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“It Is Not Possible For Us That Injustice Be Justice” Some Remarks on the Soghomon Tehlirian Trial at Age 100

DANIEL-ERASMUS KHAN

Abstract How to deal with a “crime without a name”? Probably for the first time ever, this question arose in all its poignancy in the context of the Ottoman extermination policy against the Armenian people under the guise of World War One. Who could be made accountable, by whom, by which means and for something which only three decades later should be labeled “genocide”? On the occasion of the centenary of the sensational Soghomon Tehlirian trial in Berlin and against the background of the armenocide, the present article sketches various avenues to fight impunity and bring justice: From vigilante justice, to court proceedings, humanitarian intervention and eventually the work of truth commissions.

Keywords genocide, persecutions of Armenians, Ottoman Empire, (historical) co-responsibility, origins of international criminal law, vigilante justice, truth commissions

„Unrecht kann unmöglich Recht sein“
100 Jahre später: Einige Bemerkungen zum Prozess gegen Soghomon Tehlirian

Abstract Wie umgehen mit einem “Verbrechen ohne Namen”? Wohl erstmals überhaupt stellte sich diese Frage in aller Dringlichkeit im Zusammenhang mit der ottomanischen Vernichtungspolitik gegen das armenische Volk im Schatten des Ersten Weltkrieges. Wer konnte verantwortlich gemacht werden, durch wen, mit welchen Mitteln und für etwas, das erst drei Jahrzehnte später den Namen “Genozid” erhalten sollte? Der Aufsehen erregende Prozess gegen Soghomon Tehlirian in Berlin ist genau 100 Jahre her. Dies soll zum Anlass genommen werden vor dem historischen Hintergrund des “Armenozids” verschiedene Wege im Kampf gegen Straflosigkeit und für Gerechtigkeit zu skizzieren: Selbstjustiz, Gerichtsverfahren, humanitäre Intervention und die Arbeit von Wahrheitskommissionen.

Keywords Völkermord, Armenierverfolgung; Osmanisches Reich; (historische) Mit-Verantwortung; Ursprünge des Völkerstrafrechts; Selbstjustiz; Wahrheitskommissionen

“You too, gentlemen of the jury, have to be constantly aware that you cannot render a decision which is intellectually honest but contrary to your conscience, because it is not possible for us that injustice be justice (Adolf von Gordon, Defence Attorney)”¹

1 Berlin 1921: A Beautiful Crime?

Right in the centre of the Ararat Armenian cemetery in Fresno/California rises a 20 ft. tall monument, bearing the following inscription:

“[E]rected by the Armenian people in memory of Soghomon Tehlerian, the national hero who, on March 15, 1921, brought justice upon Talaat Pasha, a principal Turkish perpetrator of the Armenian genocide of 1915 which claimed the lives of 1.500.000 Armenian martyrs.”

The message to be conveyed here is plain and simple: If law enforcement institutions will not bring justice, then vigilantes will rightly take justice into their own hands. The monument is topped by a gold-plated eagle slaying a snake: Good overcomes evil! If only the legal and moral assessment of reality were always as simple as that.

The facts of what had happened on that very March 15, 1921 are well known and undisputed: At 11:00 o'clock on a cold wet morning Talaat Pasha, former Grand Vizier (Prime Minister), Interior Minister and head of a triumvirate (the “Three Pashas”), which ruled the Ottoman Empire with dictatorial power in its last years (1913–1918),² stepped out of his home in exile in Charlottenburg/Berlin. Walking toward Wittenberg Square, Pasha was shot in the head and killed instantly with a single bullet fired by Soghomon Tehlirian – right in front of Hardenbergstrasse 17, in broad daylight and in presence of numerous witnesses. Upon his prompt arrest, the young Armenian is reported to have said to the police: “It is not I who am the murderer. It is he.”³

This “Mord auf offener Straße”⁴ [“murder in the open street”] was immediately and widely covered, both in the German and international press.⁵ The very same evening, the Berliner Tagesblatt opened its reporting of the incident with the presumption that “[a] crime which, if the first rumours were true, would have the character of a political assassination, was committed today at noon in Hardenbergstrasse.”⁶ This presumption should prove entirely correct: Another “Nemesis Operation”⁷ had successfully been accomplished on that very day.

Four days later, the funeral service for Talaat Pasha witnessed an amazingly large gathering of high representatives of German politics, the military and the financial business – *inter*

1 Soghomon Tehlirian Trial Transcripts, 3rd State Court, Criminal Department, Berlin, 16 April 1921, http://www.armeniapedia.org/wiki/The_Case_of_Soghomon_Tehlirian (accessed on 15.01.2021).

2 The regime was backed by the Committee of Union and Progress (CUP), popularly known as the Young Turks.

3 The New York Times, Assassin Boast of Talaat's Death, 17 March 1921.

4 Headline in the Berliner Tagesblatt, 15 March 1921 (evening edition), p. 1.

5 Extensive press review: Böke 2012.

6 Berliner Tagesblatt, 15 March 1921 (evening edition), p. 1.

7 Greek goddess of divine retribution: Code word for an assassination campaign by the Armenian Revolutionary Federation carried out between 1920 and 1922, during which a number of former Ottoman political and military figures were assassinated for their part in the Armenian Genocide. On April 17, 1922, two other major responsables of the genocide (Cemal Azmi and Behaeddin Sakir) were assassinated in the immediate vicinity (Uhlandstraße). This time the two assassins were not even detained in Germany (for a very readable introduction into the whole operation see Bogosian 2015).

alia Ministerial Directors Goeppert and von Zimmermann, State Secretary von Kühlmann, Generals von Seeckt and Kress von Kressenstein, Director von Gewinner (Deutsche Bank) and Freiherr von Oppenheim. Among the funeral wreaths displayed at the occasion there was not only one of the Deutsche Bank, which had been instrumental in financing the Baghdad railway, the by far most important joint German-Ottoman economic project.⁸ The *Auswärtiges Amt* (German Federal Foreign Office), too, had sent a corresponding expression of condolence: “Dem großen Staatsmann und treuen Freund [For the great Statesman and loyal friend]”⁹ – thus the inscription on the wreath read.

It would certainly be too simplistic to view the mere presence of high representatives of German elites at this mourning hour on March 19, 1921 in Pasha’s (former) home in Hardenbergstrasse 4 as a manifestation of (unwavering) solidarity with the former war ally – years after the collapse of both, the Ottoman and the Imperial Empire.¹⁰ However, the one-sided and uncritical appreciation as “great Statesman and loyal friend” of someone who had acted – what was already common knowledge at the time – as a driving force behind the annihilation policy against his country’s Armenian population, does of course reveal certain worrisome continuities in patterns of thought and action: A tiny piece in the overall picture of “continuity” – aptly and against all odds drawn by Fritz Fischer, Immanuel Geiss and other historians since the 1960s?¹¹ Admittedly, probably just a curious anecdote in some kind of modern “folktale of justice”.¹² But yet a rather telling one.

2 The Armenocide: Hard but Useful?

At the time, many German (foreign) policy makers and military leaders had indeed good reasons to praise *Pasha* as a “great Statesman” rather than to have an all too close look at his darker legacy: “Father of Modern Turkey – Architect of the Genocide” – as very fittingly captured by the subtitle of a recent biography of this ambivalent personality.¹³ At a very early stage already, German policy and military decision-makers, through abundant consular dispatches and otherwise, knew perfectly well about its war ally’s extermination policy vis-à-vis the Armenians¹⁴ – and did virtually nothing to stop it. The nature and precise extent

8 Further, according to press reports (Talaat Is Mourned as Germany’s friend, The New York Times, 18 March 1921, not verified by the author), the Deutsche Bank had Talaat Paschas fortune of more than 10,000,000 marks in safekeeping.

9 Deutsche Allgemeine Zeitung, Talat Paschats Beisetzung, 19 March 1921.

10 It may be recalled that Friedrich Freiherr Kress von Kressenstein intervened on behalf of a few Armenian victims (Baumgart 2020, p. 469 [Diary of 1 November 1915]) and the general was in fact truly indignant about the persecutions, some of which he had witnessed himself (*ibid.*, p. 472 [Diary of 5 November 1915]; own translation): “The men were killed, the women violated and then killed or sold, the older children sold as servants.” In retrospect, however, von Kressenstein did concede (at least) a moral failure of his own, too (*ibid.*, p. 131 [Aus den Lebenserinnerungen 1913–1946]; own translation): “It was deeply shameful for us that we were forced by the war situation to cooperate with such beasts as the Turks and could not face them as humanity would have required.” On this widespread and rather convenient attitude: Berlin 1954, p. 77: “Determinism [...] is one of the great alibis, pleaded by those who cannot or do not wish to face the fact of human responsibility.”

11 Seminal: Fischer 1961 and 1979.

12 Expression borrowed from Cover 1984/85, pp. 179–203.

13 Kieser 2018.

14 Telegram of 7 July 1915 from the German Ambassador in Constantinople Wangenheim to Reichskanzler Bethmann Hollweg (with copies to the Ministries of Foreign Affairs and of the Interior), according to which there could be no doubt whatsoever “that the government is indeed pursuing its purpose of eradicating the Armenian

of Germany's involvement in the atrocities is still subject of a controversial, at times even heated debate among historians.¹⁵ To be sure: As Carl Alexander Kretzlow has recently set out with ample references,¹⁶ in order to do justice to the entanglement of German military personnel, careful differentiation is needed: By hierarchical levels, specific tasks and responsibilities, or simply with regard to the individual personality acting in a specific situation. It appears that historical research on this question is far from exhaustive yet and this article does not pretend to make an original contribution to this lively debate. However, driven by alleged imperatives of a coldly and mercilessly calculated *Realpolitik* ("Kriegsraison"),¹⁷ a deep entanglement of at least part of Germany's political and military leadership in what would later quite rightly be labelled "genocide" can hardly be denied.¹⁸ The atrocities against the Armenian civilian population in the Ottoman Empire occurred under the eyes of thousands of Germans on site: Militaries, diplomats, humanitarians, businessmen and others.¹⁹ There were indeed many who raised their voices against the omnipresent cruelties, however to no avail in Berlin.²⁰ The scope of the entanglement of others ranged from simply turning a blind eye on the gruesome events to deliberate failure to provide assistance to the victims, (tacit) encouragement and, regrettably enough, time and again even to active participation.²¹ The signing in October 1915 by Lieutenant Colonel Karl Anton Böttrich of a deportation ordinance for 848 Armenian workers of the Berlin-Baghdad railway issued by the Turkish War ministry may serve as but one, albeit rather significant example in this latter respect.²² As already widely known at the time, in the great majority of cases the term "deportation" served but as an euphemist equivalent for "blatant murder".²³ Indeed, none of these workers is known to have survived deportation.

race from the Turkish Empire" (*Politisches Archiv des Auswärtiges Amtes*, Political Archive of the Foreign Ministry (PP-AA), R 14086). Most of the pertinent German documents are now available (also in English) at <http://www.armenocide.de/> (accessed on 15.01.2021).

15 See more recently only Gottschlich 2015; Hosfeld/Pschichholz 2017; Stangeland 2013. For a succinct résumé of the discussion: Guillemaret-Acet 2016, pp. 160–164.

16 Kretzlow 2017.

17 Exemplary: "Our only objective is to keep Turkey at our side until the end of the war, regardless of whether or not Armenians will perish over it" (Chancellor Bethmann Hollweg, 17 December 1915, PA/R 14089 (own translation); cited after Hosfeld 2013, p. 24).

18 It is obviously not the place here to do justice to the positioning of all (the many) individual German officials involved in the gruesome events, which ranged from open indignation (e. g. Ambassador Wolff-Metternich) to willing assistance. For a recent, balanced picture see only Hull 2017, pp. 182–214. However, as several others, Midlarsky 2005, p. 219 comes to a more radical and rather bitter overall assessment: "In the Armenian case, both the onset and magnitude of genocide were facilitated by the Germans."

19 See only the testimony of Dr. Neukirch, Red Cross Hospital Erzincan, 29 June 1915: "Our psychological situation is terrible: due to the allied relationship we are forced to watch everything that is happening without being able to do anything other than write reports" (cited after Hoffmann 2015, p. 22).

20 Indeed, countless reports on the persecutions and massacres can be found both in (German) archives and in relevant publications (see [for the German Foreign Office Archive] only Gust 2005). Hence, it is all the more astonishing that this "flood of information" did obviously not make any discernible impression on the imperial decision-makers in military and politics.

21 Instructive: Kretzlow 2017, pp. 158 ff.

22 Detailed account: Kaiser 1999, pp. 67 ff. Another inglorious role was played by the Chief of Staff of the Deputy Commander of the IV Ottoman Army, Fahri Pasha, Major Eberhard Graf Wolffskeel von Reichenberg, *inter alia* in the attempt to prevent the escape of the Armenians at Musa Dagh (literarily processed in perfection by Werfel 1933).

23 As frankly admitted, e. g., by the Military Gouverneur and Chief of the Recruitment Bureau of Boghazliyan in a telegram of 22 July 1915 (cf. Höss 1992, p. 216).

Thus, it does not really come as a surprise that the Foreign Office's condolences on the death of Germany's loyal friend Talaat Pasha were delivered by Friedrich Graf Schulenburg.²⁴ In August 1915 the diplomate was posted as German liaison officer to the Ottoman Army on the Armenian Front and served, at the same time, as German Consul in Erzerum, too. Although archival material has not (yet) revealed any active participation of von Schulenburg in the ongoing and omnipresent displacement and extermination activities in the zone at stake, what has been brought to light is a startling and highly disturbing trivialisation and indifference towards the gruesome fate of the victims²⁵ – to say the least. However, what is resounding in this senior official's attitude is virtually nothing but an echo of the general stance of the Imperial government vis-à-vis the violent persecution of the Armenian population. The Director of the Political Department in the Foreign Office, Wilhelm von Stumm, in his reply to a question asked on the subject by Karl Liebknecht²⁶ on January 11, 1916 in a German *Reichstag* debate, casts a telling spotlight on this policy of trivialisation and denial:

*“The Chancellor is aware that some time ago, as a result of the rebellious activities of our opponents, the Sublime Porte evicted the Armenian population of certain parts of the Turkish Empire and reassigned them to new dwellings. Because of certain repercussions of this measure, an exchange of views is taking place between the German and Turkish Governments. No further details can be given.”*²⁷

A follow-up question by Liebknecht (“Is the Chancellor aware that Professor Lepsius²⁸ even spoke of an extermination of the Turkish Armenians [...]”) was brusquely interrupted, declared inadmissible and eventually banned by the President of the *Reichstag*.²⁹

“Talaat war ein Staatsmann, aber kein Mörder! [Talaat was a statesman, but not a murderer]”:³⁰ In these words Lieutenant General Bronsart von Schellendorf, former chief of Staff of the Ottoman Army and one of the closest witnesses of the extermination policy, wraps up his “Testimony pro Talaat Pasha”, published on July 24, 1921 in the “Deutsche

24 For a short biographical note: Hürter 2007.

25 See only, purely by way of example: “Die Armeniermassakres vom vorigen Jahre sind zu 99/100 Lüge, entsprungen der ungeheuren Feigheit dieses Volkes und der Übertreibungswut der Orientalen. Natürlich sind eine ganze Menge totgeschlagen und noch mehr unterwegs umgekommen, große Massakres sind nur sehr wenige vorgekommen” [“The Armenian massacres of last year are to 99 % lies; they result from the tremendous cowardice of this people and the Orientals’ incredible tendency to exaggerate. Of course, a great number of them were killed and even more died while travelling, but there were only very few large massacres” (*own translation*)] (Consul Schulenburg (Erzerum) to Embassy Counsellor Neurath (Constantinopel), Report of 16 April 1916, DE/PA-AA/BoKon/100 (Gust 2005, p. 463).

26 “Is the Chancellor aware that hundreds of thousands of Armenians have been driven from their homes and massacred during the present war in the allied Turkish Empire? What steps has the Chancellor taken to bring about the necessary atonement, to bring dignity to the situation of the rest of the Armenian population in Turkey and to prevent the repetition of similar atrocities?“, Session of 11 January 1916, Proceedings of the Reichstag, Vol. 306. 1914/16, p. 512 (*own translation*).

27 Session of 11 January 1916, Proceedings of the Reichstag, Vol. 306. 1914/16, p. 512 (*own translation*).

28 Lepsius 1916. Published secretly to circumvent military censorship, “no more powerful indictment of Turkey’s crimes in Armenia appeared during the war than that presented by a German writer, Dr. Johannes Lepsius” (New York Tribune, Another Chapter in Germany’s Confession of Turkish Guilt, 27 July 1919, p. 2). On this remarkable man see the contributions in: Hosfeld 2013.

29 The minutes of the meeting record: “President’s bell – Speaker tries to continue speaking – Shouts: Silence! Silence!” Session of 11 January 1916, Proceedings of the Reichstag, Vol. 306. 1914/16, p. 512 (*own translation*).

30 Deutsche Allgemeine Zeitung, Ein Zeugnis für Talaat Pascha, 24 July 1921.

Allgemeine Zeitung”. This *declaratio honoris* for the architect of a genocide fits all too well into this overall picture: Military and political necessity justified it all, even the annihilation of an entire people. Arguably one does von Schellendorf no wrong when marking his racist-fed attitude³¹ towards the extermination policy with the label “constructive sympathy”.³² Extensive personal networks from the “good old Ottoman times” seem to have survived war and regime change in Germany unscathed, too: Since 1920, the former Military Attaché in Istanbul, Hans Humann, was acting as the publishing director of the “Deutsche Allgemeine Zeitung”.³³ As for his mind-set close to von Schellendorf, this naval officer became famous-notorious for a handwritten remark on an alarming telegram received from the German Consul in Mossul, Walter Holstein,³⁴ reporting with great indignation on a massacre of 614 Armenians. Humann’s note of June 15, 1915 reads as follows:

*“The Armenians will – on the occasion of their conspiracy with the Russians! – now be more or less exterminated. That is hard, but useful. Unfortunately, Ambassador can’t stop lamenting this, much to the detriment of our policy. Talaat Bey recently replied calmly to his reproaches: We are getting rid of the Armenians in order to become better allies for you, that is, those without the weakness of an internal enemy.”*³⁵

A letter of December 7, 1915 from this very Ambassador, Paul Graf Wolff-Metternich, to Chancellor Bethmann-Hollweg leaves no doubt either: “The mastermind of the Armenian persecutions is Talaat Bey.”³⁶ No wonder, therefore, that this man eventually became top on the list of targets in the hunt for those responsible for the genocide.

“Hard, but useful”: Does this formula not, in a (most deplorable) way, mirror a *leitmotif* of Imperial Germany’s general war policy? Virtually unconditional primacy of military necessities over international legal obligations, let alone generally recognised standards of civilisation: From the blatant violation of the neutrality of Belgium and an overly harsh occupation policy in this country (time and again even highly dubious under the yardstick

31 As Midlarsky 2005, p. 219 rightly remarks “Racism was indeed endemic in the Prussian officer corps”.

32 Startling insights with extensive references (also from archival material): Gottschlich 2015. For a very explicit pertinent statement of Schellendorf see Midlarsky 2005, p. 217. And by no means an isolated opinion among German officers – quite on the contrary: “It will be salvation for Turkey when it has done away with the last Armenian; it will be rid then of subversive bloodsuckers” (Rear Admiral Wilhem Souchon, August 1915, quoted Midlarsky 2005, p. 217).

33 One of his first acts in office was to dismiss his deputy, the liberal Max Rudolf Kaufmann, who had become known for his unsparing eyewitness accounts of the Turkish genocide against the Armenians of Anatolia (on his tense relationship with Humann during the years together in Constantinople during the war: Kaufmann 1962).

34 DE/PA-AA/BoKon/169, 10 June 1915 (*own translation*): “614 men, women and children exiled from Diyarbakir were all slaughtered on the rafting journey to this place. [...] Further transports of Armenian ‘resettlers’ on their way to Diyarbakir are facing the same fate”. An even more dramatic appeal was launched by Holstein on 10 July 1915: “The Vali of Diyarbekir, Reschid Bey, is causing havoc like an eager bloodhound amongst the Christians of his Vilayets. Also just recently in Mardin he allowed seven hundred Christians, mostly Armenians and including the Armenian Bishop, to be slaughtered like sheep in one night near the city. [...] Reschid Bey continued with this bloody deed against the innocent whose numbers have surpassed two thousand. [...] If the Government does not take firm measures immediately against Reschid Bey, then Muslims amongst the common people of the Vilajets here will also begin with a massacre of Christians. The situation here in this respect is becoming more menacing daily.” DE/PA-AA/BoKon/169 (translation by Robert Berridge: www.armenocide.net, accessed on 18.01.2021).

35 Cited after Gottschlich 2015, pp. 176 ff., 197 with further details (*own translation*).

36 “Die Seele der Armenierverfolgungen ist Talaat Bey”, PA-AA/R 14089 (*own translation*); Gust 2005, p. 395.

of international law)³⁷ to the use of chemical weapons and, on a different theatre of war, the rather cynical labelling of a genocide as “useful” – for ultimately purely military strategic considerations.

Again – no rule without exception: Field Marshal Liman von Sanders³⁸ was one of the very few high-ranking German military leaders who actually made use of his position to actively oppose the deportation policy: In a letter to the Chargé d’Affaires at the Embassy in Constantinople (Radowitz) of November 12, 1916 the Commander in Chief of the Ottoman 5th Army (Dardanelles) reports:

“[C]oncerns the deportations of the Armenians, which cause great unrest in Smyrna. As such mass deportations infringe on the military sector – those liable for military service, the use of railroads, health measures, unrest among the population of a town close to the enemy, etc. – I informed the Vali that, without my permission, such mass arrests and deportations would no longer be allowed to take place. I informed the Vali that weapons would be used to prevent such a situation, should it be repeated. The Vali then gave in and told me that this would not happen again.”³⁹

This communication also reached the Reichskanzler and the General Headquarters [Großes Hauptquartier] (“The mass deportation of the Armenians began during the past few days. Marshall Liman von Sanders objected out of military interest.”⁴⁰) – however, once again and hardly surprising, to no avail as to a possible reconsideration of the German Empire’s general positioning vis-à-vis the increasingly inhuman Ottoman policy towards the Armenian people.

Hence, military imperatives pro deportation were obviously not as imperative as widely suggested. And more courageous defiance à la Liman von Sanders might thus well have changed the fate of Armenians to the better, if only on a rather modest scale. Yet, there is no room for idealisation or even heroisation: Liman von Sanders, too, was not (primarily) driven by humanitarian motives, but rather by military considerations: What he aimed at was, plain and simple, to avoid chaos in “his” war zone.⁴¹ After all, this and other rather iso-

37 For details on the “German Way of War” Hull 2014. Cf. also Khan 2019, pp. 169 ff. with references in particular to the “Kriegsbrauch im Landkriege [Usages of War on Land]” (1902). These authoritative instructions of the Great General Staff to German officers leave little doubt about the spirit which, at the eve of World War I, reigned in the (upper ranks) of the Germany army: “Humanitarian claims such as the protection of men and their goods can only be taken into consideration in so far as the nature and object of the war permit” (at pp. 68 f.) and even more bluntly, yet cynical: “By steeping himself in military history an officer will be able to guard himself against excessive humanitarian notions, it will teach him that certain severities are indispensable to war, nay more, that the only true humanity very often lies in a ruthless application of them” (at p. 72) (*own translations*).

38 For a short biography: Menges 1985.

39 DE/PA-AA/BoKon/174; R14094 (translation by Vera Draak: www.armenocide.net, accessed on 18.01.2021). Original: “[...] betrifft die Armenier-Ausweisungen, die große Unruhe in Smyrna erregten. Da derartige Massen-Deportationen in das militärische Gebiet hinübergreifen – Wehrpflichtige, Gebrauch der Eisenbahnen, Gesundheitsmaßnahmen, Unruhe der Bevölkerung in einer Stadt nahe vor dem Feinde, pp. – so hatte ich den Vali benachrichtigt, daß ohne meine Genehmigung derartige Massen-Verhaftungen und -Deportationen nicht mehr stattfinden dürften. Ich verständigte den Vali, daß ich sie im Wiederholungsfalle mit Waffengewalt verhindern lassen würde. Daraufhin hat der Vali nachgegeben und mir gesagt, daß sie unterbleiben würden.“

40 DE/PA-AA/BoKon/174; R14094 (translation by Vera Draak: www.armenocide.net, accessed on 18.01.2021).

41 Dadrian (2014a), p. 494 (in particular Fn. 17 at p. 519). Yet, notwithstanding all criticism, Liman, in his autobiography, still tries to raise some understanding for the persecution of the Armenians and, in particular, defends the German military, unreservedly and unconditionally, against all accusations of complicity in the persecution

lated acts of resistance did not really change the overall picture of an “inglorious role of the German Empire” – as the Deutsche Bundestag would frame it just a few years ago. Indeed, it was to take a whole century⁴² before Germany finally in 2016 clearly acknowledged its historical co-responsibility for the Armenian genocide:

“The Bundestag regrets the inglorious role of the German Empire, which, as a principal ally of the Ottoman Empire, did not try to stop these crimes against humanity, despite explicit information regarding the organized expulsion and extermination of Armenians, including also from German diplomats and missionaries. The commemoration of the German Bundestag is also an expression of particular respect for the probably oldest Christian nation on earth. The German Bundestag reaffirms its decision of 2005⁴³, which was dedicated to the commemoration of the victims as well as to the historical reappraisal of the events and which aimed at contributing to the reconciliation between Turks and Armenians. During the debate on the centenary commemoration day on April 24, 2015, in the German Bundestag, speakers of all parliamentary groups and in particular the Federal President, on the eve of the debate, condemned the genocide committed against the Armenians, commemorated the victims and called for reconciliation. The German Empire bears partial complicity in the events.”⁴⁴

Late – but never too late: For a corresponding declaration from the nation that bears prime and foremost responsibility for this unspeakable crime the world community as a whole, and the descendants of victims in particular, is waiting in vain – up to the present day.⁴⁵ It is certainly true that the persecution of Armenians in the Ottoman Empire, culminating in 1915/16 in what would later be accurately labelled a genocide, not only had a long historical antecedent.⁴⁶ It also emerged as an exceedingly complex process, for which a whole range of different explanations are offered in historical research: From conspiracy to cumulative radicalisation.⁴⁷ In many instances relations between communities on the local level had de-

of Armenians (Liman von Sanders 1919, pp. 200–202). On an encounter with Talaat Pasha he himself reports: “Dem Charme der selten sympathischen und gewinnenden Persönlichkeit konnte sich niemand, der mit ihm in Berührung kam, entziehen.“ (Liman von Sanders 1919, p. 14).

42 On the long and winding road towards this long overdue step see e. g. Hoffmann 2015.

43 Deutscher Bundestag, Drucksache (BT-Drs.) (printed matter) 15/5689, 15.06.2005.

44 “Remembrance and commemoration of the genocide of the Armenians and other Christian minorities in the years 1915 and 1916“ (Resolution of 2 June 2016): BT-Drs. 18/8613. It might be recalled, however, that this historical (even if not legally non-binding) resolution by the German Parliament was adopted in the absence of all leading members of the Federal Government, including Chancellor Angela Merkel (CDU), as well as the then Vice Chancellor Sigmar Gabriel (SPD) and Foreign Minister Frank-Walter Steinmeier (SPD) – obviously out of concern for (the good) political relations with Turkey. Subsequently, however, the Federal Government, in its response to a parliamentary enquiry, expressly set out its support of the Bundestag resolution, with the caveat, however, that it understands the labelling ‘Völkermord’ [genocide] “as a political and not a legal classification of the events of 1915 and 1916” (BT-Drs. 19/10340, 20.05.2019).

45 Among intellectuals in Turkey, however, the critical reappraisal of the dreadful events has long since begun. See e. g. Akçam 1999. However, still in 2005, for uttering the evident [“a million Armenians were killed in these lands”], Orhan Pamuk faced a hate campaign which forced him to flee the country and the Nobel Prize winner was eventually put on trial for “insulting” his country (Article 301/1 Turkish Penal Code). In Turkey, the intellectual climate for a critical reappraisal of one’s own responsibility does not seem to have changed for the better since then.

46 On the Hamidian Massacres (1894–1896) see also infra note 131.

47 For a succinct survey see the Review Essay by the former President of the International Association of Genocide Scholars (IAGS): Melson 2013. See also the various perspectives in Schaller/Zimmerer 2009.

generated over decades and thus the degree of instigation from Istanbul needed to touch off violence may have differed from case to case. However, as necessary as they are: Differentiations, and the relativisations that necessarily entail, should not serve as a means to obfuscate the simple fact that – as Henry Morgenthau put it – from early 1915 onwards Turkish policy led to the large-scale extermination of a people under the guise of deportation.⁴⁸ Although, once again, uncertainty still prevails about the exact sequence of events, respective decisions by the Istanbul government were taken at the latest in early April 1915⁴⁹ and then systematically put into practice; starting with the deportation of an estimated 250 Armenian intellectuals on 24 of the same month (so-called “Red Sunday”) and the eventual murdering of the vast majority of them.

Way back in 1915, the then US Ambassador at the Sublime Porte, Henry Morgenthau (Sr.), made numerous (unsuccessful) attempts to dissuade Talaat from his extermination policy against the Armenians. In one of his many conversations with the head of the Triumvirate, the Ambassador argued that, even if, unfortunately enough, deaf to humane considerations, the Turkish Government should be aware that the treatment of the Armenians was destroying Turkey in the eyes of the world, and that this country would never recover from this infamy: “You are making a terrible mistake.” Talaat Pasha is reported to have bluntly replied: “Yes, we make mistakes, but we never regret”.⁵⁰ Not very much seems to have changed in the course of the last more than 100 years.⁵¹

3 Facing the Unspeakable: How to Cope with a Crime without a Name?

The short exposition of the historical-political context, in which the assassination of Talaat Pasha occurred, would not be complete without briefly alluding to the post World War I attempts to bring to justice Turkish officials charged with war crimes, including in particular the Armenian genocide. By the end of the war, the essential facts were widely known and virtually undisputed – also on the part of Turkish authorities.⁵² Henry Morgenthau, as just one prominent voice among many others, had repeatedly and unequivocally reported to the

48 See Morgenthau 1918/2010, p. 219: “It is absurd for the Turkish Government to assert that it ever seriously intended to ‘deport the Armenians to new homes’; the treatment which was given the convoys clearly shows that extermination was the real purpose of Enver and Talaat. How many exiled to the south under these revolting conditions ever reached their destinations? The experience of a single caravan show how completely this plan of deportation developed into one of annihilation.”

49 For a recent review of the question of the final decision (with consideration of a number of newly available Ottoman documents) Akçam 2019.

50 Morgenthau 1918, p. 338. The book is dedicated to Woodrow Wilson. Morgenthau also reports here (Morgenthau 1918, p. 339) of an episode, which made the Ambassador, very much against his nature, lose his temper: Talaat was seriously asking the US Ambassador to hand over to him a list of names of the very numerous Armenian holders of American life insurance policies, since they were practically all dead now and had left no heirs either to collect the money: “It of course all escheats to the State. The State is the beneficiary now.” Morgenthau refused: “I got up and left him.”

51 The meticulous study by Latino 2018 thus arrives at the conclusion (at p. 221): “The Armenian massacres are neither acknowledged nor condemned by Turkey.”

52 Interestingly enough, Turkish officials, the press and large parts of the public seemed to have been more willing to acknowledge responsibility for the genocide than they are today: See with further references Balint 2013, pp. 94 ff. In the immediate aftermath of the war, the then Ottoman foreign minister, Ahmed Reshid, had indeed declared that “with regard to the Armenian massacres, it was not merely the intention but the firm decision of the government to punish the guilty” (cited after Bass 2000, p. 120).

State Department on the mass atrocities against Armenians, so just for instance in a telegram of July 16, 1915:

*“Deportation of and excesses against peaceful Armenians is increasing and from harrowing reports of eye witnesses it appears that a campaign of race extermination is in progress under a pretext of reprisal against rebellion. Protests as well as threats are un-availing and probably incite the Ottoman government to more drastic measures as they are determined to disclaim responsibility for their absolute disregard of capitulations and I believe nothing short of actual force which obviously United States are not in a position to exert would adequately meet the situation. Suggest you inform belligerent nations and mission boards of this.”*⁵³

In the face of these glaring and undeniable facts, the Triple Alliance had, as early as in May 1915 already, formally and very explicitly warned the Ottoman Government that

*“[i]n view of these 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.”*⁵⁴

Allusions in this official communication, at least implicit, to the *Martens clause* will not have escaped the attentive eye of the international lawyer. Already back in the early years of the 20th century, “a campaign of race extermination” was indeed hardly compatible with moral and legal standards “as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”⁵⁵ However, concrete legal tools to seriously challenge central pillars of the traditional international legal order did not yet exist: Both, the principle of “sovereignty” and “immunity” continued to serve as a most efficient shield to protect State criminals against criminal prosecution on a solid foundation in (international) law and/or by (organs of) the international community – even for gross and heinous violations of the most basic standards of civilisation: And the Armenian genocide, it definitely fell into this latter category.

And yet, after the victorious ending of the war and under growing public pressure, prosecution of Turkish war criminals ranked quite high on the Allied agenda. The suffering of the Armenian people was probably the most important impetus for a popular backlash against impunity and could no longer be ignored – also not by those in charge of reconstructing the post war (legal) order. And so the Armenian National Delegation at the Paris Peace Conference was not only most actively lobbying for the creation of an independent (greater) Armenian State (“After these experiences, our cause needs no further pleading”⁵⁶). The “Armenian

53 Sarafian 2004, p. 55. For the enormous echo in the American press see the impressive online archive “A Daily Chronicle of the Armenian Genocide in the American Press 1915–1923”, <https://genocidediary.org/> (accessed on 15.01.2021).

54 See telegram of the Department of State, Washington, 29 May 1915, to the Embassy in Constantinople, U. S. National Archives, RG59, 867.4016/67 (printed *inter alia* in: Bartrop 2019, p. 164).

55 Named after its drafter, the Russian diplomat Friedrich Fromhold Martens, the clause appeared for the first time in in the Preamble to the 1899 Hague Convention II (Laws and Customs of War on Land). For further references: Koutroulis 2017.

56 See “The Armenian Question Before The Peace Conference. A Memorandum Presented Officially by the Representatives of Armenia to the Peace Conference at Versailles, on 26 February 1919”. With definitely lasting im-

precedent” was rather also to become key in establishing what was later very aptly described as “a prologue to Nuremberg”.⁵⁷ A “prologue”, however, raises expectations, which can be met or less so – on the theatre stage as well as on the real-world stage.

As far as our prologue is concerned, the verdict must be ambivalent: To be sure, the creation by the Paris Peace Conference⁵⁸ of the “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties” was a truly ground-breaking step, paving the way for the future prosecution of war criminals on the international plane. The Commission’s report, very swiftly presented on March 29, 1919 already, found “abundant evidence of outrages of every description”⁵⁹ – including genocidal acts against Armenians.⁶⁰ And the Commission went indeed far beyond the traditional borders of “ordinary” war crimes into the yet rather unexplored terrain of “crimes against humanity”. Explicitly referring to “the dictates of humanity”⁶¹ and – at several instances – the “dictates of public conscience”, the report culminates in the most likely unprecedented conclusion that

*“all persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of State, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.”*⁶²

The Commission’s report further recommended that war crimes trials be conducted before the victors’ national courts and, when appropriate, before an inter-Allied tribunal. The defining of a catalogue of (international) crimes, the rejection of the principle of immunity as an obstacle to prosecution and, finally, the possible setting up of an international judicial body to this end: Indeed, doesn’t this look very much like a (rudimentary) blueprint for a comprehensive system of international criminal justice?⁶³

On the other hand, however, the “Great War” did neither “end all wars”, nor did the truly visionary efforts to end impunity for war criminals did not, in the short-term, produce any significant practical results. For the time being, the international criminal justice system remained, to put it mildly, “handicapped”.⁶⁴

pression on the victorious powers assembled in Paris, the Memorandum recalled, at its very outset, with forceful words the monstrous suffering of the Armenian people: “Here we shall not recite the harrowing story of the massacres, nor the damning tale of the deportations which were but cloaks for massacres. [...] But it is of utmost importance to state here the solemn fact that this infernal scheme for the extermination of an entire nation had been methodically organized by the so-called Government, whose orders were issued by circulars and telegrams to the officials in all the Armenian Vilayets. Many of these documents have since been recovered and published. The Government of the Young Turks had left nothing to chance: murder, rapine, torture, rape, forced conversion to Islam, destruction by hunger, all had been carefully planned and carried out with ruthless savagery.” (ibid., p. 5).

57 Willis 1982.

58 Preliminary Peace Conference, Plenary session on 25 January 1919 (Minute No. 2). For details: Maogoto 2014, pp. 171 ff.

59 Commission Report 1919, p. 113.

60 Commission Report 1919, *inter alia*: “More than 200,000 victims assassinated, burned alive or drowned in the Lake of Van, the Euphrates or the Black Sea.” (for lack of space not printed in the American Journal of International Law (AJIL), but see: US Senate Committee on Foreign Relations 1919, p. 337).

61 Commission Report 1919, p. 113.

62 Commission Report 1919, p. 117.

63 See e. g. Rhea 2014, pp. 147–169.

64 Bassiouni 2002, pp. 244–291.

A first major handicap was certainly the vigorous resistance against key elements of the international criminal law order in the making on the part of representatives in the Commission of the most important victorious power, the United States:

*“The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law [...] the head of state [...] is responsible not to the judicial but [only] to the political authority of his country. [...] The American representatives know of no international statute or convention making a violation of the laws and customs of war – not to speak of the laws of humanity – an international crime affixing a punishment to it, and declaring the court which has jurisdiction over it.”*⁶⁵

Robert Lansing and James Brown Scott justified their strong dissent to the creation of an international tribunal to try war crimes committed during wartime as being

*“extralegal from the viewpoint of international law [...] contrary to the spirit both of international law and of the municipal law of civilized states and [...] would, in reality, be a political and not a legal creation”*⁶⁶

Once again, not too much seems to have changed during the last more than 100 years.

It is therefore all the more remarkable that in the immediate aftermath of the war serious attempts were in fact made to realise the wartime pledge to hold Turkish leaders criminally responsible for atrocities committed against the Armenian people. In this spirit, Article 220 of the treaty of Sèvres of August 10, 1920 explicitly required the Ottoman Empire

*“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 Ottoman Empire on August 1, 1914.”*⁶⁷

Even if this treaty has never been ratified and thus never entered the corpus of binding international law, the sheer existence of this provision must undoubtedly be regarded a milestone in the international community’s fight against impunity for crimes against humanity.

And very much unlike in Germany,⁶⁸ Turkish Military Tribunals did in fact, in what has been described as “a unique initiative of national self-condemnation”,⁶⁹ seriously engage in the trying and sentencing of high-ranking Turkish perpetrators of the Armenian genocide⁷⁰ – even if (only) at the instigation of the British occupying power (so-called “Istanbul Trials”, 1919/20). On the basis solely of existing Ottoman domestic penal codes with the key indict-

65 Commission Report 1919, pp. 134 f. and p. 146 respectively.

66 Miller 1924, pp. 456–457.

67 UK Treaty Series No. 11 of 1920; Command paper Cmd.964.

68 On the so-called “Leipzig War Crimes Trials” and their shameful failure: Wiggenshorn 2005; Form 2014: “Law as Farce”; Neuner 2014: “When Justice is left to the Losers”. For a comparative perspective (Leipzig and Istanbul trials): Rikhof 2014, in particular pp. 282–296, and Bass 2000, pp. 58–146.

69 Dadrian/Akçam 2011. In the same vein – with reference to Bass 2000 – Balakian 2009, p. 100: “Milestone in the history of war crimes tribunals”. Contemporary (British) voices were very much less enthusiastic (Bass 2000, p. 130): “Dead failure”, “more of a farce than ever”. Anyhow, with the ascent of Kemalism, the spring of “national self-condemnation” was soon over again and by August 1920 already Turkish Courts-martial ceased their activities. For further details Akçam 1996.

70 For details Dadrian 1997, pp. 28–59 and – comprehensively (with full documentation) – Dadrian/Akçam 2011.

ment “premeditated mass murder”, most accused were found guilty and received sentences ranging from prison with hard labour to death – the latter sentence actually having been carried out in three instances.⁷¹

On July 5, 1919, the Istanbul Court did also impose the death penalty on the highest-ranking organisers of the massacres, including in particular Talaat Pasha. However, *in absentia*, as on November 3, 1918 already, the (former) Grand Vizier of the Ottoman Empire had succeeded in fleeing the Ottoman capital in a German Torpedo-boat destroyer⁷² to eventually finding a safe haven in Berlin: The German Criminal Code did not provide for universal jurisdiction for the offences Talaat was accused of. And whereas under the applicable provisions of the Versailles Peace Treaty, Germany was, at least in theory, under an obligation to try its own war criminals (or, in the alternative, to extradite them),⁷³ no such obligation existed with respect to war criminals from other countries, namely from Turkey.⁷⁴

However, the Allied drive to bring Turkish war criminals to justice was soon waning, too: As a reaction to the ever-increasing political and social resistance both within the late Ottoman Empire and the competing Ankara government (Kemal Atatürk) against the dragging criminal trials in Constantinople, 61 detainees awaiting trial were eventually relocated to Malta to face trial in the British Crown Colony.⁷⁵ Conscious of the admittedly rather shaky basis under international law for the conduct of criminal proceedings, frustrated by the unsuccessful attempt to gather from Turkish authorities sufficient evidence for a conviction and, finally, under political pressure due to a drastically changing geostrategic environment, British authorities eventually released all war crimes suspects without trial and returned them to Turkey. Containment of communism was henceforth the order of the day, not justice for the Armenian cause: The latter should in no way jeopardise the increasingly good relations with Kemalist Turkey, the rising bulwark against Soviet expansion in the Caucasus. The price for the forgetting and forgiving the perpetrators of a genocide⁷⁶ was modest: The

71 Mehmed Kemal, former Kaymakam of Boğazlıyan, Yozgat (10 April 1919), Abdullah Avni, commander of the gendarmerie in Erzincan (22 April 1920), Behramzade Nusret, Governor of Bayburt (5 August 1920). The remark by Hannah Arendt in a 1964 interview on the Eichmann trial may very well suit these three not top-level perpetrators. Vigorously rejecting the war criminal’s appeal to Kant, Arendt held: “Kant’s whole morality boils down to the fact that every human being must consider for himself in every action whether the maxim of his actions can become a general law. [...] It is just so to speak the extreme reversal of obedience! Everyone is a lawmaker. According to Kant, no man has the right to obey” (*own translation*), <https://www.ardaudiothek.de/archivradio-geschichte-in-originaltoenen/hannah-arendt-und-die-banalitaet-des-boesen/75793772> (accessed on 15.01.2021).

72 See Gottschlich 2015, pp. 257 ff.

73 See part VII of the Versailles Treaty of 28 June 1919 (Art. 227–230).

74 Extradition requests transmitted by the Berlin Ambassador of the new liberal Turkish Government in Istanbul, Rifat Pasha, were rejected by the German government.

75 See for details on this almost forgotten footnote of legal history only Bonello 2008, pp. 180 ff.

76 One of the Malta detainees was Ali İhsan Sâbis, about whom, in 1918, the preacher of the German embassy, Graf von Lüttichau, reported to the German Foreign Office as follows: “[D]er in Deutschland militärisch ausgebildete, perfekt Deutsch sprechende jetzige Kommandant der 6. Armee in Mossul, Ali İssan, hat es unzählige Male geflissentlich vor deutschen Ohren ausgesprochen, dass er in den Grenzen seines Befehlsbereichs nicht dulden werde, dass ein Armenier am Leben bliebe. Deutschen Offizieren gegenüber rühmte er sich, mit eigener Hand Armenier getötet zu haben.“ [“The current commander of the 6th Ottoman Army in Mosul, who was trained in Germany and speaks perfect German, Ali İssan, countless times and purposefully let the Germans know that he would not allow a single Armenian stay alive in his command zone. He bragged to German officers that he had killed Armenians with his own hands” (*own translation*)], PA-AA/R 14104; A 44066, pr. 19.10.1918 p. m.; Schreiben (cited after Gust 2005, p. 583).

release of 22 British prisoners of war held by the (Kemalist) Government in Ankara. National interest⁷⁷ versus international humanitarian cause: an unequal fight – then and now.

Thus, though the international community's rhetoric of moral outrage was strong – including the demand for individual accountability – actual action remained shamefully modest: No serious sanctions against the Ottoman Empire, hardly any activities to salvage the Armenian people from the grip of extermination, persisting well into the aftermath of World War I, no restitution to the Armenian people for their immense material and human losses and finally – as we have seen – no serious attempts to bring the perpetrators to (international) justice.

There can be little doubt that by cold-bloodily killing Talaat Pasha, the young Armenian perpetrator did not abide by the applicable law. And the severe sanctioning by criminal law of the killing of a human being, as provided for – then and still today – in Articles 211 and 212 of the 1870 German Criminal Code (first and second degree murder), is in itself certainly not contrary to “the laws unailing and unwritten of the gods”.⁷⁸ And thus Solomon Tehlirian could hardly invoke the case of Antigone, whose only “crime” had been to attempt to secure a respectable burial for her brother: Indeed, at a first and unbiased glance hardly more than a case of civil disobedience! However, both cases do bear certain similarities – and so it is worth recalling the memorable dialogue between Creon and Oedipus' daughter as immortalised by Sophocles:⁷⁹

“Creon: You there, yes you, with your head cast down to the ground – do you confess, or deny that you have done these things?”

Antigone: I do declare I did these things, do not deny the fact.

Creon: Then you can take yourself off where you will, – absolved of any grievous charge or guilt. – You, though, answer me ... and keep it brief. – Were you aware that I had publicly forbidden such an act?

Antigone: I was aware of it, of course I was ... You made it crystal clear.

Creon: And still you dared to contravene these laws?”

Yes, both Solomon Tehlirian and Antigone dared. And in doing so, both of them alike risked their lives.⁸⁰ In fact, it seems that the very essence of the seminal drama by Sophocles con-

77 However, British shame and guilt set in immediately after the setting free of “notorious exterminators” of Armenians. Lord Curzon himself spoke of a “great mistake” (see Dadrian 2004, p. 311: “The less we say about these people [the Turks detained at Malta] the better. [...] I had to explain why we released the Turkish deportees from Malta skating over thin ice as quickly as I could. There would have been a row I think. [...] The staunch belief among members [of Parliament is] that one British prisoner is worth a shipload of Turks, and so the exchange was excused” (British Foreign Office Archives (FO) 371/7882/E4425, folio 182). See also the letter of detained Captain Campbell to his father General Campbell, which the latter inserted in his letter to Lloyd George whom he was pressuring for the release of his son: “I am more valuable than any of these miserable Turks” (FO 371/6509/E8562 (folio 16), *ibid.*, p. 315 (note 56 to Chapter 17: Allied Attempts at Retributive Justice).

78 Sophocles 441 B.C./2014, pp. 454 ff.

79 Sophocles 441 B.C./2014, pp. 441–449.

80 At the time, first degree murder was invariably punishable by the death penalty. Art. 102 of the German Fundamental Law (Grundgesetz) has abolished the death penalty with effect from 1949 only.

sists in the essentially justifiable refusal of an individual to let society prevent her from fulfilling a highly solemn personal obligation.⁸¹ Once again in the immortal words of Antigone:

“I did, since Zeus had not pronounced these laws, – nor yet does Justice, dweller with the gods below, – prescribe such laws among the ranks of mortal men. – I did not think that your decrees were of such weight – that they could countermand the laws unfailing and – unwritten of the gods, and you a mortal only and a man. – The laws divine are not for the now, nor yet for yesterday, – but live forever and their origins are mysteries to men. – There was no way that I would wish to pay a penalty – to gods for contravening them, and all because I feared – a tyrant’s temper. I know that I must die – of course – quite irrespective of your will ... and if, then, I must die – before my time, I reckon that to my advantage – since who – would choose to live, all set about with troubles such as mine, – would not consider that to die would bring advantages?”⁸²

Indeed, a tradition as old as moral and legal philosophy itself⁸³ holds that the reasons for which a person acts are crucial to give judgement on the permissibility *vel non* of a specific act. Antigone’s uncompromising individualism is somewhat disturbing – not only for many of the countless interpreters of Sophocles’ drama, but for legal positivists as well.⁸⁴ However, it is probably the combination of reason and ‘instinct’, e. g. the essentially unreflecting and impulsive response of a person to his or her circumstances, which, for millennia, made Antigone the sympathetic-tragic heroine *par excellence* on the stages of the world. How many spectators may have dreamt to be, in the truly decisive moments of life, as courageous as this woman, but simply did not dare? And so, one can probably justifiably argue that it was the heroine Antigone who prepared, from a distant and mythical past, the stage on which the sensational trial against Solomon Tehlirian would eventually unfold before a jury at the 3rd Berlin District Court in early June 1921.

4 The Trial: Who Would Have Condemned Tell if He Had Shot Gessler?

Orders to Soghomon Tehlirian by the principal organizer of Operation Nemesis, Shahan Natalie, were crystal-clear: “You blow up the skull of the Number 1 nation-murderer and you don’t try to flee. You stand there, your foot on the corpse and surrender to the police, who will come and handcuff you.”⁸⁵ No doubt about the intention: “[to] show the world through court procedure what crimes against his people had been committed and gone unpunished” – as Hannah Arendt later put it.⁸⁶

The (unavoidable) criminal trial against the perpetrator of the assassination of Talaat Pasha proved, no doubt whatsoever, extremely inconvenient for Germany – to put it mildly: On

81 Levy 1963, p. 137.

82 Sophocles 441 B. C./2014, pp. 450–465.

83 Most recently recalled with abundant references by Sevel 2018, pp. 191–215. Cf. also the seminal study by Tyler 2006.

84 Classical, albeit of course not uncontroversial, ‘definition’ by Austin 1832, p. 278: “The existence of law is one thing: its merits and demerits another thing. Whether a law be, is one inquiry: whether it ought to be, or whether it agree with a given or assumed test, is another and a distinct inquiry.”

85 Natalie 1928/2002, p. XIV.

86 Arendt 1963, pp. 265 f. This quotation encompassed both, the Tehlirian case and the case of Scholom Schwartzbad, who, in 1925, were to kill Simon Petlyura in Paris for his role in the Jewish pogroms in Ukraine.

the very day of the assassination, e. g. on March 15, 1921, the German Reich had protested to the League of Nations against the sanctions imposed by the Allies in the Ruhr area as a consequence of the failure of the London Conference earlier that month. Public exposure to the world community as an accomplice to major crimes against humanity, amounting even to what would later be labelled “genocide”, could hardly be helpful in these and similar future diplomatic interventions. The same applied of course for Germany’s standing in the various disputes with Poland regarding Upper Silesia, at the time top on the international political agenda. Closely monitored by the international press, the trial had in fact the potential to seriously impair Germany’s efforts to secure its position in the post-war order – waged at the time on many political and legal fronts. Hence, a normal criminal trial was hardly to be expected – and indeed it did not happen.

Talaat Pasha Slain in Berlin Suburb – Armenian Student Shoots Former Turkish Grand Vizier; Held Responsible for Massacres – Assassin under Arrest – Morgenthau Tells of Talaat as “Big Boss” and Blames Him for Atrocities

– such read the headline of an article in the New York Times of March 16, 1921⁸⁷ and such was the background against which the sensationalised trial against Soghomon Tehlirian would take place only two and a half months later.

The trial itself lasted just two days (June 2 and 3, 1921). And it took the jury barely one hour to declare Soghomon Tehlirian not guilty. This surprising acquittal brought to an end one of the most memorable criminal trials ever held in Germany. Just one week before the trial was opened, the German Federal Foreign Office had made desperate attempts to ‘depoliticise’ the criminal proceedings – to no avail: In a demarche of May 26, 1921 the *Auswärtiges Amt* had urged the Prussian Ministry of Justice to prevent at all costs that the whole question of the “Armenian atrocities” be brought up for discussion again and that the proceedings developed into a “political mammoth case”. From a political point of view it would be very worrying “if in the course of the court proceedings the general political role of Talaat Pasha and his relation with Germany were to be further detailed”.⁸⁸ However, this is exactly what happened.

In close cooperation with Johannes Lepsius⁸⁹ (who also mobilised very substantial financial resources for the defence), the illustrious team of defence lawyers⁹⁰ did not make any

87 Page 3, Column 5.

88 Foreign Office to the Prussian Ministry of Justice, 26 May 1921, PA-AA/R 78551 (*own translations*). For Details: Hoffmann 1989, pp. 44 ff.

89 The humanitarian commitment to the persecuted Armenians of the Ottoman Empire was, as Werfel 1933, 1934/2012, p. 139 put it, the “earthly task” of this theologian: “No! These Armenians meant a great deal to him – even more if he dared rigorously to examine his heart – more perhaps than even his own countrymen, mad and sinful as that no doubt might be.”

90 The Privy Councillor of Justice Dr Adolf von Gordon (1850–1925) had become renowned through sensational trials such as the case of Kuno Graf Moltke against Maximilian Harden in 1907 in the context of the so-called Eulenburg scandal, in the case of Matthias Erzberger against Karl Helfferich in 1920 as a joint plaintiff. – Councillor of Justice Dr. Johannes Werthauer (1866–1938) was one of the outstanding lawyers of the Weimar Republic, whose citizenship was revoked by the National Socialists in August 1933 on their first list. His Berlin office was taken over by the NS-lawyer Oswald Freisler, a brother of the later President of the “Volksgerichtshof”, Roland Freisler. In 1919, he defended Kurt Tucholsky in the case of the poem “Unser Militär [Our Military]”, for the publication of which he had been denounced by Reichswehr Minister Gustav Noske. – The Privy Councillor Dr Theodor Hugo Edwin Niemeyer (1857–1939), Director of the Institute of International Law at Kiel Univer-

attempt to cast doubt on the (undeniable) fact that the defendant, Soghomon Tehlirian, was actually the perpetrator. How could they? Rather, from the very outset, throughout the entire trial and very much in the interest of the defendant and those behind him, the defence strove to prove “that Talaat was the prime responsible for the deportations and massacres”.⁹¹ This line of reasoning served two purposes: First, to convince the jury that it was Talaat, who actually belonged in the dock, not the defendant. Second, and probably even more important so, to convince the world public, which closely followed the Berlin proceedings, of precisely this. And finally, so ran the (anything but implicit) accusation, if it was the victim who was the actual perpetrator, Imperial Germany belonged in the dock, too – at least as accomplice.

Extremely well prepared, the brilliant defence attorneys succeeded fully in achieving their objectives: Adolf von Goerden, in his final pleading on June 3, 1921, did not only manage to transform the Court Room into a lecture hall on the “Armenian Atrocities” and its main culprit, Talaat Pasha. He further endeavoured to place the assassin on the victims’ side – obviously with success:

“Think of the story of William Tell. Gessler makes fun of and jeers at the people. He erects the sign of slavery. He forces Tell to shoot an arrow at an apple placed on his sons head. The project is of the same type as the one executed by the old Turks, those who believe in force. What passes through William Tells mind passes through Tehlirian’s as well. *Of all the juries in the world, which one would have condemned Tell if he had shot his arrow at Gessler?* I ask you, is there a more humanitarian act than that which has been described in this courtroom? Tehlirian is the avenger of his people, of the one million Armenians who were killed.”⁹²

The second defence attorney, Johannes Werthauer, again in a most subtle manner left it to the jury to draw its own conclusions from his presentation. He recalled that in 1919 Talaat Pasha had indeed been sentenced to death by a Turkish court-martial⁹³ and that he had escaped justice only by fleeing to Germany, where he had been granted protection by highest political authorities. Another quite embarrassing fact for the young Republic, in whose institutions – after all – old Imperial elites still exercised considerable influence: Tehlirian not only an “avenger of his people” but also an executioner of justice? So for Werthauer all depended upon how to correctly frame the question, the jury were called upon to answer:

sity, an international lawyer of European reputation, was a co-founder of the International Law Association and a member of the Institut de Droit international, which was awarded the Nobel Peace Prize in 1904. In 1915 he founded the “Zeitschrift für Internationales Recht”. In 1917 Niemeyer initiated the founding of the “Deutsche Gesellschaft für Völkerrecht” (German Society for International Law), which was coerced into self-dissolution in 1933 (biographical sketches by Hosfeld/Petrossian 2020 – slightly shortened and modified).

91 Lepsius an Benediktsen, 09.04.1921, Lepsius Archiv Potsdam 148–1601 (cited after Hosfeld 2013b, p. 254).

92 Soghomon Tehlirian Trial Transcripts, 3rd State Court, Criminal Department, Berlin, 16 April 1921 (emphasis added), http://www.armeniapedia.org/wiki/The_Case_of_Soghomon_Tehlirian (accessed on 15.01.2021). For the German original: Wegner 1921. Wegner, an eyewitness of the Armenian genocide, and by virtue of a most courageous letter to Adolf Hitler (“[E]s gibt kein Vaterland ohne Gerechtigkeit!” [“There is no Fatherland without justice!”]) stood up to the genocide of Jews, too (Wegner 1933/2000, pp. 139–144). After his death in exile in Rome, not only was some of his ashes taken to Armenia to be honoured at a posthumous state funeral near the Armenian Genocide Monument’s perpetual flame. In honour of Wegner a tree was planted at Yad Vashem, too. For a more critical appraisal of Wegner’s activities (and somewhat less so of Morgenthau, too): Anderson 2013, pp. 126 ff.

93 See supra page 280.

*“The one thing that would affect me is if you were to confuse right and wrong. For example, if you were to ask, ‘Did the defendant kill ...?’ rather than the question which the law requires, ‘Is the defendant guilty of killing ...?’ After all, what the District Attorney wants is for you to answer the former question, while what we want is for you to answer the latter question.”*⁹⁴

And finally Theodor Niemeyer, oscillating between subtlety and sharpness, between accusation and bridge building, argued with great persuasiveness that an acquittal would in fact be in the very best interest of Germany, too:

*“During the war, German military and other establishments, both in this country and beyond its borders, passed over in silence and then tried to cover up the atrocities committed against the Armenians. This was done in such a manner as to imply that our German government actually condoned these atrocities. – Certainly, up to a point, individual Germans tried to put an end to the atrocities, but to the Turks the implications were clear. They thought, It is impossible for these events to take place without the consent of the Germans. After all, we are their allies and they are so much stronger than us. – Therefore, in the East and all over the world, we Germans have been held responsible with the Turks for the crimes committed against the Armenians. There is a wealth of literature in the United States, Great Britain, and France whose purpose is to show that the Germans were really the Talaat’s in Turkey. – If a German court were to find Soghomon Tehlirian not guilty, this would put an end to the misconception that the world has of us. The world would welcome such a decision as one serving the highest principles of justice.”*⁹⁵

Acquittal of an individual as the prize for the absolution in world opinion of Germany, the “silent partner”⁹⁶ in genocide? Indeed, a seductive offer for the Court.

Truly an extraordinary performance by a dream team of defence lawyers, which the public prosecutor could not do much to counter ... or ultimately did not want to?⁹⁷ And so Soghomon Tehlirian, on June 3, 1921, left the Courtroom as a free man.⁹⁸ An appeal was initially considered, but then – most probably as a result of political intervention – not lodged. Had justice really been done?

94 Another consideration that Werthauer made in his pleading should not have failed to impress the all-male jury: “How often you are forced to pass judgment on a husband who, upon returning home, finds his wife committing adultery and kills her! Who would even imagine condemning such a man?” And, skilfully blending truth and fiction, he continued to argue a fortiori: “But the defendant’s case does not regard marital infidelity. His sisters were raped, his brothers and family were killed, his whole family was exterminated. The defendant raised the banner against the one criminal guilty of all those vile crimes, a man who was caught in the act and condemned. The defendant saw the murderer, lost control of his rational mind, took aim, pulled the trigger, and another human life, unfortunately, was taken.”

95 Soghomon Tehlirian Trial Transcripts, 3rd State Court, Criminal Department, Berlin, 16 April 1921, http://www.armeniapedia.org/wiki/The_Case_of_Soghomon_Tehlirian (accessed on 15.01.2021).

96 Gust 2007, pp. 45 ff.

97 The protests against the Court ruling by the German Foreign Ministry, too, remained rather half-hearted (see the communication printed in Ünal 2007, pp. 86 f.). In fact, to some extent it is true that “by denying Tehlirians’ guilt, it denied Germany’s guilt and absolved Germany of complicity in those crimes” (Alexander 1991, p. 187).

98 The “not guilty” verdict was formally based on the finding that, when committing the homicide, the defendant was (temporarily) deprived of the full use of his mental faculties. This rationale convinced few – but indeed provided an elegant way out.

5 Genocide: Not Only Is Denial a Crime so Is Forgetting

Since the dawn of civilisation, the eradication of groups of people for virtually no other reason than their otherness is a faithful and frightful companion of mankind.⁹⁹ Until the mid-20th century, however, the deadly martyrdom of entire ethnic, religious, social or cultural groups was “a crime without a name”.¹⁰⁰ A name serves identification and individualisation. As fundamental and universal the concept of “naming”, as strikingly similar the etymological roots of the term both in a historical and geographical dimension.¹⁰¹ Naming is essential in particular to assign somebody a place in the coordinate system of social relations: From “Moses” to “Friday”.¹⁰² And as history has (hopefully) taught us, to deprive a person of his or her name and replace it by a mere number tattoo may well be the first step to physical annihilation. But things and concepts, too, can only be captured by normative systems, such as for instance (criminal) law, if they have a (relatively) fixed meaning, which in turn is manifested and condensed in a specific denomination. No wonder therefore that it proved difficult, if not virtually impossible, to classify the unspeakable [*sic!*] crimes against the Armenian people within the categories of the criminal law of the time: (Mass) murder ... does this really capture the very gist of this “odious scourge”?¹⁰³

The pivotal contribution of the Polish lawyer of Jewish descent, Raphael Lemkin, to the coining of the term “genocide”¹⁰⁴ and the outlawing in the post-World War II legal order¹⁰⁵ of this “crime of crimes”¹⁰⁶ as “contrary to the spirit and aims of the United Nations” is well known. It has often been told – most recently by Peter Sands in his exceptional memoir “East West Street”.¹⁰⁷ From early childhood Lemkin was seized by both a somewhat weird passion of and a most palpable compassion for persecuted minorities.¹⁰⁸ No wonder therefore that the 21 year old student of philology at the University of Lviv – according to his own testimony – was “shocked” when the British Government released Turkish war criminals detained in Malta. There was a simple, yet fundamental question, which would eventu-

99 Sartre 1971, p. 534: “The fact of genocide is as old as humanity.” Cf. also the Preamble (para. 2) of the 1948 Genocide Convention: “Recognizing that at all periods of history genocide has inflicted great losses on humanity [...]”. In a fortunate and fitting manner, the term ‘humanity’ (unlike the German term ‘Menschheit’ used in this context) encompasses both, the collectivity of humans as well as a virtue associated with basic ethics of altruism.

100 Winston Churchill, 24 August 1941 (cited after: Vasel 2019, p. 1053).

101 Old English: nama; Old High German: namo; Old Norse: nafn; Gothic: namo; Sanskrit नामन् (nāman); Latin: nomen; Greek: ὄνομα (onoma); Persian نام (nām); Proto-Indo-European: h₁nom̥; Proto-Uralic: nime.

102 Cf. for “Moses”: Exodus 2, 10; and for “Friday”: Defoe 1719, p. 244.

103 Genocide Convention, Preamble para. 3.

104 Composition of “genos” (Greek: race, tribe) and “cide” (Latin: killing): Lemkin 1944, p. 79: “new conceptions require new terms”: Elaboration of ideas first proposed in his address to the 5th International Conference for the Unification of Penal Law (1933), in which argued that attacks on racial, religious and ethnic groups should be considered international crimes.

105 See only United Nations Organisation (UNO), General Assembly (1946), Resolution 96-I, UN-Doc.A/RES/96-I, 11.12.1946; the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (as of 22.10.2020 ratified by 152 States) and Art. 6 of the 1998 Rome Statute of the International Criminal Court.

106 International Criminal Tribunal for Rwanda, Prosecutor v. Jean Kambanda, Judgment and Sentence, 04.09.1998, Case No. ICTR 97–23-S, § 16.

107 Sands 2016. See also the remarkable review of this book by Hull 2016. From the abundant literature on the subject see e. g. – with vast references – Vasel 2019, pp. 1053 ff. and Power 2002; Moses 2010; Schaller 2013; Waller 2016 and Irvin-Erickson 2017.

108 For details: Lemkin/Frieze 2013.

ally preoccupy him throughout his life: “Why is a man punished when he kills another man, yet the killing of a million is a lesser crime than the killing of an individual?”¹⁰⁹ Inspired by the immersion into Leo Tolstoy’s intellectual universe, Lemkin realised “that believing in an idea means to live it”.¹¹⁰ And so this very issue was not only to become *the* very leitmotif of his professional life¹¹¹ – with admirable consistency and tenacity. Rather, it was precisely the Armenian case that was to play a pivotal role in his lifelong intellectual struggle to outlaw genocide,¹¹² a struggle eventually crowned by him making a major contribution to ‘humanise’ the landscape of the international legal order.

Through the broad and – at times – even somewhat over-dramatic journalistic coverage, Lemkin was well informed about the 1921 assassination of Talaat Pasha and the ensuing trial against Soghomon Tehlirian. These events should in fact become central stage in Lemkin’s reflection on how to cope with the still unnamed “crime of crimes”. To be sure, for Lemkin, too, mankind owed much to the assassin: For the first time the world was “compelled to listen to the awful truth” and Tehlirian “upheld the moral order of mankind”.¹¹³ However, Lemkin had serious doubts whether the Tehlirian approach could really serve as a viable matrix for a future law and justice enforcement model, even under the truly exceptional circumstances at stake. In the words of Lemkin:

*“He had acted as the self-appointed legal officer for the conscience of mankind. But can a man appoint himself to mete out justice? Will not passion sway such a form of justice and make a travesty of it? At that moment, my worries about the murder of the innocent became more meaningful to me. I didn’t know all the answers but I felt that a law against this type of racial or religious murder must be adopted by the world.”*¹¹⁴

A couple of years later, again torn between comprehension and concern, Lemkin referred to a similar incident – the killing on May 25, 1926 in Paris of the Ukrainian politician Symon Petliura by the Jewish anarchist Sholem Schwartzbad¹¹⁵ – as a “beautiful crime”: “Beautiful” news, if in fact a felon had been brought to justice. With a view to the means employed, however, no doubt still a “crime”.

*“I deplored the absence of any law for the unification of moral standards in relation to the destruction of national, racial, and religious groups.”*¹¹⁶

Hence, in order to promote his fight against the impunity of genocide, for Lemkin, both Tehlirian and Schwartzbad served a double purpose: On the one hand, he appreciated the most valuable contribution of both assassins to increase world public’s awareness of gruesome facts, hitherto widely obfuscated behind a broad smoke screen of denial, disinformation,

109 Lemkin/Frieze 2013, p. 19.

110 Lemkin/Frieze 2013, p. 18.

111 See Jacobs 2012.

112 See e. g. Center for Armenian Remembrance 2008.

113 Lemkin/Frieze 2013, p. 20.

114 Lemkin/Frieze 2013, p. 20.

115 For a brief account of facts: Jacobs 2019, pp. 33–41, 37 f. Petliura has evoked contradictory judgements, and his actual responsibility for a 1918 pogrom against Jews in Ukraine is subject of a controversial debate: Pro Petliura: Hunczak 1969, pp. 163–183; Contra: Szajkowski 1969, pp. 184–213. For a detailed account of the entire affair: Friedman 1976.

116 Lemkin/Frieze 2013, p. 21.

deception, oblivion, whitewashing and trivialisation. The arousing of public disgust was certainly a most suitable means to shatter a central pillar of the international legal order: The principle of sovereignty as an almost impenetrable protective shield for state criminals.¹¹⁷ On the other hand, however, the cases of Tehlirain and Schwartzbad should also serve him as evidence for the inadequacy of the legal status quo: Rather than individuals appointing themselves to mete out justice, it should be upon the international community as a whole to cope with crimes of such monstrous dimensions: By universally applicable and legally binding norms as well as mechanisms for their enforcement.

We know all too well: In the years to come, the world community proved unable (and unwilling) to effectively confront this fundamental challenge to civilisation. Unfortunately enough, this silence and inaction was perceived – in a most cynical and deadly manner: On August 22, 1939, that is about a quarter century after the 1915 Armenian genocide and just one week prior to the launching of the attack on Poland, Adolf Hitler in his (in)famous Obersaltzberg speech¹¹⁸ committed his generals to the imminent extermination campaign. Could it really be more blunt and unambiguous?

“Our strength consists in our speed and in our brutality. Genghis Khan led millions of women and children to slaughter – with premeditation and a happy heart. History sees in him solely the founder of a state. It’s a matter of indifference to me what a weak western European civilization will say about me. I have issued the command – and I’ll have anybody who utters but one word of criticism executed by a firing squad – that our war aim does not consist in reaching certain lines, but in the physical destruction of the enemy. Accordingly, I have placed my death-head formation in readiness – for the present only in the East – with orders to them to send to death mercilessly and without compassion, men, women, and children of Polish derivation and language. Only thus shall we gain the living space (Lebensraum) which we need. *Who, after all, speaks today of the annihilation of the Armenians?*”¹¹⁹

The lesson Adolf Hitler thought he had learnt from the ethnic extermination of Armenians during World War I in the Ottoman Empire was that crimes committed during wartime would likely be overlooked and that nations and individuals that perpetrate genocide would not bear any serious consequences.¹²⁰ Unfortunately, with respect to the egregious events some 25 years ago, he was not entirely wrong. However, as far as the future was concerned, Hitler’s assumption proved, fortunately enough, a gross misjudgment: Many, even though

117 On a discussion of this topic with his professors at Lwow University Law School Lemkin reports his position as follows (Center for Armenian Remembrance (2008), p. 20): “But sovereignty of States [...] implies conducting an independent foreign and internal policy, building of schools, construction of roads, in brief, all types of activity directed toward the welfare of people. [...] Sovereignty cannot be conceived as the right to kill millions of innocent people.”

118 This version of the speech was first published by Lochner 1942, pp. 11 f.

119 Emphasis added. All ear-witnesses, who may seriously be considered to have authored the secret transcripts of the speech, lost their life in the wake of the failed assassination attempt on Hitler (20 July 1944) and thus have never been disclosed. However, although several versions of the speech exist, the overwhelming majority of historians subscribe to the authenticity of the “Armenian citation” (for a summary of the discussion: Albrecht 2008, pp. 115 ff.).

120 See also (with further references): Travis 2013.

by far not all, of those responsible for the Shoa and other crimes against humanity were held accountable before national and international criminal courts and tribunals,¹²¹ the international community branded the crime of genocide with its strongest means of disapproval (*ius cogens*¹²²) and last – but certainly not least – another more than 80 years later the Armenian genocide still serves, and it seems more so than ever,¹²³ as a powerful reminder: Never again shall the committing of genocidal acts and other crimes against humanity go unpunished. And if it were only for this reason, it is still a must to keep the memory both of victims and perpetrators of this ultimate crime alive – not only on April 24, the Remembrance Day of the Armenian genocide.¹²⁴

Precisely with reference to the Armenian genocide, Nobel Prize winner Elie Wiesel once claimed that not only is denial a crime,¹²⁵ so is forgetting.¹²⁶ Who would dare to disagree? Fortunately enough, though more than a century has lapsed, the suffering of the Armenian people has not fallen into oblivion.¹²⁷ However, deadly persecution of entire peoples just for their otherness is anything but a phenomenon from a distant past: Rwanda and Srebrenica,

121 From the prosecution for active participation in the Holocaust under the label “crimes against humanity” of Nazi leaders in Nuremberg (1945/46) for this at the time still nameless “crime of crimes” to the arrest warrant issued by the Appeals Panel of the ICC for Omar Al Bashir on 22 July 2010, https://www.icc-cpi.int/CourtRecords/CR2010_04826.PDF (accessed on 15.01.2021).

122 See only: Wouters/Verhoeven 2005, pp. 401 ff.

123 The epic fictionalisation by Werfel 1933, 1934/2012 may justifiably be credited with having awakened a broad worldwide awareness for the unbearable suffering of the Armenian nation during World War I. The book is preceded by a Bible quotation, which may very well be understood as an urgent call to the international moral and legal community: “And they cried with a loud voice, saying, How long, O Lord, holy and true, dost thou not judge and avenge our blood on them that dwell on the earth?” (Revelation 6, 10). Ever since (scholarly) literature on the subject has assumed an almost unmanageable volume.

124 National holiday in Armenia: On 24 April 1915 (“Red Sunday”) around 250 Armenian intellectuals were arrested in Constantinople under warrants issued by the Ottoman authorities. Most of them did not survive immediate deportation. This “decapitation strike” (Bloxxham 2005, p. 70) is viewed as the point of departure for the execution of a systematic plan to exterminate the Armenian people (see also for further rich material the “The Armenian Genocide Museum-Institute” Foundation, <http://www.genocide-museum.am/eng/> (accessed on 15.01.2021).

125 “Denial of genocide whether that of the Turks against the Armenians, or the Nazis against the Jews, is not an act of historical reinterpretation. Rather the deniers sow confusion by appearing to be engaged in a genuine scholarly effort. [...] The deniers aim at convincing innocent third parties that there is ‘another side of the story’ [...] when there is no credible ‘other side’” (Deborah Lipstadt, Letter to Chris Smith, US House of Representatives, 12.09.2000, in: Hearing before the Subcommittee on International Operations and Human Rights: H. Res. 398, The United States Training on and Commemoration of the Armenia Genocide Resolution, 14.09.2000, at p. 136). See also Lipstadt 1993, p. 216: “Denial aims to reshape history in order to rehabilitate the persecutors and demonize the victims.”

126 Wiesel 1986, p. 7.

127 At least as far as research is concerned, there can hardly be question of a “forgotten genocide” (opposite view, however, e. g. Laurinaviciute/Paulose/Rogo 2014 and Lémarchand 2011, which also includes a chapter on the Armenian genocide [Hannibal Travis]). Rather, what we have witnessed in recent years is an explosion of interest in the field in general and the Armenian genocide in particular, probably triggered by the attempt to annihilate the Tutsi in Ruanda and the Srebrenica massacre in Bosnia Herzegovina – qualified as “genocide” in both instances by the UN International Criminals tribunals set up in order to prosecute the perpetrators. See only, just by way of example: Conseil scientifique international pour l’étude du génocide des Arméniens 2015 and, far from exhaustive, the bibliography: <http://www.genocide-museum.am/eng/bibliography.php> (accessed on 15.01.2021).

the Darfuri and the Rohingya are just a few of too many painful reminders of our own times that we have not yet thoroughly learnt the Armenian lesson.¹²⁸ Will we ever?¹²⁹

6 Memory of Silence: “The Truth is Rarely Pure and Never Simple”¹³⁰

Unanimity prevails among those who have had a longstanding and formative impact on this journal – from Alfred Fried (pacifist, Nobel Peace Prize winner and, in 1899, founder of the “Friedens-Warte”) to Hans Wehberg, Jost Delbrück and Christian Tomuschat: There is no peace without justice. And the fight against impunity for those responsible for the most serious crimes against humanity has – time and again – emerged as a key element for the establishment of a durable peace, both within a society and between nations. This fight can take many guises: Individuals may claim title to take justice in their own hand, as did a century ago Soghomon Tehlirian, unanimously revered as a national hero in Armenia and by Armenians all around the world to this day. States on their part may consider warranted (military) intervention for humanitarian purposes, as did President Grover Cleveland in his Annual Message of December 2, 1895 in response to the “reported massacres of Christians in Armenia”.¹³¹ As “agents of the Christian world”, so he declared, it would be incumbent upon European countries

*“to enforce such conduct of Turkish government as will restrain fanatical brutality, and if this fails their duty is to so interfere as to insure against such dreadful occurrences in Turkey as have lately shocked civilization.”*¹³²

128 Raphael Lemkin, in his autobiography, seemed rather pessimistic in this respect, too (Lemkin/Frieze 2013, p. 132): “The fact is that the rain of my work fell on a fallow plain, only this rain was a mixture of the blood and tears of eight million innocent people throughout the world. Included also were the tears of my parents and my friends.”

129 However, in recent years, at least research on the issue has intensified and broadened across disciplines, see e.g. Sociology: Cushman 2003; Psychology: Woolf/Hulsizer 2007; Linguistics: Benesch 2014; Political Sciences: Verdeja 2002, Valentino 2004 and Strauss 2016.

130 Wilde 1899, Act I (Algernon Moncrieff).

131 The number of Armenians who fell victim to the so-called “Hamidian Massacres” between 1894 and 1896, sometimes referred to as the first phase of the Armenian Genocide, is impossible to ascertain with precision. Estimations range from 80,000 to 300,000. See only, most recently, the various articles in the “Revue arménienne des questions contemporaines” (No. 10/2018: “The Massacres of the Hamidian Period (I): Global Narratives and Local Approaches” and No. 11/2018: “The Massacres of the Hamidian Period (II): Perceptions and Perspectives”), <https://journals.openedition.org/eac/> (accessed on 15.01.2021). For a succinct overview from a human rights perspective Balakian 2009, pp. 92–103. It is noteworthy that at that time already, the German *Orientpolitik*, nourished by a mélange of Imperial *Realpolitik* and racist elements, revealed a startling degree of indifference vis-à-vis the suffering of the Armenians (see Alfons Mumm von Schwarzenstein, Die Haltung der deutschen Politik in der armenischen Frage, 25.11.1896, PA-AA/R 14437, Orientalia Generalia Nr. 5, Bd. 30, Acten betreffend die Politik der Mächte bezüglich der Balkanhalbinsel und der Meerengen, o. B. [cited after Przyrembel 2019, p. 303]). This detailed dossier of the later German Ambassador (inter alia) in China and Japan compiles the arguments for which the option of an intervention on humanitarian grounds, suggested by Cleveland, should be discarded.

132 Cf. <https://www.presidency.ucsb.edu/documents/third-annual-message-second-term> (accessed on 15.01.2021). Oscillating between cynicism and disillusionment, Lepsius 1897, p. 84 concluded about the attitude of German politics vis-à-vis the mid-1890s events: “But what does the whole story concern Germany? The truth is that German diplomacy has not sinned against the Armenian people by any criminal acts in the whole course of the years since the Berlin Treaty. It has preferred not to jeopardise the Sultan’s friendship even by expressing sympathy for the victims of its policy” (*own translation*); see also Przyrembel 2019, pp. 306–308.

Court proceedings, both on the national and international level, may constitute another and, as briefly outlined above, more or less promising avenue in this respect.¹³³

And then there is finally the still somewhat underestimated “soft” approach of truth commissions and similar bodies as a viable model of alternative or restorative justice. A multitude of such commissions have sprung up in recent decades.¹³⁴ However, few members of this “expanding universe of official truth seeking”¹³⁵ have left such a strong and lasting imprint on both, the life of the nation concerned as well as on the international human rights community, as did the “Guatemalan Commission for Historical Clarification”.¹³⁶ Its staggering (final) report “Memory of Silence” was handed over on February 25, 1999.¹³⁷ A “powerful reminder that we must engage honestly with past atrocities to make sense of the present, to prevent future violations and to better understand ourselves and our world” (Juan E. Mendez¹³⁸), this report stands out as “one of the most important documents about genocide during our time” (Daniel Jonah Goldhagen¹³⁹). No explicit naming of individual perpetrators, but a very clear stance on core human rights issues during what was probably the most brutal of all Latin America’s ‘dirty wars’ of the late Cold War.¹⁴⁰ First and foremost: in the course of the scorched earth counter-insurgency in Guatemala, genocide had indeed been perpetrated at certain times in certain places. The meticulous conclusions of facts and responsibility are brutally clear and often breathtaking.

The report starts off with a quote from Guatemalan writer Augusto Monterroso: “As we consume life’s quota, how many truths elude us?”¹⁴¹ And hence very much in this vein, the main purpose of the report was to “place on record Guatemala’s recent, bloody past ... Knowing the truth of what happened will make it easier to achieve national reconciliation.”¹⁴² Motives of the perpetrators, too, constitute an essential part of that very truth. And so the report continues to ask: “Why did these acts of outrageous brutality, which showed no respect for the most basic rules of humanitarian law, Christian ethics, and the values of Mayan spirituality, take place?”¹⁴³ The relentless disclosure of the most serious crimes does indeed appear to have made an important contribution to reconciliation and thus to internal peace in Guatemala.¹⁴⁴ The three members of the truth commission, Otilia Lux de Cotí, Alfredo Balsells Tojo and – acting as its coordinator – Christian Tomuschat, are thus undoubt-

133 See 3.

134 For early practice see in particular: Hayner 1994, pp. 597 ff.

135 Hayner 2002, p. 255.

136 See inter alia FitzGerald 2010.

137 English version e. g.: <https://hrdag.org/wp-content/uploads/2013/01/CEHreport-english.pdf> (accessed on 15.01.2021). For an annotated one-volume version see: Rothenberg 2012. For a summary of the organisation, results and impact of the Commission’s work Tomuschat 2001, pp. 233–258.

138 From 1 November 2010 to 31 October 2016 UN Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment.

139 Author of the equally powerful and impassioned as disturbing and controversial study: *Worse Than War – Genocide, Eliminationism and the Ongoing Assault on Humanity* 2009.

140 The most recent novel by Mario Vargas Llosa (*Tiempos recios* [Fierce Times] 2019) is a brilliant and powerful account of this “spookily darkened time” (“Gespenstisch verdunkelte Zeit”, Rudolf von Bitter, *Süddeutsche Zeitung*, 23.04.2020).

141 Monterroso 1972, p. 89: “Mientras consume su cuota de vida, ¿cuántas verdades elude el ser humano?”.

142 *Memory of Silence*, Report, 25.02.1999, p. 12.

143 *Memory of Silence*, Report, 25.02.1999, p. 11.

144 See e. g. Rothenberg 2012a, pp. 217 ff. For a somewhat more pessimistic assessment most recently Reinold 2020, pp. 123–147.

edly ‘peacemakers’ in the true sense of the word. What better editor could the “Friedens-Warte” have had in recent decades than my colleague and, I dare to say, fatherly friend, Christian Tomuschat?

And yet, members of the Commission were fully aware that for establishing and maintaining a truly lasting peace, each and every individual shares responsibility. Hence it was certainly a particularly fortunate choice to open the 1999 report with moral admonitions of timeless actuality from probably the most turbulent period in Israel’s history (8th century B. C.):

“cease to do evil – learn to do good – seek justice – correct oppression – defend the fatherless – plead for the widow.”¹⁴⁵

There are many ways to seek justice: It seems that Christian Tomuschat has chosen, in his work for the Guatemala Truth Commission and at numerous other occasions in his long and multi-faceted professional life, a particularly promising path. At least for the author of these lines, it is a truly exemplary path.

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¹⁴⁵ Isaiah 1, 16–17. It might be recalled that just a few verses further we find what might be called the United Nation’s unofficial mission statement (Isaiah 2, 4): “[T]hey shall beat their swords into plowshares, and their spears into pruning hooks; nation shall not lift up sword against nation, neither shall they learn war any more.”

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Geleitwort der Herausgeber |

A Note from the Editors

Editorial: Ein Dank an Christian Tomuschat |

Editorial: Thanking Christian Tomuschat

Beiträge | Articles

Menschenrechte | Human Rights

“It Is Not Possible For Us That Injustice Be Justice”. Some Remarks on the Soghomon Tehlirian Trial at Age 100
DANIEL-ERASMUS KHAN

Europäischer Menschenrechtsschutz in der Krise?
Die COVID-19-Pandemie als Herausforderung und Chance
CHRISTINA BINDER

Verlust der Staatsangehörigkeit als Maßnahme der Terrorismusbekämpfung: Welche Grenzen setzt das Völkerrecht?
CHRISTIAN WALTER/PHILIP NEDELCO

Internationale Organisation und Friedenssicherung | International Organisation and Peacekeeping

Strindberg, Fried und Tomuschat: Internationale Gerichte und bewaffnete Konflikte
CHRISTIAN J. TAMS

The Creation of the United Nations: Break with the Past or Continuation of Wartime Power Politics?
OLIVER DIGGELMANN

Die Beharrungskraft des Status quo: Die Bemühungen um eine Reform des Sicherheitsrates im Jahr des 75-jährigen Bestehens der Vereinten Nationen

BARDO FASSBENDER

Military Assistance Based on Ex-Ante Consent: a Violation of Article 2 (4) UN Charter?

ERIKA DE WET

Debatte | Debate

Für Stabilität und gegen unkontrollierbare Konfrontation – eine politische Initiative zu Dialog und Zusammenarbeit mit Russland auf der Grundlage einer glaubwürdigen europäischen und transatlantischen Sicherheitspolitik

RÜDIGER LÜDEKING/HELMUT W. GANSER

Panorama | Panorama

Konferenzbericht | Conference Report

Expert Roundtable Discussion: Formalisation Processes in Extractive Sectors as Part of State- and Peacebuilding Strategies – Peace Academy Rhineland-Palatinate, University of Koblenz-Landau, 27–28 February 2020

ZABRINA WELTER/CHRISTINA ANKENBRAND

Buchbesprechung | Book Review

Jorge E. Viñuales (ed.), The UN Friendly Relations Declaration at 50

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