

GENOCIDE AS A PROBLEM OF NATIONAL AND
INTERNATIONAL LAW: THE WORLD WAR I
ARMENIAN CASE AND ITS CONTEMPORARY
LEGAL RAMIFICATIONS

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Reprinted from
YALE JOURNAL OF INTERNATIONAL LAW
Volume 14, Number 2
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THE YALE JOURNAL OF INTERNATIONAL LAW

Volume 14, Number 2, Summer 1989

Articles

Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications

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The author wishes to thank three institutions which extended invaluable assistance during the past twenty years in the realization of this study:

1. The Public Records Office in London, now located at Kew outside London, containing the secret documents of the British Foreign Office, for allowing access to the files of the British High Commission at Istanbul (1918-1922), the British military and political intelligence offices in the Near East, and especially the British Crown Law Office. Many of these documents are coming to light for the first time in this study. See Part III(A)(2) and (3).

2. The Armenian Patriarchate of Jerusalem whose repositories, discovered only in 1967, comprise a vast corpus of data dealing with the proceedings of the Extraordinary Turkish Military Tribunal. The archives contain all the pertinent issues of *Takvimi Vekayi*, the official gazette of the Ottoman government, whose supplements covering the trial served as a judicial journal. As far as this author knows, no other archive or library outside Turkey possesses these supplements. These issues were removed from circulation by the Turkish authorities soon after their release from the print shop. Thus, this study is the first published to use these supplements extensively. See Part III(B)(1)-(7).

3. The National Science Foundation whose initial grant allowed me to undertake an exploratory research trip to Europe and Jerusalem. A generous subsequent grant enabled me to proceed with the comprehensive study of the problem, allowing me to make the numerous trips required to complete this study.

Listed below are the main abbreviations used in this article.

- A.A. *Auswärtiges Amt*. German Foreign Office Archives. Political Department (1A) (Berlin, presently Bonn).
FO British Foreign Office Archives.
N.S. *Nouvelle Série*. French Foreign Ministry Archives (AMAE), Departments Turquie (Arménie) and Jeunes Turcs. GUERRE: volumes 887-889 covering events relating to Armenia from August, 1914 - May, 1918 under the heading Turquie.
RG(L) *Record Group*, U.S. National Archives, Papers Relating to the Foreign Relations of the U.S. 1 The Lansing Papers 1914-1920.

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RG(S) *Record Group*, U.S. National Archives, Papers Relating to the Foreign Relations of the U.S. 1915 Supplement World War I.

T.V. *Takvimi Vekayi*. Official gazette of the Ottoman government, whose special supplements covering the proceedings of the Extraordinary Turkish Military Tribunal served as a judicial gazette.

Editors' Note: The accuracy of the sources used in this article was verified by an independent translator jointly hired by the *Yale Journal of International Law* and Professor Dadrian. The *Journal* took this unprecedented step because the location of the sources and the variety of foreign languages in which the materials appear made an exhaustive review by the *Journal* staff impossible. The *Journal* did, however, run spot checks to confirm the independent verifier's work. Due to the nature of the sources and the methods by which the information was obtained, exact dates and page numbers were occasionally unavailable. The *Journal* and Professor Dadrian have endeavored to provide as much information as possible about each source.

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Introduction

If a man is killed in Paris, it is a murder; the throats of fifty thousand people are cut in the East, and it is a question.

Victor Hugo¹

During World War I, as the rest of the world looked on, the Ottoman Empire carried out one of the largest genocides in the world's history, slaughtering huge portions of its minority Armenian population. The Armenian genocide followed decades of persecution by the Ottomans and came only after two similar but smaller round of massacres in the 1894-96 and 1909 periods had resulted in two hundred thousand Armenians deaths. In all, over one million Armenians were put to death. The European Powers, who defeated the Turks time and again on the battlefield, were unable or unwilling to prevent this slaughter. Even worse, they failed to secure punishment of the perpetrators following World War I. The events of that time have subsequently slipped into the

1. *Quoted in* Peterson, 61 CATHOLIC WORLD 665, 667 (1895).

shadows of world history,² thus gaining the title "the forgotten genocide."³ To this day, Turkey denies the genocidal intent of these mass murders.⁴

Over the past seventy years, the Armenian nation has struggled to have the history of the Armenian genocide brought to light. Despite the scope of the slaughter, however, the international community has only recently recognized the genocide officially. In April 1984, a group of public figures (including three Nobel Prize laureates, among whom was the late international jurist Sean McBride) conducted "People's Tribunal" hearings on the Armenian genocide and adjudged it to be a crime without statutory limitations.⁵ In August 1985, the U.N. Subcommission on Human Rights, which had been deadlocked for over fourteen years, took note, by a 14-1 vote (with 4 abstentions), of the historical fact of the Armenian genocide.⁶ Its parent body, the U.N. Commission on Human Rights, followed suit the next year.⁷ Finally, in June of 1987, the European Parliament declared the Turkish massacres of World War I to be a crime of genocide under the U.N. Convention on Genocide,⁸ and stipulated that Turkey must recognize the genocide before the Parliament would favorably consider Turkey's application for membership in that body. The European Parliament labelled Turkey's refusal to do so

2. A prominent expert on genocide describes these shadows as "the United Nations memory hole." L. KUPER, *GENOCIDE* 219 (1981).

3. D. BOYAJIAN, *ARMENIA: THE CASE OF A FORGOTTEN GENOCIDE* (1972); Housepian, *The Unremembered Genocide*, 42 *COMMENTARY* 55-61 (Sept. 1966) (published as a pamphlet).

4. See, e.g., K. GÜRÜN, *ERMENİ DOSYASI* (1983) (reversing victim-perpetrator roles in Armenian conflict and denying Turkish genocidal intent); K. GÜRÜN, *THE ARMENIAN FILE: THE MYTH OF INNOCENCE EXPOSED* (1985) (English translation of preceding); Ş. OREL & S. YUCA, *ERMENİLERCE TALÂT PAŞA'YA ATFEDİLEN TELEGRAFLARIN GERÇEK YÜZÜ* (The Real Nature of the Telegrams Attributed to Talat Pasa by the Armenians) (1983) (denying authenticity of telegrams reflecting central planning of Armenian massacres); N. ÖZKAYA, *LE PEUPLE ARMENIEN ET LES TENTATIVES DE RENDRE EN SERVITUDE LE PEUPLE TURC* (The Armenian People and the Attempts to Subjugate the Turkish People) (1971) (blaming Armenian revolutionaries for massacres of Armenians preceding and attending genocide).

5. *PERMANENT PEOPLES' TRIBUNAL, A CRIME OF SILENCE: THE ARMENIAN GENOCIDE* (1985).

6. U.N. ESCOR Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination and Protection of Minorities (38th sess.) (Item 57) at 7, U.N. Doc. E/CN.4/Sub.2/1985/SR.36 (1985) (summary record of 36th meeting, Aug. 29, 1985).

7. It is significant that Whitaker, author of the report that the Subcommission based its finding on and a British expert-member of the Subcommission renowned for his judiciousness, took eight years to research the matter. See Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, 38 U.N. ESCOR Comm. on Human Rights, Subcomm. on Prevention of Discrimination and Protection of Minorities, (Agenda Item 4), at 8-9, U.N. Doc. E/CN.4/Sub.2/1985/6 (1985). In a revised and updated report Whitaker made some corrections at the end of the Subcommission's deliberations; e.g., in note 13, he changed "1 million" to "40%." U.N. Doc. E/CN.4/Sub.2/1985/6/Corr.1 (1985).

8. Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

an "insurmountable obstacle[] to consideration of the possibility of Turkey's accession to the [European] Community."⁹

The relatively low impact of the genocidal killing of one million Armenians on modern public consciousness raises serious questions about the ability of the international community to prevent or punish acts of genocide. Many see the lack of action following the Armenian genocide as an important precedent for the subsequent Jewish Holocaust of World War II. Indeed, it has been reported that, in trying to reassure doubters of the desirability and viability of his genocidal schemes, Hitler stated, "Who, after all, speaks today of the annihilation of the Armenians?"¹⁰ This connection was raised repeatedly during the U.S. Senate's consideration of the U.N. Convention on Genocide, which the United States ratified on February 19, 1986. A score of Senators, most notably Senators Doyle, Boschwitz, Proxmire, Lugar, Levin, Lautenberg, Riegle, Kerry, and Wilson, emphasized the historical precedent of the Armenian case and pointed to the enormous suffering of the Jewish Holocaust that resulted from humanity's disregard of the Armenians' fate.¹¹

The failures that preceded and followed the Armenian genocide carry important lessons for present-day international scholars and lawyers seeking to outlaw genocide. While the post-World War II trials in Nuremberg have shaped much of the current thought on the prevention and

9. *Resolution on a Political Solution to the Armenian Question*, EUR. PARL. RESOLUTION Doc. A2-33/87, No. 10 (Armenian Question), at 31 (1987). The chronology of the treatment of the Armenian Question in the European Parliament, along with the text (comprising 15 points) is in *THE ARMENIAN WEEKLY* (Boston), June 27, 1985, at 5; *THE ARMENIAN MIRROR SPECTATOR* (Boston), July 18, 1987, at 3.

10. K. BARDAKJIAN, *HITLER AND THE ARMENIAN GENOCIDE* 6 (1985).

11. 132 CONG. REC. S1355-80 (daily ed. Feb. 19, 1986). This historical evidence should be born in mind in considering the recent legislation enacted in the United States that criminalizes genocide under domestic law. In November 1987, a bill was introduced in the Senate by Senators Joseph Biden, William Proxmire, and Howard Metzenbaum, creating a new Federal crime of genocide or attempted genocide. President Reagan signed the bill into law on November 4, 1988. Genocide and attempted genocide is now punishable by imprisonment for not more than twenty years, a fine of not more than \$1,000,000, or both. These provisions apply only to nationals of the United States or to an offense committed within U.S. borders.

J. Griffin, Chairman, Section of International Law and Practice, and J.F. Murphy, Chairman, Committee on United Nations Activities Section of International Law and Practice, American Bar Association, made the following statement on February 19, 1988, before the Senate Judiciary Committee in support of the bill:

As familiar as are the historic examples of genocide against the Armenians and the Jews, genocide is a contemporary crime of shocking magnitude, and we must prepare ourselves to fight it— . . . What is left to do is, somewhat surprisingly, quite simple: The international crime of genocide must be made part of the criminal law of the United States. In a word, we must formally recognize that which even the few opponents of the treaty must surely concede—that in the United States, as in the world, genocide is a crime. . .

. . . This is good legislation which should have been the law of our land 40 years ago.

We pledge our support to make it the law now.

Statement of J. Griffin and J.F. Murphy, at 4-5, 7 (unpublished material on file with author).

punishment of genocide, the trials resulted from a set of conditions that will rarely arise. Following World War II, Germany was forced to surrender unconditionally to the Allied forces. The Allies subsequently ran the German government, eliminating any claim of sovereignty that Germany otherwise could have asserted. Furthermore, seeking retributive justice against the Nazis promoted the Allies' self-interests, since much of the Nazi persecution was directed at the Allies' own nationals under German occupation.

Unfortunately, none of these factors were present during or after the slaughter of the Armenians. Although the European Powers did pursue a strategy of "humanitarian intervention" in Ottoman Turkey during the years leading up to World War I, and they instituted the concept of "crimes against humanity" in 1915 in response to the unfolding genocide, the Powers never shared the unity of interests that they had following World War II. Most harmful to the Armenians was the lack of a powerful state to champion their cause; thus, the victors of 1918 willingly dropped their humanitarian concerns in exchange for enhanced favor with the Kemalist regime that was gaining control of Turkey. In addition, the Allies allowed the Turks to maintain their own government following their defeat in the war. As a result, the Turkish government blocked efforts by the Allies to punish the perpetrators of the genocide by asserting its sovereign rights. While it is difficult to determine for certain, the recent history of killings in Cambodia, Bangladesh, and Ethiopia indicate that the ineffective efforts at genocide prevention preceding World War I and the frustrated efforts at punishment following it are more likely to be the norm than are the Nuremberg trials.

The truth is that the U.N. Convention on Genocide's classification of genocide as a crime under international law, while a positive step, begs the ultimate question of enforcement. Similarly, although the Nuremberg trials stand as a promising example of international cooperation in punishing acts of genocide, one cannot rely on such a complete convergence of interests arising in every case. This paper examines the unhappy history of the Armenian genocide; perhaps by studying the failures as well as the successes of the past, it may be possible to better understand and thus resolve the difficulties in preventing genocide.

There are three main lessons that emerge from the events surrounding the Armenian genocide. First, nations generally will not be able, and thus cannot be expected, to effectively police or punish themselves. The post-World War I trials in Turkey, as well those in Germany, reveal the futility of trusting domestic processes to obtain retribution for state-sanctioned crimes against humanity. The Courts Martial in Turkey are nota-

ble in that they documented the crime of organized mass murder against the Armenians. These trials, however, resulted in only a small number of convictions under Turkish penal law. The political upheaval attending Turkey's response to military defeat impaired, and ultimately destroyed, the judicial proceedings' effectiveness. The Kemalist regime that eventually gained power in post-war Turkey successfully relied on principles of national sovereignty to reject the authority of the European Powers to intervene in the trials. Further, the Kemalists weakened European resolve in this area by manipulating the political tensions that divided the Allies. In Turkey, the rise of nationalist feelings following the Kemalists' emergence conflicted with the purposes behind the prosecution of the accused war criminals. The Turkish government and people were unwilling to accept the stigma of collective guilt that was implied in these trials.

A second lesson emerging from the Armenian genocide is that groups of international actors cannot prevent or punish genocidal acts by another state when they do not remain cohesive and unequivocally committed to such ends. In World War I, the Allied Powers decisively defeated the Turkish forces. Further, through their May 24, 1915 declaration expressing their intent to punish the perpetrators of the genocide, England, France, and Russia provided a basis for international jurisdiction over the genocidal acts of the Ittihad government of Turkey. The Allied powers, however, were still unable to secure retribution for the genocide. Instead, their efforts floundered on political divisions between the countries and an inability, or an unwillingness, to usurp the Ottomans' sovereign right to punish their own people for acts committed against Ottoman subjects on Ottoman soil.¹² This failure is not surprising. The interna-

12. When the Paris Peace Conference convened in January 1919, the first item on the agenda was the matter of punishing war crimes. For this purpose, the Allies created the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties. Citing *Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812) (opinion of Marshall, C.J.), the two American representatives, Secretary of State Robert Lansing (the Commission's chairman) and James Scott, a leading international law scholar, objected to the projected trial of the German Kaiser by the victorious allies. Arguing that such a trial would imply a measure of "responsibility hitherto unknown to municipal or international law, for which no precedents are to be found in the modern practice of nations," Lansing and Scott denied the Allies the right of "legal penalties" while conceding them the right to impose "political sanctions." *CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, VIOLATIONS OF THE LAWS AND CUSTOMS OF WAR: REPORT OF THE MAJORITY AND DISSENTING REPORTS OF THE AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION ON RESPONSIBILITIES AT THE CONFERENCE OF PARIS, 1919*, Pamphlet No. 32 [hereinafter *VIOLATIONS*]. The dissenting opinions are at pp. 58-79.

By the same token, the genocide perpetrated against the Armenians was excluded from the category of "war crimes" to be prosecuted and punished by the Allies. As Willis put it:

Not until 1948 would genocide . . . be clearly defined as an international crime, and in 1919 adherence to time-honored notions of sovereignty placed limitations upon the scope

tional system, including the United Nations, often countenances acts of sovereign nations that extend to instances of organized violence and mass murder. Noted international law scholar Kuper has explicitly addressed this problem:

[T]he United Nations remains highly protective of state sovereignty, even where there is overwhelming evidence, not simply of minor violations, but of widespread murder and genocidal massacre. It is no wonder that it may seem to be a conspiracy of governments to deprive their people of their rights.¹³

The final, and perhaps most daunting, lesson of the Armenian genocide is that when international actors intervene in response to persecutions in another state without firm coordination and commitment, any actions they take may actually do more harm than good. Through their humanitarian intervention in Turkish affairs during the late nineteenth and early twentieth centuries, the European Powers were able to force the Ottoman government to adopt a number of statutory provisions ensuring equal rights for non-Muslim minorities (such as the Armenians). These statutes raised the national consciousness of the Armenian population, who began to press for the actual implementation of these reforms. Unfortunately, the Ottomans had no intention of enforcing these statutes; they had adopted them merely to appease the Europeans. The European Powers were willing to accept the statutes at face value and never truly attempted to force Ottoman compliance; nor did they offer the Armenians the military or political support that they would need to actually acquire these statutory rights. The Muslim majority in Ottoman

of traditional laws and customs of war. The Hague conventions . . . [did not deal] with a state's treatment of its own citizens. . . . From this perspective, Turkish action against Armenians was an internal matter, not subject to the jurisdiction of another government.

J. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 157 (1982).

Yet as Secretary of State during the war, Lansing did sanction a degree of intervention which he felt the brutality of the Turkish measures against the Armenians justified. In a Nov. 21, 1916 letter to President Wilson, Lansing granted the "more or less justifiable" right of the Turkish government to deport the Armenians, in so far as they lived "within the zone of military operations." But, he added: "It was not to my mind the deportation which was objectionable but the horrible brutality which attended its execution. It is one of the blackest pages in the history of this war, and I think that we were fully justified in intervening as we did in behalf of the wretched people, even though they were Turkish subjects." RG (L) 59, 763.72115/2631c; L. at 42-43. As far as it is known, only once did William Jennings Bryan, Lansing's predecessor, issue explicit instructions to Ambassador Morgenthau in Turkey "to secure from Turkish Government order to civil and military officials throughout Palestine and Syria that they will be held personally responsible for lives and property of Jews and Christians in case of massacre and looting. This is required immediately." The occasion for this instruction was the rising tide of anti-Semitism in Syria and Palestine and the concomitant apprehension of organized pogroms during the war. RG (S) 59, 367.116/309a; S. at 979.

13. L. KUPER, GENOCIDE: ITS POLITICAL USE IN THE TWENTIETH CENTURY 182 (1981).

Turkey, who had long viewed the Armenians and other non-Muslims as "tolerated infidels," seized upon the new Armenian nationalism as an excuse to rid themselves of the "Armenian problem." Thus, the humanitarian intervention of the Europeans, however benign in its intentions, created the conditions that ultimately led to the genocide.

In the first section, I will examine the Islamic tenets that shaped the Ottoman society and show how these religious beliefs led the Turks to subvert the European efforts at humanitarian intervention, both in general and in the specific case of the Armenians. In the second section, the implementation and execution of the Armenian genocide by the Ittihadist regime in Turkey under the cover of World War I will be discussed. Next, in Section III, I will look at the efforts at retribution, both internationally and domestically, and detail the divisions within the European Powers and the nationalistic pressures within Turkey that doomed these efforts to failure. This paper will conclude by considering the lessons that the history of the Armenian genocide has for modern efforts at outlawing such acts of mass murder in the future.

There is one last vital aspect of this paper that must not be overlooked. For over seventy years, the massacre of the Armenian people has been "the forgotten genocide." Many of the facts that are discussed in this paper have never before been published.¹⁴ Incredibly, the Turkish government still denies that these massacres occurred. More than one million Armenian men, women, and children were methodically and deliberately murdered in Ottoman Turkey. It is time, at last, that the world hear their cries.

14. It is important to emphasize that much of the documentation for this paper comes from within Ottoman-Turkey and her allies during World War I, Germany and Austria. Specifically, these sources include:

1. Secret and top secret Ottoman-Turkish state documents, every one of which was authenticated by ministerial officials before being introduced in the Turkish Court Martial Proceedings.
2. The preponderance of German and Austrian documents anticipating and corroborating the findings of the Turkish Military Tribunal. The importance of these documents cannot be overemphasized. Germany and Austria were the political and military allies of Turkey during World War I. Their representatives' confidential reports composed during and after the Armenian massacre reveal the enormity of the crime.