THE ASSASSIN WAS NOT INSANE: THE ACQUITTAL OF THE ASSASSIN OF A GENOCIDE'S ARCHITECT AS SYMBOLIC JURY NULLIFICATION

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I. INTRODUCTION

"The dilemma cannot be escaped – all assassins should be punished; this assassin should not be punished." – The New York Times, June 5, 1921.[1]

On the morning of March 15, 1921, on a Berlin street, a slight, barely noticeable young man, brushed passed an imposing figure who had overseen the final days of the Ottoman Empire.[2] The young man, plagued by poor health and recurring nightmares, spun back around and fired a single shot at the figure.[3] The assassin was an Armenian in his mid-twenties named Soghomon Tehlirian.[4] The victim was the former Grand Vizier of the Ottoman Empire, and one of the architects of the Armenian Genocide, Mehmed Talaat, also known as Talaat Pasha.[5]

Less than three months after Tehlirian was apprehended by the Berlin police, he faced a capital trial, which was to be decided by a twelve-man jury.[6] What followed was a unique, and controversial, moment in juridical history. What may have been a straightforward murder trial with several eyewitnesses and, in fact, the defendant's own testimony, in which he admitted to planning and committing the murder, became an unvarnished window into a human rights catastrophe, as well as an indictment on German complicity.[7] Witness after witness testified in gruesome detail to the atrocities that were perpetrated on the Armenian population of Turkey during World War I.[8] Expert witnesses then traded competing theories on whether the defendant was capable of acting with "free will" at the time of the murder,[9] which today, would commonly be understood as a type of insanity or

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1 *They Simply Had to Let Him Go*, N.Y. TIMES (Jun. 5, 1921).

2 ERIC BOGOSIAN, OPERATION NEMESIS: THE ASSASSINATION PLOT THAT AVENGED THE ARMENIAN GENOCIDE 9-11 (2015); SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE 1 (2002).

3 *See* BOGOSIAN, *supra* note 2, at 9-11; *see also* POWER, *supra* note 2, at 1.

4 BOGOSIAN, *supra* note 2, at 9-11; *see also* POWER, *supra* note 2, at 1.

5 BOGOSIAN, *supra* note 2, at 9-11; *see also* POWER, *supra* note 2, at 1.

6 *See* VARTKES YEGHIAYAN, THE CASE OF SOGHOMON TEHLIRIAN 1 (Armenian Political Trials: Proceedings 1) (Vartkes Yeghiayan trans., A.R.F. Varantian Gomideh, 1985).

7 *See id.* at 6-8, 16-17, 83-85.

8 *See id.* at 72-75.

9 *See id.* at 98-109.

diminished capacity defense.[10] Laced throughout the evidence presented at trial, were allegations, explanations, and vehement denials concerning the German government's complicity in the atrocities committed by its wartime ally.[11] After a two-day trial, the jury returned after deliberating for less than two hours.[12] Tehlirian was set free.[13]

This trial is recognized as pivotal in conceptualizing international human rights law. Indeed, Raphael Lemkin, the most notable proponent of the Convention on the Prevention and Punishment of the Crime of Genocide,[14] cited this trial as inspiration for his life's work in devising a solution to the moral and legal problems that it posed.[15] His commitment to rewriting international and domestic law,[16] in turn, has equipped nations and international institutions with the concepts and the tools, including universal jurisdiction, to hold perpetrators accountable.[17] And yet, the trial itself is often understood as a morally

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10 *See, e.g.*, 18 U.S.C. § 17 ("It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.").

11 *See* YEGHIAYAN, *supra* note 6, at 83-85.

12 *See* BOGOSIAN, *supra* note 2, at 231.

13 *See* YEGHIAYAN, *supra* note 6, at 165.

14 G.A. Res. 260 A (III), Convention on the Prevention of Crime and Genocide (Dec. 9, 1948) [hereinafter Genocide Convention]. The Universal Declaration of Human Rights passed the next day. *See* G.A. Res. 217 (III) (A), Universal Declaration of Human Rights (Dec. 10, 1948).

15 *See* POWER, *supra* note 2, at 17-19 ("Lemkin was uncomfortable that Tehlirian, who had been acquitted on the grounds of what today would be called 'temporary insanity,' had acted as the 'self-appointed legal officer for the conscience of mankind.'"); *see also* Steven Leonard Jacobs, *The Complicated Cases of Soghomon Tehlirian and Sholem Schwartzbard and Their Influences on Raphaël Lemkin's Thinking About Genocide*, 13 GENOCIDE STUDIES AND PREVENTION: AN INT'L J. 33, 39 (2019) (". . . for Lemkin, the trials and acquittals of both Tehlirian and Schwartzbard—as well as the publicly- and, at times, overly-dramatic journalistic coverage—provided the underpinnings to his evolving concept of the need for an international convention forbidding genocide.").

16 *See, e.g.*, 18 U.S.C.A. § 1091(a) ("Whoever, whether in time of peace or in time of war and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such—(1) kills members of that group . . . shall be punished as provided in subsection (b)"). The United States ratification of the Genocide Convention was not without controversy or criticism. *See, e.g.*, Jordan J. Paust, *The Need for New U.S. Legislation for Prosecution of Genocide and Other Crimes Against Humanity*, 33 VT. L. REV. 717, 719 (2009).

17 Perry S. Bechky, *Lemkin's Situation: Toward a Rhetorical Understanding of Genocide*, 77 BROOK. L. REV. 551, 622-23 (2012) ("He [Lemkin] succeeded quickly, with the Genocide Convention. This accomplishment cannot be dismissed as a mere 'piece of paper,' a fading rose. It generated domestic criminal statutes,

justifiable anomaly in the Western legal tradition.[18] The manner of the trial and the fact of Tehlirian's acquittal, are rarely tied to any established legal framework, lessening its meaning. Instead of casting the trial as an anomaly, this article will use the well-known conceptual framework of jury nullification to question existing perceptions of the decision to free Tehlirian, thus enabling us to better understand the utility of jury nullification as a feature of our judicial system.

Jury nullification is a divisive feature of the common law judicial system, as it enables a jury in a criminal trial to acquit a defendant based on moral or symbolic motivations that are not necessarily tied to justifications grounded in the law.[19] Nullification is controversial, in part, because it can create, what many perceive to be an unstable and unpredictable element that may result in unprincipled and, at times, racist or discriminatory acquittals.[20] On the other hand, nullification can arguably also serve as a sort of moral safety valve, allowing for tailored expressions of mercy in unique cases that are worthy of a departure from the strict application of the law.[21]

Today, courts in the United States, and in other countries, continue to struggle with the appropriate role, if any, for jury nullification in a democracy's judicial system. Historical examples can provide new context through which we are able to evaluate the utility of this judicial feature. Examining the Tehlirian trial as an instance of symbolic nullification, may enable us to reconsider whether the most palatable rationale for the function of nullification in our judicial system is what an acquittal symbolically communicates to society, for better or for worse.

Part I of this Article, discusses the concept and history of jury nullification and the controversy surrounding its legitimacy. Part II

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functioning international institutions, investigative teams, NGO watchdogs, political movements—even jail cells. People have been charged with, tried for, convicted of, and punished for genocide." *Id.* at 622 (internal citations omitted)).

18 HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 266 (2006) (originally published in 1963) ("The point in favor of Schwartzbard and Tehlirian was that each was a member of an ethnic group that did not possess its own state and legal system, that there was no tribunal in the world to which either could have brought its victims.").

19 *See* Arie M. Rubenstein, *Verdicts of Conscience: Nullification and the Modern Jury Trial*, 206 COLUM. L. REV. 959, 962 (2006).

20 *See* Irwin Horowitz & Norbert L. Kerr, *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207, 1210 (2001); *see also* Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 84 (2009).

21 *See* Alan W. Shefin and Jon M. Van Dyke, *Merciful Juries: The Resilience of Jury Nullification*, 48 WASH. & LEE L. REV. 165, 165 (1991).

briefly describes the history of the Armenian Genocide, including reports from German officials in Turkey during that time, as well as the subsequent failure to hold the perpetrators of the massacres responsible. Part III of this Article, returns to Berlin and analyzes the trial of Tehlirian, including some of the controversial evidentiary decisions, such as the admission of testimony and arguments concerning the conviction of Talaat Pasha by the Ottoman Courts Martial, and the complicity of the German government in the Armenian Genocide. In conclusion, this Article argues that the utility of jury nullification can be understood through an examination of the Tehlirian trial, an event in which the acquittal communicated an important symbolic message to society.

II. JURY NULLIFICATION: A FLAWED OR EFFECTIVE MORAL SAFETY VALVE

The jury occupies a special role in the common law judicial system. "It is axiomatic in the common-law system that, in a trial by judge and jury, the judge is responsible for deciding questions of law, whereas the jury is tasked with applying that law to the evidence at hand, finding facts and returning the ultimate verdict."[22] Yet, juries are also arguably empowered to *misapply* the law, particularly when crafting a verdict that matches the perceived moral imperatives required by society. This controversial feature of jury systems is often referred to as "jury nullification," which Black's Law Dictionary defines as:

> [a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.[23]

It is evident that jury nullification has a long history in the English and American judicial systems. Some suggest that the first occurrence

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22 Benjamin L. Berger, *The Abiding Presence of Conscience: Criminal Justice Against the Law and the Modern Constitutional Imagination*, 61 U. TORONTO L.J. 579, 596 (2011) ("The strong formal expectation is of a jury that exhibits utter fidelity—indeed submission—to the law, applying it to the case at bar through the exercise of reason alone."); *see also* Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1135 (2014) ("Today, in courts all over America there is a remarkable consensus on the role of the jury. The jury finds facts.") (Internal citations omitted).

23 *Jury Nullification*, BLACK'S LAW DICTIONARY 936 (9th ed. 2009).

of jury nullification in the English courts dates to 1544.[24] Yet, most view *Bushell's* Case in 1670, as seminal in recognizing the existence of the nullification power in the English judicial system.[25] In 1670, William Penn and William Mead were tried for preaching to an unlawful assembly.[26] The jury appeared to believe that the prosecution had been politically motivated.[27] After the trial had concluded, the judge instructed the jury to find the defendants guilty.[28] Several of the jurors refused to convict Penn and Mead, and the judge imprisoned them for contempt.[29] The jury foreman, Bushell, then sought a writ of habeas corpus, arguing that the court had unlawfully imprisoned him.[30] The appellate court ruled that juries could not be punished for their verdicts and suggested that they may rely, in part, on their own consciences in rendering such verdicts.[31]

As the American judicial system evolved, it carried with it the concept of jury nullification through the colonial era and the "power of the jury to nullify unpopular laws" served as "an important ingredient of the colonial experience."[32] Nullification continued to become embedded in America's early judicial culture as "[t]he power of the jury in criminal trials in the first decades following the constitutional convention appears to have been untrammeled."[33] While many may cite the landmark decision of *Sparf v. United States* in 1895, as evidence of the Supreme Court's repudiation of a jury's power to nullify,[34] due to the characteristics of America's constitutional framework

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24 *See* Aaron McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 BYU L. REV. 1103, 1113 (2014) ("Many scholars recognize the trial of Sir Nicholas Throckmorton in 1544 as the first instance of jury nullification. The crown tried Throckmorton for high treason based on his uncontested participation in Wyatt's Rebellion. However, the jury acquitted him because of his political popularity.").

25 Horowitz & Kerr, *supra* note 20, at 1213.

26 *See id.* at 1213.

27 *See id.* at 1213.

28 *See* McKnight, *supra* note 24, at 1113.

29 *See id.* at 1113-14.

30 *See id.* at 1114.

31 McKnight, *supra* note 24, at 1114; Horowitz & Kerr, *supra* note 20, at 1213.

32 Horowitz & Kerr, *supra* note 20, at 1214.

33 *Id.*

34 *See* Sparf v. United States, 156 U.S. 51, 83 (1895) ("[I]t is [the jury's] duty to be governed by the instructions of the court as to all legal questions . . . . They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful . . . ."); United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972) ("[T]he Supreme Court settled the matter for Federal courts in *Sparf v. United States*."); Jonathan Bressler, *Reconstruction and the Transformation of Jury*

and the rights of criminal defendants,[35] few dispute that an American jury's power to abrogate the law persists.[36]

Jury nullification can manifest in different scenarios. For example, a conscious misapplication of the law may occur when the jury evaluates that the law it is being asked to apply, is unjust on its face.[37] In other words, "the jurors feel that the behavior in question should not be illegal."[38] This concept was made evident by a case from the mid-1800s, in which abolitionists removed a former slave to Canada and were later acquitted of violating the prohibitions of the Fugitive Slave Act.[39] Another historic example is of jurors acquitting

Nullification, 78 U. CHI. L. REV. 1133, 1134-35 (2011) ("More than a century ago, in *Sparf v. United States* the Supreme Court held that the constitutional right to jury trial does not give jury the right to decide questions of law or to reject the law as presented to it by the court- an idea known as the right to nullify the law."); *see also* United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988) (explaining that no federal court explicitly permits jury nullification instruction and few permit it to be argued to the jury).

35 *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 98 (1998) (The Constitution was originally understood as preserving the jury's right to refuse to enforce laws it deemed unconstitutional. Although other aspects of the United States' constitutional framework may bear on the issue, two of the principle boundaries that insulate the potential exercise of the nullification power are the Sixth Amendment's guarantee of a jury trial for criminal prosecutions ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .") and the Fifth Amendment's prohibition against being tried twice for the same crime if acquitted (". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . .") *See* U.S. Const. amend. VI, V; *see also* Nathan S. Chapman, *The Jury's Constitutional Judgment,* 67 ALA. L. REV. 189, 205 (2015); *But see* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 295 (1996) ("In sum, there is little evidence that a jury's ability to acquit against the evidence-or more precisely, the 'right' of a defendant to be tried by a jury that has the power to nullify-is protected by the Constitution.").

36 *See* Schefin & Van Dyke, *supra* note 21, at 165 ("The power of a jury to soften the harsh commands of the law and return a verdict that corresponds to the community's sense of moral justice has long been recognized."); *see also* United States v. Thomas, 116 F.3d 606, 615–16 (2d Cir. 1997) ("The power of juries to 'nullify' or exercise a power of lenity is just that—a power; it is by no means a right…nullification may sometimes succeed—because, *inter alia,* it does not come to the attention of a presiding judge before completion of a jury's work, and jurors are not answerable for nullification after the verdict has been reached . . . .").

37 *See* Horowitz & Kerr, *supra* note 20, at 1209; *see also* Rubenstein, *supra* note 19, at 962 (What some refer to as "'[c]lassical jury nullification occurs where the jury believes the law itself is unjust.").

38 *See* Horowitz & Kerr, *supra* note 20, at 1209.

39 *See* United States v. Morris, 26 F. 1323 (C.C.D. Mass 1851) (No. 15,851).

defendants who had violated prohibition-era restrictions by selling liquor.[40] A more contemporary example of this type of nullification can occur when a jury refuses to convict a defendant charged with possession of marijuana, due to their belief that such possession should not be illegal.[41]

Nullification can also materialize when the jury does not object to the law itself—for instance, a prohibition against theft, but the jury members believe that the law, in a specific case, is being unjustly applied to the defendant.[42] Under these circumstances, "the jury decides the prosecutor is unjustly applying the law."[43] The "jury may think that the punishment is too severe to fit a specific defendant's behavior, such as when a defendant commits petty theft but is subject to a 'three-strikes' law,"[44] which could carry significant prison sentences.[45]

In other circumstances, "jurors may disregard or misapply the law to meet a somewhat broader goal outside of producing a preferred trial outcome for a particular defendant."[46] Indeed, some suggest "the importance of the criminal trial jury may lie as much in its symbolic or expressive value than in its narrowly instrumental use as a method for determining disputed questions of fact."[47] Considering this, an act of jury nullification can be understood as "symbolic" when "the jury does not object to the law or its application, but acquits to send a political message to the executive or legislative apparatus or society."[48] Such "[a]n acquittal may be intended to voice a protest against some agency or public policy."[49] Thus, jury nullification can serve "as another way for the people to signal to the various branches of

40 *See* Horowitz & Kerr, *supra* note 20, at 1209, 1210.

41 *See id.* at 1210.

42 *See* Rubenstein, *supra* note 19, at 962.

43 *See* McKnight, *supra* note 24, at 1107.

44 *Id.*

45 *See generally* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 236 (2014) (Stevenson describes one vignette of how "[t]hree strikes" laws and other mandatory minimum sentences have exacerbated punishment for minor offensives, noting: "One of the first incarcerated women I ever met was a young mother who was serving a long prison sentence for writing checks to buy her three young children Christmas gifts without sufficient funds in her account . . . I couldn't accept the truth of what she was saying until I checked her file and discovered that she had, in fact, been convicted and sentenced to over ten years in prison for writing five checks, including three to Toys 'R' Us."); *see also id.*

46 Horowitz & Kerr, *supra* note 20, at 1211.

47 Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2389 (1999).

48 Rubenstein, *supra* note 19, at 962.

49 Horowitz & Kerr, *supra* note 20, at 1211.

government regarding desirable policy and legislation."[50] It can also serve as a powerful tool to draw attention to the deficiencies of a government's approach or as a response to a variety of social crises.[51]

There is a perceived moral utility to jury nullification. Rather than being understood as a power to invalidate legal regulations themselves, it has been suggested that it is "a power to 'complete' or 'perfect' the law by permitting the jury to exercise that one last touch of mercy where it may not be appropriate and just to apply the literal law to the actual facts."[52] But, moral value notwithstanding, there is legitimate criticism of this aspect of the criminal justice system.[53] "[N]ullification may also occur because of caprice or unprincipled favoritism."[54] The most severe manifestation of the societal danger of nullification occurs when it is used as a tool to empower the racist or discriminatory motives of a populace.[55] Sadly, this occurred when segregationist southern juries would acquit, against the clear weight of the evidence, those charged with the murder of Black Americans.[56]

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50 McKnight, *supra* note 24, at 1121.

51 *See id.* at 1108 ("This differs from nullifying in response to unlawful government behavior because, in this instance, the government's behavior is lawful. It is the policy the government endorses by its action (such as patrolling more heavily in neighborhoods of racial minorities) that the jury finds inappropriate."); *see also* Horowitz & Kerr, *supra* note 20, at 1211 ("Jurors may also nullify the law to meet very general justice goals. So, for example, some have urged juries to combat racism in the criminal justice system by acquitting minority defendants even when the necessary elements of the charge have appeared to be proven against a specific minority defendant.").

52 Schefin and Van Dyke, *supra* note 21, at 167 ("Nullification is an integral part of the law itself, serving the unique and vital function of smoothing the friction between law and justice, and between the people and their laws."); *id.* at 168.

53 Richard St. John, *License to Nullify: The Democratic and Constitutional Deficiencies of Authorized Jury Lawmaking,* 106 YALE L.J. 2563, 2597 (1997) ("Whereas juries are charged with finding the facts and applying them to the law, jurors, as citizens in a democratic polity, have a responsibility to work through democratic channels to reform laws that violate their consciences. . . . Telling the truth may require juries to do the unpopular, but it must never mean that they ignore their mandate under the law.").

54 Horowitz & Kerr, *supra* note 20, at 1210.

55 *See* Tetlow, *supra* note 20, at 84 ("while the outright jury nullification in race-based crimes has diminished, it has not ended."); *see also* Horowitz & Kerr, *supra* note 20, at 1210.

56 *See* Tetlow, *supra* note 20, at 77 ("For centuries, those who lynched black men, raped black women, or beat their wives could count on walking away because juries refused to convict for these crimes."); *see also* McKnight, *supra* note 24, at 1116 ("Furthermore, in the 1960s, juries in the South frequently nullified cases of racial violence towards blacks.").

Although not a prerequisite to nullification, courts can cultivate a procedural environment that may encourage juries to misapply the law. For instance, judges may "exercise leniency on relevancy requirements, allowing the defense to tell a story that justifies or excuses the defendant's behavior even though the story does not support a specific legal defense theory."[57] That liberal approach to admissibility, especially in highly politicized trials, can provide fertile ground for a jury to collect evidence that reflects its moral compunction.

The effects of jury nullification have been felt beyond the American and English judicial systems, as other countries have also grappled with the phenomenon.[58] Of interest here is Germany's judicial system. In the mid-1800s, Germany borrowed elements of the American judicial system, in an effort to reform aspects of its criminal procedure, incorporating juries for criminal trials.[59] Though the jury system was eventually abolished in German criminal procedure in 1924,[60] during the period for which it existed, German criminal trials were susceptible to the jury's power to push past the boundaries of strict adherence to the law to achieve other social aims.[61]

III. THE ARMENIAN GENOCIDE, GERMAN COMPLICITY, AND THE FAILURE TO HOLD ITS PERPETRATORS ACCOUNTABLE

A. *"[W]e have got to finish with them. If we don't, they will plan their revenge:"*[62] *The massacre of Armenians in Turkey and the knowledge of the German government*

On April 24, 1915, as the Allied powers invaded Turkey, Talaat Pasha, the Ottoman Empire's interior minister, ordered the arrest and execution of over 200 Armenian intellectuals and leaders.[63] The Ottoman Government published "official proclamations" that included

57 McKnight, *supra* note 24, at 1112.

58 *See* Berger, *supra* note 22, at 597-98 (discussing Canada's own jury nullification case law and questions).

59 Hans-Heinrich Jescheck, *Principles of German Criminal Procedure in Comparison With American Law*, 56 VA. L. REV. 239, 239 (1970).

60 *See id.* at 243.

61 *See* Berger, *supra* note 22, at 596.

62 HENRY MORGENTHAU, AMBASSADOR MORGENTHAU'S STORY 224 (2000) (originally published in 1918. The quotation is from Talaat Pasha as recalled by Ambassador Morgenthau during a meeting in 1915. Henry Morgenthau Sr. had been the United States of America's Ambassador to the Ottoman Empire between 1913 and 1916). *Id.* at vii.

63 *See* POWER, *supra* note 2, at 2.

the following orders: "[o]ur Armenian fellow countrymen . . . because . . . they have . . . . attempted to destroy the peace and security of the Ottoman state, ... have to be sent away to places which have been prepared in the interior . . . ."[64] The American Ambassador Henry Morgenthau noted that "[i]nstead of massacring outright the Armenian race, they now decided to deport it . . . . The real purpose of the deportation was robbery and destruction; it really represented a new method of massacre."[65] On April 30, 1915, six days after the arrests in Constantinople, the eastern provinces of Turkey experienced the same horrific genesis with German Vice Consul of Erzurum, Max Scheubner-Richter, reporting on "the excesses and severe harassments" that the Ottoman gendarmes of Erzincan were inflicting on the Armenian inhabitants.[66] By June 1915, there were no Armenians left in Erzincan.[67]

Broad removal of Armenians from Turkey began in May and June of 1915.[68] On May 16, 1915, Vice Consul Scheubner-Richter reported that according to General Mahmud Kamil, "the deportation of the entire Armenian population of the Erzurum region was ordered by the High Command of the Third Army."[69] Another German officer, who was involved in guerrilla operations against the Russians in Turkey, was in charge of the 8th Infantry Regiment of the 10th Army Corps of the Ottoman Army.[70] Discussing General Kamil, that officer noted that "[t]he commander-in-chief must have known of the murder of the first deportee convoys . . . ."[71] According to Ambassador Morgenthau, Talaat Pasha boasted on August 3, 1915, that Morgenthau "must not get the idea that the Deportations had been decided upon hastily; in reality they were the result of prolonged and careful

64 *See id.* at 2 (citing a U.S. State Department translation of law of deportation presented by the Turkish governor of Trebizond to U.S. consul Oscar Heizer, June 28, 1915).

65 MORGENTHAU, *supra* note 62, at 205.

66 Vahakn N. Dadrian, *The Armenian Question and the Wartime Fate of the Armenians as Documented by the Officials of the Ottoman Empire's World War I Allies: Germany and Austria-Hungary*, 34 INT'L J. MIDDLE EAST STUD. 59, 70 (2002) (citing German consular reports).

67 *See* POWER, *supra* note 2, at 3.

68 TANER AKCAM, A SHAMEFUL ACT: THE ARMENIAN GENOCIDE AND THE QUESTION OF TURKISH RESPONSIBILITY 161 (2006) ("Other consular reports recount a similar story: hundreds of thousands of Armenians driven from their homes in convoys and killed, either on the road or after having arrived at their assigned destinations.").

69 Dadrian, *supra* note 66, at 74.

70 *Id.* at 66.

71 *Id.* at 74.

deliberation . . . ."[72] A week later, on August 10, 1915, Vice Consul Scheubner-Richter provided a lengthy report to his government, noting that the deportations "are carried out in such a way that they are tantamount to the act of complete annihilation of the Armenians."[73]

As the massacres continued, there is certain evidence suggesting that the German government protested the actions of Ottoman authorities.[74] However, after Ambassador Morgenthau reported that "[o]nly one power could successfully raise objections [to the massacres] and that was Germany," German Ambassador Wangenheim relayed that "I shall do nothing whatever for the Armenians."[75] Others suggested that Ambassador Wangenheim appealed to the Ottoman government regarding the massacres, but that the German government "would not push hard to stop its close war ally."[76] Between June 1915 and October 1918, four German ambassadors to the Ottoman Empire characterized the anti-Armenian measures as targeted to "solve the Armenian question through annihilation," three of whom directly quoted Talaat Pasha.[77]

Despite the ample evidence that the German government was fully aware of the atrocities being perpetrated against the Armenians, it appears that the German officers were, at times, involved in operations conducted by the Ottoman military.[78] In many instances, the Ottoman authorities would fabricate Armenian "rebellions" to justify destroying entire villages.[79] In at least one instance, Vice Consul Scheubner-Richter, who was involved in one such operation, stated that "the alleged rebels . . . had barricaded themselves and would be more than willing to surrender their arms in exchange for a promise to be spared and not killed."[80]

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72 MORGENTHAU, *supra* note 62, at 221.

73 Dadrian, *supra* note 66, at 72.

74 *See* AKCAM, *supra* note 68, at 169. ("The Germans pleaded with the Turkish government to at least exclude Protestants from the deportations.").

75 *See* MORGENTHAU, *supra* note 62, at 194, 246.

76 *See* Wolf Gruner, *"Peregrinations into the Void?" German Jews and Their Knowledge About the Armenian Genocide During the Third Reich,* 45 CENT. EUR. HIST. 1, 4 (2012).

77 Dadrian, *supra* note 66, at 71.

78 *Id.* at 68.

79 *See* POWER, *supra* note 2, at 3 ("[T]his did not stop the Turkish leadership from using the pretext of an Armenian 'revolutionary uprising' and the cover of war to eradicate the Armenian presence in Turkey.").

80 Dadrian, *supra* note 66, at 68.

For Germany, the information concerning the genocide was not confined to the files of the German government.[81] The German people were also aware of the atrocities being committed in Turkey. To be sure, "[d]espite military and political censorship, slow but steady information about the atrocities leaked into the German public via hundreds of returning German army personnel, foreign press reports, Christian newspapers, and public talks of activists."[82] Members of the German parliament directly challenged the German government, by asking whether the "Reich chancellor was aware of the fact that during the current war within the allied Turkish Empire, the Armenian population has been expelled from their homes and slaughtered by the hundreds of thousands?"[83] During the summer of 1916, German activists had spread awareness about the Armenian massacres. For instance, missionary Johannes Lepsius, compiled a 300-page report on "the situation of the Armenian people" based on "extensive eyewitness accounts"[84] distributing 20,000 copies of his book throughout Germany.[85]

Notwithstanding these efforts to raise awareness and to challenge the German government, the official German government position remained the same. After the war, when the military censorship ended, the German public was flooded with an influx of information concerning the massacre of Armenians in Turkey during the war as well as initiating a debate concerning German complicity.[86] By the end of the war, approximately 1.5 million Armenians had been killed.[87] Yet, on November 1, 1918, only days after the Armistice of Mudros formally ended the war for the Ottoman Empire, the leaders of the government, including Talaat Pasha, escaped the country.[88]

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81 *See generally*, Gruner, *supra* note 76, at 4-7.

82 *See* Gruner, *supra* note 76, at 5.

83 *See id.* at 5.

84 *Id.*

85 *Id.*

86 *See id.* at 6-8.

87 *See* RONALD GRIGOR SUNY, LOOKING TOWARD ARARAT: ARMENIA IN MODERN HISTORY 114 (1993).

88 Vahakn N. Dadrian, *The Documentation of the World War I Armenian Massacres in the Proceedings of the Turkish Military Tribunal,* 23 INT'L J. MIDDLE EAST STUD. 549, 552 (1991).

B. *The Attempt to Hold Ottoman Officials Responsible for the Armenian Genocide After the End of World War I*

Even before the war came to an end, the Allies had considered establishing an international war crimes tribunal to punish the Ottoman government for its wartime actions.[89] Following the October 1918 armistice, the British arrested Ottoman officials suspected of involvement in the massacres.[90] In January of 1919, a commission set up by the Allies decided, among other things, to classify the massacres of the Armenians and the Greeks in the Ottoman Empire as "crimes against humanity."[91] Eventually, the British government transferred many of the suspects to Malta for imprisonment;[92] but many of those prisoners, including General Mahmud Kamil, would later escape, never facing any court of law.[93]

Despite the British government's efforts, because of legal wrangling over questions of jurisdiction and sovereignty, as well as the United States' resistance to the establishment of an international war crimes tribunal,[94] no such international tribunal was created.[95] If anyone was to be charged and tried for the massacres, that decision was left to what remained of the Ottoman government itself, through a recently convened Military Courts Martial.[96]

On November 24, 1918, only three weeks after Talaat Pasha fled the country, the Ottoman government began investigating, among other things, the officials of the Ottoman government who were responsible for the massacres during the war.[97] "At the preliminary

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89 *See* AKCAM, *supra* note 68, at 229.

90 *See id.* at 236.

91 *See id.* at 230.

92 *See* Dadrian, *supra* note 88, at 554, 575 n.65.

93 *See id.* at 575 n.65.

94 *See* POWER, *supra* note 2, at 14 (The American government "rejected the notion that some allegedly 'universal' principle of justice should allow punishment . . . . If such a tribunal were set up, then, the United States would not participate.").

95 *See* AKCAM, *supra* note 68, at 240 ("On 2 April [1919] the [British] Foreign Office sent Lord Balfour at the peace conference a clear decision: Turkish war crimes suspects could not be tried before British military courts; an international court would be required. The peace conference was asked to come to a quick decision on the establishment of an international tribunal . . . . But the peace conference itself was in no hurry . . . .").

96 *See id.* at 282–84.

97 *See id.* at 282 ("The Commission to Investigate Criminal Acts [also known as the Mazhar Commission] was announced on 24 November . . . . The commission was endowed with broad authority and the right to exert it over all state functionaries, regardless of rank or position."); *see also* Dadrian, *supra* note 87, at 552.

stage, 130 files on 130 suspects were opened and forwarded for prosecution."[98] By December 14, 1918, less than one month later, it was decided that a court would be established to specifically address the crimes related to the Armenian massacres.[99] The trials in this court began in early 1919 and continued until late 1920.[100] The resulting indictments, and evidence, including testimony from those involved as well as, in some cases, convictions implicated Ottoman officials as responsible for the massacres, many of whom the German government had described in its extensive consular reports.[101]

On April 28, 1919, the trial of Talaat Pasha and other Ottoman leaders, for their involvement in the destruction of the Armenians of Turkey, began with the defendants absent.[102] The indictment placed Talaat Pasha "in the forefront of all the initiatives directed against the Armenians,"[103] naming him "the arch conspirator," with the indictment citing "a particular coded telegram betraying Tala[a]t's 'secret intent' . . . about the Armenian deportations."[104] On July 6, 1919, Talaat and other cabinet-level officials of the Ottoman government were convicted and condemned to death for their role in the massacres.[105]

Whatever merit could be found in these proceedings, the Ottoman government's decision to try the wartime leadership was a political calculation, made in an attempt to curry favor with the Allies, during negotiations at the Paris Peace Conference.[106] A creature established for political purposes, the Turkish Courts-Martial were flawed from the beginning and unraveled by 1920.[107] Specifically, by August 1920, as the Ankara-based government, led by Mustapha Kemal (later known as Ataturk), asserted itself as the dominant governing force in Turkey, it no longer perceived any political advantage in maintaining

98 AKCAM, *supra* note 68, at 283.

99 *Id.* at 284.

100 *See* AKCAM, *supra* note 68, at 352.

101 Dadrian, *supra* note 88, at 560 ("The indictment cites the order of Third Army commander, General Mahmud Kamil, threatening Muslims with death by hanging in front of any house in which an Armenian might be sheltered and the house itself torched. If the offender is an official or belongs to the military, the order provides for court-martial . . ."); *Id.* at 572 n. 51 ("In the Bayburt verdict, Erzurum's delegate Hilmi was cited as having actively participated in the direction of the massacres . . ."); *see also id.* at 559-63.

102 *See id.* at 556-57.

103 *See id.* at 557.

104 *See id.* at 558.

105 *See id.* at 561-62.

106 *See* AKCAM, *supra* note 68, at 245.

107 *Id.* at 349-52.

the trials and shut down the remaining Courts-Martial.[108] For Talaat Pasha and the remaining wartime leaders of the Ottoman government, it seemed that the crimes they committed would go unpunished in a court of law.[109]

IV. BACK TO BERLIN: THE TRIAL OF TEHLIRIAN AS SYMBOLIC JURY NULLIFICATION

On March 15, 1921, a single gunshot ended the life of Talaat Pasha. A little over two months later, the trial of Tehlirian began in Berlin.[110] Twelve jurors were empaneled[111] and Talaat's assassin, Tehlirian, was accused of "intentionally and with premeditation assassinating the former Grand Vizir [of the Ottoman Empire], Talaat Pasha . . . ."[112] Unlike the American judicial system, where the attorneys of record conduct the examination, a judge, known as a "Presiding Justice," directed most of the questions to the witnesses.[113] Tehlirian was one such witness.

During the first day of the trial, Tehlirian testified about the massacres in Turkey during the war, the violent death of his family, his struggles with epilepsy, and his travels after the war that led him to Berlin on that March morning.[114] Notably, throughout the first day of testimony, Tehlirian provided significant evidence that he had developed a premeditated plan to kill Talaat Pasha, including moving out of his first apartment in Berlin, so that he could be physically closer to Talaat after seeing visions of his mother.[115]

> PRESIDING JUSTICE — I do not understand this too well. A little while ago, you replied that, from the day your mother appeared to you, you decided to move to Hardenbergstrasse. Does this mean you knew that Talaat Pasha lived across from you?
> DEFENDANT — Yes.

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108 *Id.* at 349-52 (By August 1920, "[t]he prosecution of war crimes suspects was . . . no longer justifiable as the necessary price to be paid for the promise of a new state conserved along the lines of the National Pact."). *Id.* at 349.

109 *Id.* at 349-52.

110 *See* YEGHIAYAN, *supra* note 6.

111 *See id.* at 1-2.

112 *See id.* at 14.

113 *See id.* at 1 (The attorneys of record, including Tehlirian's defense counsel, were German).

114 *See id.* at 2-19.

115 *See id.* at 15-17.

> PRESIDING JUSTICE — Then was it your intention to live near him?
> DEFENDANT — After hearing the words of my mother.
> PRESIDING JUSTICE — At that time you made a decision. What was that decision?
> DEFENDANT — That I wanted to kill him.[116]

Much of the afternoon of the first day of the trial was devoted to expert testimony focusing on whether Tehlirian's epilepsy or past trauma resulting from the massacres, left Tehlirian without the ability to form what the German judicial system, at the time, referred to as the "free will" necessary to commit premeditated murder—what we would understand today as a type of insanity defense.[117] The experts debated whether Tehlirian's mental state was altered during the commission of the crime.[118] Although the jury listened to this routine evidence concerning Tehlirian's mental state, the trial also delved deeply into subjects that expanded far beyond the Berlin murder. The Presiding Justice admitted voluminous testimony concerning the details of the Armenian Genocide, including testimony not only from Tehlirian himself, but from other witnesses as well.[119]

A. Deportations and Massacre: The Jury is Confronted with Genocide

From the outset of the trial, the Presiding Justice decided to admit significant eyewitness testimony from Tehlirian, concerning the horrifying details of the Armenian Genocide.[120] Measured by a modern perspective and informed by the effect of post-traumatic stress disorder on criminal defendants, this decision was not without some

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116 *Id.* at 17.

117 *See id.* at 94-109.

118 *See id.* at 99 ("It is perfectly clear that we are not dealing here with the act of an insane person."); *but see id.* at 109 ("But today I am of the opinion that the defendant is suffering from emotional epilepsy as a result of a psychological shock. I would like to add that, from my point of view, an emotional epileptic, such as the defendant, is unable freely to control his will under the constraint of such mental images.").

119 *See id.* at 72-75, 90.

120 *Id.*

justification.[121] Indeed, even in the early twentieth-century, psychologists were grappling with how to understand battled-induced trauma.[122]

The first witness, Tehlirian himself, testified at length as to his family's life in Turkey and the violence perpetrated against the Armenians.[123]

> DEFENDANT — I do not know. They were assembled and taken away. I was quite fearful. I did not want to go out of the house. These groups had already been taken away when news was spread that those previously deported had been killed. Later, we received a telegram that there was only one survivor, Mardirossian, from among those deportees. In the early part of June, an order was issued for the people to get ready to leave the city. We were all told that money and valuables could be given to the government for safekeeping. Three days later, early in the morning, the people were taken out of the city.
>
> PRESIDING JUSTICE — In large groups?
>
> DEFENDANT — As soon as the order was issued, on the outskirts of the city, they divided the people into groups and marched them off in caravans.[124]

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121 Ann R. Auberry, *PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System,* 68 MARQ. L. REV. 647, 662-663 (1985) ("As previously mentioned, the first criterion for the existence of PTSD is an identifiable stressor in the individual's past. Because a stressor encompasses an event or events outside the range of human experience, any evidence tending to establish that such events were outside the range of human experience would be relevant.").

122 *See* Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMP. L. REV. 1, 5 (2011) ("By 1916, several military doctors concluded that the symptoms classified as 'shell shock' did not necessarily depend upon a person's proximity to an explosion for the cause, but, in fact, may have a gradual onset or cause due largely to the 'emotions of extreme and sudden horror and fright' or 'sudden psychic shock'. . . . Once the war [World War I] was over, concern shifted to reabsorbing these emotionally damaged soldiers into civilian society."). *Id.* at 11, 13 (internal citation omitted).

123 *See* YEGHIAYAN, *supra* note 6, at 3–10. Some have suggested that Tehlirian may not have been physically present for some of the events that he recounts in his testimony at trial. *See* Bogosian, supra note 2, at 198–203. But, for purposes of examining the question of jury nullification, what is of paramount importance is the evidence that was presented to the jury that would have informed its conclusion concerning culpability.

124 YEGHIAYAN, *supra* note 6, at 6.

Tehlirian's testimony matched the events described in German consular reports, such as those of the German officers who had warned the German government of the "murder of the first deportee convoys."[125] Although the German public may not have known of the specific information in those reports, the public was certainly aware of the general details concerning the massacres. The Presiding Justice continued his questioning of the Ottoman Government's extermination of Tehlirian's own family.

> PRESIDING JUSTICE — How did your parents die?
> DEFENDANT — While we were being plundered, they started firing on us from the front of the caravan. At that time, one of the gendarmes pulled my sister out and took her with him. My mother cried out, "May I go blind." I cannot remember that day any longer. I do not want to be reminded of that day. It is better for me to die than describe the events of that black day.
> PRESIDING JUSTICE — However, I want to point out to you that, for this Court, it is very important that we hear of these events from you. You are the only one that can give us information about those events. Try to pull yourself together and not lose control.
> DEFENDANT — I cannot say everything. Every time I relive those events. . . They took everyone away. . . and they struck me. Then I saw how they struck and cracked my brother's skull with an axe.[126]

The defense was also successful in admitting additional testimony regarding the details of the Armenian Genocide from other witnesses.[127] Such detailed and moving testimony about the atrocities perpetrated on the Armenian people, consumed a majority of the evidence introduced at the Berlin trial and framed the perspective through which the jury would measure all other evidence.

Once the background of the massacres had been described, the Presiding Justice permitted testimony and arguments regarding two subjects that interacted dynamically in a way that likely encouraged the jury to consider moral calculations beyond the murder charge at

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125 *See* Dadrian, *supra* note 66, at 74.

126 YEGHIAYAN, *supra* note 6, at 7.

127 *See id.* at 72-75 (In one instance, an Armenian living in Berlin named Christine Terzibashian testified regarding the massacres in Turkey. She testified in detail concerning the murder of hundreds of children before her eyes).

hand: (1) the allegations of German complicity in the massacres[128] and (2) Talaat Pasha's responsibility for orchestrating the genocide, as well as his prior conviction and death sentence for that crime.[129]

B. Bringing the Horror Home: The Jury Confronts German Complicity

Before the words "German" or "Germany" were even uttered, the polarizing issue of German complicity in the Ottoman atrocities, during the war permeated every corner of the courtroom. As noted above, knowledge of the Armenian Genocide and a public debate concerning Germany's complicity in the massacres raged in post-war Germany.[130] Testimony and arguments regarding German complicity quickly materialized through testimony from German officials, as well as the arguments from the attorneys.

For instance, General Otto Liman von Sanders, a German military official who was in Turkey during the war, crafted his testimony to push back on the image of German complicity, stating:

> As far as I know, the German government did whatever it could at the time, conditions permitting, to help the Armenians. However, we should also recognize that it was a difficult task for the German government. I know personally that our Ambassador, Count Metternich, continuously protested against the policies and measures taken against the Armenians.[131]

The General continued: "I can say without hesitation . . . that there was not a single German officer involved in any of the actions taken against the Armenians, contrary to the many suspicions entertained with regard to us. The fact of the matter is that we intervened whenever and wherever we could."[132] While testimony, like that of

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128 *See* YEGHIAYAN, *supra* note 6, 84, 90, and 162.

129 *See* YEGHIAYAN, *supra* note 6, 13 and 24.

130 *See* Gruner, *supra* note 76, at 5-9.

131 YEGHIAYAN, *supra* note 6, at 84.

132 *Id.* at 84. (It is worth noting that, at the end of the war, the post-war Ottoman Government considered investigating this very witness, General Liman von Sanders, for his involvement in ordering the deportation of the Greek population from certain areas of Turkey in which many died); *see also* _AKCAM, *supra* note 68, at 257 (Furthermore, there is indication that in at least one instance, German Vice Counsel Scheubner-Richter reported participating in an operation targeting alleged Armenian rebels).

General Liman von Sanders, attempted to paint Germans in a positive light, other testimony could not avoid illustrating the unwillingness of Germans or the German government to protect Armenians from violence.

A prominent Armenian Bishop, Krikoris Balakian, who only barely escaped the April 24, 1915 pogroms described earlier, generally tried to paint the Germans he had encountered in a positive light. Yet, his account still illustrated the unwillingness of the German government to take significant action to stop the massacres.

> When I arrived at the Amanos mountain chain, I came across a group of German architects and engineers who were working on a tunnel . . . I stayed with them for four months. There were 8,000 Armenians working under the protection of these German engineers. *But when the orders came to deport these Armenians as well, they were killed between Bagche and Marash.* I fled again, this time to the Taurus mountains, where other German engineers were working on a tunnel, and I found refuge among them. The Chief Engineer, Leutenegger, was very good to me. *However, as soon as the Turks discovered my identity, I fled to Adana . . . .*[133]

Overall, much of the testimony that concerned Germany's actions during the war reflected an attempt to rehabilitate the image of the German people as wartime allies who were caught in the middle of an impossible situation.[134] That narrative would have likely appealed to the sensibilities of the German jury. However, a more realistic image of the German government was one whose officers and officials, at best, took no significant action in intervening to stop the massacres on a broad scale and, at worst, continued to support and defend the Ottoman government as it committed these atrocities.[135] This contrast featured prominently in the closing arguments regarding Tehlirian's guilt.

Indeed, during summation, the defense did not avoid the issue of German complicity in the Armenian massacres but made it a focal point for the jury to consider.

133 YEGHIAYAN, *supra* note 6, at 90 (emphasis added).

134 YEGHIAYAN, *supra* note 6, at 84.

135 Though there is some indication of modest and limited German government protests of some Ottoman Government actions during the war, many sources document that the German government supported, or at minimum took no significant action to stop, the Ottoman government's actions, including the deportation of the Armenians. *See* AKCAM, *supra* note 68, at 202, 214.

> During the war, German military and other establishments, both in this country and beyond its borders, passed over in silence and then tried to cover up the atrocities committed against the Armenians. This was done in such a manner as to imply that our German government actually condoned these atrocities.
>
> Certainly, up to a point, individual Germans tried to put an end to the atrocities, but to the Turks the implications were clear. They thought, "It is impossible for these events to take place without the consent of the Germans. After all, we are their allies and they are so much stronger than us."
>
> Therefore, in the East and all over the world, we Germans have been held responsible with the Turks for the crimes committed against the Armenians. There is a wealth of literature in the United States, Great Britain, and France whose purpose is to show that the Germans were really the Talaat's in Turkey.
>
> If a German court were to find Soghomon Tehlirian not guilty, this would put an end to the misconception that the world has of us . . . .[136]

Very simply, where some lines of questioning focused on Tehlirian's plan and intent to commit the Berlin murder,[137] evidence and argument attempting to absolve the German government's complicity in the massacres, kept the genocide at the center of the trial. This would have forced the jury to continue to evaluate the enormous moral deficits cultivated by its government, when that government was confronted with how to respond to these atrocities during the war.

C. Ratifying the Ottoman Trial: Talaat Pasha's Responsibility for the Genocide and His Conviction by the Ottoman Courts Martial

Laced throughout a trial filled with the testimony of the horrors of genocide and the allegations of German complicity, were repeated

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136 YEGHIAYAN, *supra* note 6, at 162.
137 *See id.* at 20-22.

references to the murder victim, Talaat Pasha's, guilt in ordering the deportation and massacre of Armenians as well as his conviction by the post-war Ottoman Courts-Martial. This evidence likely provided a moral, if not legal, avenue for the German jury to effectively "ratify" the conviction imposed by the Ottoman Court in 1919.[138] Evidence of that conviction was first introduced through Tehlirian's testimony.

> DEFENSE ATTORNEY VON GORDON: — I would also like to ask the defendant whether or not he had read in the newspapers that Talaat Pasha had been condemned to death for these massacres by the Court Martial in Constantinople?
>
> DEFENDANT — Yes, I had read that. I was also in Constantinople when Kemal, one of the authors of the massacres, was hanged.[139] On that occasion, it was written in the papers that Talaat and Enver were also condemned to death.[140]

Later in the trial, the prosecutor lodged a delayed objection to the relevance and reliability of the verdict of the Ottoman conviction, stating:

> DISTRICT ATTORNEY — In answer to a question put by one of the defense counsels, the defendant stated that he was aware Talaat Pasha had been sentenced to death in Constantinople. It is true there was such a verdict, but it is essential for me to clarify that the verdict was rendered when the control of the city of Constantinople was in the hands of a different government. Turkey had lost the war and Constantinople was at the mercy of the British Navy. I leave it to the court to determine what value that death sentence had . . . .[141]

Yet, despite this belated objection, testimony concerning Talaat's post-war conviction and the massacres continued with the testimony of the aforementioned German missionary Johannes Lepsius, who stated:

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138 *See* YEGHIAYAN, *supra* note 6, at 13, 24.

139 *Id.* ("Kemal" likely refers to Kemal Bey, who was found guilty and sentenced to death by the post-war Courts-Martial in April 1919 for his involvement in the massacre of the Armenians. *See* AKCAM, *supra* note 68, at 293. "On 10 April, Kemal was executed in Istanbul's Beyazit Square.").

140 YEGHIAYAN, *supra* note 6, at 13.

141 *Id.* at 24.

> This was possible in the most savage of conditions, as was brought out during the proceedings of the Military Tribunal set up in Constantinople to try Talaat and his comrades and associates. . .Of the five charges brought against the Young Turks, the first dealt with the Armenian massacres. On July 6, 1919, the Military Tribunal pronounced a guilty verdict, sentencing to death the leading perpetrators of the genocide — Talaat, Enver, Jemal and Dr. Nazim.[142]

With the final day of the trial consumed by closing arguments, the prosecutor once again attempted to challenge the relevance and reliability of the post-war conviction and death sentence by arguing that:

> . . . the verdict of the tribunal in Constantinople against Talaat, mentioned in this court, cannot convince me of his culpability. I do not know if the tribunal had all of the evidence before it. It is possible; however, we must not forget that whenever a government falls, the members of the succeeding government look upon the members of the former government as criminals. . .Therefore, as I indicated earlier, we are unable to tell whether or not the tribunal of Constantinople acted justly in condemning Talaat. I repeat, the testimony of the witnesses did not, in the least, implicate Talaat morally for the killings of the Armenians.[143]

The prosecutor clearly understood the effect that the evidence of Talaat Pasha's conviction and death sentence would have on the jury's deliberations and attempted to minimize it. Where the prosecutor tried to deflect attention away from the horrors of the Genocide and Talaat Pasha's prior conviction, the defense used its closing argument to directly appeal to the jury's evaluation of Talaat Pasha's responsibility for the Armenian Genocide, noting in closing that:

> All these impressions fill the defendant's head as he picks up the revolver and descends to the street. He descends as the representative of justice versus brute force. He descends as the representative of humanity versus inhumanity, of justice versus injustice. He steps forward as the representative of the oppressed against the collective representative of the

142 *See id.* at 77-78.
143 *See id.* at 114-15.

> oppressors; for the one million killed against *the one who*, along with others, *is to blame for those crimes*. . . .[144]

Another defense attorney who participated in delivering the closing argument, directly focused on the jury's power to nullify. He stated:

> This is the raison d'etre of a jury trial — to look at both sides of a question. That is, on the one hand, to evaluate the essence of the incident through one's own free contemplative powers, independently of the rules of formal proof; and, on the other hand, to evaluate the meaning of the disposition of the law.[145]

The defense continued by noting that "[y]ou too, gentlemen of the jury, have to be constantly aware that you cannot render a decision which is intellectually honest but contrary to your conscience, because it is not possible for us that injustice be justice. . . ."[146]

For the jury, the table was set. The world had watched, absent and silent, while one of its fading powers exterminated millions of its own citizens. Compounding that injustice, was the realization that nearly no one who took part in, or who directed those crimes, would ever face a meaningful legal proceeding of any kind to adjudicate their fault. Layered on that dark page was the question of German complicity, which Tehlirian's defense attorneys ensured that the jury could not ignore. In that space, where the courtroom had been transformed into as much of an investigation into the horrors of the Armenian Genocide, as a murder trial for Tehlirian, the jury was unquestionably measuring "broader goals than producing a preferred trial outcome"[147] and considering the "political message" it would send with its verdict.[148] The jury was likely aware that its decision would send a signal to its government and the wider world concerning the broken moral and social scales that were attempting to measure the culpability of this assassin against the incalculable enormity of the crime of genocide. After deliberating for less than two hours, the jury returned and acquitted Tehlirian of premeditated murder.

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144 *See id.* at 149 (emphasis added).
145 *See id.* at 150.
146 *See* YEGHIAYAN, *supra* note 6, at 158.
147 Horowitz & Kerr, *supra* note 20, at 1211.
148 Rubenstein, *supra* note 19, at 962.

V. CONCLUSION

Following the acquittal of Tehlirian in the summer of 1921, Raphael Lemkin, and others, struggled with the moral and legal implications of freeing an assassin who may have been guilty of murder, but whose victim had committed an unpunished crime of such scale, that the moral calculus skewed in favor of acquittal. While there was evidence introduced at trial of Tehlirian's past trauma and the effect it may have had on his mental state,[149] there was also significant evidence indicating that Tehlirian had developed and executed a premeditated plan to kill Talaat Pasha without any meaningful defect upon his mental state.[150] Apart from testimony of Tehlirian's personal struggles, the jury spent hours listening to and learning about the horrifying details of the murder and destruction of the Armenians of Turkey. Laced throughout those accounts, provided by victims and witnesses, was evidence that had forced the jury to confront the allegations of German complicity in the crimes of its wartime ally. The final layer of the tragic narrative was the aborted attempt to hold those, such as Talaat Pasha, the victim whose death was the subject of this trial, responsible for their crimes.

Reducing the acquittal of Tehlirian to an application, or misapplication, of a type of insanity defense, though not without support in the evidentiary record, requires us to strip away powerful context and evidence that would have propelled a jury toward evaluating broader moral issues. The Armenian massacres were reported widely throughout the world as they occurred and were known to the German government and people before the trial began.[151] The Armenian Genocide went unpunished with its perpetrators, like Talaat Pasha, escaping to often live comfortably in exile. The Presiding Justice could have excluded evidence and the argument of German complicity in the Turkish crimes, as well as the Court-Martial conviction and death sentence of the murder victim himself. That did not occur.

In light of this context, the Tehlirian acquittal is illustrative of the jury feature playing a role in communicating a symbolic, moral, and

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149 YEGHIAYAN, *supra* note 6, at 17-27.

150 *See id.* at 15-17; *see also* BOGOSIAN, *supra* note 2. (As noted above, Bogosian discusses Operation Nemesis, an organized effort by Armenians after World War I to find and assassinate those individuals who organized and perpetrated the Armenian Genocide. Revelation of the organized assassination plot may have had an effect on the jury if it had been brought into evidence at the trial. However, this article has focused on understanding the decision the jury made based on the evidence that was, in fact, presented to it for deliberation).

151 *See* Gruner, *supra* note 76, at 4-7.

social message to the wider world. The fact that it did not have a more potent effect, especially on the post-war German society, does not invalidate its contribution to the conversation surrounding the development of international human rights law.[152] Understanding that the verdict of this trial was a moment in which twelve jurors communicated a symbolic and social message to their government and to the broader world, also helps us better appreciate what may be one of the most legitimate rationales for the phenomenon of jury nullification: the social or moral message communicated to our society.

Jury nullification rightly occupies a controversial place in common law judicial systems. Historical examples, such as the Tehlirian trial, can provide different windows through which we can examine and understand the symbolic influence of moments of acquittal. Although it has the capacity to serve as a moral safety valve, granting tailored expressions of mercy in unique circumstances, nullification can also be employed to further or cement the pernicious tendencies of society, such as racist or discriminatory beliefs. Whenever nullification occurs, it is typically regarded as controversial by one group or another. That is why society's reaction to an instance of nullification, whether that reaction is outrage or celebration, may serve as the most useful function of this judicial feature. The Tehlirian acquittal is an example of an instance of symbolic jury nullification, which contributed to the development of fully realized laws criminalizing genocide. Whether society's celebration or outrage at an acquittal spurs an effort to codify legal remedies, such as the laws criminalizing genocide that slowly materialized in the twentieth-century, or the deconstruction of racist and discriminatory legal frameworks, that symbolic force of acquittal may be the strongest rationale for leaving this feature of our system untouched.

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152 *See* POWER, *supra* note 2, at 17 ("Lemkin [in 1933] drafted a paper that drew attention both to Hitler's ascent and to the Ottoman slaughter of the Armenians, a crime that most Europeans either had ignored or had filed away as an 'Eastern' phenomenon.").