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The Istanbul and Leipzig Trials: Myth or Reality?

Joseph Rikhof[*]

9.1. Introduction

The narrative most commonly associated with the efforts to bring persons accused of war crimes to justice after the First World War goes something likes this. Pursuant to the provisions of the progressive peace treaties of Versailles[1] and Sèvres,[2] the victorious powers in this conflict could put on trial nationals of Germany and Turkey before their military tribunals, and where war crimes were committed against the nationals of more than one Allied Power, these treaties envisaged the possibility of an international tribunal. However, due to the general public post-war fatigue in Britain and France, combined with the return to the traditional policy of international isolationism on the part of the United States (US), nationals of Germany and Turkey were not tried by these tribunals but instead handed over to their own states to be put on trial there. The outcome of these trials was wholly unsatisfactory in terms of providing appropriate justice for the serious war crimes committed by these nationals, resulting directly in the creation of the International Military Tribunal ('IMT') in Nuremberg.[3]

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[1] Treaty of Peace between the Allied and Associated Powers and Germany, 9 July 1919, Articles 227–29.

[2] Treaty of Peace Between the Allied and Associated Powers and the Ottoman Empire, Articles 226–27, 230.

[3] Part of this narrative can be found in the following writings: M. Cherif Bassiouni, "International Criminal Investigations and Prosecutions: From Versailles to Rwanda" and William A. Schabas, "International Sentencing: From Leipzig (1923) to Arusha (1996)", in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. III. *International*

The purpose of this chapter is to critically examine this narrative in all its aspects. In order to do so, the political and legal developments leading up to those trials, including the negotiations of not only the Versailles and Sèvres treaties but also the 1923 Treaty of Lausanne between the new Turkish government and the Allied Powers, which contained no provisions regarding trials at all, will be addressed. A similar approach will be taken in respect to similar contexts after the trials, such as the climate leading up to the London Charter[4] after the Second World War. The largest portion of this chapter, however, will be occupied with an analysis of the Istanbul and Leipzig trials themselves. This will be both from the more general aspects, such as of the number of trials, their outcome, the legal issues decided and their reasoning, but also more specifically concerning the possible application of the nascent war crimes law and the impact of these decisions on the future development of international criminal law.

9.2. Prologue

The notion that persons involved in the commission of war crimes and crimes against humanity should be held personally responsible was not new when the Statute of the International Criminal Court ('ICC') was agreed upon in 1998. It was not a novel approach when the international criminal tribunals for the former Yugoslavia and Rwanda were established by the United Nations Security Council in 1993 and 1994 respectively. It was not even a revolutionary concept after the Second World War when the International Military Tribunals in Nuremberg and Tokyo began their work. No. The idea that violations of the laws of war

Enforcement, Brill, Leiden, 1999, pp. 38–39 and pp. 171–72; Margaret MacMillan, *Paris 1919: Six Months That Changed the World*, Random House, Toronto, 2001, pp. 163–65; Claus Kreß, "Versailles – Nuremberg – The Hague: Germany and International Criminal Law", in *International Lawyer*, 2006, vol. 40, pp. 16–20; Shane Darcy, *Collective Responsibility and Accountability Under International Law*, Brill, Leiden, 2007, pp. 191–92; Steven R. Ratner, Jason S. Abrams and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford University Press, Oxford, 2009, p. 6; Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2010, p. 110; Kai Ambos, *Treatise on International Criminal Law*, vol. 1, *Foundations and General Part*, Oxford University Press, Oxford, 2013, pp. 2–4.

4 London Agreement of 8 August 1945 attaching the Charter of the International Military Tribunal.

or the dictates of humanity could be separated from the normal reach of public international law by holding states responsible, and instead could be levelled against the very individuals who had breached those norms by other institutions than the states of which they were nationals, is almost a hundred years old.

Like the first calls to provide solace to the millions of victims of Germany and Japan during the Second World War, the call to put perpetrators of very serious crimes on trial galvanised during the First World War as a result of a number of atrocities already committed by German and Turkish nationals very early during this conflict. In particular, the crimes against the Armenian population in 1915 by Turkey, which later came to be known as genocide, as well as the unlimited U-boat warfare in the Atlantic, the treatment of British prisoners of war in internment camps and the abuse of civilians in France and Belgium throughout the war, caused a popular outcry taken over by the Allied negotiators of the peace treaties with Germany and Turkey.[5]

The issue of responsibility for the commission of war crimes was of such great importance to the Paris Peace Conference that in January 1919 a special Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties ('Commission') was established by the Supreme Council of the Paris Peace Conference, with the purpose of both setting out the legal parameters of responsibility as well as charging named individuals

[5] James F. Willis, *Prologue to Nuremberg: Politics and Diplomacy of Punishing War Criminals of the First World War (Contributions in Legal Studies)*, Greenwood, Westport, CT, 1982, pp. 27–33, 38–39; Jackson Nyamuya Maogoto, *War Crimes and Realpolitik: International Justice from World War I to the 21st Century*, Lynne Rienner, Boulder, CO, 2004, pp. 43–44; Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton University Press, Princeton, NJ, 2000, pp. 58–59, 60–64, 83, 94–96; Samantha Power, *'A Problem from Hell': America and the Age of Genocide*, Basic Books, New York, 2002, pp. 5–14; Vahakn N. Dadrian and Taner Akçam, *Judgment at Istanbul*: *The Armenian Genocide Trials*, Berghahn Books, New York, 2011, pp. 19–22. The outrage with respect to massacres of the Armenian population was reflected at the official level by a statement by the governments of France, Britain and Russia on 24 May 1915 denouncing these acts as "crimes against humanity and civilisation", for which the members of the Turkish government would be held responsible; see United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty's Stationery Office, London, 1948, p. 35; Willis, 1982, pp. 25–27; Alan Kramer, "The First Wave of International War Crimes Trials: Istanbul and Leipzig", in *European Review*, 2006, vol. 14, no. 4, p. 442; Bass, 2000, pp. 114–17; Dadrian and Akçam, 2011, pp. 17, 22, 134.

for specific war crimes.[6] The final Report of this Commission provided a lengthy list of behaviour, which violated the laws of war, based on the 1907 Hague Convention,[7] as well as, for the first time, setting out criminal liability for the offence of conducting aggressive war (with respect to Germany)[8] and the violations of the clear dictates of humanity or crimes against humanity (with respect to Turkey).[9] In addition to providing liability for particular crimes, the Commission also recommended the establishment of an international tribunal to prosecute war criminals.[10]

While the majority of the Commission clearly intended to develop international law beyond the 1907 confines, this approach was by no means unanimous as two members of the Commission, Japan and especially the US, expressed concerns about a number of aspects of the majority Report, such as the notion of 'crimes against humanity' as a legal concept and putting on trial a head of state for starting a war.[11] In

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6 The Commission had 15 members (hence the other name used for it, the Commission of Fifteen): two from Britain, France, Italy, Japan and the US and one from Belgium, Greece, Poland, Romania and Serbia. For a background of the work of the various subcommittees of this Commission and the approaches taken by its members, see United Nations War Crimes Commission, 1948, pp. 32–33, see *supra* note 5; Willis, 1982, pp. 69–74, see *supra* note 5; John Horne and Alan Kramer, *German Atrocities, 1914: A History of Denial*, Yale University Press, New Haven, 2001, pp. 330–32; Jürgen Matthäus, "The Lessons of Leipzig: Punishing German War Criminals after the First World War", in Patricia Heberer and Jürgen Matthäus (eds.), *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes*, University of Nebraska Press, Lincoln, 2008, pp. 3–9; Harry M. Rhea, *The United States and International Criminal Tribunals: An Introduction*, Intersentia, Cambridge, 2012, pp. 21–41.

7 Reprinted in *American Journal of International Law*, 1920, vol. 14, pp. 112–15; see also London International Assembly, *Reports of Commission I (formerly Commission II) on the Trial and Punishment of War Criminals* ('Reports of Commission I'), London, 1944, pp. 142–44; United Nations War Crimes Commission, 1948, pp. 33–41, 236–38, see *supra* note 5; James W. Garner, "Punishment of Offenders Against the Laws and Customs of War", in *American Journal of International Law*, 1920, vol. 14, nos. 1/2, pp. 90–94; Rhea, 2012, pp. 36–38, see *supra* note 6; Maogoto, 2004, p. 48, see *supra* note 5; Matthew Lippman, "Nuremberg: Forty Five Years Later", in *Connecticut Journal of International Law*, 1991/92, vol. 7, p. 1, reproduced in Guénaël Mettraux, *Perspectives on the Nuremberg Trial*, Oxford University Press, Oxford, 2008, pp. 495–96.

8 *American Journal of International Law*, 1920, pp. 116–17, see *supra* note 7.

9 *Ibid.*, pp. 122–23.

10 *Ibid.*, pp. 121–24; see also United Nations War Crimes Commission, 1948, pp. 263–64, 436, see *supra* note 5.

11 *American Journal of International Law*, 1920, pp. 135–36 (for the US) and pp. 151–52 (for Japan), see *supra* note 7; for the US position, see also United Nations War Crimes Commission, 1948, pp. 36–37, 39–40, 238–39, 437, *supra* note 5; Willis, 1982, pp. 75–77,

addition, they opposed the establishment of an international tribunal but would rather have had a union of existing national military tribunals.[12] The final text of the peace treaties represented a compromise between the majority and minority views in that the reference to crimes against humanity was maintained, as was a special tribunal to try the Kaiser, Wilhelm II, but the latter only on the charge of "the supreme offence against international morality and the sanctity of treaties", while the tribunals to try lesser war criminals became limited to inter-Allied tribunals or national courts martial of any of the Allied countries.[13]

In practice, the ideal of trials of persons involved in war crimes or other crimes outside their country of origin was frustrated for a number of reasons: the enormity of the undertaking of setting up military tribunals; the refusal of the Netherlands to hand over the Kaiser to stand trial; the resistance in Germany due to public anger as well as the need to send a message about German sovereignty; the vague language in the peace treaties; domestic issues in the Allied countries; the changing political situation in Germany and Turkey; the delay in bringing accused to trial; the failure of the Allies to present a united front to the Germans and Turks and to take strong measures to enforce the treaties; and the lack of control of the Allied states within Germany and Turkey.[14]

9.3. The Leipzig Trials

Originally, a list had been drawn up by the Commission on the organisation of mixed tribunals under the auspices of the Paris Peace Conference, which was responsible for implementing Articles 228 to 230 of the Versailles Treaty and which had asked individual countries to provide names of

supra note 5; Rhea, 2012, pp. 38–41, *supra* note 6; Maogoto, 2004, pp. 49–50, *supra* note 5; Bass, 2000, pp. 100–4, *supra* note 5; Mettraux, 2008, pp. 496–98, *supra* note 7.

12 *American Journal of International Law*, 1920, pp. 139–50 (for the US) and p. 152 (for Japan), see *supra* note 7; see also Reports of Commission I , 1944, pp. 144–47, *supra* note 7; United Nations War Crimes Commission, 1948, pp. 264–65, see *supra* note 5; Sheldon Glueck, "By What Tribunal Shall War Offenders Be Tried?", in *Harvard Law Review*, 1943, vol. 56, pp. 1079–81.

13 Articles 227 and 229 of the Versailles Treaty and Article 227 of the Treaty of Sèvres.

14 Reports of Commission I, 1944, p. 119, see *supra* note 7; United Nations War Crimes Commission, 1948, pp. 46, 52, see *supra* note 5; Willis, 1982, pp. 77–82, 107–12, see *supra* note 5; Horne and Kramer, 2001, pp. 340–41, see *supra* note 6; Bass, 2000, pp. 78–80, see *supra* note 5; Maogoto, 2004, pp. 55–56, 104–5, see *supra* note 5; Kramer, 2006, p. 449, see *supra* note 5; Matthäus, 2008, p. 19, see *supra* note 6.

individuals to be extradited by Germany for trial before the various tribunals. The number of names on this list reached eventually 1,590 names (from about 20,000 on the national lists). But given the impracticality of trying that many individuals, the list was pared down to 862 suspects, which was broken down to 334 each from the French and Belgian lists, 97 from the British list (including nine Turks involved in the Armenian genocide), 57 from the Polish list, 41 from Romania, 29 from Italy and four from a list submitted by Croatia, Serbia and Slovenia (for a total of 896 persons but some people appeared on more than one list). The list was slightly reduced, but on 3 February 1920 it was handed over to the German ambassador in Paris with 853 German names. In the face of very strong opposition in Germany to extraditing their nationals to foreign tribunals, the Allies, primarily Britain, decided to switch their approach. This was the result of a proposal by the German government, which was examined by a commission set up by the Allied governments and which declared this proposal compatible with Article 228 of the Versailles Treaty. The Allied countries then submitted on 7 May 1920 a much-reduced list of 45 cases, with the most serious charges for trials to be conducted in Germany. Of the 45 cases, 11 originated from France, 15 from Belgium, seven from Britain and 12 cases together from Italy, Poland, Romania and Yugoslavia.[15]

Because of the fact that most of the evidence related to these cases was in the hands of the Allied governments and because some of the accused had disappeared, it was decided at another conference in July 1920 that the Allied governments would collect and provide statements of the evidence against persons on the abridged list.[16] Of the 45 cases selected for prosecution in 1921 before the Supreme Court of Germany,

[15] Reports of Commission I, 1944, p. 9, see *supra* note 7; United Nations War Crimes Commission, 1948, pp. 46, see *supra* note 5; Kramer, 2006, pp. 446–47, see *supra* note 5; British Parliamentary Command Paper No. 1450, "German War Trials: Report of Proceedings before the Supreme Court in Leipzig" ('British Parliamentary Command Paper No. 1450'), reprinted in *American Journal of International Law*, 1922 [1921], vol. 16, pp. 628–40, p. 4; Willis, 1982, pp. 117–25 and 148–53, see *supra* note 5 (discussing attempts to put on trial war criminals from other countries, such as Austria, Hungary and Bulgaria); Horne and Kramer, 2001, pp. 341–45 and 448–50, see *supra* note 6; Bass, 2000, pp. 68 and 87–88, see *supra* note 5; Maogoto, 2004, p. 55–56, see *supra* note 5; Chantal Meloni, *Command Responsibility in International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, pp. 41–42.

[16] British Parliamentary Command Paper No. 1450, p. 5, see *supra* note 15; United Nations War Crimes Commission, 1948, pp. 46–47, see *supra* note 5.

nine (with 12 accused) proceeded to trial resulting in six convictions. There were five (involving six accused) cases involving British victims, resulting in five convictions; three French cases (involving five persons), resulting in one conviction; and one Belgian case where an acquittal was entered. These trials started on 23 May 1921 and ended in July of the same year.[17]

The details of the British cases, the first three of which dealt with prisoner of war ('POW') situations while the other two addressed issues related to naval warfare and submarines, are as follows.[18]

9.3.1. Sergeant Karl Heynen[19]

In autumn 1915 Heynen was in charge of 200 British and 40 Russian POWs in a working camp at a mine in Germany. He was charged with maltreatment of these POWs on a number of occasions. There had been a

[17] The main sources for the British cases are the summaries in British Parliamentary Command Paper No. 1450, 1921, see *supra* note 15 and *American Journal of International Law*, 1922, vol. 16, pp. 674–724, see *supra* note 15 for the actual text of the judgments. Claud Mullins, *The Leipzig Trials: An Account of the War Criminals' Trials and a Study of German Mentality*, H.F. & G. Witherby, London, 1921 provides detailed descriptions of all the trials while more general summaries can be found in Reports of Commission I, 1944, pp. 11–12, see *supra* note 7 and United Nations War Crimes Commission, 1948, pp. 48–51, see *supra* note 5. See the chapter by Wolfgang Form, "Law as Farce: On the Miscarriage of Justice at the German Leipzig Trials: The *Llandovery Castle* Case", pp. 299–331. Based on German records, this refers to the case of Dieter Lottman, Paul Niegel and Paul Sangershausen which took place in January 1921 and which was not based on the Allied list, and to the case of Karl Grüner, which was held in November 1922.

[18] The British cases had one aspect not seen in the Belgium or French cases, namely that some witnesses, who had been reluctant to testify in Germany, had given their depositions before a British court in London, attended by representatives of the accused and the German government, which were then used in the German proceedings; this approach was achieved at a conference in February 1921. United Nations War Crimes Commission, 1948, p. 47, see *supra* note 5; Mullins, 1921, p. 36, see *supra* note 17; Horne and Kramer, 2001, p. 347, see *supra* note 6. For the procedure followed at the trials, see British Parliamentary Command Paper No. 1450, 1921, p. 5–8, see *supra* note 15; Mullins, 1921, pp. 37–41, see *supra* note 17; Willis, 1982, pp. 132–34, see *supra* note 5 (while also indicating that the trials attracted a great deal of press coverage).

[19] Heynen had already been found guilty by the German military authorities in a court martial and sentenced to 14 days arrest. These proceedings were set aside as a result of the new jurisdiction of the Supreme Court and this file was selected as a test case to see if a civilian court would follow the precedent of a German military court during the war. British Parliamentary Command Paper No. 1450, 1921, p. 8, see *supra* note 15. Three British witnesses testified in Britain and 16 at the trial in Leipzig.

concerted resistance on the part of the prisoners to work in the mine, and Heynen had ordered the guard to use the butt end of their rifles as well as their fists to get the prisoners to work. The court was of the view that in light of the orders given to him by his superiors and the subordination on the part of the prisoners he was entitled to use force, which was not seen as excessive in these circumstances.[20] However, in some 15 individual cases the force used against the prisoners was considered to be violent and excessive.[21] On 26 May 1921 Heynen was sentenced to 10 months imprisonment,[22] but he only served five months.[23]

9.3.2. Captain Emil Müller[24]

Müller was a commander of a prisoner of war camp in France for five weeks in early 1918 and was convicted for individual acts of brutality. The camp was heavily overcrowded while more POWs kept arriving. The situation resulted in increase of various diseases, lack of food and terrible sanitary conditions. The court found that Müller had sought assistance from his superiors, but to no avail. The court said he was not responsible for the poor conditions but it did imply that the German Military Staff knew of these conditions. The court found Müller guilty of deliberate personal cruelty, allowing a subordinate to ill-treat a POW, minor breaches of the law and two cases of insults, as well as forcing some prisoners to work while they were in no condition to do so.[25] He was sentenced to six months of imprisonment on 30 May 1921, for which the court weighed the facts that he tried to improve situation at the camp, that none of the prisoners whom he had abused had suffered serious consequences against the fact "that there has been an accumulation of offences, which show an almost habitually harsh and contemptuous and

[20] British Parliamentary Command Paper No. 1450, 1921, p. 9, see *supra* note 15; *American Journal of International Law*, 1922, vol. 16, pp. 677–78, see *supra* note 15.

[21] *Ibid.*, pp. 680–82.

[22] *Ibid.*, pp. 683–84.

[23] Willis, 1982, p. 141, see *supra* note 5.

[24] Eight British witnesses had testified in London while 19 did so in person in Germany.

[25] British Parliamentary Command Paper No. 1450, 1921, pp. 10–11, see *supra* note 15; *American Journal of International Law*, 1922, vol. 16, pp. 685–94, see *supra* note 15.

even frankly brutal treatment of prisoners entrusted in his care. His conduct has some times been unworthy of a human being".[26]

9.3.3. Private Robert Neumann[27]

Neumann was a labourer who was in charge of the British POWs from March until December 1917 at a chemical plant in Germany. He was charged with ill-treatment of these POWs. Neumann did admit to occasionally hitting soldiers because they kept refusing orders. The court ruled he could not be held responsible as he was acting upon the order of his superior, Trinke, who could not be arrested by the German government,[28] or, in the words of the court, "He was covered by the order of his superior which he was bound to obey […] It is of course understood that the use of force in any particular case must not be greater than is necessary to compel obedience".[29] The court concluded Neumann did not know his orders constituted criminal acts. He was sentenced to six months in prison on 2 June 1921.[30]

9.3.4. Lieutenant Captain Karl Neumann (*Dover Castle* Case)

Neumann, the commander of a German submarine, was charged with sinking a British hospital ship, the *Dover Castle*, without warning in May 1917. He knew the boat was a hospital ship. There were 842 people on the ship, including 632 patients, all of whom were rescued, although six crew members perished. These facts were admitted and as a result no witnesses were called. The only issue was whether the defence of superior orders could lead to an acquittal. It was undisputed that the German Admiralty had issued orders that a certain portion of the Mediterranean was subject to a blockade, which included hospital ships, and that any such ships that found themselves in that area were to be attacked by submarines. The

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[26] *American Journal of International Law*, 1922, vol. 16, p. 695; he served three months, see Willis, 1982, p. 141, see *supra* note 5.

[27] Four British witnesses had testified in London while there were 25 British and 14 witnesses in Leipzig.

[28] British Parliamentary Command Paper, No. 1450, 1921, p. 12, see *supra* note 15.

[29] *American Journal of International Law*, 1922, vol. 16, p. 699, see *supra* note 15.

[30] *Ibid.*, pp. 703–4.

court ruled Neumann did not go beyond the orders issued by the German Staff and he could not be held responsible for following those orders.[31]

With respect to the issue of superior orders, the court said:

> It is a military principle that the subordinate is bound to obey the orders of his superiors. This duty of obedience is of considerable importance from the point of view of the criminal law. Its consequence is that, when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible […] The Admiralty Staff was the highest service authority over the accused. He was in duty bound to obey their orders in service matters […] there are two exceptional cases in which the question of the punishment of a subordinate who has acted in conformity with his orders can arise. He can in the first place be held responsible, if he has gone beyond the orders given him […] a subordinate who acts in conformity with orders is also liable to punishment as an accomplice, when he knows that his superiors have ordered him to do acts which involve a civil or military crime or misdemeanor. There has been no case of this here. The memoranda of the German Government about the misuse of enemy hospital ships were known to the accused.[32]

Neumann was acquitted on 4 June 1921.[33]

9.3.5. First Lieutenants Ludwig Dithmar and John Boldt (*Llandovery Castle* Case)[34]

The initial accused was Commander Patzig, First Lieutenant of U-boat 86, who could not be found for the trial. The factual background of the case was that in June 1918 the ship was on the way from Halifax to Britain,

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31 *Ibid.*, pp. 706–7.

32 *Ibid.*, p. 707.

33 *Ibid.*, pp. 704–5.

34 *Ibid.*, pp. 13–14; Elbridge Colby, "War Crimes", in *Michigan Law Review*, 1924–1925, vol. 24, pp. 615–16; see also Willis, 1982, pp. 137–38, *supra* note 5; Matthäus, 2008, pp. 11–18, *supra* note 6. One witness testified in Britain while 12 British witnesses came to Leipzig to attend court and a number of German witnesses were heard as well. This case was unusual in that the person on the list submitted by the British government, Patzig, could not be found by the German government, which decided on its own accord to put Patzig's subordinates on trial instead.

carrying 164 men, 80 officers, 14 nurses and men of the Canadian Medical Corps, 258 people in total. There were no soldiers on board and no ammunition. Patzig was convinced the ship was carrying eight American soldiers and some arms, so he decided to sink the ship, including two of the three lifeboats, in which a number of people had been able to escape from the sinking ship. Only 24 persons survived. Patzig was aware that he was acting against orders of the German Military Staff, but he firmly believed that the ship was used for military purposes. The court determined that Patzig had committed murder, as he killed people on the lifeboats. Two other accused knowingly assisted Patzig by executing his orders.

The court was of the view that killing defenceless shipwrecked people was contrary to ethical principles as well as German and international law. With respect to international law, the court phrased the applicable principles as follows:

> The firing on the boats was an offence against the law of nations. In war on land the killing of unarmed enemies is not allowed (compare the Hague regulations as to war on land, para. 23(c)), similarly in war at sea, the killing of shipwrecked people, who have taken refuge in life-boats, is forbidden. It is certainly possible to imagine exceptions to this rule, as, for example, if the inmates of the life-boats take part in the fight. But there was no such state of affairs in the present case, as Patzig and the accused persons were well aware, when they cruised around and examined the boats. Any violation of the law of nations in warfare is, as the Senate has already pointed out, a punishable offence, so far as in general, a penalty is attached to the deed. The killing of enemies in war is in accordance with the will of the State that makes war, (whose laws as to the legality or illegality on the question of killing are decisive), only in so far as such killing is in accordance with the conditions and limitations imposed by the law of nations. The fact that his deed is a violation of international law must be well-known to the doer, apart from acts of carelessness, in which careless ignorance is a sufficient excuse. In examining the question of the existence of this knowledge, the ambiguity of many of the rules of international law, as well as the actual circumstances of the case, must be borne in mind, because in war time decisions of great importance have frequently to be

> made on very insufficient material. This consideration, however, cannot be applied to the case at present before the court. The rule of international law, which is here involved, is simple and is universally known. No possible doubt can exist with regard to the question of its applicability. The court must in this instance affirm Patzig's guilt of killing contrary to international law.[35]

The court also refined further the defence of superior orders, which it had started to develop in the Heynen and two Neumann cases by saying:

> Patzig's order does not free the accused from guilt. It is true that according to para. 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. According to No. 2, however, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law. This applies in the case of the accused. It is certainly to be urged in favor of the military sub- ordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases. But this case was precisely one of them, for in the present instance, it was perfectly clear to the accused that killing defenceless people in the life-boats could be nothing else but a breach of the law. As naval officers by profession they were well aware, as the naval expert Saalwiachter has strikingly stated, that one is not legally authorized to kill defenceless people. They well knew that this was the case here. They quickly found out the facts by questioning the occupants in the boats when these were stopped. They could only have gathered, from the order given by Patzig, that he wished to make use of his subordinates to carry out a breach of the law. They should,

[35] British Parliamentary Command Paper No. 1450, 1921, vol. 16, pp. 721–22, see *supra* note 15; see also Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, Alfred A. Knopf, New York, 1946, partially reproduced in Mettraux, 2008, pp. 100, 152, see *supra* note 7, as well as Willis, 1982, p. 138, see *supra* note 5.

> therefore, have refused to obey. As they did not do so, they must be punished.[36]

The two accused present at trial were sentenced to four years of imprisonment on 16 July 1921. However, Boldt escaped from custody on 18 November 1921 with the help of German officials while Dithmar left prison on 31 January 1922.[37]

The following are details of the one Belgian and three French cases.

9.3.6. Max Ramdohr

Ramdohr was an officer of Secret German Military Police in Belgium and was accused of cruelty towards Belgian children in 1917–1918. The background of the case was that train signals were frequently interrupted and German trains had to stop often, resulting in the plundering of provisions as well as affecting the transport of troops. The accused arrested several Belgian children who admitted their guilt but only after they had been mistreated in order to obtain confessions or further intelligence. At the time there was an army order in place to the effect that secret police could circumvent normal arrest procedures and that any conduct pursuant to those orders would not be questioned by the court. However, this order did not apply to children. As a result the court found that "there can be no question of the accused having rendered himself guilty of deliberate illegal arrest when he kept children in confinement until the necessary inquiries were over".[38]

However, this conduct was not part of the charges brought against Ramdohr. With respect to those accusations, the court was of the view that the testimony of the children who were witnesses during the trial was on the whole not reliable, and while the court had a suspicion that Ramdohr "employed measures which were legally forbidden" the evidence was insufficient to meet the criminal standard of a finding of guilt.[39]

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[36] British Parliamentary Command Paper No. 1450, 1921, vol. 16, pp. 721–22, see *supra* note 15.

[37] Reports of Commission I, 1944, p. 11, see *supra* note 7; United Nations War Crimes Commission, 1948, p. 49, see *supra* note 5; Willis, 1982, pp. 140–41, see *supra* note 5.

[38] Mullins, 1921, p. 141–43, see *supra* note 17.

[39] *Ibid.*, pp. 149–50; see also Willis, 1982, pp. 134–35, *supra* note 5.

9.3.7. Lieutenant General Karl Stenger and Major Benno Crusius[40]

It was alleged that in August 1914 in northern France and in Germany, General Stenger, on two occasions, issued an order to kill all French POWs under his control, while Crusius was charged with personally killing several French soldiers while passing on Stenger's order to his subordinates to do the same. The court was not sure whether Stenger wanted to kill only those who were abusing the privileges of captured or wounded men, or whether his order was to the effect that all were to be put to death. The court ruled that the former type of order was in accordance with international law by saying:

> Such an order, if it were issued, would not have been contrary to international principles, for the protection afforded by the regulations for land warfare does not extend to such wounded who take up arms again and renew the fight. Such men have by so doing forfeited the claim for mercy granted to them by the laws of warfare. On the other hand, an order of the nature maintained by the accused Crusius would have had absolutely no justification.[41]

The court found that the evidence did not show that General Stenger had issued an order to kill wounded and unarmed POWs, and that Crusius had been mistaken in thinking that such an order existed as a result of his mental state or in the words of the court:

> The accused Crusius acted in the mistaken idea that General Stenger, at the time of the discussion near the chapel, had issued the order to shoot the wounded. He was not conscious of the illegality of such an order, and therefore considered that he might pass on the supposed order to his company, and indeed must do so. So pronounced a misconception of the real facts seems only comprehensible in view of the mental condition of the accused. Already on 21st August he was intensely excited and suffered from nervous complaints. The medical experts have convincingly stated, that these complaints did not preclude the free exercise of his will, but were, nevertheless, likely to affect his powers of

[40] Reports of Commission I, 1944, pp. 12–13, see *supra* note 7; Willis, 1982, pp. 135–36, see *supra* note 5; Horne and Kramer, 2001, pp. 348–51, see *supra* note 6; Meloni, 2009, pp. 41–42, see *supra* note 15.

[41] Mullins, 1921, p. 153, see *supra* note 17.

> comprehension and judgment. But this merely explains the error of the accused; it does not excuse it […] Had he applied the attention which was to be expected from him, what was immediately clear to many of his men would not have escaped him, namely, that the indiscriminate killing of all wounded was a monstrous war measure, in no way to be justified.[42]

As a result Crusius was found guilty of negligent killing and the court sentenced him to two years imprisonment for the first incident on 21 August, but acquitted him of a second killing a week later because at that time his mental state had deteriorated to such an extent (had "a morbid derangement" and "complete mental collapse") that he could not be held responsible for his actions.[43]

9.3.8. First Lieutenant Adolph Laule

Laule was charged with intentional murder of a French Captain in August 1914 during the German offensive while being a company commander. The pertinent issue was whether he had issued an order or killed the Captain himself. The court ruled that Laule did not give an order nor did he kill the Captain himself. The Captain was killed by German soldiers during an attempt to convince the French officer to surrender but who instead offered resistance. As such the "French officer was not yet a prisoner, as he persistently resisted capture. He was killed by the German soldiers of their own accord as he would not cease continuing to struggle".[44] Laule was found not guilty.

9.3.9. Lieutenant General Hans von Schack and Major General Benno Kruska[45]

In September 1914 the German Ministry of War issued an order establishing a prisoner camp in Cassel for 15,000 men. The camp accommodated Belgians, French and Russians. In March 1915 the number went up to 18,300 men. The camp faced severe medical problems, as a result of which 1,280 men died (most of them French). The court

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42 *Ibid.*, pp. 160–61.

43 *Ibid*., pp. 165–67.

44 *Ibid.*, p. 173.

45 Willis, 1982, p. 136, see *supra* note 5.

ruled that the biggest problem was that Russian soldiers (who had brought the diseases) were commingled with healthy prisoners, and that the accused were not able to separate the two groups due to the orders of the High Command of the Army, which they had to follow. The court absolved both accused from guilt in these strong terms: "General Kruska, as well as General von Schack, is, as the State Attorney has himself said, to be acquitted absolutely. That the fatal epidemic broke out during his command was a misfortune which could not be averted, even by the most strenuous fulfilment of duty". The court continued: "the trial before this Court has not revealed even the shadow of proof for these monstrous accusations".[46]

9.4. The Istanbul Trials

All the trials were related to the 1915 deportations and massacres of the Armenian population in Turkey by representatives of the government then in power, the Committee of Union and Progress ('CUP'), also known as the Young Turks. After the First World War, the Allied countries warned the re-established government of the Ottoman Empire to seek out and prosecute suspects for this genocide and put them on trial or face harsh consequences, including the division of Turkey. The first government after the war, that of Ahmet Izzet, was reluctant to do so (with as a result that a number of high level CUP officials fled to Germany), but it was forced to resign for this lack of co-operation less than three weeks after it had come to power. The new government of Tevfik Paşa, which took over on 8 November 1918, was more serious about taking steps to bring perpetrators to justice and a month later special courts martial were established for this purpose. A parliamentary commission produced files with evidence on 130 suspects, which was handed over to the courts in January 1919 while the trials began under the next government of Damad Ferid, which had come to power in March 1919. One hundred and seven arrests were made by April 1919, of which 98 were put on trial. While these trials were ongoing, the British made efforts to prosecute Turkish war criminals who had abused British POWs before their own courts in British-occupied territory, while also demanding the extradition of other suspects from Ottoman territory for trial before an international tribunal pursuant to the provisions of the Treaty of Sèvres. To that end, on 26 May

[46] Mullins, 1921, p. 189, see *supra* note 17.

1919 the British arrested 41 prominent prisoners, arrested several more later, and eventually interned, by August 1920, 118 men on Malta for trials on crimes against humanity before the to-be-established international tribunal. The government in Istanbul protested and arrested some of the suspects accused by the British government of the mistreatment of British POWs.[47]

There were 10 main trials (or 11 as the trial pertaining to the cabinet ministers and CUP members was divided into two separate phases with one verdict) before the Extraordinary Courts Martial (Extraordinary Military Tribunals or Special Military Tribunals) between 5 February 1919 and 29 July 1920. These can be divided into three major groups: cabinet ministers and members of the CUP Central Committee; secretaries and delegates of the CUP; and middle level and minor officials in various geographic regions.[48]

9.4.1. The Trial of Cabinet Ministers and Top CUP Leaders

This trial pertained originally[49] to 18 cabinet ministers (four of which were *in absentia*)[50] and 11 members of the CUP Central Committee (four of which were *in absentia*), where nine became the subject of a verdict.

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47 Willis, 1982, pp. 153–56, 158–159, see *supra* note 5; Kramer, 2006, pp. 443–44, see *supra* note 5; Maogoto, 2004, p. 57–60, see *supra* note 5; Bass, 2000, pp. 118–28, see *supra* note 5; Dadrian and Akçam, 2011, pp. 57–69, 78–91, 251–64, see *supra* note 5.

48 Bass, 2000, pp. 124–25, see *supra* note 5 (while indicating that more trials were planned but never held); Dadrian and Akçam, 2011, pp. 108–24, see *supra* note 5. The latter book makes it clear that these 10 or 11 trials with 98 accused were the ones reported in the *Takvîm-i Vekâyi*, the official journal of the tribunals, while in the estimation of the authors, based on contemporary newspaper reporting, there were likely to have been a total of 63 cases between April 1919 and July 1921, which, apart from the reported ones, involved another over 120 accused, and of which 22 cases came to a judicial decision including 17 acquittals, eight cases being dismissed due to lack of evidence while the result of 21 files remains unknown, see pp. 201–2 with more details at pp. 219–42; this book also reports one other trial at pp. 122 and 208, but that trial does not deal with the Armenian massacres and rather with persons who helped escape from prison one of the convicts in the CUP Secretaries trial, Ahmet Midhat. For contemporary legal views on the Armenian genocide, see *International Criminal Law Review*, Special Issue: Armenian Genocide Reparations, 2014, vol. 14, no. 2.

49 The British removed a number of these accused to Malta on 26 May 1919. Bass, 2000, p. 128, see *supra* note 5; Dadrian and Akçam, 2011, p. 120, see *supra* note 5.

50 Dadrian and Akçam, 2011, see *supra* note 5. The main source for this information is not clear as at p. 120 the numbers are respectively 13 and 3 while at p. 203 the numbers are 14 and 4.

The trial began on 28 April 1919 and ended on 19 July 1919, divided between the first phase, which dealt with CUP component from 28 April to 17 May 1919, while the second phase dealing with the cabinet ministers took place from 3 June to 25 June 1919. The tribunal sentenced to death four persons, all of whom had been both cabinet ministers as well as members of the CUP Central Committee: Küçük Talaat, Ismail Enver, Ahmet Cemal and Mehmed Nazim. All four had been tried *in absentia* and were not present when the verdict was announced. Three others were sentenced to 15 years hard labour, of whom two, Mustafa Şeref and Mehmet Cavit, were not present either, while for the third, Musa Kazim, the sentence was later commuted to exile. Finally, two others, Rif'at and Haşim, were acquitted.[51]

The central theme in the charges against the ministers and CUP members was the crime of mass murder against the Armenians[52] while mention was also made of "calamities",[53] "deportation with the goal of annihilation",[54] "slaughter",[55] and "massacres",[56] while accusations of plunder figured prominently[57] as did those of destruction of property, rape, torture,[58] forced displacement and deportation and, interestingly, "altering the form of government by force and compulsion, by sowing fear and terror among the populace".[59]

In the opening statement of the Attorney General it was said:

> The principal subject matter of this investigation has been the event of the disaster befalling the deported Armenians

[51] Willis, 1982, pp. 155–56, see *supra* note 5; Bass, 2000, pp. 129–30, see *supra* note 5; Dadrian and Akçam, 2011, pp. 121, 202–3, 330–31, see *supra* note 5 (for the subsequent fate of the four sentenced to death *in absentia*, see p. 196). The result of this trial prompted the British Acting High Commissioner in Istanbul to say: "It is interesting to see how skilfully the Turkish penal code has been manipulated to cover the acts attributed to the accused and the manner in which the sentences have been apportioned among the absent and the present so as to effect a minimum of real bloodshed", see Bass, 2000, p. 129, see *supra* note 5.

[52] Dadrian and Akçam, 2011, p. 120, see *supra* note 5.

[53] *Ibid.*, pp. 273, 278, 279.

[54] *Ibid.*, p. 274.

[55] *Ibid.*, p. 275.

[56] *Ibid.*, pp. 277, 282, 284, 286.

[57] *Ibid.*, pp. 284, 286.

[58] *Ibid.*, p. 286.

[59] *Ibid.*, p. 289.

> […] The disaster visiting the Armenians was not a local or isolated event. It was the result of a premeditated decision taken by a central body composed of the above-mentioned persons; and the immolations and excesses which took place were based on oral and written orders issued by that central body.[60]

The judgment came to this conclusion:

> The evidence shows that the crimes of massacre that occurred in Trabzon, Yozgad, and Boğazhyan, and that were verified as a result of the trials that were held by the Military Tribunal, were ordered, planned and carried out by persons among the leadership of the CUP. Furthermore, as was presented during the defence's case, although there were those who became aware of the crimes after their occurrence, these persons made no effort whatsoever to prevent their repetition or stop the perpetrators of the previous crimes.[61]

9.4.2. The Trial of Secretaries and Delegates of the CUP

This trial started on 12 June 1919 and completed on 8 January 1920 when the judgment was issued. The verdict was appealed on 13 February and overturned by the Appellate Court, which sent the case back to the Trial Court but there it is not clear what happened at the rehearing.[62]

The main feature of this trial, which comprised 29 accused, of whom only 11 appeared at trial, was that these persons had gained control of the state apparatus, both in the capital and in the regions where the deportations and killings had taken place. The charge against the members of the CUP in Istanbul was that they were responsible for the enactment of the Temporary Law of Deportation, which was the legal vehicle for the massacres to occur. The regional secretaries were accused of replacing local governors, who had opposed the harsh measures against the Armenian population, in order to put into effect the deportations and killings.[63]

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60 Bass, 2000, pp. 126–27, see *supra* note 5.

61 Dadrian and Akçam, 2011, p. 327, see *supra* note 5.

62 *Ibid.*, pp. 116, 202–6.

63 *Ibid.*, pp. 116–17 (there is also a reference to the 30 accused on p. 116).

Only four persons were found guilty of committing massacres, plunder and other crimes under the pretext of organising deportations (although seven others were convicted of the crime of altering the legitimate government). The court held that there was not sufficient evidence to convict some of the others, while for two persons further examination was ordered, and the case of yet two others was severed from the main case. The four accused who had been convicted were spared the death penalty as they were considered accessories to the crimes rather than principals. Two of the accused, Hasan Fehmi and Ahmet Midhat, were sentenced to 10 years hard labour, while a third, Avni, was sentenced to two months incarceration, but he was released immediately as he had already served this time during the trial. The sentence of the fourth person, Abdülgani, was held in abeyance until the completion of another trial, in which he was also an accused.[64]

9.4.3. The Trials of Regional Functionaries

There were regional trials in the districts of Yozgad, Trabzon, Harput, Bayburt, Erzincan, Büyükdere, Izmit and Çankiri. The accused had all been directly involved in the massacres of the local Armenian population, either at a high level, such as district governors or with a senior military or police rank, or at lower levels, such as businessmen, local party or government officials or lower-ranking soldiers and police officers. While in most cases the allegations of carrying out a massacre was the main count, other criminal acts, such as pillage, plunder and rape were also frequently mentioned as were the purpose of these crimes, namely the "extermination of the deportee population" or "annihilation of the population". The sentences for the accused varied from the death penalty to one-year imprisonment while a number were also acquitted.

The Yozgad trial was the first to be held and ran from 5 February to 8 April 1919. There were three defendants, namely the Yozgad Deputy Governor, Mehmet Kemal; the gendarmerie Commander Major Manastirli Mehmet Tevfik bin Halil Osman; and Abdül Feyyaz Ali, an employee of the group Religious Foundations. The latter was removed from the trial and ordered to be processed separately, while Kemal received a death sentence and Tevfik a sentence of 15 years' hard

[64] *Ibid.*, pp. 118–19, 314–16, 320–23.

labour.[65] When Kemal was executed on 10 April 1919, there was a very large nationalist demonstration during his funeral.[66]

The judgment contains this telling assessment of the situation in the Yozgad district in 1915:

> The deportation of all of the Armenians, even their helpless wives and children, thereby discounting the officially allowed exceptions, was ordered through the auspices of Boğazliyan County Executive and Acting District Governor of Yozgad, Kemal Bey, and Gendarmerie Commander for the provincial district of Yozgad, Major Tevfîk Bey, whose convictions are being demanded. Driven by their own personal ambition and greed, and after accepting the secret, illegal communications and instructions of a few evil individuals, they undertook the deportations after first taking all of the money and valuable possessions from these persons who made up the departing convoys, in complete disregard for their individual rights. Not only did they fail to adopt the necessary measures to ensure the protection of the aforementioned deportees, so that might reach their destination point in comfort and ease, they bound the hands of the men, thus allowing these premeditated tragic events to take place, causing all manner of slaughter, looting, and pillage, such are entirely unacceptable to human and civilized sensibilities and which, in Islam's views of the severity of the crimes are considered among the greatest of offences. The defendants even blocked attempts at preventing their occurrence by concealing the truth from their superiors, who have testified how they repeatedly asked for reports concerning the aforementioned tragedies. What is more, they supported and facilitated the realization of the accursed aims by dispatching irresponsible persons without any official authority as supervisors over the officials and guards responsible for the deportations.[67]

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65 *Ibid.*, pp. 110–11, 218–19.

66 *Ibid.*, pp. 195, 219; Bass, 2000, pp. 125–26, see *supra* note 5.

67 Dadrian and Akçam, 2011, p. 291, see *supra* note 5; see also Bass, 2000, p. 125, see *supra* note 5, who uses the words "against humanity and civilization", based on a number of other sources (in his footnote 133) where Dadrian and Akçam in the above excerpt say "unacceptable to human and civilized sensibilities". The excerpt of the verdict is a translation by one of the authors, Vahakn Dadrian (footnote 1 on p. 332), in describing the judgment earlier in the book the same author, states: "The crimes were committed with a

Kemal and Tevfîk were found guilty as principal co-perpetrators for these crimes, while Kemal was also considered the principal perpetrator because he was the highest official in the district. He planned the manner in which the crimes were to be carried out, ordered a group of individuals without title or authority to accompany the convoys, and encouraged the official in charge of the convoy to obey the commands of this group of individuals while bypassing the official chain of command.[68]

The Trabzon trial was held from 26 March and 22 May 1919 and involved 10 accused, two of whom *in absentia*. These two had been the main organisers of the massacres in this province, namely the Governor-General and the CUP representative in the province. Among the allegations were the separation from men and women, the latter becoming the subject of sexual crimes, even girls at a young age, and the transport of male and female infants, who were loaded on barges and boats and then drowned, in addition to the systematic killing of adults and the plunder of their properties. Six of the accused were convicted, two acquitted and two persons were separated from this proceeding and deferred for further clarification for another trial. Two were given the death penalty *in absentia*, namely Cemal Azmi, the Governor-General and Yenibahćeli Nail, the CUP representative. Mehmet Ali, the Director of Customs and the trustee of the Trabzon Red Crescent Hospital, was given 10 years hard labour; Ahmet Mustafa, an agent for a maritime company in Trabzon, and Nuri, the police chief, were each given one-year imprisonment.[69]

The difference between the death penalties and hard labour were explained by the tribunal on the basis of involvement as principal co-perpetrator or accessory in the following terms:

> If several persons unitedly commit a felony or misdemeanour or if a felony or misdemeanour is composed of several acts

firm intention. Equally important, the method of 'deportation' was a subterfuge for the ultimate objective of 'exterminating the deportee population'. About this 'there can be no doubt and no hesitation'. Referring to the method of incapacitation the male victims at the very start of the deportation operations, the verdict speaks of the standard procedure of 'tying together the arms of several men. In order to intensify the scale of the atrocities, the perpetrators incited the religious hatreds 'not only of Yozgat Muslims but Muslims in general'" (on pp. 110–11), thereby providing further insight into the term 'premeditated' used in the excerpt.

68 Dadrian and Akçam, 2011, p. 293, see *supra* note 5.

69 *Ibid.*, pp. 111–13, 196, 218, 294–99; see also Bass, 2000, p. 128, see *supra* note 5.

> and each of a gang of persons perpetrates one or some of such acts with a view to the accomplishment of the offence, such persons are styled accomplices and all of them are punished as sole perpetrators […] who knowingly assist the principal perpetrator in acts which are means of preparing, facilitating, or completing a felony or misdemeanour are deemed accessories in the commission of such felony or misdemeanour.[70]

The Harput trial started on 28 July 1919 and was completed on 13 January 1920. It involved four accused, two of whom *in absentia*, against the persons most responsible, namely high officials of the CUP in Harput province, Dr. Bahaeddim Şakir and Resneli Boşnak Nazim. The two persons *in absentia* were convicted and given the death penalty and five years hard labour respectively; the two persons present for the trial were acquitted.[71] As with the previous two cases, the verdict concentrated on the "massacre" while making reference to the "Special Organizations, which had been formed for the purpose of destroying and annihilating the Armenians".[72]

The Bayburt trial began on 15 March 1920 and ended on 20 July 1920. It involved two defendants, Mehmet Nusret, the District Governor of Bayburt, and Mehmet Necati, a reserve officer in the army, who were, again, accused of massacres against Armenians. Both were found guilty and sentenced to death, Necati *in absentia*. Nusret was executed on 5 August 1920.[73]

The Erzincan proceeding took place from 18 May 1920 to 29 July 1920. It involved seven accused, including the District Governor, Mehmet Memduh bin Tayar. Of these seven, one passed away during the trial. The trial of Tayar was separated as he was detained in Malta, while guilty verdicts and death sentences were pronounced against the other five, of whom only one, Hafiz Abdulah Avni, a businessman, was present. He was executed on 29 July 1920.[74]

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70 Dadrian and Akçam, 2011, p. 297, see *supra* note 5.

71 *Ibid.*, pp. 113–14, 196, 212–16, 299–303.

72 *Ibid.*, p. 300.

73 *Ibid.*, pp. 114–15, 197, 207–8, 304–10.

74 *Ibid.*, pp. 115–16, 196–97, 211–12, 310–13.

The Büyükdere trial was held from 23 April to May 24 1919 with four accused, two of whom were convicted and two acquitted, resulting in sentences of hard labour for two and one year.[75]

The Izmit trial involved eight defendants, four of whom received terms of imprisonment of 15 (*in absentia*), three, two and one year, as well as four months for two persons, while two others were acquitted. The trial ran from 27 October 1919 to 29 February 1920.[76]

The Çankiri trial pertained to Cemal Oğuz, a provincial party secretary, and Nureddin Bey, a Captain in the army, held between 27 October 1919 and 5 February 1920. Oğuz was originally the subject of a separate investigation but then his file was merged with the CUP secretaries' trial, only to be separated again. Both were accused of deporting Armenians from Istanbul to Çankiri and murdering them. Oğuz was sentenced to five years and four months hard labour, and Nureddin to six years and eight months hard labour but *in absentia*.[77]

9.5. The Aftermath

With respect to the Leipzig trials, the Belgian, British and French governments sent representatives to their respective trials. But the Belgian delegation left Leipzig very dissatisfied while the French delegation did not even attend the last trial, that of von Schack and Kruska.[78] The files submitted by Italy were discarded in that no action was undertaken. On 15 January 1922 the Commission of Allied Jurists, which had been appointed by the Supreme Council to inquire into the Leipzig trials, recommended that it was useless to proceed with further trials, and that the German

[75] *Ibid*., pp. 121–22, 209–10.

[76] *Ibid*., p. 122 (although the Izmit trial mentioned here pertains to three accused with different names than the ones referred to later, pp. 216–18). There is a discrepancy in the account of this trial as on p. 216 it refers to six defendants while on pp. 217–18 it appears that eight people received a sentence.

[77] *Ibid*., pp. 122–24, 210–11.

[78] Reports of Commission I, 1944, pp. 10, 13, see *supra* note 7; United Nations War Crimes Commission, 1948, p. 47, see *supra* note 5; Bass, 2000, p. 89, see *supra* note 5; Matthäus, 2008, pp. 9–10, see *supra* note 6. Neutral observers in Leipzig were of the view that the French had overreacted, see Willis, 1982, p. 137, see *supra* note 5, where it also stated that: "A Dutch judge who had watched the Stenger trial wrote that the court acted in a 'perfectly correct manner' and that the 'fairly general disapproval of the judgment is misplaced'. British officials agreed and refused the French request to end British participation".

government should be made to hand over the remaining accused to Allied countries for trial. The reasons given were that the persons who had been acquitted should have been convicted, while the sentences given to the persons convicted had been too lenient. In June 1922 the Leipzig court decided to proceed with the remainder of the trials, which was done without the presence of Allied representation. In that same month, the first trial commenced on this basis against Dr. Oskar Michelson, who had been accused of having beaten and ill-treated several French prisoners in his hospital and having caused the death of several of them. But he was acquitted on 3 July 1922 (after the 14 French witnesses scheduled to testify did not show up). In December 1922 another 93 accused (out of the original 1920 list of 853) were brought to trial, followed by the remainder in the next three years, but only six proceedings led to a conviction, bringing the total number of convictions to 12 (out of 901 files), of which a number escaped, often in collusion with their jailers.[79] At the same time, France and Belgium conducted a large number of courts martial *in absentia* against German soldiers on the original list, as well as others. This resulted in over 1,200 guilty verdicts (out of 2,000 proceedings) by December 1924 in France alone, as well as an approximately 80 in Belgium by May 1925, frequently reaching different results to the proceedings in Germany for the same suspects.[80]

The immediate reaction to the Leipzig trials differed. While, as indicated earlier, the Belgian and French observers at the trials left the proceedings in disgust because of the unwillingness of the courts to sentence most of the German soldiers involved in crimes against their nationals, the British assessments of the trials were more positive on a number of levels. One commentator, Claud Mullins, a lawyer who spoke German and who had been present during the British trials in 1921 as part of the British delegation, was of the view that the trials had been markedly fair given the overwhelming negative public and government

[79] Reports of Commission I, 1944, pp. 9, 13, 199, see *supra* note 7; United Nations War Crimes Commission, 1948, pp. 47–48, 51, see *supra* note 5; Willis, 1982, p. 140–45, see *supra* note 5; Ann Tusa and John Tusa, *The Nuremberg Trial*, Atheneum, New York, 1984, p. 19; Maogoto, 2004, p. 56, see *supra* note 5; Lippman, 1991–1992, p. 1, see *supra* note 7, reproduced in Mettraux, 2008, p. 500, see *supra* note 7; Horne and Kramer, 2001, pp. 352–53, see *supra* note 6. Form, 2014, p. 17, see *supra* note 17 suggests that the vast majority of these proceedings were not trials but summary rulings by the courts.

[80] Willis, 1982, p. 146, see *supra* note 5; Horne and Kramer, 2001, pp. 353–55, see *supra* note 6; Kramer, 2006, p. 449, see *supra* note 5; Bass, 2000, p. 90, see *supra* note 5.

attitude in Germany.[81] When venturing for an explanation why the British trials had been more successful than the Belgian or French ones, he came

[81] Mullins, 1921, pp. 42–43, 196, see *supra* note 17 states: "Never have trials taken place amidst more difficult surroundings", "No judges have ever had a more difficult task than to act judicially under such circumstances" and "At the time of the trials, The Times described them as 'a travesty of justice' and the Evening Standard said that 'Leipzig, from the Allies' point of view, has been a farce'; but I do not think that any Englishman who was present was of that opinion. However much we may criticise the judgments of the Court, and however much we may deplore their inadequacy from the point of view of jurisprudence, the trials were not a farce and the seven German judges endeavoured throughout to be true to the traditions of fairness and impartiality which are the pride of all judicial courts". Along the same lines, see Lord Cave, "War Crimes and Their Punishment" in *Problems of Peace and War, Papers Read before the Society in the Year 1922, Transactions of the Grotius Society*, vol. 8, p. xxix. "The results, so far, of our efforts to bring the war criminals to justice are far from encouraging. No doubt it is worth something that a German Court has convicted and sentenced German soldiers and sailors for flagrant inhumanity and breach of the laws of war and it appears to me that for this achievement credit is due to the British lawyers who prepared and watched the cases with so much ability and judgment. Nor would it be fair to pass by the fact that German judges and law officers were found who had the courage to listen carefully to evidence which was given by their late enemies against their own nationals and (however inadequately) to condemn and sentence some of the most flagrant offenders. Further, we have gained some experience which will be of assistance in considering what steps can be taken to ensure better results in the event (which God forbid) of our being again involved in war. But that some such steps should be taken, and that promptly, will, I think, be plain to everyone". See also comments by Sir Ernest Pollock, the head of the British delegation to Leipzig, who was "much impressed by the Supreme Court of Leipzig – the trials were conducted very impartially with every desire to get to the truth", as reproduced by Bass, 2000, p. 81, see *supra* note 5 (who does point out on the same page that this sentiment was not necessarily shared by everyone in the British Foreign Office); Colby, p. 616, see *supra* note 34 ("There were many difficulties to be surmounted in instituting and conducting such trials. The marvel is that they were held at all. Instances to the contrary must be very numerous".); Horne and Kramer, 2001, p. 346, see *supra* note 6 ("The court president, Dr. Karl Schmidt, conducted the trials with punctilious fairness and courtesy towards the both Allied witnesses and top-level delegations from Britain, France, and Belgium which attended the prosecution of 'their' cases"); Willis, 1982, p. 138, see *supra* note 5 ("Although the French and Belgians were outraged over the results of the Leipzig trials, the British viewed the proceedings with some satisfaction. *The Times* called them a 'scandalous failure of justice' but other newspapers and journals thought that the principle of punishment had been observed, despite the light sentences. Several members of parliament fumed over the 'farce' but most politicians had lost interest. The House of Commons by a large majority decisively defeated a motion to hold a special debate on the trials […] The British gratefully accepted the opinion of the law officers who pronounced themselves satisfied. Sir Ernest Pollock told the cabinet, and later the House of Commons, that the *Reichsgericht* 'acted impartially' and that the 'moral effect of the condemnation' outweighed the leniency of the sentences"); Reports of Commission I, 1944, pp. 13–14, see *supra* note 7 ("In the beginning the trials seem to have been conducted impartially: the

to the conclusion that, on the whole, the British cases were stronger from an evidentiary perspective, because the British witnesses were generally better prepared and more credible and objective.[82] He also did not view the sentences handed out to be too light, as these sentences were going to be served in the harsh conditions of German military prisons.[83] Lastly, British commentators were also in agreement with the international law applied by the German judges in these cases, specifically the parameters of the defence of superior orders.[84]

presiding judge showed a real desire to ascertain the truth and expressed the disgust at the horrors revealed, paying tribute to the objective sincerity of the British witnesses. This did not, however, prevent the Court from accompanying its findings by considerations that show a wide gulf between the German conception of honour and our own, and soon it allowed itself to be ruled by motives of opportunism. The German public showed indignation that German judges could be found to sentence the war criminals and the press brought all possible pressure to bear on the court, how successfully, its decisions showed. What the more enlightened section of the audience found most shocking was not the horrors brought to light but the fact that those truly responsible were escaping punishment"); Matthäus, 2008, p. 10, see *supra* note 6 ("The verdicts leave no doubt that the Leipzig court's attempt at professional impartiality found its limitation where political interest and national honor were at stake"); see also United Nations War Crimes Commission, 1948, p. 51, see *supra* note 5.

82 Mullins, 1921, p. 192, 195–96, see *supra* note 17; he also alludes to the fact that the conduct of the British mission during the trials might have had a positive effect on the proceedings at pp. 48–50.

83 *Ibid.*, pp. 202–8. This sentiment is shared by Sir Ernest Pollock, who states in the "Introduction" of Mullins's book at pp. 10–11: "These sentences were, to our estimate, far too light; but as the following pages show, they must be estimated according to their values in Germany. To the Germans a sentence of imprisonment upon an officer carries a special stigma, and imports a blot upon the service to which belongs"; see also along the same vein the report by Pollock to the British cabinet and parliament in 1921, as set out in Horne and Kramer, 2001, pp. 347–48, see *supra* note 6.

84 British Parliamentary Command Paper No. 1450, 1921, p. 13, see *supra* note 15; Mullins, 1921, pp. 218–21, see *supra* note 17, after comparing the German, British and French Military Manuals; see also in the same vein Colby, pp. 606–13, see *supra* note 34; Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 1944, partially reproduced in Mettraux, 2008, pp. 26–27, 42, see *supra* note 7; the United Nations War Crimes Commission, 1948, pp. 274–182, see *supra* note 5. With respect to international law in general, Mullins was of the view at p. 200 that "in the fluid state in which International Law was in 1921, it could scarcely be expected that a German Court would define for the first time principles which, however generally accepted as maxims of morality, had never hitherto been regarded as laws, the breaches of which involved penalties" while going in more detail at pp. 212–215 and saying this on pp. 223–24 (after questioning on pp. 221–22 why the general order in the *Dover Castle* case to restrict routes for hospital ships to travel or in the Ramdohr case the suspend normal arrest procedures for the secret police were accepted by the court without question): "If it had been possible

Academic and political opinion hardened considerably as the distance in time between the occurrence of the trials and the assessment of them increased. A study of the United Nations War Crimes Commission ('UNWCC'), which was published shortly after the Second World War, deplored in strong terms the outcome of the Leipzig judgments.[85] It was a sentiment followed in modern times when terms such as a "sorry mess",[86] "failed effort",[87] "farce",[88] "fiasco",[89] "debacle"[90] and "disaster"[91] were used to describe these proceedings, although these statements were almost exclusively used in relation to the number of people tried and the

to carry out the intentions embodied in the Versailles Treaty, there might have resulted decisions of real value in building up both International Law and the Laws of War. On the other hand, we may reasonably doubt whether such problems can be settled by any national court. It certainly could scarcely be expected that the Court at Leipzig would lay down principles on these points which could be generally accepted. If these problems are to be settled, they are essentially suited for the consideration of the League of Nations and of the new Permanent Court of International Justice. The Leipzig experiment has not been valueless, even from the legal point of view, but, nevertheless, the problem of punishing crimes committed either in beginning or in conducting wars has yet to be solved". Both documents address the question why in the *Llandovery Castle* case a verdict of manslaughter rather than murder was arrived at by explaining that German law has a more exacting standard for the crime of murder than British law, see British Parliamentary Command Paper No. 1450, 1921, p. 15, *supra* note 15; Mullins, 1921, pp. 200–1, *supra* note 17.

85 United Nations War Crimes Commission, 1948, pp. 51–52, see *supra* note 5 states that "the demand by public opinion that the war criminals of 1914–1918 should be made to answer for their crimes had ended in failure", that Leipzig court issued "findings that were contrary to the principles of all civilised nations" and that "the most shocking was not the horrors brought to light but the fact that those truly responsible were escaping punishment". It is interesting to note that the first and last ones of these quotes are taken almost verbatim from the Reports of Commission I, 1944, p. 13, see *supra* note 7 while at p. 119 in the same document the term 'disastrous' is used; this publication of the London International Assembly was a combination of submissions and comments by individuals as well as conclusions by its commission and the negative comments made about the Leipzig trials came from a both a submission and a comment by the same person, Dr. de Baer, Chief of the Belgian Court of Justice in Britain at that time.

86 Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, 1946, partially reproduced in Mettraux, 2008, p. 96, fn. 91, see *supra* note 7.

87 Horne and Kramer, 2001, p. 350, see *supra* note 6; Lippman, 1991–1992, p. 1, see *supra* note 7, reproduced in Mettraux, 2008, p. 501, see *supra* note 7.

88 Maogoto, 2004, p. 57, see *supra* note 5; Matthäus, 2008, p. 18, see *supra* note 6.

89 Tusa and Tusa, 1984, p. 19, see *supra* note 79.

90 Bass, 2000, p. 104, see *supra* note 5.

91 *Ibid.*, p. 80.

sentences handed out rather than with respect to the validity of the legal principles espoused in these judgments.

With respect to the Istanbul trials, after a promising beginning with the first trials conducted in a fair manner with large numbers of witnesses,[92] these same trials also showed an underlying strong fracture in Turkish society and leadership. Kemal Bey, one of the accused in the Yozgad trial, was sentenced to death. But his execution resulted in serious nationalist unrest to the extent that supporters of the political party responsible for the Armenian massacres protested against this measure and other trials still to be held.[93] In later proceedings fewer and fewer people were arrested, charged or convicted, or escaped Turkish custody before the trials even started.[94] Moreover, a combination of a nationalist upsurge in Turkey and eventual British reluctance to either try themselves the persons in their own custody or hand them over to Turkey resulted in the new nationalist or Kemalist government of Kemal Atatürk resisting the provisions of the Treaty of Sèvres and renegotiating a new treaty without any provisions relating to trials, the Treaty of Lausanne.[95] While this rebellion had originally started to paralyse the Ottoman government in Istanbul from taking further action against the perpetrators of the Armenian massacres by releasing some of the prisoners in their custody in June 1919,[96] the influence of Atatürk started to spread as his armies

[92] Dadrian and Akçam, 2011, pp. 108–24, see *supra* note 5.

[93] *Ibid.*, pp. 195, 219; Bass, 2000, pp. 125–26, see *supra* note 5.

[94] Bass, 2000, pp. 124 –30, see *supra* note 5; at pp. 128–29 he indicates that this process was viewed by the British authorities in Istanbul as a 'farce'.

[95] As a matter of fact, the Declaration of Amnesty, which was attached as Part VIII to this treaty says the following in Article IV: "Turkish nationals, and reciprocally nationals of the other Powers signatory of the Treaty of Peace signed this day who may have been arrested, prosecuted or sentenced by the authorities of the said Powers or by the Turkish authorities respectively, for reasons of a political or military nature previous to the 20th November, 1922, on territory which remains Turkish in accordance with the said Treaty of Peace, shall benefit from the amnesty, and, if they are detained, shall be handed over to the authorities of the States of which they are the nationals. This stipulation is similarly applicable to Turkish nationals arrested, prosecuted or sentenced by the authorities of the Powers who have occupied a portion of the above mentioned territory even for a transgression of the ordinary law committed before that date, and even if they have been removed from Turkey, excepting those who have committed, against a person belonging to the armies of occupation, an assault which has entailed death or a grievous wound". The Treaty was signed in July 1923.

[96] Bass, 2000, p. 129, see *supra* note 5.

started to occupy more and more of Turkey and to defeat Allied forces. This decline in the interest in trials on the part of the British culminated in 1920, when the nationalists had taken prisoner a small group of British soldiers, and the subsequent negotiations about an exchange of the British prisoners in Turkish custody and the Turkish internees on Malta eventually resulted in all perpetrators of the Armenian genocide being released by 1 November 1921.[97] A number of these perpetrators were hunted down and assassinated by a radical wing of the Armenian Revolutionary Federation ('ARF', also known as 'the Dashaks'),[98] while in 1926 the new Kemalist government also tried, convicted and executed a number of architects of the genocide, namely high CUP officials, but on different charges relating to the overthrow of this government.[99]

Subsequent assessments of the Istanbul trials have not been as negative[100] as was the case for the Leipzig trials after the Second World War. But oblivion seems to have been their fate instead, at least until recently. For instance, while there had been some references to the Leipzig trials in the report issued by the UNWCC in 1948, the Istanbul trials were not mentioned at all in these materials.[101]

The issue of how to deal with the atrocities committed during the Second World War came to the fore as a result of statements issued by the US President, Franklin D. Roosevelt, and the British Prime Minister, Winston Churchill, on 25 October 1941, to the effect that "retribution for these crimes must henceforward take its place among the main purposes

[97] *Ibid.*, pp. 139–43; Willis, 1982, pp. 161–63, see *supra* note 5; Maogoto, 2004, pp. 60–61, see *supra* note 5.

[98] Bass, 2000, p. 145, see *supra* note 5; Dadrian and Akçam, 2011, pp. 178, 196, see *supra* note 5.

[99] Dadrian and Akçam, 2011, pp. 178–82, see *supra* note 5; at pp. 182–87 this book also refers to the killing of perpetrators without trial by the CUP itself in 1915 and by the new government in 1925.

[100] Willis, 1982, p. 148, see *supra* note 5; Bass, 2000, p. 127, see *supra* note 5 refers to "a promising start" while Maogoto, 2004, p. 61, see *supra* note 5 discusses "good intentions" and Dadrian and Akçam, 2011, p. 1, see *supra* note 5 states that "the tribunal gradually lost its effectiveness".

[101] Apart from the historical overview of these proceedings, the United Nations War Crimes Commission, 1948, pp. 286–87, see *supra* note 5 also refers to these trials in respect to the notion of superior orders. The fate of the Istanbul trials has been silence, which was commented by Hitler in a 1939 speech where he said: "Who after all is today speaking about the destruction of the Armenians". Rhea, 2012, p. 53, see *supra* note 6.

of the war".[102] This followed by the similar sentiment of the Minister of Foreign Affairs of the Soviet Union, V.M. Molotov, on 7 November 1941. The impetus to take action against war criminals gained momentum by the issuance of the Declaration of St James's Palace of 13 January 1942, signed by nine occupied countries,[103] and culminated in the Moscow Declaration of 1 November 1943, signed by Britain, the US and the Soviet Union. The latter provided details as to the modalities of taking legal action against such perpetrators. It stated that "they may be judged and punished according to the laws of these liberated countries" and "they will be brought back to the scene of their crimes and judged on the spot by the peoples they have outraged". It ended by saying that "the above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint declaration of the Governments of the Allies".[104] Neither the Leipzig nor the Istanbul trials were referred to in these various statements.[105]

While there had been some discussions at the non-governmental level regarding the established of an international criminal court dealing with war crimes and other crimes committed during the war, the issue was first raised in a government setting on 20 October 1943 at the newly established UNWCC,[106] with further discussions between February and

[102] United Nations War Crimes Commission, 1948, pp. 87–88, see *supra* note 5; see also Rhea, 2012, pp. 53–54, see *supra* note 6.

[103] Belgium, Czechoslovakia, France, Greece, Luxembourg, the Netherlands, Norway, Poland and Yugoslavia while the conference leading to this declaration was also attended by representatives of Britain, the US, the Soviet Union, Australia, Canada, India, New Zealand, South Africa and China.

[104] United Nations War Crimes Commission, 1948, pp. 107–8, see *supra* note 5; Rhea, 2012, pp. 55–56, see *supra* note 6.

[105] Tusa and Tusa, 1984, p. 24, see *supra* note 79.

[106] United Nations War Crimes Commission, 1948, pp. 441–43, see *supra* note 5; Rhea, 2012, pp. 59–60, see *supra* note 6. While an international conference dealing with the crime of terrorism had prepared in November 1937 a Convention for the Repression of Terrorism, to which was attached a Convention for the Creation of an International Criminal Court, the jurisdiction of this court was limited to the subject matter of terrorism and the convention never came into force due to the deteriorating international situation, see United Nations War Crimes Commission, 1948, pp. 440–41, see *supra* note 5; "Historical Survey of the Question of International Criminal Jurisdiction: Memorandum Submitted by the Secretary General", U.N. Doc. A/CN.4/7/Rev. 1, U.N. Sales No. 1949, V.8, 1949, pp. 17–18. For a detailed overview of the work of the UNWCC, see *Criminal Law Forum*

September 1944, and resulting in draft Convention for the Establishment of a United Nations Joint Court on 20 September 1944.[107] Because of concerns from Britain and the US that the UNWCC had gone beyond its mandate in terms of setting out its jurisdiction, which went as far as to include crimes committed in Germany against its own nationals, the UNWCC on 6 January 1945 made the following recommendations regarding the prosecution of war criminals:

> (1) that the cases should be tried in the national courts of the countries against which the crimes have been committed;
>
> (2) that a convention be concluded providing for the establishment of a United Nations court to pass upon such cases as are referred to it by the Governments;
>
> (3) that pending the establishment of such a court there be established mixed military tribunals to function in addition to the United Nations Court when the latter is established.[108]

The last issue in this recommendation had already been the subject of discussion in the UNWCC since August 1944, because it had become clear that the creation of an international court would be subject to long delays and it was considered desirable to have other interim institutions in place. Articles 228 and 229 of the Versailles Treaty as well as Allied national practice were cited as precedents for such a solution.[109]

However, the two tribunals dealing with major war criminals, the International Military Tribunals in Nuremberg and Tokyo, were both initiated by the US, the first as a result of negotiations with France, Britain and the Soviet Union, resulting in the London Agreement of 8 August 1945, the second as a result of a Special Proclamation of the Supreme Commander for the Allied Powers, the US General Douglas MacArthur, on 19 January 1946.[110] The UNWCC only played an indirect part in the drawing up of the London Agreement although the statutes of

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[107] United Nations War Crimes Commission, 1948, pp. 443–50, see *supra* note 5; Rhea, 2012, pp. 60–62, see *supra* note 6.

[108] Rhea, 2012, pp. 63–64, see *supra* note 6.

[109] United Nations War Crimes Commission, 1948, pp. 450–54, see *supra* note 5.

[110] *Ibid.*, pp. 454–61.

both institutions incorporated concepts of its draft Convention for the Establishment of a United Nations Joint Court and its work done on the mixed tribunals.[111]

9.6. Legal Findings

While most of the legal findings in the Leipzig and Istanbul trials are related to the application of either the German or Ottoman criminal codes in force at the time, there are some statements which had international legal significance at the time or which still have some resonance in modern times.

In the Istanbul trials, the language used in a number of the verdicts along the lines of massacres, extermination or annihilation of a civilian population mirror the words used in the Treaty of Sèvres. There Article 230 refers to massacres, as well as the later notion of crimes against humanity, while the use of the term "premeditation", and references to Armenian Christians as a religious group foreshadowed similar terminology in the 1948 Genocide Convention,[112] the wording of which was repeated in the statutes of the International Criminals Tribunals for

[111] *Ibid.*, pp. 454, 461; for detailed accounts of the conceptualisation and negotiations of the Nuremberg tribunal, see Bradley F. Smith, *Reaching Judgment at Nuremberg*, Basic Books, New York, 1977, pp. 20–45; Tusa and Tusa, 1984, pp. 50–67, see *supra* note 79; Bass, 2000, pp. 149–203, see *supra* note 5.

[112] Convention on the Prevention and Punishment of the Crime of Genocide, Article 2, 1951 (http://www.legal-tools.org/en/go-to-database/record/498c38/). Genocide as a war crime or crime against humanity was recognised by various tribunals after the Second World War, such as the International Military Tribunal at Nuremberg where it was included in the indictment as part of murder and ill-treatment of the civilian population. In the United Nations War Crimes Commission, "Justice Trial: Trial of Josef Altstötter and Others", in *Law Reports of Trials of War Criminals*, 1948, vol. 6, p. 99, the accused Rothaug was actually convicted of this crime and also found guilty of the charges of crimes against humanity. Other examples where the crime of genocide was recognised can be found in "Trial of Hauptsturmführer Amon Leopold Goeth", in *Law Reports of Trials of War Criminals*, 1948, vol. 7, pp. 7–9; "Trial of Ulrich Greifelt and Others", in *Law Reports of Trials of War Criminals*, 1949, vol. 13, pp. 37–42 and "Trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess" in *Law Reports of Trials of War Criminals*, 1948, vol. 7, pp. 24–26. It appears that the tribunals treated genocide as the end result of a series of war crimes and crimes against humanity, rather than an independent crime. This was probably done in order to achieve a balance between recognising genocide as a crime on one hand and fitting the crime within the confines of their constituting instruments on the other.

the former Yugoslavia ('ICTY'), International Criminal Tribunal for Rwanda ('ICTR') and the ICC.[113]

Similarly, the wording used in the very first trial, the Yozgad trial, where the court convicted Tevfik Bey for issuing orders to his subalterns for the deportation of the Armenians, resembles the notion of command responsibility as does the judgment in the trial against the cabinet ministers, including in the latter case the element of not preventing crimes from occurring after having become aware of them. This became an ingredient of the notion of command responsibility in jurisprudence after the Second World War,[114] as well as at the ICTY and ICTR.[115] Lastly, there are some references to the concept of co-perpetration in the Yozgad and Trabzon cases, the explanation of which resemble a similar discussion at the ICC, even though these two verdicts discuss co-perpetration from a Turkish domestic law perspective.[116]

The judgments at the Leipzig trials not only discuss concepts, which bear a similarity to contemporary and present international law, they go further than the Istanbul trials by actually placing their discussions in an international law context. The *Llandovery Castle* and *Dover Castle* judgments were quite clear about this connection between

[113] Articles 4, 2 and 6 respectively; for a recent overview of the jurisprudence pertaining to genocide in these institutions, see Robert J. Currie and Joseph Rikhof, *International & Transnational Criminal Law*, 2nd ed., Irwin, Toronto, 2013, pp. 108–20.

[114] For an overview, see *Law Reports of Trials of War Criminals*, 1949, vol. 15, pp. 65–76.

[115] Currie and Rikhof, 2013, pp. 662–64, see *supra* note 113. The most recent iteration of this concept is included in the ICC Statute which states the following in Article 28(a):

> A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where
>
> a) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
>
> b) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

[116] For a discussion of the concept of co-perpetration in the ICC jurisprudence, see Currie and Rikhof, 2013, pp. 658–62, *supra* note 113.

German and international law. The first case stated that firing at boats with civilians on board was a crime under international law resulting in criminal responsibility for the perpetrator of such an act. With respect to the legal determination regarding naval warfare, the same principles as set out in the *Llandovery Castle* case were applied after the Second World War when both the International Military Tribunal in Nuremberg and the British Military Court in Germany convicted a number of German naval officers of similar activities, including Admiral Karl Dönitz, the head of the German naval forces during that time period.[117]

Both cases, as well as the Robert Neumann case, already stated the essential elements of the defence of superior orders by indicating that while in principle following orders to commit a crime would absolve a person from liability, there are also exceptions to this rule, namely that the

[117] Judgment of the IMT, pp. 309–14 (http://www.legal-tools.org/en/go-to-database/record/f41e8b/); the same tribunal also convicted Admiral Reader for violations of naval warfare provisions, *ibid.*, pp. 314–16. As a matter of fact, the IMT was more equivocal with respect to the rules of naval warfare than the Leipzig court had been even though the violations of the laws of war had been remarkably similar, by making comments such as "In the actual circumstances of this case, the Tribunal is not prepared to hold Dönitz guilty for his conduct of submarine warfare against British armed merchants ships" (p. 311) and "In view of all the facts proved, and in particular of an order of the British Admiralty announced on May 8, 1940, according to which all vessels should be sunk in the Skagerrak, and the answer to interrogatories by Admiral Nimitz that unrestricted submarine warfare was carried out in the Pacific Ocean by the United States from the first day that nation entered the war, the sentence of Dönitz is not assessed on the ground of his breaches of the international law of submarine warfare" (p. 312). For further background on these ambiguous statements, see Tusa and Tusa, 1984, pp. 461–62, *supra* note 79 and Smith, 1977, pp. 248–65, *supra* note 111. The British Military Court in Hamburg had less compunction in convicting senior officers of a submarine and an armed raider ship in the cases of Karl-Heinz Moehle and of Helmuth von Ruchtestell, *Law Reports of Trials of War Criminals*, 1947, vol. 9, pp. 75–82 and pp. 82–90. While some of these principles have found their way into international instruments such as the Second Geneva Convention of 1949 and the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994) (see also Wolff Heintschel von Heinegg, "Maritime Warfare", in Andrew Clapham and Paola Gaeta (eds.), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2014, pp. 145–81), neither the modern international(ised) tribunals nor the ICC have dealt with such issues nor have they been on the radar of domestic courts with one exception in the Netherlands, where a district court addressed naval blockade questions during the Iran–Iraq war in the context of a refugee exclusion proceeding. Rb, Den Bosch, Awb 10/32882, 14 November 2011, discussed in Joseph Rikhof, "Exclusion Law and International Law: Sui Generis or Overlap?", in *International Journal on Minority and Group Rights*, 2013, vol. 20, pp. 211–12.

person has to act within the limitations of his authority[118] and the person must not be aware that these orders were illegal.[119] While this defence was not given the same absolute character (it only went to mitigation of sentence) in the Charters of the International Military Tribunals in Nuremberg[120] and Tokyo,[121] nor the Statutes of the ICTY,[122],\ the ICTR[123] and the Special Court for Sierra Leone,[124] a reflection of this position can be found in the ICC Statute with respect to war crimes, which were the crimes under discussion during the Leipzig trials.[125]

[118] This is expressed in the Neumann case by saying that a person cannot use force which is greater than necessary in the circumstances while in this case and in the *Dover Castle* case the statement is made that a person cannot go beyond the order given to him.

[119] The *Dover Castle* case states this principle by saying that a person is liable if he knows that his superiors have ordered him to carry illegal acts, which language is also used in the *Llandovery Castle* case.

[120] Article 8 of the Statute of the IMT (https://www.legal-tools.org/doc/64ffdd/). It states: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires".

[121] Article 6 of the Charter of the IMTFE with the same text as the Statute of the IMT (https://www.legal-tools.org/doc/a3c41c/).

[122] Article 7.4 with again a similar text as the IMT (https://www.legal-tools.org /doc/b4f63b/).

[123] Article 6.4 with the same text as the ICTY Statute (http://www.legal-tools.org/en/go-to-database/record/8732d6/).

[124] Article 6.4 with the same text as the ICTY and ICTR Statutes (https://www.legal-tools.org/doc/aa0e20/).

[125] Article 33, paragraph 1 (http://www.legal-tools.org/en/go-to-database/record/7b9af9/): "The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) the person was under a legal obligation to obey orders of the Government or the superior in question; (b) the person did not know that the order was unlawful; and (c) the order was not manifestly unlawful" while continuing in paragraph 2: "For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful". While this defence was raised on a number of occasions after the Second World War and the jurisprudence as to its constituting elements had been generally along the same lines as the Leipzig judgments (see in general *Law Reports of Trials of War Criminals*, vol. 15, pp. 157–60) while for a specific mention of the *Llandovery Castle* case as used by prosecutors, see "The Peleus Trial", in *Law Reports of Trials of War Criminals*, 1947, vol. 1, pp. 7–11, 15, 19–20; "The Belsen Trial", in *Law Reports of Trials of War Criminals*, 1947, vol. 2, p. 107; "Trial of Lieutenant-General Shigeru Sawada and Three Others", in *Law Reports of Trials of War Criminals*, 1948, vol. 5, p. 15; "Trial of Friedrich Flick and Five Others", in *Law Reports of Trials of War Criminals*, 1949, vol. 15, p. 50; "Trial of Max Wielen and 17 others, the Stalag Luft III Trial", in *Law Reports of Trials of War Criminals*, 1949, vol. 11, pp. 48–50;

In addition to the British cases, the French Stenger and Crusius case contained a principle, which, while expressed in general terms, reflects existing international law at the time, namely the prohibition of the killing of wounded soldiers, which was set out in the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[126]

The same case also addressed two other defences, mistake of fact (which was also alluded to in the Robert Neumann case) and insanity, to the effect that if a person was under the mistaken impression that an order to execute wounded and unarmed soldiers existed he could rely on the defence of mistake of fact if he carried out such an order while a complete mental collapse could be a reason not to convict a person for the carrying out of such killings. While the Charters of the International Military Tribunals in Nuremberg and Tokyo did not specifically mention these defences, the jurisprudence after the Second World War did apply the same principles to similar situations in a few cases.[127] The international

"Trial of Hans Renoth and Three Others", in *Law Reports of Trials of War Criminals*, 1949, vol. 11, p. 78. The *Dover Castle* case is mentioned in the Peleus case, above, and the "Trial of General von Mackensen and General Maelzer", in *Law Reports of Trials of War Criminals*, 1949, vol. 8, p. 8. There has been no interpretation of this defence provided at the international level since that time (except briefly by the Extraordinary Chambers in the Courts of Cambodia in Judgment, *Kaing Guek Eav alias Duch*, Case File 001/18-07-2007/ECCC/TC, Trial Chamber, 26 July 2010, pp. 551–52). At the national level, reference was made to these two Leipzig cases in the decisions of the High Court of Australia in *Polyukhovich v Commonwealth* (War Crimes Act case) [1991] HCA 32 (Brennan, para. 56; Dawson, para. 87) and of the Supreme Court of Canada in *R v. Finta*, [1994] 1 SCR 701 at 834.

[126] Article 1 states "officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are" (https://www.legal-tools.org/doc/90dd83/) and which became Article 1 in the 1929 (https://www.legal-tools.org/doc/c613cf/) and Article 6 in the 1949 (https://www.legal-tools.org/doc/baf8e7/) conventions of the same name, the latter also known as First Geneva Convention of 1949, where a violation of this norm is also a war crime under its Article 50. The provisions of the 1929 Convention were addressed in "The Abbaye Ardenne Case. Trial of S.S. Brigadeführer Kurt Meyer", in *Law Reports of Trials of War Criminals*, 1948, vol. 4, pp. 97–112, but the similar provision in later instruments has not been the subject of judicial consideration since that time.

[127] For the defence of mistake of fact, see "The Almelo Trial: Trial of Otto Sandrock and Three Others", in *Law Reports of Trials of War Criminals*, 1947, vol. 1, pp. 35–41 and the "Trial of Carl Rath and Richard Thiel", in *Law Reports of Trials of War Criminals*, 1949, vol. 15, p. 184, fn. 4, while for the defence regarding the mental incapacity of the accused,

institutions since the Second World War have not incorporated these defences in their statutes with the exception of the ICC,[128] and no jurisprudence has emanated yet from these institutions.[129]

9.7. Conclusion

The general narrative set out in the introduction of this chapter does not correspond in all aspects to the reality of the events, which took place between 1915 and 1945. To begin with, during the negotiations for the two original peace treaties, the inclusion of tribunals to deal with perpetrators who had committed their offences against nationals of more than one state, as well as the inclusion of trials for the persons involved in the Armenian genocide, caused disagreement between the majority and

see "Trial of Wilhem Gerbsch", in *Law Reports of Trials of War Criminals*, 1949, vol. 13, pp. 131–37.

[128] Articles 32.1 and 31.1(a) respectively.

[129] In general, the ICTY has discussed four defences, namely duress, the *tu quoque* defence, reprisals and self-defence. Duress was discussed in *Prosecutor v. Erdemović*, IT-96-22, Appeals Chamber, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 88, which was accepted by the majority of the Chamber in *Prosecutor v. Erdemović*, IT-96-22, Appeals Chamber, Judgment, 7 October 1997, para. 19. The *tu quoque* defence, which stands for the proposition that if one party commits atrocities the other party should be justified in doing the same was rejected in a number of decisions, such as *Prosecutor v. Kupreškić et al*., IT-95-16, Trial Chamber, Decision on Evidence of the Good Character of the Accused and The Defence of Tu Quoque, 17 February 1999, and Trial Judgment, 14 January 2000, paras. 511, 515–20 and 765; *Prosecutor v. Kunarac et al.,* IT-96-23/IT-96-23/1, Appeals Judgment, 12 June 2002, para. 87; *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Judgment, 30 November 2005, para. 193; *Prosecutor v. Stanišić and Župljanin,* IT-08-91-T, Trial Judgment, 27 March 2013, para. 16. The defence of reprisals was examined in Kupreškić et al., Trial Judgment, paras. 527–36; *Prosecutor v. Martić,* IT-95-11-T, Trial Judgment, 12 June 2007, paras. 464–68 while self-defence was discussed in *Prosecutor v. Kordić and Čerkez,* IT-95-14/2, Trial Judgment, 26 February 2001, paras. 448-452 (which was accepted as long as it is raised on a personal level rather than as an issue of military self-defence); *Prosecutor v. Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, ICTR-98-41-T, Trial Judgment, 18 December 2008, para. 1999; *Prosecutor v. Boškoski and Tarčulovski,* IT-04-82-A, Appeals Judgment, 19 May 2010, paras. 31–36, 45–46, 51 (although the latter discussed the issue of self-defence at the state level against terrorist attacks). At the Special Court for Sierra Leone, the minority of a trial chamber raised the prospect of the defence of state necessity (*Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Separate Concurring and Partially Dissenting Judgment of Justice Bankole Thompson, 2 August 2007, paras. 68–92) but this was rejected on appeal (*Prosecutor v. Fofana and Kondewa*, SCSL-04-14-A, Appeals Judgment, 28 May 2008, para. 247).

the minority of the special Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, resulting in the watering down of the provisions for international tribunals and instead the setting up of mixed military tribunals.

The assessment and criticism of the Leipzig and Istanbul trials have centred around four themes, namely the weakness of domestic trials in general; the small number of persons on trial; the light sentences or acquittals given for very serious crimes; and the international law applied by these tribunals.

It was clear that the Allied countries would have preferred to put the major German and Turkish war criminals on trial before international or mixed military institutions. But apart from the eventual lack of political will on their part, due primarily to the emerging nationalist sentiments in the two countries, an argument can be made that, when the trials were held in Germany and in Turkey, these trials were conducted, especially in the beginning, in a fair and even-handed manner and with regard to the appropriate rules of evidence. It is telling that the first international statement during the Second World War dealing with exacting justice from the Germans, the Moscow Declaration, called for trials to be conducted again by national courts rather than by a tribunal at the international level.

With respect to the second issue, the number of people put on trial for the Leipzig proceedings could be questioned, as only 12 people were convicted from a much larger list provided to the German authorities. However, this argument holds less water with respect to the Istanbul trials as over 200 people were arrested and made subject to criminal proceedings. Additionally, with respect to the Turkish trials, the rank of perpetrators varied from low officials and individuals to the highest decision-makers in the land at the time of the commission of the crimes. The trial of the cabinet members and CUP leaders, in particular, was similar in importance to the International Military Tribunals in Nuremberg and Tokyo when taking into account the defendants with influence within their respective governments.

The observations with regard to sentencing are also only partially accurate. While a proportionally large number of accused in both the Leipzig and Istanbul trials were acquitted or convicted *in absentia*, the sentencing practice in Turkey especially was commensurate with the

crimes committed, as can be seen from the number of death penalties, namely 13 with three actual executions, and long periods of hard labour handed out.

Lastly, reliance on and application of international law principles during the Istanbul and especially the Leipzig trials were not only appropriate in the circumstances at the time of the trials but have been applied in later proceedings as well. While the reference to international law were rather embryonic in Turkey, the German judges were conversant with the principles of international law in the area of naval warfare and the treatment of wounded soldiers, while the defences of mistake of fact, mental capacity and especially superior orders were used correctly when comparing these principles to the international law at the time. During the discussions for the establishment of the two International Military Tribunals it was acknowledged that the defence of superior orders still existed at that time and while the naval warfare doctrines and the other defences set out in Leipzig have been lost to later commentators they were applied in the same manner after the Second World War and are still useful for modern times.

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Historical Origins of International Criminal Law: Volume 1

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further consolidate this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 1 comprises contributions by prominent international lawyers and researchers including Judge LIU Daqun, Professor David Cohen, Geoffrey Robertson QC, Professor Paulus Mevis and Professor Jan Reijntjes.

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