

THE ARMENIAN GENOCIDE, CUSTOMARY INTERNATIONAL LAW, AND U.S. RECOGNITION

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Abstract

This article asserts that President Biden’s statement recognizing the Armenian Genocide of 1915 illustrates that genocide was prohibited by customary international law when the genocide started. It examines possible legal theories to explain U.S. recognition as well as historical evidence and statements made by other states to establish that there is a strong case for genocide already outlawed by customary international law in 1915. This provides a foundation for the article’s assertion and subsequent legal analysis of the United States’ statements of recognition under a customary international law theory, concluding that this is the most likely legal theory the U.S. would be supporting with its recognition. It then illustrates the real-world implications of this finding for international law generally and the Armenian people.

Introduction

“We will never see justice done.”¹ This was the belief of many Armenians as the 20th century quickly forgot them. And, of course, who can blame them for feeling hopeless. This is a people who witnessed family members murdered *en masse*; who were forced from their homes to march hundreds of miles without food or water into a

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¹ Rick Gladstone, *Armenian Groups are Increasingly Focused on Reparations for Genocide*, N.Y. TIMES (Apr. 23, 2015), <https://www.nytimes.com/2015/04/24/world/europe/turkey-fear-of-reparations-possibly-in-many-billions-is-a-factor-in-armenian-genocide-denials.html>.

desert; who watched as their sons were bayoneted and beheaded; who witnessed their daughters be raped and then tortured to death; who watched their neighbors and friends burned alive and drowned; who had their children forcibly taken from them and given to the families of their enemies; and who ultimately became the last remnant of a nearly extinct people.² To see all this, and then watch the perpetrators go unpunished as the world forgets them, would make it difficult to believe that justice would ever come. But, in the 21st century, it seems, as one Armenian-American put it, “the tide is turning.”³

On April 24, 2021, President Joe Biden, the 46th President of the United States, issued a statement giving Armenians around the world reassurance that the world’s superpower was standing up for human rights. This statement finally recognized the atrocities committed by the Ottoman Empire from 1915 to 1923⁴ for what they were—a genocide. “Each year on this day, we remember the lives of all those who died in the Ottoman-era Armenian genocide and recommit ourselves to preventing such an atrocity from ever again occurring.”⁵ While this is not the first time a U.S. president had used the “g-word” to describe the Armenians’ plight, it is the strongest, most direct recognition that has been made.

But what does recognizing the genocide do? Why is it important? Aside from validating the Armenians’ history, by recognizing the Armenian Genocide, the United States has affirmed that genocide was illegal in 1915, thirty-three years prior to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide.

The United States recognizing the genocide supports the

² See THE GENOCIDE EDUCATION PROJECT, *iWitness* (last visited December 1, 2021), <https://genocideeducation.org/resources/survivor-accounts/>; ARCHITECTS OF DENIAL (Montel Media Group October 6, 2017).

³ Gladstone, *supra* note 1.

⁴ The exact years of the Armenian genocide vary depending on how it is measure it. For this article, the years 1915–23 will be used when discussing the genocide, though some sources cited might shorten or lengthen that timeline.

⁵ Joseph R. Biden, *Statement by President Joe Biden on Armenian Remembrance Day*, THE WHITE HOUSE (Apr. 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/24/statement-by-president-joe-biden-on-armenian-remembrance-day/>.

historical evidence that genocide was prohibited under the customary international law of the time. This article will outline and analyze the historical and contemporary evidence to support this claim as well as discuss real-world effects on the Armenian people and international law generally if genocide was indeed illegal back in 1915.

In Part I, this article will provide a description of the Armenian genocide and the origins of the word “genocide.” In Part II, it will examine the different legal theories that would explain the illegality of genocide in 1915 despite there being no word or convention for it, and discuss the evidence and counter-arguments for each. Part III will analyze the United States recognition of the genocide and how it supports a finding of pertinent customary international law. Part IV will discuss the real-world application of this academic and legal exercise.

Part I: Background Information

A. History of the Armenian Genocide

By the year 1915, the Ottoman Empire was in deep decline, losing many of its territories including Greece and parts of North Africa throughout the 19th century and into the 20th century, with the most recent loss in the Balkans.⁶ Because of this, a new political movement emerged, led by the Young Turks.⁷ This movement allowed the Young Turks to gain power in the government with

⁶ Holocaust Encyclopedia, *The Dissolution of the Ottoman Empire*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/map/the-dissolution-of-the-ottoman-empire-1807-1924> (last visited Dec. 1, 2021); SABBY SAGALL, FINAL SOLUTIONS: HUMAN NATURE, CAPITALISM, AND GENOCIDE 159 (2013).

⁷ Bozarslan Hamit, *The General Ottoman and Turkish Contexts, from the Tanzimat (1838) to the Suppression of the Dersim Rebellion (1938)*, SCIENCESPO (Mar. 15, 2008), <https://www.sciencespo.fr/mass-violence-war-massacre-resistance/fr/document/general-ottoman-and-turkish-contexts-tanzimat-1838-suppression-dersim-rebellion-1938.html>; Rachel Hall Beecroft, *Genocide of the Armenians*, WORLD WITHOUT GENOCIDE, <http://worldwithoutgenocide.org/genocides-and-conflicts/armenian-genocide> (updated Feb. 2020).

promises for a strong state as well as for equality among all citizens.⁸ These latter promises were short-lived, as a nationalist faction within the party was able to shape the party's ideology.⁹ This faction sought to form a national identity around Turkism.¹⁰ To achieve this new national identity based on ethnicity, a homogenized population was required.¹¹ This meant that non-Turks, specifically the Armenians, would need to be eliminated.¹²

Propaganda was created and disseminated, casting Armenians as Russian sympathizers and aiders in the war effort.¹³ Resentment due to class differences between the lower-class Turks and the entrepreneurial, middle-class Armenians was weaponized by the government.¹⁴ These and other efforts eventually allowed for the implementation of genocidal policies against the Armenians.¹⁵ So, in an effort to create a homogenized population and establish a new national identity around Turkism, the government started the genocide.¹⁶

In Constantinople on April 24, 1915, the Ottoman government rounded up 250 of the Armenian cultural, intellectual, and political leaders and executed them.¹⁷ This event signaled the start of the genocide. The genocide took place throughout the Anatolia region (modern-day Turkey) and parts of Syria, Iraq, and Greece.¹⁸ Armenian Christians were rounded up and forced to leave their homes, businesses, and livelihoods.¹⁹ Many of the men over the age of 12 were

⁸ Hamit, *supra* note 7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *See* SAGALL, *supra* note 6, at 161.

¹⁵ Hamit, *supra* note 7; ARCHITECTS OF DENIAL (Montel Media Group, Oct. 6, 2017).

¹⁶ Hamit, *supra* note 7.

¹⁷ *Q&A: Armenian Genocide Dispute*, BBC NEWS (Apr. 24, 2021), <https://www.bbc.com/news/world-europe-16352745>; *Armenian Genocide*, UNIVERSITY OF SOUTH FLORIDA LIBRARIES, <https://usflibexhibits.omeka.net/exhibits/show/armenianstudies/armenia-genocide/armenia-genocide-info> (last visited November 15, 2021).

¹⁸ *Id.*; SAGALL, *supra* note 6, at 158.

¹⁹ ARCHITECTS OF DENIAL (Montel Media Group Oct. 6, 2017).

taken outside the towns and villages and shot.²⁰ The surviving women, children, infirm, and elderly were forced to leave their homes.²¹ Many were taken to the Black Sea and rivers like the Euphrates and drowned.²² The majority were sent to the Syrian Desert,²³ a destination chosen for the difficult and brutal journey.²⁴ Approximately ninety percent of those deported to Syria would not make it to their final destination.²⁵ Once there, many more would die of starvation and disease.²⁶ But more arrived alive than the Ottomans had anticipated.²⁷ Talat Pasha, the grand vizier and architect of the genocide,²⁸ ordered the military “to reduce the [Armenian] number as much as possible.”²⁹ This resulted in over 200,000 additional Armenians being massacred in Syria.³⁰

Of the 2 million Armenians living within the Ottoman Empire, an estimated 1.5 million were killed from 1915 to 1923.³¹ In addition to the deaths, the Ottomans took orphaned children of the Armenian Christians and put them into Turkish Muslim families and attempted

²⁰ SAGALL, *supra* note 6, at 158.

²¹ *Id.*, ARCHITECTS OF DENIAL (Montel Media Group October 6, 2017).

²² SAGALL, *supra* note 6, at 158; ARCHITECTS OF DENIAL (Montel Media Group October 6, 2017).

²³ TANER AKÇAM, THE YOUNG TURKS’ CRIME AGAINST HUMANITY: THE ARMENIAN GENOCIDE AND ETHNIC CLEANSING IN THE OTTOMAN EMPIRE 207–23 (2012).

²⁴ See ARCHITECTS OF DENIAL (Montel Media Group Oct. 6, 2017).

²⁵ *Id.*

²⁶ *Id.*

²⁷ AKÇAM, *supra* note 23, at 223.

²⁸ ARCHITECTS OF DENIAL (Montel Media Group Oct. 6, 2017).

²⁹ AKÇAM, *supra* note 23, at 223 (citing ARAM ANDONIAN, MEMOIRS OF NAIM BEY, at 4).

³⁰ Raymond H. Kevorkian, *Earth, Fire, Water: or How to Make the Armenian Corpses Disappear*, in DESTRUCTION AND HUMAN REMAINS: DISPOSAL AND CONCEALMENT IN GENOCIDE AND MASS VIOLENCE 89, 107–09 (Élisabeth Anstett & Jean-Marc Dreyfus eds., 2014).

³¹ Rouben Paul Adalian, *Armenian Genocide (1915–1923)*, ARMENIAN NATIONAL INSTITUTE, <https://www.armenian-genocide.org/genocide.html> (last visited Dec. 1, 2021); R.J. Rummel, *Statistics of Turkey’s Democide: Estimates, Calculations, and Sources*, UNIVERSITY OF HAWAII, <https://www.hawaii.edu/powerkills/SOD.CHAP5.HTM> (last visited Dec. 2, 2021); R.J. Rummel, *Table 5.1A Turkish Democide: Estimates, Sources, and Calculations*, UNIVERSITY OF HAWAII, <https://www.hawaii.edu/powerkills/SOD.TAB5.1A.GIF> (last visited Dec. 2, 2021).

to erase their Armenian Christian identities.³² Women and young girls were forced to convert to Islam and marry Muslim men.³³ For a time, individuals who desired to convert from Christianity to Islam, on their own initiative, were spared.³⁴ This practice was sporadic throughout the genocide and declined as the Ottomans discovered that many of these conversions were not as sincere as they had hoped.³⁵

At the end of the war, the Allied Powers determined that the Ottoman government should be held responsible for their crimes and even had plans to hold a tribunal for those individuals responsible for the massacres.³⁶ The new Turkish government held domestic trials for the acts of genocide committed, describing them as “crimes against humanity.”³⁷ However, both of these efforts to hold the Ottomans responsible were not successful. The rise of Mustafa Kemal in Turkey and the subsequent war became too much for the Allies, and they ultimately renegotiated the peace treaty that had provided for punishment of the genocide perpetrators.³⁸ This new peace treaty did not include any tribunal or accountability for the genocide of Armenians.³⁹ The domestic military tribunals ended prematurely and many of the verdicts that did come out of it “were nullified.”⁴⁰ Because of these, Turkey was able to escape punishment for the genocide,⁴¹ and began a denial campaign that is continuing today.⁴²

³² Ug̃ur Ümit Üngör, *Orphans, Converts, and Prostitutes: Social Consequences of War and Persecution in the Ottoman Empire, 1914–1923*, *WAR IN HISTORY* 175–81 (2012).

³³ *Id.* at 181–82.

³⁴ *Id.* at 181–83.

³⁵ *See id.* at 181.

³⁶ The Treaty of Peace Between the Allied and Associated Powers and Turkey Signed at Sèvres art. 230, Aug. 10, 1920 [hereinafter Treaty of Sèvres].

³⁷ Vahakn N. Dadrian, *The Armenian Genocide as a Dual Problem of National and International Law*, 4 U. ST. THOMAS J.L. & PUB. POL’Y 60–61, 63–67, 70 (2010).

³⁸ Hamit, *supra* note 7; Norman Itzkowitz, *Kemal Atatürk*, *BRITANNICA* <https://www.britannica.com/biography/Kemal-Ataturk> (last updated Nov. 6, 2021).

³⁹ *See* Treaty of Peace with Turkey Signed at Lausanne, Art. 138, July 24, 1923, 28 LNTS 11 [hereinafter Treaty of Lausanne].

⁴⁰ Dadrian, *supra* note 37, at 69 (discussing the change in successive Kemalist government’s nullification of verdicts).

⁴¹ Treaty of Lausanne, *supra* note 39.

⁴² ARCHITECTS OF DENIAL (Montel Media Group Oct. 6, 2017).

Turkey, now, does not deny that many Armenians were killed, but it explains this as a consequence of war and suggests the number is less than 600,000 deaths rather than the 1.5 million estimated by many scholars.⁴³ It also argues that even with the deaths that did occur, the necessary genocidal intent was absent.⁴⁴ This is such an important issue for the country that it leverages its geopolitical positioning and other political tools to attempt to silence other countries to prevent them from recognizing the genocide.⁴⁵ This is one of the reasons that the United States resisted using the word “genocide” to describe the massacre of the Armenians.⁴⁶ Several U.S. presidential candidates have promised to recognize the events as a genocide, but, until recently, all failed to do so.⁴⁷ President Reagan was one of the few presidents who used the word in a speech about the Holocaust.⁴⁸ President Donald Trump’s administration accidentally called the event a genocide, but dispelled any notion that it was recognizing the genocide by pushing against Congressional bipartisan efforts to recognize it.⁴⁹ The Congress did, however, recognize the genocide with the House recognizing it as such on October 29, 2019 and the Senate on December 12, 2019.⁵⁰

On April 24, 2021, in a statement on Armenian Remembrance

⁴³ *The Armenian Allegation of Genocide: The Issue and the Facts*, THE REPUBLIC OF TURKEY, <https://www.mfa.gov.tr/the-armenian-allegation-of-genocide-the-issue-and-the-facts.en.mfa> (last visited Nov. 1, 2021).

⁴⁴ *Id.*; Rowan University, *Talat Pasha’s Killing Orders and Denial of Armenian Genocide*, YOUTUBE (Mar. 20, 2019), https://www.youtube.com/watch?v=nX0_MLV2FRQ.

⁴⁵ ARCHITECTS OF DENIAL (Montel Media Group Oct. 6, 2017).

⁴⁶ See Katie Rogers & Carlotta Gall, *Breaking with Predecessors, Biden Declares Mass Killings of Armenians a Genocide*, N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/04/24/us/politics/armenia-genocide-joe-biden.html>.

⁴⁷ Aaron Blake, *Biden Goes where his Predecessors Wouldn’t in Recognizing the Armenian Genocide*, WASHINGTON POST (Apr. 24, 2021, 12:28 PM), <https://www.washingtonpost.com/politics/2021/04/22/bidens-bold-move-recognize-armenian-genocide/>.

⁴⁸ Ronald Reagan, *Proclamation 4838—Days of Remembrance of Victims of the Holocaust*, NAT’L ARCHIVES, (Apr. 22, 1981), <https://www.reaganlibrary.gov/archives/speech/proclamations-april-22-1981>.

⁴⁹ Blake, *supra* note 47.

⁵⁰ H.R. Res 296, 116th Cong. (2019); S. Res. 150, 116th Cong. (2019).

Day, President Joe Biden released a statement finally recognizing the atrocities committed against the Armenian people from 1915 to 1923 as a genocide.⁵¹ This spurred excitement among the Armenian people,⁵² and resentment within the Turkish government.⁵³ The United States is now one of 30 countries to recognize the Armenian genocide.⁵⁴

B. Genocide: The Word and Legal Concept

The word “genocide” was created by Raphael Lemkin in 1944.⁵⁵ Lemkin was a Polish Jew “who fled the Nazi occupation of Poland and arrived in the United States in 1941.”⁵⁶ When Lemkin was a young man, he was horrified when he learned about Turkey’s

⁵¹ Biden, *supra* note 5.

⁵² See Eugene Garcia & Daisy Nguyen, *Armenian Americans Celebrate Biden’s Recognition of Genocide*, ASSOCIATE PRESS (Apr. 24, 2021), <https://apnews.com/article/middle-east-armenia-europe-ad0633f7605d244b27f255949dc83948>.

⁵³ See Zeynep Bilginsoy, *Turkish Leader Defiant on Biden Mention of Armenian Genocide*, ASSOCIATE PRESS (Apr. 26, 2021), <https://apnews.com/article/middle-east-europe-government-and-politics-e8e84a5b3828f9f4c808390db3e3446f>.

⁵⁴ The countries that recognize the Armenian Genocide are from a variety of regions, regime types, and sizes. The list of countries is as follows: Argentina, Austria, Belgium, Bolivia, Brazil, Canada, Chile, Cyprus, Czech Republic, France, Germany, Greece, Italy, Latvia, Lebanon, Lithuania, Luxembourg, Netherlands, Paraguay, Poland, Portugal, Russia, Slovakia, Sweden, Switzerland, Syria, Vatican City, Venezuela, United States, Uruguay. *Countries that Recognize the Armenian Genocide*, ARMENIAN NATIONAL INSTITUTE, https://www.armenian-genocide.org/recognition_countries.html (last visited Oct. 18, 2021). Denmark is included on the Armenian National Institute’s list of countries that have recognized the genocide, but after examining the evidence for Denmark’s “recognition,” it is arguable whether or not Denmark actually is recognizing the events as genocide. See *Forslag til vedtagelse V 26 Om det armenske folkedrab*, Jan. 19, 2017, https://www.armeniangenocide.org/Affirmation.597/current_category.7/affirmation_detail.html. I have chosen not to include it in this article for that reason.

⁵⁵ Lynn Sweet, *Biden is the Only President to Acknowledge Armenian Genocide: Promise Kept in First 100 Days in Office*, CHICAGO SUN TIMES (Apr. 25, 2021), <https://chicago.suntimes.com/columnists/2021/4/25/22402975/biden-only-president-acknowledge-armenian-genocide-promise-kept-first-100-days-office>.

⁵⁶ *Genocide*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/holocaust/what-is-genocide>.

annihilation of the Armenians during WWI.⁵⁷ Lemkin felt compelled to create a word that could capture the horrors that took place against the Armenians, Jews, and others during WWI and WWII.⁵⁸ He did this by combining the Greek word “genos,” the word for race, nation, or tribe, and the Latin word “cide,” the word for killing, to create “genocide.”⁵⁹

In October 1946, Lemkin went to a meeting of the then one-year-old United Nations and advocated that a resolution be made criminalizing genocide.⁶⁰ This resolution called for the Economic and Social Council to create a draft convention that could be used next time the General Assembly met.⁶¹ The convention was then drafted in three stages. During the first stage, the U.N. Secretariat created a first draft with the assistance of Lemkin as well as two other experts.⁶² Next, the Economic and Social Council created an ad hoc committee to rework the draft.⁶³ This reworked draft was then negotiated over by members of the General Assembly.⁶⁴ The General Assembly ultimately defined genocide as:

[Doing] any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to

⁵⁷*Id.*; Henry T. King Jr., Benjamin B. Ferenz, & Whitney R. Harris, *Origins of the Genocide Convention*, 40 CASE W. RESERVE J. INT’L L. 13, 14 (Aug. 18, 2012), <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1272&context=jil>.

⁵⁸ Sweet, *supra* note 55.

⁵⁹ Raphael Lemkin, *Genocide as a Crime under International Law*, 41 AM. J. INT’L L. 145, 147 (1947).

⁶⁰ *Id.* at 148–50.

⁶¹ *Id.* at 150.

⁶² William A. Schabas, *Convention on the Prevention and Punishment of the Crime of Genocide: Introductory Note*, U.N. (Jul. 2008), <https://legal.un.org/avl/ha/cppcg/cppcg.html#:~:text=On%203%20March%201948%2C%20the,%2F794%2C%205%20April%2D10>.

⁶³ *Id.*

⁶⁴ *Id.*

bring about its physical destruction in whole or in part;
 (d) Imposing measures intended to prevent births
 within the group; (e) Forcibly transferring children of
 the group to another group.⁶⁵

In this definition, the General Assembly required both an *actus reus* and *mens rea* to be responsible for genocide. The *actus reus*, or the physical element, of the crime is the actions listed as (a) through (e) above. Sexual violence has been added to the list of physical elements of the crime as well.⁶⁶ The *mens rea*, or the mental element, of genocide has two parts. The first part is that there must be an intent to destroy in whole or in part. This is particularly important to establish when looking at physical elements where the intent to destroy is less evident, such as sexual violence or forcibly transferring children from one group to another. In order to be liable for genocide for these actions, the intent, or an intent, must be to destroy the group in whole or in part.

The second part of the *mens rea* is that this intent to destroy must be targeted at a national, ethnic, racial, or religious group. This means if someone's intent to destroy is directed at a group outside of the parameters set here, it is not genocide.⁶⁷ For example, if a country or individual destroyed all members of a political party with the intent

⁶⁵ Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, G.A. [hereinafter Genocide Convention].

⁶⁶ Jonathon M.H. Short, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, 8 MICH. J. RACE & L. 503, 504, 508–514 (2003); OUTREACH PROGRAMME ON THE RWANDA GENOCIDE AND THE UNITED NATIONS, SEXUAL VIOLENCE: A TOOL OF WAR, U.N. 1–2 (2014).

⁶⁷ David S. Bettwy, *The Genocide Convention and Unprotected Groups: Is the Scope of Protection Expanding under Customary International Law*, 2 NOTRE DAME J. INT'L & COMP. L. 167, 195 (2011) (“The exhaustive list of protected groups is the product of considerable deliberation and forethought by the drafters and has sustained itself through subsequent corresponding codification at both the domestic and international levels. At the same time, the list has been the subject of considerable criticism and debate concerning its narrowness ... it does not appear that customary international law has enlarged the scope of protected groups set forth in the Genocide Convention ... the scope of protected groups must be exhaustive and exclusive so as to respect the prestige of the crime of genocide.”).

to destroy that group, it would not constitute genocide because it is not directed at a national, ethnic, racial, or religious group.⁶⁸

This intent is distinct from other crimes against humanity, in particular, the crime against humanity of extermination. For other crimes against humanity, including extermination, the subjective element required is “with knowledge of the attack.”⁶⁹ Knowledge exists when there is an “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”⁷⁰ So one could “kill members of a group” or “deliberately inflict[] on the group conditions of life calculated to bring about its physical destruction” knowing that these actions will ultimately “destroy, in whole or in part” a group and still not commit genocide.⁷¹ This is because the intent of the act needs to rise beyond just knowing that destruction will be the consequence.⁷² The intent of the act needs to be to destroy the group in whole or in part.⁷³

The Convention created both state liability⁷⁴ and individual criminal liability, including those typically granted immunity in the past such as sovereigns.⁷⁵ The Convention also established territorial jurisdiction for the crime, as well as jurisdiction for an international tribunal.⁷⁶ But there was no permanent international tribunal to handle

⁶⁸ See, e.g., *Diaz et al. v. Columbia*, On Admissibility, Inter-Am. Ct. H.R. (ser. L) No. 5/97, ¶ 22–25 (Mar. 12, 1997) (“The petitioners have not alleged facts which would tend to show that the Patriotic Union is a ‘national, ethnical, racial or religious group.’ ... The Commission concludes that the facts alleged by the petitioners set forth a situation which shares many characteristics with the occurrence of genocide and might be understood in common parlance to constitute genocide. However, the facts alleged do not tend to establish, as a matter of law, that this case falls within the current definition of genocide provided by international law. The Commission therefore shall not analyze the allegation of genocide on the merits.”).

⁶⁹ The Rome Statute of the International Criminal Court Precursor, art. 7, July 17, 1998 (hereinafter Rome Statute).

⁷⁰ Rome Statute, at art. 30.

⁷¹ See Geert-Jan A. Knoops, *Mens Rea and Genocide*, in 10 MENS REA AT THE INTERNATIONAL CRIMINAL COURT 93, 93–94 (Geert-Jan Alexander Knoops ed., 2017).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See Genocide Convention, at art. IX.

⁷⁵ *Id.* at art. IV.

⁷⁶ Schabas, *supra* note 62.

such cases.⁷⁷ In response to this, the General Assembly passed a resolution, after passing the Convention, that called for a statute for such a permanent tribunal to be drafted.⁷⁸ It would take another fifty years and two ad hoc international tribunals before this statute would actually be drafted.⁷⁹ This statute, known as the Rome Statute, was adopted on July 17, 1998 and came into force on July 1, 2002.⁸⁰ This statute created the International Criminal Court, a permanent court to try individuals for international crimes including the crime of genocide.⁸¹

Part II: Theories for Genocide in 1915

Because the crime of genocide was not officially codified under international law until after WWII and the promulgation of the Genocide Convention, questions remain about the appropriateness of using the term genocide to describe the actions taken against the Armenians between 1915 and 1923. In defense of this application, there are three prominent theories. Each of these theories will be described and analyzed below, leading to the conclusion that the acts that later became known as genocide were already proscribed by customary international law.

A. Natural Law

Natural law is the idea that despite what people, groups, or

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* The International Criminal Tribunal for the Former Yugoslavia mandate started in 1993, U.N. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/> (last visited Dec. 2, 2021), and the International Criminal Tribunal for Rwanda's mandate started in 1995. *The ICTR in Brief*, U.N. INTERNATIONAL RESIDUAL MECHANISM FOR CRIMINAL TRIBUNALS, <https://unictr.irmct.org/en/tribunal> (last visited Dec. 2, 2021).

⁸⁰ Rome Statute of the International Criminal Court, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en (last visited Mar. 7, 2022).

⁸¹ *Id.* at art. 1. Article 6 defines genocide the same way as the Convention on Genocide. *Id.* at art. 6.

states may think is right, there is in fact an objective right and wrong.⁸² This was the theory that governed international law for most of its existence.⁸³ In the 19th century, positivist theory became the primary theory of international law, relegating natural law to a secondary position.⁸⁴ Positivism is the idea that “the existence and content of law depends on social facts and not on its merits.”⁸⁵ This means laws exist not because they are objectively right, but rather laws exist because there are facts to support that they exist.⁸⁶ Contemporary international law has further limited the role of natural law.⁸⁷

With this said, some current natural law proponents understand that their position is weaker in this positivism-dominated international law regime but they still advocate that there can be a place for natural law, even if it is limited.⁸⁸ One such place is genocide as it applies to

⁸² John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Jules L. Coleman, Kenneth Einar Himma, & Scott J. Shapiro eds., 2012), <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199270972.001.0001/oxfordhb-9780199270972-e-1#oxfordhb-9780199270972-div1-3>; Natalie Sands, *Naturalism and the U.N. Convention on Genocide*, POLITICS 6, 14–15 (Apr. 30, 2012).

⁸³ Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT’L L. 269, 269–70 (2001).

⁸⁴ See *id.* at 269–71.

⁸⁵ Leslie Green & Thomas Adams, *Legal Positivism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2019), <https://plato.stanford.edu/archives/win2019/entries/legal-positivism/>.

⁸⁶ See *id.*

⁸⁷ See Statute of the International Court of Justice art. 38, June 26, 1945 [hereinafter ICJ Statute]. The sources of international law do not include, directly, natural law as a part. They are all positive sources of law. One exception might be the writing of academics, because, in theory, the ICJ could find a natural law proponent persuasive, but the shift has been overwhelmingly toward positivism. However, it has been argued that natural law still influences international law, even if it is discreetly. One such example would be the establishment of *jus cogens* norms. Roger Alford, *The Role of Natural Law as a Source for International Law*, OPINIOJURIS (Nov. 19, 2008), <http://opiniojuris.org/2008/11/19/the-role-of-natural-law-as-a-source-for-international-law/>. Inherent to the idea of *jus cogens* is that these norms are so important that they transcend all others, allowing them to overcome principles such as the persistent objector rule or contradictory positive laws. See Int’l Law Comm’n, Rep. of the Int’l L. Comm’n, U.N. Doc. A/74/10, at 142, 144–45, 151 (2019).

⁸⁸ E.g., Fernando R. Tesón, *Natural Law as a Part of International Law: The Case of the Armenian Genocide*, 50 SAN DIEGO L. REV. 813, 813–15 (2013).

events prior to 1948. Proponents of this theory take one of several approaches in arguing their case.

The first method is to look at the concept of the state.⁸⁹ This method primarily concerns itself with the question of whether mass murder of one's subjects is in line with the concept of the state.⁹⁰ The assertion is that it is not.⁹¹ International law was meant to "regulate the interaction between independent communities" organized as sovereign states.⁹² The argument goes that effectiveness of governments in the functions of the state is a precondition for international law.⁹³ If states are not able to internally govern effectively, international law cannot govern interstate relations.⁹⁴ As such, one of the primary functions of a state and government is to protect its citizens, whether that is from outside forces or from internal ones.⁹⁵ A lack of protection would thus make the state ineffective.⁹⁶ With this in mind, it would then stand against reason to suggest that state-sponsored mass murder is within the state's prerogative.⁹⁷ And if mass murder is against the state's prerogative, then exterminating a part of the state's populace because of their race, religion, or ethnicity is equally precluded.⁹⁸

The second method is to apply an impartial observer test.⁹⁹ The test is simple: take a neutral party in 1915 and see what she thinks about the legality of the Ottoman's actions towards the Armenians.¹⁰⁰ The usefulness of the impartial observer test is that it helps to get closer to that objectively right conduct that natural law advocates for. The argument states that an impartial observer would have in fact

⁸⁹ *Id.* at 824–29 (arguing that looking to the concept of the state would render genocide an international wrong).

⁹⁰ *Id.* at 825.

⁹¹ *Id.*

⁹² *Id.* at 824.

⁹³ Teson, *supra* note 88.

⁹⁴ *Id.*

⁹⁵ *Id.* at 824–825.

⁹⁶ *See id.*

⁹⁷ *Id.* at 25.

⁹⁸ *Id.*

⁹⁹ Teson, *supra* note 88, at 829.

¹⁰⁰ *Id.*

thought it illegal for the Ottomans to commit genocide.¹⁰¹ These arguments use the example of the Allied Powers condemning the Ottoman Empire for massacring the Armenians.¹⁰² Proponents argue that the Allied Powers were impartial because condemning the Ottoman's actions went against their interests by limiting states' ability to deal with their subjects as they pleased.¹⁰³ In other words, by decrying Turkey's treatment of the Armenians as a crime, they were precluding themselves from committing genocide, which was against their interest.¹⁰⁴ While this argument does have a compelling appeal to it, there are additional examples of impartial observers. Take United States ambassador Henry Morgenthau, for example.¹⁰⁵ Henry Morgenthau was the Ambassador to the Ottoman Empire from 1913 to 1916, putting him in the Ottoman Empire during the genocide.¹⁰⁶ The United States entered the war on April 6, 1917.¹⁰⁷ However, it did not declare war against the Ottoman Empire.¹⁰⁸ Prior to this, the United States pledged neutrality¹⁰⁹ and maintained diplomatic relations with the Ottomans.¹¹⁰ Ambassador Morgenthau described

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ But see *The Armenian Allegation of Genocide: The Issues and the Facts*, *supra* note 43 (discussing Morgenthau's lack of neutrality).

¹⁰⁶ See HENRY MORGENTHAU, AMBASSADOR MORGENTHAU'S STORY "Title Page" (1918), <https://net.lib.byu.edu/estu/wwi/comment/morgenthau/MorgenTC.htm#TC>.

¹⁰⁷ Sandra Knispel, *Why did the U.S. Enter World War I?*, UNIVERSITY OF ROCHESTER NEWSCENTER (Apr. 5, 2017), <https://www.rochester.edu/newscenter/looking-back-100-years-u-s-enters-world-war-i-on-april-6-1917/#:~:text=In%20early%20April%201917%2C%20with,joining%20the%20bloody%20battle%E2%80%9494then>.

¹⁰⁸ History.com Editors, *U.S. Entry into World War I*, HISTORY.COM (updated Jul. 22, 2020), <https://www.history.com/topics/world-war-i/u-s-entry-into-world-war-i-1>.

¹⁰⁹ Knispel, *supra* note 107.

¹¹⁰ U.S. Neutrality: 1914–1917, THE UNITED STATES WORLD WAR ONE CENTENNIAL COMMISSION, <https://www.worldwar1centennial.org/index.php/edu-home/edu-topics/584-u-s-neutrality-1914-1917.html#:~:text=When%20war%20broke%20out%20in,preferred%20to%20continue%20this%20policy> (last visited Dec. 2, 2021).

these events as atrocities and crimes.¹¹¹ In a memoir written to President Wilson, he said,

Whatever *crimes* the most perverted instincts of the human mind can devise, and whatever refinements of persecution and injustice the most debased imagination can conceive, became the daily misfortunes of this devoted people. I am confident that the whole history of the human race contains no such horrible episode as this. The great massacres and persecutions of the past seem almost insignificant when compared with the sufferings of the Armenian race in 1915.¹¹²

When explaining why the massacre of the Greeks was not on the same scale as the massacre of the Armenians, he said, “It was only a matter of state policy, therefore, that saved these Greek subjects of Turkey from all the horrors that befell the Armenians. But their sufferings are still terrible and constitute another chapter in the long story of *crimes* for which civilization will hold the Turk responsible.”¹¹³

The second method concludes by saying that since both of the impartial observers said that the Ottoman’s were not legally allowed to commit genocide in 1915, then it fails the test and is therefore illegal.¹¹⁴

There are additional historical appeals to natural law that strengthen the natural law claim. The International Court of Justice (ICJ) has used language to support natural law arguments. In its Advisory Opinion on Reservations to the Genocide Convention, the ICJ said:

¹¹¹ MORGENTHAU, *supra* note 106; *see also History of the U.S. and Turkey*, U.S. EMBASSY & CONSULATES IN TURKEY, <https://tr.usembassy.gov/our-relationship/policy-history/io/> (last visited Dec. 2, 2021).

¹¹² MORGENTHAU, *supra* note 106, at “Chapter XXIV” (emphasis added).

¹¹³ *Id.* at “Chapter XXIV” (emphasis added).

¹¹⁴ Teson, *supra* note 88, at 829.

The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as “a crime under international law” involving a denial of the right of existence of entire human groups, a denial which *shocks the conscience of mankind* and results in great losses to humanity, and *which is contrary to moral law* and to the spirit and aims of the United Nations.¹¹⁵

Invoking moral law appeals to natural law. In addition, it is commonly recognized that the prohibition against genocide has been declared by the ICJ as a peremptory norm.¹¹⁶ Peremptory norms are norms in international law that are elevated above all others.¹¹⁷ And since these norms are elevated above others, they will be applied universally, overcoming norms such as the persistent objector rule and the ability to “contract” out of such norms through treaties.¹¹⁸ Justifications for the existence of peremptory norms have heavy natural law undertones to them.¹¹⁹

The United States has an interest in supporting the positivist regime in international law, and thus would likely reject arguments that its recognition of the Armenian genocide was based on a natural law theory. Recognizing the genocide under a theory of natural law would erode the positivist regime and create a space of natural law as an independent theory of law. This could open up the United States to liability if it violates an “objective right,” that might not otherwise be illegal under current positive international law. Therefore, it is unlikely that the United States would recognize the genocide under a theory of natural law.

¹¹⁵ Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (citations omitted) (emphasis added).

¹¹⁶ Int’l Law Comm’n, Rep. of the Int’l L. Comm’n, U.N. Doc. A/74/10, at 151 (2019).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 108–109.

¹¹⁹ *See id.* at 24; *See also id.* at 25. But it is important to note that *jus cogens*, while it has a natural law feel to it, has made its way into positive law through the Vienna Convention on the Law of Treaties.

B. Retroactive Treaty

Under the retroactive treaty theory, the argument is that the Convention on the Punishment and Prevention of Genocide, which came into effect in 1951, applies both moving forward from 1951 and moving backward.

The main argument is that there is nothing in the treaty to suggest that the crime should not be applied retroactively.¹²⁰ To support this, proponents of the argument point out that at the time of the Genocide Convention, there were only three treaties that involved atrocity crimes: the Treaty of Versailles, the Treaty of Sèvres, and the Charter of the International Military Tribunal.¹²¹ Each of these treaties sought to retroactively apply atrocity crimes to the events of WWI and WWII.¹²² This precedent shows that in the case of atrocity crimes in 1948, the intent is presupposed that it will apply retroactively and that it should be explicitly stated if the intent is to not apply the crimes retroactively.¹²³ While the Vienna Convention generally bars retroactive application of treaties, it does leave open the possibility that if the intention is clear, a treaty can be applied retroactively.¹²⁴ The exact language of the Vienna Convention is:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.¹²⁵

¹²⁰ William A. Schabas, *Retroactive Application of the Genocide Convention*, 4 U. ST. THOMAS J.L. & PUB. POL'Y 36, 41 (2010).

¹²¹ *Id.* at 142

¹²² *Id.*

¹²³ *Id.*

¹²⁴ ARMENIAN GENOCIDE REPARATIONS STUDY GROUP, REPARATIONS FOR THE ARMENIAN GENOCIDE 39 (2015).

¹²⁵ Vienna Convention on the Law of Treaties, art. 28, *opened for signature May 23, 1969*, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

This language does not say that a treaty must explicitly state that it is meant to apply retroactively, but that the “very nature of the treaty rather than its specific provisions indicates that it is intended to have certain retroactive effects.”¹²⁶ There is legal precedent for this as well. In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice, the equivalent of the ICJ during the League of Nations period, cited the nature of a particular entry into a treaty as a justification for applying it to events before the treaty was in place.¹²⁷ This leaves open the possibility that the Genocide Convention could be applied retroactively.

Another argument suggests retroactivity without having to overcome the Vienna Convention Article 28 hurdle. This argument states that the Vienna Convention allows for the punishment of acts that were committed prior to a treaty being effective but that continued after it entered into force.¹²⁸ The majority of delegations believed that the Vienna Convention allowed for this type of treaty enforcement.¹²⁹ Applying this to the Armenian genocide, proponents of this argument cite that while the genocide took place prior to the Genocide Convention, the property taken from the Armenians as a result of the genocide has not been returned and therefore the situation of the genocide is still continuing.¹³⁰

But these arguments are unconvincing when determining what theory of law the United States might be using to support a recognition of genocide in 1915. The biggest weakness in these arguments is that intent must be established in order to overcome the default “non-retroactivity of treaties” rule. It is clear that the language of the Genocide Convention is more indicative of encapsulating already existing international law rather than trying to apply the law retroactively. With regard to the preamble and its assertion that genocide has been committed throughout all periods of history, the

¹²⁶ ARMENIAN GENOCIDE REPARATIONS STUDY GROUP, *supra* note 124, at 39 (citations omitted).

¹²⁷ *Id.* at 39–40.

¹²⁸ *Id.* at 40.

¹²⁹ *Id.*

¹³⁰ *See id.*; see also Aram Kuyumjian, *The Armenian Genocide: International Legal and Political Avenues for Turkey's Responsibility*, 41 REVUE DE DROIT DE L'UNIVERSITÉ DE SHERBROOK [R.D.U.S.] 247, 273 (2011) (Can.).

lead-in word to this preambulatory clause is “Recognizing.” This indicates that something already exists, rather than attempting to apply a new legal concept backwards. In a similar vein, the Member States in Article I “confirm that genocide ... is a crime under international law ...”¹³¹ The word “confirm” is indicative of already existing law, not a call for retroactive application.

Like natural law, the United States would not recognize the Armenian Genocide with this theory in mind. The United States, and many other states, have a vested interest in keeping the law on treaties proactive. If they began to create a precedent for retroactive theories, this would leave the door open for other treaties that countries have entered to suddenly be applied retroactively.

As for the second retroactivity argument, the United States would not likely agree with this argument either. It was the United States that worked diligently to try to remove language that would allow this situation but was unsuccessful.¹³² Therefore, it is unlikely that the United States would now want to support this reading of the Vienna Convention.

C. Customary International Law

International law recognizes that law can be created by states through “international custom, as evidence of a general practice accepted as law.”¹³³ This is called customary international law. There is no required legal instrument to bring it into effect, it just exists if it is there. Because of this, it is not always clear whether a purported rule has become part and parcel of customary international law or not. To show that custom is international law, two elements must exist: state practice and *opinio juris*.

¹³¹ Genocide Convention, *supra* note 65, at art. 1.

¹³² ARMENIAN GENOCIDE REPARATIONS STUDY GROUP, *supra* note 124, at 40.

¹³³ ICJ Statute, *supra* note 87, at art. 38.

1. *State Practice*

State practice is the “conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions.”¹³⁴ This can include both physical and verbal acts as well as inaction in some cases.¹³⁵ Physical action is not required and evidence of state practice can be solely verbal acts.¹³⁶ The longer and/or more widespread the practice is, the more likely this element will be satisfied.¹³⁷ Variation in state practice decreases the weight of that practice, while consistency increases it.¹³⁸ Evidence of state practice can be diplomatic action, treaties, statements by officials, domestic laws, policy, on the ground operational conduct, and more.¹³⁹ Evidence of state practice can also come from organs of the state that are purely domestic in nature.¹⁴⁰

2. *Opinio Juris*

However, simply because there exists state practice, does not mean something becomes a law. States do things for a variety of reasons. For example, a state may drop tariffs unilaterally on products, not because it thinks it is legally compelled to, but because the act of eliminating tariffs might strengthen the relationship with the country, encourage reciprocity, decrease the costs of essential products for its citizens, encourage economic growth, or many other reasons. The key for a practice becoming customary international law is the *opinio juris*.

Opinio juris, as an element of customary international law,

¹³⁴ Int’l Law Comm’n, Rep. on the Work of its Seventieth Session, U.N. Doc. A/73/10, at 120 (2018) [hereinafter ILC Rep.].

¹³⁵ *Id.* See also Omri Sender & Michael Wood, *A Mystery No Longer? Opinio Juris and Other Theoretical Controversies Associated with Customary International Law*, 50(3) ISR. L. REV. 299, 303 (2017).

¹³⁶ See ILC Rep., *supra* note 134, at 120. See also Sender & Wood, *supra* note 135, at 303.

¹³⁷ See ILC Rep., *supra* note 134, at 120.

¹³⁸ *Id.* at 120, 126.

¹³⁹ *Id.* at 120.

¹⁴⁰ *Id.* See also Sender & Wood, *supra* note 135, at 303.

means that the [state] practice in question must be undertaken with a sense of legal right or obligation.”¹⁴¹ This can include both practices that it performed or refrained from out of a belief that it was legally obligated to do so, or that it had a legal right to do so, as well as practices that it felt knew were not the law but thought *ought* to be the law.¹⁴² Evidence of this can be “public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; ... conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference ...”¹⁴³

States understand this and are, therefore, intentional in how they communicate the intent of their practices.¹⁴⁴ A state for example, might give prisoners of war greater protections than is required by the various conventions, but announce that it is not doing so because it feels that it is legally required to, but rather, that the practice is good policy. In addition, another state might provide aid to countries that are negatively affected by climate change and announce that it believes it is required to by law in an attempt to establish *opinio juris*.

Out of the different applicable theories, this one is the most likely for the United States to support in recognizing of the Armenian genocide because it establishes the genocide in 1915, as it has recognized, but it only expands the genocide timeline to 1915. It also maintains the current positivist structure and provides consistent, more predictable legal practice moving forward. This allows the United States to promote human rights while limiting its own potential liability under international law. Customary international law is also a well-established way for international law to be created and applied, unlike the natural law theories and retroactive treaty theories.

This theory is the most likely to prevail of the three theories. It is imperative to determine if there is additional evidence to support a finding for customary international law and genocide back in 1915.

¹⁴¹ See ILC Rep., *supra* note 134, at 120.

¹⁴² *Id.* See also Sender & Wood, *supra* note 135, at 302.

¹⁴³ See ILC Rep., *supra* note 134, at 120.

¹⁴⁴ *E.g.*, Joint Declaration by the Federal Republic of Germany and the Republic of Namibia, Ger.-Namib., art. 40, May 28, 2021, 999 U.N.T.S. 171.

D. Customary International Law During 1915

It is well established that the Genocide Convention codified existing customary international law.¹⁴⁵ The question then is when did it become customary international law. This article's assertion is that it was customary international law back in 1915. It will show this by establishing that there was state practice and *opinio juris* back in the early 20th century. The article will also show that as countries recognize the Armenian genocide, like the United States has, these recognitions continually strengthen the evidence. This section will start by analyzing the historical evidence and showing how each point of evidence affects the element of state practice. It will then illustrate the magnitude of each of these pieces of evidence and show why it is important to the element of state practice. It will also show the *opinio juris* of each piece of evidence and make the case that the world order in 1915 thought that genocide was illegal.

1. Allies Joint Declaration in May 1915

There are several indications starting in 1915 that suggest states thought it was illegal to commit mass murder with the intent to destroy based on race, religion, ethnicity, or nationality. The first of the evidence comes from a joint declaration made by the Triple Entente alliance—France, Britain, and Russia—to the Ottoman Empire in May 1915. It reads:

For about a month the Kurd and Turkish populations of Armenia has been massacring Armenians with the connivance and often assistance of Ottoman authorities. Such massacres took place in middle April [] at Erzerum, Dertchun, Eguine, Akn, Bitlis, Mush, Sassun, Zeitun, and throughout Cilicia. Inhabitants of

¹⁴⁵ Diaz et al. v. Colombia, Case 11.227, Inter-Am. Comm'n H.R., Report No. 5/97, OEA/Ser.L./V/II.95, Doc. 7 rev. ¶ 15 (1997) ("The Convention on Genocide ... codifies customary international law on genocide.").

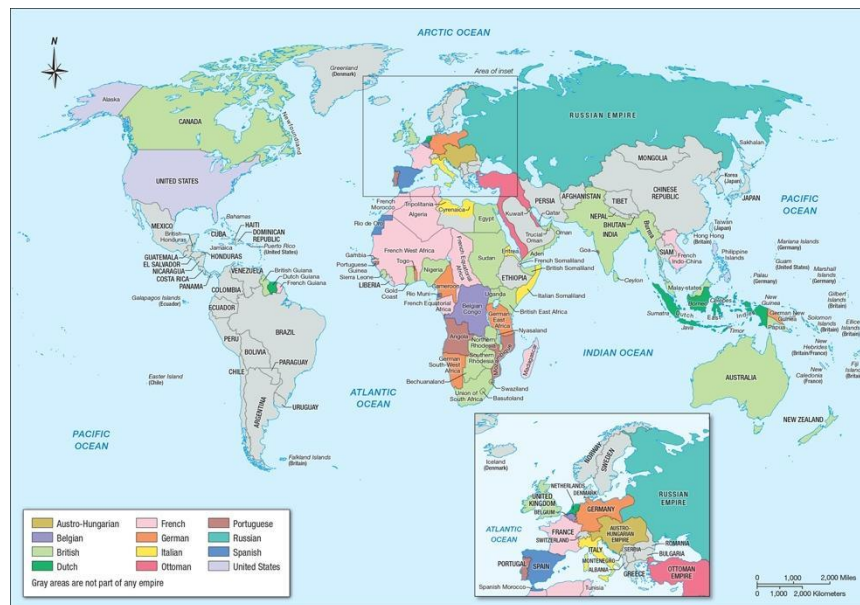
about one hundred villages near Van were all murdered. In that city Armenian quarter is besieged by Kurds. At the same time in Constantinople Ottoman Government ill-treats inoffensive Armenian population. In view of those *new crimes of Turkey against humanity and civilization*, the Allied governments announce publicly to the Sublime-Porte that *they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres*.¹⁴⁶

With regard to state practice, this declaration is strong evidence of how a widespread state practice is an important indicator of whether the element is met. The world in 1915 was much different than it is today. Large, colonial empires still existed, which makes the widespread analysis unique. In terms of the number of governments that signed onto this, there were three: Russia, France, and the British Empire. But, each of these states were, and still are, very large and represented much of the world in 1915.¹⁴⁷ Russian territory included all of present-day Russia as well as most of Central Asia and parts of Eastern Europe. France and Britain were strong colonial powers. French territories in Africa included Madagascar, French Somaliland, and most of the north-west continent of Africa. It also had its French Indo-China territory in Asia that included modern day Vietnam and Laos and French Guiana in South America. Britain had territories in parts of south Africa as well as parts of east and west Africa. It also had Yemen, Oman, Kuwait, and the Trucial States (modern day United Arab Emirates) in the Middle East; India, Burma, Malaysia, and Papua in the Indo-Pacific; Australia and New Zealand in Oceania; and Canada and British Guiana in the Western Hemisphere. These

¹⁴⁶ Armenian National Institute, *France, Great Britain, and Russia Joint Declaration*, https://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.htm (last visited Dec. 2, 2021).

¹⁴⁷ See *Empires before World War I* (illustration), FACING HISTORY & OURSELVES, <https://www.facinghistory.org/resource-library/image/empires-world-war-i> (last visited Dec. 2, 2021).

three powers represented much of the world on the international stage, and thus indicating that the practice was widespread.¹⁴⁸



Opinio juris is also present in the declaration. By using the word “crime” to qualify the Ottomans’ actions, the powers explicitly made clear the illegal nature of the massacres.¹⁴⁹ The powers went a step further by promising to hold “all the members of the Ottoman Government, as well as such of their agents as are implicated, personally responsible ...” for the massacres of the Armenians.¹⁵⁰ These two pieces show that not only is it illegal, but that the powers intended to enforce it.

Genocide does not appear in the declaration because it was not a word in 1915. However, the powers do call out that the crimes were not just massacres, but massacres targeted at a specific ethnic group,

¹⁴⁸ *Id.*

¹⁴⁹ “The best interpretation of these facts, then, is that these governments saw that these massacres were not within the legal discretion of the Ottoman Empire.” Teson, *supra* note 88, at 829.

¹⁵⁰ *Id.* at 822.

the Armenians. Whether the Allies knew of the genocidal intent yet is unclear by this declaration, but when looking at that evidence with all the other evidence, it becomes clear that they were aware of it, and called it out later.

2. *Treaty of Sèvres*

The Treaty of Sèvres was the first peace agreement with the Ottoman Empire after WWI. There are three provisions relevant to the genocide customary international law analysis. This article will examine each provision on its own and point out the *opinio juris*. It will then discuss how the treaty as a whole further establishes the state practice element.

Articles 142 and 144 discuss the state responsibility of the Ottoman Empire regarding the externalities of the genocide. Article 142 requires the Ottoman government to “repair as far as possible the wrongs inflicted on individuals in the course of the massacres perpetrated in Turkey during the war [by attempting to find and deliver persons who had] disappeared, been carried off, interned or placed in captivity.”¹⁵¹ Article 144 discusses stolen property as a result of the genocide and requires the government of the Ottomans to return that property to the greatest extent possible.¹⁵² These two articles are important to establishing that the prohibition of genocide is customary international law because it explicitly shows that the Ottoman Empire was responsible for the genocide, and that since it was responsible for the genocide it needed to remedy the wrong. In international law, when a state has committed an international wrong, it is required to remedy the wrong.¹⁵³ Here, the parties are agreeing what these remedies look like. By following this doctrine, the states demonstrated that the genocide was an international wrong and therefore supports a finding

¹⁵¹ Treaty of Sèvres, art. 142, Aug. 10, 1920, [dipublico.org](https://www.dipublico.org) Derecho Internacional, <https://www.dipublico.org/100760/the-treaty-of-sevres-1920-the-treaty-of-peace-between-the-allied-and-associated-powers-and-turkey-signed-at-sevres-august-10-1920/>.

¹⁵² *Id.* at art. 144.

¹⁵³ Int’l Law Comm’n Rep. on the Responsibility of States for International Wrongful Acts, U.N. Doc A/56/49 at art. 1 (2001).

for *opinio juris*. The last important article is Article 230. It reads:

The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being 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.

The Allied Powers reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such tribunal.

In the event of the League of Nations having created in sufficient time a tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such tribunal, and the Turkish Government undertakes equally to recognise such tribunal.¹⁵⁴

It first needs to be established that these articles are referring to genocide before continuing towards the legal analysis. Here, while it is not clear in isolation that the massacre of the Armenians was at the heart of this intent, it becomes more clear as it is introduced into the world of evidence. Since the word genocide did not exist, other words like “massacre” had to be used to describe the crime of genocide before it was established as a word. This substitution is seen in the Triple Entente joint declaration.¹⁵⁵ In this, it demonstrates that the word “massacre” is used to describe genocide in the early 20th century. So why not explicitly single out the Armenians in this case like they did in their joint declaration?¹⁵⁶ While the Armenians were the main target of the genocide, they were not the only group to go

¹⁵⁴ Treaty of Sèvres, *supra* note 151, at art. 230.

¹⁵⁵ Armenian National Institute, *supra* note 146.

¹⁵⁶ *Id.* (“For about a month the Kurd and Turkish populations of Armenia has been massacring Armenians ...”).

through a similar experience. Arameans, Greeks, and Christians generally experienced the brutality of the Young Turks' genocidal policies.¹⁵⁷ Since multiple groups were being mass murdered, it was only appropriate to generalize the crimes, rather than pointing just to the Armenians. The use of the word "massacres" in the treaty can be seen as describing all the genocides that took place.

Lastly, the facts show that any talk of massacre would have necessarily brought the Armenian massacre, or genocide, to the front of the mind. The facts are such that the overwhelming brunt of the genocide was borne by the Armenians.¹⁵⁸ There is proof that the Armenians were at the forefront of the minds of those negotiating and drafting the Treaty.¹⁵⁹ For example, during the Paris Peace Conference, where the Treaty of Sèvres and other WWI treaties were negotiated, the Ottomans appealed to the members at the conference to be light with punishment because the violence committed by the previous government was not targeted at just Christians, but rather many Muslims were targets of violence as well.¹⁶⁰ The Turkish people, the Ottoman representative argued, were just as much victims of the previous government's policies as were the Christians.¹⁶¹ In a written response to these statements, the British Foreign Minister wrote:

But surely there never was a sentiment less justified by facts. The whole course of the War exposes its hollowness. What religious issue can be raised by a war in which Protestant Germany, Roman Catholic Austria, Orthodox Bulgaria and Moslem Turkey, banded themselves together to plunder their neighbours? The only flavour of deliberate fanaticism perceptible in these transactions was the *massacre of Christian*

¹⁵⁷ Rummel, *supra* note 31.

¹⁵⁸ *Id.*

¹⁵⁹ Dan Plesch, *Human Rights After Hitler*, <http://www.unwcc.org/wp-content/uploads/2017/04/UNWCC-history.pdf> (last visited Dec. 2, 2021).

¹⁶⁰ Armenian National Institute, *supra* note 146 (citing DAVID LLOYD GEORGE, MEMOIRS OF THE PEACE CONFERENCE 650–56 (vol. 2, 1939)).

¹⁶¹ *Id.*

*Armenians by order of the Turkish Government.*¹⁶²

The Armenians and their genocide heavily informed the provisions of the Sèvres treaty.¹⁶³

Now that genocide has been attached to the language of the treaty, an *opinio juris* analysis can take place. Article 230 seeks to hold individuals criminally liable for the genocide. It is a follow-up to the 1915 declaration. This in tandem with the joint declaration create a powerful argument for *opinio juris*. It shows that the allies believed the Ottomans were legally barred from committing genocide both in the middle of the war and after. Their opinions did not change after the victory. This consistency strengthens the argument for *opinio juris*.

State practice is further established by the treaty because it shows consistency with the 1915 Joint Declaration, and it shows that the state practice was even more widespread. As mentioned earlier, consistency is important to establish state practice.¹⁶⁴ While the Joint Declaration in 1915 was a strong start, the Treaty of Sèvres strengthened a finding for state practice since it shows that the Declaration was not a one-off experience. The Allies really intended to follow through on their promises.

It brings even more of the world in to increase how widespread the practice was. Countries and territories from all over the world signed the Treaty. France, Britain, Italy, and Japan were the countries who were parties to the treaty on the allied side.¹⁶⁵ Britain had individual representatives and signers from many of its different territories including India, Canada, Australia, New Zealand, and South Africa. The addition of Japan brought in a country from Asia that was not represented by a colonial power, which creates a more compelling widespread argument. Armenia, Belgium, Greece, the Hedjaz,¹⁶⁶

¹⁶² *Id.*

¹⁶³ See Adalian, *supra* note 31, at 172.

¹⁶⁴ Int'l Law Comm'n, Rep. on the Works of Its Seventieth Session, U.N. Doc. A/73/10, at 120, 126 (2018).

¹⁶⁵ Treaty of Sèvres, *supra* note 151, at art. 230.

¹⁶⁶ The Hedjaz, or Hejaz, was a part of modern-day Saudi Arabia. See Editors of Encyclopedia Britannica, *Hejaz*, BRITANNICA (last visited Dec. 2, 2021), <https://www.britannica.com/place/Hejaz>.

Poland, Portugal, Roumania, The Serb-Croat-Slovene State, and Czecho-Slovakia, known as the Associated Powers, also signed the Treaty.¹⁶⁷

The evidence is not perfect, though. The United States did not sign the treaty because it had retreated back to a policy of isolationism, and Russia was excluded from the process due to a government change and soured relations with the other allies.¹⁶⁸ The Ottomans signed the treaty, but never ratified it.¹⁶⁹ Ratification was a precondition before it could come into effect.¹⁷⁰ The peace deal and its unpopularity with the Turkish people created the kindling for Mustafa Kemal's nationalist revolution that would eventually end the Sultanate and start the Republic of Turkey.¹⁷¹ Mustafa Kemal's victory at home as well as the victory over Greece and other Allied aggressions allowed for Turkey to negotiate a new peace agreement: the Treaty of Lausanne.¹⁷²

Two important points to note. The first is that just because the treaty did not come into full effect does not mean that it extinguishes the evidence of customary international law. It merely limits the legal effect of genocide *by a convention* in 1915. It still provides evidence of state practice and *opinio juris* by showing that states signed a treaty that called for reparations to individuals in the form of restitution and an attempt to hold individuals criminally liable for the genocide. It was the political realities of the time that prevented the states from fully applying the law as they saw it.¹⁷³ This could be compared to the modern example of Omar al-Bashir of Sudan. While the International Criminal Court (ICC) had indicted him for the Darfur genocide and it was incumbent upon countries party to Rome Statute to arrest him, Omar al-Bashir visited several countries that were party to the Statute

¹⁶⁷ Treaty of Sèvres, *supra* note 151, at preamble.

¹⁶⁸ C.N. Trueman, *The Treaty of Sevres*, THE HISTORY LEARNING SITE (Mar. 17, 2015), <https://www.historylearningsite.co.uk/modern-world-history-1918-to-1980/the-treaty-of-sevres/>.

¹⁶⁹ *Id.*

¹⁷⁰ *See id.*

¹⁷¹ *Kemal Atatürk (1881-1938)*, BBC (last visited Dec. 2, 2021), https://www.bbc.co.uk/history/historic_figures/ataturk_kemal.shtml; *The Treaty of Sevres*, *supra* note 168.

¹⁷² *Kemal Atatürk*, *supra* note 171.

¹⁷³ ARMENIAN GENOCIDE REPARATIONS STUDY GROUP, *supra* note 124, at 32.

including South Africa and Nigeria without being arrested.¹⁷⁴ The political realities of the time were that these countries were not going to arrest the head of state despite being indicted for genocide by the ICC. Does this make the law of genocide or the Rome Statute any less real? No.¹⁷⁵

And second, despite the Treaty of Sèvres' weaknesses as evidence of customary international law, the Treaty is a net positive for the argument by providing a foundation for two other pieces of evidence: the Treaty of Lausanne and the London Agreement. Each will be discussed later.

3. *British Attempts to Hold Perpetrators Responsible*

The British, outside of the new Ottoman government, were the closest to holding perpetrators of the genocide responsible. To this end, the British High Commission requested those responsible for the Armenian genocide.¹⁷⁶ In one of their requests it stated: "His Majesty's Government are resolved to have proper punishment inflicted on those responsible for Armenian massacres."¹⁷⁷ Turkey argued that detaining and trying Turks in British courts was a violation of their sovereignty, but the Commission of Responsibilities and Sanctions from the Paris Peace Conference deemed it an otherwise

¹⁷⁴ *Civil Society Declaration on Sudanese President Omar al-Bashir's Visit to South Africa without Arrest*, HUMAN RIGHTS WATCH (July 1, 2015), <https://www.hrw.org/news/2015/07/01/civil-society-declaration-sudanese-president-omar-al-bashirs-visit-south-africa#>; *Sudan's President Bashir Leaves AU Summit in Nigeria*, BBC (July 16, 2013), <https://www.bbc.com/news/world-africa-23327830>.

¹⁷⁵ The situation with the Treaty of Sèvres and Omar al-Bashir is legally different in that the ICC Statute and the Convention on Genocide are not disputed as law now. The point still goes that political realities even limit the enforcement of fully developed, codified laws. So the political realities of the early 20th century cannot erode the legality of the prohibition against genocide at that time.

¹⁷⁶ 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 J. INT'L L. 221, 284–85 (Summer 1989).

¹⁷⁷ *Id.* at 282 (quoting FO 371/4174/118377 (folio 253)).

appropriate act under international law.¹⁷⁸ The British held the Turks with plans to try them for genocide of the Armenians.¹⁷⁹ The trials never happened, however, and the British exchanged the Turks for British officers and soldiers who the new Kemalist regime had taken hostage.¹⁸⁰

This evidence contributes to the state practice element by showing consistency in state practice. There was a resolve among states that those responsible for the genocide needed to be held responsible.¹⁸¹ The British demonstrated their resolve by taking prisoners and detaining them to await trial. While the return of the accused Turks without trying them for genocide may seem like inconsistent practice enough to extinguish this evidence, it shows, rather, that political realities make international law difficult to enforce.¹⁸² Again, it is important to point out that political realities in some cases do not erode away legal significance.¹⁸³ The release of these prisoners was not because the British had a change of heart, but rather because Mustafa Kemal's Turkey gained the upper hand, and leveraged it.¹⁸⁴ It goes then that the British were attempting to operate in a weak international system that lacked the mechanics necessary to overcome political hurdles, keeping the integrity of state practice intact.¹⁸⁵

Opinio juris is also present. Imprisoning foreigners for crimes committed with plans to put them on trial is an explicit show that Britain believed it was illegal for these people to commit genocide. Therefore, this contributes to an *opinio juris* finding.

In addition, the action of approving British intentions to try

¹⁷⁸ *Id.* at 285.

¹⁷⁹ ALFRED DE ZAYAS, THE GENOCIDE AGAINST THE ARMENIANS 1915–1923 AND THE RELEVANCE OF THE 1948 GENOCIDE CONVENTION 5 (updated Mar. 2008).

¹⁸⁰ Dadrian, *supra* note 176, at 315.

¹⁸¹ See France, Great Britain, and Russia Joint Declaration, https://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html; see Joint Declaration by the Federal Republic of Germany and the Republic of Namibia, *supra* note 144; Treaty of Sèvres, *supra* note 151.

¹⁸² See ARMENIAN GENOCIDE REPARATIONS STUDY GROUP, *supra* note 124, at 32.

¹⁸³ See *id.*

¹⁸⁴ Zayas, *supra* note 179, at 5.

¹⁸⁵ Dadrian, *supra* note 176, at 284–85.

Ottoman nationals for genocide by the Commission of Responsibilities and Sanctions further shows that the states, through this international organization, also thought that genocide was illegal under international law. This furthers the scope of this practice from just Britain to the international community involved in the Commission of Responsibilities and Sanctions. This committee included representatives from the United States, France, Britain, Italy, Japan, Belgium, Greece, Poland, Roumania, and Serbia.¹⁸⁶ This Commission's stamp of approval of Britain's actions cements further the widespread nature of the practice; they justified their approval with international law, showing that there was *opinio juris*.

4. Ottoman Domestic Trials

The Ottoman domestic trials provide further evidence that genocide was prohibited by customary international law in 1915. The official legal basis for trying these individuals was the domestic penal code, but the government in these trials invoked similar language to the joint declaration from the Triple Entente and the Treaty of Sèvres.¹⁸⁷ They described the acts as “a crime against humanity,” that the perpetrators had violated “the principle of ‘human sentiment’,” and that the atrocities were those that would make “humanity and civilized world shudder, and shudder forever.”¹⁸⁸ They justified investigations and criminal proceedings into the genocide by invoking “the rules of humanity.”¹⁸⁹ These courts gathered evidence and eventually came out with guilty verdicts, only to have those verdicts nullified by the next regime and to have future verdicts become unattainable by premature end to the tribunal.¹⁹⁰

As mentioned earlier, even domestic acts can be evidence of

¹⁸⁶ *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT'L L. 95, 95–96 (1920).

¹⁸⁷ Dadrian, *The Armenian Genocide*, *supra* note 37, at 67.

¹⁸⁸ *Id.* at 61–2; Takvimi Vekhyi [Ottoman Parliament's Official Record Supplements covering the proceedings of the courts-martial], no. 3617, 1 (1919).

¹⁸⁹ *Id.* at 61 (citing OSMAN SELIM KOCAHANOLU, ITTIHAT-TERAKKI'NIN SORGULANMASI VE YARGLANMASI 52 (Istanbul 1918)).

¹⁹⁰ *Id.* at 69.

state practice.¹⁹¹ This means that the new Turkish regime's investigations, trials, and convictions can all be evidence of state practice. Here we finally see state practice leak over to one of the Central Powers countries. This widens the group of those engaging in practice to support the illegality of genocide, and now to a country of a different peer group. It is significant to show that it is not just the victors of the war that are engaging in the practice, but also those who have committed the crime.

Investigating, trying, and convicting perpetrators for the massacres of the Armenians are legal actions and thus signs of the *opinio juris* for this state practice. While the Ottomans used the domestic penal code as their basis for justifying these actions, they also invoked terms such as “crimes against humanity” to further rationalize their actions. This allows it to contribute to the *opinio juris*.

But evidence is weakened by the actions of the Kemalist regime after nullifying the convictions and ending the trials, since it shows inconsistency in state practice. When there is variation in state practice, the weight of that practice is reduced.¹⁹² In isolation, this would defeat any claim of customary international law, but when combined with the other evidence, it still adds to it. Specifically, the Treaty of Lausanne might provide enough cover to show that this action was actually consistent with the other state practice.

5. *Treaty of Lausanne*

Mustafa Kemal ended up winning the revolution he started at home and effectively pushed the Allies out of Turkey.¹⁹³ As a result, Kemal refused to ratify the Sèvres treaty and used Turkey's better position to renegotiate the peace deal.¹⁹⁴ This renegotiation resulted in the Treaty of Lausanne.¹⁹⁵ While at first glance it may seem that this

¹⁹¹ See ILC Rep., *supra* note 134, at 120; see also Sender & Wood, *supra* note 135, at 303.

¹⁹² Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 120 (2018) [hereinafter ILC Rep.].

¹⁹³ *Kemal Atatürk*, *supra* note 171; Trueman, *supra* note 168.

¹⁹⁴ See *Kemal Atatürk*, *supra* note 171.

¹⁹⁵ *Id.*

Treaty undid any progress made in creating customary international law around genocide, the Treaty actually strengthens it. It does this by granting full amnesty to those “arrested, prosecuted, or sentenced by the authorities of the said Powers or by the Turkish Authorities respectively for reasons of a political or military nature previous to the 20th November, 1922.”¹⁹⁶ It also required that if any of those who were granted amnesty were being detained, they had to be returned to their home state.¹⁹⁷ Granting amnesty presupposes that a legal wrong was in fact committed.¹⁹⁸ Since amnesty presupposes a legal wrong, it contributes to *opinio juris*. This amnesty explains away any inconsistency among state practice following this with regards to the Armenian genocide since states cannot continue to pursue actions against someone who has been pardoned of all charges. This amnesty was only granted to individuals and does not appear to relieve the state of Turkey of its responsibilities under international law to make reparations.¹⁹⁹

If any of the governments had wanted to change their position on the illegality of genocide, this was the moment. Instead of explicitly or implicitly stating that Turkey’s genocidal acts were actually legal or instead of just ignoring the issue altogether, they chose to give amnesty.

6. London Agreement and Charter of the International Military Tribunal

One of the last significant historical pieces of evidence that genocide occurred in 1915 was the London Agreement. The London Agreement was the agreement that allowed the Allies to establish the

¹⁹⁶ Treaty of Peace with Turkey signed at Lausanne, art. 138, July 24 1923, 28 LNTS 11 [hereinafter Treaty of Lausanne].

¹⁹⁷ *VIII Declaration of Amnesty*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFFAIRS, https://www.mfa.gov.tr/viii_-declaration-of-amnesty.en.mfa (last visited Dec. 2, 2021).

¹⁹⁸ Julia Klaus, *The Evolution of the Prohibition of Genocide: From Natural Law Enthusiasm to Lackadaisical Judicial Perfunctoriness - And Back Again?*, 11 GOETTINGEN J. INT’L L. 89, 104 (2021).

¹⁹⁹ See *VIII Declaration of Amnesty*, *supra* note 197.

International Military Tribunal after WWII.²⁰⁰ This International Military Tribunal in Article 6(c) allowed for the prosecution of genocide, though it did not use the word yet.²⁰¹ Article 6(c) allows for the prosecution of “[c]rimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against a civilian population.”²⁰² Genocide falls within this definition, and the term was actually used in three indictments and in one verdict.²⁰³ In a report following the start of the trials, the United Nations made an attempt to legally justify the tribunal. The commission found:

The provisions of Article 230 of the Peace Treaty of Sèvres were obviously intended to cover, in conformity with the Allied note of 1915 referred to in the preceding part, offenses which had been committed on Turkish territory against persons of Turkish citizenship, though of Armenian or Greek race. This article constitutes, therefore, a precedent for Articles 6(c) and 5(c) of the Nuremberg and Tokyo Charters, and offers an example of one of the categories of “crimes against humanity” as understood by these enactments.²⁰⁴

This points out, first, that the Treaty of Sèvres was in fact used as legal precedent for later prosecutions of what would be known as genocide. This pushes back against the Sèvres Treaty’s ostensible lack of legal authority, which strengthens the treaty as evidence of customary international law. Next, it is important to point out that this is a United Nations body which has the capability of adding to the

²⁰⁰ ARMENIAN GENOCIDE REPARATIONS STUDY GROUP, *supra* note 124, at 32.

²⁰¹ *Id.*

²⁰² Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6 ¶c, Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter London Agreement].

²⁰³ ARMENIAN GENOCIDE REPARATIONS STUDY GROUP, *supra* note 124, at 32.

²⁰⁴ Plesch, *supra* note 159, at 45 (emphasis added). The next paragraph in the report does recognize that the Treaty of Sèvres never came into effect and that it was replaced by the Treaty of Lausanne. It also points out the Declaration of Amnesty in the Treaty of Lausanne.

evidence already at play.²⁰⁵ It further adds to state practice by supporting previous state practice and bringing in another international organization, thus increasing how widespread it is. It also supports state practice by increasing the timeline that the state practice is in use. The evidence provided up to this point had only accounted for the years 1915 to 1924, nine years, whereas this report extends the practice to 1948, increasing the length of time to thirty-eight years.

Opinio juris is strengthened since this is a legal analysis of prior evidence. It uses the prior evidence to justify its own actions citing it as precedent. This shows that the Treaty of Sèvres is still legally significant for an international law analysis and gives it legal weight.²⁰⁶

7. Bird's Eye View

Since there is overlap between what is state practice and what is *opinio juris*, as well as a lot of interplay between the points of evidence, a table has been included that outlines the different points of evidence and how each contribute to the two elements.

| Evidence | State Practice | <i>Opinio Juris</i> |
|---|---|---|
| Joint Declaration by the Triple Entente in May 1915 | Three major world powers condemning the acts of the Ottomans through an official diplomatic communiqué. | Using such legal language as “new crimes of Turkey against humanity and civilization” and “they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres [of the Armenians].” |

²⁰⁵ ILC Rep., *supra* note 192, at 120.

²⁰⁶ Alford, *supra* note 87.

| | | |
|--------------------------------|---|---|
| Treaty of Sèvres | <p>Signed treaty seeking to hold Ottoman Empire accountable for actions it committed against the Armenians and other peoples.</p> <p><i>Consistent:</i> Consistency with previous practice (Joint Declaration)</p> <p><i>Widespread:</i> Signed by countries from all over the world.</p> | <p>The treaty discusses state responsibility for genocidal policies, and it discusses individual responsibility through an international military tribunal.</p> |
| British holding Turks in Malta | <p>Requesting and detaining Turks for Massacres of the Armenians.</p> <p><i>Consistency with</i> treaty and Joint Declaration.</p> <p><i>Widespread:</i> Signed off by Committee on Responsibility and Sanctions, showing approval of ten different countries, including the United States.</p> | <p>Attempting to detain people for the crime of genocide and holding them for trial.</p> |

| | | |
|---------------------------|---|--|
| Ottoman Domestic Tribunal | <p>Domestic actions can be viewed as state practice.</p> <p><i>Consistency:</i> Sought to hold perpetrators responsible for Armenian Genocide, just like all previous state practice.</p> <p><i>Widespread:</i> A Central Powers state joining in the state practice.</p> | <p>Carrying out investigations, legal proceedings, and enforcing some convictions are legal in nature and therefore signs of <i>opinio juris</i>.</p> <p>Invoked “rules of humanity” and “crimes against humanity” in legal proceedings.</p> |
| Treaty of Lausanne | <p>Amnesty explains away lack of follow through and inaction after the Treaty of Lausanne, thus maintaining strength and perhaps strengthening previous practice.</p> <p><i>Consistency:</i> Justifies lack of consistency.</p> | <p>Granting amnesty presupposes a legal wrong was committed which supports the element of <i>opinio juris</i>.</p> |
| London Agreement | <p>An international body citing previous treaties as a basis for actions.</p> | <p>Strengthens Treaty of Sèvres as evidence of <i>opinio juris</i> by citing it as precedent for the legal proceedings against the Nazis.</p> |

| | | |
|--|--|--|
| | <p><i>Consistency:</i> Uses Treaty of Sèvres to justify similar practice.</p> <p><i>Widespread:</i> Adds international organizations to the mix.</p> <p><i>Length of Time:</i> Extends the relevance of all previous practice to 1948.</p> | |
|--|--|--|

8. *Countries that have recognized that genocide took place*

An important contribution to the prohibition against genocide as customary international law is the fact that many countries now recognize that the Armenian genocide took place in 1915. While these countries fall on a spectrum of how to analyze the genocide legally, many of these recognitions can be used to support a finding for genocide as prohibited by customary international law in 1915. These countries fall into four groups: (1) countries that explicitly recognize the prohibition of genocide as law in 1915; (2) countries that use the word “crime” and/or additional legally significant words when describing the genocide; (3) countries that just use the word genocide; and (4) countries that diminish genocide’s legal impact in 1915.

All of these are evidence of state practice since verbal acts and executive and legislative acts can be seen as state practice.²⁰⁷ Among the 31 countries that recognize the genocide, there are countries from Europe, the Middle East, South America, and North America, making them representative and widespread.²⁰⁸ For many of these countries,

²⁰⁷ ILC Rep., *supra* note 192, at 120.

²⁰⁸ *Countries that Recognize the Armenian Genocide*, *supra* note 54.

their actions are consistent with their practice in the past.²⁰⁹

The fourth category is necessary to point out to show that while the majority of states that have spoken of this issue recognize that there was genocide, there is no unanimity. These states will push against the customary international law argument, but because of their small number, they will not defeat it.

There is also a fifth group of countries who have remained silent on the issue. While these countries have not recognized the genocide, they also have not explicitly or implicitly said it did not occur. This section will not examine this group except to say that they do not hurt or help the argument. They simply just exist.

One potential flaw in using present-day evidence to support a finding for law in 1915 is that it is not actually finding law that existed at the time but rather creating a new law for 1915. Theoretically, this might be true. Practically, however, states are the actors in international law and if they believe that in 1915 the prohibition against genocide existed as customary international law, then it did.

a. Countries that explicitly recognize genocide as law in 1915

There are two countries who explicitly state that what happened in 1915 was against international law. Those countries are Sweden and Russia.

Sweden: Sweden argues that the United Nations Convention on Genocide was “not a new legislation, but merely a ratification of existing international laws on ‘crimes against humanity’ which were stated in the Sèvres Treaty.”²¹⁰ It goes on to say that the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity “ratifies [the crime of genocide’s] retroactive and non-prescriptive nature. [For] this very reason, both massacres in the Ottoman Empire and the Holocaust are cases of genocide in accordance to the UN Convention, in spite the

²⁰⁹ But see Schabas, *supra* note 120, at 37 (discussing the United Kingdom’s legal argument for why the 1984 UN Convention on genocide did not apply in 1915).

²¹⁰ Motion till riksdagen 2008/09:U332, <https://www.yumpu.com/sv/document/read/20201145/motion-2008-09u332-folkmordet-1915-pa-armenier-assyrier>.

fact that both occurred before the Convention was established.”²¹¹ Important for this discussion is that Sweden first recognizes that the prohibition against genocide did exist in 1915 and it believes that genocide is non-prescribed, meaning that it was not first a written international law, but exists in some other form, like customary international law. For many of the reasons used to argue that the United States recognition most likely fell under a customary international law theory stated at the beginning of Part II, the same could be argued for Sweden.

Russia: Russia also argues that it was in fact illegal in 1915. It, like Sweden, cites both the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity when referencing the genocide. In addition, it cites its joint declaration with Britain and France saying, “Emphasizing that through the initiative of Russia, the Great European Powers already in 1915 characterized the actions of the Turkish Empire against the Armenian people as a “Crime Against Humanity ... Condemns the perpetrators of the extermination of Armenians from 1915 to 1922.”²¹² Russia does not cite which legal theory it believes supports that genocide was illegal, but it seems like it is customary international law. Russia is not arguing that there was a written convention at the time, nor is it arguing that the genocide convention applies retroactively. Again, Russia and other states likely prefer the customary international law theory over others for many of the same reasons the U.S. likely prefers the customary international law theory for recognizing the genocide.

Showing *opinio juris* is easy for these two because they explicitly state that they believe genocide was a crime in 1915. Russia has additionally contributed to the consistency of a state practice by showing that it has remained consistent since 1915 since its joint declaration.

²¹¹ *Id.*

²¹² Russ. Res. to Recognize the Armenian Genocide, Apr. 14, 1995, https://www.armenian-genocide.org/Affirmation.151/current_category.7/offset.50/affirmation_detail.html.

*b. Countries that use “crime” and/or additional legally significant words when describing the Armenian Genocide*²¹³

There are a number of countries that do not explicitly state that they believe that genocide was illegal in 1915 but allude to it strongly by the language they use in their laws and resolutions when recognizing the genocide. The language that alludes most strongly to this are references to genocide as a crime and language that cites to the Convention on the Prevention and Punishment on the Crime of Genocide, which has been recognized as codifying customary international law.²¹⁴

Here is a list of the countries who fall in this category, with the relevant language from their recognition:

Argentina: “Declare April 24 of every year as ‘Day of action for tolerance and respect among peoples,’ in commemoration of *the genocide of which the Armenian people were victims* and with the spirit of their memory being a permanent lesson on the steps of the present and the goals of our future.”²¹⁵

“[Expresses] its solidarity with the relatives of the victims of *genocide committed against the Armenian people by the Turkish State between 1915 and 1923...* This is also a manifesto of much empathy repudiating *the considerable crimes against humanity that are still unpunished.*”²¹⁶

²¹³ Here is a list of countries that are included in this section. All the countries and the language from their laws have been included in the text below, but to visually see all the countries listed without the clutter of legal language, they have included here: Latvia, Czech Republic, Syria, Italy, Germany, Paraguay, Bolivia, Austria, Luxembourg, Venezuela, Poland, Slovakia, Canada, Switzerland, Argentina, Belgium.

²¹⁴ Diaz et al. v. Columbia, On Admissibility, Inter-Am. Ct. H.R. (ser. L) No. 5/97, ¶ 22 (Mar. 12, 1997).

²¹⁵ Honorable Congreso De La Nación Argentina, Ley 26.199, Enero 11 de 2007 [Honorable Congress of the Nation of Argentina, Law 26.199, Jan. 1, 2007] Law No. 26,199, Jan. 11, 2007, <https://www.argentina.gob.ar/normativa/nacional/ley-26199-124099/texto> (emphasis added).

²¹⁶ Arg. Senate Declaration, B. No. 571/04, Mar. 31, 2004, <http://www.parliament.am/library/cexaspanutyun/12.pdf> (emphasis added).

Austria: “This 24th of April marks the centennial of the genocide of 1.5 million Armenians committed by the Ottoman Empire... Because of historical responsibility²¹⁷ - the Austro-Hungarian monarchy was allied with the Ottoman Empire in the First World War - it is our duty to recognize and condemn the terrible events as genocide. It is also the duty of Turkey to face the honest treatment of dark and painful chapters of her past, and to recognize *the crimes committed against the Armenians in the Ottoman Empire as genocide. The crimes committed against the Armenians a hundred years ago...* makes clear the need for a culture of memory.”²¹⁸

Belgium: “[H]aving regard to the 1948 *United Nations Convention on the Prevention and Punishment of the Crime of Genocide*... [Cites various international and domestic resolutions]... whereas more and more EU Member States, national parliaments and parliaments of federated entities *recognize the Armenian genocide perpetrated in the Ottoman Empire as a historical fact*... [Statement from Prime Minister in 2015:] ‘I want to be very clear, my position is known and unequivocal: I believe that the tragic events that took place between 1915 and 1917, and for which the last government of the Ottoman Empire was responsible, *should be qualified as genocide*. This is the position of the Belgian government’... to participate in the commemoration of the centenary of the *Armenian genocide*, in a spirit of European solidarity and justice; to *condemn all cases of crimes against humanity and genocide, and to condemn any questioning of their existence*.”²¹⁹

²¹⁷ Austria seems to be limiting its own liability with the language “historical responsibility” as its reason for recognizing the genocide rather than Turkey’s liability. Basically, it is saying it has no legal obligations as allies with the Ottoman Empire.

²¹⁸ Parlamentsklub der Österreichischen Volkspartei [Austria Parliamentary Joint Declaration], Apr. 24, 2015, <https://www.armenian-genocide.org/uploads/Affirmation/538.pdf> (emphasis added).

²¹⁹ Belgische Kamer Van Volksvertegenwoordigers, Voorstel Van Resolute, 23 juni 2015, [Belg. Chamber of Rep.], Doc. 1207/001, June 23, 2015, <https://www.armenian-genocide.org/uploads/Affirmation/804.pdf> (emphasis added). Belgium helps pave the way for recognizing genocide in 1915. But it offers some pushback as to whether Turkey should be responsible. It explicitly states that the responsibility should be on the Ottoman Empire and not modern-day Turkey. For purposes of arguing that genocide existed, their recognition helps. For purposes

Bolivia: “Their firm commitment to human rights, truth and justice, and their solidarity and condemnation against all negationist policies regarding *genocide and crimes against humanity suffered by the Armenian Nation*.”²²⁰

Canada: “That this House acknowledge the Armenian genocide of 1915 and condemn this act as a *crime against humanity*.”²²¹

Chile:²²² “That the Senate of Chile, through agreement No. 531, of June 5, 2007, *condemned the genocide*... That Chile has signed in 1953 *the Convention for the Prevention and Punishment of the Crime of Genocide*. ... The Chamber of Deputies adopts the following resolution: []Solidarity with the Armenian nation *in condemning the genocide of its people that began in 1915*.”²²³

Czech Republic: “[I]n view of the other major wars of the past century, in particular World War I, and the crimes associated with them... Condemns ... the genocide of Armenians and other religious and ethnic groups in the Ottoman Empire during World War I.”²²⁴

Germany: “*By order of the Young Turk regime*, the planned expulsion and extermination of over a million ethnic Armenians began in the Ottoman city of Constantinople on April 24, 1915. Their fate

of granting relief to the Armenian people by holding Turkey responsible, it directly pushes against this.

²²⁰ Bol. Chamber of Senate Declaration, Chamber Statement No. 122/ 2014–15, https://www.armenian-genocide.org/Affirmation.456/current_category.7/affirmation_detail.html (emphasis added).

²²¹ Can. House of Commons Res., Motion 380, Apr. 21, 2004, https://www.armenian-genocide.org/popup/affirmation_window.html?Affirmation=291 (emphasis added).

²²² Chile does include language such as “beyond any legal interpretation” and “call for moral reparations” when discussing the genocide. One could reasonably argue that these terms are an attempt to couch the resolution in non-legalistic terms. However, Chile is included in this category because the other language is compelling such as using genocide and citing to the Convention. See Chile Chamber of Deputies Draft Res., No. 324, Feb. 4, 2015, <https://www.armenian-genocide.org/uploads/Affirmation/805.pdf>.

²²³ *Id.*

²²⁴ 412. USNESENÍ SENÁTU z 23. schůze, konané dne 20. května 2020, <https://www.armenian-genocide.org/uploads/Affirmation/789.pdf> (emphasis added).

exemplifies the history of mass extermination, ethnic cleansing, expulsions, and *yes, of genocides*, which marked the 20th century in such a horrific way... The Bundestag regrets the inglorious role of the German Empire, which, as a principal ally of the Ottoman Empire, did not try to stop *these crimes against humanity, despite explicit information regarding the organized expulsion and extermination of Armenians*, including also from German diplomats and missionaries... *With its commemoration of the unimaginably cruel crimes...* The German Bundestag also welcomes the increasing number of initiatives and contributions in the field of science, civic society, art and culture in Turkey, which aim at the reappraisal of the *crimes against the Armenians* and the reconciliation between Armenians and Turks... The Federal Republic of Germany considers it a responsibility to promote the reappraisal of *this crime and to keep its memory alive*.”²²⁵

Italy: “[G]iven that: *the Convention for the Prevention and Punishment of the Crime of Genocide*, ratified by Italy with the law March 11, 1952, n. 153, recognizes that genocide has inflicted grave losses on humanity in all historical periods... [Cites to the UN Human Rights Committee recognition, the European Parliaments calls for member states to recognize the genocide, and countries recognitions]... engages the Government: to *officially recognize the Armenian genocide* and to give it international resonance.”²²⁶

Latvia: “[T]aking into account *the Convention on the Prevention and Punishment of the Crime of Genocide* adopted by the UN and the resolution of the European Parliament of June 18, 1987 which states that *these events are genocide according to the Convention...* condemns *the crimes committed by the Ottoman Empire against the Armenian people*, murders and forced deportations; honours the memory of all victims of the Armenian genocide and pays

²²⁵ Deutscher Bundestag Drucksache 18/8613, 18. Wahlperiode, <https://www.armenian-genocide.org/uploads/Affirmation/528.pdf> (emphasis added).

²²⁶ Mozione 1-00172 presentato da Valentini Valentino testo Martedì 9 aprile 2019 modificato Mercoledì 10 aprile 2019, seduta 160, <https://www.armenian-genocide.org/uploads/Affirmation/651.pdf> (emphasis added).

its respects to the survivors.”²²⁷

Luxembourg: “[C]onsidering that the European Parliament and a growing number of parliaments throughout the world, and in particular the Member States of the European Union, *recognize the Armenian genocide as a genocide within the meaning of the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948*... “...” [R]ecognizes that the tragic acts perpetrated since 1915 against the Armenians established on the territory of the Ottoman Empire constitute *a genocide*.”²²⁸

Paraguay: “The Senate of the Republic of Paraguay recognizes *the Genocide suffered by the Armenian people* in the period 1915-1923, *committed by the Turkish-Ottoman Empire*, when the centenary of *this crime against humanity* is commemorated this year.”²²⁹

Poland: Sejm/Parliament/of the Republic of Poland pays its respects to the victims of *the genocide committed on the Armenians in Turkey during the 1st World War*. The memory of the victims, *the crime committed* and the need to condemn it is a moral obligation²³⁰ for the whole of humanity, all nations and people of good will.²³¹

Slovakia: Recognizes the Armenian genocide in 1915 during which hundreds of thousands of Armenians living in the Ottoman Empire died. The Slovak Parliament considers this crime as a *crime*

²²⁷ Latvijas Republikas Saeimas Deklaracija par Osmani imperijas laikā īstenoto armēņu genocīdu, [Declaration about the Armenian Genocide perpetrated during the time of the Ottoman Empire by the Saeima of the Republic of Latvia], May 6, 2021, <https://www.armenian-genocide.org/uploads/Affirmation/827.pdf> (emphasis added).

²²⁸ Lux. Chamber Res., May 6, 2015, https://www.armenian-genocide.org/Affirmation.459/current_category.7/affirmation_detail.html (emphasis added).

²²⁹ Para. Congress Declaration, Oct. 29, 2015, https://www.armenian-genocide.org/popup/affirmation_window.html?Affirmation=519 (emphasis added).

²³⁰ It seems that Poland is trying to avoid creating custom that states are required by law to recognize genocides in the past. Rather, on this note, they cite moral reasons. This seems to be the limit of this language, rather than limiting genocide’s legal existence in 1915.

²³¹ Pol. Parliamentary Res., Memo No. 3918, Apr. 19, 2005, https://www.armenian-genocide.org/popup/affirmation_window.html?Affirmation=354 (emphasis added).

against humanity.”²³²

Switzerland: “By recognizing the Armenian Genocide, Switzerland renders justice to victims, survivors and their descendants, and contribute to the prevention of *other crimes against humanity*.”²³³

Syria: “[T]he People’s Assembly in the Syrian Arab Republic condemns and acknowledges the *crime of Genocide against the Armenians at the hands of the Ottoman Empire* at the beginning of the twentieth century. It also condemns any attempt to deny *this crime* and to misrepresent the historical truth by any party. It also affirms that *this crime* is one of the cruelest and most horrific crimes against humanity.”²³⁴

Venezuela: “The first scientifically planned, organized and executed genocide in the history of humanity took place 90 years ago, perpetrated by the regime of the ‘Young Turks’ ... against the Armenian People ... *Crimes of this nature* must be denounced in order to prevent them from happening again, in order to restore to the victims their human and national rights and to condemn the perpetrators.”²³⁵

Again, by citing to the Convention and using supplemental legal language such as crime, it is clear that these countries believed that genocide was a crime in 1915, thus contributing to the *opinio juris* needed to establish customary international law.

The strongest pushback to this is that countries may be citing the Convention to create a link to their prevention duties under the Convention rather than to recognize that the crime of genocide existed in 1915. If in fact this is the case, then it does not extinguish the legal implications of using the word “crime,” which many of these countries do as well. If this is taken as true, then it only eliminates Luxembourg and Italy from this list. It also does not extinguish the legal

²³² Slov. Nat’l Council Res., No. 1754/2004, Nov. 11, 2004, https://www.armenian-genocide.org/popup/affirmation_window.html?Affirmation=330 (emphasis added).

²³³ Switz. Nat’l Council Res., Dec. 16, 2003, https://www.armenian-genocide.org/Affirmation.277/current_category.7/affirmation_detail.html (emphasis added).

²³⁴ Syria People’s Assemb. Res. (2020) (emphasis added).

²³⁵ Asamblea Nacional de la República Bolivariana de Venezuela [Venez. Nat’l Assemb. Res.] No. 38.230 (2005) (emphasis added).

implications of classifying it as genocide. As we will see in the fourth category below, countries are conscious when they use words that have legal meaning and, therefore, draft language to limit the legal impact of their recognitions. If countries did not believe that genocide existed in 1915, they would be careful to word their recognitions in such a way to limit genocide rather than expand it. Countries are aware of customary international law and that they have the power to create it.²³⁶

c. Countries that call the events of 1915 a genocide

There is a group of countries that just recognize the Armenian genocide without qualifying it with additional legal language. These countries are Brazil, France, Lithuania, and Portugal. While this evidence is not as strong as categories one and two, it still provides a legal basis for the claim that genocide existed in 1915. Genocide has legal implications when it is used. This, in addition to political concerns, is one of the hesitations that countries have with using the word.²³⁷

Also, since just using the word genocide is weaker than the previous two categories, it is more susceptible to counter-arguments that would suggest otherwise. One argument is that calling something a genocide might merely be an intellectual exercise of looking back and seeing what fits into this modern legal tool. By applying genocide to these situations, it is implied that this is genocide as understood today, but not as it should be applied to that timeframe.²³⁸ While this is true, again, countries know that there are legal implications when

²³⁶ 1945 I.C.J. Stat. art. 38.

²³⁷ See, e.g., Todd F. Buchwald & Adam Keith, *By Any Other Name: How, When, and Why the U.S. Government Has Made Genocide Determinations*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM: SIMON-SKJODT CENTER FOR THE PREVENTION OF GENOCIDE (March 17, 2019).

²³⁸ Joint Declaration by the Federal Republic of Germany and the Republic of Namibia, *supra* note 144 (“The German Government acknowledges that the abominable atrocities committed during periods of the colonial war culminated in events that, from today’s perspective, would be called genocide.”).

invoking the word genocide.²³⁹ Because of this, it is safe to assume that since these countries do not have additional language to decrease the legal significance of their statements that they can contribute to the *opinio juris*.

The Netherlands is a unique country in that it straddles categories three and four since the Parliament has recognized the genocide, but the government refuses to make it its official position.²⁴⁰ The Dutch Parliament recognized the genocide in 2004 and reaffirmed its recognition with more explicit language in 2018.²⁴¹ In 2021, the Parliament “call[ed] on the government to recognize the Armenian Genocide.”²⁴² The government, however, has made no efforts to respond to the 2021 resolution.

4. Countries that diminish the genocide’s legal impact in 1915

There are four countries that explicitly do not recognize the genocide. Here is a list of those countries with their positions on genocide and their application of it to 1915:

Turkey: Turkey, obviously, has argued that the events of 1915 were not constituting a genocide. It has classified the massacres as communal violence and collateral damage from the war.²⁴³ It has pushed back against the legal application of genocide pre-1948, saying that there is no legal basis.²⁴⁴ In addition, it argues that there is no factual basis for it.²⁴⁵ Turkey has threatened to recognize the early Americans’ treatment of the Native Americans as a genocide, which indicates that they may be willing to extend genocide back even further, despite their legal objections in applying genocide pre-

²³⁹ Buchwald & Keith, *supra* note 237.

²⁴⁰ Stephanie van den Berg, *Dutch Parliament Recognizes 1915 Armenian Massacre as Genocide*, Reuters, Feb. 22, 2018, <https://www.reuters.com/article/us-netherlands-turkey-armenia/dutch-parliament-recognizes-1915-armenian-massacre-as-genocide-idUSKCN1G62GS>.

²⁴¹ Tweede Kamer der Staten-Generaal [H.R. Res.] 2277, (2021).

²⁴² *Id.*

²⁴³ *The Armenian Allegation of Genocide: The Issues and the Facts*, *supra* note 43.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

1948.²⁴⁶ This seems more like a political threat rather than its legal belief about genocide. However, if they do end up recognizing the genocide of the Native Americans, then perhaps Turkey's recognition will actually be additional evidence that genocide was prohibited under customary international law in 1915 and before.

Azerbaijan: Azerbaijan has been arguably even more hostile against the Armenian genocide than Turkey. It has used the word "fictional" to describe the events of the genocide.²⁴⁷

United Kingdom: The United Kingdom has, ironically, not recognized that the events of 1915 as genocide. It has made the argument that legally there is no basis to qualify the events as a genocide.²⁴⁸ In 2006, the government responded to a parliamentary inquiry about whether to classify the massacres as a genocide. The response said,

The UN Convention on Genocide came into force in 1948 so it was not possible at the time of the events that we are considering legally to label the massacres as genocide within the terms of the convention. I recognize that it is perfectly possible intellectually to try and apply the definitions of genocide from the convention to appalling tragedies that occurred in this case some 30 years before. The common practice in law is not to apply such judgment retrospectively.²⁴⁹

It used similar language again in 2007.²⁵⁰ It should be noted,

²⁴⁶ Vincent Wood, *Erdogan Threatens to Recognise Killings of Native Americans as Genocide in Response to Armenia Resolution*, INDEPENDENT (Dec. 16, 2019), <https://www.independent.co.uk/news/world/middle-east/erdogan-trump-turkey-us-armenian-genocide-native-americans-a9249101.html>.

²⁴⁷ Glenn Kates, *Armenian Mass Killings: Who Says 'Genocide' And Who Doesn't*, RADIO FREE EUROPE RADIO LIBERTY (Apr. 23, 2015), <https://www.rferl.org/a/armenia-genocide-recognition/26974215.html>.

²⁴⁸ Schabas, *supra* note 120, at 37.

²⁴⁹ *Id.* (citing 7 June 2006, HC Deb (2006) col. 136WH (UK)).

²⁵⁰ *Id.* (citing Geoffrey Robertson, *Was There an Armenian Genocide?* 4 U. St. Thomas J.L. & Pub. Pol'y 83 (2010)).

however, that both the Scottish and Welsh parliaments have recognized the Armenian Genocide.²⁵¹

Australia: In a letter from the Foreign Minister to the Australian Turkish Advocacy Alliance, Australia stated its position on the genocide. It said, “The Australian Government acknowledges the devastating effects which the tragic events at the end of the Ottoman Empire have had on later generations and on their identity, heritage and culture. We do not, however, recognise these events as ‘genocide’.”²⁵² This blow, however, was decreased slightly later when the Foreign Minister went on to say that Australia “has a long-standing approach ‘not to become involved in this sensitive debate.’”²⁵³ These two statements read together communicate that they do not recognize what happened in the early 20th century as genocide, but they also are not willing to side explicitly with Turkey yet.

The lack of acceptance by these states pushes directly against the argument of this article. However, since it is a relatively small number of states, and since the majority of states joining the debate come out on the side of recognizing the genocide, it is not enough to overcome.

Part III: The United States Recognition

After evaluating all other evidence, the evidence from the United States can be analyzed. There are several resolutions throughout the history of the United States that attempt to recognize the genocide, but this article will review the most important for its purposes.

²⁵¹ Wales Nat’l Assembly Res., (2006), EDM 1454 (Wales), https://www.armenian-genocide.org/Affirmation.370/current_category.158/affirmation_detail.html.

²⁵² Colin Tatz, *100 Years on, Australia’s Still Out of Step on the Armenian Genocide*, AUSTRALIAN INSTITUTE OF INTERNATIONAL AFFAIRS (Apr. 24, 2015), <https://www.internationalaffairs.org.au/australianoutlook/100-years-on-australias-still-out-of-step-on-the-armenian-genocide/>.

²⁵³ *Id.*

A. House and Senate Resolutions in 2019

In 2019, the House and Senate both passed identical resolutions recognizing the genocide.²⁵⁴ These resolutions had bipartisan support despite being opposed by President Donald Trump.²⁵⁵ In these resolutions, the House of Representatives and the Senate argue that the United States acknowledged the genocide long before they, Congress, officially recognized it. They first point out that Henry Morgenthau and the State Department descriptions of the atrocities were tantamount to genocide. They then point to several resolutions from the Senate and House throughout time,²⁵⁶ as well as two other times that the United States had used the word genocide to describe the situation with the Armenians.²⁵⁷

The first official usage of the word genocide to describe the massacre of the Armenians came in a statement to the ICJ when the ICJ was considering whether there could be reservations to the Genocide Convention. In its statement, the United States said:

The practice of genocide has occurred throughout human history. The Roman persecution of the Christians, the Turkish massacres of Armenians, the extermination of millions of Jews and Poles by the Nazis are outstanding examples of the crime of genocide. This was the background when the General Assembly of the United Nations considered the problem of genocide. Not once, but twice, that body declared unanimously that the practice of genocide is criminal under international law and that States ought

²⁵⁴ H.R. Res. 296, 116th Cong. (2019); S. Res. 150, 116th Cong. (2019).

²⁵⁵ Julian Borger, *U.S. Senate Defies Trump in Unanimous Vote to Recognize Armenian Genocide*, THE GUARDIAN (Dec. 12, 2019), <https://www.theguardian.com/us-news/2019/dec/12/senate-armenian-genocide-vote-trump-turkey>.

²⁵⁶ “Whereas the United States has officially recognized the Armenian Genocide—by House Joint Resolution 148, 94th Congress, agreed to April 8, 1975, and House Joint Resolution 247, 98th Congress, agreed to September 10, 1984.” S. Res. 150, 116th Cong. (2019).

²⁵⁷ H.R. Res. 296, 116th Cong. (2019); S. Res. 150, 116th Cong. (2019).

to take steps to prevent and punish genocide.²⁵⁸

The next time was when President Ronald Reagan used it in a speech at an event commemorating the Holocaust. He said, “like the genocide of the Armenians before it, and the genocide of the Cambodians which followed it—and like too many other such persecutions of too many other peoples—the lessons of the Holocaust must never be forgotten.”²⁵⁹

After showing support that the United States has a “proud history of recognizing and condemning the Armenian Genocide,” the two houses of Congress go on to point out that the Ottoman Empire was the perpetrator of this genocide, state that they are officially recognizing the genocide, and “encourage education and public understanding of the facts of the Armenian genocide ... and the relevance of the Armenian genocide to *modern-day crimes against humanity*.”²⁶⁰

The legal significance of this resolution has three points. First, by using the word genocide they have invoked a legal concept to describe the atrocities committed against the Armenians. As mentioned several times before, simply by using the word genocide, countries are adding legal significance to those events. Second, the Congress specifically says that the genocide was committed “by the Ottoman Empire from 1915 to 1923.”²⁶¹ This shows that they attach blame to the Ottomans and that the genocide was indeed state sponsored. Last, they attach the genocide and its relevance to “modern-day crimes against humanity.”²⁶² This supplements the genocide recognition with additional legal strength by throwing this genocide in with other crimes. These three points add to the evidence of *opinio juris*.

²⁵⁸ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Memorial of United States, 1951 I.C.J. 25 (May 28).

²⁵⁹ Proclamation No. 4838, 46 Fed. Reg. 23193 (Apr. 22, 1981).

²⁶⁰ H.R. Res. 296, 116th Cong. (2019); S. Res. 150, 116th Cong. (2019).

²⁶¹ H.R. Res. 296, 116th Cong. (2019); S. Res. 150, 116th Cong. (2019).

²⁶² H.R. Res. 296, 116th Cong. (2019) (emphasis added); S. Res. 150, 116th Cong. (2019) (emphasis added).

B. Biden's Statement in April 2021

In April 2021, President Biden issued a statement recognizing the Armenian genocide. He said:

Each year on this day, we remember the lives of all those who died in the *Ottoman-era Armenian genocide* and recommit ourselves to preventing such an atrocity from ever again occurring. Beginning on April 24, 1915, with the arrest of Armenian intellectuals and community leaders in Constantinople by *Ottoman authorities*, one and a half million Armenians were deported, massacred, or marched to their deaths in a campaign of extermination ... We affirm the history. *We do this not to cast blame but to ensure that what happened is never repeated* ... The American people honor all those Armenians who perished in the *genocide* that began 106 years ago today.²⁶³

While this statement is not as strong as the House and Senate resolution, it still provides evidence of *opinio juris*. Going back to the categories used to classify the other countries recognitions, Biden's statements would fall within the third category, since he recognizes the events as genocide but does not supplement it with additional legal language.

The line "[w]e do this not to cast blame but to ensure that what happened is never repeated," creates a problematic point—albeit a surmountable point—for the legal argument. The legally problematic point that needs to be addressed is whether Biden is attaching legal significance to the past events or fulfilling the U.S. obligation to prevent future genocides as is outlined in the Genocide Convention. It could be argued that Biden does not mean to recognize the legal nature of genocide, but rather to recognize it only to look forward with prevention in mind. If true, this would eliminate *opinio juris* with this

²⁶³ Biden, *supra* note 5 (emphasis added).

statement. This ambiguity is not cured by a State Department fact sheet or any supplemental sources to help clarify this statement. Because of the ambiguity, both sides can make compelling arguments. However, there are two points to bolster the claim that the U.S. is making a legal judgment of the past. The first is to again point out that countries are aware of the effects of their statements and practices. By using the word genocide, they apply a legal concept to a set of events. The absence of clearer language supports a finding that genocide did exist in 1915. It seems to be the practice of countries to explicitly diminish the legal impact of language rather than to explicitly affirm the legal impact that their statements—that otherwise would have legal impact—do in fact have legal impact.²⁶⁴

The simple fact that United States classified the events as a genocide creates legal significance, even if it wants to remain vague as to if blame should be attributable and who it should be attributed to. The United States understands and was aware of this when it recognized the genocide.

Part IV: Now what?

A. What this means for the Armenian People

1. International Relief

While a conversation about this is academically stimulating, it does not occur in a vacuum. The Armenian people for years have been eager to have the genocide recognized and addressed.²⁶⁵ There is a chance that if genocide was illegal in 1915, as this paper asserts, that the Armenians could get reparations.²⁶⁶ However, practically, there

²⁶⁴ See *id.*; e.g., Joint Declaration by the Fed. Republic of Ger. and the Republic of Namib., Ger.-Namib., May 28, 2021.

²⁶⁵ Geoffrey Robertson, *The Armenians want an acknowledgement that the 1915 massacre was a crime*, THE GUARDIAN (Jan. 23, 2015), <https://www.theguardian.com/books/2015/jan/23/armenians-want-acknowledgment-that-1915-massacre-was-crime-geoffrey-robertson>.

²⁶⁶ ARMENIAN GENOCIDE REPARATIONS STUDY GROUP, *supra* note 124, at 48.

are many hurdles to overcome.

There are multiple ways that states who commit international wrongs, such as genocide, can make recompense for those wrongs. These include cessation, restitution, compensation, satisfaction, and guarantees of non-repetition.²⁶⁷ Cessation is stopping the bad acts.²⁶⁸ Restitution is the act of making the party whole again, or restoring the party to their pre-injured state.²⁶⁹ Compensation is payment for damages that restitution has not cured or is not able to cure.²⁷⁰ Interest can be required and is payable from the time the state is required to pay compensation.²⁷¹ Satisfaction is recognizing the international wrong.²⁷² This can take the form of “acknowledgement of [an international wrong], an expression of regret, a formal apology, or another appropriate modality.”²⁷³ A guarantee of non-repetition is a guarantee that the state will not repeat the act in the future.²⁷⁴

In the case of the Armenian genocide, cessation has already taken place, as the Turkish government is no longer committing genocide against the Armenians.²⁷⁵ However, there are those who

²⁶⁷ Int'l Law Comm'n, Resp. of States for Int'l Wrongful Acts, U.N. Doc A/56/49 (2001).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ See Int'l Law Comm'n, Resp. of States for Int'l Wrongful Acts, U.N. Doc A/56/49 (2001).

²⁷⁴ *Id.*

²⁷⁵ *But see* ARCHITECTS OF DENIAL (Dada Films Oct. 6, 2017). “Turkey has *allegedly* played a role in supporting the Azerbaijani aggression [against the Armenian ethnic majority in Nagorno-Karabakh, a de facto independent state], significantly affecting the nature of the conflict ... In light of the emerging evidence, Genocide Watch, a non-governmental organization led by Gregory Stanton, a world-renowned genocide expert, issued a Genocide Emergency Alert due to Azerbaijan’s aggression ... Turkey, provides air support for Azerbaijani forces, sparking fears that Turkey will resume the Armenian Genocide of 1915 - 1922.” Ewelina U. Ochab, *Shortly Before Ceasefire, Experts Issue a Genocide Warning for the Situation in Nagorno-Karabakh*, FORBES (Nov. 11, 2020), <https://www.forbes.com/sites/ewelinaochab/2020/11/11/shortly-before-ceasefire-experts-issue-a-genocide-warning-for-the-situation-in-nagorno-karabakh/?sh=75d26c2fd005> (internal quotations omitted) (emphasis added).

believe that Turkey has been committing genocide since 1915 and never truly stopped.²⁷⁶ If this were true, cessation of all genocidal acts would be required by law.²⁷⁷

Complete restitution is not possible.²⁷⁸ But there have been calls for restitution as far as is able.²⁷⁹ Some suggestions have been restoration of churches and cultural sites; return of ancestral lands; access to the Mediterranean and/or Black Seas as was provided for in agreements prior to the Treaty of Lausanne; access to and custodianship of and tourism rights for cultural sites; and more.²⁸⁰ Others have said that many of these demands are not practical, beneficial, or are asking for too much.²⁸¹ For example, while private property taken during the genocide could be returned to Armenians, such a reparation would require that these Armenians own property in a state that has historically discriminated against them.²⁸² This would not be ideal.²⁸³ Compensation, they argue, would be a more appropriate remedy.²⁸⁴ Others have suggested that some items on this list could be easily done, such as restoration of churches and historical sites, while also suggesting that sites like Mount Ararat²⁸⁵ could be given as a sign of good faith since return of all ancestral/promised lands would be unrealistic.²⁸⁶

Compensation, satisfaction, and guarantees of non-repetition are also possible reparations. Compensation could take the form of

²⁷⁶ ARCHITECTS OF DENIAL (Dada Films Oct. 6, 2017).

²⁷⁷ *Id.*

²⁷⁸ ARMENIAN GENOCIDE REPARATIONS STUDY GROUP, *supra* note 124, at 48.

²⁷⁹ *Armenian Genocide Losses 1915*, <https://armeniangenocidelosses.am/> (last visited Dec. 2, 2021).

²⁸⁰ *Id.*

²⁸¹ *See* ARMENIAN GENOCIDE REPARATIONS STUDY GROUP, *supra* note 124, at 48; Robertson, *supra* note 265.

²⁸² ARMENIAN GENOCIDE REPARATIONS STUDY GROUP, *supra* note 124, at 48.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Mount Ararat is believed by the Armenians to be the place where Noah's ark rested at the end of the flood. It is near the borders of Turkey, Armenia, and Iran, but is still within the boundaries of Turkey. Editors of Encyclopedia Britannica, *Mount Ararat*, BRITANNICA, <https://www.britannica.com/place/Mount-Ararat> (last visited Dec. 2, 2021).

²⁸⁶ Robertson, *supra* note 265.

payments to the country of Armenia or directly to survivors²⁸⁷ and descendants.²⁸⁸ The estimated compensation has been anywhere from 100 billion dollars to 3 trillion dollars, with 1.64 trillion dollars owed by Turkey and the rest to be paid by nine other countries who benefited from the genocide.²⁸⁹

Satisfaction could take the form of a public apology, recognition that the events of 1915 were genocide, and/or implementation of genocide education in Turkey.²⁹⁰ Satisfaction is arguably what the Armenians want the most.²⁹¹

But are any of these reparations likely? The unfortunate reality is that they will not likely get relief soon. As discussed earlier, while the United States recognition is a big win for the Armenian people, it will likely take more states to recognize it before real change will start. As a practical matter, many states will look wearily upon expanding the timeline of genocide responsibility too far back because it may make them legally liable for atrocities they have committed. For example, Germany, while strong in their language condemning the Armenian Genocide, chose to avoid any appearance of legal obligations when making a joint declaration with Namibia about the genocide Germany committed as colonizers in 1904.²⁹² Instead, they classify payments to the Namibian government as a “moral responsibility” and classify the events as “events [that] were from today’s perspective: a genocide.”²⁹³ In addition, they avoid using the language of reparations or compensation to describe their payments, taking away legal meaning.²⁹⁴ This type of behavior by states could

²⁸⁷ As of April 24, 2020, there are only three genocide survivors in Armenia. Stepan Kocharyan, *Three Armenian Genocide Survivors Currently Live in Armenia*, ARMENPRESS (Apr. 24, 2020), <https://armenpress.am/eng/news/1013229.html>.

²⁸⁸ Gladstone, *supra* note 1.

²⁸⁹ *Id.*

²⁹⁰ *Armenian Genocide Losses 1915*, *supra* note 279.

²⁹¹ Robertson, *supra* note 265.

²⁹² See Joint Declaration by the Federal Republic of Germany and the Republic of Namibia, May 28, 2021.

²⁹³ Philip Oltermann, *Germany agrees to pay Namibia €1.1bn over historical Herero-Nama genocide*, THE GUARDIAN (May 28, 2021), <https://www.theguardian.com/world/2021/may/28/germany-agrees-to-pay-namibia-11bn-over-historical-herero-nama-genocide>.

²⁹⁴ *Id.*

lead to giving Turkey some leniency.²⁹⁵

Another obstacle is that Turkey simply has not and will not recognize that they committed genocide anytime soon. This is evident by both the ruling political party in Turkey lashing out at the United States for recognizing the genocide and the opposition parties responding similarly.²⁹⁶ This issue, unfortunately, is a uniting force in Turkey and has support from most of Turkey's political parties.²⁹⁷

And if Turkey did eventually decide to make reparations, victims do not get to choose the reparations they receive. It could be the case that Turkey never admits but decides that it will pay out some compensation to comply with international law. And that payment wouldn't necessarily need to go to the descendants of the victims, it could go to the state of Armenia. It could also be the case that Turkey admits to having committed a genocide in its past, but that by admitting it, Turkey has righted the international wrong sufficiently. While this would satisfy many who just want recognition,²⁹⁸ there are still a good number who feel that Turkey has benefited tremendously from the genocide and should not get off so easily.²⁹⁹ It could also restore some churches and historical sites, give Mount Ararat to Armenia, or make some similar effort and call it good.

2. Domestic Relief

While receiving reparations from Turkey under international

²⁹⁵ See, e.g., Belgium Chamber of Representatives, Doc. 1207/001, June 23, 2015, <https://www.armenian-genocide.org/uploads/Affirmation/804.pdf> ("Request to the federal government: 1. to recognize that present-day Turkey cannot be held responsible for the tragedy experienced by the Armenians of the Ottoman Empire.").

²⁹⁶ See *Opposition slams Erdoğan for weak reaction to Biden's genocide recognition*, TURKISH MINUTE (Apr. 28, 2021), <https://www.turkishminute.com/2021/04/28/opposition-slammed-erdogan-for-weak-reaction-to-bidens-genocide-recognition/>.

²⁹⁷ See Tolga Er, *The Positions of Political Parties in Turkey on the Resolution of the Nagorno-Karabakh Conflict and Turkey-Armenian Relations*, J. CONFLICT TRANSFORMATION (Dec. 1, 2017).

²⁹⁸ Robertson, *supra* note 264.

²⁹⁹ ARMENIAN GENOCIDE REPARATIONS STUDY GROUP, *supra* note 124, at iii; *Armenian Genocide Losses 1915*, *supra* note 279.

law will be a big hurdle to overcome, there is some good news: governments can step in and provide some relief through domestic law. This will likely be limited to remedies not involving the Turkish government, but it will be some relief for survivors and descendants. Below is an example of a way the United States recognizing the Armenian genocide could help grant relief.

In 2012, the Ninth Circuit of the United States of America struck down a California law that allowed courts to review insurance claims brought by victims of the “Armenian genocide.”³⁰⁰ Descendants of victims filed a class action suit against insurance companies who never paid out on insurance policies for victims of the genocide.³⁰¹ The suit failed because the United States had not, at that time, recognized the Armenian genocide.³⁰² The court said that the issues of foreign policy were the exclusive power of the federal government and were thus preempted, so California could not create a law that “expressed a distinct point of view on a specific matter of foreign policy.”³⁰³ This law stated a specific view on the foreign policy matter of whether what occurred a hundred years prior was genocide.³⁰⁴ Since the U.S. had not recognized the Armenian genocide, it could have direct adverse effects on foreign relations.³⁰⁵ Since the House, Senate, and Executive have all recognized the genocide, states can now make laws that implicate the genocide, such as California’s law without the risk of getting them shut down by the courts. If these actions are taken, descendants may be able to demand these insurance claims again and have their day in court.

B. What this means for international law

By arguing that the prohibition against genocide was customary international law, the assertion is essentially that this will have no effect because the law was already in existence. Practically,

³⁰⁰ *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1070 (9th Cir. 2012).

³⁰¹ *Id.*

³⁰² *Id.* at 1077.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

however, not all share this view and genocide is not currently applied in this sense. So, by establishing that genocide was violating customary international law in 1915, it will validate the calls that the Convention was in fact capturing already existing law.

By applying the prohibition against genocide to the Armenian situation, it elevates it as a legal principle among the seriousness of international crimes. It seems that the longer something has been deemed inappropriate conduct for states, the less tolerance we, as a human race, have for that thing. By applying the rule prohibiting genocide back to at least 1915, it sends a message that this was at least wrong for most of the 20th century. And it will make it easier to extend the timeline further back. Once the door has been opened so far, it becomes easier to push it open a little further. This might allow peoples who were victims of even earlier genocides get relief.

It also will strengthen the law of genocide moving forward. As the United States, and many others have pointed out, calling out past genocides may help to prevent further genocides. As the philosopher George Santayana put it, “Those who cannot remember the past are condemned to repeat it.”³⁰⁶ This, however, must be met with restraint because use of the term genocide in situations that are not actually genocide will weaken the word and potentially the legal concept by spreading it out too thin. In addition, if classifying things as genocide becomes purely a political tool, that will also weaken the term.

Conclusion

The Armenian genocide was violating customary international law in 1915 when the Armenian genocide started. This is evident by the practice and beliefs about the state of the law on genocide in 1915 as is evident by the Triple Entente Joint Declaration, various Treaties, and enforcement by foreign and domestic powers. In addition, more and more states are recognizing that genocide existed and occurred in 1915. The United States recognizing the genocide has strengthened these claims and has helped take the world one step forward to

³⁰⁶ GEORGE SANTAYANA, *THE LIFE OF REASON: INTRODUCTION AND REASON IN COMMON SENSE* 284 (Marianne S. Wokeck & Martin A. Coleman, 2011).

granting justice and relief for the Armenian people. There are still legal and practical hurdles that the Armenians will need to overcome in order to obtain it, but the United States recognition is a big win for them.