

2002

80 Years Too Late: The International Criminal Court and the 20th Century's First Genocide

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Recommended Citation

Shamsey, John (2002) "80 Years Too Late: The International Criminal Court and the 20th Century's First Genocide," *Florida State University Journal of Transnational Law & Policy*. Vol. 11: Iss. 2, Article 4.
Available at: <https://ir.law.fsu.edu/jtlp/vol11/iss2/4>

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Cover Page Footnote

B.S. Samford University, 1995; M.A. Univ. of Alabama-Birmingham, 1997; J.D. Florida State Univ. College of Law, 2002. I would like to thank my family for all of their support, especially my Uncle Joe for inspiration, and my wife Kelly for her endless hours of encouragement and editing assistance. I also offer sincere thanks to Professor Burns H. Weston for his insight and support in the preparation of this article.

80 YEARS TOO LATE: THE INTERNATIONAL CRIMINAL COURT AND THE 20TH CENTURY'S FIRST GENOCIDE

JOHN SHAMSEY*

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I. INTRODUCTION

In a century marred by genocide and killing, it is odd that the century's first genocide would be one of the least recognized and most controversial. This is the genocide of 1.5 million Armenians by heir Ottoman Turkish government from 1915-1918.¹ This slaughter

* B.S.Samford University, 1995; M.A. Univ. of Alabama-Birmingham, 1997; J.D.Florida State Univ. College of Law, 2002. I would like to thank my family for all of their support,

would shock the world as it was occurring.² However, the world was soon to relegate the Armenian suffering to the back pages of history, with consecutive Turkish governments downplaying and, in most cases, outright denying that a genocide had even taken place. There was no international Nuremberg trial for the perpetrators (most of whom, for political reasons, were never actually punished), and, therefore, their sentences were carried out by Armenian “vengeance assassins.” Thus, continued Turkish denial, the impression that the world does not care, and a general sense of a lack of closure have made a significant mark on the psyche of nearly every Armenian. Instead of simmering down, the controversy is still brewing about how to describe what happened to the Armenian minority eighty-five years ago in Ottoman Turkey.³ Armenians, nearly all historians, and most who are generally familiar with the episode, describe the massacres as genocide; Turkey, and a handful of revisionist historians choose to describe the incident as “massacres due to internal ethnic warfare.”⁴ The outcome is a rather unique phenomenon: an all-out war to write and define history.⁵

especially my Uncle Joe for inspiration, and my wife Kelly for her endless hours of encouragement and editing assistance. I also offer sincere thanks to Professor Burns H. Weston for his insight and support in the preparation of this article.

1. For excellent comprehensive works on the Armenian Genocide, see generally VAHAKN N. DADRIAN, *THE HISTORY OF THE ARMENIAN GENOCIDE* (3d ed. rev'd 1997) (1995) [hereinafter DADRIAN, *HISTORY OF ARMENIAN GENOCIDE*]; G.S. GRABER, *CARAVANS TO OBLIVION - THE ARMENIAN GENOCIDE, 1915* (1996); DONALD E. MILLER & LORNA T. MILLER, *SURVIVORS: AN ORAL HISTORY OF THE ARMENIAN GENOCIDE* (1993); *CENTURY OF GENOCIDE - EYEWITNESS ACCOUNTS AND CRITICAL VIEWS 41-77* (Samuel Totten et al. eds., 1997) (1995) [hereinafter *CENTURY OF GENOCIDE*].

2. There were dozens of *New York Times* articles describing the massacres as they were taking place in Turkish Anatolia during World War I. Press Coverage of the Armenian Genocide, *ARMENIAN NATIONAL INSTITUTE WEBSITE*, at <http://www.armenian-genocide.org/press/index.htm> (last visited May 1, 2002). For reprints of many of the *New York Times* articles, see also Armenian Genocide Articles, at <http://www.cilicia.com/armo10c.html> (last visited Apr. 4, 2002).

3. Andrew Finkel, *Debating Genocide-Turks and Armenians are Still at Odds Over the Events of 1915*, *TIME-EUROPE*, Jan. 30, 2001, available at <http://www.time.com/time/europe/eu/daily/0,9868,97410,00.html>; Marcus Warren, *The Horror That the World Wants to Forget*, *THE DAILY TELEGRAPH*, Jan. 27, 2001, at 17.

4. Julia Pascal, *A People Killed Twice*, *THE GUARDIAN*, Jan. 27, 2001, at 32; *Genocidal Politics*, *WASH. TIMES*, Feb. 5, 2001, at A14.

5. There have been numerous examples of the war over recognition or suppression of the Armenian Genocide. In the academic world, scholars have accused the Republic of Turkey of buying chairs of history in American institutions to promote an anti-Armenian version of Ottoman and Turkish history. Christopher Shea, *Turko-Armenian War Brews in the Ivory Tower* (June 9, 1999), at <http://www.salon.com>. In the political arena, the war has been even more intense. JoAnn Kelly, *Eighty Years Later, Turkey and Armenia Still Lobby Congress on Whether Genocide Occurred*, *THE HILL*, Apr. 28, 1999, available at http://www15.dht.dk/~2westh/uk/eighty_years_later-e.html. Turkey has made no effort to try to hide the fact that it will take quite aggressive measures to prevent foreign nations from recognizing the Armenian Genocide. In the fall of 2000, a bill that most likely would have passed the U.S. House was dropped by the Speaker at the last minute due to a call from President Clinton.

This article explores the crime of genocide in the context of the International Criminal Court ("ICC"). After establishing that the events in World War I Ottoman Armenia did constitute genocide, pursuant to ICC definitions, this article will look at the failure of the international community to punish the perpetrators accordingly. By looking at the consequences of this inaction, an argument will be made for the general importance of the ICC in resolving and preventing current and future tragedies. Finally, an argument will be made for present-day ICC action to resolve this issue while also looking at the possibility of alternative solutions to this very unique and continuing international dilemma.

With the recent organization of the ICC by the Rome Statute⁶ and the Court's pending status, differing viewpoints have been expressed as to the ICC's necessity and usefulness.⁷ By putting a hypothetical case of the Armenian Genocide before the ICC, the reader can speculate as to how this criminal court could help in solving this issue -even by issuing a symbolic decision⁸ - and play a

Kelly, *supra*; *Genocidal Politics*, *supra* note 4. Clinton informed the Speaker of a warning from Turkey that American lives may be at risk if the resolution passed. *U.S. Congress Withdraws Armenian Genocide Resolution*, TURKEYUPDATE.COM, at <http://www.turkeyupdate.com/tu2000/res596.htm> (Nicole Pope ed., Oct. 20, 2000); see also *Genocidal Politics*, *supra* note 4. Whether this was simply political bluffing or an honest threat is up for debate. In January 2001, a bill was passed into law by the French Senate, which simply stated, "France recognizes the Armenian Genocide of 1915." Emmanuel Georges-Picot, *French Parliament Recognizes Armenian Genocide, Infuriating Turkey*, A.P. NEWSWIRES, Jan. 18, 2001; *Genocidal Politics*, *supra* note 4. The bill does not even mention the modern day Republic of Turkey, yet Turkey withdrew its Ambassador to France, canceled multi-million dollar military deals with French companies, threatened to boycott all French goods, and is currently working on a resolution recognizing the "French Genocide against the Algerians." Robert Fisk, *The Shocking Pictures That Turkey is Trying to Stop Us From Seeing*, THE INDEP., Mar. 12, 2001, at 4. The war has even spread to cyberspace. Just recently, a Turkish diplomat in London sent a letter to the Hulton Getty Picture Library in England, demanding that they remove three famous Armenian Genocide photographs from their online photographic library. *Id.* The pictures, secretly taken outside of a Turkish concentration camp in what is now Syria, by German military photographer Armin Wegner in 1915-16, show dead Armenians as the result of the massacres. *Id.* The Turkish official objected to the caption of one picture, arguing that "the picture's caption, which stated that the dead were victims of the Turkish massacres" was obviously inaccurate, since "[t]he dead . . . had obviously only 'starved' to death." *Id.*

6. *Rome Statute of the International Criminal Court*, U.N. Doc. A/Conf. 183/9 (1998) [hereinafter *Rome Statute*].

7. See generally Lynn Sellers Bickley, Comment, *U.S. Resistance to the International Criminal Court: Is the Sword Mightier than the Law?*, 14 EMORY INT'L L. REV. 213 (2000); Gerard E. O'Connor, Note, *The Pursuit of Justice and Accountability: Why The United States Should Support the Establishment of an International Criminal Court*, 27 HOFSTRA L. REV. 927 (1999); John Seguin, Note, *Denouncing the International Criminal Court: An Examination of U.S. Objections to the Rome Statute*, 18 B.U. INT'L L.J. 85 (2000).

8. It is the opinion of this author that an ICC "Symbolic Decision Mechanism" to deal with past issues, like the Armenian Genocide, would be extremely useful and worthwhile. Although the argument may at this point be pedantic, a symbolic decision making process by the ICC or a body affiliated or commissioned by it, could actually solve issues that would

significant role in deterring future genocidal acts and denial as well. Given the general worldwide acceptance, and assumed legitimacy, of the Nuremberg trials and the obvious effect these trials had on worldwide recognition of the Holocaust, to this author it seems obvious that international multi-partisan tribunals should generally be used to try serious international crimes. The International Criminal Tribunal for Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") seem to support this line of thinking, and the establishment of the permanent ICC seems to be the next natural step. Hopefully, by looking at the propositions put forth in this article, the reader will likewise recognize the need for present-day international solutions to the problem of Armenian Genocide amnesia.⁹

II. SHORT HISTORY OF THE ARMENIAN GENOCIDE

A. *The "Murder of a Nation"*

The Armenian Genocide certainly was the culmination of decades of tension between the Turks and its minority Armenians. In the latter 19th century, having lived relatively peacefully, but mostly as second-class citizens, for several hundred years, the Armenians became unsatisfied with their subordinate status in the Ottoman Empire. Although many Armenians were successful citizens in the empire, in rural Anatolia in eastern Turkey, the majority of the Armenians were subjected to a lifestyle of continued harassment by Kurdish chieftains and Turkish governors. Years of double taxation, physical intimidation, abduction of women, and localized pogroms, coupled with a growing affinity for things Western and European, led the Armenians to push for greater civil and social rights.¹⁰ This simply was unacceptable in 19th century Turkey, and the century ended with a string of massacres between

otherwise never be resolved. However, the possibility of such a mechanism and its details should certainly be left to another study.

9. For an excellent article on the Western world's "amnesia" in regards to the Armenian Genocide, see Robert Fisk, *Remember the First Holocaust*, INDEP.-UK, Jan. 28, 2000, available at <http://groong.usc.edu/fisk.html>. Fisk writes:

Who, I wonder, chooses which holocaust we should remember and which we should not? The six million Jews who were murdered by the Nazis must always have a place in our history, our memory, our fears. Never again. But alas, the Armenians who perished in the rivers of southern Turkey, who were slaughtered in their tens of thousands in the deserts of northern Syria, whose wives and daughters were gang-raped and knifed to death by the gendarmerie and their Kurdish militiamen - they have no place in our memory or our history. Turkey is our friend. Turkey might one day join the European Union. Turkey is an ally of Israel.

10. DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 45-48; GRABER, *supra* note 1, at 21-41.

1894-1896 that left one hundred fifty thousand to three hundred thousand Armenians dead.¹¹ These extremely vicious massacres, now known as the Sultan Abdul Hamid massacres, were to many historians the “prologue” to the genocide of 1915.¹² Perhaps the world’s failure to stop these massacres gave the Young Turks, or the Committee for Union and Progress (“CUP”), the impunity they would need to carry out their genocide twenty years later during World War I. Although the Armenians initially heralded the Young Turk party as liberators from the antiquated rule of the Sultan, the CUP leaders still purported to be extremely suspicious of the Armenian minority at the outbreak of the first World War.¹³

In the spring of 1915, the Young Turk government, citing the possibility of Armenians collaborating with the invading Russians, implemented a policy that would lead to the century’s first genocide. Reports of the Ottoman military massacring Armenian civilians in Eastern Turkey were circulating.¹⁴ Stories of Ottoman Armenians in the Turkish army being disarmed, worked to death, or simply murdered, started to trickle in as well.¹⁵ Armenians in the ancient city of Van, near the Turkish/Russian border, fearing that the approaching Turkish regiment would slaughter them as well, took up arms to defend themselves.¹⁶ This “insurrection”¹⁷ as the Turkish government chose to call it, gave the CUP the impetus, and purported justification, it needed to begin its “Final Solution” of its Armenian problem. Soon after the Van incident the government

11. DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 142-63.

12. *Id.* at 172-84. See also CENTURY OF GENOCIDE, *supra* note 1, at 60-61.

13. Henry Morgenthau, Ambassador Morgenthau’s Story 326, 343-46 (1918).

14. See, e.g., Report of Allied Warning to the Ottoman Government to Stop the Massacres of Armenians, ARMENIAN NATIONAL INSTITUTE WEBSITE, May 19, 1915, available at <http://www.armenian-genocide.org/sampledocs/us-5-29-15-text.htm>.

15. *Id.*

16. *Id.* See also HENRY H. RIGGS, DAYS OF TRAGEDY IN ARMENIA 50 (1997).

17. In a narrative written on May 24, 1915, Miss Grace Higley Knapp, an American missionary stationed in Van, explained how the Armenians of Van were asked by Djevdet Bey, governor of the region, to give three thousand troops for continued fighting with the Russians. ARNOLD J. TOYNBEE, THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE 1915-1916 [DOCUMENTS PRESENTED TO VISCOUNT GREY OF FALLODON BY VISCOUNT BRYCE] 32-35 (1916). Already wary of the governor’s reputation and having heard reports of abuses against Armenian soldiers, the Armenians of Van sent four of their leaders as peacemakers to a nearby region where there was another “problem” between Turks and Armenians. *Id.* at 34. Djevdet Bey had the four murdered; the date was April 16, 1915. *Id.* The Armenians subsequently lost all faith in the newly appointed governor, who was coincidentally a brother-in-law of CUP leader Enver Pasha, and offered compromised recruit numbers and exemption taxes to Djevdet Bey. *Id.* The governor refused to compromise, proclaiming that he “must be obeyed” and would “put down this ‘rebellion’ at all costs.” *Id.* Miss Knapp then states, “[t]he fact cannot be too strongly emphasized that there was no ‘rebellion.’” *Id.* Incidentally, on the morning of April 20, Turkish soldiers, who had tried to “seize” an Armenian woman just outside the city gate, fired on two Armenian men who had approached the soldiers to quell the commotion: “[t]he siege had begun.” *Id.* at 35.

rounded up over two hundred prominent, successful Istanbul Armenians on April 24, 1915.¹⁸ These social and intellectual leaders of the Armenian community were detained and marched out of the city into the wilderness in the middle of the night.¹⁹ Only a handful survived.²⁰ With its leadership liquidated, and therefore no real voice in Istanbul to plead with the government or the outside world, the bulk of the Armenian population was utterly defenseless.

B. Deportations

By May, wholesale deportations had begun.²¹ The Turkish government's intentions quickly became clear. The CUP's dreams of an expansive pan-Turkic empire, free from minority or Western influence, were beginning to take shape. Soon, Armenians were being deported from Turkey, not just in areas proximate to the Russian/Turkish border.²² The methods of massacre and deportation varied from region to region. Some local governors attempted to be more compassionate than others, but the CUP implemented aggressive measures to make sure the deportation orders were followed.²³ In most areas, the persecution began when all relatively able-bodied males were detained without any real charges.²⁴ Then the men would be marched out of town and simply murdered.²⁵ Another method used was the "search for arms."²⁶ Males would be detained and ordered to give up their arms.²⁷ If the detainee did not produce any guns, he would be accused of hiding arms and tortured until he confessed.²⁸ However, any Armenian who did turn in arms, many times decades old hunting muskets, would be detained, accused of planning insurrection, and many times killed.²⁹ The "search for arms" enabled the Young Turks to turn Anatolia into a virtual police state, consequently intimidating

18. April 24th, now considered as the "beginning" of this slaughter, is now also the day Armenians worldwide annually commemorate the memory of the victims of the Armenian Genocide.

19. TURKISH ATROCITIES - STATEMENTS OF AMERICAN MISSIONARIES ON THE DESTRUCTION OF CHRISTIAN COMMUNITIES IN OTTOMAN TURKEY, 1915-1917, at 181-82 (James L. Barton ed., 1998).

20. *Id.*

21. DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 221, 235-36.

22. CENTURY OF GENOCIDE, *supra* note 1, at 43-44.

23. Governors and local officials who did not follow orders from Istanbul were replaced.

24. CENTURY OF GENOCIDE, *supra* note 1, at 43-44.

25. *Id.*

26. MORGENTHAU, *supra* note 13, at 301-09; RIGGS, *supra* note 16, at 47-50; TURKISH ATROCITIES, *supra* note 19, at 116.

27. *Id.*

28. *Id.*

29. See MORGENTHAU, *supra* note 13, at 301-09; RIGGS, *supra* note 16, at 47-50.

Armenians and creating a fear of “the enemy from within” among the local Turks.

Regardless of the methods, almost all deportation accounts describe the able-bodied men being separated from the women and either killed before, or soon after, the marches began.³⁰ In most cases, the deportees were given very little time to gather their possessions, and many Armenians were only allowed to take what they could carry on their backs. Most were never told where they were going, or were told a series of lies. After months of wandering in summer heat through the harsh wilderness, the majority of the caravan was dead. The marchers, mostly the elderly, women, and children, were at the mercy of the Turkish gendarmes. Many of the gendarmes were recently released convicts hired specifically by the CUP through its “Special Organization” to “oversee” the deportation process. The Armenians were subject to horrible abuses along the way from these alleged “protectors,”³¹ including deprivation of food and water, rape, robbery, and constant sadistic intimidation. In many cases the local governors or the caravan guards had previously arranged with local bandits or Kurdish chieftains to have the pitiful Armenians attacked or massacred along the way. Accounts speak of the Turkish guards conveniently “disappearing” whenever the caravan was set upon by brigands.

Many times the Turkish gendarmes simply took care of the killing themselves, gradually lessening the numbers in the caravans as the weeks rolled on. Consistent with the prevailing Muslim mindset, women and children were seen as chattel, and therefore less of a threat. There was apparently not the same urgency to kill Armenian women as quickly, as they could be disposed of in different ways. Many women and girls were given the “opportunity” to convert to Islam on the spot and therefore avoid deportation and death. Most, but not all, declined this offer to assimilate into a Muslim family. Once on the death marches, females were

30. The following two paragraphs, summarizing the deportation experiences of Armenians is a composite taken from many different survivor accounts and sources. For excellent summaries of the deportation process, see CENTURY OF GENOCIDE, *supra* note 1, at 41-45; GRABER, *supra* note 1. For good survivor accounts, see generally PETER BALAKIAN, BLACK DOG OF FATE (1997); MAE M. DARDARIAN, VERGEEN: A SURVIVOR OF THE ARMENIAN GENOCIDE (1997) (based on a memoir by Virginia Meghrouni); DAVID KHERDIAN, THE ROAD FROM HOME - THE STORY OF AN ARMENIAN GIRL (1979); MILLER, *supra* note 1; RAVISHED ARMENIA AND THE STORY OF AURORA MARDIGANIAN (Anthony Slide ed., 1997) [hereinafter RAVISHED ARMENIA]; CENTURY OF GENOCIDE, *supra* note 1, at 64-77. For an excellent, detailed account by an American missionary of the entire deportation process in one town, see RIGGS, *supra* note 16; see also TURKISH ATROCITIES, *supra* note 19.

31. The official stance of the government was that these gendarmes were present for the protection of the Armenians. In reality, it would be the gendarmes who would carry out most of the horrific abuses against the Armenians.

especially brutalized. These women were in a constant effort to appear unattractive to their Turkish "protectors," lest they be noticed and abused. The perpetual anguish due to the impending likelihood of rape is recounted in nearly all female survivor accounts. Many Armenian young women committed suicide rather than be raped or abducted by bandit Turks or Kurds. Additionally, many women, fully realizing their fate, gave their babies or small children to Muslim onlookers. In many instances, the assimilation of these Christian Armenian children into Muslim families was encouraged by local leaders.³²

In the end, the deportations had accomplished what the CUP had ultimately intended, a huge percentage of the Ottoman Armenian population had been decimated. The majority of the handful of survivors were starving middle-aged mothers and small children. Most of these helpless survivors were kept in internment camps around Deir-al-Zor in what is now Syria.³³ Many more Armenians died in these concentration camps, either by mass execution, starvation, or disease.³⁴ By the end of World War I in October 1918, there were practically no Armenians left in nearly all of the millennia-old Armenian regions of Eastern Anatolia. Most had died, but, in addition to the tattered, naked survivors in Syria, many Armenians had escaped to Russian Armenia in the Caucasus.³⁵ As the war ended, hope of justice for the Armenian survivors was dim. Days after the armistice was signed on October 30, 1918, the top CUP leaders, at the time known as the "big seven," boarded a German cruiser and headed for asylum in Germany.³⁶ Hated by many Turks for losing the war, and wanted by Allied, and some Turkish, forces for war crimes, the main perpetrators of the

32. There are scores of survivor memoirs that relay the process of deportations. For some of the better accounts, see BALAKIAN, *supra* note 30; DARDARIAN, *supra* note 30; KHERDIAN, *supra* note 30; MILLER, *supra* note 1; CENTURY OF GENOCIDE, *supra* note 1, at 64-77; RAVISHED ARMENIA, *supra* note 30. For an excellent, detailed account by an American missionary of the entire deportation process in one town, see RIGGS, *supra* note 16.

33. See CENTURY OF GENOCIDE, *supra* note 1, at 45.

34. *Id.* See also TURKISH ATROCITIES, *supra* note 19.

35. An independent Transcaucasian Republic formed in early 1918 after the Russian Revolution, consisting of Georgians, Armenians, and Azerbaijanis, soon fell apart, and the "republics" split up. GRABER, *supra* note 1, at 141-45. The Russian-Armenian Republic was declared on May 28, 1918. *Id.* at 148. However, after constant warring with Azerbaijan and Turkey, this republic would be subsumed into the U.S.S.R. two years later. DARDARIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 360. Historian Vahakn Dadrian believes that the Young Turks planned to extend their genocidal campaign to Russian Armenia, even though the top CUP leaders fled Turkey soon after the war ended. *Id.* at 347-74. However, Dadrian cites evidence of CUP leaders *in absentia* supporting invasion of the fledgling Russian Armenian state. *Id.* The Kemalist Turkish invasion of Armenia and ensuing Armeno-Turkish "war" by many is considered to be (although by a different government) the final Turkish attempt at the annihilation of the Armenian race. *Id.* at 356-74.

36. DARDARIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 306.

century's first genocide were hoping to escape punishment in Germany.³⁷

C. *The Historical Context of the Armenian Genocide*

In viewing this genocide in a broader historical context, one should first take note of the changing political and cultural situation in the Ottoman Turkish Empire. Generally, the Ottoman Empire was in a state of decline. Having lost many territories in the preceding fifty years, the government was in transition from a monarchist (the Sultan) system to a more modern, liberal, democratic one (the Young Turks (CUP) and then the Republic). The coming of the Young Turks was considered by most Ottomans, including Armenians, as the coming of a new liberal era, finally bringing Turkey out of the relatively primitive and harsh control of the Sultan. Things did not work out so well, for World War I would prove to be the end of the Young Turk regime as they were blamed for Turkey's embarrassing losses in the Great War. As far as the Armenians were concerned, the CUP inflicted greater suffering than Sultan Abdul Hamid ever did, as the systematic, centrally-controlled genocide annihilated anywhere from fifty to seventy-five percent of the Ottoman Armenian population.³⁸

The tight-knit, almost fascist-like power structure of the CUP, headed by the triumvirate of Talaat, Enver, and Djemal Pashas³⁹ enabled the Ottomans to solve the issue with its powerful minority in a way that many Turks had been promoting for years: a violent course of action.⁴⁰ The "Armenian Problem" was, to the CUP, a European-caused "thorn in the side" that had plagued Turkey's image and morale for decades. Having lost territories to other minorities in Greece, Serbia, and Bulgaria, the CUP was determined to strengthen the Empire once again, now by creating

37. *Id.*

38. This is based on the notion that the Armenian population in Turkey at the time was around two million. There has been debate on this issue among scholars as many Armenian sources at the time put the Armenian population at a considerably higher number, while many Turkish sources put it at a considerably lower number. Both sides might have had an incentive to inflate or deflate the numbers accordingly, for political purposes. After studying these numbers and looking at outside authorities, this author feels that two million is a relatively safe, accurate number. The percentage is derived from the fact that nearly all scholars and non-Turkish sources have deciphered from the evidence that anywhere from one to one-and-a-half million Armenians perished in the genocidal years of 1915-1918. *See, e.g., Case Study: The Armenian Genocide 1915-1917, GENDERCIDE WATCH WEBSITE, at http://www.gendercide.org/case_armenia.html (last visited May 28, 2002).*

39. For an excellent study of the Young Turks in the context of the Armenian Genocide, see DADRIAN, *HISTORY OF ARMENIAN GENOCIDE*, *supra* note 1, at 179-84, 192-247.

40. *See* HILMAR KAISER, *IMPERIALISM, RACISM, AND DEVELOPMENT THEORIES - THE CONSTRUCTION OF A DOMINANT PARADIGM ON OTTOMAN ARMENIANS* (1997).

a homogenous Turkic state.⁴¹ The Armenians simply had no place in the Turkey that the Young Turks envisioned. Trying to learn from past Ottoman mistakes, the CUP took an unprecedented systematic violent course of action. This is summed up in Talaat Pasha's boastful statement, recounted by then U.S. Ambassador to Turkey, Henry Morgenthau: "I have accomplished more towards solving the Armenian problem in three months than Abdul Hamid accomplished in thirty years!"⁴²

As it turned out, the British, who had been planning to prosecute the Young Turks for their heinous crimes, for political and diplomatic reasons, would abandon their crusade to deliver justice for the Armenians.⁴³ There had been talk of an international tribunal, but this too would fail eventually.⁴⁴ The only trials of any Young Turk leaders were Court Martial trials by an interim Ottoman government starting in the summer of 1919.⁴⁵ The sentences were announced in January 1920.⁴⁶ A few minor officials were sporadically punished, however, the main CUP leaders - Ministers Talaat, Enver, and Djemal, and the ultra-nationalist Drs. Nazim and Shakir - although sentenced to death *in absentia*, were residing safely in Germany.⁴⁷ Growing Turkish nationalism and

41. See DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra*, note 1 at 194-95.

42. MORGENTHAU, *supra* note 13, at 342.

43. Britain had seized over one hundred former CUP officials and was holding them on the island of Malta. DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 307-08. However, in a strict legal sense, evidentiary and jurisdictional problems would hinder the British from moving forward with the trials of the detainees. *Id.* at 308-10. Additionally, it became apparent that the British government would rather use the prisoners as bargaining chips in setting up a swap with Kemal Ataturk for British prisoners of war. *Id.* at 310-11. In the end, despite knowing that many of the Turkish prisoners were "notorious exterminators" of Armenians," the British performed an all out swap for their prisoners, on October 23, 1921. *Id.* at 311.

44. The Paris Peace Conference established a Commission to investigate war crimes in January 1919. *Id.* at 304. The Commission made sure that articles regarding the punishment of the Turkish government were inserted into the Peace Treaty of Sevres, signed with Turkey on August 10, 1920. *Id.* at 305. Article 230 of the Treaty went so far as to say that Turkey would have to hand over persons "responsible for the massacres committed during the continuance of the state of war 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 recognize such tribunal." *Id.* Despite strict intentions by the Allies, nothing would come of Article 230. *Id.* Political posturing, and the emergence of Kemal Ataturk would lead to the discarding of the Treaty of Sevres altogether. *Treaty of Sevres*, ENCYCLOPEDIA.COM, at <http://www.encyclopedia.com/html/S/Sevres-T1.asp> (last visited May 28, 2002). The binding Treaty of Lausanne signed in July 1923 did not even mention the massacres, much less Armenians at all, and lacked any provision for any sort of punishment or tribunal. See DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 333.

45. DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 330.

46. VARTKES YEGHAIYAN, THE ARMENIAN GENOCIDE AND THE TRIALS OF THE YOUNG TURKS at xxvi (1990).

47. DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 331.

waning Allied resolve, subsequently made actual legal punishment a fading reality.

III. THE CASE

A. *The Underpinnings of the Case*

By looking at the current controversy over the Armenian Genocide and noting the failure of the world to properly deal with the tragedy during the aftermath of World War I, this article has attempted to establish that the issue of the Armenian Genocide is one that should be dealt with in the international arena. On an intellectual level, it would seem that an international tribunal is an appropriate venue to work through this lingering controversy. However, the practicality of bringing a case of the Young Turks before the ICC would be more problematic. No matter how helpful a decision on such a controversy might be, the Rome Statute⁴⁸ of the ICC certainly did not intend to bring charges *post mortum* or *ex post facto*.⁴⁹ In the case of the Armenian Genocide, for the ICC to have jurisdiction, certain Rome Statute Articles would have to be bypassed, notably Articles 11, 22, and 24. Falling under Part Two, "Jurisdiction, Admissibility and Applicable Law," of the Rome Statute, Article 11, Section 1 outlines that only crimes committed after the "entry into force" of the Statute would fall under the jurisdiction of the Court. Section 2 adds that the Court would only have jurisdiction pertinent to a state after that state's becoming a Party to the statute, even if the Statute had entered into force.⁵⁰ Section 1 raises the most fundamental issues in regards to this hypothetical case. The acts in question must have been committed after the Statute's entry into force. Given the seriousness of the ICC and the major sovereignty concerns of states, it seems logical that states would want the Court to only have jurisdiction over acts committed after its entry into force. Despite this practical reality, it is of note that Article 11, Section 1 not only prevents the Armenian Genocide from falling under the Court's jurisdiction, but also excludes more recent occurrences, where direct perpetrators

48. *Rome Statute*, *supra* note 6.

49. *Id.* arts. 11, 22, 24. See also Elizabeth Wilmshurst, *Jurisdiction of the Court, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 127, 140-41 (Roy S. Lee ed., 1999).

50. *Rome Statute*, *supra* note 6, art. 11. Article 11 reads *in toto*:

Article 11 ("Jurisdiction *ratione temporis*")

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

may still be living, such as the genocidal events in East Timor since 1975, in Burundi in 1972, and in Cambodia from 1975-1979.⁵¹ The lack of any sort of punishment against Pol Pot, the mastermind of the Cambodian politico-genocide, has certainly been an ongoing embarrassment to the international community.⁵²

The perpetrators of the Armenian Genocide, like the perpetrators of these other genocides, similarly were not properly punished. To extend the crime even further, in the case of the Armenian Genocide a powerful state has also been consistently lobbying to deny that the events took place. In addition, Article 11, Section 2 would also pose problems in this respect, as Turkey would have to consent to the Court's trying of crimes prior to Turkey's ratification of the statute.⁵³ And for the Rome Statute to go into effect sixty nations must ratify it, and only thirty-one have ratified it so far.⁵⁴ However, Turkey is not even a signatory of the Statute at the present time.⁵⁵ In addition to the Article 11 conditions that would have to be waived or ignored for the case to go forward, Articles 22 and 24 likewise would have to be by-passed in order to establish jurisdiction over the accused, as genocide had not yet been defined as a crime,⁵⁶ and the purported crimes occurred before the creation of the Rome Statute.⁵⁷

B. The Definitions of the Crimes - Articles 6, 7, and 8

In bringing a charge of genocide against the CUP leaders, the Armenian Genocide case would seek to punish high-level officials for the specific crime of trying to destroy a racial group: genocide. The Court would establish jurisdiction pursuant to Article 5, Section 1 of the Rome Statute.⁵⁸ As noted human rights scholar Cherif

51. CENTURY OF GENOCIDE, *supra* note 1, at 264-90, 317-71.

52. See HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE 115-20 (1999).

53. *Rome Statute*, *supra* note 6, art. 11, '2.

54. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, Ratification Status, at <http://www.un.org/law/icc/statute/status.htm> (last modified Aug. 31, 2001).

55. *Id.*

56. *Id.* art. 22, §1.

57. *Id.* art. 24, §1.

58. *Id.* art. 5, 1 reads:

Article 5 (*Crimes within the jurisdiction of the Court*)

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

Bassiouni has pointed out, the crime of genocide as articulated in Article 6 of the Rome Statute seems to focus on those who plan, initiate, and carry out the genocidal policies.⁵⁹ The crime of genocide carries with it a specific intent requirement, while the definitions for “crimes against humanity” (Article 7) and “war crimes” (Article 8) seem to carry only a general intent requirement.⁶⁰ Additionally, while Articles 7 and 8 are detailed, specific definitions, Article 6, “Genocide” is a much shorter, general, and more academic definition of a crime.⁶¹ The result of the relevant wording is that, in practicality, the crime of genocide is probably more applicable to high-level leaders, while the other two categories certainly could be used to try lower-level state actors.⁶² The specific intent requirement of genocide, the overall intent to destroy “in whole or in part”⁶³ a racial or ethnic group, would be very difficult to prove for a lower level perpetrator, who many times would not even be wholly conscious of the big picture in relation to the events immediately occurring. However, the wording of the genocide article, specifically section (c),⁶⁴ seems to make it possible to convict high-level officials who may be quite removed from the actual atrocities. But, as Bassiouni points out, without a strong paper trail, it is nearly impossible to meet the specific intent requirement even in scenarios involving high-level actors.⁶⁵

A further distinction between genocide, versus “crimes against humanity” and “war crimes,” is the “national, ethnical, racial or religious” group element found in genocidal acts. Genocide must

Section 2 of article 5 explains that the Court will not exercise jurisdiction over “the crime of aggression” until the international court has agreed on a definition of the crime as under the Rome Statute. *Id.* Art 5, § 2.

59. Cherif Bassiouni, *Strengthening the Norms of International Humanitarian Law*, reprinted in *THE FUTURE OF INTERNATIONAL HUMAN RIGHTS* 257-61 (Burns H. Weston & Stephen P. Marks eds. & contri., 1999).

60. *Rome Statute*, *supra* note 6, arts. 7, 8.

61. *Id.* art. 6 (*Genocide*) reads *in toto*:

Article 6 (*Genocide*)

For the purpose of this Statute, “genocide” means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

62. Bassiouni, *supra* note 59.

63. *Rome Statute*, *supra* note 6, art. 6.

64. For example, the Article 6(c) language concerning “conditions of life” of the group, could be used to implicate high-level actors that otherwise might have been able to hide behind the “no-direct involvement” excuse.

65. *Rome Statute*, *supra* note 6, art. 6.

include the intention to destroy a specific ethno-religious group, while “crimes against humanity” and “war crimes” make no such distinction.⁶⁶ In actuality, this means that nearly all genocides or genocidal acts would include “crimes against humanity” and usually “war crimes” as well. However, not all “crimes against humanity” and “war crimes” will constitute genocide.⁶⁷ In fact, if one looks at the history of the development of each crime, “crimes against humanity” and “war crimes” pre-date genocide by at least thirty years, with the notion of crimes against humanity being developed around World War I and “war crimes” likewise during the Hague Conventions of 1899, 1907, and the First World War.⁶⁸ The crime of genocide was created in the aftermath of World War II, to describe the Nazi annihilation of the European Jews.⁶⁹ The “genocide” definition was built on the “crimes against humanity” definition when the “intent to destroy an ethno/racial group” component was added. “War crimes,” likewise, are now distinguished by their “occurring during wartime” component and by the fact that many nations have domestic “war crimes” laws, and thus could try individuals in a national court.⁷⁰ In fact, the Turkish Court-Martial of the CUP leaders in 1919 could be classified as a domestic “war crimes” trial, with the newly emerging concept of “crimes against humanity” present in the proceedings as well.⁷¹

66. *Id.* at arts. 7, 8.

67. Some authors have pointed out that the Cambodian Genocide, according to the ICC (and Genocide Convention) definition of “genocide,” generally categorized, does not constitute genocide, since the thrust of the Khmer Rouge’s extermination was against simply any opponent, not a specific national or ethnic group. BALL, *supra* note 34, at 110-14. In actuality, many minorities in Cambodia were massacred, many times at a higher percentage than the native Khmer. *Id.* at 110. It is this author’s opinion that the now legal distinction requiring genocide to require an ethno/religious intent is useful. Without the requirement of this intent, there would be even less of a distinction between the three heavily overlapping crimes of genocide, crimes against humanity, and war crimes. However, there should be no insinuation that, since Pol Pot murdered his victims because of alleged political reasons, these obvious “crimes against humanity” and most likely “war crimes” are any less heinous than the “genocidal” killing of Jews or Armenians! (In fact, although legally the Khmer Rouge’s actions may be better classified as “politocide”, this author takes no issue with the general/public usage of the term “Cambodian Genocide” (as evidenced by use in this article), if by doing so more attention and sympathy would be shown towards the horrific tribulations of the Cambodian people).

68. See Bassiouni, *supra* note 59, at 257.

69. See *id.* The move to establish genocide as a crime, is usually credited to Dr. Raphael Lemkin, a Polish Jew, law professor, and anti-Nazi guerrilla fighter. It is interesting to note that the massacres of the Ottoman Armenians made an impact on Lemkin as a young boy. For a good summary of Lemkin’s work and a biography, see *An Inventory to the Raphael Lemkin Papers*, AMERICAN JEWISH ARCHIVES OF HEBREW UNION COLLEGE-ONLINE, at <http://www.huc.edu/aja/Lemkin.htm> (last visited May 28, 2002).

70. Bassiouni, *supra* note 59, at 277.

71. YEGHIAYAN, *supra* note 46, at 10-26. The Turkish Court, in its indictment of the Young Turk leaders, stated the following: “The evidence . . . attests that the Committee, its true

So while the atrocities committed against the Armenian population in 1915 could certainly be considered as “crimes against humanity” and “war crimes” committed by individual actors (most revisionists would not even dispute this), this article, as mentioned, will focus on the crime of genocide. With the added standard of specific intent, would the events in general, and more specifically the acts of the Young Turk leaders, legally constitute genocide? While it can not be disputed that killings and massacres of civilian Ottoman Armenians took place,⁷² for which lower-level state actors could certainly be found guilty, this charge of genocide will examine the role of five of the most “infamous” (in regards to culpability) actors in the massacres: the high profile CUP leaders, Ministers Talaat, Enver, and Djemal, and Central Committee leading members, Drs. Nazim and Shakir.

In presenting evidence against these Young Turk leaders, the amount of evidence, although still substantial, is significantly less than it would have been eighty to eighty-five years ago. The bulk of existing primary evidence is in the form of survivor accounts, which describe the genocide from a “micro” level. While these accounts certainly add to the overall body of evidence, in regards to criminalizing specific officials, at most these accounts might implicate local mayors or provincial-governors. Most of these accounts do little to implicate or explain the culpability of the five top leaders here in question. Despite this, there are some relevant and cogent first hand statements, detailing direct interaction with the CUP Ministers or Central Committee members. The two main sources of this type, with extensive evidence are the memoirs of then American Ambassador to Constantinople, Henry Morgenthau,⁷³ and the transcripts of the Court Martial of the CUP leaders, which were printed daily at the time in *Takvimi Vekâyi*,⁷⁴

face, be charged with the crimes of violation of public order, profiteering and for the perpetration of a series of massacres.” *Id.* at 10. The Procuror-General, Mustafa Nazmi Bey, would add, “The criminal acts which occurred are so alien to the Ottoman Statutes and to the conscience of Ottomans, that they can never be accepted.” *Id.* at 23. Also, Bey stated that “the killings, destructions, atrocities, and plunders, which were instigated by the *Ittihad ve Terrakki* [CUP] Party, created heavy burdens on the populace,” *Id.* at 24; and, “[w]e are requested to adjudicate in the name of the defense of human rights.” *Id.* at 25.

72. As noted before, there are scores of first-hand survivor accounts, newspaper accounts from the period, U.S., British, and French missionary and diplomatic accounts, and even diplomatic and missionary accounts from Turkey’s ally during the war, Germany. See, e.g., VAHAKN DADRIAN, *GERMAN RESPONSIBILITY IN THE ARMENIAN GENOCIDE* (1996) [hereinafter DADRIAN, *GERMAN RESPONSIBILITY*]. This is in addition to the considerable amounts of Ottoman evidence, much of which was discussed during the Court-Martial of the Young Turk leaders.

73. See MORGENTHAU, *supra* note 13.

74. It is of note that the only access scholars have had to relevant copies of *Takvimi Vekayi* has been the copies Armenian leaders in Jerusalem have kept throughout the years, since it

the official Ottoman gazette.⁷⁵ There are also first-hand accounts, written at the time, by missionaries and diplomats,⁷⁶ which give invaluable insight into how the events of 1915 were actually unfolding.

C. Personal Responsibility and Intent - Articles 25, 27, 28, and 30

Specific evidence that is brought must show that an accused is guilty of genocide pursuant to the standards in the ICC Statute, Articles 25, 27, 28, and 30. Article 25 ("Individual criminal responsibility"), Sections 1-3(e), reads:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

has been suppressed by Turkish authorities. GRABER, *supra* note 1, at 164.

75. The transcripts of the trials printed in *Takvimi Vekâyi* in 1919 are reprinted in YEGHIAYAN, *supra* note 46.

76. See, e.g., TURKISH ATROCITIES, *supra* note 19; RIGGS, *supra* note 16; DADRAN, GERMAN RESPONSIBILITY, *supra* note 72; Sample Documents, ARMENIAN NATIONAL INSTITUTE-WEBSITE, at <http://www.armenian-genocide.org/sampledocs/index.htm> (last visited May 28, 2002).

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

Likewise, Article 30 (“Mental element”) reads:

(1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

(2) For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

(3) For the purposes of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. “Know” and “knowingly” shall be construed accordingly.

Articles 27 and 28 deal with the “Irrelevance of official capacity” and “Responsibility of commanders and other superiors,” respectively. In the present case these are both significant, as all of the accused here were high-end officials in the CUP and some had military roles as well. Of the preceding Articles listed, it is the “responsibility requirements” of Article 25, sections 3(b)-(e) - that is:

“Ordering, Soliciting, or Inducing” the commission of the crimes, “Facilitating” or “Contributing to” the commission of such crimes, and “Inciting others to genocide” - that the evidence presented should work to establish. Beginning with a look at Talaat Pasha’s, probably the most well-known of the Young Turk leaders, role in the genocide, the evidence must therefore prove that Talaat, although certainly not on the front lines during the events of 1915, either ordered, solicited, induced, facilitated, contributed to, or incited, the commission of the crime of genocide.⁷⁷ Much of the general evidence provided in establishing Talaat’s culpability, will also pertain to Enver, Djemal, Nazim, and Shakir. There is considerable evidence that Talaat, Minister of the Interior, Grand Vizier from 1917-18, and also considered the “boss” of the Young Turk party, intentionally and knowingly ordered, solicited, contributed to, and incited others to genocide.

D. Evidence - Talaat Pasha

First, the Turkish Court Martial of 1919 offers evidence into the roles of each of the accused. The following explanation by genocide historian Vahakn Dadrian gives a basic explanation of the role of Talaat, as well as Enver, Djemal, Nazim, and Shakir, as explained in the Indictment by the Court-Martial.

The top leaders of Ittihad [CUP] were also accused of having committed statutory crimes in their capacity as members of the party’s Central Committee. Two members of the triumvirate, Enver (the War Minister and de facto Supreme Commander of Ottoman Armed Forces), and Cemal [Djemal] (the Marine Minister and Commander of the IVth Army), were military leaders. Talât [Talaat], the third member, was Interior Minister and the ultimate coordinator of the Special Organization’s ties with the party’s Central Committee and the War Office The most prominently mentioned Ittihad Central Committee members were the two physician-politicians, Nazim and Şakir [Shakir]. The Indictment cited both of them eight times as the foremost organizers of the Special Organization, which itself was cited a dozen times as the principal tool used in association with

77. *Rome Statute*, *supra* note 6, art. 25.

the crimes of “murder, arson, gutting, rape, and all sorts of torture.”⁷⁸

In establishing that Talaat solicited, contributed to, and incited others to genocide, one can first look at the Turkish Court-Martial. An initial Court ruling in regards to the defendants *in absentia*, reads:

[f]ormer Grand Vizier Talat Pasha, one of the escapee members of the Central Committee of *Ittihad ve Terakki* (or Committee of Union and Progress) and of the Supreme Council of Parliament; together with ... are charged with engineering (the country's) entry into war, for having close associations with *Te-kilati Mahsusa* (Special Organization) and for committing other crimes.⁷⁹

Much of the Court-Martial's case was spent establishing that the Special Organization was indeed created by the CUP Central Committee, and that the top leaders had control of and had an active role in the Special Organization's activities. A good summary of the Court-Martial's findings was explained in this way:

The documents at hand corroborate that the Central Committee of the *Te-kilati Mahsusa* [Special Organization] was at the same time made up of two distinct organizations, of which one operated in accordance with the inner rules and bylaws of the Party, while the other operated underground, on the basis of secret orders. The evidence, which confirms the culpability of the above-mentioned influential leaders of the Committee, attests that the Committee, its true face, be charged with the crimes of violations of public order, profiteering and for the perpetration of a series of massacres.⁸⁰

Also,

[t]he key findings of this investigation shows [sic] that the criminal acts took place at various times and in various places, during the deportations of the Armenians, were not isolated, local incidents, but

78. DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 326.

79. YEGHIAYAN, *supra* note 46, at 8.

80. *Id.* at 10.

were premeditated and realized by the oral instructions and secret orders of the 'Special Center,' which was composed of the united power of the above-mentioned individuals.⁸¹

The most notable specific instances of Talaat ordering massacres that the Court Martial lists, are as follows: "The torturing and massacres in Diyabakir took place at the instigation of the fugitive Talat Bey [Talaat Pasha]. This is confirmed by the contents of a cipher-telegram sent to the above-mentioned Talat Bey from Ali Suad Bey, the *Mutasarrif* [governor of a vilayet] of (Der) Zor."⁸² An even more incriminating testimony reads, Alhsan Bey, Director of the Special Office of the Interior Ministry, confirms that Abdulahad Nuri Bey, *Kaymakam* [a sub-district commissioner] of Kilis, who had been sent from Istanbul to take office in Aleppo, had announced that:

"The main reason for the deportations is annihilation [sic](of the Armenians);' and that he had gotten in touch with Talat Bey regarding this matter, and that he had received direct orders for the massacres from him, and that he (Talat) had persuaded him that this was the only way for the salvation of the country."⁸³

Other evidence of specific orders from Talaat was presented at the trial of Talaat's assassin, Soghomon Tehlirian, in Berlin in of June 1921. There are five dispatches from Talaat that pertain to the destruction of Armenian deportees in Aleppo, and although their validity is presently disputed by Turkish historians, the chronology and contents of the orders clearly match up correctly with other diplomatic and foreign testimonies.⁸⁴

81. *Id.* at 12.

82. *Id.* at 13. Der Zor, or Deir-al-Zor was the Adestination@ of most of the surviving Armenian deportees, located in what is now Syria. See CENTURY OF GENOCIDE, *supra* note 1, at 45, 74; TURKISH ATROCITIES, *supra* note 19, at 97, 103, 113-14, 141. By all accounts, Der Zor was a concentration camp/killing field, where hopeless Armenians were methodically starved to death or eventually massacred by the Ottoman authorities.

83. YEGHIAYAN, *supra* note 46, at 8.

84. JACQUES DEROGY, RESISTANCE AND REVENGE - THE ARMENIAN ASSASSINATION OF THE TURKISH LEADERS RESPONSIBLE FOR THE 1915 MASSACRES AND DEPORTATIONS 100-02 (A.M. Berrett trans., Transaction Publishers 1990) (1986). Having now become known as the "Andonian documents" in Armenian Genocide studies, these documents are challenged as forgeries by Turkish scholars. *Id.* at 101. However, the five dispatches were authenticated by experts and were accepted as such by the Berlin Criminal Court. *Id.* The documents fell into the possession of an Armenian writer Aram Andonian, who, when the British entered the town of Aleppo in 1918, obtained the orders from an Ottoman official, Naim Bey, the Chief Secretary of the Deportation Committee of Aleppo. *Id.* at 100. The apparent speed of the

Additional testimony at the same trial from an Armenian priest, Bishop Grigor Balakian, further implicated Talaat in ordering the extermination of harmless Armenian deportation survivors, hundreds of miles away from the war front. Bishop Balakian, a survivor of the April 24 purges, testified to seeing a dispatch from Talaat to Asaf Bey, a former governor of a region in Cilicia, who was also a friend of the Bishop's companion, Professor Kelekian.⁸⁵ Asaf Bey, after warning the two Armenians to escape from the southern region, showed them the dispatch.⁸⁶ Bishop Balakian testified:

I have no reason to doubt the authenticity of a dispatch that was shown to us by a vice-governor in office. The telegram said, more or less: A Telegram to us personally without delay the number of Armenians already dead and the number of survivors. Signed: Minister of the Interior, Talaat Pasha.' Mr. Kelekian asked Asaf Bey: 'What does

British advance had kept the documents from being destroyed. *Id.* The first two of the five detailed dispatches read as follows:

1. To the Governate of Aleppo. It was previously communicated to you that the Government, by order of the Jemiet [another name for the Ittihad] had decided to destroy completely all the Armenians living in Turkey. Those who oppose this order and decision cannot remain on the official staff of the empire. Irrespective of sex and age, an end must be put to their existence, however tragic the means of extermination may be, and no regard must be paid to conscientious scruples. September 15, 1915. Talaat.

2. [Coded telegram from the ministry of the interior to the governorate of Aleppo:] From the intervention which has recently been made by the American ambassador on instructions from his government, it appears that the American consuls are obtaining information by secret means. In spite of our assurances that the deportation is being accomplished in safety and comfort, they remain unconvinced. Be careful that when Armenians are leaving the towns and villages and other centers events attracting attention do not occur. From the point of view of the present policy it is important that foreigners who are in those parts be convinced that this deportation is in truth only a change of residence. For this reason, it is for the present important that, to save appearances, a show of gentle dealing shall be made for a time and the usual measures be taken only in suitable places. In this connection, it is recommended that people who give such information or make enquiries shall be arrested and handed over to courts-martials on other grounds. November 18, 1915.

The Minister of the Interior, Talaat.

Id. at 100-01.

For an excellent study, with convincing evidence of the validity of the Andonian documents, see Vahakn N. Dadrian, *The Naim-Andonian Documents on the World War One Destruction of the Ottoman Armenians: The Anatomy of a Genocide*, 18 INT=L J. OF MIDDLE E. STUD. 3 (1986) [hereinafter Dadrian, *Anatomy of a Genocide*].

85. DEROGY, *supra* note 84, at 98-99.

86. *Id.*

that mean? I do not understand.' 'You are surely intelligent enough,' replied Asaf Bey. 'The telegram means: Why are you delaying executing those who are still alive?'"⁸⁷

While the above evidence would certainly appear to meet the "Personal Responsibility" Standard of Article 25, section 3(b)("Orders"), despite these direct orders, there is plenty of first-hand evidence that Talaat, per Article 25, sections 3(c)-(d), also, at the least, had complicit knowledge of and facilitated the commission of the atrocities occurring. For example, the Turkish Court Martial had found that:

It is fully proven that these massacres were taking place on the immediate orders and full knowledge of Talat, Enver, and Cemal [Djemal] . . . Talat Bey, in a cipher-telegram dated July 21, 1331 (1915), commands the *Valis* and *Mutasarrifs* of Diyarbakir, Harput, Urfa and (Der) Zor, to bury the corpses (currently) rotting at the roadsides, to burn the goods left behind.⁸⁸

And another example:

The testimony given by former Deputy of Trabzon [Trebizond], Hafez Mehmed, describes how the Armenians had been placed in boats on the Black Sea and drowned en masse. Even when he (Hafez Mehmed) had informed Talat Bey of this tragedy, the latter had not taken any action against (Trabzon) *Vali* Cemal Azmi. This circumstance adds even more gravity to the crimes of Talat Bey.⁸⁹

87. *Id.*

88. YEGHIAYAN, *supra* note 46, at 16

89. *Id.* at 17. *Vali* (Governor) of Trebizond, Cemal Azmi, or Djemal Azmi Bey, was one of the "big seven" who escaped to Berlin and was tried *in absentia*. *Id.* at xxi, 2. He was convicted, and given the death penalty by the Court Martial for his actions in massacring the Armenians in his region of Trebizond. *Id.* at 159-65. Djemal Azmi was assassinated in Berlin in April 1922, by an Armenian assassin; the Governor's hatred of Armenians and inhuman cruelty during the genocide was widely known among Armenians. ARSHAVIR SHIRAGIAN, *THE LEGACY - MEMOIRS OF AN ARMENIAN PATRIOT* (Sonia Shiragian trans., 1976). His assassin, Arshavir Shiragian, part of the post-WWI secret Armenian vengeance organization, "Operation Nemesis," wrote in his memoirs, "Djemal Azmi Pasha had described the manner in which Armenian children had been thrown into the sea when he was governor of Trebizond. 'The fishes ate well that year,' said the man who from that time on had been called 'The Monster of Trebizond.'" *Id.* at 156-57.

American Ambassador Henry Morgenthau, in writing about the tortuous treatment of Armenians, in the weeks preceding deportations, recalled a conversation:

One day I was discussing these proceedings with a responsible Turkish official, who was describing the tortures inflicted. He made no secret of the fact that the Government had instigated them, and, like all Turks of the official classes, he enthusiastically approved this treatment of the detested race. This official told me that all these details were matters of nightly discussion at the headquarters of the Union and Progress Committee [CUP]. Each new method of inflicting pain was hailed as a splendid discovery, and the regular attendants were constantly ransacking their brains in the effort to devise some new torment. He told me that they even delved into the records of the Spanish Inquisition and other historic institutions of torture and adopted all the suggestions found there.⁹⁰

Talaat and the other CUP leaders certainly were aware of the mistreatment of Armenians, and as all evidence indicates, condoned it. Furthering the evidence towards meeting the “facilitating and abetting” criteria of Article 25, sections 3(c)-(d), certain acts of Talaat and the CUP Central Committee, in relation to the genocide, certainly provided “the means for its commission.”⁹¹ The secret, tight-knit power structure of the CUP allowed its leaders to implement radical policies to achieve their goals. One of the main laws in implementing the genocide was the “Temporary Deportation Law” of May 1915.⁹² After submitting the law to the Cabinet, Talaat, without waiting for a reply, spread the apparent “enactment” of the law by leaking it to the press; in fact, the deportations had started weeks before.⁹³ One Turkish historian has described Talaat’s actions as “railroad[ing]” the law through the Cabinet.⁹⁴ The law was never officially accepted by the Parliament.⁹⁵ In fact the CUP suspended the Parliament on March 1, 1915, as this would make it easier for the architects of the

90. MORGENTHAU, *supra* note 13, at 307.

91. *Rome Statute*, *supra* note 6, art. 25, 3(c).

92. DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1 at 221-22.

93. VAHAKN N. DADRIAN, WARRANT FOR GENOCIDE: KEY ELEMENTS OF TURKO-ARMENIAN CONFLICT 123-24 (1999) [hereinafter DADRIAN, WARRANT FOR GENOCIDE].

94. DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 222.

95. *Id.*

genocide to facilitate the deportations and further carry out their plans against the Armenians.⁹⁶ The weakening Parliament would not reconvene until September 28, 1915, after the genocide had already been in progress for months.⁹⁷

The other political way in which Talaat and his cohorts facilitated and abetted the unfolding genocide was the creation of the earlier mentioned *Te_kilati Mahsusa*, or Special Organization. As Dadrian explains:

During this time, Ittihadist leaders secretly formed a unit called the Special Organization, one of whose principal purposes was resolving the Armenian question. Equipped with special codes, funds, cadres, weapons, and ammunition, they functioned as a semi-autonomous 'state within the state.' Their mission was to deploy in remote areas of Turkey's interior and to ambush and destroy convoys of Armenian deportees. The cadres consisted almost entirely of convicted criminals, released from the Empire's prisons by a special dispensation issued by the Ministries of both Interior and Justice.⁹⁸

First hand testimony corroborates Dadrian's claims about the convicts turned gendarmes at the behest of the Special Organization.⁹⁹ The Turkish protectors of the Armenian deportees would ultimately be the physical arm that would annihilate the Armenians per the wishes of the CUP Central Committee. Diplomatic sources and the Turkish Court-Martial would attest to this practice.¹⁰⁰ The American Consul to the city of Harput wrote on July 24, 1915:

It seems to be fully established now that practically all who have been sent away from here have been deliberately shot or otherwise killed within one or two days after their departure. This work has not all been done by bands of Kurds but has for the most

96. *Id.* at 236.

97. *Id.*

98. *Id.*

99. TURKISH ATROCITIES, *supra* note 19, at 41, 77-78; RAVISHED ARMENIA, *supra* note 30 at 47.

100. LESLIE A. DAVIS, THE SLAUGHTERHOUSE PROVINCE - AN AMERICAN DIPLOMAT'S REPORT ON THE ARMENIAN GENOCIDE, 1915-1917, at 156 (Susan K. Blair ed., 1989). *See also* DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 244 n.8; MORGENTHAU, *supra* note 13, at 319; RIGGS, *supra* note 16, at 128; YEGHIAYAN, *supra* note 46, at 15-16.

part been that of the gendarmes who accompanied the people from here or of companies of armed 'çetes' (convicts) who have been released from prison for the purpose of murdering the Armenian exiles.¹⁰¹

Thus, the enactment of the deportations, coupled with the creation of the Special Organization with its convict/gendarme bands, creating an atmosphere for massacres, seemingly meets the Article 25, sections 3(c)-(d) requirements. Before looking at the final issue of genocidal specific intent, a quick look will be taken at specific evidence regarding Enver, Djemal, Nazim, and Shakir, to further establish culpability.

E. Additional Evidence - Enver Pasha, Djemal Pasha, Dr. Nazim, Dr. Shakir

Much of the aforementioned "general" evidence, regarding the CUP, the deportations, and the Special Organization, of course applies to the remaining four leaders as well. A revealing look at Enver's culpability in the genocide is given by Ambassador Morgenthau in conversations with the Minister of War:

In another talk with Enver I began by suggesting that the Central Government was probably not to blame for the massacres. I thought that this would not be displeasing to him.

'Of course I know that the Cabinet would never order such terrible things as have taken place,' I said.

'You and Talaat and the rest of the Committee can hardly be held responsible. Undoubtedly your subordinates have gone much further than you have intended. I realize that it is not always easy to control your underlings.'

Enver straightened up at once. I saw that my remarks, far from smoothing the way to a quiet and friendly discussion, had greatly offended him. I had intimated that things could happen in Turkey for which he and his associates were not responsible.

101. DAVIS, *supra* note 100, at 156.

'You are greatly mistaken,' he said. 'We have this country absolutely under our control. I have no desire to shift the blame on to our underlings and I am entirely willing to accept the responsibility myself for everything that has taken place . . . we are the real rulers of Turkey, and no underling would dare proceed in a matter of this kind without our orders.'¹⁰²

Morgenthau goes on to explain that Enver had used the Armenians as a scapegoat for military losses since early on in the war, and was quite candid about the fact that the Armenians had brought the massacres upon themselves.¹⁰³

Likewise, Djemal Pasha, Minister of the Navy, and Commander of the IVth Army was complicit in the Central Committee's genocidal plan. After the war Djemal tried to distance himself from the massacres of the Armenians. In his memoirs, published in 1922, only months before his assassination in Tiflis [now Tblisi] on July 25, 1922, he wrote:

I know nothing of the motives for the deportation of the Armenians decided on by my colleagues in the government, who did not consult me about it If I had been in Constantinople, I do not know whether I would have approved the first drastic measures taken by my Young Turk friends.¹⁰⁴

This "know-nothing" defense by Djemal, maybe not coincidentally after four of the "big-seven" Young Turk leaders had already been assassinated by an Armenian vengeance operation, "Operation Nemesis", certainly does not match up with the bulk of the evidence. As Jacques Derogy explains:

Jemal does not explain how he became . . . the third man in the triumvirate, which dragged the Sultan's government into World War I under cover of which the final solution of the Armenian conflict was decided on and planned. And he takes good care not to mention the links of solidarity he had maintained with his two partners, Talaat and Enver. . . . Nor does he mention the reasons adduced in the death

102. MORGENTHAU, *supra* note 13, at 351-52.

103. *Id.*

104. DEROGY, *supra* note 84, at 170-71.

sentence handed down against him by an Ottoman court.¹⁰⁵

In actuality, even prior to the advent of the war, in December 1913, Djemal had threatened Armenian leaders who pressed for reforms with “massacres through ‘the Muslim populations of the six provinces’” in Anatolian Armenia.¹⁰⁶ Both Enver and Djemal were included in the Turkish Court-Martial’s statement that “the laws of the Ottoman state were created by the ‘power of the Triumvirate,’ . . . the leaders who embody the true nature of the *Ittihad ve Terakki* Party . . . are the direct authors of the criminal acts”¹⁰⁷ and the crimes bear the “signs of immediate authorship of Talat . . . Enver . . . Cemal [Djemal] and Doctor Nazim.”¹⁰⁸

Drs. Mehmed Nazim and Behaeddin Shakir were also heavily involved in the actual implementation of the genocide against the Ottoman Armenians. It is clear that these physicians and leading Central Committee members were heavily involved in the genocidal Secret Organization as well.¹⁰⁹ A cipher-telegram sent from Dr. Shakir to the CUP Secretary at Harput read, “[a]re your area’s deported Armenians being liquidated? Are they being destroyed? Or are they being merely deported and exiled? Clarify this point, my brother.”¹¹⁰ An affidavit from an CUP official also stated that:

Behaeddin Şakir Bey, in order to realize these massacres and savage acts, had recruited and trained special killer detachments in the zones that were under the military command of the IIIrd Army. Even government officials were coerced to follow Behaeddin Şakir’s orders and instructions. All the acts of savagery, knavery and depravity committed by the IIIrd Army were also conceived by Behaeddin Şakir.¹¹¹

Numerous other examples of Shakir’s role in the genocide are cited in the Court-Martial transcripts. In announcing its verdict,

105. *Id.*

106. DADRAN, *supra* note 1, at 211 n.23. In the same month, Djemal “had several Armenian students arrested for . . . celebrating the 1500th anniversary . . . of the Armenian alphabet.” *Id.* He labeled these as “traitorous activities” and threatened to “exterminate the Armenians, sparing neither infants nor the old.” *Id.*

107. YEGHIAYAN, *supra* note 46, at 112.

108. *Id.*

109. *Id.* at 12.

110. *Id.* at 15.

111. *Id.* at 19.

which ultimately gave Shakir the death sentence, the Court summarized his actions, stating, “[h]e used *Teskilati Mahsusa* bands under his command to massacre and annihilate the Armenians.”¹¹² Likewise, Dr. Mehmed Nazim, Minister of Public Education in 1918, had an unambiguous role in the destruction of the Armenians. Nazim, an ardent nationalist was considered by some to be “the chief advocate of the goal of completely ‘Turkifying’ the country through massive Muslim resettlements, coercion, and massacres.”¹¹³ The Turkish Court Martial would describe him in their verdict as one of the most influential party members¹¹⁴ responsible for creating the Special Organization, and also list him alongside Talaat, Enver, and Djemal as having committed the greatest “severity of the criminal acts.”¹¹⁵

F. *The Presence of Genocidal “Specific Intent”?*

That the five hypothetical defendants would be guilty, per Article 25, of either “Crimes Against Humanity” and/or “War Crimes” under the Rome Statute is glaringly evident from the evidence. Clearly all had a role either directly, or by facilitating or abetting, in the oppression, deportation, torture and murder of countless Ottoman Armenians. However, would these actions by the top Young Turk leaders be deemed as “genocide” by the ICC? As mentioned earlier, while nearly all instances of genocide may contain examples of crimes against humanity, not all crimes against humanity will meet the legal definition of genocide. For example, there are numerous recent cases where the ICTY has convicted leaders in former Yugoslavia of crimes against humanity, but there have been relatively few “genocide” convictions as of yet, as the ICTR has been the only tribunal specifically created to try acts of genocide.¹¹⁶ A further look at evidence pointing to the motives and specific intent of the CUP leaders will show that their crimes go further than crimes against humanity, and would fall under the ICC Statute Article 6 definition of genocide.

Nearly all of the primary evidence concerning the massacres, despite statements by the Turkish leaders to the contrary, seems to point towards an organized and planned extermination of the

112. *Id.* at 170.

113. DADRIAN, WARRANT FOR GENOCIDE, *supra* note 93, at 98.

114. YEGHIAYAN, *supra* note 46, at 112.

115. *Id.* at 113.

116. BALL, *supra* note 52, at 171-72. See also Press Release, *Judgment Trial Chamber II, In the Kunarac, Kovac, and Vukovic Case*; The Hague (Feb. 22, 2001), at <http://www.un.org/icty/pressreal/p566-e.htm>; Marlise Simons, *Hague Tribunal Convicts Bosnian Croat for War on Muslims*, N.Y. TIMES, Feb. 27, 2001, at A3.

Armenians in the Ottoman Empire. The sum of Turkish defenses to the majority of the evidence claim that the massacres were (1) a response to Armenian disloyalty and insurrection and/or (2) that they were not centrally planned events, but the result of overzealous, “backwards” local officials and actors.¹¹⁷ The first argument, despite the fact that the top CUP leaders openly admitted that they were in all likelihood punishing innocent Armenians for the alleged “misdeeds” of a few,¹¹⁸ is simply not relevant in relation to Article 6. Article 6 of the Rome Statute makes no distinction between justified or unjustified genocidal acts; no exception is present for officials claiming they were acting in the best interest of the state.¹¹⁹ Additionally, despite the fact that evidence of an empire-wide, legitimate Armenian “rebellion” simply does not exist, this “state interest” excuse has been the same one put forth throughout the 20th century, from Hitler, to Pol Pot, and recently in Rwanda.

Thus, it is the second Turkish argument of “war time mishaps escalating out of control” that will be indirectly challenged by showing the specific intent of the Young Turk leaders to wipe-out the Armenians. The first prong of the argument to show genocidal intent will focus on the Young Turk ideology, and the accompanying motives for the crimes. The second prong, will focus on the fact that, at the least, the top CUP leaders (1) knew, throughout 1915-1916, of the massacres that were occurring, (2) knew of the effect they would have on the total Ottoman Armenian population, and (3) in almost no case did anything to stop the events (while many times directly ordering the events or supporting them), thus establishing that the intent of the CUP was to destroy, Ain whole or in part” its Armenian population: genocide.

Although many times not a widely talked-about aspect of the Armenian Genocide issue, the fact that the Young Turk regime was an extremely nationalistic movement is certainly supported by substantial clear evidence.¹²⁰ This notion was actually evident at the time preceding and during World War I.¹²¹ Dr. Harry Stuermer, correspondent in Constantinople for the German paper *Kölnische*

117. See, e.g., Armenian Allegations of Genocide, Fact 4, EMBASSY OF REPUBLIC OF TURKEY AT WASHINGTON, D.C.-ONLINE, at <http://www.turkishembassy.org/governmentpolitics/issuessarmerian.htm> (last visited May 3, 2002).

118. MORGENTHAU, *supra* note 13, at 334-35, 344-46.

119. *Rome Statute*, *supra* note 6, art. 6. Additionally, Article 27 of the Rome Statute states that the defense of “head of state” or “state official” is not a valid defense under the Rome Statute. *Id.* art. 27.

120. DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 214; DADRAN, WARRANT FOR GENOCIDE, *supra* note 93, at 157.

121. See, e.g., DADRAN, WARRANT FOR GENOCIDE, *supra* note 93, at 96-101.

Zeitung, wrote memoirs about his two war years in the Ottoman capital.¹²² In explaining the Young Turk nationalistic tendencies, he wrote:

I will just preface my remarks by stating a few of the outstanding features of the present Young Turkish Government and their dependents. Their first and chief characteristic is *hostility to foreigners*, but this does not prevent them from making every possible use of their ally Germany . . . Secondly they are possessed of an unbounded store of *jingoism*, which has its origin in *Pan-Turkism* with its ruling idea of "Turanism." Pan-Turkism, which seems to be the governing passion of all the leading men of the day, finds expression in two directions. Outwardly it is a constant striving for a 'Greater Turkey,' a movement that for a large part in its essence, and certainly in its territorial aims, runs parallel with the 'Holy War;' inwardly it is a fanatical desire for a general Turkification which finds outlet in political nationalistic measures, some of criminal barbarity, others partaking of the nature of modern reforms, beginning with the language regulations and 'internal colonization' and ending in the Armenian persecutions.¹²³

Stuermer goes on to explain how the Young Turk "discovery" of Anatolia, their new interest in the peasant Turks of the interior, and obsession with anything Turkish, would eventually lead to the conclusion that Armenians simply did not fit anymore in the Empire. He writes:

Pessimists have often said of the Turkish question that the Turks' principal aim in determining on a complete Turkification of Anatolia by any, even the most brutal, means, is that at the conclusion of war they can at least say with justification: 'Anatolia is a purely Turkish country and must therefore be left to us.' What they propose to bequeath to the victorious Russians is an Armenia without Armenians!¹²⁴

122. HARRY STUERMER, *TWO WAR YEARS IN CONSTANTINOPLE* (E. Allen trans., 1917).

123. *Id.* at 151-53.

124. *Id.* at 185. Giving an example of the Young Turks' new affinity for their ethnic brethren, Stuermer writes:

Ambassador Morgenthau also spoke of the inherent Pan-Turkic ideals of the CUP party:

The power of the new Sultan had gone . . . leaving only a group of individuals, headed by Talaat and Enver, actually in possession of the state. Having lost their democratic aspirations these men now supplanted them with a new national conception. In place of a democratic constitutional state they resurrected the idea of Pan-Turkism; in place of equal treatment of all Ottomans, they decided to establish a country exclusively for Turks.¹²⁵

Much of the Young Turks' policies were aimed at freeing themselves from foreign influence, while at the same time freeing themselves from internal non-Turk dependency as well, as much of the nation's business and industry was run by Greeks, Armenians and Jews.¹²⁶ The government also began actively suppressing all

The idea of "Turanism" has been taken up with such enthusiasm by the men of the Young Turkish Committee, and utilized with such effect for purposes of propaganda and to form a scientific basis for their neo-Turkish aims and aspirations, that a stream of feeling in favour of the Magyars has set in Turkey, which has not failed to demolish to a still greater extent their already weakened enthusiasm for their German allies. And it is not confined to purely intellectual and cultural spheres, but takes practical form by the Turks . . . they much prefer to accept [help] from their kinsmen the Hungarians rather than from the Germans.

Id. at 187.

125. MORGENTHAU, *supra* note 13, at 283-84.

126. *Id.* at 285-87. On this subject Morgenthau writes:

When the Turkish Government abrogated the Capitulations, and in this way freed themselves from the domination of the foreign powers, they were merely taking one step toward realizing this Pan-Turkish ideal. I have alluded to the difficulties which I had with them over the Christian schools. Their determination to uproot these, or at least to transform them into Turkish institutions, was merely another detail in the same racial progress. Similarly, they attempted to make all foreign business houses employ only Turkish labour, insisting that they should discharge their Greek, Armenian, and Jewish clerks, stenographers, workmen, and other employees. They ordered all foreign houses to keep their books in Turkish; they wanted to furnish employment for Turks, and enable them to acquire modern business methods. The Ottoman Government even refused to have dealings with the representative of the largest Austrian munition maker unless he admitted a Turk as a partner. They developed a mania for suppressing all languages except Turkish. For decades French had been the accepted language of foreigners in Constantinople; most street signs were printed in both French and Turkish. One morning the astonished foreign residents discovered that all these French signs had been removed and that the names of streets, the directions on street cars, and other public notices, appeared only in those strange Turkish characters, which very few of them understood. Great confusion resulted

languages except Turkish, even in the international and cosmopolitan Constantinople.¹²⁷

A major actor in reviving the Pan-Turkic ideal, or "Turanism," was CUP Central Committee member, and Young Turk ideologue, Ziya Gökalp. A poet, sociologist, and professor of philosophy, Gökalp was very close with the top Young Turk leaders¹²⁸ and has been called "the pillar of panturanist ideology."¹²⁹ Gökalp was instrumental in "rejecting the liberal ideas of the 19th century *Tanzimat* [reforms] to which he counterpoised his notion that 'Islam mandates domination,' and that non-Muslims can co-exist only as subordinate subjects."¹³⁰ That Gökalp's Pan-Turkic, nationalistic ideas were an influence on his cohorts, Talaat, Enver, Djemal, Nazim, and Shakir, is undeniable. When on trial by the Turkish Court Martial in 1919, Gökalp was asked by the prosecutor to explain Turanism and its effect on the Empire, the professor explained:

That is to say, the Ottoman Turks need to create a single culture. In the future, if the other Turks accepted it, a cultural *Turan* would come into existence. And this would benefit the Ottoman government also, because it would advance the Turkism, which is the root of the Ottoman state. Naturally, the Government, and later all Turks accepting Ottoman Turkish as their language, would thereby become more powerful. The Turks of Azerbaijan have already begun to work towards a cultural *Turan*.¹³¹

In summing up the first prong of this argument, which is to show the presence of genocidal motive, it seems safe to assert that given the inherent xenophobia of Pan-Turkism, as outlined by Gökalp, it is evident that as for the five top CUP leaders in question here, the issue of getting rid of the Ottoman Armenians was

from this change, but the ruling powers refused to restore the detested foreign language.

Id. at 284-85.

127. *Id.*

128. FEROS AHMAD, *THE YOUNG TURKS* 181 (1969).

129. DADRAN, *GERMAN RESPONSIBILITY*, *supra* note 72, at 226.

130. *Id.* These specific ideas of Gökalp were embodied in a rarely publicized internal party document entitled "The Two Mistakes of *Tanzimat*," which blasted public laws that equated Muslims with non-Muslims. It was in this writing that Gökalp would coin the phrase "Islam mandates domination", and cause the party to switch from "equality and Ottomanization to Turkification." DADRAN, *HISTORY OF ARMENIAN GENOCIDE*, *supra* note 1, at 180-81.

131. YEGHIAYAN, *supra* note 46, at 65-66.

certainly a reality. The large Armenian majority signified a large cultural and geographical obstacle in their Pan-Turkic hopes for the region.¹³² Thus the first prong of this argument, and aforementioned evidence, has shown that the Young Turk leadership certainly had a *motive* - "cause or reason that moves the will and induces action,"¹³³ for genocide against the Ottoman Armenians. The second prong of this argument will give evidence that these leaders subsequently had the *intent*, "[a] state of mind in which a person seeks to accomplish a given result through a course of action"¹³⁴ and the *specific intent*, "the mental purpose to accomplish a specific act which the law prohibits,"¹³⁵ to commit what is now defined as "genocide" against their Armenian subjects.

The line between intent and specific intent is certainly a fine one. Intent is knowing and seeking that one's actions will produce a specific result. Article 30, "Mental Element," of the Rome Statute restates this fundamental legal concept.¹³⁶ It appears clear from the evidence produced in regards to Article 25, "Personal Responsibility," that each actor, whether by direct order, facilitating and abetting, or complicity, intended that Armenians, as a result of their action (or inaction), should die. For the purposes of this case however, in relation to Rome Statute Article 6, "Genocide," there must be present the specific intent that one's actions, as outlined in Article 6 (a)-(e), "destroy, in whole or in part, a national, ethnical, racial or religious group." That is, were the Young Turk policies of: "killing Armenians" (Article 6(a)); "causing serious bodily or mental harm to Armenians" (Article 6(b)); "deliberately inflicting on the Armenians conditions of life calculated to bring about their physical destruction in whole or in part" (Article 6(c)); and "Forcibly transferring children of Armenians to another group" (Article 6(e)) - implemented with the intent to destroy, in whole or in part the Ottoman Armenians? It must be noted that the problem of

132. STUERMER, *supra* note 122, at 185-86. Stuermer gives his opinion on the ethnographic aspects of this notion. "Turanism is the realisation, reawakened by neo-Turkish efforts at political and territorial expansion, of the original race-kinship existing between the Turks and the many peoples inhabiting the regions north of the Caucasus, between the Volga and the borders of Inner China, and particularly Russian Central Asia." *Id.* However, "[a]ll the Turkish attempts to rouse up the population of the Caucasus either fell on unfruitful ground or went to pieces against the strong Russian power reigning there. Enver's marvelous conception of an offensive against Russian Transcaucasia led right at the beginning of the war to terrible bloodshed and defeat." *Id.*

133. BLACK'S LAW DICTIONARY 1014 (6th ed. 1990) (defining "motive" as "[c]ause or reason that moves the will and induces action. An idea, belief or emotion that impels one to act in accordance with his state of mind or emotion").

134. *Id.* at 810.

135. *Id.* at 1399.

136. *Rome Statute, supra* note 6, art. 30.

establishing genocidal intent in this case would ultimately be decided by the standard set by, and inferences of the ICC.¹³⁷ However, as best can be ascertained in the present scenario, the background, ideology, and hopes of the Young Turks seem to point to an answer of “yes” to the specific intent question. The following final assertions, most made by either first hand actors or those who have studied the subject in detail, also lend support to this conclusion.

German journalist Harry Stuermer, living in Istanbul during 1915-1916, deduced, in studying the Turkish justifications for the deportations, the following:

But from the very beginning the persecutions were carried on against women and children as well as men, were extended to the hundred thousand inhabitants of the six eastern vilajets, and were characterized by such savage brutality that the methods of the slave-drivers of the African interior and the persecution of Christians under Nero are the only thing that can be compared with them . . .

One has only to read the statistics of the population of the six vilayets of Armenia Proper to discover the hundreds of thousands of victims of this wholesale murder. . . .

But unfortunately that was not all. The Turkish government went farther, much farther. They aimed at the whole Armenian people. . . .

137. It is the opinion of this author that when assessing if genocidal intent is present, it may be helpful to inject a big picture analysis. This means, after careful analysis, does it appear that the actor, whether high-level or low-level, had an understanding of the big-picture consequences of his action? Was this part of his state of mind when committing the crime? For example, a foot soldier could kill a member of the “blue race,” simply because the victim was of the blue race, but not have any concept of the larger intent to destroy the blue race. Of course, if he was aware of this larger intent, he could be guilty of genocide. On the other hand, a top-end official could simply create a situation conducive for the killings of blue people, yet be aware of the big picture genocidal consequences of these actions, and therefore be guilty of genocide. This sort of genocide analysis creates a wider spectrum of culpability and probably a higher genocide-conviction possibility for high-end officials, as in this author’s opinion it rightly should, yet it also leaves room for possible genocide convictions of lower actors who have the necessary specific intent.

They suddenly and miraculously discovered a universal conspiracy among the Armenians of the Empire. It was only by a trick of this kind that they could succeed in carrying out their system of exterminating the entire Armenian race. . . . They then falsified all the details so that they might go on for months in peace and quiet with their campaign of extermination. . . .

I must here emphasise (sic) the fact that all the arguments the Turkish Government brought against the Armenians did not escape my notice. . . I investigated everything, even right at the beginning of my stay in Turkey, and always from a thoroughly pro-Turkish point of view. That did not prevent me however, from coming to my present point of view....

The way these imprisonments and deportations were carried on is a most striking confutation of the claims of the Turkish Government that they were acting only in righteous indignation over the discovery of a great conspiracy. This is entirely untrue.¹³⁸

A young historian at the time, Arnold J. Toynbee, presented findings with Lord Bryce to the British House of Lords in October of 1915. He wrote:

The scheme was nothing less than the extermination of the whole Christian population within the Ottoman frontiers. For the war temporarily released the Ottoman Government from the control, slight as it was, which the Concert of Europe had been able to exert The denunciation of the "Capitulations" broke down the legal barrier of foreign protection, behind which many Ottoman Christians had found more or less effective shelter. Nothing remained but to use the opportunity and strike a stroke that would never need repetition. 'After this,' said Talaat Bey, when he gave the final signal, 'There will be no Armenian question for fifty years.'¹³⁹

138. STUERMER, *supra* note 122, at 47-54.

139. ARNOLD J. TOYNBEE, *ARMENIAN ATROCITIES - THE MURDER OF A NATION* 36-37

Lord Bryce writes in the same report:

There was no Moslem passion against the Armenian Christians. All was done by the will of the Government, and done not from any religious fanaticism, but simply because they wished, for reasons purely political, to get rid of a non-Moslem element which impaired the homogeneity of the Empire, and constituted an element that might not always submit to oppression. All that I have learned confirms what has already been said elsewhere, that there is no reason to believe that in this case Musulman fanaticism came into play at all . . . these massacres have been viewed by the better sort of religious Moslems with horror rather than with sympathy. . . . In some cases, the Governors, being pious and humane men, refused to execute the orders that had reached them, and endeavored to give what protection they could to the unfortunate Armenians. In two cases I have heard of the Governors being immediately dismissed for refusing to obey the orders. Others more pliant were substituted, and the massacres were carried out.¹⁴⁰

The Turkish Court Martial, citing specific perpetrators and instances, would reach similar genocidal conclusions:

[t]he criminals and outlaws being released from the prisons were being absorbed into the *Te-kilati Mahsousa* [Special Organization] . . . Whereas, all the testimony and documents show that these bands of brigands were formed for the sole purpose of massacring and destroying the caravans of the (Armenian) deportees. It is fully proven that these massacres were taking place on the immediate orders and full knowledge of Talat, Enver, and Cemal.¹⁴¹

Also, "[t]he massacre, annihilating and expropriation of property of the entire population of an autonomous community was conceived and perpetrated by bloodthirsty (individuals) of the Party's secret

(reprinted 1975).

140. *Id.* at 16-18 (quoting Lord Bryce's speech delivered in the House of Lords on October 6, 1915).

141. YEGHIAYAN, *supra* note 46, at 16.

clique. The ringleaders of this clique were Party Central Committee members Behaeddin Şakir, Doctor Nazim.”¹⁴² Finally, one verdict explained the central, brutal power of the CUP in implementing its wishes to completely annihilate the Armenians:

During the cross-examination of the above-mentioned Responsible Secretaries and Inspectors, it became evident that the *Ittihad ve Terakki* [CUP] Party, after arrogating to itself total governing of the country, manipulated the country into the world war, arranged deportations and massacres and looting. At the same time, it indulged in profiteering together with unlawful acts. . . .

(They) converted the homes of Armenian deportees into clubs and furnished them with the abandoned goods. In elections they gave up normal practices and exploited their position of strength to repeatedly intervene in the affairs of state and exert undue pressure on the populace. Very few individuals dared protest against this terroristic policy of theirs, for (the Central Committee) threatened those who demanded legitimate methods of government.¹⁴³

American observers simply add to the conclusion that there was a centrally planned genocide and not “mishaps” due to overzealous local officials. The astute commentaries by an American missionary in Harput, Henry Riggs¹⁴⁴ read:

There is no doubt that those who sent the order from Constantinople had determined on the absolute extermination of the Armenians. If it were not for the friendliness of local officials all over the country, the orders would have been carried out in general, as they were in those places where the officials were not friendly.¹⁴⁵

142. *Id.* at 96.

143. *Id.* at 148.

144. The insight of Mr. Riggs is invaluable. Henry Riggs was a third generation American missionary in Turkey, having been born there in 1875. He lived in Turkey some thirty odd years, having come to the U.S. for college, by the time World War I started, and was quite familiar with Turks, Armenians, and the peculiarities of the Ottoman Empire. See RIGGS, *supra* note 16.

145. *Id.* at 175.

It was vain, too, to appeal to the government officials. In former outbreaks, where the Armenians were attacked by the rabble, the officials had always professed to try to stop the outbreak, and came to the tardy rescue of the sufferers, after a few had been killed; but in this case, the destruction of the Armenians was a plan for which the government itself stood sponsor. Though camouflaged under the name of deportation, the plan was an official plan, and the execution of the plan, in all its horrid extremes, was pressed on local officials, willing and unwilling alike It was, therefore, vain for the Armenians to appeal to the government officials for help.¹⁴⁶

One fact, however, gave some hope to the poor Armenians. Their Moslem neighbors were inclined to side with them rather than with the government. In spite of all the efforts of the government to inflame the minds of the Turk, the more intelligent Turks for the most part remained either indifferent or positively friendly to the Armenians. . . . [T]here was no outbreak of popular fanaticism on the part of the Turks. In fact, we who had lived all our lives among the Turks and knew something of their ways said again and again at the time, "This is no Turkish outbreak." It was altogether too cold, too calculating, and too efficient.¹⁴⁷

146. *Id.* at 96.

147. *Id.* In further commenting on the fact that many local Turks did not agree with this government initiated massacre, Riggs recalls:

So it happened that the Turks individually did much to help their friends and rescue them from their fate. Some did it from real neighborly kindness, some from motives of cupidity or worse. At first, a large number of Armenians took refuge in the homes of their Turkish neighbors hoping thus to be overlooked in the general search. Soon, however, it became apparent that the government officials would not tolerate this. Threats of severe punishment and the systematic searchings of suspected Moslem houses by the police soon brought most of the Turks to terms. . . .

There were some few Turks, however, who were either fearless enough or influential enough to defy the threats of the government. In spite of repeated commands and threats, they kept the Armenians whom they were sheltering out of sight of the police, and refused to reveal their hiding places. In most such cases the protectors insisted that their protégées should accept Islam. The Armenian name was changed to a Turkish one; the man was duly circumcised, and adopted the Moslem worship and the Turkish language. No one believed in the sincerity of this change of faith, and the Vali [governor] officially refused to recognize it....

It took no little courage in those days for a Turk to harbor an Armenian. One of the leading Turkish businessmen of the city had hidden in his house a young Armenian who was his business partner. The Turk was ordered to surrender his ward but refused. After much parley, he was thrown into prison, and after a few days, was brought into the presence of the Kaimakan [sub-district commissioner]. With all solemnity, the Kaimakan announced that the orders from Constantinople were that if he would not surrender that Armenian, he should be condemned to be

American consular reports offer similar evidence,¹⁴⁸ but perhaps the most convincing accounts come from Ambassador Morgenthau, stationed in Constantinople until 1917, when the U.S. broke diplomatic relations with Turkey. His one-on-one conversations with the top CUP leaders, namely Talaat and Enver, offered undeniable evidence into the awareness, culpability, and hopes of the Young Turks in regard to the Armenian massacres. His memoirs are replete with conversations with the leaders, some of the most incriminating are as follows:

'Suppose a few Armenians did betray you,' I said [Morgenthau]. 'Is that a reason for destroying a whole race? Is that an excuse for making innocent women and children suffer?'

'Those things are inevitable,' he replied. [Talaat]¹⁴⁹

'It is no use for you to argue,' Talaat answered, 'we have already disposed of three quarters of the Armenians, there are none at all left in Bitlis, Van, and Erzeroum. The hatred between the Turks and the Armenians is now so intense that we have got to finish with them. If we don't they will plan their revenge. . . .'

'No Armenian,' replied Talaat, 'can be our friend after what we have done to them.'¹⁵⁰

hanged. The Moslem drew himself to his full height and said to the Governor, 'If it is my allotted time to die, I shall consider it an honor to die in defense of such a man. His father showed me every kindness in my youth, and this young man has been a faithful friend If you must execute the order, I am ready to be hanged.' Needless to say the Kaimakan was dumbfounded at receiving such a reply. The execution . . . of such a man would have been a very serious step for him to take in the state of public opinion that then prevailed. He kept him in prison for some days but finally released him and dropped the matter.

Id. at 96-97.

148. DAVIS, *supra* note 100, at 151-55.

149. MORGENTHAU, *supra* note 13, at 335-36.

150. *Id.* at 337-39. That there was an economic aspect to the destruction of the Armenians was also evident in Morgenthau's conversations, which corroborates the verdicts of the Turkish Court Martial. At one point Talaat requested that Morgenthau provide him with a list of Ottoman Armenian policyholders with the New York Life Insurance Company. Talaat stated, "They are practically all dead now and have left no heirs to collect the money. It of course all escheats to the State. The Government is the beneficiary now. Will you do so?" *Id.* Morgenthau of course refused. *Id.* Interestingly enough, a bill is being considered in California, mirroring similar Holocaust statutes, which would enable Armenian Genocide survivors or their descendants to sue New York Life Insurance Company for over 3 billion

In recalling a conversation with Enver, in which the Pasha tried to justify the treatment of the Armenians, Morgenthau wrote:

'The Armenians had a fair warning,' Enver began, 'of what would happen to them in case they joined our enemies. Three months ago I sent for the Armenian Patriarch My warning produced no effect and the Armenians started a revolution and helped the Russians. You know what happened at Van We have got to prevent this no matter what means we have to resort to. It is absolutely true that I am not opposed to the Armenians as a people But if they ally themselves with our enemies, as they did in the Van district, they will have to be destroyed.'¹⁵¹

In other conversations Morgenthau discovered that Enver certainly was aware of the massacres and took full responsibility for them.¹⁵²

Given the evidence, it seems that the Young Turk leaders in question did have the intent to commit genocide. They certainly were aware of the massacres, did nothing to stop them, and in truth condoned them, and likewise knew of, and in most cases outwardly supported, the effect it would have on the Ottoman Armenians: the literal obliteration of a three thousand year old indigenous culture and people from their original homeland. Given the ideology and accompanying motives of the Young Turk leaders, their obvious control over, and complicity in the genocide, and their knowledge of the big picture racial or ethnic ramifications that would occur, the conclusion must be reached that these five leaders would meet the "Mental element" standard of Article 30, and the specific intent requirement of Article 6. Therefore, their crimes would be rightly defined as "genocide" under the Rome Statute. Also given their "personal responsibility" in the crimes, as established earlier per the

dollars in assets still held from Armenian accounts. *New Calif. Law Seeks Resolution for Armenian Genocide Victims, Heirs, Insurance Journal-Online* (Sept. 27, 2000), at <http://www.insurancejrn.com/html/ijweb/breakingnews/archives/regional/West/we0900/we0927001.htm>. Class action suits have already been considered. See Emil Danielyan & Harry Tamrazian, *Tensions Rising Over Unpaid Ottoman Policies*, EURASIANET (Feb. 12, 2002), at <http://www.eurasianet.org/departments/rights/articles/eav021202.shtml>; Brendan McKenna, *Heirs to Armenian Genocide Sue for Life Insurance Benefits*, INSURE.COM (updated Mar. 8, 2002), at <http://www.insure.com/life/armenianlawsuit302.html>.

151. MORGENTHAU, *supra* note 13, at 344-45.

152. See *supra* Part III(F) and accompanying text.

requirements of Article 25, the conclusion follows that these five high-level leaders (Talaat, Enver, Djemal, Nazim, and Shakir) in this hypothetical, or symbolic, case would likewise be found guilty of genocide under the Rome Statute.

IV. PENALTIES/REPARATIONS - ARTICLES 75, 76, 77, AND 78

Articles 76 through 78 of the Rome Statute cover "Sentencing", "Applicable Penalties," and "Determination of Sentence," respectively.¹⁵³ Given that this hypothetical case would be trying defendants *post mortem*, most have been dead for almost 80 years, and given that the ICC would be hearing this case for mostly symbolic or legal policy reasons, given Articles 11, 22, and 24, the issues of penalties and sentencing of individual defendants simply need not be considered.¹⁵⁴ Likewise, Article 75, "Reparations to victims," which gives the Court the power to decide on proper reparations to the victim, need not be addressed in this article either. Although the prospect of reparations is still a live subject for many Armenians and Turks alike, it would be best to leave this complicated and politically charged subject to another study. As stated, the focus of this article has been to show that genocide was indeed committed by the Young Turk leaders, thereby studying the genocide mechanism of the ICC, to look at the continuing inadequate international response to this tragedy, and to look for possible ways that the ICC, or other procedures, could help in resolving the ongoing controversy surrounding the century's first genocide.

153. *Rome Statute*, *supra* note 6, arts. 76, 77, 78.

154. *Id.* arts. 11, 22, 24.

V. THE FAILURE OF THE INTERNATIONAL COMMUNITY TO PROPERLY DEAL WITH THE ARMENIAN GENOCIDE

In studying the aftermath of the Armenian Genocide, and the obvious failures of the international community to properly deal with this tragedy, two observances arise: (1) given all the circumstances, a concerted effort appears to have been initially made by the Allies to try Turkish war criminals for their apparent crimes,¹⁵⁵ (2) a Turkish court did try and find guilty of war crimes and massacres most of the architects of the genocide, however, few were actually punished.¹⁵⁶ These two observations reveal that the Young Turk leaders' conduct during the war was viewed with disdain by the Allies and the successive Turkish government, however the lack of follow-through in punishing the criminals in turn enabled the memory of the tragedy to be swept under the rug. This leads to the following questions: How much difference could a legitimate international tribunal have made over the last 80 years in regards to the still bitter enmity between Turks and Armenians, and are there currently any other possibilities for resolution of this issue?

This author believes that by focusing on the initial two observations, great strides could be made in resolving the present-day debate between Armenians and Turks about the events of 1915. Currently, each side of the argument seems to be striving for a blanket statement of conclusion. Either, "Turkey (which Turkey? all Turks?) committed genocide against the Armenians," or "Turkey did not commit genocide against the Armenians." Not enough attention is given to the singular uniqueness of the Young Turk regime, and not enough attention is given to the fact that there were "good" Turks who aided Armenians.¹⁵⁷ By distinguishing the culpable Young Turks from other Turks at the time, and from the current Turkish government, the genocide issue should become more of a historical and moral issue, and less of a cultural and geo-political issue. For example, it is easy for most of the world, including Germans, to accept the reality and the evil of the Holocaust, for it is almost taken for granted now how truly uniquely evil Hitler and his Nazis were. The proper question then, in properly classifying the Armenian Genocide, seems to be: Did the Young Turk government, in power from 1908-1918, commit genocide against its Ottoman-Armenian subjects during World War I? Note that this

155. See DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 303-16.

156. *Id.* at 317-37.

157. For an excellent article on such "good" Turks and the need to study this issue further, see Robert Fisk, *All the Heroes Deserve Remembrance*, INDEP.-UK, Mar. 7, 2001, at 5.

question does not necessarily vilify Turkey or *all* Turks, nor does it claim that *all* Armenians are innocent or are victims. Only after this very specific question is answered (and the answer as shown in this study is, of course: yes) can issues of collective guilt, unilateral culpability, and reparations be explored. At this point, by looking at the past failures of the international community to deal with the Armenian Genocide, the world can learn from these mistakes in attempts to resolve this conflict in the present.

A. The Development of Early Tribunals and Their Failures

The first attempts at creating and codifying an international standard for conduct during war preceded even World War I. The Hague conventions of 1899 and 1907 “codified certain actions in wartime as war crimes.”¹⁵⁸ However, the conventions failed to get countries to submit to an international tribunal or set up an international criminal court.¹⁵⁹ Ironically enough, only eight years later, the Allied powers would issue a warning to Turkey as the massacres against Armenians were beginning. The May 24, 1915 declaration from Great Britain, France, and Russia, for the first time would establish the concept of “crimes against humanity” and implicate that the Allied powers would “hold personally responsible . . . all members of the Ottoman government and those of their

158. HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 16-17 (1999).

159. *Id.* The United States objected strongly to the notion of accepting the jurisdiction of any international body, claiming that it “reserved the right to resolve any purely American issue.” *Id.* (quoting John R. Bolton, *The Global Prosecutors: Hunting War Criminals in the Name of Utopia*, FOREIGN AFF., Jan./Feb. 1999, at 161). As Ball observes, this is the same argument that is being used in regards to the ICC as “the world enters the twenty-first century.” *Id.*

agents who are implicated in such massacres."¹⁶⁰ Dadrian explains the international legal implications of this Allied statement:

This declaration had several important features. (1) It was a public and joint commitment to prosecute after the war those responsible for the crimes perpetrated. (2) It acknowledged the complicity of Ottoman authorities in terms of 'connivance and often assistance.' (3) It acknowledged the legacy of Turkey, involving an established record of past massacres, by appending the adjective 'new' to the words 'crimes of Turkey.' (4) It created a new framework of international law by ushering in the codification of the term 'crimes against humanity.' (5) That concept was later to serve as a legal yardstick to prosecute under an emerging international law the top strata of the Nazi leadership at Nuremberg. Consequently, it was fully embraced by the United Nations, forming the core of the preamble of its convention on the Prevention and Punishment Convention on Genocide (December 9, 1948).¹⁶¹

Bassiouni also acknowledges the significance of the Allies' honorable intentions. He lists the 1919 "Commission on the Responsibilities of the Authors of War," created to investigate war

160. Vahakn N. Dadrian, *The Armenian Genocide and the Legal and Political Issues in the Failure to Prevent or to Punish the Crime*, 29 UWLAW L. REV. 43, 57 (1998) [hereinafter Dadrian, *Legal and Political Issues*]. The full Allied statement reads as follows:

For about the last month, the Kurds and the Turkish populations of Armenia have been engaged in massacring the Armenians with the connivance and often assistance of the Ottoman authorities. Such massacres took place about the middle of April at Erzurum, Tercan, Bitlis, Mous, Sassun, Zeytoun and in all Cilicia.

Inhabitants of about 100 villages near Van were all assassinated. In the town itself the Armenian quarter is besieged by the Kurds. At the same time the Ottoman Government at Constantinople rages against the innocent Armenian population.

In view of these new crimes committed by Turkey, the Allied Governments announce publicly to the Sublime Porte that they will hold all the members of the Ottoman Government and those of their agents who are implicated in such massacres.

GRABER, *supra* note 1, at 152-53. See also DADRIAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 216.

161. Dadrian, *Legal and Political Issues*, *supra* note 160, at 57. Cherif Bassiouni also asserts that this "crimes against humanity" definition would be carried over to the Nuremberg era, as it appeared in the 1945 London Charter, Article 6(c). Bassiouni, *supra* note 59, at 250-51.^c

crimes by Germans and crimes against “the laws of humanity” by the Turks, as the first of five international investigative commissions of the 20th century.¹⁶² However, the Allies would fail to carry through with any prosecutions of Turks, and similarly with the Germans.¹⁶³ The Commission had originally intended that Turkish crimes be dealt with in the Peace Treaty of Sevres. Article 230 of the Treaty went so far as to say that Turkey would have to hand over persons “responsible for the massacres committed during the continuance of the state of war 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 recognize such tribunal.”¹⁶⁴ However, nothing would come of Article 230 as opportunistic diplomacy, and the nationalistic rise of Kemal Ataturk would lead to the discarding of the Treaty of Sevres all together.¹⁶⁵ The binding Treaty of Lausanne signed in July 1923 did not even mention the massacres, much less Armenians at all, and lacked any provision for any sort of punishment or tribunal.¹⁶⁶ So although the Allies would lay the building blocks for international tribunals and the concept of “genocide” by acknowledging the “new crimes of Turkey against humanity,” the Armenians would not see true justice brought by the international community.

Likewise British efforts at punishments would fail as well. Having seized hundreds of Young Turk party members, Britain held them on the island of Malta with the intention of trying the war criminals in some capacity.¹⁶⁷ However, as the memory of the war faded, and the Turkish nation grew even more indignant at Western

162. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 14, 62 (1997). The following four investigative commissions were: (1) The 1943 United Nations War Crimes Commission (1943 UNWCC); (2) The 1946 Far Eastern Commission (FEC); (3) The 1992 Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate War Crimes and other Violations of International Humanitarian Law in the Former Yugoslavia (1992 Yugoslavia Commission of Experts); and (4) The 1994 Independent Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) to Investigate Grave Violations of International Humanitarian Law in the Territory of Rwanda (1994 Rwanda Commission of Experts). *Id.*

163. The Allies would in the end let Germany try its own war criminals at the infamous Leipzig Trials in 1921. Bassiouni states: “The Leipzig trials exemplified the sacrifice of justice on the altars of international and domestic politics of the Allies. The Treaty commitment to try and punish offenders if Germany failed to do so was never carried out. The political leaders of the major powers of that time were more concerned with ensuring the future peace of Europe than pursuing justice.” *Id.* at 20-21.

164. Peace Between the Allied Powers and Turkey (Treaty of Sevres), Aug. 10, 1920 (unratified), art. 230, *reprinted* in 15 AM. J. INT’L L. 179 (Supp. 1921).

165. DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 305-16

166. *Id.* at 333.

167. *Id.* at 308.

interference after WWI, the British would end up releasing the detainees.¹⁶⁸ Though citing evidentiary and jurisdictional problems, it seems that the underlying motivation was to facilitate the return of British war prisoners in the custody of Atatürk.¹⁶⁹ Despite knowing that many of the Turkish prisoners were “notorious exterminators’ of Armenians,” the British chose to swap prisoners with Turkey, on October 23, 1921. The ensuing guilt was noted by one British official, “[t]he less we say about these people the better. . . . [T]he staunch belief among Members [of the Parliament is] that one British prisoner is worth a shipload of Turks, and so the exchange was excused.”¹⁷⁰ As noted earlier, the Turkish Court-Martial, though condemning many of the top CUP leaders to death, did very little to actually punish the guilty, as nearly all of the retributive justice would be administered by Armenian assassins in the years following the war.

This failure of the international community to deal with the CUP war criminals would allow the Armenian Genocide to be quickly suppressed and forgotten. In fact only 20 years later Adolf Hitler would state, on the eve of his invasion of Poland: “Who after all is today speaking of the destruction of the Armenians?”¹⁷¹ Commentators today assert that Hitler was in all likelihood aware and affected by German military stories of the Armenian Genocide.¹⁷² In fact, Dr. Max Erwin von Scheubner-Richter, a former Co-Commander of a joint Turko-German Expeditionary guerrilla force in WWI, was an early convert to the Nazi party.¹⁷³ This close advisor to the future Führer, would die with his arm linked in Hitler’s during the failed 1923 Munich Putsch.¹⁷⁴ A proper international response to the Armenian Genocide may have had an affect on either preventing or punishing other genocides as well. With an international adjudication after WWI, the Nuremberg Trials could, in retrospect, have seemed less like a novelty, less of a singular event, and a pattern would have begun that hopefully would have tried such crimes more consistently, prior to the belated

168. *Id.* at 311.

169. *Id.* at 310-11.

170. *Id.*

171. *Id.* at 403.

172. *Id.* at 401-12, 417; see, e.g., *Hitler and the Armenians*, HISTORYWIZ ONLINE, at <http://www.historywiz.com/annihilation.htm> (last updated May 20, 2002).

173. DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 410-11. Scheubner-Richter was certainly aware of the extermination of the Armenians according to one American eyewitness who spoke with him. TURKISH ATROCITIES, *supra* note 19, at 18.

174. For an impressive study of links between the Armenian Genocide and Hitler, see DADRAN, HISTORY OF ARMENIAN GENOCIDE, *supra* note 1, at 401-16. See also ROBERT MELSON, REVOLUTION AND GENOCIDE-ON THE ORIGINS OF THE ARMENIAN GENOCIDE AND THE HOLOCAUST (1992).

creation of the ICTY and the ICTR. But in reality, nations seem to, and probably will always, turn a blind eye when it is politically advantageous. One need only look at the instances of inaction in response to genocide since the Holocaust, including the amnesia and many times active suppression of the Armenian Genocide by civilized nations.¹⁷⁵

VI. A CHANCE FOR RECONCILIATION?

A. Denial

Some might still question the necessity of a legal forum to study the case of the Armenian Genocide. One might argue that other perpetrators of genocide have gone unpunished, but certainly this has not hindered the study or recognition of these genocides. The Armenian Genocide differs from all other genocides of the 20th century however, in that, from its inception there has been a well-planned, organized, and often times successful campaign of denial by a powerful government. The role of the Turkish government in actively and aggressively suppressing any mention of the genocide, whether in politics, legislation, or even academia, has been noted recently by many scholars and journalists.¹⁷⁶ Noted human rights scholar Richard Falk has spoken on the issue as well. He writes:

Slowly, yet with increasing authoritativeness, the reality of the Turkish genocide perpetrated against the Armenian people has come to be accepted as established, incontrovertible historical fact. Such a process of moral pedagogy has overcome formidable obstacles, especially the well-orchestrated, shameful, as yet ongoing campaign by the Turkish Government to impose silence by promoting a variety of coopting devices, by disseminating various falsifications of the historical record, and through cajolery and intimidation. Let us be clear. This campaign that has been conducted by Turkish authorities is not a matter of psychological denial in which unpleasant aspects of a personal or collective past are unwittingly

175. For a revealing article on this issue by noted Middle East journalist, see Fisk, *supra* note 9, and Michael R. Hickok, *Armenian Resolution-A Study in U.S. Foreign-Policy Cowardice*, *NEWSDAY*, Dec. 21, 2000, at A48.

176. For an excellent article concerning Turkish attempts to push their revisionist agenda in American academia, see Roger W. Smith, et al., *Professional Ethics and the Denial of the Armenian Genocide*, *HOLOCAUST AND GENOCIDE STUDIES* 1-22 (Spring 1995). See also *supra* note 5 and accompanying text.

suppressed to avoid acknowledging a humiliating past, although such denial clearly is part of the armor of self-respect [sic] that continues to be relied upon by many well meaning Turkish citizens to avoid confronting both their past and their government. The official campaign is far more sinister. It is a major, proactive deliberate government effort to use every possible instrument of persuasion at their disposal to keep the truth about the Armenian genocide from general acknowledgment, especially by elites in the United States and Western Europe Despite a big and expensive effort, the Turkish cover-up has basically failed, yet so long as the Ankara Government and its academic apologists maintain the historic lie there is further work to be done. Indeed, the struggle to redeem the truth of the past is far from over, especially given Turkey's geopolitical leverage arising from its valued membership in NATO and Turkey's importance to the West as business partner and regional ally on an array of sensitive Middle Eastern issues.¹⁷⁷

The government denial campaign Falk mentions has led to quite a few retaliatory actions: boycotts of French products, threats to the U.S. in regards to its air bases in southwestern Turkey, and threats to Microsoft over the inclusion of the Armenian Genocide in an on-line encyclopedia, just to name a few.¹⁷⁸

Although the questionable actions of interested governments are many times to be expected, in an ideal world truthful scholarship

177. Richard Falk, *Foreword*, 22 J. POL. & MIL. SOC. (Summer 1994), available at http://chgs.hispeed.com/Educational_Resources/Curriculum/Teaching_Armenian_Genocide/Foreword_II/foreword_ii.html.

178. For details of the first two mentioned incidents see *supra* note 5 and accompanying text. The third incident was exposed by the *Chronicle for Higher Education* in its August 18, 2000 edition. The *Chronicle* reported that the Turkish government had threatened Microsoft with "serious reprisals" unless all mention of the Armenian Genocide was removed from their online encyclopedia, *Encarta*. Microsoft approached the two scholars who had written the entries in question, Dr. Ronald Suny and Dr. Helen Fein, and asked them to include language that would cast doubt on the validity of the Armenian Genocide. The two scholars refused to censor their entries, and Microsoft eventually backed down. See *Hot Type: Two Scholars Who Wrote Encarta Entries Say Editors Asked Them to Tone Down Material on the Armenian Genocide*, CHRON. HIGHER EDUC., Aug. 18, 2000, at A20; *Chronicle of Higher Education Reveals Official Turkish Threats Against On-Line Encyclopedia for Refusing to Deny Armenian Genocide*, HUMAN RIGHTS ACTION WEBSITE-ARCHIVES, at <http://www.hr-action.org/archive3/arm16081.html> (last visited May 27, 2002). See also Jennifer K. Ruark & D.W. Miller, *Press Denies Role in Book-Promotion Scam; Encyclopedia Mincees No Words About Massacre*, CHRON. HIGHER EDUC., Oct. 19, 2001, at 14.

should win out in the end. Unfortunately, this is not always the case. Despite honest, accurate research by the majority of historians on the subject, many scholars still vehemently work to promote the denialist viewpoint.¹⁷⁹ For example, at a recent symposium sponsored by Ege University in Turkey, entitled "Turkish-Armenian Relations Throughout History," one speaker, Professor Dr. Cayci, stated in reference to the Armenian Genocide: [T]hese allegations are baseless. Armenians were not the local residents of [the] Eastern Anatolia Region. They came to the region later. When Turks came to Anatolia in 1071, there was not an independent Armenian state in the region. They always lived in peace and security under the rule of Turks.¹⁸⁰

Although this statement is inaccurate on virtually all its historical points, Professor Cayci went on to say "Armenians were forced to migrate to Diyarbakir and Syria. [The] [s]ituation of roads and geographical conditions caused [the] death of many Armenians. But Armenians were never exposed to genocide by Turks."¹⁸¹ A Turkish lawyer has even gone so far as to bring a lawsuit against France for its recent non-binding resolution which simply states, "France recognizes the 1915 Armenian Genocide."¹⁸² The lawyer, Sedat Vural, has asked the European Court of Human Rights to suspend the French law and to order Paris to pay compensation.¹⁸³

He stated, "[t]he French parliament does not have the authority to issue such a law and has unjustly accused all Turkish citizens of genocide France has degraded my humanity and is obliged to compensate me."¹⁸⁴ Sadly, these examples of Armenian Genocide

179. Speaking in support of acknowledging that the Armenian Genocide is many times considered a crime in Turkey, and this of course complicates the situation. For example, Turkish human rights activist, Akin Birdal has been charged with "humiliating and vilifying the Turkish nation" for his comments on the Armenian Genocide. The Human Rights Association chairman is currently standing trial and the prosecution has asked for up to a 6-year prison sentence. *Trial Opens of Turkish Human Rights Activist*, ANATOLIA NEWS AGENCY, available at <http://www.atour.com/~aahgn/news/20010305e.html> (Mar. 1, 2001); see also *Turk Police Arrest Priest for Genocide Remarks*, HUMAN RIGHTS WITHOUT FRONTIERS-ONLINE (May 10, 2000), at <http://www.hrwf.net/newhrwf/html/turkey2000.html#Turkpolicearrest>.

180. *Symposium on "Turkish-Armenian Relations Throughout History"* Held, ANADOLU NEWS AGENCY, at <http://www.hri.org/news/turkey/anadolu/2001/01-03-19.anadolu.html> (Mar. 20, 2001).

181. *Id.*

182. *Turkish Lawyer Challenges French Genocide Law at European Court*, AGENCE FRANCE PRESSE (Mar. 17, 2001).

183. *Id.*

184. *Id.* Sometimes denialist propaganda takes an even more aggressive approach. At an anti-Armenian Genocide recognition rally in Istanbul, a professor from Baku State University even stated, "Armenia massacred 1.5m[illion] Turks." *Turkey: Istanbul Rally Protests Against Armenian Genocide Allegations*, TURKISH NEWS AGENCY-ANATOLIA, May 21, 2001, available at 2001 WL 21515239. Another speaker at the rally, a journalist, added, "[t]he lies of the western world contradict with the historical facts." *Id.*

denial by individuals, even professors, are simply the by-product of years of government propaganda and revisionist history.

So would a symbolic decision¹⁸⁵ by the ICC concerning the Young Turks even help at this point, after decades of suppression and warring over this controversy? Despite recognition of the Armenian Genocide by the parliaments of France, Belgium, Sweden, Greece, and Russia in recent years, and by the Lelio Basso Permanent Peoples' Tribunal in 1984 and the United Nations Sub-Committee on Prevention of Discrimination and Protection of Minorities in 1985,¹⁸⁶ the Republic of Turkey still refuses to admit that there was a genocide in 1915. As a result, many argue that history should be left to the historians and politics to the politicians, and that law has no place in either arena. However, while politics are of course susceptible to the winds of change, it has to be acknowledged that even history is many times ultimately explained by the victors. It is of the opinion of this author, that law and history are intertwined, both being the study of facts and then a final assessment. There is something conclusive about a court decision; many times courts' decisions are the only factor in breaking a political stalemate. In a situation like the Armenian Genocide, and its denial, any sort of ICC decision - even symbolic¹⁸⁷ - would play a powerful role in establishing the truth. In any event, the ICC will certainly be a factor in making sure that recent, and future genocides will not be forgotten.

Given the tendencies of legislatures and even historians to succumb to pressure of *realpolitik*,¹⁸⁸ it will be crucial for the ICC, ideally an unbiased, objective international legal body to do its part in ensuring that the instances of genocide and crimes against humanity in the 21st century are not white-washed or ignored. In the Armenian case, many times the Turkish government has blamed the recognition of the Armenian Genocide in national

185. See *supra* note 8 and accompanying text.

186. Armenian National Institute, *International Affirmation of the Armenian Genocide*, at <http://www.armenian-genocide.org/affirmation/resolutions/index.php> (last visited Mar. 22, 2002).

187. See *supra* note 8 and accompanying text.

188. In fact, many Swiss parliamentarians recently complained of *realpolitik* as being the deciding factor after the Swiss National Council, the lower house of parliament, rejected passing a bill, by a 73-70 vote, that would have officially recognized the Armenian Genocide. *Swiss Parliament Votes Against Recognizing the Armenian Genocide*, SWISSINFO WEB SITE, Mar. 13, 2001, available at 2001 WL 16324005. It is also of note however, that Swiss Foreign Minister Joseph Deiss after the vote, commented that while the Swiss government has "already expressed itself clearly on the issue in the past . . . the label 'genocide' is a decision for a court, such as the future International Criminal Court, and not for the Swiss government." *Id.* See also *Swiss Deputies Reject Bill to Recognize Armenian Killings as Genocide*, AGENCE FRANCE PRESSE, Mar. 13, 2001, available at <http://www.armenpress.am/eng/activex/2001/march/14.htm>.

parliaments on lobbying efforts by the Armenian Diaspora.¹⁸⁹ Hopefully decisions by the ICC will be immune to such accusations - including any action that may be taken regarding the Armenian Genocide.¹⁹⁰

One legal body which has attempted to avoid such political posturing is the Permanent Peoples' Tribunal ("PPT"). Established in 1976 by Italian parliamentarian Lelio Basso, this independent tribunal, founded on the principles of the Universal Declaration of the Rights of Peoples, Algiers 1976, has issued verdicts on many different atrocities, including the Armenian Genocide in 1984.¹⁹¹ While in practicality the Peoples' Tribunal's verdicts are merely symbolic, the PPT's legal processes aim to expose the truth are invaluable in recording little known atrocities; and in the case of the Armenian Genocide, while the PPT's decision has done little to persuade Turkey to address the events of 1915, its meticulous assessment of the genocide can be considered a building block in establishing the historical and legal record on the Armenian Genocide. In fact, furthering this notion of international "peoples' bodies," international human rights scholars Andrew Strauss and Richard Falk have recently argued that the most just and ultimately effective international governing, or legal system, should be a "Global Peoples Assembly."¹⁹² A Global Peoples Assembly like the Permanent Peoples' Tribunal would ideally be free of any political or national influences, would be a citizen created and controlled body, and could, among its many tasks, "step-in" in situations, like the Armenian Genocide, that for some reason or another, could not be addressed by a court such as the ICC.

Unfortunately, the issue of recognition of the Armenian Genocide, at this point seems ultimately to be entwined in politics, as much of Turkey's hostility to official recognition, or even recognition by bodies such as the Peoples' Tribunal, seems to be due to the apparent fear of reparations or even land claims by Armenia and Armenians.¹⁹³ While an ICC ruling on this subject, if it were

189. See, e.g., *Letters Lay Bare Armenian Lobby's Plots In France*, Press Review, TURKISH PRESS.COM DAILY NEWS, Mar. 26, 2002, at <http://www.turkishpress.com/turkishpress/news.asp?ID=5469>.

190. See *supra* note 8 and accompanying text.

191. Armenian National Institute, *supra* note 186.

192. Andrew L. Strauss, *Re-Framing International Law for the 21st Century: Overcoming the Dysfunction of the Bifurcated Global System: The Promise of a Peoples Assembly*, 9 *Transnat'l L. & CONTEMP. PROBS.* 489, 489 (1999).

193. See, e.g., Stephen Feinstein, *From the Director*, CENTER FOR HOLOCAUST & GENOCIDE STUD. NEWSL., Winter/Spring 2000-2001, at 1-2, available at http://chgs.hispeed.com/Educational_Resources/chgsnewsletterspr01.pdf. Turkey many times also substantiates its apparent fears by asserting that recognizing the Armenian Genocide will incite Armenians to "racial terror aimed at Turkey." *The French National Assembly and the So-Called*

possible, in the long run would be extremely important in the international arena by legally confirming the truth of a past atrocity, in reality Turkey's willingness to even explore the issue could hinge solely on the reparation mechanisms that would result. This leads to the exploration of other avenues to resolve this conflict. As discussed herein, an ICC decision might certainly have been useful, but given the heated sensitivity of this issue at this point, a more effective mechanism could be the less adversarial, less retributive, Truth and Reconciliation Commission, as established in South Africa.

B. A Truth and Reconciliation Commission?

Given the jurisdictional problems and time lapse surrounding the Armenian Genocide, would the ICC, in reality, be better off to move outside of strict legal confines and commission, or at the least recommend, an entity along the lines of a Truth and Reconciliation Commission? The Truth and Reconciliation Commission, as evidenced in South Africa, is based upon the premise that, by offering amnesty to those accused and dropping traditional legal rules of evidence and procedure, there is more of a likelihood that the truth will be revealed.¹⁹⁴ By taking a less adversarial approach, and letting both sides have their say, the chance for collective societal healing appears to be greater. The argument is that, with the non-retributive search for truth, not the indictment of a few, being the main goal, the society will rebuild faster and be more apt to accept the subsequent historical record of the events.¹⁹⁵ Additionally, in lesser studied and unfinished cases, like the Armenian Genocide or Cambodian Genocide, the Truth Commission can be an important tool in documenting the truth for history's sake.¹⁹⁶

Whether the Truth and Reconciliation Commission is a better mechanism than a criminal tribunal, or simply one to be used when a tribunal cannot be established, is certainly open for debate. One of the main drawbacks of the Truth and Reconciliation Commission is that many times family members of victims will feel like the

"Armenian Genocide," MINISTRY OF FOREIGN AFF., REPUBLIC OF TURKEY-ONLINE, at <http://www.mfa.gov.tr/grupa/ad/adf/erm9808.htm> (last visited May 19, 2002).

194. See Paul Lansing & Julie C. King, *South Africa's Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post Apartheid Age*, 15 ARIZ. J. INT'L & COMP. L. 753, 753 (1998).

195. John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 277 (1998).

196. Theresa Klosterman, Note, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 ARIZ. J. INT'L & COMP. L. 833 (1998).

perpetrators are in actuality going unpunished.¹⁹⁷ Many times it seems that in the spirit of achieving national cleansing, individual victims and their families may feel as if they are still not vindicated.¹⁹⁸ However, the Truth and Reconciliation Commission, whatever its drawbacks, certainly has become a popular and effective investigative body in the last few decades, in situations where, for one reason or another, criminal sanctions may not occur.¹⁹⁹ That is not to say that criminal prosecutions would be precluded by a Truth Commission, in fact evidence uncovered in a Truth Commission could be used later in criminal proceedings.²⁰⁰

In the case of the Armenian Genocide, such a quasi-judicial, non-binding tribunal may be the best solution at this point in time. There are at least a few reasons why in the case of the Armenian Genocide, such a commission may be the best avenue available to reach a long overdue conclusion to this matter. One of the main problems associated with a Truth and Reconciliation Commission²⁰¹ would not even be present in the Armenian Genocide scenario. That is, amnesty to actual perpetrators would not be an issue, as it is presumed that, 85 years after the tragedy, nearly all are dead. The sense of guilty individuals escaping punishment would not be present, as at this point the real issue is that of setting the record straight. The ultimate hope of the victims, the Armenians, given the situation at this time, is to simply bring out the truth, and ideally the goal of both Armenians and Turks is to reconcile the century old differences between them. If the Republic of Turkey would provide such a forum, Armenian survivors and their families, given their quest for moral and historical justice, could relive the pain once again to finally set the record straight.

This is not to say that there might not be problems in even establishing such a Truth and Reconciliation Commission for the Armenian Genocide. In the South African example - as in most such commissions - the government itself set up the Commission to examine the previous government and the practice of apartheid.²⁰² Sadly, it seems unlikely that the present day Republic of Turkey

197. Lansing & King, *supra* note 194, at 771-72.

198. *Id.*

199. Klosterman, *supra* note 196, at 842.

200. *Id.* Along these lines the international community may breath a sigh of relief, as in the case of the Cambodian Genocide, after years of inaction and glaring injustice, and recent talks of a Truth Commission, the current government of Cambodia has enacted laws to prosecute former Khmer Rouge members and is currently working with the U.N. to set up a criminal tribunal. *Khmer Rouge Tribunal Approved*, BBC NEWS, July 23, 2001, available at http://news.bbc.co.uk/hi/english/world/asia-pacific/newsid_1452000/1452412.stm.

201. DUGARD, *supra* note 195, at 410-16.

202. *Id.* at 399-400.

would set up such a Commission without considerable pressure from the international community; Armenians might not trust the legitimacy of the mechanism given the history of Turkish denial as well. This is evidenced by the creation of, in the summer of 2001, an unofficial Turkish-Armenian Reconciliation Commission made up of Turkish and Armenian notables.²⁰³ The private commission, composed of six Turks and four Armenians, none of whom are currently working for any government, hopes to "seek to promote mutual understanding and goodwill between Turks and Armenians and to encourage improved relations between Armenia and Turkey."²⁰⁴ Although described as "a miracle" by Elie Wiesel,²⁰⁵ the commission has been criticized by many Armenians from its inception, as one word is glaringly absent: truth.²⁰⁶ It was reported that a prerequisite for the establishment of the commission was that the Armenian Genocide issue would not be discussed, and the focus

203. *Turks, Armenians Hold Meeting*, ASSOCIATED PRESS, July 10, 2001, at 2001 WL 24710797; Douglas Frantz, *Unofficial Commission Acts to Ease Turkish-Armenian Enmity*, N.Y. TIMES, July 10, 2001, at <http://www.library.cornell.edu/colldev/mideast/unofftr.htm>

204. *Id.*

205. Ashok Chandwani, *The R Word is Gathering Strength*, MONTREAL GAZETTE, July 17, 2001, at A6.

206. The Armenian community has been somewhat divided on this commission from its inception. Many moderate Armenians see it as a long-needed step in the right direction; they do not see it as hindering the Armenian goal to have the Armenian Genocide eventually officially recognized and documented. Others on the more nationalistic end of the Armenian political spectrum are vehemently opposed to the group. They argue that there can be no reconciliation without acknowledgment of the truth and apology first. The ARF party (which was not consulted during the establishment of the Commission), which represents a large segment of Armenians, especially in the Diaspora, issued a statement after the announcement which read in part:

Although we do not oppose the principle of free dialog between the two peoples No one should be allowed to minimize the importance and the subtleties of Turkish-Armenian relations, and circumvent the imperative of the recognition of the Armenian Genocide by Turkey, and endanger efforts to secure its international recognition. Reconciliation cannot be achieved without the acceptance of the historical truth. Armenian-Turkish dialog can be effective only after Turkey's recognition of the Armenian Genocide, a necessity which cannot be compromised [sic].

ARF Bureau Declaration, ASBAREZ ARMENIAN DAILY NEWSPAPER-ASBAREZ ONLINE, July 13, 2001, at <http://www.asbarez.com/TARC/ARFBureauDeclaration.html>. Many Diasporan Armenians cite the fact that the Commission simply does not speak for the Armenian community and will do more harm than good. There is extreme distrust of the Turkish side as many of the Turkish members are ex-government officials and are described as hardliners. Conversely, the four Armenians on the commission could be described as moderates in the Armenian community. Those who oppose the Commission see its establishment, given that it excludes talk of the Genocide, as basically acquiescence to Turkish denial. Some have gone so far as to doubt the motives of the Armenians involved, citing personal economic gain from improved relations as possible outcomes. For extensive Armenian opinions on the issue, see *Turkish-Armenian Reconciliation Commission*, ASBAREZ ARMENIAN DAILY NEWSPAPER ONLINE, at <http://www.asbarez.com/TARC/Tarc.html> (last visited Apr. 1, 2002); *Turkish-Armenian Reconciliation Commission (TARC) Background Information*, ASBAREZ ONLINE, at <http://www.asbarez.com/TARC/Tarc.html> (last visited Apr. 1, 2002).

would be solely on the present and future of Turkish-Armenian relations. Being that the Armenian Genocide is the epicenter of animosity between the two peoples, it seems amazing that such an endeavor could be set upon without discussion of the issue, but reconciliation is certainly the final step in resolving any disagreement. And if the commission can accomplish its goal of starting to bury the hatchet it should be commended for this. However, it is the opinion of this author, and many in the Armenian community, that overlooking the truth, and one party's culpability, may not be the best, and certainly not the most honest, way to deal with past injustice.²⁰⁷ Without working towards exposing the truth, such a commission loses all semblance of even a quasi-judicial body and becomes nothing more than a goodwill gesture.

A Truth and Reconciliation Commission, or even simply a Truth Commission, is what is ultimately needed to begin the process of closure for Armenians and to help Turkey properly deal with its past in regards to the Armenian Genocide. Setting the historical record straight should be the first and foremost goal of all in dealing with this issue. If the truth is established, though it may take decades reconciliation will ultimately come. Given the long history of mistrust and the bitterness on both sides, it may well be that the best, and only, way to establish and conduct a Truth & Reconciliation Commission may ultimately be through direct involvement by the UN or the ICC.

VII. EPILOGUE/SPECULATION "WHAT IF" - THE IMPORTANCE OF THE ICC

The reality of the ICC dealing with this specific issue at the present time is, at this point, still quite speculative.²⁰⁸ So, in conclusion, to argue for the importance of the ICC in properly dealing with genocide, another "what if" is asked. What if the ICC, or comparable tribunal, could have made a decision on the Young Turks in the aftermath of World War I? What difference would it have made? Convictions of the Young Turk leaders by an effective international tribunal would have certainly affected Turkish-Armenian relations for the last eighty-five years. Besides bolstering the verdicts of the Turkish Court-Martial of 1919, the international decision and proper punishment of the guilty would have kept the Armenian vengeance operations from feeling as if they had to take matters into their own hands.²⁰⁹ A punishment carried out by an

207. See *supra* note 207 and accompanying text.

208. See *supra* note 8 and accompanying text.

209. In the years following the war, five major Young Turk leaders were "executed" by

international body would certainly have spurned a less incendiary environment than has developed over the years.

Additionally, had proper recognition been given to the Armenian Genocide, perhaps the Armenian "revenge" groups of the 1970s and 80s would have not felt it necessary to assassinate some two dozen Turkish diplomats around the world.²¹⁰ These Armenian terrorist groups, as one commentator has put it, hoped to bring "back to public notice a crime against humanity that had been virtually forgotten, except in the Armenian collective memory. It served the Armenian cause to the extent that the scale of the crime motivating these attacks was far greater in its horror than the condemnation it aroused."²¹¹ These killings certainly have added to the animosity between Turkey and Armenians. In many denial arguments, Turkey often cites these modern assassinations as "proof" that what happened in 1915 was a civil war and that Armenians in turn have committed comparable atrocities against Turks.²¹² The genocide and the battle over its recognition certainly plays a role in the current cold relations between the Republic of Turkey and the Republic of Armenia. The Turkish border with Armenia has been closed since 1993,²¹³ and there are no diplomatic relations between the neighbors.²¹⁴ The official justification is the ongoing conflict between Armenia and Turkey's ally, Azerbaijan, over the disputed Armenian-populated territory of Nagorno-Karabagh.²¹⁵

If anything, a decision from a permanent tribunal such as the ICC would have, at least, given Armenia and Armenians the comfort that their tragedy was adequately dealt with and remembered. It could have provided closure and enabled Armenians and Turks to move forward. A decision would also have represented a unified

Armenian assassins working under what was called "Operation Nemesis." Talaat Pasha was assassinated in 1921 in Berlin; Halim Pasha, the former Grand Vizier, was shot in Rome in 1921; Djemal Azmi, the former governor of Trebizond, and Dr. Behaeddin Shakir were shot together in Berlin in 1922; and Djemal Pasha, one of the CUP "triumvirate," was assassinated in Tbilisi in 1922. YEGHIAYAN, *supra* note 46, at 183-84.

210. See *Armenian Allegations - List of the Assassinated Turkish Diplomats and Nationals*, MINISTRY OF FOREIGN AFFAIRS, REPUBLIC OF TURKEY-ONLINE, *supra* note 193, at <http://www.mfa.gov.tr/grupa/ad/adf/diplomat.htm> (last visited Apr. 29, 2002).

211. DEROGY, *supra* note 84, at 199-200.

212. See *Armenian Allegations - Did the Turks Undertake a Massacre of the Armenians in 1915?*, MINISTRY OF FOREIGN AFF., REPUBLIC OF TURKEY-ONLINE, *supra* note 193, at <http://www.mfa.gov.tr/grupa/ad/adf/massacre.htm> (last visited May 1, 2002).

213. Although the Nagorno-Karabagh conflict was the given reason for the closure, the Turkish stance on the events of 1915 certainly appear to be a factor as well. Jolyon Naegele, *Caucasus: Burden of History Blocks Turkish-Armenian Border*, RADIO FREE EUROPE RADIO LIBERTY-ONLINE, at <http://www.rferl.org/nca/features/1998/07/F.RU.980728135300.html>.

214. See *Turkey's Relation with Caucasian Republics*, MINISTRY OF FOREIGN AFF., REPUBLIC OF TURKEY-ONLINE, at <http://www.mfa.gov.tr/grupa/ae/caucasian.htm> (last visited May 15, 2002).

215. *Id.*

statement from the international community that there was no controversy regarding the atrocities and that attempts by Turkey to alter such truths would be immediately condemned and deemed unacceptable. By properly condemning those actors specifically responsible for the atrocities, the general mistrust between Turks and Armenians still present today may have been avoided. The ICC is an invaluable concept and hopefully the decisions it renders will not only punish international criminals committing serious crimes, but will also keep future generations and peoples from having to endure tragedies like the still ongoing denial of the Armenian Genocide.

As we look to the future of relations between Armenians and Turks, hopefully it is not too late for the international community to assist in resolving this lingering problem. The ICC, either directly,²¹⁶ or by the commission or supporting of another mechanism, should take a proactive role in putting to rest the demons created by the unresolved issues surrounding the 20th century's first genocide.

216. See *supra* note 8 and accompanying text..

