

A LESSON FROM THE HOLOCAUST RESTITUTION MOVEMENT FOR ARMENIANS: GENERATE MOMENTUM TO SECURE RESTITUTION

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“Nothing emboldens a criminal so much as the knowledge he can get away with a crime.”

- David Matas¹

INTRODUCTION

“Who, after all, still talks today of the extermination of the Armenians?” While this quote’s authenticity is steeped in controversy, many historians believe that those words were uttered by Adolf Hitler before the Nazi invasion of Poland.² He believed that the international community would promptly forget the Final Solution,³ just as they did the murder of over half of the Armenian population⁴ by the Ottoman Turks⁵ from 1915 to 1923,⁶ commonly

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¹ David Matas is a human rights scholar whose statement concerns the failure to prosecute the leaders of the Young Turk government for the Armenian Genocide, and how that failure “helped codify impunity and set a precedent.” HRAYR S. KARAGUEUZIAN & YAIR AURON, *A PERFECT INJUSTICE: GENOCIDE AND THEFT OF ARMENIAN WEALTH* 99 (Transaction Publishers 2009). For additional information about Matas, see David Matas, Ben-Gurion University’s Negev Award of Distinction tribute luncheon: *Revisiting Human Rights*, Aug. 26, 2010, in *THE EPOCH TIMES* (Aug. 29, 2010), available at <http://www.theepochtimes.com/n2/content/view/41832>.

² KEVORK B. BARDAKJIAN, *HITLER AND THE ARMENIAN GENOCIDE* 1 (The Zoryan Institute 1985). The authenticity and accuracy of the quote is hotly challenged by some historians and many Turkish scholars, in part because five moderately different transcriptions of this same quote exist. VAHAKN N. DADRIAN, *HISTORY OF THE ARMENIAN GENOCIDE* 401-10 (1995). The U.S. Department of Justice and the *New York Times*, among other sources, have confirmed its authenticity. *Id.* at 403.

³ For more information on the Holocaust, see generally MICHAEL BAZYLER, *HOLOCAUST JUSTICE* (2003); MARTIN DEAN, *ROBBING THE JEWS* (2008); STUART E. EIZENSTAT, *IMPERFECT JUSTICE* (2003); JOHN AUTHERS & RICHARD WOLFFE, *THE VICTIM’S FORTUNE* (2002).

⁴ Richard G. Hovannisian, Introduction, *The Armenian Genocide: Remembrance and Denial* in *REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE* 15 (Richard G.

(but not universally) recognized as the “Armenian Genocide.”⁷ With more than a billion dollars in restitution secured for Holocaust victims,⁸ however, Hitler was proven wrong. But he was not entirely incorrect either. Armenian Genocide victims and their descendants have received minimal restitution of unpaid insurance claims, dormant bank accounts, looted gold, and other Armenian Genocide-era looted assets.⁹

What explains this disparity?

Holocaust victims initially relied on the legal system to recover assets, without much success. Stuart Eizenstat, former U.S. Ambassador to the European Union and a crucial member of the Holocaust restitution movement, recognized that “U.S. courts are not the best places to resolve profound historical and political questions.”¹⁰ Eizenstat’s position reflects the many legal roadblocks that complicate a victim’s chances of restituting looted assets in a court of law.¹¹ Simply put, laws are not enacted in consideration of a genocide survivor-plaintiff’s unique circumstances. Moreover, whatever limited exceptions that do exist to help alleviate any statutory hurdles are regularly ignored, overlooked and/or misunder-

Hovannisian ed., Wayne State Univ. Press 1998). Estimates of the dead vary from 600,000 to 2,000,000; a report of the United Nations reports the figure of “at least one million.” *Id.*

⁵ See generally, BERNARD LEWIS, *THE EMERGENCE OF MODERN TURKEY* 25-38, 332 (2002).

⁶ See RICHARD G. HOVANNISIAN, *THE ARMENIAN HOLOCAUST: A BIBLIOGRAPHY RELATING TO THE DEPORTATIONS, MASSACRES, AND THE DISPERSION OF THE ARMENIAN PEOPLE, 1915-1923* (1980).

⁷ Official recognition of the Armenian Genocide includes resolutions passed by European Union member nations, a resolution passed by the European Union Parliament, as well as those of several other nations. See *THE ARMENIAN GENOCIDE MUSEUM-INSTITUTE*, <http://www.genocide-museum.am/eng/states.php> (last visited Dec. 30, 2011). Although the federal government has not formally recognized the genocide, forty-two U.S. states have used the word “genocide.” See Press Release, Armenian National President Committee of America, President Obama’s Home State Becomes 42nd to Recognize Armenian Genocide (April 6, 2009) (on file with author). See also *Resolution on genocides committed by the Ottoman Empire*, International Association of Genocide Scholars, available at http://www.genocidescholars.org/images/Resolution_on_genocides_committed_by_the_Ottoman_Empire.pdf (last visited Dec. 1, 2011).

⁸ AUTHERS & WOLFFE, *supra* note 3, at 364.

⁹ See KARAGUEUZIAN & AURON, *supra* note 1, at 15.

¹⁰ EIZENSTAT, *supra* note 3, at 341.

¹¹ Bases for precluding recovery include statutes of repose, the doctrine of laches, choice-of-law provisions, the Foreign Sovereign Immunities Act, and/or preemption through the federal foreign affairs power. See *infra*, Part II.

stood by the courts.¹² However, once advocates for Holocaust victims looked beyond the lawsuit as the sole channel for recovery,¹³ positive results were more common, both inside and outside the courthouse doors.

Rather than exclusively relying on adjudication, Armenian Genocide-era claims can be more effectively restituted by similarly incorporating these strategies. Indeed, Armenian claimants have had some recent success thanks, in large part, to learning from the experiences of the Holocaust restitution movement.¹⁴ Holocaust restitution expert and pioneer Michael Bazylar explains:¹⁵

[o]ne of the most important lessons to be learned from the Holocaust restitution movement is that once momentum is created for a cause, which is then embraced by the public and the media, a favorable resolution, through either a court settlement or the political arena or both, becomes much more likely.¹⁶

Professor Bazylar correctly points out that in the restitution of looted assets, particularly of decades-old claims, insufficient evidence hinders favorable court judgments. Before justice comes momentum, Bazylar argues. Advocates for restitution must create sufficient momentum for their cause if they are to be successful.

¹² See, e.g., 1968 CONVENTION ON THE NON-APPLICABILITY OF STATUTORY LIMITATIONS TO WAR CRIMES AND CRIMES AGAINST HUMANITY, available at <http://www2.ohchr.org/english/law/pdf/warcrimes.pdf> (declaring that statutory limitations should not apply in cases of war crimes and crimes against humanity, given the exigency of effective punishment and deterrence of such crimes). Notable exceptions are found in California, where the state legislature had passed laws tolling the statutes of limitation for Holocaust victims (HVIRA) until preempted in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). The validity of the corresponding law for Armenian Genocide victims (§ 354.4 CAL CIV. PRO. CODE) is pending following a grant for motion to rehear the case *de novo* in *Movsesian v. Victoria Versicherung AG* (“*Movsesian I*”), 578 F.3d 1052 (9th Cir. 2009).

¹³ For a comprehensive “cast of characters” of the Holocaust restitution movement, see AUTHERS & WOLFFE, *supra* note 3, at xi-xv.

¹⁴ BAZYLAR, *supra* note 3, at 320.

¹⁵ Professor Bazylar is a pioneer of the Holocaust restitution movement, has taught several courses in international law, and is a prolific writer about Holocaust restitution. See, e.g., Michael J. Bazylar, Narrative Biography, <http://www.michaelbazylar.com/NarrativeBio.php> (last visited Feb. 27, 2011).

¹⁶ BAZYLAR, *supra* note 3, at 323.

Momentum theoretically makes sense, but how does it actually work?

Alternative Dispute Resolution (ADR) provides a solid framework for explanation.¹⁷ Put another way, “momentum” can be characterized as a process through which negotiation causes a shift in the perceived position of parties, which in turn may compel a mutually beneficial resolution where one was initially impossible. With the support of political heavyweights, community leaders, and wealthy businessmen, negotiation has proven to be moderately effective in compelling recovery for Holocaust victims.¹⁸ Political and financial pressures are crucial to compel courts to reconsider traditional bars to recovery and to convince defendants that non-payment of outstanding claims will have repercussions.

Professor Bazylar’s notion of momentum operates on two levels. On one level, it will compel increased restitution from perpetrators and beneficiaries of looting to Armenian Genocide victims and their descendants. On a grander level, it will signal to would-be perpetrators of genocide that they cannot enrich themselves without being held accountable. With the knowledge that their wrongdoings will not be promptly forgotten, perpetrators will be more effectively deterred from using criminal conduct, among other things, for financial benefit.

This Note proceeds in five parts. Part I provides a historical background of the events prior to and during the Armenian Genocide, and the claims arising out of the Genocide. Part II discusses the status of Genocide restitution and the roadblocks that continue to prevent widespread recovery. Part III explains the timeline of the Holocaust restitution movement and how advocates for restitution were finally able to have some success. Part IV proposes that Genocide-era claims be sought not only by filing lawsuits, but also by creating momentum through negotiation and other principles of ADR. Part V concludes by reiterating the importance of restituting Armenian Genocide-era looted assets, not only for the Armenian community, but in the name of human decency and restorative justice.

¹⁷ Alternative dispute resolution, or “ADR,” is any procedure for settling a dispute by means other than only litigation. BLACK’S LAW DICTIONARY (9th ed. 2009).

¹⁸ See, e.g., AUTHERS & WOLFFE, *supra* note 3.

I. BACKGROUND: A PRIMER ON ARMENIAN HISTORY,
INCLUDING THE ARMENIAN GENOCIDE AND ITS AFTERMATH

Armenia is situated in the Caucasus and is bordered by Turkey to the west, Georgia to the north, Azerbaijan to the east, and Iran to the south.¹⁹ While Armenia is geographically located in Western Asia or the Middle East, it is frequently labeled as a country in Eastern Europe due to its cultural and religious history.²⁰ The Armenians likely originated from various Indo-European peoples and they speak the Indo-European language Armenian.²¹ Since the earliest records, Armenians have lived as subjects in empires, including those of the Persians, Greeks, Romans, Parthians, Byzantines, and Turks.²² The Armenians would then be subjects of the Ottoman Empire for several centuries before joining the U.S.S.R. and eventually gaining independence in 1991.²³

A. *Pre-1800s: Armenians Under the Ottoman Empire*

Sultan Osman I founded the eponymous Ottoman Empire at the turn of the fourteenth century. After experiencing incredible growth up to the seventeenth century, successive military defeats and concessions prompted discussions amongst Ottoman statesmen about the “decrepit state of the Empire and the abject performance of its armies.”²⁴ Ottoman leaders then sought to revive its stature as a world power.²⁵

Although Armenians as “People of the Book”²⁶ were promised certain rights by the Ottoman Empire’s government, they “en-

¹⁹ The CIA World Factbook: Armenia, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/am.html> (last visited Dec. 1, 2011).

²⁰ See, e.g., Armenia Country Profile, BBC, available at http://news.bbc.co.uk/2/hi/europe/country_profiles/1108052.stm (last visited Oct. 15, 2010).

²¹ *Id.*

²² See generally GEORGE A. BOURNOUTIAN, A CONCISE HISTORY OF THE ARMENIAN PEOPLE (2002).

²³ *Id.* at 370.

²⁴ LEWIS, *supra* note 5.

²⁵ See generally LORD KINROSS, THE OTTOMAN CENTURIES: THE RISK AND FALL OF THE TURKISH EMPIRE (1977).

²⁶ This term is defined as non-Muslim believers in a faith who have a book of prayers. The designation is most commonly used to describe Jews and Christians. Zeki Saritoprak & Sidney Griffith, *Fethullah Gülen and the ‘People of the Book’: A Voice from Turkey for Interfaith Dialogue*, 95 THE MUSLIM WORLD 329 (2005), available at <http://www.interfaithdialog.org/newsletter/documents/ZSaritoprak1.pdf> (last visited Dec. 1, 2011).

dure[d] official discrimination and second-class citizenship.”²⁷ Even during nineteenth century reforms, the government again attested to the “theoretical equality of all Ottoman subjects.”²⁸ But as Professor Hovannisian suggests, these attestations of reform “did not bring equality . . . but only accelerated the breakdown of law and order.”²⁹

B. 1890s: Massacres under Sultan Abdul-Hamid II

By the end of the 1890s, the ailing Empire faced a choice between continuing the status quo or “escap[ing] (from) doom only through egalitarianism and constitutionalism.”³⁰ Initially, Sultan Abdul-Hamid II proclaimed a liberal constitution.³¹ However, once he declared war on Russia in 1877, he suspended the constitution and any promises of reform. Armenians came to be regarded as “disloyal and dangerous.”³² Western powers pushed for protections and freedoms of Armenians from neighboring communities (commonly called the “Armenian Question”).³³ The calls for reform went unanswered and the first instance of widespread Armenian massacres occurred in 1894, known as the Hamidian massacres.³⁴ Abdul-Hamid armed Kurdish brigands and enabled them with the determination to crush the Armenian movement.³⁵ Although Abdul-Hamid was coerced by Western powers into issuing a compromise edict in the fall of 1895, his real response was to “unleash pogroms in nearly every provide inhabited by Armenians . . . [W]ithin a year more than 100,000 Armenians lay dead, thousands more had fled into exile, and hundreds of towns and villages had been looted and burned or forced to convert to Islam.”³⁶

²⁷ FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE* 251 (3d ed. 1990).

²⁸ Richard G. Hovannisian, *Etiology and Sequelae of the Armenian Genocide*, in *GENOCIDE: CONCEPTUAL AND HISTORICAL DIMENSIONS* 119 (George J. Andreopoulos ed., Univ. of Penn. Press 1994).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ See, e.g., SIMON PAYASLIAN, *UNITED STATES POLICY TOWARD THE ARMENIAN QUESTION AND THE ARMENIAN GENOCIDE* (2005).

³⁴ Hovannisian, *supra* note 28, at 119.

³⁵ *Id.* at 120.

³⁶ *Id.*

Lord Kinross, an expert on Turkish history, describes the systematic nature of the pogroms:

Each operation, between the bugle calls, followed a similar pattern. First into a town there came the Turkish troops, for the purpose of massacre; then came the Kurdish irregulars and tribesmen for the purpose of plunder. Finally came the holocaust, by fire and destruction, which spread, with the pursuit of the fugitives and mopping-up operations, through the lands and villages of the surrounding provinces. . . . Often the massacres were timed for a Friday, when the Moslems [sic] were in their mosques and the myth was spread by the authorities that the Armenians conspired to slaughter them at prayer.³⁷

C. 1900s-1910s: Political Instability and Pan-Turkism Hinder Armenian Autonomy

The Hamidian³⁸ massacres were violent and widespread. Even though the newly reigning Young Turk government promised “fundamental and far-reaching changes” to the country,³⁹ they nonetheless became “xenophobic chauvinists bent on creating new order and eliminating the Armenian presence.”⁴⁰ The Balkan Wars of 1912 and 1913 freed ethnic Bulgarians, Greeks, Montenegrins, and Serbians from Ottoman rule and renewed Europe’s interest in the Armenian Question.⁴¹ A landmark settlement was reached, giving Armenians local autonomy over six Turkish-Armenian provinces under the guarantee of the European powers.⁴² However, the outbreak of World War I stalled its implementation.⁴³ Armenian leaders urged that Ottoman-Armenians maintain neutrality and serve the Empire in the event that the theater of war reached Eastern Anatolia.⁴⁴

Despite Armenians’ promises of support, Ottomans became increasingly devoted to the idea of a collective Turkic and Uralic-

³⁷ *Id.* at 251.

³⁸ *Id.* at 119.

³⁹ *Id.*

⁴⁰ PETER BALAKIAN, *BURNING TIGRIS: THE ARMENIAN GENOCIDE AND AMERICA’S RESPONSE* 160-61 (2003).

⁴¹ See PAYASLIAN, *supra* note 33.

⁴² Hovannisian, *supra* note 28, at 259.

⁴³ *Id.*

⁴⁴ VAHAN MINAKHORIAN, 1915 TVAKANE (THE YEAR OF 1915) 66-71 (Venice: St. Lazarus, 1949); see also CHALK AND JONASSOHN, *supra* note 27, at 259.

Altaic entity, commonly called Pan-Turkism.⁴⁵ However, ethnic and religious minorities' lack of support clearly hindered Pan-Turkism. In fact, only months after promising Armenians local autonomy, the Young Turk government's policies took a complete about-face:

Not only were the Armenians alien by culture and religion, but their historic lands lay in the middle of the projected Turkic realm. Their upward mobility and their avid absorption of Western education and ideas made them all the more dangerous. The Young Turk strategy was to bring the Ottoman Empire into the European war as an ally of Imperial Germany against Russia in exchange for the right to invade Transcaucasia (the present-day Caucasus) and Central Asia and liberate the Turanic heartland (. . .) What the Armenians did not know was that Enver and his cohorts had already sealed a secret military alliance with Imperial Germany and were preparing for the invasion of the Caucasus.⁴⁶

D. 1915-1923: *The Armenian Genocide*

The official beginning of the Armenian Genocide is commonly cited as April 24, 1915. On this date, scores of Armenian political, religious, educational, and intellectual leaders in Constantinople were arrested, deported to Anatolia, and put to death.⁴⁷ Armenians were labeled "untrustworthy" and violent measures were taken against them.⁴⁸ The estimated 100,000 Armenian servicemen in the Ottoman army were searched for and required to give up all arms; many were interrogated, tortured, jailed or killed.⁴⁹ By this time, it was made clear that "a massive and systematic operation against Armenians throughout almost all of the empire was undertaken."⁵⁰ Proof included "numerous eyewitness accounts from consuls, German and Austrian military personnel, doctors, nurses, and teachers belonging to neutral or pro-German nations, and of course from survivors of the measures themselves. There were also some signifi-

⁴⁵ See generally JACOB M. LANDAU, PAN-TURKISM: FROM IRREDENTISM TO COOPERATION (1995).

⁴⁶ Hovannisian, *supra* note 28, at 123.

⁴⁷ CHALK AND JONASSOHN, *supra* note 27, at 260.

⁴⁸ Christopher J. Walker, *The Formation of the Armenian Nation*, in 1 THE ARMENIAN PEOPLE: FROM ANCIENT TO MODERN TIMES 19, 244-45, 269 (Richard G. Hovannisian ed., St. Martin's Press 1997).

⁴⁹ *Id.* at 245-46.

⁵⁰ *Id.* at 246.

cant eyewitness accounts from Muslim officers in the Ottoman army.”⁵¹

The measures amounted to systematic extermination through mass deportation. Within each town, local governments executed the same directives:

All the fit Armenian men from a town or village would be summoned to the government building. They were told that they were going to be moved to another locality and were assured that the government was benevolent. Once the authorities had got hold of them, they were jailed for several days, for no apparent reason. When they were allowed out, they were marched out of town. At the first halting place, they would be shot or bayoneted to death. Shortly afterward the women, children, and old men would be summoned in the same way. They were not jailed, but told that they would have to leave in a few days, for new homes. In actuality, they were made to suffer a terrible fate, much worse than that of the able-bodied men. In the burning summer heat, they were driven on and on, by gendarmes who completely dehumanized them, along designated routes, until they collapsed and died by the wayside . . . [M]any were told that they were being sent to Mosul [in present-day Iraq]; en route they were driven first southwestward in the general direction of Aleppo, which became a main staging post for the deportees; from there they were sent east to locations along the Euphrates River, such as Meskene and Deir ez-Zor, which became vast and pitiless extermination camps, and where death came as a blessing. Only a few ever reached Mosul.⁵²

E. WWI: Aftermath and Turkish Resurgence

After the Allies emerged victorious, they sat down with Turkey to draft the Treaty of Sevres on August 10, 1920.⁵³ The treaty memorialized Turkey’s concession of substantial lands, its recogni-

⁵¹ *Id.* at 247. For more in-depth eyewitness accounts, see *id.* at 263-73; CHALK AND JONAS-SOHN, *supra* note 27, at 261.

⁵² Walker, *supra* note 48, at 248-249.

⁵³ *Id.* at 332. The treaty included the report of an Allied-led commission, which described the crimes against humanity perpetrated by the Ottoman Empire:

[S]ystematic terror; murders and massacres; dishonoring of women; confiscation of private property; pillage; seizing of goods belonging to communities, educational establishments, and charities; arbitrary destruction of public and private goods; deportation and forced labor; execution of civilians under false allegations of war crimes; and violations against civilians as well as military personnel.

DADRIAN, *supra* note 2, at 304.

tion of an independent, autonomous Armenia and its acceptance of “the obligation to assist in the repatriation and restoration of the Armenian survivors, in the rescue of Armenian women and children still held in Muslim households, and in the prosecution of the perpetrators of the Armenian Genocide.”⁵⁴ However, political tensions amongst the Allied Powers and Turkey’s nationalist movement led to the annulment of this treaty fourteen days later.⁵⁵ Turkish forces began an offensive against the Armenians and in a matter of months were close to taking over all Armenian lands. From that bargaining position, the Turks were able to renegotiate for the Treaty of Lausanne,⁵⁶ which expanded Turkey’s pre-World War I boundaries.⁵⁷

At the urging of Great Britain, a Turkish military court was created to try the Young Turk leaders that perpetrated the Armenian Genocide.⁵⁸ This effort came to be known as “the Nuremberg that failed,” for none of its judgments were actually enforced.⁵⁹ The Armenian politician faction, the Armenian Revolutionary Federation (A.R.F.), then launched Operation Nemesis, through which several leading perpetrators of the Armenian Genocide were assassinated in different European and Asian cities.⁶⁰

F. *Outstanding Claims*

The Allies created a Reparation Commission, but the resurgence of Turkish leadership prevented any restitution.⁶¹ After the Genocide, little evidence remained that actually proved the value of the assets that were looted. To date, no compensation or restitution has ever been made from the Turkish government or Turkish companies.⁶² Outstanding claims mainly consist of unpaid insurance policies and looted assets.⁶³

⁵⁴ Richard G. Hovannisian, *The Republic of Armenia*, in 2 *THE ARMENIAN PEOPLE: FROM ANCIENT TO MODERN TIMES* 332 (Richard G. Hovannisian ed., St. Martin’s Press 1997).

⁵⁵ DADRIAN, *supra* note 2, at 305.

⁵⁶ Hovannisian, *supra* note 54, at 346.

⁵⁷ BOURNOUTIAN, *supra* note 22, at 15.

⁵⁸ Richard G. Hovannisian, Introduction, *The Armenian Genocide: Remembrance and Denial in REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE* 14 (Richard G. Hovannisian ed., Wayne State Univ. Press 1998).

⁵⁹ KARAGUEUZIAN AND AURON, *supra* note 1, at 59.

⁶⁰ See OPERATION NEMESIS, <http://www.operationnemesis.com> (last visited Jan. 16, 2011).

⁶¹ KARAGUEUZIAN AND AURON, *supra* note 1, at 126.

⁶² *Id.*

⁶³ See generally *id.*

Over a dozen European and American companies provided insurance policies and held bank accounts for tens of thousands of well-to-do Ottoman Armenians.⁶⁴ For example, New York Life Insurance was known to have at least \$10 million in policies on the eve of World War I.⁶⁵ Despite the depravity of victims and their calls to insurers for repayment of family members' policies, payments were delayed and in most cases never paid.⁶⁶ To date, there are only a few isolated cases of settlements between insurers and victims.⁶⁷ What is worse, though, is that the Young Turks were hopeful that it would reap the benefits of the unpaid insurance policies.⁶⁸

The "nationwide massive institutionalized and organized bank robbery" of Armenian assets is one of the major sources of outstanding claims.⁶⁹ The Abandoned Properties Act required that all Imperial Ottoman bank branches deliver all of the bank assets, valuables and safe deposits, cash deposits and jewelry belonging to deported Armenians to the Central Ottoman Bank in Constantinople.⁷⁰ At least 288 million dollars of gold⁷¹ was deposited by Turkish leaders in Berlin's Reichsbank in 1916.⁷² This amount was thought to be "in large part (perhaps wholly) Armenian money."⁷³ Recent documentary evidence finds that the looted assets deposited in the Reichsbank remained untapped after the Reparation

⁶⁴ *Id.* at 23-29.

⁶⁵ *Id.* at 24.

⁶⁶ BAZYLER, *supra* note 3, at 318-20.

⁶⁷ See sources cited *infra*, note 85.

⁶⁸ The eyewitness account of Henry Morgenthau, U.S. Ambassador to Turkey is particularly revealing of the government's intentions. Morgenthau recounts in his memoir one of his discussions with Mehmet Talaat, a key orchestrator of the Armenian Genocide:

One day Talaat made what was perhaps the most astonishing request I ever heard. The New York Life Insurance Company and the Equitable Life of New York had for years done considerable business among the Armenians . . . 'I wish,' Talaat now said, 'that you would get the American life insurance companies to send us a complete list of their American 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 the beneficiary now.'

Henry Morgenthau & Peter Balakian, *AMBASSADOR MORGENTHAU'S STORY* 212 (2003). *But see* HEATH W. LOWRY, *THE STORY BEHIND AMBASSADOR MORGENTHAU'S STORY* (1990) (arguing that Morgenthau's eyewitness accounts are not credible).

⁶⁹ KARAGUEUZIAN & AURON, *supra* note 1, at 99.

⁷⁰ *Id.*

⁷¹ Turkish leaders deposited five million Turkish gold pounds, which was valued at \$22 million. This amount in 1920 would be worth approximately \$247 million in 2011; See FEDERAL RESERVE BANK OF MINNEAPOLIS, <http://www.minneapolisfed.org> (last visited Sep. 10, 2011).

⁷² KARAGUEUZIAN & AURON, *supra* note 1, at 100.

⁷³ *Id.* at 113.

Commission and suggests German complicity: “Indeed, there is already sufficient evidence for Germany to acknowledge such guilt, not as the actual perpetrator of the genocide, but as an accessory of that crime of genocide.”⁷⁴

G. *The Absence of Turkish Accountability Encourages the Final Solution*

Unfortunately, the Allied governments would “forget the lavish promises they had made to the Armenian people during the War” amidst political turbulence in much of Europe.⁷⁵ In the absence of condemnation for Turkey’s acts, Hitler “found the Armenian ‘solution’ an instructive precedent.”⁷⁶ As an ally of the Ottoman Empire in World War I, the German Empire and its leaders were afforded “exceptional opportunities” to observe the perpetration of the Armenian Genocide.⁷⁷ Exemplary of this fact was Vice Consul of Erzurum and Co-Commander Dr. Max Erwin von Scheubner Richter.⁷⁸ Richter’s reports to Hitler revealed methods of exterminating the Armenians and helped fuel the Nazi movement.⁷⁹ The communications between Hitler and Richter led to a longstanding friendship, so treasured by Hitler that after Richter’s untimely assassination he dedicated the first part of *Mein Kampf* to Richter.⁸⁰

There was internal disagreement as to how the German Empire should respond to Ottoman Turkey’s killings in the public spotlight. For several years, the government ordered that “reports should be prepared so as to show that Armenians were guilty of treason and that measures taken by the Ottoman government were justified.”⁸¹

⁷⁴ *Id.* at 126.

⁷⁵ Levon Marashlian, *Finishing the Genocide, in* REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE 137 (Richard G. Hovannisian ed., Wayne State Univ. Press 1998).

⁷⁶ Hitler, *the Holocaust, the Nuremberg Trials and the Armenian Genocide*, ARMENIAN FOREIGN MINISTRY, <http://www.armeniaforeignministry.com/fr/genocide/dadrian/book/book15.html> (last visited Dec. 1, 2011) (citation omitted).

⁷⁷ DADRAN, *supra* note 2, at 410.

⁷⁸ *Id.*

⁷⁹ *Id.* at 411.

⁸⁰ ADOLF HITLER, *MEIN KAMPF* (Ralph Mannheim trans., 1962), available at http://www.jrbooksonline.com/PDF_Books/MeinKampf.pdf.

⁸¹ Hilmar Kaiser, *The Baghdad Railway and the Armenian Genocide, 1915-1916: A Case Study in German Resistance and Complicity, in* REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE 68 (Richard G. Hovannisian ed., Wayne State Univ. Press 1999).

II. ANALYSIS: STATE OF THE ARMENIAN GENOCIDE RESTITUTION MOVEMENT

To date, U.S. courts have not ordered restitution for Armenian Genocide victims and their descendants. Either the parties have settled out of court,⁸² or a defendant-insurer's motion to dismiss has been granted.⁸³ The two large-scale settlements have involved unpaid insurance claims against private non-Turkish companies. In *Marootian v. New York Life Ins. Co.*, 10,000 claimants came forth and won a \$20 million settlement,⁸⁴ and in *Ouzounian v. AXA*, another 2,300 claimants won a \$17.5 million settlement.⁸⁵ Recent results for plaintiffs have been mixed. In one case, defendants' motions to dismiss were granted.⁸⁶ The disposition of another case will be decided by an *en banc* rehearing in the Ninth Circuit.⁸⁷ Most recently, Armenian Genocide victims and their descendants have filed two cases against the Turkish government and state-sponsored companies.⁸⁸

The failure to realize an Armenian Genocide restitution movement in the American legal system is attributable to legal, political, and evidentiary potholes on the path to restitution. Momentum created outside of the courtroom is the way by which these hurdles can ultimately be overcome, either by adjudication, settlement, or diplomacy.

⁸² See Press Release, Agreement Is Reached To Settle Armenian Insurance Policies From 1915, N.Y. LIFE, <http://www.newyorklife.com/nyl/v/index.jsp?contentId=13529&vgnnextoid=3597e62f139d2210a2b3019d221024301cacRCRD>; *Ouzounian v. AXA Settlement Agreement*, Western Armenia News, available at http://www.haybachdban.org/Armenie-Occidentale/Departement-Justice/Assurances-Axa/AXA_Claim_Form.pdf (last visited Dec. 7, 2011).

⁸³ See *Deirmenjian v. Deutsche Bank*, No. 06 Civ. 00774, 2010 WL 3034060 at *1 (C.D. Cal. 2010).

⁸⁴ See sources cited *supra* note 82.

⁸⁵ BAZYLER, *supra* note 3, at 318-20; *AXA Pays Out to the Descendent of Victims of the Armenian Genocide*, ARMENIAN GENOCIDE INFORMATION CENTRE (UK) (Nov. 21, 2007), <http://www.armeniangenocide.info/2007/11/axa-pays-out-to-descendants-of-victims.html>; see generally *Kyurkjian v. AXA*, No. 02 Civ. 1750 (C.D. Cal. Feb. 28, 2002); *Ouzounian v. AXA*, No. 05 Civ. 2596 (C.D. Cal. Apr. 8, 2005).

⁸⁶ See *Deirmenjian*, 2010 WL 3034060 at *1.

⁸⁷ See Court Order, *Movsesian v. Victoria Versicherung AG ("Movsesian III")*, No. 07 Civ. 56722, 2011 WL 5336269 (9th Cir. Nov 07, 2011).

⁸⁸ Dennis Romero, *Armenian-American Lawyers, Including Mark Geragos, Seek Class-Action Status In Suit Against Turkey*, L.A. WEEKLY, Jul. 30, 2010, available at <http://blogs.laweekly.com/informer/trials/armenian-american-turkey>; Harut Sassounian, *Armenians Sue Turkey Claiming U.S. Air Base Land*, http://www.huffingtonpost.com/harut-sassounian/armenians-sue-turkey-clai_b_800003.html (last visited Dec. 11, 2011).

A. *Political Barriers*

Shortly after the systematic extermination of at least one million Armenians by the Ottoman Turks,⁸⁹ the international community widely recognized it as an Armenian “Genocide.”⁹⁰ Despite prior recognition, almost a century later the use of the word “genocide” remains a hotly contested political issue for some academics⁹¹ and governments. Most notably, Turkey⁹² and the United States⁹³ have not officially recognized the Armenian Genocide.⁹⁴ Turkey asserts that the killings were unfortunate wartime casualties provoked by Armenian revolutionary and independence movements; among the supporters of this “provocation thesis” include prominent historian Bernard Lewis.⁹⁵ In the face of potential recognition of an Armenian Genocide, Turkey argues that official recognition by individual nations is inappropriate and that further research by genocide scholars will prove that an Armenian Genocide does not exist.⁹⁶ A minority of Turkish intellectuals have come forth to recognize the Armenian Genocide.⁹⁷

⁸⁹ Hovannisian, *supra* note 4, at 15.

⁹⁰ See discussion at note 7.

⁹¹ This includes Bernard Lewis, Professor Emeritus of Near Eastern Studies at Princeton University, described as the “most influential postwar historian of Islam and the Middle East.” MARTIN KRAMER, *Bernard Lewis*, in 1 *ENCYCLOPEDIA OF HISTORIANS AND HISTORICAL WRITING* 719-720 (1999). For Professor Lewis’ biography, see http://www.princeton.edu/~nes/faculty_lewis.html (last visited Feb. 17, 2011). Lewis views the plight of the Armenians as the “the terrible slaughter of 1915,” though not as a genocide. BERNARD LEWIS, *supra* note 5, at 356; see also GUENTER LEWY, *THE ARMENIAN MASSACRES IN OTTOMAN TURKEY: A DISPUTED GENOCIDE* (2005).

⁹² See, e.g., *Statement by Farhan Haq, U.N. Spokesman, on October 5, 2000, and on April 9, 2007 About the Armenian Allegations on the UN position regarding the events in 1915*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFFAIRS, http://www.mfa.gov.tr/statement-by-farhan-haq_-n-october-5_-2000_.en.mfa (last visited Dec. 30, 2011).

⁹³ See SIMON PAYASLIAN, *UNITED STATES POLICY TOWARD THE ARMENIAN QUESTION AND THE ARMENIAN GENOCIDE* (2005). Recently, U.S. President Barack Obama used the Armenian term “Mets Yeghern” somewhat equivalent to the use of Shoah to describe the Holocaust. *Genocide, Holocaust or Mets Yeghern?*, TIMES.AM, <http://times.am/2010/04/24/genocide-holocaust-or-mets-yeghern> (last visited Jan. 18, 2011).

⁹⁴ Israel has also failed to recognize the Armenian Genocide. See generally YAIR AURON, *THE BANALITY OF DENIAL: ISRAEL AND THE ARMENIAN GENOCIDE* (2004).

⁹⁵ For a response to Bernard Lewis’ provocation thesis, see CHALK AND JONASSOHN, *supra* note 27, at 266-86.

⁹⁶ See, e.g., *The Events of 1915 and the Turkish-Armenian Controversy over History: An Overview*, THE REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFFAIRS, http://www.mfa.gov.tr/the-events-of-1915-and-the-turkish-armenian-controversy-over-history_-an-overview.en.mfa (last visited Dec. 29, 2010).

⁹⁷ See, e.g., Taner Akçam, *Denial as a Security Concept*, 10 *CARDOZO J. CONFLICT RESOL.* 233 (2008); Workshops and conferences in Turkey have been held, albeit on a small scale; for an

Citizens of the U.S. (or their ancestors) who have suffered human rights abuses find solace in an American legal system which facilitates lawsuits for related claims. Unfortunately, the United States has not explicitly recognized the Armenian Genocide, at least not in recent years.⁹⁸ Without official recognition, restitution is more difficult.⁹⁹ To date, the political process has been indifferent and sometimes even counterproductive to the Armenian Genocide restitution process. Each resolution to recognize the Armenian Genocide that has reached the House of Representatives has not passed at the strong recommendation of the U.S. President, prompted by threats from the Turkish Government.

B. *Legal Barriers*

Underlying several of the following is the court's disposition on conflicts of law and forum-selection clauses. Often, restitution hinges on the law that the court chooses to apply.¹⁰⁰

1. Statutes of Limitation and Equitable Tolling

A statute of limitation bars claims that are not filed before a certain period of time.¹⁰¹ In light of the potential preclusive force of such statutes on restitution claims, the California legislature passed § 354.4 to extend the statute of limitations through December 31, 2010; in doing so, it also called the killing of Armenians an "Armenian Genocide."¹⁰² The dormant federal foreign affairs doc-

example of a recent conference, see 2011 Workshop, <http://myweb.sabanciuniv.edu/hrantdink-workshop> (last visited Jan. 28, 2011).

⁹⁸ On at least two occasions, the House of Representatives passed resolutions using words that are in effect equivalent to Armenian Genocide. In 1975, the House observed a day of remembrance for "all victims of genocide, especially those of Armenian ancestry." H.R.J. RES. 148, 94th Cong. (1975). In 1984, the House similarly recognized "victims of genocide, especially the one and one-half million people of Armenian ancestry." H.R.J. RES. 247, 98th Cong. (1984).

⁹⁹ KARAGUEUZIAN & AURON, *supra* note 1, at 135.

¹⁰⁰ For example, in *Deirmenjian*, the court applied an Ottoman statute of repose to bar plaintiffs from recovery. *Deirmenjian*, 2010 WL 3034060 at *14; *but see* *Marootian v. N.Y. Life Insur. Co.*, No. 99 Civ. 12073, 2001 U.S. Dist. LEXIS 22274 (C.D. Cal. Nov. 28, 2001) (holding that enforcement of forum-selection clause to adjudicate all disputes in France would be fundamentally unfair); *see also* BAZYLER, *supra* note 3, at 320.

¹⁰¹ Jurisdictions differ as to how statutes of limitation apply. The majority of states, including California where the largest Armenian Diasporan population in America resides, apply the discovery rule. The discovery rule tolls the statute of limitations so long as the true owner was not able to locate the subsequent purchaser through reasonable due diligence.

¹⁰² CAL CIV. PRO. CODE § 354.4.

trine¹⁰³ would challenge whether such laws are constitutional. As of today, the fate of § 354.4 is uncertain.¹⁰⁴

Equitable tolling is another option to circumvent the effects of statutes of limitation, but is rarely approved by the courts. The U.N. General Assembly passed the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity in 1968, though courts have very rarely applied it.¹⁰⁵

2. Doctrine of Laches

“[T]he doctrine of laches focuses on one side’s inaction and the other’s legitimate reliance to bar long-dormant claims for equitable relief.”¹⁰⁶ Laches may bar a plaintiff’s claim where he “slept upon his rights . . . and especially if the delay has been prejudicial to the [other party], or to the rights of other persons.”¹⁰⁷ Some courts have recognized that under some circumstances a plaintiff may not have been able to assert his claim without delay:

There is good reason not to create or apply general hard and fixed rules of laches or relatively short statutes of limitation, newly minted by judicial fiat, in the developing area of international law. In many instances a foreign government, group or individuals may be involved both in the violation and in threats that make it impossible for individuals harmed to complain until there is a new administration or the plaintiff can escape to freedom in another country.¹⁰⁸

This excerpt was taken from recent litigation involving the use of Agent Orange, but it could just as easily be speaking about the issue of Armenian Genocide-era restitution. Somewhat surprisingly, none of the recent cases invoke laches as an affirmative defense, perhaps due to confidence in other affirmative defenses.

¹⁰³ See *infra*, Part II B-5.

¹⁰⁴ See *id.*

¹⁰⁵ See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, UNITED NATIONS TREATY COLLECTION, available at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en (last visited Aug. 22, 2011).

¹⁰⁶ *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 217 (2005).

¹⁰⁷ *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 379 (2004) (citation omitted).

¹⁰⁸ *In re Agent Orange Product Liab. Litig.*, 373 F. Supp. 2d 7, 61 (E.D.N.Y. 2005), *disagreed with on other grounds*, *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010); *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

3. Statutes of Repose

A statute of repose is in many ways similar to a statute of limitation in that it prescribes “the period within which an action may be brought.”¹⁰⁹ Without delving into the alternative definitions of this term that may exist,¹¹⁰ in the realm of Armenian Genocide restitution, statutes of repose operate in a stricter manner than statutes of limitation. Specifically, they typically bar plaintiffs’ claims without equitable considerations. For example, the plaintiffs in *Deirmenjian* brought suit against insurers under the same section as the plaintiffs in *Movsesian*.¹¹¹ The *Deirmenjian* court decided that Ottoman law was controlling and determined that the statute of repose had expired in 1926, barring plaintiffs from recovery.¹¹²

4. Foreign Sovereign Immunities Act (FSIA)

The FSIA of 1976¹¹³ defines the scope of jurisdiction of U.S. courts over cases involving foreign sovereigns, their agencies and instrumentalities.¹¹⁴ In the Armenian Genocide context, the Act is most relevant where victims seek recovery from the Turkish government or organizations that are deemed to fall under the FSIA.¹¹⁵ A recent suit by Armenian Genocide victims and their descendants seeks an accounting of confiscated property and other assets during the Armenian Genocide from the government and its two major banks, including parts of the Incirlik Air Base and the Turkish Presidential Palace in Ankara.¹¹⁶ There has been no case law as to whether courts will afford the then-Ottoman government sovereign immunity. For restitution arising from war crimes generally, Professor Michael Bazylar¹¹⁷ finds that “most lawsuits” against foreign sovereigns fail under the FSIA.¹¹⁸ It is likely that Armenian victims would face the same challenges in seeking resti-

¹⁰⁹ Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 AM. UNIV. L. REV. 579, 582 (1981).

¹¹⁰ *See id.*

¹¹¹ *Deirmenjian*, 2010 WL 3034060 at *2.

¹¹² *Id.* at *16.

¹¹³ *See* 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-11.

¹¹⁴ *See, e.g.*, Charles N. Brower et al., *The Foreign Sovereign Immunities Act of 1976 in Practice*, 73 AM. J. INT’L L. 200 (1979); Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 13 COLUM. J. TRANSNAT’L L. 33 (1978).

¹¹⁵ *See* sources cited *supra* note 114.

¹¹⁶ Romero, *supra* note 88; Sassounian, *supra* note 88.

¹¹⁷ *See* BAZYLAR *supra* note 15 and accompanying text.

¹¹⁸ BAZYLAR, *supra* note 3, at 246.

tution, unless the act fell under one of the FSIA immunity exceptions.¹¹⁹

5. Preemption: Executive Policy under the Federal Foreign Affairs Power

Zschernig was the first case to articulate that court decisions should not interfere with foreign policy decisions that are in the exclusive decision-making realm of the executive.¹²⁰ In *Zschernig*, the Supreme Court of the United States invalidated an Oregon statute for interfering with the federal foreign affairs power, even in the absence of any explicit conflict with a federal statute or law.¹²¹ A later case, *Deutsch v. Turner Corporation*, affirmed the *Zschernig* precedent.¹²² Most recently, the *Garamendi* court expanded *Zschernig* to preempt a state law that purportedly jeopardized the German Foundation Agreement, in which Germany established a fund to compensate Holocaust victims. The dormant federal foreign affairs doctrine emanates from *Garamendi*, and some commentators consider the legitimacy of the doctrine itself as controversial.¹²³

In *Garamendi*, plaintiffs brought suit against the Insurance Commissioner of California under the Holocaust Victim Insurance Relief Act of 1999 (HVIRA), which allowed victims residing in California to equitably toll the statute of limitations for Holocaust restitution claims, and required that all insurers doing business in California disclose information pertaining to Holocaust-era insurance policies.¹²⁴ The court found that HVIRA was preempted for infringing on the executive foreign affairs power, constituted by executive agreements and statements from executive officials.¹²⁵

Initially it seemed that § 354.4, the Armenian Genocide equivalent of HVIRA, would face a similar fate. The Ninth Circuit Court of Appeals found that § 354.4 was preempted under *Garamendi* for contravening the federal foreign affairs power by using the term “Armenian Genocide,”¹²⁶ thereby blocking restitu-

¹¹⁹ See sources cited *supra* note 114.

¹²⁰ See *Zschernig v. Miller*, 389 U.S. 429, 429 (1968).

¹²¹ *Id.*

¹²² See *Deutsch v. Turner Corp.*, 324 F.3d 692, 692 (9th Cir. 2003).

¹²³ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003); see, e.g., Joanne S. Hogan, *American Insurance Ass'n v. Garamendi: The Power of the Executive Agreement*, 18 TEMP. INT'L & COMP. L.J. 431 (2004).

¹²⁴ *Garamendi*, 539 U.S. at 404.

¹²⁵ *Id.* at 415.

¹²⁶ See generally, *Movsesian II*, 629 F.3d 901 (9th Cir. 2010).

tion of outstanding Armenian Genocide-era insurance claims.¹²⁷ But the procedural history of *Movsesian* has turned out more interesting than expected.¹²⁸ After a year-long wait, the Ninth Circuit issued a surprising two-to-one split decision, granting a rehearing of the case *de novo*.¹²⁹ The panel in *Movsesian II* backed away from its prior stance regarding *Garamendi* by framing the term “executive agreement” more narrowly. In particular, the Ninth Circuit decided that “there is no executive agreement regarding use of the term ‘Armenian Genocide.’”¹³⁰ Most recently, the Ninth Circuit decided that the rehearing will be *en banc*.¹³¹

6. Preemption: Executive Policy under Prior International Agreements

The defendants in *Movsesian I* also relied on past treaties between nations as explicit decisions by the executive branch to foreclose all future claims related to the Armenian Genocide.¹³² In that case, the defendants successfully argued that the plaintiffs were not entitled to recover because the Claims Agreement of 1922 and the War Claims Act of 1928 were the final settlements for all Armenian Genocide-era claims.¹³³ In *Movsesian II*, the Ninth Circuit seems to have backtracked from its expansive interpretation of *Garamendi*. The Court held that § 354.4 was not preempted by the international agreements because §354.4 concerns only life insurance claims and does not relate to the government’s exclusive power over war.¹³⁴

C. Additional Constraints

The Nazis’ perverse obsession with documenting each instance of looting ironically benefited Holocaust survivors seeking to re-

¹²⁷ *Id.* at 1058-59.

¹²⁸ Bill Kisliuk, *Descendants win the right to sue*, L.A. TIMES, Dec. 11, 2010, available at http://articles.glendalenewspress.com/2010-12-11/news/tn-gnp-ruling-20101211_1_armenian-genocide-neil-soltman-unpaid-insurance-benefits.

¹²⁹ *Movsesian v. Victoria Versicherung AG (“Movsesian II”)*, 629 F.3d 901, 903 (9th Cir. 2010).

¹³⁰ *Id.* at 906.

¹³¹ *Movsesian III*, No. 07 Civ. 56722, 2011 WL 5336269 (9th Cir. Nov. 07, 2011).

¹³² *Movsesian I*, 578 F.3d 1052, 1056 (9th Cir. 2009).

¹³³ *Id.*

¹³⁴ *Movsesian II*, 629 F.3d at 908. The issue concerning the validity of international agreements was not discussed at length at this stage in the proceedings.

claim their looted assets decades later; there was hard proof of much of the looting that had occurred. By contrast, the Armenian Genocide was executed with the maintenance of the “utmost secrecy.”¹³⁵ “[T]he denial of the Armenian Genocide began ‘officially’ only in 1923 . . . and continues today making restitution an impossible task.”¹³⁶ Moreover, the fact that the Armenian Genocide occurred nearly two decades before the Holocaust means that fewer survivors are alive to tell their stories and fewer documents exist to help prove that looting occurred. In comparison to the Holocaust, the existence of Armenian Genocide is relatively unknown. Before momentum can be created for the cause, advocates must first raise awareness of the cause itself.

III. PROPOSAL: THE HOLOCAUST RESTITUTION MOVEMENT AS A GUIDE FOR SUCCESSFUL ARMENIAN GENOCIDE RESTITUTION

In order for the Armenian Genocide restitution movement to be more successful, claimants cannot rely solely on the courts to seek recovery. The Holocaust restitution movement shows that advocates must combine their powers to increase the chances for successful restitution: “Globalization had increased the power of multinational corporations in the world economy, and correspondingly lessened the power of individual governments. Well-organized interest groups were now better equipped to take on companies than sovereign states, who were restricted by legal and diplomatic concerns.”¹³⁷ Armenians have sought the support of powerful individuals and others in the past. But, the strategy needs to be better integrated. The most effective negotiations for Holocaust restitution have occurred where leaders have kept close communication with influential individuals in other circles and leveraged them to arrive at a more favorable outcome.

¹³⁵ KARAGUEUZIAN & AURON, *supra* note 1, at 116.

¹³⁶ *Id.*

¹³⁷ AUTHERS & WOLFFE, *supra* note 3, at 68.

A. *The Holocaust Restitution Movement*

1. Growing Pains

The Holocaust saw the loss of six million Jewish lives, and an estimated \$230 billion to \$320 billion of looted assets throughout Europe.¹³⁸ Immediately after World War II, Allied support for restitution of Nazi looting led to limited recovery. For instance, Switzerland signed the Washington Accord of 1946, whereby it agreed to return some of the gold and Nazi Gold¹³⁹ that it had acquired during the war.¹⁴⁰ However, the lion's share of looted assets did not make it into Jewish hands.¹⁴¹ The Swiss were particularly stealthy about keeping secret all incriminating evidence of looted assets in their possession.¹⁴² In the case of Germany, substantial efforts were made to repay victims, with many obligations remaining outstanding.¹⁴³

Attempts for more widespread restitution did not bear fruit. Letters from survivors inquiring about outstanding Swiss bank accounts went unanswered and various initiatives by leading Israeli politicians failed to make much impact. It would not be until the mid-1990s that efforts would lead to tangible progress. How did this relative success eventually come about?

2. The Movement Gathers Momentum

To compel restitution of outstanding claims required nothing less than a well-organized critical mass of advocates with the financial resources, human capital, and political clout to collectively seek Holocaust restitution. In the mid-1990s, individuals like Seagrams billionaire President Edgar Bronfman Sr.,¹⁴⁴ Deputy Secretary of the Treasury Stuart Eizenstat,¹⁴⁵ and World Jewish Congress Secretary-General Israel Singer¹⁴⁶ worked together to help spark the Holocaust restitution movement.

¹³⁸ BAZYLER, *supra* note 3, at xi.

¹³⁹ "Nazi Gold" is the term used to describe gold stolen from individual Holocaust victims, including gold coins, jewelry, and gold tooth fillings. BAZYLER, *supra* note 3, at 3.

¹⁴⁰ *Id.* at 2.

¹⁴¹ See EIZENSTAT, *supra* note 3.

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ BAZYLER, *supra* note 3, at 2.

¹⁴⁵ *See Biography of Stuart Eizenstat*, COVINGTON & BURLING, <http://www.cov.com/seizenstat> (last visited Nov. 4, 2010).

¹⁴⁶ AUTHERS & WOLFFE, *supra* note 3, at 6. Since 1985, Israel Singer has been Secretary-General of the World Jewish Congress, an organization that addressed the interests and needs of

Bronfman offered political clout and an impressive network of business contacts to the Holocaust restitution movements.¹⁴⁷ Bronfman's connections to the Democratic Party, including New York politicians and then-First Lady Hillary Rodham Clinton, enabled the Holocaust cause to be placed on the President's agenda.¹⁴⁸ The President went so far as to write a complementary letter to former German Chancellor Gerhard Schröder, saying that "history will remember your government and those involved in the initiative for contributing to justice in the lifetime of survivors."¹⁴⁹ President Clinton's letter was instrumental in securing a ten billion mark settlement with the German government, called the German Foundation Agreement.¹⁵⁰

Singer was an aggressive and reliable mouthpiece of the Holocaust restitution cause.¹⁵¹ He enrolled N.Y.C. Comptroller Alan Hevesi as "good cop" and N.Y. Senator Al D'Amato as "bad cop" in compelling financial institutions to make good on their outstanding Holocaust claims.¹⁵² Singer's background positioned him well to negotiate with the Swiss banks: as an American he could safely attack the Swiss government, and he never ceased to mention to his Swiss adversaries his wife, a Swiss Jew whose ancestors were Holocaust victims.¹⁵³

As Deputy Secretary of the Treasury under President Bill Clinton, Stuart Eizenstat applied political pressure against several governments that directly or indirectly looted Holocaust assets.¹⁵⁴ He educated the State Department on outstanding restitution claims, including Nazi Gold.¹⁵⁵ In negotiations with the Austrian government, he rightly pointed out that "[i]f Austria wanted to restore full contact with the Clinton administration, its chances would depend in part on how it handled Holocaust issues. The Holocaust was now a benchmark in assessing the Austrian govern-

Jews and Jewish communities throughout the world. See *WORLD JEWISH CONGRESS*, <http://www.worldjewishcongress.org/en/about> (last visited Feb. 10, 2011); Restitution: The Second Round, An Interview with Israel Singer, *JERUSALEM CENTER FOR PUBLIC AFFAIRS*, <http://www.jcpa.org/phas/phas-14.htm> (last visited Feb. 10, 2011).

¹⁴⁷ BAZYLER, *supra* note 3, at 2.

¹⁴⁸ See EIZENSTAT, *supra* note 3, at 52-74.

¹⁴⁹ AUTHERS & WOLFFE, *supra* note 3, at 243.

¹⁵⁰ *Id.* at 259.

¹⁵¹ EIZENSTAT, *supra* note 3, at 53-54.

¹⁵² AUTHERS & WOLFFE, *supra* note 3, at 6.

¹⁵³ *Id.* at 12-13.

¹⁵⁴ See EIZENSTAT, *supra* note 3, at 52-74.

¹⁵⁵ AUTHERS & WOLFFE, *supra* note 3, at 54.

ment.”¹⁵⁶ He also was instrumental in securing the Swiss bank settlements.¹⁵⁷

3. Tangible Results

There is proof of Professor Bazylar’s statement that momentum for a cause increases the likelihood of a favorable resolution.¹⁵⁸ Aside from sizeable settlements with several European governments, one of the greatest successes of the Holocaust Restitution movement was the creation of the Holocaust Claims Processing Office (HCPO), located in New York. The HCPO handles art, insurance and bank claims for Holocaust victims located anywhere in the world.¹⁵⁹ Thus far the HCPO has restituted tens of millions of dollars worth of claims, all of which are funded by the banking fees paid by participating companies in the New York State market.¹⁶⁰ Although the International Commission on Holocaust-Era Insurance Claims (ICHEIC) was “failure” as a predecessor to HCPO, it helped teach important lessons about creating a process that can reliably retribute claims.¹⁶¹

Stuart Eizenstat concisely summarized the experience of Holocaust restitution:

By any fair measure, I do believe we achieved practical, political, and moral successes far outweighing the costs and disappointments . . . We galvanized the world’s attention on the overlooked issue of looted Holocaust-era assets, and we provided a final, if incomplete, financial accounting for the crimes of World War II. For the first time in the annals of warfare, systematic compensation was sought and achieved for individual civilian victims . . . This will provide a benchmark for future battles.¹⁶²

How exactly the Holocaust restitution movement turned an overlooked issue into an opportunity to achieve significant compensation for victims and descendants is best understood with the key concepts of ADR.

¹⁵⁶ *Id.* at 297.

¹⁵⁷ *Id.* at 79-80.

¹⁵⁸ BAZYLAR, *supra* note 3, at 323.

¹⁵⁹ See DEPARTMENT OF FINANCIAL SERVICES, <http://www.claims.state.ny.us> (last visited Feb. 10, 2011).

¹⁶⁰ Interview with Anna Rubin, Holocaust Claims Processing Office (Oct. 22, 2010).

¹⁶¹ See generally BAZYLAR, *supra* note 3, at 110-171.

¹⁶² EIZENSTAT, *supra* note 3, at 343.

a. Intro to ADR and Negotiation

Proponents of ADR recognize that “conventional legal systems” are sometimes ill-equipped to deal with certain human problems.¹⁶³ Rather than automatically relegating every dispute to the law, disputants should embrace “process pluralism”: an individualized assessment of the parties’ needs and the processes that are most likely to bring about a resolution.¹⁶⁴ In some circumstances, disputants need to “creatively combine” ADR and adjudication; sometimes “hybrid processes” that mix approaches better serve disputants and society.¹⁶⁵

One of the key components of ADR is negotiation. Negotiation is an interactive communication process by which two or more parties who lack identical interests attempt to find a way to coordinate their behavior or allocate scarce resources in a way that will make them better off than they would be if they were to act alone.¹⁶⁶ In short, negotiation involves two parties with differing points of view who try to arrive at a mutually beneficial result. The ways in which parties’ differences are captured are in each party’s reservation price (“reservation price”) and best-alternative-to-a-negotiated-agreement (“BATNA”). Reservation price is the most a buyer will pay to obtain a valuable item through negotiation or the least that a seller will accept to give up a valuable item.¹⁶⁷ BATNA simply is the best choice available in an agreement and is the primary input into determining reservation price.

b. Defendants Have No (Legal) Reason to Willingly Repay

Professor Bazylar’s recommendation that momentum is crucial to improving the chances of restitution is best understood through ADR principles. The reservation price in the context of restitution would be the maximum amount that a defendant would willingly pay for an outstanding claim.¹⁶⁸ A plaintiff’s reservation price is the minimum amount that he would accept for that outstanding claim.¹⁶⁹ The main problem for Armenian Genocide victims is that most defendants feel that their reservation price is

¹⁶³ CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 4 (2005).

¹⁶⁴ *Id.* at 4-5.

¹⁶⁵ *Id.*

¹⁶⁶ RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* 1 (2002).

¹⁶⁷ *Id.* at 41.

¹⁶⁸ Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 *Geo. L.J.* 1789, 1792-98 (2000).

¹⁶⁹ *Id.*

approximately zero. Stated another way, parties that are potentially responsible for outstanding claims have never been compelled to repay them in the absence of government-led restitution agreements, so defendants see no *legal* reason to repay. Most times, defendants will take the risk of going to court rather than settling because they believe that the court will grant a motion to dismiss. In the absence of legal compulsion, the Holocaust restitution experience shows that credible financial/political threats are crucial to compel restitution.

c. “Momentum” Can Compel Successful Restitution

Armenian victims must compel parties to retribute looted assets by focusing on the consequences of continued non-payment. The Holocaust restitution movement is a successful example of how strategic negotiations by victims can challenge a defendant’s belief on the relative strength of his position. This belief is based on seven factors: alternatives, preferences, probabilities of future events, risk preference, transaction costs, value of time, and effect on future opportunities.¹⁷⁰ A plaintiff that seeks to convince the defendant to pay more for an outstanding claim must change the defendant’s perception of as many of the seven factors as possible through persuasion.¹⁷¹ Key players in the Holocaust restitution movement made many strategic moves in changing perceptions, such that a failure to pay restitution was equated with a greater financial or political loss.

Numerous strategies were used in getting to this result, all of which had one factor in common: the display of power. Power is the ability of the negotiator to convince the opposing party to give her what she wants even when doing so is incompatible with the opponent’s interests. Power is the ability to bend the opponent to your will. The basis of power is a credible threat that you will not give the opponent what she wants if she will not agree to the terms that you demand.¹⁷² A threat is credible when the opponent believes that the negotiator has less to lose from failing to reach agreement than does the opponent. Continuous threats of the exercise of power compelled defendants to continue revising upward their settlement amounts for Holocaust restitution.

Successful negotiation based on power has two basic elements: there must be a threat, and that threat must be credible. In the

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Russell, *supra* note 166 at 151.

Holocaust restitution context, Singer frequently made the threats. The Swiss knew that without Singer “there could be no settlement and no closure.”¹⁷³ Hevesi bought into Singer’s ingenious bargaining tactics, like placing a three-month waiting period before possibly imposing sanctions, even though Hevesi had no intention of imposing further sanctions. Nonetheless, Hevesi and Singer used the threat to extract significant leverage from companies that could be found responsible to repay outstanding claims.¹⁷⁴

But Singer could make *credible* threats only by building a support network of powerful and respected individuals to whom he could turn when real pressure had to be exerted. Bronfman was perfect to play the role: “He’s the nine-hundred-pound gorilla with the smiling visage . . . [w]hen he came to see politicians as a multibillionaire, this meant to everyone that this was a serious subject, and we meant business. This is the industrial establishment taking on the banking establishment.”¹⁷⁵ Singer concedes that he “could never have run this without him.”¹⁷⁶

In the political realm, Singer tapped into the power of politicians like Stuart Eizenstat, Alan Hevesi, and Hillary Rodham Clinton.¹⁷⁷ Many times, his success was akin to smart networking. He was able to bring on board then First Lady Clinton by getting invited to one of Bronfman’s functions, where he pitched his idea to her.¹⁷⁸ Through Hillary Clinton, Singer was able to have the attention of President Clinton. Once Singer had President Clinton’s attention, it was much easier for next-door staff member Stuart Eizenstat to establish that “the Holocaust was now a benchmark [of the U.S. government in diplomatic relations].”¹⁷⁹ Hevesi also proved that Singer’s threats were not merely baseless by declining UBS’s bid for a city financing proposal given UBS failure to take responsibility for its role in funding the Holocaust.¹⁸⁰ At this point, governments and companies with outstanding claims could not easily disregard the threats that they faced.

For Bronfman, money alone could not compel restitution. For the many politicians involved, diplomacy without more was likewise insufficient. For Singer, baseless threats, without more, would

¹⁷³ AUTHERS & WOLFFE, *supra* note 3, at 77-78.

¹⁷⁴ *Id.* at 69.

¹⁷⁵ *Id.* at 12.

¹⁷⁶ *Id.*

¹⁷⁷ See EIZENSTAT, *supra* note 3.

¹⁷⁸ AUTHERS & WOLFFE, *supra* note 3, at 297.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 67.

surely have not brought about repayment. Each group was able to pressure the restitution of outstanding claims only by working in parallel to circumvent the drawbacks inherent in any singular approach. Armenians need to rally the support of individuals with financial and political power within their own communities. Then, they must have a reliable spokesperson for the Armenian cause that can leverage the influence of these powerful individuals.

CONCLUSION

Advocates for Armenian Genocide restitution should pool the resources of powerful individuals and local communities. The process of Armenian Genocide restitution is not only necessary to bring additional closure to the events of the past, but also is a crucial step in Turkish-Armenian rapprochement. More generally, all culprits should be held responsible for their actions, legally *and* financially. Until now, there is no international apparatus for streamlining restitution of claims such as the Armenian Genocide-era claims. In the absence of such a system, and without the reliability of recovery in courts, victims and their advocates must promote their causes with political and financial support. By disgorging ill-begotten gain, would-be criminals will think twice before enriching themselves at the expense of innocent human beings.

