GPN GenocidePreventionNow
A Holocaust and Genocide Review on the Internet for all people
www.genocidepreventionnow.org Taking the side of protecting all human life

The Principle of Reparation in International Law and the Armenian Genocide

Alfred de Zayas

G P N O R I G I N A L

The Armenians have undoubtedly a strong and legitimate claim to receive reparation from Turkey for the material and moral injury that accompanied the genocide perpetrated between 1915 and 1923.[1] Bearing in mind that there is no prescription in international law in cases of genocide and crimes against humanity, the Armenian entitlement for reparation has certainly not lapsed. Therefore, it is only normal that Armenians should continue to press their demand for reparation in the form of restitution of their cultural and religious heritage, including churches and monasteries, compensation for destroyed property as well as for the immense moral suffering endured, and a measure of satisfaction in the form of an official apology from the Government of Turkey and recognition of their status as victims of genocide. This right to the various levels of reparation can and should be invoked by the survivors of the descendants of the Armenian genocide both in Armenia and in the diaspora.

The norms of international law, outlined here, are fairly clear. Nevertheless, these norms are not always self-executing and may require legislative action in order to identify the specific legal basis and establish the proper forum where claims for restitution and reparation may be adjudicated. What is most needed is the political will of governments throughout the world to ensure that appropriate legislative and judicial measures are taken in order to implement the applicable norms of international law. For this political will to materialize, it is necessary to mobilize civil society in all countries, to educate through the universities, high schools and the media, and to appeal to the overarching principle of human dignity from which all human rights derive. To discriminate among victims of genocide is inacceptable and entails in itself a separate and distinct violation of human dignity.

The Principle of Reparation for violations of international law is not a new normative development attributable to the work of the League of Nations, or of the United Nations or of the International Law Commission. The obligation to make reparation

for violations of international law is *a general principle of law* as referred to in article 38, paragraph 1c of the Statute of the International Court of Justice. Already the Permanent Court of International Justice stated in its 1928 Judgment in the *Chorzow Factory Case*[2]*:*

"It is a principle of international law, and even a general conception of the law, that any breach of an engagement involves an obligation to make reparation."

Similarly, article 31 of the Draft Articles on State Responsibility, which essentially reflect pre-existing international law, stipulates that "the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

Article 34 stipulates further that "full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation or satisfaction, either singly or in combination."

There can be no doubt that genocide is today and was 1915-1923 an internationally wrongful act for which State responsibility exists. *[bold by GPN]*

More concretely, in the Armenian case, where enormous destruction was visited on the cultural heritage of thousands of years, the Hague Convention for the Protection of Cultural Property of 1954[3] and its Protocols give us guidance.

Among other general principles of law that apply in the context of the obligation to make reparation are the principle of "good faith", the prohibition of "unjust enrichment" the rules on "estoppel", the principle "*ex injuria non oritur jus*", which provides that no rights can be derived from a prior violation of law. Bearing in mind that genocide and crimes against humanity are the most grievous offences against international law, it is obvious that the murderer cannot keep the fruits of the crime. International *ordre public* or public order imposes this conclusion.

Some will object that the *Chorzow Factory Case* Judgment, the Hague Convention on the Protection of Cultural Property, the Genocide Convention and the International Law Commission's Articles on State Responsibility are all subsequent to the Armenian genocide and that therefore they cannot be applied retroactively. This is wrong. Not only is it a fallacy in international law, but also a red herring intended to distract attention from the core issues and to undermine the Armenian entitlements.

The fact is that the Armenian claims did not arise with these instruments and judgments, but were already in existence in 1915 and were recognized internationally in article 144 of the Treaty of Sevres of 1920, which was signed by the representatives of the Sultan but not ratified after the Kemalist revolution. The non-enforcement of article 144 does not mean that the entitlements did not exist, but

rather that the use of force by Mustafa Kemal Attaturk prevented the implementation of applicable norms of international law.

Law is not mathematics. And the norms – as good as they may look on paper – are certainly not equivalent to their enforcement. On the other hand, the non-enforcement of norms, even for a prolonged period of time, does not detract from their validity. One should not be discouraged because of the reluctance of some journalists and politicians to endorse a people's claims. It is the right of an aggrieved people to continue pressing the claims until they are satisfied.

As far as compensation is concerned, Article 36 of the Articles on State Responsibility[4] stipulates the obligation of a State "to compensate for the damage caused … insofar as such damage is not made good by restitution."

As far as satisfaction is concerned, Article 37 stipulates "The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by the act insofar as its obligation cannot be made good by restitution or compensation. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality."

In this connection it is useful to recall that in 1993 President Bill Clinton issued an apology[5] to the people of Hawaii for the crimes and abuses committed in connection with the overthrow of the legitimate government of the Hawaiian Queen one hundred years earlier, in 1893. Similarly, on 13 February 2008 the Prime Minister of Australia Kevin Rudd issued an apology to the Aborigines of Australia for the injustices visited upon them. It should be noted that title to huge areas of Australia has been returned to the Aborigines, who are now administering these territories in cooperation with Australian authorities. Thus, even "historical inequities" can be partly redressed provided that there be a modicum of good will. Indeed, over the past decades the various governments of Germany have issued countless apologies to the governments and peoples of Israel, Poland, Czechoslovakia, Belgium, the Netherlands, France, etc. in connection with the Holocaust. Germany has also made meaningful reparation in the form of both restitution and compensation to the survivors of the victims of the genocide.

In obtaining reparation the Armenians should also appeal to international solidarity and to the *erga omnes* obligation not to recognize the effects of war crimes and crimes against humanity. Article 10 of the United Nations Draft Declaration on the Illegality of population transfers of August 1997 stipulates:

"Where acts or omissions prohibited in the present Declaration are committed, the international community as a whole and individual States, are under an obligation: (a) not to recognize as legal the situation created by such acts; (b) in ongoing situations, to ensure the immediate cessation of the act and the reversal of the harmful consequences; (c) not to render aid, assistance or support, financial or

otherwise, to the State which has committed or is committing such act in the maintaining or strengthening of the situation created by such act. “[6]

Of particular relevance to the Armenians are the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the General Assembly in its Resolution 60/147 of 16 December 2005.[7] Section VII, paragraph 10 of the Basic principles stipulates: “Remedies … include the victim’s right to the following as provided for under international law:

“(a) Equal and effective access to justice

(b) Adequate, effective and prompt reparation for harm suffered,

(c) access to relevant information concerning violations and reparation mechanisms.”

Section IX, paragraph 15 stipulates:

“ Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law. Reparation should be proportional to the gravity of the violations and the harm suffered. “

Paragraph 16 stipulates:

“States should endeavour to establish national programmes for reparation and other assistance to victims.”

Paragraph 17 stipulates:

“States shall, with respect to claims of victims, enforce domestic judgements for reparation against individuals or entitles liable for the harm suffered and endeavour to enforce valid foreign legal judgements for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgments”

Paragraph 19 stipulates:

“Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. “

Paragraph 20 stipulates:

“Compensation should be provided for any economically assessable damage as appropriate and proportional to the violation and the circumstances of each case… such as “(a) physical or mental harm, (b) lost opportunities, including employment, education and social benefits, (c) material damages and loss of earnings, including

loss of earning potential; (d) moral damage; (e) costs required for legal or expert assistance, medicine and medical services and psychological and social services."

Section XI is of particular relevance. Paragraph 25 stipulates "the application and interpretation of these Basic Principles and guidelines must be consistent with international human rights law and be without any discrimination of any kind or on any ground, without exception."

Another significant United Nations document that gives support to the Armenian Claims is the report of the Independent Expert Sergio Pinheiro known as United Nations Principles on Housing and Property Restitution, or simply as the Pinheiro Principles[8].

Principle 2 stipulates clearly: "All refugees and displaced persons have the right to have restored to them any housing, land and/or property or which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal."

One can continue citing norms of hard law and soft law that apply to or are of particular relevance to the case of the Armenian Genocide. Suffice it to say that international law is on the side of the Armenians.

Another issue is that of implementation, and it is well known what an uphill battle it has been to obtain recognition of the historicity of the genocide. Here again the United Nations can strengthen the claim through its increasing insistence on the right to truth[9], including historical truth. This may be a right *de lege ferenda*, but a right that can be invoked in the form of pertinent United Nations resolutions.

One should not underestimate the obstacles that continue to delay reparation for the injuries suffered in connection with the Armenian Genocide. One problem is that of non-self-executing international norms. This is why Austria and Germany have adopted laws related to the restitution of objects to victims, as has the United States in the form of its Law on Restitution for the World War II Internment of some 120,000 Japanese-Americans and Aleuts.

It is the responsibility of politicians to propose such legislation in parliaments, e.g., to make Armenian claims against Turkey justiciable in local courts. The United States has adopted the Federal Alien Tort Claims Act pursuant to which Jewish claimants have been able to obtain redress.

One should also mention the possibility of entrusting the United Nations with the responsibility to administer a Fund for Victims of the Armenian Genocide and their Descendants. Already the Office of the UN High Commissioner for Human Rights administers several funds, e.g. for the Victims of Torture, and this experience would provide a blueprint for an Armenian United Nations Fund.

Alfred de Zayas *is an American lawyer (J.D., Harvard, member NY Bar, Florida Bar) and historian (Dr.phil.,Go"ttingen), retired Chief of Petitions at the Office of the UN High Commissioner for Human Rights and former Secretary of the UN Human Rights Committee. He is the author and editor of numerous books, including United Nations Human Rights Committee Case-Law: A Handbook (N.P.Engel, Kehl/Strasbourg 2009) and Vo"lkermord als Staatsgeheimnis (Olzog, Mu"nchen 2011). He has published scholarly articles on the Armenian Genocide, the Holocaust and ethnic cleansing in the former Yugoslavia. He teaches international law and international humanitarian law at the Geneva School of Diplomacy. On 31 March 2011 the Canadian non-governmental organization "Canadians for Genocide Education" conferred upon him the "Educators Award 2011" at the University of Toronto.*

Source: The author presented this paper at an Armenian Genocide conference at UCLA on October 23, 2010 and has prepared the present text for GPN Genocide Prevention Now

Alfred de Zayas can be found at www.alfreddezayas.com

---

[1] Alfred de Zayas, "The Genocide Against the Armenians 1915-1923 and the Relevance of the 1948 Genocide Convention", Haigazian University Press, Beirut 2010. Also available in Spanish translation, El Genocidio contra los Armenios, Catálogos S.R.L., Buenos Aires 2009.

[2] Publications of the Permanent Court of International Justice
Series A - No. 9; Collection of Judgments
A.W. Sijthoff's Publishing Company, Leyden

[3] http://www.icrc.org/ihl.nsf/FULL/400?OpenDocument,
http://www.unesco.org/new/index.php?id=19138&L=0
http://www.unesco.org.uk/convention_for_the_protection_of_cultural_property_in_the_event_of_armed_conflict_%281954%29

[4] Adopted in second reading 2001. *untreaty.un.org/**ilc**/texts/instruments/.../9_6_2001.pdf*

[5] Resolution 19, 103d U.S. Congress, 23 November 1993. http://www.hawaii-nation.org/publawall.html

[6] E/CN.4/Sub.2/1997/23.

[7] http://www2.ohchr.org/english/law/remedy.htm

[8] http://www.unhcr.org.ua/img/uploads/docs/PinheiroPrinciples.pdf

[9] http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-19.pdf