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ESTABLISHING STATE RESPONSIBILITY FOR HISTORICAL INJUSTICES: THE ARMENIAN CASE

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Abstract

The article aims to identify a legal structure to establish state responsibility for historical injustices by using the deportations and mass killings of the Armenians in the Ottoman Empire (1915-1916) as a case study. It first determines whether the conduct was unlawful at the time it was committed and concludes that the 1948 Genocide Convention cannot be applied retroactively to the events in question and that customary international law provided, at the time, that the treatment by a state of its subjects was within its domestic jurisdiction. The Ottoman Empire, however, breached a series of treaties that provided for the amelioration of the conditions and for the protection of Christian minorities in the Empire. The article then discusses whether the conduct was attributable to the state under the law of state responsibility in force at the time of the *commissi delicti* and argues that while the conduct of the Ottoman ministers, local authorities and the military can be attributed to the Ottoman Empire, the attribution of the actions of other entities and individuals involved in the killings is more problematic.

Keywords

Genocide, state responsibility, intertemporal law, retroactivity, history of international law, Armenia, Turkey.

Introduction

It is well-known that a state incurs international responsibility for an internationally wrongful act whenever certain elements are present: the violation of a primary rule, i.e. an obligation arising from any binding source of international law and incumbent

upon that state, and the attribution of the unlawful conduct to the state on the basis of the secondary rules, i.e. those on state responsibility.¹ A third element is the absence of circumstances precluding wrongfulness.² Should these elements be cumulatively present, an obligation to provide full reparation in its various forms arises on the wrongdoing state.³

With regard to state responsibility for ‘cold cases’ such as historical injustices, however, problems of intertemporal law arise, both with regard to the existence and scope of the primary rules breached (was the conduct unlawful at the time it was committed?) and with regard to the secondary rules (what did the law of state responsibility provide at the time the wrongful act occurred?).⁴ In particular, the problem has emerged with regard to the alleged responsibility of certain states for the slave trade, colonialism and gross violations of human rights of the past.⁵ It should be noted that there are no ‘statutes of limitations’ as such for internationally wrongful acts, although the right to invoke cessation, reparation or guarantees and assurances of non-repetition can be lost through waiver, acquiescence or extinctive prescription.⁶ As the International Court of Justice (ICJ) explained in the *Certain Phosphate Lands in Nauru* judgment, “delay on the part of a claimant State may render an application inadmissible” but “international law does not lay down any specific time-limit in that regard”:⁷ the determination of whether the passage of time has extinguished the claim has to be made on the basis of the circumstances of each case.⁸

¹ Art. 2, International Law Commission (ILC), Draft articles on responsibility of States for internationally wrongful acts, Text and Commentaries (hereinafter ‘ILC’s Articles on State Responsibility’), in *Yearbook of the International Law Commission*, 2001, Vol. II, Part Two, pp. 26 *et seq.* The distinction between primary and secondary rules in the context of the works of state responsibility was first used by Roberto Ago, *Second Report on State Responsibility - The Origin of International Responsibility*, *Yearbook of the International Law Commission*, 1970, Vol. II, p. 179.

² Luigi Condorelli and Claus Kress, ‘The Rules of Attribution: General Considerations’, in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, Oxford, 2010) p. 224.

³ *Case concerning the Factory at Chorzów (Claim for Indemnity) (Germany v. Poland)*, 13 September 1928, Permanent Court of International Justice, Merits, Collection of Judgments, Series A, No. 17, at 29: “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.”

⁴ By ‘historical injustices’, this article refers to violations of what are now considered *jus cogens* provisions committed before the Second World War.

⁵ See a list in Eric A. Posner and Adrian Vermeule, ‘Reparations for Slavery and Other Historical Injustices’, 103 *Columbia Law Review* (2003) pp. 694-698.

⁶ Art. 45 of the ILC’s Articles on State Responsibility. Art. 45 does not however expressly mention extinctive prescription as a ground entailing the loss of a right to invoke responsibility, as the distinction between it and acquiescence and estoppel can be difficult to make (Christian J. Tams, ‘Waiver, Acquiescence, and Extinctive Prescription’, in Crawford, Pellet and Olleson, *supra* note 2, p. 1048).

⁷ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, 26 June 1992, ICJ, Preliminary Objections, *I.C.J. Reports 1992*, para. 32.

⁸ *Ibid.*

The present article has a methodological aim: it intends to identify a legal structure for the determination of state responsibility for alleged past injustices by using the deportations and mass killings of Armenians during the last years of the Ottoman Empire (1915-1916) as a case study.⁹ Two caveats are necessary. First, the article will not address the problem of whether Turkey continues the legal personality of the Ottoman Empire as far as its international rights and obligations are concerned, as this has been dealt with elsewhere.¹⁰ Second, only issues arising from Part One of the ILC's Articles on State Responsibility will be discussed, and not the consequences of the commission of the wrongful act, i.e. the obligation to provide reparation and its implementation.¹¹

The next section will focus on the primary rules, i.e. whether the conduct in question was unlawful at the time it was committed. The analysis will then shift in section 2 to the secondary rules, i.e. whether the conduct was attributable to the state under the law of state responsibility.

1. The Primary Rules: Was the Conduct Unlawful?

The first step in order to establish if an internationally wrongful act has been committed is to determine whether a primary rule prohibiting the conduct in question was in force at the time of the *commissi delicti* and was binding on the relevant state. This is particularly important in the case of historical injustices. Judge Huber, in the *Island of Palmas* case (1928), famously held that “a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled”.¹² This fundamental

⁹ On the events before and during the deportations, see Vahakn N. Dadrian, ‘Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications’, 14 *Yale Journal of International Law* (1989) pp. 262-278.

¹⁰ See Patrick Dumberry, ‘Is Turkey the “Continuing” State of the Ottoman Empire Under International Law?’, 59 *Netherlands International Law Review* (2012) pp. 235-262.

¹¹ The question of who has *jus standi* in case of reparation claims for historical injustices, therefore, will not be discussed in the present article.

¹² *The Island of Palmas (United States of America v. The Netherlands)*, 4 April 1928, Permanent Court of Arbitration, UNRIIAA, Vol. II, p. 845. Judge Huber subsequently distinguished between the creation of a right and “the existence of the right, in other words its continued manifestation”, which follows “the conditions required by the evolution of law” (*ibid.*). See the comments by Rosalyn Higgins, ‘Time and Law: International Perspectives on an Old Problem’, 46 *International and Comparative Law Quarterly* (1997) pp. 515-520. See also Art. 1 of the 1975 Resolution of the Institute of International Law on the Intertemporal Problem in International Law adopted at the Wiesbaden session: “Unless otherwise indicated, the temporal sphere of application of any norm of public international law shall be determined in accordance with the general principle of law by which any fact, action or situation must be assessed in the light of the rules that are contemporaneous with it” (56 *Annuaire de l’Institut de droit international* (1975) p. 537). As the ICJ recently reaffirmed in the *Jurisdictional Immunities of the State* Judgment, the intertemporal law principle applies differently to procedural and substantive rules:

principle has been consistently applied, explicitly or implicitly. It is codified in Article 28 of the 1969 Vienna Convention on the Law of Treaties (VCLT), which states that

[u]nless 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.¹³

It also finds application in the law of state responsibility: according to Article 13 of the ILC's Articles, "[a]n act of state does not constitute a breach of an international obligation unless the state is bound by the obligation in question at the time the act occurs".¹⁴

The Armenian deportations and mass killings have been often qualified as 'genocide': in the *Reservations to the Genocide Convention* proceedings before the ICJ, for instance, the United States argued that "the Turkish massacres of Armenians" were one of the "outstanding examples of the crime of genocide".¹⁵ This qualification is strongly contested by Turkey. According to the Turkish government's position, no evidence has been found of the necessary genocidal intent on the part of any Ottoman official:¹⁶ deportations were an emergency measure taken in time of war to prevent a revolt in the Eastern provinces of the Empire and the killings that ensued were the

while the legality of the conduct has to be determined according to the substantive law in force when the conduct in question occurred, for procedural rules the critical time is when the court is seized or when it is to deliver its decision (*Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, 3 February 2012, ICJ, para. 93, <www.icj-cij.org>). See Stefan Talmon, 'Jus Cogens after *Germany v. Italy*: Substantive and Procedural Rules Distinguished', 25 *Leiden Journal of International Law* (2012) pp. 985-986; Luigi Condorelli, 'Conclusions générales', in Laurence Boisson de Chazournes, Jean-François Quéguiner and Santiago Villalpando (eds.), *Crimes de l'histoire et réparations: les réponses du droit et de la justice* (Bruylant, Bruxelles, 2004) pp. 299-300.

¹³ See also Art. 11 of the 1935 Harvard Draft Convention on the Law of Treaties (text in 29 *American Journal of International Law Supplement* (1935) p. 799).

¹⁴ In the *Jurisdictional Immunities of the State* judgment, the ICJ confirmed this point referring to Art. 13 and held that "the compatibility of an act with international law can be determined only by reference to the law in force at the time when the act occurred" (*Jurisdictional Immunities of the State*, *supra* note 12, para. 58).

¹⁵ Written statement of the Government of the United States of America, *Reservations to the Convention on the Prevention of Genocide*, 28 May 1951, ICJ, Advisory Opinion, *I.C.J. Pleadings*, p. 25.

¹⁶ Article II of the 1948 Genocide Convention requires that the conduct is committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The authenticity of five telegrams sent by the then Interior Minister Talaat Pasha, one of the government figures that *de facto* ruled the Ottoman Empire in those years, which would allegedly reveal genocidal intent, has been questioned. See Michael J. Kelly, "'Genocide' – The Power of a Label", 40 *Case Western Reserve Journal of International Law* (2007-2008) pp. 151-152. The text of the telegrams is in Shavarsh Toriguian, *The Armenian Question and International Law* (Hamaskaine Press, Beirut, 1973) pp. 36-38).

result of war and banditry.¹⁷ As for the arrest and killing of Armenian intellectuals that preceded the deportations, they were characterized as a police operation against a terrorist group.¹⁸

Regardless of the question of intent, however, the fundamental legal question is whether an international norm prohibiting ‘genocide’ existed in 1915 and was binding on the Ottoman Empire. It is well-known that the term ‘genocide’ itself did not appear until 1944, when Raphaël Lemkin coined it in his work *Axis Rule in Occupied Europe*.¹⁹ The Convention on the Prevention and Punishment of Genocide was adopted only in 1948 and entered into force in 1951.²⁰ The Convention would thus cover the events under examination only if it were to be applied retroactively, or if its provisions were considered a codification of pre-existing customary international law. These arguments will be addressed in turn.

Starting from the former, it has already been noted that both Article 28 VCLT and Article 13 of the ILC’s Articles, codifying a principle affirmed in the *Island of Palmas* case, deny the retroactive application of international obligations. Article 28 VCLT, however, leaves open the possibility that states parties may intend a treaty to apply to situations that occurred before its entry into force. The ILC’s Commentary on Article 13 also envisages this possibility, arguing that this situation would constitute *lex specialis*.²¹ The Genocide Convention would then have retroactive effects if it could be demonstrated that this was the intention of the parties. There is, however, nothing in the text of the Convention or in its drafting history that reveals such

¹⁷ See the comments by William Schabas, *Unimaginable Atrocities. Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, Oxford, 2012) p. 112. Intent should in any case not be confused with motive: as stated by the International Commission of Inquiry on Darfur, “what matters is not the motive, but rather whether or not there exists the requisite special intent to destroy a group” (*Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, U.N. Doc. S/2005/60, 25 January 2005, para. 493).

¹⁸ On 24 April 1915, Armenian leaders and intellectuals were arrested in Istanbul and other parts of the Empire and deported or killed (Dadrian, *supra* note 9, p. 266).

¹⁹ Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for World Peace, Washington, 1944) p. xi. According to the International Criminal Tribunal for Rwanda (ICTR), “[t]he crimes prosecuted by the Nuremberg Tribunal, namely the holocaust of the Jews or the ‘Final Solution’, were very much constitutive of genocide, but they could not be defined as such because the crime of genocide was not defined until later” (ICTR, *Prosecutor v. Jean Kambanda*, Case no. ICTR 97-23-S, Judgment and Sentence, 4 September 1998, para. 16, <www.unictr.org/Portals/0/Case/English/Kambanda/decisions/kambanda.pdf>). In the context of the slave trade, the United Kingdom also declared that it is “[n]ot appropriate to apply modern concepts such as crime against humanity to past events” (Foreign and Commonwealth Office, Press conference held in London on 8 September 2001, text in 75 *British Year Book of International Law* (2001) p. 643). See also Christian Tomuschat, ‘Prosecuting Denials of Past Alleged Genocides’, in Paola Gaeta (ed.), *The UN Genocide Convention – A Commentary* (Oxford University Press, Oxford, 2009) p. 516, who argues that “[t]he word ‘genocide’ cannot properly be used as a legal term to characterize [mass killings in the past]. Genocide did not even exist as a concept”.

²⁰ Text of the Convention in 78 U.N.T.S. (1951) pp. 277 *et seq.*

²¹ See the ILC’s Commentary, *supra* note 1, p. 58.

intention: on the contrary, this conclusion would run against Article XIII, which states that “[t]he present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession”.²² During the negotiations, several delegates also referred to genocide as to a “new crime”, which might be taken to suggest that the parties intended to assume obligations only for the future, and not for the past.²³ On the other hand, it is true that the Preamble to the Genocide Convention states that “at all periods of history genocide has inflicted great losses on humanity”, that the *travaux préparatoires* contain several references to past genocides and that General Assembly Resolution 96 (I) of 11 December 1946, which mandated the preparation of a draft convention on the crime of genocide, refers to the “many instances of such crimes of genocide” which “have occurred when racial, religious, and other groups have been destroyed, entirely, or in part”.²⁴ Nonetheless, these references seem to address the historical occurrence of such events, but do not take any position on the illegality of the acts in question when they were committed.²⁵

It is well-known, however, that the Judgment of the International Military Tribunal at Nuremberg supported some retroactivity as an exception to the *nullum crimen sine lege* principle when it is essential for the purposes of justice: “so far from it being unjust to punish [the attacker] ... it would be unjust if his wrongs were allowed to go unpunished”.²⁶ In the subsequent *Eichmann* judgment, the District Court of Jerusalem held that “[i]t is indeed difficult to find a more convincing instance of a just retroactive law than the legislation providing for the punishment of war criminals and perpetrators of crimes against humanity and against the Jewish people”.²⁷ By referring to previous judgments, the District Court focused on the

²² See, with regard to another treaty, *Ambatielos case (Greece v. United Kingdom)*, 1 July 1952, ICJ, Preliminary Objections, *I.C.J. Reports 1952*, p. 40.

²³ ‘The Applicability of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide to Events Which Occurred During the Early Twentieth Century’, Legal Analysis Prepared for the International Center for Transnational Justice, p. 7 (<<http://ictj.org/sites/default/files/ICTJ-Turkey-Armenian-Reconciliation-2002-English.pdf>>).

²⁴ GA Res. 96 (I), 11 December 1946.

²⁵ In the *Bosnian Genocide* Judgment (Preliminary Objections), the ICJ seemed to suggest that the intertemporal principle does not apply to the Genocide Convention. The Court argued that “the Genocide Convention - and in particular Article IX - does not contain any clause the object or effect of which is to limit in such manner the scope of its jurisdiction *ratione temporis*, and nor did the Parties themselves make any reservation to that end, either to the Convention or on the occasion of the signature of the Dayton-Paris Agreement” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 11 July 1996, Preliminary Objections, *I.C.J. Reports 1996*, para. 34). Nevertheless, what the ICJ meant was that the *jurisdictional* rules of the Convention, in particular Article IX, did not limit the jurisdiction of the Court *ratione temporis*, and it did not touch upon the question of whether the substantive provisions were retroactive.

²⁶ Judgment, 1 October 1946, International Military Tribunal (Nuremberg), 41 *American Journal of International Law* (1947) p. 217. See Hans Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’, 1 *International Law Quarterly* (1947) p. 165.

²⁷ *Attorney-General of Israel v. Eichmann*, 12 December 1961, District Court of Jerusalem, Criminal Case No. 40/61, 36 *International Law Reports* (1968), p. 42, para. 27.

foreseeability of criminality and held that *ex post facto* laws are objectionable only when

after an action indifferent in itself is committed, the legislator then, for the first time, declares it to have been a crime and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done would afterwards be convicted to guilt by subsequent law'.²⁸

Both the *Nuremberg* and *Eichmann* cases, however, are criminal trials and do not deal with state responsibility. In practical terms, in criminal prosecutions the problem of how far back in time one can go when applying law retroactively is necessarily a limited problem, as the accused must be alive. By contrast, states usually 'live' longer than human beings (not to mention issues of state succession) and therefore, should we accept retroactivity in at least certain instances, we would face the difficult task of establishing a time limit in the past beyond which not to go in order to avoid, for instance, that Italy is called to account on grounds of genocide for the destruction of Carthage in 146 BC.

In the *Eichmann* Judgment of 29 May 1962, the Israeli Supreme Court also argued that, at the time the events occurred, the *nullum crimen, nulla poena sine lege* principle had not yet become a rule of customary international law.²⁹ Similarly, in addition to maintaining that the principle *nullum crimen sine lege* is a "moral maxim" that gives way to superior exigencies of justice whenever necessary to punish appalling atrocities, Antonio Cassese has claimed that the legal prohibition of *ex post facto* laws was still not incorporated in international law at the end of the Second World War, nor was it a general principle of law accepted by all states.³⁰ But again, the context in which these affirmations were made is international criminal responsibility, not state responsibility. Indeed, if one looks at the early codification attempts in relation to state responsibility, as well as at the above mentioned case-law,³¹ the *tempus regit actum* rule with regard to state obligations seems uncontroversial already at the beginning of the 20th century.

Another argument put forward in favour of retroactivity when certain historical injustices were committed is that such past events amount to what are now considered violations of fundamental norms of international law. As the prohibition of genocide,

²⁸ *Ibid.*, pp. 21-22, para. 7.

²⁹ 36 *International Law Reports* (1968) p. 281, para. 8.

³⁰ Antonio Cassese, *International Criminal Law* (Oxford University Press, Oxford, 2008), 2nd ed., pp. 106-107.

³¹ The *Island of Palmas* Award is dated 4 April 1928.

slavery and colonialism have attained *jus cogens* status in contemporary international law, states that engaged in such conduct in the past would incur some form of retroactive responsibility.³² This view, however, runs against Article 13 of the ILC's Articles, which does not make distinctions on the basis of the status of the breached obligation: the Commentary states clearly that

even when a new peremptory norm of general international law comes into existence ... this does not entail any retrospective assumption of responsibility ... Accordingly, it is appropriate to apply the intertemporal principle to all international obligations, and article 13 is general in its application.³³

The Commentary, however, concedes that states can agree to make reparation for damage caused by conduct that was not, at the time it was committed, unlawful under international law.³⁴ From this perspective, one commentator has maintained that the principle of non-retroactivity does not prevent the international responsibility of the states which engaged in the slave trade even though such conduct was lawful at the time it was committed. This is so because, *inter alia*, those states have acknowledged their responsibility in declarations and domestic laws, which entails "*une reconnaissance retroactive et volontaire de leur responsabilité*".³⁵ It remains however to be demonstrated - as the commentator herself recognises³⁶ - that the responsibility to which the above states referred was not only historical and moral, but also legal: at the 2001 World Conference against Racism in Durban, for instance, the Belgian representative stated, also on behalf of the EU and associated states, that

nothing in the Declaration or Programme of Action [adopted by the Conference] can affect the general legal principle which precludes the retrospective application of international law in matters of state responsibility.³⁷

³² See, critically, Max du Plessis, 'Historical Injustice and International Law: An Exploration Discussion of Reparation for Slavery', 25 *Human Rights Quarterly* (2003) pp. 636-637.

³³ ILC's Commentary, *supra* note 1, p. 58.

³⁴ *Ibid.*, pp. 132-133.

³⁵ Nerina Boschiero, 'La traite transatlantique et la responsabilité internationale des Etats', in Boisson de Chazournes, Quéguiner and Villalpando, *supra* note 12, p. 256 (emphasis in the original).

³⁶ *Ibid.*, p. 257.

³⁷ Text in 72 *British Year Book of International Law* (2001) pp. 642-643. According to the Belgian statement, the reference in the Durban Declaration to measures to halt and reverse the lasting consequences of the slave trade "should not be understood as the acceptance of any liability for these practices" (*ibid.*, 643). See also the UK Foreign and Commonwealth Office's statement, *ibid.* The text of the Durban Declaration and Programme of Action can be found at <www.un.org/WCAR/durban.pdf> (see particularly paras. 98 *et seq.*).

Be that as it may, the above opinion, that applies exclusively when the conduct was not unlawful at the time it was committed, cannot be extended to the Armenian case, as Turkey has consistently denied not only its responsibility, but also the occurrence of at least some of the events, their magnitude and their qualification as ‘genocide’.

An alternative way to circumvent the retroactivity problem would be to argue that the wrongful act is continuing.³⁸ This argument has been suggested in relation to reparations for the slave trade: the wrongful act did not end with the abolition of slavery but continues to this day, as slavery severed family relationships, deprived the victims of education and placed them in a situation of social and economic disadvantage with respect to other groups.³⁹ Transposing this view to our case, it could be claimed that the wrongful act is continuing for as long as Turkey does not acknowledge its responsibility and provide reparations, in particular the return of Armenian properties. This argument, however, cannot be accepted. Article 14 of the ILC’s Articles distinguishes between a wrongful act and its effects: as stated in the Commentary, “[a]n act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues”.⁴⁰ Genocide will normally be a *composite* internationally wrongful act in that it will be constituted by “a series of actions or omissions defined in aggregate as wrongful” (albeit in theory a single killing with the necessary specific intent may still technically constitute the crime).⁴¹ However, it is not a *continuing* wrongful act: each murder or other genocidal act committed with the *dolus specialis* amounts to a further breach of the state’s obligations, to the extent that it is attributable to it.⁴² The obligation to make reparation under the law of state responsibility is therefore separate and independent from the primary rule on the prohibition of genocide: the fact that Turkey has not made reparation or acknowledged responsibility as part of its

³⁸ See Toriguian, *supra* note 16, p. 55.

³⁹ Randall Robinson, *The Debt: What Americans Owe to Blacks* (Penguin, New York, 2000) pp. 224-229.

⁴⁰ ILC’s Commentary, *supra* note 1, p. 60. As the Commission explains, “[t]he pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution, as required by Part Two of the articles. The prolongation of such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one” (*ibid.*).

⁴¹ Art. 15 (1) of the ILC’s Articles on State Responsibility. The ILC’s Commentary refers *inter alia* to genocide as an example of a composite wrongful act (ILC’s Commentary, *supra* note 1, p. 62). Art. 15 (2) specifies that, in case of a composite wrongful act, “the breach extends over the entire period starting with the first of the actions or omissions of the series and lasts for as long as these actions or omissions are repeated and remain not in conformity with the international obligation”.

⁴² Art. 14 (2) of the ILC’s Articles on State Responsibility provides that “[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation”.

secondary obligations under the law of state responsibility does not transform the breach of the primary obligation into a continuing wrongful act.

For all the above reasons, it is not possible to conclude that the Genocide Convention retroactively applies to the 1915-1916 events and that the Ottoman Empire was in breach of it.⁴³ Any genocide claim against Turkey would then have to demonstrate that another primary rule covering what we now call ‘genocide’ existed in 1915, was binding on the Ottoman Empire and prohibited the acts against the Armenian minority. In particular, it has been claimed that genocide as an internationally wrongful act pre-existed its naming and was, until 1948, a sub-category of crimes against humanity under customary international law.⁴⁴ The Chief Prosecutor at Nuremberg, Robert H. Jackson, observed for instance that “atrocities and persecutions on racial or religious grounds” had been “assimilated as a part of International Law since at least 1907”.⁴⁵ On the other hand, Cassese opines that the Armenian massacres

did not breach any general rule of international law, for in 1915-1916 states were still free to deal with their nationals as they pleased, as long as they were not bound by bilateral or multilateral treaties on the treatment of their nationals or their minorities.⁴⁶

In its Advisory Opinion concerning *Reservations to the Genocide Convention*, the ICJ seems to suggest, if ambiguously, that the Convention’s provisions are declaratory of customary international law.⁴⁷ The Court, however, did not establish how far back in time the customary prohibition goes and its conclusions say nothing about whether it already existed in 1915.

⁴³ This does not mean that treaties must necessarily be interpreted according to the circumstances that existed at the time of their conclusion, without taking into account successive developments of international law. See the ILC’s Commentary to Art. 13, *supra* note 1, p. 59.

⁴⁴ M. Bibliowickz, ‘The Armenian Genocide: Legacies and Challenges of a Silenced Past’, 16 *Sri Lanka Journal of International Law* (2004) p. 38. See also Anja Seibert-Fohr, ‘State Responsibility for Genocide Under the Genocide Convention’, in Gaeta, *supra* note 19, p. 354, and the bibliography cited therein.

⁴⁵ Justice Jackson’s Report to the President on Atrocities and War Crimes, 7 June 1945, para. 5, <http://avalon.law.yale.edu/imt/imt_jack01.asp>.

⁴⁶ Antonio Cassese, ‘Armenians (Massacres of)’, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice* (Oxford University Press, Oxford, 2009) p. 249.

⁴⁷ *Reservations to the Convention on the Prevention of Genocide*, 28 May 1951, ICJ, Advisory Opinion, *I.C.J. Reports 1951*, p. 23 (“[T]he principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation”). The ILC Commentary to Art. 15 also suggests that “[t]he intertemporal principle does not apply to the [Genocide] Convention, which according to its article I is declaratory” (ILC’s Commentary, *supra* note 1, p. 62). In reality, there is nothing in Art. I of the Convention that suggests that it is declaratory of customary international law.

In order to clarify this issue, it is important to look at the positions adopted at the time by other states with regard to the events under examination. The Entente Powers (Britain, France and Russia) issued a common declaration on the Armenian deportations and mass killings:

Since about a month the Turkish and Kurdish populations of Armenia are carrying out massacres among the Armenian people with the toleration and often with the support of the Ottoman authorities ... In view of these new crimes against humanity and civilization, the allied Governments publicly notify the Sublime Porte that they will hold personally responsible all the members of the Turkish government as well as all officials who have participated in such massacres.⁴⁸

This is the first reference in a quasi-legal context to “crimes against humanity”, although – as acknowledged by the International Criminal Tribunal for the former Yugoslavia (ICTY) - in a non-technical sense.⁴⁹ The “new” should not necessarily be interpreted as referring to crimes that were unheard of, but rather to the fact that the Ottoman Empire had already committed such crimes during the Hamidian massacres of 1894-1896.⁵⁰ There was, however, no follow up to this Declaration and no legal definition of “crimes against humanity” was agreed at that time. The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, set up by the 1919 Paris Peace Conference, referred to “Violations of the Laws and Customs of War and the Laws of Humanity” and determined that the Central Empires and their Allies, including the Ottoman Empire, had used “barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity”.⁵¹ Indeed, it appears that the Commission’s reference to the violations of

⁴⁸ FO/371/2488/63095 (reprinted in Mark D. Kielsgard, ‘Restorative Justice for the Armenians, Resolved: It’s the Least We Can Do’, 24 *Connecticut Journal of International Law* (2008) pp. 13-14).

⁴⁹ ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber Opinion and Judgment, 7 May 1997, para. 618, <www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>. It seems that the Russian Foreign Minister had proposed a reference to “Christianity and civilization” instead of “humanity”, but this met with the opposition of the French and British delegations, who were worried that the Muslim populations in their territories in the Middle East might feel discriminated against (Cassese, *supra* note 30, pp. 101-102). The expression “laws of humanity” had already appeared in an international legal text in the Preamble of the 1899 and 1907 Hague Convention IV With Respect to the Laws and Customs of War on Land (the so-called ‘Martens Clause’).

⁵⁰ On the 1894-1896 Hamidian and 1909 Adana massacres, see Vahakn N. Dadrian, ‘Armenians in Ottoman Turkey and the Armenian Genocide’, in Dinah Shelton (ed.), *Encyclopedia of Genocide and Crimes Against Humanity* (Thomson/Gale, Detroit, 2005), Vol. I, pp. 70-72.

⁵¹ Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 29 March 1919, 14 *American Journal of International Law* (1920) p. 115. The Commission was formed by the representatives of the United Kingdom, United States, Belgium, France, Italy, Greece, Japan, Poland, Romania and Serbia. The Report of the Commission focuses on state responsibility, in particular for the premeditation of the war, the violation of the neutrality of Belgium and Luxembourg, violations of the laws and customs of war and of the “elementary” laws of humanity,

the laws of humanity was primarily aimed at addressing the Armenian massacres.⁵² These actions included, amongst others, murders and massacres, torture, deliberate starvation of civilians, rape, abduction of women, deportation of civilians, internment of civilians under inhumane conditions and pillage. All of these acts are now incorporated in elements of the current definitions of genocide and crimes against humanity. The US member of the Commission, however, strongly objected to the inclusion of a reference to the “laws of humanity” in the mandate of the Commission on the basis that these laws were arguably not sufficiently precise at the time.⁵³ The 1920 Treaty of Peace of Sèvres also expressly mentioned Turkey’s responsibility for the 1915-1916 events, but only referred to “massacres”, not “violations of the laws of humanity” and did not specify what laws were breached by the Ottoman Empire with regard to such massacres.⁵⁴ In light of the above, it is difficult not to agree with the ICTY when it held that crimes against humanity were “a new category of crimes” created by the Nuremberg Charter.⁵⁵ The events under examination did not even amount to violations of the laws and customs of war: Section III of the 1899 Hague Regulations on the Laws and Customs of War on Land only applies to conduct committed in the territory of another state and there is no regulation of the conduct of a belligerent in its own territory.⁵⁶

If all the above supports the conclusion that in 1915 customary international law still provided that the treatment by a state of its subjects was within its domestic jurisdiction,⁵⁷ it should be recalled that the Christian minorities in the Ottoman Empire had been the object of a series of international treaties in the 1800s.⁵⁸ Article

for which Germany, Austria-Hungary and, secondly, Turkey and Bulgaria were found responsible. Only in Chapter III does it address the question of ‘personal responsibility’ for such violations.

⁵² Matthew Lippman, ‘The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later’, 15 *Arizona Journal of International and Comparative Law* (1998) p. 420; Egon Schwelb, ‘Crimes Against Humanity’, 32 *British Year Book of International Law* (1946) p. 181.

⁵³ Report of the Commission, *supra* note 51, pp. 144-146.

⁵⁴ Arts. 142, 144 and 230 (text in 15 *American Journal of International Law* (1921), Supplement, pp. 179-295). The Treaty of Sèvres also provided for the trial of those “responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914” by a tribunal designated by the Allied Powers or created by the League of Nations (Art. 230). The Treaty was signed by Sultan Mohammed V in 1920 but was not ratified and never came into force. It was later replaced by the Treaty of Lausanne (24 April 1923), which did not contain provisions for the punishment of past crimes and was accompanied by a Declaration of Amnesty for all offences committed between 1914 and 1922.

⁵⁵ *Tadić*, *supra* note 49, para. 618.

⁵⁶ The Ottoman Empire ratified the Hague Convention (II) with Respect to the Laws and Customs of War on Land on 12 June 1907. Its 1907 version was signed on 18 October 1907 but not ratified.

⁵⁷ At the time, the rights of individuals would have become internationally relevant only in the context of the treatment of foreigners and the exercise of diplomatic protection.

⁵⁸ On the peace treaties between the Ottoman Empire and the European Powers, *see generally* Karl-Heinz Ziegler, ‘The Peace Treaties of the Ottoman Empire with European Christian Powers’, in Randall Lesaffer (ed.), *Peace Treaties and International Law in European History* (Cambridge University Press, Cambridge, 2004) pp. 338-364.

IX of the 1856 Treaty of Paris expressed the will of the Sultan to ameliorate the conditions of his subjects “without distinction of Religion or of race” and refers to a Firman (Imperial decree) “which records his generous intentions towards the Christian population of his Empire”:⁵⁹ however, the provision specified explicitly that this did not give the European Powers the right to interfere in the domestic affairs of the Ottoman Empire. The 1877 London Protocol concluded between Germany, Austria-Hungary, France, Great Britain, Italy and Russia declared that the six signatories would “watch carefully” the manner in which the Ottoman Empire complied with its promises with regard to the nationalities and minorities in the Empire. It also provided for consultation and joint action should the Powers be “once more disappointed”.⁶⁰ The Protocol qualified the introduction of reforms and the amelioration of the conditions of the Christian subjects of the Sultan as “indispensable to the tranquillity of Europe” and warned that failure to do so would be incompatible with the interests of the Great Powers and of Europe in general: to use modern language, the situation of Christian minorities in the Ottoman Empire amounted to a “threat to the peace”.⁶¹ The Protocol was however rejected by Turkey and the Turkish-Russian War of 1877-1878 ensued, which led to the occupation by Russia of portions of Turkish Armenia. Under Article XVI of the subsequent 1878 Preliminary Peace Treaty of San Stefano between Russia and the Ottoman Empire, the first international agreement to specifically refer to the Armenians,

the Sublime Porte engages 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.⁶²

The provision, then, provided for two international obligations owed by Turkey towards Russia: to introduce the necessary reforms and to protect the Armenians. Thereafter, in reaction to the growing influence of Russia, the United Kingdom secretly concluded the 1878 Cyprus Convention with the Ottoman Empire. Under its Article I, the former undertook to defend the latter against Russia in Asia. In return, the Ottoman Empire committed

⁵⁹ Art. IX, Peace Treaty Concerning the Termination of the Crimean War, Paris, 30 March 1856. Text in Wilhelm G. Grewe (ed.), *Fontes Historiae Iuris Gentium* (Walter de Gruyter, Berlin/New York, 1992), Vol. III/1, p. 23. The Firman mentioned in the Treaty of Paris is the Imperial Edict of Reform (*Hatti-Houmayoun*), declared by Sultan Abdülmecid on 18 February 1856.

⁶⁰ Protocol of 31 March 1877, French text in *Martens Nouveau Recueil Général*, Série II, Vol. III (1871-79) pp. 174-175 (the translation into English is mine).

⁶¹ Art. 39 of the United Nations Charter.

⁶² Art. XVI, Russo-Turkish Preliminary Treaty of Peace, San Stefano, 19 February 1872, in Grewe, *supra* note 59, p. 415.

to introduce necessary reforms, to be agreed upon later between the two Powers, into the government, and for the protection of the Christian and other subjects of the Porte in these territories.⁶³

The Eastern Question, i.e. the problems originating from the political and economic weakness of the Ottoman Empire, was eventually settled at the 1878 Congress of Berlin. Article LXII of the Treaty of Berlin, which superseded the Treaty of San Stefano, provided that

[i]n no part of the Ottoman Empire shall difference of religion be alleged against any person as a ground for exclusion or incapacity as regards the discharge of civil and political rights, admission to the public employments, functions and honours, or the exercise of the various professions and industries ... The right of official protection by ... the Powers in Turkey is recognized ...⁶⁴

More significantly, Article LXI contains an obligation on the Ottoman Empire to

carry out, without further delay, the improvements and reforms demanded by 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.⁶⁵

A commentator of the time affirmed that the Armenians were thus placed

under the express protection of the international law of contract, and under the control of the Great Powers. The natural obligations of the Turkish Government to all its subjects have become, as regards the Armenians, strict engagements with the States which are parties to the Treaty [of Berlin], and as regards all the Christian Turkish subjects in Asia strict engagements with England.⁶⁶

⁶³ Constantinople Convention, 4 June 1878 (text in *Martens Nouveau Recueil Général*, Série II, Vol. III (1871-79) pp. 272-275). The Convention also allowed Cyprus to be occupied and administered by the United Kingdom.

⁶⁴ Art. LXII, Peace Treaty Concerning the Settlement of the Oriental Question (Act of the Congress of Berlin), Berlin, 13 July 1878. Text in Grewe, *supra* note 59, pp. 51-52.

⁶⁵ Art. LXI, *ibid.*, p. 50.

⁶⁶ Gustave Rolin-Jaequemyns, *Armenia, The Armenians, and the Treaties* (John Heywood, London, 1891) p. 40 (emphasis in the original).

If, under the Treaty of San Stefano, Turkey's commitments had been assumed only towards Russia and, under the Cyprus Convention, towards the United Kingdom, under the Treaty of Berlin the Armenians were put under the collective protection of the Great Powers, which acquired the right to receive periodic reports, evaluate the measures adopted and superintend their application.⁶⁷ At the latest by 1878, then, the Armenian question was not just an internal affair, but a matter of international obligation: the conclusion of the above mentioned treaties had removed it from the domestic jurisdiction of the Porte.⁶⁸ The actions of the Ottoman authorities towards the Armenian minority, therefore, constituted an internationally wrongful act in the form of breaches of treaty obligations.⁶⁹ It is true that the treaties under examination only provided for an obligation on the Ottoman Empire to protect the Armenians, and not for an obligation not to commit certain harmful actions against them, but, as the ICJ clarified in the *Bosnian Genocide* case in relation to genocide,

[i]t would be paradoxical if States were ... under an obligation to prevent, so far as within their power, the commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law.⁷⁰

⁶⁷ *Ibid.*, p. 35. Rolin-Jaequemyns noted that the Great Powers acquired not only a right, but also a duty to ensure the correct implementation of the provisions of the Treaty of Berlin (*ibid.*, p. 40). In several diplomatic notes, the United Kingdom protested against the non-introduction of reforms and invoked the implementation of Art. LXI of the Treaty of Berlin and of the Cyprus Convention (*ibid.*, pp. 51-53). The Great Powers also issued an Identical Note (11 June 1880) and a Collective Note (7 September 1880, sent on 11 September), which demanded the execution of Art. LXI of the Treaty of Berlin (*ibid.*, pp. 83-84, 88-93).

⁶⁸ The above mentioned Identical Note of 11 June 1880 refers to the "grave responsibility the Porte would incur by any fresh delay in the execution of the measures which the Powers agree in considering to be essential to the interests of the Ottoman Empire and of Europe" (text in Rolin-Jaequemyns, *supra* note 66, p. 84).

⁶⁹ There can be little doubt that, by this time, international responsibility arose as a result of a breach of treaty obligations: see for instance Arts. 1 and 2 of the 1930 Articles adopted in first reading by the Third Committee of the Conference for the Codification of International Law (*Yearbook of the International Law Commission*, 1956, Vol. II, p. 225); Art. 20 of the 1935 Harvard Draft Convention on the Law of Treaties (*supra* note 13, p. 977); and *Case concerning the Factory at Chorzów*, *supra* note 3, p. 29. The 1856 Paris Treaty and the 1878 Berlin Treaty were denounced by the Ottoman Cabinet only in late 1916 invoking, *inter alia*, the violation of those treaties by the European Powers and the fundamental change of the circumstances in which the treaties were signed (the text of the communication containing the denunciation is in 5 *Current History: A Monthly Magazine of The New York Times* (February 1917) pp. 822-824).

⁷⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, ICJ, Merits, *I.C.J. Reports 2007*, para. 166. Even though, under Art. I of the Convention, the states parties to the Genocide Convention only expressly undertake "to prevent and to punish" genocide in time of peace or war, the ICJ held that the Genocide Convention also contains an obligation on states not to commit genocide on the basis of Art. I, for two reasons: because the provision qualifies genocide as a "crime under international law", which means that states parties must "logically" have undertaken the obligation not to commit the act themselves, and because "the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide" (*ibid.*). According to the ICJ, states are also bound not to commit the

Whether the international responsibility of the Ottoman Empire arose solely for the deportations and for not preventing the killings, or also for the killings themselves, depends on whether the murderous conduct carried out by individuals was attributable to the Empire. This will be investigated in the next section.

2. The Secondary Rules: Can the Conduct of the Relevant Individuals Be Attributed to the Ottoman Empire?

As already noted, for state responsibility to arise it is necessary not only that there is a breach of a primary rule, but also that the violation is imputable to a state according to the secondary rules on attribution. These rules are presently codified in Chapter II of Part One of the ILC's Articles on State Responsibility.

Assuming - as argued in the previous section - that the acts under examination were unlawful at the time they were committed, were they attributable to the Ottoman Empire? From historical evidence, it appears that the deportations were decided by the leaders of the ruling Committee of Union and Progress (CUP) party, which through a *coup d'état* in 1913 had gained control of the Empire and established a military dictatorship.⁷¹ The party was dominated by the 'three Pashas', a triumvirate composed by Ismail Enver (Minister of War, *de facto* Commander of the Ottoman Army and

ancillary offences codified in Art. III (conspiracy, direct and public incitement, attempt to commit genocide and complicity) because of the "purely humanitarian and civilizing purpose" of the Convention, which would only be promoted if states are subject to the full spectrum of the Convention's obligations (*ibid.*, para. 167). In the previous *Preliminary Objections* judgment, the Court had already ruled that "the reference in Article IX [of the Genocide Convention] to 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III' does not exclude any form of State responsibility" and that "[n]or is the responsibility of a State for acts of its organs excluded by Article IV of the Convention, which contemplates the commission of an act of genocide by 'rulers' or 'public officials'" (*Genocide (Preliminary Objections)*, *supra* note 25, para. 32). These conclusions have been criticised by some commentators, according to which the Convention is "merely a treaty establishing judicial co-operation among contracting states to ensure the prevention and punishment of such a heinous crime through the adoption of appropriate national legislation, the exercise of criminal jurisdiction and the extradition of persons allegedly responsible for genocide" (Paola Gaeta, 'On What Conditions Can a State be Held Responsible for Genocide?', 18 *European Journal of International Law* (2007) p. 632; Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide', 5 *European Journal of International Law* (2007) pp. 876-877). According to these commentators, an obligation upon states not to commit genocide can only be based on customary international law.

⁷¹ Dadrian, *supra* note 50, p. 73. The Temporary Law on Deportations was adopted in May 1915 by the Ottoman Cabinet when the deportations were already under way. Without expressly referring to the Armenians or other minorities, the Law authorized local authorities to order the deportation of population on suspicion of espionage, treason and on military necessity. The Law was declared unconstitutional and repealed in 1918 by the Ottoman Parliament (Dadrian, *supra* note 9, pp. 266-267).

Commander of the Third Army in Eastern Anatolia),⁷² Mehmet Talaat (Interior Minister and Secretary-General of the CUP and, in 1917, Grand Vizier, who ordered the closure of all Armenian political organizations in the Empire and the relocation of Armenians on 2 May 1915), and Ahmed Jemal (Minister of the Navy and Commander of the Fourth Army).⁷³ The three men effectively ruled the Ottoman Empire until its defeat in the First World War.⁷⁴ The organization and execution of the deportations were entrusted to local authorities and to the military with the latter accompanying the convoys, while the killings that ensued were perpetrated by several groups and agencies, including irregular units of the Ottoman army.⁷⁵ In particular, newly formed brigand units of the Special Organization (*Teshkilati Mahsusa*), a semi-official entity set up by the CUP which also included former convicts, were employed to attack the Armenian convoys during the deportations to Syria and northern Iraq.⁷⁶ It also seems that large mobs were mobilised.⁷⁷ Five categories of individuals appear then to have been involved in the events under examination: the decision-makers, the Ottoman army, the local authorities, the Special Organization and other irregular units, and the mobs.

Even though the early codification efforts focused exclusively on state responsibility for damages caused to foreigners and their property, the general bases of attribution as we know them today were already well-established when the Armenian deportations and killings took place.⁷⁸ Article I of the Resolution adopted by the Institute of International Law in 1927 declared a state responsible for the acts of its organs whether or not in conformity with law or superior orders.⁷⁹ *Ultra vires* acts of organs committed within their apparent authority or general scope of authority were also deemed to entail state responsibility at the time of the events under consideration.⁸⁰ As Eagleton demonstrated in his seminal monograph on state

⁷² *De jure*, he was Deputy Commander of the Army, as the Sultan formally held the title of Commander in Chief.

⁷³ Bibliowicksz, *supra* note 44, p. 30. See also James G. Harbord, *Conditions in the Near East, Report of the American Military Mission to Armenia* ('The Harbord Report') (Washington, 1920) p. 10 (text at <<http://armenianhouse.org/harbord/conditions-near-east.htm>>).

⁷⁴ Dadrian, *supra* note 50, p. 73. Art. 142 of the Peace Treaty of Sèvres qualified the regime in Turkey since 1 November 1914 as "terrorist".

⁷⁵ Dadrian, *supra* note 50, p. 74.

⁷⁶ *Ibid.* See also Dadrian, *supra* note 9, p. 274.

⁷⁷ Dadrian, *supra* note 50, p. 74.

⁷⁸ The text of the early codifications of the law of state responsibility is in *Yearbook of the International Law Commission*, 1956, Vol. II, pp. 221-230, and in *Yearbook of the International Law Commission*, 1969, Vol. II, pp. 141-156.

⁷⁹ *Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers*, Resolution adopted at the Lausanne session (1927), text at <www.idi-iil.org/idiF/resolutionsF/1927_lau_05_fr.pdf>.

⁸⁰ Art. I of the above mentioned Resolution of the Institute of International Law (1927), *supra* note 79. See Heinrich Triepel, *Droit international et droit interne* (Pédone/Oxford University Press, Paris/Oxford, 1920) pp. 345-346; Edwin M. Borchard, "Responsibility of States" at the Hague

responsibility published in 1928, no distinction existed between acts of senior or lower-ranking state officials.⁸¹ Furthermore, the attribution to the state of conduct of private persons or groups of persons, such as auxiliary or irregular forces, authorized or under the direction or control of that state, was already accepted in the early 20th century.⁸²

There are, then, no problems of retroactivity with regard to the application of the broad bases of attribution contained in Part One, Chapter II of the Articles on State Responsibility, which are a codification of pre-existing law.⁸³ If we apply those bases to the 1915-1916 events, there is no doubt that the conduct of the Ottoman ministers, local authorities and army officials can be attributed to the Ottoman Empire, as they were *de jure* organs of the Empire.⁸⁴ On the other hand, the status of the Special Organization is far from clear.⁸⁵ Dadrian refers to it as a “semi-

Codification Conference, 24 *American Journal of International Law* (1930) pp. 529-530 ; Clémentine Bories, ‘The Hague Conference of 1930’, in Crawford, Pellet and Olleson, *supra* note 2, p. 65; Dionisio Anzilotti, *Corso di diritto internazionale (Introduzione – I soggetti – Gli organi)* (Athenaeum, Rome, 1923) p. 271.

⁸¹ Clyde Eagleton, *The Responsibility of States in International Law* (New York University Press, New York, 1928) pp. 45-50. The Author opines that “[p]ractice does not justify the conclusion that no responsibility exists for injurious acts by inferior officials of the state” (*ibid.*, p. 49). As Brownlie observes, “the application of policies is normally in the hands of subordinate officials” (Ian Brownlie, *System of the Law of Nations. State Responsibility* (Part I) (Clarendon Press, Oxford, 1983) p. 135).

⁸² See for instance *Charles S. Stephens and Bowman Stephens (U.S.A. v. United Mexican States)*, 15 July 1927, General Claims Commission (Mexico-United States of America), UNRIAA, Vol. IV, pp. 265-268. The Commission noted that “[i]t is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were ‘acting for’ Mexico or for its political subdivisions” (*ibid.*, p. 267). In the ILC’s Articles, the case of “State organs [that] supplement their own action by recruiting or instigating private persons or groups who act as ‘auxiliaries’ while remaining outside the official structure of the State”, such as those “who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries”, is covered by Art. 8 (ILC’s Commentary, *supra* note 1, p. 47).

⁸³ On the history of the rules of attribution, see Jan Arno Hessbruegge, ‘The Historical Development of the Doctrines of Attribution and Due Diligence in International Law’, 36 *New York University Journal of International Law and Politics* (2004) pp. 265-306.

⁸⁴ With regard to the criminal responsibility of the members of the Ottoman government, several ministers in the wartime cabinet and leaders of the CUP party (including the triumvirate) were prosecuted in absentia under the Ottoman criminal code and found guilty by a Turkish court martial on 5 July 1919 of massacres, deportation and looting. Regional CUP secretaries were also prosecuted (Cassese, *supra* note 46, pp. 249-250). Other attempts to secure the individuals responsible for the Armenian mass killings to justice eventually aborted. In May 1919, sixty-seven detainees, including former ministers, that had been arrested by the Turkish authorities, were transferred by the British to Malta, then under British rule, to be tried before an international tribunal. The trial, however, never took place as the prisoners had in the meantime escaped or were returned to Turkey in 1921 in pursuit of an exchange of prisoners agreement (Dadrian, *supra* note 9, pp. 279-289; Robert Cryer, *Prosecuting International Crimes* (Oxford University Press, Oxford, 2005) p. 33).

⁸⁵ It is not clear, for instance, whether the Special Organization had been formally set up by the Ottoman government: see the testimony of the Grand Vizier Sait Halim and of the Justice Minister before the Ottoman Parliament’s Fifth Committee investigating the Cabinet Ministers (Dadrian, *supra* note 9, p. 277). However, members of the CUP were indicted and condemned by the Court Martial in 1919 for organizing the Special Organization cadres (*ibid.*, p. 302).

autonomous ‘state within the state’⁸⁶. As it does not seem that the Special Organization was a *de jure* organ of the Ottoman Empire, the question is whether its relationship with the Ottoman government “was so much one of dependence on the one side and control on the other” that the Organization could be equated “for legal purposes, with an organ of the [Ottoman] Government, or as acting on behalf of that Government”.⁸⁷ This, however, would require “proof of a particularly great degree of State control over them”.⁸⁸ Should that not be the case, the Organization’s units could still have conducted the attacks against the Armenian convoys on the instructions or under the direction or control of the Ottoman authorities, so that the conduct could be attributed to the state.⁸⁹ In such circumstance, any claim that the Ottoman Empire is responsible for at least certain actions of the Special Organization would require evidence that the Organization received specific instructions from the Ottoman organs to carry out the attacks and the killings or that these were an integral part of an operation directed or controlled by state authorities. It should be noted that, even though the application for Imperial Legal Authorization to form the Special Organization was vague with regard to its goals, as it invoked “national ideals and objectives to be ensured through solidarity and cohesiveness to secure which will be

⁸⁶ Dadrian, *supra* note 9, p. 274.

⁸⁷ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 27 June 1986, ICJ, Merits, *I.C.J. Reports 1986*, para. 109.

⁸⁸ *Genocide (Merits)*, *supra* note 70, para. 393.

⁸⁹ Art. 8 of the ILC’s Articles on State Responsibility. In the *Nicaragua* case, the ICJ argued that “United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself ... for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua”: what has to be proved is that “that State had effective control of the military or paramilitary operation in the course of which the alleged violations were committed” (*Nicaragua*, *supra* note 87, para. 115). In the *Genocide* case, the ICJ returned to the point and clarified that “[i]t must ... be shown that this ‘effective control’ was exercised, or that the State’s instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations” (*Genocide (Merits)*, *supra* note 70, para. 400). While the ICJ claimed that “[t]he rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful acts in question in the absence of a clearly expressed *lex specialis*” (*Genocide (Merits)*, *supra* note 70, para. 401), according to the ICTY “[t]he degree of control may ... vary according to the factual circumstances of each case” (ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, 15 July 1999, para. 117, <www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>). Doubting the consistency of the ICJ’s effective control test with the “logic” of the law of state responsibility (*ibid.*, paras. 116 *et seq.*), the ICTY adopted a much less restrictive test to attribute the conduct of militarily organized armed groups to a foreign state. Under the ICTY “overall” control test, for the actions of such groups to be attributed to a state it is sufficient that the state “has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group ... regardless of any specific instructions by the controlling State concerning the commission of each of those acts” (*ibid.*, para. 137; emphasis in the original). The ICJ responded by noting that “the [ICTY] ‘overall control’ test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf” (*Genocide (Merits)*, *supra* note 70, para. 406).

the purpose of the Organization”,⁹⁰ a Turkish court martial in the *Bahâeddîn Şâkir Bey and others* trial, held that the Organization “had been formed for the purpose of destroying and annihilating the Armenians”.⁹¹ If the actions of the Special Organization’s units went beyond the scope of the specific instructions received, one should determine “whether the unlawful or unauthorized conduct was really incidental to the mission or clearly went beyond it”;⁹² in particular, “where persons or groups have committed acts under the effective control of a State, the condition for attribution will still be met even if particular instructions may have been ignored”.⁹³

As to the mobs that attacked the convoys and the deportees, their conduct cannot be attributed to the Ottoman Empire, even though they might have been incited to attack by state authorities. There is no express regulation of incitement in the ILC’s Articles on State Responsibility.⁹⁴ Incitement would thus entail state responsibility for the incited actions only to the extent it amounts to instructions, direction and control.⁹⁵ After inciting the actions, however, state authorities might subsequently publicly endorse them and adopt them as their own:⁹⁶ in the *Hostages* case, the ICJ held that, although the initial attack on the US Embassy in Teheran was not attributable to Iran, the subsequent endorsement by the Iranian authorities and the decision to perpetuate the occupation transformed the occupation and detention of the hostages into acts of the state.⁹⁷ It does not seem that such public endorsement occurred with regard to the events in question. Of course, the state would still be responsible for not preventing the attacks by the mobs. However, the responsibility would arise here not from the fact that the conduct of private individuals was attributable, but from the state’s failure to comply with its due diligence primary obligation to prevent the occurrence of certain events.

Conclusions

Any claim for reparation for historical injustices will necessarily have to demonstrate: (a) that a primary rule prohibiting the conduct in question was in force at the *tempus*

⁹⁰ Quoted in Dadrian, *supra* note 9, p. 275.

⁹¹ Quoted in Cassese, *supra* note 46, pp. 249-250.

⁹² ILC’s Commentary, *supra* note 1, p. 48.

⁹³ *Ibid.*

⁹⁴ A prohibition of incitement of specified conduct can however constitute a primary rule, as in the case of Article III (c) of the Genocide Convention.

⁹⁵ ILC’s Commentary, *supra* note 1, p. 65.

⁹⁶ See Art. 11 of the ILC’s Articles on State Responsibility.

⁹⁷ *US Diplomatic and Consular Staff in Teheran (United States v. Iran)*, 24 May 1980, ICJ, *I.C.J. Reports 1980*, para. 74.

commissi delicti; (b) that the rule was binding on the relevant state(s); (c) that the conduct allegedly in breach of the primary rule was attributable to the state under the rules of attribution in force at the time of the conduct; (d) that no circumstance precluding wrongfulness can be invoked; (e) and that the wrongdoing state still exists or, if not, its obligations are assumed by another state according to the law of state succession. In addition, the claimant will of course have to prove that it is entitled to invoke the consequences of the wrongful act.

The above structure can be used in order to determine state responsibility for any alleged past injustice. This article has applied it to the 1915-1916 deportation and killings of Armenians by focusing in particular on (a), (b) and (c), and has concluded that the primary rule breached by the Ottoman Empire is not and cannot be the 1948 Genocide Convention, as it could not be applied retroactively. It is also doubtful that customary international law already provided in 1915 for an obligation on states not to commit gross violations of human rights against individuals regardless of their nationality: the treatment by a state of its subjects was at the time within its domestic jurisdiction, unless a treaty provided otherwise. However, the situation of the Armenians had been internationalized since at least 1878 by a series of treaties, which contained obligations on the Ottoman Empire for the amelioration of the conditions and for the protection of the Christian minorities within the Empire, and of the Armenians in particular, under the supervision of the Great Powers. Those treaties were breached by the Empire, which therefore incurred international responsibility towards the other states parties.

As to the attribution issues, the conduct of the Ottoman ministers, of the local authorities and of the Ottoman military can be attributed to the state under the broad bases of attribution now codified in Chapter II of Part One of the ILC's Articles on State Responsibility, which are largely a codification of customary international law already in force at the beginning of the 20th century. The attribution of the actions of the Special Organization to the Ottoman Empire is more problematic and requires a demonstration that (a) the Organization was a *de jure* or *de facto* organ of the Empire, or, if not, (b) that it conducted the attacks and the killings on the specific instructions, or under the direction or control, of the Ottoman authorities. On the other hand, the mob attacks cannot be attributed to the Empire, which is however responsible under the above mentioned treaties for not preventing them.