UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-16060

EMIL ALPERIN, et al.,

Plaintiffs-Appellants,

v.

VATICAN BANK, aka "INSTITUTE OF RELIGIOUS WORKS" or "ISTITUTO PER LE OPERE DI RELIGIONE" (IOR); et al.,

Defendant-Appellee.

Appeal from United States District Court, Northern District of California,
Honorable Maxine M. Chesney
District Court No. CV-99-04941 MMC

APPELLANTS' PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

THOMAS EASTON
CSB #109218
967 Sunset Dr
Springfield, Oregon 97477
Tel/Fax: 541-746-1335
easton3535@gmail.com

JONATHAN H. LEVY
CSB #158032
37 Royale Pointe Dr
Hilton Head, South Carolina 29926
Tel/Fax: 202-318-2406
jonlevy@hargray.com

WINDLE TURLEY
TX.SB #20304000
TURLEY LAW FIRM
1000 Turley Law Center
6440 N. Central Expressway
Dallas, Texas 75206
Tel: 214-691-4025
Fax: 214-361-5802
turley@wturley.com

ANTHONY D'AMATO
NY #4035671
PROFESSOR OF LAW
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue,
Chicago, Illinois 60611
Tel: 312- 503-8474
Fax: 312- 587-9969
a-damato@northwestern.edu

Attorneys for Plaintiffs-Appellants

APPELLANTS' PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC

I. INTRODUCTION ~ REASON FOR A REHEARING EN BANC

In counsel's judgment this case involves a question of exceptional importance. After ten years of litigation that has attracted the world's attention because of its sensational subject matter, a Ninth Circuit panel has decided that there was no jurisdiction in the first place. Inasmuch as this result is clearly erroneous as a matter of law, it could have been written in an arbitrarily short time after the Complaint was filed in 1999. The appeals panel virtually concedes the error of its opinion by ordering that it not be published. A Ninth Circuit decision that erroneously reverses the meaning of a key provision of the Foreign Sovereign Immunities Act is a question of exceptional importance. The error should be corrected by a rehearing en banc.

II. THE VATICAN BANK IS NOT IMMUNE

Plaintiffs admit that the Vatican Bank is an organ of the Holy See government. However, a government organ can be an agency or instrumentality. 28 U.S.C. § 1603(b) of the FSIA defines an "agency or instrumentality" as "an organ of a foreign state." The Vatican Bank has admitted that it is an instrumentality of the government. (Affidavit of IOR) If the Holy See itself falls within an exception to sovereign immunity, then so does its organs, agencies, and

instrumentalities.

A careful reading of the relevant part of the FSIA's taking exception demonstrates that there is no sovereign immunity in the present case. 28 U.S.C. § 1605(a) provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States . . . in any case . . . (3) in which rights in property taken in violation of international law are in issue and . . . that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

The key terms of this provision are:

1. A foreign state;
2. property taken in violation of international law;
3. that property or any property exchanged for such property;
4. is owned or operated by an agency or instrumentality;
5. that agency or instrumentality is engaged in a commercial activity in the United States.

The panel interprets this provision as reading in a requirement that the property itself or some portion thereof be present in the United States. Under the panel's interpretation, if (a) a number of gold bars are taken in violation of international law and (b) the gold is deposited directly in the vault of the Vatican Bank to add to its reserves so as to cover an increase in the bank's ability to float loans, and (c) the gold remains indefinitely in the vault, then (d) the case must be dismissed because no portion of the gold is currently present in the United States.

Such an interpretation eviscerates the statute. For the statute clearly does *not* require the property to be present in the United States. If it did, then all a foreign agency or instrumentality would have to do to immunize itself against suit in the United States would be to make sure that the property it obtains in violation of international law is physically kept out of the United States. Congress clearly did not intend this key provision of the FSIA to be circumvented at will.

The panel's opinion nods in the direction of recognizing the correct meaning of the statute by blaming what it is doing on lead plaintiff Alperin:

> "While we recognize that it could be difficult to prove that a fungible article such as the gold alleged to have been taken in this case is currently present in the United States, Alperin did not even make such an allegation in the pleadings." *Memorandum*, at 6 of 9.

Of course, Alperin did not make such an allegation because it would have been unnecessary. The statute does not require the presence of any of the property in the United States.[1]

III. The Property was Taken in Violation of International Law

A. Genocide

When the full context of the present litigation is taken into account, it not only proves that the property was taken in violation of international law, but also

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[1] The panel in this connection refers to *Garb v. Republic of Poland*, 440 F.3d 579 (2nd Cir. 2006). But *Garb* is inapposite because it does not involve an agency or instrumentality.

shows more generally that the Complaint as well as its amendments more than adequately meet the holistic standard of plausibility mandated by *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (requiring a "claim to relief that is plausible on its face"). The Jasenovac Concentration Camp in Croatia during World War Two has been termed by historians as the "Auschwitz of the Balkans." But the comparison is misleading. At Auschwitz, as is well known, unsuspecting victims were led naked into a shower; instead of water coming from the faucets there was emitted Zyklon-B, a poison gas that immediately killed them.

By contrast at Jasenovac there was no money or equipment available to facilitate mass murder since all materiel and money were needed to support Croatia's war against the Allies and especially the USSR. Yet there were over 600,000 Serbs and other minorities to be killed — equivalent to the crowds at nine Super Bowls. The result was that the victims were killed by hand — that is, by sticks, clubs, baseball bats, knives, and ropes — evidencing a degree of hatred for a minority group that stretches the bounds of human imagination. For example[2]:

(a) Croatian civilians with butcher knives held contests of who could murder the most prisoners. One of the guards, Petar Brzica, won a prize by cutting

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[2] See Ilija Ivanovic, *Witness to Jasenovac's Hell* (2002); Barry M. Lituchy, *Jasenovac and the Holocaust in Yugoslavia* (2006); Vladimir Dedijer & Harvey L. Kendall, *The Yugoslav Auschwitz and the Vatican: The Croatian Massacre of the Serbs During World War II* (1992).

the throats of 1,360 new arrivals at the camp in a single day;

(b) Serbian mothers holding infants in their arms were led into a fenced-in area of the camp. As Croatian citizens outside the fences watched intently, the gate was opened, letting in scores of starving police dogs who leaped at the babies, tearing them to pieces before turning upon their mothers;

(c) Croatian guards and hangers-on carrying clubs and baseball bats led Serbian boys into the woods where they forced the boys to dig a pit. Then they bashed in the boys' heads and decapitated them. When the wind was blowing in the right direction, parents in the Jasenovac camp could hear the high-pitched screams of their children;

(d) Serbian women were gang-raped. When the last Croat in line had finished with a victim he gouged out her eyes so that his was the last face she would ever see;

(e) The only source of drinking water for the prisoners in the camp was the polluted Sava River. Serbian adults were tied in pairs back to back and their bellies were cut before being tossed into the river so that as they thrashed about in extreme pain their spewing intestines would add to the pollution.

(f) Small children on a daily "soup" of grasses, weeds, insects, and polluted river water, were speeded to painful death when caustic soda was mixed into their meal.

Thousands upon thousands of Serbian families had been arrested in their homes in Croatia and taken to Jasenovac. After blocks of residences had been "cleansed," Croatian soldiers went into the houses and looted everything that was valuable. This taking was discriminatory and illegal under international law. It was also part of the genocide because it deprived the Serbian victims of the opportunity of economically reconstituting themselves as a group. The Genocide Convention, ratified by the United States and Croatia, provides:

> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> *Genocide Convention*, 78 U.N.T.S. 277 (1948), 18 U.S.C. § 1091.

The present case is not reducible to a mere post-war looting of assets. Rather, it is part and parcel of the crime of genocide perpetrated by the Croatian people against their Serbian next-door neighbors. By sending the loot to the Vatican, Croatia may have counted upon putting it out of the reach of the Serbian victims forever so that their next-of-kin would be unable to restore the culture and way of life of the original group. Thus was genocide completed with the knowing and active participation of the Vatican Bank.

In the alternative, the Vatican's receipt and processing of the loot constitutes complicity in genocide. By depriving the Serbian group of the ability

economically to reconstitute itself, the Vatican aided and abetted genocide.

B. Looted Property and the Vatican Bank

Like other Balkan countries, Croatia was poor at the outset of World War II. But soon the Croatian treasury began receiving enormous amounts of property and rights in property. As over 600,000 Serbs and other minorities were arrested and transported to Jasenovac, their homes were confiscated along with all their cash, bank accounts, jewelry, paintings, gold, silver, furniture, clothing, appliances, etc. Exact figures are unavailable and have been suppressed by the Croats.

As alleged in the 4th Amended Complaint (at ¶ 154), based on U.S. intelligence reports, Croatia transferred property and rights in property to the Vatican during and at the end of World War Two in the amount 200 million Swiss Francs (about 47 million in 1946 U.S. dollars, Eizenstat Report, p. 150, ER Tab 6). At least a substantial portion of this sum, if not nearly all of it, derived from the property and rights in property taken from the persons killed at Jasenovac. Other property and rights in property made their quiet way to the Vatican at various times during the war. The Jasenovac Concentration Camp was established in August 1941. Eleven months later the IOR (Instituto per le Opere di Religione) was founded at the Vatican, the legal precursor of the Vatican Bank. It is a reasonable presumption whose validity will have to await discovery that the new stream of Croatian funds helped build the Vatican Bank. It is even more likely

that the Vatican Bank's duty to receive "gifts" of property, resulting in the sale of such property with proceeds going to the Bank, was a greater source of funds for the new Bank. Plaintiffs have alleged that a ten-truck convoy carrying valuables taken from the Serbian victims of the genocide was directed to the College of San Girolamo Degli Illirici and then to the IOR for conversion into cash. (4th Amended Complaint ¶ 154.) Although the purpose of all these operations on looted property may have been religious or charitable, the test of commercial activity according to the FSIA is not the purpose but rather the nature of the activity. See 28 U.S.C. § 1603(d), which provides:

> The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

The panel opinion states that the Vatican Bank might not "own" the looted property. But the Bank clearly "operates" on the looted property by selling it and converting it into cash, by storing gold in its vaults as bank reserves (available to cover loans but not necessarily owned by the Bank), and by using it to cover loans to customers. Under the FSIA, either owning or operating on the property are equivalent for immunity purposes:

> A foreign state shall not be immune . . . [if] that property or any property exchanged for that property is owned or operated by an agency or instrumentality . . . 28 U.S.C. § 1605(a)(3).

Further, it is objected that the Vatican Bank does not retain profits from its

activities, and this fact somehow impairs the characterization that it is engaged in commercial activity. On the contrary, if any corporation pays out 100% of its annual profits to its shareholders, it is no less a corporation.

The Vatican Bank's status as an "instrumentality" of the Holy See depends on its relationship with the Vatican at the time this suit was brought (1999) rather than when the conduct occurred (1941 to 1946 and thereafter). See *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), relied upon in *Austria v. Altmann*, 124 S.Ct. 2240, 2253 (2004). As one of the world's major banks, the Vatican Bank has risen from humble beginnings in World War II funded by the Croatian treasury, to engaging in "for-profit merchant banking transactions in the United States, California, and elsewhere." (4th Amended Complaint, ¶ 76.) It regularly receives by wire transfer the Sunday collections of 194 dioceses across the United States. It makes construction loans to various dioceses at prevailing interest rates. It is connected by international routing number to all the major banks in the world.

IV. CONCLUSION

This case's importance demands that it be given an En Banc review.

DATED: January 12, 2010.

Respectfully submitted,

ANTHONY D'AMATO
s/ THOMAS EASTON
JONATHAN LEVY
WINDLE TURLEY
Attorneys for Appellants Alperin et al.

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EMIL ALPERIN; et al., Plaintiffs - Appellants, v. VATICAN BANK, aka Institute of Religious Works aka Instituto per le Opere Di Religione (IOR), Defendant - Appellee.	No. 08-16060 D.C. No. 99-cv-04941-MMC MEMORANDUM [*]

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

Argued and Submitted December 10, 2009
San Francisco, California

Before: B. FLETCHER, THOMAS and N.R. SMITH, Circuit Judges.

Survivors and descendants of victims of the Holocaust, and associated organizations (collectively referred to herein as "Alperin"), appeal the dismissal of their purported class action lawsuit against the Vatican Bank, also known by its

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[*] This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

official title Istituto per le Opere di Religione (the "IOR"). On a previous appeal, we held that the political question doctrine barred broad allegations of violation of international law but did not bar certain property claims. *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005). We are now asked whether the IOR is a foreign sovereign protected by the Foreign Sovereign Immunity Act (the "FSIA"), and if so, whether Alperin's claims fall within the international takings exception or commercial takings exception to the FSIA's jurisdictional bar. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

"The existence of sovereign immunity and subject matter jurisdiction under the [FSIA] are questions of law that [this Court] review[s] de novo." *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1085–86 (9th Cir. 2007) (internal quotation marks and citation omitted) (alteration in original). A District Court's interpretation of foreign law is also reviewed *de novo*. *Brady v. Brown*, 51 F.3d 810, 816 (9th Cir. 1995). On a motion to dismiss, the court "assume[s] that [it has] truthful factual allegations before [it]." *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

I

The district court did not err in holding that the IOR is an organ of a foreign state entitled to FSIA immunity. In assessing whether an entity is an organ of a foreign state, *see* 28 U.S.C. § 1603(b)(2), we "[t]ak[e] a holistic view" of the defendant, *Cal. Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1102 (9th Cir. 2008). In doing so, we examine

> "[1] the circumstances surrounding the entity's creation, [2] the purpose of its activities, [3] its independence from the government, [4] the level of government financial support, [5] its employment policies, and [6] its obligations and privileges under state law. An entity may be an organ of a foreign state even if it has some autonomy from the foreign government."

Powerex, 533 F.3d at 1098 (quoting *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 640 (9th Cir. 2003)) (internal quotation marks omitted).

A showing of organ status may be based exclusively on foreign law. *See, e.g. Gates v. Victor Fine Foods*, 54 F.3d 1457, 1460–64 (9th Cir. 1995) (using Alberta statutes and regulation to determine defendant's organ status). *But see*

prima facie case of immunity. *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 306 (9th Cir. 1997).

Through its affidavit showing its status, structure, and role under Vatican law, the IOR made a prima facie case that it is an agency or instrumentality of the Vatican, and thus entitled to FSIA immunity. The affidavit shows that the modern IOR was created by the Pope as a public and independent juridic entity that is responsible for managing assets placed in its care for the purpose of supporting religious or charitable works. The highest administrative level of the IOR is composed of high-ranking government officials all appointed by the Vatican. The IOR has exclusive control over several obligations created and assigned by Vatican law. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 848 (9th Cir. 2000) (emphasizing monopoly over task); *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996) (same). And the IOR is immune from suit in Italy as a foreign sovereign. Alperin did not challenge the affidavit or provide a counter-affidavit. Therefore, we conclude that the district court correctly held that the IOR established a prima facie case that it was an organ of a foreign state entitled to FSIA immunity.

Contrary to Alperin's argument, the historical origins and activities of the IOR are not relevant to this inquiry. *Dole Food Co. v. Patrickson,* 538 U.S. 468,

480 (2003) ("[I]nstrumentality status is determined at the time of the filing of the complaint."). Accordingly, this court has not considered evidence pertaining to the IOR's organ status prior to 1999, when the first Complaint was filed. The IOR need not be the Vatican Central Bank for it to have a public purpose. *See Powerex*, 533 F.3d at 1098. Its involvement in commercial affairs does not automatically render the IOR non-governmental. *EIE Guam*, 322 F.3d at 641. Nor is it necessary that the Vatican maintain day-to-day control over the IOR's activities. *Gates*, 54 F.3d at 1461. Notwithstanding the IOR's commercial activities and arms-length supervision by the Vatican, the record, viewed holistically, supports the district court's conclusion that the IOR is an agency or instrumentality of the Vatican.

II

The district court did not err in holding that the international takings exception does not apply to remove FSIA immunity. Where the defendant sovereign succeeds in "establish[ing] a prima facie case of immunity, the burden of production shifts to the plaintiff to offer evidence that an exception applies." *Phaneuf*, 106 F.3d at 307.

FSIA's international taking exception provides that:

> A foreign state shall not be immune from the jurisdiction of the courts of the United States . . . in any case . . . (3) in which rights in property taken in violation of international law are in issue and [1] that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or [2] that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

28 U.S.C. § 1605(a).

Of critical importance to any analysis under this exception is that plaintiffs not only must plead a right to property taken in violation of international law—and we do not reach the question of whether they have in this case—but that they must plead a jurisdictional nexus to the United States. Under either prong of § 1605(a)(3), this involves pleading the current status of the property at issue (or any property exchanged for such property)—that it either *is* present in the United States or *is* owned or operated by an agency or instrumentality of the foreign state.

While we recognize that it could be difficult to prove that a fungible article such as the gold alleged to have been taken in this case is currently present in the United States, Alperin did not even make such an allegation in the pleadings. Therefore, assuming without deciding that plaintiffs may meet their burden under the first prong through pleadings about the commercial activities of an agency or instrumentality of a foreign state rather than the foreign state itself, Alperin failed

to do so in this case. *Cf. Garb v. Republic of Poland*, 440 F.3d 579 (2d Cir. 2006) (holding that only the first clause of the takings exception applies where the jurisdictional nexus is based on allegations regarding the commercial activity of the Ministry of the Treasury, since the Ministry is the state itself, not an agency or instrumentality). *But see* 28 U.S.C. § 1603(a) ("A 'foreign state' . . . includes . . . an agency or instrumentality of a foreign state . . . .").

Nor, under the second prong of § 1605(a)(3), did Alperin sufficiently plead that the IOR has current ownership of the expropriated property or property exchanged for expropriated property. At most, Alperin asserted that "defendants" (in this multi-defendant case) "retained" some portion of the Ustasha Treasury, after other portions were laundered in the 1940s. They never allege that the expropriated property "retained" by the defendants includes property that properly belongs to the named plaintiffs. This is insufficient where the FSIA requires present ownership of the expropriated property (or any property exchanged for such property).

III

The district court also did not err in determining that the commercial activity exception does not remove FSIA immunity in this case. A second exception to FSIA is for cases "in which the action is based upon a commercial activity carried

on in the United States by the foreign state" or based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

Nor does Alperin's complaint meet either prong of the commercial activities exception. Plaintiffs allege that a different defendant used funds laundered by the IOR to establish publishing houses and other commercial activities in Chicago, and they argue that the IOR was enabled to store gold in the United States and trade it on U.S. markets because its gold collection was enhanced by the Ustasha Treasury. These alleged commercial activities in the United States are too tangentially related to their legal claims to be considered "the basis for [the] suit." *Nelson*, 507 U.S. at 358; *see also Alder v. Fed'l Republic of Nigeria*, 219 F.3d 869, 874–75 (9th Cir. 2000) (analyzing claim based on money-laundering under direct effects prong only). Nor are the effects that Alperin alleges—the cumulative impact of Ustasha gold on the IOR's holdings and on its commercial activities in the United States over a decade later; and the results of another party allegedly investing laundered funds in Chicago—sufficiently direct to fall within this exception. *See Corzo v. Banco Cent. de Reserva del Peru*, 243 F.3d 519, 525 (9th Cir. 2001) (holding that "secondary or incidental results" do not count under direct effects prong).

IV

The district court correctly dismissed the complaint. Given our reasoning, we need not–and do not–reach any other issue raised by the parties. All motions for judicial notice filed by both parties are **DENIED**.

AFFIRMED.

CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APPELLANT. P. 27 AND CIRCUIT RULE 27-1 FOR CASE NUMBER NO. 08-16060

I certify that: Pursuant to Fed. R. Appellant. P. 27 and Ninth Circuit Rule 27-1, the attached

APPELLANTS' PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC and MEMORANDUM FILED DEC. 29, 2009

is proportionately spaced, has a typeface of 14 points or more and does not exceed 15 pages.

Dated: January 12, 2010.

Respectfully submitted,

s/ THOMAS EASTON

Attorneys for Appellants' Alperin et al.

CERTIFICATE OF SERVICE

(When All Case Participants are Registered for the Appellate CM/ECF System)

I hereby certify that on January 12, 2010, I electronically filed the foregoing

APPELLANTS' PETITION FOR PANEL REHEARING AND FOR REHEARING EN BANC and MEMORANDUM FILED DEC. 29, 2009

with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature s/ THOMAS EASTON, Esq.