



# The Consequences of Turkey Being the ‘Continuing’ State of the Ottoman Empire in Terms of International Responsibility for Internationally Wrongful Acts

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## Abstract

The present article examines whether the modern State of Turkey (which was officially proclaimed in 1923) can be held responsible under international law for internationally wrongful acts which were committed by the Ottoman Empire against the Armenian population during and shortly after World War I. The first part examines whether Turkey should be considered as the ‘continuing’ State of the Ottoman Empire or whether it should instead be deemed as a ‘new’ State. Part 2 will examine the legal consequences in terms of international responsibility for considering Turkey as the ‘continuing’ State of the Ottoman Empire. This will include an examination of case law and State practice in the context of secession and cession of territory. The conclusion is that Turkey should be held responsible for all internationally wrongful acts committed by the Ottoman Empire (including acts of genocide) which were committed before its disintegration.

## Keywords

Armenian Genocide – Ottoman Empire – Turkey – state continuity – international responsibility

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## Introduction

It is now well documented that the Ottoman Empire committed ‘internationally wrongful acts’ against the Armenian population during and shortly after World War I (the ‘War’).<sup>2</sup> According to Article 1 of the International Law Commission’s *Articles on Responsibility of States for Internationally Wrongful Acts*, the commission of an internationally wrongful act by a State entails its international responsibility.<sup>3</sup> The responsible State must make full reparation for the injury caused by the internationally wrongful act.<sup>4</sup>

The problem at the centre of this article lies in the fact that the Ottoman Empire ceased to exist as a State in 1923. The present article examines the following question: can the modern State of Turkey (which was officially proclaimed on 29 October 1923, i.e., only *after* the wrongful acts were committed), be held responsible under international law for internationally wrongful acts which were committed by the Ottoman Empire before its disintegration?

This article is structured in two parts. The first part briefly examines whether Turkey should be considered under international law as the ‘continuing’ State (or ‘continuator’ State) of the Ottoman Empire or whether it should instead be deemed as a ‘new’ State. Part 2 will examine the legal consequences of considering Turkey as the ‘continuing’ State of the Ottoman Empire.

### 1 Turkey is the Continuing State of the Ottoman Empire

The first section (1.1) of this part examines some of the criteria that have been used in international law to determine whether two entities are in fact ‘identical’, that is, constitute the same State having a continuing international legal personality. These criteria will then be applied to the specific case of the Ottoman Empire and Turkey. In a second section (1.2), the article examines provisions of the Lausanne Treaty, two international arbitration cases, and one municipal court decision, all dealing with the question of continuity between the Ottoman Empire and Turkey.

<sup>2</sup> This article does not discuss whether or not these acts qualify as genocide under international law.

<sup>3</sup> International Law Commission, *Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading* (Doc. A/CN.4/L.602/Rev.1).

<sup>4</sup> *Ibid.*, Art. 31.

### 1.1 *Relevant Criteria to Determine State Identity and Their Application to Turkey*

The decline of the Ottoman Empire took place in the 19<sup>th</sup> and early 20<sup>th</sup> Centuries; it is a case of ‘partial’ succession where the Empire continued to exist despite important losses of territories. This slow decline eventually led to the official proclamation of the ‘Republic of Turkey’ in 1923. This section examines the question of whether or not the Republic of Turkey that emerged in 1923 should be considered a ‘new’ State under international law.<sup>5</sup>

To assess any questions related to State identity, one must examine the characteristics of an entity at two different moments in time: *before and after* the events that led to the territorial transformation.<sup>6</sup> When the two entities, examined at two different moments, are considered as being ‘identical’, this means that there is a ‘continuing’ international legal personality.<sup>7</sup> This is, of course, a legal fiction insofar as the State that exists *now* is necessarily not perfectly ‘identical’ to the one that existed *back then*.<sup>8</sup> Thus, the very question of continuity arises *precisely because* some doubt may exist as to whether two entities are in fact truly identical. In fact, the relevant question to be asked is whether two entities have the same international legal personality *despite* substantial changes to the pre-existing entity’s territory, name, and government.<sup>9</sup> There is a presumption in favour of continuity under international law. According to this presumption, a State will continue to exist unless sufficient evidence demonstrates its extinction.<sup>10</sup>

There are no formal criteria under international law that help to categorically distinguish cases of continuity from those of discontinuity.<sup>11</sup> Some criteria have nevertheless been identified in doctrine to determine concretely whether there is State identity.

The first such criterion is territory. A State does not necessarily lose its international legal personality as a result of a change to its territory. Thus, it is clear

5 This question is further examined in: Patrick Dumberry, ‘Is Turkey the “Continuing” State of the Ottoman Empire under International Law’, 59(2) *Netherlands International Law Review* (2012) 235-262.

6 Wladyslaw Czaplinski, ‘La continuité, l’identité et la succession d’États: évaluation de cas récents’, 26 *R.B.D.I.* (1993) 374.

7 Krystyna Marek, *Identity and Continuity of States in Public International Law* (Librairie Droz, Geneva, 1968), p. 6.

8 Brigitte Stern, ‘La succession d’États’, *R.C.A.D.I.*, t. 262 (1996) 40.

9 *Ibid.*

10 James Crawford, ‘The Criteria For Statehood in International Law’, 48 *British Year Book I.L.* (1975-76), p. 139; Czaplinski, *supra* note 6, pp. 375, 379.

11 Stern, *supra* note 8, p. 52; Czaplinski, *supra* note 6, p. 379; Marek, *supra* note 7, pp. 7, 9.

that territorial losses, per se, do not affect a State's identity.<sup>12</sup> Some authors have nevertheless argued that a *significant* or "very considerable" loss of territory could lead to a conclusion of non-identity.<sup>13</sup> For them, a State with a significantly reduced territory would be somewhat too different to be considered as identical to the one that existed before.

By some accounts, between 1878 and 1918 the Ottoman Empire lost 85 per cent of its territory.<sup>14</sup> But as explained by Judge Kreca in his Dissenting Opinion in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case, a diminution of territory, even a substantial one, does not in itself affect the legal personality of a State.<sup>15</sup> In fact, Judge Kreca gave the example of Turkey as an illustration. Other authors have also used Turkey's example as an illustration of this phenomenon.<sup>16</sup> It is generally recognised in doctrine that the identity of a State is not affected even when the territory lost is substantially *greater* than the remaining territory.<sup>17</sup> This is the case of Turkey in 1923. It was not a new State under international law; it was the same State as the Ottoman Empire, only with a much smaller territory.<sup>18</sup>

Similarly, a change of government does not in itself amount to the creation of a new State.<sup>19</sup> The identity of a State is not affected by a change of

12 Josef L. Kunz, 'Identity of States Under International Law', 49 *A.J.I.L.* (1955) 72; James Crawford, *The Creation of States in International Law*, 2nd ed., (Clarendon Press, Oxford, 2006), p. 673; Wilfred Fiedler, 'Continuity', in R. Bernhardt (ed.), *Encyclopaedia Of Public International Law*, Vol. 1 (Max Planck Institute, North Holland, 1984) p. 807.

13 Marek, *supra* note 7, p. 23-24 (for a review of doctrine); E.J. Castren, 'Aspects récents de la succession d'États', *R.C.A.D.I.*, vol. 78(1) (1951) 393.

14 Taner Akçam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (Metropolitan Books, New York, 2006), p. 11.

15 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 11 July 1996, International Court of Justice, Preliminary Objections, *ICJ Reports 1996*, pp. 762-3, Judge Kreca, Dissenting Opinion, para. 87.

16 Kunz, *supra* note 12, 72.

17 Crawford, *supra* note 12, p. 673; Konrad G. Bühler, *State Succession and Membership in International Organizations: Legal Theories versus Political Pragmatism* (Martinus Nijhoff, Leiden, The Netherlands, 2001), p. 15; Ineta Ziemele, 'Is the Distinction between State Continuity and State Succession Reality or Fiction? The Russian Federation, the Federal Republic of Yugoslavia and Germany', *Baltic Yearbook of International Law* (2001) 216; Kunz, *supra* note 12, 72; G. Cansacchi, 'Identité et continuité des sujets de droit international', *R.C.A.D.I.*, t. 130(1) (1970) 25.

18 Ziemele, *supra* note 17, 215; Marek, *supra* note 7, p. 40; Crawford, *supra* note 12, p. 676.

19 Marek, *supra* note 7, p. 24 *et seq.*

government even when it arises as a result of a revolution or a *coup d'état*.<sup>20</sup> It is not disputed that Turkey went through fundamental changes in the 1920s. The changes were not limited to the replacement of the monarchy by a republic – far-reaching changes also affected the society more globally. Despite these changes, it cannot be concluded that Turkey is a *new State* under international law.<sup>21</sup>

It is also clear that changes in population do not affect the identity of a State.<sup>22</sup> By some accounts, the Ottoman Empire lost some 75 per cent of its population between 1878 and 1918.<sup>23</sup> While this is no doubt a significant loss of population, it is not in itself proof of discontinuity. Similarly, changes to the name of a State are clearly not decisive to determine questions of identity.<sup>24</sup> Thus, from the fact that in 1923 the country's name was changed from the 'Ottoman Empire' to the 'Republic of Turkey', it simply cannot be automatically deduced that this is a *new State*.<sup>25</sup> In fact, the two terms had long been used interchangeably in treaties throughout the 19<sup>th</sup> Century.<sup>26</sup>

There is one important criterion that has been used by some writers to decide issues of identity in the context of considerable losses of territory. Writers have looked at whether what is left of a State's territory following a significant reduction in its size is the 'essential portion' (its core or its nucleus) of the State that existed before its disintegration.<sup>27</sup> In other words, they assess whether what remains of a territory after a radical change can be considered as the 'essential portion' of the territory of the 'old' State.<sup>28</sup> For others, there is also identity of State when the dismembered State is still populated by its 'core'

20 Kunz, *supra* note 12, 73.

21 Marek, *supra* note 7, p. 40. *Contra*: Enrico Zamuner, 'Le Rapport entre Empire ottoman et République turque face au droit international', 6 *J. Hist. Int'l L.* (2004) 230-231.

22 Kunz, *supra* note 12, 71; Czaplinski, *supra* note 6, 378.

23 Akcam, *supra* note 14, p. 11.

24 Stern, *supra* note 8, 74; Czaplinski, *supra* note 6, 377.

25 Stern, *ibid.*; Czaplinski, *ibid.*

26 Emre Oktem, 'Turkey: Successor or Continuing State of the Ottoman Empire?', 24(3) *Leiden Journal of International Law* (2011) 577. *See, inter alia*, the Treaty of Sèvres (1920), which, although signed by the Ottoman Empire in 1920, nevertheless contains a reference to "Turkey" (the preamble mentions that "on the request of the Imperial Ottoman Government an Armistice was granted to Turkey on October 30, 1918").

27 Stern, *supra* note 8, 80.

28 W.E. Hall, *A Treatise on International Law*, 8th ed., (Clarendon Press, Oxford, 1924), p. 21; Oscar Schachter, "The Development of International Law through the Legal Opinions of the United Nations", 20 *B.Y.I.L.*(1948) 105.

ethnic/national group, which was the largest, the most dominant, and the most powerful in the 'old' State.<sup>29</sup>

It can be argued that after centuries of territorial expansion of the Empire, which was then followed by slow disintegration, modern Turkey was reduced in 1923 to its nucleus, its 'essential' part, i.e., the 'historical homeland' of the Turkish nation.<sup>30</sup> Thus, the dominant ethnic group in the Ottoman government were the Turks and the official language of the Empire was indeed Turkish.<sup>31</sup> The territories that the Empire gradually lost in the 20<sup>th</sup> Century were essentially non-Turkish (they were populated mainly by Arabs, Jews, and Kurds). In that sense, modern Turkey is the historical homeland of the Turkish population.<sup>32</sup> It is also important to note in this context that non-Turkish peoples (Arabs, Jews, and Kurds) were fighting for independence from the Empire. Only the Turks were favourable to the integrity of the Empire.<sup>33</sup> In sum, the criterion of the core or the nucleus of the State strongly supports the proposition that there is an identity of State between the Ottoman Empire and the Republic of Turkey.<sup>34</sup>

Any assessment of continuity by a State affected by territorial changes will have to be made by other States.<sup>35</sup> They will decide whether or not to recognise any claim of continuity or non-continuity.<sup>36</sup> Recognition will ultimately be the decisive factor to determine issues of identity in cases where substantial territorial changes occurred and where a claim of continuity is controversial or has been contested by other States.<sup>37</sup> Recent State practice in the context of the break-up of Yugoslavia and the U.S.S.R. shows the importance of other States' recognition when it comes to deciding the fate of controversial and contested claims of continuity.<sup>38</sup>

Post-1923 Turkey is a prime illustration of a situation involving a substantial modification of territory coupled with a controversial claim of discontinuity.

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29 Cansacchi, *supra* note 17, 31.

30 Zamuner, *supra* note 21, 210; Aram Kuyumjian, 'The Armenian Genocide: International Legal and Political Avenues for Turkey's Responsibility', 41 *R.D.U.S.* (2011) 283; Oktem, *supra* note 26, 575-576.

31 Oktem, *supra* note 26, 577.

32 Shavarsh Toriguian, *The Armenian Question and International Law*, 2nd ed. (University of La Verne Press, La Verne, CA, 1988), p. 111.

33 Cansacchi, *supra* note 17, 32.

34 *Ibid.*

35 Czaplinski, *supra* note 6, p. 379.

36 *Ibid.*

37 Stern, *supra* note 8, 60, 66-67, 85.

38 *Ibid.*, 85.

Turkey claimed to be a new State in 1923. One of the many reasons explaining why Turkey took this position has to do with the fate of the Ottoman Empire's financial obligations. Turkey argued that because it was a new State, it should not be held responsible for the entire debt of the defunct Ottoman Empire; but rather, only for a portion of it just as all the other new States. This position was clearly taken during negotiations at the Lausanne Conference leading to the signing of the Treaty of Lausanne.<sup>39</sup>

Turkey's claim of discontinuity was rejected by other States; it was never recognized as a 'new' State.<sup>40</sup> One of the reasons why other States rejected Turkey's claim of discontinuity was to ensure that its responsibility for the Ottoman Empire's financial obligations would remain intact.<sup>41</sup>

In sum, the application of the *objective* criterion of the 'essential' part strongly supports the conclusion that there is an identity of State between the Ottoman Empire and the Republic of Turkey. This conclusion that Turkey is continuing the international legal personality of the Ottoman Empire is also supported by one *subjective* criterion: other States' refusal to recognise Turkey's claim to be a new State. In this context, it is not surprising that the overwhelming majority of writers believe that despite Turkey's considerable losses of territory and population, as well as radical changes to its government (and its society), it continues the international personality of the Ottoman Empire.<sup>42</sup> In fact, only a few writers support the discontinuity thesis.<sup>43</sup>

39 Declaration by Hassan Bey, *Recueil des Actes de la Conférence de Lausanne*, Serie I, tome 3, Paris 1923, p. 130 (quoted in Zamuner, *supra* note 21, 227): "Le gouvernement d'Angora prendra à sa charge une part équitable de la dette au même titre que les autres États détachés de l'ancien Empire ottoman, étant donné qu'il n'est que l'un des États successeurs de cet Empire".

40 Oktem, *supra* note 26, 577; Cansacchi, *supra* note 17, 32; M. Udina, 'La succession des États quant aux obligations internationales autres que les dettes publiques', *R.C.A.D.I.*, t. 44 (1933) 688.

41 Vladimir D. Degan, 'Création et disparition de l'Etat (à la lumière du démembrement de trois fédérations multiethniques en Europe)', *R.C.A.D.I.*, t. 279 (1999) 304; Cansacchi, *supra* note 17, 35; Zamuner, *supra* note 21, 225.

42 Oktem, *supra* note 26, 575 *et seq.*; A. Sottile, 'Eugène Borel: Son rôle dans la jurisprudence internationale, sa sentence arbitrale sur la répartition de la dette ottoman', 4 *Revue de droit international, de sciences diplomatiques et politiques*, (1926), 106; Kunz, *supra* note 12, 68, 72; Kuyumjian, *supra* note 30, 283; Cansacchi, *supra* note 17, 29, 32; Czaplinski, *supra* note 6, 376; Pekka T. Talari, 'State Succession in Respect to Debts: The Effect of State Succession in the 1990's on the Rule of Law', 7 *Finnish Y.I.L.* (1996) 150; Vahakn N. Dadrian, 'The Armenian Genocide as a Dual Problem of National and International Law', 4

### 1.2 *The Position Adopted by International Treaties and Tribunals*

As discussed above, other States' firm refusal to recognise Turkey's claim to be a new State ultimately prevented such claim from having any effectiveness.

Several provisions of the Lausanne Treaty support the conclusion of continuity between the Ottoman Empire and the Turkish Republic.<sup>44</sup> For instance, Article 1 indicates that "from the coming into force of the present Treaty, the state of peace will be definitely *re-established* between" the different parties to the treaty.<sup>45</sup> Any "re-establishment" of the peace that existed before the War necessarily presupposes the idea of continuity between the Ottoman Empire and Turkey.<sup>46</sup> Another example is Article 58, where the State that existed between 1914 (beginning of the War) and 1924 (coming into force of the Treaty) is described as being 'Turkey' notwithstanding the fact that it did not yet formally exist until 1923.<sup>47</sup> This is a clear sign that the Parties to the Treaty believed that both entities were essentially the same. Moreover, the fact that under this provision the Contracting Powers renounced to submit any claims against *Turkey* for damages, which had been committed by the *Ottoman Empire* also shows that the two entities were considered as identical from a legal standpoint.<sup>48</sup>

The same conclusion of continuity was also reached by the arbitral tribunal in the *Ottoman Public Debt* case (1925). Sole arbitrator Borel concluded that Turkey was the continuing State of the Ottoman Empire:

[À] l'égard de la D.P.O., [Ottoman public debt] la situation juridique de la Turquie n'est nullement identique à celle des autres États intéressés. En droit

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*University of St. Thomas Journal of Law and Public Policy* (2009-2010) 75; M. Bibliowickz, 'The Armenian Genocide: Legacies and Challenges of a Silenced Past', 16 *Sri Lanka JIL* (2004) 41; Toriguian, *supra* note 32, p. 109-112; Joe Verhoeven, 'The Armenian People and International Law', in Gerard Libaridian (ed.), *A Crime of Silence, The Armenian Genocide: Permanent Peoples' Tribunal* (Zed Books Ltd., London, 1985), pp. 206-7; Ziemele, *supra* note 17, 215.

43 Zamuner, *supra* note 21, 230-231.

44 Zamuner, *ibid.*, note 19, 224-7; Cansacchi, *supra* note 17, 32.

45 Emphasis added.

46 Zamuner, *supra* note 21, 224.

47 Article 58 reads as follows: "Turkey, on the one hand, and the other Contracting Powers (except Greece) on the other hand, reciprocally renounce to all pecuniary claims for the loss and damage suffered respectively by Turkey and the said Powers and their nationals (including juridical persons) between the 1st August 1914, and the coming into force of the present Treaty, as the results of acts of war or measures of requisition, sequestration, disposal or confiscation."

48 Other provisions of the Lausanne Treaty also support this continuity thesis: Articles 30, 46, 60, 65, 240, 241.

*international, la République turque doit être considérée comme continuant la personnalité de l'Empire ottoman.*<sup>49</sup>

The District Court of Amsterdam in the 1925 case of *Roselius* also arrived at the same conclusion:

Although Turkey was no longer an Empire but a Republic and its size had been considerably curtailed after the Great War by loss of territory, yet it could not be considered that the Republic was not the successor of the Empire. The remaining part, which was the main portion of the country, was the continuation of the State which, under another form of government and larger in size, had formed Turkey, and it had retained all its rights and duties except such as were attached to the lost territories.<sup>50</sup>

The *Lighthouse Arbitration* case (further discussed below) decided in 1956 by the French-Greek Arbitral Tribunal also explicitly recognised that Turkey was the continuing State of the Ottoman Empire.<sup>51</sup>

## 2 Rules of International Law on International Responsibility for a Continuing State

The logical consequence of an identity of State is the *continuity of rights and obligations* between the two entities.<sup>52</sup> Thus, if one concludes that entity A (at one point in time) is, in legal terms, identical to entity B (at another point in time), it must logically follow that the rights and obligations which were those of entity A will remain those of entity B. Thus, because entities A and B have the same international personality, it follows that there is a continuity of rights and obligations.<sup>53</sup> This section examines whether the same principle

49 *Affaire de la dette publique ottomane*, 18 April 1925, *U.N.R.I.A.A.*, vol. 1 (1948), p. 573.

50 *Roselius and Company of Bremen in Germany (plaintiff) v. (1) Dr. Ch. F. Karsten, Advocate of Huizen in Holland (defendant); (2) The Turkish Republic at Angora (intervener)*, 1925, District Court of Amsterdam, *Annual Digest* (1925-1926), no. 26.

51 *Lighthouse Arbitration* case (*Sentence arbitrale en date des 24/27 juillet 1956 rendue par le Tribunal d'arbitrage constitué en vertu du Compromis signé à Paris le 15 juillet 1932 entre la France et la Grèce*), French-Greek Arbitral Tribunal, Award of 24/27 July 1956, *U.N.R.I.A.A.*, vol. 12, p. 155, 23 *I.L.R.* (1956), pp. 91, 93.

52 Hans Kelsen, *Principles of International Law*, 2nd ed. (rev. and ed. by Robert W. Tucker) (Holt, Rinehart & Winston Inc, New York, 1966), p. 383. See also Ian Brownlie, *Principles of Public International Law*, 6th ed., (Clarendon Press, Oxford, 2003), p. 80.

53 Stern, *supra* note 8, 41.

applies to obligations arising from international wrongful acts, which were committed *before* any territorial changes took place.<sup>54</sup> In other words, does the continuing State also remain responsible for such wrongful acts? It should be noted that since Turkey is the continuing State of the Ottoman Empire, the controversial question of State succession to international responsibility simply does not arise.

First, we examine case law and State practice in the context of *cession of territories*. This is relevant because the Ottoman Empire's decline was marked by a number of 'cessions' of territories (where territories formally part of the Empire were ceded to other already existing States).<sup>55</sup> Case law and State practice show that the State which continues to exist (the continuing State) after the cession of part of its territory to another State (the successor State), will continue to be held responsible for *its own* internationally wrongful acts committed before the date of succession (i.e., the date when the cession of territory took place).<sup>56</sup>

This principle was applied, *inter alia*, by several municipal courts of the successor State (to which the ceded territory was now attached) in the context of the transfer of the territory of Bessarabia from Soviet Russia to Romania in April 1918<sup>57</sup> as well as by French courts<sup>58</sup> and the French-German

54 This question is further examined in Patrick Dumberry, 'Turkey's International Responsibility for Internationally Wrongful Acts Committed by the Ottoman Empire,' 42 *Revue générale de droit* (2012) 562-589.

55 See, for instance, the territories of Bessarabia (ceded to Russia in 1878), Bosnia and Herzegovina (ceded to the Austria-Hungary Empire in 1908), the Island of Crete (ceded to Greece in 1913), Macedonia (ceded to Greece in 1913), and the Island of Cyprus (which was leased to the United Kingdom in 1878, and later became a British Protectorate in 1914). After the War, several other territories were also ceded to the Allies, which established protectorates over them: the United Kingdom in Mesopotamia (now Iraq) and Palestine, and France in Syria and Lebanon.

56 Case law and State practice is examined in detail in Patrick Dumberry, *State Succession to International Responsibility* (Martinus Nijhoff, Leiden, 2007), p. 124.

57 *Mordcovici v. P.T.T.*, 29 October, 1929, Romania, Court of Cassation, *Buletinul deciziunilor Inaltei Curti de Casatie*, LXVI (1929), Part 2, p. 150, *Annual Digest* (1929-1930), p. 62; *Sechter v. Ministry of the Interior*, 1929, Romania, Court of Cassation, *Jurisprudenta Română a Inaltei Curti de Casatie si Justitie*, vol. XVII, no. 4 (1930), p. 58, and *Annual Digest* (1929-1930), case no. 37; *Vozneac v. Autonomous Administration of Posts and Telegraphs*, 22 June 1931, Romania, Court of Cassation, *Jurisprudenta Română a Inaltei Curti de Casatie si Justitie*, 1932, pp. 36-38, *Annual Digest* (1931-1932), case no. 30.

58 *Alsace-Lorraine Railway v. Ducreux Es-qualité*, 30 March 1927, French Court of Cassation, Civil Chamber, 55 *J.D.I.* (1928) at p. 1034; *Sirey*, 1928, Part I, p. 300, *Annual Digest* (1927-1928), p. 85;

Mixed Arbitral Tribunal<sup>59</sup> in the context of the cession of the territory of Alsace-Lorraine from Germany to France in 1919.

Another illustration of the application of this principle is the *Lighthouse Arbitration* case involving concession rights obtained in 1860 by a French company from the Ottoman Empire for maintaining lighthouses in Crete – a Greek territory under Ottoman sovereignty at the time. Several claims (contractual and delictual) were brought by the French owner of the concession (*la Société Collas et Michel*) against Greece after the latter gained sovereignty over the territory (in 1913) and decided to expropriate the concession during World War I. In Claim no. 12-a, France was seeking damages against Greece (as successor State) for acts committed by the authorities of the Ottoman Empire on the Island of Crete. The Arbitral Tribunal ultimately ruled that the Ottoman authorities had not committed any wrongful act. It added that, had the Ottoman Empire committed such an act, Greece could nevertheless not be held liable since Turkey was the continuing State of the Ottoman Empire and as such it would be liable for its ‘own’ acts committed before the loss of a substantial portion of its territory.<sup>60</sup>

Second, case law and State practice in the context of secession should be considered. Again, this is pertinent since the Ottoman Empire’s decline was also marked by a series of ‘secessions’ (where new States were created).<sup>61</sup> Case law and State practice show that the continuing State remains responsible for any international wrongful acts committed before changes affecting its territory.<sup>62</sup>

For instance, this is the situation that prevailed in the context of the break-up of the Austria-Hungary Dual Monarchy after World War I, which was considered by the Allies as a case of a series of secessions by Poland, Czechoslovakia, and Yugoslavia (which all became new States), with both Austria and Hungary remaining the continuing States.<sup>63</sup> The Allies insisted on both States being considered as continuing States precisely to ensure that they would be held

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*Kern v. Chemin de fer d'Alsace-Lorraine*, 16 May 1927, Cour de Colmar (Première Ch, civile), 56 *J.D.I.* (1929) 446 *et seq.*

59 *Levy v. German State*, French-German Mixed Arbitral Tribunal, Award of 10 July 1924, *Recueil des décisions des tribunaux arbitraux mixtes*, vol. IV, p. 726, *Annual Digest* (1923-1924), case no. 27.

60 *Lighthouse Arbitration* case, *supra* note 50, at p. 108.

61 See, for instance, secessions by Greece (1832), Serbia (1878), Romania (1878), Montenegro (1878), Bulgaria (1908), and Albania (1913). Several new States were also created in the Arabian Peninsula after the War: Hejaz, Idrisi Emirate of Asir, and Yemen.

62 See the analysis in Dumberry, *supra* note 56, p. 142.

63 See the discussion in Marek, *supra* note 7, p. 220 *et seq.*

responsible for internationally wrongful acts committed by the Dual Monarchy during the War.<sup>64</sup> The *Peace Treaty of St. Germain* (entered into by the Allies and Austria) clearly considers the break-up of Austria-Hungary as a case of secession with Austria as the continuing State. The Treaty contains a provision indicating Austria's responsibility for the War.<sup>65</sup>

In sum, case law and State practice in both contexts of cession of territories and secession shows that the continuing State remains responsible for any international wrongful acts committed before changes affecting its territory. Since the Turkish Republic is the same State as the Ottoman Empire, it follows that there is a continuity of rights and obligations between the two entities. As a result, under international law the Turkish Republic is responsible for *any* internationally wrongful acts that took place before 1923. This conclusion applies to all wrongful acts, including acts of genocide. This is the position adopted by a number of writers.<sup>66</sup>

## Conclusion

The conclusion of the foregoing argument is that Turkey should be considered under international law as the 'continuing' State of the Ottoman Empire. This has some important consequences in terms of responsibility for internationally wrongful acts. Case law and State practice in the context of secession and cession of territory are clear: the continuing State remains responsible for *its own* internationally wrongful acts committed before the date of succession. Turkey should therefore be held responsible for all internationally wrongful acts committed by the Ottoman Empire (including acts of genocide) which were committed before, during, and after World War I. This being said, many different hurdles (including issues of jurisdiction) remain before Turkey is *actually* held responsible for any acts committed by the Ottoman Empire. For instance, which international court would have jurisdiction over such claim?

64 J.H.W. Verzijl, *International Law in Historical Perspective*, t. VII (*State Succession*) (A.W. Sijthoff, Leiden, 1974), p. 126.

65 *Treaty of Peace between the Allied and Associated Powers and Austria; Protocol, Declaration and Special Declaration*, St. Germain-en-Laye, 10 September 1919, entered into force on 16 July 1920, see at Article 177, *U.K.T.S.* (1919), no. 11 (Cmd. 400), Article 177.

66 Alfred de Zayas, 'The Twentieth Century's First Genocide: International Law, Impunity, the Right to Reparations, and the Ethnic Cleansing Against the Armenians, 1915-16', in S.B. Vardy & T. Hunt Tooley (eds.), *Ethnic Cleansing in 20th Century Europe* (Columbia University Press, New York, 2003); Dadrian, *supra* note 42, 75,76; Bibliowicksz, *supra* note 42 41; Oktem, *supra* note 26, p. 581.

The possibility to submit a claim before a municipal court against Turkey seems remote considering State's jurisdictional immunity. Also, in a post-War agreement between Turkey and the United States, the latter waived its rights (as well as that of its nationals) to claim any reparation against Turkey for acts that took place during the War.<sup>67</sup> Similarly, under Article 58 of the Lausanne Treaty, the Contracting Powers have renounced to "all pecuniary claims for the loss and damage" suffered by them (and their nationals) as a result of "acts of war or measures of requisition sequestration, disposal or confiscation" committed by Turkey during the War in exchange for Turkey's reciprocal renunciation to any damage claims against the Contracting Powers.

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67 *Agreement regarding the Settlement of the Claims Embraced by the Agreement*, 24 December 1923, signed at Ankara, 25 October 1934, *League of Nations: Treaty Series*, 1935, pp. 391, 392. It provides for a final settlement of the claims of American citizens for acts committed during the First World War in return for a lump-sum payment by Turkey of US\$1,300,000. Under the Agreement, Turkey is effectively released from any liability with respect to all such claims by US nationals. The Agreement was recently enforced in the context of court proceedings in US Courts: *Deirmenjian v. Deutsche Bank, A.G.*, 525 F. Supp. 2nd 1068 (C.D. Cal, 14 December 2007). See "California District Court Finds Post-World War I Agreements with Turkey Trump California Armenian Genocide Statute", 102 *AJIL* (2008) 349.