie crime against humanity) turn into an act of genocide instead? Secondly the ICTJ conclusion seems erroneous since it fails to apply a consistent legal standard on the doctrine of genocide itself. The ICTJ first denied that involvement of public officials was material in the issue at stake thus no standard on state responsibility would be applied, instead the ICTJ chose to confine its findings *strictu sensu* to the Convention's definition of 'private individuals'. Further on, however, it argued that 'some of the perpetrators' were guilty, hence, the jurisprudential lines of the ICTY and ICTR on "genocidal intent" were present, which in turn would trigger some kind of *automatic* responsibility on the state level.

The true point here though is not to criticize the ICTJ rapport which was confronted with the various contended historical and emotional sources but to display the highly technical and evolved concept of genocide. To demonstrate that such concept does not stand alone but forms part of other international crimes especially 'crimes against humanity'; crimes which have been interpreted and refined to fit to the complex nature of zones of armed conflict. Indeed one could effectively argue that, throughout the case law of the ICTY and the ICTR it follows that genocide, as a concept, is a highly complicated notion that has displayed its function to capture the malicious culpable mind at the individual criminal level (with its constituent element of *dolus specialis* or special intent). Yet, at the same time, 'genocide' has been able to denote state responsibility when on an escalating scale of persecution (which is normally a 'crime against humanity') or ethnic cleansing may imply evidence of a state policy of genocidal intent. As such, both international crimes complement each other but each serves its purpose. In this way criminal and humanitarian law has equipped itself against the difficult and fragmented situations of real life conflict zones: situations which are extremely hard to comprehensibly evaluate with their often intermittent and geographically disperse acts of violence. Today with usually television accounts of various areas a situation of ethnic violence or militias is hard to properly put into context (compare Bosnia Herzegovina) let alone historical events during the first World War in which multi ethnical violence on a world scale was taking place.

The principal point here is that this modern genocide concept is crafted by

time and has an evolutionary character. International law by definition evolves to cope with the changing necessities of its surroundings. As such, an accommodating legal system keeps on to serve its purpose. This being said, the legal question remains as to whether it should be possible to take the modern concept of genocide and apply it to another situation (in this case, the volatile imperial and nationalistic events of World War One I).

6. International Law & Retroactivity

Now to return to the core of this debate; is it possible, from a pure legal standpoint, to apply a legal concept that did not exist at the time to an old situation?

Initially, if we look at the workings of the system on treaty law and the notion of genocide, this seems rather debatable. As has been affirmed by the ICJ on several occasions, genocide has attained the category of a rule of *jus cogens* or peremptory norm of international law. Thus the prohibition on genocide represents a rule which is so fundamental to the international community that no state can derogate from this rule.[71] The ever evolving international law system has in fact found a good way to cope with the situation when a 'new' rule of jus *cogens* enters the international stage so to speak. As is stated in the much-cited VCLT in art 64 that: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates". The VCLT drafting history clearly shows that "the new rule of *jus cogens* is not to have retroactive effects on the validity of the treaty".[72] Now why would this rule stipulate that the treaty is not valid anymore for the future, while at the same time the treaty is still valid for past events? Clearly, if a treaty becomes void from the very beginning, the stability of all previous arrangements will come to a halt, and legal certainty and reliability will be harmed. Before we explore the legal rationale behind the rule we need to be careful to keep an adequate overview of its entire legal context.

A very well established principle of international law is called the intertemporal law doctrine. The concept was first introduced in the *Island of Palmas* case[73] when the question to a title was raised, and, when at the core

71 *Democratic Republic of the Congo v. Rwanda*, ICJ Reports, 2006, pp. 6, 31-32. M. C Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', *Law and Contemporary Problems* 59 (4) (1996): 63-74.

72 'Report of the International Law Commission on the Work of the Second Part of its Seventeenth Session, Monaco, January 3-28, 1966'; (1967) 61 *AJIL* 248 at p. 412.

73 *Island of Palmas* case; (1928) 22 *AJIL* 867 at p. 883. Judge Huber stated; "..a juridical fact must be appreciated in light of the law contemporary with it, and not with the law in force at the time when a dispute with regard to it arises or falls to be settled."

of the controversy lay a concept that had changed through time and consequently had acquired two different legal interpretations. Today it can be regarded as "an established principle of international law that [..] the situation in question must be appraised [..] in light of the rules of international law as they existed at the time, and not as they exist today". [74]

This intertemporal concept or rule stands on itself because the entire international law system has its maxim in stability and above all predictability. The rationale behind a rule is that it has a precise definition so that the legal certainty is guaranteed.

Far from a theoretical discussion within the ambit of international law, this has immense implications. What if the intertemporal law component did not exist or come back to our earlier example? What if a treaty would fully work retroactively and apply the *new* norm of *jus cogens* to an old situation?

For instance today the prohibition on the use of force or more importantly the threat of the use of force in international relations has become a rule of jus *cogens,* before the threat of the use of force was not considered to be illegal *per se*.[75] History has exhibited too many instances where the use or threat of the use of force of a more powerful state on a smaller state could be argued to have in fact been exerted to sign for instance a peace treaty. What would happen if all treaties that were signed in international law under the threat or the actual use of force in the past would become retroactively void because of modern-day interpretation on the use of force principle? Just a random pick from numerous examples but the Washington treaty of 1898 which rendered the judicial award on the contested borders between Venezuela and back then British Guyana would be invalidated, the 1903 treaty on the rent of Guantanamo bay would be invalidated, the international status of Tibet according to the 1951 Seventeen Point Agreement would be re-questioned, and so on and so forth. This situation in legal terms would open Pandora's box. The legal rationale seems overwhelming: a legal concept is constructed for its time and place and given its surrounding it either evolves or becomes obsolete, but it cannot be taken out of its proper context (rule on slavery, the old laws of war on e.g. chemical weapons etc.). It is thus submitted that the highly evolved concept of genocide, that was first introduced after the Second World War and that gradually evolved along two law schemes and that more recently made a great reentrance with the

74 G. Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-54: General Principles and Sources of Law', *BYIL* 30 (1953) 1 at 5.

75 E.g. article 52 of the Vienna Convention on the Law of Treaties:

"A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." *Cf* art. 2 (4) UN Charter made available at official website of the UN http://www.un.org/en/documents/charter/index.shtml.

expansion of criminal law, cannot be said to be fit to judge historical events from the past. It just simply lacks the judicial context that is detrimental for any law. It is no coincidence that law is always defined by the social contracts and norms of a certain place at a certain time and no law or moral concept stands forever.

Now apart from this presented argument from a broader perspective there still remain two very cogent legal arguments that make the whole exercise of the applicability of the term genocide fruitless.

The highly evolved concept of genocide, that was first introduced after the Second World War and that gradually evolved along two law schemes and that more recently made a great reentrance with the expansion of criminal law, cannot be said to be fit to judge historical events from the past.

7. Consistent Treaty Law Interpretation

Again taking the ICTJ rapport as a starting point and taking a closer look at the second line of reasoning, the ICTJ, as stated earlier, concludes that the terminology of genocide can in fact be examined; arguing that, such intent by its drafters could be extracted from a textual interpretation of the Genocide Convention. This judicial applicability of the *term* genocide is in the words of the ICTJ rapport possible because "it is clear from the text of the Convention and the related documents and the *traveaux preparetoires*, that the term genocide may be applied to events that pre-dated the adoption of the Convention". The ICTJ rapport goes on to explain that the conclusion on the applicability of the term is warranted because several references in the *traveaux preparetoires* clearly cite genocide examples from history and so on.[76] The legal question here, nevertheless, remains; whether it is possible to apply the term 'genocide' as codified in a Convention that itself has been found to be of non retroactive working.

The rules on treaty interpretation seem to have been blurred and incorrectly applied in the legal analysis of the ICTJ rapport. The VCLT clearly illustrates in art. 31 (dealing with the subject matter of the rules on treaty interpretation), that a treaty has firstly to be interpreted in good faith in accordance with the object and purpose of the original treaty.[77] This primary form of interpretation uses next to the object of the treaty any *subsequent agreements or treaties or practice* of the state parties to interpret the meaning given to the original treaty (ex art. 31 (3) (a) (b)). Under the heading of the next article of the

76 ICTJ rapport, 10.

77 Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/CONF. 39/27 (1969) made available at www.ilsa.org/jessup/jessup06/basicmats/vclt.doc

VCLT (art. 32), termed *supplementary* interpretation, it is clearly stated that if the methods of interpretation of the object and purpose of the treaty *and* thus its subsequent interpretation through agreement etc. are unclear, recourse *then* can be had to the preparatory work (i.e. *traveaux preparetoires*).[78]

It is an elementary rule of international law confirmed by the case law of the ICJ to first examine subsequent agreements to discover what interpretations need to be given to a treaty[79] before it is warranted to take account of the preparatory work.[80] In the case of the Genocide Convention, the situation of possibly wanting to apply the term of genocide to past events cannot be said to have been overlooked. A fortiori a special subsequent Convention has been drawn up to deal with this subject matter. Thus, the "Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity" has as its main aim or intention the opportunity to provide the parties with the legal option to decide to apply these concepts to situations *before* the Conventions 'own creation in 1948. As up to today, Turkey – together with quite a substantial number of other countries – has (intentionally) not become a part of this later Convention. [81] It would seem that the conclusion of the ICTJ rapport to warrant any use of the term genocide is based primarily on comments made during the stage of the preparatory work of the Convention, and not the subsequent interpretation through agreement or practice. Thus the ICTJ conclusion seems rather precipitated, as simple rules of priority in treaty interpretation seem to have been forgotten.[82]

8. Allied War Commission

Apart from this strictly legal point there seems to be a final, even more cogent reason why to question the line of argument displayed by the ICTJ rapport. According to the well established doctrine of *res judicata,* it would be

78 Ibid.

79 *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway*) ICJ Reports (1993), para 28

80 E.g. *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion*) ICJ Reports (1950), 8; *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, ICJ Reports (1991), para 48.

81 State Parties to the Convention made readily available at the official website of the UN (last visited 21 Feb 2011) http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en

82 Finally, it should be pointed out that the same flaw has occurred when the ICTJ interpreted the retroactivity clause of the VCLT itself. As Art. 28 of the VCLT clearly states: "unless a different intention appears from the treaty *or is otherwise established*, its provisions..etc." Clearly the element of "or is otherwise established" qualifies to parties subsequent agreements on this subject matter.

untenable to uphold any claim of genocide.[83] *Res judicata* or the doctrine of finality impairs the possibility to set aside a previous judgment (leaving certain theoretical exceptions aside such as excess of power, fraud etc.).[84] The rationale behind the doctrine of *res judicata* is clear; it is necessary to maintain the stability in the international law system. If a state does not need to respect a judicial decision but can reopen the decision of the judges or if a state at its own will can contend any of the politically sensitive issues lying at the core of the judgment then few things of contention will ever get a closure in the international (political) arena (a practice that was indeed rather common among states in the international/European arena of 17th, 18th and 19th century). Thus a competent judicial organ specifically erected after the 1915 events had taken place i.e. appointed Allied War Commission in fact took full use of the opportunity to pronounce on the war affairs of the Allied Powers. As the records clearly show this Allied War Commission had taken ample cognizance of the Armenian plight (as to those of the Pontic Greeks, the Serbs etc.) and after all arguments were discussed the Commission unequivocally ruled that these atrocities committed were "crime against humanity" (and not genocide, seeing as this concept not existed at the time).[85] Hence a group of judges who were all but prejudice toward the beaten Allied Powers ruled, after hearing all the different plights, that this conduct had to be condemned as "crimes against humanity", and even here some judges reserved a strong doubt as to whether this was at the time (in 1915) already established law or rather a moral concept.[86] Thus to put now the label of genocide on the 1915 events would be legally incorrect and would be side stepping the decision of 'crimes against humanity' that was rendered by a specially erected judicial organ of the victor states.

9. Conclusion

As amply demonstrated by the three arguments presented, any applicability of the term of genocide cannot be upheld: it would be overlooking the

83 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal* (Advisory Opinion of July 13, 1954), [1954] ICJ Rep. 47 at 53; *cf* Article 54 Hague Convention for Pacific Settlement of International Disputes, Article 81 of the 1907 Convention, and Article 59 ICJ Statute.

84 Exceptions to *res judicata* are first documented in Article 35 of "Model Rules on Arbitral Procedure" *YB ILC* (1958) Vol. II, Report of the Commission to the General Assembly, Doc. A/3859, at p. 86 reprinted in (1959) 53 *AJIL* 230 at 247.

85 "Commission On the Responsibility of the Authors of the War and on Enforcement of Penalties" (1919) final judgment reprinted in 14 AJIL (1920) 95. B. B. Ferrencz, *Crimes Against Humanity*, 1 EPIL (1992), 870. A. Cassese, *International Criminal Law* (Oxford: Oxford University Press 2003), 327-328.

86 The American Judges stated: "A judicial body only deals with existing law and only administers existing law, leaving to another forum the infractions of moral law .." "Commission On the Responsibility of the Authors of the War and on Enforcement of Penalties" (1919) judgment reprinted in 14 *AJIL* (1920) 95 at 144.

technical evolutionary character of the notion of genocide, a wrong interpretation of the retroactivity clause and the VCLT, and finally side stepping the doctrine of *res judicata*. Moreover, the evolutionary character of the concept itself would not be served by misguiding it for historic events; no matter how morally righteous. Again from a legal standpoint it is imprecise. This is not making believe that the Armenian deaths as a result of the events of 1915 are absolved. Far from it, the Ottoman Empire received the full legal responsibility for the acts committed, but within the scope of the legal instruments of that day. Thus we can conclude that to term the events of 1915 as genocide is to detach genocide from its legal definition and to use it for political or moral purposes. Whether it is sound to keep hammering on a legal term based on non-legal considerations is doubtful. Not only would this not help the dire - economically torn country of Armenia to restore its economic ties with its neighbors, it also adds to a wrong conceptualization of the legal system and eventually could lead to a devaluation of the norm itself.

To term the events of 1915 as genocide is to detach genocide from its legal definition and to use it for political or moral purposes. Whether it is sound to keep hammering on a legal term based on non-legal considerations is doubtful. Not only would this not help the dire - economically torn country of Armenia to restore its economic ties with its neighbors, it also adds to a wrong conceptualization of the legal system and eventually could lead to a devaluation of the norm itself.

The legal scholar Pakhavan eloquently captured the problem at hand when he wrote;

"Another dimension that cannot be overlooked is the legacy of the Holocaust upon which the crime of genocide rests. There is sometimes a temptation to adopt expansive interpretations as a means of expressing outrage or vindicating the suffering of victims through categorizing a particular situation as - to quote the words of the ICTR Trial Chamber in the Kambanda case – "the crime of crimes". Conversely, there may be a temptation to conceive of this crime as unique, as belonging only to the realm of grand conspiracy among leaders as in the Nazi "Final Solution", and not a crime that also pertains to the myriad willing executioners at lower levels of power".[87]

87 P. Akhavan, 'Contributions of the International Criminal Tribunals of the Former Yugoslavia and Rwanda to the Development of Definitions of Crimes Against Humanity and Genocide', *ASIL Proc*. 94 (2000), 279 at 282. It should be noted though that the author's opinion was that the interpretation of genocide as displayed in the case law of the ICTY and the ICTR was normatively expanding, and that the notion of genocide and would thus, in the authors' opinion, undo its original malicious nature of a truly vile category of war atrocities.

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