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Is It Nobody's Business But the Turks': Recognizing Genocide?

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Why doesn’t United States Government recognize the early 20th century massacre of Armenians at the hands of the Ottoman Empire as genocide? The answer, to the surprise of many, is that we may have already done so.

Yet, how politically inconvenient even this near century old crime of barbarity has proven to be. So politically inconvenient, in fact, that state legislatures are now precluded from providing their resident victims with what otherwise would be lawful access to potential, and never resolved, remedies arising out of issues from this crime against humanity. These limitations seem particularly ill-conceived given the fact that America’s lawmakers had for long periods of time acted upon the assumption that the massacre of the Armenians was in fact genocide. In addition, this denial of access to state courts in order to pursue civil litigation would seem to be somewhat inconsistent with federal statutes which appear to permit state criminal prosecution of even foreign perpetrators of genocide committed anywhere in the world. An example of this paradox was recently on display in the Ninth Circuit.

The Ninth Circuit Federal Court of Appeals sitting en banc in the case of Movsesian v. Victoria Versicherung AG declared unconstitutional a California statute which had authorized the filing of state lawsuits over never paid insurance claims brought by the descendants of victims of the 1915-1921 Turkish massacres of Armenians. In doing so the court seems not to have considered the United Nations Genocide Convention, or the federal laws implementing it as part of American Federal law.

The case had originally been brought in an effort to recover on insurance policies that had been issued to eventual victims of the Armenian genocide, but never paid. The state law under which these claims had been brought had specifically allowed California courts to hear just such insurance lawsuits arising out of the “Armenian genocide.” This type of lawsuit would be permitted so long the defendant, as was true for the insurer in this particular case, also happened

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1 Movsesian v. Victoria Versicherung AG, 670 F.3d 1067 (9th Cir. 2012).
2 Id. at 1077. The Ninth Circuit decision, of course, is not binding on federal appellate courts in other circuits, and so if another state enacts a statute similar to California’s, it does not mean that federal courts in another circuit will automatically strike it down. On June 22, 2012 plaintiffs filed a petition for writ of certiorari with the United States Supreme Court, and, as of this writing, awaiting the decision of the Supreme Court.
3 Movsesian v. Victoria Versicherung AG, 578 F.3d 1052, 1055 (9th Cir. 2009) reh'g granted, opinion withdrawn, 629 F.3d 901 (9th Cir. 2010) on reh'g en banc, 670 F.3d 1067 (9th Cir. 2012).
to be doing business in California. The law, additionally, eliminated any statute of limitation barriers to such claims.\(^6\) The en banc court held that this California statute intruded on territory reserved to the federal government’s exclusive power to conduct and regulate foreign affairs.\(^7\)

While the Ninth Circuit suggested that any State may possess the power to acknowledge the massacre of the Armenians as having been “genocide,”\(^8\) California had crossed a constitutionally impermissible line by additionally providing a legal remedy in its state courts for civil issues arising out of this particular genocide.\(^9\) The court concluded that, by virtue of this legislation, California had intruded into a politically charged area in a way that amounted to establishing a particular foreign policy for the state.

In authorizing California state courts as a forum for such lawsuits, a political message was being sent that could have a direct impact upon foreign relations and might adversely affect the power of the federal government to deal with these problems.\(^10\) The court’s opinion acknowledged that the concerns of the Turkish government, which had filed a friend of the court brief, played a part in their decision.\(^11\)

> “By declaring that the ‘Armenian Genocide’ has occurred and by providing a right of action for its victims, California is intruding into the field of foreign relations by passing judgment on another nation when the President has expressly decided to pursue an alternate way of addressing the issue.”\(^12\)

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\(^5\) Id. at 1069-70.
\(^6\) Id. at 1070.
\(^7\) Movsesian, 670 F.3d at 1077.
\(^8\) Id. at 1071-72. Under the foreign affairs doctrine, state laws that intrude on this exclusively federal power are preempted. Foreign affairs preemption encompasses two related, but distinct, doctrines: conflict preemption and field preemption. Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 418–20, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003). Under conflict preemption, a state law must yield when it conflicts with an express federal foreign policy. See id. at 421, 123 S.Ct. 2374 (“The exercise of the federal executive authority means that state law must give way where, as here, there is evidence of clear conflict between the policies adopted by the two.”); Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 960 (9th Cir.2010) (“The Supreme Court has declared state laws unconstitutional under the foreign affairs doctrine when the state law conflicts Id. at 1071-72: with a federal action such as a treaty, federal statute, or express executive branch policy.”), cert. denied, — U.S. ——, 131 S.Ct. 3055, 180 L.Ed.2d 885 (2011). But the Supreme Court has made clear that, even in the absence of any express federal policy, a state law still may be preempted under the foreign affairs doctrine if it intrudes on the field of foreign affairs without addressing a traditional state responsibility. This concept is known as field preemption or “dormant foreign affairs preemption.” Deutsch v. Turner Corp., 324 F.3d 692, 709 n. 6 (9th Cir.2003).” In Movsesian, the Ninth Circuit relied on field preemption to strike down the statute.

\(^9\) Id. at 1076.
\(^10\) Id. at 1077.
\(^11\) Id. at 1077.
\(^12\) Id. at 1067.
Strangely, in holding the streets cannot provide civil remedies for losses arising out of the Armenian Genocide, the Ninth Circuit never mentions the United States ratification of the United Nations Genocide Convention, nor does it discuss the federal implementation legislation enacted after ratification. Was this an error? Both the convention and the legislation give rise to significant legal issues with respect to genocide in general and the massacre of the Armenians in particular.

First, with respect to the general concept of genocide, it must be remembered that the international convention this country has joined not only obligates all signatories to intervene when acts of genocide are taking place, but also recognize genocide as an international law crime which party nations undertake to prevent and to punish. The particular provisions of the Genocide Convention provide that those charged with the perpetration of this international crime “be tried by a competent tribunal of the state in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those contracting parties which shall have accepted its jurisdiction.”

After the United States ratified the Genocide Convention, it chose a particular manner by which to further implement the convention’s desire that all parties “undertake to prevent and to punish” genocidal perpetrators (genocidaires). Beginning in 1988, prosecution could be
pursued domestically in the United States federal courts, so long as the alleged offender was accused of having either committed the crime of genocide within the United States or was a national of the United States.\textsuperscript{18} In 2000 a Federal law was amended to expand those subject to prosecution “to include alleged offender[s] brought into, or found in, the United States, even if that conduct occurred outside the United States.”\textsuperscript{19}

Additionally, domestic criminal prosecution may have never have been intended to be the province of the federal courts alone. From its inception, the federal statutes implementing the goal of prevention and punishment of genocide specifically provided, in section 1092 of Title 18, that “nothing in this chapter shall be construed as precluding the application of state or local laws for conduct proscribed by this chapter . . . .”\textsuperscript{20}

The “conduct proscribed by this chapter” is, of course, the crime of genocide. The “chapter,” explicitly provides, in part, for potential federal prosecutions of alleged perpetrators.\textsuperscript{21} Since section 1092 of Title 18 specifically provides that nothing in the law should be interpreted as precluding state or local prosecution of genocide, the states would be thus free to provide their own criminal (or perhaps even civil) consequences for this “proscribed” conduct.\textsuperscript{22} Thus, so long as a state has personal jurisdiction over the individual defendants, federal law would appear to have conceded to the states a right to bring criminal proceedings against any perpetrator of genocide regardless of where the offense had been committed.\textsuperscript{23}

Assuming, therefore, we are in fact dealing with genocide, the Ninth Circuit decision has, at a minimum, created the anomaly that the State of California would be constitutionally permitted to criminally prosecute those guilty of past genocides, such as the massacres occurring in Darfur,\textsuperscript{24} but would not be constitutionally permitted to provide civil remedies against those same perpetrators or any others who may have assisted them. How could a lawsuit against an


\textsuperscript{19} Genocide convention accountability act of 2007, PL 110–151, December 21, 2007, 121 Stat 1821 (The Genocide Accountability Act expanded the jurisdictional bases of the U.S. law criminalizing genocide, the Proxmire Act, to allow prosecution of any perpetrator of genocide found in the U.S.).


\textsuperscript{23} “There is jurisdiction over the offense . . . if . . . regardless of where the offense is committed, the alleged offender is – present in the United States.” Genocide Convention Implementation Act of 1987 18 U.S.C. §§ 1091 (e) (2) (D) (2011).

\textsuperscript{24} Genocide Watch (2008); The Prosecutor v. Omar Hassan Ahmad Al Bashir (2009) (The International Criminal Court charged the President of Sudan with three counts of Genocide.) “The Pre-Trial Chamber indicted al-Bashir as an indirect (co-) perpetrator for five counts of crimes against humanity (murder, extermination, forcible transfer, torture, rape) and two counts of war crimes (direct attacks on civilians and pillaging)…. the International Criminal Court (ICC) issued a second warrant of arrest against Al- Bashir, considering that there are reasonable grounds to believe he is responsible for three counts of genocide committed against the Fur, Masalit and Zaghawa ethnic groups, that include: genocide by killing, genocide by causing serious bodily or mental harm and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group’s physical destruction.”
insurance carrier" (which in Movsesian, the defendant is German insurance company) doing business in California, be said to adversely affect the power of the federal government, when that same federal government has ceded to the states the power to criminally prosecute a foreign genocidaire?

Given the fact that federal law created a federal crime of genocide, it might be argued that without such specific Federal statutory acquiescence to the states the authority to enter an otherwise uniquely federal area, no such state criminal proceedings could constitutionally take place. However, regardless of whether this would be a correct conclusion with respect to state criminal prosecutions, the same argument simply does not provide a similar justification for precluding state laws authorizing civil actions arising out of genocide.

Unlike the criminal arena, no federal law specifically authorizing federal civil actions relating to genocides has ever been enacted. Civil actions relating to issues of genocide have been filed in federal courts in a manner no different than any other torts seeking monetary damages. The plaintiffs in these cases have argued in favor of jurisdiction in American courts, but not on the basis of any specific or particular federal law authorizing lawsuits involving genocide. Rather, the plaintiffs seeking relief base their claims, and are confronted with responses founded, upon the normal jurisdictional issues which might arise in any federal litigation.

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25 In 2003, Movsesian and several other individuals filed this class action against Defendants Victoria Versicherung AG (“Victoria”), Ergo Versicherungsgruppe AG (“Ergo”), and Munchener Rückversicherungs-Gesellschaft Aktiengesellschaft AG (“Munich Re”). Munich Re is the parent company of Victoria and Ergo. The class consists of persons of Armenian descent who claim benefits under Defendants’ life insurance policies issued or in effect in the Ottoman Empire between 1875 and 1923.” Movsesian v. Victoria Versicherung AG, 670 F.3d 1070 (9th Cir. 2012).

26 In re Holocaust Victim Assets Litig., 225 F.3d 191, 193 (2d Cir. 2000) (“These lawsuits seek redress for the defendants’ ‘knowing participation and complicity in crimes’ committed against plaintiffs and their relatives by the Nazi regime. Plaintiffs allege that the Swiss banks unjustly enriched themselves at the expense of these victims by: (1) failing to account for funds deposited in the years preceding the period of Nazi persecution by individuals who feared they would become the targets of this persecution and who then failed to survive the death camps; (2) serving as a vehicle for the disposal of Nazi plunder looted from victims; and (3) financing the construction of Nazi slave labor camps and providing a safe haven for profits obtained through the use of slave labor”); Alperin v. Vatican Bank, 410 F.3d 532, 538 (9th Cir. 2005) (A group of twenty-four individuals and four organizations (the “Holocaust Survivors”) claim that the Vatican Bank, known by its official title Istituto per le Opere di Religione, the Order of Friars Minor, and the Croatian Liberation Movement (Hrvatski Oslobodilacki Pokret), profited from the genocidal acts of the Croatian Ustasha political regime (the “Ustasha”), which was supported throughout World War II by Nazi forces).

27 In re Holocaust Victim Assets Litig., 225 F.3d 191, 196 (2d Cir. 2000) (“With respect to PADC’s standing, we look for instruction to the Supreme Court, which has held that an organization has standing to bring suit on behalf of its members if: ‘(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.’”); Alperin v. Vatican Bank, 410 F.3d 532, 548 (9th Cir. 2005) (“We conclude that the claims for conversion, unjust enrichment, restitution, and an accounting with respect to lost and looted property are not committed to the political branches.”).

28 Id.
The reason why Congress felt the need for specific legislation authorizing state criminal prosecutions is quite different. With respect to criminal prosecution, the argument could be more reasonably made that the 1988 law authorizing federal prosecution for foreign acts of genocide could have been interpreted as federal occupation and preemption of the area.\(^{29}\) In order to avoid this problem, a law was enacted demonstrating that such federal preemption was not intended.\(^{30}\) Since no such federal law exists with respect to the specifics of civil claims arising out of genocidal behavior, no such specific Congressional action would be needed in order to empower the states to allow them the right of civil litigation.

The very fact that no federal law was created to specifically deal with the question of civil litigation arising out of genocide would suggest that Congress had no interest in making this an area exclusive to federal courts or federal control. Thus, the State of California simply chose to allow civil claims arising out of the Armenian genocide to be litigated in California state courts.

We are then led to the preliminary question of whether there was in fact “genocide” perpetrated by the Ottoman Empire (the predecessor to the present nation of Turkey) against the Armenians. To understand how obvious and clear it is that the early 20th century massacre of the Armenians falls within the international definition of genocide, all we need do is to look at the history of the Genocide Convention itself.

The history began when in 1944 Raphael Lemkin, a Polish Jewish lawyer and law professor\(^{31}\) fled NAZI occupied Poland sought to connect what he likely believed to be the two greatest crimes of the 20th century: the destruction of European Jewry and the 1915-1921 Turkish massacre of the Armenians.\(^{32}\) Lemkin felt a need for a single word that could describe these two all-but-unfathomable tragedies. Unfortunately, there was no individual term in all the tongues he searched that could express adequately the monstrous intent that connected the two events; so he simply created one.

\(^{29}\) U.S. Const. art. VI, cl. 2; Coll. Loan Corp. v. SLM Corp., a Delaware Corp., 396 F.3d 588, 595-96 (4th Cir. 2005) (“Pursuant to the applicable principles, state law is preempted under the Supremacy Clause in three circumstances: (1) when Congress has clearly expressed an intention to do so (“express preemption”); (2) when Congress has clearly intended, by legislating comprehensively, to occupy an entire field of regulation (“field preemption”); and (3) when a state law conflicts with federal law (“conflict preemption”). S. Blasting Servs., Inc. v. Wilkes County, N.C., 288 F.3d 584, 590 (4th Cir.2002”).


\(^{32}\) See Dominik J. Schaller and Jürgen Zimmerer, From the Guest Editors: Raphael Lemkin: The “Founder of the United Nation’s Genocide Convention” as a Historian of Mass Violence, 7 J. GENOCIDE & RES. 447, 448-450 (2005) (discussing that the fate of the Anatolian Armenians during World War I “deeply shocked” Lemkin and had “a lasting impact” on him that led to his lobby for the inclusion of genocide in international law); See also Dan Stone, Raphael Lemkin on the Holocaust, 7 J. GENOCIDE & RES. 539, 540 (2005) (explaining that although it was the genocide of the Jews that “above all provided him with the main impetus” for his fight to have genocide “incorporated into international law,” his interest in “the nullification of peoples emerged in his teenage years around the time of the Armenian genocide.”).
The word he created in 1944 in his seminal work, *Axis Rule in Occupied Europe* was “genocide.” The word combined the Greek term “genos” for family or tribe and the Latin word “cide” for killing. His writings soon became a resource for the prosecutions at the Nuremberg Trials.

In the fall of 1946, Raphael Lemkin, unemployed and without portfolio, began to haunt the corridors of the United Nations building hoping to rally support for adoption of his international law specifically making punishable the destruction of human groups. In 1948, Lemkin took the word he had fashioned and through force of personal will forged it into law. It was thus that one man was to make the world take note of the word he had created.

Lemkin then spent the next three years traveling from country to country lobbying for ratification of the United Nations Genocide Convention. He had become “a one-man lobbyist, with unflagging energy, zealous conviction and persuasive logic expressed in dozens of languages, made genocide a fundamental issue in the international community.” The law first took effect in 1951, when the 20th nation signed the treaty.

Unfortunately, by the end of 1951, as the United States conflict with the Soviet Union intensified, genocide had “gradually disappeared as an issue from [the American] public consciousness, [and] ratification of the convention by the Senate faded from practical politics.” Passage now had to deal with opposition amongst both Republicans and Democrats. For example, even though he had formally been one of the convention’s most important supporters,

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34 Id.
35 Schabas, supra note 31, at 14; See also Yuval Shany, *The Road to the Genocide Convention and Beyond, in The UN GENOCIDE CONVENTION: A COMMENTARY* 3, 7 (Paola Gaeta, ed., 2009) (discussing the use of Lemkin’s term ‘genocide’ at the Nuremberg Trials).
37 See id. (Lemkin “walked the halls” of U.N. “every day from the spring of 1946 until until Dec. 9, 1948, when the General Assembly…adopted a resolution approving his convention.”); See also Stone, supra note 32, at 539 (explaining that it was Lemkin’s “tireless campaigning that led to the framing and adoption of the UN Convention on Genocide in 1948.”).
41 John Quigley, The Genocide Convention: An International Law Analysis 8 (2006); See also Cooper, supra note 39, at 173 (explaining that 20 states had to ratify the Genocide Convention for it to become part of international law).
42 See Cooper, supra note 39 at 207.
when John Foster Dulles became the new Republican Secretary of State in 1953 he took a hard line against human rights in general and the convention in particular.43

In addition to conservative Republican opposition, ratification of the Convention was also strongly opposed by the southern wing of the Democratic Party.44 “[T]he clause in the convention referring to the causing that of ‘mental harm’ to racial group was said by opponents to be aimed at the segregation laws of the Southern States.” 45 “The phrase in Article 2 of the convention, dealing with intent to destroy a group ‘in whole or in part’ was pounced on by critics to allege that this definition of genocide could be applied to anyone accused of lynching blacks.” 46 As early as September 1949, the influential and conservative ABA House of Delegates voted to oppose the convention.47

It took until the late 1980s for politics to have changed sufficiently so that the United States finally became a signatory to the treaty (which today has 142 nations as parties). As the United States Congress revisited the subject and engaged in the actual debate which led to the ratification and implementation of the United Nations Genocide Convention, Raphael Lemkin was again recognized as having been a source which shaped and clothed the concept of genocide as binding international law. There was no dispute that he had coined the term and that he had authored the Genocide Convention itself.

Congressman Tom Lantos, a member of the House committee considering the legislation intended to implement the Genocide Convention once ratified by the Senate, paid tribute to Raphael Lemkin as the author of this multilateral treaty when he included in the Congressional Record the following comments about Lemkin:

“He walked the halls everyday from the spring of 1946 until December 9, 1948 when the General Assembly [finally] adopted a resolution approving his convention. That day reporters went looking for him to rejoice in this trial. But we could not find him [reporters noted] until hours later, [when they] thought to look into the darkened assembly hall. He sat there weeping as if his heart would break. He asked please to be left in solitude.” 48

So complete was the professor’s authorship of the rule that to this day commentators as diverse as Samantha Powers, senior director for multilateral affairs at the National Security

43 Id.
44 Id.
45 Id. at 197
46 Id. at 196, 197
47 Id.
Council in the Obama administration, and international correspondent Christiane Amanpour refer to the genocide treaty simply as “Lemkin’s Law.”

As we adopted the Convention as the law of the land we were arguably also adopting a legislative history which includes the definition and origin of the legal definition of “genocide.”

Today, attorneys involved in the prosecution and defense of those charged with genocidal crimes at international tribunals comb the papers of Raphael Lemkin in search of legislative intent in hope of supporting whatever legal position they may be taking.

The following quotations from Lemkin’s writings regarding the Armenian genocide were entered into the record of the committee, as an illustration of his intent and motivation in offering the Convention:

“In Turkey . . . . Armenians were put to death for no other reason than they were Christians . . . . After the end of the war, some 150 Turkish war criminals were arrested and interned by the British government on the Island of Malta. The Armenians sent a delegation to the peace conference in Versailles. They were demanding justice. Then one day, the delegation read in the newspapers that all Turkish war criminals were released. I was shocked. A nation was killed and the guilty persons were set free. Why is a man punished when he kills another man? Why is the killing of 1 million a lesser crime than the killing of a single individual?

“A bold plan was formulated in my mind. This consisted of obtaining the ratification of Turkey among the first 20 founding nations. This would be an atonement for the genocide of the Armenians.”

49 See SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE 47-60 (2002) (Chapter 4, called “Lemkin’s Law,” focuses on Lemkin’s relentless efforts in drafting and lobbying for the adoption of the genocide convention.; See also Scream Bloody Murder (CNN television broadcast Dec. 4, 2008) (CNN reporter Christiane Amanpour states that, “Finally, in 1948, the Genocide Convention became law. And it required nations to act to stop genocide. Some called it “Lemkin’s law.”).

50 Am. Rusch Corp. v. U. S., 74 Cust. Ct. 153, 159 (Cust. Ct. 1975) (“In United States, etc. v. Simon Saw & Steel Co., 51 CCPA 33, 40, C.A.D. 834 (1964), our appellate court commented: It is well established that the basic rule of construction applicable to any case involving the construction of a statute is that the intent of the Congress is to be given effect. Thus, for example, this court has said in United States v. Clay Adams Co., Inc., 20 CCPA 285, 288, T.D. 46078: * * * All rules of construction must yield if the legislative intent is shown to be counter to the apparent intent indicated by such rules. The master rule in the construction of statutes is to so interpret them as to carry out the legislative intent.”)

When the meaning of statutory language is unclear, one must look to the legislative history. When the statutory language is clear, and there is no reason to believe that it conflicts with the congressional purpose, then legislative history need not be delved into, unless it is brought to the court’s attention that there is within the legislative history something so probative of the intent of Congress as to require a reevaluation of the meaning of the statutory language. Heppner v. Alyeska Pipeline Serv. Co., 665 F.2d 868, 871 (9th Cir. 1981) In trying to learn Congressional intent by examining the legislative history of a statute, we look to the purpose the original enactment served, the discussion of statutory meaning in committee reports, the effect of amendments whether accepted or rejected and the remarks in debate preceding passage. Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1080 (5th Cir. 1980).

51 Id. at 204.
During Congressional hearings and debates, various legislators and other speakers not only discussed the Holocaust of the Jews and the massacre of the Armenians, they actually referred to the slaughter of the Armenians as “genocide.” In fact, there seems to have been no dispute, among the committee members, as to whether the World War I atrocities against the Armenians had qualified as a genocide. All those who spoke on the point identified it as such and accepted that the massacre of the Armenians was a classic example of genocide and central to both the Senate and House of Representatives discussion of the eventual ratification and thereafter implementation of the Genocide Convention as U.S. law. The following quotes from various Committee members, illustrates this recognition:

Senator Claiborne Pell:

“The history of mankind is marred by the tragic record of man’s inhumanity to his fellow man through violations of fundamental human rights. [These would be exemplified by] the pogroms against the Jews in Russia or a genocidal attempt by the government of that country to obliterate its Jewish population. Turkey’s efforts to resolve its Armenian problem resulted in 27 years of bloody horror which ended with the death of over 2 million members of the Armenian minority. Most infamous of all was the systematic eradication over 6 million Jews by the Nazis in World War II.”

Senator Jesse Helms:

“Now, the Holocaust of the Jewish people first crystallized world opinion against the horror of genocide. The world owes a special debt of gratitude to all Jews, not only in recognition of the special horror which touched in some way almost every Jewish family, but also because it made the world focus on genocide, as such, as a crime . . . . It was in great part the result of this consciousness-raising that we began to perceive the crimes against the Armenians and the Ukrainians and others.”

Senator Jesse Helms in his “Additional Views” filed on September 24, 1984 (and reissued on March 5, 1985 by the United States Senate Committee on Foreign Relations) explored what he referred to as “The Armenian case”:

“The Armenian nation was the object of a murderous policy of annihilation during the World War I era . . . . The suffering of the Armenian nation knew no limit and they became the objects of the first massive genocide of the 20th century . . . .

52 Infra, text accompanying notes 48-54.
“[The American] Ambassador [to the Ottoman Empire during the time of the worst of the massacres] Henry Morgenthau . . . . recorded in his book his views of the Armenian genocide in a chapter entitled, “The Murder of a Nation”: ‘The Turks never had the slightest idea of reestablishing the Armenians in this new country. They knew that the great majority would never reach their destination and that those who did would either die of thirst or starvation or being murdered by the wild Mohammedan Desert tribes.’”\(^\text{55}\)

During the hearings by the Committee of the Judiciary United States Senate 100th Congress second Session on a bill to implement the International Convention on the Prevention and Punishment of Genocide, the American Bar Association representatives noted:

“As familiar as are the historic examples of genocide against the Armenians and the Jews, genocide is a contemporary crime of shocking magnitude, and we must prepare ourselves to fight it.”\(^\text{56}\)

These same sentiments were shared by various members of the House of Representatives committee examining implementation of the Genocide Convention:

Congressman Tony Coelho:

“The crime of genocide, the premeditated destruction of an entire ethnic, racial or religious group is certainly one of the most terrible crimes known to man. Among the most appalling instances of genocide in this century must be counted the brutal extermination of 1.5 million Armenians by the Ottoman Turks between 1915 and 1923. “Mr. Speaker, it is in the memory of the 1.5 million Armenians who were killed by the Ottoman Turks, the 6 million Jews who perished at the hands of the Nazi Germans and all the countless other victims of genocide throughout history that the United States must finally become a full party to the genocide convention.”\(^\text{57}\)

Congressman Mel Levine:

“It is exceptionally appropriate that this subcommittee consider House Resolution 104 at this time. This is the 70th anniversary of the Armenian genocide and the 40th anniversary of the liberation of the Nazi concentration camps.”\(^\text{58}\)

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\(^{55}\) \textit{Id.} at 202.

\(^{56}\) \textit{A Bill to Implement the International Convention on the Prevention and Punishment of Genocide: hearing on S. 1851 Before the Committee on the Judiciary United States Senate, 100th Cong. 23 (1988)} (statement of Joseph P. Griffin, Chairman Section of International Law and Practice and Professor John F. Murphy, Chairman Committee on United Nation Activities Section of International Law and Practice expressing the American Bar Association’s full support of the immediate enactment of the Genocide Convention Implementation Act.).

\(^{57}\) \textit{H.R. No. 100-149, pt. 1, at 3 (1988)} (statement of Con. Tony Coelho in support of passing the Genocide Convention Implementation Act in the House of Representatives.).

\(^{58}\) \textit{Expressing the Sense of the House of Representatives with Respect to Ratification of the Convention of the Prevention and Punishment of Genocide: Markup on H. Res 104 and H. Res 166 Before the Committee on Foreign}
Similar comments from the President and Chairman of the Standing Committee on law and National Security of the American Bar Association, John C. Sheppard were also included in the Congressional Record of the hearings:

“Next month also marks the 70th commemoration of the Armenian genocide. These historical realities, as incomprehensible as they are for us to fathom, are mirrored in potentially similar acts of more recent vintage in Iran, Kampuchea, Uganda and Nicaragua.”

Though it is remotely possible to engage in a futile intellectual exercise as to whether certain other attempts at man-made extinction (such as the mass murders in Bosnia, Rwanda or Darfur) legally qualify as genocides, there can be no such debate under international treaty for the massacres of the Armenians or with respect to the Holocaust of the Jews. To claim that either are not legally genocide would be like arguing that slavery is not governed by the Thirteenth Amendment; that the ancient city of Carthage never suffered a Carthaginian Peace; that the Greek general Pyrrhus never sustained a Pyrrhic Victory; that Charles Dickens never described a Dickensian workhouse; that the Little Lindbergh Law was not inspired by the kidnapping of the Lindbergh baby; or that baseball pitcher Tommy John never underwent Tommy John Surgery. You cannot eliminate from the definition of a term the very thing the word was created to describe.

Affairs and Its Subcommittees on Human Rights and International Organizations, 99th Cong. 5 (1985) (statement of Congressman Mel Levine speaking on behalf of the House resolution to consider the Genocide Convention Act, which he introduced to the House of Representatives.).

59 The Prevention and Punishment of the Crime of Genocide: Hearing Before the Committee on Foreign Relations United States Senate: 99th Con. 51. (1985) Appendix 4 (statement of John C Sheppard, Pres. and Chairman of the standing committee on law and national security, American Bar Association, urging prompt Senate approval and implementation of the treaty.).

60 U.S. CONST. amend. XIII; Civil Rights Cases, 109 U.S. 3, 20, 3 S. Ct. 18, 28, 27 L. Ed. 835 (1883) (“the thirteenth amendment may be regarded as nullifying all state laws which establish or uphold slavery.”).


62 McKay & Hill & Buckler & Crowston &Wiesner-Hanks, Western Society: A Brief History, 91 (Bedford/St.Martin’s, 10th ed. 2010).

63 Charles Dickens, Oliver Twist (London: Chapman and Hall, 1866).

64 18 U.S.C.A. § 1201 (West); Barry Cushman, Headline Kidnappings and the Origins of the Lindbergh Law, 55 St. Louis U. L.J. 1293, 1307 (2011) (“The Senate Judiciary Committee announced a few days later that it was postponing action on the bill pending the return of the Lindbergh child, but after the baby was found dead a few miles from his home on May 12, there was no longer any reason to delay.”)


Tommy John was a 31-year-old left-handed pitcher for the Los Angeles Dodgers when he tore his ulnar collateral ligament in July 1974. At the time, such an injury was considered to be the end of
Thus, the actual genocide treaty to which the United States is a party was authored by the man who created the word “genocide” specifically to refer to the massacre of the Armenians at the hands of the Turks and the slaughter of the Jews at the hands of the Nazis and their allies.67

Consider civil actions involving Jewish victims of the Holocaust. Let us assume that the Art Loss Registry discovers that a large and influential Austrian corporation has in one of its American offices a valuable painting looted by the Nazis from the home of Sigmund Freud as the elderly Jewish psychiatrist fled Vienna in 1938.68 Freud’s American-born descendants, who are his legal heirs, file a civil claim in an American state court in an effort to retrieve ownership of the stolen artwork. The Austrian government, however, maintains that it would be an embarrassment to one of its country’s major companies and thus could affect that foreign nation’s relations with the United States if the lawsuit were allowed to proceed. Are we now to simply conclude that Austria’s objection to a suit against one of its nation’s private corporations thereby disables American courts from attempting to retrieve property in spite of all American laws to the contrary?

Although it must be admitted that more recent administrations have been hesitant to support symbolic reiterations designating the atrocities against the Armenians as genocide,69 this does not change the fact that the recognition of the genocide of the Armenians is as an intrinsic part of our having agreed to the United Nations Genocide Convention as is the recognition of the German Holocaust of the Jews. Given the reality that federal law already authorizes the

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67 Stone, supra note 32, at 539; Schaller and Zimmerer, supra note 32, at 448.
68 Though much in this paragraph is fictional and no such lawsuit was ever filed, it has long been accepted by many as true that “Freud resisted [the Nazis after their absorption of Austria in 1938] as long as he could but eventually decided it was time to leave Vienna. To do so, however, he was forced to sign a document attesting to the respectful and considerate treatment he had received from the Nazis; to this document, Freud added the comment (sarcastically, of course), ‘I can heartily recommend the Gestapo to anyone.’” (An Introduction to the History of Psychology 538, B.R. Hergenhahn, 6th ed., Wadsworth, Cengage, Learning 2009).
69 Armenian National Committee of America, “Would Clinton Betray Armenia, Again?”, 2012 http://www.anca.org/ancadesk.php?aid=237 (“Speaker of the House Dennis Hastert stopped H.R. 596 from reaching the floor of the House of Representatives, even though the Armenian National Committee of America (ANCA) had secured a majority of votes for passage. Hastert explained that he was doing so at the behest of President Bill Clinton, who was twice endorsed by the ANCA. Clinton claimed recognizing the Armenian genocide would hurt national security by damaging the U.S. relationship with Turkey.”); Desmond Butler, Associated Press, “Bush Opposes Armenian Genocide Measure,” 2007 http://www.newsvine.com/_news/2007/10/10/1015060-bush- opposes-armenian-genocide-measure, (“President Bush urged Congress to reject legislation Wednesday that would say it was a genocide when thousand of Armenians were killed around the time of World War I.”); Ankara (Agencies), Turkey presses US to stop ‘genocide’ resolution, 2010 (“U.S. Secretary of State Hillary Clinton has assured Turkey the White House opposes a congressional resolution labeling the World War One massacres of Armenians in Turkey as genocide, the Turkish Foreign Ministry said on Monday.”)
prosecution of foreign nationals as perpetrators of genocidal crimes in federal courts as well as permitting states to do the same, how then can Turkish annoyance and objection be grounds to invalidate a civil remedy against private companies in order to obtain some minimal form of restitution for as yet uncompensated losses arising out of this genocide?

Much has changed in the near century since the massacres of the Armenians. As it is now Istanbul and not Constantinople,\(^{70}\) so too the Ottoman Empire morphed (an age ago) into the modern Republic of Turkey.\(^{71}\) History, however, is immutable. Although the actual perpetrators of those early 20th century crimes against humanity may no longer be within any party to the Genocide Conventions’ criminal jurisdiction, civil claims still remain unsettled. Is it the role of our federal courts to add unnecessary roadblocks to the path of the victims’ efforts to achieve a small modicum of long overdue restitution? This could not have been the intent of the United States Government when this country signed the United Nations Genocide Convention.


\(^{71}\) Rene´e Hirschon, Crossing the Aegean 50 (Berghahn Books 2003)

Indeed, the transfer of the capital city from Istanbul to Ankara, a place without significations, testifies to the desire to locate the new project in a neutral space devoid of history and symbolic weight. In a sense, then, a geography of nowhere was constructed to correspond to the claim in the official discourse that our real geography was elsewhere.

It is not difficult to argue that this geographical estrangement was prompted by an intense effort to forget and erase from memory the associations of places that had been populated preponderantly by Greeks; they were now approached as frontier land to be reconquered. This endeavour is evident in the frequent toponymic reconfiguring of Anatolia. Attempting to find Turkish origins for place names, the government often decreed a similar sounding name to replace the previous Greek or Armenian name. Where a Turkish name had also existed, it was usually allowed to remain unless it too contained an unacceptable reference, for instance, to a heterodox tradition. In other cases, the old name was domesticated through the device of a bogus story.

\(^{71}\) “The Turkish War of Liberation was directed by the National Assembly from Ankara from 1919 to 1922 while Istanbul was under occupation. The same national Assembly would decide the abolition of the Sultanate in November 1922 and proclaim the foundation of the Republic as the expression of the sovereignty of the nation in October 1923.” (Jonathan Osmond, Power and Culture: Identity, Ideology, Representation, at 97)