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William A. Schabas

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RETROACTIVE APPLICATION OF THE GENOCIDE CONVENTION

WILLIAM A. SCHABAS*

THE CONVENTION FOR THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE was adopted on December 9, 1948,[1] and entered into force on January 11, 1951.[2] It defines the crime of genocide and sets out various norms governing its punishment, as well as establishing the jurisdiction of the International Court of Justice in the matter of disputes about its interpretation and application. Its obligations essentially concern issues of criminal liability for the crime. Nevertheless, in the recent case between Bosnia and Serbia, the International Court held that it could make a finding that a State had either committed genocide or failed to prevent it.[3] This might, as a result, lead to a finding that some form of just compensation would be due, although in the specifics of that case the Court declined to make such a finding.

The Genocide Convention was drafted by the United Nations General Assembly pursuant to Resolution 96(I), which was adopted two years earlier on December 11, 1946. Resolution 96(I) affirmed "that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices - whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds - are punishable."[4] Thus, the starting point for the debate about the existence of genocide in positive international law occurs somewhat before the adoption of the Genocide Convention.

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* *OC, MRIA, Professor of Human Rights Law, National University of Ireland, Galway and Director, Irish Centre for Human Rights; Global Legal Scholar, University of Warwick School of Law.*

1. G.A. Res. 260 (III) U.N. Docs. A (Dec. 9, 1948).
2. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.
3. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 20 (Feb. 26).
4. G.A. Res. 96 (I) U.N. Doc. A/310 (Dec. 11, 1946).

The issue of the temporal operation of the Convention has arisen in debates about the atrocities perpetrated upon the Armenians in the Ottoman Empire, primarily during 1915. For example, the recent study by Geoffrey Robertson, and in particular the documents that he obtained from the British Foreign and Commonwealth Office pursuant to an access to information request, reveal British diplomats invoking the supposed non-retroactive application of the Convention as a rationale for failing to take a position on the description of the events. A draft answer prepared by bureaucrats in the Foreign Office said that "additionally, the government's legal advisors have said that the 1948 UN Convention on genocide, which is in any event not retrospective in application, was drafted in response to the holocaust and whilst the term can be applied to tragedies that occurred subsequent to the holocaust, such as Rwanda, it cannot be applied retrospectively."[5] The issue returned on June 7, 2006, when government spokesman Geoff Hoon replied to a parliamentary inquiry:

> The fact is that the legal offence of genocide had not been named or defined at the time that the actual atrocities were committed. The UN Convention on Genocide came into force in 1948 so it was not possible at the time of the events that we are considering legally to label the massacres as genocide within the terms of the convention. I recognize that it is perfectly possible intellectually to try to apply the definitions of genocide from the convention to appalling tragedies that occurred in this case some 30 years before. The common practice in law is not to apply such judgment retrospectively. . .[6]

The British government returned to the point in 2007, in a memorandum that said "it is not common practice in law to apply judgments retrospectively."[7]

This paper attempts to address two questions: (1) Does the Genocide Convention apply to acts or events prior to its entry into force? (2) Did the crime of genocide exist under international law prior to January 11, 1951?

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5. *Parliamentary Question Background Document relating to a written question from Lord Buffen tabled on 23 January 2001 – Draft response for Baroness Scotland, cited in* GEOFFREY ROBERTSON, WAS THERE AN ARMENIAN GENOCIDE? 65 (2009).

6. Hansard, 7 June 2006, Col. 136WH.

7. *HMG's position on the Armenian Genocide Claims,* Memorandum from the Russia, South Caucasus and Central Asia Directorate, FCO to Mr Murphy, (July 2, 2007), *cited in* ROBERTSON, *supra* note 5, at 35.

RETROACTIVE APPLICATION OF THE GENOCIDE CONVENTION

Several distinguished authorities have addressed the issue of retroactive application of the Genocide Convention in recent years. In 2003, the International Center for Transitional Justice, a prestigious non-governmental organization, based in New York City, issued an opinion on this subject, which it said was prepared by "independent legal counsel." The opinion begins by noting that international law generally prohibits the retroactive application of treaties. It refers to Article 28 of the Vienna Convention on the Law of Treaties:

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.[8]

The Vienna Convention did not itself enter into force until 1980, suggesting its own problem of retroactivity. However, as the opinion notes, it is widely agreed that the Vienna Convention provision merely codifies a norm that has been well-established in customary international law, and one that is supported by decisions of international treaties.[9] The opinion also notes that there is no clause in the Genocide Convention suggesting the intent of the parties to give it retroactive effect, nor is there any support for this in the preparatory work of the Convention. According to the opinion:

> The *travaux préparatoires* of the Convention support the contention that the negotiators understood that they were accepting prospective, not retrospective, obligations on behalf of the States they represented, including the 'prevention of future crimes'. One delegate described the purpose of the Convention as expressing 'the peoples' desire to punish all those who, in the future, might be tempted to repeat the appalling crimes that had been committed'.[10]

The opinion concludes: "The Genocide Convention does not give rise to individual criminal or state responsibility for events which occurred during the early twentieth century or at any time prior to January 12, 1951."[11] More recently, Geoffrey Robertson has reached a similar conclusion.[12]

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8. Vienna Convention on the Law of Treaties art. 28, May 23, 1969, 1155 U.N.T.S. 331.

9. Mavrommatis Palestine Concessions Case (Greece v. U.K), 1924 P.C.I.J. (Ser. A.) No. 2. Preliminary Objections, Ambatielos Case (Greece v. U.K.), 1952 I.C.J. 40 (July 1).

10. International Center for Transitional Justice [ICTJ], *Analysis on Applicability of UN Convention on Genocides pre-1951* at 4 (Feb. 4 2003).

11. *Id.*

12. ROBERTSON, *supra* note 5, at 14.

Alfred de Zayas is sometimes cited as a proponent of the view that the Genocide Convention applies retroactively. In fact, on close scrutiny of his writing, this does not appear to be the case.[13] Rather, de Zayas argues that the crime of genocide existed prior to the entry into force of the Genocide Convention. His views are not really very different from those of the International Center for Transitional Justice and Geoffrey Robertson.

Nevertheless, it is probably imprecise to suggest that the Convention is without legal consequences with respect to events prior to its January 11, 1951, ratificication. In that sense it might be said to have a retroactive or retrospective effect. There are at least two dimensions to this issue. First, the Genocide Convention is a widely ratified, multilateral treaty that in at least some respects is acknowledged to either confirm, codify, or to declare, the norms and principles of customary international law. In its advisory opinion on reservations to the Genocide Convention, issued in 1951, the International Court of Justice wrote that:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.[14]

Obviously, if only a few months after the entry into force of the Convention, the International Court of Justice considered that "the principles underlying the Convention" were binding on States, regardless of whether they had ratified the Convention, there is an evident implication that these principles applied in the past, that is, before the entry into force and even before the adoption of the Convention.

Reference is also often made to the preamble of the Convention, which states that at "all periods of history genocide has inflicted great losses on humanity."[15] Obviously, these words are meant to apply to events prior to January 11, 1951. The preamble to a treaty is deemed to be part of its context for the purposes of interpretation of the treaty, according to Article

13. Alfred de Zayas, *The Genocide Against the Armenians 1915–1923 and the Relevance of the 1948 Genocide Convention*, (2004), http://alfreddezayas.com/Law_history/armlegopi.shtml.

14. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 23 (May 28, 1951).

15. Convention on the Prevention and Punishment of the Crime of Genocide, preamble, Jan. 12, 1951, 78 U.N.T.S. 277.

31(2) of the Vienna Convention on the Law of Treaties.[16] As Jann Kleffner has pointed out, nothing in the law of treaties suggests that provisions of a preamble have an inferior legal force to other provisions or no legal force whatsoever.[17] According to Charles Rousseau, "[o]n a parfois considéré le préambule des traités comme doué d'une force obligatoire inférieure à celle du dispositive. Mais c'est là une opinion isolée."[18]

Paragraph 2 of the preamble of the Convention, read along with the judgment of the International Court of Justice, should be enough to dispose of the suggestion that the term "genocide" cannot apply to events prior to entry into force of the Convention. The Preamble to the Convention fulfils an essentially declaratory function, although probably one that is perhaps superfluous given General Assembly Resolution 96(I).[19] There is also some State practice to confirm this perspective on the crime of genocide historically. In submissions to the International Court of Justice in 1951, the United States said:

> The practice of genocide has occurred throughout human history. The Roman persecution of the Christians, the Turkish massacres of Armenians, the extermination of millions of Jews and Poles by the Nazis arc outstanding examples of the crime of genocide. This was the background when the General Assembly of the United Nations considered the problem of genocide.[20]

Nevertheless, paragraph 2 refers to "genocide" rather than to "the crime of genocide."[21] This may have been inadvertent, although it might suggest a distinction, to which this paper will return shortly. Although "genocide" may have inflicted great losses on humanity at "all periods of human history," it does not necessarily follow that the *crime* of genocide was punishable under international law at all times.

Second, it might be contended that the Genocide Convention is applicable to acts that took place prior to its ratification, to the extent that there is an ongoing or prospective procedural obligation to investigate and punish acts of genocide. The procedural obligations in the Genocide Convention are framed rather vaguely, at least by comparison with more modern treaties governing international crimes and human rights abuses.

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16. Vienna Convention on the Law of Treaties art. 31(2), May 23, 1979, 1155 UNTS 331.

17. Jann K. Kleffner, *Auto-referrals and the Complementary Nature of the ICC*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 41, 45 & n.18 (Carsten Stahn & Goran Sluiter eds., 2009).

18. CHARLES ROUSSEAU, DROIT INTERNATIONAL PUBLIC, I, INTRODUCTIONS ET SOURCES 87 (2nd ed.1970).

19. G.A. Res. 96 (I), U.N. Doc. A/310 (Dec. 11, 1946).

20. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951I.C.J. 25 (May 28, 1951).

21. Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 78 U.N.T.S. 277.

Despite inadequacies in the text, a purposive reading of the Convention supports the existence of a positive obligation to investigate and prosecute crimes of genocide. Could this include genocide committed prior to January 11, 1951? State practice probably confirms such an interpretation of the Convention. A large number of States have incorporated the crime of genocide within their own national legislation, often giving their legislation retroactive effect. Yet it does not seem to be State practice to limit this retroactive effect to events subsequent to entry into force of the Convention. For example, Canada's Crimes Against Humanity and War Crimes Act, adopted in 2000, gives national courts jurisdiction over genocide committed in the past, without any temporal limitation.[22] Although prosecutions for genocide by national jurisdictions are rare, even with respect to contemporary events, there is some evidence of proceedings for the crime of genocide directed at acts perpetrated prior to entry into force of the Convention. The *Eichmann* trial, held in Israel in the early 1960s, is the great example here.[23]

This contention might be said to be bolstered by a recent decision of the Grand Chamber of the European Court of Human Rights. In *Varnava et al* v. *Turkey*, the European Court concluded that Turkey was under an obligation to investigate and punish with respect to disappeared persons, even when the disappearance itself took place prior to the acceptance by Turkey of the jurisdiction of the Court.[24] It is probably unwise, however, to extrapolate the holding in *Varnava* too much, given that it dealt specifically with cases of enforced disappearance. It seems improbable that the European Court would conclude in a similar vein with respect to a murder or a rape that occurred prior to recognition of its jurisdiction by a State party. Nevertheless, *Varnava* represents a significant evolution in the case law of the Court, and the possibility that this line of reasoning might go even further in the future can certainly not be excluded.

As has already been mentioned, writers on the subject have generally dismissed the hypothesis that the Convention could apply in a robust sense to events prior to its entry into force. Reliance is placed upon Article 28 of the Vienna Convention on the Law of Treaties. However, there is nothing in the Convention to suggest that it does *not* apply retroactively either. Moreover, the general rule for treaties dealing with international criminal liability for atrocity crimes actually seems to favor retrospective application. At the time the Genocide Convention was adopted, in December 1948, there were three examples of international treaties defining atrocity crimes, and each of them had an implicit retrospective application.

22. Canada's Crimes Against Humanity and War Crimes Act, 2000 S.C., ch. 24, s. 6 (Can.).

23. CrimA 40/61 A-G Israel v. Eichmann, [1961] IsrSC 36 277.

24. Varnava et al v. Turkey, [2008] Eur. Ct. H.R. 16064/90. *See also*, Šilih v. Slovenia, [2009] Eur. Ct. H.R. 71463/01 156–58.

The first is the Treaty of Versailles, adopted in 1919, which contemplated the prosecution of the German emperor "for a supreme offence against international morality and the sanctity of treaties."[25] Nothing explicitly referred to a retroactive application, but this was obviously the intent of the parties. The second is the Treaty of Sèvres, which envisaged prosecution of "the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August, 1914."[26] Although the Treaty of Sèvres did not enter into force, it nevertheless provides further authority for the proposition that treaty practice in the area of international criminal law regarding atrocity crimes is to provide for retroactive effect. Finally, the Charter of the International Military Tribunal also provides for retroactive prosecution of crimes against peace, war crimes and crimes against humanity.[27] Finally, practice subsequent to adoption of the Genocide Convention suggests that when an international criminal law treaty is to apply only prospectively, there will be explicit provision to this effect. The best example here is the Rome Statute of the International Criminal Court. Not one but two distinct provisions of the Statute,[28] and one provision in the ancillary Elements of Crimes,[29] ensure that it has no retroactive effect. In other words, with respect to this specialized area of international law, the exception would seem to be the rule; that is, treaties are retroactive absent some evidence of a clear intention to the contrary. Accordingly, the argument that the Convention applies retroactively should not be so cavalierly dismissed. There is at least an arguable case for retroactive application, based upon treaty practice.

TEMPORAL SCOPE OF THE "CRIME OF GENOCIDE"

Whether or not a retrospective scope is given to the Genocide Convention, there is the quite separate matter of the punishability of the crime of genocide under general international law or customary international law prior to January 11, 1951. Indeed, even if a retrospective effect to the Convention is acknowledged, the temporal scope of this still remains to be determined to the extent that the retroactive effect is limited

25. Treaty of Peace between the Allied and Associated Powers and Germany art. 227, Jun 28, 1919, 225 Consol. T.S. 482.

26. [1920] U.K.T.S. 11 art. 230.

27. Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 82 U.N.T.S. 279.

28. Rome Statute of the International Criminal Court arts. 11, 24, July 1, 2002, 2187 U.N.T.S. 90.

29. International Criminal Court, Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 article 7(1)(i) (2000). *See also*, WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 418–19 (2010).

in time. Genocide, as a punishable crime, may have existed prior to the adoption or entry into force of the Convention, but it does not follow that it existed at all periods of human history.

The term "genocide" appears for the first time in any language in November 1944, in the writings of Raphael Lemkin.[30] It is sometimes said that it was invented in 1943, because that was Lemkin's own claim, but he did not use it in any publication until the following year. Lemkin explained that the word "genocide" was "coined by the author to denote an old practice in its modern developments."[31]

There is no doubt that the term "genocide" was employed in official and international legal contexts prior to the adoption of the Convention, and even before General Assembly Resolution 96(I). Seven months after the publication of Lemkin's book, the word "genocide" was used by the United States delegation to the London Conference. Justice Robert Jackson, the head of the delegation, made reference to "Genocide or destruction of racial minorities and subjugated populations by such means and methods as (1) underfeeding; (2) sterilization and castration; (3) depriving them of clothing, shelter, fuel, sanitation, medical care; (4) deporting them for forced labor; (5) working them in inhumane conditions."[32] The indictment of the International Military Tribunal, issued in October 1945, charged Nazi defendants with "deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, and Gypsies."[33] The term was also used on several occasions by prosecutors during the trial itself.[34]

On December 11, 1946, the United Nations General Assembly adopted Resolution 96(I) on the subject of genocide:

> Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, results in great losses to humanity in the form of cultural and other contributions represented by these human groups, and is contrary to moral law and to the spirit and aims of

30. RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE, LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS (1944).

31. *Id.* at 79.

32. Robert H. Jackson, *Planning Memorandum Distributed to Delegations at Beginning of London Conference, June 1945,* REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 68 (1945), http://avalon.law.yale.edu/imt/jack11.asp.

33. France v. Göering, 13 I.L.R. 203, 45–6 (Int'l Military Trib. 1948).

34. *Id. See also*, 19 I.M.T. 497, 509, 531 (1948).

> the United Nations.
>
> Many instances of such crimes of genocide have occurred when racial, religious, political and other groups have been destroyed, entirely or in part.
>
> The punishment of the crime of genocide is a matter of international concern.
>
> The General Assembly, therefore
>
> Affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices—whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds—are punishable;
>
> Invites the Member States to enact the necessary legislation for the prevention and punishment of the crime;
>
> Recommends that international co-operation be organized between States with a view to facilitating the speedy prevention and punishment of the crime of genocide, and, to this end,
>
> Requests the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.[35]

This Resolution began the process that led to adoption of the Convention in 1948. Was the resolution intended to be declaratory of pre-existing international law, or is it better described as belonging to the progressive development of international law? The preparatory work of the Resolution is ambiguous in this respect. On the one hand, the Preamble states: "Many instances of such crimes of genocide have occurred." Perhaps this idea is the ancestor of paragraph 2 of the Convention's Preamble. Innovative criminal law legislation is always aimed at events that take place in the past but previously have been unpunishable. Thus, the preambular idea that genocide *has* occurred in the past is not necessarily authority for the view

35. G.A. Res. 96(I) UN Doc. A/310 (Dec. 11, 1946).

that it was already an international crime.

The initial draft of Resolution 96(I), which was apparently authored by Lemkin himself, said:

> *Whereas* the punishment of the very serious crime of genocide when committed in time of peace lies within the exclusive territorial jurisdiction of the judiciary of every State concerned, while crimes of a relatively lesser importance such as piracy, trade in women, children, drugs, obscene publications are declared as international crimes and have been made matters of international concern.[36]

The draft resolution was proposed by Cuba, India and Panama.[37] These three States, at any rate, do not seem to have thought that genocide was an international crime in 1946. Yet in presenting the draft resolution to the General Assembly, the Cuban representative said that "genocide was not a new crime but had been committed on a vast scale during the last World War."[38] The Cuban delegate continued that "in deference to the rule of *non crimen sine lege* . . . Cuba therefore asked that genocide be declared an international crime."[39] A Secretariat document explained:

> The chief legal and constitutional obstacle to the punishment of crimes against peace, war crimes, and crimes against humanity was, in the past, the opinion held by some that the rules against retroactive penal legislation, namely, the rules *nullum crimen sine lege* and *nulla poena sine lege*, made the punishment impermissible. It is one of the purposes of the draft convention to dissipate any doubt as far as the crime of genocide is concerned.[40]

This indicates a view of Resolution 96(I) as declaratory of existing international law, by which genocide was already a crime. Its purpose was not to create new law but rather to "dissipate any doubts" because of the "opinion held by some."[41]

Moreover, Resolution 96(I) was soon taken as authority for the existence of the crime of genocide prior to its adoption. In *United States v. Alstötter*("The Justice Case"), an American Military Tribunal, delivering judgment on December 3-4, 1947, spoke of "the crime of genocide"

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36. UN Doc. A/BUR.50. For a summary of the history of the resolution, *see* Prevention and Punishment of Genocide, Historical Summary, U.N. Doc. E/621 (Nov. 2, 1946–Jan. 20, 1948)

37. *Id.*

38. Prevention and Punishment of Genocide, Historical Summary, U.N. Doc. E/621 (Nov. 2, 1946–Jan. 20, 1948).

39. *Id.*

40. Ad Hoc Committee on Genocide, *List of Substantive Issues to be Discussed in the Remaining Stages of the committee's Session, Memorandum submitted by the Secretariat*, UN Doc. E/ADC.25/11.

41. *Id.*

committed during the Second World War.[42] The Tribunal referred to Resolution 96(I) as authority for the prosecution of Nazi atrocities. Speaking to the charge that this might constitute retroactive prosecution, the Tribunal said, "we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed."[43] The Tribunal concluded that Oswald Rothaug, a Berlin prosecutor, "participated in the national program of racial persecution. . . He participated in the crime of genocide."[44] Another Berlin prosecutor, Ernst Lautz, was convicted of enforcing the law against Poles and Jews which comprised "the established government plan for the extermination of those races. He was an accessory to, and took a consenting part in, the crime of genocide."[45] Similarly, in *United States v. Greifeldt* ("The RuSHA Case"), in a judgment dated March 10, 1948, the American Military Tribunal referred to the "crime of genocide."[46] In both cases, the convictions were registered pursuant to Control Council Law No. 10,[47] which did not use the word "genocide." However, it is clear that the Tribunals considered genocide to be a form of crime against humanity. Convictions for genocide were also recorded by courts in Poland in 1946 and 1947 with respect to Second World War atrocities.[48]

A more direct link with the Genocide Convention itself exists in the *Eichmann* prosecution. The accused was charged pursuant to legislation enacted to give effect to Israel's obligations under the Convention. The Nazi and Nazi Collaborators (Punishment) Law,[49] which was adopted in 1950 and was explicitly intended to apply retroactively, contained a provision entitled "crimes against the Jewish people."[50] It was essentially identical to the definition of genocide in Article 2 of the Convention except that it did not apply generally to national, ethnic, racial and religious groups, but only to "the Jewish people." Eichmann was convicted on this basis for acts perpetrated between 1941 and 1945.[51]

All of these prosecutions, by national courts applying legislative provisions that they considered to be derived from international law,

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42. United States v. Alstötter, 3 T.W.C. 954, 963 (U.S. Military Trib. 1951).
43. *Id.* at 983.
44. *Id.* at 1156.
45. *Id.* at 1128.
46. United States v. Greifelt, 5 L.R.T.W.C. 88, 253 (U.S. Military Trib. 1951). (The RuSHA Case).
47. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 Dec. 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, Jan. 31, 1946, pp. 50–55.
48. Poland v. Greiser, 13 L.R.T.W.C. 70 (Supreme Nat'l. Trib. of Poland 1948). Poland v. Goeth, 7 L.R.T.W.C. 4 (Supreme Nat'l. Trib. of Poland 1946).
49. Nazi and Nazi Collaborators (Punishment) Law, 5710–1950, 2 LSI 115 (Isr.).
50. *Id.*
51. CrimA 40/61 A-G Israel v. Eichmann, [1961] IsrSC 36 277.

concerned acts that occurred prior to the entry into force of the Genocide Convention. Indeed, most of the punishable acts took place even before the word genocide had been invented. These cases are therefore all good authority for the proposition that the crime existed prior to January 11, 1951. They do not, however, provide an adequate response to the question whether the crime of genocide existed under international law prior to the Second World War. There is no authority for prosecution for the crime of genocide prior to the Nazi atrocities. This is a question that may never be answered by a court of law, and one that is probably already entirely theoretical. It is generally understood that criminal prosecution is confined to living human beings who were above the age of criminal responsibility when the acts took place, and who are physically and mentally fit to stand trial. It seems unlikely that there will ever be prosecutions for the crime of genocide with respect to acts that took place before the Second World War. For the same reason, related or ancillary issues to the existence of the crime of genocide, such as the absence of statutory limitation and the availability of universal jurisdiction, may be relevant to acts perpetrated in recent decades but are of no interest with respect to events that took place 90 years ago.

Unless one adopts the view that the crime of genocide is based in natural law and that it therefore existed from the beginning of human society, it must be acknowledged that at some point in the past it cannot be accurate to speak of the *crime* of genocide. In other words, despite the preambular reference in the Genocide Convention to "all periods of history," genocide *became* punishable under international law at some point in time. Certainly, there can be no doubt that there are international crimes subject to prosecution today that did not always exist, and that did not even exist very long ago. The recently codified crime of enlistment or recruitment of child soldiers is an example. There is some debate as to when this phenomenon became an international crime,[52] but the quarrel is about a couple of decades rather than centuries or millennia. Nobody would seriously contend that the crime of recruiting child soldiers, which is now comprised within the Rome Statute, was always an international crime.

The entire phenomenon of international atrocity crimes[53] can only be dated to the early twentieth century. Indeed, the first formal recognition of the concept was a response to the atrocities perpetrated against Armenians.

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52. *See, e.g.*, Prosecutor v. Samuel Hinga Norman, Case No. SCSL-04-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (May 31, 2004) (Robertson, J. dissenting).

53. This expression, which is used to refer to the *genus* of international crimes that includes genocide, crimes against humanity, war crimes and possible other crimes, has been devised by David Scheffer. David J. Scheffer, *The Future of Atrocity Law*, 25 SUFFOLK TRANSNAT'L L. REV. 399 (2002).

On May 24, 1915, referring to the Armenian massacres, Russia, France and Britain denounced "these new crimes of Turkey against humanity and civilization."[54] The idea was developed further after the war ended. A provision in the Treaty of Sèvres contemplated international prosecution, possibly by a League of Nations tribunal, "for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August, 1914."[55] Obviously, the term "genocide" was not used at the time; it had not been invented. But the acts referred to are clearly analogous to the definition adopted later. Thus, there is some authority for the existence of the "crime of genocide" as early as August 1, 1914, although it is not as compelling in the absence of actual prosecutions and convictions.

Before 1914, the trail goes even colder. Sometimes, reference is made to the so-called "Martens clause" of the 1907 Hague Convention. It states:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[56]

However, despite this noble statement of humanitarian concerns, it is clear from the context that the "Martens Clause" was meant to apply to the parties' international armed conflict, in a context of reciprocity. What was so radical about the declaration by Britain, France and Russia about the Armenian massacres was its application to atrocities perpetrated by a sovereign State against its own population. Moreover, perpetrators of such violations could be held liable under international law.

In an article soon to be published, Professor Paul Boghossian of New York University speaks to the retroactivity argument as follows:

> How it is possible for a concept that was introduced in 1948 to apply to events that occurred in 1915? The first thing to say about this argument is that one can't *in general* assume that a concept can apply to some event (or object) only if, *at the time that the event occurred* (or the object existed), there were people around who were prepared to apply that concept to it. For example, I can truly say that there were dinosaurs on Earth 65 million years ago even though 65 million years ago there was no one around who had the

54. UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 35 (1948).

55. [1920] UKTS 11, Martens, Recueil général des traités, 99, 3e série, 12, 1924, p. 720 (French version).

56. Laws and Customs of War on Land (Hague IV) preamble, Oct. 18, 1907, 2 U.S.T. 2269.

concept *dinosaur*.[57]

He goes on to give the example of the tuberculosis bacillus, which obviously existed and killed people before it was "discovered" in the early nineteenth century. But this is merely another way of formulating the proposition in the preamble of the Genocide Convention that "at all periods of history genocide has inflicted great losses on humanity." The real question is not whether genocide existed, but rather whether the *crime* of genocide existed, which is a different matter altogether.

An international *crime* only exists when it is actively addressed by a criminal justice system within an international legal framework. We have no evidence of this taking place with respect to genocide or a crime resembling genocide before August 1, 1914. Even then, there is no evidence of prosecution until the 1940s. Thus, the conclusion seems warranted that the international crime of genocide existed prior to the adoption of the Convention, on December 9, 1948, and even prior to the adoption of Resolution 96(I), on December 11, 1946. The evidence is fairly strong for such "retroactive" existence of the crime during the Second World War, and somewhat weaker for the period beginning with the outbreak of the First World War. Before 1914, there is no real authority for the existence of a *crime* of genocide, unless its source is believed to lie within natural law.

THE PRINCIPLE OF LEGALITY

The objection that any recognition of a crime of genocide prior to the entry into force of the Convention is contrary to the principle of legality, pursuant to the maxim *nullum crimen sine lege*,[58] is somewhat separate from the question whether the crime actually existed before January 11, 1951. That the prosecutions took place and the convictions were registered is authority for the existence of the crime. The fact that this may have been retroactive criminal prosecution is a complaint about fairness, but it does not imperil the claim that the crime existed. For example, there may be jurisdictions that would refuse to prosecute genocide committed prior to a certain date out of concern for the principle of legality. This is a jurisdictional rather than a substantive matter. Nevertheless, it may be useful here to address the retroactivity argument. The debates in the United Nations General Assembly in 1946 confirm the importance of dealing with this point, given that it seems to bolster some arguments about the inexistence of the crime in a retroactive sense.

The judgment of the International Military Tribunal spoke to objections

57. Paul Boghossian, *The Concept of Genocide*, 12 J. GENOCIDE RESEARCH (forthcoming 2010).

58. Translated: "No crime without a law."

concerning the principle of legality. The Nazi defendants had a good argument that prosecution for crimes against peace violated the prohibition of retroactive criminal law. According to the Nuremberg judgment, "it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice."[59] The French version of the judgment is even more qualified: "[N]ullum crimen sine lege *ne limite pas la souveraineté des États; elle ne formule qu'une règle généralement suivie.*" The judgment continues:

> To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. . . [The Nazi leaders] must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression.[60]

With respect to war crimes, the Tribunal was able to point to some precedent, including the Hague Conventions.[61]However, for crimes against humanity, which is the cognate of the crime of genocide, the Tribunal produced no real authority, nor did it even seriously try to demonstrate that such acts had been punishable under international law in the past.[62] Perhaps, although the Tribunal never seems to have said so clearly, it favored the same logic with respect to crimes against humanity as with crimes against peace. Thus, with respect to the atrocities and persecutions contemplated by the notion of crimes against humanity, the Nazis "must have known that they were acting in defiance of all international law." This was the approach taken a few years later in one of the successor trials, *Alstötter,* referred to above.[63]

> There are contending theories to defend the apparent retroactivity of the Nuremberg prosecution of crimes against humanity. One relies upon such instruments as General Assembly 95(I) of December 1946, confirming the Nuremberg principles as evidence that the London Charter and the judgment of the International Military Tribunal were declaratory of international law.[64] The other concedes the point that crimes against humanity constituted new law, but holds this to be acceptable because the Nazi crimes could

59. *Göering,* 13 I.L.R. at 462.
60. *Id.*
61. *Id.* at 497.
62. *Id.* at 498.
63. *See supra* note 42.
64. G.A. Res. 96 (I) U.N. Doc. A/310 (Dec. 11, 1946).

> not go unpunished. A proponent of the latter hypothesis, Hans Kelsen, wrote:Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the Second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions.[65]

Along similar lines, the Dutch judge at the International Military Tribunal for the Far East ("Tokyo Tribunal"), B.V.A. Röling, said of the principle *nullum crimen sine lege* that:

> [T]his maxim is not a principle of justice but a rule of policy, valid only if expressly adopted, so as to protect citizens against arbitrariness of course (Nullum crimen, nulla poena sine lege), as well as against arbitrariness of legislations (Nullum crimen, nulla poena sine praevia lege). Nor does this rule consider whether a certain act was criminally wrong at the moment it was committed, but only the question as to whether that act was or was not forbidden under penalty. As such, the prohibition of ex post facto law is an expression of political wisdom, not necessary applicable in present international relations. This maxim of liberty may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom. It is, however, neither the task nor within the power of the Tribunal to Judge the wisdom of a certain policy.[66]

These remarks were echoed years later, by the District Court of Jerusalem, in *Eichmann*:

> It is indeed difficult to find a more convincing instance of just retroactive legislation than the legislation providing for the punishment of war criminals and criminals against humanity and

65. Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?* 1 INTERNATIONAL LAW QUARTERLY 153, 165 (1947) (For an endorsement of Kelsen's approach, see the reasons of Justice Peter Cory in *R. v. Finta*, (1994) 1 SCR 701, 874 (Can.)).

66. DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL, CHARTER, INDICTMENT AND JUDGMENTS 700 (Neil Boister and Robert Cryer, eds., 2008).

> against the Jewish People, and all the reasons justifying the Nuremberg judgments justify eo ipse the retroactive legislation of the Israel legislator. We have already referred to the decisive ground of the existence of a "criminal intent" (mens rea), and this ground recurs in all the Nuremberg judgments. The Accused in this case is charged with the implementation of the plan for the "Final Solution of the Jewish Question." Can anyone in his right mind doubt the absolute criminality of such acts?[67]

The International Military Tribunal is not without its critics, of course. At the International Military Tribunal for the Far East, Judge Pal of India objected strenuously on the retroactivity issue, and in the result, voted to acquit (although his concerns were with crimes against peace, not crimes against humanity).[68] Along similar lines, Kenneth S. Gallant has written recently that the statement of the Nuremberg Tribunal "has a cynical ring to it. It implies that judges can and should ignore principles of justice in service of the sovereign powers that created their court."[69] Yet examination of contemporary case law suggests that the Nuremberg approach has stood the test of time.

The relativism of Nuremberg with respect to retroactive crimes gave way to a more positivist view with the adoption of the Universal Declaration of Human Rights on December 10, 1948 (only hours after the Genocide Convention had been approved by the General Assembly). Article 11(2) of the Universal Declaration states:

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.[70]

The prosecution of crimes against humanity (and genocide) is thus acceptable to the extent that they were recognized as crimes under "national or international law" at the time of their perpetration. Nuremberg is compatible with this norm if the first theory is adopted, but apparently not the second.

Concern about the fate of the Nuremberg precedent weighed heavily on States engaged in the process of transforming the rather laconic provisions of the Universal Declaration of Human Rights into treaties. Two drafting

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67. A.G. Israel v. Eichmann, 36 I.L.R. 5 (District Court Jerusalem 1968).

68. *See supra* note 66at 811–930.

69. KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 1 (2009).

70. Universal Declaration of Human Rights, G.A. Res. 217A, ¶ 71. U.N. Doc. G.A.O.R., 3d Sess., 1st plen. mtg. U.N. Doc. A/810 (Dec. 10, 1948).

projects were underway in the months following the adoption of the Declaration: the European Convention on Human Rights and the Covenant on Human Rights. The European Convention moved more quickly to completion, and was concluded in November 1950. The Covenant took much longer, being split into two instruments along the way. Only the first, the International Covenant on Civil and Political Rights, adopted in 1966, is relevant to this essay.

In 1949 and 1950, the Western European states that prepared the European Convention of Human Rights chose to incorporate Article 11(2) of the Universal Declaration—it became Article 7(1) of the Convention—but added a paragraph, Article 7(2), so as to much more explicitly shelter the Nuremberg jurisprudence from challenges based upon the principle of legality: "This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations."[71] According to a Chamber of the European Court of Human Rights, in a July 2008 judgment:

> The preparatory works to the Convention show that the purpose of paragraph 2 of Article 7 is to specify that Article 7 does not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish war crimes, treason and collaboration with the enemy; accordingly, it does not in any way aim to pass legal or moral judgment on those laws.[72]

Similarly, the drafters of the International Covenant on Civil and Political Rights adopted a slightly different provision than article 7(2) of the European Convention, but one that is of similar effect and that was driven by the same considerations: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[73] Thus, two of the major human rights instruments reflect a large degree of deference toward the approach of the Nuremberg Tribunal, even though it probably did not, strictly speaking, faithfully respect the *nullum crimen* principle.

The European Court has often seemed inspired by the same flexible approach adopted by the International Military Tribunal and endorsed by

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71. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 7, § 2, Nov. 4, 1950, 213 U.N.T.S. 221.

72. Kononov v. Latvia, (no. 36376/04), Judgment, 24 July 2008, para. 115(b), citing, X. v. Belgium, (no 268/57), [1960] *Yearbook* 241; *Touvier* v. *France*, no. 29420/95, (1997) 88 DR 148; *Papon* v. *France (no. 2)* (dec.), no. 54210/00, ECHR 2001-XII (extracts).

73. International Covenant on Civil and Political Rights art. 15, § 2, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171.

Hans Kelsen and B.V.A. Röling. It has adopted two tests: (1) the law must be "foreseeable" and (2) it must be "accessible. " It need not be written down. In practice, at least in certain cases, this test has quite a resemblance to the Nuremberg view by which the Nazi defendants "knew what they were doing was wrong." Two cases from the United Kingdom dealing not with international crimes but with the ordinary crime of "spousal rape" provide important authority here.[74] This concept had not traditionally been part of the common law, which defined the crime of rape as an act perpetrated by a man against a woman "other than his wife." In the 1980s, common law judges in England started to find defendants guilty of raping their wives. The convicted men petitioned the European Court of Human Rights, arguing that the law had been changed without them being properly informed. The Court dismissed the applications, saying the criminal prohibition of rape, even with respect to a spouse, was both foreseeable and accessible. The Court was persuaded in its opinion by the fact that the crime in question was offensive to "human dignity and human freedom."[75] In other words, it might well have applied the non-retroactivity rule more strictly had the case concerned a more technical or administrative offence that did not engage core values of human dignity and freedom.

The liberal approach to *nullum crimen* taken by the European Court has quite evidently inspired judges at the *ad hoc* international criminal tribunals. In one of the more detailed treatments of this issue, in *Hadžihasanović*, a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia was asked to declare that the concept of superior responsibility as a mode of liability amounted to retroactive law. It turned to the case law of the European Court of Human Rights, noting that Article 7 of the Convention "allows for the 'gradual clarification' of the rules of criminal liability through judicial interpretation."[76] It said that it was "not necessary that the elements of an offence are defined, but rather that general description of the prohibited conduct be provided,"[77] citing in support several rulings of the European Court, including one of the spousal rape decisions, which it quoted *in extenso*.[78] Subsequently, the Appeals Chamber of the Special Court for Sierra Leone relied upon this passage in its discussion of *nullum crimen* in the child soldier case.[79]

A year after the *Hadžihasanović* jurisdiction motion, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia

74. C.R. v. United Kingdom, 21 Eur. Ct. H.R. 363 (ser. A.) at 41 (1996).

75. *Id.*

76. Prosecutor v. Hadžihasanović., Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 58 (Nov. 12, 2002).

77. *Id.*

78. S.W. v. United Kingdom, Ser. A, No. 335-B, para. 36.

79. Prosecutor v. Samuel Hinga Norman, Case No. SCSL-04-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) (May 31, 2004).

invoked the words of the International Military Tribunal to the effect that *nullum crimen* was "first and foremost a 'principle of justice.'"[80] Also citing the spousal rape cases of the European Court, the Appeals Chamber said:

> This fundamental principle 'does not prevent a court from interpreting and clarifying the elements of a particular crime'. Nor does it preclude the progressive development of the law by the court. But it does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification. This Tribunal must therefore be satisfied that the crime or the form of liability with which an accused is charged was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time, taking into account the specificity of international law when making that assessment.[81]

The Appeals Chamber referred again to the European Court's position that the concepts of "foreseeability" and "accessibility" of a norm will greatly depend on "the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed."[82] On the specificity of international criminal law, the Court returned to Nuremberg and the words of the United States Military Commission in the *Alstötter* case, explaining the difficulties of applying the *ex post facto* rule to such prosecutions.[83]

As noted earlier, even if it is valid, the *nullum crimen* objection does not undermine the conclusion that the crime of genocide existed prior to January 11, 1951. But in any event, the authorities tend towards a rejection of the *nullum crimen* argument. Perhaps the *nullum crimen* was thinner in the 1940s, and it is thicker today. But case law of the European Court of Human Rights and the International Criminal Tribunal for the former Yugoslavia echoes the philosophy of the judges at Nuremberg, at least to the extent that the prosecutions concern crimes that strike at human dignity. But, as has also been noted above, this issue is all rather theoretical, given the virtual impossibility of criminal trials for acts perpetrated prior to the Second World War.

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80. Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—*Joint Criminal Enterprise*, ¶ 37 (May 21, 2003).

81. *Id.* ¶ 38.

82. *Id.* ¶ 39 (*citing* Groppera Radio AG v. Switzerland, 12 Eur. Ct. H.R. 321, ¶ 68, (1990)).

83. *Id.* United States v. Alstötter, 3 T.W.C. 954, 963 (U.S. Military Trib. 1951).

"CIVIL" CONSEQUENCES WITH RESPECT TO PAST GENOCIDE

Even if there can be no realistic prosecution for genocide with respect to acts perpetrated in 1915, because of human longevity, can there be civil consequences if it is acknowledged that the crime of genocide was indeed committed at the time? Alfred de Zayas has argued that the general law of state responsibility may be applicable, noting the uncontroversial point that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[84] But this is a trifle simplistic; even a lay person would be aware of the enormous number of violations of international law committed in recent history that have never brought with them an "obligation to make reparation." There are huge legal obstacles, especially the farther back we go in time. In addition to demonstrating the violation of international law itself, it is above all essential to establish a jurisdiction where the dispute might be heard. Identifying the parties to such litigation is not straightforward either.

Much of De Zayas's argument seems predicated upon the idea that genocide by Turkey against Armenians is ongoing, with the consequence that the issue of statutory limitation is inapplicable. The examples of such continuing manifestations of genocide are destruction of property and of "historical memory." This certainly cannot be genocide within the meaning of the definition set out in the Convention, because destruction of property and of "historical memory" are not punishable acts of genocide listed in Article 2. A plain reading of Article 2 makes it clear that the list of genocidal acts is an exhaustive one, and there is much authority to confirm this, should a literal reading of the text be deemed insufficient.

Of course, it is possible to adopt a broader view of the definition of genocide, one that would encompass such acts. However, the general tendency of international case law has been relatively conservative in this respect. Attempts to introduce "cultural genocide," or the related concept of "ethnic cleansing," have been generally unsuccessful. In *Bosnia* v. *Serbia*, the International Court of Justice adopted the views of a Trial Chamber of the International Criminal Tribunal for the former Yugoslavia that, even in customary law, "despite recent developments, genocide was limited to physical or biological destruction of a group."[85] Accordingly, the Court concluded "that the destruction of historical, religious and cultural heritage cannot be considered to be a genocidal act within the meaning of Article II

84. Factory at Chorzów (Germ. v. Pol.), 1928 P.C.I.J. (ser. A), No. 17, at 20 (Sept. 13).

85. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 20 (Feb. 26).

of the Genocide Convention."[86] Nevertheless, the Court endorsed a statement by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia that "where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group."[87]

One of the difficulties with the civil dimension is identifying the victims; few remain alive. Dr. de Zayas invokes various recent human rights declarations, such as the United Nations Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and International Humanitarian Law, to support the right of "the immediate family, dependants or other persons or groups of persons closely connected with the direct victims."[88] This might plausibly extend to the second or third generation, but there is no judicial authority to support such a conclusion. The Armenians are not the only group with historic claims. There are also campaigns for restitution or compensation related to the slave trade, colonialism and the subjugation of indigenous peoples, for example. To date, none have been particularly successful in establishing their entitlements before international or national judicial bodies. Future success cannot be ruled out, and many bright legal minds are trying to find the magic bullet that can make such grievances justiciable. But it is unhelpful to suggest that recourse of this nature has a serious prospect of success.

In recent years, there has been some fairly successful adjudication of claims related to the Holocaust. However, they do not necessarily provide very helpful precedent for other grievances. The payment of reparations by Germany in the aftermath of the war was made out of a sense of responsibility but was in no sense a result of a legal claim against an unwilling defendant. More recently, the litigation has been directed towards private bodies for the restitution of artwork, bank accounts and similar assets.[89] Of course, to the extent this may also exist with respect to the Armenian atrocities in 1915, the door may be open. But it seems difficult to contend that any principle of state responsibility has been established and that a case can be directed against Turkey itself.

Recourse before the International Court of Justice does not seem realistic for the reasons discussed above, relative to the non-retroactivity of

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86. *Id.*

87. *Id.*

88. Alfred de Zayas, The Genocide Against the Armenians 1915–1923 and the Relevance of the 1948 Genocide Convention, (2004), http://alfreddezayas.com/Law_history/armlegopi.shtml.

89. MICHAEL R. MARRUS, SOME MEASURE OF JUSTICE, THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S 4, 36–39 (2009).

the Genocide Convention. Both Armenia and Turkey are parties of the Genocide Convention and neither has made a reservation to Article 9, which gives jurisdiction to the International Court of Justice. Neither side seems to have shown any inclination to test the point by taking a claim before the Court, an indication in itself that this remedy is probably rather remote. Nevertheless, if a case were taken, and in the remote possibility that the International Court of Justice would acknowledge a retroactive scope to the Convention, an order for reparation cannot be excluded.

The General Assembly or the Security Council could also seek an advisory opinion of the International Court of Justice. But it seems improbable that such an option would be followed if neither of the parties seeks such judicial resolution of the dispute. Other states could hardly be expected to invite one or the other bodies of the United Nations to apply for an advisory opinion, absent the consent of at least one or other of the concerned states.

CONCLUSION

The statements of the British Foreign and Commonwealth Office, referred to in the introduction to this essay, are clearly erroneous. Geoffrey Robertson describes this as "a dubious attempt to blind Parliament with bogus legal science."[90] Both General Assembly Resolution 96(I) and the Genocide Convention itself recognize that genocide has taken place at all times in human history. There have been prosecutions for the crime dealing with acts perpetrated even before the word was invented.

Although the hypothesis of retroactive operation of the Genocide Convention should not be totally dismissed, the prevailing view would seem to make this an unlikely scenario. The argument is only of any real interest to the extent that either Turkey or Armenia might choose to litigate issues concerning the Convention before the International Court of Justice. Neither has shown any inclination to do so. Otherwise, there is no available forum.

There is very good authority for the proposition that genocide was a punishable crime under international law before the adoption of Resolution 96(I) and even before 1944, when the word itself was coined. There is an arguable case that the *crime* of genocide existed even before the Second World War, and as far back as 1914, although the authority becomes less and less solid the further back one goes. Certainly, there have been no prosecutions for pre-Second World War events. In any case, the issue is rather theoretical: because of the lapse of time, there are no known suspects alive who can be traced to acts perpetrated in 1915.

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90. ROBERTSON, *supra* note 5, at 115.

This leaves the possibility of remedies for some kind of civil compensation. But here too, the chance of any real progress is very unlikely. If the goal is to obtain financial reparation, in whatever form, the authorities at present are not very favorable to the Armenian cause. It is not impossible that this might change in the future, although only if there is a dramatic adjustment in terms of broader principles in a manner that would apply to many historic crimes and atrocities.

On the other hand, if the debate is essentially about an acknowledgement of the atrocities for the purpose of the historical record, perhaps accompanied by an apology, there is no good reason why the term "genocide" cannot be used to describe the events of 1915. If this is the case, conceding that the Genocide Convention itself, and the customary legal obligations associated with its content, are not properly applicable may actually assist the process. Legal opinions that overstate the law may play well in certain Armenian communities, but they have negative consequences to the extent that they frighten Turkey about the consequences of any admission. In fact, the debate about the proper description of the events of 1915 is only made more complicated to the extent that it is haunted by the suggestion that it brings with it legal entitlements which may have substantial financial consequences. Greater realism on both sides of the debate would be helpful. There can quite obviously be no criminal prosecution simply because of the passage of time. Nor, for the reasons outlined above, does there appear to be any serious prospect of a successful legal remedy that would bring with it something resembling compensation or reparation. The word "genocide" becomes easier to use if it is dissociated from the implication that the Convention itself may apply retroactively.