Introduction

Legal Avenues for Armenian Genocide Reparations

Henry C. Theriault
Professor of Philosophy, Worcester State University, Worcester, MA, USA

1 The Emergence of the Issue

From 1915 to 1923, the Ottoman Empire and then Turkish Republican nationalist forces committed genocide against its Armenian, Assyrian, and Greek minorities. In what is typically termed 'the Armenian Genocide', 1.5 million Armenians out of a population of about 2.5 million are believed to have been killed through the perpetrators' genocidal actions. In addition, eyewitness accounts indicate many tens of thousands of women and girls were forced directly or by circumstances into sexual servitude, domestic servitude, or 'marriage', which included forced or coerced conversion to Islam. Similarly, tens of thousands or more children were 'adopted' by Turks or other Muslims, or placed in Turkish-run orphanages, stripped of their Armenian identity, and forcibly Turkified.


As eyewitness accounts tell us, rape and torture were pervasive and continuous.³

Beyond this violence, the genocide functioned as a mass expropriation of the movable and immovable property of Armenians.⁴ Indeed, one can say that expropriation was an important motive for the genocide itself⁵ and that the national economy of the Turkish Republic was built on the wealth expropriated from the Ottoman Armenian population.⁶

After trials of a few perpetrators in 1919 which ultimately resulted in little punishment, no criminal or civil actions have addressed the harms of the Armenian Genocide. While of course, with more than 90 years having passed from the end of the process of mass murder, there is no longer any question of criminal prosecutions for the genocide itself, that does not preclude non-criminal legal processes, most notably suit for reparations for at least some of the damage done by the genocide. But the subsequent Turkish state and society, much more powerful than the residual, globally-dispersed Armenian population, have steadfastly refused any accountability for the genocide. The primary means of defense against responsibility has been the organized, heavily-funded, politically-driven denial campaign waged by the Turkish government and other governments, organizations, and individuals seeking its favour or aligned politically or ideologically with Turkey.⁷ By manipulating a

⁴ One particularly important recent treatment of this issue is Uğur Ümit Üngör and Mehmet Polatel, Confiscation and Destruction: The Young Turk Seizure of Armenian Property (Continuum, London, 2011).
shift in the very terms of discussion of the Armenian Genocide, from what should be done about it (prevalent in the years right after it) to whether it happened at all, the denial campaign has long prevented substantive discussions of reparations even within the mainstream of the global Armenian community.\(^8\)

In the past decade, however, a growing number of scholars and activists, including many Turkish figures, have looked beyond denial to consider what should be done to address the outstanding issues of the Armenian Genocide. The response to denial had been a long campaign for 'recognition' of the genocide, that is, official acts by governments and non-governmental organizations attesting to the veracity of the genocide and the culpability of Ottoman and nationalist Turkish leaders and others. Along with the major focus on recognition there had always been a minor strain concerned about reparations, particularly return of historical Armenian lands to Armenian control in the form of an independent Armenian state. These often invoked the 'Wilsonian boundaries', that is, the boundaries drawn up in 1919 through the Wilsonian arbitration process called for in the Treaty of Sèvres. But, especially during the Cold War, discussion of reparations remained at the level of an abstract demand for rectification of the genocide without specific proposals to that end. After the Cold War and an initial stabilization of the newly-independent Armenian Republic, whose most crucial challenge was Azerbaijan’s attempted ethnic cleansing of Armenians from the Karabakh region and the resulting military conflict over that territory, and resulting shifts in the political activities of Armenian diasporas in North and South America, Europe, and the Middle East, reparations began slowly to enter the mainstream discourse within Armenian circles.

Initially derided by many Armenian scholars and organizational leaders, in favour of negotiatonal dialogue with Turkish individuals and the Turkish government, as the dominant dialogue efforts continued to fail to bring about meaningful changes in Turkish attitudes and emerged more and more as new methods of advancing denial,\(^9\) a number of scholars and activists began to

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9 The most prominent instance of this kind of dialogue process was the Turkish-Armenian Reconciliation Commission (TARC). For an account of the genesis and activities of TARC, see David L. Phillips, Unsilencing the Past: Track Two Diplomacy and Turkish-Armenian
emphasize reparations publically in the early 2000s. There soon followed organized efforts in a number of directions, including lawsuits for recovery of individual funds from banks and insurance companies and the Armenian Genocide Reparations Study Group focused on group repair. By 2010, reparations had entered the mainstream of Armenian and third-party discourse on the genocide, and had even emerged as a legitimate issue among progressive Turks.\textsuperscript{10}

Finally, in 2012, the Armenian National Committee of America, with the strong support of the Armenian Catholicosate of Cilicia and its leader, His Holiness Aram I, launched a successful campaign to have a resolution passed in the US Congress calling for Turkey to return Armenian Church lands, buildings, and other property within its borders that had been confiscated during the genocide – property that continues to represent an essential aspect of the spiritual, community, and cultural existence of Armenians that has spanned 1700 years and remains vital in the post-genocide struggle of Armenians to survive as a religious, cultural, and political community despite the great destruction they have experienced. This resolution represented not just the commitment of Armenian groups and third-party supporters, but of the US government, to one form of repair for the Armenian Genocide.

2 \hspace{1cm} The 2012 Conference

It is in this context that, on 23 through 25 February 2012, His Holiness Aram I convened an important global conference on the issue of reparations for the Armenian Genocide. The ‘Armenian Genocide: From Recognition to Reparation’ conference, held at the post-genocide location of the Catholicosate, Antelias, Lebanon, brought together leading experts on various aspects of international law and related areas to consider possible legal avenues for pursuit of reparations claims arising out of the 1915-1923 Armenian Genocide.

Two days of presentations ranged across a host of issues and legal avenues and mechanisms. Various experts analysed and debated the viability of potential suits in the International Court of Justice, the International Criminal Court, the European Court of Human Rights, foreign national courts, and Turkish


\textsuperscript{10} For example, there were multiple panels on reparations at the 24-25 April 2010 '1915 Within Its Pre- and Post-historical Periods: Denial and Confrontation' symposium in Ankara, Turkey (see supra note 5).
domestic courts, as well as the applicability of various laws, treaties, and legal precedents, such as the United Nations Convention on the Prevention and Punishment of Genocide (UN Genocide Convention). Others considered how proper compensation amounts might be calculated, the differences between individual and group reparations, and previous attempts to achieve reparations for the genocide.

The bulk of presentations on the first day of the conference considered obstacles to legal avenues to repair for the genocide. This was in part due to the comprehensive nature of the conference, which considered every major international mechanism for pursuit of justice for human rights violations, some which were created well after the genocide and specifically excluded retroactive cases. On the one hand, the nearly uniform inapplicability to the Armenian case of various avenues considered resulted in a rather pessimistic sense at the end of the day that legal mechanisms were in fact inadequate to gaining even partial justice for such acts of mass human rights violation as the Armenian Genocide. On the other, the incisive analyses produced by consideration of mechanisms that many would dismiss out of hand as inapplicable ended up driving a rich exploration of the political and ethical as well as legal issues at stake and generated many creative ideas. What became clear was that even negative responses to various legal avenues were fostering productive insights into the problem.

The 'reality check' of the first day set the stage for the second. The topics for this day went beyond core legal issues and international legal structures, to look at such things as Turkish domestic courts and the practical methods that could be used to calculate monetary compensation for lost properties such as businesses. If the result of the second day was not a single cohesive formula for pursuit of reparations, it was a comprehensive and unprecedented understanding of various aspects of the issue from its most theoretical to its supremely concrete elements. Productive discussions about the tension between ethics and law, what should happen as opposed to what the law allows to happen, and questions about the evolution of law, the flexibility of law, and the possibility of a political solution that might achieve what law cannot were all part of the discourse. A key insight was that, even if a solely legal approach would not be sufficient, legal analysis would yet be crucial in marking the contours of any political settlement of the issue.

The Contents of this Special Issue

The articles here represent these presentations, discussions, and further research coming out of them. They have been arranged thematically, rather than according to the presentation order at the conference.
The first set of articles provides background on and general foundations for approaching the issue of reparations for the Armenian Genocide. The opening article is His Holiness Aram I's contribution. This article situates the Armenian Genocide and the question of reparations in the context of global human rights principles and their history, and discusses some of the insights generated by the conference. This work is especially significant in two ways. First, it explains the centrality of 'churches and church-related properties' to Armenian identity and thereby the urgency of return of these properties. Church property was and continues to be a principal target of the genocide; not only was church property expropriated and converted to other uses, often by their nature demeaning to Armenians' faith (such as using churches as stables), but since the genocide and into the present church structures and cemeteries continue to be destroyed and fewer and fewer remain even in poor condition. This denial of use and ruination undermine the spiritual vitality and cultural cohesion of Armenians. Contemporary Turkish control is thus a continuing force in the dismantling of Armenian identity and future viability. Second, in the tradition of predecessors such as Archbishop Desmond Tutu, His Holiness also argues that the church's unique position at the centre of Armenian spiritual and moral life entails a special responsibility to take on a leadership role regarding reparations. To this end, the article concludes with His Holiness' crucial first step, a formal declaration of the Catholicosate's commitment to a reparative process for the Armenian Genocide. In this way, this contribution becomes itself a primary historical document.

Susan Karamanian's article emphasizes the genocidal nature of the vast and comprehensive property expropriations to which Armenians were subjected and the intent to use them as the basis of a new Turkish nationalist economy and economic control of Asia Minor. The core of the article examines various international agreements and case precedents that support reparations for similar expropriations, including specifically in cases of genocide, as well as previous cases for reparations related to the Armenian Genocide. By appraising the possibilities and obstacles, Karamanian offers a crucial analysis that should be taken into account in any attempt to pursue a legal process to achieve reparations. The article also includes an intriguing alternative to 'time-consuming and costly' 'asset-by-asset' suits, in the form of an Armenian-Turkish 'compensation fund and claims commission'.

Patrick Dumherry has a similarly general focus, in his case on the primary question of whether the present Turkish Republic, established in 1923, can be held responsible for any remedies appropriate for the Armenian Genocide. This point is essential, for even if international law holds that contemporary Armenians have legitimate property claims, if these are valid against only the
long-defunct Ottoman Empire, then the issue of reparations would be an intellectually interesting problem without any practical implications. The issue turns on whether the Turkish Republic is the 'continuing state' of the Ottoman Empire under international law. Through an analysis of legally-binding international agreements and relevant case law, Dumberry finds that it is the case that the Turkish Republic 'should be considered under international law as the “continuing” State of the Ottoman Empire'. An important issue treated by Dumberry is whether this is true even though some of the areas in which the Armenian Genocide occurred have been transferred to other ('successor') states. He demonstrates that, according to the relevant law and legal cases, the Turkish Republic retains the responsibility to meet the obligations of the Ottoman Empire, including reparations for a past act of mass violence.

The second set of articles looks at the applicability of particular international courts, laws, and principles to the Armenian case. Dov Jacobs considers whether the International Criminal Court (ICC) would be an appropriate venue for Armenian reparations claims. Jacobs points out that the major obstacle to applicability is that the Rome Statute founding the court specifically excludes application to any crime committed prior to entry into force of the statute in 2002. Jacobs does not end his inquiry with this fundamental problem, however, but looks at other obstacles as well, which would likely impact cases in a range of courts beyond the ICC. The subtleties of his legal analysis of different obstacles allow readers to understand what would need to be asserted successfully, such as demonstrating that the Armenian Genocide is a 'continuing crime', for any attempt to make a reparations case in another court beyond the ICC. His realistic appraisal of the likelihood of success of any purely legal approach to the problem is very useful in this regard. A strength of Jacobs' work is that it is based on the minority position that the intent and central plan behind the genocide are not provable; in this way, Jacobs adds to the difficulty of the case in a way that highlights its challenges. Jacobs' point that 'international law today has answers for genocides committed today', not in the past, is a very important caution to those who would expect too much of law in the Armenian or similar long-past cases.

Marco Roscini considers whether the 1948 UN Genocide Convention can be applied to the Armenian Genocide as a legal basis for finding Turkey responsible for reparations. Roscini argues that the UN Genocide Convention is not retroactively applicable. He does not, however, stop with his negative finding, but on the contrary develops a highly innovative approach to legal claims regarding the genocide. He identifies various treaties entered into by the Ottoman Empire prior to the Armenian Genocide as determining legally
binding obligations regarding treatment of Armenians that it clearly violated. What is especially noteworthy about this approach is that it appeals to legal obligations entered into voluntarily by the Ottoman Empire, rather than international legal standards that can be seen as much less voluntary.

Frédéric Mégret considers the issues that would arise for an Armenian case at the European Court of Human Rights (ECtHR), the jurisdiction of which Turkey recognized less than three decades ago. Mégret revisits Jacobs' argument that the problem of retroactive jurisdiction is effectively insurmountable. Taking as fact that the events of the Armenian Genocide itself cannot come under the ECtHR's temporal jurisdiction, he argues that the notion of 'continuous violation' can be applied to expropriations of Armenian property that began in the genocide period. He develops the notion and its range of applicability through analysis of relevant case law, starting with 'disappearances' and moving to property expropriations. While showing that the bulk of case law supports the view that 'deprivation of ownership is ... an instantaneous act which does not produce a continuing situation of "deprivation of a right"', Mégret does find in certain ECtHR cases precedent for identifying expropriations as continuing violations that fall under the court's jurisdiction despite the original act having occurred prior to the court's temporal reach. A key issue is whether an expropriation can be said to have been fully completed by the government responsible for the original act of dispossession. In the Armenian case, Mégret points out that the 'legally euphemistic terms' applied to confiscations, particularly their treatment as 'abandoned property' 'held "in trust" for Armenians', might be the basis for the claim that the expropriation was never completed and Armenians retained a reasonable expectation that their property would be returned. Return was prevented in large part by an active obstruction by the Turkish Republic, which would make the dispossession a continuing violation. Mégret raises other intriguing issues for consideration, including whether 'genocidal expropriation' should be treated differently from other kinds of systematic expropriation.

Richard Wilson's article focuses on recent relevant cases at the Inter-American Commission on Human Rights and the ECtHR and the principles underlying them. He begins with an enumeration and analysis of what he identifies as the key principles regarding remedies for the victims of mass human rights violations. His principles provide an important expansion of the discussion of the Armenian case, in emphasizing that property restitution is just one part of a broader concept of reparations. He identifies key elements relevant to the Armenian case, such as the 'right to truth'. Particularly noteworthy is that, where many commentators on the Armenian case typically pose the 'right to truth' (that is, an end to Turkish denial of the Armenian...
Genocide) in an either/or opposition to material reparations, Wilson presents these as two elements of an overall cohesive concept of repair. A second important contribution by Wilson is the suggestion, based in particular on the Árbenz case, that the various elements of reparations can be pursued in a balanced way through a negotiative legal process that, ultimately, benefits not just the victims but the perpetrator group as well. While the Turkish Republic has remained steadfastly opposed to any such process to provide justice to Armenians, the model Wilson develops could have applicability if the political and social conditions in Turkey change in a positive direction.

The third set of articles focuses on local avenues for redress. Vahé Tachjian presents a historical analysis of the negotiations between France and Turkey in the 1920s regarding the property of former Ottoman subjects who later received Syrian or Lebanese citizenship through the Treaty of Lausanne and other international agreements of the period. Initially, Armenians who had been deported from other areas of the Ottoman Empire as part of the genocide but managed to survive or who had fled from the genocide were included in this broader group. Whether the result of negotiations would have been return of property in Turkey or compensation for it, this would have been a lifeline to the '[t]ens of thousands of Armenians [living] in refugee camps in Beirut, Aleppo, Damascus, or Alexandretta (Iskenderun)', where 'instability of life, poverty, and dreadful housing conditions ruled' and '[t]here was a struggle every day for daily bread'. The article traces the geopolitically-driven shift in the French position, to exclusion of Armenian Genocide survivors and restriction of support to the property claims of individuals who had resided in Syria and Lebanon prior to the genocide period.

In the next article, Marcel Brus argues that pursuit of Armenian claims today in foreign domestic courts is likely to be unsuccessful. Brus begins by developing the concept of 'ius humanitatus', that is, 'a humanization of international law' that embeds both individual and group human rights dimensions in international law, which formerly mainly concerned relations among states. This evolution has made international law much more able to protect the human rights of people around the world. But Brus points out that '[o]ne area in which much needs to be done is providing better legal rights and opportunities for victims of international crimes to obtain reparation'. While, for instance, the September 2011 judgment by the District Court of The Hague concerning a 1947 massacre in Rawagede, then a Dutch colonial possession and now in Indonesia, is an example of the positive developments in this regard, Brus stresses that extra-legal 'moral and political' considerations are requisite 'for any chance of success' in such a case. Thus, the law allows for and can support reparative processes for past mass violence, but appears at this point
insufficient on its own to sustain such a process. Brus analyses the key legal obstacles underlying this insufficiency in regard specifically to domestic courts. First, understandably, international law is at best ambivalent about the exercise of jurisdiction by a domestic court in one state over events in another state. Second, Brus shows that temporal jurisdiction is just as much of an obstacle for domestic courts as for other courts discussed in previous articles in this special issue. Finally, Brus highlights a feature specific to the issue of foreign domestic courts, 'state immunity' that does 'not allow domestic courts to exercise their jurisdiction over foreign states'. As he points out, '[a]lthough this rule is no longer absolute, the exceptions do 'not apply to international crimes'.

Taner Akçam considers whether Turkish courts can be an avenue for Armenian reparations. Through examination of 'the laws and decrees regarding [Armenian] “abandoned properties” from both the Ottoman and the Turkish Republican eras', Akçam shows that the original representation of the dispossession as a care-taking exercise by the Ottoman government, through which Armenian properties were to be held in trust for Armenians, has never been superseded. For instance, the 10 June 1915 regulations for dealing with Armenian property included provisions that 'the income received from Armenian properties sold at auction or leased would be deposited “with the state property coffers for safekeeping on behalf of the owners” and that ‘they would be “returned to the owners by notice to be posted in the future”'. As Akçam points out, because of the permanence of the destruction of the Armenian communities in Turkey and inability of survivors to return, this commitment was empty. In the 1920s, however, especially with the Treaty of Lausanne, the possibility of return was grounded in an international agreement binding on Turkey. The new republic responded to this by erecting complex legal obstacles to property claims by Armenians, even if in formal legal terms Armenians could return to Turkey and make claims. The result has been a continuing ‘inherent tension in the Turkish legal system’ that makes impossible ‘any law that explicitly prohibits the return of Armenian properties’. Thus, Turkish domestic courts remain a possible venue for pursuit of Armenian claims, despite the strenuous efforts to prevent this.

Sait Çetinoğlu's article takes up the issue mentioned at the end of Akçam's, post-genocide confiscation of non-Muslim minority foundation properties in Turkey. While Çetinoğlu does not focus on confiscations during the genocide, he does discuss the possibilities for non-Muslim minority groups, including Armenians, to gain restitution for property confiscated after the genocide but based on anti-minority attitudes and policies that can be said to have been forged or consolidated through the genocidal process and which further undermine the viability of survivor groups in Turkey. Çetinoğlu offers an account of
the history of measures instituted to accomplish post-genocide confiscations aimed at further undermining non-Muslim foundations. The central measure was what is termed the '1936 Declaration', which required all non-Muslim foundations to submit a list to the government of all immovable property. These lists and other measures were long used to support confiscation of much of this property. For instance, property that was included on a 1936 list but that had not been registered in the proper name of the foundation that owned it was often claimed not to belong to that foundation, even though it had long been the property of the foundation. After the passage of some years, the 1936 Declaration was applied with renewed vigour starting in 1974, as a response to the Cyprus situation. At that point, the Foundations General Directorate required non-Muslim foundations to present their founding contracts. Because many of 'these foundations had been established prior to the Republican era by *firman* issued by the Sultan, they did not have such founding contracts'. This was used 'as a rationale for confiscating all properties such foundations had gained, including through donation, after 1936'. Çetinoglu then discusses certain steps forward, including an ECtHR decision to award restitution for property confiscated through the 1936 Declaration process from the Fener Greek High School. He concludes by analysing the significant obstacles to addressing the extensive confiscations accomplished through means deriving from the 1936 Declaration.

The final set of articles examines practical and theoretical issues that will have to be addressed regardless of the particular approach to reparations pursued. Among other elements, Irmgard Marboe's crucial article takes up the central question of how expropriated assets will be valued currently, should a court issue a finding calling for restitution or an out-of-court settlement be reached. As might be expected, the issue is complex and multifaceted, particularly because there are numerous possible valuation methods. For instance, should compensation for real property be valued based on the lost income that could have been generated with the property from the time of its confiscation to the present, based on current or past 'fair market value', or some other method? Marboe considers many subtleties. For instance, if the 'fair market value' of Armenian property dropped significantly in 1915 because of the expected expropriations, use of the artificially lowered values at the time of expropriation would seem to be unfair to the victims. Also, if one chooses the lost income method, how are religious sites, which 'are not meant to and do not yield income as such to their owners', to be valued? Ultimately, Marboe provides a comprehensive template of the various possible valuation methods, analyses of their proper scopes of applicability and difficulties that might be encountered using one or another, and examples of applications
of different approaches, all of which comprise a highly useful framework for valuation.

Gabriele Della Morte looks at the issue of reparation conceptually, questioning what level of 'oblivion' – that is, erasure from contemporary focus – should be balanced with what level of memory – that is, contemporary focus on a past instance of mass violence, such as the Armenian Genocide. Della Morte traces out the complex contours of the tension between oblivion and memory, which has been played out in such mechanisms as the South African Truth and Reconciliation Commission, through consideration, for instance, of the role of 'clemency' and its form 'amnesty' in international law. Recognizing that these 'instruments which suspend the law ... have become themselves instruments of law' [Della Morte's emphasis], Della Morte explains what might be considered a new emerging framework in international law approaches to mass violence. An important contribution of this article is in looking at the range of possible outcomes and goals for repair, which go beyond restitution, to consider such things as victim-perpetrator 'reconciliation'.

Henry Theriault's article considers the question of individual versus group repair. Recent Armenian reparation cases have exclusively concerned individual property. Theriault argues that, while legitimate, such claims are in fact mislabelled as 'Armenian Genocide reparations cases'. Not only do awarded or negotiated reparations not function to address the harm done by the Armenian Genocide as a force of destruction of the Armenian people, a force whose consequences remain in some ways debilitating politically, economically, culturally, and socially, but the basis of the cases is not genocide. On the contrary, the claims attempt to show that the expropriations of Armenian property in question – or, in the insurance cases, the failure to pay legitimate claims – violated laws regarding property and contracts. Since this would have been true whether there was a genocide or not, these violations are not treated as wrong because they occurred as an essential feature of a genocidal process. Theriault continues by arguing that a significant part of the problem is that the international legal system is based on individual, not group, rights, and thus the very framework in which Armenian Genocide reparations have been raised so far is not appropriate for addressing such claims.

4 Importance of the Special Issue

Taken as a whole, the articles in this special issue offer a cutting-edge analysis of the key legal issues of Armenian Genocide reparations. It is the hope of the guest editor that the collection will prove useful to those engaging the issue
for the first time as much as those with substantial backgrounds doing advanced legal or scholarly research on it. The articles treat a wide range of considerations and offer both key insights and creative new approaches to genocide reparations. As much as the collection will surely become a resource for those interested in the Armenian case, following His Holiness’ contextualizing of this case within global human rights and ethics, the articles herein are just as likely to have great value to those working on reparations for other cases of mass violence.

5 Acknowledgments

The quality of the articles is a testament not just to the great academic abilities of their authors, but to their authors’ dedication to scholarly excellence and human rights, which should be recognized. But other individuals contributed in crucial ways to this special issue. First and foremost, the guest editor wishes to thank Brill’s journal manager, Brenda Kaldenbach, and International Criminal Law Review’s editor, Professor Michael Bohlander, for their tremendous support and patience in getting this special issue together. The guest editor would also like to recognize the ground-breaking efforts of His Holiness Aram I in organizing a global conference on reparations for the Armenian Genocide, and for his impressive intellectual leadership on the issue at the conference and beyond. Dr Nora Bayrakdarian, Professor of International Law at the Lebanese University and chair of the conference organizing committee, was invaluable in organising submissions for the special issue and always eager to help in other ways. Finally, Rita Abrilian, Administrative Secretary for the Department of Ecumenical Relations of the Catholicosate of Cilicia, provided frequent, timely, and essential support in contacting authors and coordinating submissions.