

THE UNFINISHED BUSINESS OF THE ARMENIAN GENOCIDE: ARMENIAN PROPERTY RESTITUTION IN AMERICAN COURTS

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ABSTRACT:

Because of its striking success, the modern Holocaust restitution movement was initially seen as a model for other victim groups seeking compensation in American courts for financial injustices committed on a large scale by public entities and complicit private actors during a genocide or other mass atrocities. Lawyers seeking restitution for property takings during the Armenian genocide explicitly sought to emulate this success in a number of lawsuits filed in United States courts beginning in the early 2000s. Now, more than a decade later, it is clear that the early success of multi-million dollar settlements with insurance companies for unpaid policies held by Armenian families represented a high point in this litigation. Courts have consistently declined to hear later-filed cases founded on California state statutes explicitly designed to grant relief to a particular class of Armenian genocide victims. The courts have dismissed these cases by

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holding the state statutes to be unconstitutional on the ground that they interfere with the foreign affairs powers of the federal government. A 2015 amicable settlement between the Armenian church and the J. Paul Getty Museum regarding Armenian artworks stolen during the Armenian genocide may offer the best example of the way forward for Armenian genocide-era litigation.

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I. INTRODUCTION

By the second decade of the twenty-first century there was much reason for optimism regarding the lawsuits filed in American courts arising from Armenian genocide-related financial wrongs.¹ The Holocaust restitution movement and accompanying litigation that began in the late 1990s led to multi-billion dollar settlements with Swiss banks, French banks, Austrian companies, German companies, and multiple European insurance companies for their roles in facilitating and/or benefiting from the massive thievery that took place as European

1. See generally Michael J. Bazzyler, *From “Lamentation and Liturgy to Litigation”: The Holocaust-Era Restitution Movement As a Model For Bringing Armenian Genocide-Era Restitution Suits In American Courts*, 95 MARQ. L. REV. 245 (2011) [hereinafter Bazzyler, *Lamentation and Liturgy*]; MICHAEL BAZZYLER, HOLOCAUST, GENOCIDE AND THE LAW: A QUEST FOR JUSTICE IN A POST-HOLOCAUST WORLD 153-183 (2016) [hereinafter BAZZYLER, HOLOCAUST, GENOCIDE AND THE LAW].

Jews were being persecuted and then murdered.² The perceived successes of the Holocaust restitution litigation led American lawyers representing Armenian claimants to file suits against private actors who likewise benefited from the thievery during the Armenian genocide. The Armenian genocide civil suits explicitly followed the Holocaust civil litigation model. The Armenian genocide restitution movement began with insurance litigation filed in California federal courts against New York Life Insurance Company and French insurance company AXA.³ Both companies did business in Ottoman Turkey, where they had sold insurance policies to the Ottoman Armenians during the early years of the twentieth century, but had never paid on these policies. These Armenian suits likewise were successful, reaching separate settlements totaling nearly \$40 million.⁴

Spurred by these early successes, additional Armenian genocide-era lawsuits began to be filed. These suits focused on other financial wrongs committed during the mass murder of the Armenians in Ottoman Turkey. The California legislature, cognizant of the approximately 800,000 Armenians living in California,⁵ signaled its interest in providing a forum for Armenian genocide-era claims by extending the limitations period on certain claims.⁶ The later suits called for the return of bank deposits lost during the Armenian genocide. They also sought compensation for Armenian-owned land expropriated by Turkey and its state-owned entities during the genocide.⁷ While each of these suits presented challenges—including prescription, forum non conveniens, federal preemption, political question, act of state, choice of law, and sovereign immunity defenses—it appeared that there were

2. See Bazylar, *Lamentation and Liturgy*, *supra* note 1, at 248-49; see also *America's Role in Addressing Outstanding Holocaust Issues: Hearing Before the House of Representative's Committee on Foreign Affairs, Subcommittee on Europe*, 110th Cong. 8 (2007) (statement of Hon. J. Christian Kennedy, Special Envoy for Holocaust Issues) [hereinafter Kennedy Hearing]; see generally MICHAEL MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990s* (2006).

3. See *Turkey Sued in California Over Armenian Genocide*, REUTERS, July 30, 2010, <http://www.reuters.com/article/us-usa-turkey-genocide-idUSTRE66T5LH20100730>.

4. *Id.*

5. California is home to the largest number of Armenians outside Armenia. See *Deirmenjian v. Deutsche Bank A.G.*, No. CV 06-00774 MMM(CWx), 2006 WL 4749756, at *16 (C.D. Cal. Sept. 25, 2006).

6. See CAL. CIV. PROC. CODE §§ 354.4-354.45 (West 2006); see also Rajika L. Shah, *The Making of California's Art Recovery Statute: The Long Road to Section 338(c)(3)*, 20 CHAP. L. REV. 1 (2017).

7. See generally *Deirmenjian*, 2006 WL 4749756; *Davoyan v. Republic of Turkey*, 116 F. Supp. 3d 1084 (C.D. Cal. 2013) and Complaint in related case *Bakalian v. Republic of Turkey*, No. CV 10-09596 DMG (SSx) (C.D. Cal. Dec. 15, 2010).

likewise solid legal arguments available to plaintiffs to counter each such defense.⁸

As the contours of the legal landscape for Armenian genocide-era litigation began to be filled in by these later lawsuits, the results have not been positive for the Armenian claimants. Federal appellate courts, particularly the Ninth Circuit Court of Appeals, took a narrow, rather than expansive, view of whether and in what circumstances Armenian genocide cases should be allowed to proceed in American courts. Insurance litigation beyond *New York Life and AXA* was shut down on federal field preemption grounds. A California federal district court's dismissal of the bank deposit litigation against German banks doing business in Ottoman Turkey was affirmed on choice of law and statutes of limitations grounds.⁹ As of this writing in early 2017, the Ninth Circuit has yet to issue its decision in the cases seeking compensation for real property takings in Turkey. In that litigation, another California federal district court rejected the Republic of Turkey's sovereign immunity defense, but nevertheless dismissed the lawsuits on political question grounds.¹⁰

Amidst these successive legal defeats, there appeared one legal victory. The West Coast branch of the Armenian Apostolic Church successfully beat back legal challenges and convinced a California state trial court in Los Angeles to allow a lawsuit filed against the world's wealthiest museum, the J. Paul Getty Museum, to proceed to trial. The suit involved several rare illuminated manuscript pages separated from the Zeyt'un Gospels, a book of gospels created in the Middle Ages, during the Armenian genocide.¹¹ The decoration was created by T'oros Roslin (circa 1210-1270), the most prominent Armenian manuscript illuminator in the High Middle Ages.¹² The illumi-

8. See Bazylar, *Lamentation and Liturgy*, *supra* note 1, at 255-301.

9. See generally *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012) (holding the suit against a German insurance company brought by Armenian genocide victims alleging breach of contract, unjust enrichment, and constructive trust was preempted because the California statute intruded on the federal government's power); *Deirmenjjan v. Deutsche Bank AG*, 548 F. App'x 461, 463 (9th Cir. 2013) (affirming the district court's dismissal).

10. See *Davoyan v. Republic of Turkey*, 116 F. Supp. 3d 1084 (C.D. Cal. 2013) and Minute Order in related case *Bakalian v. Republic of Turkey*, No. CV 10-09596 DMG (SSx) (C.D. Cal. Mar. 26, 2013) (holding that, although the expropriation exception to foreign sovereign immunity was met, the court lacked subject matter jurisdiction when plaintiffs brought suit against the Republic of Turkey for constructive trust, breach of statutory trust, and unjust enrichment for property taken during the Armenian genocide because the court could not resolve "such an inherently political question").

11. Complaint and Demand for Jury Trial at 1, Western Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum, No. BC438824 (Cal. Super. Ct. filed June 1, 2010).

12. *Id.*

nated pages, once separated, appeared to be lost. They resurfaced in the United States in the 1990s and were purchased in 1994 by the Getty from an American family of Armenian descent. As the case began moving towards trial, the Getty and the Church jointly announced a “Solomonic settlement.” The Getty recognized that the illuminated pages were part of the Zeyt’un Gospels and legally belonged to the Church, and the Church in turn transferred the pages to the Getty for safekeeping and preservation. The settlement took place at an auspicious time, on the hundred-year anniversary of the beginning of the Armenian genocide in 1915.¹³

The Getty suit was modeled on the numerous and high-profile Nazi-looted art cases filed in American courts since the 1990s. These suits were filed against museums and private collectors worldwide found to have in their collections art stolen from the Jews of Europe during the Nazi era. The Getty suit was the first such suit arising from thievery of Armenian art and cultural objects during the Armenian genocide. This art likewise has found its way into collections of museums and private collectors. The successful resolution of the first Armenian genocide-looted art case opens the door for other such lawsuits.¹⁴

Section II of this article will examine the Holocaust restitution model and evaluate its success as a model for other victim groups. Section III will explore the legal landscape for Armenian genocide litigation as it exists today and examine what has changed in the past five years. Section IV will look at the successful settlement of the Getty art case. In the Conclusion, we discuss the outlook for the future of Armenian genocide restitution litigation.

II. THE HOLOCAUST RESTITUTION MODEL AS REFERENCE

A. *What Does the Term “Armenian Genocide” Mean?*

In all, between 1 million and 1.5 million Armenians died between 1915 and 1920 as a result of the forcible expulsion by Turkish authori-

13. Mike Boehm, *Getty, Armenian Church Settle*, L.A. TIMES, Sept. 22, 2015, at E6; Press Release, J. Paul Getty Museum, J. Paul Getty Museum and the Western Prelacy of the Armenian Apostolic Church of America Announce Agreement in Armenian Art Restitution Case (Sept. 21, 2015), <http://news.getty.edu/images/9036/manuscript2015release.pdf> [hereinafter Getty Press Release].

14. See MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS 202-268 (2003) [hereinafter BAZYLER, HOLOCAUST JUSTICE], and MELISSA MÜLLER & MONIKA TATZKOW, LOST LIVES, LOST ART: JEWISH COLLECTORS, NAZI ART THEFT, AND THE QUEST FOR JUSTICE (2010), for a discussion of Nazi-looted art litigation in American courts.

ties of the entire Armenian population from eastern Anatolia into the deserts of Mesopotamia, a region now in modern-day Iraq, Kuwait, and Syria.¹⁵ The expulsion was carried out through forced marches, where the expelled Armenian civilians died for lack of food, water, or shelter.¹⁶ Many were also murdered by local Kurdish and Turkish populations that the Armenians encountered during the forced marches.¹⁷ Village-by-village mass killings led to additional deaths.¹⁸

Was this genocide? There is no dispute that the Armenian minority in Ottoman Turkey was a distinct ethnic and religious group, and so would be a protected legal group under the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), as adopted by the United Nations in 1948 and entered into force in 1951.¹⁹ There is also little doubt that three *actus rea* of genocide, found in Article 2 of the Genocide Convention, were committed. With regard to subsection (a) “killing members of the group,”²⁰ it is unrefuted that a substantial number of Armenians, whether in the tens or hundreds of thousands or a million or more, were killed. With regard to subsection (b) “causing serious bodily or mental harm to members of the group,”²¹ there is also no dispute that the same number of Armenians incurred serious bodily and mental harm. With regard to subsection (c) “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,”²² the forced deportation of the Armenians (“conditions of life”) inflicted conditions that brought about the physical destruction of a substantial part of the Armenian people.

In 1915, approximately 2.5 million Armenians were living in the Ottoman Empire.²³ By 1923, only about 200,000 Armenians re-

15. See CHRISTOPHER J. WALKER, *World War I and the Armenian Genocide*, in *THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES* 239, 271 (Richard G. Hovannisian ed., 1997).

16. See RAYMOND KEVORKIAN, *THE ARMENIAN GENOCIDE: A COMPLETE HISTORY* 581 (2006).

17. See *id.* at 294.

18. See Norman M. Naimark, *Preface to A QUESTION OF GENOCIDE: ARMENIANS AND TURKS AT THE END OF THE OTTOMAN EMPIRE*, at xvii (Göcek Naimark Suny et al. eds., 2011); see also KEVORKIAN, *supra* note 16.

19. Convention on the Prevention and Punishment of the Crime of Genocide, art. II, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

20. *Id.*

21. *Id.*

22. *Id.*

23. See JAMES BRYCE & ARNOLD TOYNBEE, *THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE 1915-1916*, at 664 (1916).

mained.²⁴ In all, two-thirds of the Armenian population living in Ottoman Turkey in 1915 was gone by 1923, either deported or massacred by the Ottoman government.²⁵

Did the Ottoman leaders also possess the necessary *mens rea*, “intent to destroy, in whole or in [substantial] part,” the Ottoman Armenians by committing acts (a), (b), and (c)? Prominent British human rights barrister Geoffrey Robertson deftly summarized in 2009 the circumstantial evidence of genocidal intent on the part of the Ottoman Turkish rulers who initiated the expulsions and killings:

[The Ottoman rulers] were well aware, throughout the time when the deportations were underway, that they had turned into death marches. The Armenians were dying in their 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. There is ample evidence that the CUP [Committee of Union and Progress, the Young Turks who wrestled rule from the Ottoman sultan] leadership knew of these massacres. The US ambassador, Henry Morgenthau, says he complained several times to Interior Minister Talaat Pasha about his government’s “extermination” policy, and quotes Talaat as replying: “*We have already disposed of three quarters of the Armenians; there are none left in Bitlis, Van and Erzenum. 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.*” In a modern war crimes trial, the ambassador’s testimony would be relied on as evidence of an admission by Talaat to the knowledge (*mens rea*) sufficient for guilt of genocide, under the command responsibility principle.²⁶

24. See DONALD E. MILLER & LORNA TOURYAN MILLER, *SURVIVORS: AN ORAL HISTORY OF THE ARMENIAN GENOCIDE* 44 (1999).

25. See 1 KAI AMBOS, *TREATISE ON INTERNATIONAL CRIMINAL LAW: FOUNDATIONS AND GENERAL PART*, at 4 (2013). The term “deportation” does not fairly describe what the Armenians were forced to endure. As genocide scholar William Schabas explains:

The treatment of the Armenians by the Turkish rulers in 1915 provides the paradigm for the provision [of subsection (c)] dealing with imposition of conditions of life. These crimes have often been described as ‘deportations’. But they went far beyond mere expulsions or transfer, because the deportation itself involved deprivation of fundamental human needs with the result that large numbers died of disease, malnutrition and exhaustion.

WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES 192–93* (2nd ed. 2009).

26. Geoffrey Robertson, *Was There an Armenian Genocide?*, 4 U. OF ST. THOMAS J. OF L. & PUB. POL’Y 83, 94 (2010) (quoting HENRY MORGENTHAU, *AMBASSADOR MORGENTHAU’S STORY* 232 (1918)).

To buttress their claim, the Armenians and their supporters point to the links between the Holocaust and the Armenian genocide.²⁷ The Armenians and their supporters also marshal two additional pieces of evidence: (1) the reported utterance by Hitler in August 1939 to his generals in explaining that they would all enjoy impunity from prosecution for the naked attack on Poland, since “[w]ho, after all, speaks today of the annihilation of the Armenians?”²⁸ and (2) Raphael Lemkin apparently not only had the contemporaneous murder of the Jews in mind, but also the earlier murder of the Armenians when coining the term “genocide.”²⁹

Turkey steadfastly refuses to recognize the massacres of the Armenians as a genocide.³⁰ At most, the official position of the Republic of Turkey is to label the events as the “so-called Armenian genocide,” but this is a disrespectful use of the word and hardly its recognition.³¹ According to Turkey, the forced dislocation was “a war-related dislocation and security measure” that led to unfortunate deaths.³² Under the Turkish narrative, aspirations of Armenian nationalists for independence in the waning days of the Ottoman Empire made the Armenian minority a security risk. Because the Armenians took up arms against the Ottoman government, they were relocated due to their political aims, and not their ethnicity or religion.³³ But according to British historian Donald Bloxham, “nowhere else during the First World War was the separatist nationalism of the few answered with the total destruction of the wider ethnic community from

27. K.B. BARDAKJIAN, *HITLER AND THE ARMENIAN GENOCIDE* 1-2 (1985).

28. *See id.* (discussing this statement and specifically noting Hitler’s quote, saying, “Who still talks nowadays of the extermination of the Armenians?”).

29. *See* RAPHAEL LEMKIN’S DOSSIER ON THE ARMENIAN GENOCIDE (manuscript from Raphael Lemkin’s Manuscript Collection, American Jewish Historical Society) (Vartkes Yeghiayan ed., 2008) for Lemkin’s writings on the massacres of the Armenians.

30. *See, e.g., The Events of 1915 and the Turkish-Armenian Controversy over History: An Overview*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFF., http://www.mfa.gov.tr/the-events-of-1915-and-the-turkish-armenian-controversy-over-history_-an-overview.en.mfa (last visited Oct. 22, 2016).

31. *See, e.g., The Draft Law on the So-Called Armenian Genocide in the French Parliament*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFF., http://www.mfa.gov.tr/the-draft-law-on-the-so-called-armenian-genocide-in-the-french-parliament-_br__unofficial-translation__br_no_20_-_february-24_-2000.en.mfa (last visited Oct. 22, 2016).

32. According to Turkey’s Ministry of Foreign Affairs website, the Armenian deaths were due to the effects of “inter-communal conflict” and a world war when 2.5 million Muslims also perished. *See The Armenian Allegation of Genocide: The Issue and the Facts*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFF., <http://www.mfa.gov.tr/the-armenian-allegation-of-genocide-the-issue-and-the-facts.en.mfa> (last visited Nov. 23, 2016).

33. *Id.*

which the nationalists hailed.”³⁴ Turkey also claims that not all Armenians were targeted for deportation, with much of the Armenian population in Istanbul untouched by the events, that the usually cited figure of 1.5 million deaths is an exaggeration, and that a comparable number of Turks also perished during the same period.³⁵

In 2014, on the ninety-ninth anniversary of the Armenian genocide, some movement toward recognition was made when Turkish President Recep Tayyip Erdoğan offered condolences to the victims and their descendants and spoke of the “inhuman consequences” of the Armenians’ expulsion. However, he did not speak of genocide.³⁶ Nevertheless, this was the first time that any Turkish head of state, or for that matter any high-ranking Turkish government official, acknowledged the suffering of the Armenians on one of the most sacred days for the Armenian people. In 2015, on the centenary of the massacres, Turkish Prime Minister Ahmet Davutoğlu issued an even stronger statement of condolence: “We once again respectfully remember Ottoman Armenians who lost their lives during the deportation of 1915 and share the pain of their children and grandchildren.”³⁷

It is beyond the scope of this article to analyze the denialist history of Turkey and the reaction of the international human rights community and reputable historians and their refutation of such denialism. However, we observe that the debate has become too centered on the word itself rather than the issue at hand: obtaining for the Armenians a long-overdue acknowledgment and apology from Turkey for the sufferings of their ancestors. As Thomas DeWaal observes: “For most Armenians, it seems that no other label could possibly describe the suffering of their people. For the Turkish government, almost any other word would be acceptable.”³⁸ With regard to the

34. DONALD BLOXHAM, *THE GREAT GAME OF GENOCIDE* 92 (2007). For another well-researched study, see RONALD GRIGOR SUNY, “THEY CAN LIVE IN THE DESERT BUT NOWHERE ELSE”: A HISTORY OF THE ARMENIAN GENOCIDE (2015). The title comes from a pronouncement made by Talaat Pasha, Ottoman Minister of Interior, considered the primary architect of the Armenian genocide. The book of notes from Talaat’s private papers documenting the actions against the Armenians is now available in English. See ARA SARAFIAN, *TALAAAT PASHA’S REPORT ON THE ARMENIAN GENOCIDE 1917* (2011), <http://www.gomidias.org/uploads/Talaat%20Pashas%20Report%20on%20the%20Armenian%20Genocide.pdf>.

35. See REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFF., *supra* note 32.

36. See YÜCEL GÜÇLÜ, *HISTORICAL ARCHIVES AND THE HISTORIANS’ COMMISSION TO INVESTIGATE THE ARMENIAN EVENTS OF 1915*, at 293-95 (2015).

37. Carol J. Williams, *The Genocide Controversy*, L.A. TIMES, Apr. 22, 2015, at A4.

38. See Thomas de Waal, *The G-Word: The Armenian Massacre and the Politics of Genocide*, 94 FOREIGN AFF. 137 (2015), and THOMAS DE WAAL, *THE GREAT CATASTROPHE* (2015), for an excellent discussion of the century-old dispute between the Armenians and Turkey regarding what happened to the Ottoman Armenians.

Armenian genocide, it appears therefore that the use of the G-word stands today as an obstacle to reconciliation—even though the genocide designation for the atrocities committed against the Armenians is proper.

B. Why Does Property Restitution Matter?

Victims of genocide and other mass atrocities properly have personal claims under both international law and domestic law for their own personal injuries and for the loss of the lives of their loved ones.³⁹ They also have claims for unjust enrichment for property losses based on the value of the benefit received by the defendant perpetrators at the victim plaintiff's expense.⁴⁰ These restitution claims include demands for the return of personal and real property, and represent an important component of lawsuits filed by plaintiffs alleging to have suffered genocide or other mass atrocities.⁴¹

Such claims exist against both state and non-state actors. The claims may be directed at: (1) those who directly perpetrated the genocide or another mass atrocity; (2) those who aided and abetted or facilitated the genocide or atrocity in some way; and (3) those who took no direct or indirect participation in the genocide or atrocity but nevertheless benefited from it by virtue of having received, purchased, or come into possession of property taken during the genocide or atrocity. Taking of the victim group's property is not merely incidental to, or a byproduct of, the genocide or the atrocity; rather, the property takings themselves constitute genocide, war crimes, and crimes against humanity.⁴²

An important case from the U.S. Court of Appeals for the District of Columbia issued in 2016 illustrates well this point by holding that property takings themselves—apart from any murders—constitute a form of genocide. In *Simon v. Hungary*,⁴³ fourteen elderly Holocaust survivors originally from Hungary sued the Republic of Hungary and its state-owned Hungarian railway for having collaborated with the German Nazis in 1944-1945, during the waning months of the Second World War, to perpetuate the deportation and extermi-

39. See, e.g., Genocide Convention, *supra* note 19; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

40. See generally *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016).

41. *Id.*

42. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

43. *Simon*, 812 F.3d at 127.

nation of nearly half a million Hungarian Jews.⁴⁴ The plaintiffs alleged a three-step governmental policy designed to inflict maximum destruction, carried out in the space of just three months.⁴⁵ First, Hungarian Jews were targeted in a persecution campaign that included travel and certain clothing bans, bans from eating in restaurants or using public pools, and the requirement that every Jew wear the yellow Star of David.⁴⁶ Second, Jews were forced into cramped, unsanitary ghettos and their clothing removed.⁴⁷ All of their property was systematically inventoried and confiscated by Hungarian officials going door-to-door.⁴⁸ Third and finally, Jews were rounded up and marched to the railways, all their remaining belongings confiscated, and they were transported to Nazi death camps (primarily Auschwitz-Birkenau in German-occupied Poland) under the direction of Nazi mastermind Adolf Eichmann, where they were virtually all murdered upon arrival.⁴⁹ As this description makes clear, widespread property confiscation was not merely incidental to the extermination of Hungarian Jews, it was part and parcel of the integrated plan to destroy the group, its way of life, and its culture.⁵⁰ The *Simon* plaintiffs brought causes of action for property loss, including conversion and unjust enrichment, as well as personal injury and international law claims.⁵¹

Because the plaintiffs sued Hungary and a Hungarian state agency, jurisdiction over the defendants was governed exclusively by the Foreign Sovereign Immunities Act (FSIA).⁵² Unless one of the enumerated exceptions was met, the general rule applied and the foreign sovereign and the state railway would be immune from suit in U.S. courts.⁵³ The relevant exception, commonly known as the “takings” or “expropriation exception,” holds that a foreign sovereign and its related entities are not immune from suit in U.S. courts if “[1] rights in property [2] taken in violation of international law are in issue and [3] that property or any property exchanged for such property

44. *Id.* at 132.

45. *Id.* at 133.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 133-34.

50. *Id.* at 142.

51. *Id.* at 134.

52. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 433-34 (1989) (holding FSIA is “the sole basis for obtaining jurisdiction over a foreign state in our courts”).

53. *See* 28 U.S.C. § 1604 (2012).

is present in the United States” in connection with [specified commercial activity with a U.S. nexus].⁵⁴

The property-related claims for conversion and unjust enrichment satisfied the first element of the exception, and the state-owned railway did not dispute that it engaged in the requisite U.S.-based commercial activity.⁵⁵ Thus, the key issue in *Simon* was whether plaintiffs’ property had been “taken in violation of international law.”

Because there was no dispute that genocide itself violated international law, the court began its analysis by determining whether the alleged property takings “[bore] a sufficient connection to genocide that they amount to takings in violation of international law.”⁵⁶ The court’s starting point was the definition of genocide, as found in international law and incorporated into U.S. domestic law.⁵⁷

The Genocide Convention set forth for the first time a legal definition of genocide and criminalized genocidal activity, whether committed in peacetime or during war. Article 2 of the Convention defines genocide as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.⁵⁸

As the D.C. Circuit saw it, “the pivotal acts constituting genocide” that occurred in *Simon* “are those set out in subsection (c) of the definition.”⁵⁹ In other words, the property takings alleged by plaintiffs were intended to “deliberately inflict[] on the group conditions of life calculated to bring about its physical destruction in whole or in part,” which was the very reason such language was included in the defini-

54. 28 U.S.C. § 1605(a)(3) (2012).

55. *Simon*, 812 F.3d at 147.

56. *Id.* at 142.

57. *Id.* at 143.

58. Genocide Convention, art. II, *supra* note 19.

59. *Simon*, 812 F.3d at 143.

tion of genocide.⁶⁰ The court's view on this point was unambiguous: the property taken from Hungary's Jews did more than "finance Hungary's war effort" and was not merely incident to the ghettoization of the Hungarian Jews.⁶¹ Rather, the "systematic, wholesale plunder of Jewish property" by Hungarian and German authorities was intended to deprive them of the resources they needed to survive as a people—the property was taken for the very purpose of ensuring the destruction of Hungary's Jews.⁶² As a result, the international law violation required to establish the court's jurisdiction was not the uncompensated expropriations themselves, but rather genocide.⁶³

This conclusion comports with victims' sense of why property takings are at the core of genocidal activity and places property claims at the heart of any effort to restore victims to wholeness. In agreeing with the plaintiffs, the *Simon* court confirmed and further articulated the conclusion reached by the Seventh Circuit four years earlier in another case involving the theft of property of Hungarian Jews during the Second World War. In *Abelesz v. Magyar Nemzeti Bank*, the appellate court explained that acts of thievery such as "the freezing of bank accounts, the [establishment of] straw-man control of corporations, the looting of safe deposit boxes and suitcases brought . . . to the train stations, and even charging third-class train fares to victims being sent to death camps" is both a "ghoulishly efficient" means of financing the rounding up and deportation or incarceration of the targeted group, and an "integral part" of the genocide itself.⁶⁴

C. *The Holocaust Restitution Model*

Following the Second World War and murder of six million European Jews (the event known as the Holocaust, or *Shoah* in Hebrew), the world Jewish community (led by groups in the United States such as the World Jewish Congress) made restitution of property stolen by the Germans and other perpetrator groups a priority.⁶⁵ If the six million could not be brought back, at least the possessions of those murdered could be returned to the Jewish community.⁶⁶ Holocaust restitution efforts continued for the next seventy years, and included

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 142.

64. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 675 (7th Cir. 2012).

65. See MARRUS, *supra* note 2, at 65.

66. *Foreword to id.* at ix.

restitution for both Jews and other victim groups.⁶⁷ The efforts to obtain what has been called “some measure of justice”⁶⁸ through restitution following the Holocaust still continue today.⁶⁹ The Holocaust “Some Measure of Justice” (HSMJ) movement can be divided into three separate periods, each of which faced its own set of challenges. Each period also provides important lessons for other victim groups, including those seeking a “measure of justice” through restitution for the Armenian genocide.

The HSMJ movement began immediately following the war. During this first period, the Allied countries focused on recovering and returning assets stolen by the Nazis throughout Europe, including but not limited to Jewish property.⁷⁰ Although this period saw the Allies enacting multiple laws governing seizure of assets owned or controlled by the Nazis and blocking the transfer of such assets, such efforts were only partially successful.⁷¹ Many seized assets were later returned to their unlawful German owners, and the low financial penalties imposed on Nazis prosecuted for wartime criminal activity meant that there was little left to be passed on to victims.⁷² Perhaps most devastating, private property in Soviet-occupied Germany and other Eastern bloc states was nationalized within a few years after the war and became the property of the new communist states, thus erecting a second barrier to restitution.⁷³

The second period of HSMJ began in 1949, when sovereignty was restored to Germany after the Allied occupation. The major event in this period was a 1952 bilateral treaty between Germany and Israel known as the Luxembourg Agreement, following the location where the treaty negotiations took place. Under the Luxembourg Agreement, West Germany (but not East Germany), formally known as the Federal Republic of Germany (FRG), agreed to make payments to the new state of Israel over the following decade.⁷⁴ The treaty also

67. See Carol Kino, *Stolen Artworks and the Lawyers Who Reclaim Them*, N.Y. TIMES, Mar. 28, 2007, at H28.

68. See MARRUS, *supra* note 2.

69. See *id.* at xiv, 5.

70. *Id.* at 67.

71. See Monroe Karasik, *Problems of Compensation and Restitution in Germany and Austria*, 16 LAW & CONTEMP. PROBS. 457, 457-60 (1951).

72. See Seymour J. Rubin & Abba P. Schwartz, *Refugees and Reparations*, 16 LAW & CONTEMP. PROBS. 377, 379 (1951) (stating that the amount allotted is “pitifully small” given the large number of persons who need to be compensated).

73. See MARRUS, *supra* note 2, at 68-69.

74. Agreement between the State of Israel and the Federal Republic of Germany, art. III, Sept. 10, 1952, 162 U.N.T.S. 205.

included a provision for lifetime payments to individual Holocaust survivors living in the West (Jewish survivors living behind the Iron Curtain were not covered) for the duration of their lives.⁷⁵ The Luxembourg Agreement was revolutionary. For the first time in history, a nation complicit in the mass murder of a victim group and concomitant mass theft agreed to pay reparations to individuals in the victim group *and* to the state that represented the victim group: Israel, the nation state of the Jewish people.⁷⁶ The prime mover in West Germany for this unique form of state-to-state reparations and individual victim restitution was Konrad Adenauer, the first prime minister (called chancellor) of the postwar FRG.⁷⁷ Adenauer had to overcome significant domestic resistance to his plan by the German people and German politicians from his own party, the Christian Democrats.⁷⁸ The German parliament eventually approved the treaty, with most of the votes coming from opposing Social Democrats.⁷⁹ Many Israeli politicians (including future prime minister Menachem Begin) and a large segment of the Israeli public were also highly conflicted at the prospect of taking “blood money” from Germany, particularly to compensate for what many survivors viewed as essentially a moral wrong.⁸⁰ Massive street demonstrations took place in Tel Aviv and Jerusalem, with David Ben-Gurion, Israel’s first prime minister, vilified for negotiating with the nation representing what until recently was the greatest enemy of the Jewish people, seeking its complete destruction.⁸¹

In the end, practicalities won out. West Germany was eager to rejoin the family of nations, and voluntarily paying reparations and individual restitutions was seen as an important symbolic act in that regard. The new state of Israel badly needed economic assistance, and so the initial payments in the form of German goods significantly boosted the Israeli economy.⁸² Israel also had (and still has) the largest population of Holocaust survivors, many of whom badly needed economic assistance.⁸³ The surviving European Jews now living in

75. *Id.*

76. *See* MARRUS, *supra* note 2, at 72.

77. *See id.* at 70.

78. *See id.* at 72.

79. *See id.* at 73.

80. *See id.* at 72.

81. *See id.* at 73.

82. *See id.*

83. *Id.*

Israel often came to their new homeland with nothing more than the clothes on their backs.⁸⁴

German payments to individual survivors still continue, but since the fall of the Berlin Wall, payments expanded to those living in the Communist east.⁸⁵ Since 1952, Germany has paid out more than \$70 billion in individual payments, varying from lump-sum payments ranging from a few thousand euros to the equivalent of an annual salary, to monthly compensation payments lasting over decades.⁸⁶

The third period of HSMJ began in the 1990s and was focused on litigation in U.S. courts. Its purpose was to tackle the “unfinished business” of the Holocaust by seeking to hold accountable private actors and state agencies for the benefits they received as a result of Nazi persecution of both Jews and non-Jews.⁸⁷ This included: restitution of unreturned bank deposits, the largest portion from Swiss banks; payments arising from insurance policies taken out by Jews from European insurance companies and never paid; and compensation made by German multinational corporations and the German state to still-living individuals who labored as slaves for these companies during the war.⁸⁸ The largest category of recipients of slave labor payments were non-Jewish nationals of Eastern European countries who were dragooned into unwillingly working for German industry.⁸⁹ The individual one-time payments were small: \$7,500 to those, mostly Jews, that survived the Nazi “death-through-labor” regime and \$2,500 for the non-Jews of Slavic origin that worked as forced laborers in the German Reich.⁹⁰

A number of factors combined to make these suits appear viable only in United States courts, including the recognition of jurisdiction over foreign corporate defendants that do business in the United States, even over claims that occurred abroad; the ability of lawyers to

84. See TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST* 173 (1993).

85. See MARRUS, *supra* note 2, at 75.

86. CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY ANNUAL REPORT 21 (2012), <http://forms.claimscon.org/ar/2012-CC-AR-web2.pdf>.

87. See, e.g., STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (2003); JOHN AUTHERS & RICHARD WOLFFE, *THE VICTIM'S FORTUNE* (2002); *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* 50 (MICHAEL BAZYLER & ROGER P. ALFORD eds., 2006); MARRUS, *supra* note 2, at 20-21.

88. See EIZENSTAT, *supra* note 87, at xiii; BAZYLER, *HOLOCAUST JUSTICE*, *supra* note 14, at 323.

89. See MARRUS, *supra* note 2, at 21.

90. *Id.*

take cases on a contingency basis, thereby giving Holocaust claimants top-notch legal representation when filing suits against European and American corporate giants; and a legal culture in which lawyers are willing to take high-risk cases with a low probability of success, in order to test the limits of the law.⁹¹ Equally important to the positive outcome of the modern push for Holocaust restitution were the commitment and willingness of American public officials to shine a spotlight on the mass theft of Jewish property and broker settlement agreements, the effective advocacy of U.S.-based Jewish community organizations, and American media interest in Nazi reparations.⁹² These remarkable efforts led to compensation totaling more than \$8 billion in individual and community-based payments, with significant European and American government cooperation.⁹³ However, the success of HSMJ-3 should not be overstated. None of the lawsuits, most filed as class actions, ever reached trial and many were dismissed outright on technical grounds: statute of limitations, political question, lack of subject matter jurisdiction, and forum non conveniens.⁹⁴ As discussed later, the defendants sued for restitution arising out of the Armenian genocide would rely on the same defenses, usually with success.

While the lawsuits became the “loud knock on the door” of the defendants to recognize these long-dormant and forgotten claims, the eventual settlements took place outside the courtroom.⁹⁵ Germany and its corporations realized that, even if they succeeded in getting a particular lawsuit dismissed, they still faced a political and public relations problem that would not simply go away.⁹⁶ Victims’ advocates were able to exert settlement pressure on them by reminding the American public that the German products they were buying—

91. BAZYLER, HOLOCAUST, GENOCIDE, AND THE LAW, *supra* note 1, at 161.

92. See *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139, 147-48 (E.D.N.Y. 2000); Bazylar, *Lamentation and Liturgy*, *supra* note 1, at 286-88, 295-96; Ronald W. Zweig, *Holocaust Restitution, Reparation, and Indemnification*, YIVO ENCYCLOPEDIA OF JEWS IN E. EUR., http://www.yivoencyclopedia.org/article.aspx/Holocaust/Restitution_Reparation_and_Indemnification (last visited Dec. 2, 2016).

93. Kennedy Hearing, *supra* note 2.

94. See *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 140-42; see, e.g., *Simon v. Republic of Hungary*, 812 F.3d 127, 132 (D.C. Cir. 2016) (holding that federal courts do not have jurisdiction over claims for personal injury or death against a foreign sovereign).

95. See *In re Nazi Era Cases Against German Defs. Litig.*, 198 F.R.D. 429, 430-32 (D.N.J. 2000) (discussing the lengthy negotiations between the numerous class action complaints filed in the United States against the German government which culminated in the creation of a foundation to make payments to victims of slave and forced labor).

96. See Sean D. Murphy, *Implementation of German Holocaust Claims Agreement*, 97 AM. J. INT’L L. 692, 693-94 (2003).

whether cars, computers, aspirin, or insurance—were from the same companies that were implicated in some of the most horrific crimes committed in human history.⁹⁷ Moreover, the lawsuits spurred many companies—both European and American—to review their archives and official histories in light of allegations of Nazi complicity, and in some cases even issue apologies.⁹⁸

D. *How Have Other Restitution Movements Fared in U.S. Courts?*

The success of the Holocaust restitution litigation came at a time when a wide range of other victim groups was also attempting to achieve redress through lawsuits in U.S. courts, hoping for similar results. These included: (1) suits against Germany and German companies for their role in the Herero genocide in southwestern Africa (sometimes called the “first” genocide of the twentieth century);⁹⁹ (2) suits against Japan and Japanese industry arising out of the Second World War for slave labor;¹⁰⁰ (3) suits against multinationals arising out of their business activities in apartheid South Africa;¹⁰¹ and, most prominently, (4) claims by African-Americans for reparations against the U.S. government and American companies involved in slavery arising from the American slave era.¹⁰² None were able to duplicate the financial settlements reached during the HSMJ-3 campaign.

The Herero people in Southwest Africa (present-day Namibia) were enslaved by imperial Germany beginning in 1904 when Germany colonized the region.¹⁰³ After the Herero tribe revolted,¹⁰⁴ the Ger-

97. S. Jonathon Wiesen, *German Industry and the Third Reich: Fifty Years of Forgetting and Remembering*, DIMENSIONS J. OF HOLOCAUST STUD., http://archive.adl.org/braun/dim_13_2_forgetting.html#.VyznPfkrKM8 (last visited Nov. 3, 2016).

98. Maia de la Baume, *Survivors of Holocaust Hear Apology in France*, N.Y. TIMES, Jan. 26, 2011, at A6; *Hugo Boss Apology for Nazi Past a Book Is Published*, BBC (Sept. 21, 2011), <http://www.bbc.com/news/world-europe-15008682>; Murphy, *supra* note 96, at 682; Laurie C., *Bayer Sorry for Nazi Role*, N.Y. DAILY NEWS (Dec. 21, 1995), <http://www.nydailynews.com/archives/news/bayer-nazi-role-article-1.701925>.

99. *See Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1193 (D.C. Cir. 2004); *see also Hereros ex rel. Riruako v. Deutsche Afrika-Linien GmbH & Co.*, 232 F. App'x. 90, 93 (3d Cir. 2007).

100. *See In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 940 (N.D. Cal. 2000).

101. *See Balintulo v. Ford Motor Co.*, 796 F.3d 160 (2d Cir. 2015); *see also Balintulo v. Daimler A.G.*, 727 F.3d 174, 175 (2d Cir. 2013); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 255-256 (2d Cir. 2007).

102. *See In re African-American Slave Descendants Litigation*, 471 F.3d 754 (7th Cir. 2006).

103. *See Herero People's Reparations Corp.*, 370 F.3d at 1193; *see also Hereros ex rel. Riruako*, 232 F. App'x at *93.

104. The smaller neighboring Nama tribe also revolted, and German soldiers massacred the Nama like the Herero.

man military killed approximately 100,000 and sent others to concentration camps where they were put to work as slave labor.¹⁰⁵ Many Herero were also beheaded, and their skulls sent to Germany for scientific research.¹⁰⁶ The mass killings of the Herero group certainly fall within the meaning of genocide under Article 2 of the Genocide Convention, and the *mens rea* is shown by a “smoking gun” document written by the commander of the German forces, Lotha von Trotha, who wrote: “I believe that the nation as such should be annihilated, or, if this is not possible by tactical measures, expelled from the country.”¹⁰⁷

In July 2016, Germany apologized to the Herero and admitted that the massacres constituted a genocide, but only after the Herero filed suits in American courts against German companies alleged to have profited from the genocide.¹⁰⁸ In 2004 and 2007, respectively, the suits were dismissed on the basis of lack of subject matter jurisdiction and statute of limitations.¹⁰⁹

A more viable set of suits that followed the Holocaust restitution litigation model were those filed by American and other Allied soldiers who had been made to work as slave laborers for Japanese companies during the Second World War while being held as prisoners of war.¹¹⁰ Akin to these suits, were suits filed by nationals of China and Korea who had been abused during the Japanese occupation of these states.¹¹¹ These suits likewise did not succeed, even though California sought to make the suits more viable by passing a statute giving California courts jurisdiction over such suits and extending the limitations period.¹¹² Federal courts held that the 1951 Peace Treaty between Japan and its wartime enemies barred litigation against the

105. *Hereros ex rel. Riruako*, 232 F. App'x at *90-93; Jeremy Sarkin, *The Coming Age of Claims for Reparations for Human Rights Abuses Committed in the South*, 1 SUR J. INT'L HUM. RTS. 67, 89 (2004).

106. Justin Huggler, *Germany to Recognise Herero Genocide and Apologise to Namibia*, TELEGRAPH (July 14, 2016), <http://www.telegraph.co.uk/news/2016/07/14/germany-to-recognise-herero-genocide-and-apologise-to-namibia>.

107. *Id.*

108. *Id.*

109. *Herero People's Reparations Corp.*, 370 F.3d at 1192; *Hereros ex rel. Riruako*, 232 F. App'x at *90.

110. See *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003); *Mitsubishi Materials Corp. v. Superior Court*, 113 Cal. App. 4th 159 (2003).

111. See *In re World War II Era Japanese Forced Labor Litigation* 164 F. Supp. 2d 1160 (N.D. Cal. 2001).

112. *Deutsch*, 324 F.3d at 706; see also *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001).

Japanese.¹¹³ As for the California law, the Ninth Circuit declared the state statute unconstitutional on the ground that it unduly interfered with the foreign policy of the United States, which the federal government has exclusive power to conduct.¹¹⁴ For the Holocaust restitution suits, the German companies that succeeded in having the suits dismissed continued to negotiate with the claimants to achieve a political resolution.¹¹⁵ Japanese corporations that were sued because they committed atrocities by using slave labor, however, declined to engage in any further settlement discussions with the victims.¹¹⁶

The South African apartheid cases also ended in dismissal in 2015, after several years and multiple appeals.¹¹⁷ There, the lapse of time between the actual events and the claims was not the issue, nor any alleged interference with U.S. foreign relations, but rather whether sufficient wrongdoing occurred in the United States so as to justify jurisdiction over the matter by a U.S. court.¹¹⁸ Although the corporate defendants included Ford Motor Co. and IBM (as well as, originally, UBS, Credit Suisse, Deutsche Bank, Dresdner Bank, and Commerz Bank, all of whom were dismissed in earlier stages of the litigation), the court ultimately held that having knowledge of serious international law violations being committed was insufficient to establish the requisite *mens rea* required to show aiding and abetting liability, which required some purposeful activity directed towards facilitation of the crime.¹¹⁹

113. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 940 (N.D. Cal. 2000) (citing Article 14(b) of the Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45, which states: "Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.").

114. *Deutsch*, 324 F.3d at 706, 716.

115. See Madeline Doms, *Compensation for Survivors of Slave and Forced Labor: The Swiss Bank Settlement and the German Foundation Provide Options for Recovery for Holocaust Survivors*, 14 *TRANSNAT'L LAW.* 171, 174-75 (2001) (stating that the German government has paid more than \$60 billion in reparations to Holocaust survivors).

116. *Deutsch*, 324 F.3d at 692; John Haberstroh, *In re World War II Era Japanese Forced Labor Litigation and Obstacles to International Human Rights Claims in U.S. Courts*, 10 *ASIAN L. J.* 253, 255-56 (2003).

117. See *Balintulo v. Ford Motor Co.*, 796 F.3d 160 (2d Cir. 2015).

118. See *id.* at 163. The claims had been brought by South African citizens pursuant to the Alien Tort Statute, 28 U.S.C. § 1350, which provides for jurisdiction in U.S. courts over claims brought by aliens for torts only in violation of the law of nations (international law). Plaintiffs in the South African apartheid cases had brought claims for, inter alia, racial discrimination, torture, unlawful killings, and other human rights abuses. *Id.* at 167-70.

119. See *id.*

The success of the Holocaust reparations litigation sparked renewed calls for reparations arising out of America's own history of African-American slavery.¹²⁰ Litigation began in the early 2000s against insurance companies, railroads, and other companies which allegedly benefited from slave labor.¹²¹ Again, statutes of limitations problems and the challenges posed by having to determine—150 years after slavery was officially abolished in the United States in 1865—who had standing to make a claim eventually resulted in dismissal of the cases.¹²²

One major difference between the settlements achieved by Holocaust victims and the failure to obtain redress by these other disparate groups of victims is reflected in the difference in approach and attitude of the defendants: while Germany and German companies expressed remorse for the Holocaust and sought to move past that difficult chapter in their history by laying the outstanding claims to rest, it seems that different political considerations and pressures are at play in these other situations (although Mitsubishi Materials has, in the past two years, taken steps to apologize for its wartime activities and make symbolic reparations payments to certain Chinese wartime laborers).

In addition, the length of time that had passed between the events at issue and the claimant litigation was a major contributing factor. In the Holocaust, Japanese, and apartheid cases, for instance, many of the actual victims or their immediate heirs were still alive to make a claim.¹²³ That was simply not the case with the Herero and African-American reparations cases, which attempted to obtain compensation for events that had occurred in the more distant past.¹²⁴

In 2011, Michael Thad Allen declared that “the Holocaust-era cases of the late 1990s have had few progeny. Despite their spectacu-

120. See *In re African-American Slave Descendants Litigation*, 471 F.3d 754 (7th Cir. 2006); see also Tamar Lewin, *Calls For Slavery Restitution Getting Louder*, N.Y. TIMES, June 4, 2001, at A15.

121. See *In re African-American Slave Descendants Litigation*, 231 F. Supp. 2d 1357 (J.P.M.L. 2002).

122. *In re African-American Slave Descendants Litigation*, 471 F.3d at 754.

123. See generally *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139, 147 (E.D.N.Y. 2000); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003); *Balintulo v. Ford Motor Co.*, 796 F.3d 160 (2d Cir. 2015).

124. See *In re African-American Slave Descendants Litigation*, 471 F.3d at 754; *Herero People's Reparations Corp. v. Deutsche Bank, A.G.*, 370 F.3d 1192, 1193 (D.C. Cir. 2004); see also *Hereros ex rel. Riruako v. Deutsche Afrika-Linien Gmbh & Co.*, 232 F. App'x. 90, 93 (3d Cir. 2007).

lar settlements, they are a legal cul-de-sac.”¹²⁵ As of this writing in early 2017, he appears to have been right, though restitution litigation over Holocaust-era thievery continued during the Obama presidency. What lies in store during the Trump presidency is unknown.

III. ARMENIAN GENOCIDE RESTITUTION EFFORTS TO DATE

HSMJ-3, the third phase of modern Holocaust restitution, corresponds to the recent efforts by Armenians to obtain some measure of redress for what they and their families suffered during the Armenian genocide, which has focused on lawsuits against Turkey, Turkish state agencies, and private entities that profited from Turkey’s actions. Inspiration for this litigation came directly from the Holocaust restitution litigation. Attorney Vartkes Yeghiayan, himself a child of survivors of the Armenian genocide who initiated the use of American courts to litigate events surrounding the Armenian genocide, explained in an article in the *Los Angeles Times*: “For the first time [the Armenian community] has gone beyond lamentation and liturgy to litigation, from picketing and going to church every April 24 [the Armenian Day of Remembrance] and mourning to taking legal action. . . . Holocaust victims’ heirs showed me the way.”¹²⁶

A. *The Insurance Cases*

Taking direct inspiration from suits brought by Holocaust survivors and heirs against European insurance companies that failed to pay on life insurance and other policies purchased by European Jews prior to the Second World War, Yeghiayan and his fellow Armenian-American co-counsel Brian Kabateck and Mark Geragos brought several suits in Los Angeles federal courts against various American and European insurance companies that failed to pay on policies purchased seventy or more years earlier by Armenians in Ottoman Turkey prior to the Armenian genocide.¹²⁷ The lawsuits arose out of a chance discovery made by Yeghiayan upon reading the memoirs of American Ambassador to Ottoman Turkey, Henry Morgenthau. In

125. Michael Thad Allen, *The Limits of Lex Americana: The Holocaust Restitution Litigation as a Cul-De-Sac of International Human Rights Law*, 17 WIDENER L. REV. 1, 67 (2011).

126. Beverly Beyette, *He Stands Up in the Name of Armenians*, L.A. TIMES, Apr. 27, 2001, at E1 (internal quotation marks omitted) (quoting Armenian-American attorney Vartkes Yeghiayan, who represented plaintiffs in Armenian Genocide-era restitution suits).

127. See *Marootian v. N.Y. Life Ins. Co.*, No. CV-99-12073 CAS (MCx), 2001 U.S. Dist. LEXIS 22274 (C.D. Cal. Dec. 3, 2001); Complaint, *Kyurkjian, v. AXA*, No. 2:02-cv-01750-CAS-Mc (C.D. Cal. Feb. 28, 2002); Complaint, *Ouzounian v. AXA*, No. 2:05-cv-02596-CAS-Mc (C.D. Cal. Apr. 8, 2005); *Movsesian v. Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012).

the memoirs Morgenthau recalls how Talaat Pasha, the main instigator of the Armenian genocide, requests American insurance companies that sold policies to Armenians in Ottoman Turkey to make payment to the Turkish state, since the Armenians were no longer alive.¹²⁸

Surprisingly, some children or grandchildren of the Armenian purchasers still had in their possession originals of such policies.¹²⁹ One of them was the Marootian family, living in Southern California. Martin Marootian, a retired pharmacist living in San Diego, still had his deceased uncle Setrak Cheytanian's original New York Life insurance policy, along with other documents showing how Martin's mother—one of the only two remaining family members who had survived the genocide—had tried unsuccessfully over the years to collect on the policy from New York Life.¹³⁰ New York Life refused to pay out on the policy even after the family spent more than thirty years obtaining the proper certification the company claimed it required.¹³¹ After reading about attorney Vartkes Yeghiayan's efforts to locate surviving heirs, Martin's sister responded, but died before the suit could be filed.¹³² Marootian thereby became the lead plaintiff in the first Armenian genocide insurance class action lawsuit, filed against New York Life in 1999.¹³³

The second lawsuit was filed against the French insurance company AXA, by another group of Armenian plaintiffs, likewise arguing that their ancestors purchased policies in Ottoman Turkey before the First World War from AXA, but the French insurer never paid out on

128. The exchange in Morgenthau's diary reads as follows:

One day Talaat made what was perhaps the most astonishing request I had ever heard. The New York Life Insurance Company and the Equitable Life of New York had for years done considerable business among the Armenians. The extent to which these people insured their lives was merely another indication of their thrifty habits. "I wish," Talaat now said, "that you would get the American life insurance companies to send us a complete list of Armenian policy holders. They are practically all dead now and have left no heirs to collect the money. It of course all escheats to the state. The Government is beneficiary now. Will you do so?" This was almost too much, and I lost my temper. "You will get no such list from me," I said, and I got up and left him.

HENRY MORGENTHAU, *AMBASSADOR MORGENTHAU'S STORY* 339 (1918).

129. Elaine Woo, *Martin Marootian Dies at 95; Lead Plaintiff in Suit Over Armenian Genocide Victims' Insurance Policies*, L.A. TIMES (Mar. 12, 2011), <http://articles.latimes.com/2011/mar/12/local/la-me-martin-marootian-20110312>.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Marootian v. New York Life Ins. Co.*, No. CV-99-12073, 2001 U.S. Dist. LEXIS 22274 (C.D. Cal. Dec. 3, 2001).

the policies when the policyholders perished during the Armenian genocide.¹³⁴

The lawsuits against New York Life and AXA closely followed the Holocaust restitution litigation model. New York Life filed a motion to dismiss, arguing that, under a forum selection clause in the policies, the action should be heard in either France or England.¹³⁵ The judge denied the motion, holding that to adhere to the contractual forum selection clauses would be fundamentally unfair.¹³⁶ A specific statute passed by the California legislature, codified at California Code of Civil Procedure Section 354.4, established California as a forum for such cases despite any forum-selection clause in the contracts and extended the limitations period for filing the cases.¹³⁷ Section 354.4 was explicitly modeled after previous California statutes extending the limitations period for Holocaust-era insurance claims and World War II slave labor claims.¹³⁸

In 2004, New York Life settled for \$20 million.¹³⁹ In 2005, AXA likewise settled for \$17 million.¹⁴⁰ Settlement funds were established in both cases, administered by a three-person settlement board with authority to review and decide on claims under the supervision of the presiding federal judges, to pay out the valid insurance claims.¹⁴¹ The remainder of the funds was to be distributed in *cy pres* funds to various American and French Armenian non-profit groups.¹⁴²

At this point, the Armenian genocide litigation hit a legal cul-de-sac. The subsequent suits were nearly all unsuccessful. In the third insurance case, *Movsesian v. Victoria Versicherung A.G.*, the Armenian claimants made similar claims against German insurers.¹⁴³ However, that case followed a different and a most unusual trajectory. In

134. See Complaint, *Kyurkjian, v. AXA*, No. 2:02-cv-01750-CAS-Mc (C.D. Cal. Feb. 28, 2002); Complaint, *Ouzounian v. AXA*, No. 2:05-cv-02596-CAS-Mc (C.D. Cal. Apr. 8, 2005).

135. *Marootian*, 2001 U.S. Dist. LEXIS 22274, at *7-9.

136. *Id.* at *54, 55.

137. See CAL. CIV. PROC. CODE § 354.4 (West 2006).

138. *Movsesian v. Victoria Versicherung A.G.*, 578 F.3d 1052, 1054 (9th Cir. 2009).

139. See Woo, *supra* note 129.

140. See *Armenian Heirs Settle AXA Class Action Lawsuit*, BUS. WIRE (Oct. 12, 2005, 11:00 AM), <http://www.businesswire.com/news/home/20051012005262/en/Armenian-Heirs-Settle-AXA-Class-Action-Lawsuit>.

141. See Francie Grace, *\$20M Settlement For Armenians*, CBS NEWS (Jan. 29, 2004), <http://www.cbsnews.com/news/20m-settlement-for-armenians/>; see also Marine Martirosyan, *AXA Settlement Fund Board Claims Embezzlement/Irregularities in Insurance Payments to Genocide Heirs*, HETQ (Aug. 1, 2014), <http://hetq.am/eng/news/55882/axa-settlement-fund-board-claims-embezzlement-irregularities-in-insurance-payments-to-genocide-heirs.html>.

142. See *Armenian Heirs Settle AXA Class Action Lawsuit*, *supra* note 140.

143. *Movsesian v. Victoria Versicherung A.G.*, No. CV-03-09407-CAS-JWJ (C.D. Cal 2008).

addition to the technical arguments made in the other suits such as statute of limitations, forum non conveniens and the like, the German defendants in *Movsesian* argued that Section 354.4 was unconstitutional, similar to the claim of unconstitutionality made in the claims against the Japanese companies discussed above.¹⁴⁴ As in the Japanese cases, defendants argued that the California statute impermissibly intruded on the federal government's conduct of foreign affairs, and was therefore preempted and should be struck down.¹⁴⁵ In particular, they argued that the statute was intended to benefit a particular class of victims—"Armenian Genocide victims"—and objected to the statute's definition of "Armenian Genocide victim" as "any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period."¹⁴⁶ The district court judge rejected the argument, and defendants appealed to the Ninth Circuit.¹⁴⁷

The appellate court issued a split 2-1 decision in 2009 reversing the district court and holding for the defendants.¹⁴⁸ In an opinion authored by Judge Thompson and joined by Judge Nelson, from which Judge Pregerson dissented, the court held that Section 354.4 conflicted with an express federal policy to avoid recognizing an "Armenian genocide."¹⁴⁹ Although the Congressional House of Representatives regularly introduced measures to formally recognize the events targeting Armenians and other ethnic and religious minorities in Ottoman Turkey as a genocide, the court pointed to Executive efforts to prevent the measures from coming to a House vote, and letters to Congress from the State Department that such resolutions would "complicate our efforts to bring peace and stability to the Caucasus and hamper ongoing attempts to bring about Turkish-Armenian reconciliation," as evidence of clear executive policy.¹⁵⁰ The court noted that "the heart" of the conflict lay in the two-word phrase "Armenian genocide." "The symbolic effect of the words . . . is precisely the problem. The federal government has made a conscious decision not to apply the politically charged label of 'genocide' to the deaths of these

144. *Id.*

145. *Id.*

146. *Id.*

147. See *Movsesian v. Victoria Versicherung A.G.*, 578 F.3d 1052, 1054 (9th Cir. 2009).

148. *Id.* at 1053.

149. *Id.* at 1063.

150. *Id.* at 1058.

Armenians during World War I.”¹⁵¹ Because such policy had preemptive force and Section 354.4 was in conflict with the policy, the court struck down the statute.¹⁵²

Due to the importance of the issues at stake, the plaintiffs sought panel rehearing and rehearing en banc.¹⁵³ After more than a year, the same three-judge panel issued a new decision in 2010 granting the petition for rehearing, withdrawing the original 2009 decision, and filing a new opinion and dissent.¹⁵⁴ This time, Judge Pregerson wrote the majority opinion, joined by Judge Nelson, and Judge Thompson was in the dissent.¹⁵⁵ Evidently, Judge Pregerson had persuaded Judge Nelson that, in fact, there was no express federal policy against use of the term “Armenian genocide,” and therefore Section 354.4 should be allowed to stand.¹⁵⁶ This time, the court held that “informal presidential communications” to Congress suggesting that the House decline to formally recognize the Armenian genocide were not sufficient to establish a federal policy against recognition, particularly in light of other executive and legislative statements favoring such recognition.¹⁵⁷ The court pointed to regular Congressional remembrance day celebrations in honor of genocide victims, including Armenians; Executive statements regarding the events using language “virtually indistinguishable” from “Armenian genocide”; and statements by then-presidential candidate Barack Obama urging recognition of an Armenian genocide.¹⁵⁸ Nor had the federal government previously expressed any opposition to the large number of states that individually recognized the Armenian genocide.¹⁵⁹ In the absence of a clear federal policy, Section 354.4 presented no conflict and was therefore not preempted on that basis.¹⁶⁰

The second panel decision further held that the doctrine of field preemption did not apply, because California was validly acting within its traditional state interest in regulating the insurance field and was not, as the original panel decision had held, simply using the statute as a means of impermissibly taking a position on foreign affairs.¹⁶¹ For

151. *Id.* at 1061.

152. *Id.* at 1063.

153. *See* *Movsesian v. Victoria Versicherung A.G.*, 629 F.3d 901, 903 (9th Cir. 2010).

154. *Id.*

155. *Id.*

156. *Id.* at 909.

157. *Id.* at 906 (citing *Medellin v. Texas*, 552 U.S. 491, 31-32 (2008)).

158. *Id.* at 906-07.

159. *Id.* at 907.

160. *See id.* at 909.

161. *Id.*

these reasons, the court now found that Section 354.4 was a valid exercise of state power and was not preempted.¹⁶²

The legal saga in *Movsesian*, however, did not end there. In December 2011, the Ninth Circuit reheard the case en banc.¹⁶³ In February 2012, the en banc panel, in a decision issued by Judge Susan Graber, found that Section 354.4 was preempted because it “intrude[d] on the field of foreign affairs without addressing a traditional state responsibility.”¹⁶⁴ In other words, the en banc panel held that the doctrine of field preemption, also called dormant foreign affairs preemption, applied to make Section 354.4 unconstitutional. This was a completely new direction for the court, which in its previous two *Movsesian* decisions had focused almost exclusively on conflict preemption and the existence, or not, of an *express* federal policy with which Section 354.4 conflicted.¹⁶⁵

Field preemption is a powerful doctrine, because it may apply regardless of whether the federal government has taken any action at all; or, if it has, regardless of whether the state action at issue was in any conflict.¹⁶⁶ Its purpose is to ensure that the states do not engage in foreign affairs policy, even if the federal government has not acted.¹⁶⁷ The en banc court relied on a little-used Supreme Court case from the 1960s, *Zschernig v. Miller*,¹⁶⁸ to illustrate its point. *Zschernig* struck down an Oregon probate statute providing that nonresident aliens could not inherit property in Oregon (it would escheat to the state) unless they could prove that the country in which they resided granted reciprocal rights to U.S. citizens.¹⁶⁹ Although the statute purported to be a traditional exercise of state power over property and inheritance rights, the Supreme Court determined that it would require Oregon state courts to engage in a detailed inquiry into foreign political systems and the nature of foreign property rights, including whether such rights were granted on an equal basis or based on governmental caprice and whether state confiscation of property was an important feature.¹⁷⁰ This being the height of the Cold War, the Supreme Court concluded that the real purpose of the statute was to take a particular

162. *Id.*

163. *See Movsesian v. Victoria Versicherung A.G.*, 670 F.3d 1067 (9th Cir. 2012).

164. *Id.* at 1077.

165. *See Movsesian v. Victoria Versicherung A.G.*, 629 F.3d 901 (9th Cir. 2010); *Movsesian v. Victoria Versicherung A.G.*, 578 F.3d 1052 (9th Cir. 2009).

166. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 418–20 n.11 (2003).

167. *Movsesian*, 670 F.3d at 1072.

168. *Id.* (citing *Zschernig v. Miller*, 389 U.S. 429 (1969)).

169. *Zschernig v. Miller*, 389 U.S. 429 (1969).

170. *Id.* at 433–34.

foreign policy position and make value judgments regarding certain countries' approach to property distribution in order to "keep United States money out of the grasp of communist or authoritarian nations."¹⁷¹ Thus, even though the federal government had not established any policy that conflicted with Oregon's statute, it was nevertheless preempted because it would necessarily require judges to make determinations that would intrude into the field of foreign affairs.¹⁷²

The en banc court also examined one of its own recent field preemption cases, *Von Saher v. Norton Simon Museum of Art at Pasadena*—a case decided by the same three-judge panel (Thompson, Nelson, and Pregerson) as the first two *Movsesian* decisions.¹⁷³ Marei von Saher was the surviving heir of Jacques Goudstikker, a prominent Jewish art dealer living in the Netherlands before World War II.¹⁷⁴ The family fled when war broke out and left all their assets behind, including Goudstikker's collection of over one thousand artworks, which were looted by the Nazis.¹⁷⁵ However, Goudstikker did bring his notebook containing a list of each of the paintings; it noted that his collection included the "Adam and Eve" diptych by Cranach the Elder, which the Norton Simon Museum had purchased in the 1970s.¹⁷⁶ Von Saher brought claims against the museum under California Code of Civil Procedure Section 354.3, which extended the statute of limitations on actions to recover artwork taken during the Holocaust.¹⁷⁷ Judge Thompson, writing for the majority, held that although Section 354.3 did not conflict with any federal foreign policy, it was nevertheless invalid under the doctrine of field preemption.¹⁷⁸ First, the potential class of defendants was not limited to museums or galleries operating in California, which indicated that California's true interest was in providing a friendly forum for Holocaust art claims—regardless of whether the claimant or even the art was located in California—and not in protecting California's residents and regulating businesses operating within its borders, as claimed.¹⁷⁹ Second, Section 354.3 established a particular remedy for wartime injuries perpetrated

171. *Id.* at 437-38.

172. *Id.* at 440.

173. *See generally* *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010).

174. *Id.* at 959.

175. *Id.*

176. *Id.*

177. *Id.* at 957.

178. *Id.* at 954, 963, 965-66.

179. *Id.* at 964-65.

by the Nazis, and therefore intruded on the federal government's power to conduct war.¹⁸⁰ Moreover, California courts would have to inquire into the validity of European governments' restitution policies and decisions made after the war, which the U.S. government had expressly left to each nation to determine.¹⁸¹

With these precedents in hand, the *Movsesian* en banc court turned to Section 354.4. According to the court, the real concern with Section 354.4 was that it did the same thing as the unconstitutional statutes in *Garamendi* and *Von Saher*: it provided a particular remedy for a particular class of people for the purpose of righting what California had determined was a historical wrong; namely, the persecution of Armenians at the hands of the Ottoman Turks.¹⁸² Such a goal fell outside the scope of traditional state responsibility.¹⁸³ The statute, according to the en banc panel, also had more than an incidental effect on foreign affairs, because it "expresse[d] a distinct political point of view on a specific matter of foreign policy" by labeling the events at issue a "genocide" and displayed sympathy for "Armenian Genocide victims."¹⁸⁴

Finally, the court was concerned that, in order to determine whether a particular claimant qualified as an "Armenian Genocide victim" according to the statute's definition, a judge would have to make a politicized inquiry into the sensitive question of whether the policyholder had "escaped to avoid persecution" by the Ottoman Turks.¹⁸⁵ For these reasons, the court held Section 354.4 unconstitutional under the doctrine of field preemption.¹⁸⁶

It did not escape the court's notice that, only a few days after the en banc oral argument was held, France and Turkey became embroiled in a diplomatic row after the French National Assembly passed a bill criminalizing denial of the Armenian genocide, much as Holocaust denial is also a crime in France.¹⁸⁷ Turkey recalled its ambassador to France, canceled bilateral visits, and refused cooperation

180. *Id.* at 965-67.

181. *Id.* at 967.

182. *Movsesian v. Victoria Versicherung A.G.*, 670 F.3d 1067 (9th Cir. 2012).

183. *Id.* at 1076-77.

184. *Id.* at 1076.

185. *Id.* at 1076-77.

186. *Id.* at 1077.

187. *Id.* (citing a BBC news article from December 22, 2011 detailing the developments); *Turkey Retaliates over French 'Genocide' Bill*, BBC NEWS (Dec. 22, 2011), <http://www.bbc.com/news/world-europe-16306376>.

in certain areas.¹⁸⁸ Perhaps even more concerning for the court was the fear of angering Turkey, an important NATO ally, at a time of increasing tension in the Middle East.¹⁸⁹ The “Arab Spring” began less than a year before the en banc oral argument, with demonstrations and protests in Tunisia that spread to several surrounding countries and eventually led to the downfall of multiple regimes.¹⁹⁰ One of NATO’s most important strategic airbases is located in Incirlik, Turkey, and continues to play a pivotal role in combating terrorism, providing support to Syrian rebels, and fighting the spread of the Islamic State (ISIS).¹⁹¹ These events lend support to the court’s conclusion that the question of whether a genocide occurred in Ottoman Turkey “continues to be a hotly contested matter of foreign policy” and that “Turkey expresses great concern over the issue.”¹⁹²

Given the sweeping nature of the court’s decision that *any* state action promoting use of the term “Armenian genocide” was preempted, the *Movsesian* plaintiffs sought review by the Supreme Court and filed a petition for writ of certiorari.¹⁹³ In light of federal government interests at stake, the Supreme Court invited the Solicitor General to submit the views of the U.S. government.¹⁹⁴ The Obama Administration was unequivocal: Section 354.4 impermissibly intruded on federal foreign affairs powers, the en banc panel had reached the correct decision, and there was no need for further review by the Supreme Court.¹⁹⁵

188. See *Turkey Retaliates over French ‘Genocide’ Gill*, *supra* note 187; see also *German MPs Recognise Armenian ‘Genocide’ amid Turkish Fury*, BBC NEWS (June 2, 2016), <http://www.bbc.com/news/world-europe-36433114> (noting that Turkey took similar actions when the German Bundestag voted in June 2016 to declare the killings of Armenians in Ottoman Turkey a genocide).

189. See *Movsesian*, 670 F.3d at 1077 (citing a New York Times article describing President Obama’s reluctance to use the term “Armenian Genocide” during a remembrance day celebration due to Turkey’s fierce opposition).

190. See David Cutler, *Timeline—Arab Spring: A Year that Shook the Arab World*, REUTERS (Jan. 14, 2012), <http://in.reuters.com/article/tunisia-revolution-anniversary-idINDEE80C0IT20120113>.

191. See Jim Garamone, *Incirlik Provides Important NATO Capability*, DOD NEWS (Dec. 9, 2014), <http://www.defense.gov/News/Article/Article/603781/incirlik-provides-important-nato-capability>.

192. *Movsesian*, 670 F.3d at 1077.

193. Petition for Writ of Certiorari, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft A.G.* (2012) (No. 12-9). The case name changed on petition for writ of certiorari as only certain plaintiffs elected to proceed with claims against certain defendants.

194. Opinion, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft A.G.*, 133 S. Ct. 404 (U.S. 2012).

195. Brief for the United States as Amicus Curiae at 5, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft A.G.* (2013) (No. 12-9).

The Solicitor General also suggested that, while there was no express conflict between Section 354.4 and certain treaties and settlement agreements between the United States and Turkey after World War I to settle claims of U.S. nationals, the existence of such documents demonstrated that the United States adopted a particular approach to the settlement of wartime claims—an approach with which California expressed dissatisfaction in the passage of Section 354.4.¹⁹⁶ Indeed, the government indicated that its consistent policy response, when faced with questions such as those presented by the *Movsesian* plaintiffs' claims, was to encourage Turkey and Armenia to reach a mutually agreeable solution.¹⁹⁷

The Supreme Court thereafter denied appellant's petition for certiorari. Thus, the en banc decision stands as the final word on the *Movsesian* plaintiffs' claims.¹⁹⁸

B. *The Bank Deposit Case*

In 2006, Yeghiayan and his co-counsel filed a new suit against the German banks Deutsche Bank and Dresdner Bank, seeking to recover money and property allegedly withheld by these defendants during the Armenian genocide from their Armenian depositors.¹⁹⁹ The German banks were accused of trading in assets stolen from the Armenian victims by the Ottoman Turkish state perpetrators.²⁰⁰ The complaint in the action initially recited the historical facts of the murder and deportation of the Armenian population of Ottoman Turkey, including the death of 1.5 million to 2 million Armenians between 1915 and 1923.²⁰¹ The bulk of the complaint, however, focused not on the extermination of the Armenians but on the theft of the victims' property.²⁰² As the Holocaust has so aptly demonstrated, part and parcel of every genocide is not only murder but also massive theft of the victims' assets.²⁰³ The Armenian genocide likewise contains this characteristic.

196. *Id.* at 15.

197. *Id.* at 17.

198. *Id.*

199. See *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774, 2006 U.S. Dist. LEXIS 96772, at *1-2 (C.D. Cal. Sept. 25, 2006).

200. *Id.*

201. See *id.* at *7-8.

202. *Deirmenjian*, 2010 U.S. Dist. LEXIS 86957, at *3 (explaining the theories on which plaintiffs sought recovery).

203. DONALD BLOXHAM, *THE FINAL SOLUTION: A GENOCIDE* 41 (2009). There have been material motivations and benefits from genocide. “[B]yproducts like property theft from the victims were an important means of further binding the beneficiaries to each other and the re-

The filing of the suit against the two German banks marked an important step in closing in on the circle of perpetrators and beneficiaries of the Armenian genocide. In the claims by the Armenian heirs against the insurance companies, the Armenian genocide played a tangential role in the litigation; in contrast, the instant action accused the German banks of being directly involved in the theft of Armenian assets during the genocide.²⁰⁴ While literature on the murder and deportation of the Armenians is voluminous and well-documented,²⁰⁵ discussion of the property theft of the Armenians still awaits a thorough study.²⁰⁶

The *Deirmenjian* suit focused on the alleged role of the German banks as conduits for the theft of the Armenians' assets.²⁰⁷ The allegations eerily paralleled those cases involving theft of Jewish property during the Holocaust and the role of Swiss and German financial institutions in facilitating such theft. In fact, the same two German banks were sued by Jewish victims of Nazism and their heirs, who alleged that Deutsche Bank and Dresdner Bank colluded with the Nazi regime to steal from Jews in Europe and profited from those dealings.²⁰⁸ Procedurally, the Armenian suit against the German banks followed the model of the Holocaust restitution suits by proceeding as a class

gime" despite the primary goals, which were to "remov[e] 'problem' groups while simultaneously sharpening and rendering more exclusive the identity of the majority." *Id.*

204. *Deirmenjian*, 2010 U.S. Dist. LEXIS 86957 at *2, *9-20 (stating "Plaintiffs assert that the banks 'concealed and prevented' the recovery of assets that were deposited in accounts with 'Old Deutsche Bank' and 'Old Deutsche Orientbank' by Armenians prior to the First World War and the Armenian Genocide").

205. See generally TANER AKÇAM, A SHAMEFUL ACT: THE ARMENIAN GENOCIDE AND THE QUESTION OF TURKISH RESPONSIBILITY (2006) (showing recent studies on the Armenian Genocide); DONALD BLOXHAM, GREAT GAME OF GENOCIDE: IMPERIALISM, NATIONALISM, AND THE DESTRUCTION OF THE OTTOMAN ARMENIANS (2005).

206. For discussions of theft during the Armenian Genocide, see UĞUR ÜMIT ÜNGÖR & MEHMET POLATEL, CONFISCATION AND DESTRUCTION: THE YOUNG TURK SEIZURE OF ARMENIAN PROPERTY (2011) (discussing theft of Armenian property); HRAYR S. KARAGUEUZIAN & YAIR AURON, A PERFECT INJUSTICE: GENOCIDE AND THEFT OF ARMENIAN WEALTH (2010); DICKRAN KOUYMJIAN, CONFISCATION AND DESTRUCTION: A MANIFESTATION OF THE GENOCIDAL PROCESS 1-2 (1998); Dickran Kouymjian, *When Does Genocide End? The Armenian Case*, THE ARMENIAN WEEKLY, vol. 69, no. 15 (Apr. 12, 2003), available at http://www.academia.edu/24784817/Dickran_Kouymjian_When_Does_Genocide_End_The_Armenian_Case_The_Armenian_Weekly_vol_69_no_15_April_12_2003_pp_8-9.

207. *Deirmenjian*, 2010 U.S. Dist. LEXIS 86957 at *9-20 (focusing on the banks' role and involvement in the genocide claims and its post-genocide responsibility to its insurers).

208. See CHRISTOPHER SIMPSON, INTRODUCTION TO WAR CRIMES OF THE DEUTSCHE BANK AND THE DRESDNER BANK: OFFICE OF MILITARY GOVERNMENT (U.S.) REPORTS 1 (2002) (studying the German bank activities during the Nazi era); HAROLD JAMES, DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS: THE EXPROPRIATION OF JEWISH-OWNED PROPERTY 57-59, 63 (2006).

action.²⁰⁹ Varoujan Deirmenjian and his six fellow plaintiffs did not sue just on their own claims, but also on behalf of all other similarly situated heirs of Armenian genocide victims.²¹⁰ All seven plaintiffs were American citizens and were grandchildren of the Armenian victims of the genocide.²¹¹

The complaint in *Deirmenjian* alleged that the Armenian minority in Ottoman Turkey relied on the stability of the European banks and, therefore, deposited assets in such banks for their protection.²¹² The two German banks, operating in Ottoman Turkey under the name of Deutsche Orient Bank, allegedly had over a dozen branches throughout the Ottoman Empire and targeted affluent Armenians as their customers.²¹³ With the onset of the killings and deportations of Armenians, the German banks allegedly accepted gold deposits from the Ottoman Turkish government with full knowledge that such deposits were taken from the Armenian victims.²¹⁴ Moreover, the German banks allegedly transferred to their own books assets belonging to their deceased Armenian customers rather than returning those assets to the customers' heirs, and deliberately concealed the existence of the deposits from such heirs.²¹⁵

In 2006, plaintiffs scored a major victory in the litigation when the Los Angeles-based federal judge presiding over the litigation, Margaret Morrow,²¹⁶ denied the banks' motion to dismiss the class action.²¹⁷ However, in a later decision in December 2007, Judge Morrow

209. *Deirmenjian*, 2010 U.S. Dist. LEXIS 86957 at *2.

210. *Id.*

211. *Id.* at *8-9, *12, *15, *17, *19.

212. First Amended Class Action Complaint and Demand for Jury Trial at 7, *Deirmenjian v. Deutsche Bank*, No. CV 06-0774 MMM (RCx) (C.D. Cal. Sept. 25, 2006) [hereinafter *Deirmenjian Complaint*].

213. *Id.* at 4-5. Similar allegations were made against the Swiss banks: Jews fearing the troubled times after Hitler's rise to power and as a result of historic anti-Semitism in Europe deposited money and assets in Swiss banks for protection and privacy. See BAZYLER, HOLOCAUST JUSTICE, *supra* note 14, at 43, 52.

214. See *Deirmenjian Complaint*, *supra* note 212, at 9; cf. BAZYLER, HOLOCAUST JUSTICE, *supra* note 14, at 26 (explaining that in the Holocaust restitution litigation, both Swiss banks and German banks were accused of knowingly accepting from the Nazis gold and other assets looted from the Jews).

215. *Deirmenjian Complaint*, *supra* note 212, at 10; cf. BAZYLER, HOLOCAUST JUSTICE, *supra* note 14, at 43, 57 (explaining that, in a similar vein, the Swiss banks were accused of keeping assets deposited for safekeeping by their Jewish customers who perished during the Holocaust; a similar allegation was made against the German companies).

216. Judge Morrow retired from the federal bench in early January 2016. *Public Counsel Announces New President and CEO*, PUB. COUNS. (Dec. 2, 2015), <http://www.publiccounsel.org/stories?id=0190>.

217. *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774 MMM (CWx), 2006 U.S. Dist. LEXIS 96772, at *150-51 (C.D. Cal. Sept. 11, 2006).

found that another California statute, California Code of Civil Procedure section 354.45 (akin to the previously-discussed section 354.4 utilized by the plaintiffs in *Movsesian*²¹⁸) and adopted by the California legislature specifically to help claimants overcome the prescription obstacle when filing suit in California courts for recovery of assets stolen during the Armenian genocide,²¹⁹ was unconstitutional.²²⁰ According to Judge Morrow, the new California law impermissibly intruded on the foreign affairs power of the federal government to settle wartime claims of American citizens against Turkey and Germany arising out of World War I.²²¹

After this loss before Judge Morrow, the tide of litigation for both plaintiff classes turned against them. From this point on, every one of Judge Morrow's rulings in the *Deirmenjian* case went in favor of the German banks.²²²

On March 23, 2008, plaintiffs filed a motion for class certification, which Judge Morrow denied on May 13, 2010.²²³ Under Federal Rule of Civil Procedure 23(d), Judge Morrow did allow the plaintiffs to engage in pre-certification communications with potential class members in order to find evidence of bank accounts.²²⁴ After doing so, she held, however, that the evidence that the plaintiffs discovered through the pre-certification notices was insufficient to form an ascertainable class.²²⁵ She explained that in making this determination, she took into account the fact that it was unlikely that the depositors and their heirs would have preserved any documentation of their accounts since

218. See *Movsesian v. Victoria Versicherung A.G.*, 578 F.3d 1052, 1054 (9th Cir. 2009).

219. CAL. CIV. PROC. CODE § 354.45(c) (West 2006). The statute provides as follows:

Any action, including any pending action brought by an Armenian Genocide victim, or the heir or beneficiary of an Armenian Genocide victim, who resides in this state, seeking payment for, or the return of, deposited assets, or the return of looted assets, shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is filed on or before December 31, 2016.

Id.; see also S. 1524, 2005-2006 Leg. Reg. Sess. (Cal. 2006) (explaining section 354.45's connection with the Armenian genocide).

220. *Deirmenjian v. Deutsche Bank, A.G.*, 526 F. Supp. 2d 1068, 1085 (C.D. Cal. 2007).

221. *Id.* at 1089.

222. See *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774 MMM (CWx), 2010 U.S. Dist. LEXIS 86957 at *77 (C.D. Cal. July 30, 2010); see also *Deirmenjian v. Deutsche Bank AG*, 548 F. App'x 461 at 465-66 (9th Cir. 2013).

223. Motion for Class Certification at 2, *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774 MMM (RCx) (C.D. Cal. Mar. 23, 2009); Order Denying Plaintiffs' Motion for Class Certification and Motion for Leave to File a Third Amended Complaint at 53, *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774 MMM (RCx) (C.D. Cal. May 13, 2010) [hereinafter Order Denying Class Certification].

224. Order Denying Class Certification, *supra* note 223, at 21 (acknowledging that the court followed FED. R. CIV. P. 23(d)).

225. *Id.* at 27.

most were killed or deported from Turkey and any records that the banks had were probably lost to history.²²⁶ In effect, Judge Morrow was denying class certification to the genocide victim group because the members of the victim group had been victims of a genocide.

On June 21, 2010, the defendant German banks, on the heels of their class certification victory, filed a motion for summary judgment seeking to dismiss the entire case without a trial.²²⁷ On July 30, Judge Morrow granted that motion.²²⁸

On August 27, 2010, one of the plaintiffs, Khachik Berian (both on his own behalf and on behalf of the class plaintiffs similarly situated), filed an appeal before the U.S. Ninth Circuit Court of Appeals seeking to have Judge Morrow's ruling that the Turkish limitations period applies to Armenian genocide-era claims overturned.²²⁹ Written briefing concluded in May 2011, but oral argument was not scheduled until November 2013. During that time, two developments occurred that impacted the issues on appeal in *Deirmenjian*. First, the Ninth Circuit issued its en banc field preemption opinion in *Movsesian III* striking down Section 354.4.²³⁰ Second, the United States filed its wide-ranging amicus brief to the Supreme Court regarding the *Movsesian* plaintiffs' petition for certiorari.²³¹ In an unpublished Memorandum Opinion, issued December 9, 2013, the Ninth Circuit affirmed the district court's grant of summary judgment on statute of limitations grounds.²³²

By the end of 2013, a new narrative of Armenian genocide cases in U.S. courts was beginning to emerge. After early initial settlements with insurance companies still spooked by the success of Holocaust restitution litigation with high-level U.S. government support and massive pressure campaigns, companies that fought back against Armenian genocide-era claims found they could make significant head-

226. *Id.* at 29.

227. Defendants' Notice of Motion and Motion for Summary Judgment: Memorandum of Points & Authority at 3, *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774 MMM (RCx) (C.D. Cal. June 21, 2010).

228. Judgment for Defendants at 1-2, *Deirmenjian v. Deutsche Bank, A.G.*, No. CV 06-00774 MMM (CWx) (C.D. Cal. July 30, 2010).

229. See Opening Brief of Appellant Khachik Berian at 1-2, 9, *Deirmenjian v. Deutsche Bank, A.G.*, No. 10-56359 (9th Cir. Feb. 7, 2011) (explaining that Berian only appealed the judgment against Deutsche Bank because this is the bank where his ancestors allegedly deposited funds in Ottoman Turkey, and Defendant Dresdner Bank was, therefore, no longer a party on the appeal; additionally, since no Class B plaintiff (representing the looted assets claims) filed an appeal, those claims also were not before the Ninth Circuit).

230. See *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012).

231. See Brief for the United States as Amicus Curiae, *supra* note 195.

232. *Deirmenjian v. Deutsche Bank AG*, 548 F. App'x 461, 463 (9th Cir. 2013).

way.²³³ Courts, it turned out, were reluctant to hear hundred-year-old claims notwithstanding the circumstances giving rise to the claims and the difficulties faced by U.S. citizen survivors and heirs in bringing their claims in Turkey.²³⁴ The United States was not willing to risk harming its relationship with strategic NATO ally Turkey over the genocide issue, instead urging courts to defer to its preferred approach of diplomatic negotiations between Turkey and Armenia.²³⁵ California's numerous legislative attempts to provide a forum for its Armenian residents seemed to be going nowhere, as the courts repeatedly deferred to action at the federal level. The looming question was whether any further avenues for redress existed, or whether *Movsesian III's* blanket prohibition would prove to be a malignant tumor infecting the entire body of Armenian genocide litigation.

C. *The Real Property Cases*

In the second half of 2010, the legal focus finally turned to the actual perpetrators. Suits were filed in American courts against the Republic of Turkey, as successor of Ottoman Turkey, and two state-owned banks: the Central Bank of Turkey and Ziraat Bank, a state-owned commercial bank with origins going back to 1863, making it the oldest bank in Turkey.²³⁶

The two suits were filed by two different sets of lawyers. The first suit, *Davoyan v. Republic of Turkey*,²³⁷ was filed as a class action by plaintiff Garbis Davoyan, on behalf of beneficiaries of former Turkish citizens and their heirs, against the successor Turkish government, the Republic of Turkey.²³⁸ The suit claimed the Turkish government had deprived plaintiffs of citizenship, brutally deported the plaintiffs' ancestors, and seized and expropriated the ancestors' property.²³⁹ Fur-

233. See Jeffrey W. Stempel et al., *Stoney Road out of Eden: The Struggle to Recover Insurance for Armenian Genocide Deaths and Its Implications for the Future of State Authority, Contract Rights, and Human Rights*, 18 BUFF. HUM. RTS. L. REV. 1, 55-57 (2012).

234. See *Supreme Court Will Not Review Armenian Genocide-Era Insurance Claims Cases*, THE ARMENIAN WEEKLY (June 10, 2013), <http://armenianweekly.com/2013/06/10/supreme-court-will-not-review-armenian-genocide-era-insurance-claims-case/>.

235. See Bazlyer, *Lamentation and Liturgy*, *supra* note 1 at 260-61; Brief for the United States as Amicus Curiae, *supra* note 195.

236. For information on Ziraat Bank's New York branch, see *About Us*, ZIRAAT BANKASI N.Y., <http://www.ziraatnewyork.com/about-us/about-us> (last visited Sept. 3, 2016).

237. *Davoyan v. Republic of Turkey*, No. CV 10-05636 DMG (SSx), 2011 U.S. Dist. LEXIS 53152 (C.D. Cal. May 5, 2011).

238. *Id.* This suit was filed by a team of lawyers headed by Brian Kabateck and Mark Geragos, who were also counsel in the *New York Life*, *AXA*, and *Deirmenjian* cases.

239. Class Action Complaint and Demand for Jury Trial, *Davoyan v. Republic of Turkey*, No. CV 10-05636 DMG (SSx) (C.D. Cal. July 29, 2010) [hereinafter *Davoyan Complaint*].

ther, the plaintiffs in *Davoyan* claimed that the defendant, the Republic of Turkey, is a legitimate successor of the predecessor government—the Ottoman Turkish Empire—and should be amenable to suit.²⁴⁰

The second suit, *Bakalian v. Republic of Turkey*, was filed by plaintiff Alex Bakalian and two other individuals, and seeks fair market rents and just compensation for some 122.5 acres of property located in the Adana region of Turkey, taken from their ancestors during the Armenian genocide.²⁴¹ On this Armenian property stands today the Incirlik Air Base, one of the most important American bases on foreign soil. Its importance comes from its use by the American military to stage NATO operations throughout the Middle East.²⁴² The irony, of course, is that the United States is fighting wars to establish democracy and freedom in the region on land stolen during a genocide.

Although the two suits are similar and proceeded along parallel tracks, some important differences exist. *Davoyan* was filed as a class action on behalf of all Armenian landowners and their descendants living in the United States whose real property was expropriated by Turkey during the genocide, while *Bakalian* was brought by three individual plaintiffs seeking compensation for their property only.²⁴³ Additionally—and perhaps crucially—the *Davoyan* plaintiffs' causes of

240. *Id.*

241. Complaint and Demand for Jury Trial, *Bakalian v. Republic of Turkey*, No. CV 10-09596 DMG SS (C.D. Cal. Dec. 15, 2010) [hereinafter *Bakalian Complaint*]. A third case, *Manookian v. Republic of Turkey*, was filed in 2013 (Complaint and Demand for Jury Trial at 1, *Manookian v. Republic of Turkey*, No. CV13-01401 DMG SS (C.D. Cal. Feb. 26, 2013)). The case is broadly similar to *Bakalian* and *Davoyan*, and brought property claims for the land and improvements owned by Manookian's grandfather in Aintab, Turkey. Most notably, the Manookian family home had been turned into a museum operated by the Turkish Ministry of Culture and advertised to American tourists. Following service of process, the case was stayed pending a decision in the appeals in *Davoyan* and *Bakalian* relating to jurisdiction and the political question doctrine. Order Granting Plaintiff's Motion for Stay Pending Appeal Except for Service of Process at 2, *Manookian v. Republic of Turkey*, No. CV13-01401 DMG SS (C.D. Cal. July 16, 2013).

242. For information about the Incirlik base, see *U.S. Air Force: Incirlik Air Base*, INCIRLIK AIR BASE, <http://www.incirlik.af.mil/> (last visited Nov. 21, 2016); see also Rouben Paul Adalian, *Adana Massacre*, in 1 *ENCYCLOPEDIA OF GENOCIDE* 47, 47 (Israel W. Charny ed., 2000) ("The Adana Massacre was the second series of large-scale massacres of Armenians to break out in the Ottoman Empire. The atrocities committed in the province of Adana . . . [resulted in] an estimated 30,000 Armenians [being] killed."). The Incirlik base website recognizes the area as historically Armenian land: "[T]he Seljuk dominance of Adana ended with the coming of the Crusaders in 1097. After which it was part of the kingdom of Cilician Armenia for nearly 300 years. . . . From the end of the Renaissance to the modern era (1517-1918), the Ottoman Empire ruled the area."

243. *Davoyan Complaint*, *supra* note 239; *Bakalian Complaint*, *supra* note 241.

action were not just for property claims, but were also for “human rights violations and violations of international law,” including “forced deportation, confiscation and extermination in furtherance of the commission of war crimes, crimes against humanity, crimes against peace, torture, rape, starvation, physical and mental abuse, summary execution and genocide.”²⁴⁴

Both sets of plaintiffs asserted jurisdiction in the district court under the FSIA.²⁴⁵ In particular, plaintiffs asserted that Turkey and the two bank defendants were not entitled to sovereign immunity pursuant to the exceptions to sovereign immunity found in 28 U.S.C. § 1605(a)(2) (the “commercial activity” exception) and 28 U.S.C. § 1605(a)(3) (the “expropriation” or “takings” exception).²⁴⁶

Turkey did not answer or otherwise respond to either complaint, and the clerk entered default against it.²⁴⁷ Both actions proceeded against only Central Bank and Ziraat Bank. The banks fought every step, challenging the sufficiency of service of process in both actions, petitioning for a writ of mandamus to challenge the district court’s finding that service was proper, and even filing an interlocutory appeal of the service order without obtaining permission from the district court.²⁴⁸

Eventually, in September 2011, the banks answered each complaint and simultaneously filed two Rule 12 motions—a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), and a motion for judgment on the pleadings pursuant to Rule 12(c).²⁴⁹

244. Davoyan Complaint, *supra* note 239, at 21.

245. *Id.* at 3; Bakalian Complaint, *supra* note 241, at 9.

246. Davoyan Complaint, *supra* note 239, at 3; Bakalian Complaint, *supra* note 241, at 9.

247. Default by Clerk at 1, Bakalian v. Republic of Turkey, No. CV 10-09596 DMG (SSx) (C.D. Cal. Mar. 11, 2011); Default by Clerk at 1, Davoyan v. Republic of Turkey, No. CV 10-05636 DMG (SSx) (C.D. Cal. Oct. 11, 2011). This is the first step in the two-step process of obtaining a default judgment against an absent defendant pursuant to the Federal Rules. *City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 128 (2d Cir. 2011). The first step is to seek an entry of default, usually entered by the Clerk of the Court on a showing that the defaulting defendant failed to answer or otherwise respond to the complaint. *Id.*; *see also* FED. R. CIV. P. 55(a). The motion for default judgment is the second step. *Mickalis*, 645 F.3d at 128; *see also* FED. R. CIV. P. 55(b).

248. *See* Petition for Writ of Mandamus, Central Bank of the Republic of Turkey v. USDC-CALA, No. 11-72824 (9th Cir. Sept. 23, 2011). The writ petition was summarily denied, and the court held that it lacked jurisdiction to consider the interlocutory appeal. *See* Order Denying Bank Defendants’ Motion to Dismiss at 1, Bakalian v. Republic of Turkey, No. CV 10-09596 DMG (SSx) (C.D. Cal. Aug. 2, 2011); Order at 1, Bakalian v. Republic of Turkey, No. 11-56516 (9th Cir. Dec. 9, 2011).

249. Answer to Complaint, Davoyan v. Republic of Turkey, No. CV 10-5636 DMG (SSx) (C.D. Cal. Sept. 3, 2011); Notice of Motion and Motion of Defendants to Dismiss, Davoyan v. Republic of Turkey, No. CV 10-5636 DMG (SSx) (C.D. Cal. Sept. 3, 2011); Notice of Motion and

The 12(b)(1) motions asserted that the banks were immune from suit pursuant to the FSIA.²⁵⁰ In the 12(c) motions, the banks sought judgment based solely on the pleadings (complaint and answer) pursuant to multiple doctrines: the act of state doctrine, foreign affairs preemption, the political question doctrine, international comity, the failure to show a right to relief as plaintiffs had not demonstrated that they were the rightful heirs of the original landowners, and statute of limitations.²⁵¹ The motions were argued before the district court in December 2011.

In a sign of the complexity and difficulty of the issues at stake, the court did not issue a ruling on the Rule 12 motions until March 2013, fifteen months later. In a written decision issued in *Davoyan* and simultaneously made applicable to *Bakalian* via a minute order, the district court held that (1) although the FSIA's commercial activity exception to foreign sovereign immunity did not apply, (2) the plaintiffs had established a prima facie case that the expropriation exception applied because the expropriation of property of a state's own nationals without payment of compensation, when "integrally related to . . . government-sanctioned genocidal policies" such as those directed at Armenians in Turkey, violates international law.²⁵²

Motion of Defendants for Judgment on the Pleadings, *Davoyan v. Republic of Turkey*, No. CV 10-5636 DMG (SSx) (C.D. Cal. Sept. 3, 2011); Answer to Complaint, *Bakalian v. Republic of Turkey*, No. CV 10-9596 (C.D. Cal. Sept. 19, 2011); Notice of Motion and Motion of Defendants to Dismiss, *Bakalian v. Republic of Turkey*, No. CV 10-9596 (C.D. Cal. Sept. 19, 2011); Notice of Motion and Motion of Defendants for Judgment on the Pleadings, *Bakalian v. Republic of Turkey*, No. CV 10-9596 (C.D. Cal. Sept. 19, 2011). The banks also filed a motion to consolidate the two actions, which had been designated related cases. Notice of Motion and Motion of Defendants to Consolidate Related Cases at 1, *Davoyan*, No. CV 10-5636 DMG (SSx) (C.D. Cal. Nov. 3, 2011). The district court denied the motion to consolidate as moot in light of its order on the Rule 12 motions. Amended Order Re Bank Defendants' (1) Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings, and (2) Motion to Consolidate Cases at 25, *Davoyan*, No. CV 10-05636 DMG (SSx) (C.D. Cal. Mar. 26, 2013).

250. See Notice of Motion and Motion of Defendants to Dismiss, *Davoyan v. Republic of Turkey*, No. CV 10-5636 DMG (SSx) (C.D. Cal. Sept. 3, 2011); Notice of Motion and Motion of Defendants to Dismiss, *Bakalian v. Republic of Turkey*, No. CV 10-9596 (C.D. Cal. Sept. 19, 2011).

251. See Notice of Motion and Motion of Defendants for Judgment on the Pleadings, *Davoyan v. Republic of Turkey*, No. CV 10-5636 DMG (SSx) (C.D. Cal. Sept. 3, 2011); Notice of Motion and Motion of Defendants for Judgment on the Pleadings, *Bakalian v. Republic of Turkey*, No. CV 10-9596 (C.D. Cal. Sept. 19, 2011).

252. See Amended Order Re Bank Defendants' (1) Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings, and (2) Motion to Consolidate Cases at 21-22, *Davoyan v. Republic of Turkey*, 116 F. Supp. 3d 1084 (C.D. Cal. 2013) [hereinafter Memorandum Opinion]; In Chambers—Order Dismissing Action for Lack of Subject Matter Jurisdiction, *Bakalian v. Republic of Turkey*, No. CV 10-09596 (C.D. Cal. Mar. 26, 2013) [hereinafter Minute Order].

The district court nevertheless considered the political question issue raised by the banks in their Rule 12(c) motions. After first describing the governing standard and six factors set forth in *Baker v. Carr*,²⁵³ the district court failed to undertake the required six-factor analysis and instead applied the federal field preemption principles underlying the appellate court's en banc decision in *Movsesian III* to find that a determination of whether the FSIA's jurisdictional requirements were met (as mandated for the courts by Congress) would constitute a political question.²⁵⁴ Accordingly, the district court dismissed the two suits.²⁵⁵

Thus, the district court held that jurisdiction under the FSIA was sufficiently pled based on allegations that the unlawful taking of property occurred during the Ottoman Empire's perpetration of mass human rights atrocities—without inquiring whether the political question doctrine was necessary to the jurisdictional determination.²⁵⁶ Once having determined that jurisdiction existed, the district court then revisited the jurisdictional finding again through the political question lens, examining the political question doctrine in a separate, second analysis focused on adjudication of the generic property claims, the elements of which raise no political question when analyzed under the six *Baker* factors and do not require a court to find that Turkey committed a genocide or any other human rights abuse.²⁵⁷

Both sets of plaintiffs appealed the district court's political question finding.²⁵⁸ The *Davoyan* plaintiffs also appealed the court's finding that the commercial activity exception did not apply.²⁵⁹ The banks cross-appealed to challenge the finding that the expropriation exception was met.²⁶⁰ The cases thus presented a number of intertwined issues for the appellate court to resolve.

253. 369 U.S. 186 (1962).

254. See Memorandum Opinion, *supra* note 252, 116 F. Supp. 3d at 1102-04.

255. See *id.* at 1104; Minute Order, *supra* note 252.

256. See Memorandum Opinion, *supra* note 252, 116 F. Supp. 3d at 1100-02.

257. See *Alperin v. Vatican Bank*, 410 F.3d 532, 547-51 (9th Cir. 2005) (affirming that courts adjudicate generic property claims every day, but dismissing war crimes and slave labor claims as raising political questions and nothing that a "surgical approach" must be taken in "benchmarking the Baker formulations against the individual claims").

258. See Notice of Appeal to the United States Court of Appeals for the Ninth Circuit, *Bakalian v. Republic of Turkey*, No. CV 10-09596 (C.D. Cal. Apr. 19, 2013) [hereinafter *Bakalian Notice of Appeal*]; Notice of Appeal, *Davoyan v. Republic of Turkey*, No. CV 10-5636 DMG (SSx) (C.D. Cal. May 1, 2013) [hereinafter *Davoyan Notice of Appeal*].

259. See *Davoyan Notice of Appeal*, *supra* note 258.

260. See Notice of Cross-Appeal at 1, *Bakalian v. Republic of Turkey*, No. CV 10-9596 (C.D. Cal. May 3, 2013); Notice of Cross-Appeal at 1, *Davoyan v. Republic of Turkey*, No. CV 10-5636 DMG (SSx) (C.D. Cal. May 8, 2013).

The primary written briefing on appeal was completed for both *Davoyan* and *Bakalian* by March 2014. Oral argument was scheduled for March 4, 2015 in Pasadena, California. However, in early February 2015, the clerk issued an order vacating oral argument and staying the appeals pending the Supreme Court's decision in *OBB Personenverkehr A.G. v. Sachs*, a case involving the commercial activity exception to the FSIA in which the Supreme Court had just granted a petition for certiorari.²⁶¹ The district court had found that the commercial activity exception did not apply in either *Davoyan* or *Bakalian*, a ruling which only the *Davoyan* plaintiffs had appealed.²⁶² *OBB* was argued and submitted in October 2015, and a decision was issued on December 1, 2015.²⁶³ After a final round of supplemental briefing addressing the impact of *OBB*,²⁶⁴ oral argument was again scheduled for August 4, 2016.

In the meantime, the D.C. Circuit issued its ruling in *Simon v. Hungary*, resolving in plaintiffs' favor many of the issues on appeal in *Bakalian* and *Davoyan*.²⁶⁵ First, the court agreed that, where "plaintiffs . . . seek recovery based on garden-variety common-law causes of action such as conversion, unjust enrichment, and restitution," allegations that the property taking at issue violated international law are necessary only to satisfy the FSIA's jurisdictional requirement.²⁶⁶ Second, where the taking of property "amounted to the commission of genocide," it constitutes a violation of international law as required by the FSIA.²⁶⁷ Third, the "wholesale plunder of Jewish property . . . aimed to deprive Hungarian Jews of the resources needed to survive as a people," and therefore the takings themselves met the definition of genocide under international and U.S. law.²⁶⁸ Fourth, because the "international-law violation on which the plaintiffs premise their argument for jurisdiction under [28 U.S.C.] § 1605(a)(3) is not the traditional prohibition against uncompensated takings" but rather

261. See generally *OBB Personenverkehr A.G. v. Sachs*, 136 S. Ct. 390 (2015).

262. See Memorandum Opinion, *supra* note 252, 116 F. Supp. 3d at 1097; see also *Davoyan* Notice of Appeal, *supra* note 258.

263. *OBB Personenverkehr A.G.*, 136 S. Ct. at 390.

264. See generally *id.* at 392-93 (*OBB* deals solely with the interpretation and application of the statutory term "based upon" found in the FSIA's commercial activity exception, 28 U.S.C. Section 1605(a)(2)) (The "based upon" analysis is not an issue in either *Bakalian* or *Davoyan*. It is not disputed that the acts alleged were "based upon" the defendant banks' conduct in Turkey, and the issue in *Davoyan* is rather the U.S. nexus, *e.g.*, whether those acts cause a "direct effect" in the United States as required by the third clause of Section 1605(a)(2)).

265. See generally *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016).

266. *Id.* at 141.

267. *Id.* at 142.

268. *Id.* at 143.

genocide or other mass atrocities, the “so-called ‘domestic takings’ rule” was inapplicable.²⁶⁹ Fifth, “the case does not present a non-justiciable political question.”²⁷⁰ Indeed, the court confirmed long-standing precedent that “[t]here is no across-the-board constitutional bar preventing the Judiciary’s consideration of actions arising out of the wartime conduct of a foreign sovereign.”²⁷¹ Nor was there any indication from the Executive Branch that “adjudication of the plaintiffs’ lawsuit would . . . raise any broader foreign relations concerns.”²⁷²

Given the length of time that had passed since the appeal had been filed (more than three years), the parties were eager to move forward.²⁷³ The appellate panel was composed of Judges Stephen Reinhardt, Alex Kozinski, and Kim Wardlaw, all of whom have significant experience with cases involving international law, the FSIA, and the political question doctrine.²⁷⁴

Questioning at oral argument was active and began almost immediately, with questions from Judge Kozinski to Lee Boyd, counsel for plaintiffs in *Bakalian*.²⁷⁵ Judge Kozinski took issue with plaintiffs’ central premise, that the FSIA jurisdictional determination had been statutorily delegated exclusively to the judiciary and thus could not implicate the political question doctrine.²⁷⁶ As he put it, “In principle, there is nothing wrong” with the court applying any of the constitutional doctrines limiting federal courts’ power “that supersede any statute.”²⁷⁷ Whether the doctrine was applied at the jurisdictional stage or later in the case, from his perspective, did not make a difference if the case was going to involve a political question at some point.²⁷⁸ Judge Reinhardt appeared to agree, asking “[w]hat’s the difference?” between finding jurisdiction and applying the political question doctrine to the merits, versus applying the doctrine on the jurisdictional inquiry.²⁷⁹

269. *Id.* at 145.

270. *Id.* at 149.

271. *Id.* at 131.

272. *Id.* at 150.

273. The cases were filed in 2010.

274. The Foreign Sovereign Immunities Act (FSIA) establishes limitations as to whether a foreign sovereign nation may be sued in U.S. federal courts. *See* 28 U.S.C. §1330.

275. *See* Oral Argument, *Bakalian v. Central Bank Republic of Turkey*, No. 13-55664 (9th Cir. Aug 4, 2016), http://www.ca9.uscourts.gov/media/view.php?pk_id=0000016199 [hereinafter *Bakalian Oral Argument*]. Co-author Rajika Shah also attended oral argument, but did not make a formal appearance.

276. *See id.* at 0:54.

277. *Id.*

278. *See id.* at 3:52.

279. *Id.* at 4:30.

But the biggest point of contention between the judges and plaintiffs' counsel was the role that "genocide" played, or did not play, in the case. Each of the judges expressed concern that, at some point in the case, the question of whether genocide had been committed would have to be decided, whether it be: (1) to meet the FSIA's jurisdictional requirement that the taking be in violation of international law (because genocide is an exception to the domestic takings rule);²⁸⁰ (2) because it was explicitly brought as one of the claims (in *Davoyan* only); or (3) because—as counsel for the bank defendants suggested—it would eventually be asserted as an exceptional circumstance justifying the delayed running of any applicable statute of limitations.²⁸¹

The panel understood that Turkey's sensitivity to the claim of genocide distinguished it from Germany and the Holocaust. As Judge Kozinski noted: "The question of whether the takings during the Holocaust were . . . a genocide are not really politically controversial, whereas this is, for better for worse, our government has resisted calling this a genocide."²⁸² Judge Wardlaw phrased it in even starker terms:

[E]ven with respect to the property claims, in doing an analysis of the political question doctrine, what weight would we give to the current situation in Turkey and the fact that the United States is their partner in defense, and that you want the very land returned to you that our money paid for . . . I mean, do we just put blinders on to the real world events?²⁸³

Out of all the judges, Judge Wardlaw seemed most interested in how the six-factor analysis required by *Baker* would play out in the case, asking counsel for the bank defendants whether he could point to any textual constitutional commitment giving the adjudication of property claims to the political branches.²⁸⁴

Counsel for both sets of plaintiffs clarified that, even absent genocide, international law norms that forbid widespread arbitrary and dis-

280. See *id.* at 1:15:00; see also *Altmann v. Rep. of Austria*, 317 F.3d 954, 968 (9th Cir. 2002) (the "domestic takings rule," as it is commonly referred to, posits that a taking by a state of property of its own nationals does not violate international law).

281. See Bakalian Oral Argument, *supra* note 275, at 1:04:00.

282. *Id.* at 16:25.

283. *Id.* at 31:43; see generally Paul Kirby, *Turkey Coup Attempt: Who's the Target of Erdogan's Purge?*, BBC NEWS (July 20, 2016), <http://www.bbc.com/news/world-europe-36835340>. Just days before oral argument was held on August 4, 2016, Turkey's president Recep Tayyip Erdoğan was the target of an attempted coup. In the wake of the coup, President Erdoğan initiated an extensive crackdown on those deemed supportive of the purported coup organizers. The crackdown targeted thousands people across sectors including the military, police, the judiciary, university administrators and faculty, and the education and finance ministries.

284. See Bakalian Oral Argument, *supra* note 275, at 1:10:00.

crimutory acts targeting a particular class of people would, on their own, satisfy the jurisdictional requirement.²⁸⁵ Thus, the genocide question need never be reached, and if it were reached, it would only be at the jurisdictional stage pursuant to the FSIA's mandate that the courts determine whether a taking "in violation of international law" had occurred.²⁸⁶ Indeed, after intense questioning from Judge Kozinski—asking why, if the word "genocide" was truly a non-issue in the case, counsel had not disclaimed it—Mark Geragos, counsel for the *Davoyan* plaintiffs, explicitly withdrew the genocide claim from the *Davoyan* causes of action.²⁸⁷ Geragos also clarified that only the *Davoyan* plaintiffs had brought international law causes of action, a point that apparently had escaped the panel's notice during their preparations.²⁸⁸ The *Bakalian* plaintiffs' claims only relate to property.²⁸⁹ Whether this was enough to satisfy the panel or not remains to be seen; Judge Reinhardt's final comment on the issue was that, at least in *Bakalian*, genocide had still "crept back in."²⁹⁰

Counsel for the bank defendants, Neil Soltman of Mayer Brown, was questioned most closely about his clients' position regarding the domestic takings rule. In an extended exchange with Soltman, Judge Kozinski, supported by Judge Reinhardt, argued the case for why it was appropriate for the court to recognize that there were some circumstances in which a state could be held accountable in international law even for property takings from its own nationals:

What I'm trying to point out is that, just the taking of one individual, good reasons or bad, is different from saying, a government saying, we're going to take away your people's property if they are a particular religion, ethnicity, something of that sort, race. They are different. And the principle that, we don't mess in your business because we don't want you to mess in our business, doesn't really hold when that happens, when a government chooses to, you know, Judge Reinhardt called it a caste system. It's not the same thing, is it?²⁹¹

Judge Kozinski seemed disinclined to hold, as urged by the banks, that there were no exceptions at all to the rule, at least in part because that would create or exacerbate a split with both the D.C. Circuit (in

285. *See id.* at 20:20, 43:40.

286. *See id.* at 15:20.

287. *See id.* at 40:40.

288. *See id.* at 38:00.

289. *See id.* at 38:29.

290. *Id.* at 45:38.

291. *Id.* at 55:37.

Simon) and the Seventh Circuit (in *Abelesz*).²⁹² Searching for alternatives, Judge Kozinski expressed some interest—echoed by Judge Reinhardt—in issuing a formal request to the State Department to solicit the Executive’s views as to the foreign affairs implication, if any, of adjudicating the cases.²⁹³

Interestingly, the panel did not mention *Movsesian III*, which indicates a judicial recognition of the limits of that decision as well. It will not be used as a blanket invocation to knock out any case even tangentially involving the Armenian genocide, and is likely to remain limited to clarifying the circumstances in which a state steps too far over the line reserving foreign affairs powers to the federal government.²⁹⁴

Clearly, the panel was most concerned with how to deal with the political question issue if it finds that jurisdiction exists under the FSIA’s takings exception, because it appears convinced that “genocide” and all of its political ramifications with Turkey lie at the heart of the case, whether or not an American court would ever have to determine whether an Armenian genocide occurred. As of this writing in early 2017, the panel’s decision is pending.

IV. ARMENIAN GENOCIDE PROPERTY RESTITUTION COMES OF AGE

Attorney Vartkes Yeghiayan filed one more Armenian genocide-era case in 2010, this time on behalf of the Western Prelacy of the Armenian Apostolic Church of America.²⁹⁵ The lawsuit, originally filed by the Western Prelacy in June 2010 in the Los Angeles Superior Court, named as defendants the J. Paul Getty Museum and the J. Paul Getty Trust—one of the wealthiest and most prominent art institutions in the world.²⁹⁶ The complaint accused the Getty defendants of purchasing art which was stolen from the rightful owner, the

292. *Id.* at 1:01.

293. *Id.* at 1:12.

294. Compare *Movsesian v. Vershicherung AG*, 670 F.3d 1067, 1069 (9th Cir. 2012) (holding that “California statute vesting state courts with jurisdiction over insurance actions by ‘Armenian Genocide’ victims and extending statute of limitations for victims claims intruded on federal government’s exclusive power to conduct and regulate foreign affairs, and thus was preempted”) with *Gingery v. City of Glendale*, 831 F.3d 1222, 1231 (9th Cir. 2016) (holding that a city’s installation of a monument to female wartime sex slaves did not intrude on the federal government’s foreign affairs powers). *Gingery* was issued on the same day as the *Bakalian* oral argument and decided by two of the same panel members, Judges Reinhardt and Wardlaw.

295. Complaint and Demand for Jury Trial, Western Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum, No. BC438824 (Cal. Super. Ct. filed June 1, 2010).

296. *Id.*

Catholicosate of Cilicia, during the gravest days of the Armenian genocide, 1915-1923.²⁹⁷

The Western Prelacy's ownership of the art can be traced back to the church's origins. The One Holy Universal Apostolic Orthodox Armenian Church was founded in 301 A.D., when Armenia adopted Christianity as its official religion, and is recognized as the oldest organized Christian church in the world.²⁹⁸ It continues as the key religious authority for the Orthodox Christian population in Armenia, and for the Armenian diaspora as well.²⁹⁹ The Catholicosate of the Holy See of the Great House of Cilicia is a regional see currently located in Antelias, Lebanon with jurisdiction of the Dioceses of Lebanon, Syria and Cyprus, as well as Iran, India, Canada, and the United States.³⁰⁰ The head of the Catholicosate of the Great House of Cilicia is the "Catholicos."³⁰¹

Since the enormous disruption and displacement of the Armenian genocide, the Catholicosate has largely focused on reorganizing and reestablishing itself and the lines of communication both internally and to its parishioners.³⁰² The structure of the Armenian church has evolved and expanded, and today both the Catholicosate of Cilicia and the Mother See of Holy Echmiadzin (headquartered in Armenia, with different jurisdiction) have branches in the United States.³⁰³ In the United States, the Western and Eastern Prelacies are each independently functioning units of the Catholicosate of the Holy See of the Great House of Cilicia.³⁰⁴ The Western Prelacy of the Armenian Apostolic Church of America was established in 1973 and is headquartered in La Crescenta, California, where it serves southern California's large Armenian population.³⁰⁵

297. *Id.* at 1.

298. Second Amended Complaint and Demand for Jury Trial at 2, *Western Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum*, No. BC 438824 (Cal. Super. Ct. filed Aug. 1, 2011) [hereinafter *Getty Complaint*].

299. *Id.*

300. *Id.* Prior to the Armenian genocide, the Catholicosate of Cilicia had been located in Sis, a medieval Armenian city near the southern coast of Turkey (now located in modern-day Kozan, Turkey). *Id.* Sis was targeted by the Turks during the genocide, and then-Catholicos Sahak retreated with his followers to Aleppo, Syria. *Id.* In 1929, following the exodus of hundreds of thousands of Armenian inhabitants from Cilicia during the genocide, the Catholicosate was reestablished at Antelias, Lebanon, which remains its headquarters today. *Id.* at 2-3.

301. *Id.* at 2.

302. *Id.* at 3.

303. *Id.*

304. *Id.*

305. *Id.*

The facts of the complaint tell a story that could have come right out of a Hollywood film. It begins 800 years ago with T'oros Roslin (circa 1210-1270), the most prominent Armenian manuscript illuminator in the High Middle Ages.³⁰⁶ Roslin's works occupy a central place in the history of Armenian book painting, and have been the subject of countless scholarly books and articles in multiple languages concerning not only Armenian art history, but art history in general.³⁰⁷ Today, Roslin's illuminated manuscripts are held in collections around the world, including Jerusalem, Yerevan, Baltimore, Washington, Los Angeles, and Istanbul.³⁰⁸ His works are considered to be Armenian national treasures.³⁰⁹

The artwork at issue in the Getty case was contained in a manuscript known as the Zeyt'un Gospels. Roslin illustrated the Zeyt'un Gospels at the scriptorium in Hromkla, Cilicia in 1256 for Catholicos Constantine I of the Holy See of the Great House of Cilicia.³¹⁰ A series of eight folios (sixteen pages) known as the Canon Tables—essentially an index to passages that describe the same events in more than one of the four Biblical New Testament gospels—contained the richest and most sumptuous decorations, including colorful birds, flowers, columns, and other ornamental designs.³¹¹ Housed for centuries in the Armenian church in the town of Zeyt'un, the Gospel book was said to wield supernatural powers of protection for those who venerated and protected it.³¹² The Armenians of Zeyt'un called on those powers during the darkest days of the Armenian genocide, when the full Armenian church hierarchy paraded the Zeyt'un Gospels through every street in Zeyt'un in order to create a “divine firewall of protection” around the city.³¹³

The Gospel book was also protected through more practical means. From the late nineteenth century onwards, the Gospels were in joint possession of the church and the Sourenian family, a prominent Armenian family known as “Defenders of the Church.”³¹⁴ The Gospels were held in an iron chest with two locks in the wall of

306. *Id.* at 5.

307. *Id.*

308. *Id.*

309. *Id.* at 5-6.

310. *Id.*

311. See *Canon Tables from the Zeyt'un Gospels*, GETTY (Sept. 21, 2015), <http://www.getty.edu/art/collection/objects/5253/t'oros-roslin-t'oros-roslin-canon-tables-from-the-zeyt'un-gospels-armenian-1256/>.

312. Getty Complaint, *supra* note 298, at 6.

313. *Id.*

314. *Id.*

Church of the Holy Mother of God in Zeyt'un.³¹⁵ The church held a key to one of the locks, and the Sourenian family held the key to the other lock.³¹⁶ Only by inserting both keys at once could the Gospels be "freed."³¹⁷

In or about 1915, the Zeyt'un Gospel book was given to Prince Asadur Agha Sourenian to hold for safekeeping.³¹⁸ When Prince Asadur and his family were ordered deported in late 1915, the prince brought the Gospel book to the nearby town of Marash in order to save it from destruction, and also in the hopes that its divine power would protect him and his family.³¹⁹ However, in the spring of 1916, the Sourenians, who continued to safeguard the Zeyt'un Gospels in Marash, were ordered exiled to Der Zor in the Syrian desert.³²⁰

In Marash, the Sourenians had an Armenian friend named Dr. H. Der Ghazarian, who was working in a nearby German hospital.³²¹ When he discovered that the Sourenians were going to be deported, he persuaded them to let him borrow the Zeyt'un Gospels the day before they left.³²² That request ultimately saved the Gospel book, because Dr. Der Ghazarian was allowed to remain in Marash longer than other Armenians due to his work at the hospital.³²³

When Dr. Der Ghazarian and his family finally fled Marash in 1920, they were forced to leave behind the unwieldy Gospel book as they fled.³²⁴ Sometime within the next few years, an unknown Turkish individual found the Zeyt'un Gospels and brought the manuscript to an Armenian named Melkon Atamian in Marash for him to sell.³²⁵ It appears that Atamian then carefully cut out the eight folios bearing the Roslin illuminated Canon Tables and returned the rest of the manuscript to the Turk.³²⁶

From this point onward, in or about 1923, the separated Canon Tables and the remainder of the Zeyt'un Gospel manuscript continued on different paths. The Turk who possessed the manuscript, minus the eight folios, subsequently took it to the Prelate of the Armenian

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.* at 7.

325. *Id.*

326. *Id.*

Church of Marash, part of the Catholicosate of the Great House of Cilicia.³²⁷ The Prelate, for his part, entrusted the Gospel book to Reverend James K. Lyman—an American missionary in Marash.³²⁸ Rev. Lyman sent word from Marash to the “Zeyt’un Compatriotic Union” in Aleppo that he now possessed the Zeyt’un Gospels and wished for them to have it, although he was not allowed to take it outside of Turkey due to strict laws regarding objects with historical value.³²⁹ Ultimately, and with the consent of the Patriarch of Marash, it was agreed that Lyman should pass the Gospel book on to the Patriarchate of the Armenian church in Istanbul.³³⁰ In the late 1960s, with the consent of Catholicosate of the Great House of Cilicia, the Armenian Patriarch of Istanbul took the Gospel book to Armenia and entrusted it to the Catholicos at Echmiadzin.³³¹ Finally, the Zeyt’un Gospel book, minus the eight folios containing the Canon Tables, was then presented to the Matenadaran—a state museum located in Yerevan, Armenia and the main repository for Armenian manuscripts—for safekeeping, where it is currently housed.³³²

The illuminated Canon Tables followed a very different journey. Unbeknownst to the Catholicosate of the Great House of Cilicia, the Atamian family maintained the eight stolen folios in their private collection for the next seventy years, from the time Melkon Atamian removed them from the Zeyt’un Gospels until the Getty museum purchased them in 1994.³³³ At some point, Melkon Atamian and/or his descendants made their way to the East Coast of the United States, bringing the Canon Tables with them. Throughout that entire period, the Catholicosate had no knowledge of facts to suggest that the pages had been stolen during the Armenian genocide.³³⁴ No one, including scholars associated with the Catholicosate, was able to definitively conclude that the eight separated folios belonged to the Zeyt’un Gospels.³³⁵

In 1994, the Atamian family anonymously loaned the folios to the Pierpont Morgan Library in New York for an exhibition of Armenian art, entitled *Treasures In Heaven: Armenian Art, Religion, and Soci-*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 7-8.

331. *Id.* at 8.

332. *Id.*

333. *Id.*

334. *Id.*

335. *Id.*

ety.³³⁶ The Atamians did not inform the Catholicosate either that they possessed the Canon Tables, or that Melkon Atamian had removed them from the Zeyt'un Gospels.³³⁷ Nor did the Pierpont Morgan Library inform the Catholicosate that they temporarily possessed the stolen folios during the exhibition.³³⁸ Sometime after the exhibition, in 1994, the Getty Museum purchased the eight stolen folios (Canon Tables) from the Atamian family.³³⁹

The Catholicosate of Cilicia did not discover that the Canon Tables had been stolen and were being housed in the Getty Museum in Los Angeles until on or about July 2006.³⁴⁰ The Western Prelacy, as the authorized representative and assignee of the Catholicosate of the Great House of Cilicia, brought claims against the Getty in June 2010 in California state court in Los Angeles for replevin, conversion, damages under California Penal Code Section 496, quiet title, and declaratory relief.³⁴¹ The suit sought the return and reunification of the Canon Tables with the Zeyt'un Gospels.³⁴²

As with the other Armenian genocide cases, the timeliness of the claims was a major issue. Plaintiff's claims were brought pursuant to California Code of Civil Procedure Section 338(c)(3), adopted by the California legislature and signed into law in 2010, which relates particularly to the recovery of fine art taken by theft.³⁴³ Specifically, the statute provides that:

[A]n action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft, as described in Section 484 of the Penal Code, of a work of fine art, including a taking or theft by means of fraud or duress, shall be commenced within *six years of the actual discovery* by the claimant or his or her agent, of both of the following:

- (i) The identity and the whereabouts of the work of fine art. In the case where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts sufficient to determine that the work of fine art is likely to be the work of fine art that was unlawfully taken or stolen.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.* at 8-9.

340. *Id.* at 9.

341. *Id.* at 10-13.

342. *Id.* at 1.

343. *Id.* at 9-10.

(ii) Information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen.³⁴⁴

The Getty filed a demurrer to the complaint on September 6, 2011.³⁴⁵ In its demurrer, the Getty argued that the Catholicosate's claims were time-barred, claiming that the Catholicosate actually discovered in the 1940s that the Canon Tables had been stolen.³⁴⁶ In November 2011, the court overruled the Getty's demurrer, rejecting the Getty's assertions that early dismissal was appropriate based upon statutes of limitations.³⁴⁷ The court then ordered the parties to participate in mediation, which was unsuccessful.³⁴⁸

Developments in Nazi looted art cases soon began to have an impact on the litigation against the Getty. In October 2012, the Western Prelacy and the Getty museum asked the court to stay the case in light of a recent federal district court ruling in *Cassirer v. Thyssen-Bornemisza Collection Foundation*—an FSIA case against a Spanish state-run art museum brought by the heir to a Holocaust survivor whose valuable artwork had been stolen by the Nazis—declaring Section 338(c)(3) to be unconstitutional.³⁴⁹ The decision was on appeal to the Ninth Circuit, and thus the resolution of the appeal could determine the outcome of the Western Prelacy's case.³⁵⁰

The Ninth Circuit issued its ruling in *Cassirer* in December 2013.³⁵¹ In a major victory for plaintiffs' advocates, the court held that—unlike the state statutes at issue in *Von Saher, Movsesian*, and a third case involving wartime claims, *Deutsch v. Turner*³⁵²—Section 338(c)(3) was not preempted under the foreign affairs doctrine.³⁵³ According to the Ninth Circuit, Section 338(c)(3) “does not create a remedy for wartime injuries by creating a new cause of action for the recovery of artwork”; rather, it “extends the statute of limitations for

344. CAL. CIV. PROC. CODE § 338(c)(3) (West 2015) (emphasis added).

345. Defendant's Demurrer and Memorandum of Points and Authorities, Western Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum, No. BC438824 (Cal. Super. Ct. filed Sept. 6, 2011).

346. *Id.* at 1-4.

347. The court ruled from the bench and did not issue a written opinion. For a discussion of the November 3, 2011 demurrer hearing, see Boehm, *supra* note 13.

348. *Id.*

349. *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 2012 WL 12875771 (C.D. Cal. May 24, 2012).

350. See Parties' Joint Stipulation Re: Stay of Proceedings, Western Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum, No. BC438824 (Cal. Super. Ct. filed Oct. 17, 2012).

351. *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613 (9th Cir. 2013).

352. *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003).

353. *Cassirer*, 737 F.3d at 618-19.

preexisting claims concerning a class of artwork that is unrelated to foreign affairs on its face.”³⁵⁴ The court noted that Section 338(c)(3) was neutral on its face and said nothing about wartime injuries or claims.³⁵⁵ The statute did not limit the class of claimants only to “Holocaust” or “Armenian Genocide” victims, but rather any person could recover a work of fine art as long as the statute’s other requirements were met.³⁵⁶ In its decision, the Ninth Circuit specifically cited the Getty case as an example of a non-Holocaust-era case relying on the statute for recovery.³⁵⁷

Following the Ninth Circuit’s February 2014 denial of the Thyssen-Bornemisza Collection Foundation’s petition for rehearing en banc in *Cassirer*, the stay was lifted in the Getty case so that proceedings and discovery could recommence.³⁵⁸ Trial was scheduled to begin on November 3, 2015.³⁵⁹

On September 21, 2015, in the year marking the hundredth anniversary of the start of the Armenian genocide, the parties announced in a joint press release that they had resolved their dispute over the ownership of the eight Canon Tables.³⁶⁰ In the settlement, the Getty museum “acknowledges the Armenian Apostolic Church’s ownership of the eight 13th Century manuscript pages. . . . Separately, in recognition of the Getty’s decades-long stewardship of the Canon Tables and its deep understanding and appreciation of Armenian art, the Church will donate the pages to the Getty Museum in order to ensure their preservation and widespread exhibition.”³⁶¹ The Canon Tables will continue to be housed at the Getty museum and will be available to museum visitors as well as scholars and researchers.³⁶²

As the first successful settlement of an Armenian genocide-era art case, the Western Prelacy’s suit against the Getty may point the way towards the future of Armenian genocide litigation. Dozens of other Armenian manuscripts are known to exist in museum collections across the United States, including the Huntington Library and Art Gallery in San Marino, California; the Walters Art Gallery in Bal-

354. *Id.*

355. *Id.* at 618.

356. *Id.* at 619.

357. *Id.*

358. See Renewed Motion to Lift Stay and Restore Action to Active Civil Status, Western Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum, No. BC438824 (Cal. Super. Ct. filed Apr. 16, 2014).

359. See *id.*

360. Getty Press Release, *supra* note 13.

361. *Id.*

362. *Id.*

timore; the Museum of Fine Arts in Boston; the Pierpont Morgan Library in New York; the Philadelphia Museum of Art; and the Freer Gallery of Art at the Smithsonian in Washington.³⁶³

There are almost certainly more art and cultural objects stolen or taken during the Armenian genocide that have yet to be found and returned to their rightful owners. As is amply demonstrated by the complicated and confusing history of the Zeyt'un Canon Tables, it is not at all clear that the rightful owner(s) are even aware of the existence of their art, much less the location and how it came to be at its present location. Museums, galleries, and art dealers cannot acquire good title from a thief, and they have an obligation to look carefully into the provenance of any artworks they purchase and abide by ethical acquisition standards.³⁶⁴ An independently funded group, similar to the Holocaust Art Restitution Project, which was founded in the late 1990s with the specific purpose of “document[ing] cultural property losses suffered by Jewish individuals, families, and institutions between 1933 and 1945 at the hands of the National Socialists and their Fascist allies across continental Europe” and “conduct[ing] historical research into the wartime and postwar fate of stolen, confiscated, misappropriated cultural property,”³⁶⁵ could assist the Armenian diaspora in identifying and locating Armenian art stolen or looted during the genocide. For many, this is less about profit and more about justice, patrimony and memory.³⁶⁶

The Getty case is also an example of the “creative and mutually beneficial solution[s]” that can be achieved when the parties work together and acknowledge that there is often a middle ground.³⁶⁷ Recognition of the suffering the Armenians faced during the genocide can go a long way towards reconciliation, and need not impede art institutions’ laudable goals of protecting and preserving valuable artworks

363. See, e.g., Melissa Conway & Lisa Fagin Davis, *Directory of Collections in the United States and Canada with Pre-1600 Manuscript Holdings*, 109 PAPERS BIBLIOGRAPHICAL SOCIETY AMERICA 273, 301, 357, 387 (2015).

364. See, e.g., *Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era*, AMERICAN ALLIANCE OF MUSEUMS, <http://www.aam-us.org/resources/ethics-standards-and-best-practices/collections-stewardship/objects-during-the-nazi-era> (last visited Dec. 1, 2016).

365. See Plunderedart, *Holocaust Art Restitution Project: About*, FACEBOOK https://www.facebook.com/plunderedart/about/?ref=page_internal (last visited Dec. 1, 2016) for a description of the nonprofit group and its activities.

366. See Phil Hirschhorn, *Why finding Nazi-looted art is “a question of justice,”* PBS NEWSHOUR (May 22, 2016), <http://www.pbs.org/newshour/updates/why-finding-nazi-looted-art-is-a-question-of-justice/>; see also Ronald S. Lauder, *Time to Evict Nazi-Looted Art from Museums*, WALL ST. J. (June 30, 2014), <http://www.wsj.com/articles/ronald-lauder-time-to-evict-nazi-looted-art-from-museums-1404076759>.

367. Getty Press Release, *supra* note 13.

and cultural artifacts so that everyone may enjoy and learn from them. Surely similarly creative solutions exist to resolve even the most intractable claims involving Turkey and its state agencies—if the parties can find the leadership, political will, and moral courage to step outside their comfort zones and search for mutual benefit, rather than scoring points.

V. CONCLUSION

After initial success in the New York Life and AXA insurance cases, fresh on the heels of successful multi-billion dollar settlements in Holocaust restitution cases, the movement for restitution through litigation for victims of the Armenian genocide was dealt a number of setbacks. Despite repeated efforts in the California legislature to pass plaintiff-friendly statutes extending the statutes of limitations for “Armenian Genocide victims” bringing various types of claims, defendants quickly realized that they could capitalize on Turkey’s historic refusal to acknowledge the genocide and the U.S. government’s reticence to consistently challenge Turkey’s characterization of events. Armenian plaintiffs in U.S. courts have had to leave much on the table: bank deposits and looted assets deposited in banks, insurance claims against certain companies, and potentially hundreds of millions of dollars in real property claims.

Moreover, while the United States has historically provided a home and safe haven for refugee groups fleeing mass atrocities and has often negotiated post-war settlements on behalf of U.S. nationals, those settlements may leave refugees out in the cold—as happened to the Armenians fleeing Turkey in the wake of the genocide—if they cannot claim U.S. citizenship at the time of settlement or are excluded from the settlement at the request of the settling state.

Without the support of the political branches of government, accompanied by robust and targeted private advocacy efforts that can highlight the benefits of a comprehensive resolution and apply consistent pressure toward that end, as occurred in the Holocaust restitution cases, litigation in American courts may not be—for the foreseeable future—the most likely, or efficient, means of obtaining redress or restitution. The Obama Administration was not a friend of such litigation, whether filed by Armenians or other victim groups,³⁶⁸ and it is

368. See, e.g., Brief for the United States as Amicus Curiae, *Arzoumanian v. Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG*, No. 12-9 (S. Ct. filed May 2013); Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (S. Ct. filed June 2012); Brief for the United States

unlikely that the Trump Administration will act otherwise. The recent history of Armenian genocide restitution efforts in the United States, particularly in contrast with the successes of the modern Holocaust restitution movement, underscores that the struggle for justice for the financial wrongs arising from the Armenian genocide has yet to be won.

Yet there is reason for optimism: the Ninth Circuit appellate panel that is currently considering whether U.S. courts have jurisdiction over the Republic of Turkey to hear cases alleging the unlawful expropriation of real property is clearly grappling with the fact that there is no “political question” lurking in Congress’s express delegation of the jurisdictional question to the judicial branch or in the “garden variety” property claims at issue. Whatever the outcome, the court’s decision will likely be the subject of petitions for rehearing en banc and for certiorari to the Supreme Court.

California’s stolen art recovery statute, Section 338(c)(3) of the Code of Civil Procedure, also stands out. After years of failed attempts by the California legislature to provide a forum for and extend limitations periods on claims brought by various defined victim groups, Section 338(c)(3)’s carefully neutral descriptions of the claimant class and the circumstances in which the limitations period would be extended finally passed constitutional muster.³⁶⁹ It is also the template for a nearly identical federal statute, the Holocaust Expropriated Art Recovery Act of 2016 (the HEAR Act). Passed by Congress with unanimous bipartisan support and signed into law by President Obama on December 16, 2016, the HEAR Act enshrines in law the existing U.S. policy promoting the return of Nazi-confiscated art, and extends the statute of limitations on claims to stolen art.³⁷⁰ The HEAR Act’s six-year limitations period for filing claims applies in every court in the United States.³⁷¹

Section 338(c)(3) set the stage for the successful, amicable settlement of the first Armenian genocide art recovery case, *Western Prelacy of the Armenian Apostolic Church of America v. The J. Paul Getty*

as *Amicus Curiae*, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 09-1254 (S. Ct. filed May 2011).

369. For further discussion of the years of interplay between the California legislature and the federal courts in determining the limits of legislation in this area, see Shah, *supra* note 6.

370. See Holocaust Expropriation Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (to be codified at 22 U.S.C. § 1621 note); see also *HEAR Act Signed Into Law*, COMMISSION FOR ART RECOVERY, <http://www.commartrecovery.org/hear-act> (last visited Feb. 17, 2017).

371. See Holocaust Expropriation Art Recovery Act, Pub. L. No. 114-308, § 5, 130 Stat. 1524, 1526-27.

Museum. The settlement took place in 2015, the hundred-year anniversary of the genocide. The Getty litigation points the way toward the future of Armenian genocide litigation in the United States: targeted efforts based on narrowly written statutes that avoid the “third rail” term for American courts—”Armenian genocide”; a willingness to be open to creative solutions; and political pressure that enhances and supports the litigation. If Armenians can learn to harness these energies as effectively as the Jewish survivors and heirs of the Holocaust, they may yet be able to achieve some measure of justice.