

From the 1915 allied joint declaration to the 1920 Treaty of Sèvres : back to an international criminal law in progress

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Abstract

Soon after World War I, the 1923 Treaty of Lausanne burries the Armenian question. Nevertheless, the 1915 Allied Declaration, the 1919 Paris Peace Conference's work and the 1920 Treaty of Sèvres are key documents for a better understanding of the emergence of international criminal law. In particular, they constitute a legal basis for major innovations such as: the conceptualization of "crime against humanity"; the recognition of the principle of individual criminal responsibility of leaders; and the attempt to materialize the idea of an international judicial intervention in internal State affairs for the defense of the fundamental rights of human beings.

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From the 1915 Allied Joint Declaration to the 1920 Treaty of Sèvres: Back to an International Criminal Law in Progress

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“History only tastes bitter to those who expected it to be sugar coated.”

- Chris Marker²

WHILE THE FIRST WORLD WAR captivated the world’s attention, the Young Turk government was carrying out its drastic plan of “Turkification” of the Ottoman Empire through deportations and the systematic extermination of the Armenians of Turkey.³ A month after the beginning of what would later be termed “genocide,” France, Great Britain, and Russia issued a stern warning via a Joint Declaration dated May 24, 1915.⁴ Their condemnation was clear:

In view of those *new crimes of Turkey against humanity and civilization*, the Allied governments announce publicly to the Sublime-Porte that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres⁵ (*emphasis added*)

The declaration was important on several fronts. First, it stood as the first “official” appearance of the concept of *crime against humanity* at the international level, which would be confirmed decades later by judges at the international tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR).⁶ Furthermore, the use of the word *crime* conveys the recognition of criminal responsibility. But while France, Great

Britain, and Russia explicitly recognized the individual responsibility of heads of state (in this case those of the Ottoman Empire), disregarding the established principle of immunity for heads of state and diplomatic agents, they did not envisage punishing those responsible. Nevertheless, their condemnation, though political in nature, was decisive insofar as qualifying, for the first time, malevolent acts of leaders against their own nationals, outside of the context of war, as “crimes against humanity and civilization.”

In addition, this new concept constituted an *incrimination without infraction*—that is, the recognition of a crime which had yet to be codified. Indeed, the acts in question would constitute a violation of not one or multiple laws, but violations against “humanity” or “civilization.” How these two terms were used at the time remains ambiguous. Documents from that era provide little in the way of helping one understand what the term “humanity” signified.⁷ As for the term “civilization,” it seemed to refer to a fundamental idea inherent to the future international prosecution of crimes against humanity, according to which “*civilization* itself becomes the plaintiff.”⁸

Finally, the expression *new crimes* can signify three things, either: (1) condemnation of the crimes committed by the Ottoman Empire in 1915 against its Armenian nationals, while implicitly recalling that similar atrocities had already been committed against the Armenian population since the end of the 19th century; or (2) expression of the willingness to create a new concept to denounce a particular and specific form of criminality, distinguished from previous acts by its extent and gravity, or (3) recognizing that these are crimes that had already been committed in the past, it may be presumed that only those crimes perpetrated after May 1915 are liable to be condemned—a way, perhaps, of underscoring indirectly the non-retroactive character of the Declaration.

As such, it would seem that the most novel element was the expression of a necessity to *punish* the actions of the Turkish leaders. Indeed, the Treaty of Berlin of July 13, 1878, which legalized the principle of humanitarian intervention by the Great Powers into the Ottoman Empire in such a way that raised the Armenian question within the domain of positive international law, had already authorized European

states to “supervise” the Sublime Porte with regards to the future treatment of its Armenian minority (article LXI).⁹ Yet, this text only spoke of the necessity of surveillance—of which the modalities had to be defined—and not of a necessity for judicial intervention.

The attempt to prosecute, on legal grounds, those Turkish leaders responsible for the violence against the Armenian population would only take place years later in Paris during the Peace Conference of 1919. Although the idea, which was itself widely accepted at the time, to criminally punish breaches committed outside the scope of warfare perpetrated by a third country against its own nationals constituted a remarkable innovation, its effective implementation would be doomed to fail.

The Will to Punish a New Form of Criminality at the 1919 Paris Peace Conference

While the deliberations of the Paris Peace Conference got underway, the so-called Commission of Fifteen (led by the American Secretary of State, Robert Lansing, and given the task of determining responsibility for violations of the laws and customs of war) was envisaging—simultaneously with the prosecution of war criminals—the prosecution of Turkish authorities for “crimes against the laws of humanity” for their acts against the Armenian population of the Ottoman Empire, outside the scope of international armed conflict.

It is noteworthy that four years after the initial use of the expression “crime against humanity” the willingness to create a new category of crimes independent from war crimes remained unequivocal. Indeed, Nicolas Politis, the Greek Minister of Foreign Affairs and member of the Commission of Fifteen, proposed the adoption of this new offense with the aim of bringing to justice those Turkish leaders responsible for the massacres and deportations. Conscious of the legal impediments posed by the creation of this new offense, Politis sought to justify his initiative through qualifying the aforementioned malevolent acts as *grave offenses against the “rights of humanity,”*¹⁰ without necessarily proposing a definition or even a more precise scope.

After initial hesitations, the Commission agreed to take steps to undertake the prosecution of Turkish authorities for “crimes against

the laws of humanity.” In a report dated March 5, 1919, the Commission specified the violations committed by the leaders of the Ottoman Empire: systematic terrorism, murder and massacre, abuse against women, confiscation of private property, pillage, arbitrary destruction of public or private property, deportation and forced labor, execution of civilians based on false allegations of war crimes, and violations against civilian and military staff.¹¹ The influence of the list drawn up by the 1919 Commission would prove to be important in the process of elaborating the legal definition of a crime against humanity during the preparatory work of the Nuremberg Charter in the aftermath of the Second World War.¹² It is, hence, not surprising that judges of the ICTY and the ICTR would often make reference to the work of the Paris Peace Conference.¹³

Days later, on March 14th, the Armenian national delegation submitted a supplementary factum to the Commission. After a reference to the Allied Declaration of May 24, 1915 and a denunciation of the “passive and culpable attitude of the German government,” the document stipulated that the “real persons responsible” were those who conceived the project of exterminating the Armenian population, gave orders to that end, organized the killings, and/or led the massacres.¹⁴ In other words, the document stated that those principally responsible were the leaders, with the crimes in question having been recognized as having a eminently political nature—that is to say, they were politically planned.¹⁵

In its final report of March 29, 1919, the Commission of Fifteen concluded that there existed grave offenses against *the laws and customs of war* on the one hand, and against *the laws of humanity* on the other. Both types of crimes—*war crimes* and *crimes against the laws of humanity*—were characterized as liable to criminal prosecution.¹⁶ Hence, the Commission took into account the atrocities committed by Ottoman Turkey against its Armenian nationals outside of the context of an international armed conflict. Although in this specific case the Commission sought to interfere within the internal affairs of Turkey so as to prosecute breaches outside the context of war, the very notion of “laws of humanity” and that of “crimes against the laws of humanity,” however, appeared only within legal texts relating to warfare. Even

still, the Commission chose to base its accusations against the Turkish authorities on the aforementioned charges given the absence of a more suitable source of positive international law. The connection between *war crimes* and *crimes against the laws of humanity*, both types of crimes being at once distinct by nature and related through their shared legal foundation, would subsist until the verdict reached at Nuremberg.¹⁷

In this way, the Commission acted upon the warning set out in the Declaration of May 24, 1915. Whereas the new offense, the principle of the responsibility of Turkish leaders, and the necessity of a prosecution were accepted by the Commission of Fifteen (despite the reservations iterated by the Americans denouncing a non-respect for the principle of legality),¹⁸ the choice of means to prosecute offenders still posed a problem.

In order to avoid intervening directly in the judicial process against Turkish leaders (in the absence of appropriate legal instruments), the Allies suggested that Turkey first put in place a special national tribunal charged with prosecuting the accused offenders, even before the beginning of the deliberations of the Paris Conference. This procedure would eventually prove to be inefficient.¹⁹ The Commission of Fifteen's reference to the crimes committed against the Armenians in its final report of March 29, 1919, would secondly make possible the insertion of several articles in the 1920 Treaty of Sèvres that provided for the prosecution of Turkish leaders within an international jurisdiction. However, this initiative would prove to be in vain: Turkey would never ratify the treaty.

The Failure to Implement the International Prosecution of Turkish Leaders

The legal contribution of the Treaty of Sèvres (August 10, 1920) regarding the peace between Turkey and the Allies, imposed by Article 22 of the Covenant of the League of Nations, is significant on several fronts. The treaty, "in view of the terrorist regime which existed in Turkey since November 1, 1914," provided for the invalidation of all conversions to Islam of persons who were non-Moslems,²⁰ as well as for "the deliverance of all persons, of whatever race or religion, who have disappeared, been carried off, interned or placed in captivity" since that date, "in order to

repair so far as possible the wrongs inflicted on individuals in the course of the massacres perpetrated in Turkey during the war (article 142)."²¹

The treaty also organized "the return to their homes and re-establishment in their businesses of the Turkish subjects of non-Turkish race who have been forcibly driven from their homes by fear of massacre or any other form of pressure since January 1, 1914" (article 144). It then specified that the "Turkish Government recognizes that any immovable or movable property of the said Turkish subjects or of the communities to which they belong, which can be recovered, must be restored to them as soon as possible, in whatever hands it may be found,"²² and that it "agrees that arbitral commissions shall be appointed by the Council of the League of Nations wherever found necessary (*idem*)."

More particularly, article 230 of the treaty obliged the "Turkish Government to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914." In such, the Allies reserved "to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognize such tribunal"—which could be a tribunal created by the League of Nations, if done "in sufficient time (*idem*)."

The Treaty of Sèvres echoed the final report of the Paris Peace Conference by taking into consideration two distinct types of crimes, even if the distinction was implicit. It considered *war crimes* as acts contrary to the laws and customs of war and so-called *massacres* as acts considered contrary to the laws of humanity. It is nevertheless important to note that the terms "crimes against the laws of humanity" and "laws of humanity," though used during the 1919 Paris Conference, were, at no time, referred to in the 1920 treaty. Indeed, the legal provisions that were violated in the case of crimes considered "massacres" were never specified.

However, the willingness of the Allies to distinguish between the two categories of the above-mentioned crimes was displayed in the editorial choices within the various provisions. Indeed, the articles concerning the acts committed by Turkey against the nationals of the

Allied Powers systematically referred to the expression “acts contrary to the laws and customs of war;” those concerning the acts committed by Turkey against its own non-Muslim nationals (i.e., the Armenians) referred to the expression “massacres.” In the present case, one may understand the word “massacres” as a synonym for “crimes against the laws of humanity.”

This distinction was particularly clear in provisions relating to sanctions (Part VII of the Treaty of Sèvres, articles 226 and later). On the one hand, the treaty provided for the prosecution of “persons accused of having committed acts in violation of the laws and customs of war” before military tribunals “notwithstanding any proceedings or prosecution before a tribunal in Turkey or in the territory of her allies (article 226).”²³ On the other, it provided for the prosecution of persons accused of having committed “massacres” on the Turkish Empire’s territory before a special international court (article 230).

Although different, war crimes and massacres nevertheless remained intimately linked. Massacres referred to in the treaty of August 10, 1920 were those committed *during the First World War*, though the crimes in question were not war crimes *per se*. Moreover, the two types of crimes summoned, according to the Allies, the jurisdiction of military tribunals. The connectivity hereby established between two forms of criminality (a link already noted in the final report of the Commission of Fifteen when referring to the legal basis of the two offenses) would be used in the same way, a quarter century later, in the charter and verdict of the Nuremberg International Military Tribunal.²⁴

One could imagine that such a link between the two categories of crimes was necessary in order to counter the legal problems raised by this international text. Indeed, the weakness of the Treaty of Sèvres in relation to the question of “massacres” resided within its retroactive character, because this offense did not exist in international law at the time of the acts nor did it exist in domestic Ottoman law.²⁵ In addition, the 1920 treaty did not specify the relevant jurisdiction, the applicable law, or the punishment allotted.

Yet, such reasoning assumes that the provisions concerning “war crimes” did not, on the contrary, constitute new, retroactive, and imprecise law. In other words, the assumption is that international legal

texts allowing the prosecution and trying of the acts committed during the First World War were already in existence. But this was not the case. None of the treaties concluded at the time of the events allowed for the incrimination and sanctioning for violations of the rules established by these instruments. Although in 1914 the laws and customs of war were codified in the Hague Conventions (of which the Ottoman Empire was a state party), positive international law did not, however, contain any norm permitting the criminal prosecution of war crimes. Even the Treaty of Versailles of June 28, 1919, which outlined the peace between Germany and the Allied Powers and meant to lay the foundations for the prosecution of German war criminals (including Kaiser Wilhelm II), was in reality drafted in such a way that rendered the desire to prosecute a dead letter. In short, the only function of the 1919 treaty was to condemn politically the aforementioned war crimes.²⁶

The link established between *war crimes* committed against the nationals of the Allied Powers and the *massacres* (or crimes against the laws of humanity) committed against the Armenians in Turkey was hence mainly relevant from the point of view of the respect for the principle of state sovereignty. To associate these two categories of crimes implied that the massacres were crimes of such magnitude that they could no longer simply be considered the domestic affairs of the Ottoman Empire and would, thus, be of equal concern to the Allies as war crimes. This came back to justifying the will of the Allied Powers to try acts committed by a third state against its own nationals, especially given that the treaties authorizing the Europeans to intervene in the Ottoman Empire for humanitarian reasons had been annulled by Turkey since 1914.²⁷

Not surprisingly, the Treaty of Sèvres, ignored by the Kemalists and denounced by Constantinople, would never come into force. Rather it would be replaced by the Treaty of Lausanne (July 24, 1923) signed between Kemalist Turkey and the Allies, which does not contain any provisions related to the prosecution of Turkish nationals for these specific crimes. The reason for launching such a unique policy of state denial, is “obvious:”²⁸ “the ‘Declaration of Amnesty’ for all offences committed between 1914 and 1922, which the Allies gave Turkey as part of the Treaty of Lausanne’s political package.”²⁹

Soon after World War I, the Armenian Question would be buried and along with it the hope to implement and make use of the nascent concept of “crime against humanity.” The words of the legal scholar Eugène Aronéanu, written in reference to this episode in history, are eloquent: “We had donned with a new fake hat (the term ‘war crime’) the head of a veritable new body (crimes against humanity) that we dressed with old fake clothing (the laws of war). Once made up, the misdemeanor was hardly recognizable and its perpetrators nowhere to be found.”³⁰

Nevertheless, the contribution of the 1915 Allied Declaration, the 1919 Commission’s work, and the 1920 Treaty of Sèvres is revolutionary and remains a “key” for a better understanding of the emergence of international criminal law. These documents are the legal basis for major innovations that constitute precedents for the elaboration of the Nuremberg Charter, such as: the conceptualization of *crime against humanity*; the recognition of the *principle of international individual criminal responsibility of leaders*;³¹ and the attempt to materialize the idea of an *international judicial intervention* in internal state affairs for the defense of the fundamental rights of human beings.

The legal definition and the subsequent implementation of the concept of crime against humanity would be developed some twenty years later with the establishment of the Nuremberg Tribunal which would be the first *ad hoc* international criminal jurisdiction. Yet, in many respects, the context would then be slightly different from that of the aftermath of World War I. First, the victorious powers would show themselves to be a cohesive and united group in the face of a recently vanquished common adversary.³² Further, they would have to deal with a German state not only occupied, but also legally inexistent after having lost its sovereignty (according to the terms of the Declaration of Berlin of June 5, 1945).³³ Finally and foremost, the victims of crimes against humanity being not exclusively German nationals, the Great Powers would, for the first time, have direct political interests in rendering this new form of judicial interference more concrete.³⁴ The most spectacular reversal would be that of the American government which, after 1943, had radically altered its more fainthearted attitude on display in 1919.³⁵

Following the work of the League of Nations and the doctrinal debates of the 1920s, the American and Allied governments would make numerous declarations condemning the “inhuman crimes” of the Nazi regime. They would stand together in the belief that judicial interference is necessary, even if the terms of such an intervention would remain vague. In light of these public declarations, the distinction between actual war crimes and the atrocities perpetrated against civilian populations outside the context of warfare, which underscored the deliberations of the 1919 Paris Conference, would be apparent.³⁶

Meeting in London in 1945 to negotiate the Nuremberg Charter, the Americans and the Allies would finally be confronted with the unanswered question dating from the First World War—in particular, the question of how to reconcile the creation of new laws tackling specific forms of state criminality with respect for the principles of legality and state sovereignty. As Cherif Bassiouni observes rightly, “[t]he reluctance to recognize ‘crimes against the laws of humanity’ in the post-World War I era as prosecutable and punishable international crimes [would come] back to haunt the very same Allies, and particularly the United States, after World War II.”³⁷

NOTES

- 1 The author is grateful to Sébastien Malo for his contribution to the translation of this paper initially written in French, as well as to Jeff Kalousdian for his careful rereading.
- 2 Chris Marker, *Sunless* (film), 1982.
- 3 For historical studies, see for example: Richard Hovannisian ed., *The Armenian Genocide. History, Politics, Ethics* (London: St. Martin Press, 1992); Vahakn Dadrian, *Histoire du génocide arménien* [History of the Armenian Genocide] (trans. Marc Nichanian) (Paris: Stock, 1996); Vahakn Dadrian, *Warrant for Genocide. Key Elements of Turko-Armenian Conflict* (New Brunswick & London: Transaction Publishers, 1999); Taner Akcam, *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (trans. Paul Bessemer) (New York: Metropolitan Books, 2006); and Raymond Kevorkian, *Le génocide des Arméniens* [The Genocide of the Armenians] (Paris: Odile Jacob, 2006).
- 4 For developments on the position of the United States, refusing to sign the Joint Declaration despite the numerous and sharp encouragements of the American ambassador Henry Morgenthau and the very important media coverage (particularly in the *New York Times*), see Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Harper Perennial, 2003), 5 ff. At the time Henry Morgenthau

described the mass murder in question as a “*race murder*” (*Ibid.*, 6). See also Roupen P. Adalian, “L’ambassadeur Morgenthau et l’élaboration de la politique américaine de protestation et d’intervention contre le génocide” [Ambassador Morgenthau and the Elaboration of the American Protest and Intervention Policy Against the Genocide] *Revue d’histoire de la Shoah*, no. 177-178 (2003): 425-435. More generally, on the American position toward the Armenian question: Jay Winter ed., *America and the Armenian Genocide of 1915*. (Cambridge: Cambridge University Press, 2003); Peter Balakian, *The Burning Tigris: the Armenian Genocide and America’s response. A History of International Human Rights and Forgotten Heroes* (New York: Harper Collins Publishers, 2003) and Simon Payaslian, *United States Foreign Policy toward the Armenian Question and the Armenian Genocide* (New York: Palgrave-McMillan, 2006).

- 5 The complete 1915 Joint Declaration read: “For about a month the Kurd and Turkish populations of Armenia has been massacring Armenians with the connivance and often assistance of Ottoman authorities. Such massacres took place in middle April (new style) at Erzerum, Dertchun, Eguine, Akn, Bitlis, Mush, Sassun, Zeitun, and throughout Cilicia. Inhabitants of about one hundred villages near Van were all murdered. In that city Armenian quarter is besieged by Kurds. At the same time in Constantinople Ottoman Government ill-treats inoffensive Armenian population. In view of those new crimes of Turkey against humanity and civilization, the Allied governments announce publicly to the Sublime-Porte that they will hold personally responsible [for] these crimes all members of the Ottoman government and those of their agents who are implicated in such massacres.” Armenian National Institute. “France, Great Britain and Russia Joint Declaration.” http://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html (accessed February 10, 2009). For a reproduction of the French version, see Arthur Beylerian, *Les grandes Puissances, l’Empire ottoman et les Arméniens dans les archives françaises (1914-1918)* [The Great Powers, the Ottoman Empire and the Armenians in the French Archives (1914-1918)] (Paris: Publications de la Sorbonne, 1983), 29. That same day, the *New York Times* printed an article titled: “Allies to Punish Turks Who Murder,” *New York Times*, May 24, 1915.
- 6 In particular: ICTY Judgment, Trial Chamber II, *Dusko Tadic*, 7 May 1997, IT-94-1, § 618, and ICTR Judgment, Trial Chamber I, *Jean-Paul Akayesu*, 2 September 1998, ICTR-96-4, § 565.
- 7 See Antonio Cassese, “Crimes Against Humanity: Comments on Some Problematical Aspects,” in *The International Legal System in Quest of Equity and Universality. Liber Amicorum Georges Abi-Saab*, ed., Laurence Boisson de Chazournes and Vera Gowlland-Debbas (The Hague, London, Boston: Martinus Nijhoff Publishers, 2001), 431: “Indeed, they did not ask themselves, nor tried to establish in practice, whether by ‘humanity’ they meant ‘all human beings’ or rather ‘the feelings of humanity shared by men and women of modern nations’ or even ‘the concept of humanity propounded by ancient and modern philosophy.’”
- 8 Famous statement made by Robert H. Jackson, American prosecutor at Nuremberg.
- 9 On this topic, see G. Rolin-Jaequemyns, “Le droit international dans ses rapports avec les événements contemporains (chronique du droit international): l’Arménie, les Arméniens et les traités” [International Law in Contemporary Events (International Law News): Armenia, Armenians and Treaties] *Revue de droit international et de législation comparée* (1887): 320 ff.
- 10 Vahakn Dadrian, *Histoire du génocide arménien*, 483.

- 11 *Ibid.*
- 12 For developments: Sévane Garibian, *Le crime contre l'humanité au regard des principes fondateurs de l'Etat moderne. Naissance et consécration d'un concept* [Crime Against Humanity and the Founding Principles of the Modern State. Birth and Consecration of a Concept] (Geneva, Paris, Brussels: Schulthess, LGDJ, Bruylant, 2009), chapter 2, section 1, § 2. Let us recall the definition of crime against humanity according to article 6 (c) of the 1945 Nuremberg Charter: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."
- 13 In particular: ICTY Judgment, Trial Chamber II, *Dusko Tadic*, 7 May 1997, IT-94-1, § 663, and ICTR Judgment, Trial Chamber I, *Jean-Paul Akayesu*, 2 September 1998, ICTR-96-4, § 565.
- 14 See Commission des responsabilités des auteurs de la guerre et sanctions, *Recueil des mémoires déposés par les différentes délégations sur le bureau de la sous-Commission des faits criminels* [Collection of the Memorandum Registered by the Different Delegations at the Office of the Sub-Commission on Criminal Facts] *Conférence des préliminaires de paix, 3 February-29 March 1919*, 156 ff.
- 15 *Ibid.*, 157.
- 16 *Violation of the Laws and Customs of War* (Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities), Conference of Paris (Washington D.C.: Carnegie Endowment for International Peace, 1919): 19.
- 17 On this topic: Sévane Garibian, "Souveraineté et légalité en droit pénal international: le concept de crime contre l'humanité dans le discours des juges à Nuremberg" [Sovereignty and Legality in International Criminal Law: the Concept of Crime Against Humanity in the Discourse of the Nuremberg Judges], in *Le droit pénal à l'épreuve de l'internationalisation*, ed., Marc Henzelin and Robert Roth (Paris, Geneva, Brussels: LGDJ, Georg, Bruylant, 2002): 29-45.
- 18 "(...) the American members declared that there were two classes of responsibilities, those of a legal nature and those of a moral nature, that legal offences were justiciable and liable to trial and punishment by appropriate tribunals but that moral offences, however iniquitous and infamous and however terrible in their results, were beyond the reach of judicial procedure, and subject only to moral sanctions" (*Violation of the Laws and Customs of War*, 58-59); "The American Representatives also believe that the above observations apply to liability of the head of a State for violations of positive law in the strict and legal sense of term. They are not intended to apply to what may be called political offences and to political sanctions" (*Ibid.*, 66). Be it noted that this reasoning leads to the theoretical question most often raised about the Nuremberg experience, i.e., the question of the *nature of the judgment*. See Sévane Garibian, "Crimes Against Humanity and International Legality in Legal Theory After Nuremberg." *Journal of Genocide Research* (2007): 93-111.
- 19 See Vahakn Dadrian, *Autopsie du génocide arménien* [Autopsy of the Armenian Genocide] (trans. Marc et Mikaël Nichanian) (Brussels: Complexe, 1995) and Raymond Kevorkian, "La Turquie face à ses responsabilités. Le procès des criminels Jeunes-Turcs (1918-1920)" [Turkey Facing its Responsibilities: the Trial of the Young-Turk Criminals (1918-1920)], *Revue d'histoire de la Shoah*, no. 177-178 (2003): 166-205.
- 20 "[U]nless, after regaining their liberty, [those persons] voluntarily perform the

- necessary formalities for embracing the Islamic faith (article 142).”
- 21 Being added in the same article that “[t]he Turkish Government undertakes to facilitate the operations of mixed commissions appointed by the Council of the League of Nations to receive the complaints of the victims themselves, their families or their relations, to make the necessary enquiries, and to order the liberation of the persons in question;” and that “[t]he Turkish Government undertakes to ensure the execution of the decisions of these commissions, and to assure the security and the liberty of the persons thus restored to the full enjoyment of their rights.”
- 22 According to the same provision, “[s]uch property shall be restored free of all charges or servitudes with which it may have been burdened and without compensation of any kind to the present owners or occupiers, subject to any action which they may be able to bring against the persons from whom they derived title.” It must be noted that article 144 did not allow for compensation for victims whose goods remained missing, nor did it allow for compensation commensurate with the offense or abuses suffered. But it did specify that “[t]he Turkish Government recognizes the injustice of the law of 1915 relating to Abandoned Properties (*Emval-i-Metroukeh*), and of the supplementary provisions thereof, and declares them to be null and void, in the past as in the future.” On the matter of the “abandoned properties” raised before the Council of the League of Nations in 1925, after the signature of the 1923 Treaty of Lausanne: Gilbert Gidel, Albert de Lapradelle, Louis Le Fur and André Mandelstam, *Confiscation des Biens des Réfugiés Arméniens par le Gouvernement Turc* [Confiscation of the Properties of Armenian Refugees by the Turkish Government], (Paris: Imprimerie Massis, 1929) (legal consultation).
- 23 According to article 227, “[p]ersons guilty of criminal acts against the nationals of one of the Allied Powers shall be brought before the military tribunals of that Power,” and “[p]erson guilty of criminal acts against the nationals of more than one of the Allied Powers shall be brought before military tribunals composed of members of the military tribunals of the Powers concerned.” The latter option reminds us of the Nuremberg experience.
- 24 Sévane Garibian, “Souveraineté et légalité en droit pénal international: le concept de crime contre l’humanité dans le discours des juges à Nuremberg,” 29-45.
- 25 Note that retroactive laws were strictly banned at article 15 of the Ottoman penal code.
- 26 See James Brown Scott, “Le procès du Kaiser” [The Trial of the Kaiser], in *Ce qui se passa réellement à Paris en 1918-1919 (Histoire de la Conférence de Paix)*, ed., Edward Mandell House and Charles Seymour (Paris: Payot, 1923): 184-202. For recent developments on this point: Sévane Garibian, *Le crime contre l’humanité au regard des principes fondateurs de l’Etat moderne...*, chapter 1, section 2, § 1, B.
- 27 Vahakn Dadrian, *Autopsie du génocide arménien*, 67-68.
- 28 Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (The Hague, London, Boston: Kluwer Law International, 2nd ed. 1999), 68.
- 29 *Ibid.*
- 30 Document dated September 3, 1946 and registered at the Nuremberg Tribunal under the following reference: Dc F775.19, 15, quoted in French in Annette Becker, “L’extermination des Arméniens, entre dénonciation, indifférence et oubli, de 1915 aux années vingt” [The Extermination of the Armenians, Between Denunciation, Indifference and Oblivion, from 1915 to the Twenties]. *Revue d’histoire de la Shoah*, no. 177-178 (2003): 309: “On avait vêtu d’un faux chapeau neuf (le terme de crime de guerre) la tête d’un corps véritablement nouveau (le crime contre l’humanité) que

l'on a habillé d'un faux vieux vêtement (les lois de la guerre). Ainsi maquillé, le forfait était méconnaissable et ses auteurs introuvables."

- 31 Even though it is a *political* recognition. According to Cherif Bassiouni, the non-ratification of the Treaty of Sèvres followed by the adoption of the Treaty of Lausanne is a "clearly politically motivated decision" which "did not, however, alter the fact that criminal responsibility had been recognized, though actual prosecution of individual offenders was subsequently foregone." See Cherif Bassiouni, "Crimes Against Humanity," in *International Criminal Law*, ed., Cherif Bassiouni (New York: Transnational Publishers, Inc., 2nd ed. 1999, volume I), 541.
- 32 See Vahakn Dadrian, "The Armenian Genocide and the Legal and Political Issues in the Failure to Prevent or to Punish the Crime," *University of West Los Angeles Law Review* 29 (1998): 77.
- 33 For a detailed analysis: Hans Kelsen, "The Legal Status of Germany according to the Declaration of Berlin," *The American Journal of International Law* 39 (1945): 518-526.
- 34 See James F. Willis, *Prologue to Nuremberg. The Politics and Diplomacy of Punishing War Criminals of the First World War* (Connecticut: Greenwood Press, 1982), 163: "The first tentative step toward defining and punishing genocide failed because of Turkish nationalism and Allied indifference. The Armenians, victims and survivors, had been virtually unrepresented in Allied councils. They were too easily ignored and forgotten. The League of Nations might have established an international tribunal to bring to justice men whose policies and actions had led to the death of hundreds of thousands of Armenians, an act of genocidal magnitude. But the League ignored this effort, and the British mishandled and then abandoned it. Of all failures to punish the war criminals of the First World War, this one was, perhaps, most regrettable, and it would have terrible consequences." See also Vahakn Dadrian, "The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice," *Yale Journal of International Law* 23 (1998): 558: "Most important, many of the nations participating in the judicial prosecution of Nazi crimes were, next to the Jews, the principal victims of Nazi atrocities. It is appropriate to wonder whether the victorious Allies would have contemplated, let alone instituted, war crimes trials at all if the Jews and the Gypsies had been the sole victims of the Nazis. As Holmes commented, there is no substitute for lived experience as an impetus for lawmaking."
- 35 See Telford Taylor, *Procureur à Nuremberg* [Prosecutor at Nuremberg] (trans. Marie-France De Paloméra) (Paris: Seuil, 1995), 45.
- 36 See Sévane Garibian, *Le crime contre l'humanité au regard des principes fondateurs de l'Etat moderne...*, chapter 2, section 1, § 1, B.
- 37 Cherif Bassiouni, "The Time has Come for an International Criminal Court," *Indiana International and Comparative Law Journal*, (1991): 3-4.

BIBLIOGRAPHY

"Allies to Punish Turks Who Murder," *New York Times*, May 24, 1915.

Commission des responsabilités des auteurs de la guerre et sanctions, *Recueil des mémoires déposés par les différentes délégations sur le bureau de la sous-Commission des faits criminels* [Collection of the Memorandum Registered by the Different Delegations

at the Office of the Sub-Commission on Criminal Facts]. Conférence des préliminaires de paix, 3 February-29 March 1919.

Violation of the Laws and Customs of War (Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities), Conference of Paris. Washington D.C.: Carnegie Endowment for International Peace, 1919.

Adalian, Roupén P. "L'ambassadeur Morgenthau et l'élaboration de la politique américaine de protestation et d'intervention contre le génocide" [Ambassador Morgenthau and the Elaboration of the American Protest and Intervention Policy Against the Genocide]. *Revue d'histoire de la Shoah*, no. 177-178 (2003): 425-35.

Akcam, Taner. *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (trans. Paul Bessemer). New York: Metropolitan Books, 2006.

Balakian, Peter. *The Burning Tigris: the Armenian Genocide and America's response. A History of International Human Rights and Forgotten Heroes*. New York: Harper Collins Publishers, 2003.

Bassiouni, Cherif. "The Time has Come for an International Criminal Court." *Indiana International and Comparative Law Journal*, (1991): 1-43.

Bassiouni, Cherif. "Crimes Against Humanity." In *International Criminal Law*, edited by Cherif Bassiouni, 521-88. New York: Transnational Publishers, Inc., 2nd ed. 1999, volume I.

Bassiouni, Cherif. *Crimes Against Humanity in International Criminal Law*. The Hague, London, Boston: Kluwer Law International, 2nd ed. 1999.

Becker, Annette. "L'extermination des Arméniens, entre dénonciation, indifférence et oubli, de 1915 aux années vingt" [The Extermination of the Armenians, Between Denunciation, Indifference and Oblivion, from 1915 to the Twenties]. *Revue d'histoire de la Shoah*, no. 177-178, (2003): 295-312.

Beylerian, Arthur. *Les grandes Puissances, l'Empire ottoman et les Arméniens dans les archives françaises (1914-1918)* [The Great Powers, the Ottoman Empire and the Armenians in the French Archives (1914-1918)]. Paris: Publications de la Sorbonne, 1983.

Cassese, Antonio. "Crimes Against Humanity: Comments on Some Problematical Aspects." In *The International Legal System in Quest of Equity and Universality. Liber Amicorum Georges Abi-Saab*, edited by Laurence Boisson de Chazournes and Vera Gowlland-Debbas, 429-47. The Hague, London, Boston: Martinus Nijhoff Publishers, 2001.

Dadrian, Vahakn. *Autopsie du génocide arménien* [Autopsy of the Armenian Genocide] (trans. Marc et Mikaël Nichanian). Brussels: Complexe, 1995.

Dadrian, Vahakn. *Histoire du génocide arménien* [History of the Armenian Genocide] (trans. Marc Nichanian). Paris: Stock, 1996.

Dadrian, Vahakn. "The Armenian Genocide and the Legal and Political Issues in the Failure to Prevent or to Punish the Crime." *University of West Los Angeles Law Review* 29, (1998): 43-78.

Dadrian, Vahakn. "The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice." *Yale Journal of International Law* 23, (1998): 503-59.

Dadrian, Vahakn. *Warrant for Genocide. Key Elements of Turko-Armenian Conflict*. New Brunswick & London: Transaction Publishers, 1999.

Garibian, Sévane. "Souveraineté et légalité en droit pénal international: le concept de crime contre l'humanité dans le discours des juges à Nuremberg" [Sovereignty and Legality in International Criminal Law: the Concept of Crime Against Humanity in the Discourse of the Nuremberg Judges] in *Le droit pénal à l'épreuve de l'internationalisation*, edited by Marc Henzelin and Robert Roth, 29-45. Paris, Geneva, Brussels: LGDJ, Georg, Bruylant, 2002.

Garibian, Sévane. "Crimes Against Humanity and International Legality in Legal Theory After Nuremberg." *Journal of Genocide Research*, (2007): 93-111.

Garibian, Sévane. *Le crime contre l'humanité au regard des principes fondateurs de l'Etat moderne. Naissance et consécration d'un concept* [Crime Against Humanity and the Founding Principles of the Modern State. Birth and Consecration of a Concept]. Geneva, Paris, Brussels: Schulthess, LGDJ, Bruylant, 2009.

Gidel, Gilbert, de Lapradelle, Albert, Le Fur, Louis and Mandelstam, André. *Confiscation des Biens des Réfugiés Arméniens par le Gouvernement Turc* [Confiscation of the Properties of Armenian Refugees by the Turkish Government]. Paris: Imprimerie Massis, 1929.

Hovannisian, Richard ed. *The Armenian Genocide. History, Politics, Ethics*. London: St. Martin Press, 1992.

Kelsen, Hans. "The Legal Status of Germany according to the Declaration of Berlin." *The American Journal of International Law* 39, (1945): 518-26.

Kevorkian, Raymond. "La Turquie face à ses responsabilités. Le procès des criminels Jeunes-Turcs (1918-1920)" [Turkey Facing its Responsibilities: the Trial of the Young-Turk Criminals (1918-1920)]. *Revue d'histoire de la Shoah*, no. 177-178 (2003): 166-205.

Kevorkian, Raymond. *Le génocide des Arméniens* [The Genocide of the Armenians]. Paris: Odile Jacob, 2006.

Payashian, Simon. *United States Foreign Policy toward the Armenian Question and the Armenian Genocide*. New York: Palgrave-McMillan, 2006.

Power, Samantha. *'A Problem from Hell.' America and the Age of Genocide*. New York: Harper Perennial, 2003.

Rolin-Jaequemyns, G. "Le droit international dans ses rapports avec les événements contemporains (chronique du droit international): l'Arménie, les Arméniens et les traités" [International Law in Contemporary Events (International Law News): Armenia, Armenians and Treaties]. *Revue de droit international et de législation comparée*, (1887): 284-325.

Scott, James Brown, "Le procès du Kaiser" [The Trial of the Kaiser] in *Ce qui se passa réellement à Paris en 1918-1919 (Histoire de la Conférence de Paix)*, edited by Edward Mandell House and Charles Seymour, 184-202. Paris: Payot, 1923.

Taylor, Telford. *Procureur à Nuremberg* [Prosecutor at Nuremberg] (trans. Marie-France De Paloméra). Paris: Seuil, 1995.

Willis, James F. *Prologue to Nuremberg. The Politics and Diplomacy of Punishing War Criminals of the First World War*. Connecticut: Greenwood Press, 1982.

Winter, Jay ed. *America and the Armenian Genocide of 1915*. Cambridge: Cambridge University Press, 2003.