# THE LEGAL AVENUES THAT COULD BE RESORTED TO AGAINST ARMENIAN GENOCIDE CLAIMS

**Pulat Tacar**
Ambassador (Rtd), Author

**Abstract:**
The view that the tragic events of 1915 do not constitute genocide is widely accepted by the Turkish general public and Turkish governments. However, the parliaments, senates, regional assemblies, statesmen and politicians of some countries have declared that a genocide was perpetrated against the Armenians . In the face of these developments, the view that Turkey should resort to legal avenues has begun to take root amongst the ranks of the Turkish politicians and the general public. This article which analyzes the various legal means which may be resorted to against these genocide allegations, concludes that alongside promoting the conduct of historical research in order to shed light upon the historical truth that lies behind these events, the Turkish authorities should officially underline and insist that the crime of genocide can not be established by political decisions taken by parliaments, but only by the verdict of the competent court as foreseen in the 1948 Genocide Convention. Furthermore, this article maintains that against laws and practices restricting the freedom of expression, individuals can resort to the European Court of Human Rights as "victims" or "potential victims"

**Key Words:** Turk, Armenian, Genocide, Ottoman

## INTRODUCTION

Genocide is a crime under international law[1]. The main feature which differentiates this crime from other crimes, including crimes against humanity, war crimes or common crimes is the special "intent to destroy, in whole or in part a national, ethnical, racial or religious group, *as such*."

1 United Nations General Assembly Decision 96 (I) 11 December 1946. and the Preamble of the Convention on the Prevention and Punishment of the Crime of Genocide

The Armenian Diaspora as well as the government of the Armenian Republic demands the Turkish Government and the Turkish general public to acknowledge that genocide was perpetrated against the Ottoman Armenians between the years 1915–1923. In reality Their goal is not to attain moral satisfaction but: *"to plan what comes after Turkey has been forced to recognize the Armenian Genocide and provide restitution and reparations..."*[2]. To achieve this goal, the Diaspora continues to stir into action its supporters in the parliaments of some countries as well as in the European parliament with a view to exert pressure on Turkey. The political, legal and ethical consequences sought by this political action can be summarized as follows:

The acknowledgement by the Turkish Government that the Ottoman Government ordered the annihilation of Ottoman Armenians solely on the basis of their group identity;

The acknowledgement of the guilt of 130 persons who were transferred to Malta to stand trail for committing crimes against humanity and civilization and subsequently released after two years of detention without even being brought before a court due to lack of evidence;

The payment of compensation by the Turkish Republic, as the successor State of the Ottoman Empire, for the damages caused on the part of Ottoman officials alleged to have committed genocide and in this manner to pave the way of returning certain immovable properties;

The creation of the political groundwork for demands of an Armenian homeland in Turkey (*Armenia continues to refer to the Eastern Provinces of Turkey as "Western Armenia);*

2 Press Release of the Armenian Revolutionary Federation Association dated November 19, 2006 announcing a Panel Discussion to be held in Hollywood, California on December 3, 2006.

The acceptance by Turkey that the 1915 genocide allegations can be dealt within a political framework and outside of the legal sphere created by the Genocide Convention of 1948;

The acceptance by the Turkish public of a selective treatment of the victims of tragic events during the period covering the years 1915-1923 by recognizing that their ancestors committed the crime of genocide against the Ottoman Armenians and overlooking the massacres and loss of life of the Muslim Ottoman citizens during the same period.

The great majority of the Turkish nation and Turkish governments are of the belief that the tragic events which occurred in Eastern Anatolia during the period under discussion can not be called genocide. Various other governments- such as the British Government, the Israeli Government-[3] as well as many foreign scholars, historians, intellectuals or members of the media are also of the belief that the necessary conditions have not been fulfilled for the events in question to be classified as genocide.

Nonetheless, various parliaments, senates, regional assemblies, statesmen and politicians have acknowledged that an act of genocide has been committed against the Armenians as of 1915.

3 - On 14 April 1999 the Foreign Office spokesperson Baroness Ramsay of Cartvale said that "*the British Governments have not recognized the events of 1915 as indications of Genocide*";-on 7 February 2001, acting on behalf of the British Government, Baroness Scotland of Asthal declared : "*The Government, in line with the previous British Governments, have judged the evidence not to be sufficiently unequivocal to persuade us that these events should be categorized as genocide as defined by the 1948 United Nations on Genocide, a Convention which was drafted in response to the Holocaust and is not retrospective in application. The interpretation of events in Eastern Anatolia in 1915-1916 is still the subject of genuine debate among historians*"( U.N. Document A/55/1008- S/2001/655 which include in its .annex the letter of the Permanent Representative of Turkey to the United Nations Secretary-General dated 29 June 2001. -On 10 April 2001 the Nobel Prize awarded Israeli, Foreign Minister Shimon Perez said that "*the fate of Armenians in Anatolia was a tragedy, not a genocide*". He added: " *Armenian allegations are meaningless. We reject attempts to create a similarity between the Holocaust and the Armenian allegation... If we have to determine a position on the Armenian issue it should be done with great care not to distort the historical realities*" (Middle East Intelligence Bulletin. Vol.3.No.5 May 2001)

In the face of these developments, the view that Turkey should resort to legal avenues to counter these claims has begun to take root amongst the ranks of the Turkish politicians and the general public.

On the other hand a legal adviser of the European Armenian Federation for Justice and Democracy Mr. Alfred de Zayas, who has written a Memorandum for this Federation suggests that the Government of Armenia should address the International Court of Justice (ICJ) by invoking Article IX of the Convention and submit a dispute to the ICJ, requesting a determination that the massacres against the Armenians constitute genocide within the meaning of the Convention. The legal consequences of a decision by the ICJ concerning such a demand should be –he asserts- the "*return to the Armenian people and to the Armenian Church of monasteries, churches and other properties of historic and cultural significance, as well as the granting compensation to the descendants of the victims of the genocide....*[4]"

Regarding the Armenian demands of restitution and compensation I would like to underline that all the issues concerning the period covering World War I have been settled by the Lausanne Peace Treaty and today no one has the right to make demands from Turkey about the historical events which occurred before the signing of this agreement [5]. One should also bear in mind that if the issue of compensation and restitution has been settled by way of an international treaty in the aftermath of a given event, then the provisions of that agreement shall be applied thereof. In this context the treaty of Peace with Turkey signed at Lausanne should be considered the main legal reference.

**The Lausanne Peace Treaty and the Armenian demands**

According to the Lausanne Peace Treaty ending the war between Turkey and

4 Alfred de ZAYAS, Memorandum written to the European Armenian Federation for Justice and Democracy: "The Genocide Against the Armenians 1915-1923 and the Application of the 1948 Genocide Convention" Executive Summary p.19

5 Kamuran GÜRÜN, *The Armenian File,* İstanbul, Rustem, 2001, pp. 299-300

other powers, it was decreed that previous Ottoman citizens who resided in countries that were separated from Turkey by the Article 31 of the Lausanne Treaty, and who had automatically gained citizenship of that country by Article 30, would have the right within two years to choose Turkish citizenship. Through these decrees, all the Armenians who were at the time outside Turkey, and who had retained Turkish citizenship, and those Armenians who were in those countries separated from Turkey, obtained the right to return to Turkey if they wished.

Furthermore a General Amnesty Declaration has been signed in Lausanne . Article 6 of the Declaration states : " *The Turkish Government which shares the desire for general peace with all the Powers, announces that it will not object to the measures implemented between 20 October 1918 and 20 November 1922, under the protection of the Allies, with the intention of bringing together again the families which were separated because of the war, and of returning possessions to their rightful owners.*" It is apparent that this Article concerned the individuals were forced to emigrate, and who returned to their homes during the period of armistice and occupation. At that time, Turkey announced that these procedures, which were made under the control of the occupation powers, would be maintained without modification.

According to the Amnesty Declaration, and Protocol, Turkish nationals, and reciprocally nationals of the other Powers signatory of the Treaty of Peace arrested, prosecuted or sentenced prior to 20 November 1922, have taken benefit from an amnesty.

Article 65 of the Treaty of Lausanne stipulates that property of individuals who had foreign citizenship when the war started, and whose possessions in Turkey had been confiscated, would be returned to them. The Article 95 gave a deadline for inquiries on this mater. Finally Articles 46-63 of the Lausanne Treaty are about the liquidation of the debts of the Ottoman State. As a result of this process

Turkey has paid all the debts.

## I. The Legal Avenues Which Can Be Resorted to by the State

### 1. Applying to the International Court of Justice

#### *a. The Legal Basis for Applying to the International Court of Justice: Article IX of the Genocide Convention*

According to Article IX of the Genocide Convention "the disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III, shall be submitted to the International Court of Justice at the request of any of the Parties to the dispute."

The acts enumerated in Article III are: genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide.

To address a point widely misunderstood, it should be emphasized that to resort to the ICJ, the applicant and respondent do not need to arrive at a prior agreement among them. At most, the respondent state can advance a counter-claim that the ICJ does not have jurisdiction to hear the case, which the Court shall have to ascertain prior to hearing the merits of the case.

#### *b. The Precondition: Officially Establishing the Existence of a Dispute*

For a Party to apply to the ICJ on the basis of Article IX of the Genocide Convention, the State in question must, in the first instance, officially establish the existence of a dispute to be brought before the Court. "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons...."[6]

6 Permanent Court of International Justice: Mavrommatis Palestine Concession Case, PCIJ, Series A, No.2, 1924,pp.6*93

Because of the reasons stated below, I am of the opinion that the French Law of 2001 recognizing the existence of the 1915 Armenian genocide created a dispute between France and Turkey relating to the application and interpretation of the 1948 Genocide Convention.

Whether or not the ICJ will find itself competent to consider an application on this subject is another issue which I will not address in detail in the context of this article.

### *c. The Perpetrator(s) of Genocide; the Competent Court and the ICJ Decision on Bosnia*

According to the Genocide Convention the crime of genocide is perpetrated by individuals (Article IV)[7]. The court which has jurisdiction to try persons charged with genocide is the competent Tribunal of the State in the territory of which the act was committed, or an International Penal Tribunal the jurisdiction of which has been accepted by the Contracting Parties (Article VI). As such, the determination that an act constitutes genocide can be established only by way of a valid judgment at law rendered by a competent court convicting the accused in question. Such a legal decision of criminal law falls within the framework of individual criminal responsibility.

During the drafting of the Genocide Convention the question of jurisdiction has been discussed at length. A proposal concerning the principle of universal repression by a national court in respect to individuals who had committed genocide abroad has been rejected by four votes against two and one abstention on 13 April 1948. During the discussion of Article VII a proposal to reverse the foregoing decision was also rejected on 26 April 1948. [8]

7 Article IV of the Genocide Convention reads as follows: Persons committing genocide or any of the other acts enumerated in Article 3 shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

8 Travaux Preparatoires of the Genocide Convention. U.N. ECOSOC Document E /794, 24 May 1948

With regard to the question of determining the responsibility of a State: this in principle is the subject of a civil court case carried out in accordance with civil law of the country.

Furthermore, according the Article IX of the Genocide Convention the International Court of Justice is also competent to rule on the matter. But one should underline that in its Bosnia judgment, the ICJ observed " *that if a State is to be responsible because it has breached its obligation not to commit genocide, it must be shown that genocide as defined in the Convention has been committed*"[9]and "*claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive*" [10]

This raises the question of whether or not the recent Bosnia and Herzegovina *v.* Serbia and Montenegro judgment of the ICJ, infringed Article IV of the Convention. It was the International Criminal Tribunal for the Former Yugoslavia (ICTY) who was (and still is) the "competent court" on that matter, and ICTY - in the Kristic and Blagoyevic cases- arrived at the determination that during 12-13 July 1995 the massacres which took place in Srebrenica amounted to genocide. As such, several of the allegations brought before the ICJ have already been the subject of decisions of the ICTY. The ICTY has not yet arrived at the conclusion that genocide was committed elsewhere other than in Srebrenica; the trials still continue and some suspects are actually at large. But the evidence and judgments rendered by the ICTY has established that several crimes may have been committed throughout the Bosnian War.

In dealing with this situation the ICJ states that although these do not amount to genocide, they might constitute crimes against humanity or war crimes, which -as stipulated in the judgment- the ICJ does not have jurisdiction over. As such, after the decision of the ICJ, it appears unlikely that the crimes which are the

9 Judgment of the ICJ on Bosnia and Herzegovina *v* Serbia and Montenegro . para..180
10 Judgment of the ICJ on Bosnia and Herzegovina *v* Serbia and Montenegro . para..209

subject of the remaining cases before the ICTY shall be determined to be of a genocidal nature.

The ICJ decision underlined the difference between genocide and "ethnic cleansing"; while "ethnic cleansing" can be carried out by the displacement of a group of persons from a specific area, genocide is defined by "*specific intent*"

The ICJ placed dispositive emphasis on the question of intent. It held that genocide as defined in the Convention requires both acts and intent.[11] The court added " It is not enough to establish that deliberate killings of members of the group have occured. The additional intent must also be established and this intent -dolus specialis is defined precisely. It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. The acts listed in Article II must be done with the intent to destroy the group as such." The words " as such" emphasize that intent to destroy the protected group[12] and "great care must be taken in finding in the facts a sufficiently clear manifestation of that intent"[13]

In the judgment under section IV "The Applicable Law: The Convention on the Prevention and Punishment of the Crime of Genocide", the ICJ concludes that "State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one."[14] This controversial decision does not fall in line with the wording of the Genocide

11 International Court of Justice, "Case Concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro" para. 187

12 International Court of Justice, "Case Concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro" para. 187.

13 International Court of Justice, "Case Concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro" para. 189

14 International Court of Justice, "Case Concerning the Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro" para. 182.

Convention, for according to Article IV of the Convention -as I underlined above- "genocide is perpetrated by individuals"

267 pages of dissenting and separate opinions were written by the judges, appended to the judgment of the Court, attest that there is a serious lack of consent amongst the judges regarding various issues of central concern.[15]

On this point, I would like to add that during an International Conference hosted by the Ankara Bar Association in January 2005, I asked the following question regarding the competent court to Mrs. Anika Usacka, judge at the International Criminal Court:

" According to the 1948 Genocide Convention, whether or not a given event constitutes genocide can be ascertained by a competent court, ie. the competent tribunal on the territory of which the crime has been committed, or the International Criminal Court, that is, the Court you are currently working at. Is it possible to designate an event as genocide without a competent court decision?" The reply of Judge Usacka was as follows: "We are presently at a Law Conference, hence my reply must be compatible with the dictates of law. Without a decision of a competent court an event can not be designated as genocide".

***d. State Responsibility Relating to the Crime of Genocide***

Article IX of the Genocide Convention addresses the issue of State responsibility with regard to the crime of genocide. It should be reiterated that State responsibility concerns the interpretation, application and fulfillment of the Convention. For example if a Contracting Party does not transfer for trial an individual accused of or indicted for genocide, state responsibility is incurred[16]. Responsibility

15 Vice-President Al-Khasawneh appended a dissenting opinion; Judges Ranjeva, Shi and Koroma appended a joint dissenting opinion; Judge Ranjeva appended a separate opinion; Judges Shi and Koroma appended a joint declaration; Judges Owada and Tomka appended separate opinions; Judges Keith, Bennouna and Skotnikov appended declarations; Judge ad hoc Mahiou appended a dissenting opinion; and Judge ad hoc Kreća appended a separate opinion to the Judgment of the Court .

16 *The tragic events of 1915 do not fall under the 1948 Convention which can not be applied retrospectively.*

on the part of a state is further incurred, for example, if a Government representing a State violates its obligation to prevent genocide. In the Bosnia Herzegovina v. Serbia and Montenegro case heard at the ICJ, the responsibility of the state of Serbia was incurred for these reasons.

The other responsibilities of a State prescribed by the Convention are as follows:

In accordance with Article V, the Contracting Parties have the responsibility "to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions" of the Convention and, "to provide effective penalties for persons guilty of genocide or of any of the other acts enumerated in Article III"

In accordance with Article VI, the Contracting Parties have the responsibility to transfer those accused of committing genocide to the competent tribunal which may have jurisdiction, and in accordance with Article VII, they have the responsibility to extradite criminals.

If any Contracting Party violates these obligations, its responsibility is incurred and if a disagreement is to arise thereupon, a State may resort to the International Court of Justice on the basis of Article IX of the Convention.

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*But taking into account that such crimes also were unlawful at that period under customary international law and to underline that the Ottoman Government prosecuted and condemned at that time the perpetrators of the crimes one should not fail to mention that in 1916 the Ottoman Government charged 1673 individuals for violations against -among others- the Ottoman citizens of Armenian origin ; 659 suspects were convicted and 67 of them executed in accordance with the Ottoman Penal Code- . Those were crimes like murder, massacre[2], rape, usurpation and maltreatment etc. . These trials continued after the end of the war under the occupation of the Allied powers. The legality and the fairness of these trials are seriously contested by some historians. The courts records and judgments have been published in Takvimi Vekayi. the Otoman governments' official gazette. Ref: Associate Prof. Yusuf Sarınay, "Ermeni Tehciri ve Yargılamalar 1915-1916. Türk-Ermeni İlişkilerinin Gelişimi ve 1915 Olayları Uluslar arası Sempozyum Bildirileri* Ankara, Gazi Üniversitesi Atatürk ilkeleri ve İnkılap Tarihi Araştırma ve Uygulama Merkezi Yayını, 2006, pp.257-265. Prof. Yusuf Sarınay : in its article with the title " The Armenian Relocation and Trials" reports that this information is deduced from the lists annexed to confidential letters dated. *February 19, 1916; March 16, 1916; and May 22, 1916.* sent from the Ottoman Ministry of Interior to the Ottoman Foreign Ministry

### *e. Damages Caused by the Officials*

According the general principles of law the State is under the obligation to provide compensation for the damages caused on the part of its officials. Those leaders or members of the governments who incited the crime of genocide will also be punished and may have to provide for compensation for damages caused. However, under the Genocide Convention for such consequences to arise, the competent court must, in the first instance, arrive at the determination that the accused committed the crime of genocide.

### *f. The Legal Continuity of the Successor Government*

According to general principles of international law, and specifically the doctrine of legal continuity and State responsibility, a successor government can be made liable in respect claims arising from a former Government's violation of law[17] As such, the German Government incurred the responsibility stemming from the actions of the Third Reich, The French Government redressed the damage inflicted by the Vichy regime under German occupation. Article 36 of the 1983 Vienna Convention on Succession of States in Respect of State Property, Archives, and Debts states that "a succession of states does not as such affect the rights and obligations of creditors". The Turkish Republic having paid all the debts of the Ottoman State has legally accepted to be the successor of the Ottoman State.

### *g. Retroactive Application of the Genocide Convention*

Positivist lawyers argue that the Genocide Convention can not be applied retroactively. This is a general rule under international law. Article 28 of the 1969 Vienna Convention on the Law of Treaties which entered into force on January 27, 1980, states that the provisions of treaties "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."

17 Commission on Human Rights: Document E/CN.4/1999/65.

The legal analysis prepared at the initiative of the Turkish–Armenian Reconciliation Commission, for the International Center for Transnational Justice (ICTJ) by a group of anonymous legal advisors entitled "The Applicability of the United Nations Convention on the Prevention and Punishment of the Crimes of Genocide to Events Which Occurred During the Early Twentieth Century" explicitly states that "the Genocide Convention contains no provisions mandating its retroactive application"[18] In fact, this analysis maintains that "neither the text nor the "travaux préparatoires" of the Convention manifest an intention to apply its provisions retroactively."[19] The said document includes the following statement: "Although the Genocide Convention does not give rise to State or individual liability for events which occurred prior to January 12, 1951, the term "genocide" as defined in the Convention, may be used to describe such events". The analysis pretends that the term "genocide" may be applied "as a general matter" or as a "historical fact" to describe the events of 1915. This deduction should be viewed as a political endeavor (as opposed to a legal conclusion) undertaken to appease those supporting the Armenian stance on this matter. Actually those who now consent that the tragic events of 1915 can not be legally qualified as genocide, started to use the terminology "genocide in the political meaning" or "genocide according to the definition accepted by social sciences" . There is of course no consensus on the definition of this terminology.

Disturbed by the above mentioned legal analysis the Armenian diaspora appointed Alfred de Zayas, a retired U.N. official, to draft a counter-memorandum[20].

In its memorandum entitled "The Genocide Against the Armenians 1915-1923

18 "The Applicability of the United Nations Convention on the Prevention and Punishment of the Crimes of Genocide to events which occurred during the early twentieth century", prepared for the International Center for Transnational Justice" (by unknown and unnamed experts) : p.4.

19 "The Applicability of the United Nations Convention..., p.7

20 Alfred de Zayas, Memorandum written for the European Armenian Federation for Justice &Democracy with the title of " Memorandum on the Genocide Against the Armenians 1915-1923 and the Application of the 1948 Genocide Convention"

and theRelevance of the 1948 Genocide Convention", Alfred de Zayas states that the language of the Genocide Convention is inconclusive on the issue of its retroactive application, and that the *travaux préparatoires* of a Treaty merely provides for a "supplementary means of interpretation." Moreover, de Zayas refers to the Article 1 of the 1968 U.N. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity and maintains that statutory limitations do not apply to the Genocide Convention.

According to the general principles of criminal law there can be no crime without law, as laid out in paragraph 1 of Article 15 of the International Covenant on Civil and Political Rights. But there are certain exceptions to this general principle: the paragraph 2 of article 15 of the Covenant reads as follows: "nothing in this article should 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"[13].

The Armenian's advisor stresses that "the criminal law aspects of the Convention are of lesser relevance in the Armenian context, since none of the perpetrators ... are still alive" [21] but that laws of restitution and compensation can be resorted to and brought into action. As such it would not be wrong to state that efforts towards the recognition of the Armenian Genocide for purposes of moral satisfaction, is merely a facade for attaining restitution and compensation and for advancing territorial claims.

However, without establishing that the crime of genocide was perpetrated and without determining who actually carried out the crime, how can such compensation claims be advanced and what will they be based upon? The Armenian side aspires to attain these goals by way of the decisions of various parliaments recognizing the so-called genocide and the French Parliament (among others) is being manipulated for this very purpose.

21 " Memorandum on the Genocide..., p. 19

These arguments and counter-arguments may lead one to feel that this debate shall not be resolved soon. Nonetheless one should bear in mind that the non retroactivity of the Genocide Convention is espoused by the great majority of legal scholars.

***b. A Case in Point: The French Law of 2001***

With the legislation passed in 2001, France has publicly recognized the 1915 events as genocide perpetrated by the Armenians. This may be seen as a misinterpretation of Article VI of the 1948 Genocide Convention relating to the competent court. Furthermore, in October 2006, a bill was passed in the French National Assembly foreseeing the punishment of those denying "the 1915 Armenian genocide". This draft bill will become law if endorsed by the Senate and if it is subsequently published in the Official Gazette upon ratification on the part of the French President. The threat of this bill becoming law shall continue to disrupt trade, cultural, and other relations between France and Turkey. Furthermore, this situation will no doubt have an adverse affect upon the friendly ties between the peoples of these two countries, and shall present itself as an obstacle on the road leading to the European Union; an aim likely to be pursued by those who militate against Turkish membership.

In view of legally establishing the existence of the conflict, Turkey could address a diplomatic note to France with regard to the 2001 Law and state the following:

"On January 29, 2001 the French Senate and National Assembly adopted a Law by which " France publicly recognizes the Armenian Genocide of 1915. Although merely of a declaratory nature, the adoption of this Law has created a dispute between France and Turkey relating to the interpretation of the 1948 Convention, manifested by its effects and damaging consequences. The records of the debates at the French Parliament and at the Turkish Grand National Assembly reflect the magnitude of this dispute. By affirming that the crime of genocide

was perpetrated in 1915, the French National Assembly has substituted itself to the position of a competent court and has arrived at this conclusion without a trial or hearing the other side of the truth. However, the Genocide Convention foresees that whether or not an accused committed the crime of genocide is to be ascertained by a competent court, and if so determined foresees the punishment of the responsible perpetrator(s). However, with the bill adopted by France in 2006, the legislation of 2001 has been equated to a court verdict and France has chosen to penalize those who "deny" the existence of the crime of genocide.

According Article VI of the Genocide Convention, the competent body to ascertain the perpetrators of the crime of genocide is not a parliament, but the court in the territory of which the crime was perpetrated or an International Penal Tribunal. It is against the basic principles of law for a competent court to find a party guilty of any crime, before hearing the defense of the accused, let alone for that of genocide. Actually, the Paris Civil Court of First Instance had stipulated during the trial held against the eminent historian Bernard Lewis that it was not within its jurisdiction to adjudge whether or not the events of 1915 amounted to genocide. According the Turkish Government as well as many scholars, a court or a Parliament is not entitled to name the tragic events of 1915 in Eastern Anatolia a genocide, because the discussions among the historians on this issue did not yet come to a result and also the core element of the crime of genocide which differs that crime from other crimes , namely the intention to destroy in whole or in part a national, ethnical, racial or religious group *as such,* the *dolus specialis* has not been assessed or proved. There are numerous documents attesting that such an intent did not exist.

By disregarding the Genocide Convention of 1948 and the basic principles of law, the French Government acting upon the law adopted by the French Parliament has contravened Article VI of the Genocide Convention. Consequently a dispute relating to the interpretation and application of the Genocide Convention as foreseen in Article IX has emerged between Turkey and France. Turkey

expects that France shall repeal the legislation in question".
In response, the French Government may declare that : "The 2001 legislation is merely of a declaratory nature, and that the 2006 bill has not yet become law. The legislation adopted by the French National Assembly does not fall within the scope of the 1948 Genocide Convention. The Genocide Convention can not be applied retroactively. However, as stated in the Preamble of the Convention, France recognizes that at all periods of history genocide has inflicted great losses on humanity and acting upon the conviction of the majority of the French citizens on the matter, declared that the events of 1915 amounted to genocide."

If the ICJ is resorted to on the basis of the 2001 legislation, the Court will first decide if there exists a "dispute" between France and Turkey. The Turkish demand will most probably not focus on the question "Was or was not the Armenian community of the Ottoman Empire the victim o a genocidal act in 1915?" But will concentrate on the following question. " Having regard to the legislation enacted by the French Republic on 29 January 2001 and 12 October 2006 whose justification is disputed by the Government of Turkey, and having regard to the dispute that has arisen between their Governments as a consequence of these legislation, is the cited legislation a) in conformity with the definition of the crime under the international law of genocide as that crime is defined by Article II of the Genocide Convention ;b) are the factual predicates of the French legislation sustainable under the standards of proof established by the Court in respect of a claim of genocide ;c) Can the French Parliament enact as the competent court on this judicial matter?"

Taking the current composition of the ICJ into account and the very controversial decision taken by it on the Bosnian case the Court may take a cautious position on this rather political issue and may decide not to hear the case on the premise that this legislation does not fall within the scope of the application of the Genocide Convention, because clearly the Convention is only applicable to acts of genocide perpetrated after its entry into force.

On the other hand Turkey is faced by demands coming from several French politicians to acknowledge the Armenian Genocide . Lately the French President Chirac reiterated such a demand during his official visit to Armenia in 2006[22]. The request for "acknowledgment" is a form of "reparation" for an international wrongful act as established under Article 37 of the Articles of State Responsibility. [23] Turkey could argue that in view of the inaccuracy of the characterization as genocide of the tragic events of 1915 no such request for reparation can be made without "humiliating" the Republic of Turkey.

**2. Inter State Application to the European Court of Human Rights**

If the 2006 Law is adopted, then Turkey may complain about the violation by France of Article 10 (on the freedom of expression) of the European Convention of Human Rights. Turkey may lodge an application with the European Court of Human Rights, pursuant to Article 33 of the European Convention. However, proceedings before the Court are lengthy, costly and the outcome is never sure. Instead of this, the author of this article recommends encouraging the victims or potential victims of the violations of Article 10 of the European Human Rights Convention to lodge an application with the European Court of Human Rights.

**3. The International Court of Arbitration**

As a further alternative, the view that Turkey could resort to the International Court of Arbitration to counter Armenian genocide claims, was advanced by Rtd. Ambassador Gündüz Aktan.[15] During debates carried out at the Turkish

22 http://ec.europa.eu/enlargment/turkey/key-documents.htm

23 U.N. General Assembly Resolution 56/83 of December 12i 2001 :

*"Satisfaction:*

1. *The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.*
2. *Satisfaction may consist of an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality*
3. *Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State"*

Grand National Assembly (TGNA) , Istanbul deputy and Rtd. Ambassador Şükrü Elekdağ also made a suggestion in this direction.

In a statement made to Milliyet newspaper on November, 16, 2006, Ret. Ambassador Gündüz Aktan made the following remarks: "Instead of France, lets bring Armenia to court... In the event that a resolution in this regard is passed in Congress, we should equally take the U.S. to court...The most appropriate avenue to see this case is the Permanent Court of Arbitration situated in the Hague. Arbitration may last between 5-10 years...If they do not respond to our call to resort to arbitration, they shall be exposed to public contempt, if they respond positively all lies shall be revealed..." According to Aktan, the option of resorting to arbitration would entail "the examination of archives, statistics, military history, records relating to deaths during the relocation, medical statistics and if necessary, forensic research."

However, it is highly unlikely that the Armenians shall accept resorting to arbitration on this matter as it carries with it a high probability of undermining their dogmatic theses. Actually, under the present conditions, it does not appear possible for the two sides to arrive at an arbitration agreement, a prerequisite for resorting to this legal alternative. Likewise, France would not accept taking this matter to arbitration, a matter which is not of direct concern to them. As such, the said proposal would be tantamount to a political challenge.

The Armenian Republic which would not view this proposal favorably if advanced, will in all likelihood continue to propagate genocide allegations with the desire of exerting pressure on Turkey. They are of the belief (or have been made to believe) that they can obtain all that is desired from Turkey by way of international pressure. Speaking to Ece Temelkuran of Milliyet newspaper, the French politician Patrik Devecian has explicitly stated that "the acquiescence of Turkey can be obtained only through pressure" Armenian Foreign Minister Oskanian has made similar remarks.

French politicians are engaging in pressure tactics via genocide recognition to a) gain votes from the Armenian constituent body and b) to keep Turkey from attaining full membership in the European Union.

And now there are those who believe pressure can be exerted upon Turkey by way of passing resolutions in both houses of the U.S. Congress. It is certain that such initiatives shall be counter-productive in the long run and even in the short-term.

**a. The Drawbacks of Resorting to Arbitration**

• Arbitration is a legal avenue resorted to for the resolution of civil law disputes. However, genocide is a crime relating to national and international criminal law. The Genocide Convention foresees the punishment of those who have committed the crime of genocide. Criminal law is applied by way of legal trials and not by way of arbitration.,

• According to the Genocide Convention "Disputes between the Contracting Parties relating to the interpretation, application or fulfillment of the present Convention...shall be submitted to the International Court of Justice at the request of any parties to the dispute." Overlooking this stipulation, or going against it would not be wise as this would imply Turkey's acquiescence to accepting a solution that supersedes the framework of the Genocide Convention. The aim of the Armenian side and their sympathizers is to discard certain provisions of the Genocide Convention (including the clause concerning the competent court) to set this issue within a political framework.

• If the alternative of arbitration is resorted to, the consequential outcome will be the acceptance of the capacity of another body or authority other than that foreseen by the Genocide Convention to determine whether or not the crime committed by the accused (which according to the Genocide Convention may only be an individual) amounts to genocide.The Permanent Court of Arbitration is to consist of an equal number of judges or specialists designated by both parties

and an individual (whose vote shall constitute a determining factor) appointed by the President of the International Court of Justice or the Secretary General of the U.N. As such, in a manner unprecedented by law, the authority to determine whether the acts of individuals no longer alive constitute genocide shall be delegated to the Court of Arbitration. Consequently, basic principles of law, including the right of defense as well as the corner stones of the Genocide Convention shall be disregarded.

• Moreover, resorting to arbitration, shall equate into the acceptance, on the part of Turkey, that the definition incorporated into the Genocide Convention can be applied retroactively[17], an outcome which would be wise to preclude. The judgments of the Ottoman courts-martial rendered 80 years ago and in accordance with the Ottoman Penal Code, took into consideration the conditions under which the crimes (ascertained by legal decisions) were perpetrated, i.e. whether or not the crimes occurred as a result of deliberate killings, with the aim of revenge, or as result of mutual mass killings. It is not possible according to general principles of law, to take sides and alter these decisions 80-90 years on to suit political purposes. No state governed by the rule of law can accept the alteration of court decisions by a unauthorized bodies.

**b. Political and Moral Responsibilities**

If we are to discuss the political and moral responsibilities relating to the events of 1915, the situation is different. This issue should be analyzed taking into account the conditions of that time. For example, the Van massacre committed prior to the relocation decision by three Armenian detachments lead by Armenian members of the Ottoman Parliament as well as from the other rebellions which transpired at the time should also be taken into account when evaluating the tragic events of 1915. To counter the rebellions and to defend the country, the Ottoman Government resorted to necessary military and penal measures, which were no different than those resorted to by various other governments during the time. On this matter, historians, and archive experts and in fact politicians must step in because the analyses and reports they could draft may serve to

engender objective opinions. If the sentiments of the majority of those who are to read these analyses are to converge on a certain view, "personal opinions" could then engender a "common public sentiment and understanding." The Armenians resort to the term "Metz Yergern" meaning "The Odious Scourge" when referring to the events of 1915. While the Armenians shall continue to view and refer to the tragic events as such, others shall continue to refer to them as "genocide" or "mutual mass killings". It should not be expected these views shall change any time soon. However, these evaluations do not constitute legal assessments but pertain to one's conscience or are of a political nature.

Certain individuals within the Turkish society state that the massacre carried out was intentionally committed by members of or those affiliated with the Committee of Union and Progress party, such as the Teşkilat-ı Mahsusa units (namely, the Ottoman Special Forces). It seems unlikely that people of this contention will alter their views. However, the great majority of the Turks shall continue to speak of mutual mass killings and the great loss of lives during the mass relocation and continue to reject the existence of an intent annihilating the Ottoman Armenians as a group as such. This discrepancy in opinions is only normal as it is not possible to make all minds think alike. The freedom of expression permits, within the confines laid down in European Convention of Human Rights, the expression of all these views.

**4. The European Court of Human Rights**

Article 33 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that "any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party."

The content of such an application is laid out in Article 46 of the Courts Statute. Before lodging a state application with the European Court of Human Rights (ECHR), the bill passed in the French National Assembly in 2006 becoming law

will be a pre-condition sought after by the Court. In accordance with Article 46 (e) of the ECHR Statute, Turkey must prove that as a country it-or that one of its citizens- became a victim as a result of the enforcement of the French law.

Specialists have expressed that the outcome of such an application would be determined on the basis not of objective, but political and subjective criteria. This alternative which would last many years is not the main preference of the author.

## II. OPTIONS FOR LODGING INDIVIDUAL APPLICATIONS WITH THE ECHR

### 1. Resorting to the ECHR As A Victim

If a bill foreseeing the conviction of an individual for denying the Armenian "genocide" is to become law in France (or another country), and if an individual is convicted along these lines by, for example, a French (or Swiss) court, the individual in question, after exhausting all domestic remedies, can lodge an application with the ECHR. In such an event, it may be stated that in contrast with the genocide perpetrated against the Jews, in the case of the Armenian "genocide" , there is no competent court decision substantiating such claims, that the French law which penalizes those denying the Armenian genocide violates the "competent court" stipulation of the Genocide Convention, that the French parliament is substituting itself as the competent court and that for this reason being convicted for having stated that "the tragic events which befell the Armenians as of 1915 can not be deemed as genocide" contravenes articles X of the European Convention on Human Rights relating to the freedom of expression. To apply to ECHR the victim in question must be convicted and all domestic legal remedies must be exhausted.

On the basis of the jurisprudence of the ECHR thus far, one may conclude that the chances of an individual winning such a case are high. Nonetheless this is a

laborious path to walk down. The individual in question may have to pay a penalty or go to prison. To this end civil society organizations or official authorities may provide the necessary legal or logistic (i.e. financial) support to the person who has lodged such an application with the ECHR.

**2. Resorting to the ECHR As A Potential Victim**

According to a detailed analysis conducted by the President of Istanbul Bahçeşehir University, Professor Dr. Süheyl Batum, and other members of staff; individuals who reside particularly in France or in Switzerland, academics, businessmen, sportsmen and others who have to go to these countries for various reasons and do not qualify the tragic events of 1915 as genocide, may feel as potential victim as "potential victims" or muzzled and silenced persons because of the risk of penalization on the ground they express their conviction and views contrary to those included in the legislation in question.

In the example of France, if the 2001 legislation, altered in 2006, is enforced , even some individuals which have not yet expressed their views and have not been convicted for the "crime of denying the Armenian genocide", may evaluated themselves directly placed under risk. The concept of "potentially victim", is a concept that has been adopted and applied by the ECHR in previous judgments, in the event that it is proved that a reasonable convincing risk is directly affecting the applicant. That the 2006 French legislation foreseeing the penalization of those denying the Armenian "genocide" has not, as of yet, been applied, does not guarantee that it shall not be applied in the future.

Furthermore, in the event that a genocide denial law incorporating the term "Armenian genocide" is passed by the Swiss Confederation or if a sentence of a Swiss national court condemning an individual because of contesting the existence of the so called 1915 Armenian genocide (e.g. Mr. Dogu Perincek which was condemned by the Geneva Police Court) is confirmed by the highest court in Switzerland, then other individual may feel as "potential victims" because they

freedom of expression will be denied.[21]

The grounds for advancing that article X of the Convention was violated can be summed up as follows:

The prohibition of expressing one's opinion on a certain topic and attaching to this penal sanctions: a) suppresses pluralism; b) suppresses the external dimensions of the right to freedom of thought and conscience, and renders meaningless the right of inquiry born out of these freedoms; c) prohibits the thought embodied in opinions the expression of which have been prohibited, state indoctrination is pursued, and the manner in which individuals are to think is systematically inculcated.

The French bill directly infringes upon the freedom of expression recognized by the ECHR. For such an intervention to be made, it must be compatible with the conditions, and restrictions laid down in article 10/2 of the Convention. Accordingly, the exercise of this freedom may subject to limitations "prescribed by law" and that "are necessary in a democratic society"; such as protecting against the incitement of hostility, animosity, and hatred amongst citizens due to religious or ethnic origins, or the incitement of violence against a Government official or a section of the public, or an armed struggle, or clash of arms, or protecting against racist expressions or those based on racist hatred. It is manifest that the French bills' infringement of the freedom of expression is not necessary in a democratic society, is not in the interest of the public good, and is not necessary for maintaining the authority and impartiality of the judiciary. The restriction does not set a balance, and as such, is not proportionate. The bill aims not at the prohibition of commending the crime of genocide or the expression of thoughts vindicating or excusing the crime, but aims at prohibiting the research of historical facts, and all opinions arrived at bye way of deliberation. However, there does not exist an accord of viewpoints among historians and scholars on this matter. A historical event can not be assessed by way of judicial decisions which carry definitive

judgments, can not be established as an irrefutable legal fact and the freedom of expression can not be restricted in such a broad manner.
The study conducted by Bahçeşehir Universıty assessed the ECHR case law and has based its legal views on the grounds and clauses incorporated thereof. If France ratifies the said bill, inevitably several Turkish citizens shall resort to the ECHR against France, and such cases, as the author maintains, will come to a favorable conclusion.

## CONCLUSION

The Republic of Turkey is a party to the Convention on the Prevention and Punishment of Genocide. According to article IX of the said Convention, if one of the Contracting Parties is of the view that another Party violated its obligations of interpretation, application or fulfillment of the Convention, it may resort to the International Court of Justice. However, if France counters with the argument that it did not pass the 2001 bill and the 2006 draft bill within the framework of the Genocide Convention, the ICJ would in all likelihood accept the argument that the Convention can not be applied retroactively; and may favor the view that the French legislation has not been enacted within the frame of the Genocide Convention. That may lead the Court to reject the claim as inadmissible. Doing so, the Court would not enter into the controversial field of judging history.

Due to the reasons cited in this article, the author believes that resorting to the International Court of Arbitration against the Republic of Armenia against Armenian genocide allegations is not advisable. If the 2006 legislation is enforced in France and a sentence condemning an individual on the ground that he or she does not interpret the tragic events of 1915 as genocide is given by a national court in France or in Switzerland, then an individual "victim" or "potential victim" may lodge a case with the ECHR.Alongside conducting vigorous studies to unravel the historical truth that lies behind the events of 1915, Turkey must focus on and adopt the official line that a) the crime of genocide can only be ascertained by a competent court ; b) that the ICJ requires a very high level of proof and a certainty with regard to the allegations of the existence of special intent (dolus specialis) and ; c) that everyone has the right to to hold opinions and to express them .