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International Court of Justice: United States of America v. Republic of Turkey

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INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING CULTURAL PROPERTY AND THE ARMENIAN GENOCIDE

(UNITED STATES OF AMERICA v. REPUBLIC OF TURKEY)

APPLICATION FOR THE INSTITUTION OF PROCEEDINGS OF THE UNITED STATES OF AMERICA

INTRODUCTION

The United States of America brings this Application against the Republic of Turkey under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[1] to establish the international responsibility of the Republic of Turkey for certain acts of genocide targeting Armenians.[2] By this Application, the United States asks the International Court of Justice (ICJ) to declare the Republic of Turkey responsible for these acts and to ensure that the cultural rights of Armenian citizens of the Republic of Turkey are fully respected and protected. Article IX of the Genocide Convention establishes the jurisdiction of the ICJ to resolve all legal disputes between state parties arising under the Genocide Convention. The ICJ has found that states can be liable for genocide acts under the Genocide Convention.[3]

The Republic of Turkey is responsible for genocidal acts perpetrated after 1948 that are part of the iterative genocide aimed at the elimination of the Armenian people from the Republic of Turkey. In particular, the

1. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948; 102 Stat. 3045, 78 U.N.T.S 277 [*hereinafter* the Genocide Convention].

2. The United States government has argued before the ICJ that the "Turkish massacres of Armenians" are an "outstanding exampl[e] of the crime of genocide." *See* WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 19 (2 ed. 2009).

3. The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzigovina v. Serbia and Montenegro). 2007 I.C.J. 62, 68 (Feb. 26).

Republic of Turkey has purposefully pursued the destruction and neglect of the Armenian cultural patrimony within the Turkish Republic. The goal of this policy is the formation of a homogenous Turkish cultural identity and nationalist narrative that will strengthen the Turkish state. This is a continuation of the eliminationist policies of the Ottoman Empire begun as early as 1870. Born of the perceived need to save and strengthen the Turkish state by destroying its enemies, these policies have led to the near elimination of ethnic Armenians and Armenian culture from the Republic of Turkey.

By its accession to the Genocide Convention, the Republic of Turkey has undertaken "to prevent and punish" genocidal acts committed in war time or in peace time.[4] The Republic of Turkey is the successor state to the Ottoman Empire in more ways than one. It has continued the Ottoman Empire's program of genocide against the Armenians, and by doing so has violated its obligations under the Genocide Convention. The United States asks the Court to find that the Republic of Turkey has effected the destruction of the following five Armenian cultural sights: the Church of St. Sarkiss in the province of Kars, the Church of Holy Ejmiacin at Soradir, the Cathedral of the Holy Apostles in Kars, the Armenian Cathedral of Ani, and the Cathedral of Aghtamar.

This Application instituting proceedings before the Court will set out the facts which lie behind the legal dispute between the United States and Turkey, the subject of the dispute, and the legal theory which forms the basis of the United States' Application.

FACTS

The goal of this section is to demonstrate that the Armenians of the Ottoman Empire and Republic of Turkey have been subjected to acts of genocide for over 140 years. This campaign waxes and wanes in its ferocity. But its goal is always the same: the elimination of Armenians and Armenian culture from the Turkish state.

To understand the genocidal acts committed against the Armenian citizens of the Republic of Turkey, it is necessary to understand something of the structure and history of the Ottoman Empire.[5] First, two Ottoman institutions are of particular importance for understanding the facts surrounding the plight of the Armenians: the *millet* system and the Capitulations. Second, four important historical events concerning the

4. *Id.* at 152.

5. The Republic of Turkey is a successor state to the Ottoman Empire. *See* Treaty of Peace with Turkey Signed at Lausanne, Jul. 24, 1923, 28 L.N.T.S. 11 (1924) [*hereinafter* Treaty of Lausanne] (recognizing the new Turkish Republic as the successor state to the Ottoman Empire).

Armenian Problem[6] will be discussed: the Russo-Ottoman War 1877–1878, the Hamidian Massacres, the Final Solution of 1915–1917, and the adoption of problematic cultural heritage policies by the Republic of Turkey after World War II. The following treatment of these institutions and historical events is not thorough but is sufficient to put the relevant facts in the proper context.

I. STRUCTURE: TWO IMPORTANT OTTOMAN INSTITUTIONS

The *millet* system. The Ottoman Empire was made up of people from many religions and of many nationalities,[7] but the dominant culture and the state religion of the Ottoman Empire was Islam.[8] Muslims enjoyed full rights of citizenship whilst non-Muslims—referred to as *dhimmi*—did not.[9] The legal status of the *dhimmi* is founded on the Koran's Ninth Sura, which reads, "Fight against such of those who have been given the Scripture as believe not in Allah nor the Last Day, and follow not the Religion of Truth, until they pay tribute readily, being brought low."[10] In exchange for living under the protection of a Muslim state, *dhimmi* were "obligated to display subservience and loyalty to the Muslim order and to pay a tax known as the *jizya*."[11] "The relationship [was] not one of equals, but one of tolerance and forbearance."[12]

The inequality between Muslims and non-Muslims in the Ottoman Empire can be seen in numerous ways. For example, the Ottoman Empire organized its *dhimmi* population by religion or sect. These groups were known as *millets*. Each *millet* administered "not only the clerical, ritual, and charitable affairs of their flocks, but also education and the regulations of matter of personal status like marriage, divorce, guardianship, and inheritance."[13] *Dhimmi* had to wear certain colors assigned to their *millets* and refrain from wearing valuable materials.[14] Additionally, they were prohibited from building their houses higher than those of Muslims, riding horses, and conducting religious observances in a way that would disturb

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6. The Armenian Problem, sometimes called the Eastern Question, refers to the problems of the Armenian Christians during the final days of the Ottoman Empire.

7. TANER AKÇAM, A SHAMEFUL ACT: THE ARMENIAN GENOCIDE AND THE QUESTION OF TURKISH RESPONSIBILITY 20 (Paul Bessemer trans., Metropolitan Books 2006) (1999).

8. *Id.*

9. *Dhimmi* rights were limited to protection from violence and depredation. *Id.*, at 22.

10. KORAN, SURA 9:29; *see* BERNARD LEWIS, THE JEWS OF ISLAM 14 (Princeton University Press 1984).

11. *See generally* CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE FUNCTIONING OF A PLURAL SOCIETY (Benjamin Braude & Bernard Lewis eds., 1982).

12. AKÇAM, *supra* note 7, at 23.

13. RODERIC DAVIDSON, REFORM IN THE OTTOMAN EMPIRE, 1856–1876 13 (Princeton University Press 1963).

14. AKÇAM, *supra* note 7, at 24 (citing BINSWANGER, OSMANISCHEN REICH 165).

Muslims.[15] *Dhimmi* were also discouraged from living in Muslims areas of towns.[16] The pluralism of the Ottoman Empire was built upon debasement and toleration.

The Capitulations. The Capitulations were a body of agreements between the Ottoman Empire and foreign states that formalized commercial privileges[17] but eventually expanded to include numerous religious and legal privileges.[18] These privileges were initially applicable only to France and her allies, but foreign powers worked to extend them to non-Muslim subjects of the Empire, particularly Christians.[19] A good example of this is the 1774 Küchük-Kainarji Treaty in which Russia contentiously claimed to have been given protective rights over all Ottoman Orthodox Christians.[20]

The Capitulations resulted in the Ottoman Christians becoming more antagonistic and alienated from the Ottoman Empire,[21] causing Ottoman authorities to become concerned about the survival of the empire. The foreign powers used this struggle as "a pretext for interfering in internal Ottoman affairs."[22] From the late eighteenth century on, "wars between the Ottomans and different European powers resulted in peace treaties that brought significant privileges to Ottoman Christian subjects which, in turn, paved the way for the eventual independence of these non-Muslim communities."[23]

In response to the fracturing of their empire, Ottoman authorities began a reorganization of the state that aimed to remove the inequality of the *millet* system and to create a new form of Ottoman patriotism: the Tanzimat reform.[24] But the reality was that little appetite for equality existed among Muslim Ottomans; the announced reforms appeared to be for foreign consumption and were often not followed by action.[25] The impotence of the Tanzimat reforms stems from the fact that the concept of Christian-Muslim

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15. *Id.*
16. *Id.*
17. *Id.* at 25.
18. *See* Edgar Turlington, *Treaty Relations with Turkey*, 35 YALE L.J. 326, 331 (1926) (citing Van Dyck, *Report upon the Capitulations of the Ottoman Empire since the year 1150* Executive Document No. 3, Special Session of Congress (1881)).
19. *See* CHARLES WHITE, THREE YEARS IN CONSTANTINOPLE 139 (1864); *see also* AKÇAM, *supra* note 7, at 25–6 (discussing the extension of Capitulation privileges to Ottoman subjects). The first such capitulation was concluded with the king of France in 1535. In 1673, King Louis XIV signed an agreement with the Sultan Mehmet IV in which Louis became the "sole protector of Christianity in the East."
20. J. KIRAKOSSIAN ARMAN, BRITISH DIPLOMACY AND THE ARMENIAN QUESTION, FROM THE 1830S TO 1914 21 (The Gomidas Institute 2003) (1999).
21. AKÇAM, *supra* note 7, at 27.
22. *Id.*
23. *Id.* (discussing the Serbian revolt of 1804).
24. İBER ORTAYLI, *Tanzimat*, TANZIMATTAN CUMHURIYETE TÜRKIYE ANSIKLPEDESI 1545 (1985).
25. DAVIDSON, *supra* note 13, at 45.

equality "represented the most radical breach with ancient Islamic tradition and was therefore most shocking to Muslim principles and good taste."[26] Put another way, the concept of equality threatened the dominant status Muslims had traditionally held within the Ottoman Empire.[27] This caused Muslims to regard non-Muslims, particularly Christians, with hostility.

Non-Muslim Ottomans were unenthusiastic about the state reforms of 1836–1876.[28] Equality would require non-Muslims to give up the established privileges accorded to them in the *dhimma* agreement.[29] "Although the Ottoman Christians may have wanted equality in theory, they preferred in practice to pay a tax and so gain exemption from five years of military service and possible death, and to devote their time to trade or agriculture."[30] In the absence of Ottoman Muslims, who were required to lay down their lives for the empire, Ottoman Christians were easily able to secure control of land and trade.[31] As Akçam notes, "it becomes easier to understand why plans to create equality fostered the growth of hostility and resentment in Ottoman society."[32]

The hostility and resentment of Muslim Ottomans toward Christian Ottomans during the nineteenth century found expression in Muslim assaults and revolts against Christians.[33] "From the late eighteenth century through the nineteenth century, expulsion, outbreaks of mob violence, and even massacres became increasingly frequent."[34] The violence against Armenians is best understood in the light of the aforementioned historical background.

II. HISTORY: THE ARMENIAN QUESTION

The problem of the Armenian population in the Ottoman Empire became an issue of international importance at the Berlin Conference concluding the Russo-Ottoman War of 1877–1878.[35] But decades before becoming an international issue, the Armenians of Anatolia were subjected to looting, murder, taxation irregularities, criminal behavior of government

26. BERNARD LEWIS, THE EMERGENCE OF MODERN TURKEY 107 (Oxford University Press 2d. ed. 1968. This reprint 1975) (1961).

27. AKÇAM, *supra* note 7, at 32.

28. *Id.*

29. *See* FEROZ AHMAD, İTTIHATÇILIKTAN KEMALIZME 121 (1985).

30. ENVER ZIYA KARAL, 6 OSMANLI TARIHI 94 (1995).

31. DAVIDSON, *supra* note 13, at 106 n. 77.

32. AKÇAM, *supra* note 7, at 33 (referencing DAVIDSON, *supra* note 11, at 106).

33. *Id.*, at 34 (citing Lebanon in 1844, Mecca in 1855, Jeddah and Syria in 1858, and Serbia in 1856-61).

34. LEWIS, *supra* note 8, at 168.

35. AKÇAM, *supra* note 7, at 35. The Armenian population of the Ottoman Empire centered around the Six Armenian Vilayets: Van, Erzurum, Mamûretü'l-Azîz, Bitlis, Diyarbekir, and Sivas. Collectively, these vilayets (provinces) were known as Western Armenia. See Armenia, World Statesmen, *available at* http://www.worldstatesmen.org/Armenia.html.

officials, and an inability to be witnesses at trials.[36] These problems were assembled into a report by the Armenian Communal Council in 1870 and submitted to the government.[37] "Overall, the report, submitted to the Ottoman government on 4 March 1872, summarized twenty years of grievances, including 73 offenses during tax collection, 154 cases of abuse of power by government officials, and 249 cases of kidnapping, robbery, and illegally preventing religious functionaries from performing their duties."[38]

A. The Russo-Ottoman War of 1877–1878

Following the Russo-Ottoman War of 1877–1878,[39] the Armenian population of the Ottoman Empire began to look to Russia for protection against the "forced land seizures, profaning [of] churches and places of worship, and in particular the forced conversion of women and children, arson, protection extortion, rape and murder" frequently encountered by Armenian Ottomans.[40] As a result of Armenian Ottoman petitions, the Russian government ensured the following article was added to the 1878 Preliminary Treaty of Peace Between Russian and Turkey signed at San Stefano:

> As the evacuation of the Russian troops of the territory which they occupy in Armenia, and which is to be restored to Turkey, might give rise to conflicts and complications detrimental to the maintenance of good relations between the two countries, the Sublime Porte engaged to carry into effect, without further delay, the improvements and reforms demanded by local requirements in the provinces inhabited by Armenians, and to guarantee their security from Kurds and Circassians.[41]

This application of this provision of the peace treaty effectively made Russia supervisor of the Armenian provinces of the Ottoman Empire.[42] This expansion of Russian power did not sit well with the other Great Powers, who convened the 1878 Congress of Berlin to revise the San Stefano Treaty.[43] The Congress of Berlin ended with the Sublime Porte offering

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36. *See* YVES TERNON, ERMENI TABUSU 58–9 (1993).

37. E. URAS, TARIHTE ERMENILER VE ERMENI MESELESI 177 (Ankara 1987) (1950).

38. AKÇAM, *supra* note 7, at 36 (citing YVES TERNON, ERMENI TABUSU 58–9 (1993)).

39. *Id.* The Russo-Ottoman war was caused, in part, by the bloody suppression of uprising in the Balkans between 1875–76. The Great Powers, angered by the ruthlessness of Ottomans, interpreted the 1856 Paris Treaty as giving them the right to intervene in Ottoman affairs in order to protect the interests of the empire's Christian populations.

40. URAS, *supra* note 37, at 178. Kurdish and Circassian gangs were often responsible for terrorizing the Armenian Ottoman population.

41. Preliminary Treaty of Peace Between Russia and Turkey Signed at San Stefano, art. XVI. *See* ARMAN, *supra* note 20, at 67.

42. AKÇAM, *supra* note 7, at 38.

43. *See* Great Britain, 83 Parl. Papers 690–705 (1878)(providing English text of the 1878

protection to the Armenian Ottomans but not to the extent found in the San Stefano Treaty:

> The Sublime Porte undertakes to carry out, without further delay, the improvements and reforms demanded by the local requirements in the provinces inhabited by the Armenians, and to guarantee their security against the Circassians and Kurds. It will periodically make known the steps taken to this effect to the Powers, who will superintend their application.[44]

Despite assurances to the contrary, the Ottoman authorities showed no interest in implementing the reforms promised to their Armenian subjects.[45]

The intervention of the Great Powers caused Muslims to unite against the perceived Christian threats:

> [a]ctions taken since 1875 by both Balkan Christians and Christian states in Europe to the detriment of Turkish and Muslim populations had produced a sense of solidarity among the Muslims. A good number of high Ottoman statesmen, Adbul Hamid II first among them, advocated a foreign policy intended to preserve the power of the state by tapping into this solidarity, a policy which over time began to be known as Pan-Islamism.[46]

Thus, the Ottoman elite came to believe that the preservation of their empire necessitated the solidarity of its Muslim populations[47] and the elimination of the Christian forces hostile to it.[48] This policy left Christian communities, particularly the Armenian Ottomans, without the protection promised them under the Berlin Treaty of 1878.[49] This abandonment added momentum to a burgeoning Armenian nationalist movement that sought to liberate Armenians from the Ottoman yoke.[50] The Ottoman response to Armenian demands for the protections promised them under the Berlin Treaty was bloody and ruthless.

B. The Hamidian Massacres 1894–1896

The Hamidian Massacres refer to the killing of 80,000 to 300,000

Berlin Treaty); *see also* Vahakn N. Dadrian, *Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications*, 14 YLJ 221, 240 (1989).

44. Berlin Treaty, art. 61 (1878).

45. *See generally* CEVDET KÜÇÜK, OSMANLI DIPLOMASISINDE ERMENI MESELESININ ORTAYA ÇIKIŞI, 1878-1897 (1986).

46. KARAL, *supra* note 30, at 274.

47. AKÇAM, *supra* note 7, at 40.

48. *Id.* at 44.

49. *Id.*

50. For example, the group Armenakan [Արմենական կուսակցություն] was founded in Van province in 1885 and was dedicated to Armenian independence.

Armenian Ottomans[51] between 1894 and 1896. They are named after Sultan Abdul Hamid II, who had adopted a Pan-Islamist ideology in an attempt to stop the "process of decline and collapse" of his empire.[52] The Sultan believed that his empire was faced "with the endless persecutions and hostilities of the Christian world."[53] The goal of Sultan Abdul Hamid II's policy was "for [Ottoman] Muslims to look upon attacks against Christians as a fulfillment of a religious duty."[54] Abdul Hamid II presided over what the French vice-consul at Diyarbakir called the "gradual annihilat[ion] of the Christian element."[55]

As noted above, an area of particular concern for the Sublime Porte was its border with the Russian Empire. In November 1890, the Ottoman government created irregular cavalry forces called the Hamidiye Regiments.[56] These regiments consisted of Kurds from the Ottoman provinces bordering the Russian Caucasus.[57] While the official reason for the formation of these regiments was to provide security along the Russian border, Turkish sources have claimed that they were formed to terrorize Armenian Ottomans.[58] Indeed, Sultan Abdul Hamid II is reported to have said, "I tell you, I will soon settle those Armenians. I will give them a box on the ears which will make them smart and relinquish their revolutionary ambitions."[59]

The Hamidian Massacres broke out in 1894. The Armenian villagers of Sasun revolted because they were forced to pay taxes to the Kurds in addition to those owed to the Ottoman government.[60] The villagers had lodged a formal complaint with the authorities in Constantinople, which found in the Armenians' favor; but the governor of the province incited the local Muslim population to violence.[61] At the same time, an Armenian revolutionary organization called "Hunchak" encouraged the Armenian

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51. There are various estimates for the number of Armenians killed during the Hamidian Massacres. AKÇAM, *supra* note 7, at 42 (citing German, French, and English reports along with the claims of the Armenian partriarchate).

52. *Id.* at 43.

53. JOAN HASLIP, THE SULTAN: THE LIFE OF ABDUL HAMID II 211 (1973).

54. AKÇAM, *supra* note 7, at 45.

55. SÈBASTIEN DE COURTOIS, THE FORGOTTEN GENOCIDE: EASTERN CHRISTIANS, THE LAST ARAMEANS 138 (Vincent Aurora trans., Gorgias Press 2004) (citing Diplomatic Dispatch #2, Vice-Consul at Diyarbakir, (Jan. 9, 1901)).

56. *See* AKÇAM, *supra* note 7, at 40 (referencing MEHMET BAYRAK, KÜRTLER VE ULUSAL DEMOKRATIK MÜCADELELERI 61–73 (1993)(giving details of the Hamidiye Regmiments)).

57. *Id. (referencing* KENDAL NEZAN, *Die Kurden unter den Osmanischen Herrschaft, in* KURDISTAN UND DIE KURDEN 61 (vol. 1, Gerard Chaliand ed. 1988)).

58. *Id. (referencing* ORHAN KOLOĞLU, ABDULHAMIT GERÇEĞI 337 (1987)).

59. AKÇAM, *supra* note 7, at 40 (citing JOAN HASLIP, THE SULTAN: LIFE OF ABDUL HAMID II (1973)).

60. *Id.* at 41.

61. *See* VAHAKN N. DADRIAN, THE HISTORY OF THE ARMENIAN GENOCIDE: ETHNIC CONFLICT FROM THE BALKANS TO ANATOLIA TO THE CAUCASUS 114ff (1995).

Sasun villagers to rise up.[62] The Ottoman authorities savagely suppressed the Armenian uprising, killing many,[63] and leading the Great Powers to force the Sultan into accepting a program of reform.[64]

This reform program called for the Sublime Porte to reign in the Hamidian Regiments, but, like all the attempts at reform to date, it was ineffective.[65] Instead the result was a series of systematic massacres of Armenian Ottomans in the Anatolian regions of Zeytun, Trabzon, Erzurum, Bitlis, Van, Harput, Diyarbakir, Sivas, and Çukurova.[66] A particularly appalling incident occurred in December 1895 in the city of Urfa. Eight thousand Armenians were killed in forty-eight hours,[67] three thousand of whom were burned to death in Urfa's Armenian Cathedral.[68] This brutality, along with other pogroms, led the Austrian ambassador to the Sublime Porte to report that Muslim Ottomans were engaging in a "Muslim Crusade."[69]

The British embassy *dragoman*[70] at the time summarized his understanding of the situation by referring to the cultural justification for killing Armenians:

> [The Muslims] are guided by the prescriptions of the Shari'a. The law prescribes that if the "*rayay*," or cattle, Christians try, through their recourse to foreign powers, to overstep the privileges allowed them by their Mussulman masters and free themselves from their oppression, their lives and property are forfeited, and they are at the mercy of the Mussulmans. To the Turkish mind, the Armenians tried to overstep those limits by appealing to the foreign powers, especially England. They therefore consider it their religious duty and a righteous thing to destroy . . . the Armenians. . . .[71]

This sentiment is echoed by Yusuf Kemal Tengirsenk, who was a member of the investigative commission of the Ottoman parliament after the Adana Massacres of 1909[72] and later the second foreign minister of the Republic of

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62. AKÇAM, *supra* note 7, at 41.

63. *Id.* (referencing KARAL, *supra* note 30, vol. 8 at 138 (citing the memoirs of Kâmil Paşa)).

64. *Id.*

65. *Id.* (referencing URAS, *supra* note 37, at 297–326 (comparing the proposals of reform with those accepted by the Sublime Porte)).

66. *See generally* DADRIAN, *supra* note 61.

67. V.N. Dadrian, *Introduction*, *in* EPHRAIM K. JERNAZIAN, JUDGMENT UNTO TRUTH: WITNESSING THE ARMENIAN GENOCIDE 3 (trans. Alice Haig, 1990).

68. *Id.*

69. AKÇAM, *supra* note 7, at 44 (citing Report, *in* HAUS-, HOF-, UND STAATSARCHIV [*hereinafter* "HHStA"], BELOHNUNGSAKTEN [*hereinafter* "BA"] 413, A 1c, Constantinople, (Oct. 11, 1896)).

70. "Dragoman" is the title given to translators and intermediaries between different ethnic groups in the Ottoman Empire.

71. AKÇAM, *supra* note 7, at 45 (quoting FO/195/1930 (Folio 34/187) as quoted *in* DADRIAN, *supra* note 43, at 243).

72. An estimated 15–20 million Armenians died in the Adana Massacre of 1909. It is argued

Turkey. He said, "I am of the opinion that the great majority truly believed that their government, their lives, and their religion were under threat."[73]

C. The Final Solution of 1915–1917

The genocide of 1915–1917 consisted of forced conversions, the destruction of cultural property, and deportations, which turned into massacres.[74] The deportations, massacres, and forced conversions comprised a concerted effort by the Committee of Union and Progress to settle the Eastern Question.[75] This is confirmed by the testimony of Vehip Paşa, commander of the Ottoman Third Army in 1916:

> These atrocities, committed according to a clear program and with absolute intent, were carried out at the orders and supervision of first, members of the Union and Progress Central Committee, and second, by leading members of government who, by casting aside law and conscience, served as tools for the designs of the Committee.[76]

Furthermore, Vehip Paşa described how government officials knew of these atrocities and did nothing to prevent them.[77] As a result, between 800,000 and 1.5 million Armenians were killed.[78] The Ottoman government, in its 1918–1919 investigation[79] of the genocide, set the death count at 800,000.[80] Prominent Turkish historian Y. H. Bayur has said that 800,000 must be considered an accurate figure.[81]

Before 1915, massacres of Armenian Ottomans were not an empire-wide policy, rather localized events designed to strengthen the empire's Islamic identity.[82] The genocidal acts of 1915–1917 had a different purpose, a purpose that escalated the eliminationist program. Talât Paşa—one of the

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that the tremendous wealth and prosperity of Armenians in this region reversed the traditional Muslim non-Muslim social arrangements. *Id* at 69.

73. *Id.* at 46 (citing YUSUF KEMAL TENGIRSENK, VATAN HITZMETINDE 120 (1981)).

74. *Id* at 174.

75. *Id.* at 153 (citing a recorded statement of Dr. Nazim recorded during the post-war indictment of Committee leaders. First Session, Main Indictment, Takvîm- *i* Vekâyı, no. 3540 (27 Nisan 1335/27 April 1919)).

76. *Id.* at 154 (citing the testimony of Vehip Pasa, Dec. 5, 1918).

77. *Id.*

78. This is the number of victims generally accepted by the international community. DICTIONARY OF GENOCIDE 19 (Samuel Totten, Paul Robert Bartrop & Steven L. Jacobs eds., 2008). The actual number of deaths is a controversial topic. *See* Sarkis J. Karajian, *An Inquiry into the Statistics of the Turkish Genocide of the Armenians, 1915–1918* 25 ARMENIAN REVIEW 25 (Winter 1972), cited in AKÇAM, *supra* note 7, at 183, n. 217.

79. This commission was established by Interior Minister Mustafa Arif Değmer in December of 1918. AKÇAM, *supra* note 7, at 183.

80. This finding of fact was announced by the Ottoman Interior Minister Cemal Bey on March 18, 1919. *Id.*

81. *Id.* (citing Y.H. BAYUR, TÜRK İNKLILABI TARIHI 787 (vol 3, pt. 4 1983)).

82. *Id.* at 47.

leaders of the Committee of Union and Progress[83] that controlled the Ottoman Empire during World War I—stated that the attacks on Armenian Ottomans starting in 1915 were aimed at "a complete and fundamental elimination of this concern."[84]

This "final solution" was the result of an intellectual commitment to Turkish nationalism, an ideology that suffused the Committee of Union and Progress during the war years.[85] This version of Turkish nationalism was built on the notion that Ottoman Muslims were "superior to . . . other peoples and nations, and therefore possessed the inherent right to rule over them."[86] This ideology is similar to that set out in Islamic culture and could be explained by Bernard Lewis's observation that "[a]mong the different peoples who embraced Islam, none went farther in sinking their separate identity in the Islamic community than the Turks."[87] Thus, what it meant to be Turkish was heavily influenced by what it meant to be a Muslim.[88]

Like Pan-Islamism, Turkish nationalism was a response to uncertainty over the future of the Ottoman Empire.[89] Like Pan-Islamism, Turkish nationalism sought explanations for the empire's decline.[90] And, like Pan-Islamism, those explanations appeared to center on the Christian minorities and their struggle for civil and political rights.[91] The Committee of Union and Progress saw it as their special and sacred duty to heal the empire's wounds and to eliminate "anyone, regardless of who they were, who seemed an obstacle to its sacred calling."[92] Turkish historians have described this mindset as having "influenced the decisions and behavior of the Unionists in events such as the Armenian deportations."[93] This political ideology, espoused by the Ottoman government, led one of the postwar Istanbul war-crimes trial courts [94] to say that the decision to massacre Armenians was made by the Central Committee for Union and Progress and

83. The Committee of Union and Progress was a political party associated with the Young Turk Revolution in 1908. It came to power in 1913 in a *coup d'etat.*

84. AKÇAM, *supra* note 7, at 47. (citing Talât Pasa's letter of May 26, 1915 to the Grand Vizier).

85. *Id.*

86. *Id.* at 48. This "ruling nation" concept is very much influenced by Islamic ideas.

87. *Id.* (quoting BERNARD LEWIS, THE EMERGENCE OF MODERN TURKEY 329 (2d ed. 1968)).

88. *Cf.* AKÇAM, *supra* note 7, at 50.

89. *Id.* at 55.

90. *Id.*

91. *Id.*

92. *Id.* at 58.

93. *Id.* at 59 (quoting SINA AKSIN JÖN TÜRKLER VE İTTIHAT VE TERAKKI 159 (1987)).

94. After World War I, the Ottoman government tried certain members of the Committee of Union and Progress for atrocities committed during the Armenian Genocide. *See generally* TANER AKÇAM, ARMENIEN UND DER VÖLKERMORD: DIE ISTANBULER PROZESSE UND DIE TÜRKISCHE NATIONALBEWEGUNG 185 (1996).

conveyed to the provinces by special couriers.[95]

The deported Armenians were taken from "areas far removed from the war zone directly into the theater of operations, from inner Anatolia to the front[96] where the Fourth and Sixth Armies were fighting the British."[97] At no point during the deportation were any provisions made for transporting tens of thousands of people.[98] No help in the form of food, money, or other basic necessities were given; [99] thousands died of starvation on the roadside.[100] The Ottoman governor-general of Aleppo attempted to provide housing to deported Armenians, but was rejected by officials in Constantinople.[101] The Ottoman government insisted that the Armenians be moved to the Syrian and Iraqi deserts.[102]

In certain areas, Ottoman authorities forcibly converted Armenians to Islam.[103] The German consul at Samsun reported that "all the Armenian villages in and around Samsun had been Islamicized."[104] Contemporaneous reports from Erzurum, Trabzon, and Adana contained similar news.[105] Those Armenians who converted were spared;[106] those who did not were forcibly expelled from their homes.[107]

The final solution included the destruction of many Armenian cultural properties, like the ancient monasteries of Varagavank and Khtskonk.[108] Indeed,

> [d]uring the years 1915–23, a period of eight years, some 1,000 Armenian churches and monasteries were leveled to the ground

95. AKÇAM, *supra* note 7, at 154 (referencing *Tercümanı Hakikat* (Aug. 5, 1920)).

96. The front in question was in the Syrian and Iraqi Deserts.

97. AKÇAM, *supra* note 7, at 184 (citing Çerkez Hasan, *Peki Yüzbinlerce Ermeniyi Kim Öldürdü?* [*"Well, then, who* did *kill hundreds of thousands of Armenians?"*], *in* ALEMDAR (April 5, 1919)).

98. *Id.* (citing Scheubner-Richter's report that Tashin Bey, governor-general of Erzurum, had asked to delay the deportation until the road security could be established but was turned down by Third Army commander Mahmut Kâmil Pasha. Reports by Consul Schneuber-Richter (Erzurum), German Foreign Office, *in* POLITICAL ARCHIVE [*hereinafter* "PA-AA"], Bo. Kons./B. 169 and R 14088 (June 22, and Aug. 5, 1915)).

99. *Id.* at 185 (citing Report by Ambassador Wangenheim, *in* PA-AA/R 14086 (June 17, 1915)).

100. *Id.* at 174.

101. *Id.* (citing Halep Valisi Celal'in Anıları *in* VAKIT (Dec. 12, 1918)).

102. AKÇAM, *supra* note 7, at 177 (referencing Report by Ambassador Hohenlohe, *in* PA-AA/Bo. Kons./B. 170 (Sept. 16, 1915)).

103. *Id.* at 175.

104. *Id.* (quoting PA-AA/R 14086, Appendix to Report by Ambassador Wangenheim, (July 16, 1915)).

105. *Id.*

106. *Id.*

107. *Id.*

108. This monastery was destroyed in 1915 by Ottoman forces. It was an important place of pilgrimage because it contained a piece of the True Cross. *See* Dickran Kouymjian, Haig & Isabel Berberian Professor of Armenian Studies, Cal. State Univ., Fresno, Holocaust Lecture Series: *When Does Genocide End? The Armenian Case* (Mar. 11, 2003).

while nearly 700 other religious structures were half-destroyed. The city of Van is a good example of this. Four years after the genocide the historic city was completely gone, that is except for a few ruins such as those of a part of one Armenian church.[109]

D. The Adoption of Problematic Cultural Property Laws by the Republic of Turkey

Cultural property is defined as,

> [P]roperty which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories: (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological [sic] interest; (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance; (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries; (d) elements of artistic or historical monuments or archaeological sites which have been dismembered; (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals; (f) objects of ethnological interest; (g) property of artistic interest, such as: (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand); (ii) original works of statuary art and sculpture in any material; (iii) original engravings, prints and lithographs; (iv) original artistic assemblages and montages in any material; (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections; (i) postage, revenue and similar stamps, singly or in collections; (j) archives, including sound, photographic and cinematographic archives; (k) articles of furniture more than one hundred years old and old musical instruments.[110]

This is the official United Nations (UN) definition taken from the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. As is readily seen, the list of things that constitute cultural property is very large

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109. *Id.* at 10.

110. United Nations Educational, Scientific and Cultural Organization [UNESCO] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property [*hereinafter* UNESCO Convention], art. 1, Nov. 14, 1970, 823 U.N.T.S. 231 (1972).

and diverse. The power to control these properties is, in some sense, the power to control the past, and, perhaps, the present.

i. The International Framework

The UN has the following purposes: 1) to maintain international peace and security; 2) to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; 3) to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and 4) to be a center for harmonizing the actions of nations in the attainment of common ends.[111]

In 1970, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) drafted a convention designed to prevent the illegal transfers of cultural property, the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (the UNESCO Convention).[112] The UNESCO Convention responded to "the growing international concern that the high demand for cultural objects in the art market had generated rampant pillaging of archaeological and ethnological heritage."[113] To assuage international concern, the treaty obliged its signatories to adopt import restrictions on art objects mirroring the export restrictions of other signatories.[114] Therefore, the internationalist solution to the rampant pillaging of archaeological sites was to empower national governments to keep them safe.

ii. The Cultural Property Laws of the Turkish Republic

One of the immediate tasks of the new Republic of Turkey was "to construct a national identity."[115] Concern for national identity had been a theme in the Ottoman Empire from the early twentieth century,[116] and became of utmost importance for Mustafa Kemal Atatürk and the founders of the new republic.[117] In particular, the founders of the new republic

111. U.N. Charter art. 1.

112. UNESCO Convention, *supra* note 110.

113. United States Information Agency, Information on U.S. Assistance under the Convention of Cultural Property Implementation Act 2 (1986).

114. UNESCO Convention. *See* Leah A. Hofkin, *The Cultural Property Act: The Art of Compromise*, 12 COLUM.-VLA J. L.& ARTS 423 (1988).

115. JAMES CUNO, WHO OWNS ANTIQUITY 75 (2008).

116. LEWIS, *supra* note 26, at 326–27, 352–53.

117. *Id.* at 353.

wanted to be distinct from the Ottoman Empire.[118] At the same time, the Turkish Republic adopted the 1906 Ottoman Decree on Antiquities (this law was replaced by a similar law in 1973 and updated in 1983 to include additional cultural properties) which declared that all cultural property found in or on public land was the property of the national government.[119] Combining the search for a national identity with control over cultural property caused archaeology in Turkey to be "much more related to the ideology of the modern Republic than to the existing archaeological potential of the country."[120] Professor Mehmet Özdoğan of Istanbul University notes:

> The emergence and the development of archaeology in Turkey took place under constraints that are deeply rooted in history. Confrontation between the traditional Islamic framework and the Western model, the endeavor to survive as a non-Arabic nation in the Middle East while the Empire was disintegrating, the hostile and occasionally humiliating attitude of Europeans, and growing nationalism have all been consequential in this development.[121]

The Turkish government has used the control given to it by the 1906 Decree and its progeny to effect the removal of Armenian cultural property from within its borders.[122] In all parts of the Ottoman Empire under Turkish control, except Istanbul, "genocide has [been] persistently pursued by either destroying all Armenian cultural remains or depriving them of their distinguishing national elements."[123]

The relevant destruction of Armenian cultural property has been done by willful neglect and the encouragement of trespassing by the local Turkish population.[124] The Church of St. Sarkiss, located in the Turkish province of Kars, was severely damaged by an earthquake in 1935,[125] and only fragments of masonry walls remain.[126] The material of the ruined Church of Holy Ejmiacin at Soradir[127] has been used by the local Turkish population in the construction of a storehouse for feed or hay for their

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118. CUNO, *supra* note 115, at 75.

119. *Id.* at 82.

120. Mehmet Özdoğan, *Ideology and Archaeology in Turkey*, *in* ARCHAEOLOGY UNDER FIRE: NATIONALISM, POLITICS, AND HERITAGE IN THE EASTERN MEDITERRANEAN AND MIDDLE EAST 113 (Lynn Meskell ed.,Routledge 1998).

121. *Id.* at 113.

122. Kouymjian, *supra* note 108.

123. *Id.*

124. *Id.*

125. *See* Tekor in Index of Armenian Art: Armenian Architecture, http://armenianstudies.csufresno.edu/ iaa_architecture/tekor.htm (last visited Apr. 14, 2010).

126. Kouymjian, *supra* note108.

127. *See* Soradir in Index of Armenian Art: Armenian Architecture, http://armenianstudies.csufresno.edu/ iaa_architecture/soradir.htm (last visited Apr. 14, 2010).

animals.[128] A third example is the Holy Apostle Cathedral in Kars.[129] The building—considered one of the jewels of Armenian architecture—was converted to a mosque in 1999.[130]

Armenian cultural property has been destroyed by a failure to provide adequate maintenance; the best examples of which are the Cathedrals of Ani and Aghtamar.[131] The Cathedral of Aghtamar—a church considered unlike any other in the world—was an important See of the Armenian Church; [132] today nothing but the dilapidated exterior of the church remains.[133] The Cathedral of Ani—the medieval capital of Armenia—was destroyed by an earthquake in 1988.[134] Turkish authorities ignored the damage done to the Cathedral, focusing on restoring the Islamic structures of Ani.[135]

LEGAL THEORY

The United States founds this Application on the *jus cogens* norm prohibiting genocide, on the Genocide Convention, and on the customary international law of genocide.

SUMMARY OF THE LEGAL THEORY

Genocide is a crime under international law. The Genocide Convention controls this dispute because the United States and the Republic of Turkey are signatories to the convention. What is at issue is the definition of genocide set out in the Genocide Convention. The definition is unduly limited. It excludes genocidal acts. The customary international law of genocide encompasses eliminationist actions directed at people for political, economic, and cultural reasons.

Jus cogens norms are based on customary international law. The *jus cogens* norm of genocide includes eliminationist actions directed at people for political, economic, and cultural reasons. *Jus cogens* norms have an impact on the interpretation of treaty law, since treaty provisions inconsistent with *jus cogens* norms are not valid law. Therefore, the

128. Kouymjian, *supra* note, 108.

129. *See* Kars in Index of Armenian Art: Armenian Architecture, http://armenianstudies.csufresno.edu/ iaa_architecture/kars.htm (last visited Apr. 14, 2010).

130. Kouymjian, *supra* note 108.

131. *Id.*

132. *See* Aghtamar in Index of Armenian Art: Armeanian Architecture. http://armenianstudies.csufresno.edu/iaa_architecture/aghtamar.htm (last visited Apr. 14, 2010).

133. Dickran Kouymjian, *supra* note 108.

134. *See* Ani Cathedral in Index of Armenian Art: Armenian Architecture. http://armenian studies.csufresno.edu/iaa_architecture/ani.htm (last visited Apr. 14, 2010).

135. Dickran Kouymjian, *supra* note 108. Ani was the site of the first Seljuk mosque in Anatolia.

definition of genocide set out in the Genocide Convention must be interpreted as being consistent with the *jus cogens* norm of genocide.

The definition of genocide set out in the Genocide Convention is inconsistent with the *jus cogens* norm of genocide because it excludes forms of genocide included in the *jus cogens* norm. As a result, the Genocide Convention definition should be interpreted as including every facet of the *jus cogens* norms.

The *jus cogens* prohibition of genocide encompasses the post–1948 cultural property policies followed by the Republic of Turkey with regard to Armenian cultural patrimony. These cultural policies are properly understood as part of a century-long eliminationist program. Evidence of pre–1948 actions is offered not to prove genocide occurred in the early twentieth century but to prove the character of post–1948 actions. On this theory, the United States holds the Republic of Turkey responsible for acts of cultural genocide committed after 1948 at five sites: the Church of St. Sarkiss in the province of Kars, the Church of Holy Ejmiacin at Soradir, the Cathedral of the Holy Apostles in Kars, the Armenian Cathedral of Ani, and the Cathedral of Aghtamar.

A. GENOCIDE IS CRIMINALIZED UNDER INTERNATIONAL LAW IN THREE DIFFERENT WAYS.

Genocide is a violation of *jus cogens* norms, customary international law, and international treaty law. These three bodies of law constitute separate sources of obligations for states, each having a "separate existence."[136] For example, state obligations under customary international law are not limited by treaties.[137] Therefore, states are prohibited from committing acts of genocide by *jus cogens*, treaty law, and customary law.

1. Jus cogens norms and genocidal acts.

Acts of genocide violate *jus cogens* norms. *Jus cogens* norms are norms "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[138] The principal purpose of *jus cogens* is "to maintain the integrity of the fundamental norms of international law and set limits on how far States and other subjects of international law can go in treating

136. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (Summary of the Judgment).

137. Beth V. Schaack, *The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot*, 106 YALE L.J., 2259, 2274–77 (1997).

138. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 333 [*hereinafter* Vienna Convention].

each other."[139] *Jus cogens* obligations trump treaty obligations, rendering inconsistent provisions null and void.[140]

The Vienna Convention on the Law of Treaties, Article 53, is the only convention that recognizes the transcendent authority of *jus cogens*, but this does not mean that this transcendent effect is limited to treaties.[141] Indeed, it ranges far outside the scope of the law of treaties.[142] The fact that *jus cogens* norms render conflicting clauses of a treaty invalid necessarily means that the underlying acts themselves are invalid.[143] This is consistent with the International Law Commission's observation that "a rule of *jus cogens* is an overriding rule depriving any act or situation which is in conflict with it of legality."[144] Therefore, the Vienna Convention's prohibition of derogation of *jus cogens* should be construed broadly, encompassing acts as well as treaties.[145]

The principles that prohibit acts of genocide "are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."[146] Because of this, the ICJ has held the crime of genocide to be a *jus cogens* norm.[147] This view has been implicitly endorsed by the UN Security Council[148] and explicitly endorsed by the International Criminal Tribunals for Rwanda[149] and Yugoslavia.[150]

2. Customary international law prohibits states from committing genocidal acts.

Genocide is prohibited under customary international law. International

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139. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 1 (2006).

140. Vienna Convention, *supra* note 138.

141. ORAKHELASHVILI, *supra* note 139, at 205–06.

142. *Id. See* JENNINGS, GENERAL COURSE OF PRINCIPLES OF INTERNATIONAL LAW, II RDC (1967), 564; *See also* Allain, *The jus cogens Nature of non-refoulement*, 13 INT'L JOURNAL OF REFUGEE LAW 535 (2002).

143. Suy, *The Concept of Jus Cogens in International Law*, *in* LAGONISSI CONFERENCE: PAPERS AND PROCEEDINGS CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE 75 (1967).

144. *See* Draft Report of the Commission on its Eighteenth Session, Commentary on Article 37: Treaties Conflicting with a Peremptory Norm of International Law, 2 YBILC 309 (Jul. 14, 1966).

145. JAMES CRAWFORD, CREATION OF STATES IN INTERNATIONAL LAW 82 (1979).

146. Reservations to the Convention on Prevention and Punishment of Genocide, Advisory Opinion, 1951 I.C.J. 24 (May 28). [*hereinafter* Reservations].

147. Armed Activities on the Territory of the Congo (New Application 2002) (Democratic Republic of the Congo v. Rwanda) 2002 I.C.J. 29 (Feb. 3, 2006); *See* M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective: The Tension Between State's Interests and the Pursuit of International Justice*, *in* THE OXFORD COMPANION TO INTERNATIONAL JUSTICE 131 (Antioio Cassese ed., Oxford University Press 2009).

148. *See* The Secretary-General, Report of the Secretary-General Pursuant to Paragrapgh 2 of Security Council Resolution 808. U,N. Doc S/25704 (May 3, 1993).

149. *See* Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Judgment, ¶ 495 (Sept. 2, 1998).

150. *See* Prosecutor v. Krstic, Case No. IT-98-33, Judgment, ¶ 541 (Aug. 2, 2001).

custom is evidenced by "general practice accepted as law."[151] Thus, there are two elements of international custom: generality of practice and *opinio juris et necessitatis*.[152] Here, the general practice of civilized nations is to prohibit acts of genocide.[153] From the Paris Peace Conference of 1919[154] to today,[155] the community of civilized nations has recognized the need to protect minority groups from genocidal acts. Furthermore, disputes arising out of the treatment of minorities were to be resolved as a matter of international law: such disputes were to be referred to the Permanent Court of International Justice (PCIJ).[156] This conviction has carried through to today with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY)[157] and the International Criminal Tribunal for Rwanda (ICTR).[158] The existence of these tribunals shows that the prohibition on genocidal acts is made from a sense of legal obligation rather than courtesy, fairness, or morality; the prohibition is *opinio juris*.[159] Therefore, customary international law prohibits states from committing genocidal acts.

3. International treaty law prohibits states from committing genocidal acts.

The Convention on the Prevention and Punishment of the Crime of Genocide of 1948 is the law-making treaty that affirms the international

151. Statute of the International Court of Justice, art. 38(1)(b), June 26, 1945, 59 Stat. 1031 T.S. No. 993.

152. IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 7-10 (6th ed., 2003) (1966).

153. Reservations, supra note 146.

154. 'Poland agrees that the stipulations in the foregoing Articles, so far as they affect persons belonging to racial, religious, or linguistic minorities, constitute obligations of international concern and shall be placed under the guarantee of the League of Nations.Treaty of Peace between the United States of America, the British Empire, France, Italy, and Japan, and Poland, art. XII (June 28, 1919)(emphasis added); *see* Carole Fink, *Minority Rights as an International Question*, 9 CONTEMPORARY EUROPEAN HISTORY 3, 385–400 (2000)(discussing the plight of German minorities in Poland after World War I).

155. *See* Genocide Convention, *supra* note 1.

156. *Id.*

157. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 5, U.N. Doc. S/RES/827 (1993), amended by S.C. Res. 1166, U.N. SCOR, 53rd Sess., 3878th mtg., U.N. Doc. S/RES/1166 (1998) [*hereinafter* ICTY Statute].

158. 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, Between 1 January 1994 and 31 December 1994, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., art. 3, U.N. Doc. S/RES/955 (1994), amended by S.C. Res. 1165, U.N. SCOR, 53rd Sess., 3877th mtg., U.N. Doc. S/RES/1165 (1998) [*hereinafter* ICTR Statute].

159. BROWNLIE, *supra* note 152, at 8.

norm prohibiting acts of genocide.[160] Under Article 1, the contracting parties to the Genocide Convention recognize genocide as a crime under international law and pledge themselves to prevent and punish it.[161] While it is a minority opinion, Article IX of the Genocide Convention should be read as applying to disputes regarding the fulfillment of the Genocide Convention.[162] Therefore, contracting parties should be held responsible for failing to fulfill their duties under the Genocide Convention.

B. THE GENOCIDE CONVENTION'S DEFINITION OF GENOCIDE UNDULY LIMITS THE CUSTOMARY INTERNATIONAL LAW DEFINITION OF GENOCIDE.

In 1948, the United Nations drafted a definition of genocide for the Genocide Convention.[163] Article II of the Genocide Convention describes genocide as follows:

> [G]enocide means any of the following acts committed with the 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.[164]

This definition expands the concept of genocide set out in the so-called London Charter that established the Nuremburg tribunals.[165] There, genocide was limited to acts involving an international war.[166] The Genocide Convention remedies this limitation by expanding the crime of genocide to include acts committed "in time of peace or in time of war."[167] The International Criminal Court,[168] the International Criminal Tribunal for Rwanda,[169] and the International Criminal Tribunal for the former

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160. Genocide Convention, *supra* note 1.

161. *Id.*

162. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda) (dissenting opinion, Koroma, J.) para 4.

163. Genocide Convention, *supra* note 1.

164. *Id.*

165. *See* United Nations, Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 5 U.N.T.S. 251.

166. *See* THOMAS W. SIMON, THE LAWS OF GENOCIDE: PRESCRIPTION FOR A JUST WORLD 51 (2007).

167. Genocide Convention, *supra* note 1, at art. 1.

168. Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, 37 I.L.M. 999 [*hereinafter* Rome Statute].

169. Statute of the International Criminal Tribunal for Rwanda art. 2.

Yugoslavia[170] use this expanded definition from the Genocide Convention.

While the Convention's definition has been accepted by international tribunals, some scholars do not consider it to be sufficiently comprehensive.[171] It does not encompass groups killed for political affiliation (such as the communist Indonesians in 1965) or economic position (such as the Russian kulaks slaughtered by the Soviets).[172] It also does not include forced cultural homogenization despite the fact that genocidal acts "almost always substantially homogenize a country. . . .The perpetrators often destroy and expel people precisely because they bear despised or rival cultural ideas and practices. This is particularly evident when religion is the impetus for one leadership and group to slaughter or eliminate another."[173]

Raphael Lemkin, the legal architect of Genocide Convention, recognized the connection between cultural homogenization and genocide. Lemkin understood genocide as "a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. . . . Genocide is directed against the national group *as an entity*, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group."[174] The Genocide Convention is silent about collective or community rights.

This connection was picked up by the international community and the PCIJ during the interwar period. Through treaties, national minorities were entitled to equal civil and political rights[175] and the rights to establish, control, and manage their own "charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein."[176] This scheme was designed to perpetuate "the essence of the minority's cultural identity within the State but with its members being loyal fellow-citizens."[177] Cultural identity and cultural rights were central to protecting minorities from being eliminated by the majority group.[178]

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170. Statute of the International Tribunal for the former Yugoslavia art. 4.

171. DANIEL JONAH GOLDHAGEN, WORSE THAN WAR: GENOCIDE, ELIMINATIONISM, AND THE ONGOING ASSAULT ON HUMANITY 26 (2009).

172. *Id.* at 137–40.

173. *Id.* at 140.

174. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED 79 (Joseph Perkovich ed., The Lawbook Exchange, LTD. 2005) (emphasis added).

175. *Rights of Minorities in Upper Silesia (Minority Schools),* 1928 PCIJ (ser. A) No. 15. at 29 (Apr. 26).

176. Article 67, Section V, Treaty of Peace between the Allied and Associated Powers and Austria, St Germain-en-Laye, Sept. 10, 1919, in force Nov. 8, 1921.

177. Ana Filipa Vrdoljak, Minorities, Cultural Rights, and the Protection of Intangible Cultural Heritage, http://www.esil-sedi.eu/fichiers/en/Vrdoljak0_0__036.pdf

178. *See Minority Schools in Albania*, 1935 PCIJ. (ser. A/B) No. 64, at 17 (Apr. 6).

Thus, the customary law of genocide, from conception, has encompassed more than the definition set out in the Genocide Convention: namely collective cultural rights. By limiting the definition of genocide to acts perpetrated against individuals, the Genocide Convention cannot fulfill its stated aim of punishing and preventing the "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[179] The Genocide Convention's definition of genocide must encompass the collective cultural patrimony of minority groups.

C. *THE CUSTOMARY LAW DEFINITION OF GENOCIDE SHOULD BE THE DEFINITION APPLICABLE TO THE JUS COGENS PROHIBITION ON GENOCIDE*

A *Jus cogen* norm is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[180] Here, genocide is recognized as a *jus cogens* norm. The principal purpose of *jus cogens* is "to maintain the integrity of the fundamental norms of international law and set limits on how far States and other subjects of international law can go in treating each other."[181] Here, the limiting definition of the Genocide Convention does not allow for the maintenance of the integrity of fundamental norms of international law: a people can be eliminated from a defined area, yet that genocidal act can fall outside the Genocide Convention. The norm prohibiting genocide must cover such genocidal acts resulting in cultural homogenization, or it fails its purpose. The *jus cogens* norm does not prohibit most genocidal acts while admitting some. Therefore, a proper understanding of the *jus cogens* norm prohibiting genocide includes the destruction of cultural property with the intent to eliminate that culture from an area.

Jus cogens obligations trump inconsistent treaty obligations, rendering inconsistent provisions null and void.[182] Here, the definition of genocide in the Genocide Convention is inconsistent with the *jus cogens* norm prohibiting genocide. It is inconsistent because it excludes acts that have come to be understood as genocide. *Jus cogens* norms are non-derogable,[183] thus the contracting parties may not contract to exclude certain forms of genocide. Therefore, the treatment of the definition of genocide in the Genocide Convention is the replacement of the provided definition with the *jus cogens* norm.

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179. Genocide Convention, *supra* note 1, at art. 2.
180. Vienna Convention, *supra* note 138, at art. 53.
181. ORAKHELASHVILI, *supra* note 139, at 1.
182. Vienna Convention, *supra* note 138, at art. 53.
183. CRAWFORD, *supra* 145, at 82.

D. CONCLUSION

The overarching intent of the Turkish state—from 1850 to the present—has been to strengthen the Turkish state by eliminating rival cultures from its territory. The Turkish state has engaged in a systemic mass annihilation and elimination of Armenian individuals and Armenian culture. This systemic, eliminationist policy is continued by the Republic of Turkey's destructive cultural property policies. The evidence for this can be seen at the Church of St. Sarkiss in the province of Kars, the Church of Holy Ejmiacin at Soradir, the Cathedral of the Holy Apostles in Kars, the Armenian Cathedral of Ani, and the Cathedral of Aghtamar.

The customary international law of genocide, echoed in the *jus cogens* prohibition against genocide, encompasses the destruction of cultural property in furtherance of eliminating a people from a given area. Therefore, the *jus cogens* norm prohibiting genocide is applicable to the Armenian case.

STATEMENT OF JURISDICTION

As members of the United Nations, the United States and the Republic of Turkey are parties to the Statute of the International Court of Justice.[184] Article 36, paragraph 2, of the Statute of the Court provides that:

> State parties to the present statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
>
> a. the interpretation of a treaty;
>
> b. any question of international law;
>
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

The United States and the Republic of Turkey are also parties to the Convention on the Prevention and Prohibition of the Crime of Genocide, from 25 November 1988 and 31 July 1950 respectively.[185] Article IX of the Genocide Convention provides:

> Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention, including those relating to the responsibility of a State for genocide

184. U.N. Charter, art. 93.

185. See List D: Parties to the Genocide Convention, http://www.preventgenocide.org/law/gencon/nonparties-by ICCstatus.htm (last visited Apr. 15, 2010).

> or any of the other acts enumerated in Article 3, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

This article gives the International Court of Justice compulsory jurisdiction in all legal disputes arising under the Genocide Convention.[186]

To date, the Republic of Turkey has not entered a reservation, declaration, or understanding regarding Article IX of the Genocide Convention.[187] The United States has entered a reservation to Article IX stating "[t]hat with reference to article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case."[188] The United States, as the plaintiff, consents to the jurisdiction of the Court. Therefore, any matters in dispute between the United States and the Republic of Turkey are subject to the compulsory jurisdiction of the Court.

CLAIMS OF THE UNITED STATES

The Government of the United States claims, in its own right and as *parens patriae* of its citizens, that the Republic of Turkey as the successor state to the Ottoman Empire and through its State organs, State agents, and other persons and entities exercising governmental authority is responsible for the destruction of Armenian cultural property constituting a continuation of the Armenian Genocide. The United States respectfully requests the Court to order the Republic of Turkey to comply with its obligations under the Genocide Convention, the International Covenant on Civil and Political Rights, and the Culture Convention, including:

Taking immediate steps to preserve the churches of St. Sarkiss in Kars and Holy Ejmiacin in Soradir, Holy Apostle Cathedral in Kars, the Cathedral of Ani, and the Cathedral of Aghtamar.

Ensuring that Armenian cultural property uncovered during government sanctioned digs is properly excavated and preserved.

Providing adequate facilities to house and display Armenian cultural artifacts.

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186. Although the plain language of Article IX does not reference compulsory jurisdiction, states have considered Article IX to be a compulsory jurisdiction clause. *See* Reservations to Article IX of the Genocide Convention by the China, India, Spain, and the United States, http://www.preventgenocide.org/law/convention/reservations/ (last visited Apr. 15, 2010).

187. *Id.*

188. *Id.*

RESERVATION OF RIGHTS

The United States reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

APPOINTMENT OF AGENTS

The United States has designated as its Agent Mr. Simeon A. Morbey, law student at the University of St. Thomas School of Law, Minnesota. Pursuant to Article 40, paragraph 1, of the Rules of the Court, all communications relating to this case should be sent to:

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