

2002

The Holocaust Restitution Movement in Comparative Perspective

Michael J. Bazylar

Recommended Citation

Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L LAW. 11 (2002).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol20/iss1/2>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

The Holocaust Restitution Movement in Comparative Perspective

By
Michael J. Bazyler*

I. INTRODUCTION

This article examines the use of civil litigation in the United States to deal with human rights abuses committed during World War II. The specific scenario examined is the Holocaust restitution movement in the United States, whose aim is to obtain financial restitution from European and American corporations¹ for their nefarious wartime activities. This article also examines other movements aiming to bring justice for historical wrongs that arose as a direct result of the successes achieved in the Holocaust restitution arena. Three such prominent movements are: (1) the lawsuits filed in the United States by victims of slave labor by Japan and Japanese industry during World War II; (2) the recent claims in U.S. courts of the survivors of Armenian genocide for reimbursement of the insurance proceeds paid by their deceased relatives; and (3) the emerging call for African-American reparations stemming from slavery. All of these movements are a direct outgrowth of the successful claims achieved in the Holocaust restitution arena. Finally, this article discusses the emerging debate about the propriety of seeking monetary damages for historical wrongs, especially as it has now emerged in the sphere of Holocaust-era litigation.

The fact that American courts are being used today to deal with wrongs committed during World War II, over one-half century after the events took place, is astounding. In the history of American litigation, no class of cases has ever appeared in which so much time had passed between the wrongful act and the filing of the lawsuit. Most surprisingly, almost all of the Holocaust restitu-

* Professor of Law, Whittier Law School, Costa Mesa, California, U.S.A. and Research Fellow, Holocaust Educational Trust, London, U.K. The views expressed herein are those of the author and not reflective of the position of the Holocaust Educational Trust.

1. Almost all of the lawsuits filed in the United States to-date stemming from the Holocaust have been against private entities rather than against governments, since litigation against foreign governments would, most likely, be barred by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1350 *et. seq.* (1976). There are several examples of unsuccessful Holocaust-era restitution litigation against foreign governments. *See, e.g.,* *Princz v. Federal Rep. of Germany*, 26 F.3d 66 (D.C. Cir. 1994) (suit dismissed against present-day Germany by Jewish-American sent to concentration camps by the Nazis; Germany subsequently settled with Princz and ten other Holocaust survivors who were American citizens during the war for \$2.1 million); *Haven v. Rep. of Poland*, No. 99 C 727 (N.D. Ill. filed June 25, 1999) (suit dismissed against Poland for failure to return properties to Polish Holocaust survivors living abroad; case is now on appeal).

tion lawsuits have been successful. This is in contrast to Holocaust-era suits filed between 1945 and 1995, when victims filed approximately a dozen lawsuits in American courts seeking compensation for World War II-era wrongs, with most of them being summarily dismissed.² As a result of the U.S.-based litigation, and concomitant political efforts of the past six years, an astoundingly short period of time, Holocaust-era settlement payouts now total over \$8 billion.³

The Holocaust did not occur in the United States, but in Europe. Most Holocaust survivors reside outside of the United States. It is the United States legal system, however, that has taken the lead in delivering some measure of long-overdue justice to aging Holocaust survivors. As with all transnational litigation today, the highly-developed and expansive system of American justice makes the United States the best, and in most instances, the only, legal forum for the disposition of such claims. American courts have a long history of recognizing jurisdiction over defendants where courts of other countries would find jurisdiction to be lacking. American-style discovery, mostly unknown in Europe, allows the plaintiffs' lawyer to better develop the case through requests for production of documents, requests for admission, and depositions of adverse parties and witnesses during the pre-trial process, rather than having all the evidence available at the outset of the litigation. Guarantee of jury trials in civil cases, coupled with a culture where juries are accustomed to granting awards in the millions (or even billions) of dollars,⁴ both as compensation and as punitive damages, makes the filing of a Holocaust-era lawsuit in the United States more likely to succeed financially. The existence of the concept of a "class action," where representative plaintiffs can file suit not only on their behalf, but also on behalf of all others similarly situated, creates a more efficient system of filing suits and raises the prospect of large awards against the wrongdoers.⁵

American legal culture has also been a key factor. American attorneys are greater risk-takers than their European counterparts. Unlike in most other countries, an American lawyer can take a case on a contingency basis, in which the client does not pay if the case is unsuccessful, but must share a percentage of the award if the case succeeds. Moreover, in the United States, a losing party, except in unusual cases, does not pay the attorneys' fees of the successful litigant.

2. By contrast, since 1996 over 75 lawsuits have been filed in the United States by various World War II survivors or their heirs seeking damages for wartime wrongs. As I describe in a previous article, "the floodgates of litigation have opened [in the United States] . . ." Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 *UNIV. RICH. L. REV.* 1 (2000). Appendix A of this article (at 265-71) lists every lawsuit filed in the United States since October, 1996, by Holocaust survivors or their heirs.

3. See Stuart E. Eizenstat, *Justice for Survivors*, *WASH. POST*, Jan. 16, 2001, at A21 (author was deputy Treasury Secretary and chief U.S. government negotiator for Holocaust-era restitution claims).

4. See, e.g., James Sterngold, *Jury Awards Smoker with Lung Cancer \$3 Billion From Phillip Morris*, *N.Y. TIMES*, June 7, 2001, at 1.

5. In Germany, for instance, every former slave laborer had to file a separate lawsuit against his or her former German corporate master, making slave labor litigation both inefficient and expensive. In the United States, rather than repeating the same claims in hundreds of individual lawsuits, the cases were filed as class actions and could all be consolidated before one judge.

The American system thus creates incentives for both attorneys and plaintiffs alike, allowing victims to bring claims more often.⁶ The great British jurist Lord Denning recognized American courts as the most desirable forum for transnational litigation when he wryly observed in an English court opinion: "As a moth is drawn to light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune."⁷

Even so, the stark reality is that, until recently, a Holocaust-era lawsuit would have been summarily dismissed if a victim brought the claim in the United States.⁸ What made these lawsuits possible was the development of human rights law by U.S. courts over the last two decades. An American court today is more likely to allow a human rights case to proceed forward even if (1) the acts complained of did not occur in the United States and (2) the plaintiff is not American. The recognition of such suits began with the seminal opinion of *Filartiga v. Pena*,⁹ where the Second Circuit of the Court of Appeals held that the Paraguayan father and sister of a victim of state-sanctioned torture and killing committed in Paraguay could sue the perpetrator, a government official, if the perpetrator is found in the United States.¹⁰ This decision opened the door to other human rights victims injured abroad to successfully bring suits in the United States.¹¹ In 1992, Congress confirmed the right of victims of foreign

6. David Irving learned the costly lesson of filing an unsuccessful defamation lawsuit in the U.K. through his lawsuit against Deborah Lipstadt, the American Holocaust scholar, where the court required him to pay Lipstadt's legal fees. In the United States, Irving would only have been required to pay court costs. Marjorie Miller, *Historian Loses Libel Suit on Holocaust View*, LA TIMES, April 12, 2000 at A11.

7. *Smith Kline & French Labs v. Bloch*, 2 All E.R. 72, 74 (Eng. 1983).

8. *See, e.g., Kelberine v. Societe Internationale*, 363 F.2d 989 (D.C. Cir. 1966) (slave labor class action lawsuit brought by a Holocaust survivor against a European corporation dismissed as non-judicial); *Handel v. Artukovic*, 60 F. Supp. 42 (C.D. Cal. 1985) (class action lawsuit brought by Holocaust survivors from Yugoslavia against a former pro-Nazi Croatian official living in the United States dismissed for lack of jurisdiction and also as being time-barred); *Princz v. Federal Rep. of Germany*, 26 F.3d 66 (D.C. Cir. 1994).

9. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

10. The Second Circuit found jurisdiction based upon a long-forgotten law, passed by the first U.S. Congress in 1789, entitled the Alien Torts Claims Act, 28 U.S.C. § 1350 ("ATCA"), which declares that federal district courts shall have jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The *Filartiga* court found that state-sanctioned torture is a clear violation of the law of nations, or (using modern terminology) international law, and since the plaintiffs were Paraguayan nationals, as aliens, their claims fell within the ambit of the ATCA. For a treatise discussing the *Filartiga* case and its aftermath, see generally, *THE ALIEN TORTS CLAIM ACT: AN ANALYTICAL ANTHOLOGY* (Ralph Steinhart & Anthony D'Amato eds., 1999).

Many of the Holocaust-era lawsuits have relied on the ATCA to establish jurisdiction in United States courts. *See, e.g., Sonabend v. Union Bank of Switzerland*, No. CV-97-046 (E.D.N.Y. filed Jan. 29, 1997) (class action against Swiss banks where alien plaintiffs assert jurisdiction under the ATCA); *Snopczyk v. Volkswagen AG*, No. 99-C-0472 (E.D. Wis. filed May 5, 1999) (slave labor lawsuit against VW where alien plaintiffs assert jurisdiction under the ATCA).

11. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (lawsuit against Bosnian Serb warlord, Rodovan Karadzic, brought by victims of Serb atrocities in Bosnia; in August 2000, jury awarded \$745 million to plaintiffs); *Marcos Estate II*, 25 F.3d 467 (9th Cir. 1994) (lawsuit against estate of former Philippine dictator Ferdinand Marcos brought by victims of human rights abuses in the Philippines); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (lawsuit against Argentina for human rights abuses during military rule brought by Argentine Jew and his

torture to sue in American courts by enacting the Torture Victims Protection Act (hereinafter "TVPA").¹² Without the groundwork laid out by *Filartiga*, the cases that followed it, and the TVPA, the recently filed Holocaust-era cases surely would have been summarily dismissed.

A detailed examination of the modern Holocaust-era cases reveals how the passage of the TVPA and the monumental *Filartiga* decision favoring victims of human rights abuses changed the landscape for Holocaust-era claims. This changed landscape, coupled with political pressures, acted as a catalyst to make Holocaust-era claims successful in the past decade, thereby opening the door for other restitution movements.

II.

HOLOCAUST RESTITUTION EFFORTS IN THE UNITED STATES

A. Cases Against European Banks

1. Swiss Banks Litigation

The modern era of Holocaust assets litigation began in October 1996 with the filing of a class action lawsuit in federal district court in Brooklyn, New York against the three largest private Swiss banks: Credit Suisse, Union Bank of Switzerland (hereinafter "UBS") and Swiss Bank Corporation. Two similar lawsuits were then filed against the same banks. All three actions were consolidated in April 1997 as *In re Holocaust Victim Assets Litigation*, and heard by Judge Edward R. Korman, one of the heroes of this litigation.¹³

The consolidated lawsuits made three accusations against the Swiss banks: (1) that the banks failed to return moneys deposited with them by Jews seeking a safe haven for their assets in the face of persecution by the Nazis, known as the "dormant account" claims; (2) that the banks traded in assets looted from the Jews by the Nazis, known as the "looted assets" claims; and (3) that the banks traded in assets made by slave labor which were then sold, and the sale proceeds deposited with the banks, known as the "slave labor" claims.¹⁴ The lawsuits alleged that the banks set up specious collection requirements for the dormant account claims. For example, victims claimed that the banks unnecessarily required heirs to produce death certificates for Holocaust victims, and used this as an excuse for failing to return funds deposited with them for safekeeping, making it impossible for heirs to retrieve the funds that were due to them. For the latter two categories, looted assets and slave labor claims, the victims alleged that the banks wrongly accepted deposits from the Nazis knowing that the funds

family); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (lawsuit against American oil company by Burmese nationals forced to resettle due to the building of an oil pipeline in Burma).

12. Pub. L. No. 102-256, 106 Stat. 173 (1992) (codified as an amendment to the ATCA at 28 U.S.C. § 1350).

13. *In re Holocaust Victim Assets Litigation*, No. CV-96-4849, 2000 U.S. Dist. LEXIS 20817 (E.D.N.Y. Nov. 22, 2000).

14. *Id.*

deposited were either looted from Jews or came from sale of goods made by Jewish slave labor.¹⁵

In response to the suits, the Swiss banks filed voluminous motions to dismiss, setting out numerous reasons why the lawsuits could not proceed.¹⁶ In addition to arguing that American courts lacked jurisdiction over these claims and that the claims were time-barred, the banks contended that they were already dealing with the problem. Specifically, the banks published a list of dormant accounts and created the so-called Independent Committee of Eminent Persons (hereinafter "ICEP"), chaired by Paul Volcker, the former head of the U.S. Federal Reserve Board, to both process claims made against them by Holocaust survivors and heirs and to reexamine the banks' actions during the war. According to the banks, "Plaintiffs were not required to come to a court of law to seek redress . . . [S]uperior, cooperative mechanisms are available, and those alternatives become more attractive every day."¹⁷ In June 1998, while Judge Korman was considering their motions, the banks made what they called their first and last offer to settle the claims: \$600 million.¹⁸

In the meantime, a number of political factors came into the picture, all of which had the effect of putting added pressure on the Swiss banks in addition to the litigation. First, beginning in April 1996, the U.S. Senate Banking Committee, headed by Senator Alfonse D'Amato, held hearings on the issue. Second, a number of state and local governments threatened to stop doing business with the Swiss banks unless they settled the claims. Third, in May 1997, the United States government issued a report, written by then-Undersecretary of State Stuart Eizenstat (and later Deputy Treasury Secretary and Special Representative of the President and the Secretary of State for Holocaust Issues) sharply criticizing the Swiss for their World War II dealings with the Nazis. Finally, UBS, now undergoing a merger with co-defendant Swiss Bank Corporation, was caught attempting to shred World War II-era financial documents, in violation of a newly-enacted Swiss law forbidding such actions.¹⁹

In August 1998, the banks doubled their settlement offer and under Judge Korman's guidance settled the case for \$1.25 billion. Rather than paying the settlement in a lump-sum, the banks agreed to pay the \$1.25 billion in four installments over three years, with the final payment to be made in November 2001. The settlement agreement sets out five classes of claimants eligible to receive payments from the \$1.25 billion fund: (1) the "Deposited Assets Class,"

15. *Id.*

16. For a detailed discussion of the various defense arguments to the lawsuits presented by the Swiss banks, see Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 39-57 (2000).

17. Defendants' Overview Reply Memorandum at 1, *In re Holocaust Victims Assets*, (No. CV-96-4849).

18. For a more detailed discussion of the Swiss banks settlement see Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 61-88 (2000).

19. In January 1997, Christoph Meili, a night security guard working at the UBS offices in Zurich, discovered such documents in the UBS shredding room and publicly disclosed the bank's shredding activities.

consisting of “Victims or Targets of Nazi Persecution” (hereinafter “VTNP”) claimants and their heirs seeking to recover World War II-era assets deposited in a Swiss bank prior to May 9, 1945 (the end of World War II in Europe); (2) the “Looted Assets Class,” consisting of VTNP claimants and their heirs seeking to recover compensation for assets belonging to them and stolen by the Nazis, which had made their way to the Swiss banks; (3) “Slave Labor Class I,” consisting of VTNP claimants who performed slave labor for companies that deposited assets derived from that slave labor in Switzerland; (4) “Slave Labor Class II,” consisting of individuals who performed slave labor at a facility or business headquartered, organized, or based in Switzerland; and (5) the “Refugee Class,” consisting of individuals who sought entry into Switzerland to escape the Nazis and were either denied entry, or, after gaining entry, were sent back or mistreated by the Swiss.²⁰

One of the most striking elements about the Swiss settlement is that the class of recipients is not limited to Jews. In addition to Jewish victims, the settlement includes the following four groups persecuted by the Nazis as VTNPs, all of whom will also receive a part of the \$1.25 billion settlement: (1) homosexuals; (2) physically or mentally disabled or handicapped persons; (3) the Romani (Gypsy) peoples; and (4) Jehovah’s Witnesses.²¹ This non-Jewish victim group included in the settlement, however, is small and excludes the entire category of Slavic peoples—primarily Poles and Russians—forced to work as slave laborers for the Nazis. These victims of Nazi persecution will not receive anything from the Swiss settlement, but instead are obtaining recovery from the slave labor settlement already finalized with Germany (*see* discussion below).

In effect, the settlement agreement obtained from the two private Swiss banks insulates the entire nation of Switzerland, and all its businesses, from any kind of litigation—anywhere in the world—having any connection to World War II. In return for \$1.25 billion, plaintiffs agreed to drop all lawsuits against the Swiss banks being sued. In addition, the settlement released not only the defendant banks but also “the government of Switzerland, the Swiss National Bank, all other Swiss banks, and all other members of Swiss industry, except for the three Swiss insurers who are defendants in the [federal class action insurance litigation (*see* discussion below)].”²² Finally, as a condition of settlement, all sanctions and threats of sanctions against Switzerland and any of its businesses were dropped. In accordance with American federal class action rules, Judge Korman held a hearing in November 1999 to confirm the fairness of the settlement, and, in July 2000, finalized it. Distribution of the funds began in July

20. *Holocaust Survivors to Receive First Payments from Swiss Fund*, AGENCE FRANCE-PRESSE, July 18, 2001.

21. Settlement Agreement, paragraph 1, available at <http://www.swissbankclaims.com> (defining “Victim or Target of Nazi Persecution”).

22. Transcript of Settlement Before the Hon. Edward R. Korman at 3, *In re: Holocaust Victim Assets* (No. CV 96-4849). *See also* Settlement Agreement, paragraph 1, available at <http://www.swissbankclaims.com> (defining “releasees,” and “discharging releasees”).

2001.²³ The current status of the Swiss banks settlement is available at www.swissbankclaims.com.

The settlement against the Swiss banks marks a milestone in American litigation. At the time, it represented the largest settlement of a human rights case in United States history. When asked to explain the banks' sudden reversal of their position, Rabbi Marvin Heir, head of the Los-Angeles based Simon Wiesenthal Center, commented: "It was for only one reason: they were pressured into it. Without the pressure, without Sen. D'Amato's banking committee, without the threat of sanctions, the Holocaust survivors would have gotten nothing."²⁴ The *Financial Times* came to the same conclusion:

The clearest lesson from the Swiss banks' \$1.25bn settlement with holocaust survivors is this: threatening to impose sanctions can work. Every important breakthrough in the negotiations came soon after threats from US local government officials to impose sanctions (banning, for example, Swiss banks from certain kinds of business in New York). The settlement itself came two weeks before a threat to start the sanctions and a week after Moody's, the rating agency, published a report saying that UBS, Switzerland's (and Europe's) biggest bank, might lose its triple-A rating if sanctions were imposed.²⁵

The process used to achieve the Swiss banks settlement became the model for the entire Holocaust restitution movement. Repeatedly, other European corporate defendants, when confronted with the forceful combination of American class action litigation and political pressure, would buckle and agree to settle the claims against them. For this reason, the Swiss banks settlement can rightly be called the "mother of all the Holocaust restitution settlements."

2. German and Austrian Banks Litigation

German and Austrian banks maintained close business relationships with the Nazis, profiting handsomely from these dealings. Deutsche Bank, Germany's largest bank, financed the building of Auschwitz.²⁶ A historical report

23. AGENCE FRANCE-PRESSE, *Holocaust Survivors to Receive First Payments from Swiss Fund*, July 18, 2001.

24. Lisa Anderson, *Jewish Leaders Hail Decision by Swiss on Stolen War Assets*, CHI. TRIB., Aug. 3, 1998, at A3.

25. John Authers and Richard Wolfe, *When Sanctions Work*, FINANCIAL TIMES, Sept. 9, 1998, at 1.

26. Deutsche Bank disclosed that officials discovered documents showing a branch of the bank in Nazi-occupied Katowice, Poland, had provided loans to construction companies with contracts for facilities at Auschwitz, as well as an adjacent IG Farben chemical plant. Brian Milner, *Auschwitz Role May Derail Bank Deal: German Institutional's Revelation of Activities During War Adds Firepower to Holocaust Suits*, GLOBE & MAIL, Feb. 6, 1999, at A6.

This information came to light through an independent historical commission created by Deutsche Bank after it was sued. The same commission found that Deutsche Bank "had bought more than 4.4 tons of gold from the Reichsbank, the onetime central bank. As a Deutsche Bank spokesperson described, "This gold business was normal business during the war. . . Of purchases totaling 4,446 kilograms of gold, the [historical] report concluded, 744 kilograms were dental gold taken from Jews' teeth, wedding bands and personal jewelry amassed in Berlin by an SS officer known as Bruno Melmer. . . [In a statement, Deutsche Bank] 'fully acknowledges its moral and ethical responsibility for the darkest chapter of its history.'" Alan Cowell, *Biggest German Bank Admits and Regrets Dealing in Gold*, N.Y. TIMES, Aug. 1, 1998, at A2 (quoting a July 31, 1998 statement of Deutsche Bank).

of Dresdner Bank found that in Nazi-occupied lands the saying went, "Right after the first German tank comes Dr. Rasche from the Dresdner Bank."²⁷

In June 1998, three Holocaust survivors, all American citizens, filed a class action lawsuit against the two German banks, charging them with profiting from the looting of gold and personal property of Jews. Thereafter, victims filed other lawsuits against these two banks in addition to other German and Austrian banks for their World War II-era activities. The lawsuits were eventually consolidated in March 1999 as *In re Austrian and German Bank Holocaust Litigation* in the Southern District of New York before Judge Shirley Wohl Kram.²⁸ That same month, Bank Austria and its recently purchased subsidiary, Creditanstalt, settled the lawsuits against them for \$40 million. A fairness hearing was held in November 1999, and Judge Kram approved the Austrian settlement in January 2000. As of June 2001, no moneys have yet been distributed from the settlement. The current status of the Austrian banks settlement is available at www.austrianbankclaims.com.²⁹

The settlement achieved with the Austrian banks rode the coattails of the Swiss banks settlement, which had come just one year earlier. The Austrian banks settlement was achieved through the class action mechanism, without resort to political pressure. Unlike the Swiss banks, the Austrian banks, when faced with the lawsuits against them, recognized that it would be less costly for them to settle than to fight the litigation. Undoubtedly, however, they also realized from the Swiss experience what would be coming next: if they did not settle, political pressure similar to that exerted against the Swiss banks would certainly follow.³⁰

3. *French Banks Litigation*

After the Nazis conquered France, French banks began to confiscate the accounts of their Jewish depositors in a process known as "Aryanization" of the accounts. In late 1997 and early 1998, victims of these confiscations filed two class actions (which were eventually consolidated) against a half dozen French banks in federal court in New York, followed by another action in California state court in San Francisco.³¹ The defendant French banks all do business in the United States, and plaintiffs were both American nationals and foreigners.

27. Holman W. Jenkins, Jr., *Once More into the Dock with "Nazi" Companies*, WALL STREET J., March 24, 1999, at A27.

28. No. 98 Civ. 3938, 2001 U.S. Dist. LEXIS 2311 (S.D.N.Y. Mar. 7, 2001).

29. Litigation against the German banks continued. However, the "rough justice" settlement, a comprehensive settlement reached with the German government and German industry in December of 1999, and finalized in July 2000, (*see* discussion below) also included the settlement of the claims made against the German banks.

30. The \$40 million settlement was also a deal that the Austrian banks found hard to refuse. In 1945, figures amounted only to \$4 million, a pittance compared to the amounts stolen by the Austrian banks from their Jewish account holders and profits earned in their dealings with the Nazis. For a detailed examination of the Austrian banks litigation and settlement, *see* Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 239-42 (2000).

31. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); *Mayer v. Banque Paribas*, No. BC 302226 (Cal. Super. Ct. filed Mar. 24, 1999).

The lawsuits also named the British bank, Barclays' Bank, and two U.S. financial institutions, Chase Manhattan Bank and J.P. Morgan & Co. These banks had branches in France during the war, and are alleged to have also participated in the confiscation of the assets of their Jewish depositors.

In July 1999, Barclays' settled for \$3.6 million, to be paid to the families of its Jewish customers in France who lost their assets during the Nazi occupation. The other banks declined to settle, and filed motions to dismiss. The motions were denied.³² This was a major victory for the plaintiffs, and, as a result, the banks were eventually forced to settle. Settlement was achieved in the last days of the Clinton Administration in large part through the efforts of Stuart Eizenstat, Clinton's special envoy for Holocaust restitution issues.³³ The banks agreed to establish two funds to compensate claimants for assets seized by the French banks during the occupation. One fund, with no limits, will pay claimants who have documentation or some other substantiated proof of wartime assets held in French banks. The second fund, capped at \$22.5 million, will compensate claimants with less proof for their claims, known as "soft claims," who will present their case to a commission. Each of the soft claims approved by the commission will be paid at least \$1500.

In September 2001, class action notices began to be published in newspapers throughout the world announcing the French banks settlement. Like the settlement reached with the Austrian and German banks, the settlement reached with the French banks is a clear example of the successful use of the model for restitution that the Swiss banks litigation set forth earlier. Distribution of the funds is set to begin in 2002. The current status of the French banks settlement can be found at <http://www.civs.gouv.fr>.

B. Cases Against European Insurance Companies

Before the two world wars, insurance policies and annuities were popular investment vehicles in Europe. Jews in pre-war Europe often purchased insurance, and an insurance policy was known as a "poor man's Swiss bank account." This form of savings made Jews particularly vulnerable to insurance companies during and after the war. Upon coming to power in Germany, the Nazis' persecution of Jews included confiscation of insurance policies from its Jewish citizenry. A particularly poignant example of the theft of insurance proceeds by the Nazis, and German insurers' collusion in such theft, occurred in the aftermath of *Kristallnacht*, in November 1938. Even though many of the Jewish merchants, whose shops and other properties were damaged or looted by the Nazis during the campaign, held casualty insurance to cover their losses, the Nazis ordered the insurance companies to pay all such claims to the state rather than to the injured parties. In a deal made with the insurers, the companies were

32. Memorandum and Order, *Bodner*, (No. 97 CV 7433).

33. Bernard Edinger, *U.S. Sees Deal In French Bank Holocaust Suits*, REUTERS, Jan. 9, 2001.

allowed to expunge the claims of their Jewish policyholders by paying only a fraction of the claims' value to the German state.³⁴

Many of the insurance companies that had participated in swindling Jews out of receiving insurance claims remain prominent insurance carriers today. The European insurance company with the most notoriety in the field of Holocaust-era restitution is Assicurazioni Generali S.p.A., the largest insurance company in Italy, and owner of Israel's largest insurer, Migdal. Generali, as the company is commonly known, was founded in 1831 by a group of Jewish merchants and, until recently, its chairman was a Jewish survivor of Auschwitz. In pre-war Europe, Generali was known as a "Jewish company whose agents saturated the major Jewish population centers before the war."³⁵ The other insurance company with a large stake in the pre-war European market is Allianz of Germany, presently the second largest insurance company in the world. Allianz's CEO, Kurt Schmidt, was Hitler's Minister of Economy. During the war, Allianz insured a number of concentration camps, including Auschwitz and Dachau. In a situation akin to the failure by the Swiss banks to return moneys deposited with them prior to the war, Generali and Allianz, along with other European insurers, have been accused of failing to honor policies purchased from them by Holocaust victims in pre-war Europe.³⁶

Beginning in 1997, Holocaust survivors or their heirs brought two class action lawsuits against more than a dozen European insurers, in federal court in New York. Six individual actions in California state court followed. As with the Swiss bank litigation, political pressure has been an important component in bringing the European insurers to the bargaining table, and sometimes even arriving at settlement. In 1997, the National Association of Insurance Commissioners, composed of the insurance regulators in all fifty states, created a working group on Holocaust and insurance issues. Some of the regulators began holding hearings, inviting the companies to explain their reasons for non-payment of pre-war policies to Jews. Since insurance companies in America are regulated at the state level, and receive their licenses to operate from the state, the commissioners began threatening to revoke the licenses of the European insurers doing business in their state for failure to honor these claims.

34. For a discussion of the scheme concocted in the aftermath of *Kristalnacht*, as well as a general discussion of the Holocaust-era restitution claims, see DEBORAH SENN, WASHINGTON STATE INSURANCE COMMISSION, PRIVATE INSURERS AND UNPAID HOLOCAUST ERA INSURANCE CLAIMS, available at <http://www.insurance.wa.gov>.

35. Marilyn Henry, *A Holocaust Paper Trail to Nowhere?*, JERUSALEM POST, May 2, 1999, at 1.

36. Generali originally maintained that it had no records of policies it issued before the war. In late 1997, however, it revealed that a warehouse at its headquarters in Trieste, Italy, was found to contain partial records (called "water copies," akin to carbon copies) of such policies. Originally said to contain records of between 330,000 and 384,000 pre-war policyholders, Generali culled the list down to approximately 100,000 policies, which it transferred to a CD-ROM disc. In mid-1998, it turned over the disc to Yad Vashem to match the names of Holocaust victims found in Yad Vashem's archives with its list. As of November 1, 2001, Yad Vashem still has not released its data. Interview with Neal Sher, Chief of Staff, ICHEIC (Nov. 1, 2001).

The state insurance commissioners from California, New York and Florida combined, containing the largest concentration of Holocaust survivors in the United States, prodded five of the insurers sued, including Generali and Allianz,³⁷ to form and fund the International Commission on Holocaust Era Insurance Claims, commonly known as ICHEIC, headed by former U.S. Secretary of State Lawrence Eagleburger.³⁸ Following the model of the Swiss banks' ICEP, ICHEIC is similarly intended to be a non-adversarial alternative to the American litigation brought against the insurance companies. In February 2000, after numerous delays, ICHEIC announced that it would begin a two-year claim process to locate and pay unpaid Holocaust-era insurance policies. That same month, ICHEIC began placing advertisements in newspapers and journals around the world soliciting Holocaust survivors and heirs to submit claims.

Unfortunately, to date ICHEIC has done a poor job. By May 2001, it distributed only \$3 million to claimants, while spending more than \$30 million in expenses.³⁹ Eagleburger's annual salary alone is \$350,000.⁴⁰ The individual California lawsuits, five of which have settled, have yielded higher settlements than the amounts distributed individually through ICHEIC.⁴¹ While the settle-

37. The other three insurers participating in ICHEIC are France's AXA, and Swiss insurers Winterthur Lieben (owned by Credit Suisse Bank) and Zurich. Eagleburger has attempted to have the other European insurers that have been sued join the Commission, but, so far, without success. Conal Walsh, *Pro Faces Holocaust Backlash*, THE OBSERVER, May 27, 2001, at 4.

38. In addition to the participating insurance companies and the insurance commissioners of the three states, the World Jewish Congress, the Claims Conference, and the World Jewish Restitution Organization (all related NGOs), as well as the State of Israel, have a seat on the ICHEIC board.

39. See Henry Weinstein, *Spending by Holocaust Claims Panel Criticized*, L.A. TIMES, May 17, 2001, at 1. See also Michael Maiello & Robert Lenzer, *The Last Victims*, FORBES, May 14, 2001, at 112.

40. Weinstein, *supra* note 39. According to *Forbes*, as of May 2001, "70,000 claims have been filed with [ICHEIC]—but over 80% of them still haven't been processed. Only 9,600 have reached a final ruling, and the commission has made settlement offers in a mere 496 cases, totaling only \$5.7 million, an average of less than \$12,000 per claimant—a tiny sum given the value of money, the equivalent of \$300 compounded at 7% since the end of World War II." Maiello & Lenzer, *supra* note 39 (emphasis added).

In November 2001, the House of Representatives held a hearing on the effectiveness of ICHEIC. According to Congressman Henry Waxman, ranking minority member of the committee holding the hearing:

ICHEIC is simply not working well The system has failed to ensure thorough identification of policyholders. A dismally low percentage of the claims filed through ICHEIC have been approved. ICHEIC standards have been ignored. The majority of German insurance companies have not even agreed to follow the ICHEIC procedures. And questions have been raised whether ICHEIC has been responsible with its own expenses.

International Holocaust Commission Under Fire for Lack of Claims Payment, Best's Insurance News (Fri. Nov. 16, 2001).

41. A substantial reason for settlement of these individual suits in California has been the aggressive stance taken by California against the insurers accused of failing to honor Holocaust-era insurance claims. California led the way in enacting new laws threatening suspension of licenses of such insurers (CAL. INS. CODE §§ 790-790.15 (West 1998)), requiring the insurers to open their prewar insurance records (CAL. INS. CODE § 3800 (West 1999)), and extending the limitations period for filing suits for such claims until December 3, 2010 (CAL. CIV. PROC. CODE § 354.5 (West 1998)). The states of Washington and Florida have followed suit by enacting similar statutes. See Holocaust Victim Insurance Act, FLA. STAT., ch. 626.9543 (1999); Holocaust Victims Insurance Relief Act, WASH. REV. CODE § 48.04.060 (1999); and Holocaust Victims Insurance Act, WASH. REV. CODE

ment terms remain confidential, the *New York Times* reported that one of the California cases settled for \$ 1.25 million.⁴²

A significant reason for the failure of the cases against the European insurance companies is that, unlike the cases against the Swiss, German, Austrian, and French banks, the claimants have failed to effectively use the American litigation system in order to reach settlement. The establishment of the non-adversarial ICHEIC process has allowed the five insurance companies joining ICHEIC to outmaneuver both the representatives of the Jewish organizations and state insurance commissioners on the ICHEIC board. The insurance companies have been able to drag out the claims settlement process in order to avoid having to publish lists of possible dormant Holocaust-era insurance policies and to enter into settlements which do not accurately reflect the amounts they owe on the dormant Holocaust-era insurance policies. In hindsight, claimants may have been more successful in their restitution claims had the state insurance commissioners never established ICHEIC. As the Swiss, German, Austrian and French settlements show, the adversarial "class action litigation coupled with political pressure" mechanism yields higher, speedier and more just results than the non-adversarial process attempted through ICHEIC. The current status of the ICHEIC claims settlement process is available at <http://www.icheic.org>.

C. *Cases Stemming from the Use of German and Austrian Slave Labor*

During World War II, the Nazis forced between eight and ten million people to work as laborers in factories and camps in Germany, Austria and throughout occupied Europe. Approximately 1 1/4 million of these laborers, now elderly, are alive today.

The reparations program that West Germany designed in order to assist Jewish victims of Nazi persecution (see discussion below in Section V), specifically excluded payment for slave labor. Former German slave laborers found themselves caught between the German government and the German industry, with each pointing fingers at each other, neither accepting responsibility. The German government claimed that it was not obligated to the laborers because they worked during the war for private German firms. German industry, on the other hand, argued that any payments should come from government coffers

§ 48.04.040 (1999). The insurance companies have challenged these statutes, asserting that they are unconstitutional. To date, no final ruling has been issued on this question.

42. See *Holocaust Insurance Settlement Reported*, N.Y. TIMES, Nov. 25, 1999, at A4, reporting settlement of *Stern v. Generali*, a case filed by a Holocaust survivor, Adolf Stern, 82 years old, and his family for policies purchased from Generali by his father, Moshe "Mor" Stern, a wealthy wine and spirits merchant from Uzghorod, Hungary, who perished at Auschwitz. In June 1945, Adolf, who survived Buchenwald and was then 28-years old, presented himself to Generali's offices in Prague seeking payment on the policies. At his deposition, Adolf testified that the Generali officials demanded that he produce a death certificate for Mor. When Adolf explained that the Nazis did not issue death certificates, he was forcibly ejected from Generali's offices. Deposition of Adolf Stern at 26-27, *Stern v. Generali*, No. BC 185376, 1999 WL 167546 (Cal. Super. Jan. 25, 1999).

since, as the German firms claimed, the Nazi government forced them to use slave laborers to support the national war effort.⁴³

In October 1998, the then-newly-elected Chancellor Gerhard Schroeder reversed the German government policy by announcing that his government would favor the creation of an industry-wide fund to compensate the former slave laborers. By that time, however, American plaintiffs' lawyers, emboldened by their success with the Swiss bank litigation, had already begun filing suits in American courts against various German and American companies on behalf of slave laborers living both in the United States and abroad. Eventually, former slave laborers filed close to forty separate lawsuits in various courts throughout the United States against numerous German companies that had used slave labor during World War II. The slave labor lawsuits constituted the largest category of Holocaust restitution cases that had been filed in the United States to date.

On September 13, 1999, the claimants suffered a serious setback in the litigation. That day, two federal judges sitting in New Jersey issued separate opinions dismissing five of the lawsuits. First, Judge Joseph Greenaway, Jr. dismissed the lawsuit against Ford Motor Company and its German subsidiary, Ford Werke, which had been filed by a Belgian national deported by the Nazis from the Soviet Union and forced to work at the Ford Werke plant in Cologne.⁴⁴ In addition, Judge Dickinson R. Debevoise dismissed four separate lawsuits against German companies Degussa and Siemens.⁴⁵ Both judges held that the suits were non-justiciable, specifically that they were precluded by the treaties that Germany and the Allied powers entered into after the war. Judge Greenaway also found some claims against Ford to be time-barred.

Plaintiffs appealed. The appeals eventually became moot when, in December, 1999, German government and industry entered into a preliminary settlement with the plaintiffs' lawyers and representatives of Jewish organizations to resolve all slave labor and related claims⁴⁶ for DM 10 billion (approximately \$4.8 billion). While the total amount may seem significant, it appears that each survivor will receive a lump sum payment of only between \$2,500 and \$7,500.⁴⁷ It took over one and a half years to finalize the German slave labor settlement.

43. As stated by Bernard Graef, head of the Volkswagen historical archives: "From a legal position the crimes of the Nazis were a state crime, and the issue of slave labor compensation must be addressed to the [German] government" Adam Lebor, *Holocaust Slaves Set to Gain Compensation*, INDEP., Aug. 22, 1998, at 5.

44. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).

45. *Burger-Fischer v. Degussa A.G.*, 65 F. Supp. 2d 248 (D.N.J. 1999).

46. In addition to claims for slave labor, the settlement also includes: (1) claims by mothers shipped to Germany whose children were taken away from them and placed in a *kinderheim*, a children's home, where they often died; and (2) claims by survivors of horrific medical experiments conducted by the Nazis, allegedly for the benefit of German private pharmaceutical concerns. Opinion, *In re: Nazi Era Cases Against German Defendants Litigation*, No. 00-5496 at 22 (D.N.J. 2001). Finally, since German insurance companies also agreed to contribute to the slave labor fund, they were included in the settlement.

47. Count Otto Lambsdorff, the German government representative to the slave labor negotiations, testifying before the U.S. Congress, defended the settlement figure as follows: "Believe me, I wish I had greater funds available for distribution. But 10 billion marks is what we got and what

Claimants achieved final resolution in May 2001, when the German parliament gave final approval to a law providing the monies for the settlement fund.⁴⁸ Distribution of the funds to the aging survivors began in the latter half of 2001.

Under the contemplated distribution scheme, those condemned to work to death, slave laborers, and primarily Jews, who survived the war and are still living will receive payments up to \$7,500. According to some estimates, this will apply to approximately 240,000 former slave labor claimants.⁴⁹ Former forced laborers, primarily non-Jews estimated to number approximately 1 million, will be awarded \$2,500 each.

In return for the settlement, the plaintiffs' attorneys agreed to drop all the pending slave labor and related suits.⁵⁰ To block future litigation, the United States government, as part of the deal, agreed to intervene on behalf of German defendants in any future lawsuit filed in the U.S. for their wartime activities. As with the Swiss banks' \$1.25 billion settlement, Germany and its entire private industry, for DM 10 billion, have achieved complete "legal peace"⁵¹ from onerous American litigation for slave labor and related activities stemming from World War II.

The Germans have conceded that, after a half-century of failing to recognize the claims of the slave laborers, the fear of American litigation is what finally brought them to the bargaining table. Chancellor Schroeder, announcing the establishment of a fund for slave laborers in February 1999 (then set at \$1.7 billion), explicitly stated that Germany was establishing the fund in order "to counter lawsuits, particularly class action suits, and to remove the basis of the campaign being led against German industry and our country."⁵² German industry, in a website devoted to charting the progress of the settlement fund, stated: "For the Foundation to be established and for the funds to be made available, it is an indispensable prerequisite that the enterprises have full and lasting legal certainty, in other words, that they are safe from legal action in the fu-

was agreed upon by all the participating parties after long and arduous negotiations." *Hearing of the Committee on Banking and Financial Services*, 106th Cong. 6 (Feb. 9, 2000).

48. Carol J. Williams, *Germany Oks Funds for Nazi Slave Laborers*, L.A. TIMES, May 31, 2001, at A9.

49. INT'L MONITOR, Aug. 2000, at 1, available at <http://www.comptroller.nyc.gov> (website of the Office the New York City Comptroller Alan G. Hevesi, head of the U.S.-based Executive Monitoring Committee, "a panel of [U.S. state and local] public and regulatory officials who monitor worldwide progress in Holocaust-era asset restitution efforts").

50. For a fuller discussion of these claims and their settlement, see Michael J. Bazylar, *supra* note 2, 34 U. RICH. L. REV. at 249, 256.

51. "Legal peace" is the term used by the German companies to explain their requirement that all U.S. class action litigation must stop, and that they be guaranteed protection from future litigation, before payments are made.

52. Roger Cohen, *German Companies Set up Fund for Slave Laborers under Nazis*, N.Y. TIMES, Feb. 7, 1999, at A1.

ture.”⁵³ To make this point, Germany delayed finalizing the settlement until U.S. courts dismissed all of the lawsuits in their jurisdictions.⁵⁴

Following the German precedent, the Austrian government and Austrian industry alike agreed to compensate its former slave laborers and other victims of its policies. Under a preliminary agreement reached in October 2000, Austria pledged \$500 million to settle claims for Holocaust-era seizures. On January 17, 2001, it agreed to add \$210 million to the settlement fund, and \$20 million in interest, for other property claims and unpaid insurance policies. An additional \$112 million was pledged for social benefits, such as pensions and \$8 million for a land swap - a total package of \$500 million.⁵⁵

Earlier, Austria agreed to compensate former slave and forced laborers, setting aside approximately \$410 million, and to supplement those payments with an additional \$112 million for pension payments to Jewish victims who fled Austria as children.⁵⁶ Indeed, the Austrian government’s actions to compensate former slave laborers could not have come without the precedents that had been set by Germany. Witnessing the events that followed the filing of earlier Holocaust-era claims in U.S. courts compelled the Austrian government and Austrian industry to settle.

III.

WORLD WAR II-ERA CLAIMS AGAINST JAPANESE COMPANIES⁵⁷

The successful Holocaust restitution suits against Swiss banks, European insurance companies and German and Austrian companies have now led formerly captured soldiers and civilians to file claims against Japanese companies for their use of slave labor during World War II.⁵⁸ Without a doubt, the claims against the Japanese multinationals are a direct result of the earlier litigation

53. See preamble of the German Economy Foundation Initiative Steering Group, at <http://www.stiftungsinitiative.de>. Of course, “safe from legal action” refers to legal action in the United States, and specifically class action litigation of the kind first launched against the Swiss banks and then against the German companies. The German companies do not fear being sued anywhere in the world, except in the United States.

54. This fear of American litigation and Germany’s requirement of legal peace added another six months to the settlement process, when one American federal district court judge, contrary to the wishes of the U.S. government, asserted her judicial independence and refused to dismiss the slave labor suits against the German companies until she was satisfied that the settlement was fair. Grant McCool, *U.S. Judge Helps Clear Holocaust Payment Obstacle*, N.Y. TIMES, May 16, 2001, at A1.

55. Pauline Jelinek, *Austria Pays \$500 Million to Jews. Compensation, Apology Offered to Victims Who Lost Property In War*, THE DETROIT PRESS, Jan. 19, 2001, at 4; *Austrian Fund To Pay Out to Holocaust Survivors*, REUTERS, Apr. 3, 2001.

56. *Id.*

57. In the interest of full disclosure, I note that I have advised plaintiffs’ counsel in this litigation, even though I am not counsel of record in any of the cases. I have not been involved in the Holocaust restitution litigation.

58. For news articles describing the ongoing claims made against both Japan and Japanese corporations, see Mark Fritz, *Calling Japan to Account*, BOSTON GLOBE, May 31, 2001, at A1; Michael Dobbs, *Lawyers Target Japanese Abuses*, WASH. POST, March 5, 2000, at A1; Mike Tharp, *Past-Due Bills for Japan*, U.S. NEWS & WORLD REPORT, Feb. 7, 2000, at 30; Sonni Efron, *U.S. Rabbi Presses Japan To Investigate Its War Crimes*, L.A. TIMES, Feb. 9, 2000 at A6; Shirley Leung, *Suit Will Test State Law on War Labor*, WALL STREET J., Oct. 27, 1999, at CA1; Teresa Watanabe, *Japan’s War Victims in New Battle*, L.A. TIMES, Aug. 6, 1999, at A1.

brought against their European counterparts. Aging victims of Japan's wartime activities began filing their lawsuits in American courts only after witnessing the successes achieved in the Holocaust litigation.⁵⁹

Over 36,000 American soldiers became Japanese prisoners of war during World War II. The Japanese also captured nearly 14,000 American civilians. Approximately 25,000 American prisoners were shipped to Japan and Japanese-occupied Asia to work for private Japanese companies.⁶⁰ These companies are now some of the largest corporate entities in the world: Mitsubishi, Mitsui, Nippon Steel, Kawasaki Heavy Industries, and at least forty other Japanese companies.⁶¹ Additionally, the Japanese captured tens of thousands of British, Canadian, Australian and New Zealander soldiers, who toiled as slave laborers for Japanese industry. These companies also used local Chinese, Korean, Vietnamese and Filipino civilians as slaves.⁶²

Former POW Ralph Levenberg filed the first World War II-era restitution lawsuit pertaining to Japan against Nippon Sharyo Ltd. and its U.S. subsidiary in March 1999.⁶³ Levenberg filed the suit in federal district court in San Francisco. Other lawsuits followed in various other jurisdictions.⁶⁴ Eventually, all such litigation gravitated to California, as a result of a state law enacted in July, 1999 permitting any action by a "prisoner-of-war of the Nazi regime, its allies or sympathizers" to "recover compensation for labor performed as a Second World War slave victim . . . from any entity or successor in interest thereof, for whom that labor was performed . . ."⁶⁵ The California statute extended the limitations period for filing such lawsuits until 2010.⁶⁶ The California legislature passed the statute at the same time that the negotiations with the German companies for WWII slave labor compensation were stalled. Thus, the statute's primary goal was to allow lawsuits against these German companies to proceed in California.⁶⁷ As an afterthought, the legislature added language to allow similar suits

In the U.K., the government has paid compensation to British soldiers captured by the Japanese during the war, each POW receiving 10,000 pounds. See *Payments to Begin for Former POWs*, L.A. TIMES, Feb. 1, 2001, at A4.

59. In fact, many of the attorneys involved in the Holocaust restitution litigation are now acting as counsel for claimants in the litigation against the Japanese companies.

60. See LINDA GOETZ HOLMES, UNJUST ENRICHMENT: HOW JAPAN'S COMPANIES BUILT POST-WAR FORTUNES USING AMERICAN POWs xvii (2001).

61. The U.S. government-created Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group ("IWG") is now searching through U.S. archives to ferret out, among other matters, information detailing the wartime activities of Japanese companies. See <http://www.nara.gov.iwg> (detailing the work of the IWG).

62. See Elizabeth Rosenthal, *Wartime Slaves Use U.S. Law to Sue Japanese*, N.Y. TIMES, Oct. 10, 2000, at A1.

63. *Levenberg v. Nippon Sharyo Ltd.*, No. C-99-1554 (N.D. Cal. filed March 16, 1999).

64. See, e.g., *Jackfert v. Kawasaki Heavy Industries, Ltd.*, No. CIV 99 1019 (D.N.M. filed Sept. 13, 1999).

65. CAL. CIV. PROC. CODE § 354.6 (West 2000).

66. *Id.*

67. The legislative history of CAL. CIV. PROC. CODE § 354.6 sets out the statute's primary objective as follows: "According to the author [California State Senator Tom Hayden], 'thousands of elderly California residents are survivors of slave labor exploitation carried out by the Nazis during the Holocaust, living victims of the "real profiteers" of Hitler's Third Reich. These slave laborers and their heirs are entitled to seek just compensation from their oppressors.' SB 1245 would allow

by POWs captured by “allies or sympathizers” of the Nazi regime, meaning Japan and Italy among others. Ironically, litigants never used the statute for its original purpose; shortly thereafter the German companies entered into an all-inclusive settlement of the claims against them.⁶⁸ Every use of the statute has been by victims of the Pacific conflict in suits against Japanese companies.

Eventually, victims of Japanese slave labor filed over two dozen lawsuits against numerous Japanese corporations that had employed slave labor during the war,⁶⁹ all of which do business in the United States.⁷⁰ Plaintiffs included American POWs, allied POWs, and civilians, both U.S. citizens and non-citizens. By Transfer Order dated June 5, 2000, the Federal Judicial Panel on Multidistrict Litigation consolidated the lawsuits before Judge Vaughn Walker of the Northern District Court of California, the judge presiding over the *Levenberg* lawsuit.⁷¹ On September 21, 2000, Judge Walker dismissed the lawsuits filed by American POWs and Allied POWs.⁷² The court held that, in the 1951 Peace Treaty with Japan, the U.S. had waived on behalf of itself and its nationals all claims arising out of actions taken by Japan and its nationals during the war, including actions taken by private Japanese corporations. The court relied on Article 14(b) of the Peace Treaty, which states:

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.⁷³

Based on this language, the court also dismissed the claims of the British, Australian and New Zealander POWs, since these POWs also came from nations that were signatories to the 1951 Treaty.

for victims to attempt to seek such compensation.” SB 1245 SENATE BILL - BILL ANALYSIS. See also Henry Weinstein, *Bill Signed Bolstering Holocaust-Era Claims*, L.A. TIMES, July 29, 1999, at A:3.

68. See Section II(C) of this article (“Cases Stemming From the Use of German and Austrian Slave Labor”).

69. For a list of lawsuits filed to-date in the United States against Japanese companies (maintained by the author) see <http://www.law.whittier.edu/sypo/final/lawsuit.htm>.

70. Goetz points out that “Kawasaki Heavy Industries used at least 250 American POWs for slave labor at its shipyard in Kobe, but the company was awarded a \$190 million contract in December 1998 by the Metropolitan Transit Authority of New York to build 100 new subway cars. Kawasaki was awarded even larger contracts by transportation departments in Maryland and Boston, but our ex-POWs never got a dime from their former ‘employer.’” Goetz, *supra* note 60, at xix.

71. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, (N.D. Cal. 2000). In the Swiss banks litigation, the terms “slave labor” and “forced labor” were used interchangeably. In the Holocaust litigation against German companies, plaintiffs’ lawyers began to distinguish between “slave laborers” and “forced laborers,” defining the former as “concentration camp inmates earmarked for extermination” and the latter as “conquered civilian population and prisoners of war.” See, e.g., Class Action Complaint and Jury Demand, paragraph 22, *Rosenberg v. Continental AG*, No. 99 DC 01892 (D.N.J. Apr. 26, 1999). However, such a distinction was never adopted by the Nuremberg Tribunal. See *The Nuremberg Trial*, 6 F.R.D. 69, 123-26 (discussing slave labor policies of the Nazis). In the Japanese litigation, the two terms also have been used interchangeably.

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

73. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

At the same time the court left open the claims of Chinese, Filipino and Korean civilian internees since "these plaintiffs are not citizens of countries that are signatories of the 1951 Peace Treaty."⁷⁴ It then asked the parties to file supplemental briefs on these claims. In September 2001, Judge Walker dismissed these claims as well. For the Filipino plaintiffs, the court found that their claims were indeed covered by the 1951 Treaty, since the Philippines ratified the treaty in 1956.⁷⁵ For the plaintiffs from the non-signatory states, the court found other reasons to dismiss their claims. In a 44-page opinion, the court held that the California state law (Cal. Code of Civil Procedure Section 354.6) authorizing slave labor claims in California courts was unconstitutional since it amounted to an infringement on the powers of the federal government to conduct foreign policy. Without the aid of the California law, which extended the statute of limitations to 2010, the claims, stemming from activities conducted by the Japanese companies during World War II, were time-barred.⁷⁶

Critical to the court's rulings was the appearance of the United States government in the litigation.⁷⁷ In a Statement of Interest filed with the court, the United States asserted that the above-quoted language of the 1951 Peace Treaty barred claims by the Allied POWs. The court emphasized the "significant weight" to be given to the U.S. government's statement of interest.⁷⁸

The position taken by the U.S. government in the Japanese litigation differed significantly from the position it took in the Holocaust litigation. In the Holocaust slave labor litigation, when asked for its position regarding the impact of the various post-war treaties with Germany, the government did not file a Statement of Interest on behalf of the private German companies. Rather, it only advised the court that negotiations over the creation of a German foundation to compensate the former slave laborers of the German companies were under way, with the aim of fully resolving such claims. The U.S. government continued to play an active role as a party to the German slave labor negotiations, even after the courts dismissed the slave labor cases as being precluded by the post-war German treaties. For the Japanese slave labor claims, however, the U.S. government not only sided with the Japanese companies, but, to date, has failed to press Japan and its private industry to recognize the same type of claims that it forced Germany and its private industry to resolve.⁷⁹

74. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 945.

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

76. *Id.*

77. The United States appeared in response to a request by the court that the U.S. government express its views on whether federal or state law should cover the POWs claims. The United States, in response, not only answered this question stating that federal law should govern—but also opined that article 14(b) of the 1951 Peace Treaty precluded the claims. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 948.

78. *Id.*

79. See *supra* Section II(c) of this article ("Cases Stemming from the Use of German and Austrian Slave Labor"). On the eve of his departure from the U.S. government, Deputy Treasury Secretary Stuart Eizenstat, President Clinton's special representative on Holocaust issues, expressed in an interview that "one of his regrets was his inability to get Japan to make a similar commitment to Chinese, Korean and others whose assets had been seized or who had been forced into slave labor.

Concerned with the disparity in the U.S. government's treatment between the German and Japanese restitution claims, in June 2000, the Senate Judiciary Committee held a hearing on the matter.⁸⁰ At the hearing, the State Department maintained its position that the 1951 Peace Treaty barred the claims of the POWs in the litigation against the Japanese corporations.⁸¹ At the conclusion of the hearing, and at the urging of Committee Chairman Senator Orrin Hatch, the State Department representative agreed to re-evaluate the government's position.⁸² Subsequently, the U.S. government filed two more Statements of Interest, urging that cases filed by (1) alien civilians against private Japanese companies similar to the claims of the allied POWs,⁸³ and (2) claims by sex slaves of the wartime Japanese army (the so-called "comfort women") also be dismissed.⁸⁴ As a consequence, in September 2001, Judge Walker dismissed the claims of the alien civilians. Similarly, in October 2001, the federal district court in Washington, D.C. dismissed the lawsuit filed by the "comfort women" against Japan.⁸⁵ All the cases are now on appeal.

While the above-quoted waiver language of article 14(b) may appear broad, it is not clear that this language in fact bars the type of damages sought in the Japanese litigation: private claims by POWs and civilians against private Japanese companies for uncompensated labor. First, article 14(b) speaks of a waiver of "reparations." The POW and civilian victims are not seeking reparations from the Japanese companies, since reparations are defined as "[p]ayment made by one country to another for damages during war."⁸⁶ Article 14(b) then speaks of a waiver of "other claims of the Allied Powers *and their nationals* arising out

The 1951 treaty with Japan clearly foreclosed a lot of options to seek redress, he said, adding, "In the end we never heard back from the Japanese government or companies." David Sanger, *Report on Holocaust Assets Tells of Items Found in the U.S.*, N.Y. TIMES, Jan. 17, 2001, at A3. Eizenstat, however, did not explain why he continued negotiations with Germany and its industry even after the U.S. courts held that the postwar treaties with Germany also precluded the claims of the slave laborers from Nazi-occupied Europe.

80. *Former U.S. World War II POWs: A Struggle for Justice, Hearing before the Senate Comm. on the Judiciary*, 106th Cong. 14 (2000) [hereinafter "Sen. Judiciary Comm. Hearing"].

81. Referring to article 14(b) of the Peace Treaty, the State Department representative stated:

This is clear and unequivocal language: all reparations claims against Japan and its nationals. . . . The overreaching intent of those who negotiated, signed, and ultimately ratified this Treaty was to bring about a complete, global settlement of all war-related claims, in order both to provide compensation to the victims of the war and to rebuild Japan's economy and convert Japan into a strong ally. It was recognized at the time that those goals could not have been served had the Treaty left open the possibility of continued, open-ended legal liability of Japanese industry for its wartime actions.

Id. at 14-15 (statement of Ronald J. Bettauer, U.S. State Dept. Deputy Legal Adviser).

82. *Id.*

83. Statement of Interest of the United States of America at 28, *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. 2000).

84. Statement of Interest of the United States of America at 35, *Hwang Geum Joo v. Japan*, No. 00-CV-288 (D.D.C. filed April 27, 2001); see also Bill Miller, *U.S. Resists 'Comfort Women' Suit*, WASH. POST, May 14, 2001, at A1.

85. Mem. Opinion at 24, *Hwang Geum Joo* (No. 00-2233). See also K. Connie Kang, *Judge Dismisses Suit by Japan's Ex-Slaves*, L.A. TIMES, Oct. 5, 2001, at A27. Like the Statement of Interest filed by the U.S. in the POW cases, these additional statements undoubtedly also influenced the judges to dismiss these other cases.

86. BLACK'S LAW DICTIONARY 1298 (6th ed. 1990).

of any actions taken by Japan *and its nationals in the course of the prosecution of the war.*” While this second waiver appears to extinguish the individual claims of U.S. nationals and the nationals of U.S. allies (the plaintiffs in these suits) against the nationals of Japan (which would include the private Japanese corporations named as defendants), it also contains an important qualifier. Not all claims for any wartime actions taken by Japanese nationals are waived, rather, only those wartime “actions taken. . . in the course of the prosecution of the war.”⁸⁷

It is quite reasonable to interpret this clause to exclude actions taken by private Japanese companies for profit (i.e. the use of unpaid slave labor) as not being actions taken in the “course of the prosecution of the war.” In fact, the U.S. Supreme Court, in a post-war appeal of a treason conviction of a dual U.S.-Japanese national who worked for a Japanese mining company and brutally abused U.S. POWs who worked there, opined that Japanese companies doing business during the war should be viewed as nothing more than private, profit-making ventures.⁸⁸ Private, profit-making enterprises do not prosecute war; governments do.

Another article of the 1951 Peace Treaty also bolsters plaintiffs’ claims. Article 26 states that if Japan ever entered into a war claims settlement agreement with any other country that provides terms more beneficial than those extended to the Allied Powers signatories to the 1951 Treaty, then those more favorable terms would be extended to the Allied Powers.⁸⁹ In fact, Japan entered into subsequent bilateral treaties with Sweden, Spain, Burma, Denmark, the Netherlands and Russia, in which it agreed to pay compensation to the na-

87. The term “*in the prosecution of the war*” is never defined in the 1951 Peace Treaty. However, before the Senate Judiciary Committee hearing, three international law professors submitted opinions stating that the claims being made in the Japanese slave labor litigation do not come fall within the meaning of that term. See Senate Judiciary Comm. Hearing, *supra* note 80.

88. *Kawakita v. United States*, 343 U.S. 717 (1952). Defendant Kawakita defended his actions on the ground of coercion. He argued before the Supreme Court that, as an employee of Oeyama Nickel, which used soldiers captured by the Japanese military as captive labor, he was part of the Japanese war effort. The Supreme Court rejected this characterization of his status and that of Oeyama Nickel:

The Oeyama Nickel Industry Co., Ltd., was a private company, organized for profit. . . . The company’s mine and factory were manned in part by prisoners of war. They lived in a camp controlled by the Japanese army. Though petitioner [Kawakita] took orders from the military, he was not a soldier in the armed services. . . . His employment was as an interpreter for the Oeyama Nickel Industry Co., Ltd., a private company. The regulation of the company by the Japanese government, the freezing of its labor force, the assignment to it of prisoners of war under military command were incidents of a war economy. But we find no indication that the Oeyama Company was nationalized or its properties seized and operated by the government. The evidence indicates that it was part of a regimented industry; but it was an organization operating for private profit under private management.

Id. at 727-28.

89. Article 26 provides: “Should Japan make a peace settlement or war claims settlement with any State granting that State greater advantages than those provided by the present Treaty, those same advantages shall be extended to the parties to the present Treaty.” Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 136 U.N.T.S. 45.

tionals of those countries.⁹⁰ Therefore, even if article 14(b) of the 1951 Peace Treaty is interpreted as a bar to compensation claims by nationals of the Allied Powers signatories against Japan or its nationals, that bar was impliedly lifted, pursuant to article 26, when Japan agreed to make payments to the nationals of other countries under the subsequent peace treaties it signed.

Judge Walker held, however, that the article 26 “more favorable treatment” clause⁹¹ cannot be asserted by private individuals. Rather, since it is part of a treaty between Japan and the Allied signatory nations, he ruled that only a signatory nation can assert the provision against Japan.⁹² With this in mind, and given the strong legal arguments in favor of allowing restitution, in March 2001, Congress introduced a bill specifically for that purpose.⁹³ The bill, with over forty co-sponsors, is presently before the U.S. House of Representatives. If the bill passes in Congress, it remains unclear what position the Bush Administration will take on it.

As of January 2002, it appears that the restitution movement against the Japanese companies (and Japan) is not achieving the same favorable results as those achieved in the restitution movement against the European companies (and European governments) for their wartime activities, at least in federal court.⁹⁴ No doubt, the hostile positions of both the Clinton and Bush adminis-

90. For example, in the bilateral Japan-Netherlands Treaty, entered into in 1956, Japan, “[f]or the purpose of expressing sympathy and regret for the sufferings inflicted during the Second World War by agencies of the Government of Japan upon Netherlands nationals,” agreed to pay \$10 million “to the Government of the Kingdom of The Netherlands on behalf of those Netherlands nationals.” Protocol Between the Government of the Kingdom of the Netherlands and the Government of Japan Relating to Settlement of the Problem Concerning Certain Types of Private Claims of Netherlands Nationals, March 13, 1956, art. 1, No. 3554.

91. Courts have also called this type of clause in a treaty a “most favored nation” clause, borrowing the phrase from economic trade agreements. *See, e.g.*, *United States v. Cole*, 717 F. Supp. 309 (E.D. Penn. 1989).

92. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 945.

93. Justice for United States Prisoners of War Act of 2001, H.R. 1198, 108th Cong. (2001). Section 3(a)(2) of the bill also would specifically construe section 14(b) of the 1951 Peace Treaty as *not* “constituting a waiver by the United States of claims by nationals of the United States, including claims by members of the United States Armed Forces, so as to preclude [litigation of such claims].” *Id.*

94. Two California state judges have issued decisions finding that the claims against the Japanese companies are not barred by the 1951 Peace Treaty:

In September 2001, one day before Judge Walker dismissed in federal court the claims of the alien civilians, Judge Peter Lichtman of the California Superior Court in Los Angeles held that such claims are not extinguished by the Peace Treaty. The court found that because the plaintiff alien civilian in that case, a former Korean national and now a U.S. citizen, 1) was not a national of the United States at the time of signing of the Treaty, and 2) since Korea was not a signatory to the Treaty, the plaintiff’s claims against the private Japanese companies for forced labor could not be barred by the Treaty. *See Court’s Ruling Re: Defendants’ Second Motion for Judgment on the Pleadings, Jae Won Jeong v. Onoda Cement Co., Ltd., et. al.* (Super. Ct. Los Angeles County, 2001, No. BC217805). The court also found that there is conflicting authority whether a 1965 Treaty between South Korea and Japan bars such claims. *In light of conflicting foreign authority*, Judge Lichtman chose to apply California law, CAL. CIV. PROC. CODE 354.6, which specifically authorizes such claims. The court therefore concluded “that there has been no waiver or bar to the claims presented.” *Id.* at 12.

In November 2001, Judge Lichtman again rejected the Japanese companies’ dismissal motion. This time, the defendant companies, in the aftermath of Judge Walker’s September 2001 ruling that CAL. CIV. PROC. CODE 354.6 was unconstitutional, attempted to have Judge Lichtman dismiss the

trations to these claims, contrary to their views with respect to the Holocaust restitution claims, has played a key difference. While millions of aging Jewish and non-Jewish survivors, both in the United States and abroad, are finally receiving some measure of justice for the wrongs that European enterprises committed against them during World War II, aging POWs and civilians who suffered at the hands of the Japanese industry are being denied the same treatment.⁹⁵

case on that same ground. Judge Lichtman declined to do so. *See* Court's Ruling Re: Defendants' Motion for Judgment on the Pleadings, *Jae Won Jeong v. Onoda Cement Co., Ltd., et. al.* (Super. Ct. Los Angeles County, 2001, No. BC217805). In his second ruling, Judge Lichtman specifically declined to follow the reasoning of Judge Walker:

[T]his court respectfully declines to follow the [federal] District Court's orders and finds that said rulings lack persuasive reasoning and are inconsistent with the reasoning of the Ninth Circuit in both *Gerling Global Insurance Corp. of America v. Low* (9th Cir. 2001) 240 F.3d 739 and *Patrickson v. Dole Food Co., Inc.* (9th Cir. 2001) 251 F.3d 795.

Id. at 9-10. Earlier in the opinion, the California judge critiqued Judge Walker as follows:

Regrettably, the District Court *never* explains, nor is it apparent, how Japan's current government is even remotely relevant to Plaintiff's claims. Once again it bears repeating that the case before this Court involves claims by private individuals against private companies doing business in or having contacts with California. The claims being asserted *are not being prosecuted against the government of Japan.*

Id. at 7 (emphasis in original).

The United States government submitted yet another Statement of Interest, this time in support of the Japanese companies' claims that CAL. CIV. PROC. CODE 354.6 was unconstitutional. Judge Lichtman was greatly troubled by the differing positions taken by the United States with regard to the World War II-era litigation claims. As he explained, in the Holocaust-related cases:

[T]here was no Statement of Interest asserted by the federal government. . . . In light of the above, it struck this Court that the United States has issued its Statements of Interest in a somewhat disparate fashion. While, on the one hand, victims of the European Theatre can proceed to seek reparations against *'the Nazi regime, its allies or sympathizers. . .'* yet on the other hand, victims of the Pacific Theatre may not. Facially, this policy, if it is a policy, appears to be legally unsupportable. This Court is greatly troubled by this approach.

Id. at 10-11 (emphasis in original). Judge Lichtman declined to follow the views of the U.S. government in its Statement of Interest. Both of Judge Lichtman's decisions can be found at http://www.liefcabraser.com/japanese_slave_labor.htm (website of one of the plaintiffs' attorneys).

In October 2001, Judge William McDonald of the California Superior Court in Orange County, in three cases before him brought by POWs or their widows against Japanese companies, declined to dismiss these cases, finding that "factual issues exist as to the application, if any, of the 1951 Peace Treaty with Japan to the plaintiffs' claims. . . ." *See In Re Japanese P.O.W. Cases* (Super. Ct. Orange County, 2001, No. 4153). Judge McDonald also declined to follow the federal government's opinion that the Peace Treaty barred the claims: "While the State Department's position is entitled to some deference, it is the courts, not the executive branch, that will ultimately determine the meaning or applicability of a treaty." *Id.* at 2. (citing *Kolovrat v. Oregon*, 366 U.S. 197 (1961) and *Sullivan v. Kidd*, 254 U.S. 433 (1921)).

A conflict now exists, therefore, between one federal judge in California and two California state judges as to (1) the correct interpretation of the 1951 Peace Treaty; and (2) the constitutionality of CAL. CIV. PROC. CODE, § 354.6. This conflict will have to be resolved by the federal and California appellate courts, as these cases are winding their way through the appeals process.

95. For a recent editorial severely criticizing the disparity between the U.S. government's position toward the two sets of claimants, see Iris Chang, *Betrayed by the White House*, N.Y. TIMES, Dec. 24, 2001. The writer, author of the seminal treatise on Japanese wartime atrocities committed during the Rape of Nanking, comments:

The decision of the Bush administration to wage a legal fight against its own veterans is shortsighted as well as morally insupportable. A sustained assault against terrorism

IV.

THE HOLOCAUST-ERA RESTITUTION MOVEMENT AS A MODEL FOR OTHER
COMPENSATION CLAIMS FOR HISTORICAL WRONGSA. *Insurance Claims Arising Out of the Armenian Genocide*

During the Turkish Ottoman Empire, Armenians and other minorities purchased insurance policies from European and American insurance companies, which marketed those policies in the region. Many of the Armenian purchasers perished in the Armenian genocide during and after World War I. Their relatives, some of whom survived the genocide as young children and are now quite elderly, sought payment from the insurers, claiming that payments were never made on the policies.

In 2000, twelve elderly Armenians brought the first, and to date, only lawsuit filed with regard to these insurance claims against the American insurance giant New York Life Insurance Company. All but one of the claimants reside in the United States. Claimants filed the suit, *Marootian v. New York Life Ins. Co.*⁹⁶, as a class action, akin to the Holocaust restitution and Japanese slave labor litigation, and sought for New York Life to pay on the policies. In response, New York Life filed motions to dismiss. The insurance company did not dispute that it sold such policies to the Armenian population in Ottoman Turkey. In fact, it combed its archives and located records, including aged insurance cards, for 2,300 Armenian policy holders from that time period. It argued, however, that the suit should be dismissed because all of the policies contained forum selection clauses mandating that if a dispute ever arose about the policies, the parties would resolve such a dispute either before French or English courts.⁹⁷ In addition, New York Life argued that, since the policies were written and allegedly unpaid almost a century ago, the lawsuits were time-barred.

California again came to the rescue. In 2001, the California legislature enacted a statute similar to those it had passed in response to the World War II-era insurance and slave labor litigation, using the previous actions in the Holocaust restitution movement as a model for the present actions against the Armenian insurance companies. Like the World War II-related statute, this statute (1) allows suits to collect benefits on Armenian genocide-era policies to be heard in

will require men and women who believe their country and their commander in chief stand behind them. Americans should be ashamed that the government is now prepared to sacrifice the interests of a previous generation of soldiers in order to woo their former enemy. Our leaders in Washington must not be permitted to sell out the men who gave so much in the fight for freedom. Otherwise, what shall live in infamy will be not only Pearl Harbor and Sept. 11, but this unjust betrayal. If we are to have another 'greatest generation' we must duly honor the rights of the first one.

Id.

96. No. 99-12073 (C.D. Cal. filed Jan. 17, 2000).

97. Mem. of Points of Authorities In Support of Defendant's Motion To Dismiss Due To Improper Venue at 2-3, *Marootian* (No. 99-12073). The policies purportedly contain one of the following two forum selection clauses: 1) "For the enforcement of this document, the civil Courts of France will be the only competent courts"; or 2) "Any action or proceeding under this Policy shall be brought in the London Courts." *Id.* at 2.

California courts, despite the forum-selection clauses in the policies, and (2) extends the limitations period of such suits to 2010.⁹⁸

In May 2001, New York Life agreed to settle the matter. A preliminary settlement was reached for \$15 million but was not finalized as plaintiffs demanded a larger settlement.⁹⁹ As of January 2002, the parties were still negotiating to finalize the agreement.¹⁰⁰

The legacy of the Holocaust restitution cases was critical to the success of the settlement reached in the Armenian genocide litigation. The effective use of the American litigation system and political pressures in the Holocaust arena in order to bring justice to long-forgotten historical wrongs inspired the victims of Armenian genocide to seek the same for their historical inequities.¹⁰¹ In turn, the Armenian genocide litigation has now created its own legacy, pushing back the time limits for recognition of historical wrongs by the U.S. justice system by an additional 50 years to the beginning of the 20th century.

B. *The Call for African-American Reparations*

One of the most interesting consequences of the Holocaust restitution litigation has been to give fresh impetus to the call for payments to African-Ameri-

98. The applicable provisions of the new statute, CAL. CIV. PROC. CODE, § 354.4, read: (b) Notwithstanding any other provision of law, any Armenian genocide victim, or heir or beneficiary of an Armenian Genocide victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923 from an insurer. . . may bring a legal action or may continue a pending legal action to recover on that claim in any court of competent jurisdiction in this state, which shall be deemed to be the proper forum for that action until its completion or resolution.

(c) Any action, including any pending action brought by an Armenian genocide victim, whether a resident or nonresident of this state, seeking benefits under the insurance policies issued or in effect between 1875 and 1923 shall not be dismissed for failure to comply with the applicable statute of limitations, provided the action is filed on or before December 31, 2010.

Id. at §§ 354(b) and (c).

New York Life challenged the constitutionality of CAL. CIV. PROC. CODE, § 354.4 on the same grounds that the Japanese companies challenged the constitutionality of CAL. CIV. PROC. CODE, § 354.6, California's slave labor litigation statute. On November 30, 2001, federal judge Christina Snyder rejected New York Life's arguments, finding, in a lengthy opinion, that CAL. CIV. PROC. CODE, § 354.4 was constitutional. Judge Snyder also held that California courts do possess jurisdiction over claims against insurance carriers arising out of the Armenian genocide. *See Order Denying Defendant's Motion to Dismiss Due to Improper Venue Under Fed. R. Civ. P. 12(B)(3), Marootian v. New York Life Insurance Co.*, No. CV-99-12073, 2001 U.S. Dist. LEXIS 22274 (C.D. Cal. Dec. 3, 2001).

99. Nathan Vardi, *Settling A Case - After 85 Years*, FORBES, May 14, 2001, at 120. *See also* Beverly Beyette, *He Stands Up In The Name of Armenians*, L.A. TIMES, Apr. 27, 2001, at E1.

100. Interview with Vartkes Yeghyan, attorney for plaintiffs (Oct. 3, 2001).

101. "For the first time [the Armenian community] has gone beyond lamentation and liturgy to litigation, from 'going to church every April 24 [Armenian Day of Remembrance] and mourning' to taking legal action." Beyette, *supra* note 97 (quoting plaintiffs' attorney Vartkes Yeghyan; brackets in original). Paying homage to the Holocaust restitution movement, Yeghyan comments: "Holocaust victims' heirs' showed me the way." *Id.* *See also All Things Considered: Class Action lawsuit against New York Life filed by heirs of Armenian policyholders during the First World War*, (NPR radio broadcast Apr. 9, 2001) available at 2001 WL 9434314 ("The legal challenge is modeled on similar efforts by survivors of the Nazi Holocaust": Comment of NPR host Linda Wertheimer).

cans by the U.S. government for pre-Civil War slavery. The African-American reparations movement is now being taken seriously as a direct result of the achievements made in the Holocaust restitution arena. Reparation proponents specifically point to settlement agreements for WWII wrongs as precedent for their cause. If the American legal system can be used to obtain \$8 billion in compensation from European entities for slavery and other wrongs committed in another part of the world over a half-century ago, they argue, why can similar compensation not be made for slavery that occurred here in the United States, which ended over a century ago, but whose consequences still reverberate in the African-American community today?

Holocaust survivors and their heirs have been seeking restitution for over fifty years. The African-American slavery reparations movement is well over a century old.¹⁰² Every year since 1989, Michigan Representative John Conyers, Jr., has unsuccessfully introduced legislation in Congress to study the issue of slavery reparations.¹⁰³

An important precedent for African-American reparations was the success of the so-called redress movement for the internment of American citizens of Japanese ancestry in the United States during World War II.¹⁰⁴ The redress movement resulted in the 1998 passage of the Civil Liberties Act,¹⁰⁵ which authorized a one-time lump-sum payment of \$20,000 to approximately 60,000 Japanese-American survivors of the wartime internment.¹⁰⁶ Equally significant, in 1990, President George Bush issued an apology to the Japanese-Americans on behalf of the United States government for their wartime imprisonment.¹⁰⁷

In 1999, prominent African-American activist Randall Robinson published *The Debt*, which forcefully argued for slavery reparations.¹⁰⁸ The book's theme, however, did not gain much interest outside the African-American community until Robinson and others began to use the Holocaust restitution movement as a model for their cause. Robinson now was able to entice superstar attorney Johnnie Cochran to join him. There is currently talk of putting together

102. For a history of the African-American reparations movement, see Robert Wesley, *Many Billions Gone: Is It Time To Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998).

103. Tamar Levin, *Calls for Slavery Restitution Getting Louder*, N.Y. TIMES, June 4, 2001, at 1.

104. For a discussion of the parallels between the two movements, see Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 19 B.C. THIRD WORLD L.J. 477 (1988).

105. 50 U.S.C. § 1989(b)4 (1998). See also *Mochizuki v. United States*, 43 Fed. Cl. 97 (Fed. Cl. 1999).

106. For a discussion of the movement for payments and apology for the wartime internment of Americans of Japanese ancestry, see ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 30-41 (2000) and sources cited therein.

107. "A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustices and to uphold the rights of individuals. We can never fully right the wrongs of the past. . . In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality and justice." *Id.* at 43 (quoting President George Bush).

108. RANDALL N. ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (1999).

another “dream team” of lawyers to file suit for African-American slavery restitution.¹⁰⁹

Such a suit would face a variety of procedural legal obstacles. Foremost, of course, would be the statute of limitations. Slavery in the United States ended in 1865, and the suit appears to be time-barred. As with the Holocaust restitution and Japanese slave labor litigation, this can be overcome by the passage of a federal or state law extending the statute of limitations (*i.e.* the California statutes created a new limitations period for WWII claims, expiring in 2010). A more difficult problem that such a lawsuit would face is finding the proper class of aggrieved claimants. In both the Holocaust restitution and Japanese slave labor lawsuits, the plaintiffs were the actual slaves or their immediate heirs. Similarly, in the Japanese-American internment movement, the claimants also were individuals who were actually interned by the U.S. government during the war. No former American slaves are alive today to serve as plaintiffs.¹¹⁰

Passage of time and identification of claimants pose major legal obstacles to a suit for African-American reparations to be recognized by a U.S. court. Most likely, a suit seeking such damages will be summarily thrown out of court, if ever filed, based on the time factor alone. In fact, in 1995, the Ninth Circuit affirmed the dismissal of two suits brought by African American plaintiffs against the U.S. government seeking reparations.¹¹¹ The court of appeals held that: (1) the United States possesses sovereign immunity to such claims; (2) that the claims are time-barred, and (3) claimants lack standing to pursue such claims since they themselves were never slaves.¹¹²

However, when the first Holocaust restitution lawsuit was filed in October 1996 against the Swiss banks, most legal observers viewed the suit as a “sure loser.” Less than two years later, the Swiss banks were ready to pay \$1.25 billion to end the litigation. Similarly, Germany and its industry, in the face of the slave labor litigation, agreed to pay DM 10 billion (\$4.8 billion) in Decem-

109. Rick Montgomery, *Emotions High When The Issue Is Reparations; Push to Make Amends for Slavery Advances*, THE KANSAS CITY STAR, Mar. 11, 2001, at A1. Others on the reparations legal “dream team” include Harvard Law School professor Charles Ogletree, Alexander Pires, Jr., who won a \$1 billion settlement for African-American farmers for discrimination by the U.S. Department of Agriculture, and Richard Scruggs, who obtained a \$368 billion settlement with the tobacco companies for suits filed by various U.S. states. Laura Peek, *US Lawyers to Sue for Slavery Reparations*, THE TIMES OF LONDON, Jan. 2, 2001, at 16. The formal name of the legal team is “The Reparations Coordinating Committee.” Tamar Levin, *Calls for Slavery Restitution Getting Louder*, N.Y. TIMES, June 4, 2001, at 1.

A separate legal team, the “Reparations Litigation Committee,” established by the National Coalition of Blacks for Reparations in America (N’COBRA), is also planning to file suit. <http://www.ncobra.com>.

110. Stuart Eizenstat, President Clinton’s chief envoy on Holocaust restitution and one of the chief architects of the Holocaust-era settlements, explains the difference between the two movements as follows: “For slavery *qua* slavery, I think the appropriate remedy is affirmative government action in general, rather than reparations And if 100 years from now the great-great-grandson of a Holocaust laborer asked for reparations, I don’t think that would be appropriate, unless there was some specific property that had been confiscated that they wanted to cover.” Tamar Levin, *Calls for Slavery Restitution Getting Louder*, N.Y. TIMES, June 4, 2001, at 1.

111. *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995).

112. *Id.* at 1107-1111.

ber 1999, just months after two New Jersey federal courts ruled that German companies were immune from such litigation in the United States.

One of the most critical 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, either through a court settlement or through the political arena or both, becomes much more likely. The call for African-American reparations presently has such momentum. The issue has been featured on all the major American television networks.¹¹³ The print media has written lengthy and incisive articles about the issue, including a recent piece in the *New York Times*¹¹⁴ and a cover story in the leading American law magazine, the *ABA Journal*.¹¹⁵ Politicians have also gotten into the act. In 2000, the Chicago City Council passed a resolution calling for federal hearings on the issue. Cleveland, Detroit, and Dallas also passed similar resolutions.¹¹⁶ California, again leading the way, enacted a law in 2001 forcing American insurance companies who sold policies insuring slaves as chattel to disclose information about such policies.¹¹⁷

The momentum that currently exists in the African American reparations movement sets the stage for the next step of filing suits against these insurers for compensation and disgorgement of profits, similar to the earlier Holocaust-era insurance lawsuits and the suits against American insurers for profiting in the aftermath of the Armenian genocide. In March 2000, Aetna Insurance Company issued an apology for having issued policies to slave owners insuring slaves as property.¹¹⁸ As with culpable insurers in the Holocaust-era and Armenian genocide claims, public pronouncements of contrition may not be enough. Aetna and other American insurers that issued similar slave policies may now be forced to confront lawsuits and make some form of financial restitution for their long-forgotten activities.

V.

THE CONSEQUENCES OF HOLOCAUST RESTITUTION

The debate about whether victims of the Holocaust should accept restitution payments brings into question the effectiveness and validity of all the restitution movements. Does the taking of moneys by the survivors demean the memory of the deceased victims? Does it allow the perpetrators or their heirs to now claim that their debt has been paid, and all moral guilt extinguished? Such

113. See, e.g., *20/20: America's IOU: Debate Over Reparations To Black Americans For Slavery* (ABC television broadcast, Mar. 23, 2001) available at 2001 WL 21803895.

114. Tamar Levin, *Calls for Slavery Restitution Getting Louder*, N.Y. TIMES, June 4, 2001, at 1.

115. Ghannam, Jeffrey, *Repairing the Past*, ABA J., Nov. 2000. For a view, by an African-American, arguing against the reparations movement, see Jack E. White, *Don't Waste Your Breath*, TIME, Apr. 2, 2001, at 48. See also John McWorter, *Against Reparations*, THE NEW REPUBLIC, July 23, 2001, at 32 (cover story).

116. Rick Montgomery, *Emotions High When The Issue Is Reparations; Push to Make Amends for Slavery Advances*, THE KANSAS CITY STAR, March 11, 2001, at A1.

117. CAL. INS. CODE §§ 13811 – 13813 (West 2001).

118. Peter Slevin, *In Aetna Archives, Insurance Policies on Slaves for Owners*, WASH. POST, Mar. 9, 2000, at A17.

questions are raised whenever monetary damages are sought from those responsible for genocide or other massive human rights abuses. On the whole, the Holocaust restitution movement has proven that the beneficial consequences it has produced for the victims of the Holocaust, coupled with the positive precedents it has set for future restitution movements, far outweigh any questions that might exist with regard to acceptance of restitution monies.

At the end of World War II, both Holocaust survivors and the new State of Israel (created, to a large extent, as a reaction to the Holocaust and which today still has the largest population of Holocaust survivors per capita) found themselves in, what historian Elazar Barkan has called, "the Faustian predicament."¹¹⁹ Should Israel and the survivors accept restitution from a willing West Germany, or does acceptance of such funds dishonor the six million killed by the Nazis?

Informal negotiations began between West Germany and Jewish representatives after it became clear that the Western allies would not impose onerous reparations on defeated Germany. These representatives met in secret, fearing the reaction from Jewish opponents who viewed the Jewish delegates as traitors.¹²⁰ In September 1951, the German Chancellor Konrad Adenauer indicated West Germany's willingness to make restitution payments to Israel and the surviving victims. In January 1952, the Israeli Knesset (Parliament) agreed to authorize negotiations with West Germany over the payments. The debate that followed over whether such negotiations should take place was raucous, with opponents labelling such payments as "blood money." Street demonstrations, led by both opponents and proponents, showed the terrible rift in the Israeli populace over the issue, creating the first great debate in the new Israeli state. The controversy was mirrored outside Israel, as American Jewry and surviving European Jews also held angry exchanges as to how to respond to the West German offer.¹²¹

Pragmatism eventually won out. Israel was in dire financial straits, needing an estimated \$1.5 billion to resettle the refugees from Europe. It was agreed that West Germany would pay \$1 billion of that amount. This led to the next stage of payments, where individual Holocaust survivors throughout the world began receiving lifetime monthly payments from West Germany. These payments still continue today. To date, Germany has paid approximately \$60 billion.¹²²

119. *Id.* at 3. An excellent discussion of the debate about accepting restitution from post-war Germany is found in TOM SEGEV, *THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST*, 189-252 (1991).

120. Interview with Benjamin Ferencz, one of the Jewish representatives to the negotiations (Apr. 23, 2001).

121. ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 9, 23-27 (2000).

122. The Conference on Material Claims Against Germany, *1998 Annual Report*, at 1 ("Since the end of the initial negotiations in 1952, the German government has paid more than DM 118 billion in indemnification for suffering and losses resulting from Nazi persecution.") The Claims Conference is the umbrella organization for worldwide Jewry dealing with wartime compensation from Germany and Austria. For a discussion of the Claims Conference, see generally, RONALD W. ZWEIF, *GERMAN REPARATIONS AND THE JEWISH WORLD: A HISTORY OF THE CLAIMS CONFERENCE*

While this amount comes nowhere close to compensating the material losses suffered by European Jewry during World War II—never mind the loss of life—the debate over whether to accept financial restitution appeared to have been settled by the late 1950s. Presently, however, that does not appear to be the case. The same debate has now reemerged, more than forty years later, with the Holocaust restitution litigation in the United States.

The first publicly raised misgivings over the litigation appeared in late 1998, with two prominent editorials. In December 1998, Abraham Foxman, head of the U.S.-based Anti-Defamation League and himself a Holocaust survivor, wrote a commentary in the *Wall Street Journal*,¹²³ labelling the litigation against the Swiss banks as undignified. In an oft-repeated statement, he decried that this struggle for restitution from the private defendants makes money the “last sound bite” of the Holocaust.¹²⁴ According to Foxman, this is a “desecration of the victims, a perversion of why the Nazis had a Final Solution, and too high a price to pay for justice we can never achieve.”¹²⁵

In a similar tone, that same month nationally syndicated columnist Charles Krauthammer published his critique of the litigation under the title “Reducing the Holocaust to Mere Dollars and Cents.”¹²⁶ Krauthammer suggested that “[i]t should be beneath the dignity of the Jewish people to accept [money], let alone to seek it.”¹²⁷ To Krauthammer, the villains are the lawyers. He accused attorneys representing Holocaust victims of being “shysters” out to commit a “shake-down of Swiss banks, Austrian industry, [and] German automakers.”¹²⁸ Krauthammer warned that “[t]he scramble for money by lawyers could revive anti-Semitism [in Europe].”¹²⁹

(1987). See also Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 25- 28 (collecting criticism and litigation against the Claims Conference by Holocaust survivors and others).

123. Abraham H. Foxman, *The Dangers of Holocaust Restitution*, WALL STREET J., Dec. 4, 1998, at A18. In 2001, Efraim Zuroff, director of the Israeli office of the Simon Wiesenthal Center, publicly echoed Foxman’s concerns. According to Zuroff:

I think this is a dangerous thing, that people are getting hung up on the financial aspects. This is not what the Shoah [Hebrew word for the Holocaust] is about. People are going to think: Why are Jews so obsessed with the Holocaust? Because they want to give in a bill the end of the day.

Elli Wohlgelemer, *Compensation Issue Clouds Holocaust Message*, JERUSALEM POST, Jan. 19, 2001 at 6A. Referring to the billion dollar settlements obtained, Zuroff explained:

These are deals that have far-reaching implications, way beyond the dollars and cents that are being obtained. And I’m not always so sure that the success in getting money will be translated into success in getting the idea across. The thing that scares me more than anything else is that people will really get the wrong idea about all of this, and will increasingly think of the economic aspects of this, which is not what this is all about. This is a secondary, or tertiary byproduct of the crimes of the Holocaust.

Id.

124. Foxman, *supra* note 121.

125. *Id.*

126. Charles Krauthammer, *Reducing the Holocaust to Mere Dollars and Cents*, L.A. TIMES, Dec. 11, 1998, at 26.

127. *Id.*

128. *Id.*

129. *Id.*

That same message was a theme in an angry diatribe published in 2000, with the sensational title, *The Holocaust Industry*.¹³⁰ In the book, American professor Norman Finkelstein accused Jewish organizations in the United States of using the Holocaust to perpetuate their existence. Finkelstein claims that these organizations are extorting money from European businesses, which are vulnerable to blackmail because they dealt with the Nazis during the war. An anti-Zionist, Finkelstein also sees the movement as part of the drive to bolster the policies of Israel.¹³¹

While Finkelstein's book has largely been ignored in the United States,¹³² it has received extensive publicity in Europe. Finkelstein was featured on the BBC as the book was launched in England. The London-based daily *The Guardian* serialized portions of the book.¹³³ The *Economist* labelled it a "provocative new book."¹³⁴ It also became a best-seller in many European countries, including Germany and Switzerland.¹³⁵ Finkelstein has been able to reap much of his publicity from "the fact, first that he himself is Jewish and, second, as he repeats shamelessly at every opportunity, that he is the son of Jews who suffered in the Holocaust."¹³⁶

130. NORMAN FINKELSTEIN, *THE HOLOCAUST INDUSTRY: REFLECTIONS ON THE EXPLOITATION OF JEWISH SUFFERING* (2000).

131. In an interview with the Egyptian weekly, *Al-Ahram*, Finkelstein explained:

I had a political motive to write the book because the Holocaust industry has exploited the Jewish people's suffering in order to justify flagrant human-rights violations by Israel against the Arabs, most notably the Palestinians . . . I thought that there is a political responsibility to repudiate this political misuse of Jewish people's suffering to justify and rationalize the suffering of others. I felt it important to restore the scholarly record on the Nazi Holocaust, which has been recklessly falsified by the Holocaust industry in its greedy pursuit of compensation money.

Omayma Abol-el-Latif, *The Business of Shoah: who dares speak?* AL-AHRAM WEEKLY, NOV. 9-15, 2000, available at <http://www.ahram.org.eg/weekly/2000/507/books6.htm>.

132. "While some leading American historians have welcomed Mr. Finkelstein's determination to open up the subject of how the Holocaust is remembered for debate, they have generally been fiercely critical of his conspiracy theories about American Jews and contested the accuracy of the book." Roger Cohen, *Book Calling Holocaust A Shakedown Starts A German Storm*, N.Y. TIMES, Feb. 8, 2001 at 1. For a well-written, critical review, see Mike Steinberger, *He Could Have Been A Star*, THE JERUSALEM REPORT, Aug. 28, 2000, at 44.

133. Norman Finkelstein, *The Holocaust Industry*, THE GUARDIAN, July 12, 2000 at 1; Norman Finkelstein, *The Holocaust Industry*, THE GUARDIAN, July 13, 2000, at 1.

134. *Explosive Charges*, THE ECONOMIST, Aug. 5, 2000, at 103. The book reviewer concludes: "[Finkelstein] is obsessive, and he rants. Yet his basic argument that memories of the Holocaust are being debased is serious and should be given its due." *Id.*

135. See, e.g., DER SPIEGEL, 17/2001, at 217 (listing *Die Holocaust-Industrie* as #2 on the non-fiction German bestseller list). See also Roger Cohen, *Book Calling Holocaust A Shakedown Starts a German Storm*, N.Y. TIMES, Feb. 8, 2001, at 1: "The publication of a book here today by an American historian declaring that the Holocaust has become an 'extortion racket' through which some Jews blackmail Germany has ignited a stormy debate. A television documentary on the author, Norman Finkelstein, . . . was canceled at the last moment . . . Mr. Finkelstein, protected by security guards, and looking tense, said he was 'concerned about the enthusiastic reception of my book that may occur in right-wing circles'. . . . But the author, who teaches at Hunter College, said his worries about how the German right would use his book were outweighed by his determination to put 'the Holocaust industry out of business' and so end what he called the 'exploitation of my parents' memory.'"

136. Gabriel Schoenfeld, *Controversy: Holocaust Reparations*, COMMENTARY, Jan., 2001, at 20.

A more serious critique of Holocaust litigation appeared last year in *Commentary*, the respected Jewish monthly, written by its senior editor Gabriel Schoenfeld, and entitled *Holocaust Reparations—A Growing Scandal*.¹³⁷ Schoenfeld, while not denying the legitimacy of seeking Holocaust restitution payments from the European wrongdoers, expressed concern about how the movement was being conducted. He accused the Jewish community leaders involved in the restitution efforts of ignoring the concerns of individual survivors, frequently lacking adherence to historical truth in making their accusations against the wrongdoers, and failing to see the impact that the movement is having on other vital Jewish interests, primarily the security of the State of Israel.

In some respect, Schoenfeld and other critics have valid claims. Actual payments that the Holocaust claimants will receive are minuscule (whether \$7,500 or \$50,000) compared to the personal and financial losses they suffered. The payments made by the corporate wrongdoers will come nowhere close to disgorging the profits they made from their dealings with the Nazis or participation in the Holocaust. Moreover, anti-Semitism may increase as a result of these latest financial demands being made on behalf of Jewish victims of the war.

Nevertheless, not seeking financial restitution, in the face of documented proof that financial giants worldwide are sitting on billions of dollars in funds made on the backs of World War II victims, which they then invested and reinvested many times over during the last half-century, amounts to an injustice that cannot be ignored. Allowing these corporate concerns to escape financial liability amounts to unjust enrichment.

Equally significant, forcing a wrongdoer to pay up is a form of retributive justice. As Stuart Eizenstat, the top U.S. official involved in the Holocaust restitution effort, has observed, "I think there is a certain symbolic quality that only money can convey to repair the injustices."¹³⁸ Israel Singer, rabbi and a leader of the World Jewish Congress who was intimately involved in crafting many of the settlements, explains:

I don't want to enter the next millennium as the victim of history Himmler said you have to kill all the Jews because if you don't kill them, their grandchildren will ask for their property back. The Nazis wanted to strip Jews of their human rights, their financial rights and their rights to life. It was an orderly progression. I want to return to them all their rights.¹³⁹

Richard Cohen, in the *Washington Post*, also accurately answers criticism that seeking compensation and making the wrongdoers pay demeans the memory of the Holocaust:

An immense calamity was committed in Europe, a moral calamity that left a black hole in the middle of the 20th century. Money is the least of it. But money is part of it. Holocaust victims paid once for being Jewish. Now, in a way, they or their heirs are being asked to pay again—a virtual Jewish tax, which obliges them not

137. Gabriel Schoenfeld, *Holocaust Reparations—A Growing Scandal*, COMMENTARY, Sept., 2000, at 1.

138. Richard Wolffe, *Putting A Price On the Holocaust*, IRISH TIMES, Mar. 16, 1999, at 15.

139. *Id.*

to act as others would in the same situation. But in avoiding one stereotype, they adopt a worse one—perpetual victim.¹⁴⁰

Besides obtaining long-overdue restitution, the litigation in America has produced other beneficial effects. The litigation has forced European governments to create various historical commissions,¹⁴¹ which have unearthed new and valuable information about the financial wrongs committed against European Jewry during the war. Private companies, against whom similar accusations have been made, are likewise putting Holocaust historians on retainer and, for the first time ever, opening up their wartime files for inspection.¹⁴²

Similarly, in the United States, former President Clinton created the Presidential Commission on Holocaust Assets to ferret out Nazi-stolen loot, which may have gotten into U.S. government hands in the aftermath of the war.¹⁴³ The Commission issued its final report in December 2000.¹⁴⁴ The report included a study of the plunder by American troops of a train loaded with gold, artworks, and other valuables stolen from the Hungarian Jews by the Nazis. The

140. Richard Cohen, *The Money Matters*, WASH. POST, Dec. 8, 1998, at A21.

141. For example, Switzerland created a historical commission headed by Swiss historian Francois Bergier, to examine its role during World War II. In 1999, the Commission issued its report castigating both the private Swiss banks and the Swiss government for their dealings with the Nazis, and corroborating most of the allegations made in the Holocaust lawsuits filed in the U.S. See BERGIER COMMISSION INDEPENDENT COMMISSION OF EXPERTS, SECOND WORLD WAR, SWITZERLAND AND REFUGEES IN THE NAZI ERA (1999) (report on wartime treatment of refugees by Switzerland).

Similarly, France created a historical commission under former Cabinet minister and Resistance hero Jean Matteoli to examine the looting of assets of Jews in wartime France. The Matteoli Commission likewise accused wartime French officials of theft of Jewish assets, and recommended restitution. See THE PRIME MINISTER'S OFFICE, EXTRACTS FROM THE SECOND REPORT OF THE STUDY MISSION INTO THE LOOTING OF JEWISH ASSETS IN FRANCE (1999).

In 1997, Sweden, a WWII neutral like Switzerland, created a commission to determine the fate of Jewish assets that made their way to the country in the pre-war and war years. In March 1999, the commission submitted its final report. See *Sweden and Jewish Assets: Final Report From the Commission on Jewish Assets At the Time of the Second World War* (1999). To its surprise, the commission found that the issues of Sweden's wartime role as a haven for Jewish assets and as a possible, but unintended, accomplice to the Nazi atrocities have never been examined in Sweden. The commission called for further research in the following three areas: (1) whether Sweden's trade with Nazi Germany prolonged the war and persecution of the Jews; (2) the relationship of Swedish industry to Jews and Jewish businesses at the time of the Nazi persecutions; and (3) persecution in wartime Europe of the non-Jewish victims of Nazi Germany. *Id.* at 18.

In mid-2001, an Italian government commission issued its final report. It determined that both Italian Fascists and Nazis systematically plundered Jewish assets in Italy. Allesandra Rizzo, *Italy Panel Finds Asset Plundering*, AP ONLINE, May 2, 2001. Italian Premier Giuliano Amato stated that the report's findings left him "breathless." *Id.*

142. For example, the Swiss Bankers Association created the Volcker Committee to determine the Swiss banks' dealing with the Nazis. See INDEPENDENT COMMITTEE OF EMINENT PERSONS, REPORT ON DORMANT ACCOUNTS OF VICTIMS OF NAZI PERSECUTION (1999). Deutsche Bank also hired a team of historians to examine its wartime activities. See Jonathan Steinberg, *THE DEUTSCHE BANK AND ITS GOLD TRANSACTIONS DURING THE SECOND WORLD WAR* (1998). Other German companies have followed suit. As reported by *The New York Times*, "the lawsuits have also created a mini-boom for. . . [World War II-era] historians and research [scholars]." Barry Meier, "Chronicles of Collaboration: Historians Are in Demand to Study Corporate Ties to Nazis," N.Y. TIMES, Feb. 8 1999, at C1.

143. The Commission maintains a web site at <http://www.pcha.gov>.

144. See PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS' ASSETS—REPORT TO THE PRESIDENT OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES (December 2000) available at <http://www.pcha.gov/pr9937.htm>.

Allies captured the train on May 16, 1945, a week after V-E Day. According to the report, in a notable exception to the generally good effort of American troops to restore property to its rightful owners, both high-ranking U.S. Army officers and lower-level personnel may have helped themselves to these valuables rather than returning them to the Hungarian Holocaust survivors or the postwar Hungarian Jewish community.¹⁴⁵

In May 2001, a group of Holocaust survivors from Hungary sued the United States, seeking restitution for the American military's complicity in the so-called "Hungarian gold" theft.¹⁴⁶ According to one plaintiffs' attorney, "This is the first case of its type—a class action brought on behalf of Holocaust survivors that charges the U.S. government with improperly disposing of assets."¹⁴⁷

Earlier that year, IBM was sued for its wartime dealings with the Nazis after publication of a sensational study examining IBM's role in supplying the Nazis with custom-made IBM-created punch cards and tabulating machines (which were precursors to modern computers).¹⁴⁸ The IBM equipment apparently enabled the Nazis to identify and categorize their Jewish victims.¹⁴⁹ Suits also have been filed against Ford Motor Company, General Motors, and American financial giants Chase Manhattan Bank and J.P. Morgan & Company. All have been accused of profiting from the Holocaust.¹⁵⁰

Strangely, therefore, the Holocaust restitution movement, born in the United States with a specific focus to determine wartime financial misfeasance in Europe, has now ensnared both the U.S. government and corporate America. The finger of blame that was first pointed from the United States to Europe is now being pointed back.

Even Israel has not been immune from becoming ensnared in the Holocaust restitution controversy. In the face of accusations that Israeli banks, like the Swiss banks, are holding dormant funds deposited in pre-war Palestine by European Jews who perished during the war, the Israeli Knesset, in April 2001, created a commission of inquiry to search for such funds.¹⁵¹ Estimates have placed the value of such dormant accounts in Israeli banks at \$40 million. The commission will also search Israeli property records to determine which landholdings may have belonged to Holocaust victims. The Israeli custodian-general

145. *Id.*, at 113-17.

146. *Rosner v. United States*, No. 01-1895-Civ. (S.D. Fla. filed May 7, 2001).

147. Henry Weinstein, *Hungarians Sue U.S. Over Seized Holocaust Loot Reparations: Plaintiffs Seek Payment For Assets Stolen by Nazis and Captured by Americans*, L.A. TIMES, May 8, 2001, at A14.

148. EDWIN BLACK, *THE IBM AND THE HOLOCAUST* (2001).

149. *Id.* The lawsuit has been temporarily dropped to effectuate the German slave labor settlement, since IBM-Germany is participating in that settlement. For the current state of the litigation, see <http://www.cmht.com> (web site for Cohen, Milstein, Hausfeld & Toll, attorneys for plaintiffs in the lawsuit).

150. For a discussion of these lawsuits, see Michael Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. OF RICH. L. REV., at 259-62 (2000).

151. Isaac Gilbert, *Panel to Probe Holocaust-Era Assets*, THE JERUSALEM POST, Apr. 20, 2001, at 5A.

estimates the value of this unclaimed land at a minimum of \$90 million. The commission chair stated that the goal of the one-year probe is to “arrive at the truth about the assets in Israel of Holocaust victims.”¹⁵²

VI. CONCLUSION

The new trend by governments and corporations to finally “come clean” about the wrongs committed by them in the past would not be occurring without the spotlight being shined on their activities through the lawsuits in the United States.

As shown throughout this article, the successes achieved in obtaining funds from World War II wrongdoers for acts committed over a half-century ago has led to a resurgence of movements seeking to obtain compensation and recognition for other historical injustices. The ongoing claims of the victims of Japanese wartime corporate misfeasance, the spark in the debate about reparations to African-Americans for slavery, the payment to descendants of the Armenian genocide, and new litigation for other historical injustices are all direct consequences of the Holocaust restitution litigation.

The ultimate goal is that the Holocaust restitution cases can serve as a template for a new era of financial relief and recognition for the victims of present war crimes and crimes against humanity, without the fifty-year delay for justice. As a result of the victories achieved by victims of the Holocaust in courts of the United States, individuals and corporations presently engaged in human rights abuses are on notice: eventually you will be held responsible for your misdeeds.

152. *Id.*