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The First Wave of International War Crimes Trials: Istanbul and Leipzig

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The Nuremberg tribunal following the Second World War is universally considered as the foundation stone of international law with regard to war crimes and crimes against humanity. It may come as a surprise, however, to learn that the first international attempts to prosecute war crimes and crimes against humanity came at the end of the First World War, with trials held at Allied prompting in Turkey and Germany.

Already, during the First World War, the Allies had accused Turkish officials of committing acts against the Armenian population that amounted to 'crimes against humanity'. The concept 'genocide' not having been invented until 1944, the usual term at the time was massacres. However, contemporaries such as Lord Bryce recognized that the Young Turk government intended to 'exterminate' the Armenians, and historians outside Turkey increasingly apply the term 'genocide' retrospectively to these events. Estimates of the total number of deaths range from 150,000 (the figure given by the Turkish Historical Society) to 1.5 million (Armenian estimate). In March 1919, the Turkish minister of the interior produced the figure of 800,000.[1] One million (out of a contemporary Ottoman Armenian population of some 1.8 million) is the consensus among international scholars.

The Allies put pressure on the post-war government of Turkey to prosecute those allegedly responsible for the mass killing of the Armenians. Turkey at the time was divided, with an Allied occupation in Constantinople (called Istanbul from 1930) in European Turkey, and a rival parliament and national movement in what became the new capital in Ankara. The courts martial in Istanbul prosecuted 200 of those responsible in 35 trials in 1919–1920.[2] Just as great power involvement played a role in the development of the Ottoman policy of genocide, bungled great power intervention ensured that the judicial process against the perpetrators was aborted after a promising start.

In signing the Treaty of Versailles in June 1919, Germany agreed to extradite those accused of committing war crimes. In 1920, the Allies submitted a list for the extradition of alleged German war criminals for judgment before an international tribunal. Hundreds of officers and political leaders were charged with responsibility for waging ruthless warfare, killing thousands of civilians during the invasion of Belgium and France in 1914, cruelty to prisoners of war, U-boat warfare in which unarmed civilians and non-combatants were drowned, and laying waste to territory during the German retreats in 1917 and 1918. The German government, supported by nationalist street protests, persuaded the Allies to suspend extradition. In the end, Germany extradited none of the accused, and put 45 men on trial before the Supreme Court at Leipzig in 1921.

Istanbul

Extraordinarily early – only a few weeks after the start of deportations and mass killings in March 1915 – the British, French and Russian governments announced on 24 May their intention to prosecute Turkish crimes: 'In view of those new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime-Porte [Ottoman government] 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.'[3] This was the first time the concept 'crimes against humanity' was used in the history of international law.[4] A moral imperative lay at the heart of the process. Similar sincere feelings of outrage at German violations of international law in 1914 had impelled Britain, France, and Belgium to collect evidence, with the publicly announced intention to prosecute German war criminals after the war.[5]

Yet, in the case of Turkey, the issue was clouded by great power politics – the British and French war aim of permanently excluding Ottoman rule from Europe and extending their own influence in the Middle East.

The Sykes–Picot agreement of November 1915 for the division of the Ottoman Empire remained secret, but British statesmen had made clear in public their sympathy for the Armenian claims. Balfour, the foreign secretary, stated in the House of Commons the intention not to allow 'Armenia … to be put back under Turkish rule', and to remove 'from under Turkish rule people who are not Turks, who have been tyrannized over by the Turks … and who, I believe, would flourish under their own rule'.[6] There was likewise no secrecy about the British support for the Arab nationalist revolt against the Ottoman empire; and the British answer to the revolutionary Bolshevik government's support for the self-determination of nations was a policy that combined the rhetoric of democratization and national rights with imperialism. The British government could thus link 'the liberation of Armenia, a desolated country where Britain had no … territorial

interests … with the liberation of strategically important, oil-rich and fertile Mesopotamia.'[7] As Sir Mark Sykes, the influential War Office member of a British government committee on the Middle East, put it in November 1917: 'The Armenian question is the real answer to Pan-Turanism (i.e. the radical Young Turk plans for territorial expansion into Central Asia) just as free Arabia is the answer to Turkish pan-Islamism.'[8] An independent Armenia would be a pro-British, Christian buffer state between Bolshevik Russia and Turkey.

After the Bolsheviks called on Muslims to liberate themselves from British rule, threatening British control over India and the Mid-East, that need became more urgent.[9] In January 1920, the Allies recognized the Republic of Armenia, but failed to guarantee its existence.[10] Britain, in its post-war crisis of imperial overstretch, without the financial means, the political will, or the economic necessity, to act against Turkey, relied instead on a naval presence in the Dardanelles, small Allied occupation forces in Istanbul, Cilicia and Syria, and diplomatic pressure on the Ottoman government.[11] Inter-allied disunity, with rival imperialist claims on Ottoman territory by Britain, France, Italy, and Greece, and above all Anglo-American de facto approval of the Greek occupation of Smyrna/Izmir, did not redound to the credit of those claiming moral superiority over alleged war criminals. This fuelled a nationalist remobilization based in Ankara that soon gained the initiative over the Istanbul government, which was seen as collaborating with the Allies.[12]

In the period between the armistice on 31 October 1918 and the treaty of Sèvres on 10 August 1920 the Allies warned the Sultan and the Ottoman government to prosecute the suspects or face harsh international measures, including, they intimated, the division of Turkey.[13] Immediately after the armistice many of the leading members of the CUP (Committee of Union and Progress, i.e. the ruling Young Turk party) fled abroad to escape prosecution, but the government of Ahmet Izzet (who came into office on 14 October 1918) remained under its influence. The government continued to view the deportation of the Armenians as a necessity of war, refused to distance itself from the measures, and ordered the official records relating to the genocide to be destroyed. Ahmet Izzet's government was forced to resign on 8 November 1918 because of criticism of its evident lack of intent to prosecute and for allowing Talaat Pasha, Enver Pasha, and other suspects to escape on board a German destroyer.[14]

The new government of Tevfik Pasha undertook the first serious steps to investigate and prosecute the crimes. Special courts martial to prosecute the perpetrators of the genocide were established by decree of the Sultan and the council of ministers of 14 December 1918.[15] A parliamentary commission produced files of evidence on 130 suspects, which it handed to the special courts martial in January 1919.[16] The subsequent trials took place under the governments of Damat Ferit, in office from 4 March 1919.[17] The records of some of the trials

conducted by the special court martial in Istanbul have now been published by Taner Akçam in German translation.

The British wanted to prosecute Turkish war criminals before their own courts in British-occupied Ottoman territory, and demanded the extradition of the other suspects from Ottoman sovereign territory for trial before an international tribunal. In May 1919 they arrested several suspects, removed other detainees from prison, and interned on Malta 118 men pending trial 'for crimes against humanity' before an international tribunal which they hoped would be established.[18] The government in Istanbul protested, stating this infringed their sovereignty, and arrested suspects accused by the British of maltreatment of prisoners of war, in order to pre-empt their extradition. Lacking both incriminating evidence from the Turkish government, which refused to cooperate, and also lacking support from the French to put pressure on the Turkish government, the British dropped the demand for extradition, and released the prisoners at various stages between spring 1920 and November 1921.[19] Although the government of Tevfik Pasha pretended to cooperate with the British by making 100 arrests, many of the most prominent suspects were tipped off about impending raids, so they had time to destroy incriminating documents and disappear.

The subsequent government of Damat Ferit proved to be more sincere in its resolve to prosecute war criminals, arresting many important suspects.[20] It had its own reasons to take measures against the CUP, which was blamed for the disastrous war, political abuses, and economic crimes. The political forces opposed to the CUP included the Sultan, Damat Ferit, and many civil servants, retired officers, and intellectuals and journalists, and the desire for retribution was widely expressed in the press.[21]

Plentiful testimony was provided to the courts martial by Armenian survivors, American and German diplomats, and by Turkish witnesses at the Istanbul trials held after the war; there were also dozens of telegraphic orders to and from the provinces.[22] One of the officials who was centrally involved in the genocide proudly wrote that he 'sought to exterminate the Armenian nation to the last person … 300,000 Armenians … more or less, I did not count them. Wherever they rebelled against my state, I crushed and punished them with reserve forces.'[23]

In the first important trial, Mehmet Kemal Bey, who had been deputy district commissioner of Yozgat, was sentenced to death for his role in the massacres, and executed on 10 April 1919. The mood in the country, which at first had been in favour of punishing those responsible for war crimes, began to shift. The funeral was the occasion for a nationalist, anti-British demonstration, in which the executed official was called an 'Islamic martyr'. The nationalist reaction against the trials intensified when the Greeks invaded Turkey, occupying Smyrna in May 1919, and unleashing massacres of Moslems. The French and British refusal to rein in the Greeks, despite warnings by the British high commissioner of the risk

of violent repercussions on the Armenians, was a lost opportunity to exert a positive influence on Turkey. Worse still, rumours emerged of plans for a 'Greater Armenia', and the short-lived Armenian government in Erivan poured petrol on the fire by announcing on 28 May the intention to annex Turkish Armenia. The French use of the 'Légion Arménienne' – an unruly group of volunteers – in their occupation of Cilicia confirmed Turkish suspicions that imperialist rule threatened Ottoman sovereignty and ethnic Turkish interests.[24]

A rival nationalist government based in Ankara under Ali Riza Pasha, a supporter of Mustafa Kemal, at first also complied with the Allied request for trials. Soon, however, it halted the investigations against those responsible for the Armenian massacres and banned the return of surviving Armenians to their homes. Ankara took British officers and civilians as hostages, and forced the British to release some of those interned in Malta in spring 1920.[25] Meanwhile the British occupation in Istanbul arrested suspects in cooperation with the Ottoman authorities. The state was beginning to break up, with the Ottoman government prosecuting not only those guilty of genocide but also sentencing to death in absentia some of the nationalist leaders of Anatolia, including Mustafa Kemal. Two more perpetrators of the massacres were executed in 1920.[26]

This process fuelled the resurgence of the nationalist movement in Ankara. The British arrest of nationalist leaders on 16 March 1920 prompted Mustafa Kemal, chairman of the Ankara national assembly, to call for the 'liberation of the Caliphate with the help of Allah'.[27] The Ankara government released the suspects it had in custody, and closed the courts martial by August 1920. The Ottoman government in Istanbul continued prosecutions for a while, mainly to obtain lenient treatment at the peace conference, until Kemal threatened to kill the British hostages. By signing the Treaty of Sèvres on 10 August 1920, the Ottoman government agreed to extradite 'those responsible for the massacres' for trial by an international tribunal yet to be constituted. The Ankara government saw no further incentive to cooperate, and next day it announced the closure of all courts martial in Anatolia dealing with the 'deportations'.[28] It promised disingenuously to put on trial those interned in Malta if the British returned them to Turkey, citing the German offer to try its suspects in Leipzig as a precedent. The British finally agreed to a deal in which the hostages were freed in return for the suspects in custody in Malta. In return, the Ankara government broke its promise to try the men, and instead gave them high offices in government.[29] For example, Şükrü Kaya, who was 'General director of the office for the resettlement of nomadic tribes and refugees' in the interior ministry and thus responsible for the deportations of Armenians, had frankly told the German consul at Aleppo who was attempting to have a group of Armenians freed in December 1915: 'You do not seem to understand what we want. We want an Armenia without Armenians.' He managed to escape from British custody in Malta in 1921, and by 1924 Mustafa

Kemal had appointed this Turkish Adolf Eichmann to the government; he was minister of the interior from 1927 to 1938.[30]

The net result of the Istanbul trials was that 17 men were condemned to death, mainly in absentia, including the leadership of the Young Turk party, the CUP; among them was Dr Bahaeddin Şakir, the political director of the 'Special Organization' which had planned and orchestrated the genocide. In the end only three junior officials were executed.[31] The failure of the trials was due partly to the overt intervention of high politics into international criminal prosecutions. Contamination of the judicial process by politics is often difficult to avoid in international law even today. The fact that the international legal framework was still in its infancy made it too easy for the Turkish national movement to reject the Allied demand for punishment of the guilty as interference in national sovereignty, and the Allied occupation and division of Anatolia reinforced this view. The Allies were not prepared to distinguish between the two issues of sovereignty and legal process. In fact, Sultan Vahdettin claimed the British told him that the trials were the precondition for the sovereignty of the Ottoman Empire.[32] It was impossible for the Allies to deny the Turkish accusation that this was part of an imperialist policy to extend their influence in the Near East.

At the Lausanne Conference at the end of 1922, unlike at Sèvres, the Armenian delegations were refused entry. The Allies admitted that it was impossible to force Turkey to continue the prosecutions because no one wanted to go to war against Turkey, and there was in any case no longer allied unity, with some states supporting Turkey with money and arms. The Turkish representative put forward what has since become the official standpoint: Turkey had been forced to take punitive measures of self-defence against the Armenians during the war, for which the Armenians themselves were to blame because of their subversion and their calls for foreign intervention. The conference passed a general amnesty that ended the prosecutions of the perpetrators of the genocide.[33]

The Prosecution of German war criminals[34]

The Allied governments had originally wanted at least 1590 German suspects to be extradited on war crimes charges. The British prime minister, Lloyd George, was in favour of exemplary punishment of a much smaller number of prime criminals, between 50 and 60; at one point he said: 'If even 20 were shot it would be an example.' But it was impossible to ignore public opinion and also the deeply held convictions of French and Belgian officials who did not want to drop the prosecutions, and the British succeeded only in having the list pared to 862 suspects. These suspects consisted of 334 each from the lists of Belgium and France (making up three-quarters of the final list), 97 from the British list (including the nine Turkish suspects who had fled to Germany), and over 100

others. Prominent figures in public life were named, including Germany's best-known officers such as Hindenburg, Tirpitz, Bülow, and Ludendorff, along with the former chancellor Bethmann Hollweg.

The individuals sought for extradition were charged with various types of crimes. The greatest number, 18%, related to the killing of civilians in the invasion of Belgium and France, and in total 37% of the charges related to crimes committed during the invasion in 1914. Other major categories included crimes against prisoners of war (14%), and deportations of civilians. On allied definitions these were 'atrocities' and 'war crimes' by contemporary understanding (the term 'war crime' having been introduced in 1906 by the German-British international lawyer Lassa Oppenheim).

The publication of the extradition list in Germany in early February 1920 was greeted with what appeared to be a spontaneous outburst of anger, including street violence and mass meetings denouncing the affront to national honour. In fact, it was a propaganda campaign orchestrated by right-wing nationalist associations, secretly coordinated by the Defence Ministry. As in post-armistice Turkey, there had been a significant body of opinion in Germany that demanded prosecutions of war criminals, as well as judicial investigation of those responsible for the decisions to go to war, starting with the Social-Democratic demand for a *Staatsgerichtshof*, or state tribunal, shortly before the end of the war, and the calls by left-wing socialists for the ex-Kaiser and Ludendorff to be shot. Largely owing to the British fear of chaos in an already unstable Germany, the Allies acceded to the request of the German government to prosecute the accused before the Supreme Court in Leipzig, the *Reichsgericht*. Although an even stronger desire for justice and retribution than in the Turkish case drove the Allied demand for extradition, for most of the victims were Allied civilians and military personnel, it is clear that high politics again took precedence: the Allied concession was a part of Lloyd George's broader shift to a policy of conciliating Germany.

Nevertheless, the Allied wish for prosecutions was no mere diplomatic game or theatrical gesture to satisfy the public at home. Gerd Hankel, who published the first full study of the Leipzig trials, puts it like this: the war crimes trials were 'the expression of a deep-rooted conviction that after this war, the duration and harshness of which no-one had predicted, one could not simply return to the order of the day.' At the heart of it was the intention to apply 'a civilisatory achievement', the legal restraint on the violence of war, in order to prevent future war crimes.[35]

A great deal therefore rested on the Leipzig court. Failure to comply with the Allies could have had serious repercussions, as with the default on reparations that led the French to occupy the Ruhr. Yet finding former soldiers guilty, many of them illustrious senior officers, and sentencing them to prison, could have had equally destabilizing consequences.

Of the original list of 862 alleged war criminals submitted to Germany by the Allies, 45 were chosen to be tried at Leipzig as an initial test of Germany's good will. In the event, the Allies chose not to have the leading figures like Hindenburg and Ludendorff prosecuted in these test cases. In 1921–22, seventeen cases were heard, of which ten ended with convictions and seven with acquittals. The British declared themselves satisfied with the outcome, although the extent of the penalties was hardly commensurate with the large number of war crimes committed. Light sentences were imposed on three junior officers for brutality towards prisoners of war; and two junior U-Boat officers were found guilty and jailed for 10 years for failing to stop their commander from firing on survivors of a hospital ship they had torpedoed. German eagerness to prosecute in the British cases stemmed from the correct prediction that the British would be easiest to satisfy, and that once satisfied, the impetus for the trials would abate. The Leipzig court could afford to pass judgments that more or less satisfied the British because these cases did not affect the principles of German land warfare. There was also the (not unjustified) assumption that the Allies could be divided, since the British were evidently more inclined to appease Germany than the French and Belgians.

The Belgian and French cases were far less satisfactory. The Belgian delegation departed from Leipzig in protest, after the court acquitted a German officer who had tortured Belgian boys aged 9 to 12 to extract confessions of sabotage. The remaining Belgian cases were therefore dropped. In one French case, the killing of between 100 and 200 French wounded soldiers captured at Ethe and Goméry in August 1914, the court did not even open proceedings, although German witnesses gave plausible evidence.[36] The general commanding the 5th army corps, von Strantz, was held not responsible because he had not given any criminal orders, and the combat officers who had given criminal orders were not prosecuted because the court found exonerating circumstances in that they had allegedly been fired on by civilians. The case against General Stenger for having issued orders in August 1914 to kill all captured and wounded French soldiers exemplified the bias of the court and led the French to abandon the process. The judge clearly favoured General Stenger and penalized instead his co-accused Major Crusius, who was the chief witness implicating Stenger. General Stenger did not deny saying that the captured and wounded Frenchmen should be killed, but claimed he had not issued an official order to that effect. In fact there was excellent, copious evidence from German soldiers that he had issued an order, which officers and men felt bound to carry out, although there were also several men and officers who refused to do so. Crusius was sentenced to two years in prison for manslaughter; Stenger was acquitted.[37] The court reached this extraordinary verdict by rejecting as unreliable the evidence of German soldiers attesting to criminal orders, because the men were untrustworthy Alsatians, or allegedly deserters.

The explanation for the judgments of the *Reichsgericht* lay not only in its desire to exonerate the Imperial army. There were two other reasons: first, it was to send a message about national sovereignty to Germany's former enemies. As such, it was a part of nationalist mythmaking tolerated by Weimar's democratic governments. The second explanation lies in the history of German legal doctrine. Before 1914, Germany differed from the democratic nations in its implacable rejection of the developments towards humanitarian international law. The German concept of '*Kriegsräson*' ('military necessity'), i.e. the need to commit an act illegal in international or national law, justified virtually any action in the interest of swift victory, and it contrasted with the acceptance of limitations on military necessity by American, British, French, and Italian authors.[38]

The court followed the principle that German military law took precedence over international law, even when, as with the Hague Convention, the German government had signed an agreement to incorporate it into domestic military law. This is proved by the 1916 edition of the commentary on the military penal code: 'Commanding power … may explicitly or implicitly declare international law to be a part of its will, but it can also reject it in part or totally. It is therefore basically always our own law, and only our own law, that determines our way of war.'[39] Seldom does one find such a frank admission of dissent from international law.

After withdrawing from Leipzig, the Allies condemned the trials as unsatisfactory, and reserved their right to demand extradition. Although the French still wanted to have German war criminals extradited, the British blocked them. France and Belgium proceeded to hold trials in absentia in the 1920s, and by December 1924 the French courts had found more than 1200 Germans guilty. In turn the *Reichsgericht* continued to work through the caseload from the extradition list, and also those who had been found guilty by Belgian and French courts, a total of over 1700 cases, the purpose being to exonerate the men. The Reich prosecutor instituted proceedings, conducted an investigation usually on the basis of army internal enquiries, official war diaries, and even official war histories, and then published the decision not to proceed with prosecution or with formal acquittals. The accused almost invariably did not have to appear. Even where there was sufficient German testimony to convict the accused, the court generally decided to acquit. If no other legal argument could be found, then it was stated that the accused 'lacked awareness of illegality' ('fehlendes Unrechtsbewußtsein').[40] In general, the *Reichsgericht* maintained the fiction of massive partisan warfare in Belgium and France in 1914 and therefore found no injustice had been committed in the mass killing of civilians to contain it.[41]

In almost every sense, Leipzig was indeed unsatisfactory, both for the Allies, and for the Germans who resented the entire process. In the sense of John Horne's question in his introduction to this Focus, we can ask whether Leipzig captured

'the enormity of the collective crimes for which individuals were being prosecuted'. The answer, of course, is no, because the trials gave the impression of finding guilty only a few expendable individuals guilty of gross transgressions, while the general, collective crimes of the land army were exonerated. Only in one sense do subsequent generations have some cause for satisfaction. The investigations carried out by the Reich prosecutor's office were actually based on thorough research in army records, producing thousands of files that can be used by historians and lawyers to understand the dynamic of the commission of war crimes and the development of legal doctrine.

Vahakn Dadrian has argued that the Allies brought the failure of the Istanbul trials upon themselves 'by allowing the Ottoman government to remain in place after its defeat in the war'.[42] With hindsight, this seems obvious in the light of the successful occupation of post-Second World War Germany. Other, more recent occupations, suggest that even humanitarian international interventions can have unintended and undesirable outcomes. Dadrian's conditions for the success of intervention to protect vulnerable minorities are: wars to prevent genocide, followed by 'a clear and decisive victory, a concomitant unconditional surrender, and a firm resolve to prosecute and apply penal sanctions.'[43] These are unduly stringent and take no account of the range of less bellicose options, and ignore the fact that genocide can take place in the absence of full-scale war. Dadrian's argument that 'the Turks, like the Germans following World War I, were unwilling to accept the collective guilt that these domestic trials represented'[44] underrates the internal political willingness to condemn the war regime of the CUP. It also implies that the German people were 'collectively' guilty for the crimes of its army in the First World War and those of the regime in the Second World War, and were made to feel collectively guilty by the Nuremberg Tribunal. However, it can be argued that the judgments at Nuremberg served to create a politically useful division between the two dozen identifiable perpetrators found guilty and the mass of the people who could absolve themselves of responsibilty.[45]

When Raphael Lemkin invented the term genocide in 1944, he invoked the Armenian case as a definitive example of genocide. Yet neither Istanbul nor Leipzig was a precedent for Nuremberg. Rather, dissatisfaction with the failure of international law made the Allies resolve in the Second World War not to leave the prosecution of war criminals to the perpetrator states. Istanbul and Leipzig did not create any institutional instrument of international law, but left instead a legacy of important judicial concepts (among them crimes against humanity, and the possibility of prosecuting the highest representatives of a state, including the head of state). In that sense, therefore, Nuremberg, the UN resolution on genocide in 1946, and today's International Criminal Tribunal at The Hague have been constructed on the experience of Leipzig and Istanbul. In a broader sense, the attempt to prosecute those guilty of the Armenian genocide implanted in the

international public sphere a new consciousness and a will, however imperfectly realized, to intervene. Sir Hartley Shawcross, the British chief prosecutor at Nuremberg, referred to the Armenian genocide as a case justifying international intervention and limiting the sovereignty of states:

> Normally International Law concedes that it is for the State to decide how it shall treat its own nationals; it is a matter of domestic jurisdiction …. Yet International Law has in the past made some claim that there is a limit to the omnipotence of the State and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon his rights in a manner which outrages the conscience of mankind.[46]

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45. Admittedly, Norbert Frei sees West German popular rejection of the perceived accusation of 'collective guilt' (never actually raised by the Allied prosecutors) as the predominant reaction to Nuremberg. N. Frei (2001) Der Nürnberger Prozeß und die Deutschen, in *Kriegsverbrechen im 20. Jahrhundert*, W. Wette and G.R. Ueberschär (eds) (Darmstadt: Wissenschaftliche Buchgesellschaft), pp. 477–492.
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