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Geoffrey Robertson

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# WAS THERE AN ARMENIAN GENOCIDE?

THE OPINION OF GEOFFREY ROBERTSON, QC.

## THE ISSUE

There is no doubt that in 1915, the Ottoman government ordered the deportation of up to two million Armenians from Anatolia and other provinces: they were marched towards Syria and hundreds of thousands died *en route* from disease, starvation, and armed attack. There were other atrocities committed against Armenians in that year because of their race and their Christian religion, beginning with the rounding up of several hundred intellectuals in Constantinople on April 24<sup>th</sup>. The “Young Turk” government was accused of responsibility for what the governments of Britain, France, and Russia, jointly and formally declared to be a “crime against humanity.” These allies solemnly promised to punish the perpetrators, and after the war, special provisions were made to do so in the Treaty of Sèvres.

The United Kingdom rounded up sixty-seven Turkish officials suspected of ordering atrocities and held them for trial in Malta, but for reasons of diplomatic expediency, they were eventually released. There was, until the Nuremberg Charter in 1946, no international criminal law to punish the political and military leaders of sovereign states for mass-murder of their own citizens for religious or racial reasons. The destruction of a substantial part of the Armenians in Turkey became, in the years before the Holocaust, the paradigm for those who argued for the creation of a new crime to be called genocide; this came to pass with the United Nation’s Genocide Convention of December 1948. Most genocide scholars and historians, and many European parliaments, have described the fate of the Armenians as “genocide,” but recent British governments have, when asked by members of parliament, resolutely refused to do so.

Pursuant to an application under the Freedom of Information Act (FOIA), the hitherto secret policy documents and memoranda in which officials advised and drafted these refusals have been obtained from the

Foreign & Commonwealth Office (FCO). I am instructed by the Armenian Centre to consider the attitude of the British government in refusing to accept that the massacres of Armenians in 1915–16 amounted to genocide, and whether its reasons for taking this position are valid and sustainable in international law.

The invariable attitude of the British government over the past decade whenever this issue is raised—whether in parliamentary debate, by way of ministerial question, or in diplomatic exchanges—is to describe the events of 1915 as “a tragedy” and to state “in the absence of unequivocal evidence to show that the Ottoman Administration took a specific decision to eliminate the Armenians under their control at the time, British governments have not recognised the events of 1915 and 1916 as ‘genocide.’”<sup>1</sup>

This formula was first enunciated by Baroness Ramsey, a government spokesman in the House of Lords, at the conclusion of a debate on April 14<sup>th</sup>, 1999. It was most recently echoed in February 2008 in the House of Lords’ written answer by Lord Malloch-Brown, when replying on behalf of Her Majesty’s Government (HMG) to the question of whether it would recognise the existence of genocide in Armenia in 1915:

The position of the government on this issue is longstanding. The government acknowledges the strength of feeling about this terrible episode of history and recognises the massacres of 1915–1916 as a tragedy. However, neither this government nor previous governments have judged that the evidence is sufficiently unequivocal to persuade us that these events should be categorised as genocide, as defined by the 1948 UN Convention on Genocide.<sup>2</sup>

### LEMKIN’S ANSWER

This answer would certainly have perplexed Raphael Lemkin, the legal architect of the Genocide Convention, because the Armenian massacres were uppermost in his mind when he coined the word—a hybrid of the Greek *geno* (meaning “race” or “tribe”) and the Latin *cide* (from *caedere* i.e., “killing”). The massacres had pre-occupied him ever since he read about the case of Soghomon Tehlirian, an Armenian whose family had been killed in the massacres and who, in reprisal, assassinated Talaat Pasha, the former Ottoman Interior Minister regarded as primarily responsible for them. The evidence called on Tehlirian’s behalf at his trial, in Germany in 1923, had convinced Lemkin that the purpose of the Turkish authorities in deporting the Armenians was to destroy the race, but he was reluctant to

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1. 599 PARL. DEB., H.L. (5th ser.) (1999) 826.

2. 699 PARL. DEB., H.L. (5th ser.) (2008) WA165.

approve of the acquittal of a vigilante who had acted as the “self-appointed legal office for the conscience of mankind.”<sup>3</sup> Lemkin studied the abortive British proceedings against the “Young Turk” leaders in Malta and the jurisdictional difficulties that had arisen. These difficulties arose from the absence at the time of any international criminal law: there was no juristic basis for prosecuting officials of a foreign government for organising the deaths of their own nationals.

Lemkin’s first paper on this subject, written for a conference in Madrid in 1933, argued that the world needed a new law to prohibit the murderous repression of racial and religious groups. He warned that this was necessary in order to prevent the repetition, in other countries at other times, of the Ottoman slaughter of the Armenians. Presciently, he drew attention to Hitler’s recent rise to power, but his first and subsequent drafts of this new law were always referable to the fate of the Armenians: the evidence, to his mind, was unequivocal. Lemkin’s chief example of the kind of crime that he wanted the world to outlaw remained, until the outbreak of war, the Armenian massacres.

After the outbreak of war, Lemkin adopted Churchill’s description of the Nazi Holocaust (“we are in the presence of a crime without a name”) as his premise for urging the adoption of a new crime which in 1943 he named “genocide.” His penultimate example of genocide, as he lobbied throughout the 1940s for the acceptance of a convention, was always the Armenians: he began with the Maronites—he could have started with the citizens of Carthage—then the Huguenots in France, the Protestants in Bohemia, the Hottentots, and then the Armenians, followed finally by the Jewish, gypsy, and Slavic victims of the Nazis.<sup>4</sup> He pressed the case of the Armenians on the Canadian ambassador, who introduced him to Dr. H. V. Evatt, Australian Foreign Minister and President of the General Assembly who took up the cause. It was assisted by reports (published as early as 1942) of Hitler’s infamous speech to his generals on the eve of their invasion of Poland:

I have sent my Death’s Head units to the East with the order to kill without mercy men, women and children of the Polish race or language. Only in such a way will we win the lebensraum that we need. Who, after all, speaks today of the annihilation of the Armenians?<sup>5</sup>

Lemkin’s lecturing to and lobbying of the delegates to the United Nations (UN) legal sub-committee in Geneva during the drafting of the

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3. See SAMANTHA POWER, *A PROBLEM FROM HELL* 19 (Penguin 2002); see also George R. Montgomery, *Why Talaat’s Assassin was Acquitted*, *CURRENT HISTORY*, July 5, 1921, at 551.

4. See POWER, *supra* note 3, at 54–5.

5. LOUIS P. LOCHNER, *WHAT ABOUT GERMANY?* 12 (Hodder & Stoughton 1943) (citing notes of Admiral Canaris taken on Aug. 22, 1939).

Genocide Convention leaves little doubt that the Preamble statement “that at all periods of history genocide has inflicted great losses on humanity”<sup>6</sup> was intended to refer, *inter alia*, to that period in history, 1915–16, when approximately half the Armenians living in the Ottoman Empire were starved or slaughtered. Indeed, in the first case on the interpretation of the Convention, the United States government submitted to the International Court of Justice that “the Turkish massacres of Armenians” were one of the “outstanding examples of the crime of genocide.”<sup>7</sup>

### HMG’S POSITION AT THE TIME

HMG’s current description of these events as no more than a “tragedy” would have astonished the leaders of HMG in 1915 and during the post-war peace conferences, who viewed them not as a tragedy but as a monumental crime. A joint declaration by Britain, France, and Russia in May 1915 vowed that all members of the Ottoman government would be held personally liable for what was, for the first time, described as a “crime against humanity.”<sup>8</sup> Lord Balfour, the Foreign Secretary, said that “the massacres in Syria and Armenia are far more terrible than any that history has recorded in those hapless countries,”<sup>9</sup> and the government replied to speeches in the House of Lords accusing the Turks of proceeding “systematically to exterminate a whole race out of their domain”<sup>10</sup> with the promise that “when the day of reckoning arrives, the individuals who have precipitated or taken part in these crimes will not be forgotten.”<sup>11</sup> Lloyd George, then Prime Minister, did not mince his words when recollecting his view at the time:

By these atrocities, almost unparalleled in the black record of Turkish rule, the Armenian population was reduced in numbers by well over one million . . . . If we succeeded in defeating this inhuman empire, one essential condition of the peace we should impose was the redemption of the Armenian valleys forever from the bloody misrule with which they had been stained by the infamies of the Turk.<sup>12</sup>

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6. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [*hereinafter* the Genocide Convention].

7. WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW 19 (2d ed. Cambridge 2009) (2000).

8. U.N. WAR CRIMES COMM’N, HISTORY OF THE UNITED NATIONS WAR CRIMES COMM’N AND THE DEVELOPMENT OF THE LAWS OF WAR 35 (1948) (describing the joint declaration of France, Great Britain, and Russia on May 28, 1915).

9. TANER AKÇAM, A SHAMEFUL ACT 213 (Holt 2006).

10. FO 371/2488/172811, Nov. 17, 1915 (on file with author).

11. FO 371/2488/148483, Oct. 6, 1915 (on file with author).

12. LLOYD GEORGE, MEMOIRS OF THE PEACE CONFERENCE 811–12 (Yale University Press,

As Winston Churchill, himself no mean historian, saw it: "In 1915 the Turkish government began and ruthlessly carried out the infamous general massacre and deportation of Armenians in Asia Minor. . . . There is no reasonable doubt that this crime was planned and executed for political reasons."<sup>13</sup> "Whole districts were blotted out in one administrative holocaust."<sup>14</sup>

At the Paris Peace Conference, Britain demanded the indictment of the Turkish leaders responsible for the Armenian massacres. A Commission on the Responsibility of the Authors of the War was established in January 1919, and it recommended the prosecution of the Turkish leaders for war crimes committed against their own citizens on their own sovereign territory because these were an example of "primitive barbarism" implemented by a "terrorist system." In the Treaty of Versailles, the Allies reserved the right to bring suspected war criminals to trial. Article 230 of the Treaty of Sèvres proclaimed:

The Turkish government undertakes to hand over to the Allied powers the persons whose surrender may be required as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire. The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such Tribunal.<sup>15</sup>

Under Article 228, the Turkish government undertook to furnish all documents, the production of which might be "considered necessary to ensure the full knowledge of the incriminating acts, the prosecution of offenders and the just appreciation of responsibility."<sup>16</sup> Although France and Italy soon tired of this novel commitment to international justice and recognised the advantage of friendly relations with the new Turkey under Ataturk, Britain maintained its promise to bring the authors of the atrocities to justice. Not content with the domestic trials of the young Turk leaders that had been held in Constantinople, Britain brought sixty-seven of them to Malta—which was under colonial governance—to face trial. But the jurisdictional difficulties of prosecuting foreign officials for killing their own people concerned Balfour. In December 1918, he told an Allied conference that the perpetrators of the Armenian massacres,

strictly speaking had committed no definite legal offences. . . . It was necessary to consider how they could be got at. Talaat had said

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1939).

13. WINSTON CHURCHILL, *THE WORLD CRISIS: THE AFTERMATH* 405 (1929).

14. *Id.* at 175.

15. See Treaty of Lausanne, July 24, 1923, in MARTIN LAWRENCE, *THE TREATIES OF PEACE* 971 (Lawbook Exchange, Ltd. 2007) (1924).

16. *Id.*

that Armenians were a constant trouble. He had made up his mind to get rid of them, and, in consequence, he had massacred them *en masse*. That was merely the policy, and the offenders could not be tried by court martial, as they had committed no definite legal offence.<sup>17</sup>

Eventually, this noble first stab at international justice petered out, and the Turkish suspects detained in Malta were exchanged for British prisoners who were being held in Constantinople virtually as hostages.<sup>18</sup> It is true that there had been problems with collecting evidence against individuals—the Turkish cooperation demanded by the Treaty of Sèvres had not been forthcoming, and the investigators lacked access to the Ottoman archives. In due course, Ataturk's victory over the Greeks forced the Allies to abandon all the penal clauses of Sèvres in the 1923 Treaty of Lausanne.<sup>19</sup> But as Balfour's speech demonstrates, no difficulty was apprehended in proving the *fact* of the massacres or that they were racially motivated. So the question now to be asked is whether, irrespective of individual culpability, the massacres themselves fulfilled the criteria for genocide laid down in the 1948 Convention on the Prevention and Punishment of Genocide, and whether a state, as distinct from an individual defendant, can be liable for the crime.

## THE LAW AGAINST GENOCIDE

### THE GENOCIDE CONVENTION

Article I of the 1948 Convention on the Prevention and Punishment of Genocide simply states that “genocide, whether committed in time of peace or time of war, is a crime under international law.”<sup>20</sup> This treaty has been ratified by so many states that it is now considered *jus cogens*, a rule of modern customary international law binding on all states (whether they have ratified the convention or not) and requiring them to prosecute acts of

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17. GARRY BASS, STAY THE HAND OF VENGEANCE 131 (2000) (quoting CAB 28/5 I.C.-99, Inter-Allied Conference, London, Dec. 2, 1918).

18. *Id.* at 142 (citing FO 371/6504/E10411, Sept. 16, 1921). The FCO advised, “[i]t is in a measure yielding to blackmail, but seems justified by present conditions.”

19. Ataturk admitted the massacres were a “shameful act”; but denied Turkish responsibility on the basis they were unauthorised—the position Turkey enforces today, by prosecuting under s.301 of its Penal Code, those who allege genocide. The Treaty of Lausanne featured a “Declaration of Amnesty” for all offences committed between August 1, 1914 and November 20, 1922, although such blanket amnesties would not now be recognised in international law. See *Prosecutor v. Kondewa*, Case No. SCSL-04-14-T-128-73747, Decision on Lack of Jurisdiction/Abuse of Process: Amnesty Provided by the Lomé Accord, (Robertson, J., separate opinion) (May 25, 2004); see also GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY 296–312 (Penguin 3d ed. 2006).

20. Genocide Convention, *supra* note 6, at art. I.

genocide. As the International Court of Justice (ICJ) explained in its decision in the *Reservations to the Convention of Genocide Case*, “the origins of the Convention show that it was the intention of the UN to condemn and punish genocide as a ‘crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and the spirit and aims of the United Nations.”<sup>21</sup>

Article II of the Convention lays down that:

genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

- a) Killing members of the group;
- b) Causing serious bodily 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 that group;
- e) Forcibly transferring children of the group to another group.<sup>22</sup>

The legal concept of genocide is not fully understood by those historians and FCO officials who have declined to apply it to the Armenian massacres. This crime, like all other serious crimes, has a factual element (*actus reus*) and a mental element (*mens rea*). The *actus* involves the causation of harm, physical or mental, to members of a group, targeted by discrimination on national, ethnic, or religious grounds. Importantly, it includes “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or part,” and this Article II(c) may well have been drafted with the fate of the Armenians in mind. The Ottoman government had ordered their deportation under conditions that were known to expose them to disease, starvation, and lethal attack by “Special Organisation” (*Teshkilat-i Mahsusa*) paramilitaries and marauding Kurds. As the leading legal textbook on genocide notes:

The treatment of the Armenians by the Turkish rulers in 1915 provides the paradigm for the provision dealing with imposition of conditions of life. These crimes have often been described as “deportations.” But they went far beyond mere expulsion or transfer, because the deportation itself involved deprivation of fundamental human needs with the result that large numbers died of

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21. *Reservations to Convention on Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, at 23 (May 28).

22. *Genocide Convention*, *supra* note 6, at art. II.



disease, malnutrition and exhaustion.<sup>23</sup>

#### PARTIAL DESTRUCTION OF GROUP MEMBERS

The object does not have to be the extermination of the entire group: a part of it will suffice, even a small part, defined geographically. For example, the ICJ has held that genocide was not committed generally in Bosnia, other than at Srebrenica, by the killing of 7,000 men and boys and the deportation of 25,000 women and children who resided in that area.<sup>24</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) examined the requirement that there must be an intention to destroy a group “in whole or in part” in the case of *Krstic*, and concluded that the intent to eradicate a group within a limited geographical area, such as a region of a country or even a municipality, could be characterised as genocide.<sup>25</sup> As Schabas notes:

... destroying all members of a group within a continent, or a country, or an administrative region or even a town, might satisfy the “in part” requirement of Article II. The Turkish government targeted Armenians within its borders, not those of the diaspora.<sup>26</sup>

What is required is that the “part” should be an identifiable part or else a significant part of the whole. For example, the ICTY in its *Bosnia v. Serbia* decision considered that a “substantial” part must be targeted. There is no doubt that all the Armenians in the eastern provinces, including Anatolia (about 1.5 million) were targeted by the deportations and about 800,000 were killed (estimates have ranged from 600,000 to 1.2 million deaths). On any view, whichever estimate is chosen, this is a substantial proportion of the Armenians (about 2 million in all), and of course hundreds of thousands more were physically and/or psychologically damaged. There is a good deal of evidence that Armenians were targeted as such, i.e., as a racial group, and not merely because they were Christians.<sup>27</sup>

In the case of *Akayesu*, before the International Criminal Tribunal for Rwanda (ICTR), the Trial Chamber held that the phrase “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” included subjecting a group of people to “systematic expulsion from homes.”<sup>28</sup> The deportation orders to

23. SCHABAS, *supra* note 7, at 192–93.

24. The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) 2007 I.C.J. 91 (Feb. 26) [*hereinafter* The Genocide Case].

25. Prosecutor v. *Krstic*, Case No. IT-98-33-T, Judgment, ¶ 589 (Aug. 2, 2001).

26. SCHABAS, *supra* note 7, at 285.

27. See DONALD BLOXHAM, THE GREAT GAME OF GENOCIDE 93–4 (2005). For example, when Dr. Reshid, provincial governor in Diyarbakir, began killing all the Christians he could apprehend, he was informed by the Interior Ministry to restrict his attentions to Armenians.

28. Prosecutor v. *Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶¶ 505–06 (Sept. 2, 1998)

which the Armenians were subjected in 1915 fall within this category. In the case of *Kayishema and Ruzindana*, it was held that this category also includes the deliberate deprivation of resources indispensable for survival, such as food or medical services.<sup>29</sup> This was a feature of the 1915 deportation, and is accepted by pro-Turkish historians. The ICTY has ruled that the definition also covers the creation of circumstances that lead to a slow death, such as lack of proper housing, clothing, hygiene, or excessive work or physical exhaustion—another feature of the 1915 “death marches.”<sup>30</sup>

Article III of the Convention extends the definition of genocide to “conspiracy” (an agreement to participate in a genocidal act), “incitement” to commit genocide (a crime committed, e.g., by radio broadcasts in Rwanda: “the grave is only half full—who will help us fill it?”) and “complicity” in genocide—a concept that involves not only aiding and abetting but being an “accessory after the fact,” i.e., helping to cover it up or taking its benefits. The ICJ found that Serbia had breached its obligations under the Convention by failing to prevent the Srebrenica massacres and by failing to prosecute those responsible for the genocide.<sup>31</sup>

Under Article IV of the Convention, there is no immunity for genocide: it covers “constitutionally responsible rulers, public officials or private individuals.” This is an important article, because pro-Turkish historians and the FCO seem to think that genocide can only be carried out as a matter of state policy, and demand “unequivocal” documentary evidence of a government decision. This is not a necessary element of the crime.

#### GENOCIDAL INTENT

The Genocide Convention stipulates that the crime of genocide requires the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. In *Akayesu*, the ICTR Trial Chamber held that the commission of genocide requires proof of “special intent,” meaning the perpetrator clearly sought to bring about the act charged as a crime. The Trial Chamber noted that in the absence of a confession, it is difficult to prove this intention, and consequently ruled that the necessary intention could be inferred from a number of other factors.<sup>32</sup> For example, the intent can be inferred from words, or deeds, or by a pattern of purposeful action.<sup>33</sup>

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[*hereinafter* Akayesu].

29. Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, ¶ 115 (May 21, 1999) (referring to the First Draft of the Genocide Convention art. I(II)(1)(b), U.N. Doc. E/447) [*hereinafter* Ruzindana].

30. Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, ¶ 691 (Sept. 1, 2004).

31. The Genocide Case, *supra* note 24.

32. Akayesu, *supra* note 28, at ¶ 523.

33. Ruzindana, *supra* note 29, at ¶ 93.

The intent can also be inferred from the general context in which other culpable acts were committed systematically against the same group, regardless of whether such acts were committed by the same perpetrator or by others. Other factors, such as the scale of atrocities committed, their general nature, whether committed in a region or a country, or the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can also enable the inference of genocidal intent to be drawn.<sup>34</sup>

In the case of *Akayesu*, the ICTR Trial Chamber inferred that the accused had the necessary intent from the speeches he had made and the deliberate and systematic atrocities committed against the Tutsis.<sup>35</sup> Similarly, in the case of *Musema*, the ICTR Trial Chamber inferred the necessary intent to destroy the Tutsis from the numerous atrocities committed against them, the large scale attacks against the Tutsi civilians, and from the widespread and systematic perpetration of other criminal acts against members of the Tutsi group.<sup>36</sup> These elements were present during the Armenian deportations. The case law of the ICTR and ICTY does not appear, from the documents disclosed, to have been drawn to the FCO's attention.

The mental element (*mens rea*) is often difficult to prove against public officials (who destroy incriminating records) and against private individuals, who must be proved to have a "discriminatory intent," i.e., to be acting out of a conscious determination to participate in a programme which aims to destroy the group as such, in whole or part. Rarely will such a heinous intention be spelled out in any document; it must be inferred from circumstantial evidence. There will be little difficulty in proving mass murder, often from photographic evidence or the opening of mass graves. The discriminatory intent to destroy can be deduced from a range of evidence that demonstrates malice aforethought towards the group. Usually there will be some history of its persecution, and the persecutors will themselves be in the grip of nationalist fervour which boasts their own racial supremacy and demeans the victim group (e.g., the "Turkification" programme of the Committee for Union and Progress (CUP) which was designed to eliminate rival ethnic identities, especially those of the Armenians and the Kurds). Other familiar indicia of genocidal intent are attacks which single out the intelligentsia or cultural leadership of the victim group (such as the arrests, deportations, and subsequent killings of several hundred Armenian intellectuals, lawyers, writers, and cultural

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34. *Akayesu*, *supra* note 28, at ¶ 523.

35. *Id.* at ¶ 729–30.

36. See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 143 (Oxford 2d ed. 2008) (2003).

figures in Constantinople on and immediately after April 24, 1915)<sup>37</sup> and attacks on the groups' religious and cultural symbols.

It is evident from the policy memoranda that the FCO and the pro-Turkish historians it has cited think that the crime of genocide requires a government policy or the collective activity of a state. However, the Appeal Chamber of the ICTY held in the case of *Jelusic* that "the existence of a plan or policy is not a legal ingredient of the crime"<sup>38</sup> To the extent that "deliberately inflicting on a group conditions of life calculated to bring about its physical destruction in whole or in part" involves some kind of order that amounts to an "infliction," the Interior Minister's orders for deportation of Armenians is an obvious example. Collective or organised action may follow as when others pursue a common plan, e.g., to rob or rape or murder the deportees. However, this does not need to be a government policy: it can be conduct which has the acquiescence of the authorities.<sup>39</sup> There is no doubt that in 1915, the Ottoman government willingly acquiesced and even continued the deportations in the knowledge that many of the deportees would die.

There is no dispute that the Ottoman government was responsible for "ethnic cleansing" by ordering the Armenians removed to Syria, although this does not amount to genocide unless it was accompanied by the infliction of conditions of life calculated to destroy the group. It would, of course, amount to a crime against humanity. The ICJ, in its *Bosnia v. Serbia* decision,<sup>40</sup> cautioned that ethnic cleansing will in some circumstances constitute genocide, but is not necessarily or always carried out with a destructive intent. Whether or not it does amount to genocide will depend on whether those who order the deportations and those who carry out the orders are aware that the manner and circumstances of the deportations would inevitably involve physical or mental destruction of whole or part of the group. Even if mass deportation orders were in some cases accompanied by instructions that deportees should be well looked after, and their homes locked up to await their eventual return, it would be unrealistic to suggest, in the circumstances of the Armenian deportations, that those involved at ministerial, departmental, and local levels did not have foreknowledge of the lethal consequences of their policy. In any event, they were well aware, throughout the time when the deportations were underway, that the deportations had turned into death marches. The Armenians were dying in the tens of thousands, and those who put them in these conditions did nothing to extract them or bring the conditions to an end by, for example, protecting the deportees or punishing those who attacked them.

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37. See PETER BALAKIAN, *THE BURNING TIGRIS* 212–16 (Heinenmann 2003) (2002).

38. Prosecutor v. Jelusic, Case No. IT-95-10-A, Judgment, ¶ 48 (July 5, 2001).

39. See CASSESE, *supra* note 36, at 141.

40. The Genocide Case, *supra* note 24, at ¶ 190.

There is ample evidence that the Committee of Union and Progress (CUP) leadership knew of these massacres. The U.S. ambassador, Henry Morgenthau, complained several times to Interior Minister Talaat Pasha about his government's "extermination" policy, and he quotes Talaat as replying, "[w]e have already disposed of three quarters of the Armenians; there are none left in Bitlis, Van and Erzerum. 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."<sup>41</sup> In a modern war crimes trial, the ambassador's testimony would be relied upon as evidence of an admission by Talaat to the knowledge (*mens rea*) sufficient for guilt of genocide under the command responsibility principle.

#### STATE RESPONSIBILITY

The issue here is not whether any particular "Young Turk" leader or official was guilty beyond reasonable doubt of this crime. HMG has been regularly asked whether the Ottoman state committed genocide, and its reply that the "evidence is not sufficiently unequivocal" seems to assume that an individual is on trial and that the state, as such, cannot commit the crime. This was Serbia's argument before the ICJ in *Bosnia v. Serbia*. The court rejected it, holding that all states have an obligation, under Article I of the Convention, to prevent genocide and that obligation implies that states as well as persons are prohibited from committing the crime.<sup>42</sup> The state will be responsible if it has "effective control" over those who carried out the genocidal acts,<sup>43</sup> although a lesser standard, that of "overall control," has been preferred in war crimes courts.<sup>44</sup> The Ottoman government was certainly in "overall control" of Anatolia in 1915 and of those who carried out the atrocities there. That control was effective enough in most (if not all) of the areas where the killings took place to shepherd streams of Turkish refugees from the Balkans flowing the other way, into Anatolia, and some of these émigrés were to occupy the houses forcibly vacated by the Armenians.

Under the draft laws of state responsibility, the liability of the state for

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41. BALKIAN, *supra* note 37, at 274; *see also* HENRY MORGENTHAU, AMBASSADOR MORGENTHAU'S STORY 333-38, 342 (Doubleday 1918).

42. *The Genocide Case*, *supra* note 23, at ¶¶ 142-79.

43. *Id.* at ¶¶ 399-407.

44. *Prosecutor v Tadic*, Case No. IT-94-1-A, Appeal Judgment, ¶ 131 (July 15, 1999). The court says,

[i]n order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

genocide may be engaged:

- (i) if the orders are given and implemented by *de jure* organs of the state, i.e., by ministers or government officials, police or regular army officers;
- (ii) if the killings are done by *de facto* organs of the state—namely irregular bodies (such as the “Special Organisation”), death squads and paramilitaries connected with the state agencies; or
- (iii) by persons or bodies acting under orders of state organs in a particular set of circumstances.<sup>45</sup>

Applying these tests, the ICJ held—on the evidence before it, which many allege was incomplete—that although there had been genocide in Srebrenica committed by the army of Republica Serpska, neither that government nor its army were effectively controlled by Serbia, so its international responsibility was not engaged. As we shall see, there is no doubt that deportation orders which were known to inflict conditions of life calculated to bring about the destruction of a substantial part of the Armenian people were given by *de jure* organs of the state such as ministers and government officials, and that the massacres involved both *de jure* and *de facto* agents of the Ottoman Empire. Moreover, the state was well aware of historical animosities prone to break out in mass murder of the Armenian minorities (i.e., in 1894–96 and 1909) and had deliberately stirred up that animosity through its Turkification programme. The officials who ordered the deportations must have known of the likely consequences, yet took no steps to avoid them or to put safeguards in place. In such circumstances, where killings are being carried out by criminal gangs with the knowledge and acquiescence of authorities who could (but do not) act to prevent them, “command responsibility” principles make the authorities themselves responsible for murders by criminal gangs which they foresee yet fail to prevent or subsequently to punish.<sup>46</sup>

#### CRIMES AGAINST HUMANITY

Before moving on to consider whether the indisputable facts of the Armenian deportations and massacres can be properly described as genocide, it should be understood that, on any view, they constitute a crime against humanity. This appellation was applied by the allies in 1915 more as rhetoric than as a legal description, because international law had not, at the time, developed a criminal jurisdiction. Today, this category of crime is authoritatively defined by Article VII of the Statute of the International

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45. See THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY (Shabtai Rosenne ed. 1991).

46. Application of Yamashita, 327 U.S. 1, 15 (1947).

Criminal Court.<sup>47</sup> Article VII covers deportation of, or forcible transfer of, population (i.e., “forced displacement by expulsion or other coercive acts from the area in which they are lawfully present”) and persecution (the “intentional and severe deprivation of fundamental rights by reason of the identity of the group” when such group or collectivity is identifiable “on racial, national, ethnic, cultural (or) religious grounds . . .”). The deportation or persecution amounts to a crime against humanity when the perpetrator is aware that it is part of a “widespread or systematic attack directed against any civilian population.” It is beyond reasonable doubt that the deportations of the Armenian population of Turkey’s western provinces, under conditions known to be life threatening, amounted to what would now be accurately described as a crime against humanity. Does it therefore matter if it also answers to the description of genocide? There is a considerable overlap between the two international crimes. All genocides are crimes against humanity, but not all crimes against humanity amount to genocide. The distinction rests upon whether the perpetrator has the necessary racist or discriminatory intention to destroy the group in whole or in part. It is this element which makes genocide so heinous, and attaches duties and penalties in international law that are more severe and better established than those attaching to crimes against humanity. To this extent, the issue addressed in this opinion retains an importance that is not just symbolic.

## CAN THE ARMENIAN MASSACRES BE DESCRIBED AS GENOCIDE?

### THE RETROACTIVE ISSUE

I do not consider the Genocide Convention to be retroactive, and I do not accept the view of those legal scholars who believe the Genocide Convention can be applied retroactively because it was declaratory of pre-existing international law.<sup>48</sup> The Vienna Convention on the Law of Treaties<sup>49</sup> sets up a presumption that treaties are not retroactive. This presumption is all the stronger in relation to a criminal offence, and I find nothing to rebut this presumption in the language of the Genocide Convention. Plainly, the *term* “genocide” may be applied to massacres before the passage of the Convention. Those who drafted and debated it spoke repeatedly of other historical events as “genocide” even though they

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47. Rome Statute of the International Criminal Court, U.N. Diplomatic Conf. of Plenipotentiaries on the Establishment of an ICC, art. VII, U.N. Doc. A/CONF.183/9 (1998).

48. See, e.g., Alfred de Zayas, *Memoranda on the Genocide Against the Armenians 1915–1923 and the Application of the 1948 Genocide Convention*, EUR. ARMENIAN FED’N FOR JUST. AND DEMOCRACY (on file with author), available at [http://cafjd.eu/IMG/pdf/dezayas\\_report.pdf](http://cafjd.eu/IMG/pdf/dezayas_report.pdf).

49. Vienna Convention on the Law of Treaties art. 28, May 23, 1969, 1155 U.N.T.S. 331.

had occurred centuries before. Early examples include the decimation of the Spartans and the destruction of the citizens of Carthage. The Preamble statement, which recognises that “at all periods of history genocide has inflicted great losses on humanity,” is sufficient warrant for applying the label to pre-Convention events that satisfy its definition.

#### THE BUILD-UP TO GENOCIDE

The Ottoman Empire included about two million Armenians, mainly living in the eastern provinces of the Empire. They were tolerated, without sharing military or political power, until the Empire became “the sick man of Europe” towards the end of the nineteenth century, during the repressive rule of Sultan Abdul Hamid II (condemned by Prime Minister Gladstone as “the great assassin” for his role in the massacres of the Armenians in the 1890s). Abdul Hamid II bears some responsibility for whipping up pan-Islamic passions (he described Armenians as “a degenerate community”).<sup>50</sup> The first mass murders took place in 1894–96, committed by Ottoman forces assisted by local Kurds. Tens of thousands of Armenians (some estimates put the casualties in six figures) were killed in this period (1,200 were burnt alive in Urfa cathedral). Their Christian churches were pillaged and many were forcibly converted to Islam. At the same time, several Armenian revolutionary movements emerged, most notably the Dashnak Party, advocating a separate state and forcible resistance to achieve it. However, there is ample evidence that the 1894–96 violence was motivated by racial and religious hatreds encouraged by the Ottoman government, exacerbated by pockets of armed Armenian resistance. This was certainly the view of the British Ambassador and his vice-consuls at the time, who protested to the Ottoman authorities and left the British government in no doubt about their culpability.<sup>51</sup> There was another massacre of about 25,000 Armenians in Adana in 1909, committed mainly by army units: this time it was denounced by the then government, but few were punished. These massacres emphasised the depths of the racial and religious hatreds that existed in the country, and that any government had a duty not to unleash them again.

Meanwhile, the “Young Turk” movement was growing in power through the CUP. At first politically progressive, the CUP nonetheless developed the kind of race supremacy theories that are particularly associated with a build-up to genocide. For example, the CUP adopted the racist idea that Turanian nationality was a badge of superiority, to the

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50. See Michael Oren, *The Mass Murder They Still Deny*, 53 THE N.Y. REV. OF BOOKS 8 (2007) (reviewing AKÇAM, *supra* note 9).

51. BALAKIAN, *supra* note 37, at 55–61 (describing how British missionaries identified anti-Christian motivations in the massacres).



exclusion of non-Muslims and especially Christians; public subhumanising of minority groups like Armenians (“tubercular microbes”); extreme nationalist fervour, demanding a “warrior nation” to prevent “the decay of the Turkish race”; a “Turkification” programme for language and culture; the banning of Armenian organisations. With the *coup d'état* of January 23, 1913, the Young Turks gained a share in government. At the beginning of 1914, their three leaders assumed political control. They set up the “Special Organisation” attached to Talaat’s Interior Ministry, which targeted members of minority races whose loyalty was suspect. The British Ambassador noted at this time the emergence of a violent “Turkey for the Turks” campaign: “For [the Young Turks] ‘Ottoman’ evidently means ‘Turk’ and their present policy of ‘Ottomanisation’ is one of pounding the non-Turkish elements in a Turkish mortar.”<sup>52</sup> The most powerful Young Turk politicians—Talaat, Cemal, and Enver Pashas—occupied high offices and formulated policy through the Central Committee of the CUP. Their strident nationalism took Turkey into the First World War on the side of Germany. There can be no doubt of the “Turkification” campaign or of the race hate it stirred against Armenians. Government decrees deprived Armenians of their property, deeming it abandoned, and directed banks to transfer Armenian assets to “liquidation commissions” established by the state.<sup>53</sup> Telegram directives from Enver Pasha ordered that villages, rivers, and towns that had been taken over by Muslims should be renamed if they bore Christian or Armenian names.<sup>54</sup>

There is considerable evidence from 1914 onward that the CUP Congress developed a “Turkification” rhetoric that paved the way for genocide. Taner Akçam, for example, argues that after Enver’s appointment as Minister of Defence in January 1914, a series of secret meetings were held to discuss the ethnic cleansing of Anatolia. In November, war fever resulted in a declaration of *jihād* (holy war) against Christians (although the Germans and Austro-Hungarians, were exempted as the government’s allies).<sup>55</sup> Talaat and Cemal threatened reprisals against Armenians if Muslims were killed by Allied naval bombardment. In February 1915, Armenian soldiers in the Ottoman army were disarmed and transferred to

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52. BEN KIERNAN, *BLOOD AND SOIL—A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR* 405 (2007).

53. On Jan. 1, 1916, the Minister of Commerce directed banks to transfer Armenian assets—land, bank deposits, etc.—to state commissions. These confiscation decrees were acts of the Ottoman government. See *Deirmenjian v. Deutsche Bank*, 526 F. Supp. 2d 1068, 1072 (C.D. Cal. 2007). These decrees are inconsistent with the Turkish claims that the deportations were merely temporary.

54. See Taner Akçam, *Demographic Policy and Ethnic Cleansing* (March 4, 2008) (on file with author).

55. This *jihād* which Morgenthau claimed began the passions that led to the massacres, was declared by the chief religious authority, a recent CUP appointee. See BALAKIAN, *supra* note 37, at 169.

labour battalions.<sup>56</sup> Plans were made for re-settlement of areas “cleansed” of Armenians, and the “Special Organisation” was geared up to carry out work which could not be publicly linked to the government.<sup>57</sup>

#### THE DEPORTATIONS AND MASSACRES

The facts of the massacres are not in doubt. Whether, as some historians claim, an extermination programme was agreed upon at a secret CUP conference in January 1915 does not matter: there must have been political planning behind the government’s deportation orders, which commenced in April 1915. On April 24, the night before the Allied landings at Gallipoli, several hundred Armenian intellectuals were arrested in Constantinople and sent for deportation, and some were lynched. In May, Talaat ordered the deportations from Anatolia, and this was followed by deportations of other Armenian groups throughout Eastern Turkey. A few local officials refused to carry out the orders—an indication that some government agents realised their deadly consequences.<sup>58</sup> The homes and property of Armenians were pillaged or seized. Little or no food was made available to those ordered to march through the desert or forced aboard packed trains, and tens of thousands were to die from starvation and disease. There was no security, and columns of people were set upon, their members robbed, raped, abducted, or killed by Kurdish brigands, by paramilitaries, and by police under the control of party officials or local governors. There were no safe havens already prepared to receive them. The Harbord Report, a credible United States’ fact-finding mission in 1919, concluded that “[t]he women, old men and children were after a few days, deported to what Talaat Pasha called ‘agricultural colonies,’ from the high cool breezeswept plateau of Armenia to the malarial flats of the Euphrates and the burning sands of Syria and Arabia.”<sup>59</sup> Hundreds of thousands were killed on these marches because they were Armenians and because they had been deliberately ordered to suffer “conditions of life calculated to bring about their destruction in whole or in part”—a very substantial part on any calculation. Talaat’s orders, it is reliably reported, were to bring the Armenian problem to “a final end, in a comprehensive and absolute way.”<sup>60</sup> Many thousands of women were abducted or acquiesced in conversion to Islam in order to save

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56. DONALD BLOXHAM, *THE GREAT GAME OF GENOCIDE* 70–71 (2005).

57. See AKÇAM, *supra* note 9, at 182.

58. These are credible reports that a few officials who refused to comply were punished.

59. MAJOR GENERAL JAMES HARBORD, REPORT OF THE AMERICAN MILITARY MISSION TO ARMENIA, S. DOC. NO. 66–2, at 7 (2d Sess. 1920).

60. See Oren, *supra* note 50. Morgenthau cites telegrams from Talaat ordering orphanages to reject Armenian children whose parents died on the marches because “the government . . . considers the survival of these children as detrimental.” See also Michael J. Kelly, *Genocide—The Power of a Label*, 40 Case W. Res. J. Int’l L., 151, 151–52 (2008).

their lives or the lives of their children.<sup>61</sup> Forcible religious conversion is another indicium of genocide.

The realities of the massacres demonstrate the extent to which racial hatred was whipped up by the ideology of “Turkification.” There are reports of whole communities being liquidated by means including mass burnings, drownings, and asphyxiation at desert camps. Many Armenian men had been conscripted, and in February 1915, they were taken out of Ottoman army units and consigned to labour camps. Old men, children, and women were the vulnerable victims of the marches through the desert. Some young women and children were able to survive by offering themselves as brides or chattels whilst others were spared by converting to Islam. There is evidence that some children were forcibly removed and placed with Muslim families—a breach of Article II(e) of the Genocide Convention. Out of an Armenian population of two million, between 800,000 and one million were directly or indirectly killed from 1915–16.<sup>62</sup> The latest factual summary, published in 2009 by British historian Cathie Carmichael, is as follows:

Deportations from different locations, initiated by government telegrams involved the rounding up and killing of some Armenians on the spot. Many were also subjected to the wrath of their neighbours and put on the open road with no protection. Although they were nominally “deported”, most of the Armenians died of exposure, disease, starvation or violent attack, either from gendarmes or from bands of Kurds in the mountains. In the Black Sea port of Trebizond, the local community was taken out to sea and drowned. Many women were violated and murdered in front of their families. At least two-thirds of the ‘deportees’ did not survive this treatment; those few who did eked out a precarious existence in refugee camps in Syria or in Russian controlled areas . . . . Within a few weeks, an entire community had effectively been destroyed forever. About one million Armenians died, approximately half of the prewar population, but their community was never reconstructed within Anatolia itself . . . . The deportations and massacres had effectively used violence to solve what European diplomats had been calling ‘the Armenian question’ for decades. As Donald Bloxham has argued the massacres ‘enabled the Committee of Union and Progress to secure Anatolia as an ethnically “purified” core area for the development for the Turkish people.’<sup>63</sup>

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61. BALAKIAN, *supra* note 37, at 180.

62. MARK LEVENE, *GENOCIDE IN THE AGE OF THE NATION STATE: THE MEANING OF GENOCIDE* 73 (I.B.Tauris 2008) (2005).

63. CATHIE CARMICHAEL, *GENOCIDE BEFORE THE HOLOCAUST 18–9* (2009).

## JUSTIFICATION OR EXCUSE?

The CUP defended its deportation policy at the time (as the government of Turkey does today) as necessary for the country's self-defence: it was justified in removing "fifth columnists" at the moment of the Dardanelles invasion at Gallipoli and threats on its Eastern border, where the Armenian population posed a real risk of linking up with a Russian invasion—and that risk was demonstrated by an uprising of Armenians in Van on April 20th. However, notwithstanding the existence of pockets of armed Armenian resistance, this was hardly a justification for ordering the deportation of an entire population. As one recent study concludes:

Overall, there is little evidence of a general Armenian threat in the eastern region . . . . Armenian religious and political leaders in 1914–15 were actually preaching loyalty and placidity as well as encouraging young men to fulfil their Ottoman army obligations. Moreover, the vast majority of Armenians remained unpoliticised. What Armenian resistance there was appears to have been localised, desperate and reactive in the face of liquidation.<sup>64</sup>

One moderate historian sympathetic to the Turks and an advocate for "avoiding the g-word" observed in 2009 that:

Relentlessly monitored, intermittently terrorised, the vast majority of Armenians, even in the politically literate towns, were in no state to launch a rebellion. For most poor farmers, deportation was a death sentence, and there is no doubt that deportation orders came, for village after village, from central government, implemented by local officials who knew that the hastily assembled convoys would be subjected to pillage, rape and massacre from local paramilitaries, robbers and police. Many killings were motivated by opportunistic greed or lust, but they would not have taken place without a rooted ethnic hatred towards Armenians, or the religious hatred encapsulated in the cry of "God is Great" which accompanied many of the killings.<sup>65</sup>

Nonetheless, it would be wrong to discount the perception of the Turkish leaders that the Armenian population was a threat—a fifth column that could ally itself with Russia in the event of an invasion. When the Tsarist forces advanced into Eastern Anatolia later in 1915, its Armenian brigade exacted brutal revenge on local Kurds and Turks, and at the war's end, after the tide had turned, there is ample evidence of Armenian atrocities. It is reasonable to criticise Armenian historians like Vahakn Dadrian for glossing over these unpalatable facts,<sup>66</sup> but they do not, viewed in

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64. *Id.*

65. CHRISTOPHE DE BELLAIGUE, *REBEL LAND* 79 (2009).

66. *Id.* at 106. (noting the oddity that Dadrian should skip the subject in his exhaustive

perspective, alter the characterisation of Turkish actions as genocide. They do not excuse or extenuate, much less justify, a policy that aimed to rid the nation of a racial minority. The crime was introduced precisely to deter the formation of a policy to persecute minorities in times of threat and national emergency, when minorities which have been discriminated against are for that reason likely to side with an invader, perceived as their liberator. This danger may justify their temporary removal from border areas, or the internment of their political leaders, but it cannot begin to excuse what the Harbord Report to the United States' government in 1919 described as "this wholesale attempt on the race."<sup>67</sup>

#### THE EVIDENCE

There are hundreds of contemporary accounts of these appalling events. Many were by eyewitnesses: journalists, notably from *The New York Times*, German bankers, missionaries (including German Christian missionaries), aid organisers and consular officials (especially United States' vice-consuls, reporting as anxious neutrals and German officials reporting as anxious allies). Some of the most telling accounts, which attest to the genocidal intentions of Talaat and other high political figures, were written in dispatches or subsequent books by Western diplomats. The American Ambassador Henry Morgenthau (whose cables alerted Washington to the "race extinction" by "terrible tortures, expulsions, and massacres") on several occasions interceded with Talaat, only to be told to "let us do with these Christians as we please." He had no doubt that what he described as "this attempt to exterminate a race" was not a response to fanatical popular demands, but was a policy "directed from Constantinople."<sup>68</sup>

German diplomats had no motive to lie when reporting on the behaviour of an ally, and the German Ambassador to Istanbul, Count Wolff-Metternich, reported to Berlin that "the CUP demands the extirpation of the last remnants of Armenians . . . . Turkification means licence to expel, to kill or destroy everything that is not Turkish, and to violently take possession of the goods of others."<sup>69</sup> The German Vice-Consul in Erzurum reported that the cruelty of CUP measures would mean "the certain death" of the Armenian deportees. He said that the CUP "are bluntly admitting that the purpose of their actions is the total obliteration of the Armenians. As an authoritative person word-for-word declared, 'we will have in Turkey no more Armenians after the war.'<sup>70</sup> United States' Vice-Consul Lesley

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*History of the Armenian Genocide*).

67. BALAKIAN, *supra* note 37, at 357.

68. POWER, *supra* note 6, at 6–8.

69. KIERNAN, *supra* note 52, at 412.

70. BALAKIAN, *supra* note 37, at 186 (citing German archives at Auswärtiges Amt (West Germany's Foreign Office Archives) K170, no. (4674), folio 63).

Davis, an experienced lawyer, had no doubt in his cables in 1915 and his subsequent autobiography, *The Slaughterhouse Province*, that the government was bent on destroying the Armenian race along with repositories of its culture.<sup>71</sup> Jesse K. Jackson, the hardened United States' diplomat who served as consul in Aleppo, 1915–16, described in his despatches the local towns and districts “where Armenians have already been practically exterminated” and called the Turkish government's confiscation scheme “a gigantic plundering scheme as well as a final blow to extinguish the [Armenian] race.”<sup>72</sup>

There are many corroborative statements from Christian missionaries and aid workers, not to mention the books and other writings and correspondence of survivors. Common to most of these first person accounts is a depiction of a race hate element in the killings, the beatings, and the rapes. Sometimes the race hatred emanated from officials, sometimes from attackers who were connected with the army or the “Special Organisation,” and from the marauding Kurds. There can be no doubt, from all these sources, that there was a systematic pattern of racial attacks on vulnerable and starving columns of displaced Armenian men, women, and children as they trudged through the Eastern Provinces towards Syria. This result could and should have been foreseen. In any event, it took place over a number of months without any official intervention to stop the killings or to protect the deportees or to punish the perpetrators.

Punishment was attempted after the Young Turks lost power in October 1918. The current Sultan described the CUP persecution of the Armenians as “[c]rimes against the laws of humanity and state” and a military tribunal indicted them specifically for the crimes of “deportation and massacre.” It found many of them guilty. Although Talaat, Cemal, and Enver Pashas had escaped to Germany by this time, they were convicted *in absentia*. The new government may have established this court in the hope of pleasing the victor nations, but there is no suggestion that its judges were not independent or that the procedures they employed were unusual or unfair by local standards. Their conclusions on the evidence were chilling, describing in one case how the CUP secretary and a local governor organised “the massacre and annihilation of the Armenians” by employing criminals released from prison to act as their guards, but with directions to kill the men and to drown the children. Tellingly, the court concluded that the CUP measures had the characteristics of a “final solution.” Statements attributed to Talaat and other CUP leaders in despatches by foreign diplomats suggests that this sort of language was often used by political leaders who must have realised by mid-1915 that their deportations would become death

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71. LESLIE DAVIS, *THE SLAUGHTERHOUSE PROVINCE: AN AMERICAN DIPLOMAT'S REPORT ON THE ARMENIAN GENOCIDE 1915–1917* (Susan K. Blair ed. 1989).

72. BALAKIAN, *supra* note 37, at 188, 257.

marches.

Any objective analyst must be struck by the number and consistency of these reports: they plainly describe incidents of genocide. The Turkish government and pro-Turkish historians have sought to undermine some of these accounts. For example, the *Blue Book*, which has a preface by Lord James Bryce and is edited by Arnold J. Toynbee, is called into question by Bryce's record as a propagandist,<sup>73</sup> who has been accused of exaggerating or inventing German atrocities in Belgium. I have, therefore, placed no reliance upon it as a source.<sup>74</sup> But the sheer weight of evidence and the consistency of witness accounts, including those by respectable people who could have no axe to grind or reason to fabricate (the German missionaries and diplomats, for example, whose country was in alliance with Turkey and the neutral US vice-consuls like Davis and Jackson) puts beyond doubt the suggestion that there has been some anti-Turkish conspiracy to suppress the truth. As for all the Armenian accounts, whilst some may be exaggerated, they do collectively have a ring of truth: as one historian comments, "[f]or the Armenian diaspora, flung around the world, speaking different languages, it would require a stupendous concert of deceit to fabricate the descriptions of massacres, and to dream up reminiscences. Such a conspiracy would be without precedent."<sup>75</sup>

The trials and verdicts in 1919 cannot be shrugged aside as having been staged to please the allies: these were genuine proceedings carried out according to Turkish law, which, although deficient by our standards (particularly in permitting trials *in absentia*), were nonetheless legitimate

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73. See PHILIP KNIGHTLY, *THE FIRST CASUALTY* 83–84 (1975); David Miller, *The Treatment of Armenians in the Ottoman Empire: History of the Blue Book*, 150(4) ROYAL UNITED SERVICES INSTITUTE JOURNAL 36, (2005); JAMES BRYCE, *THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE* (Taderon Press, 2000) (1916). Knightly notes that the plethora of invented atrocity stories about the Germans led to "an understandable reluctance to believe those few atrocity stories that were true. Hari Barbly of *Le Journal*, Paris and Edmund Candler of *The Times* both wrote horrifying stories about the atrocities the Turks were committing against the Armenians, but their detailed and damning accusations were lost in the welter of false and exaggerated propaganda of the period (*op cit* pages 104–05).

74. Controversy over the "Blue Book" has never been satisfactorily settled. Bryce was formerly

Professor of Civil Law at Oxford and Ambassador to the US and recent research has to some extent rehabilitated his reputation by proving some of his 'propaganda' claims true, to the extent that it is now clear that the German army ruthlessly executed 6,500 innocent French and Belgium civilians between August and November 1914. See JOHN HORNE & ALAN KRAMER, *GERMAN ATROCITIES 1914: A HISTORY OF DENIAL* (2001). Toynbee, a truly great historian, compiled and edited the "Blue Book" and was later in no doubt that its contents proved "an attempt to exterminate the Armenians in 1915. In this case hundreds of thousands of people were done to death and thousands turned into robbers and murderers by the administrative action of a few dozen criminals in control of the Ottoman Empire." However, he commented (ironically), that the "Blue Book" "was distributed as war propaganda!" See ARNOLD J. TOYNBEE, *THE WESTERN QUESTION IN GREECE AND TURKEY* 50, 265–66 (1922).

75. DE BELLAIGUE, *supra* note 65, at 104.

exercises which bought former leaders and officials to account under domestic law at a time when international law afforded no jurisdiction to punish officials for mass murder of their own people. The fact-finding mission undertaken by a team led by General Harbord in September 1919 is also credible. Harbord concluded that the massacres and deportations in the countryside were carried out pursuant to a “definite system”—in the areas he studied, soldiers would go from town to town, summoning all Armenian men, aged 15–45, to government offices and then marching them off to execution. The women, children, and old men were then set off at bayonet point on long marches, where “starvation, typhus, and dysentery,” as well as armed attacks, took an incalculable toll.<sup>76</sup>

I have examined some of the writings of four historians relied upon by the FCO, and I doubt whether they really understand the legal meaning of genocide. They imagine, as the FCO imagines, that genocide requires evidence of a specific government decision to exterminate the Armenian race. Because no government document has been found that gives such an order or recites such a policy, they doubt whether genocide has been committed. They do not understand that genocide, as defined by the Convention, may be committed by private individuals as well as by officials, if these officials are acting with official encouragement or acquiescence. And they do not seem to realise that its definition includes the deliberate imposition of “conditions of life” likely to lead to death and destruction. It is this definition of genocide, in Article II(c) of the Genocide Convention, which precisely describes the circumstances of the 1915 deportations.

These historians have sought to explain the circumstances under which the deportations came to be ordered. They highlight, quite convincingly, the tensions arising from the collapse of the Ottoman Empire and the impending allied landing in the Dardanelles. They emphasise the provocation caused by armed Armenian resistance to Turkish rule, which in 1915 led to a serious uprising in the province of Van. They point out that a number of Armenians defected to fight with the Russian forces against the Turks after their incursions in July, albeit after the deportations had started. They claim that most massacres were the work of marauding Kurdish gangs, not obviously connected with central government, and that many deaths came from starvation and disease. All this may be true, but it serves only to explain why the genocide happened and to identify the Kurds as one of the perpetrator groups. It cannot serve to excuse an inexcusable crime, committed by CUP leaders and local officials who should have known—and obviously did know—that the conditions of life they were inflicting

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76. HARBORD, *supra* note 59.



upon Armenians *because* they were Armenians would inevitably result in the death of a substantial proportion of that people.

In short, I consider that the evidence is compelling that the Ottoman State is responsible, on the legal principles discussed above, for what would now be described as genocide. Those running that state in 1915 must have known what was apparent to unbiased foreign observers, and their racist intention may be inferred, not just from their reported statements, but from their knowledge of racial and religious pogroms in 1894–96 and 1909; their deliberate fanning of racial superiority theories in the Turkification programme; the deportation orders and their foresight of the consequences; their failure to protect the deportees or to punish their attackers, some of whom were state agents. They instigated, or at very least acquiesced in, the killing of a significant part of the Armenian race—probably about half of those who were alive in Eastern Turkey at the beginning of 1915. Put another way—perhaps the way in which a fair minded and informed FCO should have advised ministers would be to answer the question the following way: if these same events occurred today, in a country with a history similar to Turkey’s in 1915, there can be no doubt that prosecutions for genocide would be warranted and indeed required by the Genocide Convention.

## **FOREIGN & COMMONWEALTH OFFICE POLICY:**

### **GENOCIDE DENIAL**

#### **THE FREEDOM OF INFORMATION REQUESTS**

In order fully to understand the government’s reasoning for refusing to acknowledge the Armenian persecution as genocide and the evidence to which its parliamentary answers referred, Freedom of Information Act (FOIA) requests were made to obtain the relevant documents and policy memoranda from the FCO. The first request was rejected by the FCO, although it admitted that it “holds information relating to these matters, dating back over many years.”<sup>77</sup> However, it estimated that it would take over three and a half days to locate this information and that the exercise would cost more than the cap of £600 allowed by the Act. Given the importance of the contemporary issue—as a result of laws against Armenian genocide denial passed in many European countries in the last few years—it is extraordinary that the FCO has not catalogued or collated the requested material in any rational way so as to allow its retrieval within

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77. Letter from Iain Willis, Foreign and Commonwealth Office, to Bernard Andonian, (Aug. 5, 2008).

three and a half days. Furthermore, this initial response was a breach of Section 16 of the Act, which places a duty on the FCO to assist with requests for information and to comply with the Code of Practice issued under Section 45 of the Act. Ms. Kate Annand drafted a follow-up letter which demanded that the FCO properly comply with Sections 16 and 45 of the FOIA,<sup>78</sup> and on October 16, 2008, this bore some fruit. The FCO released to my instructing solicitors a substantial number of documents relating to the policy as discussed and noted behind the scenes in Whitehall over the past ten years.

This documentation came in answer to the request, “to be provided with a copy of the evidence that this current Labour government has judged not to be sufficiently unequivocal to persuade it that these events should be categorised as genocide.” However, nothing in this documentation could be classed as evidence, let alone any “judgment” of the kind implied in the Lord Malloch-Brown answer. Indeed, the FCO conceded that the Labour government since its election in 1997 simply continued the current policy of previous governments “without a review from first principles.”<sup>79</sup> This is an important concession because it shows that the Labour party has never considered the “first principles” of the Genocide Convention as applied to the established facts of the 1915–16 massacres. Moreover, the FCO admits that “there is no collection of documents, publications and reports by historians, held on the relevant files, or any evidence that a series of documents were submitted to ministers for consideration.”<sup>80</sup> What it disclosed instead was piecemeal advice provided to ministers since 1997, mainly by the Eastern Department of the FCO, which revealed no judgment on the issue and no consideration of anything that could be termed “evidence.”

Parts of these documents were redacted (i.e., blacked out) by reference to Section 27 of the FOIA, which provides that information is exempt if it would “be likely to prejudice relations between the UK and other countries.” The FCO claims that “the disclosure of some of the information we hold related to your request could potentially damage the bilateral relationship between the UK and other countries, if released.” From reading between and beneath the blacked-out lines, most of the redacted sections relate to comments about the attitude of the Turkish government. They doubtless provide a further commentary on the government’s real concern, plain enough from the released documentation, that acknowledging a genocide in Armenia would damage relationships with Turkey without any

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78. Letter from Bernard Andonian, to Iain Willis, Foreign and Commonwealth Office, (Sept. 11, 2008) (on file with author).

79. Letter from Lynne Rocks, Foreign and Commonwealth Office, to Bernard Andonian, (Oct. 16, 2008) (on file with author).

80. *Id.*

compensating advantage for British economic or diplomatic interests. The FCO refused to disclose, on the usual ground of cost, any written documents for an earlier period (my solicitors had asked for similar documentation covering the Major and part of the Thatcher administration). They were subsequently provided, after a further request, with some policy submissions to ministers made since 1997. This last set of documentation, again subject to redactions pursuant to Section 27, was not supplied by the FCO until March 13, 2009.<sup>81</sup> No doubt by error, it included some memos from 1995 in which the FCO discouraged the then minister (Mr. Hogg) from attending an all-party memorial service on the 80th anniversary of the massacres.<sup>82</sup> Subsequently, Labour government ministers were similarly discouraged.

I am still not satisfied that the FCO has fully or properly complied with the scaled-down FOIA application. I note, for example, that a memo in 2001 claims that “research analysts” looked at views in the academic community, yet we have not been provided with any such document. In the debate on July 14, 2005, Lord Triesman on behalf of the government referred to “the judgment required under the United Nations Convention. . . . “Such a judgment requires a demonstration “. . . that a state had intent. That is the element that the lawyers have concluded is not shown in this case.”<sup>83</sup> I have seen no reference in any of the material supplied to the effect that any lawyers have ever “concluded” or advised the government on this issue or have ever been instructed to advise. If they had, it is hardly conceivable that no reference would ever be made to this advice in the FCO documents. However, despite the gaps and the redactions, I now have sufficient information to answer the questions that relate to HMG policy, the reasons for it, and whether those reasons are consistent with international law.

#### POLICY DOCUMENTS – TWO BASIC ERRORS

The documentation relating to the policy of the Labour government since 1997 begins with the Eastern Department formulation on March 8, 1999 in response to Lord Avebury, who had provided a bibliography of 400 scholarly works which maintain that the Armenian massacres amount to genocide.<sup>84</sup> The Department admits that it has neither the resources nor the inclination to study these references and that any conclusion from them (e.g., that the massacres unequivocally amounted to genocide) would not “have an impact on present policy.” The memorandum claims that “the

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81. Letter from Lynne Rocks, Russia, S. Caucasus and Cent. Asia Directorate, Foreign and Commonwealth Office, to Bernard Andonian, (Mar. 13, 2009) (on file with author).

82. Memorandum to Mr. Hogg (Mar. 12, 1995) (on file with author).

83. 673 *PARL. DEB.*, H.L. (5th ser.) (2005) 1212.

84. Memorandum from the Foreign and Commonwealth Office to Minister Joyce Quin (Mar. 1999) (on file with author).

argument is not about what happened or what to call it”—although that is precisely what the argument was about (i.e., whether to call it “genocide”). The Eastern Department claims that it is not the work of HMG to decide what constitutes genocide: “investigating, analysing and interpreting history is a matter for historians.” At the outset, this basic error can be detected, namely HMG’s reliance upon historians to decide a legal issue. Deciding what amounts to genocide is a matter for judgment according to international law and not at all a matter for historians. Historians establish facts; lawyers must judge whether those facts amount to a breach of international law.

It further appears from this memorandum that the Eastern Department is simply not interested, and does not want HMG to be interested, in the question of whether the massacres amount to genocide. The memorandum notes that 600,000 Armenians were killed and “hundreds of thousands more died in flight” (in fact, they were killed in the course of being deported). It further asserts that “some historians say there is evidence that the deaths were part of a deliberate state policy, or that the Ottoman government must have given at least tacit approval to the killings. But we know of no documentary evidence to prove this.”<sup>85</sup> Here, we have another canard that appears routinely and repeatedly in Eastern Department memoranda: the notion that there must be some *written* document that records a government or leadership decision to exterminate the Armenian people. No such document, of course, exists in relation to the Nazi Holocaust, or (as the International Tribunal in Rwanda has pointed out) in relation to the Rwandan Genocide.<sup>86</sup> It is obviously wrong to suggest that there must be documentary evidence of a policy decision to commit genocide before it is possible to make a finding of genocide.

The memorandum goes on, rather cynically, to consider the clout of the campaign to recognise the genocide and notes that “the campaign does not appear at this stage to have enough support or direction to seriously embarrass HMG.”<sup>87</sup> With this cynical message to ministers, the recommendation is to follow the longstanding “line” that:

HMG has long recognised the massacres of 1915, and they were condemned by parliament in the strongest terms, but a) there is no evidence to show the Ottoman government took a specific decision to eliminate the Armenians under their control at that time and b) it

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85. Memorandum from the Foreign and Commonwealth Office, E. Dep’t, to Minister Joyce Quin and others, (Apr. 12, 1999) (on file with author) [*hereinafter* April 12 Memo].

86. Prosecutor v. Bagosora et al., Case No. ICTR 98-41-T, Judgment and Sentence, ¶ 2088 (Dec. 18, 2008) “With respect to the *actus reus*, the agreement can be proven by establishing the existence of planning meetings for the genocide, but it can also be inferred, based on circumstantial evidence. The concerted or coordinated action of a group of individuals can constitute evidence of an agreement.” *Id.*

87. April 12 Memo, *supra* note 85.

is for historians, not governments, to interpret the past.<sup>88</sup>

This formulation embodies the two basic errors. First, the failure to recognise that there is no requirement for evidence of a “specific government decision” or indeed any documented decision to eliminate all Armenians under government control as an element of the crime of genocide. Second, the failure to understand that it is a matter for legal judgment, and not a matter for historians, as to whether past events amount to a crime of genocide. The latter error was compounded by the Eastern Department in a draft of the letter responding to Lord Avebury which the minister (Joyce Quin) was asked to endorse as follows: “I continue to believe that it is not the business of the British or any government to pronounce on matters more properly addressed by historians. We must leave it to the experts.”<sup>89</sup>

Historians, of course, as will become all too clear, are not experts on genocide. This was the Eastern Department draft, which the minister did not send. She did, however, write to Lord Avebury on February 9, 1999, stating, “[I]t is for historians to interpret the past and society learns and benefits from their assessment of events. Generally speaking, I do not think it is the job of today’s government to review past events with a view to pronouncing on them according to today’s values and attitudes.”<sup>90</sup> That the values and attitudes in respect of genocide are timeless did not seem to occur to the minister.

#### THE 1999 HOUSE OF LORDS DEBATE

The matter came to a head a few months later with a full-scale debate in the House of Lords initiated by Baroness Cox. A note from the Eastern Department put the matter exactly in perspective. It said bluntly:

HMG is open to criticism in terms of the ethical dimension. But given the importance, of our relations (political, strategic and commercial) with Turkey, and that recognising the genocide would provide no practical benefit to the UK or the few survivors of the killings still alive today, nor would it help a rapprochement between Armenia and Turkey, the current line is the only feasible option.<sup>91</sup>

This reveals the cynical truth behind the position urged by the FCO on Labour government ministers over the next decade, and almost invariably accepted by them without demur. The FCO urged that the position they

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88. *Id.*

89. Draft Letter for Joyce Quin to reply to Lord Avebury (undated) (on file with author).

90. Letter from Joyce Quin, Minister of State, Foreign and Commonwealth Office, to Lord Avebury, (Feb. 9, 1999) (on file with author).

91. April 12 Memo, *supra* note 85.

were taking was open to ethical question, but that the economic, strategic and political importance of maintaining good relations with Turkey meant that the ethical dimension should be ignored. There was no countervailing profit in making any answer that might displease them. In other words, this particular genocide could not be recognised, not because it had not taken place, but because it was politically and commercially inconvenient to do so.

In this note, dated April 12, 1999, the FCO repeated the familiar, and doubly mistaken, mantra that “we are aware of no evidence of intent on the part of the Ottoman administration of the day to destroy the Armenians (a key element in the crime of genocide) and that it is for historians, not governments, to determine what happened.”<sup>92</sup> The FCO even sounded a note of caution about the Secretary of State’s use of the word “genocide” to describe the actions of Milosevic and his Serb forces in “ethnically cleansing” Kosovo. There was concern that this would provoke calls for the same label to be attached to the massacres of the Armenians whose “ethnic cleansing” by way of deportation was, after all, of a different level of gravity than the sufferings of the Kosovars, who were not starved and attacked and killed in their hundreds of thousands.

Attached to this note was a draft speech, which Baroness Ramsey, speaking for the government, delivered virtually verbatim on April 14th.<sup>93</sup> As well as claiming that there was no evidence of “a specific decision to eliminate the Armenians,” the speech considered whether a tribunal like the ICTY or ICTR should be set up to resolve the issue, but pointed out that respective defendants were long since dead and said that it “had not been established . . . if the genocide convention can be applied retrospectively”—a point to which, some years later, Mr. Geoff Hoon, MP, was to return. It is a bad point, in the sense that the rule against retroactivity applies to criminal charges, made against individuals, of offences which were not against the law at the time they were allegedly committed. Nobody is suggesting that criminal charges should be brought now against long dead individuals—the question is whether the massacre of the Armenians is correctly described as “genocide,” according to the definition adopted by the UN Convention in 1948.

The Eastern Department brief was at least read by one minister, Joyce Quin. She took exception to its extreme “genocide denial” position, which included lines such as “we are aware of no firm evidence of intent on the part of the Ottoman administration of the day to destroy the Armenians” and “HMG has no first hand evidence of why the atrocities took place.” Quin privately and correctly pointed out, the day before the debate, that the

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92. *Id.*

93. 599 PARL. DEB., H.L. (5th ser.) (1999) 827.

question of intent had never been examined by the government or by anyone else in the FCO.<sup>94</sup> These passages were duly deleted. But the very fact that the FCO, without any investigation, could actually inform a minister of state that there was no firm evidence of intent (were they unaware of Ambassador Morgenthau's conversations with Talaat, or of the Harbord Report, or of the Treaty of Sèvres, or of the Constantinople trial verdicts?) and that there was no first hand evidence of why the atrocities took place (ignoring the hundreds of witness statements from victims, missionaries, consular officials, etc.) does show the extent to which genocide denial had entrenched itself in the Eastern Department by this time. Britain's condemnation of Turkey in 1915 upon ample evidence for a "crime against humanity" no longer echoes down the corridors of an FCO which now seems all too willing to turn a blind eye to genocide in the interest of political and commercial relations with Turkey.

### THREE "DENIAL" HISTORIANS

A few days after this debate, the Turkish Ambassador initiated a correspondence, which continued over the following years, with several FCO ministers: Joyce Quin, Keith Vaz, and Baroness Scotland. He sent them extracts from work by an American historian, Justin McCarthy, and sought to portray the 1915 killings as having been provoked by "Armenian terrorists" who continue to murder Turkish diplomats to this very day. He claimed that more Turks than Armenians died, the latter not from government action but from "starvation, disease and attacks by guerrillas which the authorities at the time were powerless to prevent."<sup>95</sup> The Turkish Embassy was pleased with the FCO's position of refusing to acknowledge genocide "in the absence of unequivocal evidence to show the Ottoman administration took a specific decision to eliminate the Armenians." The Turkish embassy believes this to be "the correct view and [it] hope[s] it would be maintained."<sup>96</sup>

This hope has been well-founded. Keith Vaz told the Turkish Ambassador<sup>97</sup> that the government had refused to include the Armenian massacres as part of Holocaust Memorial Day. This decision, Mr. Vaz makes clear, reflected "wide inter-departmental consultation, including with the FCO." The controversial decision to exclude the Armenian massacres from Holocaust Memorial Day was, therefore, influenced by the flawed

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94. Letter on behalf of Joyce Quin, Minister of State, Foreign and Commonwealth Office, to the E. Dep't of the Foreign and Commonwealth Office (Apr. 13, 1999) (on file with author).

95. Letter from Turkish Chargé d'Affaires, to Baroness Scotland, Under-Secretary of State, Foreign and Commonwealth Office, (Aug. 7, 2000) (on file with author).

96. Letter from Turkish Chargé d'Affaires, to Baroness Scotland, Under-Secretary of State, Foreign and Commonwealth Office, (Aug. 7, 2000) (on file with author).

97. Letter from Keith Vaz, to Ambassador H.E. Korkmaz Haktanir, Turkish Foreign Ministry Under-Secretary (Feb. 6, 2001) (on file with author).

perspective of the Eastern Department, overly concerned to maintain good relations with Turkey.

Mr. Justin McCarthy, the historian proffered by the Turkish government, is a professor at Louisville University. He has a different emphasis, but I do not regard his analysis either as legally correct or as factually excluding a finding of genocide. He sees the 1915 events as a civil war and describes it as “a war of extermination. If you were caught by the other side you were killed. Neither side spared women or children.”<sup>98</sup> This description can fit the definition of genocide if one side’s killing has been directed or permitted by its government or government officials on racial or religious grounds.

McCarthy admits that the Ottoman government,

ordered the deportation of the Armenians of Anatolia to Syria . . . on the ensuing forced marches great numbers of Armenians died from hunger and attacks, many of them killed by the tribesman who were involved in a war to the death with the Armenians. There is no question but that the convoys were not well protected by the Ottomans. However, more than 200,000 Armenian deportees arrived safely in greater Syria.<sup>99</sup>

This too is entirely consistent with a finding of genocide: that some victims survived (as they did in Nazi Germany, Rwanda and even in Cambodia) is nothing to the point. The government bears command responsibility for ordering the forced marches and deciding not to protect the convoys adequately, in the knowledge that many on the “death marches” would be killed. McCarthy is a historian who appears not to understand the law relating to genocide, and so makes the curious remark<sup>100</sup> that “[i]f this was genocide, it was a very strange genocide indeed in which many more killers than victims perished.” Numbers do not matter: it is the question of genocidal intent that counts. Besides, in 1915, the victims were predominantly Armenian, unless McCarthy is counting the Turkish losses in the Dardanelles and on the Russian front, which would make an entirely false point since most of those Turks were killed by the Allies and not the Armenians. Even assuming those skewed figures, a much higher *proportion* of Armenians than Turks were killed. And the figures are skewed if the comparison is with the Turks who were killed by Armenian brigades and brigands when the Russian army invaded later in 1916. There were massacres then, certainly, although a respected Turkish historian puts

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98. JUSTIN MCCARTHY, *THE OTTOMAN TURKS: AN INTRODUCTORY HISTORY TO 1923* 365 (1997).

99. *Id.*

100. Justin McCarthy, *Armenian Terrorism: History as Poison and Antidote*, in *PROCEEDINGS OF SYMPOSIUM ON INTERNATIONAL TERRORISM* 85–94 (Ankara University Press, 1984).



Turkish casualties at Armenian hands at about 40,000.<sup>101</sup> McCarthy is obviously sympathetic to the Turkish cause, but his work does not, as HMG is later to claim, refute the genocide charge. The truth is that a substantial proportion of the Armenians of the Ottoman Empire perished and few survived in Anatolia.

McCarthy is one of the three historians upon whom the FCO relies for its stance of genocide equivocation. In the FCO material, however, I note that he admits that half a million Armenians perished “as a result of their armed rebellion against the Ottoman state.” But, because most of the victims on the marches were women, children, and old men, this seems a propagandist rather than an accurate comment. McCarthy goes on to admit the causes of death were “sickness, exhaustion following long marches, immediate change of climate and the attacks of marauders upon rich convoys.” These are all life-threatening conditions of which those who ordered the deportations must have known. Indeed, anyone who has examined the contemporaneous photographs of the huddled masses carrying their few possessions may find his description of “rich convoys” both misleading and distasteful. He adds that “the Turks are estimated to have lost over 1 million people owing to similar causes.” Yet, estimated by whom, in relation to what period? There were no deportations of Muslims ordered by the Ottoman government, and there were comparatively few Turkish casualties of the uprisings in four Armenian cities (only one of which, in Van, was successful). Of course, thousands of Muslims were displaced (from homes that in many cases they had taken over from deportees) by the subsequent advance in parts of Anatolia by the Russian army (which had a brigade of Armenian volunteers). Over a million Turks lost their lives in the course of a war the Ottoman government chose to enter on the side of Germany, but to suggest that this in any way detracts from the genocide would be disingenuous: the comparison is not of like with like. The heinousness of the Holocaust cannot be diminished, let alone excused, by claiming that more Germans than Jews died in the World War II. It is unacceptable that the FCO should place as much reliance as it has upon an American professor whose work does not in fact (for all that the Turkish Ambassador may think) deny the facts that can in law constitute genocide.

There was further pro-Turkish advice from the Eastern Department in 2001 as it prepared answers to questions put down by Lord Biffin arising from the Holocaust Day exclusion. One favoured approach was to say that “interpretation of events is still the subject of genuine debate among historians.” There is a background note that “research analysts looked again at the balance of views in the academic community last year: they

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101. AHMED EMIN, *TURKEY IN THE WORLD WAR 222* (Yale University Press, 1930).

confirmed that disagreements remained.”<sup>102</sup> No such analysis has been disclosed, and the FCO covering letter responding to the FOIA request denies that anything of the kind exists. There is still no understanding that academic historians establish facts, but the question of genocide is for legal judgment. It is plain, in any event, that the great majority of historians of the period have recorded facts that are only consistent with genocide, and even the work of Justin McCarthy, relied upon by the Turkish government, does not exclude this legal characterisation.

An FCO draft answer for Baroness Scotland to give to Lord Biffin in 2001 stated,

additionally, the government’s legal advisors have said that the 1948 UN Convention on genocide, which is in any event not retrospective in application, was drafted in response to the holocaust and whilst the term can be applied to tragedies that occurred subsequent to the holocaust, such as Rwanda, it cannot be applied retrospectively.<sup>103</sup>

This seems to be a dubious attempt to blind parliament with bogus legal science, and if the government’s legal advisors ever said that the term cannot be applied to “tragedies” before the Holocaust, they are palpably mistaken. Of course the *term* “genocide” can be applied retrospectively, and frequently is—to the attempted extermination of the Tasmanian Aborigines in the 1830s, for example.<sup>104</sup> A retrospective prosecution for the crime of genocide (as distinct from war crimes or crimes against humanity) may not be brought in respect of conduct *before* the Genocide Convention, but that is an entirely different matter. Moreover, the 1948 Convention was not drafted solely in response to the Holocaust. The historical evidence shows that Raphael Lemkin had the Armenian genocide very much in mind in conceiving the Convention, which includes an indirect reference to the Armenian genocide in its Preamble. There is no reference in the policy documents to any advice from government lawyers, who, if they did give it must have been unacquainted with the drafting history of the Genocide Convention.

HMG’s policy was next considered in 2004, after the Armenian government had taken offence when the British Ambassador undiplomatically emphasised the view that there was “no unequivocal

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102. FCO Background Document regarding question from Lord Biffen, Tabled on Jan. 25<sup>th</sup>, 2001 (on file with author).

103. Draft response for Baroness Scotland to Parliamentary Question Background Document relating to a written question from Lord Biffen, Tabled on Jan. 25<sup>th</sup>, 2001 (on file with author).

104. The entire race was exterminated by British soldiers and convicts and settlers on mainland Tasmania: the 47 survivors were exiled to an offshore island. A parliamentary committee reported in 1838, endorsing Sir Gilbert Murray, that this was “an indelible stain” on British reputation: an apt description of the crime of genocide, a century before Lemkin coined the word.

evidence” that genocide had ever been committed. A memorandum to Secretary of State Bill Rammell admits that Turkey “devotes major diplomatic resources to heading off any possible recognition. Turkey would react very strongly indeed to any suggestion of recognition by the UK.”<sup>105</sup> This was the reason why Simon Butt recommended that the policy should be maintained.

At some point, either in 2004 or 2005 (the disclosed memoranda are undated), the FCO supplied the usual mantra to ministers for answers in the House but suggested that, “if pressed,” they might add the following:

There is genuine debate amongst historians as to whether or not the events of 1915–16 would constitute genocide as defined by the 1948 UN Convention. Prominent historians who dispute the genocide label include Professor Bernard Lewis, formerly of Princeton, Dr Heath Lowry of Princeton and Professor Justin McCarthy of the University of Louisville.<sup>106</sup>

The Turkish ambassador, as we have seen, provided text from Justin McCarthy back in 2001 and a later exchange suggests that these three names may originally have been supplied by an FCO researcher, Craig Oliphant. They appear first in March 2001 in a letter written by Keith Vaz to an MP who asked on what sources the FCO were relying.<sup>107</sup> Vaz wrote, “Professor Bernard Lewis formerly of Princeton . . . said in 1993 that it was ‘extremely doubtful’ that the Turks had carried out a policy of systematic annihilation.” He added that both Heath Lowry and Justin McCarthy “dispute that the evidence supports a verdict of genocide.”

Bernard Lewis is a well-known professor of Middle Eastern Studies. What Vaz did not reveal was that Lewis’ remark, in an interview with *Le Monde* in 1993, caused him to be prosecuted in France and fined (if only one franc) for denying the Armenian genocide.<sup>108</sup> In a later interview, he said, “no one disputes that terrible things happened” and that hundreds of thousands of Armenians died.<sup>109</sup> He explained that he had only been seeking in *Le Monde* to deny the claim that there was a close parallel between the sufferings of the Armenians and the sufferings of the Jews in Nazi

105. Memorandum from Simon Butt, FCO Official, to Bill Rammell, Secretary of State (Mar. 19, 2004) (on file with author).

106. *Armenia: Public Lines*, (undated) (on file with author). It goes on to dismiss Ben Whittaker’s report.

107. Letter from Keith Vaz, Minister for Europe, Foreign and Commonwealth Office, to Julia Down, Member of Parliament (Mar. 12, 2001) (on file with author).

108. See Letter from Bernard Lewis to the Princeton Alumni Magazine (June 15, 1996) (on file with author).

109. See Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, June 21, 1995, J. Cochard (Fr.) (citing the *Le Monde* interview published on Nov. 18, 1993, and the clarification offered by Bernard Lewis printed in *Le Monde* on Jan. 1, 1994) available at [http://www.armeniangenocide.org/Affirmation.240/current\\_category.76/affirmation\\_detail.html](http://www.armeniangenocide.org/Affirmation.240/current_category.76/affirmation_detail.html).

Germany. Some of the former were active in fighting against the state while the latter were not in any kind of armed opposition to Nazi rule. Lewis accepted that “the Turks certainly resorted to very ferocious methods” in repelling Armenian freedom fighters but insisted “there is clear evidence of a decision by the Turkish government to deport the Armenian population . . . . There is no evidence of a decision to massacre.”<sup>110</sup> Lewis does not understand that a finding of genocide may be inferred from a government’s deliberate failure to protect those it is deporting, the majority of whom—women and children—were certainly not active in fighting against the state. Lewis complains that “nowadays the word ‘genocide’ is used very loosely even in cases where no bloodshed is involved at all.”<sup>111</sup> This is not a complaint that could be made against labelling as “genocide” events in which up to half the members of a particular race were exterminated. The Vaz letter suggests that Lewis is an FCO “source,” but there is no evidence in the documents that he has ever been consulted. It may well be that the FCO was only alerted to Lewis’ view as a result of the publicity about his prosecution.

Dr. Heath Lowry is a controversial figure who provoked the “Heath Lowry affair” after Princeton University accepted a large sum of money from the Turkish government and appointed him to the “Ataturk Chair,” which that government sponsored. Controversy erupted when Dr. Lowry was discovered to have drafted letters for the Turkish ambassador denying the genocide.<sup>112</sup> Both Dr. Lowry and the University were condemned by a petition of over one hundred leading writers and scholars, including Arthur Miller, Harold Pinter, Susan Sontag, William Styron, John Updike, Kurt Vonnegut, Norman Mailer, Seamus Heaney, Deborah Lipstadt, and Allen Ginsberg. It is only fair to point out that writers may have no greater insight into the law of genocide than historians, and it does not appear that Dr. Lowry in his personal capacity has actually denied the genocide, but has merely said that he is reluctant to apply this label to the massacres until he has fully studied the Ottoman archives. He maintains that he “cannot accept the characterisation of this human tragedy as a pre-planned, state perpetrated genocide . . . unless and until the historical records of the Ottoman state . . . are studied and evaluated by competent scholars.”<sup>113</sup> According to a website that supports Dr. Lowry, his privileged access to the Ottoman archives has enabled him to find one document which, according to Dr. Lowry, “strongly suggests that there was government involvement in

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110. Professor Bernard Lewis, Comments made at the National Press Club, (Mar. 25, 2002).

111. *Id.*

112. Roger W. Smith, Eric Markusen, & Robert Jay Lifton, *Professional Ethics and the Denial of Armenian Genocide*, 9 HOLOCAUST & GENOCIDE STUDIES 1(1995).

113. Rich Miller, *History and the Power to Change it Academic Leaders Erupt Over Appearance of Turkish Influence at Princeton*, THE TRENTON TIMES, Dec. 10, 1995.

the killing of Armenians.”<sup>114</sup> In any case, historians who take a pro-Turkish position after having taken Turkish government money and proffered special access to documents have a conflict of interest. Given the controversy surrounding Dr. Lowry, his comparatively modest scholarly standing,

and his financial relationship with the Turkish government, he is a strange choice for the British government to rely upon in support of its position of genocide denial, or at least of genocide-equivocation.

#### FURTHER INQUIRIES

In the 2004–2005 memoranda, there is a “background memo” attached, which makes some attempt to be fair:

The extent to which the killings were official government policy is a long standing dispute. But the Young Turk movement which ruled the Ottoman Empire from 1908 undoubtedly had come to believe that the Armenians posed a threat to the unity and security of the empire. . . . Non-partisan non-specialist European historians would seem to agree that there was some official collusion. But how far did it go? . . . One such historian A L McFie: *The end of the Ottoman Empire 1908-23* (Longman 1998) draws the following balance: “It is difficult if not impossible, to escape the conclusion that, once the deportations were instituted the Ottoman leadership, or at least elements in it were not averse to exploiting the opportunity to resolve a problem that had for decades caused the empire much difficulty.”<sup>115</sup>

This cautious conclusion is the only approximation to historical truth to be found in the many hundreds of pages of legally obtuse FCO briefings to ministers about the lack of evidence for genocide.

Nonetheless, in mid-2005, HMG’s pro-Turkish position was revisited and confirmed. Pressed about Article 301 of the Turkish Penal Code, under which a number of writers and intellectuals had been convicted for mentioning the Armenian genocide, the FCO claimed that alleging genocide was not prohibited by the Code but only by the “explanatory note” about what it should cover.<sup>116</sup> This was a pettifogging response to the persecution by Turkey of citizens for speaking the truth, or at least for publishing honest and well-sourced opinion. It is a blatant contravention of

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114. Lis Verderman, *Professor Feels the Heat*, THE PRINCETON ALUMNI WEEKLY, Jan. 24, 1996, at 14–15.

115. FCO Document, *Background: Armenia 1915–16* (on file with author).

116. Parliamentary Question Background Document, relating to an oral question in the House of Lords. Answer to be given on 14 July 2005 by Lord Triesman. Question 4: What is HMG’s view of the article in Turkey’s Penal Code that describes affirmation of the Armenian “genocide” as a crime against the state? (on file with author).

Article 10 of the European Convention on Human Rights.

In 2005, the Minister for Europe, Dennis McShane, suggested an Independent International Commission to review the massacres of 1915. He, no doubt, had a judicial commission in mind, but the Turkish government agreed only to seek an investigation by a committee of historians. The Armenian government replied that this will not solve the problem, as indeed it will not. A decisive way of authoritatively settling the issue would be for the UN to set up an *ad hoc* international court to look at all the evidence (adduced, no doubt, with the help of historians) and decide whether the conduct of the Ottoman authorities amounted to complicity in genocide. In September 2009, the Turkish and Armenian governments, after mediation by the Swiss, agreed to a protocol for the establishment of diplomatic relations. This welcome development included a promise to “implement dialogue on the historical dimension” through “an impartial scientific examination of the historical records and archives to define existing problems and formulate recommendations.”<sup>117</sup> The Turkish press hailed this as an Armenian acceptance of a “Commission of Historians,” although the language indicates merely a preliminary investigation. There is no authoritative decision that will come from a committee of historians; the issue requires an independent judicial decision. Any “definition of existing problems” would have to begin by the repeal of Article 301 of the Turkish Penal Code, which, as interpreted, makes it an offence to use the word “genocide” in Turkey with respect to the Armenian massacres.

There has been one credible international inquiry, and it is extraordinary that amongst the hundreds of pages of FCO policy documents, there is only one obscure and dismissive reference to it. It was directed by the UN’s Economic and Social Council (at the request of the Commission on Human Rights) and conducted by its Special Rapporteur on Genocide, Mr. Ben Whitaker, a British barrister and former Labour MP for Hampstead. Mr. Whitaker had no hesitation in concluding that the 1915 atrocities amounted to genocide.<sup>118</sup> This was the key issue for his decision: the previous rapporteur had initially concluded that Turkey was guilty of genocide, but had removed this finding after Turkish protests in order to “maintain unity within the international community.”<sup>119</sup> Whitaker’s report is a powerful document which should weigh with any British government, although, surprisingly, there is no other reference to it in the FCO material.

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117. *Armenian & Turkish Protocols*, Lragir (Sept. 1, 2009) available at <http://lragir.am/engsrc/politics15026.html>.

118. U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, UN Doc. E/CN.4/Sub.2/1985/6 (July 2, 1985) (prepared by Ben Whitaker).

119. See SCHABAS, *supra* note 7, at 555–58.

## RECENT PARLIAMENTARY PROCEEDINGS

In 2006, Steven Pound initiated an adjournment debate on the issue. The FCO briefed Geoff Hoon that,

HMG has long argued in the absence of unequivocal evidence to show that the Ottoman administration took a specific decision to eliminate the Armenians under their control at the time, British governments have not recognised the events of 1915–16 as genocide. There has been no reason to change that position.<sup>120</sup>

However, by this stage, eight EU parliaments had passed resolutions recognising the genocide: France, Italy, Poland, Greece, Cyprus, Belgium, Slovakia, and the Netherlands, not to mention the Holy See, Uruguay, Argentina, Russia, Lebanon, and Canada. Various parliaments, including the German Bundestag and the US House of Representatives Foreign Affairs Committee, were debating the issue.<sup>121</sup> The FCO briefing continued:

Turkey is neuralgic and defensive about the charge of genocide despite the fact that the events occurred at the time of the Ottoman Empire as opposed to modern day Turkey. There were many Turks who lost their lives in the war and there may also be an element of concern over compensation claims should they accept the charge of genocide. This defensiveness has meant that Turkey has historically stifled debate at home and devoted considerable diplomatic effort to dissuading any further recognition.<sup>122</sup>

The debate initiated by Steven Pound went ahead on June 7, 2006. Geoff Hoon, for the government, faithfully read his FCO brief. But this time, while repeating that “the evidence is not sufficiently unequivocal,” he flagged up a relatively new point:

The fact is that the legal offence of genocide had not been named or defined at the time that the actual atrocities were committed. The United Nations convention on genocide came into force in 1948, so it was not possible at the time of the events that we are considering legally to label the massacres as genocide within the terms of the convention.

I recognise that it is perfectly possible intellectually to try to apply the definitions of genocide from the convention to appalling tragedies that occurred, in this case, some 30 years before. The common practice in law is not to apply such judgments

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120. Briefing Note to Geoff Hoon from Russia, South Caucasus and Central Asia Directorate, FCO, June 6<sup>th</sup>, 2006 (on file with author).

121. In 2007 the Committee voted 27–21 to recognise the Armenian genocide. This Resolution 106 was not put to a vote in the House for the reason that it might imperil US national security, i.e., if Turkey reacted by removing US bases and monitoring stations.

122. Briefing note to Geoff Hoon, June 6, 2006 (on file with author).

retrospectively.<sup>123</sup>

This is nonsense. There is no “common practice in law” not to apply the definitions of genocide “intellectually” to tragedies that occurred before the Convention was ratified. The “common practice in law” is to not prosecute a crime that did not exist at the time it was committed, but nobody is talking about prosecution because there is no one left to prosecute. Mr. Hoon went on to say that it is not possible to provide a substitute today “for the submission of evidence, cross-examination or arguments that necessarily would have arisen in a court of law.” But the motion was not seeking any such inquiry. Of course, if Turkey and Armenia were to agree to an international judicial tribunal, the processes of submitting evidence and cross-examining experts would be perfectly possible. If Mr. Hoon suggests that there is some technical legal inhibition about describing the 1915 massacres as genocide, he is under a misapprehension.

In October 2006, Mr. Hoon visited Armenia. The resulting brief was largely the same as his FCO brief. However, paragraph 5 (which has been heavily redacted for fear of damaging relations with Turkey) does end with the unredacted sentence “Turkey would react very strongly indeed to any suggestion of recognition by the UK.”<sup>124</sup> This undoubtedly explains the real reason for the FCO advice and for the HMG position throughout the present Labour government and under previous governments.

In March 2007, Lord Avebury returned to the fray by asking for the names of the British historians on whom HMG relies for its refusal to describe the treatment of Armenians in 1915–16 as genocide. HMG responded that the FCO had “input from a variety of historical sources and works.”<sup>125</sup> This was seriously misleading. It is belied by the response to the FCO request. The only sources mentioned were the “Blue Book” (which contains witness statements irreconcilable with genocide denial) and a British historian named Malcolm Yapp, who was said to “question” other accounts. Professor Yapp is a member of the Editorial Advisory Board of the *Middle Eastern Studies Journal*, who has indeed questioned Vahakn Dadrian’s *The History of the Armenian Genocide*, but not in a way that refutes his allegation of genocide.<sup>126</sup> Yapp accepts that the massacres took place and that “there was some connivance and even participation by local Ottoman officials.” He accepts that the Ottoman government ordered the deportations “without adequate arrangements for the transport, food or

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123. 447 PARL. DEB., H.C. (6th ser.) (2006) 136WH.

124. Background document for Geoff Hoon’s visit to Armenia in October 2006 titled, *Armenia: Relations with Turkey, and the Genocide of 1915–16: Key Messages* (on file with author).

125. 690 PARL. DEB., H.L. (5th ser.) (2007) WA321.

126. Malcolm Yapp, *Review article: The History of the Armenian Genocide: Ethnic Conflict from the Balkans to Anatolia to the Caucasus by Vahakn N. Dadrian*, 32 *MIDDLE EASTERN STUDIES* 395 (1996).



security.” He says that “although Dadrian produces many reports seeming to suggest that members of the Ottoman government wanted to destroy the Armenians, he fails to find any document which constitutes a definite order for massacre.” This failure, as I have pointed out, is not crucial. No such documents are to be found in Nazi or Rwandan government papers, either, although the circumstantial evidence is overwhelming. Yapp does not purport to apply the law, and his book review provides no basis for HMG to deny genocide.

On July 2, 2007, a memorandum on HMG’s position on the Armenian genocide restated the position that “there is an absence of unequivocal evidence to prove that at the top level the Ottoman administration took a specific decision to eliminate all Armenians under their rule.”<sup>127</sup> It further added the misleading claim that “it is not common practice in law to apply judgments retrospectively.” There can be no logical or legal objection to an authoritative judgment which decides whether the events of 1915 satisfy the 1948 definition.

The suggestion made by Mr. Dennis McShane, MP, to set up an independent commission is fully endorsed in this memo, although the only commission that Turkey was offering to set up was one comprising historians—plainly a pointless exercise. This appears to have become a mantra. At a meeting with Andrew George, MP, on October 16, 2007, ministers were briefed to encourage pro-Armenian MPs to lobby the Armenian government to respond more positively to the Turkish suggestion of a commission of historians, and this pressure may have produced the concession made in the protocol for resumed diplomatic relations.

Throughout this voluminous material, there is never any mention that HMG denounced the massacres in 1915 as “a crime against humanity.” Indeed, some memos read as if the government had denounced both sides and had not blamed the Turks. The FCO again reveals its hand in this briefing, telling the minister that “this is an emotive subject and we do not anticipate an easy meeting—ultimately there is no positive message that HMG can give to this audience on this issue. But it is important to demonstrate that we are listening.”<sup>128</sup> In other words, HMG has a closed mind on the subject but will pretend that it is at least partly open. Because the delegation comprised not only Armenia Solidarity members but also the Vice-Chairman of the International Association of Genocide Scholars, the FCO’s advice was, in effect, to string them along, despite the fact that “the genocide scholar in the group is likely to take issue” with HMG’s

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127. Memorandum from the Russ. S. Caucasus and Cent. Asia Directorate, FCO, to Mr. Murphy (July 2, 2007) (on file with author).

128. Document titled, *Armenia: Meeting with Andrew George MP and members of Armenia Solidarity, 16 October 2007*, (on file with author).

position.<sup>129</sup> There is no sign that anyone at the FCO had read Professor David Bloxham's book, *The Great Game of Genocide*, which powerfully refutes its genocide denial stance. Genocide scholarship is one thing that the FCO has never been interested in applying to an issue it wishes would go away. There is no reference in the papers to the 2007 Resolution of the International Association of Genocide Scholars, which stated that "the Ottoman campaign against Christian minorities of the empire between 1914–1923 constituted a genocide against Armenians and the Assyrians and Pontian and Anatolian Greeks." The FCO merely evinces concern that the US House Foreign Affairs Committee had resolved to recognise the events as genocide: as a result, "we can also expect the Armenian diaspora worldwide lobbying machine to go into overdrive." This is hardly the language of an impartial enquirer: the FCO has become a rather cynical adversary.

Although the FCO accepts that Article 301 of the Turkish Penal Code can result in charges of "insulting Turkishness" made against those who allege genocide (such as Orhan Pamuk and Harant Dink), this is not a matter for anxious lobbying in support of free speech. HMG's position in 2007 hardened behind the Bush administration's support for Turkey. Fearing that a negative Turkish reaction would harm US interests, particularly its NSA surveillance bases and its oil interests, President Bush took the unusual step of speaking out before the House Foreign Affairs Committee passed Resolution 106 calling upon him to "ensure that the foreign policy of the US reflects appropriate understanding and sensitivity concerning issues related to human rights, ethnic cleansing, and genocide documented in the US record relating to the Armenian genocide and for other purposes."<sup>130</sup> Bush said, "this resolution is not the right response to these historic mass killings, and its passage would do great harm to our relations with a key ally in NATO and in the global war on terror." On October 23, 2007, Prime Minister Blair met Prime Minister Erdogan of Turkey who said "that his view remained that the 'genocide' was an issue for historians." This is the position that, as we have seen, the FCO had long promoted. There is no suggestion in the heavily redacted minutes that Mr. Blair made any suggestion of a truth and reconciliation process, or pointed out the importance of nations coming to terms with their own past.

#### THE DOWNING STREET WEBSITE INCIDENT

In 2008, the FCO was caught out when its stock response about historians being unable to agree about genocide was placed on the Downing

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129. *Id.*

130. See H.R. RES. 106 110th Cong. (2007). It was adopted by the US House Foreign Affairs Committee by a vote of 27 to 21.

Street website in answer to an e-petition, and its inaccuracy was pointed out by members of the public. FCO draftsman Sofka Brown was warned by a colleague, Matthew Extance, about high level dissatisfaction with this “line.” Apparently, the minister, Jim Murphy, had demanded to know exactly what evidence had been deemed “not sufficiently unequivocal.” His demand “very specifically requests a detailed list of all the evidence looked at which leads us to believe that the evidence is not sufficiently unequivocal.” This request may have proved difficult for Ms. Brown; the FOIA response reveals there had been no evidence properly looked at within the FCO, at least since 1997. She urgently requested one Craig Oliphant to provide some names.<sup>131</sup> Mr. Oliphant replied, just three hours later, with three familiar names. He cited the three sceptics put forward in 2001 and 2005: Bernard Lewis, Justin McCarthy, and Dr. Heath Lowry. Oliphant offers an “intermediate view” in McFie and in Dr. Eric Zuercher, whose view is not “intermediate” at all. Dr. Zuercher writes:

[T]here are indications that, while the Ottoman government as such was not involved in genocide, an inner circle within the Committee of Union and Progress under the direction of Talaat wanted to “solve” the Eastern Question by the extermination of the Armenians and that it used the relocation as a cloak for this policy.<sup>132</sup>

Then Oliphant cites six historians who have written “authoritative” accounts of what they firmly describe as genocide.

The FCO ploy of citing historians on either side, which can give the misleading impression that the historians are equally divided did not, on this occasion, pass muster. The draft answer made no mention of historians and was accompanied by a handwritten explanation to Jim Murphy, the responsible Minister (perhaps by Andrew Page, the Head of Department): “Jim—added some more detail as requested. Not mentioned historians explicitly. We stopped referring to historians in June 2007 when this new line was deployed. We found that references to historians tended to raise further questions/allegations.”<sup>133</sup>

This may signal the end of the familiar FCO “spin” about divided historians. However, Murphy appears to have been pacified. His answer, given by Lord Malloch-Brown on March 4<sup>th</sup>, 2008, was a brief restatement of the classic formula: “neither this Government nor previous Governments have judged that the evidence is sufficiently unequivocal to persuade us that these events should be categorised as genocide as defined by the 1948 UN

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131. Email from Sofka Brown, FCO Second Secretary (Political), to Craig Oliphant, FCO E. Research Grp., (Feb. 4, 2008) (on file with author).

132. ERIK-JAN ZÜRCHER, *TURKEY: A MODERN HISTORY* 116 (I.B. Tauris & Co. Ltd., 2004).

133. Parliamentary Question Background Document relating to a written question from Baroness Finlay of Llandaff, Tabled on Feb. 19, 2008 (on file with author).

Convention on Genocide.”<sup>134</sup>

This was, of course, misleading. The documents since 1997 now establish that this government has not “judged the evidence” at all. It has neither judged, nor been provided with evidence on which to judge. The FCO has never sought such evidence, other than by asking Craig Oliphant for a few names on each side.

What is meant by saying that the evidence is “not sufficiently unequivocal?” This is a standard of proof that seems to have been invented by the FCO, playing with words, and does not reflect the law. There are only two standards of proof in UK law: the civil standard (on the balance of probabilities, i.e., more likely than not) and the criminal standard (beyond reasonable doubt).

The House of Lords, in its judicial capacity, has made it clear that there is just one standard of proof in civil proceedings and that any heightened standard must mean the criminal standard of proof. Lord Hoffmann has confirmed this:

I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not. . . . clarity would be greatly enhanced if the courts said simply that although the proceedings were civil, the nature of the particular issue involved made it appropriate to apply the criminal standard.<sup>135</sup>

To apply a test of whether evidence is “not sufficiently unequivocal” therefore makes no sense. The term is an oxymoron (something is either unequivocal, or it is not; it cannot be a little bit unequivocal). The phrase seems to have been chosen by the FCO not only to beg the question but to fudge it. It has invented a meaningless new standard under which the bar can be set impossibly high.

## CONCLUSIONS

The result of my examination of the advice provided by the FCO to HMG, and reproduced by ministers in parliamentary answers drafted over the past decade by the FCO, is that this advice reflects neither the law of genocide nor the demonstrable facts of the massacres in 1915–16, and has been calculated to mislead parliament into believing that there has been an assessment of evidence and an exercise of judgment on that evidence.

The truth is that throughout the life of the present Labour government and (so the FCO admits) throughout previous governments, there has been no proper or candid appraisal of the 1915 events. These events were

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134. 699 PARL. DEB., H.L. (5th ser.) (2008) WA165.

135. *In re B (children)* [2008] UKHL 35, [2008] EWCA Civ. 282 (U.K.).

condemned by HMG at the time, and immediately afterwards, in terms that anticipate the modern definition of genocide. The drafters of the Genocide Convention referred to the 1915 mass killings as a prime example of the kind of atrocity that would be covered by this new international crime. HMG has consistently (at least until 2007) wrongly maintained both that the decision is one for historians and that historians are divided on the subject. HMG ignores the fact that the decision is one for legal judgment, and no reputable historian could possibly deny the central facts of the deportations and the racial and religious motivations behind the deaths of a significant proportion of the Armenian people.

HMG has also maintained the fiction that it is somehow contrary to legal practice to apply the description “genocide” to events that occurred prior to 1948. This and other mistaken or illogical arguments have been made, so the internal policy memoranda reveal, in a hitherto successful effort not to upset the “neuralgic” Turkish government. The dubious ethics involved in this approach have been acknowledged (once, back in 1999), but there appears to be no interest in establishing the truth of the matter or re-asserting the position that HMG took at the time, or in understanding (let alone applying) the modern law of genocide as it has emerged from decisions of the ICJ, the ICTY, and the ICTR. There is no recognition at all of the importance of nations acknowledging their past crimes against humanity, or of supporting the descendents of victims who still, almost a century later, have to live with the consequences.

In my opinion, the law set out above, when applied to the facts, produces the inevitable conclusion that the treatment of the Armenians in 1915 answers to the description of genocide. The historians relied upon by the FCO in support of its refusal to accept this conclusion do not, on analysis, sustain the FCO position or affect my opinion. Should the question put by Baroness Cox and others be asked again, the proper answer would be as follows:

In 1915, the Turkish government, then in league with Germany, faced an Allied attack in the Dardanelles and a prospective incursion by Russian forces on its eastern front. These circumstances do not, however, justify its orders to deport some two million Armenians from Eastern Turkey and its infliction upon them of conditions which were calculated to, and did in fact, bring about the destruction of a significant part of that group. HMG condemned this action at the time as “a crime against humanity” and promised that its perpetrators would be punished. But it was not until 1948 that international law recognised the crime of genocide. HMG has welcomed the recent establishment of diplomatic relations between Armenia and Turkey and the protocol under which they have agreed to examine objectively these events,

and hopes that the Turkish government will abolish section 301 of its Penal Code, which would otherwise impede such examination. HMG makes clear that should the same events occur today, in any country with a similar history to that of Turkey in 1915, there can be no doubt that the Genocide Convention would be engaged and would require prosecutions for that crime as well as for crimes against humanity.

I consider that parliament has been routinely misinformed by ministers who have recited FCO briefs without questioning their accuracy. HMG's real and only policy has been to evade truthful answers to questions about the Armenian genocide because the truth would discomfort the Turkish government. It can be predicted that any future question on the subject will be met with the same meaningless formula about "insufficiently unequivocal evidence," disguising the simple fact that HMG will not now come to terms with an issue on which it was once so volubly certain, namely, that the Armenian massacres were a "crime against humanity," which should never be forgiven or forgotten. Times change, but as other civilised nations recognise, the universal crimes of genocide and torture have no statute of limitations. Judge Balthazar Garzon, in opening his investigation of the crimes of the Franco era, declared that their perpetrators should have no posthumous impunity. The same might be said of the authors of the Armenian genocide.