On the Breaking of Consensus : the Perinçek Case, the Armenian Genocide and International Criminal Law

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CHAPTER XII
ON THE BREAKING OF CONSENSUS
The Perinçek Case, the Armenian Genocide and International Criminal Law

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The 100th anniversary of the Armenian genocide is also the year of the revision by the Grand Chamber of the *Doğu Perinçek v.Switzerland* judgment rendered by the European Court of Human Rights (ECHR) on December 17 2013. We will focus here on one of the arguments set forth by the ECHR in 2013, which disfavours the Swiss criminal jurisdictions in this case of genocide denial: the problematic argument of the absence of a 'general consensus' on the 1915 genocide. This contribution aims to shed light on the paradoxes and consequences of such an argument that calls, notably, for a historical perspective – and demands, in particular, that we look back on the history of international criminal law.

> '*… they will persist. And you won't yet have come to their real plan: they do not, in spite of what they say, intend to make history, but rather modify* irreversibly *what happens when a community consents*'
>
> Patrice Loraux[1]

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1 '*… ils persisteront. Et vous n'aurez pas encore atteint leur véritable projet: ce n'est pas de l'histoire qu'ils entendent faire, malgré leurs dires, mais modifier irréversiblement ce qui se passe quand une communauté consent.*' P. Loraux, 'Consentir' (1989) 22 *Le Genre Humain* 151, 152–153.

The year which marks the centenary of the Armenian genocide is also the year which sees a legal challenge against the ruling of 17 December 2013 by the European Court of Human Rights (ECHR) in the case of *Doğu Perinçek v.Switzerland*.[2] In this ruling, the Court (by five votes to two) found Switzerland guilty of having violated the applicant's freedom of expression guaranteed by Article 10 of the European Convention on Human Rights. The holder of a law doctorate who 'considers himself as an historian and writer',[3] Perinçek is the Chairman of the Turkish Workers' Party (recently renamed 'Homeland Party' – *Vatan Partisi*) and the founder of the Talaat Pasha Committee, the aim of which is to rehabilitate and defend the memory of the principal instigator of the 1915 Armenian genocide – the 'Ottoman Hitler'.

Among the various arguments presented by the ECHR in support of its overruling of the Swiss courts in this genocide denial case, one stands out as deserving particular attention here. According to the Court, the denial expressed by Doğu Perinçek when he described the Armenian genocide specifically as an 'international imperialist lie' poses no problem from the point of view of human rights, as it supposedly only denies the legal characterisation of the genocide (rather than the facts themselves): a characterisation which, in this particular case, is apparently not the subject of 'general consensus'.[4] This is in spite of the fact that the Swiss judges had reached the opposite conclusion in the very same case.[5] The ECHR justifies this argument by declaring that 'the present case is clearly distinct from those cases which related to the denial of the crimes of the Holocaust'[6] for the following reasons: 1. 'convictions for crimes committed by the Nazi regime (…) had a clear basis in law, namely Article 6, subsection (c) of the Charter of the Nuremberg International Military Tribunal, set out in an annex to the London Agreement of 8 August 1945'; and 2. 'the historical facts challenged by the defendants had been judged to have been clearly established by an international jurisdiction'.[7]

After the request by the Swiss government to refer the case to the Grand Chamber was granted on 2 June 2014, the second appeal hearing took place in Strasbourg on 28 January 2015. It gave the Grand Chamber the chance to rule on genocide denial in relation to human rights law, a judgment awaited by many. Indeed, the ECHR had previously ruled on genocide denial once

2 *Doğu Perinçek v. Switzerland*, no. 27510/08, ECHR 2013-II (hereafter 'Perinçek case').

3 Ibid., §112.

4 Ibid., §114.

5 Cf. the ruling of 9 March 2007 by the Lausanne Police Court, upheld on 18 June 2007 by the Court of Cassation of the Canton of Vaud. The Federal Court (the highest legal chamber in Switzerland) subsequently upheld the rulings of these lower courts in its verdict of 12 December 2007 (the most relevant extracts from which are reproduced in Perinçek case, §13).

6 Perinçek case, §117. Cf. the view of the United Nations Human Rights Committee on the case of *Robert Faurisson v. France*, 8 November 1996 (Communication no. 550/1993, doc. CCPR/C/58/D/550/1993 (1996)); and *Roger Garaudy v. France*, no. 65831/01, ECHR 2003-IV.

7 Perinçek case, §117.

before, in the famous 2003 *Roger Garaudy v. France* case,[8] but without any referral to the Grand Chamber being requested. It is important to bear in mind that in the latter case, the European Court considered that denial or rewriting of 'clearly established historical facts, such as the Holocaust, (…) undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order'; 'such acts are incompatible with democracy and human rights because they infringe the rights of others' and 'run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace'. The Court hence excluded genocide denial from any protection by the Convention, in accordance with its Article 17 (prohibition of abuse of rights). It considered that Roger Garaudy attempted 'to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends which are contrary to the text and spirit of the Convention'. It concluded that 'denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them'.

Furthermore, this comprehension of genocide or other crimes against humanity denial as 'aggravated denial' – i.e. as a kind of hate speech 'directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin'[9] likely to have harmful consequences – is predominant in Europe. Nevertheless, *denial* describes many types of expression[10] and its forms evolve constantly.[11] In any case, we do believe that denial 'does not constitute historical research', the 'real purpose being to rehabilitate [a political] regime and, as a consequence, accuse the victims themselves of falsifying history'.[12] Genocide denial is, above all, an *ideology* aiming at destroying facts and manipulating history.[13] Lastly, even though *denial* (or *denialism*) as the common translation of the French neologism *négationnisme* (initially created in 1987 by historian Henry Rousso) is, in our view, debatable,[14] such a discussion falls outside the scope of this paper. We will thus refer here to the term 'denial' as it is also the one used in the English version of the ECHR rulings.

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8 *Roger Garaudy v. France*, no. 65831/01, ECHR 2003-IV.

9 See Article 1 of the Council Framework Decision 2008/913/JAI of 28 November 2008 on combatting certain forms and manifestations of racism and xenophobia by means of criminal law.

10 See L. Hennebel and T. Hochmann (eds.), *Genocide Denials and the Law*, Oxford University Press, New York 2011, introduction pp. xix ff, in particular on the distinction between *bare* and *aggravated* denial.

11 Cf. I. Charny, 'A classification of Denials of the Holocaust and other genocides' in: S. Totten and P.R. Bartrop (eds.), *The Genocide Studies Reader*, Routledge, New York 2009, pp. 517.

12 *Roger Garaudy v. France*, no. 65831/01, ECHR 2003-IV.

13 See also S. Garibian, 'Taking Denial Seriously: Genocide Denial and Freedom of Speech in French Law' (2008) 9(2) *Cardozo Journal of Conflict Resolution* 479, 486.

14 Notably in light of existing distinctions in French between *négation*/*dénégation*/*déni*.

Whatever one thinks of the Perinçek December 2013 ruling and its effects, the aforementioned argument of the absence of a 'general consensus' regarding the Armenian genocide is a surprising one. This contribution aims to shed light on the paradoxes and consequences of such an argument. Indeed, the latter calls notably for a historical perspective and demands, in particular, that we look back on the history of international criminal law, following some introductory remarks on the disputable presumptions contained in the analysed argument. The contribution ends with summarised conclusions.

1. INTRODUCTORY REMARKS

The ECHR argument of an absence of consensus provides an opportunity both to clarify some important points and to consider the problem posed by the three glaring presumptions, which this argument contains.

The first presumption (and a very shaky one at that) is that a distinction exists between the denial of the characterisation of a crime as genocide and the denial of historical facts. Such a distinction is nonsensical: denying a crime's legal characterisation as genocide amounts precisely to denying the *specific intent*, which defines this crime (namely the intention to destroy the entirety or a part of a national, ethnic, racial or religious group). And denying this specific intent amounts, in this particular case, to denying the 'reality of clearly established historical facts' (quoting the *Garaudy* case).[15] The second, erroneous, presumption is that only a 'general consensus' regarding said legal characterisation as *genocide* would allow a sentence to be imposed in a denial case: neither Swiss law[16] (nor other national legal systems such as, for example, French law)[17] nor, indeed, the 2008 EU framework decision[18] on this subject

15 When his case came before the ECHR, Roger Garaudy had argued, to no avail, that he did not deny the existence of the crimes of the Nazis.

16 Doğu Perinçek had been found guilty in Switzerland on the basis of Article 261*bis* of the country's Penal Code, targeting (paragraph 4) 'any person who has publicly (…) insulted or discriminated against, in a way which infringes on human dignity, a person or group of persons on account of their race, ethnic origin or religion, or who, for the same reason, *denies, unduly downplays, or seeks to justify a genocide or other crimes against humanity*' (emphasis added).

17 Law no. 90–615 of 13 July 1990 enabling the prosecution of all racist, anti-Semitic or xenophobic acts (known as the Gayssot Law) refers to 'crimes against humanity as defined in Article 6 of the Charter of the [Nuremberg] International Military Tribunal'.

18 Council Framework Decision 2008/913/JAI of 28 November 2008 on combatting certain forms and manifestations of racism and xenophobia by means of criminal law (which refers to crimes of genocide, crimes against humanity and war crimes, as well as 'crimes against humanity as defined in Article 6 of the Charter of the [Nuremberg] International Military Tribunal'). Cf. also the Report from the Commission to the European Parliament and the Council COM(2014) 27 final of 27 January 2014 regarding the implementation of this framework decision.

set such stringent condition. The third presumption, which is questionable at the very least, is that only legal language, and more specifically a *judicial*, not to mention *international*, decision, would allow the existence or otherwise of a consensus regarding a historical fact to be established. This is all the more problematic given the degree to which, as we know only too well, the implementation of international justice is governed by the vagaries of politics. Such a presumption amounts to dismissing out of hand the importance of – and need for – the work of historians 'on events such as those considered here, given that', as the ECHR informs us, 'historical research is by definition debatable and open to question, and is ill-equipped to reach definitive conclusions or establish objective and absolute truths'.[19] Fortunately, however, no serious lawyer or historian would see fit to question the existence of the genocide, as such, of the Jewish people, despite the fact that no international judgement has ever characterised the Holocaust in these exact terms.[20] Nor, indeed, is it clear why and exactly how the work of a judge would take precedence over the (quite distinct and complementary) work of the historian, or *vice versa*; nor why judicial truth, while presumed to be valid – and certainly absolute in terms of its effects – should not be relative and debatable from an epistemological point of view.

With respect to this question, I will briefly make three points, which I have had the opportunity to set out more thoroughly elsewhere.[21] Firstly, and contrary to what is often stated, it is not the role of judges to rule one way or the other over the historical facts as such in the trials of those accused of crimes against humanity or genocide (the primary aim of which is to establish the guilt or otherwise of the defendants, a process involving the application of legal characterisation)[22] or in the trials of genocide deniers (where judges rule on the methods used by deniers and their intentions, not on their opinions as such regarding the truth of the events in question). Judges may, however, use the work of historians to assist them in their own tasks, *pace* the objections raised by proponents of the relativistic theory developed out of the 'linguistic turn'[23]: this

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19 '*[S]ur des événements tels que ceux qui sont en cause ici, étant donné que la recherche historique est par définition controversée et discutable et ne se prête guère à des conclusions définitives ou à des vérités objectives et absolues*.' Perinçek case, §117.

20 See also the dissenting opinion expressed by Judges Vučinić and Pinto de Albuquerque (hereafter 'dissenting opinion'), §§17–18.

21 S. Garibian, 'La mémoire est-elle soluble dans le droit? Des incertitudes nées de la décision n° 2012–647 DC du Conseil constitutionnel français' (2013) 2/66 *Droit et Cultures* 25, 49.

22 Such a characterisation, while it involves an implicit acknowledgment of the facts, does not aim to establish these *per se*, but rather to evaluate 'facts in order to settle disputes which have arisen regarding them' ('choses pour trancher les disputes nouées à leur sujet'). Y. Thomas, 'Présentation' (2002) 6 *Annales HSS* 1425, 1426. On the 'efficient force' ('pouvoir efficace') of the legal characterisation of facts by the 'authentic authority' ('l'autorité authentique') represented by a judge, see O. Cayla, 'Ouverture: la qualification, ou la vérité du droit' (1994) 18 *Droits* 3, 3–18.

23 An intellectual current chiefly represented by the Californian historian and literary critic Hayden White, who argues that history is fiction, and that no defined limit separates the

is how law apprehends historical fact, which forms the basis of its treatment of a past event with respect to its consequences in the present. Accordingly, we have seen the mass crimes of 1915 form the subject of various practices of judicial 'recognition'.[24] On the one hand are those which appeared in the context of the trials conducted in Turkey from 1919 onwards[25] or of the Tehlirian trial (for the killing of Talaat Pacha) in 1921 in Berlin,[26] and, more recently, those which have arisen from trials for genocide denial, particularly in Europe.[27] On the other are those which have been produced by 'alternative', *sui generis* judicial mechanisms that have had to fill the vacuum left by the absence of any international criminal tribunal due to the stubborn facts of *Realpolitik*, amnesty and the death of the perpetrators: one could cite such examples as the ruling passed by the Permanent Peoples' Tribunal in April 1984,[28] or that pronounced by a federal judge on 1 April 2011 in the context of a 'trial for the truth' (*juicio por la verdad*) in Argentina (the Hairabedian case).[29] Lastly, an analysis of both the ECHR case law related to freedom of expression and the text of the EU framework decision mentioned above confirm that the force of *res judicata*[30] (i.e. the pre-existence of a judicial decision attesting the criminal fact) is not a precondition for the prosecution of genocide deniers: the former insofar as it does not predicate the recognition of 'clearly established historical facts' upon the existence of a legal ruling;[31] the latter insofar as, according to Article 1 §4 of its text, it allows states, if they so wish, to restrict the scope of indictments for denial 'to crimes which have been established by a final decision of a national court of [the] Member State and/or an international court' – showing that, far from being a necessary precondition, this is rather an option left to the discretion of sovereign states.

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two disciplines, thus reducing the study of history to a linguistic study lacking any objective character (H. White, *Metahistory: the Historical Imagination in Nineteenth-Century Europe*, Johns Hopkins University Press, Baltimore-London 1973). His main critic is the Italian historian Carlo Ginzburg, to whom a special issue of the journal *Critique* (n° 769–770, 2011) has recently been devoted, returning in particular to the key issues of the famous White/Ginzburg controversy.

24 For a summary of international political and legal recognition of the genocide, see dissenting opinion, §§8–10.

25 See dissenting opinion, §9 and *infra* n. 47 and 51.

26 See dissenting opinion, §9. On the trial, see *infra* n. 58.

27 Cf. dissenting opinion, §9 and S. Garibian, 'La mémoire est-elle soluble dans le droit? Des incertitudes nées de la décision n° 2012–647 DC du Conseil constitutionnel français' (2013) 2/66 *Droit et Cultures* 25, 49–50.

28 An opinion tribunal established 24 June 1979 in Bologna. Its judgment relating to the Armenian genocide was published following its 11th session, held at the Sorbonne (Paris) between 13 and 16 April 1984.

29 On the Argentine 'trials for the truth' and the Hairabedian case, see S. Garibian, 'Ghosts Also Die. Resisting Disappearance Through the 'Right to the Truth' and the *Juicios por la verdad* in Argentina' (2014) 12(3) *Journal of International Criminal Justice* 515, 515–538.

30 Which implies the presumption that 'the thing judged is taken to be the truth' (*Res judicata pro veritate habetur*).

31 Cf. the case of *Lehideux and Isorni v. France*, no. 24662/94, ECHR 1998 (the European Court was in this instance referring to the Holocaust).

However one looks at it, it is history and the *archives* which reveal the reasons behind and the judicial-political context of the successful creation in 1945 of the International Military Tribunal (IMT) in Nuremberg, and of its legal authority, both of which are referred to by the European judges in their 2013 ruling in order to explain, by means of a counter-example, exactly *why* consensus exists regarding the crimes of the Nazis (in contrast to the crimes of the Ottomans). It is precisely this history of international criminal law that allows us to understand the legacy of the Armenian Question, its treatment following the First World War and its role in the difficult elaboration of a new form of international justice, which would, a quarter of a century later, revolutionise traditional concepts of law and the state.

The argument that there is no 'general consensus' regarding the 1915 genocide, and the use of this argument by the judges of the ECHR, make it necessary to adopt a historical perspective on this question in the light of two important facts.[32] Firstly, the mass crimes, deportations and exterminations committed by the Ottoman Empire against its Armenian population were the original reason for the creation and definition of the concept of crime against humanity and subsequently, in conjunction with the persecution of the Jewish people, for that of the crime of genocide. Secondly, these historical facts are at the heart of the first, abortive attempt to set up an international tribunal for the prosecution of the mass violations in question, before this became a reality in 1945.

2. A 'CLEAR BASIS IN LAW': REVISITING THE ORIGINS OF THE NUREMBERG STATUTE

While the world's attention was focused on the First World War, the Young Turk government was implementing its radical plan for the 'Turkification' of the Ottoman Empire through the systematic deportation and extermination of Turkey's Armenian population. On 24 May 1915, France, Great Britain and Russia issued a warning in the form of a Joint Statement. Their condemnation was unambiguous:

> 'In view of those *new crimes of Turkey against humanity and civilisation*, the Allied Governments announce publicly to the Sublime Porte that they will hold personally

[32] The overview which follows is developed in greater detail in the opening chapter of S. Garibian, *Le concept de crime contre l'humanité au regard des principes fondateurs de l'Etat moderne. Naissance et consécration d'un concept*, Schulthess-LGDJ-Bruylant, Geneva-Paris-Brussels 2009. See also S. Garibian, 'From the 1915 Allied Joint Declaration to the 1920 Treaty of Sèvres: Back to an International Criminal Law in Progress' (2010) 52(1–2) *Armenian Review* 86, 86–103. Some of the points raised in this section are also referred to in the dissenting opinion (§§6–7).

responsible for these crimes all the members of the Ottoman Government and those of their agents who are implicated in such massacres.'[33]

This was a highly significant event: it was the first time that the concept of *crimes against humanity* had appeared at an international level – recent international criminal tribunals have acknowledged this in their rulings.[34] Although the Allies' condemnation was political in nature, it was nevertheless revolutionary insofar as, for the first time, acts by a government targeting its own citizens, independently of the wartime context, were described as 'crimes against humanity and civilisation', thus also raising the question of its criminal responsibility.

Concrete attempts to prosecute the Turkish leadership would be made a few years later in Paris, during the Paris Peace Conference organised following the Great War. As part of the conference, which began on 18 January 1919, the group known as the Commission of Fifteen, led by the American Secretary of State Robert Lansing, had the job of examining individuals' responsibility for breaches of the laws and customs of war. Alongside its work in preparation for the trials of German war criminals, it envisaged prosecuting Turkish officials for 'crimes against the laws of humanity' committed against the Armenian population of the Ottoman Empire outside the scope of the international armed conflict.[35] In a report dated 5 March 1919, the Commission specified the breaches in question: systematic terrorism, murders and massacres, violations of the honour of women, confiscation of private property, looting, confiscations of property belonging to communities or educational and charitable institutions, wanton destruction of public or private property, deportation and forced labour, executions of civilians on false allegations of war crimes and violations against civilian and military personnel.[36] Contained in this list are the fundamental underpinnings of the legal definition of a crime against humanity as set out in Article 6 c) of the Charter of the Nuremberg IMT of 8 August 1945.

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33 'En présence de ces *nouveaux crimes de la Turquie contre l'humanité et la civilisation*, les Gouvernements alliés font savoir publiquement à la Sublime Porte qu'ils tiendront personnellement responsables desdits crimes tous les membres du Gouvernement ottoman ainsi que ceux de ses agents qui se trouveraient impliqués dans de pareils massacres.' Note from the French Ministry of Foreign Affairs to the Havas news agency, 24 May 1915: Archives du Ministère des Affaires étrangères, Guerre 1914–1918, *Turquie*, tome 887, folio 127; reproduced in A. Beylerian, *Les grandes Puissances, l'Empire ottoman et les Arméniens dans les archives françaises (1914–1918)*, Publications de la Sorbonne, Paris 1983, p. 29.

34 See in particular the judgement *Dusko Tadic*, IT-94–1, §618, ICT for the Former Yugoslavia, Trial Chamber II, 1997; also the Judgement *Jean-Paul Akayesu*, ICTR-96–4, §565, ICT for Rwanda, Trial Chamber I, 1998.

35 Here, again, the rulings of the ICTs contain explicit references to the work carried out in 1919. See the judgements cited *supra* from the ICT for the Former Yugoslavia (§663) and the ICT for Rwanda (§565).

36 V. Dadrian, *Histoire du génocide arménien* (trans. Marc Nichanian), Stock, Paris 1996, p. 483.

It must be noted here that the Charter of the Nuremberg Tribunal, and consequently its judgements, contain no reference to the crime of *genocide*, a concept that did had yet to be formulated in legal terms at this time.[37] The latter expression had, it is true, been coined in 1944 by Raphael Lemkin[38] in order to designate policies of extermination such as those carried against the Armenians and the Jews, as its creator himself confirmed in an interview given to CBS in 1949,[39] as well as in his recently published autobiography.[40] But it would be four years before the legal theorist would manage to convince the General Assembly of the United Nations to adopt the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December 1948, on the eve of the adoption of the Universal Declaration of Human Rights, thus laying down the first legal definition of the crime in question.[41] This explains why there are no international judgements referring to the 'genocide' of the Jewish people, as the IMT of 1945 was the only international criminal jurisdiction with the authority to rule on the crimes of the Nazis, by means of a retroactive application of the new Nuremberg Statute drawn up by the Allies.[42]

The fact remains, though, that the debates held during the 1919 Peace Conference in general, and the final report of the Commission of Fifteen dated 29 March 1919 in particular,[43] laid the foundations for the necessary preliminaries to the Nuremberg tribunal and paved the way for an approach based on three main legal innovations: the conceptual distinction between war crimes ('grave offences against the laws and customs of war' in the context of an international armed conflict) and crimes against humanity ('grave offences against the laws of humanity' committed independently of a situation of

37 It should be noted that the word 'genocide' appears, albeit rather covertly, in the List of Charges from 18 October 1945 under Charge no. 3 relating to *war crimes* (*Trial of the Major war Criminals before the International Military Tribunal 14 November 1945–1 October 1946*, vol. I, International Military Tribunal, Nuremberg 1947, p. 46). It would also be used by the British prosecutor Sir Hartley Shawcross in his summing-up (*supra*, vol. XIX, pp. 518 and 521).

38 R. Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Washington 1944, pp. 79–95.

39 The dissenting opinion also refers to this (§29). A short extract from the interview is accessible on <http://youtu.be/dzAexRmeZFs> accessed 11.11.2014.

40 D.-L. Frieze, *Totally Unofficial. The Autobiography of Raphael Lemkin*, Yale University Press, New Haven-London 2013.

41 Cf. Article 2 of the Convention of 1948. On Lemkin's role in having this Convention accepted, see T. Elder, 'What you see before your eyes: documenting Raphael Lemkin's life by exploring his archival Papers, 1900–1959' (2005) *Journal of Genocide Research* 469, 480 ff.

42 On the issues raised by this retroactive application of these laws and the consequences of the use of the concept of crimes against humanity in the judgements of the IMT, see S. Garibian, *Le concept de crime contre l'humanité au regard des principes fondateurs de l'Etat moderne. Naissance et consécration d'un concept*, Schulthess-LGDJ-Bruylant, Geneva-Paris-Brussels 2009, pp. 133 ff.

43 *Violation of the Laws and Customs of War* (Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities), Conference of Paris, Carnegie Endowment for International Peace, Washington D.C. 1919, p. 19.

war); the principle of the individual criminal responsibility of agents of states for such crimes; and the recognition of the need for judicial intervention in order to prosecute and judge the accused. The diplomatic conference held on 20 October 1943 at the Foreign Office in London would put the finishing touches to the official formation of the United Nations Commission for War Crimes first announced in 1942 by the United States and Great Britain. This would be something of a 're-run' of the 1919 Commission of Fifteen, whose conclusions it would reprise – with the important difference that the political context was now favourable to the concrete implementation of the innovative ideas produced in the aftermath of the Great War. The most spectacular shift occurred in the position of the American government, which in 1943 executed a 'U-turn'[44] with respect to the reticent attitude it had shown in 1919: this time the Americans were determined to set up an international criminal tribunal, even though the strictly legal obstacles were identical to those encountered a quarter of a century earlier in Paris.[45]

Yet the 1920s had already seen an important change in the general climate, in particular with the work of the League of Nations and the emergence of the idea of a new legal world order in order to protect human rights. And all this had occurred following the first, abortive, attempt to establish an international tribunal for the prosecution and judgement of those responsible for the 'massacres' of the Armenians.

3. 'FACTS […] CLEARLY ESTABLISHED BY AN INTERNATIONAL COURT': AN OVERVIEW OF THE FIRST ATTEMPT AT INTERNATIONAL PROSECUTION

Before the work of the Peace Conference had even begun, the Allies had, in order to avoid intervening directly through judicial action against the Turkish leadership (owing amongst other reasons to a lack of appropriate legal

44 T. Taylor, *Procureur à Nuremberg* (trans. Marie-France De Paloméra), Seuil, Paris 1995, p. 45.

45 Some ascribe this shift in position to a feeling on the part of the Americans that their refusal to join the League of Nations and take firm measures against German aggression had helped cause the catastrophe of the Second World War (see, for example J.F. Willis, *Prologue to Nuremberg. The Politics and Diplomacy of Punishing War Criminals of the First World War*, Greenwood Press, Connecticut 1982, p. 174). The active role played by Lemkin in bringing about this new sense of responsibility in the United States following his arrival in America in April 1941 is to be noted. See S. Power, *'A Problem from Hell'. America and the Age of Genocide*, Harper Perennial, New York 2003, pp. 26 ff. On his contribution to the debate surrounding legal doctrine on these issues, see D. M. Segesser and M. Gessler, 'Raphael Lemkin and the international debate on the punishment of war crimes (1919–1948)' (2005) *Journal of Genocide Research* 453, 453–468.

instruments),[46] suggested that Turkey should set up an 'extraordinary national tribunal' with the objective of prosecuting those responsible for the 'crimes against humanity and civilisation' denounced in May 1915. A court martial was duly set up in Constantinople in order to judge the Turkish cabinet and the leadership of the *Ittihad ve Tiraki* (the Union and Progress Committee, or Young Turk party, which held power in the Ottoman Empire during the First World War).[47] Its stated aim was to judge crimes which had 'revolted all humanity',[48] were 'of a nature that would forever cause the conscience of humankind to quiver with horror'[49] and were contrary to the 'rules of law and of humanity'.[50] The chief culprits (including Talaat Pacha) were sentenced to death *in absentia*, while lower-ranking *Ittihadists* were given prison sentences of15 years with hard labour, and some former ministers were acquitted. The archives from these trials contain an extraordinary wealth of documentation, bringing together evidence both of the intention to exterminate the whole of the Armenian population and of the concerted plan drawn up to this end by the Young Turk government.[51] On 13 January 1921, the newly-formed Kemalist regime abolished all the courts martial and passed their jurisdiction over to regular military tribunals. In the meantime, most of the criminals had already fled or been released. Yet, as much as they illustrate the limitations of a system of national justice hastily drawn up in a period of political transition, with the clear aim of obtaining more favourable treatment from the Allies at the Paris Peace Conference,[52] these trials are nonetheless of undeniable historical and legal importance.

By taking the mass crimes committed against the Armenians into account in its definitive report of 29 March 1919, the Commission of Fifteen would facilitate

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46 The treaties authorising the European powers to intervene in the Ottoman Empire *in the cause of humanity* had, from 1914 onwards, been annulled by Turkey. See V. Dadrian, *Autopsie du génocide arménien* (trans. Marc and Mikaël Nichanian), Complexe, Paris 1995, pp. 67–68.

47 Parallel trials were also set up to judge lower-ranking defendants, in particular in Yozgat, Trebizonde and Kharpert (see V. Dadrian, *Autopsie du génocide arménien* (trans. Marc and Mikaël Nichanian), Complexe, Paris 1995, pp. 132 ff and R. Kévorkian, 'La Turquie face à ses responsabilités. Le procès des criminels Jeunes-Turcs (1918–1920)' (2003) 177–178 *Revue d'histoire de la Shoah* 166, 195 ff).

48 Statement by the new Grand Vizier Damat Ferid, sworn enemy of the *Ittihad*, reproduced in V. Dadrian, *Autopsie du génocide arménien* (trans. Marc and Mikaël Nichanian), Complexe, Paris 1995, p. 127.

49 Note from Grand Vizier Damat Ferid dated 17 June 1919 addressed to the Paris Conference (A. Mandelstam, *La Société des Nations et les Puissances devant le problème arménien*, 2nd ed., Edition des Universitaires Arméniens, Lebanon 1970 (1926), p. 23).

50 Statement by a Turkish deputy during preliminary enquiries and investigations prior to the trials (V. Dadrian, *Autopsie du génocide arménien* (trans. Marc and Mikaël Nichanian), Complexe, Paris 1995, p. 113).

51 See V. Dadrian and T. Akcam, *Judgment at Istanbul. The Armenian Genocide Trials*, Berghahn Books, New York and Oxford 2011.

52 In a political/media context favourable to the prosecution of Young Turk officials – all of whom were discredited at this time.

the subsequent insertion of several articles into the Treaty of Sèvres of 10 August 1920 calling for the prosecution of Turkish officials by an *international tribunal*. The legal implications of the Treaty of Sèvres, which was imposed by Article 22 of the Covenant of the League of Nations of 28 June 1919, were considerable in a number of respects.[53] Firstly, it declared all conversions of non-Muslim Ottoman subjects to Islam void 'in view of the terrorist regime which has existed in Turkey since November 1, 1914', and demanded the 'delivrance of all persons […] who have disappeared, been carried off, interned or placed' since that date, '[i]n order to repair so far as possible the wrongs inflicted on individuals in the course of the massacres perpetrated […] during the war' (Article 142). Secondly, it required the restoration of 'any movable or immovable property' to 'Turkish subjects of non-Turkish race' who had survived the 'massacres', and demanded that they be allowed to return to their homes (Article 144). More specifically, the Treaty of Sèvres required the Ottoman government to 'hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914', adding that the Allied Powers 'reserve to themselves the right to designate the tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such tribunal'. The tribunal in question could, it was stated, be the one created by the League of Nations if this was done in sufficient time (Article 230). This was a first in international law.

None of the provisions relating to the Armenian Question in general, and the 'massacres' perpetrated in the Ottoman Empire in particular, would be included in the Treaty of Lausanne, signed between Kemalist Turkey and the Allies on 24 July 1923.[54] This new Treaty rendered the Treaty of Sèvres null and void for reasons of international *Realpolitik*, in a climate of growing tension between the French, Italians and British caused by the support given by the first two of these powers to the new national policy in Turkey from 1920 onwards.[55] The resulting *tabula rasa*, which in many ways represented the 'official' launch of the Turkish state's policy of denial, was made all the more complete by the fact that this international agreement began with the statement that the 'relations [between the signatories] must be based on respect for the independence and sovereignty of States', and ended with an annex containing a declaration granting amnesty

53 For the full (French) text of the Treaty of Sèvres, see H. Triepel, *Nouveau Recueil général de Traités* (continuation of the *Grand Recueil* by G.F. de Martens), series III, vol. XII, Librairie Theodor Weicher, Leipzig 1923, pp. 664 ff.

54 For the full (French) text of the Treaty of Lausanne, see H. Triepel, *Nouveau Recueil général de Traités* (continuation of the *Grand Recueil* by G.F. de Martens), series III, vol. XIII, Librairie Theodor Weicher, Leipzig 1924, pp. 342 ff.

55 V. Dadrian, *Autopsie du génocide arménien* (trans. Marc and Mikaël Nichanian), Complexe, Paris 1995, p. 140.

to the Turkish leadership for all crimes committed between 1914 and 1922.[56] It is crucial, then, not to lose sight of the reasons behind the failure to establish the international tribunal as initially envisaged, and of the direct link between this infliction of impunity and the scale of the 'industry of denial'[57] – the only one of its kind – that has been organised ever since by the Turkish state.

It is also interesting to place this radical removal of the Armenian Question from the international scene in the otherwise extremely active context of the 1920s. At the international level, on the one hand, this decade saw the flourishing of a doctrine centred on the construction of a system of international criminal law and universal human rights law, with its basis in a new world order whose primary constituents were no longer states, but rather the 'international community'. At the national level, too, it witnessed the highly publicised trial of Soghomon Tehlirian, a survivor of the genocide of the Armenians, for the assassination of Talaat Pasha (who, having been condemned to death *in absentia* at the Constantinople trials, had fled to Germany) and his subsequent acquittal by the German Court of Assizes on 3 June 1921.[58] At each of these levels emerged two famous legal minds whose thinking, later to prove decisive in the development of international human rights law and international criminal law, was deeply affected by the realisation of the impunity that would henceforth characterise the genocide of the Armenians.

The first was André Mandelstam, a passionate supporter of the League of Nations and from 1921 onwards a permanent member of the *Institut de droit international* (International Law Institute, or ILI) where he coordinated the activities of the *Commission de la protection internationale des droits de l'homme, du citoyen et des minorités* (International Commission for the Protection of Human Rights, the Rights of Citizens and of Minorities). He drew directly on the Armenian Question in several of his works as a means of enriching his thinking on the fundamental rights of the human individual at the most universal level.[59] He had already, in his 1917 book *Le sort de l'Empire ottoman* ('The Fate of the

56 It should be noted that the validity of amnesties for the most serious international crimes (crimes not subject to a statute of limitations) has now been brought into question in international law, as the two dissenting judges point out (dissenting opinion, §7).

57 To use an expression coined by the historian Taner Akcam. See T. Akcam, *Un acte honteux: le génocide arménien et la question de la responsabilité turque* (trans. Odile Demange), Denoël, Paris 2008.

58 For more details of this unusual trial, the archives and testimony that it brought to light in Europe, and the role of *independent third party* played by the German judicial authorities, which unwittingly became a *secondary witness* to the genocide, see S. Garibian, '"Ordonné par le cadavre de ma mère". Talaat Pacha, ou l'assassinat vengeur d'un condamné à mort' in S. Garibian (ed.), *La mort du bourreau. Réflexions interdisciplinaires sur le cadavre des criminels de masse,* Pétra, Paris forthcoming 2016.

59 A full description of the main aspects of his thinking is given in A. Mandelstam, 'La protection internationale des droits de l'homme' (1931) *Recueil des cours de l'Académie de droit international* 125, 129–229.

Ottoman Empire'),[60] denounced the 'crimes of treason against humanity'[61] of which the Armenians had been the victims, arguing that these acts ought to be sanctioned by a universal humanitarian law which would place them outside the arbitrary purview of nation states.[62] He later proposed the drafting of a universal convention for the protection of human rights and the rights of the citizen which would, after various setbacks, eventually result in the adoption by the ILI on 12 October 1929 of the *Déclaration des droits internationaux de l'homme* (Declaration of the International Human Rights). The second of these jurists was Raphael Lemkin. While the vast majority of the press hailed Tehlirian's acquittal as an 'act of justice bringing honour upon the new Germany',[63] the young Lemkin, born in Belarus but at that time a student at the University of Lwów, was struck by these events: 'why is the killing of a million a lesser crime than the killing of an individual?',[64] wrote the man who would become the father of the concept of genocide and an advisor to Robert H. Jackson, the American prosecutor at Nuremberg. Left deeply affected by this case[65] that, on its own, encapsulated the key problem with which legal doctrine was struggling at this time, and tormented by the question of impunity, he embarked upon a study of state crimes and their international prosecution; a study that would be provided with grim new 'material' by a policy of extermination that was far closer to home, and more pressing – that pursued by Nazi Germany.

4. CONCLUSION

While the Armenian Question and the international prosecution of the mass crimes committed by the Ottoman Empire disappeared from the political agenda with the signing of the Treaty of Lausanne, the legal attempts made to deal with them in the aftermath of the First World War were, and remain, crucial to a better understanding of the genealogy of the concepts of crimes against humanity and genocide – and, more generally, of the birth of international criminal justice. It

60 A. Mandelstam, *Le sort de l'Empire ottoman*, Payot, Paris 1917.

61 *'[C]rimes de lèse-humanité'*.

62 See the study by D. Kévonian, 'Exilés politiques et avènement du "droit humain": la pensée juridique d'André Mandelstam' (1869–1949)' (2003) 177–178 *Revue d'histoire de la Shoah* 245, particularly 259 ff for more on this point.

63 '[U]n acte de justice honorant la nouvelle Allemagne'. *Justicier du génocide arménien. Le procès de Tehlirian*, Editions Diasporas, Paris 1981, pp. 21.

64 D.-L. Frieze, *Totally Unofficial. The Autobiography of Raphael Lemkin*, Yale University Press, New Haven-London 2013, p. 19.

65 On Lemkin and the Tehlirian case, see. Power, *'A Problem from Hell'. America and the Age of Genocide*, Harper Perennial, New York 2003, pp. 17 ff; S.L. Jacobs, 'Raphael Lemkin and the Armenian Genocide' in: R. Hovannisian (ed.), *Looking Backward, Looking Forward: Confronting the Armenian Genocide*, Transaction Publishers, New Brunswick 2003, pp. 125–135;. Elder, 'What you see before your eyes: documenting Raphael Lemkin's life by exploring his archival Papers, 1900–1959' (2005) *Journal of Genocide Research* 469.

is surprising, then, that not only the historical facts themselves, but also their legacy in the gradual construction of a system of international criminal law *in progress* have both been declared the subject of a lack of 'general consensus', when they in fact constitute a documented reality, a *stock* forming the germ of the legal concepts created to take this reality into account.

The paradox underpinning the argument that there is an absence of consensus over the genocide of 1915, as discussed earlier, thus becomes clear. And it itself serves to mask another, doubly problematic paradox. For, by adopting this line of argument, the European judges are unwittingly echoing the well-known *demand for proof* so characteristic of denialist rhetoric, thus flying in the face of sound existing historical research in constant development.[66] They fall instead into the aporia in which we find ourselves locked by the essential underlying argument, indefensible on several counts, based on the absence of the force of *res judicata* (i.e. based on the absence of a judicial international decision establishing the genocide, in other words based on impunity) – a familiar argument, to which the French Constitutional Council had already given succour in 2012.[67] Yet this same impunity should be seen as a further reason to take a serious view of genocide denial – which impunity assists by providing it with a solid footing – rather than being used as a means of justifying negationism. The European Court is, furthermore, contributing to the *competitive victimhood* which so often feeds – or is fed by – denialist discourse: for they have established a double standard[68] (Holocaust/Armenian genocide), an inequality that Swiss law avoids by recognising no hierarchy either between different genocides, or between genocides and crimes against humanity. It is rather surprising that the application of a Swiss anti-racism measure aimed at preventing discrimination and incitement to hatred – a law, in other words, which expresses solidarity between human beings and is the basis of the very principle of their equality – should give rise to a judgment by the ECHR which carries such an inequality. An inequality of treatment that ought, at least, to be subjected to close scrutiny.

To sum up, then, the argument based on the lack of 'general consensus' regarding the Armenian genocide runs counter to the spirit of the European Convention on Human Rights (1950) which was drawn up following the ravages of the Second World War: it marks a victory for negationist ideology. This ideology of the 'specialists of the interruption of consent' ('people (…) – as says French philosopher Patrice Loraux – whose aim is to make you ashamed

66 Valeria Thus argues that the ECHR embodies a new form of denial: V. Thus, 'Armenian Genocide: Perinçek case. Does the European Court of Human Rights embody a new form of denial based on trivialisation?', *Journal of Armenian Genocide Studies*, forthcoming.

67 See S. Garibian, 'La mémoire est-elle soluble dans le droit? Des incertitudes nées de la décision n° 2012–647 DC du Conseil constitutionnel français' (2013) 2/66 *Droit et Cultures* 25, 46.

68 See dissenting opinion, §22.

for having acquiesced too soon, without having demanded further proof')[69] disrupts democratic consensus through its manipulative U-turns and the distortion of facts that it creates. For consent, explains Loraux in his strong analysis of genocide denial, is the act by which 'one stops the *hyperbolic* motion of the demand for proof at the threshold of what we perceive through our "sensus communis"'.[70] By taking this point of view, and whatever might happen in the future, we can better grasp the importance of the referral of the Perinçek case to the Grand Chamber of the ECHR by the Swiss government: a powerful rejection of the idea that the negationist project is irreversible.

69 *'[S]pécialistes de l'interruption du consentement', 'des gens (…) dont l'intérêt est de vous faire honte pour avoir trop tôt acquiescé sans avoir demandé un supplément de preuve.*' P. Loraux, 'Consentir' (1989) 22 *Le Genre Humain* 151, 155.

70 '*[O]n arrête le mouvement hyperbolique de la demande de preuve au seuil de l'expérience des "sensibles communs"*.' P. Loraux, 'Consentir' (1989) 22 *Le Genre Humain* 151, 156. The author derives the notion of '*sensus communis*' from Aristotle.