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The Role of the United States Government in Recent Holocaust Claims Resolution

Ronald J. Bettauer

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**STEFAN A. RIESENFELD
SYMPOSIUM 2001
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BERKELEY, CALIFORNIA**

**Keynote Address—
The Role of the United States
Government In Recent Holocaust
Claims Resolution**

By
Ronald J. Bettauer*

I am honored to have been asked to deliver the keynote address to the 2001 Riesenfeld Symposium. Berkeley hired Steve, Stefan Riesenfeld, and he came to California, just before the Holocaust. Steve had such a long and wonderful career. The Office of the Legal Advisor had a close connection to, and deep affection for, Steve. He served as Counselor on International Law in our office in 1980 and remained a consultant to our Office from then until his death two years ago. Personally, I would always feel free to call him and discuss a problem with him. While I headed our International Claims Office, I asked him to help us on one of the cases before the Iran-United States Claims Tribunal, which he gladly did.

This year's symposium deals with World War II Reparations and Restitution. This is a field in which we have seen amazing developments in just the last few years. Many of the participants in this symposium have played a role in those developments. The United States Government has been centrally involved. An extraordinary amount of effort has been expended to help achieve successful results.

At the outset, let me make one general comment, which I'm sure will be a theme running through this symposium: how striking it is that now, 50 years after the Holocaust, these matters have come to the fore and we have seen a series of settlements of Holocaust era claims. A confluence of factors seems to

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have resulted in this—a recognition that there can be no adequate compensation to victims of the Holocaust, the desire to provide those victims at least some measure of justice and closure in their lifetimes, the reunification of Germany, the fall of the Soviet Union—these and other factors surely were in play. But I will leave these factors to others to analyze further and focus today on how the U.S. Government came to be involved in a number of the key settlements, and what its role was.

This is, I think, an interesting story—one that is hard for outsiders to know. Since our role was so fundamental, I thought that today I would talk about the U.S. Government's role in three of the Holocaust settlements: the 1995 so-called "Princz" agreement; the Swiss bank settlement; and the German Foundation for payments to forced and slave laborers and other victims of the Nazi era.

I do not propose to describe each of these settlements in any detail. The texts in question are public. The Princz agreement can be found in the January 1996 issue of *International Legal Materials*; the Swiss bank settlement can be found at its web site (www.swissbankclaims.com), and the texts and documents related to the German Foundation can be found on the State Department's web site (www.state.gov/www/regions/eur/holocaust/germanfound.html). Much has already been written about the settlements, and they have been described both in press statements and in court filings in great detail. I will, however, talk about them as examples of three types of roles that the U.S. Government has played.

Let me start by pointing out that for two centuries the U.S. Government has concluded claims settlement agreements on behalf of its nationals. Under the customary international law of state responsibility and diplomatic protection, in certain circumstances the Government has the right to "espouse" and settle the claims of nationals. Under international law, a government may espouse the claim of one of its nationals against another government if the claim was owned by one of its nationals at the time it arose and continuously thereafter until it is espoused, if the claim involves a breach attributable to the foreign government of an international obligation, and if the national has first exhausted local remedies in the foreign nation. If these requirements are met, a government has discretion to espouse a claim; even a claim that is eligible for espousal may not be espoused for foreign policy reasons. The authority of the Executive Branch of the U.S. Government - the President and the Secretary of State - to exercise the espousal power on a discretionary basis has consistently been upheld by U.S. courts.

In dealing with the Princz matter, we followed the traditional legal claims settlement framework, and dealt with espousable claims. But the Swiss and German matters depart from this framework widely and move into uncharted areas. These settlements dealt with much broader categories of claimants, worldwide, and new negotiation frameworks for the U.S. Government.

The Princz Agreement between Germany and the United States of September 1995—formally titled the "Agreement Concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution"—is, as I noted, a claims settlement agreement in the traditional

mold. This agreement was a lump sum settlement with Germany that provided compensation to certain U.S. citizens who were victims of Nazi persecution, essentially concentration camp survivors, in return for waiver of all claims against Germany in that category. Similar agreements were concluded between Germany and other countries in the 1960s, many of which are included in the two-volume compilation of claims agreements edited by Richard Lillich and others.¹

This particular agreement had a unique background. For many years Hugo Prinz, a Holocaust concentration camp survivor, had sought compensation from Germany, and the U.S. Government had urged the German Government to settle with Mr. Prinz. U.S. officials asserted to the German Government that Mr. Prinz's case was unique. Mr. Prinz sued the German Government in U.S. federal court, but the suit was dismissed in view of Germany's sovereign immunity. Then, Mr. Prinz sued German companies. At the same time, Mr. Prinz's congressional supporters pressed U.S. legislation to remove sovereign immunity from the German Government for Holocaust suits, and in 1994 the House of Representatives passed such a bill. This situation warranted serious attention by the two Governments, and the German Chancellor and U.S. President agreed in March 1995 that a claims settlement agreement covering Mr. Prinz and comparable claimants should be concluded.

At this point, the United States embarked on a claims settlement negotiation with Germany. This was a traditional government-to-government negotiation. I led a U.S. Government team to meetings in Bonn with a German Government team led by a German deputy legal adviser. The German Government had in mind the model of the agreements it had concluded with other governments, and wanted to have a settlement that finally resolved any future potential claims. Both governments wished to conclude an agreement as a matter of great urgency before the issue was further complicated. We wanted a resolution that would dispose of any future congressional threats to German sovereign immunity.

We in the State Department did not, however, believe it would be just to settle all claims that were comparable to Mr. Prinz's without a thorough program to locate all claimants who might qualify. Under the framework of a traditional claims settlement, the United States would "espouse" all the claims in the category covered by the agreement, that is, take over those claims as U.S. claims against the foreign government. We would settle the claims for an appropriate lump sum payment from the German Government and we would take responsibility for distribution of the payments to individual beneficiaries.

Since all claims in the categories covered by the settlement would be cut off, we wanted to be sure that we had located everyone. By the time the U.S. and

1. DAVID J. BEDERMAN, RICHARD B. LILLICH & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS, 1975-1995 (Procedural Aspects of International Law, Series No. 23, 1999). DAVID J. BEDERMAN, RICHARD B. LILLICH & BURNS H. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS (Procedural Aspects of International Law, Series No. 12, 1975).

German Governments held negotiations in May 1995, we knew of a small number of other persons who, like Mr. Princz, had survived concentration camps, had been U.S. citizens at the time, and had never received any significant payment from Germany. To allow time for the United States to locate additional persons covered by the agreement, the two Governments agreed to negotiate an additional lump sum after two years. Thus, under the agreement, it was only upon payment of the second lump sum that all claims in the category of claims covered by the agreement were considered fully and finally settled. Agreement on this framework was reached with exceptional speed: a second round of negotiations was held in August 1995, and the agreement was brought into force in September 1995. We agreed on a 3 million DM settlement for known victims in 1995, and agreed on an additional 34.5 million DM settlement for additional victims in 1999, for a total of over \$20 million.

Although this agreement followed the traditional mode of claims settlement agreements, it was challenged in U.S. federal court. One claimant not covered by the agreement sued to try to force the U.S. Government to present his claim to Germany, although the claim had been found not to fall under the agreement. A ruling favorable to the claimant by the district court was summarily reversed in a per curiam opinion of the D.C. Circuit Court of Appeals in *Miller v. Albright*, which held that the court was not entitled to force the Secretary of State to adopt a certain position in negotiations, i.e., to mandate an espousal of the claim, usurping the executive's conduct of foreign affairs.²

In sum, in the Princz case, we see an example of the traditional U.S. Government role. It took up the claims of its citizens—persons who had been citizens at the time the claim arose—in accordance with practice long sanctioned by both U.S. and international law. The U.S. Government then had control of the claims, and could settle them as it deemed appropriate, without any requirement to consult the claimants involved.

The subsequent Holocaust claims talks departed sharply from this established precedent. The Swiss bank settlement was a traditional class action settlement; but what was different was the U.S. Government involvement in bringing it about. The German Foundation arrangements, on the other hand, were unprecedented.

Let me first turn to the Swiss bank settlement.

By 1997, class action suits had been brought against the three major Swiss banks, "UBS", Credit Suisse and "SBC". These class actions involved a wide series of allegations of wrongdoing by the banks during the Holocaust, such as failure to return dormant accounts, looting assets, and profiting from slave labor. In the fall of 1997, the question arose as to whether the State Department should play any role in this litigation. Our initial reaction was that this was litigation in U.S. courts by private parties against other private parties, and that we should let the litigation proceed.

2. *Miller v. Albright*, 1998 U.S. App. LEXIS 30885 (D.C. Cir. 1998).

Soon, however, both the counsel for the plaintiffs and for the defendants approached the Department and asked for help in resolving the matter. We decided that we had legitimate interests in becoming involved in this litigation—both in assisting in getting payments to victims of the Holocaust, and in removing an irritant from our relationship with Switzerland.

Stuart Eizenstat, at that time the Under Secretary of State for Economic Affairs, led the U.S. team, including members from the State and Justice Departments. Our interlocutors were attorneys for the defendant banks and for plaintiffs. We normally met in the State Department, although we kicked off the meetings in Zurich at a meeting with the CEOs of the three banks, and held one session in New York as well. The U.S. Government acted as a facilitator and a mediator.

All parties usually met together, but there were also many side consultations. First, the parties discussed the structure of a possible settlement. Each side set forth its propositions on what the claims were and what should be covered, and on how the settlement should be structured. We went into rather great detail, and had many intensive meetings. The U.S. team would draw out each side and look for areas of compromise. There were sometimes rather heated discussions, and even temporary breakdowns.

At a certain point, the parties seemed to reach an agreement on structure. We moved next to the discussion of the settlement amount. This was so difficult and sensitive that the parties thought it necessary for the U.S. Government to take on even a greater role. We essentially had proximity talks. Counsel for each side occupied different rooms. We would hear a detailed presentation from one side of the basis for its view on financial claims—and probe that presentation for clarifications and support. Then we would go to the other side's room and do the same. We would also convey to one side the other's presentation and probe for comments.

When we received settlement figure proposals, we did not report one side's proposal to the other side—for initially, that could have resulted in a complete breakdown in the talks. Rather, we pressed each side repeatedly to bring the proposals closer together. At a certain point, both sides thought it would be best for us to develop a detailed proposal which showed not a single settlement figure, but rather a settlement range. Our initial range proposal was roundly rejected by both sides, and we went on to produce a few more such proposals until the U.S. Government-mediated talks broke down in the summer of 1998.

The talks were revived by the judge before whom the consolidated class actions were pending, Judge Korman, and a deal was struck that was reduced to writing and signed at the beginning of 1999. It is interesting that the final \$1.25 billion class action settlement adopted the concept of, and was within the range of, the initial U.S. Government proposal.

So, the Swiss bank settlement talks are something quite different than the U.S. Government's traditional claims settlement role. Here, the Government settled no claims on behalf of its nationals. The lawsuit settlement does, however, cover claims of U.S. citizens, but not necessarily only those who were citizens at

the time their claims arose (as would be required under customary international law of espousal). It also covers worldwide classes of persons who had been Holocaust victims, no matter what their nationality.

While a State Department-led mediation of a lawsuit is rather unconventional, the skills used were not dissimilar to skills used in certain international negotiations.

There appeared to be no precedent for the U.S. role in helping achieve the Swiss bank class action settlement. Yet the settlement was still, in the end, a traditional class action settlement, and our role, in the end, that of a mediator.

Our role in the German Foundation matter was even more complicated. We were involved as facilitators and mediators, helping develop an unconventional and unprecedented arrangement. The arrangement involved an executive agreement between the United States and Germany, but not a claims settlement agreement. It involved dismissals of class action lawsuits, but no class action settlement.

By way of background, this arose from a series of class action lawsuits that were brought by Holocaust victims—both U.S. nationals and foreign nationals—against German companies, primarily for compensation for slave and forced labor, but also for a broad range of other wrongs committed during the Nazi era and World War II.

German companies initially thought that the U.S. Government could take care of the whole matter by concluding an executive agreement with Germany settling these claims. However, customary international law of state responsibility and diplomatic protection would only cover claims of persons who were nationals of the espousing government at the time they arose, and, furthermore, did not speak to the espousal and settlement of claims against private entities, such as foreign companies. Moreover, there was no precedent in U.S. law for the settlement of claims of nationals against foreign private entities by executive agreement (as opposed to by treaty), and thus such a method could be subject to serious challenge. Therefore, despite lengthy discussions—beginning with a session I had with German company and Government lawyers in Bonn in November 1998—the State Department declined to enter into a traditional claims settlement negotiation.

In January 1999, a U.S. Government team headed by Stu Eizenstat visited Bonn. At this point the German Government and German companies requested the United States Government become involved—as their partner—in developing a solution. The plaintiffs' attorneys also asked that we take on this facilitation role.

Thus, beginning in January 1999, the United States Government became co-facilitator of the talks, working with the German Government. Eizenstat headed the U.S. effort. The German Chancellor first appointed Chancellery Minister Hombach, and then former Finance Minister Lambsdorff, to be the other co-facilitator.

During an initial phase, all parties paid much attention to how the talks were to be structured. After much discussion, we included in the talks the Gov-

ernments of Israel, Russia, Poland, Ukraine, the Czech Republic and Belarus, as well as those of Germany and the United States. In addition, we included lawyers and other representatives of the defendant German companies and lawyers for each of the major plaintiff groups. Finally, we included the Conference on Jewish Material Claims Against Germany, an organization representing Jewish groups worldwide and given special status under German postwar legislation, to ensure the participation of appropriate organizational leaders and Holocaust survivors. This mix of negotiating partners was novel—government representatives, private attorneys, company representatives and an NGO. Since different participants were deemed to have interests in different claims, initially a fairly complex “wiring diagram” was prepared to structure the talks into various working groups, with the idea that the U.S. and German co-facilitators would co-chair a steering committee.

Very quickly the “wiring diagram” and carefully articulated group structure fell by the wayside. All participants seemed to be interested in all matters at stake in the negotiations. In the end, at each of the dozen major negotiating sessions we had relatively short opening and closing “plenary” meetings, involving all the approximately 60 participants, while working groups and informal consultations occurred between these plenary meetings. There were also myriad intersessional informal meetings and consultations. In addition, a legal working group was established that met both intersessionally and in conjunction with plenary meetings. All these meetings were open-door, in that any participant in the process could attend any of the formal working group sessions. And the U.S. and German Governments co-chaired all the formal meetings.

During these meetings, the German companies made it clear that they would not agree to follow the Swiss bank precedent and negotiate a class action settlement. They viewed such a settlement as giving the lawsuits status and legitimacy. Rather, they were willing to establish a foundation to make payments to victims on what they considered an *ex gratia* basis. Indeed, in February 1999, the companies and German Government announced that they would establish an industry foundation for this purpose. For a substantial period thereafter, the negotiations focused on the parameters of such a foundation, and how, if there were agreement on acceptable parameters, an arrangement could be found to provide the companies “legal peace” in the United States.

For many reasons, no one contemplated the enactment of a statute seeking to oust U.S. courts from jurisdiction over these cases. Having excluded the options of a claims settlement agreement and of a class action settlement, it became clear that no available mechanism could completely guarantee that German companies and the German Government would never again be subject to lawsuits in the United States arising out of World War II and the Nazi era. An alternative idea was developed. If an acceptable arrangement was negotiated, the participating attorneys would seek to arrange for dismissal of the pending lawsuits, and the United States would file statements of interests in those lawsuits and in all future lawsuits with claims against German companies arising out of World War II and the Nazi era stating the United States position that it would be

in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims.

This approach resulted in another permutation of the U.S. Government role. The German companies and Government wanted a binding commitment from the United States to file such statements of interest. Thus, in addition to facilitating discussions between all participants, the U.S. and German Governments became direct parties to the negotiation of an executive agreement. This agreement was not to be a claims settlement agreement—no claims would be espoused or settled—but one under which the United States undertook the then-unprecedented commitment of filing a statement of interest in its courts in a certain category of cases, no matter when any such case might in the future be brought. There were many rounds of talks to work out the text of the agreement and its annexes, and in the last months of the talks there was intense focus on the nature of the commitments and what the United States would be prepared to say in its statements of interest. The Justice Department was deeply involved. The Solicitor General participated personally, since the agreement would commit the United States to positions in appellate courts and the Supreme Court. This too was unprecedented.

At another point in the negotiations, there was another fundamental shift in approach. As noted, the focus was initially on developing the parameters for a private Foundation funded by German companies. But this created problems. First, it became clear that to achieve adequate funding to resolve the matter, both the German Government and the German companies would need to contribute. Second, the private Foundation would only cover wrongs of the German companies. Certain categories of laborers, however, had worked for German state companies; after 50 years, many of the victims might not know what kind of company they had worked for. These problems were overcome with a German decision to combine the private and federal Foundations and create one Foundation under German law.

This move had a major impact on the negotiations and our role in the negotiations. The United States Government now focused on negotiating with the Germans an annex to the executive agreement setting forth the parameters of the Foundation to be created by the new German law, and in due course began detailed discussions with the German Government about drafts of this law. The paper setting forth the parameters of the earlier proposed private Foundation was dropped, but we sought to incorporate the fundamental compromises and understandings that had been achieved in that context into the annex to the executive agreement under negotiation between Germany and the United States and into the proposal for a German law that the German Government was developing. While other participants commented on this annex and the draft law, the U.S. Government lawyers were the primary interlocutors in the talks with the Germans. At one point, Stu Eizenstat even testified on the law before the German Bundestag.

This was a unique role for the U.S. Government. It is unusual, and perhaps unprecedented, for the U.S. Government to be involved in a detailed discussion

of the exact terms of a proposed internal law of another country. This was needed here, however, since the German law—and the annex to the executive agreement concerning it—set the essential parameters for the Foundation that was being established by this complex negotiation among the governments, attorneys, German companies and the Conference on Jewish Material Claims against Germany.

As the negotiations came to a conclusion, we needed a document indicating what further steps it was agreed each participant would take. It would not have been appropriate to have an international agreement between individual lawyers, private companies, an NGO and sovereign states. We therefore developed a document that set forth political rather than legal commitments—that is, undertakings that various participants “will” take various steps, rather than legal commitments that they “shall” do so. At this phase, we were once again involved in a negotiation with all the participants on the text of what became the “joint statement.” This document set forth the undertakings of each party as to the steps it would take. This final aspect of the arrangement was more akin to a resolution that an international organization adopts. But this was not a negotiation in an international organization.

The “joint statement” was crucial from another, and perhaps more important, perspective. In December 1999, after much negotiation, agreement was reached on the 10 billion DM capped settlement amount. But no one wanted to leave the agreement at that, since the Swiss bank settlement did not result in prompt payments in major part because there had been no agreement on how to allocate the funds. Thus, from December to March 2000, the participants in the German Foundation talks had the difficult task of negotiating how the 10 billion DM would be allocated. A chart attached to the joint statement reflected the resulting agreement on allocation, with all participants declaring their agreement to the distribution plan. Each participant signed the document in July 2000, at the same ceremony at which the executive agreement was signed. As a result, as you all surely are aware, the major portion of the funds will go to seven partner organizations to make payments to former slave and forced laborers, but funds are also reserved for property claims, insurance, and a future fund.

Thus, in the German Foundation talks, the United States Government played both the roles of a facilitator and mediator among disparate parties, and, in a manner of speaking, of a treaty negotiator with another government. It played the role of a government pressing another government on internal law matters, and the role of a government engaged in a multilateral negotiation of a final document of a “conference.” The combination of roles, the interaction of the parties to the negotiation, the series of issues addressed, the variety of documents in which the final deal was reflected—all these were unique and unprecedented.

Let me wrap this up with a number of observations.

Clearly, the United States will engage in claims settlement negotiations in the future; that is a traditional function, well-established in U.S. and international law, which serves to remove irritants from relations with other countries

and to benefit U.S. citizens. Do the Swiss bank settlement and German Foundation arrangement serve as precedents for a U.S. Government facilitation role? Obviously, the latter has served as a precedent for similar (but not identical) Holocaust arrangements with Austria and France. (My colleague Mr. Rosand will address the Austrian settlement during this symposium.) In both the Austrian and French cases, all the parties to the dispute requested that the United States Government assist in fashioning arrangements taking the German Foundation settlement as a point of departure.

Beyond that, there may be future disputes that are between private parties, some of which are foreign, where all the parties request the U.S. Government to become involved to facilitate a negotiated resolution. Where the dispute is in the form of private litigation in U.S. courts, it is important that all parties to the dispute request U.S. Government involvement as a facilitator. Whether the U.S. Government agrees to facilitate the resolution of such disputes, will be, I think, a case-by-case decision, based on a judgement of the United States government interests involved in the circumstances presented. In the Swiss case, as I mentioned, we concluded that our involvement was in the U.S. interest because it would remove an irritant from relations with an important country and because it would bring a measure of justice to certain claimants. In the German case, we concluded that we had similar interests—again, bringing a measure of justice to Holocaust victims as promptly as possible and removing an irritant from relations with an important ally. Those sorts of interests could well arise in a future case.

Thank you.

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The Holocaust Restitution Movement in Comparative Perspective

Michael J. Bazylar

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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-

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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.*

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The Amorality of Profit: Transnational Corporations and Human Rights

By
Beth Stephens*

I. INTRODUCTION

On the plane to California in March 2001, on my way to present a paper on corporate accountability and the Holocaust, I discovered a remarkably pertinent book review in that day's *New York Times*.¹ The review addressed a recently published book on the role of IBM in Nazi Germany, *IBM and the Holocaust*, by Edwin Black.² In his book, Black condemns IBM and its management for selling a revolutionary data management system to the Nazis. Black concludes that this system enabled Nazi Germany to organize information about the tens of millions of people under their control, a key tool without which they would not have been able to implement their brutally efficient extermination program. The reviewer, Richard Bernstein, challenges the conclusion that Germany needed IBM's technology.³ Even if Black's assertions were true, however, Bernstein offers a pointed critique of Black's underlying moral assumptions. IBM's conduct, according to Bernstein, merely demonstrated "the utter amorality of the profit motive and its indifference to consequences."⁴ "[M]any American companies did what I.B.M. did," Bernstein writes.⁵ That is, "they refused to walk

* Associate Professor of Law, Rutgers-Camden Law School. My thanks to several generations of Rutgers-Camden research assistants: Christine Park, Mellany Alio, Danielle Buckley, Evelyn Cox, Kelly Lenahan, and Mark Morgan, as well as to the staff of the Rutgers-Camden law library. I should note that as a cooperating attorney with the Center for Constitutional Rights, I have assisted the plaintiffs in several of the human rights lawsuits against corporations discussed in this article.

1. Richard Bernstein, *I.B.M.'s Sales to the Nazis: Assessing the Culpability*, N.Y. TIMES, March 7, 2001, at E8.

2. EDWIN BLACK, *IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION* (2001).

3. Bernstein questions whether the Nazis in fact required IBM technology:

Is Mr. Black really correct in his assumption that without I.B.M.'s technology, which consisted mainly of punch cards and the machines to tabulate them, the Germans wouldn't have figured out a way to do what they did anyway? Would the country that devised the Messerschmitt and the V-2 missile have been unable to devise the necessary means to slaughter millions of victims without I.B.M. at its disposal?

Bernstein, *supra* note 1, at E8.

4. *Id.*

5. *Id.*

away from the extraordinary profits obtainable from trading with a pariah state such as Nazi Germany.”⁶ Such business decisions, he concludes, were reasonable, morally neutral choices.

Over the past decade, new revelations about corporate involvement in the Holocaust have sharpened our understanding of the extent to which even businesses that remained neutral towards Nazi Germany were able to profit from the Holocaust. Bernstein’s perspective makes clear one ethical evaluation of such conduct: business as usual. At the same time, however, litigation against those corporations has demonstrated that the law takes a very different approach. Morally defensible or not, business as usual or not, if corporations are complicit in human rights violations, the victims of the abuses have a legal right to compensation from those corporations.

It is appropriate that the Holocaust serve as the trigger for a reassessment of corporations, morality and legal accountability. The horrors of World War II triggered the transformation of international human rights law. Over the fifty years since the Holocaust, the international community has recognized that governments can be held liable for abuses directed at both their own citizens and foreigners, during war and when at peace—and that individuals can be held accountable as well. Today, the abuses of the Holocaust are contributing to the development of new approaches to human rights accountability, this time focusing on corporate human rights violations and the line between the legally acceptable pursuit of profit and criminal or tortious behavior.

Profit-maximization, if not the *only* goal of all business activity, is certainly central to the endeavor. And the pursuit of profit is, by definition, an amoral goal—not necessarily immoral, but rather morally neutral.⁷ An individual or business will achieve the highest level of profit by weighing all decisions according to a self-serving economic scale. Large corporations magnify the consequences of the amoral profit motive. Multiple layers of control and ownership insulate individuals from a sense of responsibility for corporate actions. The enormous power of multinational corporations enables them to inflict greater harms, while their economic and political clout renders them difficult to regulate.

Corporate involvement in the Holocaust illustrates each of these points. Decisions as to whether to conduct business with the Nazi regime were often made in purely economic, amoral terms. Shareholders and managers were able to enjoy the profits generated from such business without directly confronting the human consequences of their business operations. Hundreds of thousands of people were harmed by corporate activities that spanned national borders and thus escaped regulation.

The role of corporations in the Holocaust also highlights an additional observation: Allowing corporate misdeeds to go unresolved compounds the problem dramatically. Fifty years later, attempts to compensate those harmed raise

6. *Id.* (quoting BLACK, *supra* note 2, at 232).

7. Unless, of course, one believes either that the pursuit of economic gain is by definition immoral or, at the other extreme, that making money is by itself a moral good.

thorny questions, even beyond the factual issues generally present when attempting to determine the details of events that took place half a century ago. The use of slave labor by the Ford Motor Company, for example, arguably contributed to the vast expansion of that company over the following decades.⁸ But our modern judicial systems have difficulty calculating the value of that input to the company or to the millions of individual shareholders who might be asked to disgorge profits based in part on that labor. One of the many painful lessons we can draw from the Holocaust, then, is the need to settle corporate accounts in a timely fashion.⁹ By providing prompt compensation to those injured, we both offer justice to the victims of abuse and also prevent ill-gotten profits from becoming the foundation for future corporate growth.

With corporate abuses during the Holocaust as a background, I discuss in this article the development of corporate human rights law, looking both at the norms to which corporations must now conform and at the still weak efforts to enforce those norms. Corporate accountability for human rights abuses has received much attention over the past few years from governments, human rights organizations, business groups, and even the United Nations. Little has been written, however, about the relationship between corporate human rights norms and the legal structure of business organizations. My first goal in this essay is to strengthen the foundation of corporate human rights regulation by situating it within the extensive literature on the nature of the corporate entity and government power to impose limits on that entity.

My second goal is to propose an assertive approach to interpreting corporate human rights responsibilities. Both domestic governments and international organizations have danced around this topic, urging voluntary codes of conduct rather than seeking to impose binding rules of law. I argue that such circumspection is unfounded. Corporations are already bound by many core human rights norms. So-called voluntary codes that ask business entities to refrain from committing genocide or to avoid profiting from slave labor are weak concessions to the enormous economic and political power of multinational corporations.

Before beginning, a definitional parenthesis: I define the multinational corporation as any firm which “owns (in whole or in part), controls and manages income generating assets in more than one country.”¹⁰ As Muchlinski explains, control is central to this definition—multinational corporations do not merely have a financial stake in foreign ventures but also exercise managerial control.¹¹ This control enables a level of coordination among the various subparts that

8. See, e.g., *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 432-34 (D.N.J. 1999) (discussing allegations about Ford’s use of slave labor and the impact of that labor on the company’s profitability).

9. Current demands for compensation for slavery raise similar issues, over an even longer time period.

10. See PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 12 (1995).

11. *Id.*

transforms the multinational corporation from a mere network of independent entities into an entirely new business structure.¹²

I begin in part II with an overview of the human rights problems presented by multinational corporations, looking at modern human rights abuses as well as the Holocaust. Part III explains the regulatory challenge posed by transnational corporations, examining the historical development of the corporate structure and the disjuncture between modern multinational entities and the still largely independent domestic legal systems. Despite these challenges, governments clearly have the legal authority to regulate corporations, either through national or international legal regimes.

I discuss in part IV the foundation of this governmental power to regulate and demonstrate that such regulation is well-accepted in domestic legal systems around the world. In part V, I analyze the current state of the international law governing corporate human rights practices, concluding that core human rights norms apply to corporations as well as to states and individuals. Enforcement of these norms, however, remains “the Achilles’ heel” of the system, as it does generally in the human rights arena.¹³ In part VI, I discuss this weakness and argue that international norms enforced through international mechanisms or coordinated domestic approaches are essential to the effective regulation of corporate human rights abuses.

A final caveat: My purpose in this article is not to enter the debate about whether multinational corporations have, as a whole, been good or bad for humanity. I do not address the benefits that this economic structure may or may not offer. My goal is to address the largely uncontrolled human rights danger posed by multinationals, and I do not pretend to offer a balanced assessment of multinational corporations. I do not accept that human rights abuses are the unavoidable price of economic development. To the contrary: our international and domestic legal systems have available the legal tools necessary to regulate multinational corporations and to deter and punish their human rights abuses.

12. International commentary uses various combinations of two sets of terms to refer to this entity: transnational/multinational and corporation/enterprise. The various combinations of these four terms are then abbreviated as MNCs, MNEs, TNCs and TNEs. A spirited literature ascribes content to the debate. See MUCHLINSKI, *supra* note 10, at 12-15 (explaining history and content of the disagreements); Menno T. Kamminga & Saman Zia-Zarifi, *Liability of Multinational Corporations Under International Law: An Introduction*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 1, 2-4 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000) (comparing varying usages of multinational, transnational, corporation and enterprise) [hereinafter *LIABILITY OF MULTINATIONAL CORPORATIONS*].

“Multinational corporation” has a somewhat wider use and I will give it preference, while taking an expansive view of each of its terms. Thus, I include all cross-border corporate activities, whether they be “trans-” or “multi-” national. My use of the term “corporation” is similarly broad. In the interest of flexibility and readability, and in quotations from other works, I occasionally use the terms transnational and enterprise interchangeably with multinational and corporation.

13. See Beth Stephens, *Book Review and Note: Remedies in International Human Rights Law*, by Dinah Shelton, 95 *AM. J. INT’L L.* 257, 257 (2001) (discussing the absence of an effective enforcement system).

II.

THE CORPORATE HUMAN RIGHTS PROBLEM

Corporate human rights abuses, of course, did not begin with World War II and the Holocaust. The earliest corporate-style multinational enterprises, the British and Dutch East India Companies, abused their extraordinary powers in Asia, Africa and the Americas to undermine local governments and exploit both human and natural resources.¹⁴ These abuses also triggered early consumer human rights protests, including seventeenth century British protests against the slave trade and boycotts in Massachusetts during the eighteenth and nineteenth centuries.¹⁵

In this section, I discuss the harsh reality that corporations often profit from abusive behavior. From oppressive working conditions to slavery and even genocide, from pollution to environmental destruction, corporations are capable of extracting economic gain from harms inflicted on people and on the environment in which we live. I focus first on the Holocaust, during which thousands of corporations profited in varied ways, and then offer some modern examples. These extreme cases expose the degree to which the corporate pursuit of profit can lead to human rights abuses.

A. *The Holocaust*

Almost sixty years after World War II, the full extent to which corporations profited from the Holocaust is only now receiving widespread attention. The delayed investigations reflect both the power of corporations to mask their dealings and the difficulties created when justice is so long denied.

Most directly, financial corporations profited by retaining the assets of those killed by the Nazis. Banks and insurance companies pocketed the deposits of families who were exterminated or whose heirs were unaware of their relatives' accounts, as well as those who were unable to supply documentation to support their claims.¹⁶ In addition, banks profited from the mere fact that they

14. See, e.g., Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1677 (2000) (describing the British East India Company as "one of the most notorious corporations of all time," with a bitter legacy in China); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-century International Law*, 40 HARV. INT'L L.J. 1, 37 (1999) (describing problems in the administration of colonies by corporate bodies as the "unsurprising" result of the fact that "the territories were administered simply for profit."); Bruce P. Frohnen & Charles J. Reid, Jr., *Diversity in Western Constitutionalism: Chartered Rights, Federated Structure, and Natural-law Reasoning in Burke's Theory of Empire*, 29 McGEORGE L. REV. 27, 34-46 (1997) (describing East India Company's rule in India as one of tyranny, despotism, corruption and bribery).

15. See Donald C. Dowling, Jr., *The Multinational's Manifesto on Sweatshops, Trade/Labor Linkage, and Codes of Conduct*, 8 TULSA J. COMP. & INT'L L. 27, 52 (2000) ("As far back as the seventeenth century, Britons were outraged at the East India Company's ventures in the slave trade."); Akhil Reed Amar, *A State's Right, a Government's Wrong*, WASH. POST, Mar. 19, 2000, at B1 (Massachusetts citizens boycotted tea from the morally unattractive East India Company in the 18th century.).

16. See Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 31-39 (2000), for discussion of Holocaust claims against Swiss banks; *id.* at 93-136, for claims against European insurance companies; *id.* at 237-249, for claims

were able to handle large accounts from Germany, investing the profits from assets stolen from Nazi victims as well as from goods produced by slave labor.

At the same time, companies exploited slave labor supplied to them by the German army. Recent investigations estimate that hundreds or even thousands of German companies benefited from the slave labor of eight to ten million people.¹⁷ In addition to paying little or nothing to the workers, the companies were often literally permitted to work their laborers to death.¹⁸ Major companies accused of profiting from slave labor include Ford, Siemens, Volkswagen, Daimler-Benz and BMW.¹⁹ According to claims filed against Ford, for example, the Ford affiliate in Germany operated with as much as half of its labor force composed of forced laborers. The company grew rapidly during the war years, emerging from the war as a powerful economic entity.²⁰ Plaintiffs in the lawsuit sought disgorgement of profits accrued over more than fifty years, alleging that the U.S.-based Ford parent company profited from the rapid growth of its German subsidiary.

Thousands of corporations also did business with the German war industry. Deutsche Bank financed the construction of the Auschwitz concentration camp.²¹ Allianz, the second largest insurance company in the world, insured buildings and other facilities in the camp.²² Pharmaceutical companies supplied medication and other chemicals used in Nazi medical experiments.²³ IBM supplied punch cards for Nazi record-keeping.²⁴ Profits from these activities enriched successor corporations and have been distributed to investors throughout much of the Western world.

against non-Swiss banks. More than a dozen insurance companies have been accused of failing to honor policies issued before World War II. *Id.* at 101.

17. *Id.* at 191-92.

18. The Nazi system included distinctions among workers of different "classes," regulating the amount of food and degree of abuse to which they would be subjected. *Id.* at 191 n.784. Some were intentionally worked to death:

The Jewish concentration camp workers were less than slaves. Slavemasters care for their human property and try to preserve it; it was the Nazi plan and intention that the Jews would be used up and then burned. The term "slave" is used in this [book] only because our vocabulary has no precise word to describe the lowly status of unpaid workers who are earmarked for destruction.

BENJAMIN B. FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* at xvii (1979), quoted in Bazylar, *supra* note 16, at 191 n.784.

19. *Companies and the Holocaust: Industrial Actions*, *ECONOMIST*, Nov. 14, 1998, at 75, available in 1998 WL 11700614.

20. *Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424, 432-33 (D.N.J. 1999).

21. See *Deutsche Bank Admits Auschwitz Role*, *IRISH TIMES*, Feb. 5, 1999, at 51, cited in Bazylar, *supra* note 16, at 237-38 n.1030.

22. See John Marks & Jack Egan, *Insuring Nazi Death Camps: History Catches Up with Another German Corporation*, *U.S. NEWS & WORLD REP.*, Feb. 22, 1999, at 52, cited in Bazylar, *supra* note 16, at 99 n.400.

23. Bazylar, *supra* note 16, at 207 n.843, 249-55.

24. See BLACK, *supra* note 2.

B. *Modern Day Abuses*

Corporate human rights abuses during the Holocaust raised issues unique in human history, as businesses profited from the systematic extermination of millions of people. Similar concerns, on a lesser scale, have been raised by corporate abuses during the past fifty years. Particularly egregious examples include the involvement of the United Fruit Company and ITT in overthrowing elected governments in Guatemala and Chile.²⁵ Corporations have also participated on a massive scale in the exploitation of natural resources and corruption of national governments.²⁶

Such conduct is not a relic of the past: corporate abuses today raise identical issues. In the pursuit of profit and often in partnership with repressive governments, corporations violate the rights to life, to health, to gainful employment, and to political participation. In offering a few examples, I focus on corporate abuses that have generated widely acknowledged violations over the past decade: security measures; sweatshops and other labor rights violations; and environmental harm.

When a business invests in a region with a repressive government and political unrest, it is often impossible to operate without becoming complicit in human rights abuses. Corporations, of course, have legitimate security concerns and a right to protect their employees and property. However, in some situations, it may be impossible to do so without participating in human rights abuses. At one extreme, corporate involvement may include paying such forces to suppress opposition to corporate activities. The Enron Corporation, for example, has been accused of collaborating with the Indian police to violently repress local residents opposed to a massive energy project.²⁷ Royal Dutch Shell has been sued for alleged complicity in the executions of activists protesting the

25. See STEPHEN C. SCHLESINGER & STEPHEN KINZER, *BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA* (1982) (detailing role of United Fruit in overthrow of government of Guatemala); *Multinational Corporations and United States Foreign Policy: Hearings before the Subcomm. on Multinational Corporations of the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. 381-86 (1975) (describing role of ITT in overthrow of Chilean government).

26. See, for example, Theodore Panayotou, *Counting the Cost: Resource Degradation in the Developing World*, in *THE FLETCHER FORUM OF WORLD AFFAIRS* 270, 271, 272 (1990), for discussions of the environmental impact of multinational activities; LOUIS TURNER, *MULTINATIONAL COMPANIES AND THE THIRD WORLD* 11-12 (1973), for description of the impact of a 1968 corruption scandal on the government of Peru. Saman Zia-Zarifi explains why "resource extraction" corporations are "particularly prone to associate with egregious violators of human rights":

[R]esource extraction MNCs . . . have to dig for resources where they find them, typically in the developing world, and where the resource is one of the main sources of income for the government; all this in addition to the massive physical presence demanded for resource extraction work, including construction of large-scale infrastructure and intensive use of labor. . . . [W]ithout slandering the character and image of these corporations, their officers, shareholders, and employees, it is safe to say that sometimes resource extraction MNCs, like other MNCs, follow the path to profit around the world through rough moral terrain and get some of the dirt—if not blood—on their hands.

Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 *UCLA J. INT'L L. & FOREIGN AFF.* 81, 82-83 (1999) (footnotes omitted).

27. See HUMAN RIGHTS WATCH, *THE ENRON CORPORATION: CORPORATE COMPLICITY IN HUMAN RIGHTS VIOLATIONS* (1999); Amnesty International, *India: The "Enron Project" in*

company's environmental and development policies in Nigeria.²⁸ Human rights groups have also criticized British Petroleum for contracting with the Colombian armed forces despite reports of military human rights abuses from many sources, including the U.S. State Department.²⁹ British Petroleum has acknowledged paying millions of dollars to the government to protect oil operations and has been criticized for taking no steps to ensure that human rights will be respected.³⁰

A hotly contested lawsuit has charged the Unocal Corporation with complicity in human rights violations committed by the Burmese military government. A district court last year found that Unocal should not be held liable because it had not been actively involved in the abuses, a holding that is currently on appeal, but nevertheless found credible evidence of substantial corporate knowledge of the abuses:

Plaintiffs present[ed] evidence demonstrating that before joining the Project, Unocal knew that the [Burmese] military had a record of committing human rights abuses; that the Project hired the military to provide security for the Project, a military that forced villagers to work and entire villages to relocate for the benefit of the Project; that the military, while forcing villagers to work and relocate, committed numerous acts of violence; and that Unocal knew or should have known that the military did commit, was committing and would continue to commit these tortious acts.³¹

These examples highlight the problems raised not only when corporations directly commit human rights abuses, but also when they enter situations in which their activities foster or contribute to such abuses.

Such issues are also presented in the area of labor rights. Certain core labor rights have been recognized as entitled to international protection, including the rights to organize and to collective bargaining and the prohibitions of forced labor and certain kinds of child labor.³² Transnational corporations search out inexpensive locations to manufacture their products, often choosing countries with low wages and weak protection of labor rights. These practices often lead to denials of these basic rights. Investigations of working conditions in factories supplying goods to well-known brands such as Disney, Nike, and Levi Strauss have drawn attention to abuses including unpaid overtime, child labor, illegally low wages and dangerous working conditions.³³

Maharashtra: Protests Suppressed in the Name of Development, AMNESTY INTERNATIONAL INDEX: ASA 20/31/97 (July 1997).

28. See summary of allegations in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 121 S.Ct. 1402 (2001).

29. Human Rights Watch, *Columbia: Human Rights Concerns Raised by the Security Arrangements of Transnational Oil Companies* (April 1998), at <http://www.hrw.org/advocacy/corporations/columbia/Oilpat.htm>.

30. *Id.*

31. *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1306 (C.D. Cal. 2000).

32. See International Labor Organization, *Declaration of Fundamental Principles and Rights at Work*, June 18, 1998, ¶ 2(a),(b),(c).

33. See generally NO SWEAT: FASHION, FREE TRADE, AND THE RIGHTS OF GARMENT WORKERS (Andrew Ross ed., 1997); Clean Clothes Campaign, at www.cleanclothes.org.

Several lawsuits illustrate the environmental harm that transnationals can inflict when freed from the environmental regulations that apply in their home countries. Texaco in Ecuador, Freeport-McMoran in Indonesia, and Shell in Nigeria have all been accused of using devastating practices long banned in Europe and the United States.³⁴ In Ecuador, for example, Texaco oil operations have reportedly spilled million gallons of oil and dumped billions of gallons of untreated toxic brine into the water and soil.³⁵ One commentator has described Texaco as using “antiquated, pre-Love Canal technology” in Ecuador.³⁶ In Indonesia, investigators have accused Freeport-McMoran of dumping hundreds of thousands of tons of toxic mine tailings into local waterways, destroying the local river, flooding surrounding forests, and polluting lakes and ground water.³⁷ Shell’s operations in Nigeria are reported to have devastated large tracts of land, producing fires that burn around the clock and soaking the groundwater with oil.³⁸

Current economic incentives are insufficient to trigger voluntary compliance with international human rights standards in the areas of physical integrity, labor rights or the environment. The legal system, however, is also at a disadvantage when regulating multinational actors, particularly those with the economic and political clout of multinational corporations. I look next at the difficulties of regulating multinational corporations, before turning to the options open to both national governments and the international community.

34. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 121 S.Ct. 1402 (2001) (Shell/Nigeria); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999) (Freeport-McMoran/Indonesia); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (Texaco/Ecuador).

35. See Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon*, 14 HASTINGS INT’L & COMP. L. REV. 849, 864-72 (1991) (summarizing environmental abuses in Ecuador); Richard L. Herz, *Litigating Environmental Abuses under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT’L L. 545, 547-48 (2000) (same).

36. Zia-Zarifi, *supra* note 26, at 99.

37. See PROJECT UNDERGROUND, *RISKY BUSINESS: THE GRASBERG GOLD MINE* 10, 14-18 (1998); Herz, *supra* note 35, at 548.

38. See Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23 BROOK. J. INT’L L. 927, 958-63 (1998) (describing of allegations of violations of environmental norms in Nigeria); see also Joshua P. Eaton, Note, *The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT’L L.J. 261 (1997) (same).

See also Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. U. L. REV. 235 (1994) (detailing multinational corporate responsibility for a series of industrial disasters); Hari M. Osofsky, Note, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT’L L. REV. 335 (1997) (allegations of corporate abuses in Indonesia and Ecuador); William A. Wines, Mark A. Buchanan & Donald J. Smith, *The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico’s Costa Grande and Elsewhere*, 26 DENV. J. INT’L L. & POL’Y 453 (1998) (alleging abuses by a logging company in Mexico, including environmental degradation and harassment of protesters).

III.

THE REGULATORY CHALLENGE

The modern multinational corporation has evolved over centuries, reaching its current form over the course of the past hundred years. The legal structures governing this modern entity, however, still reflect, to a large degree, the outmoded single-nation structure of the nineteenth century corporation. Corporations are multinational while legal systems are still largely national, creating a disconnect between international corporate structures and the law. A review of the history and focus of the transnational enterprise demonstrates that the multi-layered, multinational division of labor and responsibility of the modern corporation, its singled-minded focus on economic gain, and its economic and political power all render multinational corporations a difficult regulatory target. Multinational corporations have long outgrown the legal structures that govern them, reaching a level of transnationality and economic power that exceeds domestic law's ability to impose basic human rights norms.

A. *The Rise of the Transnational Corporation*

The key characteristics of modern transnational business corporations developed piecemeal over the course of hundreds of years. This disjointed history explains the gap between the economic reality and the legal tools available to hold corporate groups accountable for their actions.

The concept of a corporation as a legal unit distinct from its owners traces back to Roman law.³⁹ The first *business* corporations were chartered by the British Crown in the fifteenth century. These early business corporations followed the already settled corporate model of "a legal unit with its own legal rights and responsibilities, distinct from those of the individuals who constituted its members or shareholders . . ." ⁴⁰ The core attributes of a corporation, present in these early models, included the right to sue and be sued, to contract, and to acquire and dispose of property. Shares in the corporation were transferable, and the corporation maintained a continuing existence regardless of its membership.⁴¹ Limited liability, now generally viewed as an additional core element of

39. See PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* 3-7 (1993), for a general history of the corporation. Blackstone credits Numa Pompilius (715-672 B.C.) with the development of the corporation as a means to dilute the power of two warring Roman factions by dividing them into smaller trade and professional groups. 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 468-69, cited in Mark B. Baker, *Private Codes of Corporate Conduct: Should the Fox Guard the Henhouse?*, 24 U. MIAMI INTER-AM. L. REV. 399, 406 n.41 (1993). Baker locates the earliest corporate structures in Rome, in approximately 700 B.C., then traces the development of the modern multinational corporation from fifteenth century merchant families with businesses throughout Europe, through seventeenth and eighteenth century merchant companies with royal charters and monopolies, to nineteenth century industries seeking raw materials from nations around the globe. *Id.* at 401-02.

40. BLUMBERG, *supra* note 39, at 4.

41. *Id.* Additional attributes of the corporation at that time have not survived: a public purpose and monopoly powers. *Id.* at 5-7.

the corporate form, became widespread only in the early nineteenth century in the U.S. and some fifty years later in England.⁴²

Until well into the nineteenth century, corporations could be formed only by an act of the government—the king or Parliament in England, or the state legislatures in the United States. General statutes permitting incorporation through registration were not widespread until after the Civil War.⁴³ The articles of incorporation approved by the government limited the corporation to a specific task. As one means to restrict the scope of activity of any one corporation, ownership of stock in another corporation was generally prohibited. This restriction persisted until the late nineteenth century: the generally accepted rule was that corporations could not own stock in other corporations. This limitation reflected in part a “deep suspicion and hostility” towards corporations and fear of corporate monopoly power.⁴⁴ In the words of a Georgia court, “It has ever been considered the very highest public policy to keep a strict watch upon corporations, to confine them within their appointed bounds and especially to guard against the accumulation of large interests under their control.”⁴⁵

Despite these restrictions, large multinational enterprises began to develop in the second half of the nineteenth century, as individual corporations expanded their operations.⁴⁶ U.S. firms quickly expanded their manufacturing and distribution networks around the world. Muchlinski describes the growth of the American Singer Sewing Company as “the first true manufacturing” multinational enterprise.⁴⁷ Over the course of the second half of the nineteenth century, the Singer Company sold finished machines in Europe; it began to assemble sewing machines in Europe from parts manufactured in the United States; and in 1882, it built a factory in Glasgow to manufacture machines from local parts.⁴⁸ During the same time period, during the last years of the nineteenth century, corporations based in England, Germany and other European countries began to expand their direct investments in foreign nations.⁴⁹

The rise of the modern transnational corporation in the United States traces to the late 1880s. The legislature of New Jersey, in an effort to attract corporate licensing fees, liberalized corporate regulatory statutes, authorizing businesses incorporated in New Jersey to own stock in any other corporation.⁵⁰ This New Jersey statute represented a major turning point in the history of U.S. business. As the other states followed suit, “Corporate groups soon grew to occupy a

42. *Id.* at 7-19. Moreover, exceptions to limited liability continued well into the twentieth century, including provisions for double and triple indemnity, and pro rata liability in California. *Id.*

43. *Id.* at 22. The Constitutional Convention overwhelmingly rejected a proposal to grant the power of incorporation to the new Congress. *Id.* at 31.

44. *Id.* at 52-54. “United States colonists were suspicious of corporations, viewing them as representing ‘the privileged society against which the settlers were rebelling.’” Baker, *supra* note 39, at 407, citing *I. MAURICE WORMSER, FRANKENSTEIN, INCORPORATED* 28 (1931).

45. *Central R.R. v. Collins*, 40 Ga. 582, 625, 630 (1869).

46. MUCHLINSKI, *supra* note 10, at 20-21.

47. *Id.* at 21.

48. *Id.*

49. *Id.* at 21-22.

50. BLUMBERG, *supra* note 39, at 56.

commanding role in American industry and eventually in the world economy as well.”⁵¹

The protections of limited liability were transferred immediately to these new corporate groups—without any recognition of the distinction between the limited liability of individual shareholders and that of a collective enterprise composed of parent and subsidiary companies engaged in a common enterprise.⁵² Blumberg has pointed out the illogic of this extension of limited liability protections to the components of a corporate group:

It overlooked the fact that the parent corporation and its subsidiaries were collectively conducting a common enterprise, that the business had been fragmented among the component companies of the group, and that limited liability—a doctrine designed to protect investors in an enterprise, not the enterprise itself—would be extended to protect each fragment of the business from liability for the obligations of all the other fragments.⁵³

Nevertheless, limited liability within the corporate group remains the norm today.

With this new authority to own stock in other corporations, multinational corporate groups grew rapidly during the years leading up to the first World War, followed by a slow period between the two World Wars, and resumption of rapid expansion after World War II.⁵⁴ Post-World War II multinational growth followed a new style. Pre-World War I, international trade had been dominated by imports of raw materials and agricultural products from the developing countries of the South to meet the needs of manufacturers and consumers in the industrialized North.⁵⁵ After World War II, the truly modern multinational corporation came to dominate, with integrated production across borders, and goods and services flowing in multiple directions.⁵⁶ This modern model has proven difficult to regulate with the legal tools available to the governments of sovereign states.

B. The Difficulty of Regulating Transnational Corporations: Corporate Economic, Political and Legal Power

Multinational corporations have proven to be remarkably efficient economic entities, “formidably effective and swift machine[s],” capable through their coordinated operations of far outperforming smaller scale, national business models.⁵⁷ The multinationals exploit to great effect their ability to coordinate operations and to trade and invest internally, seeking the greatest return for

51. *Id.* at 58.

52. *Id.* at 58-59.

53. *Id.* at 59.

54. U.S. companies dominated this expansion until the 1960s, when the economies of Europe and Japan recovered from the devastation of the war. The past decade has seen the entry of both the former Socialist nations and developing countries onto the international trade and investment stage. MUCHLINSKI, *supra* note 10, at 26-32.

55. *Id.* at 22.

56. *Id.* at 26.

57. Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739, 756 (1970).

the group as a whole. In short, "multinational groups pursue a policy of group profit maximization in which the interests of the individual constituent members of the group are subordinated to the interests of the parent, that is, the group as a whole."⁵⁸

The tremendous growth of multinational corporations has raised new accountability dilemmas. Corporations have grown to a level of economic power that dwarfs most nation-states. General Motors, for example, is larger than the national economies of all but seven countries.⁵⁹ The largest fifteen corporations have revenues greater than all but thirteen nations.⁶⁰ And the trend is toward greater corporate dominance: a comparison of figures from 1991 and 2000 shows a dramatic change over nine years. In 1991, nineteen countries had revenues greater than General Motors, compared to only seven today; similarly, in 1991, three corporations were among the top twenty-eight economic entities, compared to fifteen today.⁶¹

Concerns about corporate economic power are not new: analysts have decried growing corporate power as far back as the Dutch East India Corporation.⁶² President Lincoln expressed concern about the growth of corporate power following the Civil War.⁶³ On the international stage, corporate dominance over the economy became an issue of global concern in the 1960s.⁶⁴ This pattern has accelerated over the past decade, as the socialist economies collapsed

58. BLUMBERG, *supra*, note 39, at 139. Vagts cautions against exaggeration of the internal consistency of corporate decision-making, noting that corporate "structures house considerable tensions between different levels of management, between home offices and branches abroad, between line and staff," so that "one must consider MNE activities as the end-product of a coalition of individuals pursuing somewhat different goals and coordinated only to a limited degree toward the achievement of a common purpose." Vagts, *supra* note 57, at 753. Despite this caution, however, he concludes that the multinational corporation is "basically a coherent organization with a narrow range of economic motivations," capable of efficient, coordinated economic activity. *Id.* at 756.

59. Only the economies of the United States, Germany, Italy, the United Kingdom, Japan, France and the Netherlands are larger than General Motors. See Global Policy Forum, *Comparison of Revenues Among States and TNCs*, at <http://www.globalpolicy.org/soecon/tncstat2.htm> (last visited May 23, 2001).

60. *Id.*

61. Compare *id.* with *Nations v. Corporations*, at <http://www.ratical.com/corporations/NvC.html> (last visited May 23, 2001).

62. See sources cited *supra*, note 14 (noting contemporary concerns about Dutch East India Company and its powers).

63. Lincoln wrote in a letter in 1864:

I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. As a result of the war, corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed. I feel at this moment more anxiety for the safety of my country than ever before, even in the midst of war. God grant that my suspicions may prove groundless.

Letter from Lincoln to Col. William F. Elkins, Nov. 21, 1864, in *THE LINCOLN ENCYCLOPEDIA* 40 (Archer H. Shaw ed., 1950) (quoting EMANUEL HERTZ, 2 *ABRAHAM LINCOLN: A NEW PORTRAIT* 954 (1931)).

64. "That the world's largest multinational corporations . . . are more powerful and influential than many States has been a cliché since the 1960s." Menno T. Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, in *THE EU AND HUMAN RIGHTS* 553, 553 (Philip Alston ed., 1999).

and opened up to capitalist investment, and as developed nations reduced regulation of international trade and investment, and pressured developing nations to do the same. "No longer is the control of the potentially negative impacts of TNCs the major issue; rather it is how best to reintegrate developing countries into the global economy in a manner that ensures inflows of new investment capital."⁶⁵ With the fall of the Soviet bloc, economic deregulation has become the mantra of the new millennium. International trade agreements have pushed the free trade model upon even the more reluctant national governments. "States once critical of TNCs now find themselves competing for the benefits of foreign direct investment from multinational companies."⁶⁶

As both cause and effect of growing corporate economic power, the international and domestic political systems have increasingly relinquished their control over business. Economic power carries with it a growing political clout. Corporations play influential direct and indirect roles in negotiations over issues ranging from trade agreements to international patent protections to national and international economic policy.⁶⁷ This political power is in part a recognition of the economic advantages of the multinational corporate model. But it also reflects corporate power advantages that put governments at a disadvantage. Governments themselves are coalitions, representing varying interests, and may have difficulty submerging those differences into a common policy.⁶⁸ "MNE's [Multi-National Enterprises] in the past often have used their bargaining skills, their clearly conceived purposes and their overall experience to outdo naive and divided governments."⁶⁹

The very strengths of transnationals render them difficult regulatory targets. As corporate power becomes increasingly international and increasingly disassociated from the nation-state, regulation becomes more difficult. "The fact that they have multiple production facilities means that TNCs can evade state power and the constraints of national regulatory schemes by moving their operations between their different facilities around the world."⁷⁰ Regulatory schemes are largely domestic, based upon national laws, administrative bodies and judicial systems, while transnationals operate across borders.⁷¹ Over thirty years ago, Professor Vagts pointed out that "the present legal framework has no comfortable, tidy receptacle for such an institution," producing a tension between the legal theory of independent corporate units, each "operating as a native within the country of its incorporation," and the reality of the "economic interdepen-

65. MUCHLINSKI, *supra* note 10, at 596.

66. Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 MINN. J. GLOBAL TRADE 153, 160 (1997).

67. See generally Vivien A. Schmidt, *The New World Order, Incorporated: The Rise of Business and the Decline of the Nation State*, in 124 DAEDALUS 75 (1995).

68. Vagts, *supra* note 57, at 757.

69. *Id.* at 780.

70. Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1, 8 (1993).

71. "In the modern world of transnational corporations, the economic actor is typically the corporate group; however, the law continues to focus on each component company, rather than on the group, as the legal actor." BLUMBERG, *supra* note 39, at 205.

dence” of the multinational corporation.⁷² More recently, even George Soros has decried the lack of a global system capable of regulating global capitalism.⁷³

In addition, the recent trend toward decreasing government control over international commerce has led to the weakening of ties between transnational corporations and particular states. The state of incorporation may be nothing more than a convenient location chosen for tax and other regulatory advantages.⁷⁴ “One important effect of these developments is that TNCs have become ‘de-nationalized’ in the sense that they view the world, rather than their home or host states, as their base of operations.”⁷⁵ With multinational sources of financing, operations, and international joint ventures, “corporations are part of a ‘global web’ that increasingly defies categorization by national origin.”⁷⁶ The dispersed corporate form permits corporations to establish legally independent entities around the world, a multinationality that transforms into statelessness.

However, states cannot regulate transnational corporations effectively without addressing all aspects of the operation. “From the viewpoint of effective economic regulation, it is not merely appropriate, it is essential that the legal structure match the economic structure of the enterprise subject to the regulatory system.”⁷⁷ Otherwise, multinationals shift capital and goods to avoid regulation, taxation, capital repatriation rules, and currency exchange controls, and to resist union demands.⁷⁸ Prevention of corporate evasion of regulatory standards requires international consensus on the norms applicable to corporations. Enforcement of regulations requires coordinated enforcement mechanisms, whether through international systems or through coordinated domestic structures. I lay the foundation for my discussion of international norms and coordinated enforcement mechanisms by examining the state’s power to regulate transnational corporations.

72. Vagts, *supra* note 57, at 740, 743.

73. George Soros, *Towards a Global Open Society*, 1/1/98 ATLANTIC MONTHLY 20 (1998) (“[T]he capacity of the state to look after the welfare of its citizens has been severely impaired by the globalization of the capitalist system . . .”).

74. Fleur Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELBOURNE UNIV. L. REV. 893, 895-96 (1994). (“[S]election of a state of incorporation may be a matter of mere convenience—a decision made at a particular time for tax or other reasons. The fact that this decision may have lasting significance at international law seems therefore ludicrous.”).

75. Grossman & Bradlow, *supra* note 70, at 8.

76. Schmidt, *supra* note 67, at 79, citing ROBERT REICH, THE WORK OF NATIONS (Knopf 1991).

77. BLUMBERG, *supra* note 39, at 201. “The reality of the matter is that effective regulation of corporate groups or their activities inevitably requires control of all the components participating in the enterprise.” *Id.* at 200-01. “While the economic forms of enterprise organization have evolved in the direction of multicorporate structures, the legal forms of its organization have remained stuck to a statutory model designed and conceived exclusively for the case of single corporate enterprises.” Jose Engracia Antunes, *The Liability of Polycorporate Enterprises*, 13 CONN. J. INT’L L. 197, 207 (1999).

78. BLUMBERG, *supra* note 39, at 139-40.

IV.

THE STATE'S POWER TO REGULATE

Despite centuries of development, and the fact that corporations support the world economy, economists, lawyers, political theorists and philosophers continue to debate the essential definition of the corporation. Under any of the myriad of conflicting views, however, a government has the right and power to regulate corporate firms. Moreover, governments of every variety have done so, holding corporations accountable for their actions through some combination of criminal, civil or administrative sanctions. This section will first demonstrate that whatever their nature and whatever their inherent social responsibilities, governments have the legal authority to hold corporations liable for harms their operations inflict. Next, a comparative review of disparate legal systems will demonstrate that states assert that right through varied legal procedures.

A. *The Inherent Nature of the Corporation: Whatever It Is,
It Can Be Held Accountable*

Academics and practitioners from several disciplines have produced a vast literature debating the nature of the corporation. The fault lines of this debate reflect several heated disputes about the nature of the corporation, its formation, and its social obligations. Under any of these views, however, government has the right and power to restrict corporate behavior. Without a doubt, states can forbid corporate conduct constituting human rights abuses, such as physical harm, denials of basic labor rights, and harm to the environment, and can hold corporations liable for violations of these basic rights.

1. *The Corporate Nature Debate and Accountability for Human Rights
Violations*

Debate over the nature of the corporation as a legal and economic institution has continued for centuries. Ninety years ago, the literature on the controversy was described as of "appalling size,"⁷⁹ and it has grown apace during the ensuing decades.⁸⁰ One product of this multitude of analyses is disagreement even about how to classify the varied theories. Bratton lists three sets of "recurring questions" that are the subject of the inquiry.⁸¹ The first set of questions examines the corporation's "being"—is the corporation a construct of people's minds or a real thing with a separate existence? A second and related line of questions examines the distinction between the corporate being, whatever it is, and "the aggregate of separate individuals and transactions in and around it,"⁸² the "entity" or "aggregate" debate. Third is what Bratton terms a "political ver-

79. Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 254 n.3 (1911).

80. See William W. Bratton, *The New Economic Theory of the Firm: Critical Perspectives From History*, 41 STAN. L. REV. 1471 (1989), for a thorough analysis and history of the debates.

81. *Id.* at 1474-75.

82. *Id.* at 1475.

sion” of these questions, which asks whether the corporation is a creature formed by the state or rather the sum of contractual arrangements by individuals.

Working within a similar framework, Blumberg summarizes three historical answers to these questions.⁸³ The earliest view of corporate nature, reflecting a time when corporations could only be formed through a special legislative decree, saw the corporation as an artificial person, created by the legislature, not by individuals. Chief Justice Marshall articulated this view of the firm as the artificial creation of law, existing only by virtue of government’s permission:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.⁸⁴

Under this view, the corporation has only those rights and obligations attributed to it by the enacting legislation.⁸⁵

A second view of the corporation describes it as primarily an association of individuals contracting with each other to form the corporation. The Supreme Court employed this view as a means to explain the attribution of constitutional rights to corporations:

Private corporations are, it is true, artificial persons, but . . . they consist of aggregations of individuals united for some legitimate business It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation.⁸⁶

The corporation thus claims certain rights to protect the rights of the individuals of whom it is composed.⁸⁷

A third view, which Professor Blumberg describes as a “strong” version of the entity theory, defines the corporation as an organic being, with independent legal rights that go beyond both those of its shareholders and those granted by the government.⁸⁸

Whether the corporation is a creature created by law, one arising out of a web of individual contractual agreements, or a distinct legal being, it is subject to state regulation. Indeed, as John Dewey pointed out many decades ago, the debate about the inherent nature of the corporation is essentially no different than a debate about what rights and obligations society will choose to impose upon it.⁸⁹ “The corporation is . . . a right-and-duty-bearing unit,” with those

83. Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 291-99 (1990).

84. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).

85. Blumberg, *The Corporate Entity*, *supra* note 83, at 293.

86. The Railroad Tax Cases, 13 F. 722, 743-44 (C.C.D. Cal. 1882), *writ of error dismissed as moot sub nom.* See also San Mateo County v. Southern Pac. R.R., 116 U.S. 138 (1885); Santa Clara v. Southern Pac. R.R., 18 F. 385 (C.C.D. Cal. 1883), *aff’d*, 118 U.S. 394 (1886).

87. Blumberg, *The Corporate Entity*, *supra* note 83, at 293-95.

88. *Id.* at 295.

89. See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

rights and duties which the law ascribes to it.⁹⁰ The imposition of duties upon the corporate unit applies either to the corporation as an entity or to the individuals who contract to establish the corporation. Either way, the state can impose limits on corporate behavior, including accountability for harms caused to others.

To be sure, proponents of the view that the corporation is no more than a set of contractual relations have argued against government regulation, asserting that individuals left to negotiate contracts will better achieve their own and society's goals. "Since their firm 'is contract,' and since private actors do a better job at making contracts than do government officials, they see little constructive role for public policy."⁹¹ This policy argument, however, does not challenge the underlying governmental authority to regulate the corporation. The contracts that form the basis of a corporation under this theory are no more immune from government oversight than individual agreements. Government can impose civil and criminal liability on those who contract to violate the law, regardless of whether or not the contract is formed in a corporate context. The state may prohibit individuals from committing physical abuses, labor law violations, and environmental harm; under any of these corporate theories, the state may also prohibit corporations from committing these offenses.

2. *Corporate Amoralty*

Are multinational corporations amoral by definition? In the vast literature on this issue, vigorous calls for corporate social responsibility are countered by equally spirited cries that business enterprises are, by definition, created only to make a profit.⁹² Neither view, however, challenges government's authority to impose regulations on corporations.

In a now-famous essay, Milton Friedman insisted that "the social responsibility of business is to increase its profits."⁹³ William Safire picked up the refrain decades later, railing against "new socialists" who sought to impose social responsibilities on corporations.⁹⁴ Safire argues that his model of unregulated business operations need not entail disregard for the social consequences of business decisions. He insists that corporate executives inevitably adopt socially responsible policies out of self interest:

Capitalism's defenders know that only stupidly shortsighted executives overlook the need for a loyal, motivated work force; we also know that good community relations help attract the best managers and innovators to a company. And easing the shock of necessary belt-tightening on workers who are not producing is "good P.R.," which makes business sense—provided it does not squander assets on ego-

90. *Id.* at 656 (quoting 3 MAITLAND, COLLECTED PAPERS 307 (1911)).

91. Bratton, *supra* note 80, at 1482 (footnote omitted).

92. See *ETHICAL THEORY AND BUSINESS* (Tom L. Beauchamp & Norman E. Bowie eds., 5th ed. 1997), for a collection of essays giving an overview of the issues.

93. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, reprinted in *ETHICAL THEORY AND BUSINESS*, *supra* note 92, at 56.

94. William Safire, *The New Socialism*, N.Y. TIMES, Feb. 26, 1996, p. A13.

satisfying do-gooding or becoming the new delivery system for politicians' largesse.

What are the primary "social" responsibilities of a corporation? To serve its owners by returning a profit and its community by paying taxes; to earn the allegiance of customers by delivering value, and to provide a secure future for employees who help it succeed in the marketplace.⁹⁵

However, Safire's premise is questionable even within the United States, with its democratic political system and active media. As Safire describes the motivations leading to socially responsible behavior, profit-based incentives only deter abusive corporate behavior if such behavior leads to "bad P.R." The various interest groups Safire identifies—shareholders, management, employees—have multiple goals, but their self interest is not necessarily advanced by adopting protections against corporate human rights violations.

Moreover, these business-based motives are of no relevance in repressive societies. If the media are unable to report on abusive behavior, there will be no public relations consequences of corporate bad acts. If government leaders share in the inflated profits generated by abusive behavior, they will have no incentive to enforce even the most basic norms. As Douglas Cassel suggests, theories of self-regulating corporate structures work, if at all, only in democratic systems.⁹⁶ "In most countries, governments have limited power or resources to do good."⁹⁷ The profit motive will inevitably exert pressure against responsibility, creating incentives to cut corners, and to commit abuses. If this is the case even in a democratic society, it is much more the case in a repressive system, where the citizenry has no means by which to force corporate accountability.

The issue of whether businesses are defined as purely profit-seeking or as obligated to respond to certain societal needs is, fundamentally, a question to be decided by society as a whole. Debates about the social obligations of the corporation are "hopelessly circular" because "[o]ur beliefs about what are proper concerns of the business community are themselves social constructs, and have evolved significantly over time in tandem with broader changes in the social and political environment."⁹⁸ As proponents of the amorality of profit disengage corporate policy from social concerns, they merely emphasize the role of government in setting the boundaries of acceptable corporate behavior:

[T]o the extent that this argument asserts that it is the role of government to fashion and implement policy—in this case human rights policy—it also necessarily concedes to government the right to further specific policies by, inter alia, regulating the practices of U.S. corporations. Examples of such regulation, from legislation restricting companies' ability to discriminate or pollute at home, to laws prohibiting corrupt practices by corporations abroad, are too numerous to leave any room for doubting the legitimacy of government efforts to advance social policies in part by regulating corporate behavior.⁹⁹

95. *Id.*

96. Douglas Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 *FORDHAM INT'L L. J.* 1963, 1978-80 (1996).

97. *Id.* at 1980.

98. Diane F. Orentlicher & Timothy A. Gelatt, *Public Law, Private Actors: The Impact of Human Rights on Business Investors in China*, 14 *Nw. J. INT'L L. & Bus.* 66, 96 n.83 (1993).

99. *Id.*

Society has the authority to regulate corporate behavior, by defining the terms of the corporate entity and its relationship with the surrounding society. Such has been the conclusion of domestic legal and political systems around the world, a comparative perspective to which I now turn.

B. A Comparative View: Corporate Accountability Across Legal Systems

All domestic legal systems recognize that corporations can be held accountable for harm they cause to others. Part of the core definition of the corporation is that it can both sue and *be sued*. In all legal systems, corporations are held accountable in some way, be it through criminal or civil procedures or through administrative regulations. The collective enterprise, not just the individuals who compose it, is the legal unit for purposes of both claims and obligations.

1. Criminal Liability and Equivalent Sanctions

Legal accountability includes a range of possible procedures and sanctions, including criminal, civil and administrative. In most legal systems, corporate accountability includes criminal liability.¹⁰⁰

Corporate criminal liability was common in continental Europe in the seventeenth and eighteenth centuries, imposed in great detail, for example, in the French Criminal Code of 1670.¹⁰¹ The concept fell into disfavor after the French Revolution, however, when corporate-style associations were disbanded and individualism dominated.¹⁰² With the rise of industrialization over the course of the nineteenth and early twentieth century came a corresponding interest in holding businesses liable for injuries inflicted by their operations. In England and Canada as well as the U.S., legislatures and courts gradually expanded the notion of corporate criminal accountability. Starting with liability for breaches of statutory duties, by the mid-twentieth century the doctrine had evolved from vicarious liability for the acts of employees to include direct liability for corporate actions.¹⁰³

Most of the civil law systems of continental Europe have returned to corporate criminal liability, led by the Netherlands in the 1920s and 1930s.¹⁰⁴ The Council of Europe gave additional impetus to this movement in 1988, recommending that member states adapt their laws to permit corporate criminal prosecutions.¹⁰⁵ In response, France amended its laws in 1991, returning to the curiously modern principles of corporate crime that it had followed before the

100. See generally CRIMINAL LIABILITY OF CORPORATIONS (Hans de Doelder & Klaus Tiedemann eds., 1996) (XIVth International Congress of Comparative Law); CELIA WELLS, CORPORATIONS AND CRIMINAL RESPONSIBILITY (1993); L.H. Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 MICH. L. REV. 1508 (1982).

101. Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 INT'L & COMP. L.Q. 493, 494 (1994).

102. *Id.* at 494-95.

103. See *id.* at 495-98.

104. *Id.* at 500.

105. Council of Europe Recommendation No. R(88)18.

revolution.¹⁰⁶ The Inter-American system as well has recommended that states adapt their laws to permit criminal prosecution of corporations.¹⁰⁷ The environmental movement has further spurred the recognition of corporate crime, with widespread adoption of statutes imposing criminal sanctions for corporate violations of environmental safeguards.¹⁰⁸

Exceptions to corporate criminal liability persist. Argentina, for example, maintains the doctrine of *societas delinquere non potest*, that is, an association cannot be the author of a crime.¹⁰⁹ Nevertheless, the concept continues to expand in Asia¹¹⁰ and Latin America,¹¹¹ and the international trend is toward acceptance of the criminal liability of corporations.¹¹² Andrew Clapham offers an interesting indication of the increasing acceptance of the concept of corporate criminal liability—culled, ironically, from the defeat of a proposal to include corporate defendants within the statute of the proposed International Criminal Court.¹¹³ Clapham details the procedural and definitional problems that led to the withdrawal of the proposal,¹¹⁴ but notes that the negotiators demonstrated general support for the theoretical principle that corporations can be bound by criminal law, to the extent that “no delegation challenged the conceptual assumption that legal persons are bound by international criminal law.”¹¹⁵

The question *whether* legal persons are bound by international criminal law was never posed. The disagreements arose over the complexities involved in interna-

106. WELLS, *supra* note 100, at 122.

107. See Inter-American Juridical Committee, *Inter-American Model Legislation on Illicit Enrichment and Transnational Bribery*, OEA/Ser.Q CJI/doc.70/98 rev. 2, adopted Aug. 22, 1998, (“Although some legal systems do not allow for criminal sanctions the intention is that the legislating State will adapt its law to do so, so as to comply with the Convention.”).

108. See, e.g., Donald A. Carr & William L. Thomas, *Devising a Compliance Strategy under the ISO 14000 International Environmental Management Standards*, 15 PACE ENVTL. L. REV. 85, 93-94, 94 n.17 (1997) (describing increasing reliance on criminal sanctions for environmental violations); Sevine Ercmann, *Enforcement of Environmental Law in United States and European Law: Realities and Expectations*, 26 ENVTL. L. 1213, 1218-19 (1996) (detailing use of administrative, civil and criminal sanctions to enforce environmental law in the United States and Europe).

109. Romina Picolotti and Juan M. Picolotti, *Human Rights and Corporations: Legal Responsibility of Corporations for Human Rights Abuses in Argentina* (Maria-Candela Conforti trans., 2000) (on file with author).

110. See Kevin A. Gaynor & Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 COLO. J. INT’L ENVTL. L. & POL’Y 39, 92-93 (1999) (describing corporate criminal sanctions for environmental injuries in Asia, including Thailand and Singapore).

111. See *id.*, at 92 n.330 (citing corporate criminal penalties in Brazil and other Latin American countries). See also Chijioke Okoli, *Criminal Liability of Corporations in Nigeria: A Current Perspective*, 38 J. AFR. L. 35 (1994) (1990 Nigerian statute explicitly provides for corporate criminal and civil liability).

112. See, e.g., Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT’L L. 18, 20 (1998) (noting the international “movement towards this form of criminalization,” so that “in the modern business world a corporation itself may be criminally liable for the actions or omissions of agents acting on the corporations behalf . . .”); Klaus Tiedemann, *Rapport General, in CRIMINAL LIABILITY OF CORPORATIONS*, *supra* note 100, at 11, 12-13 (recognizing gradual adoption of corporate criminal liability, although the concept is not yet universally accepted).

113. Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS*, *supra* note 12, at 139-95.

114. *Id.* at 157-58.

115. *Id.* at 191.

tional trial of a non-natural person: *how* to serve the indictment, *who* would represent the interests of the legal person, *how much* intention need be proved, *how* to ensure that natural persons could not hide behind group responsibility.¹¹⁶

In fact, delegates were more concerned about the impact of corporate criminal responsibility on quasi-public corporate entities and non-governmental associations such as the Palestinian Liberation Organization than about the consequences for private corporations.¹¹⁷

Within the growing acceptance of corporate criminal liability, there are different approaches to determining when and how a corporation can be held to have committed a crime. According to U.S. federal law, corporations can be held liable when a corporate employee has committed a crime while acting within the scope of his or her authority, with an intent to benefit the corporation.¹¹⁸ Each of these requirements has been interpreted broadly. Thus, if a crime includes a required knowledge or intent, a corporation may be held liable based on the collective knowledge of various employees. Virtually all job-related acts are considered within the scope of employment, and a broad range of neutral or even harmful acts are considered to have benefited the corporation.¹¹⁹ By contrast, in some legal systems, only the acts of corporate officers or policy-makers can be attributed to the corporation.¹²⁰ Yet another approach holds a corporation liable if "its procedures and practices unreasonably fail to prevent criminal violations."¹²¹ Once again, however, these differences do not undermine the key building block of corporate accountability: corporations can be held liable for criminal violations committed by their employees, even if legal systems disagree about exactly what behavior by which employees will render the corporation liable.

One indication of the general acceptance of the need to expose corporations to the risk of criminal-like sanctions is that systems that do not directly recognize corporate criminal liability compensate by imposing similar alternatives, thus achieving something virtually identical to penal liability. As Stessens has detailed, such systems employ substitute, or "ersatz" corporate sanctions, "without attaching a 'criminal label'" to the penalty.¹²² One such alternative is a system of administrative fines. These differ from criminal fines only in that they are imposed by an administrative agency, not a criminal court—with the conse-

116. *Id.*

117. *Id.*

118. John C. Coffee, *Corporate Criminal Responsibility*, in 1 *ENCYCLOPEDIA OF CRIME AND JUSTICE* 253, 255 (Sanford H. Kadish ed., 1983).

119. *Id.* at 255-56.

120. *Id.* at 254-55; Stessens, *supra* note 101, at 506-10; WELLS, *supra* note 100, at 94.

121. WELLS, *supra* note 100, at 95. Liability for corporate policies is an important response to the fact that the corporation's internal structures may be faulty, whether or not individual employees are also personally responsible for the violation. "[G]enerally the criminal acts of a modern corporation result not from the isolated activity of a single agent, but from the complex interactions of many agents in a bureaucratic setting." Note, *Corporate Crime: Regulating Corporate Behavior through Criminal Sanction, Part II: Rationale*, 92 *HARV. L. REV.* 1231, 1243 (1979).

122. Stessens, *supra* note 101, at 498. See also Leigh, *supra* note 100, at 1509-10, 1519-20, 1522-23, 1526. Leigh concludes, "Whether the range of sanctions is seen as penal or administrative in nature, the important point is that the sanctions be available." *Id.* at 1526.

quence that the corporate “defendant” is deprived of the protections associated with criminal prosecutions.¹²³ Another common provision provides that the corporation is civilly liable for a criminal fine assessed against an individual for actions taken on behalf of the corporation.¹²⁴ Through this maneuver, the criminal sanction is actually imposed on the corporation, while still maintaining the position that the corporation cannot be subjected to criminal prosecution.

Differences between legal systems that recognize corporate criminal liability and those that reject it, therefore, are more disagreements about theory than about practice:

[Despite] start[ing] from first principles that are diametrically opposed, they often arrive in practice at a structure of liability that produces broadly similar answers to the problems of corporate crime. The coverage achieved by a system of administrative offenses, or by a system that permits corporations to be fined as a secondary party or assessed damages as a civil consequence of a crime, or by one that contains provisions imposing corporate liability only for certain offenses, for example, may differ little from that achieved under a system of full corporate liability.¹²⁵

Under each of these systems, corporations can be held liable for the consequences of their wrongful acts, through penalties that are often identical, whether they be labeled criminal, civil or administrative.

Corporate criminal responsibility in national legal systems is more commonly applied to economic crimes. In practice, criminal prosecutions of corporations for traditional crimes of violence are rare.¹²⁶ This rarity, however, does not result from a theoretical problem but rather appears to be the result of a reluctance to view the corporation as being truly responsible for such crimes rather than the individuals who directly order, direct or commit violent acts.¹²⁷ Where corporate acts of violence fit within the legal requirements for attributing such conduct to the corporation, however, the corporation can be held criminally responsible. Attributing liability for violent human rights abuses to a corporation thus should not be problematic where corporate responsibility is based upon clear corporate policy, such as directing a security force to use violent abuse to repress opponents.

2. Liability by Any Other Name

Through the criminal and “ersatz criminal” liability of corporations, in combination with civil and administrative regulation, states assert their power to hold corporations accountable for transgressions of the law. For the purposes of

123. Stessens, *supra* note 101, at 502-06. The practice is so common that the European Court of Human Rights has considered the human rights consequences, concluding that certain administrative proceedings are “criminal in nature” and trigger the protections associated with criminal prosecutions, no matter the label assigned to the action by the national legal system. *Id.* at 504-05.

124. *Id.* at 501-02. “The technique of holding a corporation civilly liable for criminal fines imposed on natural persons acting on its behalf is widespread in continental legal systems.” *Id.* at 501.

125. Leigh, *supra* note 100, at 1509-10.

126. *Id.* at 1512.

127. *Id.* at 1512-13.

corporate accountability, the exact category to which such accountability is assigned is not material. Corporations can be held accountable through awards of compensatory or punitive damages, through fines payable to the government, or through regulatory orders, up to and including dissolution. While criminal prosecution may have the advantages of greater moral condemnation and punishment in some legal systems, this is not uniformly the case. Regulatory crimes may not carry any moral impact, and in some situations, a finding of civil tort liability will entail both a hefty punishment and moral condemnation. In the U.S., the civil system of punitive damages will often produce more effective sanctions than the cumbersome, rarely used criminal prosecution of corporations.

Assumptions about inherent differences between civil and criminal procedures generally fail when applied to varied legal systems:

[N]ational legal systems draw the line between civil and criminal in different ways. In some systems, criminal prosecutions are always public actions; in others they can be initiated and prosecuted by private parties. Conversely, governments can initiate civil actions that can be as onerous and “punishing” to the civil defendants as criminal prosecutions. . . . In some systems, damages for civil claims are always compensatory, in others they serve as a form of punishment as well. Some crimes are punishable only by fines, or orders to compensate the victim; some civil offenses can be “punished” by imprisonment. . . . The varieties of civil and criminal claims in domestic legal systems seeking redress for human rights violations span these different categories, with their exact categorization dependent on the definitions used by each system.¹²⁸

Human rights abuses can be addressed in diverse ways. When handled in national legal systems, they must be “translated” into the procedures appropriate to each system.¹²⁹ The key in terms of international law and accountability is that all domestic systems hold corporations accountable, whether through criminal, civil or administrative proceedings.

International law can apply well-developed human rights norms to hold the various corporate entities responsible for their involvement in human rights abuses, and can rely on accepted principles of international jurisdiction to locate the domestic legal systems empowered to impose liability. These remaining topics—international norms and enforcement mechanisms—will be addressed in the following two parts of this article.

V.

DEFINING THE INTERNATIONAL HUMAN RIGHTS NORMS GOVERNING CORPORATIONS

Human rights regulation entails both the articulation of norms and the enforcement of those standards. International law has made great strides in articu-

128. Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies For International Human Rights Violations*, *YALE J. INT'L L.* (forthcoming 2002) (manuscript at 51, on file with author).

129. See generally *id.* (explaining “translation” of human rights accountability principles into varied national legal procedures).

lating the human rights norms applicable to corporations, far greater than often acknowledged. Although enforcement is still largely ineffectual, the existence of norms as a benchmark by which to evaluate corporate conduct plays an important role in the movement for corporate accountability.

In this part, I discuss the varied sources of international norms applicable to corporations, looking first at the rapidly growing set of treaties specifically directed at corporations. I then analyze generally binding human rights norms to demonstrate that they apply to corporations as fully as to private individuals. I conclude this part by demonstrating that so-called “voluntary” norms adopted by international and national governments and by corporations actually include many binding rules of law, and suggest that the broader, truly voluntary aspirational standards are likely to develop into binding rules as well.

A. *Specific Norms Aimed at Corporations*

An effort in the 1970s and 1980s to draft a comprehensive set of rules governing multinational corporations was unsuccessful. At that time, the underdeveloped and socialist countries sought to impose international rules regulating corporations doing business in their territory, including respect for local priorities and laws and reinvestment of profits in the host countries.¹³⁰ With the triumph of the global economy, such host country efforts have collapsed. In several specific areas, however, treaties define international law obligations that specifically apply to corporations.

Earliest among these was the Apartheid Convention, which established the international crime of apartheid and declared it a crime when committed by “organizations, institutions and individuals.”¹³¹ The Apartheid Convention was accompanied by a proposal—never implemented—for an international court to prosecute criminal violations of the treaty.¹³² Most recently, the U.N. Convention Against Transnational Organized Crime, opened for signature on December 12, 2000, defined the international crimes of participation in an organized criminal group, money laundering, corruption, and obstruction of justice, all of which applied to corporations as well as natural persons.¹³³ In the intervening years,

130. See Development and International Economic Cooperation: Transnational Corporations, U.N. Economic and Social Commission, 2d Sess., Agenda Item 7(d), at 1, U.N. Doc. E/1990/94 (1990).

131. International Convention on the Suppression and Punishment of the Crime of Apartheid, art. I(2), U.N. Doc. A/2645 (1953) (entered into force July 18, 1976).

132. Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and Other International Crimes, reproduced in M.C. BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY (1998). According to the proposal, persons, legal entities, groups and organizations would all have been subject to the jurisdiction of the court. *Id.* at arts. 5, 6, 21(4).

133. United Nations Convention Against Transnational Organized Crime (advance copy of the authentic text of the treaty), arts. 5, 6, 8, 23, available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_eng.pdf (last visited Apr. 18, 2001). As of December 15, 2000, the treaty had been signed by 124 states, including the United States. See U.N. Office for Drug Control and Crime Prevention, Annex: United Nations Convention Against Transnational Organized Crime and the Protocols Thereto, at http://www.unodc.org/crime_cicp_signatures.html (last visited Apr. 18, 2001).

several treaties have established international corporate crimes connected to bribery and corruption.¹³⁴ The European Convention on Corruption, for example, calls for national prosecutions of “legal persons” for the crimes of bribery, trading in influence and money laundering.¹³⁵

Another set of international treaties addresses corporate environmental violations. The Convention on Transboundary Movements of Hazardous Wastes criminalizes unauthorized movement of hazardous wastes committed by any “person”—including corporations as well as individuals.¹³⁶ In addition, a number of international agreements create *civil liability* for environmental damage caused by corporations.¹³⁷ The Convention on Civil Liability for Oil Pollution Damage, for example, imposes civil liability on ship owners for damage caused by oil pollution.¹³⁸

Each of these treaties calls upon state parties to enact legislation making the prohibited conduct a crime under national law or imposing civil liability upon corporate violators. That is, rather than establishing an international enforcement mechanism, they instead require states to enact domestic measures of enforcement. The lack of international enforcement and the need for national action, however, should not be mistaken for the absence of an international norm. The standard of conduct, the definition of the crime or the civil wrong, is established by the international agreement; as is the case with most international norms, enforcement is left to the national legal system. As Professor Clapham points out, these treaties make clear that the international legal system is capable of defining international legal standards applicable to corporations. “[T]he international legal order has already adapted to define corporate crimes in international law and to oblige States to criminalize this behaviour.”¹³⁹

These detailed treaties demonstrate that states have the authority to develop rules specifically applicable to corporations. In addition, many human rights

134. See, e.g., Council of Europe Criminal Law Convention on Corruption, opened for signature Jan. 27, 1999, art. 18, *Europ. T.S. No. 173*, at 6, 38 I.L.M. 505, 509 (active bribery, trading in influence and money laundering); Inter-American Convention Against Corruption, Mar. 29, 1996, art. 8, 35 I.L.M. 724, 730 (prohibiting offering article of monetary value to a government official of another state); OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, art. 1, available at <http://www.oecd.org/daf/nocorr-uption/20nov1e.htm> (bribery of foreign public officials).

135. Council of Europe Criminal Law Convention on Corruption, *supra* note 134, at art. 18(1).

136. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, arts. 2, 4, 28 I.L.M. 657, 662. See discussion in Clapham, *supra* note 113, at 173-74.

137. See, e.g., International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, art. 3, 973 U.N.T.S. 4, 5 (entered into force June 19, 1975) (92 states ratified; United States signed) (“[T]he owner of a ship . . . shall be liable for any pollution damage caused by oil . . .”), as amended by the Protocol of 1992, art. 4; Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, arts. 6, 7, 32 I.L.M. 1228, 1233-34 (operator of polluting facility or waste dump liable for damage); Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, opened for signature Jan. 30, 1990, art. 4(3)(b), 30 I.L.M. 773 (signed by 22 nations) (imposing strict liability on generators of hazardous wastes within states).

138. International Convention on Civil Liability for Oil Pollution Damage, *supra* note 137, at art. 3.

139. Clapham, *supra* note 113, at 178.

norms of general application bind private individuals and corporations, as well as state officials and states themselves. In the next section, I analyze the history of international regulation of corporate human rights abuses to demonstrate that corporations are bound by the core human rights norms.

B. *Universal Human Rights Norms and Corporations*

The international community has determined over the past fifty years that certain actions are prohibited and constitute violations of international law whether or not a state is a party to treaties outlawing the acts. These violations are prohibited by customary international law, binding on all regardless of state consent. The most egregious example is genocide, the intentional destruction, in whole or in part, of a national, ethnic, racial or religious group.¹⁴⁰ Others include summary execution, torture, and slavery and the slave trade.¹⁴¹ Most of the international agreements that codify these and other human rights obligations are addressed to states, calling on states to enforce the listed obligations. But the norms embedded in the agreements bind the behavior of private individuals and corporations alike. International law has never been limited to regulating state behavior. Over the past fifty years, the international community has moved decisively to expand not only the rights of non-state actors but their responsibilities as well.

1. *Individuals*

The application of international law to individuals has been much debated, with “traditionalists” arguing that only states can be bound by international law’s strictures.¹⁴² This view, however, is both historically inaccurate and rejected by modern international law.

Historically, international law has long barred piracy, a violation that by definition is committed by stateless private actors.¹⁴³ The prohibition of the slave trade also applies to all actors, private as well as public.¹⁴⁴ Almost fifty years ago, the Nuremberg Tribunal reaffirmed the principle of individual responsibility, now a bedrock of modern international human rights law, in stirring language, stating, “[T]hat international law imposes duties and liabilities upon

140. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

141. The full list adopted by the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter RESTATEMENT OF THE FOREIGN RELATIONS LAW] § 702 (1987), includes genocide; slavery or the slave trade; murder or causing disappearance; torture or other cruel, inhuman, or degrading treatment; prolonged arbitrary detention; systematic racial discrimination; and “a consistent pattern of gross violations of internationally recognized human rights.”

142. Clapham describes—and rebuts—this “traditional” view. ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 89-91, 93-133 (1993).

143. Piracy consists of “[a]ny illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft . . .” Convention on the High Seas, Apr. 29, 1958, arts. 15, 16, 13 U.S.T. 2312, 2317, 450 U.N.T.S. 82, 90; see also Convention on the Law of the Sea, Dec. 10, 1982, arts. 101, 102, 1833 U.N.T.S. 3, 436.

144. See Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

individuals as well as upon States has long been recognized. . . . Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."¹⁴⁵ The Nuremberg judgment thus took general international rules of behavior and applied them to individuals.¹⁴⁶

Today, however, the application of international law to individuals is widely recognized. For example, The Genocide Convention, a modern outgrowth of the principles stated at Nuremberg, applies by definition to private actors as well as public officials. The Genocide Convention states that "persons committing genocide shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals."¹⁴⁷ The preamble to the Universal Declaration of Human Rights states that "every individual and every organ of society" should promote respect for basic human rights.¹⁴⁸ Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights recognize private obligations in their preambles, in the following terms: "Realizing that the individual, having duties to other individuals and to the Community of which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant."¹⁴⁹ Moreover, all of the international agreements regulating corporations that were discussed in the prior section specifically govern the activities of private actors.

Clapham makes an additional argument for recognizing private rights and duties in the international human rights documents, based upon understanding the evolving context in which the documents were drafted and are currently interpreted. He argues for a broad, contextual interpretation of international agreements, stating that "it is neither a literal nor a teleological interpretation but a contextual/evolutive/dynamic one that is most appropriate" to an understanding of international law.¹⁵⁰ As stated by the International Court of Justice, "[A]n international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."¹⁵¹ The ICJ concluded that the application of a fifty-year-old international agreement "must take into consideration the changes which have occurred in the supervening half century, and its interpretation can not remain unaffected by the

145. Judgment of Oct. 1, 1946, Transcript of Proceedings.

146. The Nuremberg judgments applied these general norms to corporations as well as to individuals, as discussed later in this part.

147. Genocide Convention, *supra* note 140, at art. 4.

148. Universal Declaration of Human Rights, Preamble, Dec. 10, 1948, U.N. Doc. A/810 [hereinafter Universal Declaration].

149. International Covenant on Civil and Political Rights, Dec. 19, 1966, Preamble, para. 5, 999 U.N.T.S. 171, 173 (entered into force Jan. 3, 1976); International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, Preamble, para. 5, 993 U.N.T.S. 3, 5 (entered into force Jan. 3 1976).

150. CLAPHAM, HUMAN RIGHTS, *supra* note 142, at 98-99.

151. *Id.* at 99, *citing* Advisory opinion of the ICJ on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) [1971] ICJ Rep. 31, ¶ 53.

subsequent development of law,” including customary international law as well as treaty law.¹⁵²

The context in which international human rights norms must be interpreted and applied today is one in which such norms are routinely applied to private actors. Human rights law in the past several decades has moved decisively to prohibit violations by private actors in fields as diverse as discrimination, children’s rights, crimes against peace and security, and privacy.¹⁵³ Significant provisions of international humanitarian law apply to non-state actors.¹⁵⁴ International and regional human rights bodies frequently call upon states to prevent human rights abuses committed by private actors.¹⁵⁵ It is clear that individuals today have both rights and responsibilities under international law. Although expressed in neutral language, many human rights provisions must be understood today as applying to individuals as well as to states.

2. Complicity

Certain international human rights prohibitions are triggered only with some level of state involvement or complicity. The Convention Against Torture, for example, prohibits torture “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”¹⁵⁶ However, this and other international law prohibitions apply to those who are complicit in violations or participate in other ways.¹⁵⁷ The Genocide Convention, for example, prohibits both complicity and conspiracy to commit genocide, as well as prohibiting genocide itself.¹⁵⁸ The Torture Convention requires states to criminalize any act “that constitutes complicity or participation in torture.”¹⁵⁹ Similarly, the Supplementary Slavery Convention establishes liability for “being an accessory thereto” of the enslavement of an

152. *Id.*

153. *Id.* at 99-102.

154. *Id.* at 112-18. For example, common Article 3 of the four Geneva Conventions sets minimal rules applicable to all parties engaged in armed conflict, including private parties as well as states. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 3518-3521, 75 U.N.T.S. 287, 288-289; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 3318-3321, 75 U.N.T.S. 135, 136; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 3220-3223, 75 U.N.T.S. 85, 86; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31, 32. The Second Protocol to the Conventions similarly applies to private parties engaged in internal armed conflicts. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 13, 1125 U.N.T.S. 609.

155. CLAPHAM, HUMAN RIGHTS, *supra* note 142, at 107-12, 118-24.

156. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 1(1), 1465 U.N.T.S. 113, 113 (entered into force June 26, 1987) [hereinafter Torture Convention].

157. See sources cited *infra*, notes 158-60.

158. Genocide Convention, *supra* note 140, art. 3.

159. Torture Convention, *supra* note 156, art. 4(1).

other person, or "being a party to a conspiracy to accomplish any such acts."¹⁶⁰ Thus, private actors violate these international norms when they participate with official actors in acts constituting prohibited violations.

From the time of the Nuremberg Tribunals through recent decisions of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, international law has recognized that those who conspire to commit an international crime or aid and abet its commission are criminally liable along with the principals. Several World War II cases found defendants guilty of war crimes and crimes against humanity as accomplices to the crimes. In *The Zyklon B Case*,¹⁶¹ for example, several German industrialists were convicted of supplying poison gas to Nazi concentration camps based on proof that they knew the purpose for which the gas was to be used.¹⁶²

The modern international criminal tribunals have applied the holdings of the World War II cases to develop an international law definition of aiding and abetting.¹⁶³ In a case arising in Rwanda, the tribunal held that the required *actus reus* was "practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime."¹⁶⁴ The required *mens rea* was that the accomplice "have knowledge that his actions [would] assist the perpetrator in the commission of the crime;" it required neither intent to commit the crime nor even knowledge of the exact crime to be committed.¹⁶⁵ Reviewing the common understandings as to accomplice liability in domestic legal systems, the Rwanda tribunal concluded both that all criminal systems provide that an accomplice can be tried in absence of the principal perpetrator and that the accomplice need not intend the principal offense: "As a result, anyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offense."¹⁶⁶ The statute of the International Criminal Court similarly holds liable

160. Supplementary Convention on the Abolition of Slavery, the Slave Trade, Institutions and Practices Similar to Slavery, Sept. 7, 1956, art. 6 266 U.N.T.S. 3, 43.

161. *The Zyklon B Case (Trial of Bruno Tesch and Two Others)*, 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (Brit. Mil. Ct. 1946).

162. *Id.* at 100. Similarly, Friederich Flick was convicted for knowingly contributing financial support to the Nazis. *U.S. v. Flick*, 6 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1, 1216-23 (1949). In *U.S. v. Krauch*, pharmaceutical industrialists were convicted because they knowingly supplied experimental vaccines to the Nazis, knowing they would be used in illegal medical experiments on concentration camp inmates. 8 TRIALS OF WAR CRIMINALS, 1081, 1169-72 (1952).

163. See generally Brief of Amici Curiae International Human Rights Organizations and International Law Scholars in Support of Plaintiffs-Appellants, *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001), at 7-19 (international law recognizes concept of complicity and does not require actual participation), available at www.aclu.org/library/iclr/2000/iclr2000_6.pdf; Andrew Clapham & Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses* (Mar. 2001) (on file with author).

164. *Prosecutor v. Furundzija*, IT-95-17/1-PT (Dec. 10, 1998), ¶ 249. Moral support is sufficient where such support has "a significant legitimizing or encouraging effect on the principals." *Id.* ¶ 232.

165. *Id.* ¶ 246.

166. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T (Int'l Crim. Trib. for Rwanda, Trial Chamber I, Sept. 2, 1998), ¶¶ 531, 539, at <http://www.ictor.org/ENGLISH/cases/Akayesu/judgement/akay001.htm>. Quoting an English case, the Rwanda tribunal stated:

a person who, “[f]or the purpose of facilitating the commission” of a crime, “aids, abets or otherwise assists in its commission. . . .”¹⁶⁷

In the non-criminal context of state responsibility for violations of international law, international tribunals have also recognized the concept of complicity. Thus, both the European Court of Human Rights and the United Nations Human Rights Committee have held that a state violates international law where it extradites a person to a country where the fugitive is likely to be subjected to human rights violations.¹⁶⁸

International human rights organizations also insist upon accountability that reaches beyond direct actions. Applying this principle to corporations, Human Rights Watch holds companies responsible for “human rights abuses that are being committed on their behalf and in their interest.”¹⁶⁹ This responsibility goes beyond the “most egregious examples,” such as when a company requests, pays for or supervises security operations that involve human rights violations.¹⁷⁰ Where company operations are “deeply intertwined” with repressive actions, the corporation has an obligation to take affirmative actions to ensure that abuses are not committed on its behalf.¹⁷¹

Non-state actors thus violate international norms when they are complicit in such abuses, as well as when they directly commit abuses. Moreover, private actors violate the norms requiring state action when they participate in acts taken in complicity with state actors. These principles apply to corporations as well as individuals, as discussed in the next section.

3. Corporations as well as Private Individuals

General human rights norms apply to individuals as well as to states. Although international enforcement mechanisms may be weak, with enforcement often left to domestic legal systems, the international rules of law prohibiting, for example, genocide, slavery and torture bar such conduct by individuals as well as by governments. Where some public action is required under interna-

[A]n indifference to the result of the crime does not of itself negate abetting. If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abettor.

Akayesu, ¶ 539 (quoting *National Coal Board v. Gamble*, 1 Q.B. 11 (1959)).

167. Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), art. 25, §3(c).

168. See generally *Soering v. United Kingdom*, 11 E.H.R.R. 439 (1989) (European Court of Human Rights held that the United Kingdom would be responsible for violations where there was substantial reason to believe Soering would be subjected to torture or other inhuman or degrading treatment if extradited); *Ng v. Canada*, U.N. Doc. CCPR/C/49/D/469/1991 (1994) (U.N. Human Rights Committee found violation of international law where Canada extradited petitioner knowing that human rights violations might occur).

169. Human Rights Watch, *The Price of Oil: Corporate Responsibility and Human Rights Violations in Nigeria's Oil Producing Communities*, Summary, at <http://www.hrw.org/hrw/press/1999/feb/nigsumm.htm> (last visited June 5, 2001).

170. *Id.*

171. *Id.*

tional law, the norm applies to private individuals who act in complicity with state actors.

The same concepts underlie the application of international human rights norms to corporations.¹⁷² Indeed, given the widespread recognition of corporate accountability within domestic legal systems, such an application is not surprising. International tribunals have applied human rights and humanitarian norms to corporations from the time of the Nuremberg Tribunals. That legacy, combined with the international consensus on corporate accountability, underlies the application of human rights provisions to corporate as well as individual persons.

The Nuremberg Tribunal made clear that norms applicable to “persons” applied to legal persons as well as individuals.¹⁷³ Thus, organizations were declared to be criminal where their purpose was to commit or facilitate crimes detailed in the Charter:

A criminal organization is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes. There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the Charter.¹⁷⁴

The Nuremberg Charter authorized the criminal prosecution of only individuals, thus the groups labeled “criminal organizations” were not actually subject to criminal charges.¹⁷⁵ But, in applying the Charter in the area under its control, the United States Military Tribunal found that the I.G. Farben Corporation had violated international law:

[W]e find that the proof establishes beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 *were committed by Farben*, and that these offences were connected with, and an inextricable part of the German policy for occupied territories.¹⁷⁶

Farben in these passages is held to have violated international law prohibitions against pillage and plunder:

172. See Kamminga & Zia-Zarifi, *supra* note 12, at 8-9 (noting the “growing consensus that MNCs are bound by those few rules applicable to all international actors,” including, *inter alia*, the prohibitions of slavery and forced labor, genocide, torture, extrajudicial murder, piracy, crimes against humanity and apartheid).

173. See Clapham, *supra* note 113, at 160-71 (discussing Nuremberg application of international law to corporations). Various international and national documents use the terms “judicial person,” “legal person,” “juristic persons” and “corporations” to refer to the organizations recognized as having legal status. *Id.* at 152, 152 n.24.

174. Nuremberg Judgment, *The Accused Organizations*, Oct. 1, 1946, reprinted in 41 AM. J. INT’L L. 172 (1947).

175. The jurisdiction of the International Military Tribunal included only prosecution of natural persons. Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, art. 6 59 Stat. 1544, 82 U.N.T.S. 279 (granting the Tribunal authority to evaluate the “individual responsibility” of “persons” who acted as “individuals or as members of organizations”). Organizations, however, could be held to be “criminal,” subjecting certain members to prosecution for the crime of membership in a criminal organization. *Id.*, arts. 9, 10.

176. Case No. 57, The I.G. Farben Trial, U.S. Military Tribunal, Nuremberg, 14 Aug. 1947-July 29, 1948, 10 LAW REPORTS OF TRIALS OF WAR CRIMINALS 1; 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1108, 1140, INT’L L. REP. 676 (1948) (emphasis added) [hereinafter 8 TRIALS OF WAR CRIMINALS].

The result was the enrichment of Farben and the building of its greater chemical empire through the medium of occupancy at the expense of the former owners. Such action on the part of Farben constituted a violation of the rights of private property, protected by the Laws and Customs of War¹⁷⁷

Thus, these general humanitarian law provisions governing the laws and customs of war applied to legal persons as well as individuals.

Despite some reluctance to apply international criminal law to corporations in the mid-twentieth century, the concept of international corporate crimes is now common.¹⁷⁸ As discussed above, several international treaties have expressly included corporate crimes, including the Apartheid Convention, and treaties governing corruption and bribery, hazardous wastes, and other environmental violations.

The absence of criminal prosecution as an enforcement mechanism does not detract from the conclusion that the norms bind corporate actors. International law and domestic legal systems may choose to enforce international norms through civil or administrative proceedings, as well as criminal prosecutions.¹⁷⁹ Moreover, discussion about criminal prosecution should not mask the more fundamental recognition that such conduct is prohibited—a violation of international law—even in the absence of specific enforcement mechanisms.

The preamble to the Universal Declaration of Human Rights contains a pointed application that goes beyond both states and individuals:

The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and *every organ of society*, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.¹⁸⁰

As Professor Louis Henkin has emphasized, “*Every individual* includes juridical persons. *Every individual* and *every organ of society* excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all.”¹⁸¹ Corporations are independent legal entities, subject to international and domestic regulation and capable of being held legally accountable for their actions. When an international agreement applies broadly to all actors, it applies

177. 8 TRIALS OF WAR CRIMINALS, *supra* note 176, at 1132, 1140 (emphasis added).

178. In both 1951 and 1953, the International Law Commission chose to exclude legal persons because some legal systems did not recognize penal responsibility on the part of legal entities. In the words of the 1953 report, the Commission decided to omit “so novel a principle as corporate criminal responsibility.” U.N. Doc. A/2645 (1953). See Clapham, *supra* note 113, at 171-72, for a discussion of this history.

179. Similarly, the fact that the Statute of the International Criminal Court does not authorize international criminal prosecution of corporations implies nothing about the applicability of the norms covered by the court to legal persons: “[L]ack of ICC jurisdiction over legal persons for war crimes should not mislead us into thinking that the laws of war and international human rights law do not apply to companies.” Clapham, *supra* note 113, at 178.

180. Universal Declaration, *supra* note 148, preamble (emphasis added).

181. Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT’L L. 17, 25 (1999) (emphasis in original).

to corporations as well. In the realm of core human rights norms, multinational corporations “are bound by those few rules applicable to all international actors.”¹⁸²

The international committees that interpret human rights agreements increasingly apply them in this manner to corporations. Thus, the United Nations Committee on Economic, Social and Cultural Rights has said that:

[A]ll members of society—individuals, families, local communities, non-governmental organizations, civil society organizations, *as well as the private business sector*, have responsibilities in the realization of the right to adequate food. . . . *The private business sector—national and transnational—should pursue its activities within the framework of a code of conduct conducive to respect of the right to adequate food.*¹⁸³

The Committee has used similar language in reference to the right to health.¹⁸⁴ In addition, the Human Rights Committee has stated that private entities are governed by the protection of the right to privacy.¹⁸⁵ Non-binding resolutions at numerous international conferences have applied human rights obligations in the area of discrimination, the environment, human rights and development to private corporations.¹⁸⁶

Although international law norms are often viewed as addressed only to states, many in fact apply to corporate persons as well as to private individuals and state officials and to states themselves.

C. “Voluntary” Codes/Binding Rules

Before discussing enforcement mechanisms, this section will address a curious phenomenon of the past decade: “voluntary” codes of corporate conduct. Such codes have their roots in a series of codes of conduct drafted by the United Nations and other international organizations in the 1970s, at a time when developing countries were most vocal in their concerns about the impact of multinational corporations on their economies.¹⁸⁷ The first of these, the draft U.N.

182. Kamminga & Zia-Zarifi, *supra* note 12, at 8.

183. U.N. Committee on Economic Social and Cultural Rights, General Comment 12, The Right to Adequate Food (Art. 11), May 12, 1999, para. 20.

184. U.N. Committee on Economic Social and Cultural Rights, General Comment 14, The Right to the Highest Attainable Standard of Health (Art. 12), July 4, 2000, para. 42.

185. U.N. Human Rights Committee, General Comment 16, The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honor and Reputation (Art. 17), April 8, 1988.

186. International Council on Human Rights Policy, Business Rights and Wrongs: Human Rights and the Developing International Legal Obligations of Companies 39 (2001) (draft report), at <http://www.ichrp.org>.

187. “Between 1970 and 1981, virtually all major international governmental organizations interested in international trade and investment developed detailed proposals for MNE codes of conduct.” Baker, *supra* note 39, at 409 (citing Hans V. Baade, *Codes of Conduct for Multinational Enterprises*, in 1 LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 407, 412 (Norbert Horn ed., 1980)).

The concept of voluntary codes of conduct rests upon a historical tradition of corporate self-regulation, tracing back to medieval Europe, through to the beginnings of the U.S. industrial economy. See ANTONY BLACK, GUILDS AND CIVIL SOCIETY IN EUROPEAN POLITICAL THOUGHT FROM THE TWELFTH CENTURY TO THE PRESENT 4, 6 (1984); Harvey L. Pitt & Karl A. Groskaufmanis,

Code of Conduct for Transnational Corporations, aimed primarily at regulating corporate meddling in the internal affairs of developing countries, was never adopted.¹⁸⁸ The draft code included general human rights language, stating that “[t]ransnational corporations shall respect human rights and fundamental freedoms in the countries in which they operate” and prohibiting discrimination.¹⁸⁹

Perhaps the most well-known of the private codes was the Sullivan Principles, a code of conduct for businesses operating in apartheid South Africa that prohibited discrimination.¹⁹⁰ Corporations were asked to pledge compliance and to report on their efforts. The author of the principles, Leon Sullivan, later criticized the code as ineffective, largely because of the lack of enforcement mechanisms.¹⁹¹ Similar efforts in the 1980s addressed corporate activities in Northern Ireland, the Soviet Union and China.¹⁹²

A host of such codes of conduct have been drafted by governmental and private organizations as well as by corporations over the past decade. Multilateral international efforts include the Compact for the New Century sponsored by U.N. Secretary General Kofi Annan¹⁹³ as well as a draft circulated by the sub-commission of the U.N. Human Rights Commission.¹⁹⁴ The European Parliament has proposed a similar code, as well as calling for adoption of a binding code of conduct.¹⁹⁵ On a national level, the U.S. government has worked with business representatives on codes to govern both the apparel industry and mining and petroleum industries.¹⁹⁶ Private efforts include codes developed by corporations themselves and those drafted by a wide range of independent nongovernmental organizations.

Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct, 78 GEO. L. J. 1559, 1561, 1576-78 (1990); Baker, *supra* note 39, at 407.

188. See Development and International Economic Cooperation: Transnational Corporations, U.N. Economic and Social Commission, 2d Sess., Agenda Item 7(d), at 1, U.N. Doc. E/1990/94 (1990).

189. *Id.*

190. *Sullivan Principles for U.S. Corporations Operating in South Africa*, 24 I.L.M. 1496 (1985) (citing “The (Sullivan) Statement of Principles” (Fourth Amplification), Nov. 8, 1984).

191. See Leon Sullivan, *The Sullivan Principles and Change in South Africa*, in *BUSINESS IN THE CONTEMPORARY WORLD* 175 (Herbert L. Sawyer ed., 1988); Karen Paul, *The Inadequacy of Sullivan Reporting*, 57 Bus. & Soc. R. 61 (1986).

192. See discussion of these codes in Lance Compa & Tashia Hinchliffe-Darricarrere, *Enforcing International Labor Rights Through Corporate Codes of Conduct*, 33 COLUM. J. TRANSNAT’L L. 663, 671-72 (1995).

193. U.N. Secretary-General Kofi A. Annan, *A Compact for the New Century*, at <http://www.unglobalcompact.org/un/gc/unweb.nsf/content/thenine.htm> (last visited Apr. 14, 2001) [hereinafter U.N. Compact].

194. See generally David Weissbrodt, *The Beginning of a Sessional Working Group on Transnational Corporations Within the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities*, in *LIABILITY OF MULTINATIONAL CORPORATIONS*, *supra* note 12, at 119-38.

195. Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, European Parliament, Resolution A4-0508/98.

196. Bureau of National Affairs, Inc., Voluntary “Model Business Principles” Issued by the Clinton Administration, May 26, 1995, Daily Rep. For Executives, May 31, 1995, <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/usmodel.htm> (last visited Nov. 3, 2001) [hereinafter U.S. Dep’t of Commerce].

Perhaps the most striking fact about these “voluntary” codes is the extent to which they incorporate human rights norms that are, in fact, obligatory duties, not voluntary undertakings. The U.N. Compact, for example, calls on world business to “respect the protection of international human rights within their sphere of influence” and “make sure their own corporations are not complicit in human right abuses.”¹⁹⁷ The Compact proceeds to ask business leaders to respect the four most fundamental labor rights principles that were adopted by unanimous consensus by the 170 members of the International Labor Organization: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced and compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation.¹⁹⁸

Similarly, the self-proclaimed voluntary Guidelines for Multinational Enterprises drafted by the Organization for Economic Cooperation and Development call on corporations to “[r]espect the human rights of those affected by their activities” and to “contribute to the effective elimination of child labor” and “forced or compulsory labor in their operations.”¹⁹⁹ The ILO itself has adopted a non-binding declaration of principles that urges “All parties”— governments, employers and trade unions—to “respect the Universal Declaration of Human Rights” as well as the two International Covenants.²⁰⁰ The Model Business Principles issued by the Clinton Administration follow this same pattern, terming their provisions voluntary, although they include a pledge to avoid forced labor and to comply with U.S. and local law.²⁰¹

Despite the voluntary language in these codes, it is difficult to imagine a corporation arguing that it is not obligated to respect human rights and to refrain from using forced labor. The prohibition against forced labor has been a core, obligatory feature of international law for almost fifty years, since the adoption of the Supplementary Slavery Convention.²⁰² Use of forced labor violates international law—and there is nothing voluntary about a corporation’s agreement to refrain from doing so. Similarly, paying a security force to commit torture violates international law; corporations do not “voluntarily” choose to abide by this international norm. This is not to deny that there is some importance to a pledge to abide by the law. Obviously, obligations are not actually honored in practice, and anything that contributes to greater compliance is useful. But, the fact that such obligations are included in “voluntary” codes should not obscure the obligatory foundation of many of the norms included in the codes.

197. U.N. Compact, *supra* note 193, §§ 1(a), (b).

198. *Id.* at § (2).

199. OECD Guidelines for Multinational Enterprises, II(2), IV(1)(c), available at <http://www1.oecd.org/daf/investment/guidelines/mnetext.htm> (last visited Nov. 3, 2001). The OECD guidelines were first drafted in 1976; this reference to respect for human rights was inserted in the most recent revision, in June 2000.

200. Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, International Labor Organization, art. 8, 17 I.L.M. 422, 425-28 (1978).

201. U.S. Dep’t of Commerce, *supra* note 196.

202. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 226 U.N.T.S. 3.

The sad reality is that the weak language of most of these codes reflects the economic and political power of multinational corporations. The United Nations, for example, has acknowledged that the Global Compact is voluntary because corporations would not accept a binding commitment.²⁰³ Critics have charged that the U.N. is “making peace with power,” while abandoning the drive to strengthen legally binding norms.²⁰⁴

It is interesting to note, however, that the United Nations at the time of its foundation made a similar “peace with power” with surprising results, drafting an aspirational human rights code that has since evolved into a powerful human rights platform. The Universal Declaration of Human Rights was drafted as a non-binding document because the states belonging to the United Nations refused to agree to binding norms. As described by Eleanor Roosevelt, a key leader in the drafting and passage of the Declaration:

In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations.²⁰⁵

The United Nations described the Universal Declaration as originally “a manifesto with primarily moral authority.”²⁰⁶ Nevertheless, half a century later, the document is now considered to be binding, in important part, if not in total.²⁰⁷

Today’s “voluntary” codes of business conduct are already, in part, statements of binding international law. To the extent that they extend beyond currently existing law, they may follow the path of the Universal Declaration, acquiring binding status through their incorporation into customary international law or international treaties.²⁰⁸

203. Irwin Arief, *UN: One Year Later Global Compact Has Little To Show*, REUTERS, July 27, 2001 (U.N. Assistant Secretary-General Michael Doyle “acknowledged the program’s [voluntary] form was in part dictated by a recognition that the corporate world was unwilling to accept binding global standards on corporate governance”).

204. George Monbiot, *The United Nations is Trying to Regain its Credibility by Fawning to Big Business*, THE GUARDIAN, Aug. 31, 2000 (The U.N. is “helping western companies to penetrate new markets while avoiding the regulations which would be the only effective means of holding them to account. By making peace with power, the U.N. is declaring war upon the powerless.”).

205. Quoted in 5 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 243 (Washington, D.C.: Dept. of State Publication # 7873, 1965).

206. United Nations, *The International Bill of Human Rights* 1 (U.N. Dept. of Public Information, 1988).

207. See Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287, 317-39 (1995/1996). Hannum concludes that although there is insufficient international support to find that the *entire* Declaration constitutes binding customary international law, there would seem to be little argument that many provisions of the Declaration today do reflect customary international law. *Id.*

208. See RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 141, at § 213 note 7 (describing voluntary codes of conduct and concluding: “Such codes . . . may contribute to the development of international norms supporting state regulation of [multinational] enterprises.”)

VI.

ENFORCEMENT: DOMESTIC AND INTERNATIONAL

There is no dispute about governmental authority to regulate corporations and to require that corporations abide by the rule of law. In fact, given corporate unwillingness to accept social obligations as part of the business ethic, governmental regulation is essential. Domestic legal regimes include myriad rules applicable to corporations and enforceable through the national legal systems. In addition, the international community has developed a considerable body of rules applicable to corporations. These international norms have the advantage of uniformity and consistency. Where domestic norms vary, multinational corporations have the ability to structure their operations so as to take advantage of the most favorable legal regime.

Many international norms are already well-developed; effective enforcement of those rules, however, remains the crucial missing piece of the regulatory puzzle. A great deal of effort has been spent developing enforceable rules to govern the *economic* behavior of multinational corporations: trade, patents, investment, financing are all the subject of existing international regulation or ongoing efforts to draft rules. These economic regulatory systems include well-elaborated enforcement mechanisms. Ironically, the human rights consequences of multinational corporate operations have received much less international attention, despite the fact that transnationals have an ongoing, and at times devastating, impact on human rights around the world.²⁰⁹

Uniform international norms prevent multinational corporations from evading regulation by transferring their operations to countries with weaker standards. Similarly, consistent international enforcement mechanisms would prevent multinationals from evading the consequences of their actions by avoiding nations with the most effective enforcement mechanisms. Such international efforts, however, are at the moment a rather distant goal. In the meantime, domestic enforcement can be at least partially effective, by enforcing either domestic laws or international norms. To the extent that enforcement becomes more widespread, evasive techniques will be correspondingly less successful.

A. *An Overview of Domestic Enforcement*

Domestic enforcement can take place either in the *home* state, the state of citizenship of the corporation, or in the *host* state, the place in which the relevant operations take place. Host state enforcement has seemingly clear advantages, because it permits local control over local events. Such enforcement is not possible, however, if the host government is complicit in the human rights abuses, as in Burma or Nigeria under the former military dictatorship. Moreover, the

209. As stated by Orentlicher and Gelatt:

The powerful influence of transnational corporations on human rights conditions in the countries where they invest makes it both appropriate, and necessary, to assure that the behavior of these private actors comports with the human rights standards established by public international law and enforced by national law.

Orentlicher & Gelatt, *supra* note 98, at 69.

unequal division of economic power within the global economy makes such regulation difficult for developing nations. Unequal bargaining power makes it difficult if not impossible for host countries to enforce restrictions on corporate activity. In addition, transnational businesses can often insulate themselves from liability in any one country by moving assets and operations to more favorable locations.

Although home country enforcement has disadvantages, it may nevertheless be a more viable alternative in many situations. Home state enforcement efforts may provoke opposition from host states, arguing that western efforts to impose higher labor and environmental standards will cost them jobs. These considerations may be valid in some settings. Moreover, regulation by the United States is often suspect, given the well-grounded suspicion that the U.S. only intervenes when such regulation is in the self-interest of the U.S. economy. Nevertheless, given the lack of an effective international regulatory system and the difficulties host countries face when trying to impose standards on the corporations acting within their territory, home country regulation may be the best short-term alternative. As Professor Vagts has said, a U.S. refusal to control the activities of U.S. corporations abroad would amount to "abdication" of a power that no other entity can, at this time, exercise.²¹⁰ He called for U.S. regulation in order to avoid a vacuum in which multinational corporations set their own rules, "without regard to their broader impact."²¹¹

Most legal systems assert jurisdiction over the activities of corporations based in their state, although many may either refuse jurisdiction where the activities at issue occurred in another country or apply the laws of that country to the claim.²¹² The United States is more assertive, both in retaining jurisdiction over claims arising in another state and in applying substantive U.S. law to the activities of U.S. corporations in foreign countries. U.S. law permits Congress to impose its authority outside our borders but presumes that statutes do not have extraterritorial effect unless that presumption is overcome by a showing of congressional intent.²¹³ Jonathan Turley demonstrates the inconsistent manner in which this supposed presumption is applied: statutes regulating anti-trust, securities and criminal law have been found to apply extraterritorially, while statutes with near identical language in the areas of environmental or labor regulation have been denied extraterritorial application.²¹⁴ Nevertheless, the

210. Vagts, *supra* note 57, at 786.

211. *Id.*

212. Stephens, *Translating Filártiga*, *supra* note 128 (manuscript at 24-27, 36-39).

213. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) (Congress "legislates against the backdrop of the presumption against extraterritoriality," which can be overcome by "the affirmative intention of Congress clearly expressed.").

214. See Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Territoriality*, 84 NW. U. L. REV. 598 (1990). Turley suggests that extraterritoriality is upheld in areas involving protection of the free market, and rejected in cases involving non-market concerns. *Id.* at 601. More recently, Gibney and Emerick propose an even more blatant predictor of these otherwise inconsistent decisions: statutes are held to be extraterritorial when to do so would advance U.S. interests, and denied extraterritorial application when against our interests. See Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protec-*

power of the U.S. government to develop norms governing human rights-related behavior, and to impose those norms on corporations based in the United States, is clear.

A bill introduced into the U.S. Congress last year would have imposed a detailed set of international environmental, labor and human rights standards on U.S.-based corporations, with violators facing denial of access to a series of key government trade programs.²¹⁵ The European Parliament has also proposed imposing binding norms on European-based corporations.²¹⁶

Norms governing corporate operations can also be enforced through litigation. A U.S. corporation, for example, can be sued in the United States by individuals harmed by its activities abroad. Such suits have been filed in England, Canada and Australia, asserting negligence claims arising out of corporate activities in foreign countries, where the firm is incorporated in the forum or has taken key decisions in its headquarters.²¹⁷ Such claims are possible only if the litigation satisfies the requirements of the domestic legal system.²¹⁸ The first hurdle is identifying a tort subject to suit. Claims based on domestic tort law are possible only when they fall within recognized domestic causes of action. Given that choice-of-law principles in most legal systems will direct the court to apply the law of the place where the events took place, host state laws may make it difficult or impossible to litigate claims based on human rights violations, labor rights or environmental norms.²¹⁹

The national courts must also be authorized to assert personal jurisdiction over the defendant corporation. Where the forum state is the place of incorporation, that is, the state of nationality of the corporation, personal jurisdiction is generally not a problem. More difficult jurisdictional issues arise where the defendant is the parent company of the corporation charged with the abuses or related in some other way through the corporate group, an issue discussed later in this part.

Dismissal based on forum *non conveniens* is also a possibility, where all relevant events have taken place outside of the forum territory. However, in England, the House of Lords recently rejected an effort to dismiss a series of

tion of Human Rights: Holding Multinational Corporations to Domestic and International Standards, 10 TEMP. INT'L & COMP. L.J. 123 (1996).

In our view, the case law falls together very neatly, depending not so much on what will promote a general principle such as the free market, but simply on what will benefit the United States. . . . In short, the law has been applied extraterritorially when it seeks to prevent negative phenomena from occurring in the United States, but generally not when an agent of the United States (or the government itself) pursues activities that might bring about "negative effects" in other countries.

Id. at 141.

215. The Transparency and Responsibility for U.S. Trade Health Act of 2001, H.R. 460, 107th Cong. (2001).

216. Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, EUR. PARL. DOC. (Com 104) 108 (1999).

217. See Richard Meeran, *Accountability of Transnationals for Human Rights Abuses*, 148 NEW L.J. 1686 (Nov. 13, 1998), 148 NEW L.J. 1706 (Nov. 20, 1998).

218. See generally Stephens, *Translating Filártiga*, *supra* note 128.

219. *Id.* (manuscript at 36-39).

cases in favor of a forum in South Africa.²²⁰ The Court found that South Africa did not offer a viable alternative forum given that the plaintiffs would be unable to find counsel capable of handling their claims. The *Lubbe* litigation is a significant example of a growing recognition by host states that their interests and those of their citizens may be served by litigation in the home states. Indeed, one reaction to such litigation is to argue that citizens of the developing world have a right to bring their claims in the more highly developed legal systems where the corporate defendants are based and where those defendants' assets are available for satisfaction of an eventual judgment. In *Lubbe*, the South African government supported the plaintiffs' efforts to maintain the lawsuit in England, arguing that South Africa's overtaxed, post-apartheid judiciary was not yet capable of handling such claims.²²¹ Similarly, although the government of Ecuador took varying positions as to litigation against Texaco for environmental damage, it eventually argued that the claims should be litigated in the United States.²²²

B. U.S. Human Rights Litigation

Domestic litigation can also, in some circumstances, apply international law to corporate violations. Many legal systems will not recognize civil international claims in the absence of authorizing legislation. Both civil and criminal claims for violations of fundamental rights, however, may be permitted under the authorization of universal jurisdiction.²²³

Civil claims for human rights violations are possible in the United States because of a unique statute that permits domestic litigation to enforce *international law*. The Alien Tort Claims Act²²⁴ grants the federal courts jurisdiction over a "civil action by an alien for a tort only, committed in violation of the law of nations or by a treaty of the United States." In the first modern case to apply the statute, *Filártiga v. Peña-Irala*,²²⁵ the Second Circuit held that the statute addresses violations of the law of nations as that body of law evolves over time and concluded that torture by a state of its own citizens violated modern norms of international law.²²⁶ Since *Filártiga*, the statute has been consistently inter-

220. *Lubbe v. Cape plc*, 4 All E.R. 268 (2000).

221. See Statement of Case on Behalf of the Republic of South Africa (May 26, 2000) in *Lubbe v. Cape plc*, *supra* note 220 (arguing that consideration of "public interest" weighed in favor of deciding the case in England, not in South Africa) (copy on file with author).

222. See *Jota v. Texaco, Inc.*, 57 F.3d 153, 156-58 (2d Cir. 1998), for discussion of the various Ecuadoran government submissions. One Ecuadoran legislator concluded that the United States represented the only possibility of "finding just treatment" for those injured by the oil company's operations. *Id.* at 157.

223. See Stephens, *Translating Filártiga*, *supra* note 128 (manuscript at 46-65).

224. 28 U.S.C. § 1350 (1994) [hereinafter ATCA].

225. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). Although cited in an early opinion by the U.S. attorney general, 1 OP. ATT'Y GEN. 57 (1795) (in response to complaint that U.S. citizens had attacked a British colony in Sierra Leone, attorney general suggested that those injured file civil suit for damages under ATCA), the statute was largely ignored until the Second Circuit decided the *Filártiga* case in 1980.

226. *Id.* at 881, 884-85. In *Filártiga*, the family of a young Paraguayan man who was tortured to death in Paraguay filed a lawsuit against a Paraguayan police officer. The district court dismissed the case, holding that the torture by a state official of that state's own citizen did not violate interna-

preted as applying to acts that violate "universal, obligatory and definable" norms,²²⁷ including human rights and humanitarian law violations such as genocide, summary execution, war crimes and crimes against humanity, disappearance, slavery and forced labor.²²⁸

Two related principles permit ATCA litigation against corporations. First, private corporations are liable for violations of human rights norms such as genocide, slavery and war crimes that by definition apply to private actors as well

tional law, *see id.* at 880 (summarizing district court decision), the holding was then reversed by the Second Circuit.

227. First articulated in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987), this standard has since been widely accepted. *See, e.g.,* *Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383 (9th Cir. 1998); *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994); BETH STEPHENS & MICHAEL RATNER, *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* 51-52 (1995).

Filártiga has been followed by every Circuit and District Court to reach a decision on the issue. *See, e.g.,* *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied*, 121 S.Ct. 1402 (2001); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *Martinez v. City of Los Angeles*, 141 F.3d 1373 (9th Cir. 1998); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996). In one decision by the D.C. Circuit, a three-judge panel rejected an ATCA claim without reaching agreement on the significance of the statute. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985). One judge disagreed with the *Filártiga* holding, *id.* at 798-823 (Bork, J., concurring), while one agreed with it, *id.* at 775-98 (Edwards, J., concurring), and one would have dismissed the case on the basis of the political question doctrine, *id.* at 823-27 (Robb, J., concurring).

228. *See, e.g.,* *Estate of Marcos*, 25 F.3d at 1475-76 (summary execution, torture, disappearance); *Kadic*, 70 F.3d at 246 (genocide, war crimes, and crimes against humanity); *Abebe-Jira*, 72 F.3d 844 (torture); *Doe I v. Unocal Corp.*, 963 F. Supp. 880, 891-92 (C.D. Cal. 1997) (slavery and forced labor).

Claims have been rejected where the courts find no universal consensus as to the prohibition, including claims against private corporations for environmental harm, and claims based on expropriation of property, state contract law, fraud and free speech violations. *See, e.g.,* *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 166-67 (5th Cir. 1999) (rejecting environmental claim against corporation); *Bigio v. Coca Cola Co.*, 239 F.3d 440, 447-50 (2d Cir. 2000) (rejecting ATCA jurisdiction over claim that defendant acquired property that had previously been expropriated by Egyptian government on basis of the owners' religion); *Nat'l Coalition Gov't of the Union of Burma v. Unocal*, 176 F.R.D. 329, 345 (C.D. Cal. 1997) (dismissing ATCA claim for loss of property); *Wong-Opasi v. Tennessee State University*, 229 F.3d 1155 (6th Cir. 2000), *available at* 2000 WL 1182827 at *2 (unpublished disposition) (rejecting ATCA jurisdiction over state law contract and tort claims); *Hamid v. Price Waterhouse*, 51 F.3d 1411, 1417-18 (9th Cir. 1994) (holding that claims of fraud, breach of fiduciary duty, and misappropriation of funds are not breaches of the "law of nations" for purposes of jurisdiction under the Alien Tort Statute); *Guinto v. Marcos*, 654 F. Supp. 276, 280 (S.D. Cal. 1986) ("violation of the First Amendment right of free speech does not rise to the level of such universally recognized rights and so does not constitute a 'law of nations'").

Post-*Filártiga* cases have recognized additionally the categories of defendants who can be held liable under the ATCA. *Filártiga* held liable the actual torturer. Defendants in several subsequent cases have included military commanders held responsible for violations committed by troops under their command. Philippine dictator Ferdinand Marcos, for example, was held responsible for thousands of executions, disappearances and torture committed by his military forces. *Estate of Marcos*, 25 F.3d 1467. *See also, e.g.,* *Kadic*, 70 F.3d 232 (leader of the Bosnian Serbs held responsible for violations committed by troops); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (military commander held responsible for violations committed by troops); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993) (same); *Forti*, 672 F. Supp. 1531 (same).

as official government agents.²²⁹ Second, private corporations can be held liable for human rights violations when they act together with public officials.²³⁰

The concept of private corporate liability under the ATCA has been upheld in a handful of preliminary decisions, although none has resulted in a final judgment. In *Doe I v. Unocal Corp.*,²³¹ for example, the district court found that a corporation can be held liable for private acts of slavery and forced labor, because the international law prohibitions apply to all actors. Similarly, *Beanal v. Freeport*²³² found that a private corporation can be held liable for genocide, which by definition is barred whether committed by “public officials or private individuals.”²³³ These decisions have also recognized that corporations can be held responsible under the ATCA for international law violations that require state action, such as torture and summary executions. As stated by the court in *Beanal*, “[A] corporation found to be a state actor can be held responsible for human rights abuses which violate international customary law.”²³⁴ State action will be found when the private corporation acts in complicity with state actors; the courts apply the well developed standards of domestic civil rights cases to determine complicity.²³⁵

Where litigation is based on international norms, rather than domestic tort law, U.S. courts have found a heightened U.S. interest in offering a forum for the claims. Considering both the ATCA and a more recent U.S. statute, the Torture Victim Protection Act,²³⁶ the court in *Wiwa v. Royal Dutch Petroleum Company* found that “Congress has expressed a policy of U.S. law favoring the adjudication of such suits in U.S. courts.”²³⁷ A coordinated international effort to provide access to national courts to litigate human rights claims would greatly further efforts to enforce the human rights obligations of transnational corporations.

229. The Second Circuit decision in *Kadic v. Karadzic*, 70 F.3d 232, addressed the responsibility of nonstate actors, rather than those committed by officials of recognized states. *Kadic* involved claims of genocide, torture and war crimes against Radovan Karadzic, the head of the unrecognized Bosnian Serb regime. The court held that the international prohibitions against genocide and certain war crimes apply to all actors, including private citizens. *Id.* at 241-43.

230. The *Kadic* court also found that international law norms that govern official action apply to private actors who act “in concert with” a state. *Id.* at 245. Plaintiffs alleged that Karadzic acted in concert with the recognized government of the former Yugoslavia.

231. 963 F. Supp. 880, 891-92 (C.D. Cal. 1997), dismissed on a motion for summary judgment, 110 F. Supp. 2d 1294 (C.D. Cal. 2000) (appeal pending).

232. *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362, 372-73 (E.D. La. 1997). In *Beanal*, however, the district court dismissed plaintiff’s third amended complaint, holding that even as amended it still did not adequately allege genocide. *Beanal v. Freeport-McMoran, Inc.*, 1998 WL 92246 (E.D. La. Mar. 3, 1998) (unpublished opinion), *aff’d* 197 F.3d 161 (5th Cir. 1999).

233. Genocide Convention, *supra* note 140, art. 4.

234. *Beanal*, 969 F. Supp. at 376.

235. See, e.g., *Kadic*, 70 F.3d at 245; *Beanal*, 969 F. Supp. at 374-80; *Doe I v. Unocal*, 963 F. Supp. at 890-91.

236. Torture Victim Protection Act of 1991, 28 § U.S.C. 1350 note (1994).

237. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000), *cert. denied*, 121 S.Ct. 1402 (2001).

C. Extraterritorial Jurisdiction and Enterprise Theory

The *Wiwa* claims against Royal Dutch Petroleum illustrate a final obstacle to the use of domestic court systems to hold transnational corporations accountable. As stressed earlier, national law is ill-structured to regulate multinationals, whose operations, by definition, straddle many countries. Domestic judicial systems may be unable to obtain jurisdiction over the piece of the multinational that actually sets human rights policies and that has the resources to satisfy a judgment. In *Wiwa*, a magistrate originally concluded that the U.S. federal court in New York did not have jurisdiction over Royal Dutch Petroleum.²³⁸ The district court judge disagreed, finding jurisdiction, a holding that was upheld by the Second Circuit on appeal.²³⁹ However, jurisdiction was based not upon the presence of Shell gas stations throughout the United States; the court did not consider plaintiffs' argument that Shell U.S.A. was the alter ego of Royal Dutch Petroleum.²⁴⁰ Jurisdiction instead was premised on a handful of direct contacts between Royal Dutch and New York State. The Shell components clearly have put tremendous effort into structuring their operations in such a way as to isolate themselves from the responsibilities of the other members of their corporate family—an effort that might have worked but for the direct contacts between the parent company and New York.

This same problem arises when applying international rules of jurisdiction. International law sets guidelines for exercise by national legal systems of both jurisdiction to prescribe, to determine the rules applicable to persons or activities, and jurisdiction to adjudicate, to subject persons or things to judicial process.²⁴¹ Both jurisdiction to prescribe and to adjudicate generally turn upon the contacts with the state seeking to assert jurisdiction.²⁴² Home state jurisdiction over multinational corporations is based upon the nationality of the corporation, that is, the fact that it is incorporated in the home state. However, where a multinational corporation is composed of multiple units, each incorporated in different states, each of these units may have a different "home state." As a result, multinational corporations argue that parents and subsidiaries are not subject to the jurisdiction of the other's home state. Once again, the reality of economic interdependence is masked by the legal fiction of separate corporate identities.

This highlights the importance of Professor Blumberg's call for application of enterprise law, looking at the reality of control, decision-making and economic benefit rather than the formalities of corporate legal structures. Blumberg highlights an emerging view of the corporate nature, one that recognizes that

238. *Id.* at 94.

239. *Id.* at 94-99.

240. *Id.* at 95 n.4.

241. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 141, § 401 (defining categories of jurisdiction under international law).

242. Both look at the location of the persons, things or activities central to the dispute; the nationality of the natural or legal persons involved; and the impact of the activities at issue on the state. *See id.* §§ 402 (listing bases of jurisdiction to prescribe), 421 (listing bases of jurisdiction to adjudicate).

corporations are no longer single-nation entities with a readily identifiable nationality:

These very large corporations typically operate as multi-tiered multinational groups of parent and subsidiary corporations collectively conducting worldwide economically integrated enterprises that for legal or political purposes have been fragmented among the constituent companies of the group. In selected areas, the law is beginning to recognize corporate groups rather than a particular subsidiary company, as the juridical unit, and to impose group obligations and, less frequently, to recognize group rights as well.²⁴³

Such an approach was tried—and rejected—in response to the Union Carbide disaster in Bhopal, India, after a chemical leak in 1984 killed thousands of people and injured tens of thousands more.²⁴⁴ The government of India, representing those injured by the chemical leak, argued in U.S. federal court that the multinational corporation must be viewed as “one entity” rather than as independent parts:

In reality there is but one entity, the monolithic multinational, which is responsible for the design, development and dissemination of information and technology worldwide, acting through a neatly designed network of interlocking directors, common operating systems, global distribution and marketing systems, financial and other controls. . . . Persons harmed by the acts of [a] multinational corporation are [not] in a position to isolate which unit of the enterprise caused the harm, yet it is evident that the multinational enterprise that caused the harm is liable for such harm. The defendant multinational corporation has to bear this responsibility for it alone had at all material times the means to know and guard against hazards likely to be caused by the operation of the said plant, designed and installed or caused to be installed by it and to provide warnings of potential hazards.²⁴⁵

The district court flatly rejected this approach, dismissing the case on the basis of *forum non conveniens*, after concluding that there was insufficient connection between the U.S. parent company and the Indian operation to justify suit in U.S. courts.

Shortly after the Bhopal disaster, Westbrook noted the difficulty in applying notions of enterprise liability to an economic system built upon limiting liability:

[A] central theme of the last two centuries of modern economic development has been the effort to harness enterprise capitalism without crushing it. . . . To choose to adopt or reject a theory of enterprise liability for personal injuries, or at least for mass disasters, is to confront once again the dilemma of capitalism.²⁴⁶

The concept of limited liability, however, arose long before corporations were permitted to expand to create the interlocking multinational enterprises that now dominate the international economy. As the Bhopal litigation illustrates, in the

243. Blumberg, *supra* note 83, at 298 (footnotes omitted).

244. See Jamie Cassels, *Outlaws: Multinational Corporations and Catastrophic Law*, 31 CUMB. L. REV. 311 (2000), for a summary of the facts and efforts to obtain legal redress.

245. *Id.* at 324 (quoting Complaint, Union of India v. Union Carbide Corporation (5 Sept., 1986), ¶ 19). The full complaint is reprinted in VALIANT VICTIMS AND LETHAL LITIGATION: THE BHOPAL CASE 3 (Upendra Baxi and Amita Dhanda eds., 1990).

246. Jay Lawrence Westbrook, *Theories of Parent Company Liability and the Prospects for an International Settlement*, 20 TEX. INT'L L. J. 321, 326 (1985).

absence of a pragmatic international approach, one that recognizes the reality of economic interdependence rather than relying on legal independence, multinationals will continue to evade regulation in domestic legal systems. International regulation and enforcement are necessary to regulate an international enterprise. To be fully effective, the corporate regulatory system must recognize enterprise principles so that it can deal with the global phenomenon of multinational corporations.

VII. CONCLUSION

Multinational corporations are the driving force behind the global economy. Reining in their unchecked power, imposing regulations that force accountability for human rights abuses, is indeed a challenge to modern capitalism. International law has already developed applicable standards. The task ahead is to find effective mechanisms to enforce those norms, to ensure that the amorality of profit does not permit corporate human rights abuses to fester for another fifty years.

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Corporate Complicity:
From Nuremberg to Rangoon¹
An Examination of Forced Labor
Cases and Their Impact
on the Liability of
Multinational Corporations

By
Anita Ramasastry*

“Corporations have neither bodies to be punished, nor souls to be condemned.
They therefore do as they like.”

—Edward, 1st Baron Thurlow,
English Jurist and Lord Chancellor (1731-1806)

INTRODUCTION²

Can multinational corporations (MNCs) violate the law of nations? If so, how should nation-states deal with them when they are perpetrators?³ In recent

1. Rangoon is the capital city of Burma. Myanmar is the name for Burma in the Burmese language. The country is currently ruled by the State Law and Order Restoration Council (SLORC), which took power in a 1988 coup, suspending the legislature and the judiciary. In 1989, the Burmese military government issued a decree that the country be known by the name of Myanmar. Since then, Burma has been referred to as Myanmar in Burmese government publications. The name Burma is still very much in use both unofficially and by other nations that do not recognize the present military government.

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2. Although this article includes many textual excerpts, such excerpts are important because they emphasize the focus that courts (both contemporary and historical) have focused on slave labor and its status as a violation of the law of nations and also on the role of corporate entities (referred to as legal persons) as participants in or beneficiaries of such crimes.

3. Multinational corporations, or MNCs, have been defined as corporations with affiliates or business establishments in more than one country. See W.H. Meyer, *Human Rights and MNCs: Theory v. Quantitative Analysis* 18 HUMAN RIGHTS Q. 369 (1996). Other terms that are often used

years, there has been increasing discussion of the problem of “corporate complicity”⁴ with respect to MNC investment activity in countries with repressive regimes.⁵ The investments may involve joint ventures or contractual partnerships with repressive host governments. MNCs may also have physical presences such as factories or mining operations in the host countries. The term complicity is used because MNCs are characterized as accomplices to serious human rights violations perpetrated by host governments. Victims in the host country typically are unable to seek redress in their own country. The courts are unable or ill equipped to handle their cases or the host government will not pursue enforcement against the perpetrators (e.g., security forces or the military).

There has been a particular focus on MNCs involved in extraction industries. In order to gain access to certain types of natural resources, such as oil and gas, copper, or diamonds, MNCs may have to partner with a repressive government.⁶ MNCs entering into partnerships in so-called “conflict zones” have been subjected to increasing scrutiny. Some MNC partnerships allegedly have involved serious human rights violations such as forced labor, forced displacement of local communities, and torture and execution of citizens by government security forces retained to guard MNC project sites. In other instances, MNCs are alleged to have benefited from a repressive government’s policies. For example, it has been alleged that MNCs have used prisoners as forced laborers to manufacture products in countries with poor human rights records.

In the United States, this heightened scrutiny has resulted in a wave of litigation against MNCs for violations of public international law under the federal Alien Tort Claims Act (ATCA). These lawsuits represent an effort of “home” states to assert jurisdiction over MNCs in an attempt to influence their behavior overseas and to provide compensation to victims. These lawsuits have twin compensatory and deterrent aims. Other nations, such as the United King-

when referring to corporations or business entities that transact globally are transnational corporations and multinational enterprises. See P. MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 12-15 (1995). See also, Detlev F. Vagts, *The Multinational Enterprise: A New Challenge for Transnational Law*, 83 HARV. L. REV. 739 (1970).

4. One of the earliest groups to use the term “corporate complicity” in its publications was Human Rights Watch, a leading nongovernmental organization. Human Rights Watch has published two major reports that focus on investment activities of MNCs and their relationship to human rights violations. See, e.g., HUMAN RIGHTS WATCH, *THE ENRON CORPORATION: CORPORATE COMPLICITY IN HUMAN RIGHTS VIOLATIONS* (1999), available at <http://www.hrw.org/reports/1999/enron/> (last visited Feb. 7, 2002).

5. For a useful overview, see CHRISTOPHER AVERY, *AMNESTY INT’L UK, BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE* (2000), available at <http://www.business-humanrights.org/Avery-Report.htm> (last visited Jan. 23, 2002).

6. See JULIETTE BENNETT, *INT’L PEACE FORUM, BUSINESS IN ZONES OF CONFLICT—THE ROLE OF THE MULTINATIONAL IN PROMOTING REGIONAL STABILITY* (2001), available at http://www.unglobalcompact.org/un/gc/unweb.nsf/content/Reg_Stability.htm (last visited Jan. 23, 2002). See also, THE ENRON CORPORATION, *supra* note 3; HUMAN RIGHTS WATCH, *THE PRICE OF OIL: CORPORATE RESPONSIBILITY AND HUMAN RIGHTS VIOLATIONS IN NIGERIA’S OIL PRODUCING COMMUNITIES* (1999), available at <http://www.hrw.org/reports/1999/nigeria/> (last visited Jan. 23, 2002).

dom, have begun to allow suits against parent MNCs for actions of their subsidiaries located overseas.⁷

What is the legal responsibility of an MNC with operations in a country where human rights violations are widespread, or where its revenues provide support for a repressive regime? Should MNCs be liable if their actions assist or contribute to serious violations of international law by host governments? Furthermore, what type of MNC activity is sufficient to trigger aidor and abettor liability? The nature and degree of complicity that should give rise to liability will be a major theme of this article.

Advocates of greater corporate accountability for human rights violations argue that companies sometimes significantly contribute to a host government's ability to carry out systematic human rights abuses. MNCs may sometimes precipitate human rights violations by requesting or funding government activities that lead to such harm. One example is hiring government security forces to guard a project site. Corrupt governments may use force to subdue local citizens who object to investment activity. MNC investment may benefit government officials but worsen the economic situation for the local population. In other instances, an MNC may invest in a country and knowingly accept the inevitability or likelihood of governmental human rights abuses. Not all of these actions may trigger liability. Industry leaders, consequently, have raised concerns about the lack of clarity in the definition of corporate complicity.⁸

This article examines the historical origins of corporate complicity. In particular, it examines the impact of British and American war crimes tribunals after the Second World War, along with recent civil litigation by forced laborers seeking restitution from German and Japanese companies for their enslavement during the war. These cases are historical examples of MNC actions that rose to the level of egregious violations of international law. These cases also provide examples of how courts and legislators can develop and apply appropriate civil and criminal standards for MNC accomplice liability.

At the same time, cases involving corporate complicity during wartime are not directly analogous to MNC investment activities in modern conflict zones or in countries that have no internal conflict but that repress the rights of their citizens. During World War II, German and Japanese corporations directly utilized forced labor in their own factories and operations as part of a government-industry partnership. Their direct participation in certain war crimes and crimes against humanity led to the prosecution of their officers and employees. Today, MNCs may partner with repressive governments, like companies during World War II. They are not, however, alleged to be the principal perpetrators of criminal acts. Rather, certain MNCs allegedly have possessed knowledge of and con-

7. See *Lubbe v. Cape, Plc.*, 1 WLR 1545, 1566-67 (C.A. 2000), available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000720/lubbe-1.htm> (last visited Feb. 7, 2002) (landmark tort case brought by South African plaintiffs against British parent of South African asbestos company in which House of Lords refused to dismiss the case against the parent on grounds of *forum non conveniens*).

8. See, e.g., Gregory Wallace, *Fallout from Slave-Labor Case is Troubling*, 150 N.J. L. J. 896, 24 (1997).

done or been complicit in the criminal acts perpetrated by a host government and its security forces. The acts of the host government allegedly further an economic joint venture or project with tangible economic benefit flowing to the MNC.

This article focuses on the liability of MNCs with respect to the use of forced or slave labor. An analysis of forced labor cases allows us to examine corporate complicity in a historical as well as contemporary context. Enslavement or forced labor constitutes a violation of certain peremptory norms of international law such that states, individuals, and legal persons are prohibited from engaging in such conduct.⁹ The International Labor Organization (ILO) recently published its first global report on forced and compulsory labor.¹⁰ The report highlights the unfortunate reality that forced and compulsory labor is still a global problem. It further notes that while most leaders in the business and labor community state that they are committed to ending forced labor practices, much work remains to be done.¹¹

9. See *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) where the Second Circuit held that participation in the slave trade violates the law of nations when undertaken by private individuals as well as state actors.

10. "The growth of forced labour worldwide is deeply disturbing," said ILO Director-General Juan Somavia in announcing the publication of the report in May. "The emerging picture is one where slavery, exploitation and oppression of society's most vulnerable members—especially women and children—have by no means been consigned to the past. Abusive control of one human being over another is the antithesis of decent work." *Forced Labour, Human Trafficking, Slavery Haunt Us Still*, 39 *WORLD OF WORK* (June 2001), available at <http://www.ilo.org/public/english/bureau/inf/magazine/39/human.htm> (last visited Oct. 8, 2001). See also, DIRECTOR GENERAL, INTERNATIONAL LABOUR ORGANIZATION, STOPPING FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK (89th Session of the International Labour Conference 2001), Report I(B), available at <http://www.ilo.org/declaration> (last visited Oct. 8, 2001). The Executive Summary reports that:

Worldwide attention to forced labor has increased in recent years through the international appeals to one country in particular (Myanmar) to rectify that persistent problem. Trafficking of women and children—mainly for prostitution and domestic service but also sweatshop work—has also increased dramatically throughout the world in the last ten years. In North America, several high-profile cases in sweatshop industries have resulted in severe penalties and heightened public awareness.

Id. at vii.

11. The ILO Report states:

While many policy statements endorsing the principle of the elimination of all forms of forced or compulsory labor have been issued by employers' and workers' organizations, the topic has not often been at center stage in their own activities. This may simply reflect the general lack of interest in forced labour problems within international and national economic forums as a whole, or a lower level of presence in the economic sectors or geographical areas where the phenomena are most often found . . . The subject matter itself may seem rather removed from the daily concern of organized employers. Nevertheless, there have been some recent developments on both the part of employers' and workers' organizations.

Id. at 86.

Certain industry groups are taking affirmative steps in acknowledging the problem and trying to eradicate it. See, e.g., Sumana Chatterjee, *Chocolate Industry to Target Child Slavery on Cocoa Farms*, *THE BOSTON GLOBE*, Oct. 1, 2001, available at http://www.boston.co. . /chocolate_industry_to_target_child_slavery_on_cocoa_farmst.shtml (last visited Oct. 7, 2001). The chocolate industry announced that it accepted responsibility for labor practices on cocoa farms and will work with other stakeholders to eliminate child slavery. The industry plan includes the establishment of an indepen-

This article contends that MNCs should be held liable either civilly or criminally for their complicity in certain types of egregious human rights violations, including genocide, war crimes, crimes against humanity, and enslavement (often referred to as forced labor).¹² For purposes of this argument, complicity is defined as situations in which an MNC “aids and abets” a host government in carrying out serious human rights abuses. Additionally, this article advocates that an MNC’s knowledge of ongoing human rights violations, combined with its acceptance of direct economic benefit arising from the violations, and continued partnership with a host government should give rise to accomplice liability.

This article also advocates treating corporate complicity as a universal problem deserving of attention in international criminal law and human rights law more broadly, rather than solely with respect to the ATCA. The ATCA is purely an American statute and as such should not be the sole determinant of how human rights are defined. Civil liability for MNCs that commit intentional torts would provide victims with compensation for their injuries.¹³ Criminal sanctions against MNCs, however, may provide a stronger deterrent. Moreover, it appears, at least at present, that outside the United States, jurisdictional considerations favor prosecuting an MNC under international criminal law rather than civil law.

The heightened emphasis on MNCs does not mean that we should absolve host states of their responsibility to uphold and protect human rights. The duties imposed by international humanitarian law fall primarily to governments. Governments are required to act consistently with human rights principles and to ensure that private actors also comply. A government adhering to this duty will often enact and enforce laws that prohibit others from abridging the human rights of its citizens.

A government might set out laws, for example, prohibiting child labor as a way of protecting the rights of children from infringement by other private actors. Through such legislation, non-state actors, including businesses, become duty-holders. Corrupt governments, however, may fail to protect human rights and to ensure that other parties do not violate human rights. The absence of government action does not nullify the existence of human rights and the duties of non-state actors to respect such rights.

MNCs, like individuals, have an important role to play in protecting and promoting human rights. The preamble to the Universal Declaration of Human Rights states that, “every individual and every *organ of society*, keeping this

dent monitoring system in the cocoa farms in the Ivory Coast to ensure that cocoa is not picked by child slaves.

12. As discussed below, there are situations in which an MNC might be liable for a second class of crimes in which the MNC acts “under color of law” such that it is deemed to be engaged in state action. Thus, in some circumstances, private actors, including MNCs, may be accountable when they are complicit with public (state) actors through the coercive use of state power. See Beth Stephens, *Corporate Accountability: International Human Rights Litigation Against Corporations in U.S. Courts*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW* 216 (Menno T. Kamminga and Saman Zia-Zarifi eds., 2000).

13. See William Schabas, *Enforcing International Humanitarian Law: Catching the Accomplices*, 83 INT’L REV. OF THE RED CROSS 439, 453 (2001).

Declaration in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance.”¹⁴

To the extent that individuals have rights and duties under customary international law and international humanitarian law, MNCs as legal persons have the same set of rights and duties, and hence limited international legal personality.¹⁵ This is not to say that we should focus exclusively on the actions of MNCs and forget about the role of states with respect to human rights. Rather, it is to say that as MNCs have an increased role in the global economy, so too do they have increasing rights and duties.¹⁶ In order to deter MNCs from facilitating or participating in very serious human rights violations, we need to develop standards that will discourage them from doing so. At the same time, solutions should be circumscribed to deal with the most serious of harms.

Some commentators and critics may ask: Why penalize a corporate actor when nations and international tribunals have the ability to prosecute individual employees for wrongdoing? This debate is not new. Many nations have dealt with the issue of how to handle domestic corporate crime.¹⁷ While individuals may be prosecuted and removed from a corporation, the corporate entity continues to exist and might continue its misconduct.¹⁸ Prosecuting an individual may not deter the behavior of the corporation as a whole. Conversely, prosecuting an MNC may not deter an individual’s criminal conduct.¹⁹ A parallel approach to the problem of MNC complicity is therefore necessary.²⁰ In addition, sanctioning the MNC with fines, criminal prosecution, and even prohibiting future business operations may provide a greater deterrent for MNCs than the isolated prosecutions of individuals.²¹

14. Universal Declaration of Human Rights, G.A. Res 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948); *see also*, BENJAMIN R. BARBER, *JIHAD VS. McWORLD* 24-32 (Bantane Books 1995).

15. *See* Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW*, *supra* note 12, at 189-90.

16. *See id.*

17. *See* CELIA WELLS, *CORPORATIONS AND CRIMINAL RESPONSIBILITY* (2001). Wells discusses corporations with respect to the commission of regulatory offenses and also conventional crime. Wells notes that the recognition of corporations as legal persons (as a capital pooling device) has afforded them certain protections without the imposition of corresponding obligations or responsibilities.

18. *See* BRENT FISSE AND JOHN BRAITHWAITE, *CORPORATIONS, CRIME AND ACCOUNTABILITY* 39 (1993).

19. *See id.* Fisse and Braithwaite discuss the problem of individuals being shielded from responsibility when the corporation takes the rap. *Id.* at 14.

20. *See id.* at 131-57.

21. This article does not address what type of sanction provides the greatest deterrence for corporate actors. There are a wide variety of financial and non-financial sanctions that can be imposed on a corporation, including monetary fines, equity fines, direct restitution to victims, corporate dissolution, adverse publicity, community service, and punitive injunctions. *See* WELLS, *supra* note 17, at 33-39. Wells notes that preventive and non-financial sanctions may have a greater deterrent effect than financial sanctions. Fisse and Braithwaite note that sanctions are appropriate, but only if the private justice system is not able to come up with its own plan for remedial action. *See* FISSE AND BRAITHWAITE, *supra* note 18, at 15.

Decision-making within a modern MNC may involve multiple persons whose activity leads collectively to human rights violations. The sum of the activity as a whole is egregious. It may be difficult to apportion individual responsibility.²² The actions of an individual perpetrator or group of perpetrators, when facilitated through a large corporate enterprise, may also create greater harm than an individual acting alone. The public often blames a corporation for misconduct as opposed to focusing on an individual employee.²³ Finally, a collective or communitarian view of complicity would suggest that at some level, the effects of corporate wrongdoing should be borne by the corporate entity and hence, ultimately its shareholders.²⁴

Other critics may ask whether the debate over corporate complicity is purely academic. First, new international guidelines and principles for MNCs that focus on human rights obligations are being developed by organizations such as the United Nations.²⁵ These guidelines refer to corporate complicity but do not adequately define the concept. To the extent that such guidelines may become binding, it is important to define the parameters of conduct that should be prohibited pursuant to such codes or principles.²⁶ Moreover, the increased focus on international criminal law and universal jurisdiction is recent and therefore, the status of legal persons within these spheres is even more recent in origin. While the debate over when and how to impose civil and criminal liabil-

22. See *id.* at 27. Fisse and Braithwaite also discuss the problems inherent in trying to aggregate the liability of individual actors.

23. See *id.* at 25. We do not, for example, state that Director "Y" of Company "X" was responsible for child labor problems or sweatshop conditions overseas. Rather, we tend to discuss the responsibility of Company "X" for the problem.

24. See CHRISTOPHER KUTZ, *COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE* 204-53 (2000).

25. The United Nations Subcommission for the Promotion and Protection of Human Rights is responsible for drafting the principles. Commentary to the draft principles discusses the issue of corporate complicity:

Business enterprises shall inform themselves of the human rights impact of their principal activities and major proposed activities, so that they can avoid complicity in human rights abuses. Business enterprises shall have the responsibility to ensure that their business activities do not contribute directly or indirectly to human rights abuses, and that they do not knowingly benefit from these abuses. Businesses shall further refrain from activities that would undermine the rule of law as well as governmental and other efforts to promote and ensure respect for human rights, and shall use their influence in order to help promote and ensure respect for human rights. Governments may not use the Principles as an excuse for failing to take action to protect human rights, for example, through the enforcement of existing laws.

Draft Universal Human Rights Guidelines for Companies, Addendum 2, U.N. Doc. E/CN.4/Sub.2/2002/X/Add.1.E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1, available at <http://www1.umn.edu/humanrts/links/principles11-18-2001.htm> (last visited Jan. 1, 2002). See also, Principle 2 of the United Nations Global Compact, available at <http://www.unglobalcompact.org/un/gc/unweb.nsf/content/prin2.htm> (last visited Jan. 23, 2002) (noting that "the Secretary-General has asked world business to make sure their own corporations are not complicit in human rights abuses")

26. Margaret Jungk recommends that a company take action when a host government "is perpetrating planned, systematic, and continuous violations of fundamental human rights and the company maintains a direct connection to those violations." Margaret Jungk, *A Practical Guide to Addressing Human Rights Concerns for Companies Operating Abroad*, in *HUMAN RIGHTS STANDARDS AND THE RESPONSE OF TRANSNATIONAL CORPORATIONS* 171, 178 (Michael K. Addo ed., 1999).

ity on legal persons is new, there is still an emerging emphasis on creating standards for such determinations. The concept of complicity proposed in this article is meant to be narrowly tailored and relates only to serious violations of international law.

Still others may fear that advocating MNC liability will open the floodgates for litigation in the United States and perhaps criminal prosecution elsewhere. As noted above, corporate complicity, as discussed herein, relates only to the most egregious violations of international law. The Second World War gives us a framework from which to analyze what sort of actions give rise to culpability. The notion that an MNC might be sued or prosecuted does not mean that states will choose to do so with frequency.²⁷

With respect to civil liability, plaintiffs still need to establish personal jurisdiction for a corporate defendant. In common law jurisdictions, the doctrine of forum non-conveniens also provides protection for corporate defendants.²⁸ Some advocates argue that in the United States, for example, forum non-conveniens has resulted in many lawsuits being dismissed, never to be brought in the host country jurisdiction where the MNC subsidiary is located.²⁹

Part I of this article outlines various levels of corporate complicity as a way of understanding the spectrum of conduct for which MNCs have been criticized. This provides a necessary background for examining how courts have treated corporate actors with respect to their alleged involvement in war crimes and crimes against humanity. This also helps to delineate where on this continuum MNC conduct should give rise to accomplice liability.

Part II of this article examines the post-World War II trials of German and Japanese civilian businessmen for war crimes and crimes against humanity. The war crimes prosecutions provide an important starting point for developing a modern conception of corporate complicity. After the war, a group of major industrialists were prosecuted by the United States Military Tribunal (USMT) for their companies' use of slave labor. Similarly, a group of Japanese mining officials were also prosecuted by a British military court concerning forced labor activities in Formosa. These cases establish that there can be legal conse-

27. See Schabas, *supra* note 13, at 451.

28. Forum non-conveniens is a common law doctrine that allows a court to dismiss a civil lawsuit when there is proper personal jurisdiction, subject matter jurisdiction, and venue, and when dismissal would serve the convenience of the parties and the ends of justice. The doctrine has been significant in cases where the alternative forum is a foreign court as opposed to another court within the United States. Only defendants may invoke the doctrine. The Uniform Interstate and International Procedure Act states that "when the court finds that in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any condition that may be just." Uniform Interstate and International Procedural Act, 13 U.L.A. § 1.05 (2000).

29. See Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA J. INT'L L. 41 (1998); David W. Robertson and Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937 (1990); Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650 (1992).

quences to cooperation between economic actors and repressive governments, including prosecution for international crimes.

Part III focuses upon recent litigation brought by civilian victims interned in Nazi and Japanese concentration camps who were forced or slave laborers³⁰ in mines, factories, and plants owned by private German and Japanese corporations. This section considers the significance of those cases for the future of international humanitarian law, as well as for the ATCA in the United States.³¹

Part IV examines the issue of corporate complicity from a contemporary perspective. In particular, Part IV analyzes a recent case brought in a federal district court against Unocal Corporation for alleged use of forced labor as part of its pipeline project in Burma. The *Unocal* case relies heavily on the trials of the industrialists by the USMT, as well as the modern forced labor cases. The case is notable because of two seemingly conflicting opinions. The first judge who presided in the case issued an opinion that established that Unocal, as an MNC, could be sued for violations of international law—specifically, for knowing of the Burmese military’s use of forced labor and for continuing to retain the military to provide security despite such knowledge. In a subsequent opinion, issued by a different judge, the case was dismissed.³² The court found that Unocal’s actions were not sufficient to create liability because Unocal had not affirmatively sought out forced labor for the pipeline. The two opinions provide conflicting accounts of what kind of MNC conduct is sufficient to trigger possible liability.

Part V provides a critique of the most recent *Unocal* decision. In particular, this section critiques the court’s approach to defining corporate complicity and argues for a different standard for MNCs that operate outside of a wartime context.

Finally, Part VI argues that in light of recent litigation in the United States, there should be a further focus on criminal liability for MNCs in home states and also a renewed focus on how the International Criminal Court might deal with MNCs and legal persons. This section also notes that an expanded definition of

30. The term slave labor has sometimes been used as well as forced labor. One of the American prosecutors at Nuremberg has noted that the term “slave” in the context of the Nazi slave labor program is inappropriate because:

The Jewish concentration camp workers were less than slaves. Slavemasters care for their human property and try to preserve it; it was the Nazi plan and intention that the Jews would be used up and then burned. The term ‘slave’ is used in this [book] only because our vocabulary has no precise word to describe the lowly status of unpaid workers who are earmarked for destruction.

BENJAMIN FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION*, XVII (1979).

In the recent lawsuits against German corporations, plaintiffs’ attorneys have distinguished between slave laborers and forced laborers. The former are concentration camp inmates earmarked for extermination and the latter are civilians and prisoners of war. The International Military Tribunal at Nuremberg never made a distinction and used the term slave labor. See *The Nurnberg Tribunal*, 6 F.R.D. 69, 123-26 (West 1948) (discussing slave labor policies of the Nazis).

31. See 28 U.S.C. § 1350 (2001). For a description of the ATCA, see note 112, *infra*, and accompanying text.

32. Judge Ronald Lew replaced Judge Richard Paez when the latter was elevated to the U.S. Court of Appeals for the Ninth Circuit.

corporate complicity should be included in international and national guidelines governing the conduct of MNCs as another way to deter MNCs from acting as accomplices.³³

I. THE SPECTRUM OF CORPORATE COMPLICITY

Before embarking on a historical analysis of corporate complicity, it is important to define the various ways in which an MNC can be described as complicit in the human rights violations of a host state. In this regard, the terms “complicity” and “accomplice” are used in a non-legal sense, to define possible ways in which a corporation may be implicated or linked to human rights abuses perpetrated by a host government.

A. *International Law Violations for Which an MNC Might be Implicated*

There are several ways in which an MNC might be implicated in violations of international law or the law of nations. For purposes of discussion, the term “law of nations” refers to international legal norms that are recognized as universal, obligatory, and definable.³⁴ An MNC might be liable: (1) directly for certain violations, (2) as an accomplice, or (3) as a joint actor who is complicit in state action that violates international law. Both the second and third types of liability link back to an analysis of whether the MNC has been an accomplice to the actions of a government in the context of foreign direct investment.

First, an MNC might be liable for its direct commission of a crime. Under international law, individuals (natural persons) have a duty not to violate a handful of fundamental or peremptory norms of international law, sometimes referred to as *jus cogens* norms.³⁵ An individual may be criminally liable for engaging in crimes such as piracy, aircraft hijacking, enslavement (including forced labor), genocide, war crimes, and crimes against humanity.³⁶ The Nuremberg and British war crimes trials are important benchmarks. These cases affirmed the notion that private individuals have certain non-derogable duties and responsibilities under international law and may be prosecuted for a limited class of international crimes.

At least in the United States, courts have begun to treat corporations (legal persons) in the same fashion as private individuals with respect to this class of

33. Corporations have been referred to as legal persons, legal entities, or juridical persons in many statutes and legal documents. Under the so-called “fiction,” the law creates a legal entity known as a corporation and vests it with certain rights and duties.

34. See *Forti v. Suarez Mason*, 672 F. Supp. 1531, 1540 (N.D. Cal. 1987).

35. *Jus cogen* norms are defined in the Vienna Convention on the Law of Treaties and are often referred to as “peremptory norms” of international law. These norms are “‘accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’” *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties, Art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679).

36. See Restatement (Third) of Foreign Relations, § 404 (1986); see also, *Karadzic*, 70 F.3d at 239.

crimes. To the extent that an MNC is directly involved in forced labor, for example, the MNC, or its employees might be liable under international criminal law. Similarly, however, an MNC would be liable with respect to the category of offenses that apply to private individuals to the extent that it aids and abets the actions of a government. In other words, an MNC also might be liable for aiding and abetting a government's use of forced labor. In order for an MNC to be liable as an accomplice, however, the MNC would have to be prosecuted as an aidor and abettor under international criminal law.

A second set of international crimes is only actionable against states. Both customary international law as well as international treaties impose duties and obligations only on states for certain crimes. These crimes include, for example, torture, execution, rape, and forcible displacement.³⁷ In the United States, courts have been willing to exercise jurisdiction over individuals (and MNCs) when the private individuals act under color of law.

For purposes of making this determination, courts have applied jurisprudential standards developed when analyzing state action under American law.³⁸ Determining whether an MNC acted in concert with a state actor has involved inquiries into whether the MNC was a joint actor that conspired with the government to commit certain crimes in furtherance of the venture. At least one appeals court has noted that "the [ATCA] does confer subject matter jurisdiction over private parties who conspire in, or aid and abet, official acts of torture by one nation against the citizens of another nation."³⁹ Thus, notions of conspiracy and aidor and abettor liability exist even for crimes requiring state action.

This article focuses predominantly on how to determine accomplice liability with respect to an MNC's conduct in relation to forced labor, and by implication, violations of international law for which it can be implicated as a legal person. This analysis is relevant, however, to a general discussion of when an MNC acts "jointly" with a host government in violation of international law. In both of these contexts, the MNC is necessarily analyzed as an accomplice rather than as a principal for purposes of liability. Thus, some of the same facts and criteria that may trigger accomplice liability may also provide indicia of joint action between an MNC and a host government.

B. Typologies of Corporate Complicity

Recently, commentators have attempted to outline different categories of corporate complicity.⁴⁰ The three main categories of complicity are (1) direct complicity, (2) indirect complicity, and (3) mere presence in a country, coupled with complicity through silence or inaction.

37. See *Karadzic*, 70 F.3d at 243.

38. There is a wide body of case law interpreting 42 U.S.C. § 1983, which defines when an individual has acted under color of state law.

39. *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988).

40. See Andrew Clapham and Scott Jerbi, *Categories of Corporate Complicity in Human Rights Abuses* (2001), available at <http://www.business-humanrights.org/Clapham-Jerbi-paper.htm> (last visited Feb. 7, 2002). See also, Jungk, *supra* note 26, at 171-83.

1. *Direct Corporate Complicity*

The first category of complicity has been referred to as direct corporate complicity. This involves an MNC knowingly assisting a state in violating customary international law.⁴¹ The MNC may be directly complicit where it “decides to participate through assistance in the commission of human rights abuses and that assistance contributes to the commission of the human rights abuses by another.”⁴² The MNC need not wish the criminal results but the corporation and its employees and agents must know of the “likely effects of their assistance.”⁴³ Characterizations of direct complicity, however, are somewhat contingent on notions of accomplice liability since what constitutes direct participation still must be defined.

As discussed in Parts II, III, and IV, *infra*, German and Japanese corporations that used forced labor during World War II fall into the category of direct accomplices. In many instances, these companies sought out, or affirmatively utilized, forced laborers in their business operations and knew of the consequences of their actions.

2. *Indirect Corporate Complicity*

The broader and more difficult category to conceptualize is referred to as indirect complicity or “beneficiary” corporate complicity. In this category, the MNC is not itself the direct perpetrator of the crimes, but it benefits from human rights abuses committed by the host government. This category includes MNCs that have contractual partnerships or joint ventures with host governments and that stand to benefit from human rights violations committed in relation to the particular project. An oft-cited example is a situation in which security forces use repressive measures while guarding MNC facilities or to suppress peaceful protests.⁴⁴ As discussed in Part V, *infra*, Unocal’s relationship with the government of Myanmar with respect to the building of an oil pipeline seems to be an example of indirect corporate complicity.⁴⁵

The spectrum of what might constitute indirect complicity is broad indeed. On one end of the spectrum, a company may provide economic assistance to a repressive government in the form of revenues gained as part of a joint venture. The MNC may know that the host government is engaging in human rights violations but the links between its investment and the human rights violations may be more attenuated. Factors that are relevant to a determination of complicity include time or duration of the investment and partnership; the type of financing that is provided by the MNC to the government; the nature of the business relationship (e.g., highly integrated joint venture with the MNC having

41. See Clapham and Jerbi, *supra* note 40, at 3.

42. *Id.* at 5.

43. *Id.*

44. See *id.* at 6.

45. See THE DANISH HUMAN RIGHTS AND BUSINESS PROJECT, DEFINING THE SCOPE OF BUSINESS RESPONSIBILITY FOR HUMAN RIGHTS ABROAD (2001), available at www.humanrights.dk (last visited Feb. 7, 2002).

substantial control versus limited business dealings in the absence of a partnership) and whether the MNC continues to do business with the government once it knows that there may be human rights abuses associated with the investment.

MNC receipt of the economic benefits of human rights violations may rise to the level of direct complicity when (1) there is a strong and interdependent business relationship between the MNC and the host government (i.e., the MNC hires the security forces or contracts for their services); (2) the MNC is aware of the human rights violations; and (3) the MNC continues to provide financial support to the host state and continues to perform under contractual arrangements, particularly in furtherance of a collaborative project or endeavor.

When the above criteria are satisfied, acquiescence becomes action and encouragement. Therefore, indirect corporate complicity may be a misnomer and beneficiary complicity may be a better term, as the MNC is a beneficiary of profits or benefits generated in part through human rights violations.

As this article suggests, courts need to balance factors to determine whether beneficiary complicity has reached such a threshold that an MNC's continued presence and investment amounts to participation in a criminal enterprise. This second category of beneficiary complicity might trigger liability for international crimes applicable to private individuals, as well as those that require state action (to the extent that close collaboration in a business venture provides substantial support for a government's violation of human rights in furtherance of the business venture).

Human Rights Watch describes corporate complicity in a way that collapses the distinction between direct and indirect complicity, when it describes situations in which "[a] corporation facilitates or participates in government human rights violations. Facilitation includes the company's provision of material or financial support for states' security forces which then commit human rights violations that benefit the company."⁴⁶

3. *Silence or Inaction in the Face of a Host Government's Human Rights Violations*

While direct complicity is on one end of the spectrum, mere presence in a country with a repressive political history is another. Companies that had investment and operations in apartheid South Africa, for example, were often criticized for their presence in the country as perpetuating discrimination and racism. Simply by engaging in business activity in the host country, human rights activists' maintain that companies may unintentionally aggravate human rights violations.⁴⁷ A counter argument raised by MNCs, however, is that the presence of foreign companies improves the situation of employees who work for foreign subsidiaries, as well as for local stakeholders. MNCs also assert that they can constructively engage a repressive government through their presence and thereby bring about change in their human rights policies.

46. See THE ENRON CORPORATION, *supra* note 4.

47. See Jungk, *supra* note 26, at 171.

Human rights Non-Governmental Organizations (NGOs) assert that when MNCs become aware of systematic or continuous human rights abuses, they have an affirmative obligation to raise these issues with the government and to attempt to exert influence. Silence or inaction may amount to complicity in that it implies, at some level, tacit approval for a government's actions rather than mere neutrality. MNCs are exhorted to speak out in opposition to the human rights violations and to call for the host government to change its behavior and practices.⁴⁸

This last category of complicity, relating to the duty to speak is the most difficult to link to accomplice liability under international law. This is the case because in this category, human rights violations are often unrelated to the MNC investment activity itself. Rather, the abuses are part of a more widespread phenomenon within a country. Thus, it is more difficult to maintain that the MNC is a criminal accomplice simply because its investment activity furthers the ability of the government to oppress its citizenry generally. MNCs may have a moral obligation to criticize the practices of the host state but are not directly liable for the human rights violations of the state.

II.

TRIALS OF THE INDUSTRIALISTS: THE FOUNDATIONS OF MNC LIABILITY

A. *The United States Military Tribunal and German Industry*

After the Second World War, the United States Military Tribunal (USMT) tried several German industrialists. The trials of Nazi era industrialists for using forced labor during the Holocaust and the prosecution of Japanese mining company officials provide support for the capacity of courts to adjudicate criminal and civil cases in which corporate officials are accused of committing human rights abuses. In addition, the World War II prosecutions provide useful text for understanding how a corporate entity also might be held legally responsible. Thus, there *is* case support for imposing liability on legal persons for violations of international humanitarian law despite the historic reluctance of some jurisdictions to do so.

Often, we instinctively think that it is inconceivable that an MNC would be capable of engaging in war crimes or crimes against humanity. Similarly, it is difficult to imagine penalizing an MNC for such conduct if it did occur. One important question to ask therefore, is if the actions of German or Japanese corporations during the Second World War occurred today, how would we respond? Moreover, to the extent that we would prosecute an individual for such crimes, why would we hesitate to similarly penalize the corporation for the same conduct? Starting with World War II as a baseline aids us in thinking about

48. See Clapham and Jerbi, *supra* note 40, at 7. See also, CHRIS AVERY, BUSINESS AND HUMAN RIGHTS IN A TIME OF CHANGE (1999), available at <http://www.business-humanrights.org/Chapter1.htm> (last visited Jan. 24, 2002).

what other factual situations might give rise to liability or public criticism and condemnation.

After Germany's defeat, the Allied powers formed a Control Council composed of four representatives of the victorious powers: The United States, Great Britain, France and the U.S.S.R. In order to provide a uniform basis for the trial of war criminals in the various occupied zones, the Control Council enacted Law No. 10, which designated international crimes that were prosecutable offenses. Pursuant to Control Council Law No. 10, the Americans established six military tribunals within the American Zone of Occupation and conducted twelve trials before American judges. Three of the trials involved the prosecution of German industrialists.

A parsing of the judgments rendered at Nuremberg by the International Military Tribunal (IMT) and the USMT involving industrialists and other commercial actors reveals an underlying implication that the corporations for which they worked had also committed international war crimes.⁴⁹ At Nuremberg, the IMT did not try any industrialists for their use of forced labor. Subsequently, however, the USMT did try executives from three German firms: I.G. Farben, Flick,⁵⁰ and Krupp.⁵¹

These decisions also discuss whether an affirmative defense of duress or necessity was applicable for defendants accused of engaging in forced labor.⁵²

49. See Anita Ramasastri, *Secrets and Lies? Swiss Banks and International Human Rights* 31 VAND. J. TRANSNAT'L L. 325, 423 (noting that the trial of corporate officers from the German company I.F. Farben by the USMT "bases much of its factual findings on the role of Farben as a corporate entity or corporate personality." See also, Clapham, *supra* note 15, at 166-71. For an historical account of I.G. Farben's wartime activities, see PETER HAYES, *INDUSTRY AND IDEOLOGY: I.G. FARBEN IN THE NAZI ERA* (1987).

50. Friedrich Flick was a leading German industrialist who owned steel plants in Germany. Flick was tried along with five members of the Flick concern for war crimes and crimes against humanity, including the enslavement and abuse of concentration camp inmates. Flick was convicted of using slave labor because of his knowledge and approval of certain activities of his deputy, Bernhard Weiss. Weiss "took an active and leading part in securing and allocating Russian prisoners of war for use in the work of manufacturing increased quotas" in one of Flick's plants. Flick has been described as someone who "at the height of his career . . . had voting control of a dozen companies, employing at least 120,000 persons engaged in mining coal and iron, making steel, and building machinery and other products which required steel as raw material." *The Flick Case*, VI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1192 (1952). See *Doe I v. Unocal*, 110 F. Supp.2d 1294, 1309 (C.D. Cal. 2000). See also, L.M. Stallbaumer, *Frederick Flick's Opportunism and Expediency*, 13 DIMENSIONS: A JOURNAL OF HOLOCAUST STUDIES, available at http://www.adl.org/braun/dim_13_2_flick.html (last visited Oct. 9, 2001); FERENCZ, *supra* note 29, at 156-70.

51. See Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers"*, 9 TEMPLE INT'L & COMP. L. J. 173, 229-49 (1995).

52. I refer to the defense of "necessity" and "duress" interchangeably throughout this article. The terms "duress" and "necessity" have different meanings in the context of the common law. Necessity in common law is seen as a justification where a defendant is presented with a choice of two evils and must choose the lesser of two. Duress, by contrast, is referred to as an excuse. The defendant knows that the conduct in which he or she engaged was wrong but the defendant's own will or volition was overcome due to threats of death or serious bodily harm. See Joshua Dressler, *Exegesis of the Laws of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1335-57 (1989); Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 254 (1995). German law, by contrast, refers to the defense of necessity, but defines necessity in relation to human coercion. See Herbert Schumann, *Criminal*

1. *The Farben Case—An Early Example of Corporate Complicity*

In 1947, twenty-three employees of I.G. Farben were indicted for plunder, slavery, and complicity in aggression and mass murder.⁵³ I.G. Farben was a major German chemical and pharmaceutical manufacturer. The defendants in the Farben case were prosecuted for “acting through the instrumentality of Farben” in the commission of their crimes.⁵⁴ Five of the Farben directors were held criminally liable for the use of slave labor.⁵⁵ This was the first time that a court attempted to impose liability on a group of persons who were collectively in charge of a company.⁵⁶

The USMT based much of its findings on the role of Farben as a corporate entity. The Tribunal did not have jurisdiction over legal persons and therefore could not render a verdict against Farben itself. Nonetheless, the decisions focus quite clearly on the nature of the corporation and its role in perpetrating certain crimes. Farben is portrayed as the instrumentality through which individual actors were able to collectively engage in criminal acts. As the USMT noted:

While the Farben organization, as a corporation, is not charged under the indictment with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the *Farben organization as an instrument* by and through which they committed the crimes enumerated in the indictment.⁵⁷

The indictment charged that Farben, “through its foreign and economic policy, participated in weakening Germany’s potential enemies and that Farben carried on propaganda, intelligence, and espionage activities for the benefit of the Reich.”⁵⁸ The Tribunal noted, furthermore, that the action of private entities (including legal persons) had to be scrutinized under different rules. The Tribunal stated, “certainly where the action of private individuals, *including juristic persons*, is involved, the evidence must go further and establish that a transaction otherwise apparently legal in form is not voluntarily entered into because of the employment pressure.”⁵⁹

Law, in INTRODUCTION TO GERMAN LAW 383, 392-93 (Werner F. Ebke & Matthew W. Finkin, eds., Kluwer Law Int’l 1996). The International Military Tribunal and USMT both refer to the defense of necessity but appear to use it in a mixed fashion to refer both to duress and necessity. For example, in discussing the concept of necessity, the USMT states that necessity has also been referred to as compulsion, force and compulsion, and coercion and compulsory duress. See *United States v. Krupp*, IX TRIALS OF WAR CRIMINALS at 1436.

53. See *U.S. v. Krauch, et. al, The I.G. Farben Case*, VIII TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS, iii-iv (1952) [hereinafter “*The I.G. Farben Case*”].

54. *Id.* at 14.

55. See *id.* at 1081, 1205-09.

56. See Ramasastry, *supra* note 49, at 423 (1998).

57. *The I.G. Farben Case*, *supra* note 53, at 1108 (emphasis added).

58. *Id.* The Tribunal notes, at another point in the decision:

Farben marched with the Wehrmacht and played a major role in Germany’s program for acquisition by conquest. It used its expert technical knowledge and resources to plunder and exploit the chemical and related industries of Europe, to enrich itself from unlawful acquisitions, to strengthen the German war machine and to assure the subjugation of the conquered countries to the German economy.

Id. at 1128-29.

59. *Id.* at 1140. The Tribunal continued:

Other examples of how Farben was portrayed as a criminal actor relate to the company's seizure of property in enemy territory. The Tribunal stated:

With reference to the charges in the present indictment concerning Farben's activities in Poland, Norway, Alsace Lorraine and France, *we find that the proof established beyond a reasonable doubt that offences against property as defined in Control Council Law No. 10 were committed by Farben*, and that these offences were connected with, and an inextricable part of the German policy for occupied countries as above described.⁶⁰

Although limits on the USMT's jurisdiction precluded it from holding Farben liable for the use of slave labor, the USMT found that, as a corporate entity, Farben had violated Article 47 of the Hague Regulations on the Laws and Customs of War. Because of Farben's liability, individual directors could be convicted by virtue of their affiliation with Farben.⁶¹ In the Tribunal's assessment:

The result was the enrichment of Farben and the building of its greater chemical empire through the medium of occupancy at the expense of the former owners. *Such action on the part of Farben constituted a violation of rights of private property, protected by the Laws and Customs of War. And in the instance involving private property, the permanent acquisition was in violation of the Hague Regulations which limits the occupying power to a mere usufruct of real estate.* The forms of the transactions were varied and intricate, and were reflected in corporate agreements well calculated to create the illusion of legality. But the objective of pillage, plunder and spoliation stands out, and there can be no uncertainty as to the actual result.⁶²

As part of its decision, the Tribunal also noted that Farben, as a corporate entity, had been directly involved in war crimes and crimes against humanity. For example, the Tribunal stated, "Auschwitz was financed and owned by Farben . . . The Auschwitz construction workers furnished by the concentration camp lived and labored under the shadow of extermination . . ."⁶³

In some instances, following confiscation by Reich authorities, Farben proceeded to acquire permanent title to the properties it has confiscated. In other instances involving "negotiations," with private owners, Farben proceeded permanently to acquire substantial or controlling interests in property contrary to the wishes of the owners, forceful seizure of property by the Reich, or other similar measures, such, for example, as withholding licenses, raw materials, the threat of uncertain drastic treatment in peace-treaty negotiations, or other effective means of bending the will of owners. The power of the military occupant was the ever-present threat in these transactions and was clearly an important, if not decisive, factor.

60. *Id.* at 1141.

61. See Hague Regulations Annexed to the 1907 Hague Convention on the Law and Customs of War on Land, Oct. 18, 1907, art. 47, 36 Stat. 2277, 1 Bevans 631. See also, Article 33 of the Geneva Convention of Aug. 12, 1949, Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, 3538.

62. *The I.G. Farben Case*, *supra* note 53, at 1140 (emphasis added).

63. *Id.* at 1183-84. It should also be noted, however, that the Tribunal focused on individual responsibility with respect to forced labor at Auschwitz:

The defendants most closely connected with the Auschwitz construction project bear great responsibility with respect to the workers. They applied to the Reich Office for Labor . . . Responsibility for taking the initiative in the unlawful employment was theirs, and, to some extent at least, they must share the responsibility for mistreatment of the workers with the SS and the construction contractors . . . The use of concentra-

Perhaps the most definite expression of the Tribunal's focus on the actions of the corporate entity was the court's reference to legal persons:

Where private individuals, including *juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law. The payment of a price of other adequate consideration does not, under such circumstances, relieve the act of its unlawful character. Similarly, where a private individual or a *juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.⁶⁴

2. *The Krupp Firm*

In addition to the prosecution of Farben managers, the USMT prosecuted industrialists from the Krupp firm. The Krupp case involved the prosecution of twelve defendants for commission of war crimes and crimes against humanity with respect to plunder and spoliation of civilian property and factories in occupied territories, and also in the deportation of and use of prisoners of war and concentration camp inmates as forced laborers in various Krupp factories in Germany.⁶⁵ Eleven of the twelve defendants were convicted and sentenced by the USMT.

As with the Farben case, the Krupp decision is instructive concerning the possible attribution of criminal liability to MNCs. The decision discusses the actions of individuals but often only after a lengthy and detailed explication of the actions of the Krupp firm as the prime actor and perpetrator of the various war crimes and crimes against humanity.

The Krupp case underscores the possibility that in certain instances, it is the actions of the enterprise rather than individual defendants that appears criminal. For example, the Krupp firm, through multiple employees and officers, engaged in systematic plunder and spoliation through its acquisition and removal of prop-

tion camp labor . . . at Auschwitz with the initiative displayed by the officials of Farben in the procurement and utilization of such labor, is a crime against humanity. *Id.* at 1185-87.

Farben was sued after the war but was initially unreceptive to a forced laborer's restitution claims. After the end of the war, a lawsuit brought by a Farben laborer at Auschwitz, Norbert Wollheim, in a German court, also highlighted the role of Farben as a corporate actor and its civil liability for unpaid wages. Farben argued that the SS, the Nazi Party, the German state, or subcontractors were responsible for the damages Wollheim sought. Farben also stated that had it not employed inmates, they would have been killed even sooner. The Frankfurt court concluded that Farben was liable for its negligence in failing to protect the life, body, and health of the plaintiff. Farben eventually settled with Wollheim and with the Conference on Jewish Material Claims Against Germany to compensate forced laborers who had been employed by Farben at Auschwitz. Farben agreed to pay no more than DM 30 million of which 10 percent would be reserved for non-Jewish claimants. See FERENCZ, *supra* note 30, at 34-38. (citing the Decision in *Wollheim v. I.G. Farben in Liquidation*, Frankfurt District Court, June 10, 1953, court file no. 2/3/0406/51. *Id.* At 37, n. 9).

64. *The I.G. Farben Case*, *supra* note 53, at 1132-33.

65. *The Krupp Case*, *supra* note 52.

erty in France, Alsace, and the Netherlands. The actions of the firm come to the fore as opposed to decisions or conduct of any individual worker.

According to the USMT, the Krupp concern originated with the business known as Fried. Krupp, founded in 1821.⁶⁶ The concern was converted into a German corporation in 1903 and became known as Fried. Krupp. A.G.⁶⁷ Krupp A.G. was a private, limited liability company.⁶⁸ Bertha Krupp, the mother of the defendant, Alfried Krupp, initially owned nearly all of the shares of this company.⁶⁹ In December 1943 Fried. Krupp. A.G. was dissolved and in accordance with the provisions of the "Lex Krupp," a special Hitler decree, the defendant Alfried Krupp became the sole owner.⁷⁰ After December 1943, the unincorporated privately owned concern, owned and controlled directly and through holding companies, mines, steel and armament plants, two subsidiary operating companies, shipyards, and a machinery factory.⁷¹

Under count two of the USMT's indictment, ten of the defendants were charged with plunder and spoliation amounting to war crimes and crimes against humanity.⁷² The Krupp defendants were charged "in the plunder of public and private property, exploitation, spoliation, devastation, and other offenses against property and the civilian economies of the countries and territories which came under the belligerent occupation of Germany in the course of its invasions and wars."⁷³ Six of the defendants were found guilty under count two.⁷⁴ The Tribunal, in its judgment, described the actions of defendants as "[h]aving exploited, as principals or as accessories, in consequence of a deliberate design and policy, territories occupied by German armed forces in a ruthless way, far beyond the needs of the army of occupation and in disregard of the needs of the local economy."⁷⁵

At the outset of its decision, the Tribunal discussed the Krupp firm's acquisition of property in France. The Krupp firm took over production at the Austin factory in Liancourt, France. This tractor factory was previously owned by Robert Rothschild, a Yugoslavian Jew, who had purchased the plant 1939. In 1940, the factory was confiscated by the German army after the German occupation.⁷⁶ The Krupp firm, in contravention of the Hague Regulations, purchased the Austin plant from the German administrator of Jewish properties, without compensation being made to the original owner.

66. *See id.* at 1332.

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. The relevant law relating to plunder and spoliation was contained in Articles 46-54 of the Hague Regulations of 1907 stating, for example, that "private property . . . must be respected," and cannot be confiscated" (Article 46); "pillage is formally forbidden" (Article 47). Hague Regulations, *supra* note 61.

73. *The Krupp Case*, *supra* note 52, at 467.

74. *See id.*

75. *Id.* at 1338.

76. *See id.* at 1349.

As with the *Farben* decision, the Tribunal states that the firm itself violated the Hague Regulations in its seizure and confiscation of property in occupied countries. In remarking on Krupp's actions in France, the Tribunal noted, "[t]he correspondence between the *Krupp firm* and the Paris office show the avidity of the firm to acquire the Austin factory and the Paris property."⁷⁷ The Tribunal stated:

We conclude from the credible evidence before us that the confiscation of the Austin plant based upon German-inspired anti-Jewish laws and its subsequent detention by the *Krupp firm* constitute a violation of Article 48 of the Hague Regulations which requires that the laws in force in an occupied country be respected; that it was also a violation of Article 46 of the Hague Regulations which provides that private property must be respected; that the Krupp firm, through defendants Krupp, Loeser, Houdremeont Mueller, Janssen and Eberhardt, voluntarily and without duress participated in these violations . . . and that there was no justification for such action.⁷⁸

The Krupp firm also leased an office in Paris as its French headquarters. Rather than leasing or purchasing property from a non-Jewish owner in Paris, the Krupp firm chose to profit from the anti-Jewish policy of the Nazi regime and leased a property on the Boulevard Haussmann that had been seized by the Commissioner for Jewish Affairs.⁷⁹ In describing this transaction, the USMT noted, "[t]his example of the Krupp firm's exploitation of the Nazi anti-Jewish policy is most objectionable because there was nothing to prevent the firm from honestly leasing or buying a building from a non-Jewish owner in Paris."⁸⁰

Krupp also seized and plundered various plants and manufacturing facilities in order to provide its German facilities with adequate machinery and supplies. The USMT found that "the Krupp firm not only took over certain French industrial enterprises. It also considered occupied France as a hunting ground for additional equipment which was either shipped to the French enterprises operated by the Krupp firm or directly sent to Krupp establishments in Germany."⁸¹

In the Netherlands, the Krupp firm, through its Dutch subsidiaries, participated in a wholesale seizure and confiscation of materials that it had previously sold to municipal boards of work, gas works, municipalities, and private firms. Krupp participated in the confiscation and transport of seized goods and machinery. The third phase of the Dutch confiscation took place between November 1944 and May 1945 and was described as the "systematic plunder of public and private property."⁸² Krupp took, from one factory alone, twenty-one freight

77. *Id.* at 1351 (emphasis added).

78. *Id.* at 1351-52. The Krupp firm also engaged in permanent acquisition of and then subsequent looting of a textile factory in Alsace. *See id.* at 1355. The USMT noted that "from a careful study of the credible evidence, we conclude that there was no justification under the Hague Regulations for the seizure of the [Alsatian] property and the removal of the machinery to Germany." Rather, the USMT concluded that, "this interference with the rights of private property was a violation of Article 46 of the Hague Regulations." *Id.* at 1357.

79. *See id.* at 1350.

80. *Id.* at 1351.

81. *Id.* at 1361.

82. *Id.* at 1365.

cars of machines and materials for its factories in Essen, Germany.⁸³ While ascribing liability, the USMT once again makes reference to the acts of the firm:

We conclude that it has been clearly established by credible evidence that from 1942 onward illegal acts of spoliation and plunder were committed by, and on behalf of, the Krupp firm in the Netherlands on a large scale, and that particularly, between about September 1944 and the spring of 1945 certain industries of the Netherlands were exploited and plundered for the German war effort, in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy.⁸⁴

The USMT was of the opinion that the Krupp firm actively sought to engage in spoliation and plunder. In rendering its opinion, the Tribunal repeatedly refers to the collective intent of the firm, “[t]here are a number of other such examples, which make it clear to us that the initiative for the acquisition of properties, machines, and materials in the occupied countries was that of the Krupp firm and that it utilized Reich government and Reich agencies whenever necessary to accomplish its purposes. . . .”⁸⁵

Count three of the indictment was entitled “Deportation, Exploitation and Abuse of Slave Labor.”⁸⁶ All twelve defendants were charged under count three.⁸⁷ Eleven of the twelve defendants were convicted.⁸⁸ According to the USMT, the Krupp firm participated extensively in the Third Reich’s compulsory labor program.⁸⁹ Krupp utilized the majority of its compulsory labor, which included prisoners of war, foreign civilians and concentration camp inmates at a constellation of 80-100 Krupp-owned factories in Essen Germany referred to collectively as the Cast Steel Factory.

Krupp was alleged to have treated Russian prisoners of war as well as eastern concentration camp inmates the worst of all of the groups. As for Russian prisoners of war, the Tribunal noted:

[T]wo determinative factors which are established beyond doubt by contemporaneous documents taken from the Krupp files, some of which are quoted herein-above. These are (1) that Russian prisoners of war were put to heavy work when, due to undernourishment, they were totally unfit physically, and (2) that not only

83. *See id.* at 1367.

84. *Id.* at 1370 (quoting *Trial of Major War Criminals*, I TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 239 (1950)).

85. *Id.* at 1372.

86. *Id.* at 667.

87. Count three of the indictment charged all of the defendants with violation of Article II of Control Council Law No. 10, paragraphs 1(b) and (c) for war crimes and crimes against humanity. Count three also charged the defendants with violations of the laws and customs of war. The relevant charge alleged that defendants participated:

in atrocities and offenses against persons, including: murder, extermination, enslavement, deportation, torture, abuse and other inhumane acts committed against civilian populations of countries and territories under belligerent occupation of, or otherwise controlled by the Third Reich enslavement and deportation of foreign and German nationals, including, concentration camp inmates, employment of prisoners of war in war operations, and work having a direct relation to war operations.

Id.

88. *See id.*

89. *See id.* at 1374.

was there no official requirement that this be done but it was directly contrary to the orders of the competent officials.⁹⁰

As for the eastern workers, the USMT found that they:

were beaten as part of their daily routine. The beatings took place in the Krupp plants and in the camps. The victims were beaten by the camp leaders . . . and by ordinary workers. Weapons with which they were beaten were supplied by the Krupp firm although all foreign workers were subjected to mistreatment, the most severe and inhumane was that suffered by the Russian prisoners of war and the eastern civilian labor.⁹¹

Furthermore, the Tribunal noted that there the Krupp firm had purposefully availed itself of slave labor. The USMT highlighted this decision of the firm when discussing liability. In 1944, the SS offered concentration camp inmates to the armaments industry. If armament firms wished to take advantage of this free labor, they submitted requests. As the USMT noted “[i]t was not a matter of refusing to accept an allocation. It was up to the enterprises to put in requests. Many armament firms refused. The Krupp firm sought concentration camp labor because of the scarcity of manpower then prevailing in Germany.”⁹²

The Tribunal rejected the defendants’ defense of necessity and stated that “[t]he situation at the Berthawerk [one factory Krupp owned] again leads to the conclusion that the Krupp firm planned its own program upon its desire to use concentration camp labor.⁹³ Krupp and the other defendants argued that they would have lost their factories and properties had they refused to use slave labor. The Tribunal noted that fear of property loss was not sufficient grounds for invoking necessity. By contrast, the USMT did accept the defense of necessity for the majority of defendants who worked in the Flick concern (see Section V *infra*) because they had feared loss of life for refusing to accept forced labor in their factories.

The Krupp firm, the Tribunal concluded, had an “ardent desire” to employ forced labor. In using such a characterization, the Tribunal attributed intent to the corporate entity as well as the individual defendants. The notion that the Krupp firm *planned, desired, and sought* forced labor, or *engaged* in plunder and pillage, exemplifies the way in which (1) some criminal acts are the manifestation of planning and execution at the firm level, and (2) courts can attribute liability to the MNC as well as its employees.

3. *Karl Rasche and the Role of the Financier*

Another industrialist who was charged with engaging in slave labor was Karl Rasche, the Chairman of Dresdner Bank, a private commercial bank in

90. *Id.* at 1388. The fact that during a substantial part of the war years, Russian prisoners of war and Italian military internees were required to work in semi-starved conditions is conclusively demonstrated through documentary evidence taken from the Krupp files, which had been concealed. Because the evidence on the subject is voluminous, it cannot be discussed in detail, but it leaves no doubt as to the treatment of the war prisoners and internees.

91. *Id.* at 1409.

92. *Id.* at 1412.

93. *See id.* at 1423.

Germany that has been characterized as the bank of the Third Reich.⁹⁴ Rasche was the only private banker tried under the Nuremberg Charter.⁹⁵ He was charged with facilitating slave labor on the grounds that he made loans to entities using slave labor.⁹⁶ The USMT stated, "We cannot go so far as to enunciate the proposition that the official of a loaning bank is charged with the illegal operations alleged to have resulted from loans or which may have been contemplated by the borrowers."⁹⁷

In the recent litigation brought by Holocaust survivors against Swiss banks, much was made by the defendant Swiss banks about the language of the *Rasche* decision. The banks cite *Rasche* to demonstrate that the mere act of providing money or credit to finance criminal activity does not constitute a violation of customary international law, even where the bank had knowledge of the purpose for such financing.⁹⁸

When analyzing the spectrum of conduct that may give rise to complicity, one might analogize the *Rasche* case to a situation where an MNC may be present in a host country and where its limited investment activity might contribute to human rights violations. Passive investment or presence in a host country will not by itself trigger accomplice liability. On the other hand, one might argue that the *Rasche* decision itself needs to be tempered by examining the nature of the relationship between the financier and the criminal perpetrator. If the bank or banker provides continuous, ongoing and knowing financial support for criminal conduct in the form of loans, why should it not trigger accomplice liability? One can draw parallels from contemporary rules concerning the liability of individuals and legal persons for money laundering or for financing terrorist activity as situations in which the knowing provision of financial assistance contributes to criminal conduct and also triggers liability for the financial activity.

B. *Trials of Other Industrialists: Japanese Mining Company Officials and the Kinkaseki Mine Prosecutions*

Much of the current debate concerning corporate complicity and forced labor has focused on the USMT trials of the German industrialists. Legal commentators have overlooked the trial of employees of the Japanese Nippon Mining Company for their actions at the Kinkaseki Mine in Formosa during World War II.

The Kinkaseki Mine trial was held before the British War Crimes Court in Hong Kong.⁹⁹ The nine defendants were all civilian employees of the Nippon

94. See *United States v. Von Weizsaecker (Ministries Case)* XIV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 621-22 (1952).

95. See *id.* For a more detailed account, see Ramasastry, *Secrets and Lies*, *supra* note 49, at 414.

96. See *Ministries Case*, *supra* note 94, at 852.

97. *Id.* at 854.

98. See Ramasastry, *supra* note 49, at 416.

99. The Court consisted of Lieutenant-Colonel R.C. Laming (Department of the JAG of India), Major R.S. Butterfield (Indian Grenadier), and Captain K.R. Busfield. The current POW litigation that was recently dismissed by a federal district court in California involved the activities of the

Mining Company who were accused of mistreating POWs forced to labor in the mines. Among them was the general manager of the mine, two production managers, a production supervisor, and five foremen. The trial took place in May 1947. The sentences ranged from one to ten years.

The *South China Morning Post*, a newspaper published in Hong Kong, provided detailed reports of the trials. According to the news reports, there were three main issues at trial: (1) whether the Army or the Nippon Mining Company was responsible for accidents to and mistreatment of POWs; (2) whether the working conditions in the mines were adequate; and (3) how the accused may have mistreated POWs. There may be court documents available in British government archives, but the author has only been able to locate these news reports, to date, providing an account of the proceedings.

The reports of the trials are instructive because they show that the war crimes tribunals in the Far East also grappled with the liability of economic actors. Moreover, the proceedings provide useful examples of the difficulty that tribunals face when apportioning liability to private actors and state actors.

As the discussion below illustrates, the British Military court focused a great deal of attention on whether care for the prisoners (and subsequent mistreatment) was the responsibility of the mining company or of the army. Similar to the German industrialists, the mining company officials invoked the defense of necessity. They asserted that in using POW labor in their mining operations, they were acting under orders from the Japanese Army. The court appeared to disregard this defense when imposing liability.

Newspaper accounts of the trial are not clear as to why the court reached the verdict that it did. However, it can be inferred that the court held the mining company legally responsible for deaths, injuries, and the suffering of the POWs. This is deduced from the fact that two of the defendants, Toda and Nakamura, a mining company manager and supervisor respectively, were found guilty, although they did not directly participate in the beatings or mistreatment of the prisoners. Thus, their guilt was predicated more upon their responsibility as members of the mining company than as private individuals engaged in human rights violations.

Nippon Mining Company at Kinkaseki. Nippon Mining Company, a subsidiary of Japan Energy Corporation, allegedly forced the British POWs to dig copper in Taiwan's Kinkaseki mine. The POW litigation was commenced in California on behalf of the POWs that were forced to work in the Kinkaseki mines. The case focused on Arthur Titherington, Henry Blackham, and Fergus McGhie, men currently in their late seventies or eighties who argue they were given poor food and no medical care by the company while working in the mine and were subjected to constant vicious beatings. According to news reports, there are more than five-hundred survivors who worked at Kinkaseki. See *Excavating Japan's Past*, ABC News, Feb. 23, 2000, available at <http://abcnews.go.com/sections/world/DailyNews/slavelabor000223.html> (last visited Oct. 9, 2001). For further accounts of the experiences of British POWs at the Kinkaseki Mine, see *POWs Fight Japan in USA Courts*, BBC News, Feb. 23, 2000, available at http://news.bbc.co.uk/hi/english/uk/newsid_652000/652633.htm (last visited Oct. 9, 2001). One of the plaintiffs in the POW litigation against the Japanese corporation is Arthur Titherington. He has written an account of his experiences. See ARTHUR TITHERINGTON AND ROBERT P. O'NEIL, *KINKASEKI: ONE DAY AT A TIME* (2001).

During the trials, the defendants and witnesses from the Japanese Army argued that when the POWs were working in the mine, the Army was not responsible for their welfare. Two Japanese Army officers on trial before another War Crimes Court, Colonel Nakano and Captain Imamura, were called as prosecution witnesses in the Kinkaseki Mine Trial. Both testified that the responsibility for the safety of POWs working in the mine lay with the members of the Nippon Mining Company and not with the staff of the POW camp. They alleged that the Company was also responsible for establishing the work quota and for supplying POW workers with the necessary equipment for working in the mine.¹⁰⁰

Nakano, the Chief Commandant of all POW Camps in Formosa, declared that his guardianship of the POWs ended at the entrance of the mine and that the POWs came under the supervision of the Company once they entered the mine. According to relevant military regulations, the Camp Commandant appointed guards to escort the POWs to the mine. These guards took the POWs to the entrance of the mine, handed them over to the Company employees and remained on guard outside the mine. At the end of the day, the Army guards met the POWs at the entrance of the mine and escorted them back to camp.¹⁰¹

An affidavit from Colonel Yokoda Hiroshi, former Staff Officer to General Ando, a Taiwan Army Commander, corroborated Nakano's testimony by stating that the Company officials and their subordinates were directly responsible for the conditions in the mine. The Company was responsible for any deaths or injuries due to accidents or mishaps in the mine and the individual treatment of POWs by the mining Company's staff.

In his closing address, the prosecutor argued that there was ample evidence to prove that Company officials, including Toda Mitsugu and Nakamura Katsumi, were entirely responsible for the safety and welfare of the POW laborers at the mine. According to the prosecutor, the very fact that the defendants took such pains to explain the measures they implemented to improve the working conditions showed they felt some responsibility.

Defendant Toda Mitsugu, the manager of the Nippon Mining Company, claimed that the POWs were at all times under the orders and control of the POW Camp Commandant. Toda argued that when Japan went to war, the nation was instructed to obey the Army's leadership. He claimed that although he personally did not wish to employ POWs, he was not in a position to raise any objection, especially as his predecessor had reached an agreement with the Army.

Toda stated that during the war, the Company had sufficient laborers to meet the production demand and that POW labor was therefore superfluous. He claimed that it was not profitable to use POWs because they were inexperienced and had to be maintained at the Company's cost.¹⁰² Toda alleged that the Army instructed the mining Company that it was responsible for the POWs' pay and

100. See *Copper Mine Trial*, SOUTH CHINA MORNING POST, May 13, 1947, at 4.

101. See *In a Copper Mine*, SOUTH CHINA MORNING POST, May 11, 1947, at 9.

102. See *Formosan Mine*, SOUTH CHINA MORNING POST, May 14, 1947, at 4.

other amenities, but that at all times the POWs would be under the orders and control of the Camp Commandant. Toda added that the mine staff was also told to report all irregularities to the Camp Commandant.¹⁰³ Both Toda and Mitsugu's arguments echo those of the German industrialists. They claimed to have accepted slave labor because they were not in a position to refuse the Japanese government's request.

According to Toda, Captain Imamura's predecessor told him that the POWs were not employed at the discretion of the Company as they were prisoners of the Japanese Army. The Camp Commandant organized the POWs into work parties. The Camp Commandant admonished the work parties that they were under the Army's control, but should regard the instructions of the Company leaders as coming from the Commandant himself.¹⁰⁴

Toda also testified that, as he was not in a position to control the POWs directly, he did not care much about their safety. Toda maintained that, according to the regulation, the control and guarding of POW workers was the responsibility of the Japanese Army authorities, while the Company was responsible for teaching the POWs how to mine. He further supported his contentions by stating that the Camp Commandant and his staff regularly visited the mine and inspected POWs working there.¹⁰⁵

Toda Mitsugu denied having knowledge of the "hanchos'" (foremen) beatings of POWs while he was manager. Toda disclaimed his responsibility for crimes committed by the hanchos. He testified that he visited the mines about three times a year and had never witnessed ill treatment. The Camp Commandant never reported any beatings to him and he had no direct contact with the POWs themselves. The hanchos did not report any beatings to him. Had he known of ill treatment of POWs, Toda said that he would have cautioned the leaders of the working parties and informed the Camp Commandant.¹⁰⁶

A second accused Company official, Nakamura Katsumi, said in his statement that when he took over as production supervisor at the mine, he was informed by Captain Imamura, the POW Camp Commandant, that he was directly under Imamura's command and must obey his orders. Nakamura was also instructed to stop all beatings in the mine and to prevent the hanchos from punishing POWs, and to report all irregularities directly to the Commandant.¹⁰⁷

Nakamura also testified that he understood the Japanese Army to be responsible for POW workers, as it had established a sentry box at the mine entrance. He

testified that although he had heard that beatings and mistreatment of POWs had taken place prior to entering the mine, he did not know any details of those occurrences. He also stated that he had neither witnessed nor heard any case of beatings or mistreatment during his service in the mine.¹⁰⁸ During cross-examination

103. See *In a Copper Mine*, *supra* note 101, at 9.

104. See *Formosan Mine*, *supra* note 102.

105. See *Copper Mine Trial*, *supra* note 100.

106. See *Formosan Mine*, *supra* note 102.

107. See *In a Copper Mine*, *supra* note 101.

108. See *id.*

by the prosecution, Nakamura said that he did feel responsible for any lapse of safety, but that preventing misconduct on the part of the hanchos was not part of his duties.¹⁰⁹

In his closing address, the defense counsel argued that neither Toda nor Nakamura could be held responsible for the safety and welfare of the POW laborers forced on them by the Army. Defense counsel also argued that the safety and welfare of the POWs during work hours remained the responsibility of the Camp Commandant. POWs were purportedly employed against the wishes and the advice of the mining company.¹¹⁰

On May 28, 1947, British War Crime Court Number Five found eight of the nine accused guilty, including Toda and Nakamura, although neither was found to have directly participated in the abuse of the POWs. Toda was sentenced to imprisonment for one year and Nakamura was sentenced to five years.¹¹¹

C. Drawing the Line: Developing a Standard for Corporate Complicity Based on Previous War Crimes Prosecutions

The prosecution of both German and Japanese company officials establishes the proposition that active and willing participation in the use of forced labor constitutes violations of international humanitarian law. Based on these earlier cases, the prosecution of private economic actors for similar criminal acts should be actionable today. In other words, if an MNC actively sought forced labor from a host government or acquiesced to the use of forced labor in a factory or project, there is a good argument that the USMT and British Tribunal decisions would create some sort of liability. As discussed below, the venue for such a case might be either an international criminal tribunal or a domestic court.

The USMT cases and the British Tribunal cases provide us with differing assessments as to whether and when the defense of necessity should be applicable to economic actors (as contrasted with military personnel). The USMT accepted the defense of necessity proffered by several of the German defendants that they had no choice but to accept forced labor, although only when the defendants could demonstrate that they feared loss of life as opposed to property. By contrast, the British court appears to have rejected such a defense because it found the various mining officials guilty despite their arguments about military compulsion. Thus, under the British court's analysis, the fact that the use of forced labor occurred during wartime should not, by itself, provide a defense for corporate defendants.

Today, an MNC should not be absolved of liability simply because it claims that the host government required it to take certain actions. The defense of duress or necessity, moreover, is less relevant when assessing the decisions of MNCs to collaborate with repressive governments. Today, an MNC makes a

109. See *Copper Mine Trial*, SOUTH CHINA MORNING POST, May 16, 1947, at 4.

110. See *War Trial Ends*, SOUTH CHINA MORNING POST, May 29, 1947, at 1.

111. See *id.*

deliberate choice, outside of the context of war, to work with a repressive regime as a business partner.

The war crimes prosecutions also give rise to another open question: Should knowledge alone also give rise to liability? Assume an MNC has knowledge that forced labor is used by a host government in a way that benefits the MNC's investment activity, should this give rise to liability for the corporate entity or the individuals? Should liability only be imposed when the MNC affirmatively requested or compelled the use of forced labor? As discussed below, a federal district court recently concluded that knowingly accepting the benefits of forced labor is insufficient to create liability.

The Nippon Mining, Farben, Krupp, and Rasche prosecutions provide us with a spectrum upon which to assess culpability. On the one hand, active participation in the use of forced labor was deemed sufficient grounds for imposing criminal liability. On the other hand, the mere act of providing money that financed the construction of a concentration camp was not sufficient. Today, however, precedent established by the Yugoslav and Rwanda War Crimes Tribunals support the notion that knowingly engaging in a war crime or crime against humanity might well give rise to accomplice liability.

The gray area remains situations where an MNC might finance a project in conjunction with a host government. In this situation, the actions of the MNC arguably exceed the discrete activity of providing a commercial loan as was the case with Rasche. There is an ongoing business relationship where, (1) continued economic benefit may be derived as a result of human rights violations, and (2) repression is necessary to extract profits from the investment. In such a case, the *Rasche* holding, discussed in Part II.A.3 above, could be distinguished because there the profits were made on the loan rather than on the ongoing operation of the factories at Auschwitz. The *Rasche* decision, moreover, is outdated in the sense that international criminal law has evolved and the notion of accomplice liability has been developed more fully.

The issue of MNC culpability should be assessed in terms of the level, degree and duration of complicity, and the context in which that complicity occurs. A single loan, for example, might not trigger liability whereas a continuous business relationship might. In some ways, the USMT tried to grapple with the possible spectrum of culpability. It is significant to consider that the cases adjudicated by the USMT were borne of war. Because they are not operating against the backdrop of war, in which they may be commandeered by the State, MNCs that work with repressive regimes today arguably present a stronger case for the imposition of liability. Such MNCs are acting purely for profit rather than out of the national interest. At the same time, any guidelines for when liability should attach to an MNC must take into account the fact that MNCs may operate in countries with internal civil conflicts.

III.

CONTEMPORARY FORCED LABOR LITIGATION: REVISITING WORLD WAR II

A. *Litigation Against German MNCs*

The war crimes trials have established an important precedent for holding private civilians accountable for violations of international humanitarian law. They also help to establish parameters for when to attribute liability to legal persons and private actors with respect to egregious human rights violations such as enslavement. In both the German and Japanese prosecutions, however, the focus was on the criminal liability of individual defendants rather than the corporations.

Only in recent years has the federal Alien Tort Claims Act (ATCA) in the United States applied the doctrine from the USMT cases to MNCs directly. An analysis of the recent forced labor cases is important for several reasons. First, these cases help us to understand how courts have made the leap from the criminal prosecution of individual persons to the civil prosecution of MNCs. These cases bridge the historical gap. Second, the recent litigation is directly related to the use of forced labor by German enterprise during World War II. These cases do not provide clear definitions or answers to the question of when an MNC should be regarded as complicit. They do, however, help frame the pivotal questions by focusing on the conduct of MNCs engaged in violations of international law through economic cooperation with a state.

The ATCA provides domestic remedies for plaintiffs for egregious violations of international law.¹¹² The ATCA was first enacted in 1789, during the first session of the U.S. Congress. It authorized civil lawsuits in U.S. courts for damages by persons injured by violations of international law. The ATCA pro-

112. For a useful overview of the history of the ATCA, see INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (Beth Stephens and Michael Ratner, eds., 1996). For a discussion of the ATCA and MNC liability, see Ralph G. Steinhardt, *Litigating Corporate Responsibility*, GLOBAL DIMENSIONS 1, 7, (June 1, 2001), available at <http://www.globaldimensions.net/articles/cr/steinhardt.html> (last visited Oct. 9, 2001). Steinhardt notes that "there can be no prophylactic rule against private obligations under international law, especially for well-defined, egregious violations of the law. There is, in short, no doctrinal firebreak that keeps private corporations from being liable for any violation of international law, ever." Later in the paper, Steinhardt also seems to imply that jurisdiction via the ATCA is akin to an exercise of universal jurisdiction. When discussing possible objections to the ATCA, he states, "the principle of universal jurisdiction expresses this sense that some international wrongs are sufficiently intolerable that every state has a legally-protectable interest in its suppression to apply its own law. From this perspective, the domestic courts are not acting unilaterally. They are acting as agents for the international legal order." *Id.* at 9. See also, *Corporate Liability for Violations of International Human Rights Law*, 14 HARV. L. REV. 2025 (2001) (advocating the development of a multilateral solution for MNC liability for human rights liability, rather than creation of ill-defined standards under the ATCA); Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 UCLA J. INT'L & FOREIGN AFF. 81 (1999); Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?* 23 BROOK. J. INT'L L. 927 (1998); Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 CATH. U. L. REV. 881 (1999).

vides federal court subject matter jurisdiction over suits by aliens (noncitizens of the U.S.) for a “tort . . . in violation of the law of nations.”¹¹³

After lying dormant for nearly two centuries, the ATCA was revived in 1980 in a case brought by the family of a young man named Joel Filartiga, who was tortured to death in Paraguay.¹¹⁴ Although the trial court initially rejected plaintiffs’ claim, the U.S. Court of Appeals for the Second Circuit reinstated the case and noted that aliens could sue under the ATCA for violations of international law for which there was an international consensus. The court found that there was such a consensus concerning the prohibition of torture.¹¹⁵

The language of the ATCA states that courts may exercise jurisdiction over torts in violation of the “law of nations.” U.S. courts have defined the law of nations to include international law norms that are universal and obligatory.¹¹⁶ This standard has been applied in an evolving manner by U.S. courts, to encompass a broad range of international human rights violations. One of the most recent cases that has extended the scope of the ATCA was a lawsuit against Radovan Karadzic, the leader of the Bosnian Serbs during the war in the Balkans. In *Karadzic*, the Second Circuit found that genocide, war crimes, and crimes against humanity were proper predicates for ATCA jurisdiction.¹¹⁷

The *Karadzic* decision was also groundbreaking in that the court held that certain international human rights norms were applicable to private actors as well as public actors.¹¹⁸ Accordingly, the court concluded that the ATCA applies to suits against private parties (as opposed to state actors) where, as in genocide, international law indicates that the prohibition binds private parties as well as state actors.¹¹⁹

113. 28 U.S.C. §1350 (2001).

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

115. The *Filartiga* court stated:

In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest . . . Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.

Id. at 890.

116. *See Forti v. Suarez Mason*, 694 F. Supp. 707, 709 (N.D. Cal. 1988) (on reconsideration).

117. *See Karadzic*, 70 F.3d at 244. Karadzic was the head of a *de facto* state based upon an illegal seizure of power. He was charged by plaintiffs with genocide, war crimes, crimes against humanity, summary execution, and torture (including rape).

118. *See id.* at 239-43.

119. For example, the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948, specifically prohibits genocide whether committed by a public or private actor. *See* Article 4 of the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. The USMT stated quite succinctly that private individuals have duties under international law:

It is argued that individuals holding no public offices and not representing the State, do not, and should not, come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts judged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not

As discussed *infra*, U.S. courts extended the *Karadzic* decision one step further in 1997, when a federal district court concluded that it had subject matter jurisdiction over the Unocal corporation with respect to its pipeline operations in Burma. Unocal as a legal person was treated as analogous to a natural person with respect to allegations of forced labor. For other violations of international law such as the forcible displacement of Burmese civilians in order to build a pipeline, the court relied on U.S. constitutional doctrine concerning “joint actors” where private entities have acted in concert with the government.

The basis, at least in American law, for imputing liability to MNCs under the ATCA in the same fashion as natural persons is found in U.S. corporate and tort law. For example, rules of criminal responsibility hold corporations accountable for the illegal acts of their agents, if the agent was acting within the scope of his or her employment. In tort law, an agent’s tortious acts can be attributed to the employer if the agent is acting pursuant to his or her employment.¹²⁰

The recent World War II slave labor cases will have a longstanding impact on human rights litigation—firmly establishing, at least in American jurisprudence, the notion that a company can be sued civilly for certain direct participation in the use of forced labor. *The question is no longer whether an MNC can be sued but rather what factual circumstances will give rise to liability.*

In 1999, a host of cases was filed against German, Austrian, and American corporations alleging that these companies, or related subsidiaries, had used and benefited from slave labor during the Second World War. The suits were filed using the ATCA as the basis for subject matter jurisdiction. In a parallel and related effort, the German government and certain large German corporations agreed to create a fund of \$5.2 billion (approximately DM 10 million) to settle slave labor claims.¹²¹

in quality . . . There is no justification for a limitation of responsibility to public officials.

The Flick Case, *supra* note 50, at 1192.

120. See Stephens, *supra* note 12, at 219-20. (“The common acceptance in the United States of the concept of corporate crimes, however, undoubtedly contributes to the acceptance of the related concept that corporations can be held legally accountable for human rights violations.”).

121. See John Hooper, *Nazis forced labourers to get payments*, THE GUARDIAN, May 31, 2001, available at <http://www.guardian.co.uk/international/story/0,3604,498828,00.html> (last visited Feb. 7, 2002). See also Interview with President William J. Clinton, 35 Wkly Compilation Presidential Documents 2610, in Orlando, FL (Dec. 20, 1999), available at 1999 WL 12655361.

The website of the German Economy Initiative Foundation, the nonprofit created to disburse the settlement funds, notes:

Today, it cannot be a matter to give payments alone for the fact of forced labor. No legal basis exists for claims against German enterprises with regard to forced labor or to injuries consequential upon persecution during the Nazi era. The consequences of the fact that German enterprises were involved in Nazi wrongs cannot be settled by legal means. However, German enterprises recognize their moral responsibility, in particular where forced labor had to be performed under particularly harsh conditions and in cases where enterprises cooperated in discriminating against people who were persecuted on racial grounds during the Nazi regime.

See <http://www.stiftungsinitiative.de/eindexr.html> (last visited Feb. 7, 2002).

According to recent documentation, over 400 German companies used slave labor made available by the Nazis during the Second World War.¹²² Slave laborers or forced laborers were not paid reparations by the German government. The German government took the position that private industry should pay any restitution, since it had benefited from the slave labor. Conversely, German corporations insisted that the government should be responsible for reparations since the postwar German government was a legal successor to the Third Reich. German companies also claimed that responsibility should not rest with them since they were forced to use slave labor by the German war effort.¹²³ The necessity and duress defenses were commonly raised in the trials of the industrialists, as well as in subsequent civil litigation in German courts.

The first slave labor action filed in the United States was against the American car manufacturer Ford Motor Company.¹²⁴ In 1998, a federal class action suit was filed in federal district court in Newark, New Jersey alleging that Ford

122. See Press Release, American Jewish Committee, American Jewish Committee Issues Second List of German Firms That Used Slave and Forced Labor During the Nazi Era (Jan. 27, 2000), available at <http://www.ajc.org/pr/germany2ndlist.htm> (last visited Oct. 9, 2001). Plaintiffs' lawyers commissioned a report that calculates the number of forced laborers under the Third Reich as well as the number of survivors and the economic value of the labor brought to the present day. In the summer of 1999, Cohen, Milstein, Hausfeld, and Toll asked Nathan Associates "to bring together in a consistent framework the various estimates of the total number of foreign forced laborers during World War II and of the number of survivors of this labor." See <http://www.cmht.com/casewatch/slavelabor/cwslreport.htm> (last visited Oct. 9, 2001).

123. See, e.g., FERENCZ, *supra* note 30, at xviii. Ferencz, when referring to the industrialists tried from I.G. Farben, Krupp, and Flick, states, "[a]s far as they were concerned, the use of slaves was a patriotic duty which was both normal and proper under the circumstances." See also, *id.* at 188-89; Michael J. Bayzler, *Nuremberg in America*, 34 U. RICH. L. REV. 1, 194 n. 792. For an interesting article on the role of historians in documenting the role of German industry in World War II, see S. Jonathan Wiessen, *German Industry and the Third Reich: Fifty Years of Forgetting and Remembering*, 13 DIMENSIONS: A JOURNAL OF HOLOCAUST STUDIES, available at http://www.adl.org/braun/dim_13_2_forgetting.html (last visited Feb. 7, 2002).

124. See Ken Silverstein, *Ford and the Fuhrer: New Documents Reveal Close Ties Between Dearborn and the Nazis*, THE NATION, Jan. 24, 2000, available at <http://past.thenation.com/issue/000124/0124silverstein.shtml> (last visited Oct. 7, 2001); David Ensor, *G.M., Ford deny collaboration with Nazis during WWII*, CNN.COM, Nov. 30, 1998, available at <http://www.cnn.com/US/9811/30/autos.holocaust> (last visited Oct. 9, 2001). For a differing view, see Simon Reich, *The Ford Motor Company and the Third Reich*, 13 DIMENSIONS: A JOURNAL OF HOLOCAUST STUDIES, available at http://www.adl.org/braun/dim/_13_2_ford.html (last visited Oct. 9, 2001). Reich, a professor at the Graduate School of Public and International Affairs at the University of Pittsburgh is the author of *The Fruits of Fascism: Postwar Prosperity in Historical Perspective*, which documents the different degrees of success enjoyed by the Ford Motor Company in Germany and Great Britain in the 1930's and 1940's. Reich was retained as part of an investigative team commissioned by Ford in response to the forced labor lawsuit, to assess Ford's wartime activities. Reich states that, "I certainly found no evidence that American management ever sanctioned the use of slave labor or that it even knew of the use of slave labor." See also, Adam Lebor, *Slave Labour at Auschwitz Used by Ford*, INDEPENDENT, Aug. 20, 1999, at 8, available at 1999 WL 21262339.

On the subject of corporate payments to the victims of forced labor, the German Economy Foundation Initiative states:

The absolutely necessary precondition for releasing the money is that all-embracing and enduring legal peace be created for the companies, i.e. that they be protected against all lawsuits and that there be a realistic prospect of protection against corresponding administrative and legislative measures against German companies.

German Economy Foundation Initiative, *Preamble*, available at <http://www.stiftungsinitiative.de/eindexr.html> (last visited Jan. 24, 2002).

had knowingly accepted economic benefits derived from the use of forced labor by its German subsidiary, Ford Werke A.G. in Nazi Germany.¹²⁵ Ford Werke also was joined as a defendant and the complaint alleged that the subsidiary had “knowingly earned enormous profits from the aggressive use of forced labor under inhuman conditions.”¹²⁶

The named plaintiff representing the class was Elsa Iwanowa, a Belgian citizen and resident, who alleged that she performed unpaid “forced labor under inhuman conditions for Ford Werke A.G.” from 1942 to 1945 in its Cologne plant.¹²⁷ Iwanowa claimed that she was “abducted by Nazi troops and transported to Germany with approximately 2,000 other children by a representative of Ford Werke A.G.” in order to work at the Cologne factory.¹²⁸ The class was comprised of all persons who were compelled to work for Ford Werke between 1941 and 1945.¹²⁹ Plaintiffs sought disgorgement of all profits and benefits that Ford earned through its subsidiary, as well as punitive damages “arising out of defendant’s knowing use of forced labor under inhuman conditions.”¹³⁰

The complaint further alleged that Ford Werke AG, which had been doing business in Germany since 1925 and was headquartered in Cologne, aggressively requested the use of forced laborers.¹³¹ The complaint states that in 1943, 25% of Ford Werke’s workforce was unpaid forced labor. By 1944 the percentage of unpaid laborers had allegedly grown to 50%. It apparently remained constant until the end of the war.¹³²

Ford moved to dismiss the Iwanowa case on three grounds: (1) lack of subject matter jurisdiction; (2) failure to state a claim; and (3) expiration of the statute of limitations.¹³³ While the motion to dismiss was pending before the court, new documents from Nazi archives were publicized revealing that Ford Werke A.G. was one of 51 German companies to use Auschwitz internees as slave laborers.¹³⁴ Ford’s response was that the American parent did not control its German subsidiary’s operations.¹³⁵

Plaintiffs alleged that as a result of the use of unpaid forced labor, Ford Werke’s annual profits had doubled by 1943.¹³⁶ The complaint also stated that unlike other subsidiaries of American-owned companies, Ford Werke had never

125. See *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); see also, Class Action Complaint and Jury Demand, *Iwanowa v. Ford Motor Co.* (Civil Action No. 98-959).

126. *Iwanowa* complaint at ¶ 2.

127. *Id.* at ¶¶ 1-2 and 24-28.

128. *Id.* at ¶ 25.

129. See *id.* at ¶ 29.

130. *Id.* at ¶ 38.

131. See *id.* at ¶ 10.

132. See *id.*

133. See Ford Motor Company’s Motion to Dismiss, *Iwanowa v. Ford Motor Co.* (Civil Action No. 98-959).

134. See Lebor, *supra* note 123, at 8.

135. See Douglas Davis, *Documents Reveal Ford was Part of the Auschwitz Industrial Complex*, GLOBAL JEWISH NEWS, Aug. 22, 2001, available at <http://www.jta.org/story.asp?story=2020> (last visited Nov. 3, 2001).

136. See *Iwanowa* Complaint ¶ 12.

been nationalized by the Nazis and that the American parent retained a controlling interest throughout the war.¹³⁷

In addition to the Ford case, dozens of other lawsuits were filed against different German and Austrian corporations for their use of slave labor during World War II.¹³⁸

In September 1999,¹³⁹ Judge Joseph Greenaway, U.S. district court judge for the District of New Jersey, dismissed the lawsuit against Ford and its subsidiary Ford Werke A.G.¹⁴⁰ However, before dismissing the claim, the court found that it had subject matter jurisdiction over Iwanowa's slave labor claims under the ATCA.¹⁴¹ The court found that Ford indeed had used "unpaid, forced labor during World War II" and that this "violated clearly established norms of customary international law."¹⁴² The court further stated that Iwanowa's allegation that "she was literally purchased along with 38 other children . . . by a representative of [Ford Werke] . . . [is sufficient] to support an allegation that [Ford and Ford Werke] participated in slave trading."¹⁴³ Ford's alleged slave trading also was held to violate customary international law.¹⁴⁴

The court further noted that although customary international law is sometimes referred to as the "law of nations," it nonetheless applies to private actors such as Ford in certain circumstances.¹⁴⁵ Slave trading, the court found "is included in that 'handful of crimes' to which the law of nations attributes individual responsibility."¹⁴⁶ The district court ruled that Ford could not use the non-state actor argument because it had worked with the Nazi government to procure slave laborers and therefore "acted as an agent of, or in concert with, the Ger-

137. *See id.* at ¶ 15.

138. *See* Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Federal Foundation "Remembrance, Responsibility, and the Future," July 17, 2000, Annex C. List of known World War II and National Socialist era cases against German companies pending in U.S. courts filed by plaintiffs' counsel participating in the negotiations. Lawsuits were filed against Agfa Gevaert, Alcatel, SEL, Albert Ackermann, Aktiengesellschaft, Audi, BASF, Beiersdorf, BMW, Bosch, Continental, (Tire), Daimler-Benz, Diehl Sifting & Co., Dunlop, drop Adler, Franz Haniel & Cie, Dyckerhoff Heinkel, Heiderlberger Zement, Hochtief, Hoescht, Phillip Holzman, Hugo Boss, Leica Camera, Leonhard-Moll Krupp, Lufthansa, MAN, Mannesmann, Messerschmitt-Boelkow-blohm, Miele & C., Pfaff Akteingesellschaft, Rheinmetall, Rodenstock, Siemens, Steyr-Daimler-Puch, Thyssen, VARTA, Voiest, Volkswagen, Wurttembergische, Metallwarenfabrik, and Zeppelin. American car manufacturers Ford and General Motors and their German subsidiaries, Ford Werke A.G., and Opel, were also sued. For further discussion of the slave labor litigation, *see* Bayzler, *supra* note 122, at 207, n. 843. *See also* *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 281-82 (D.N.J. 1999).

139. Many of the slave labor cases were filed in federal court in New Jersey because the American subsidiaries of many German chemical and pharmaceutical companies are located in New Jersey.

140. *See Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 491 (D.N.J. 1999).

141. *See id.* at 438-46.

142. *Id.* at 440.

143. *Id.*

144. *See id.* at 439-41.

145. *Id.* at 443-45.

146. *Id.* at 445 (citing *Nat'l Coalition Gov't v. Unocal Corp.*, 176 F.R.D. 329, 348 (C.D. Cal. 1997)).

man Reich.”¹⁴⁷ Thus, the court treated Ford as if it was a natural person with respect to certain violations of international law.

Although the court concluded that Ford had violated international law, it ultimately dismissed *Iwanowa's* case. Dismissal was warranted, according to the Court, because relevant treaties between the Allied Powers and Germany required individual claims against corporations to be pursued exclusively through inter-governmental settlement.¹⁴⁸ Further, the court held that *Iwanowa's* claims against Ford and Ford Werke under the ATCA, American law,

147. *Id.* at 446 (referring to the Agreement on Reparations from Germany on the Establishment of an Inter-Allied Reparation Agency and on Restitution to Monetary Gold, Jan. 14, 1946, 3157 T.I.A.S. No. 1655).

148. *See id.* at 460. The court first looked at the treaties entered into between the Allied powers and the Federal Republic of Germany (F.R.G.) subsequent to the War. In January 1946, the United States and seventeen other nations met in Paris to sign the Paris Reparations Treaty obliging Germany to pay wartime reparations. *See id.* at 448-55. The Paris Reparations Treaty was never fully executed as the Cold War led to the division of Germany into two states, the Federal Republic of Germany (so called West Germany) and the German Democratic Republic (so called East Germany). *See* Convention Between the United Kingdom of Great Britain and Northern Ireland, France, the United States of America and the Federal Republic of Germany on the Settlement of Matters Arising out of War and the Occupation, May 26, 1952, 6 U.S.T. 4117, 331 U.N.T.S. 219 (as amended by Protocol on Termination of the Occupation Regime in the Federal Republic of Germany, Oct. 23, 1954, 6 U.S.T. 4117, 331 U.N.T.S. 219).

In 1952, the F.R.G. entered into a treaty known as the Transition Agreement with Western Nations that postponed its payment of reparations. In 1953, the Wartime powers and seventeen other nations entered into yet another treaty with the F.R.G. known as the London Debt Agreement. *See* Agreement on German External Debts, Feb. 27, 1953, 4 U.S.T. 443, 333, U.N.T.S. 3.

The London Debt Agreement deferred the collection of any reparations (as originally set forth in the Paris Reparations Treaty) until the F.R.G. had rebuilt its economy. In 1990, the F.R.G. and the German Democratic Republic both entered into a treaty with the United States, France, and the U.S.S.R. known as the Two-Plus-Four Treaty. *See* Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 29 I.L.M. 1186. The *Iwanowa* court treated the Two-Plus-Four Agreement as the treaty that settled the problem of wartime reparations because it stated that the Allied nations could demand no further reparations from a unified Germany. *See Iwanowa*, 6 F. Supp. 2d at 453. The court's analysis focused on article 5(2) of the London Debt Agreement:

Consideration of claims arising out of the Second World War by countries which were at war with or were occupied by Germany during the war, and by nationals of such countries, against the Reich, or agencies of the Reich . . . shall be deferred until the final settlement of the problem of reparations.

Iwanowa, 67 F. Supp. 2d at 453 (quoting from the London Debt Agreement).

Since plaintiff *Iwanowa* had been a national of the U.S.S.R. during World War II, Article 2 covered her claims. Furthermore, although *Iwanowa's* claims were against Ford and Ford Werke, two private corporations, the court noted that previous interpretations of the London Debt Agreement provided the same deferral of reparations payments to private corporations. In 1963 and 1973, the German Supreme Court held that private German corporations that utilized unpaid slave labor were entitled to deferral of claims pursuant to the London Debt Agreement. *See id.* at 452-54 (discussing the German cases before the German Federal Supreme Court).

Commentators have criticized the court's analysis of article 5(2) as being incorrect. For example, Bayzler remarks that,

nothing in the Agreement makes such claims available only through government-to-government diplomacy. The court's analysis, in effect, interprets article 5(2) as not only deferring such claims, but forever extinguishing them. Moreover, the court's conclusion is contrary to the decisions reached by the German courts. Three German court decisions in 1997, in 1998, and in 1999 have allowed private claims for slave labor to go forward in German courts.

Bayzler, *supra* note 123, at 215.

and German law, were all time barred. Finally, the court ruled that the lawsuit should be dismissed on grounds of nonjusticiability and international comity.¹⁴⁹

In September 1999, on the same day in which the action against Ford was dismissed, another federal district court (also in the federal district court for the District of New Jersey) dismissed four other slave labor cases involving German corporations Degussa and Siemens.¹⁵⁰ Degussa allegedly utilized slave laborers in various refining and manufacturing facilities¹⁵¹ and Siemens purportedly used nearly 100,000 slave laborers in its electronic and communications equipment manufacturing facilities.¹⁵²

Although Judge Dickensen Debevoise dismissed the lawsuits on grounds of nonjusticiability, the court also made certain factual and legal findings that serve as important precedents for future slave labor claims.¹⁵³ First, the court noted that the plaintiffs' claims comported with history concerning the involvement and knowledge of Degussa and Siemens with respect to their use of slave labor: "Plaintiffs factual allegations . . . are totally consistent with the history of the Nazi era and with the record developed during the post-war trials in Nuremberg."¹⁵⁴

In the Court's opinion in *Burger-Fischer v. Degussa A.G.*, it stated that, "[t]he plaintiffs' accounts of the wrongs they suffered at the hands of the Nazi government and the defendants are deemed to be completely accurate. The historical events recited herein are established either by undisputed submissions in the record or are of common knowledge."¹⁵⁵

The *Burger-Fischer* decision, similar to the *Iwanowa* decision, affirms the notion that the use of slave labor by private corporations is a violation of cus-

149. See *Iwanowa*, 67 F. Supp. 2d at 483-88 and 489-91. The discussion of justiciability suggests that the court dismissed the case under the political question doctrine.

150. See *Burger-Fischer*, 65 F. Supp. 2d at 248. The opinion dismissed the following actions: *Vogel v. Degussa AG*, Civil Action No. 98-5019 (D.N.J. filed Nov. 6, 1998); *Klein v. Siemens AG*, Civil Action No. 98-4468 (D.N.J. filed Sept. 24, 1998); *Lichtman v. Siemens AG*, Civil Action No. 98-4252 (D.N.J. filed Sept. 9, 1998); *Burger-Fischer v. Degussa AG*, Civil Action No. 98-3958 (D.N.J. filed Aug. 21, 1998). All four cases involved Holocaust survivors who had worked as slave laborers for German companies.

151. See *id.*

152. See *id.* at 253.

153. See *id.* at 272-81.

154. *Id.* at 255. The court went on to state:

In brief[,] Degussa and Siemens's executives were fully aware of the widespread use of slave labor and of the inhumane conditions in which the victims lived and worked. The two corporations were aware that this program was utilized not only to advance the German war effort, but also as part of the Nazi goal of exterminating the entire Jewish community in Germany, in the territories of its allies and in the conquered lands. Degussa was aware of the uses to which the Zyklon B it manufacturer would be used in concentration camps and was aware that the gold it refined was seized from the Jewish people at their places of residence, when they arrived at the concentration camps and from their bodies before and after they had been killed. Knowing this[,] Degussa and Siemens voluntarily participated and profited from the use of slave labor and[,] in the case of Degussa, in the manufacture and sale of Zyklon B and the refining of stolen gold.

Id. at 255.

155. *Id.* at 285.

tomary international law: "There can be little doubt that the acts in which the defendant corporations are alleged to have engaged were and are proscribed by customary international law . . . [and] defendants' alleged conduct violated German civil law in effect at the time they engaged in that conduct."¹⁵⁶

To date, Ford and Ford Werke have not participated in any settlement fund or provided any reparations to laborers from the Werke plant. Degussa and Siemens, however, have pledged to participate in the German slave labor fund.¹⁵⁷ The dismissal of the various slave labor cases allows a company such as Ford, which regained ownership of the Werke plant at the end of World War II, to avoid liability for its violations of international law.

The lawsuits are important for publicizing the complicity of German and Austrian industry with the Nazis, as well as exerting pressure on German industry to participate in the slave labor fund. The cases also provide strong precedent for the fact that a corporation's active participation in the use of slave or forced labor is actionable under the ATCA.

Most importantly, the cases bridge the gap between World War II and modern MNC complicity. The *Iwanowa* and *Burger-Fischer* courts recognized that absent a treaty, plaintiffs would have a private right of action against the defendants for their violations of international law. In this respect, one can read the USMT decisions in tandem with the modern forced labor cases and develop a framework for holding MNCs accountable for direct complicity as outlined in Section I.

B. Litigation Against Japanese MNCs

While cases involving German corporations proceeded on the East Coast, litigation relating to the use of Korean and Chinese civilian slave labor and POW slave labor by the Japanese was commenced on the West Coast of the United States.

In September 2001, Judge Vaughn Walker, federal district court judge for the Northern District of California, dismissed a series of lawsuits brought by Chinese and Korean nationals against Japanese corporations. The plaintiffs sought compensation for forced labor activities during World War II.¹⁵⁸ The court previously had dismissed cases brought by American and Allied war veter-

156. *Id.*

157. See David Voraceos, *Ford Fights Lawsuit by Holocaust Survivors*, THE RECORD, Aug. 6, 1999, at A1, available at 1999 WL 7109695.

158. See *In re World War II Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001) (hereinafter *Japanese Forced Labor Litigation II*). The case dismisses the following actions: *Choe v. Nippon Steel Corp.*, *Kim v. Ishikawajima Harima Heavy Industries Co. Ltd.*, *O v. Mitsui Co., Ltd.*, *Sin v. Mitsui C. Ltd.*, *Su v. Mitsubishi Corp.*, *Sung et. al v. Mitsubishi Corp.*, and *Ma v. Kajima Corp.* For a brief account of the litigation, see David Caron and Adam Schneider, *U.S. Litigation Concerning Japanese Forced Labor in World War II*, ASIL INSIGHTS, Oct. 2000, available at <http://www.asil.org/insights/insigh57.htm> (last visited Oct. 9, 2001). For discussion of the claims of POWs, see LINDA GOETZ HOLMES, UNJUST ENRICHMENT: HOW JAPAN'S COMPANIES BUILT POSTWAR FORTUNES USING AMERICAN POWS (2001).

ans who had been Japanese POWs on the grounds that their claims were precluded by a peace treaty between the United States and Japan.¹⁵⁹

The primary cause of action of the civilian plaintiffs was based on a special statute—Section 354.6—enacted by the California Legislature in 1999. The statute provides a cause of action for all individuals forced to labor without compensation “by the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the [same regimes].”¹⁶⁰ The California statute also waived relevant statutes of limitations that might have otherwise barred claims. In addition to the state law

159. See *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. 2001) (dismissing the cases because the 1951 Peace Treaty with Japan waived all claims) [hereinafter *Japanese Forced Labor Litigation II*]. Judge Walker, in his decision, focused on Article 14(b) of the Treaty of Peace with Japan, between Japan and 47 other Allied powers. The Article reads:

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparation 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 Allied Powers for direct military costs of occupation.

114 F. Supp. 2d at 945 (quoting the Multilateral Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, TIAS No. 2490).

The United States Congress is currently considering federal legislation that would either preserve their causes of action in federal court or would authorize some sort of payment to U.S. war veterans who had been forced laborers for Japanese companies. See Steve La Rocque, *Two Bills Proposed to Help U.S. POWs Used as Forced Labor by Japan*, United States Embassy (Tokyo), available at <http://www.usembassy.state.gov/tokyo/wwwhus0039.html> (last visited Oct. 9, 2001). See also, *Senate Urges Government to Negotiate for World War II Prisoners*, ASSOCIATED PRESS, Nov. 1, 2000, available at <http://www.207.25.71.29/2000/ALLPOLITICS/stories/11/01/powlaw suits.ap/> (last visited Oct. 9, 2001).

In August 2001, Senators Orrin G. Hatch and Dianne Feinstein introduced legislation to assist American POWs that were forced into slave labor by Japanese companies during World War II. According to Senator Dianne Feinstein,

the POW Assistance Act of 2001 makes clear that any claims brought in state court, and subsequently removed to federal court, will still have the benefit of the extended statute of limitations enacted by the state legislatures. The statute of limitations should not be permitted to cut off these claims before they can be heard on the merits. Today’s bill does nothing more than ensure that these POWs receive their fair day in court.

Press Release, Senator Dianne Feinstein, Hatch/Feinstein Introduce POW Assistance Act of 2001 to Assist American Soldiers Forced into Slave Labor by Japanese Companies During World War II (Aug. 1, 2001), available at <http://www.senate.gov/~feinstein/releases01/R-POW.htm> (last visited Jan. 24, 2002).

160. CAL. CODE OF CIV. PROC. §354.6(a). Section 354.6(a) states:

Any Second World War slave labor victim, or heir of a Second World War slave labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.

Attorney General Bill Lockyer of California submitted an *amicus* brief supporting the constitutionality of the California statute. The Attorney General also submitted a similar *amicus* brief to the United States Court of Appeals for the Ninth Circuit supporting the constitutionality of California’s Holocaust Victims Insurance Relief Act, which required that insurance companies seeking to do business in California provide information concerning insurance claims from the Holocaust era. The Ninth Circuit determined in March 2001 that the California insurance statute did not interfere with U.S. foreign relations. See Press Release, Office of the Attorney General, Attorney General Lockyer Defends the Rights of Holocaust Victims and World War II Slave Laborers (Aug. 14,

claims, the plaintiffs sought compensation under the ATCA and under various state laws and customary international law. The court ultimately concluded that § 354.6 was unconstitutional because it infringes on the federal government's exclusive power of foreign affairs.¹⁶¹ As with the German slave labor cases, the court found that the plaintiffs' claims were time barred.

Importantly, however, the court did find that a claim alleging that the Japanese corporations had used forced labor was actionable under the ATCA. The court's reasoning was based largely on the findings of the New Jersey district court in *Iwanowa v. Ford Motor Co.*: "[i]n this regard, a district court in New Jersey addressing forced labor claims under the ATCA against Ford Motor company recently concluded that '[t]he use of unpaid forced labor during World War II violated clearly established norms of international law.'"¹⁶² The district court also cited with approval the fact that the *Iwanowa* court had based its findings on Nuremberg precedent.¹⁶³

As with the German cases, the court was willing to state that "it seems beyond doubt that two forced labor practices of defendants during the Second World War violate traditional international law."¹⁶⁴ However, the court noted that as such conduct took place over 50 years ago, the claims were precluded by the controlling statute of limitations.¹⁶⁵

2001), available at <http://www.caag.state.ca.us/newsalerts/2001/01-079.htm> (last visited Oct. 9, 2001).

161. See *Japanese Forced Labor Litigation II*, 164 F. Supp. 2d at 1164. The Japanese government had filed a submission with the court in which it stated that the California statute would have a deleterious effect on its relationship with the United States, as well as with China, and North and South Korea. See *id.* at 18-19. The U.S. State Department also concurred with this assessment. See *id.* at 19.

162. *Id.* at 1179 (citing *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 440 (D.N.J. 1999)).

163. The court stated:

As [the *Iwanowa* court] reasoned, this conclusion is supported by the following: (1) the Nuremberg Tribunals held that enslavement and deportation of civilian populations during the war constituted a crime against humanity in violation of international law; (2) the Nuremberg Principle IV(b) provides that the "deportation to slave labor . . . of civilian populations of or in occupied territory constitutes both a 'war crime' and a 'crime against humanity'" (quoting Nuremberg Charter, Annexed to the London Agreement on War Criminals, Aug. 8, 1945, art. 6, 59 Stat. 1544, 82 UNTS 279); and (3) several American and German jurists have stated that the conduct related to slave labor violates international law.

Id. at 1179.

164. *Id.* at 1179. For further discussion of Japanese corporations and their involvement with wartime forced labor, see ILO Report of the Committee of Experts on the Application of Conventions and Recommendations, Forced Labour Convention, 1930 (No. 29) Observation, 2000 Japan (ratification 1932). In its annual report drawn up by a committee of legal experts, the ILO said Japan's mass relocation of workers from the Korean Peninsula and Japanese-occupied areas of China to work at mines, construction sites, and factories in Japan "violated ILO Convention No. 29 that banned forced labor." The unofficial version is available online at <http://www.angelfire.com/ny2/village/ilo2000.html> (last visited Oct. 9, 2001).

165. The court in *Japanese Era Forced Labor Litigation II* stated:

None of the allegations in the Korean and Chinese plaintiffs' complaints suggest that they could not have attempted to bring those claims sooner. To be sure, the Ninth Circuit only formally recognized a right of action under the ATCA in 1994. But the statute has been in force since the 18th century and several courts found it to provide a cause of action much earlier than the Ninth Circuit. The Korean and Chinese plain-

In the end, the lawsuits brought against German and Japanese corporations may achieve some small amount of relief for the victim plaintiffs through settlements brokered as a result of political negotiations (in the case of the German lawsuits) or legislation (in the case of American POWs). Their greater significance, however, is in reinforcing the basis for holding a contemporary MNC liable for suit under the ATCA by reference to Nuremberg and USMT proceedings as precedent. The U.S. courts, through their own deliberations, have extended the possibility of liability to corporations in addition to private individuals. The trials of the industrialists did not make this link explicit.

The recent litigation brought by the forced labor victims of German and Japanese enterprise makes it clear that legal persons have the same obligations as natural persons when it comes to certain egregious violations of international law norms, at least for purposes of ATCA jurisdiction. Even more important is the fact that the courts have recognized that MNCs, even when collaborating with a government actor, may nonetheless bear responsibility. MNCs, therefore, may be directly complicit in crimes under international law. They are not excused solely because of the presence of the state.

It is ironic, however, that private violations of international law can be immunized by virtue of government settlements. If such collaboration can result in immunity, it should result in liability in situations where there is no settlement (i.e., in the non wartime context of MNC activity today). There is currently a debate within the human rights community as to whether a government can or should ever grant amnesty for gross human rights violations without itself breaching its own duties under treaties and customary international law. To do so, some commentators argue, would be incompatible with the duty of states to investigate such acts and to guarantee freedom from such acts within their jurisdiction. States cannot, it is argued, deprive individuals of their right to an effective remedy.

IV.

BENEFICIARY COMPLICITY¹⁶⁶: THE UNOCAL CASE AND FORCED LABOR IN BURMA

The criminal prosecution of industrialists after World War II and the more recent forced labor cases are highly relevant to the development of a doctrine of corporate complicity for MNCs that collaborate with repressive governments today. The existence of recent civil litigation against a multinational oil company alleging that it knowingly permitted the use of forced labor is illustrative of

tiffs do not assert reasons why their claims could not have been brought under the ATCA within ten years of the war's end.

164 F. Supp. 2d at 1181.

166. The term beneficiary corporate complicity is a relatively new term. It has been used to refer to situations in which a MNC knowingly benefits from human rights violations committed by someone else (e.g., a host government). For a discussion of this concept, see Clapham and Jerbi, *supra* note 40.

the continuing probity of the criminal prosecutions of World War II era German and Japanese industrialists.¹⁶⁷

Modern MNC complicity, however, may occur outside of the context of war. It is important, therefore, to appraise contemporary situations to determine when an MNC might be liable outside of war. As noted above, the larger question is whether an MNC could be liable as a result of its role as a beneficiary accomplice (also referred to as indirect complicity). As discussed in Part I, beneficiary complicity relates to situations in which an MNC has knowledge of ongoing human rights violations in a host country and engages in a business

167. For example, the Herero community in Namibia has instituted a legal claim against German companies seeking reparations for the enslavement and destruction of their tribe. The lawsuit alleges that imperial Germany (which colonized Namibia in the early twentieth century) had formed a "brutal alliance" with German industry and engaged in enslavement, extermination, forced labor, medical experimentation, and other crimes in order to advance common financial interests. See *Hereros Sue German Firm for Reparations*, BUSINESS DAY, Sept. 6, 2001, available at <http://allafrica.com/stories/200109060457.html> (last visited Oct. 9, 2001). For a description of German colonization in Southwest Africa, see *A Bloody History: Namibia's Colonization*, BBC NEWS, Aug. 29, 2001, available at <http://news.bbc.co.uk/1/hi/english/world/africa/newsid1514000/1514856.stm> (last visited Oct. 9, 2001).

The United Steel Workers Union and the International Labor Rights Fund have partnered with a Colombian trade union to file suit against Coca-Cola, its Latin American bottler, and two Florida investors who own a bottling company in Colombia. The lawsuit alleges that Coca-Cola's Colombian business partners maintain open relations with a Colombian death squad as part of a strategy to intimidate trade union leaders. The complaint states that five union members working in Coca-Cola bottling plants have been killed since 1994. See *Coke Abuse in Colombia*, MULTINATIONAL MONITOR (2001), available at <http://www.essential.org/monitor/mm2001/01september/sep01front.html> (last visited Jan. 24, 2002). See also Aram Rostoin, *It's The Real Thing: Murder*, THE NATION, Sept. 3, 2001, available at <http://www.thenation.com/docmhtml?I=20010903&c=1&s=roston> (last visited Oct. 9, 2001); Julian Borger, *Coca-Cola sued over bottling plant terror campaign*, THE GUARDIAN, July 21, 2001, available at <http://www.guardian.co.uk/international/story/0,3604,525209,00.html> (last visited Oct. 9, 2001). For a copy of the complaint, see <http://www.laborrights.org/projects/coke/index.html> (last visited Oct. 9, 2001).

The United Steelworkers and UNITE have also brought a case in federal district court in California against textile and garment manufacturers in which Nicaraguan garment workers allege that their employers have subjected them to cruel, inhuman, and degrading treatment in violation of the rights to life, liberty, and security of person and have prevented them from exercising their right to freedom of association in contravention of international law. Plaintiffs are bringing their suit under the ATCA. See *Plaintiffs' Complaint in Manzanarez v. C&Y Sportswear*, available at http://www.nlcnet.org/court_complaint.htm (last visited Oct. 9, 2001).

In June 2001, Exxon was sued by eleven villagers from Aceh, a territory in Indonesia. Plaintiffs allege that Exxon paid Indonesian security forces to guard its facilities and that the company had provided the military with buildings that were used to torture local residents who are part of the Free Aceh movement and excavators to dig mass graves for victims of military violence. The lawsuit further alleges that the company purchased military equipment for security forces assigned to the project and also paid mercenaries to provide training and intelligence to military in the project area. Exxon closed down its operations in March 2001 due to security concerns. See Audrey Gillan, *Exxon Accused of Rights Abuses*, THE GUARDIAN, June 22, 2001, available at <http://www.guardian.co.uk/indonesia/Story/0,2763,510896,00.html> (last visited Oct. 9, 2001); *Aceh: Lawsuit accuses Exxon Mobil of complicity in abuses*, DOWN TO EARTH, Aug. 2001, available at <http://www.gn.apc.org/dte/50Ach.htm> (last visited Oct. 9, 2001). For a copy of plaintiffs' complaint, see <http://www.laborrights.org/projects/aceh/index.html> (last visited Oct. 9, 2001).

Weir Group, a Scottish manufacturer of oil pumps used for oil pipelines has been criticized by human rights groups for its business activity in the war-torn Sudan. Weir allegedly has been complicit in the Khartoum government's campaign of violence against the population. See Saeed Shah, *Weir Group Stands Firm Over Sudan*, THE INDEPENDENT, Aug. 23, 2001, available at <http://www.independent.co.uk/story.jsp?story=90140> (last visited Oct. 9, 2001).

relationship with a repressive host government. If the MNC, after learning of human rights violations linked to its investment, continues to do business with the host government, this should give rise to accomplice liability. An important caveat is that the MNC needs to benefit from the violations.

In the United States, one of the earliest cases in which a court held that a multinational corporation could be subject to a civil suit for alleged violations of international human rights law was *Doe v. Unocal*.¹⁶⁸ Unocal, a multinational oil company, undertook a joint venture with Total S.A, a French oil company, and the Myanmar government, to extract oil and build a pipeline in the Tena-nerim region of Burma (Myanmar).¹⁶⁹ The case was filed in federal district court in California on behalf of Burmese citizens who allegedly suffered torture, assault, rape, loss of their homes and property, forced labor, and other human rights violations.¹⁷⁰ In addition to the corporation, the plaintiffs named the President and Chief Executive Officer of Unocal as defendants.

The *Unocal* case is significant because it was the first lawsuit in which a court acknowledged that an MNC could be liable for violations of international law. It is also important because of two conflicting district court decisions that have emerged. In 1997, a federal district court refused to dismiss the case for lack of subject matter jurisdiction. The court concluded that knowing acceptance of the benefits of forced labor was actionable as a violation of international law. By contrast, in August 2000, a different judge ruled that Unocal could not be held liable solely for knowing about the Burmese government's use of forced labor in relation to the pipeline project.

168. Other cases include *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000). The *Wiwa* case charged that the defendants, Royal Dutch Petroleum and Shell Transport and Trading Company, were complicit in human rights violations perpetrated by Nigerian security forces, including the murder of prominent environmental activists. *Jota v. Texaco, Inc.* involves two consolidated claims, *Aguinda v. Texaco* (S.D.N.Y., Docket No. 93-7527) (on behalf of residents of the Oriente Region of Ecuador), and *Aguinda v. Texaco* (D.D., Docket No. 94 Civ. 9266) (residents of Peru). The complaints allege that Texaco polluted the rain forests and rivers of the two countries during oil exploration in Ecuador between 1964 and 1992. The case was originally dismissed on the ground of forum non-conveniens. In 1998, the U.S. Court of Appeals for the Second Circuit reversed the dismissal. The case was remanded for further consideration of whether it should be heard in Ecuador. A more recent case is *Bowato v. Chevron* (N.D. Cal. 1999, Docket No. C99-2506). This case charges that California-based Chevron was involved in a series of machine gun attacks upon unarmed protestors in Nigeria. The protestors were allegedly summarily executed during the attacks, burned in a fire set during the attack, or subsequently tortured by the police after the attack. For an analysis of the current status of these and other cases, see Jennifer Green and Paul Hoffman, *Litigation Update: A Recent Summary of Developments in the U.S. Cases Brought Under the Alien Tort Claims Act and Torture Victim Protection Act*, in THE AMERICAN CIVIL LIBERTIES UNION INTERNATIONAL CIVIL LIBERTIES REPORT (2001), available at <http://www.aclu.org/library/iclr/2001/> (last visited Feb. 15, 2002).

169. For Unocal's description of its investment activity in Burma, see <http://www.unocal.com/myanmar> (last visited Oct. 1, 2001). For additional background that supported the plaintiffs' viewpoints, see EARTHRIGHTS INTERNATIONAL AND SOUTHEAST ASIAN INFORMATION NETWORK, TOTAL DENIAL: A REPORT ON THE YADANA PIPELINE PROJECT IN BURMA (1996) available at <http://www.earthrights.org/pubs/td.html> (last visited Oct. 11, 2001). For an update on the Yadana Pipeline Project, see EARTHRIGHTS INTERNATIONAL, TOTAL DENIAL CONTINUES (2000), available at <http://www.earthrights.org/pubs/td2000.html> (last visited Jan. 24, 2002); see also <http://www.earthrights.org/burma.html> (last visited Oct. 9, 2001).

170. See *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

Burma has been under military control since 1958.¹⁷¹ In 1988, Burma's military government suppressed pro-democracy movements and imposed martial law. A new military government, known as the State Law and Order Restoration Council (SLORC), took control and renamed the country Myanmar.¹⁷²

The 1997 decision by Judge Paez of the Central District of California, ruled that Unocal could be held liable for human rights violations under public international law if the plaintiffs could prove that Unocal acted in concert with the Burmese military government in carrying out these abuses. The court further held that Unocal could be held independently liable for using forced labor.

The *Unocal* decision extended the scope of the ATCA¹⁷³ to private corporations. The Court noted that for certain violations of international law, private actors (such as Unocal) might be liable absent state action. Citing the *Karadzic* decision, the court observed that "[p]articipation in the slave trade "violates the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."¹⁷⁴ For other types of violations of international law, the court held that if Unocal was a "joint actor" with SLORC (i.e., the Burmese government), "where there is a substantial degree of cooperative action between the state and private actors in effecting the deprivation of rights, state action is present."¹⁷⁵

With respect to the plaintiffs' factual allegations, the court found that the allegations were sufficient to support a claim under the ATCA:

The allegations of forced labor in this case are sufficient to constitute an allegation of participation in slave trading. Although there is no allegation that SLORC is physically selling Burmese citizens to the private defendants, plaintiffs allege that, despite their knowledge of SLORC's practice of forced labor, both in general and with respect to the pipeline project, *the private defendants have paid and continue to pay SLORC to provide labor and security for the pipeline, essentially treating SLORC as an overseer accepting the benefit of and approving the use of forced labor.* These allegations are sufficient to establish subject matter jurisdiction under the ATCA.¹⁷⁶

When moving to dismiss the lawsuits, defendants asserted that Unocal had nothing more than a business relationship with SLORC and MOGE. The court rejected this argument and stated: "First, plaintiffs allege that Unocal and its officials knew or should have known about SLORC's practices of forced labor and relocation when they agreed to invest in the Yadana pipeline project, and that despite this knowledge, they agreed that SLORC would provide labor for the joint venture. . . ."¹⁷⁷

171. See *Doe I v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000).

172. See *id.* More recently, SLORC has changed its name to the State Peace and Development Council.

173. See 28 U.S.C. §1350.

174. *Doe I*, 963 F. Supp. at 893 (citing *Kadic v. Karadzic*, 70 F.3d at 238).

175. *Id.* at 891. The court relied on precedent dealing with joint action between the state and private actors under U.S. positional law. This article does not explore the parameters of the joint action test because the prohibition against engaging in slave labor is one that the *Unocal* court found extended to private individuals even in the absence of state action.

176. *Id.* at 892 (emphasis added).

177. *Id.* at 896 (citing Unocal Complaint at ¶ 52).

The initial court decision focused on several key criteria for establishing the potential liability of Unocal with respect to the forced labor claims. The court rejected the defendants' motions to dismiss for failure to state a claim on the basis of three of the plaintiffs' allegations: (1) that Unocal financed SLORC's operations; (2) that Unocal knew about the use of forced labor; and (3) that Unocal accepted the benefits of forced labor. Thus, the plaintiffs maintained that Unocal went beyond the mere act of providing finance to a war criminal (e.g., as in the case of Karl Rasche).

After the defendants lost on their motions to dismiss for failure to state a claim, they proceeded against the plaintiffs with motions for summary judgment. On August 31, 2000, a different judge granted the defendants' motions on the ground that although there was evidence that Unocal knew about and benefited from forced labor on the Burma pipeline project, it was not involved directly in the alleged abuses. The court cited to decisions of the USMT involving the prosecution of German industrialists for their participation in the use of slave labor by the Third Reich. The summary judgment decision appears to be a complete reversal of the court's earlier findings regarding the legal standards governing the forced labor claim.

In its decision granting summary judgment, the court first described the history of Unocal's presence in Burma and its knowledge of the forced labor problem. Unocal began negotiating with SLORC in 1991.¹⁷⁸ In May 1992, Unocal retained a consulting company, Control Risk Group, to assess the risks associated with foreign investment in Burma. The report makes note of the fact that: "Throughout Burma the government habitually makes use of forced labor to construct roads."¹⁷⁹ In 1992, the Myanmar government established a state-owned company, the Myanmar Oil and Gas Enterprise (MOGE), as the holding company for the government's interest in energy resources.

Unocal bid on an oil product license but initially lost to the French Oil Company Total. Thereafter, MOGE entered into contractual agreements with Total.¹⁸⁰ In furtherance of the oil project, MOGE contracted to "assist and expedite [Total's] execution of the Work Programme by providing . . . security protection and rights of way and easements as may be requested by [Total]."¹⁸¹ Unocal eventually acquired a 47.5 percent interest in Total's rights and interests in the various oil contracts.¹⁸²

One part of the project involved the construction of a pipeline in Burma's Tennesarim region. As the court noted: "According to the deposition testimony of plaintiffs and witnesses, the military forced plaintiffs and others, under threat of violence, to work on these projects [building army barracks and helipads and clearing roads] and to serve as porters to the military for days at a time."¹⁸³ The

178. *See Doe I*, 110 F. Supp. 2d at 1296-97.

179. *Id.* at 1297 (citing Richardson Declaration, Ex. 476 at 33575).

180. *See id.*

181. *Id.*

182. *See id.*

183. *Id.* at 1298.

court also stated that the violence perpetrated against the plaintiffs "is well documented."¹⁸⁴

In early 1995, human rights groups began corresponding and meeting with Unocal executives to inform them of the increased use of forced labor and of villager relocation by the Myanmar government.¹⁸⁵ Unocal took the position that SLORC was providing military protection for the pipeline as part of its contractual obligations.¹⁸⁶ Some correspondence between Unocal employees internally or with Total indicates that there was some deliberation over the nature of services provided by SLORC and also Unocal's relationship to SLORC in this regard.¹⁸⁷

The court, in its reasoning, notes that slavery is a violation of *jus cogens* norms which were derived from values taken to be fundamental by the international community and which "enjoy the highest status within customary international law and are binding on all nations."¹⁸⁸ Thus, the court noted that individual liability under the ATCA could be established for acts amounting to slavery or slave trading.¹⁸⁹ The plaintiffs contended that forced labor is akin to "modern slavery," whereas Unocal characterized the Myanmar military's use of forced labor as a public service requirement.¹⁹⁰

The court cited reports and conventions of the International Labor Organization (ILO) when discussing the issue of whether forced labor constitutes slavery. As the court noted, Burma is a signatory to twenty-one ILO conventions including Forced Labor Convention No. 29, which prohibits the use of forced labor and defines it as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."¹⁹¹ The ILO has repeatedly condemned Burma and issued a report in 1998 concerning Burma's non-compliance with the forced labor convention. The report acknowledged that the definition of slavery now encompasses forced labor.¹⁹²

184. *Id.*

185. *See id.* at 1299.

186. *See id.* at 1300-01.

187. The court noted that on May 10, 1995:

A Unocal employee, Joel Robinson, sent a letter informing Total of his general thoughts about his visit to the pipeline route . . . The letter stated that from Unocal's standpoint, probably the most sensitive issue is what is forced labor and how can you identify it. I am sure that you will be thinking about the demarcation between work done by the Project and work done on behalf of the Project. Where the responsibility of the Project ends is *very important*. *Id.* at 1301 (emphasis in the original, citations omitted).

See also letter from Total's Herve Chagnou to Unocal, dated Feb. 1, 1996, in which Chagnou states: "About forced labour used by the troops assigned to provide security on our pipeline project, let us admit between Unocal and Total that we might be in a gray zone." *Id.* at 1302.

188. *Id.* at 1304 (citing *Siderman de Blake v. Republic of Argentina*, 96 F.2d 699 (9th Cir. 1992)).

189. *See id.* at 1307.

190. *Id.*

191. *Id.* at 1308 (citing Article 2 of ILO Convention No. 29 (1930)).

192. *See id.* (citing *Forced Labor in Myanmar (Burma): Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organization to Examine*

The court rejected Unocal's public service argument and also noted that "the evidence does suggest that Unocal knew that forced labor was being utilized and that the Joint Venturers benefited from the practice."¹⁹³ Despite Unocal's knowledge, the court still dismissed the lawsuits. The court based its decision on a review of three decisions cited by plaintiffs "concerning the prosecution of German industrialists for their participation in the Third Reich's slave policies." According to the court, plaintiffs claimed that based on these cases, knowledge and approval of slave labor activity is sufficient for a finding of liability.¹⁹⁴

Borrowing directly from the USMT proceedings, the court stated that during the Second World War, the Reich Labour office "implemented a massive slave-labor program utilizing foreign civilians, prisoners of war and concentration camp inmates. The German government compelled German factories to employ the slave laborers and severely punished industrialists for failing to meet production quotas."¹⁹⁵ The court appeared to cast the Nazi slave labor program as one that was imposed by the Nazi regime on private industry. Hence, the opinion suggests that many German industrialists accepted slave labor in their factories as a matter of necessity rather than as a deliberate criminal act. In other words, the *Unocal* court focused on the acceptance of forced labor as a result of necessity.

In *Unocal*, the court focused primarily on necessity as a defense to war crimes prosecutions. The *Unocal* court first analyzed the USMT prosecution of the Flick enterprise. The court emphasized that the USMT found that four of the six Flick defendants were entitled to the affirmative defense of necessity with respect to using slave labor.¹⁹⁶ The court pointed out that "in reaching its decision, the Tribunal acknowledged that the German slave labor program was created and supervised by the Nazi government, and that it would have been futile and dangerous for these defendants to have objected."¹⁹⁷ The *Unocal* court contrasted Flick's conviction on the grounds that he "took active steps to participate in the Reich's slave labor program."¹⁹⁸

the Observance by Myanmar of the Forced Labor Convention, 1930 (No. 29), ILO Part IV.9.A § 198 (1998).

193. *Id.* at 1310.

194. *See id.* at 1309.

195. *Id.* *See generally*, YISREAL GUTMAN AND MICHAEL BERENBAUM, ANATOMY OF AN AUSCHWITZ DEATH CAMP (Indiana Univ. Press 1994) (discussing conditions of slave laborers forced to work for German industry).

196. *See Doe I*, 110 F. Supp. 2d at 1309.

197. *Id.* At Nuremberg, Flick's defense counsel argued that defendants had acted out of necessity with respect to their use of slave labor. According to an American prosecutor, defense counsel "pictured the deeds of the German industrialists as acts of military and economic necessity against the 'Red Flood.' The employment of forced labor was explained away as something beyond the defendant's control in a situation where production was ordered by the state and supervised by the SS." The prosecution, led by General Telford Taylor, rebutted the defense thesis by stating that the wholesale deportation of millions of civilians was not lawful under international law. Defense counsel also noted that the Hague Conventions were an anachronism that even the Allies had repudiated. *See The Flick Case, supra* note 50, at 1044-90, 1157, and 1172-85.

198. *Doe I*, 110 F. Supp. 2d at 1309.

The case of I.G. Farben was the second USMT prosecution consulted by the *Unocal* court. The court noted that “like the Flick defendants, the Farben defendants invoked the necessity defense and testified that they were under such oppressive coercion and compulsion that they could not be said to have acted with criminal intent.”¹⁹⁹ Moreover, the court stated that five of the Farben defendants were found guilty, despite their proffered necessity defense, because “like Weiss and Flick, they were not moved by a lack of moral choice, but on the contrary, embraced the opportunity to take full advantage of the slave labor program. Indeed, it might have been said that they were, to a very substantial degree, responsible for broadening the scope of that reprehensible system.”²⁰⁰

According to the *Unocal* court, the USMT noted that the Third Reich had not compelled Krupp to accept slave labor “but instead coincide[d] with the will of these from whom the alleged compulsion emanate[d].”²⁰¹ Furthermore, the “Krupp firm had manifested not only its willingness but its ardent desire to employ forced labor.”²⁰² The court’s emphasis seems to focus more on the will of the German industrialists and whether they had acted out of free will or had been compelled to act. Although the court’s analysis of the USMT precedent focuses on issues of will, its analysis of *Unocal* focuses more on direct versus indirect participation in the forced labor.

Based on a review of these decisions, the court held that in order to be liable, *Unocal* must have taken active steps in cooperating or participating in the forced labor activities. Mere knowledge that someone else might commit abuses was not sufficient. Unable to adduce the requisite affirmative conduct, the *Unocal* court ruled that the corporation could not be held liable under international law and therefore the claim under the ATCA failed.²⁰³

The court assessed *Unocal*’s actions in relation to the Myanmar government in connection with plaintiffs’ physical violence and forced relocation claims. These alleged human rights violations are ones that require state action (in order to be actionable). The court analyzed whether *Unocal* could be deemed to have “acted under color of law” by acting together with state officials or with significant state aid.²⁰⁴

In making this determination, the court analyzed whether *Unocal* was a “joint actor” with the Myanmar government with respect to the alleged human rights violations. Joint action has been found whether a private party is a “willful participant in joint action with the State or its agents.” Some of the indicia of joint action, according to the court, include “a conspiracy between private and state actors” and “willful participat[ion] in joint action with the State or its

199. *Id.* at 1310 (citing to *Krauch*, *supra* note 53).

200. *Id.* (citing *Krauch*, *supra* note 53). The court also noted that *Krauch* was characterized as “a willing participant in the crime of enslavement.”

201. *Id.* (citing *Krupp*, *supra* note 52, at 1439).

202. *Id.* (citing *Krupp*, *supra* note 52, at 1440).

203. *Id.* at 1310. See also William Branigin, *Claim against Unocal rejected: Judge cites evidence abuses in Burma but no jurisdiction*, WASH. POST, Sept. 8, 2000, at E10.

204. *Doe I*, 110 F. Supp. 2d at 1305.

agents.”²⁰⁵ The cooperation, furthermore, needs to be of a “substantial degree.”²⁰⁶

In particular, the court focuses on a decision from the United States Court of Appeals for the Tenth Circuit, *Gallagher v. Neil Young Freedom Concert*.²⁰⁷ In this case, the appeals court described joint action as follows:

Some courts have adopted the requirements for establishing a conspiracy under Section 1983. These courts [require] that both public and private actors share a common, unconstitutional goal. Under this conspiracy approach, state action may be found if a state actor has participated in or influenced the challenged decision or action.²⁰⁸

In *Gallagher*, the University of Utah (a state university and state actor), had met with and retained private security for a rock concert. The security firm had engaged in a pat down search of concert-goers before allowing them to enter the concert venue. Plaintiff concert-goers sued the university and the firm for violations of their constitutional rights.²⁰⁹

The *Unocal* court noted that in *Gallagher*, a university and the state had shared a common goal of producing a profitable music concern but had not shared a common goal of violating the plaintiffs’ constitutional rights. The *Gallagher* court concluded that the university’s silence as to the kind of security provided or its acquiescence to the searches did not create state action.²¹⁰

The *Unocal* plaintiffs alleged that Unocal’s participation in a joint venture satisfied the requirements for state action under the joint action test. The court rejected this argument and concluded:

as in *Gallagher*, Unocal and SLORC shared the goal of a profitable project. However, as the *Gallagher* court states, this shared goal does not establish joint action. Plaintiffs present no evidence that Unocal ‘participated in or influenced’ the military’s unlawful conduct; nor do Plaintiffs present evidence that Unocal ‘conspired’ with the military to commit the challenged conduct.²¹¹

The court, in assessing whether Unocal’s actions were the proximate cause of the human rights violations, concluded that “plaintiffs present no evidence Unocal ‘controlled’ the Myanmar military’s decision to commit the alleged tortuous acts.”²¹²

As discussed below, there are alternative ways in which a court can and should analyze conduct in the context of an international joint venture to determine whether Unocal aided and abetted SLORC’s human rights violations with respect to torture and forced relocation. The court based much of its analysis on one or two alternative tests developed under American law, rather than looking to international law for precedent. Furthermore, the *Gallagher* case involved a

205. *Id.* (citing *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980)).

206. *Id.* at 1306.

207. *See* 49 F.3d 1442 (10th Cir. 1995).

208. *Id.* at 1454 (quoting *Cunningham v. Southlake Ctr. For Mental Health, Inc.*, 924 F.2d 106, 107 (9th Cir. 1991)).

209. *See id.* at 1146.

210. *See id.* at 1456-57.

211. *Doe I*, 110 F. Supp. 2d at 1306.

212. *Id.* at 1307.

one-time relationship between the state and a private actor. Unocal was part of a long-term venture with SLORC that necessarily involved more collaboration between the parties and hence a different type of approach to the question of whether Unocal was acting under color of law.

V.

RETHINKING CORPORATE COMPLICITY AFTER THE SECOND WORLD WAR

Under certain circumstances, war may create an emergency situation that allows for derogation from certain principles of international law. This is evidenced by the USMT's findings in the trials of the industrialists. In the absence of war, should an MNC be allowed to continue to receive the economic benefit of illegal forced labor? Is there a point at which conscious acceptance of a benefit over an extended period of time constitutes active participation in the forced labor (i.e., does beneficiary complicity ever give rise to liability?)?

A. *Unocal Summary Judgment Focuses Incorrectly on the Issue of Necessity*

The *Unocal* summary judgment decision does not consider the temporal nature of Unocal's actions in Burma, which are potentially of indefinite duration. When the World War II industrialists were tried, the war had ended and the enslavement had ceased. The *Unocal* case is being litigated against a backdrop of ongoing human rights violations.

The largest problem, however, is the fact that the court makes no effort to distinguish between wartime and non-wartime violations of *jus cogens* norms. One major distinction between the trials of the German industrialists and the trial of Unocal relates to context. The German industrialists used forced labor during wartime; Unocal is alleged to have used or at least benefited from forced labor outside of the context of war.

There is a civil war in Burma but this war does not directly implicate Burma—other than to make MNCs' investment activity riskier. But this type of political risk is inherent in foreign investment decisions and cannot be equated with a wartime situation where a government may compel a company within its jurisdiction to engage in the use of slave labor. Security for a project may be necessary when internal conflict exists in a host country. Securing a site, however, does not mean that government security forces may engage in forcible conscription of citizens or other egregious violations of human rights.

Based on the categories of complicity outlined in Part I, litigation against Unocal should proceed. The Myanmar military was an agent of the Total-Unocal-SLORC joint venture and its activities were carried out in furtherance of the joint venture. The court, rather than focusing on whether Unocal had aided and abetted SLORC, analyzed whether Unocal had actively participated in enslavement or in some way had been compelled to do so under duress. In light of the historical differences, as well as the earlier Unocal ruling in 1997, it is puzzling why the district court focused much of its decision on language from the USMT

decisions discussing the fact that the defendants knew of and accepted the benefits of slave labor out of necessity.

In *Flick*, the USMT defined necessity as follows: "Necessity is a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportionate to the evil."²¹³ The defense of necessity, therefore, rests on the premise that there is no means of escaping the egregious wrong that one is forced to commit.

If one accepts the *Unocal* court's version of the *Flick* and *Farben* cases, the reason why more than acceptance of the forced labor was actionable is because there were grounds for defendants to plead an affirmative defense of necessity. The defendants in the Nuremberg cases would have been found liable for aiding and abetting the forced labor program if they did not have access to the necessity defense.²¹⁴ The *Krupp* defendants, in fact, were convicted of forced labor and their defense was summarily rejected. In *Flick*, the necessity defense was defeated by a showing that the defendant actively expanded its production efforts and increased the use of slave labor. The increase was not "necessary" for the *Flick* defendants to avoid retribution from the Nazis.

In the *Unocal* case, however, *Unocal had and has* a choice either to stop participating in forced labor programs by terminating its business relationship with the Myanmar government or to continue receiving the benefits of illegal slave labor. *Unocal* does not fear any retribution from Myanmar such as fear of death, as claimed by the German industrialists. The German defendants were exonerated when they could invoke the defense of necessity, not because knowledge was insufficient to trigger liability.

Moreover, decisions from the International War Crimes Tribunals for the former Yugoslavia and Rwanda have found that defendants who aid or abet human rights violations do not have the defense of duress or necessity available to them.²¹⁵ Necessity has been treated as relevant only as a mitigating factor at the sentencing phase.²¹⁶ The defense of duress is not condoned under contem-

213. *The Flick Case*, *supra* note 50, at 1200.

214. *See id.* (quoting Article II of Control Council Law No. 10, stating that "any person . . . is deemed to have committed a crime . . . if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission; *see also*, *The Krupp Case*, *supra* note 52, at 1433-34.

215. *See* AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: 14 PRINCIPLES ON THE EFFECTIVE EXERCISE OF UNIVERSAL JURISDICTION, Principle 5 (1999), available at http://www.web.amnesty.org/web/web.nsf/pages/14_principles (last visited Feb. 15, 2002). Principle 5 states that the related defense of acting under the orders of a superior is prohibited as a defense with respect to grave crimes against international law. Amnesty International notes that Article 33 of the Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9 (1998), provides that a superior order does not relieve a person of criminal responsibility for crimes against humanity or genocide. The statutes for the International Criminal Tribunals of Yugoslavia and Rwanda also exclude superior orders as a defense.

216. *See Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22, Trial Judgment, Nov. 29, 1996, available at <http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsj961129e.htm> (last visited Feb. 7, 2002).

porary humanitarian law for violations of *jus cogens* norms; therefore the court's emphasis is incorrect. Gross violations of human rights do not constitute "lawful" acts of state. Consequently, the defense of necessity or sovereign compulsion should not be available when the MNC assists a host government in violating *jus cogens* norms.

In addition to some of the excerpts that the court emphasized in its decision, there are some alternative pieces of text that suggest that the USMT's acquittal of some of the defendants on the grounds of necessity was not supported by all the American judges. For example, in the trial of the *Farben* defendants Judge Paul Herbert believed that his colleagues had been too lenient with the defendants:

I conclude from the record that Farben accepted and frequently sought the forced workers . . . The important fact is that Farben's Versant [executive board of directors] willingly cooperated in utilizing forced labor. They were not forced to do so . . . The conditions at Auschwitz were so horrible that it is utterly incredible to conclude that they were unknown to defendants, the principle corporate directors, who were responsible for Farben's connection with the project . . . Each defendant who is a member of the Vorstand should be held guilty.²¹⁷

The *Unocal* case is currently on appeal before the U.S. Court of Appeals for the Ninth Circuit. It is notable, however, that the principle that a private non-state actor can be sued before the U.S. courts for alleged violations of human rights was not challenged. The outcome of the *Unocal* case is crucial. The issue of whether beneficiary complicity is sufficient to create liability for an MNC is at stake.

B. Can Unocal Be Characterized as an Accomplice with Respect to the Forced Labor Claim?

The question of what constitutes "complicity" also remains unclear within the *Unocal* decisions. The original district court opinion held that *Unocal* merely accepted the benefits of the criminal acts, but did not directly participate in them as an accomplice. There is a plausible argument, however, that *Unocal's* alleged actions in financing SLORC, when coupled with the knowledge of SLORC's criminal purpose, triggers *Unocal's* liability for aiding and abetting SLORC in its enslavement of villagers.

To date, human rights literature has not provided clear parameters for what constitutes direct versus indirect corporate complicity in human rights abuses. Thus, the *Unocal* court was working with limited precedent when trying to create its own standards for corporate complicity.

Accomplice liability requires intentional participation, but not necessarily any intention to do harm. Rather, knowledge of foreseeable harmful effects should be sufficient. International criminal law has evolved since Nuremberg to explicitly include liability for aiding and abetting the commission of a crime. Thus, direct participation in the crime is not required in order to be found liable as an accomplice. As two commentators have noted:

217. FERENCZ, *supra* note 30, at 35.

[A] corporation which knowingly assists a State in violating the customary international law principles contained in the Universal Declaration of Human Rights could be viewed as directly complicit in such a violation. For example, a company that promoted, or assisted with, the forced relocation of people in circumstances that would constitute a violation of international human rights could be considered directly complicit in the violation.²¹⁸

Aiding and abetting constitutes a prosecutable offense and, in the words of the International Criminal Tribunal for the Former Yugoslavia, constitutes “beyond any doubt customary law.”²¹⁹ Control Council Law No. 10, which governed the USMT proceedings, itself made reference to the notion of aiding and abetting.²²⁰ More recently, the statutes governing the International Criminal Tribunals for the Former Yugoslavia and Rwanda (“Yugoslav Tribunal” and “Rwanda Tribunal”) also impose criminal responsibility upon persons who have “planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution” of the various crimes set forth in the statute.²²¹ The Tribunals also criminalize the act of complicity in genocide.²²² Article 25 of the Rome Statute of the International Criminal Court imposes liability on a person who “aids, abets or otherwise assists in [the] commission or [the] attempted commission, including providing means for [the] commission” of specified offenses.²²³

The Rwanda Tribunal distinguishes between aiding and abetting, noting that aiding means giving assistance to a perpetrator whereas abetting involves facilitating commission of a crime by being sympathetic to the act.²²⁴

218. CLAPHAM AND JERBI, *supra* note 40, at 3.

219. See, e.g., *Prosecutor v. Tadic*, Case No. IT 94-1 Trial Judgment, May 7, 1997, at ¶¶ 662, 669, available at <http://www.un.org/icty/tadic/trialc2/judgement/index.htm> (last visited Feb. 7, 2002).

220. Article II(2) of Control Council Law No. 10 provided that “a person is deemed to have committed a crime if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered and or abetted the same.

221. See STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, ART. 7, U.N.S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th meeting, at Article 5, U.N. Doc. S/Res/827 (1993) amended by U.N.S.C. Res. 1166, U.N. SCOR 53rd Sess., 3878th meeting, U.N. Doc. S/Res/1166 (1998); STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, ARTICLE 6, U.N.S.C. Res. 955, U.N. SCOR, 49th Sess. 3453rd Meeting, at Article 3, U.N. Doc. S/RES/955 (1994). Accomplice or aidor and abettor liability has been recognized in a host of international treaties or conventions relating to slavery, genocide, torture, apartheid and inhuman treatment. See, e.g., SUPPLEMENTARY CONVENTION ON THE ABOLITION OF SLAVERY, THE SLAVE TRADE AND INSTITUTIONS AND PRACTICES SIMILAR TO SLAVERY, Article 6, Sept. 7, 1956, 266 U.N.T.S. 3 (1956) (imposing criminal liability on persons who are accessories to enslavement); CONVENTION ON THE PREVENTION AND PUNISHMENT OF GENOCIDE, Article III(e), Dec. 9, 1948, 78 U.N.T.S. 277, entered into force on Jan. 12, 1951 (criminal liability may be imposed on persons who are complicit in genocide); INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID, Article III(b), G.A. Res. 3068, U.N. GAOR 28th Sess., Supp. No. 30, at Article 2, U.N. Doc A/9030 (1973) (imposing criminal liability on individual involved in directly abetting or encouraging commission of the crime of apartheid).

222. See ICTY Statute, Art. 4(3)(e); ICTR Statute, Art. 2(3)(e).

223. U.N. Doc A/CONF. 183/9 (1998), 37 I.L.M. 999, available at <http://www.un.org/law/icc.statute/romefra.htm> (last visited Feb. 7, 2002).

224. See Schabas, *supra* note 13, at 443 (citing *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment, Sept. 2, 1998, available at <http://www.icttr.org> (last visited Feb. 7, 2002)).

There are perhaps three main requirements for the establishment of accomplice liability under international law. First, an international crime must have been committed. Second, the accomplice must have contributed in a material way to the crime through its action. Third, the accomplice must have intended that the crime be committed or have been reckless as to its commission.²²⁵

With regard to the concept of accomplice liability for someone who aids and abets an international crime, the “intentional participation test” articulated by the Yugoslav Tribunal in the *Tadic* case is instructive:

The most relevant sources for such a determination are the Nürnberg war crimes trials, which resulted in several convictions for complicitous conduct. While the judgments generally failed to discuss in detail the criteria upon which guilt was determined, a clear pattern does emerge upon an examination of the relevant cases. First, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime. Second, the prosecution must prove that there was participation in that the conduct of the accused contributed to the commission of the illegal act.²²⁶

As to the first requirement, an accomplice can only be charged for aiding and abetting if someone else has perpetrated an international crime. However, this does not require the conviction of the perpetrator of the underlying crime. In criminal law an accomplice can usually be tried for complicity in a crime even where the principal perpetrator has not been identified or where guilt could not be proven against that principal. Moreover, the accomplice need not desire the commission of the offense.²²⁷

Even if the requirement of an underlying crime has been met, an accomplice must still have the requisite intent and actions. The requisite *mens rea* has been described as knowledge that the acts will assist the principal in the commission of a criminal act.²²⁸ Unocal has admitted that it had knowledge of the military’s actions. Thus, there is evidence to support the contention that Unocal knew that its investment activity, as well as its retention of government security forces for the pipeline project, could foreseeably contribute to violations of international law.

As for the required *actus reus*, the Rwanda and Yugoslav Tribunals have developed a broad understanding of what constitutes participation in the commission of a crime. According to the Yugoslav Tribunal, the *actus reus* required for aiding and abetting consists of “practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of the crime.”²²⁹ As-

225. See *id.* at 446.

226. *Tadic*, *supra* note 219, at ¶ 674.

227. See Schabas, *supra* note 13, at 447 (citing *Prosecutor v. Akayesu*, Case No. IT-95-0-T, Trial Judgment, Dec. 2, 1999, at ¶ 530).

228. See *Prosecutor v. Delalic* (“*Celibici Case*”), Case No. IT-96-21, Trial Judgment, Nov. 1998, at ¶ 326, available at <http://www.un.org/icty/celebici/appeal/judgement/index.htm> (last visited Feb. 7, 2002).

229. *Prosecutor v. Furundzija*, Case No. IT-95-17/1, Trial Judgment, Dec. 10, 1998, at ¶ 249, available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm> (last visited Feb. 7, 2002).

sistance of any kind, including providing moral or psychological support, may trigger culpable participation.²³⁰

In *Prosecutor v. Akayesu*, the Rwanda Tribunal convicted a village mayor as an accomplice relating to certain crimes of sexual violence because his encouragement of other such acts “sent a clear signal of official tolerance for sexual violence” that contributed to the offense.²³¹ Moral support and encouragement has also been found when a defendant has failed to act.²³²

The Yugoslav War Crimes Tribunal has also noted, in a case involving allegations of torture, that an accomplice’s mere presence may constitute “participation” in certain circumstances. Presence may constitute complicity when it has a significant legitimizing effect on the perpetrator’s conduct. The tribunal cited a decision of the German Supreme Court in which a high-ranking official of the Nazi Party was tried under Control Council Law No. 10. The defendant was convicted as an accomplice in the destruction of a synagogue due to his presence at the crime scene, his status within the Nazi party, and his knowledge of the criminal enterprise. The Yugoslav Tribunal stated:

An additional requirement with respect to the predicate act for accomplice liability is that it must have a “direct and substantial effect” on the commission of the offense.²³³ A “direct and substantial effect” has previously been found where a defendant could have pursued an alternative course of conduct that would have prevented or somehow mitigated the offense. The Yugoslav Tribunal has indicated that an accomplice’s participation is substantial “if the criminal act most probably would not have occurred in the same way had not someone acted in the role that the accused in fact assumed.”²³⁴

Assistance, however, need not constitute an “indispensable element” for the acts of the principal.²³⁵ In the *Eintzgruppen* case, for example, the USMT convicted a military officer of aiding and abetting summary executions because he had the ability to object to the executions but “chose to let the injustice go uncorrected.”²³⁶

Do Unocal’s activities in Myanmar meet the threshold for application of accomplice liability under international law? Unocal is not alleged to have directly conscripted workers for the pipeline. Had Unocal done so, it may have been liable for directly violating international humanitarian law or for being “directly complicit” as outlined in the categories of complicity in Part I above.

Most recently, the court appears to have applied an incorrect standard when analyzing the conduct of Unocal with respect to forced labor. The court emphasized the issue of active participation in light of an implied defense of necessity.

230. See *id.* at ¶¶ 199-204 (citing British Military Tribunal cases); *Prosecutor v. Musema*, Case No. ICTR-96-13, Trial Judgment, Jan. 27, 2000, at ¶ 126, available at <http://www.ict.org>.

231. *Akayesu*, *supra* note 227, at ¶ 692-93.

232. See *Prosecutor v. Blaskic*, Case No. IT-95-14, Trial Judgment, March 3, 2000, at ¶ 284, available at <http://www.un.org/icty/blaskic/trialc1/judgement/index.htm> (last visited Feb. 7, 2002).

233. *Tadic*, *supra* note 219, at ¶ 692.

234. *Id.* at ¶ 688.

235. *Furundzija*, *supra* note 229, at ¶ 209.

236. *Trial of Otto Elmendorf and Others (Eitzgrippen Case)*, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1, 572 (1949).

The correct inquiry, however, is whether Unocal's actions constitute aiding and abetting under international law. The court's earlier ruling, where it refused to dismiss the case for lack of subject matter jurisdiction applies a different standard that focused on Unocal's role as an accomplice. The earlier *Unocal* decision relating to subject matter jurisdiction applied the correct legal standard. The court, in its earlier decision, stated:

Although there is no allegation that SLORC is physically selling Burmese citizens to the private defendants, plaintiffs allege that, despite their knowledge of SLORC's practice of forced labor, both in general and with respect to the pipeline project, the private defendants have paid for and continue to pay SLORC to provide labor and security for the pipeline, essentially treating SLORC as an overseer, accepting the benefit of and approving the use of forced labor. These allegations are sufficient to establish subject matter jurisdiction under the ATCA.²³⁷

The court recognized that the doctrine of "beneficiary" complicity (i.e. knowledge of the host government's criminal acts coupled with continued assistance that creates economic benefit for the MNC) is actionable.

Unocal knew that its actions would assist SLORC in the commission of crimes.²³⁸ The district court found that Unocal knew that forced labor, imprisonment and executions occurred in the pipeline area.²³⁹ It knew that the military's actions related to the pipeline project. Therefore, any continued support of the military in relation to the project, whether financial or otherwise, would appear to show that Unocal knew that its actions would further aid human rights violations. Alternatively, Unocal may have acted recklessly with respect to its agreements with the military.

The more difficult question is whether Unocal's actions are sufficient to create accomplice liability. Can Unocal be said to have provided practical assistance, support, or encouragement to SLORC through its actions that directly and substantially instigated the use of forced labor? More specifically, are the plaintiffs' factual allegations sufficient to support a claim of this nature?

First, it appears from the record that Unocal's alleged actions do constitute practical assistance, support, and encouragement of the military. Unocal provided practical assistance in the form of its financial support and agreements with the military. Unocal acknowledged that it "hired the Burmese military to provide security for the project and pay for these through the Myanmar Oil and Gas Enterprise" which is government-operated.²⁴⁰ Three truckloads of soldiers accompanied project officials in their survey work and village visits.²⁴¹

237. *Doe I*, 963 F. Supp. at 892.

238. The requisite *mens rea* for aiding and abetting is knowledge that the act will assist the principal in the commission of the crime. See *Furundzija*, *supra* note 229, at ¶ 242. Knowledge has been found where there is "a conscious decision to assist" and where the accomplice acts "accept[ing] that such assistance would be a possible and foreseeable consequence of [the] conduct." *Id.* at ¶ 241; *Blaskic*, *supra* note 232, at ¶ 286.

239. See *Doe I*, 110 F. Supp. 2d at 1306, 1310.

240. *Id.* at 1301.

241. See *id.*

Unocal hired the Myanmar military to provide security for the pipeline and to build supporting roads and infrastructure for the project. Unocal continued to retain the military even after it became aware that it had committed offenses in furtherance of the pipeline project.²⁴² Due to the pipeline project, SLORC is alleged to have increased its activities in the pipeline area. The inference is that Unocal's investment increased military presence. Company employees have stated "[Unocal's] assertion that SLORC has not expanded and amplified its usual methods around the pipeline on our behalf may not withstand much scrutiny."²⁴³

In furtherance of the project, the military allegedly enslaved the local population, evacuated villages, executed some resisters and engaged in other criminal acts. Monetary support, coupled with the continued business relationship might well rise to the level of aiding and abetting SLORC's enslavement of its citizens. One could argue that if not for the pipeline and the income generated by Unocal, SLORC would not have engaged in forced labor to the extent that it did.

Alternatively, Unocal was (and is) a continued and influential spectator and knowing business partner to the Myanmar military. The company's presence and conduct at the project site through visits and the ongoing presence of officials may also create accomplice liability if it can be shown that the MNC's presence created a presumption that Unocal encouraged or approved of SLORC's actions. None of these considerations factored into the district court's reasoning.

C. *The State Action Test and International Law*

The main focus of this article is on situations in which an MNC may be held directly liable for its actions under international law. Where an MNC aids and abets a host government in violation of a *jus cogens* norm, it could potentially be held liable as a private actor. For certain types of human rights violations, however, the MNC must be deemed a state actor and therefore acting under color of law. This segment of the article briefly discusses the *Unocal* court's analysis of the state action requirement and suggests alternative approaches to this requirement. As noted above, the *Unocal* court also dismissed plaintiff's physical violence and forced relocation claims. It did so after finding that Unocal was not a joint actor as defined by U.S. precedent, including *Gallagher*. The following discussion briefly sets forth ideas that will be developed more fully in a future article.

The issue of whether an MNC (or an individual) has acted in collaboration with a state actor in commission of certain crimes such as torture, rape, and forced displacement should be decided based on principles of international law. In this sense, it would be more appropriate for U.S. courts to look to international precedent, rather than U.S. precedent with respect to state action.²⁴⁴ In

242. See *id.* at 1306, 1310.

243. *Id.* at 1300.

244. See Craig Forcese, Note, *ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act*, 26 *YALE J. INT'L L.* 487, 509-10 (2000).

due course, international tribunals, other national courts, and international and national lawmakers may also grapple with the problem of MNC complicity. Such groups will need to develop standards and tests based more on international experience. One of the main thrusts of this article is that American or ATCA jurisprudence alone should not be the basis for crafting theories of MNC responsibility or liability.

The *Unocal* court, relying on *Gallagher*, also seems to have devoted considerable attention to whether Unocal conspired with the military to engage in the unlawful acts of forcible displacement of villagers, and the violence that accommodated the displacement and forced conscription of the villagers for labor. In doing so, the court treats this as a situation like *Gallagher*, where the relationship between the state actor and the private actor is isolated, not continuous. There is no assessment of whether the joint action between Unocal and SLORC over a period of time caused the unlawful conduct to occur. The *Gallagher* test is not instructive when trying to understand the interrelationship between an MNC and a host government or its security forces. Such a relationship exists on a continuum and consists of multiple acts and omissions.²⁴⁵

The *Unocal* court also noted that, for liability to be imposed, Unocal's actions must have been proximately caused of the alleged human rights violations. In doing so, the court focused on whether Unocal had some control or power over SLORC that would have resulted in the harm.²⁴⁶ An alternative reading of the proximate cause requirement would have focused on whether Unocal's actions could foreseeably have caused the human rights violations.²⁴⁷

Various U.S. cases examining the state action question have looked to see whether one party initiated a process or set in motion a series of acts that resulted in harmful conduct. The harmful or unlawful conduct, of course, was required to have been a reasonably foreseeable outcome of the original actions. Applying a test of reasonable foreseeability, one can quite plausibly argue that Unocal should have foreseen that its hiring of the military to provide security and to assist in creating infrastructure for the pipeline would result in human rights violations.

More generally, the *Unocal* decision does not adequately address the issue of how to develop appropriate standards with respect to MNC liability or, in the absence of liability, at least responsibility for acts of violence committed by a

245. See *id.* at 513.

246. See *id.* at 506.

247. Alternative precedent suggests that an analysis of foreseeability is appropriate when analyzing proximate cause in the context of state action under Section 1983. See, e.g., *Tidwell v. Schweiker*, 677 F.2d 560, 569 (7th Cir. 1982) (*cert. denied*, 61 U.S. 905 (1983)) (state did not have control over the procedures but it was sufficient that the state was responsible for initiating process that culminated in the harmful act; agency "set in motion a series of acts when the [agency] knew or should have known that a constitutional injury was the only reasonable outcome."); *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978) (requisite causal connection can be established . . . also "by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict this constitutional injury"); *Tahoe Preservation Council v. Tahoe*, 216 F.3d 765 (9th Cir. 2000) (foreseeability analysis an appropriate part of proximate cause determinations).

host government in furtherance of a joint venture. There are alternative sources of law for developing clearer standards.

First, alternative tests exist under international law. For example, under international law, a state is responsible for the actions of agents undertaken on the state's behalf. In the *Tadic* case, the Appeals Chamber of the Yugoslav Tribunal stated: "The requirement of international law for the attribution to states of facts performed by private individuals is that the State exercises control over the individuals."²⁴⁸ The notion of state responsibility relates to when a state might be responsible for the actions of private actors. If such a doctrine is applied in the MNC context, it must be inverted so that an MNC is liable for the acts of the host state's military where the MNC exercised control over the military units that committed human rights violations.²⁴⁹ Thus, one possible analysis is to ask to what extent a host government delegates to any MNC functions traditionally performed by the government. If the MNC stands in the shoes of the state, it could be deemed a state actor.

Second, plaintiffs alleged that Unocal satisfied the joint action test by virtue of its joint venture with SLORC. Merely alleging that a joint venture exists should not trigger state action in a case involving MNC-government partnership. However, the court could have examined the nature of the joint venture itself to determine whether Unocal had acted under color of law. If courts, as well as policymakers and activists, want to develop clearer guidelines for MNCs (whether binding or non-binding), they also need to examine the contractual structures that give rise to such partnerships.

Therefore, as an alternative to the "joint action" test, it may be appropriate to develop a "joint venture" test for purposes of evaluating whether an MNC has conspired or aided and abetted a host government. Questions or factors that are relevant to this inquiry include the structure of the business relationship or the joint venture, the level of control exercised by both parties (in terms of ownership in the joint venture and directors for the investment vehicle), the level of profit sharing from the activity, and the types of concessions granted to the MNC by the government as part of the investment process.

Third, an alternative to the U.S. "joint action" text articulated in *Gallagher*, is a nexus/symbiotic relationship test. Under this test, plaintiffs must establish that "where there is a symbiotic relationship between the State and a privately owned enterprise, so that the State and a privately owned enterprise are [participants in a joint venture, the actions of the private enterprise may be attributable to the State."²⁵⁰ The threshold for establishing a symbiotic relationship is high and courts have required that each party (the state and the private actor) benefit from the wrongful act itself.²⁵¹

248. *Id.* at 508 (citing *Tadic*, *supra* note 219).

249. *See* Forcese, *supra* note 244, at 508 (citing *Tadic*, *supra* note 219).

250. *Id.* at 503 (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 847 (1982) (Marshall, J. dissenting), referring to doctrine outlined in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)).

251. *See id.* at 503.

Given that MNC-host government relationships are often long-term ventures, the nexus test may be more apt for analyzing whether state action is present. The nexus/symbiotic relationship test could itself serve as the basis for developing a joint venture test that permits an analysis of the underlying business relationship between the parties.

D. *Extending Beneficiary Complicity Beyond Unocal*

Can one extend a notion of beneficiary complicity to other situations? For certain violations of international humanitarian law, the publicity of certain war crimes and atrocities may be sufficient to establish *mens rea* of an MNC. As an example, one commentator has noted that the publicity of war crimes and atrocities in Sierra Leone, by the United Nations and other non-governmental organizations and the press, would permit a court to conclude that “diamond traders, airline pilots and executives, small arms suppliers and so on, have knowledge of their contribution to the conflict.”²⁵²

However, the question remains, how far could one cast the accomplice’s net? For example, could one prosecute the diamond vendor that trades with combatants in Angola or Sierra Leone? On the other hand, what about the bank that provides a loan to the diamond merchant who purchases the stones from the trader? This is where the court needs to examine the relationship between the MNC or business entity involved.

This article advocates extension of accomplice liability only when the MNC is actively investing in the host country and is providing assistance to the state through its investment activities. Both the intention and the action of an MNC must be viewed over time. The Second World War cases involved forced labor and other criminal activity that did stretch over several years. The end of the war, however, curtailed the duration.

Today, when assessing accomplice liability, it is important to assess the level of knowledge possessed by the MNC at the point of its entry into a host state. MNCs should be encouraged to engage in human rights risk assessment prior to investing in a country where there is corruption or repression emanating from the state. It is relevant to any inquiry about accomplice liability to determine what knowledge existed at the beginning of a business relationship and then, what knowledge was acquired by the MNC over time.²⁵³

252. See, e.g., Schabas, *supra* note 13, at 450-51 (“Given the intense publicity about war crimes and other atrocities in Sierra Leone, made known not only in specialized documents such as those issued by the United Nations and international non-governmental organizations, but also by the popular media, a court ought to have little difficulty in concluding that diamond traders, airline pilots and executives, small arms suppliers and so on, have knowledge of their contribution to the conflict and to the offences being committed.”).

253. One proposal for the creation of a statutory cause of action for situations similar to Unocal suggests that MNCs should be penalized when they engage with a foreign affiliate (e.g., a foreign host government or its agents) in a business enterprise where the foreign affiliate “was predisposed to commit one or more human rights violations in furtherance of that enterprise when the agreement with it was reached.” The same proposal defines “predisposed” as when the foreign affiliate has committed a human rights violation in the past and an MNC’s “reasonable inquiry into the affiliate’s past would have uncovered as much.” The proposal, however, is limited to situations in which the

Let us assume that knowledge can be demonstrated, either through specific admissions or because (as in the case of Sierra Leone, for example) human rights abuses are publicly documented by reputable sources. A second question will remain as to how the MNC continues to act when it has acquired knowledge. Unocal is alleged to have known that SLORC had a history of human rights violations (amounting to violations of customary international law) when it entered into an agreement asking SLORC to clear the pipeline route. Despite this prior knowledge, Unocal is alleged to have provided financial assistance to SLORC and to have continued to contract with the military.²⁵⁴

Moreover, the definition of aiding and abetting under international law requires that the accomplice's act constitute "substantial assistance." "Substantial," at least with respect to an MNC, involves collaboration with the host government. Factors that are important in assessing whether the assistance is substantial include duration of the investment activity, duration of knowledge of the human rights violations, nature of the assistance to the host state (such as financial assistance), contractual agreements, and collaboration in a business venture. Substantial assistance should involve not only individual actions that are large in magnitude or scope, but continuous actions or presence that become substantial by virtue of their duration.

The substantial assistance requirement coupled with an examination of the relationship between an MNC and the host government suggests that courts must engage in some sort of proximate cause analysis. There needs to be a tangible nexus between the MNC conduct and the human rights violations.

This article advocates encompassing beneficiary complicity within the scope of accomplice liability for MNCs. This would mean that an MNC's knowledge of ongoing human rights violations, combined with its acceptance of direct economic benefit arising from the violations and continued partnership with a host government, could give rise to accomplice liability. As noted in Part I, however, there still remains a distinction between crimes for which an MNC might be liable as an accomplice and crimes for which the MNC must act in collaboration with the state to establish state action.

For war crimes, crimes against humanity, piracy, enslavement, and similar crimes, an MNC can be either directly liable or liable as an accomplice. For crimes such as torture, rape, and forcible displacement, the MNC must collaborate with the state under color of state law. To date, this concept is ambiguous and has been made perhaps more so by the application of American law.

For purposes of establishing liability, an MNC should be liable if the state has delegated its functions to the MNC such that the MNC acts as an agent of the government or performs governmental functions in its stead. As an alternative, a test as to whether a nexus or joint venture exists between the MNC and

MNC contracts with a non-subsidiary affiliate. This proposal may be limited in its utility but provides an example of how one might begin to think about the issue of knowledge in the context of accomplice liability. See David I. Beker, Note, *A Call for the Codification of the Unocal Doctrine*, 32 *CORNELL INT'L L. J.* 183, 202-05 (1998).

254. See *Unocal I*, 863 F. Supp. at 885.

the state may be appropriate. Such a joint venture test would examine the nature of the business relationship between the parties and also assesses the MNC's conduct with respect to whether it was reasonably foreseeable that the MNC's actions would lead to the relevant crimes.

Ultimately, it may prove more difficult to ascribe accomplice liability in situations where an MNC has acted in concert with the state in the commission of an offense. How does this affect the theory of beneficiary complicity? At a minimum, guidelines and codes of conduct dealing with MNC complicity should prohibit beneficiary complicity irrespective of the class of crime. An MNC should not aid a host state or its agents in violating international law—whether the crime is enslavement or torture and physical violence. Therefore, defining complicity to encompass direct as well as beneficiary complicity is important.

VI.

FUTURE CRIMINAL LIABILITY FOR MULTATIONALS: EXTENDING THE PINOCHET PHENOMENON TO MNCs

If individuals are capable of engaging in certain egregious violations of international law, why does it surprise us to think that legal persons, such as MNCs, may likewise be implicated in such violations?²⁵⁵ As discussed above,

255. While many countries are able to prosecute individuals for crimes committed abroad, governments have been reluctant, historically, to prosecute a corporation in a home jurisdiction (e.g., where the MNC is incorporated) for crimes committed overseas in a host state, but this is changing. See Theodore Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT'L L. 1 (1998), available at <http://www.ejil.org/journal/Vol9/No1/art2.html#TopofPage> (last visited Oct. 9, 2001).

With respect to the dichotomy between a state's prosecution of individuals versus corporations, one commentator has asked the question in this fashion:

The more consensus there is of a common international interest in a specific form of legal sanction with respect to specific subject matter, the more this will count in favor of the acceptability of extraterritorial regulation. The point at which a consensus becomes so widespread and clear that states are no longer simply permitted to regulate a matter but required to do so is the point at which we move from the realm of state jurisdiction to state obligation—i.e., to state responsibility which is incurred when a state fails to provide for jurisdiction in its domestic law and to exercise it where the triggering facts are present. For example, normative discourse has progressed to the point with respect to the problem of child sex tourism that some states, such as Canada and Australia, have made it a criminal offense for their nationals to have “sex” with children anywhere in the world. Little, if any protest, from states afflicted by the sex-tourism trade, such as Thailand and Sri Lanka has occurred, and the debate has rapidly gone to another level. The real question now is not whether states are permitted to regulate their nationals' conduct but whether they have a duty to do so as an extension of their duty to ensure human rights . . . However, the truly interesting question . . . is whether two variants on the just-described sex-tourism regulations would meet with the same general acquiescence [sic]. The first variation would be to take the regulation out of the context of criminal law sanctions over individual tourists and extend the regulation to some form of regulation of corporate behavior (e.g., civil liability regime) with respect to those national travel agencies and national tour operators that deliberately facilitate such tours. The second variation would be to see if regulation, whether criminal or corporate, could be justified beyond a nationality basis for that jurisdiction. That is to say, if Australia began to allow civil suits against Japanese corporate sex-tour operators organizing

the USMT, after Nuremberg, did find that corporate entities had violated certain laws of war, although the statute of the Tribunal did not permit the prosecution of legal persons. Since Nuremberg, there has been an emerging practice among states to impute criminal responsibility to corporations—albeit in different manners, sometimes through regulatory statutes and at other times through the direct application of general penal laws. At the same time, certain international treaties, relating to issues such as bribery and corruption and hazardous wastes, create avenues for the prosecution of MNCs by domestic courts.

Corporations can commit international crimes and thus corporations can potentially be tried nationally. The U.S. slave labor cases brought under the ATCA, coupled with the renewed focus on the trials of the industrialists, provide us with a richer understanding of the prohibition on the use of slave labor as a peremptory norm of international law. Moreover, these cases highlight the possible role of the private corporation with respect to forced labor.

Nonetheless, there remains a question as to whether MNCs might be criminally accountable in national courts for such offenses.²⁵⁶ Other nations do not have the benefit of a statute such as the ATCA.²⁵⁷ This last section explores some of the reasoning behind the application of international criminal law to situations in which MNCs violate the law of nations by engaging in the knowing

trips to Bangkok or Phuket, would Japan and Thailand accept this as a reasonable exercise of extra-territorial jurisdiction?

Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, in *TORTURE AS TORT*, 56 (Scott ed., 2000).

256. A few commentators have begun to discuss the applicability of universal jurisdiction or international criminal law to situations in which corporations commit crimes that constitute violations of the law of nations. See, e.g., Andrew Clapham, *supra* note 14, at 141 (“[W]e can therefore consider that corporations commit international crimes, including war crimes and that these corporations may be tried, in some circumstances outside the jurisdiction where the crime took place. In other words, the ‘Pinochet phenomenon’ is applicable in the sphere of corporate international crimes.”); Menno Kamminga and Saman Zia-Zarifi, *Introduction*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW*, *supra* note 12, at 8 (noting that “MNCs are prohibited from engaging directly or indirectly in violations of *jus cogens* principles (such as the prohibition of slavery and forced labour, genocide and torture, extrajudicial murder, piracy, crimes against humanity, and apartheid)”; Muthucumaraswamy Somarajah, *Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States*, in *TORTURE AS TORT*, *supra* note 255, at 492 (“It is equally clear that there is jurisdiction for any domestic court of any state to prosecute the multinational corporation if the allegation relates to a violation of a *jus cogens* norm like the prohibition of torture.”); Schabas, *supra* note 13, at 454; Stephens, *supra* note 12, at 209. Stephens does not mention universal jurisdiction but states: “potential enforcement actions [against MNCs] include complaints to international agencies, as well as a range of civil and criminal proceedings in domestic courts, on behalf of both public and private plaintiffs.” For a civil law perspective, see ATTAC, *THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS (SEMINAR CONCLUSIONS)* (2001), available at <http://www.attac.org/fra/toil/doc/cetim2en.htm> (last visited Oct. 13, 2001). Among the seminar’s conclusions was the statement that “national tribunals can receive claims and requests against Transnational Companies and their managers . . . Those making the claim have the option . . . to apply the increasingly widespread principle of universal jurisdiction.”

257. For an argument regarding the extension of ATCA principles to other jurisdictions see John Terry, *Taking Filartiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad*, in *TORTURE AS TORT*, *supra* note 255, at 109-33.

use of, for example, forced labor. To date, this argument has been purely academic, because such a prosecution has never occurred.

Criminal liability may be more feasible than civil litigation, given the need for a proper statute conferring jurisdiction in the civil context. Moreover, since criminal prosecution requires a much higher burden of proof than civil cases, states would have to satisfy a higher evidentiary threshold. Finally, criminal sanctions for egregious violations of international law may have a greater deterrent effect than civil lawsuits. Paying a civil fine is much less stigmatizing than a criminal conviction and penalty.

Under the universality principle, the jurisdiction of a national court does not depend on where an offense occurred, or on the nationality of the defendant. Jurisdiction is not limited by territorial boundaries where basic human rights are violated. Rather, the nature of the offense confers jurisdiction on all states. Offenses that have been described as giving rise to universal jurisdiction include piracy, slave trading, war crimes, crimes against humanity (that are part of systematic conduct), genocide, and torture.²⁵⁸

The most recent example of an exercise of universal jurisdiction relates to the decision of the United Kingdom (UK) authorities to arrest General Pinochet and to consider his extradition to Spain.²⁵⁹ The UK's action generated criticism of the use of universal jurisdiction, but much of the adverse commentary may relate to the political consequences of a foreign court trying Pinochet, rather than the legality of a jurisdiction doing so.²⁶⁰

Some commentators have argued that a concept of universal civil jurisdiction might also be implied by virtue of the status of torture and slavery as *ius cogens* and *erga omnes* norms. Many treaties and standards of customary international law provide the basis for imposing liability on MNCs in national

258. See KENNETH C. RANDALL, *FEDERAL COURTS AND THE INTERNATIONAL HUMAN RIGHTS PARADIGM*, at 163 (Duke 1990). The basis for such a list of breaches of international law arise from documents such as the Nuremberg Principles as adopted by the United Nations General Assembly and multilateral treaties such as the Geneva Convention on the Laws of War. See *The Flick Case*, *supra* note 50; *The Krupp Case*, *supra* note 52; *The I.G. Farben Case*, *supra* note 53.

259. See Sonorajah, *supra* note 256, at 492 (citing the judgment of Lord Millet in the Pinochet case. Millet argued for universal jurisdiction in situations of torture, even absent any law incorporating norms prohibiting torture into domestic law); see also, A. Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EUR. J. INT. L. 2 (1999), available at <http://www.ejil.org/journal/Vol10/No2/art1.html> (last visited Feb. 7, 2002). These two executives are each alleged to have "participated in, directed and/or authorized the tortuous conduct resulting from the unlawful conspiracy between Unocal, Total, [Myanmar Oil and Gas Enterprise] (MOGE) and [Burmese State Law and Order Restoration Council] (SLORC) or . . . specifically knew or reasonably should have known that some hazardous conditions or activity under his control could injure plaintiffs and negligently failed to take or order appropriate action to avoid the harm . . . Plaintiffs Compl. For Damages and Injunctive Declaratory Relief, *Doe v. Unocal*, (C.D. Cal. 1996) (Civ. 96-6959), ¶¶ 15-16. A second suit was filed against Unocal in September 1996 by supporters of opposition leader and Nobel Peace Prize winner Aung San Suu Kyi, whose government was elected in 1992, but who was prevented from taking office by military rulers who had seized control of the country several years previously. See *Dissidents of Myanmar File Rights Suit Against Unocal Energy; They accused the firm of violations, money laundering through the pipeline project*, L.A. TIMES, Sept. 4, 1996, at D2.

260. See, e.g., Scott, *Introduction*, in *TORTURE AS TORT*, *supra* note 255, at 5, n. 9.

courts.²⁶¹ For example, the USMT was able to use treaty language to determine that IG Farben had violated the laws of war.

Slavery constitutes a *jus cogens* and *erga omnes* norm in public international law. *Erga omnes* obligations refer to certain obligations that flow to all states from general principles of international law and international instruments of universal or quasi-universal characteristics.²⁶² *Jus cogens* norms are peremptory norms accepted and recognized by the international community as a whole. No derogation from *jus cogens* norms is permitted.²⁶³

Jus cogens norms are derived from basic concerns about human dignity and this includes the most fundamental human rights protections, such as protection from torture and slavery. According to some commentators, there is enough evidence in international law that shows that the prevention of slavery qualifies as a higher obligation that would trigger the principle of universal jurisdiction. The prevention of torture and slavery is the specific subject of multilateral treaties such as the Convention Against Torture.²⁶⁴ The prohibition on slave trading and slavery is likewise found in multiple international treaties and instruments.²⁶⁵

More generally, there are examples in which national jurisdiction attaches to international crimes committed by MNCs.²⁶⁶ In addition, states whose national criminal law permits prosecution of legal persons may be able to extend such jurisdiction to international crimes. Different jurisdictions have permitted

261. See Scott, *Translating Torture into Transnational Tort*, in *TORTURE AS TORT*, *supra* note 255, at 57 (“A central tension stems from the necessity to take seriously the following question: given the state of international law on the applicability of human rights norms to corporate actors, should judges assume the authority to develop such accountability without express or at least clear authorization from the relevant legislature? The question is bound up with the general question of justiciability and the associated debates on the relative competence and legitimacy of courts and legislatures in relation to law-creation activity.”).

262. See *Barcelona Traction, Light and Power company, Ltd.*, (1970) I.C.J. Rep. at 3.

263. See Article 64 of the VIENNA CONVENTION ON THE LAW OF TREATIES, 23 May 1969 (entered into force January 2, 1980) which states: “If a new peremptory norm of general international law emerges any existing treaty which is in conflict with that norm becomes void and terminates.” All *jus cogens* norms are also *erga omnes* but *erga omnes* may include more than *jus cogens* norms.

264. See CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OF PUNISHMENT, adopted December 10, 1984, G.A. Res. 39/46 U.N. GAOR 9th Session, Supp. No. 51, U.N. Doc. A/39/51 (1985). Reprinted in (1984) 23 I.L.M. 1027.

265. See SLAVERY CONVENTION, September 25, 1926, 212 U.N.T.S. 17, INTERNATIONAL LABOR ORGANIZATION CONVENTION (No. 29) CONCERNING FORCED OR COMPULSORY LABOR, June 28, 1930, 39 U.N.T.S. 55, SUPPLEMENTARY CONVENTION ON THE ABOLITION OF SLAVERY AND THE SLAVE TRADE AND INSTITUTIONS AND PRACTICES SIMILAR TO SLAVERY, September 7, 1957, 266 U.N.T.S. 3; INTERNATIONAL LABOR ORGANIZATION CONVENTION (No. 105) CONCERNING THE ABOLITION OF FORCED LABOR, June 25, 1957; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, adopted December 16, 1966, G.A. Res 2200 (XXI). U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force March 23, 1976).

266. THE BAMAKO CONVENTION ON THE BAN AND IMPORT INTO AFRICA AND THE CONTROL OF TRANSBOUNDARY WASTES WITHIN AFRICA has been cited often as an example of a treaty that demands that countries adopt legislation “for imposing criminal penalties on all persons who have planned, committed, or assisted in such illegal imports. Such penalties should be sufficiently high to both punish and deter such conduct.” January 29, 1991 reprinted in 30 I.L.M. (1991) at 793. The Convention defines person as “any natural or legal person”; see also the BASEL CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENT OF HAZARDOUS WASTES AND THEIR DISPOSAL, (1989) 28 I.L.M. 657.

legal persons to be tried for criminal offenses under varying standards, and have grappled with different tests for attributing actions of employees/agents to the corporate entity. The failure in some jurisdictions to proceed with prosecutions of corporate manslaughter or negligent homicide relate to prosecutorial restraint rather than a sense that it is not permissible.²⁶⁷

In 1948, the United Nations General Assembly asked the International Law Commission (ILC) to study the desirability of establishing a criminal chamber for the International Court of Justice. Neither this nor the international penal tribunal described in the 1948 Genocide Convention ever came to fruition. The project to establish an international criminal court was not reexamined until 1992 when the U.N. General Assembly directed the ILC to prepare a draft statute for an international criminal court. The ILC adopted a draft in 1994. Subsequently, the UN General Assembly set up an *ad hoc* committee to review the ILC draft. In 1996, a preparatory committee met. After five additional meetings, a draft statute was submitted to the United Nations Diplomatic Conference on the Establishment of an International Criminal Court (ICC) in Rome. The final text of the statute was adopted on July 17, 1998.²⁶⁸

At the Rome Conference, the draft statute under consideration included bracketed text that would give the ICC jurisdiction over natural and legal persons.²⁶⁹ The French delegation was responsible for the proposal to include legal persons within the jurisdiction of the ICC. France is a jurisdiction that recog-

267. See WELLS, *supra* note 17. For a discussion of the various theories with respect to attribution of liability for corporate crime see B. Fisse and J. Braithwaite, *The Allocation of Responsibility for Corporate Crimes*, 11 SYDNEY L. REV. 468 (1988).

There is no single accepted theory for attributing criminal liability to corporations. Some of the hurdles faced with respect to imputing liability to a legal person include the problem of imputing the acts of a natural person to a corporation. Common law systems have resolved this difficulty either by adopting vicarious liability or by identification of the acts of those representing the corporate "mind" or "will" as acts of the corporation (i.e., attribution). See, e.g., L.H. LEIGH, *THE CRIMINAL LIABILITY OF CORPORATIONS IN ENGLISH LAW* 4-5 (1969); Civil law jurisdictions have responded by enacting legislation that provides for the application of specific penal laws to legal persons.

A second difficulty is when a crime includes specific intent in its definition. It is a conceptual impediment in any legal system to accept that a legal person can have *mens rea* for purposes of criminal prosecution. Some jurisdictions attribute the acts and *mens rea* of the employee to the corporation.

Under a related principle known as the identification principle, the liability of a corporation is limited to the actions of its policymaking officials. In the United Kingdom, this has been referred to as the directing mind doctrine. See *H.L. Bolton (Engineering) Co. Ltd. v. Graham & Sons Ltd.*, (1957) 1 Q.B. Other impediments have related to the doctrine of *ultra vires*, also referred to as the doctrine of declared aims. Under this doctrine, a corporation is formally limited to those acts that are expressly authorized in its corporate charter. Because corporate charters only permit companies to engage in lawful acts, the corporation lacks any power to commit unlawful acts. Thus, illegal acts committed by employees incur liability for the individual only.

268. The statute was adopted by a non-recorded vote with 120 votes in favor, 7 votes against, and 21 abstentions. See UN Press Release L/ROM 12 July 1998.

269. UN Doc. A/CONF.183/2/Add.1 at p. 49. Article 23 paras 5 and 6 read:

The Court shall have jurisdiction over legal persons, with the exception of States, when the crimes committed were committed on behalf of such legal persons or by their agencies or representatives.

The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators.

nizes legal responsibility for legal persons.²⁷⁰ France further believed that criminal organizations such as those declared illegal at Nuremberg should likewise be outlawed by the ICC.²⁷¹

Despite various attempts to create an acceptable formulation that would include legal persons within the ICC's jurisdiction, it proved impossible to reach a consensus within the short time of the Rome Conference and therefore the French withdrew the proposal.²⁷² The disagreements turned on issues such as devising rules of attribution (with respect to the knowledge and culpability of a legal person) and highlighted the importance of creating a way to deal with corporate war crimes.²⁷³

The ICC statute can be amended, at the earliest, seven years after it comes into force. According to Article 123, at that time, a review conference will be convened to consider amendments. Any amendments will require a consensus of the states that are parties to the statute, or a two-thirds majority if consensus is not possible.²⁷⁴ While it seems that states can exercise criminal jurisdiction over MNCs either within a home or host state for violations of human rights, they often are not willing to do so. It is therefore increasingly important to develop mechanisms for encouraging them to do so. Amending the statute of the ICC to include legal persons is one way to accomplish what individual states are reluctant to do.²⁷⁵ Nonetheless, this proposition is likely to face resistance from governments where large MNCs are domiciled. Attempts by some nation states to create a workable proposal suggests that the jurisdiction over legal persons is an issue deserving further consideration at the international level. If the ICC is not given general jurisdiction over legal persons, it may be more realistic for binding obligations to be created by virtue of treaties governing the conduct of MNCs.

270. See Clapham, *supra* note 14, at 146.

271. *See id.*

272. *See id.* at 157.

273. *See id.* at 140. Clapham notes that in addition to discussions relating to the activities of corporations during the Second World War:

[v]arious delegations pointed to the possible involvement of construction companies in covering up mass graves and several delegates referred to the role of the radio station that had urged the killing of Tutsis during the Rwanda genocide. The representative of Tanzania made a reference to coffee companies in Rwanda that had assisted in the genocide by storing arms and equipment. The involvement of multinational oil companies in population transfers and acts of violence in other countries were also sometimes considered.

Id. at 148.

274. *See id.* at 159.

275. See Francois Rigaux, *An International (Criminal) Court for Transnational Companies?* 2001 ATTAC SEMINAR ON THE ACTIVITIES OF TRANSNATIONAL CORPORATIONS, available at <http://www.attac.org/fra/toil/doc/cetim7en.htm> (last visited Feb. 7, 2002); see also, Amanda Macdonald, Hilke Molenaar, Peter Pennartz, Controlling CORPORATE WRONGS: THE LIABILITY OF MULTINATIONAL CORPORATIONS. LEGAL POSSIBILITIES, INITIATIVES AND STRATEGIES FOR CIVIL SOCIETY. (The IRENE Report of 2000) at 10 located at <http://www.elj.warwick.ac.uk/global/issue/2000-1/irene.html>. This report summarized major findings from a seminar sponsored by the International Restructuring Education network at the University of Warwick in March 2000.

VII. CONCLUSION

The *Farben* and *Nippon Mining* prosecutions provide a starting point for understanding the nature of individual responsibility, but also corporate responsibility, for grave breaches of international law. The effect of these cases, as well as of the recent World War II forced labor lawsuits, are that they have brought these issues to the attention of judges and jurists. Post-Nuremberg, the role of the industrialists was not the focus of many legal scholars' attention, especially in relation to the liability of legal persons. The renewed focus on restitution for World War II forced laborers, after more than fifty years, has caused scholars to reexamine these historically significant documents. Their relevance is clear as demonstrated by the *Unocal* decision. These cases have served to solidify the jurisdictional basis for suing MNCs in the United States and arguably could provide a similar foundation for establishing criminal (and perhaps even civil) jurisdiction in other countries.

At present, none of the recent MNC cases have been successful. The Holocaust related cases were dismissed on grounds of nonjusticiability, and also because the statute of limitations, according to the court, had expired. Very recently, civilian slave labor cases against Japanese MNCs were also dismissed because the applicable statutes of limitations were held to have run out. In both sets of litigation, the courts recognized, however, that plaintiffs had plausible causes of action against the MNCs for their use of slave labor during World War II. Thus, the procedural reasons for dismissal should not diminish the impact of the courts' findings in either case. Moreover, both the German and Korean cases can be construed as prompting settlement, thus opening possibilities for restitution to the victims.

With *Unocal*, the court held that mere knowledge of the use of slave labor by Unocal's business partner (the Myanmar military government) and acceptance of economic benefits were insufficient to give rise to a cause of action. The court, in rendering its decision, relied heavily on a brief reading of decisions of the USMT prosecution of several German industrialists with ties to the Third Reich. The court's analysis for many reasons, is flawed in that it ignores the distinction between wartime economic activity and foreign investment decisions made by MNCs today. The contradictory decisions with respect to the notions of beneficial complicity as well as aidor and abettor liability, also provide problematic guidance concerning the parameters of corporate complicity. The *Unocal* court at least implicitly recognized that forced labor claims against MNCs are possible.

The United Nations Subcommission on the Promotion and the Protection of Human Rights is drafting a comprehensive Human Rights Code for Companies. This is the only inter-governmental initiative, at present, that has the possibility of working its way through the United Nations bureaucracy to become either a binding convention ratified by states or a non-binding but legally authoritative document, which at least states clearly MNCs' human rights obligations. Such a code would be an explicit recognition of the obligations that exist implicitly in

many of the existing international conventions, documents, and judgments.²⁷⁶ The guidelines, as well as any similar type of regional or multilateral initiative, should clearly state that beneficial corporate complicity is prohibited.

This evolution of criminal law coupled with the precedent delineating which precepts of international law apply to private actors means that states might well be more daring in their exercise of criminal jurisdiction over MNCs. The *Pinochet* case was a bold move with respect to the exercise of universal jurisdiction against a natural person. The extension of such jurisdiction to MNCs may seem far-fetched, but is arguably permissible under existing international law.²⁷⁷

Moreover, there may be other bases, including the ATCA and foreign direct liability under a tort theory of a parent corporation's breach of duty through its investments overseas that may also create civil liability in the United States and potentially other jurisdictions. Kent Greenfield has recently written an interesting article stating that American shareholders may be able to seek injunctive relief against American MNCs for violations of customary international law.²⁷⁸ His argument is based on the principle that norms of customary international law apply equally to legal persons and natural persons, at least in the United States. In addition, the law of the United States historically has incorporated international law. Therefore, he argues, corporations should be held, as a matter of domestic company law, to a duty to uphold customary international law, including the prohibition on forced labor. Crucial to any of these possible causes of action is an understanding of what constitutes accomplice liability.

While MNCs are responsible for positive results such as foreign investment, capital flow, and job creation, they sometimes have been responsible for human rights abuses such as the use of child labor, failure to provide safe and healthy working environments, and repression of the formation of trade unions.²⁷⁹ Although the problems of MNC violations of human rights should not be overstated, it is those exceptional cases implicating an MNC, in which the law should not remain silent.

276. See David Weissbrodt, *UN guidelines for companies*, 2001 AMNESTY INTERNATIONAL HUMAN RIGHTS AND BUSINESS MATTERS, available at <http://www.amnesty.org.uk/business/newslet/spring01/un.shtml> (last visited Oct. 9, 2001). For the most recent version of the draft guidelines, see Draft Universal Human Rights Guidelines for Companies, Introduction, U.N. Doc. E/CN.4/Sub.2/2001/WG.2/WP.1 (2001), available at <http://www1.umn.edu/humanrts/links/draftguidelines-intro.html> (last visited Oct. 9, 2001).

277. There are many reasons why the criminal prosecution of an MNC may serve as a greater deterrent to MNC violations of human rights. The possibility of criminal prosecution and the accompanying sanctions may be a greater deterrent than civil fines or penalties. See, e.g., Andrew Clapham, *The Question of Jurisdiction Under International Criminal Law Over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in *LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW*, supra note 12, at 141.

278. See Kent Greenfield, *Ultra Vires Lives: A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)* 87 VA L. REV. 1279, 1369-77 (2002).

279. See D. Weissbrodt and M. Hoffman, *The Global Economy and Human Rights: A Selective Bibliography*, 6 MINN. J. GLOBAL TRADE 189 (1997).

This article has examined some of the original decisions that attributed criminal responsibility to private economic actors, and, by implication, to the corporate entities for which they worked. It is hard to imagine that the judges who comprised the various military tribunals after the Second World War would believe that their words and judgments would have so much relevance today, especially with respect to the liability and intent of economic actors. The rationale for prosecuting MNCs as accomplices may be more ambitious than states with large commercial and financial interests are willing to be. The focus on corporate complicity is a new phenomenon. To the extent that corporate actors reflect on the potential for liability and the basis for such liability under established precepts of international law, then international law will have successfully achieved its goal of deterrence.

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Can Lawyers and Judges Be Good Historians?: A Critical Examination of the Siemens Slave-Labor Cases

By
Stephen Whinston*

I. INTRODUCTION

From my perspective as a participant, the litigation and ultimate resolution of the recent Holocaust-related lawsuits was a remarkable experience that produced truly extraordinary results. In response to cases against German companies and banks, a fund of DM 10 billion (or about \$4.5 billion) was created to provide compensation for involuntary labor¹ and other acts which had gone uncompensated for over a half century. German private industry contributed half of that fund, certainly the largest private reparations program in history.

The only legal decisions to come from this effort which address the merits of the underlying claims, however, were district court opinions granting motions to dismiss in *Burger-Fisher v. Degussa AG*,² and *Iwanowa v. Ford Motor Co.*³ By the time the appeals from these decisions were ready for argument, the international negotiations which ultimately resolved these claims had reached a point where further litigation would have been counterproductive. The appeals were therefore put on hold and dismissed once an agreement was reached.

These district court decisions stand as the last judicial word on the involvement of German companies in the Nazi involuntary labor program. This article

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1. As discussed below, the Nazis compelled millions of people to provide uncompensated labor for private and public entities in nearly every aspect of the German economy. As used in this article, the term "slave labor" refers to the servitude of concentration camp inmates while "forced labor" refers to the servitude of others, primarily Eastern European civilians. The circumstances of these two types of labor were significantly different, as were the conditions of confinement. The term "involuntary labor" refers to both slave and forced labor.

2. 65 F. Supp. 2d 248 (D.N.J. 1999).

3. *Id.* Other legal decisions addressed the voluntary dismissals of putative class actions (with prejudice as to the named plaintiffs only) as an element of the establishment of a German Foundation which acted as the funding source for settlement payments. *In re Nazi Era Cases against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000); *Duveen v. United States District Court*, 250 F.3d 156 (2d Cir. 2001).

will discuss how one subset of these cases, the labor cases against the German electronics conglomerate Siemens, addressed the controversial issues at the interface of history and law. In particular, this article will discuss the different ways in which the litigants attempted to present historical arguments to the court. It will then analyze how the court's opinion drew incorrect historical conclusions from the record before it and therefore adopted erroneous legal reasoning to justify dismissal. Finally, it will suggest various alternatives which may be useful in future efforts to ascertain historical facts.

II.

THE HOLOCAUST IN THE COURTROOM

From the early days of our country, the American courtroom has been a place where major issues have been debated and, sometimes, resolved. A short list of the well-known and well-studied Supreme Court cases could be the basis for a curriculum in American history: the powers of the presidency,⁴ the legality of slavery,⁵ the use of "separate but equal" public services,⁶ the right to vote,⁷ the appropriateness of the death penalty⁸ and, most recently, the conduct of a presidential election.⁹ In this global age, it should not be surprising that events beyond our shores often become grist for the judicial mill. The list of historic events addressed by the courts now includes the Holocaust. The differences between all these previous cases and the Holocaust litigation is that by the time the Holocaust litigation was filed, the events were already over fifty years old.¹⁰

The issues before a court, no matter how broad their potential impact on society, are framed in a microcosm: the resolution of a dispute between one party and another. For it is only in concrete, specific factual situations that a court issues its rulings on the law.¹¹ A court determines the facts by listening to the testimony of first-hand observers, or witnesses. It allows exceptions to this rule only in limited circumstances.¹²

Cases are often in court because the parties do not agree on the facts. Our legal system is built on the "adversarial" model. In an automobile accident case, for example, the injured pedestrian might observe that the car that hit him ran a red light, while the driver of the car might recall that the light was green. In

4. See, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803).

5. *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

6. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Bd. of Educ. of Topeka, Kansas*, 347 U.S. 483 (1954).

7. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

8. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972).

9. *Bush v. Gore*, 531 U.S. 98 (2000).

10. *Iwanowa*, 67 F. Supp. 2d at 461-66 (discussing legal reasons for this delay). Cases filed in the years after World War II addressed Holocaust-related issues, primarily the Nazi seizure of Jewish-owned property. However, the litigants in those cases did not face the same challenges as to the presentation of facts as the participants in the district court cases discussed herein. See, e.g., *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

11. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE* 407-10 (1976) (discussing background of the lead plaintiff in *Brown v. Bd. of Educ.*, 347 U.S. 483).

12. See generally FED. R. EVID. 803-04 (hearsay exceptions).

such a case, it is the role of the pedestrian's lawyer to use his or her best efforts to show the judge (or jury) that the light was red. Facts that tend to show that the light was green are rebutted or discredited. The driver's lawyer does just the opposite, and the judge or jury "finds" what actually occurred.

Among the many interesting and novel challenges presented to the lawyers and judges involved in the recent Holocaust litigation was how to plead, argue and determine the relevant "facts" when the traditional kind of witnesses are not available for cross-examination. As is often the case, the facts are critical because different sets of facts may lead to diametrically opposite conclusions of law.

Both lawyers and historians are trained in the investigation and analysis of facts. Within this commonality, however, significant differences emerge. Because of evidentiary limitations, attorneys focus on primary sources—eyewitnesses and contemporaneous documents. While historians use these sources, they are comfortable examining secondary sources as well. Historians can debate facts for years, in books, reviews, articles and conferences, while lawyers have a specific time period, usually quite short, within which to gather their factual evidence. Lawyers, as noted, approach facts as zealous advocates for the point of view that would be in their client's best interest. Historians, on the other hand, aspire to a more objective approach, although whether or not they achieve it is open to question.¹³ Most importantly, the legal process is characterized by a judge or jury whose function is to resolve the factual debate. In a legal case, the judge or jury "finds" the facts based on what is presented by the parties. This becomes the official version of the facts, at least as far as the judicial system is concerned. There is no comparable process to resolve historical debate.

The presentation and evaluation of facts surrounding Siemens' participation in the Nazi involuntary labor program became the lynchpin for the New Jersey District Court's legal conclusion that the case was nonjusticiable. As explained below, the parties creatively attempted to present historical facts to the court, but these facts were either misunderstood or ignored, leading to the application of the incorrect legal doctrine.

III.

THE *SIEMENS* LITIGATION

A. The Parties Present Their Arguments to the District Court

Siemens was among approximately two dozen Germany companies sued in United States federal court beginning in late 1998 for their involvement in Nazi-era involuntary labor. Two class action cases¹⁴ were filed against Siemens in

13. See, e.g., JONATHAN STEINBERG, *THE DEUTSCHE BANK AND ITS GOLD TRANSACTIONS DURING THE SECOND WORLD WAR* 12 (1999).

14. *Lichtman v. Siemens AG*, No. 98-4252 (D.N.J. filed Sept. 9, 1998); *Klein v. Siemens*, No. 98-4468 (D.N.J. filed Sept. 24, 1998).

the United States District Court in Newark, New Jersey,¹⁵ and assigned to Senior United States District Judge Dickinson R. Debevoise, a highly respected and experienced jurist who served in the United States military (European theater) during World War II.

Although both cases were brought by Jewish plaintiffs taken from concentration camps and forced to work for Siemens under grotesquely inhumane conditions, they sought to assert the claims of very different groups of people. In the first case, plaintiff Malka Lichtman¹⁶ asserted the rights of "all persons taken from concentration camps and ghettos and forced to work for Siemens." This class was intentionally defined to be limited primarily to Jews, although it also comprised smaller numbers of other oppressed groups. In the second case, plaintiffs Martha Klein¹⁷ and Zelig Preis¹⁸ sought to represent "all persons forced to work for Siemens" without limitation as to place or conditions of confinement. This broader definition swept into the class huge numbers of non-Jewish Eastern Europeans who were involuntarily conscripted to provide labor to the Nazi state and German corporations but who were not subjected to the brutal conditions of a concentration camp.

Also on Judge Debevoise's docket were two Nazi era cases against Degussa AG, a German company responsible for smelting the Jews' gold possessions into bars designed to look like official German or Prussian treasury bars.¹⁹ One of these complaints included a claim of slave labor. Other Nazi-era involuntary labor cases were also filed in the District of New Jersey and other federal district courts. Despite the common legal issues and factual circumstances shared by these cases, the New Jersey cases were assigned to different judges and no motion for consolidation or coordination was filed.

Each case, therefore, proceeded at its own pace, dictated by the schedule established by the presiding judge. The first case to be briefed and argued was one against Ford Motor Company and its German subsidiary,²⁰ in which the plaintiff asserted that Ford was responsible for the involuntary labor which occurred at the Fordwerke plant during the Nazi era. Unlike many of the other early cases on slave labor, the plaintiff was neither Jewish nor an American citizen. Thus, the basis for jurisdiction in *Iwanowa* was the Alien Tort Claims Act,²¹ rather than federal question jurisdiction. The *Ford* case was pending

15. Siemens was sued in New Jersey because its American subsidiary, Siemens Capital Corporation, was headquartered in Iselin, New Jersey. Compl. ¶ 3, *Lichtman* (No. 98-4252).

16. Ms. Lichtman lived in the area of pre-War Czechoslovakia that was annexed by Hungary in 1938-1939. She was deported as part of the massive expulsion of Jews from Hungary in the spring of 1944. At Auschwitz, Ms. Lichtman was among a group of Jewish women selected to work at an underground Siemens factory in Nuremberg. Compl. ¶ 4, *Lichtman* (No. 98-4252).

17. Ms. Klein was a native Hungarian deported in the spring of 1944 to work for Siemens at a factory affiliated with the Ravensbrück concentration camp. *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 253 (D.N.J. 1999).

18. Mr. Preis was a native of Poland who was forced to work for Siemens' Bau-Union factory, which was an annex to the Plaszow concentration camp. *Id.*

19. Complaint, *Alice Burger-Fisher, et. al. v. Degussa AG*, 65 F.Supp 2d 248 (D.N.J. 1999) (No. 98-3958); Complaint, *Vogel v. Degussa AG*, No. 98-5019 (D.N.J. 1998).

20. *Iwanowa v. Ford Motor Co.*, No. Civ. A. 98-959 (D.N.J. 1998).

21. 28 U.S.C. § 1350 (2002).

before District Judge Joseph A. Greenaway, Jr., a relatively new appointee to the bench.

These early cases were filed by one or more of three groups of plaintiffs' counsel, all of whom were on the court-appointed executive committee in the Swiss Banks litigation which had recently settled.²² The first group, led by Melvyn I. Weiss, Professor Burt Neuborne and Michael D. Hausfeld,²³ filed cases against Ford, Degussa and Siemens, among others. The second group, led by Robert A. Swift and Lawrence J. Kill,²⁴ filed a case against Degussa, as well as cases against other German companies. The complaints of the first and second groups were on behalf of the all-inclusive class described above. The third group, led by the author of this article, filed a case against Siemens, as well as cases against other German companies. The complaints of the third group were on behalf of the more narrow class.

Briefing in the *Siemens* case lagged behind the *Ford* case. In February 1999, Siemens filed separate motions to dismiss, arguing such legal issues as statute of limitations, personal jurisdiction over Siemens, *forum non conveniens*, whether plaintiffs could sue for violation of international law,²⁵ and whether claims arising out of World War II were waived by treaty or otherwise the exclusive province of international negotiation, rather than individual litigation. Plaintiffs' counsel responded jointly in May 1999.

Siemens' argument on justiciability began on page 32 of its brief and took up a mere four pages out of a total of forty. "The claims at issue," Siemens argued, "arise out of a war, not a run-of-the-mill private dispute."²⁶ Since wars are fought between nations, claims arising out of wars can only be resolved by such nations. To avoid intrusion on the conduct of foreign relations, and in particular the reparations policies, of the United States government, and for reasons of international comity, Siemens urged that the case be dismissed as non-justiciable. Defendant found support for this argument in basic concepts of international law, as well as certain court decisions.²⁷ This argument, if accepted, would allow a court to avoid the difficult issues of whether there was a violation of international law, whether an individual could sue for such a viola-

22. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y.), *aff'd.*, 225 F.3d 191 (2d Cir. 2000).

23. These counsel were affiliated respectively with Milberg Weiss Bershad Hynes & Lerach, LLP; New York University School of Law; and Cohen, Milstein, Hausfeld & Toll, P.L.L.C. See *Burger-Fisher*, 65 F. Supp. 2d at 249 and *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 431 (D.N.J. 1999) for the complete list of participating counsel.

24. These counsel were affiliated respectively with the law firms of Kohn Swift & Graf, P.C. and Anderson Kill & Olick, P.C.

25. All countries and their citizens are bound by certain established principles of international law. In the United States, courts recognize that this body of international law is enforceable as part of federal law, whether or not a specific federal statute has been passed. See, e.g., *The Paquette Habana*, 175 U.S. 677 (1900).

26. Memorandum in Support of Defendant's Motion to Dismiss at 33, *Lichtman v. Siemens AG*, No. 98-4252 (D.N.J. filed Sept. 9, 1998).

27. *Siemens' brief string-cited Can v. United States*, 14 F.3d 160, 164 (2d Cir. 1994); *Kelberine v. Société Internationale*, 363 F.2d 989, 995 (D.C. Cir. 1966) and *Z&F Assets Realization Corp. v. Hull*, 114 F.2d 464, 468-73 (D.C. Cir. 1940), *aff'd.*, 311 U.S. 470 (1941).

tion and whether the statute of limitations had expired. No support, however, was provided for the key factual premise from which the legal argument flowed, i.e. that the slave and forced labor claims against Siemens “arise out of a war.”

Counsel representing the two groups of plaintiffs suing Siemens filed a joint response. Treating the issues in the same order as addressed by Siemens, plaintiffs responded to the justiciability argument beginning at page 48 of their brief. However, from its very beginning, the brief challenged the concept that war claims can only be resolved between governments. The central legal focus of plaintiffs’ argument was *The Paquette Habana*.²⁸ There, plaintiffs argued, the Supreme Court had resolved a war-time dispute between private parties arising out of ownership claims to the cargo of a ship which had been seized during the naval blockade of Cuba during the Spanish-American War. Thus, if the Supreme Court could address the war-related claims to a ship’s cargo, the claims against Siemens could proceed.²⁹ Since plaintiffs argued that even war-related claims were justiciable, they did not directly challenge the factual underpinning of Siemens’ legal argument, although mention was made of the slave labor program being used as a means of genocide.³⁰

Separate and apart from the *Siemens* litigation, briefing was also moving forward in the *Degussa* cases. Unlike the *Siemens* model, the two groups of *Degussa* plaintiffs filed separate oppositions to the motion to dismiss. The *Burger-Fisher* plaintiffs injected a new aspect with the submission of an extensive declaration by Dr. Wolf, a German historian. The professor’s declaration attempted to describe in detail the factual circumstances surrounding the creation and operation of the slave labor system. Most significantly, for the purposes of this article, Prof. Wolf clearly laid out the different rationale and treatment of Jewish slave laborers as opposed to Eastern European forced laborers:

World War II and the accompanying acts of war must be clearly distinguished from the unprecedented acts of extermination of the Nazi regime based on racial motives. The mere temporal coincidence of racial persecution and acts of war cannot lead to the conclusion that these racial acts of persecution constitute typical acts of war and therefore the damages arising out of these acts are covered by the reparation claims. The indirect connection does not justify viewing these damages as war damages. The term “reparation” must thus be understood in its traditional meaning of compensation for war damages as they have always occurred in the past excluding the injustice specific to World War II flowing from racial and ideological persecution under the Nazi regime.³¹

This presentation is interesting from a legal perspective and, at first glance, would seem to be inconsistent with generally accepted procedures surrounding a Rule 12(b) motion, where the court uses the well-pleaded allegations of the

28. 175 U.S. 677 (1900).

29. Plaintiffs’ Joint Memorandum of Law in Opposition to Defendant’s Motion to Dismiss (May 24, 1999) at 6, *Lichman* (No. 98-4252).

30. *Id.* at 2-3.

31. See *Burger-Fisher v. Degussa AG*, 65 F. Supp. 2d 248, 275-76 (D.N.J. 1999) (quoting entire argument).

complaint as the factual predicate for its legal analysis.³² The *Burger-Fisher* plaintiffs did not attempt to build on this factual presentation with a legal argument specific to the treatment of Jewish slave laborers. Instead, they adopted a tack similar to the *Siemens* plaintiffs, arguing that war-related claims were justiciable.³³

Judge Debevoise called for joint oral argument on the *Siemens* and *Degussa* cases. Surprisingly, the court issued a single opinion in the *Siemens* and *Degussa* cases which ruled the matters to be nonjusticiable since they arose from claims which were war-related. Although it recognized that the *Lichtman* case raised different considerations, the court analyzed all the cases together and therefore subsumed the *Lichtman* allegations within those of the *Klein* and *Burger-Fisher* cases. The critical part of the district court's opinion was its discussion, and rejection, of the distinction between Jewish slave labor and non-Jewish forced labor set forth in the Wolf declaration. According to the court, this distinction:

if valid, would be applicable only to a small portion of slave laborers and not justify treating the forced labor program differently after World War II. It is true that the plaintiffs in the present cases who were subjected to [slave] labor were seized from concentration camps and were victims of racial persecution. They purport to represent, however, all forced laborers, not just those who were the subject of racial persecution. . . . Many victims in the concentration camps were thrust into the forced labor program and, like millions of others, treated abominably, but that did not change the nature of the program as primarily a war related effort, subject to reparations as negotiated by the victorious nations.³⁴

Since not a single historical text or other source was cited by the court to support this important conclusion, the source of its reasoning cannot be analyzed.³⁵ Indeed, the court remarked on how historical information was unnecessary to reach its decision: "The plaintiffs' accounts of the wrongs they suffered at the hands of the Nazi government and the defendants are deemed completely accurate. The historical events recited herein are established either by undisputed submissions in the record or are of common knowledge."³⁶

32. See, e.g., *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *Degussa* did not object to this factual presentation, probably because it contained information which supported its arguments.

33. In contrast to the *Siemens* complaints, other cases against German companies filed by the attorneys representing the *Lichtman* plaintiffs made much more specific allegations regarding Jewish slave labor. For example, in *Rosenfeld v. Volkswagen AG*, No. 98-4429 (D.N.J. filed Nov. 24, 1999), the amended complaint described the Nazi war effort and the recruitment of foreign workers. Then, the complaint detailed a "separate" plan, documented by the Wannsee Protocol, to murder European Jewry. The plan explicitly referenced slave labor as a means to this end. The complaint alleged that "the natural and intended consequences of [defendant's slave labor program] were not to promote Jewish labor productivity but to hasten the death of Jewish slave laborers."

34. *Burger-Fisher*, 65 F. Supp. 2d at 276. The court used the term "forced labor" to refer to what is described in this article as "slave labor."

35. The district court saddled the *Siemens* plaintiffs with the Wolf declaration, which was submitted only in the *Degussa* cases. The cases were not consolidated; nor were the *Siemens* plaintiffs proponents of the Wolf declaration. The court did not explain the doctrinal basis for its application of the Wolf affidavit to the *Siemens* litigation.

36. 65 F. Supp. 2d at 285.

On the surface, the court's categorization of the claims as war-related in nature seems logical and unimpeachable. However, the historical "evidence" contradicts the court's conclusion. The *Lichtman* attorneys recognized the serious historical error made by the district judge. Therefore, rather than directly appealing the decision, they filed a motion to reconsider which set forth in greater detail the background of the German approach to Jewish slave labor. Historical materials submitted to the court included the Wannsee protocol, the Allied War Crimes Prosecution Staff's differential description of forced and slave labor, and American and German historical sources which clearly described slave labor as a device to exterminate Jews, rather than to obtain war production.³⁷

The court, however, refused to consider this additional information and suggested that counsel file an appeal.³⁸ Notices of appeal were indeed filed in each of the cases. By the time briefing had been completed, however, international negotiations sponsored by the United States and the Federal Republic of Germany, which included counsel in each of the decided cases, were progressing to a point where both sides felt that an appellate decision ran the risk of disturbing a potential settlement. The date for oral argument was put on hold. A resolution of all Holocaust-related litigation against German entities was reached in July 2000. The appeals were eventually dismissed.

While recoveries were therefore obtained for the plaintiffs and the classes described in the complaints, the district court decision remains on the books. Because it distorts history, it should not constitute the last word on the ability of an American court to address gross violations of human rights such as occurred during the Nazi period.

B. *The Historical Perspective on Slave Labor*

There is substantial historical evidence that the use of Jews as slave laborers was an aspect of genocide, not war.³⁹ The German crusade against the Jews was unrelated to the armed hostilities of World War II and stemmed from a genocidal motivation.⁴⁰ The nationality of the particular Jew played no role in

37. Among other sources cited were: 1 OFFICE OF UNITED STATES CHIEF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 909-18, 988 (1946) [hereinafter NAZI CONSPIRACY AND AGGRESSION]; RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS* (1985); DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1970); KARL-DIETRICH BRACHER, *THE GERMAN DICTATORSHIP* (1970); FLORIAN FREUND, *CONCENTRATION CAMP EBENSEE* (1990); and BERND KLEWITZ, *DIE ARBEITSSKLAVERN DER DYNAMIT NOBEL* (1986).

38. Order and Opinion of October 26, 1999, *Lichtman v. Siemens AG*, No. 98-4252 (D.N.J. filed Sept. 9, 1998).

39. See *infra* notes 41-61 and accompanying text.

40. As of 1935, at least 45 Jews had died at Dachau. By June 1938, 2,200 Austrian Jews had been sent to a new camp, Buchenwald; and on November 7, 1938, Kristallnacht (the "Night of the Broken Glass"), 91 German Jews were killed as a result of government sponsored riots. Immediately thereafter, approximately 35,000 Jews were seized and taken to camps. By the time World War II began, several hundred of them had died in Buchenwald alone. MARTIN GILBERT, *ATLAS OF THE HOLOCAUST* 6, 17, 19, 22 (1988). These deaths were clearly not war-related since the war had not yet begun.

how he or she was treated, as would be the case if war-related goals were involved. German Jews were subjected to the same extermination through work policies as Jews of Allied countries such as Italy or Hungary, Jews of absorbed countries such as Austria, and Jews of enemy countries such as Poland or Russia. When Ms. Lichtman was sent to work for Siemens, it was not in response to an invasion of the area where she lived. Rather, her deportation resulted from the extension of the "Final Solution" to territory controlled by Germany's ally, Hungary, and the conscious use of extremely arduous labor and accompanying unsanitary and overcrowded housing as a means of extermination.

Historians have recognized that the Nazi involuntary labor program evolved over time, arose from differing motivations, and had a widely disparate impact on its victims. The historical evidence shows Nazis used Jews such as Ms. Lichtman as slaves not to produce war material, but rather to exterminate them through starvation and overwork. The Wannsee Protocol,⁴¹ the Nazi blueprint for the "Final Solution," sets forth the role of slave labor in the Nazis' plan to exterminate European Jews. As explained by historian Raul Hilberg:

Next, Heydrich⁴² explained what was to happen to the [Jewish] evacuees: they were to be organized into huge labor columns. In the course of this labor utilization, a majority would undoubtedly "fall away through natural decline." The survivors of this "natural selection" process—representing the tenacious hard core of Jewry—would have to be "treated accordingly," since these Jews had been shown in the light of history to be the dangerous Jews, the people who could rebuild Jewish life. Heydrich did not elaborate on the phrase "treated accordingly," although we know from the language of the Einsatzgruppen reports he meant killing.⁴³

The Wannsee Protocol set the parameters for the use of Jewish labor by Siemens and other German companies. As concisely summarized by William Shirer, the Wannsee Protocol provided that "the Jews of Europe were just to be transported to the conquered East, then worked to death, and the few tough ones who survived simply put to death."⁴⁴ As another contemporary historian has put it, the Wannsee Protocol transformed working orders into execution orders:

It was this meeting which, in a sense, formalized the meaning of Jewish "work" within the Nazi German empire as a means of destruction, as a partial synonym for killing In its essence, Jewish "work" was not work in any ordinary sense of "work," but a suspended form of death—in other words, it was death itself.⁴⁵

The use of Jews as slave laborers had no connection to the conduct of World War II. Death, not economic productivity, was the desired result. This motivation was noted as early as the Nuremberg proceedings against the top Nazi leaders. In addressing involuntary labor, the Allied prosecutors grouped their evidence into two categories: one entitled, "The Use of Slave Labor in

41. The Wannsee Protocol was a memorandum which reflected the results of a conference of high ranking Nazi officials convened specifically to establish an action plan to effectuate Hitler's genocidal intentions with regard to the Jews of Europe. See generally HILBERG, *supra* note 37.

42. Oberggruppenfuehrer Reinhardt Heydrich, Chief of the Security Police and the Security Service of the SS, presided over the Wannsee Conference.

43. HILBERG, *supra* note 37, at 166 (footnote added).

44. WILLIAM SHIRER, *THE RISE AND FALL OF THE THIRD REICH* 965 (1960).

45. GOLDHAGEN, *supra* note 37, at 322-23.

German War Industries,” and the other entitled, “The Concentration Camp Program of Extermination through Work.” With regard to “slave labor” by civilians and prisoners of war, “[t]he primary purpose of the slave labor program was to compel the people of the occupied countries to work for the German war economy.”⁴⁶ Hitler appointed Fritz Saukel as Plenipotentiary-General for Manpower and put him in charge of “recruitment and allocation of foreign labor and prisoners of war in these industries.”⁴⁷

In contrast to this utilitarian effort to obtain production from civilian laborers, a separate program under the aegis of the SS was set up for concentration camp inmates who were primarily Jews. As the prosecution staff described:

A special Nazi program combined the brutality and the purposes of the slave labor program with those of the concentration camp. The Nazis placed Allied nationals in concentration camps and forced them, along with the other inmates of the concentration camps, to work in the armaments industry under conditions designed to exterminate them. This was the Nazi program of extermination through work.⁴⁸

The concentration camp program had basically no limits. The prosecutors concluded that the concentration camp slave labor program “was directly integrated into the larger Nazi program of extermination.”⁴⁹ “Measures were also adopted to insure that extermination through work was practiced with maximum efficiency. Subsidiary concentration camps were established near important war plants.”⁵⁰ The “death through work” program became “such a major operation that the SS established an infrastructure under the control of Oswald Pohl and his deputy Karl Sommer, to manage the allocation of labor.”⁵¹

The conditions to which Jewish slave laborers were subjected were inconsistent with the rationale of obtaining production from them. Indeed, despite severe labor shortages in the early years of World War II, skilled Jewish workers were ousted from their positions and not considered part of the human resources available to German industry.⁵² When large numbers of Polish Jews came under German control, the primary motivation of extermination remained: “[T]he Germans’ policies, in fact, form a textbook plan of how to turn healthy, able workers quickly into shadows of human beings, into decrepit living skeletons, or into real ones.”⁵³ These policies, as Goldhagen notes, “were calculated to destroy the Jews, not to use their labor power.”⁵⁴ Jews were the only group of slave laborers subjected to mass killings.⁵⁵ As practiced, German slave labor

46. This is the concept of “forced labor” as used in this article.

47. NAZI CONSPIRACY AND AGGRESSION, *supra* note 37, at 909.

48. *Id.* at 914-15.

49. *Id.* at 916.

50. *Id.* at 918.

51. Compl. ¶ 15, *Lichtman v. Siemens AG*, No. 98-4252 (D.N.J. filed Sept. 9, 1998).

52. GOLDHAGEN, *supra* note 37, at 288.

53. *Id.* at 289.

54. *Id.* As an example, Goldhagen cites the mass murder of 43,000 Jewish slave laborers working for German military-industrial plants in Poland in November 1943. *Id.* at 291.

55. *Id.* at 311-13. Goldhagen cites mortality statistics at Mauthausen for six months in the period from November 1942 to December 1943. Monthly Jewish mortality rates were uniformly 100%, while the highest rate for any other group was 35% for one period, which then subsequently dropped to less than five percent. *Id.* at 312. The only groups of currently employed workers whom

represented “a way station to death” for Jews.⁵⁶ Where Jews and non-Jews were held in the same facilities, the differentiation in treatment remained dramatic. The German overseers treated Jews “far more harshly, fed them more miserably, and assigned them the most exhausting and demeaning jobs.”⁵⁷ The Allied prosecution staff concurred:

The Jews, having been registered and confined within the ghettos, now furnished a reservoir for slave labor. The difference between slave labor and ‘labor duty’ was this: the latter group were entitled to reasonable compensation, stated working hours, medical care and attention, and other social security measures, while the former were granted none of these advantages, being in fact, on a level below that of slaves.⁵⁸

Using the term “slave” labor to encompass all involuntary labor instituted by the Nazis thus obscures important differences:

Slaves, generally understood to be useful and morally neutral, are supposed to obey and work. Jews, conceived of in Germany as being evil and destructive to the moral and social order, were supposed to suffer and die. Slaves are to be fed adequately and kept healthy, so that they can produce. Jews were purposely starved, so that they would weaken and die.⁵⁹

Based on this historical record, there can be little doubt that neither the German government nor Siemens looked to Jewish labor as a way to make money. As a prominent German historian concluded with regard to the rationale for Jewish slave labor: “The theory and methods of mass murder revealed the racist ideology of National Socialism as being an end in itself. Practical considerations connected with the need for slave labor played only a minor role. And ultimately they too were overshadowed by the final goal—extermination.”⁶⁰

Other German historical sources concur: “That mass extermination took priority over putting prisoners to work is generally accepted in the West German literature on the topic.”⁶¹

As these historical sources indicate, the court’s “common knowledge” of the war-related nature of slave labor is simply not supported by the factual “record” accepted by historians. This disparity illustrates the failure of the adversarial system as a model for the presentation of historical facts. As discussed below, however, this failure is not endemic.

C. *The Treaty Waiver Issue*

The nature of Nazi slave labor was not the only aspect of the *Siemens* litigation which addressed history. In a second argument premised on an historical understanding of the events of the World War II era, Siemens sought dismissal

the Germans killed *en masse*, necessitating the closing down of manufacturing installations, were Jews. *Id.* at 311. Never did Germans act irrationally and close down factories to kill non-Jewish workers. *Id.* at 312.

56. *Id.* at 292.

57. *Id.* at 313, 340-42. See also FREUND, *supra* note 37, at 19.

58. NAZI CONSPIRACY AND AGGRESSION, *supra* note 37, at 988.

59. GOLDHAGEN, *supra* note 37, at 169.

60. BRACHER, *supra* note 37, at 428.

61. KLEWITZ, *supra* note 37, at 174.

by arguing that through the signing of certain international agreements, the post-World War II government of Czechoslovakia (and later the Czech Republic) waived any right to sue Siemens which Ms. Lichtman might have had.⁶² Plaintiffs opposed this argument on both factual and legal bases. While the legal argument focused on issues of treaty interpretation, the factual argument again had to address history. Although the court did not address the parties' conflicting views,⁶³ this issue again illustrates the difficulty of arguing history in court.

Ms. Lichtman was born in 1920 in an area then part of Czechoslovakia. As a result of the Munich Conference between Hitler, Chamberlain and others, the area in which Ms. Lichtman lived fell under Hungarian control. In 1944, Ms. Lichtman was deported to Auschwitz and sent to work for Siemens in Germany. After World War II, central European boundaries changed yet again. Ms. Lichtman became a citizen of the United States in 1954.⁶⁴ In the context of this factual situation, the district court dismissed the plaintiff's complaint based on the presumption that Ms. Lichtman's rights under international law could be waived by the government of the former Czechoslovakia.⁶⁵ As with the war-related nature of slave labor, this seems to be a common sense conclusion.⁶⁶ But, again, historical facts get in the way.

Ms. Lichtman argued that Czechoslovakia lacked the ability to "espouse" and waive her claims because she was a stateless person. The United Nations has defined stateless persons as those who "having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals."⁶⁷ Ms. Lichtman argued that Czechoslovakia could not espouse for her since it had ceased to exist over five

62. Memorandum in Support of Defendant's Motion to Dismiss (Feb. 17, 1999) at 30-31, *Lichtman v. Siemens AG*, No. 98-4252 (D.N.J. filed Sept. 9, 1998).

63. A detailed critique of the court's lengthy analysis of the applicable treaties, *Burger-Fisher v. Degussa AG*, 65 F. Supp. 2d 248, 262-72 (D.N.J. 1999), is beyond the scope of this article. However, in concluding that the Transition Agreement ceded ultimate resolution of slave labor claims to Germany, the court did not address several arguments made by Ms. Lichtman, including that the Transition Agreement was not applicable to her claims because the Czech government was not a party thereto. Memorandum in Support of Motion for Reconsideration or Reargument (Sept. 27, 1999) at 12-21, *Lichtman* (No. 98-4252). The applicability of the Transition Agreement was addressed subsequent to the court's decision because it was not raised by Siemens in support of its motion to dismiss. Rather, Siemens relied on other post-World War II agreements to argue for dismissal.

64. For a statement of some of the facts, see Compl. ¶ 4, *Lichtman* (No. 98-4252). The briefs filed by Ms. Lichtman presented additional facts.

65. *Burger-Fisher*, 65 F. Supp. 2d at 278-79. Czechoslovakia has since split into the Czech Republic and Slovakia.

66. Generally speaking, an individual's home country has the exclusive ability to pursue certain types of claims in the international arena. See RESTATEMENT (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. a (1987) [hereinafter RESTATEMENT]. See also *Burger-Fisher*, 65 F. Supp. 2d at 273-75. Thus, at first blush, it would appear that Czechoslovakia could determine whether to assert, compromise or waive claims Ms. Lichtman may have against Siemens.

67. Rachel Settlege, *No Place To Call Home: Stateless Asylum-Seekers in Hong Kong*, 12 GEO. IMMIG. L. J. 187, 190 (1997) (quoting *A Study on Statelessness* at 8-9, U.N. Doc. No. E/1112 (1949)).

years before her enslavement by Siemens. Hungary could not do so because its pro-Nazi government did not extend citizenship rights to Ms. Lichtman, evicting her to a Nazi death camp in 1944 along with hundreds of thousands of other Jews.

A nation which persecutes and evicts its nationals cannot later decide to espouse their claims against a third party. International law confirms this sensible conclusion. As the Restatement notes:

Since responsibility under §§ 711 and 712 is to the state of nationality, the principles stated in these sections provide no protection for persons who have no nationality; and the responsibility of the offending state to the state of nationality ceases if the alien has voluntarily given up that nationality or has lost or been deprived of it under the law of that state. However, the human rights of an alien who has no nationality are protected under general human rights law (Chapter I of this Part), which applies to all persons subject to a state's jurisdiction, regardless of nationality.⁶⁸

In a review of the Restatement, German legal scholars concur:

The situation of a stateless person remains unclear. The Restatement correctly maintains that such an individual cannot be diplomatically protected owing to a lack of nationality, but it subsequently indicates that stateless persons are also bearers of human rights. Whether, in this case, all states are entitled to exercise protection remains open, although the violation of human rights is qualified as an international crime *erga omnes*.⁶⁹

Other international law texts also agree. Directly on point is Oppenheimer, who concludes that with regard to stateless persons, "there is no State which is competent to take up their case."⁷⁰

Siemens also argued that although Czechoslovakia did not exist, Ms. Lichtman's rights could be waived by the Czech government-in-exile in London. However, under international law, the powers of a government in exile are limited to effects within the jurisdiction of recognizing States.⁷¹ Since neither Germany, Hungary nor Poland recognized the Czech government-in-exile, it cannot be deemed capable of espousing Ms. Lichtman's claims.

The United States government has recognized that it is unable to espouse the rights of Holocaust victims who later became U.S. citizens, such as Ms. Lichtman. In its document, *German Compensation for National Socialist Crimes*, the Department of State asserts,

68. RESTATEMENT, *supra* note 66, § 713 cmt. d.

69. Rudolph Bernhardt, et al., *Book Review: Restatement of the Law Third: The Foreign Relations Law of the United States*, 86 A.J.I.L. 608, 617 (1992).

70. L. OPPENHEIMER, 1 INTERNATIONAL LAW: A TREATISE 640 n.14 (H. Lauterpacht ed., 8th ed. 1955). The author concludes that stateless persons have "no means of redress" against offending States. *Id.* However, the claim here is against a private party, Siemens. See also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160-61 (1963).

71. STEFAN TALMON, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW, WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE* 23-29 (1988). Dr. Talmon demonstrates the limited recognition accorded to the Czech National Committee by quoting a letter read by Winston Churchill to the House of Commons. The letter, dated July 21, 1940 and sent from Lord Halifax to Dr. Benes, read in part as follows: "His Majesty's Government in the United Kingdom are happy to recognize and enter into relations with the Provisional Government established by the Czechoslovak National Committee to function *in this country*." *Id.* at 28 (emphasis added).

It is important to note that the ability of our Government to pursue individual claims is determined under principles of international law. One of these principles limits the United States to pressing claims against foreign governments only on behalf of citizens who were U.S. nationals at the time that the claim or loss occurred and who continuously maintained their citizenship to the present.⁷²

Even if espousal were possible, a State's power is not unlimited. In particular, a State lacks the ability to waive individual claims of human rights violations. Again, the Restatement is quite clear on this point: "A state that makes a claim for a violation of an obligation *erga omnes* can abandon or settle its own claim, *but not those of other states or the community at large*".⁷³ Professor Henken amplifies on this concept in a note to section 703:

A state's claim under Subsection (1) or (2) for violation of an individual's human rights is subject to the rules governing interstate claims generally, see § 902, and § 713, but claims under Subsection (2), being *erga omnes*, *cannot be waived or settled by any one state, and in principle a claim for a violation of the human rights of an individual cannot be waived or settled by a state without the consent of the individual* (emphasis added).⁷⁴

Thus, at least for a stateless person such as Ms. Lichtman, rights cannot be waived by international agreements. Stateless persons are left on their own in the international arena. They lack the single most important and most effective weapon, a sovereign to espouse their cause. Without such a sovereign to utilize channels of diplomacy and international relations, stateless persons must act on their own without governmental support.⁷⁵ Ms. Lichtman would surely have preferred the espousal of a government such as the United States, which obtained payments of \$75,000 each for its citizens who were victims of Nazi oppression,⁷⁶ rather than resorting to litigation. That support ultimately arrived in the context of the international negotiations which led to the establishment of a German foundation to pay slave labor and other claims.

IV.

CONCLUSION

The court's approach to the *Siemens* case was seriously flawed on a number of different levels, both legal and historical. In the traditional case, the judge relies on the parties' presentation of the facts. Unless public records would shed further light on the situation, the judge has no obligation (and no need) to go beyond the parties' version of the facts, especially on a Rule 12(b) motion to dismiss, where a court is duty bound to accept the well-pleaded allegations of the complaint and engage in all reasonable inferences in favor of the plaintiff.⁷⁷

72. U.S. DEP'T OF STATE, GERMAN COMPENSATION FOR NATIONAL SOCIALIST CRIMES (1996), <http://www.ushmm.org/assets/frg.htm>.

73. RESTATEMENT, *supra* note 66, § 902 cmt. h (emphasis added).

74. *Id.* § 703 reporter's note 2.

75. *Mendoza-Martinez*, 372 U.S. at 160-61 (stateless persons have "no State which is competent to take up their cause").

76. Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution, Sept. 19, 1995, 35 I. L.M. 193.

77. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Issues of history, we suggest, are of an entirely different nature. A court simply cannot draw accurate conclusions about historical events without going to source materials. And, if adequate sources are not provided by the parties, the judge should do the needed research. Gross conclusions regarding the nature of the Nazi slave labor program should not be cavalierly reached without a solid historical footing. Yet this is precisely what happened in the *Siemens* case. Now, the law books will forever contain the conclusion that the Nazis utilized the labor of Jew and non-Jew alike to produce war material.

Discovering historical “facts” is different from discovering whether the light was red or green in a traffic accident case. What may seem obvious to the lay person may be the subject of intense historical debate or may be contrary to historical analyses. The litigation process does not provide a ready means to examine any of the historians quoted above about their conclusions. In the context of typical litigation, these questions would be subject to close scrutiny and direct inquiry. With history, however, that would not seem to be practical. The court is expected to be a skilled researcher of the law. However, when it comes to history, judges may not have ready access to historical sources.⁷⁸ But they must still make decisions.

One possible device available to a court in these circumstances is the appointment of a special master. Under Rule 52 of the Federal Rules of Civil Procedure, a federal judge may appoint a special master to examine complicated or time-consuming issues and report back to the judge.⁷⁹ While masters are typically lawyers, this is not required by the rules. A second device, authorized under Rule 706 of the Federal Rules of Evidence, is the appointment of an expert to advise the court on matters in dispute.⁸⁰ This is typically done when the court is faced with a “battle of the experts” retained by the parties to the litigation and the judge perceives the need for an independent expert who has no financial or other ties to the parties to the case. The appointment of an expert to address issues which appear to be historically ambiguous removes the adversary nature of the process, at least to a certain extent, and returns it to the arena of scholarship.

This examination of the interplay between history and the courtroom does not lend itself to a simple lesson. When history is an issue in a courtroom, the lawyers can read archival documents and historical texts. They can consult with historians. Indeed, these steps are necessary since there is an opponent on the other side of the case who is likely to do so. But judges are under no similar compulsion. What is presented to them may be misleading or incomplete; it may consist of minority viewpoints among historians. Where history is involved, particularly with events such as the Holocaust, judges have an obligation not just to the parties but to society as a whole to get it right. They should therefore take a more active role in the investigation of the historical events in

78. For example, critical information might be in archives, rather than libraries, or in a foreign language.

79. FED. R. CIV. P. 52(a).

80. FED. R. EVID. 706(a).

question, in the scrutiny of the points of view presented to them by the litigants and in consulting with independent experts. And, when judges put pen to paper on historical subjects such as the Holocaust, they should write like historians, with full citation to historical sources. Absent this type of analysis, a judge runs the risk not only of getting it wrong and thereby doing a disservice to the litigants, but also to the broader popular understanding of historical events.

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From the Luxembourg Agreement to Today: Representing a People

By
Karen Heilig*

I. INTRODUCTION

During the last three years, I have been given the unique opportunity to engage Jewish history and to play a small part in fifty years of Holocaust restitution. I have been fortunate to benefit from the work of those who, in the aftermath of the devastation and destruction of the Holocaust, confronted unprecedented dilemmas during restitution negotiations and in the allocation of restitution funds. They were sailing in uncharted waters and had to reach difficult decisions and compromises. During this concluding phase of restitution matters, we are fortunate to have the benefit of their experience. The Claims Conference¹ successfully met the challenges before it during the last fifty years. This was due, in no small part, to the broad representation of the Claims Conference—geographically, religiously, and ideologically—thereby forging a consensus among the Jewish people as they dealt with unprecedented issues. I take this opportunity to pay tribute to the leaders of the Claims Conference who worked tirelessly for the Jewish people and in particular to Saul Kagan, whose wisdom and vision I have been privileged to witness first hand.

For over fifty years the Claims Conference has undertaken the daunting task of representing the Jewish people in Holocaust compensation and restitution negotiations. Throughout its history, the Claims Conference has not only negotiated Holocaust compensation and restitution agreements but has played a pivotal role in monitoring the implementation of laws and agreements and has participated in the distribution of funds. Since 1995 it has distributed DM 2.7 billion in direct payments to Holocaust survivors and allocated over \$400 million to organizations that provide for the needs of Nazi victims.² Recently, the Special Master in the Swiss Bank Settlement noted the important role of the Claims Conference, stating that:

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1. The Conference on Jewish Material Claims against Germany (Claims Conference) is a non-governmental organization.

2. CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, 2000 ANNUAL REPORT 3, 8 (2001) [hereinafter ANNUAL REPORT 2000].

[The] Claims Conference was created in 1951 . . . and has had a singular role in post-Holocaust compensation ever since. Virtually every significant German and Austrian indemnification and restitution program is directly attributable to the Claims Conference's initiative and strenuous negotiations on behalf of hundreds of thousands of Nazi victims. Of equal importance, within the last decade, the Claims Conference has utilized the proceeds of sales of restituted properties in the former East Germany to fund an ever-growing network of social welfare programs designed primarily for the benefit of needy and ill elderly Jewish victims of Nazi persecution.³

However, to understand the agreements and settlements of the 1990s one must recognize that Holocaust compensation and restitution is founded upon certain principles (legal principles and principles relating to distribution and allocation of funds) that have been developed over the course of fifty years.

II.

EVENTS LEADING UP TO THE LUXEMBOURG AGREEMENT

A. *Pre-Luxembourg Developments*

Following the suffering and destruction of the Shoah,⁴ the major Jewish organizations of the time⁵ conducted discussions with the United States Government on the issue of restitution and indemnification.⁶ As a result, the United States Government established two legal principles that, although ground-breaking at the time, are now unquestioned. First, it recognized that while the interests of private persons whose property was despoiled by Germany were protected by their respective governments, this was not a viable option for Jewish Nazi victims, many of whom were stateless.⁷ Thus justice called for allowing representatives of the Jewish people to pursue a global "Jewish claim." Secondly, on November 10, 1947 under Military Law No. 59, *The Restitution of Identifiable Property*, American authorities accepted that property subject to persecution measures should be restituted to a successor organization where there were no surviving heirs or no timely claimants for such assets. In June 1948 the Jewish Restitution Successor Organization was authorized to take action to recover any

3. Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds at 121-22 n. 353, *In re Holocaust Victims Assets Litigation (Swiss Banks)*, 105 F.Supp. 2d 139 (E.D.N.Y. 2000) (No. CV 96-4849) [hereinafter Special Master's Proposal].

4. The Hebrew term "Shoah" is used here in place of Holocaust.

5. These organizations included the World Jewish Congress, American Jewish Committee, American Jewish Joint Distribution Committee, American Jewish Conference and the Jewish Agency for Palestine.

6. The representatives of these organizations presented proposals on restitution to Under Secretary of State Dean Acheson and other State Department officials on Oct. 19, 1945. NANA SAGI, *GERMAN REPARATIONS: A HISTORY OF THE NEGOTIATIONS* 33 (Dafna Alon trans., Magnes Press 1980).

7. "The United States ambassador to the Allied Commission on Reparations Edwin Pauley, argued that. . . most of the 'persecutees' (the name used in official circles for survivors of the Holocaust) were in fact stateless. They had been stripped of their citizenship at the same time as their assets had been seized by the Third Reich. [He further argued that] as stateless refugees they had no channels through which they could seek recompense." RONALD ZWEIG, *GERMAN REPARATIONS AND THE JEWISH WORLD: A HISTORY OF THE CLAIMS CONFERENCE* 13 (2d ed. 2001).

unclaimed or heirless property in the American zone⁸ and equivalent provisions were later adopted in the British and French zones and the western sectors of Berlin (and in recent years with respect to East Germany).⁹ This principle, which was established in response to the unprecedented devastation of the Holocaust, represented a departure from general legal doctrine, as it was and is in stark contradiction to the law of escheat whereby all heirless property reverts to the state.

B. Preparations for Negotiations with the Federal Republic of Germany and the Establishment of the Conference on Jewish Material Claims Against Germany

Although the German Lander adopted certain compensation measures immediately after the war,¹⁰ often at the urging of the occupying power, the main developments in indemnification measures commenced after the creation of the First German Federal Republic. On September 27, 1951 the first Chancellor of post war Germany, Chancellor Adenauer, declared that the German Federal Republic was prepared to commence discussions relating to material reparations with the newly established State of Israel and the representatives of world Jewry. Israel presented their claims in a series of diplomatic notes during 1951 to the four occupying powers.¹¹ The basis of these claims was the cost of resettling 500,000 refugees of Nazi persecution.¹² The occupying powers passed these diplomatic notes to the first German Federal Republic.

On October 26, 1951 Dr. Nahum Goldmann called together twenty-two Jewish organizations covering the broad spectrum of Jewish political and religious ideology and geographic location.¹³ The twenty-two organizations met at the Waldorf-Astoria in New York where they founded the Conference on Jewish Material Claims Against Germany (known as the Claims Conference)—an organization created to pursue the material claims of the Jewish world.¹⁴ The

8. *Id.* at 15; SAGI, *supra* note 6, at 41.

9. Military Law No. 120 in the French Zone was promulgated on the same date as U.S. Military Law No. 59. The British authorities only promulgated their law (British Military Law No. 59 in the British Zone of Germany and Ordinance 180 in the British Sector of Berlin) in July 1949. SAGI, *supra* note 6, at 38. The law in respect to East Germany was passed in 1990 and is described in section VI(2) below.

10. *Id.* at 42.

11. The first note was dated January 16, 1951 and a further note was presented on March 12, 1951. For a full discussion of these issues see *id.* at 49-61.

12. *Id.* at 55.

13. The organizations that are currently members of the Claims Conference include organizations as varied as the ultra-orthodox Agudath Yisroel, the World Union for Progressive Judaism, le Conseil Représentatif des Institutions Juives de France, the South African Jewish Board of Deputies, the American Jewish Joint Distribution Committee and the Jewish Labor Committee. See ANNUAL REPORT 2000, *supra* note 2.

14. "The principal objectives of the Claims Conference were:

- To gain indemnification for injuries inflicted upon individual victims of Nazi persecution;
- To secure restitution of assets confiscated by the Nazis;
- To obtain funds for relief, rehabilitation and resettlement of victims of Nazi persecution;
- To aid in rebuilding Jewish communities which Nazi persecution had devastated;

Claims Conference presented a *global claim* based primarily upon heirless assets—though in its explanation of the global claim, the Claims Conference pointed to the huge costs faced by Jewish organizations in resettling Jewish refugees and rebuilding Jewish communities devastated by the Nazis outside of Israel.¹⁵ As late as 1950 there were still tens of thousands of people in displaced persons camps in Europe. “It was estimated that there were up to 22,000 cases of serious mental or physical illness among the survivors of Nazism outside of Israel; another 150,000 less serious cases would also need help.”¹⁶ Significantly, the Claims Conference demanded that Germany enact comprehensive indemnification legislation to settle individual claims and resolved that the satisfaction of individual claims should have priority over the global claim.¹⁷ This decision to prioritize individual claims led the Claims Conference to make concessions on the global claim in reaching a settlement agreement with the Federal Republic of Germany.¹⁸

III.

THE LUXEMBOURG AGREEMENTS

After six months of negotiations, which at times were on the brink of collapse, the German Federal Republic signed an agreement on September 10, 1952 with the State of Israel and a separate but parallel agreement with the Claims Conference.¹⁹ The parties agreed that DM 3 billion in goods and services would

• To foster commemoration, research, documentation and education of the Holocaust.” Memorandum from Saul Kagan, Executive Vice President of the Claims Conference (1951-1998), to Members of the Negotiating Committee of the Claims Conference 3 (Jan. 14, 1999) (on file with author).

15. ZWEIG, *supra* note 7, at 34.

16. *Id.* at 35.

17. *Id.* at 34.

18. *Id.* at 36.

19. See Agreement Between Israel and the Federal Republic of West Germany, Sept. 10, 1952, 162 U.N.T.S. 205, *cited in* SAGI, *supra* note 6, at 212-29 [hereinafter *Isr-F.R.G. Agreement*]; Protocol I Between the Federal Republic of Germany and the Conference on Jewish Material Claims Against Germany, *cited in* SAGI, *supra* note 6 at 231-38 [hereinafter *Protocol I*]; Protocol II Between the Federal Republic of Germany and the Conference on Jewish Material Claims Against Germany, *cited in* SAGI, *supra* note 6, at 238-41 [hereinafter *Protocol II*]. Sagi relates that the road leading to the agreement was accompanied by criticism both in Israel and in Germany:

In Germany, reaction to Adenauer’s “personal move”—the acceptance without consulting his Government of an obligation which imposed a heavy economic burden on his country – came first from powerful economic interests and industrial and commercial circles. . . Among the principle opponents was Fritz Schaeffer, the German Finance Minister, who maintained that the German budget was already heavily burdened with the costs of occupation and relief for the millions of refugees. The addition of the Israel claim could fatally destroy the precarious balance that had been attained.

The reaction in Israel was more intense. On January 7, 1952, when the question of negotiations came before the *Knesset* . . . violence erupted. While the issue was being debated within the *Knesset* walls, a stormy demonstration . . . was raging outside . . . Demonstrators poured stones at the building. The police responded with force, the fight went on for hours, and hundreds of people were injured.

SAGI, *supra* note 6, at 81.

be transferred to the State of Israel.²⁰ The agreement with the Claims Conference consisted of two protocols. Protocol 1 called for the enactment of laws that would compensate Nazi victims directly for indemnification and restitution claims arising from Nazi persecution. Protocol 2 provided that DM 450 million would be paid to the Claims Conference to be used for the benefit of victims of Nazism according to the urgency of their needs, the principles and priorities determined by the Claims Conference, and in principle for the benefit of those living outside Israel.²¹ Collectively, these accords became known as the Luxembourg Agreements.

Both at the time and in hindsight, the 1952 adoption of the Luxembourg Agreements was wholly novel. The adoption:

was a revolutionary idea. In no previous case in history had a State paid indemnification directly to individuals, most of them not even its own citizens. Countries paid indemnification when they were defeated in war; the fact is as old as human history itself. But that a government should pay for crimes committed, not only to its own citizens, which was unusual enough, but to hundreds of thousands of non-citizens,²² or to another state, the State of Israel, which was not even in existence at the time the crimes were committed . . . was truly a revolutionary idea.²³

Moreover, the agreement between Germany and the Jewish people was seen as one of the most important cornerstones of the newly formed German Federal Republic as well as an important element in the future relationship between Germany and the Jewish people. Because Germany viewed reparations to victims as a moral obligation as well as pragmatic policy, Germany provided reparations to victims who were in no political position to enforce such payments.²⁴ From the Jewish perspective, the Luxembourg Agreements represented recognition by the Jewish community of the German attempt to atone for its crimes, but in no way symbolized forgiveness of them.²⁵

IV.

1952–1965: IMPLEMENTATION OF THE LUXEMBOURG AGREEMENTS

During the period from 1952 to 1965, the Claims Conference focused on representing the Jewish people in negotiating indemnification legislation, as envisioned by Protocol 1 of the Luxembourg Agreement, and the distribution and

20. See Isr-F.R.G. Agreement, art. 1(a), *cited in* SAGI, *supra* note 6, at 212.

21. Protocol II, art. 1, *cited in* SAGI, *supra* note 6, at 239-40.

22. Sagi notes that “the principle that reparations should be paid by the defeated country not only to the victors but to a persecuted minority among its own citizens as well, was a new departure in international law.” SAGI, *supra* note 6, at 16 (footnote added).

23. NEHEMIAH ROBINSON, TEN YEARS OF GERMAN INDEMNIFICATION 8 (1964), *quoted in* Special Master’s Proposal, *supra* note 3, at E-15, 16. (Mr. Robinson was the principal legal advisor to the Claims Conference at the negotiations leading to the Luxembourg Agreements). Also, “[t]here was no legal precedent for the Luxembourg Agreement, both because there is no international law regarding individual financial reparations and because there had never been such a wide-ranging agreement between a sovereign state and voluntary organizations.” ZWEIG, *supra* note 7, at 187.

24. See SAGI, *supra* note 6, at 3.

25. ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES xxiv (2000).

allocation of the funds awarded to the Claims Conference under Protocol 2 of the Agreement.

A. Allocation and Distribution of Luxembourg Funds

The allocation and distribution of funds was conducted in accordance with certain fundamental principles and procedures. First, applications for funding were initially reviewed by an allocations sub-committee created by the Executive of the Claims Conference.²⁶ Recommendations of the sub-committee were thereafter submitted to the full Board of Directors of the Claims Conference for approval.²⁷ This procedure allowed all Jewish Organizations represented in the Claims Conference to participate in the decision making process. The structure outlined above is the same basic structure that is used today to distribute institutional allocations.²⁸

In addition, certain basic principles were established that would guide all allocations. Saul Kagan memorialized these principles in 1954 and they can be summarized as follows:

- All allocations must be governed by the contractual obligations of the Conference.
- No new agencies will be created by the Conference for the spending of allocated funds.
- No allocations shall be made to compensate institutions or individuals for property losses incurred as a result of Nazi action.
- No allocations shall be made to reimburse organizations for past expenditures in connection with the relief and rehabilitation of Nazi victims.
- Conference funds should not be a substitute for local fundraising or enable local organizations to forego assistance which they might otherwise obtain (e.g. heirless property, grants by local and central governments), nor to forego the use of local funds existing for the purposes requested in the application (building or endowment funds, legacies, foundations, etc.).
- Conference funds should not be allocated to new institutions principally created for the purpose of receiving Conference funds, unless there are compelling reasons to do so.
- The Conference shall make allocations only to recognized, functioning relief organizations, unless there are compelling reasons to do otherwise.
- The Conference shall not make direct allocations to individuals, except in special cases.
- Communities largely dependent on external aid shall have priority over communities independent of external aid.²⁹

26. ZWEIG, *supra* note 7, at 91.

27. *Id.* at 99.

28. All allocations are presented to the Allocations Subcommittee of the Board of Directors and are thereafter presented to the full meeting of the Board of Directors of the Claims Conference. CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, AN OVERVIEW OF ALLOCATIONS: 1952-1999, at 8 (2000) [hereinafter OVERVIEW OF ALLOCATIONS].

29. ZWEIG, *supra* note 7, at 102-03.

A report entitled "Twenty Years Later—the Activities of the Conference on Jewish Material Claims Against Germany 1952-1972" details the expenditures during this first phase of the Claims Conference's activities. In general, approximately 76% of the funds allocated by the Claims Conference during that phase were for the relief, rehabilitation and resettlement of Nazi victims, 20% of funds were used for cultural and educational reconstruction, 1.5% for the legislative programs of the Claims Conference, and 2.5% for administration.³⁰

The funds for the relief, rehabilitation and resettlement of Nazi victims initially focused on the closing of the displaced persons camps, and in 1957 the last of these camps, Camp Foehrenwald, closed its gates.³¹ In addition, the Claims Conference assisted over 85% of the approximately 20,000 Jewish refugees from Hungary after 1956, the overwhelming majority of whom were Nazi victims, with emergency aid and assistance in migrating overseas.³² However, the largest distribution of funds from the Claims Conference allocations during this period was for the Claims Conference's "relief in transit" program. This program was designed to benefit Nazi victims in Eastern European countries who were barred from compensation under German laws. "Twenty Years Later," notes that the Claims Conference allocated a total of \$48 million to the program. The "relief in transit" program was conducted in a discreet manner by the American Jewish Joint Distribution Committee (JDC). During this period, the JDC acted as the main operating arm of the Claims Conference in its welfare and relief operations.³³ The number of persons who benefited from the "relief in transit" program in 1964 numbered over 200,000.³⁴

The second major effort to receive Claims Conference funding was the reconstruction of destroyed European Jewish communities, including their cultural and educational infrastructure. The rebuilding of Jewish communities that had been destroyed by the Nazis is an enduring legacy of the Claims Conference.³⁵

During the 1990s the Claims Conference devoted 80% of the funds derived from the sale of properties acquired by the Claims Conference as the successor organization in the former East Germany (described *infra*) to welfare and 20% to holocaust research, documentation and education.³⁶

30. CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, TWENTY YEARS LATER: ACTIVITIES OF THE CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY 1952 – 1972, at 11 (1973) [hereinafter TWENTY YEARS LATER].

31. THE HOLOCAUST ENCYCLOPEDIA 159 (Walter Lacquer ed., 2001).

32. TWENTY YEARS LATER, *supra* note 30, at 12.

33. To this day, there exists a close relationship between the American Joint Distribution Committee and the Claims Conference. Specifically, during the last three years, the Joint Distribution Committee has overseen and monitored the allocation of over \$70 million from the Claims Conference, from funds derived from the Claims Conference designation as the successor to property in East Germany, to the social welfare *Hesedim* in the Former Soviet Union that assist the "double victims" of Nazi persecution.

34. ZWEIG, *supra* note 7, at 133; TWENTY YEARS LATER, *supra* note 30, at 12.

35. For further details about cultural and educational projects during this period, see TWENTY YEARS LATER, *supra* note 30, at 13, 53-66.

36. This allocation was recently endorsed by the Claims Conference. See Planning Committee, Conference on Jewish Material Claims Against Germany, A Plan for Allocating Successor Organization Resources 12 (June 28, 2000) (unpublished report, on file with author).

B. Indemnification Legislation

During the period between 1952 and 1965 the Claims Conference was intensively involved in monitoring and modifying German indemnification legislation. The Claims Conference initially concentrated on pressing for amendments to the first Federal Indemnification Law,³⁷ enacted in 1953, which provided for compensation for wrongful death, damage to health, loss of liberty, damage to economic standing, and limited property restitution. The provisions of the initial law contained numerous deficiencies including, *inter alia*, provisions that limited the persecutees eligible to receive compensation and limited the amount of compensation.³⁸ In response, the Claims Conference created a legal committee of experts which submitted a memorandum of inadequacies to the German Government.³⁹ A revised law, the Federal Indemnification Law ("BEG"), was enacted in 1956,⁴⁰ introducing so many changes that it assumed the character of a new law rather than a mere revision of an earlier law.⁴¹

The focus of the Claims Conference's political negotiations with the German government after the revised BEG was enacted were based upon (a) the inadequacies in the implementation in the law and (b) changing circumstances that required amendments to the legislation. During this period there were numerous instances demonstrating the inflexible and burdensome way in which the BEG was being implemented. For example, there were 74,000 claims for damages to health still pending in 1964, most of which were attributable to the requirement that the Holocaust survivor prove that the damage to his health was a result of Nazi persecution.⁴² The Claims Conference advocated the establishment of a presumption in the case of all survivors of concentration camps and ghettos that the damage to health was a result of incarceration.⁴³ In addition, despite the revisions of the law, the Claims Conference continued to urge the German Government to amend the indemnification legislation based on changing political realities and circumstances. For example, the tens of thousands of victims of Nazi persecution that fled Hungary after 1956 were ineligible to receive compensation under the revised BEG of 1956.⁴⁴ The Claims Conference presented the German Government with a comprehensive list of 50 amendments

37. The full name of the law was *Bundesergänzungsgesetz zur Entschädigung für Opfer des Nationalsozialismus (BErgG)*, v.9.18.1957 (BGB1 I S.1387) [hereinafter *BErgG*].

38. For a summary of some of the deficiencies that were amended in the 1956 Federal Indemnification Law see Special Master's Proposal, *supra* note 3, at E-19, 20. In addition, the Special Master notes that: "The German press and radio frequently contrasted the slow indemnification procedure and the great number of rejected claims with the great generosity shown to former Nazis. The attitude of the indemnification offices and the courts was repeatedly criticized in the Bundestag." Special Master's Proposal, *supra* note 3, at E-20 n.41.

39. TWENTY YEARS LATER, *supra* note 30, at 126.

40. The full name of the law was *Bundesgesetz zur Entschädigung für Opfer der Nationalsozialistischen Verfolgung (BEG-Bundesentschädigungsgesetz)*, v. 6.29.1956 (BGB1. I S.559) [hereinafter *BEG*].

41. TWENTY YEARS LATER, *supra* note 30, at 126.

42. *Id.* at 127.

43. *Id.*

44. Generally, only Nazi victims who inhabited the German Federal Republic or West Berlin up to Oct. 1, 1953 and stateless refugees were eligible to apply to the BEG.

to the revised BEG.⁴⁵ Finally, after hearings at the Bundestag in 1964, a second revised BEG was enacted in 1965.⁴⁶

The second major piece of restitution legislation was the Federal Restitution Law (known as the BRUEG) which covered the restitution of personal property.⁴⁷ As with the BEG, the Claims Conference was involved in attempting to improve the law and monitoring the implementation of the BRUEG. During the critical years after 1952, the Claims Conference testified before the Bundestag. Representatives of the Claims Conference also met and lobbied members of the Indemnification Committee of the Bundestag, one of the most important committees of the Bundestag until the 1980s.⁴⁸ The Claims Conference office in Frankfurt, which had been in existence since the founding of the Claims Conference and, in fact, predated the establishment of the Embassy of the State of Israel in the Federal German Republic, served as the representative of the Jewish people on indemnification and restitution issues. Since their enactment, over DM 100 billion has been paid to individuals under the BEG and the BRUEG.⁴⁹

C. URO

In addition to direct negotiations with the German Government, the Claims Conference had a close relationship with the United Restitution Organization (“URO”), which not only assisted Nazi victims in pursuing their claims but also advanced certain “test” cases with the German courts relating to the implementation and interpretation of the restitution and indemnification laws.⁵⁰

Throughout this first phase, the Claims Conference pursued every avenue available to ensure that as many Holocaust victims as possible would be eligible for compensation. Nevertheless, after the deadlines in the Federal Indemnification Laws expired, thousands of Holocaust victims had not received compensation. Thousands were still behind the iron curtain and were unable to apply for or receive payments, some had missed deadlines while trying to rebuild shattered lives, and others yet had been unwilling to apply for payments from the German Government in the 1950s but with the onset of old age required financial assistance. In addition, the German Democratic Republic (“GDR”) had neither contributed to individual compensation programs nor enacted property

45. TWENTY YEARS LATER, *supra* note 30, at 126.

46. The full name of this law is *Bundesentschädigungsschlussgesetz*, v. 9.14.1965 (BGB1. I S. 1315) [hereinafter Second Revised BEG].

47. The full name of this law is *Bundesruckerstattungsgesetz*, v. 19.7.1957 (BGB1. I S. 734) [hereinafter BRUEG].

48. The Indemnification Committee still exists as a subcommittee of the Committee on Internal Affairs.

49. Deputy Secretary of State Richard Armitage, Remarks at the Annual Meeting of the Conference on Jewish Material Claims Against Germany (July 18, 2001) (transcript on file with author) (“Through your efforts, more than half a million Holocaust survivors in 67 countries have received approximately \$60 billion in compensation payments”); *See also* CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, 1998 ANNUAL REPORT 8 (1999) [hereinafter ANNUAL REPORT 1998].

50. CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, 1962 ANNUAL REPORT 192.

restitution. For these reasons, the Claims Conference would continue to pursue its mission during the coming decades.

V.

1965–1990: THE ESTABLISHMENT OF THE HARDSHIP FUND

As a result of the détente between the United States and the Soviet Union, significant numbers of Soviet Jews, many of whom were victims of the Holocaust, were permitted to emigrate from the Soviet Union. Following this emigration, the Claims Conference advocated that these Nazi victims should be entitled to apply to existing indemnification programs—thereby extending the deadline of the BEG.⁵¹ Such representations were rejected by the German Government.⁵² After long negotiations, the German Government agreed to establish a “Hardship Fund” which would provide a one-time lump sum payment of DM 5,000 to those persons who had received no prior compensation.⁵³ Moreover, the German Government insisted that a precondition for the establishment of the Hardship Fund was a commitment by the Claims Conference to administer it.⁵⁴

The Claims Conference was confronted with two difficult decisions: should it agree to a program where the amount of compensation was only modest at best, and for the first time, would it, not the German Government, be the body to accept or reject an application for compensation from a victim of Nazi persecution? The Claims Conference agreed to the conditions of the Hardship Fund, and as of January 1, 2000, over 230,000 persons had received a payment of DM 5,000 from the Hardship Fund.⁵⁵

VI.

FROM 1990 TO THE PRESENT: REUNIFICATION AND THE END OF THE COLD WAR

During the last decade, there have been significant developments in Holocaust compensation and restitution. The two main factors that led to renewed and successful compensation negotiations in the 1990s were the fall of the iron curtain and the globalization of the world economy. After the fall of the iron curtain, the unified Germany, in implementation of its treaty obligations, began negotiations with the Claims Conference for payments to certain Holocaust survivors that had received little or no compensation. Further, globalization encouraged many German companies that had participated in wartime activities (by using slave labor or aryanizing Jewish assets) and many other companies

51. ANNUAL REPORT 1998, *supra* note 49, at 17.

52. *Id.*

53. *Id.*

54. Editorial, THE JERUSALEM POST, NOV. 28, 1996 (“When pressed about compensation for survivors who emigrated from the Soviet Union in the 1970s, Germany said no, because the original filing deadline for reparations had expired in 1969. Bonn later agreed to expand compensation but only on the condition that the Claims Conference . . . administer the program under the criteria established by the German Government”), *quoted in* Special Master’s Proposal, *supra* note 3, at E-41 n. 108.

55. ANNUAL REPORT 2000, *supra* note 2, at 17.

that profited from the despoliation of Jewish assets (such as insurance companies and banks) to do business worldwide—exposing them to political pressure, government regulators and lawsuits. Moreover, the fall of the iron curtain resulted in the availability of archival information that was not previously accessible. In addition to the above, in the 1990s the U.S. Government became extremely involved in and committed to pursuing Holocaust restitution. The combination of these factors resulted in the creation of the Article 2 pension program and numerous settlements with industry during the last few years. However, all of these agreements required difficult decisions and compromises—especially as the beneficiaries were often by now an elderly population—but would nevertheless be based upon the principles developed during the period after the Second World War.

A. Establishment of the Article 2 Fund (and Later the Central and Eastern European Fund)

In the mid-1970s, following the entry of both Germanys to the United Nations in 1973, the German Democratic Republic commenced negotiations with the United States for the establishment of diplomatic relations. In the course of these negotiations, following representations from the Claims Conference, the United States obtained a promise from the German Democratic Republic to discuss restitution and compensation issues directly with the Claims Conference.⁵⁶ These negotiations were initially conducted on a low level and in the guise of meetings between the Anti-Fascist Committee (“AFC”) and the Claims Conference.⁵⁷ During the course of one of these meetings in November 1976, the East Germans wired the sum of \$1 million to the Claims Conference as a humanitarian gesture to aid Nazi victims in the U.S. East Germany also informed the Claims Conference that talks on compensation would serve no purpose.⁵⁸ This payment was returned.

During the 1980s the Claims Conference and East Germany renewed discussions. A number of these negotiations were conducted between the GDR and the Claims Conference at the highest level, including a meeting between the President of the Claims Conference, Rabbi Israel Miller, and President Honecker, but the GDR continued to deny any responsibility for Nazi era wrongs, and ultimately these compensation discussions did not bear fruit.

During 1990 the German Federal Republic and the German Democratic Republic negotiated the reunification agreement and the Treaty on the Final Settlement with Respect to Germany (also known as the “2 + 4” Treaty) concerning the withdrawal of Allied forces from both Germanys. The Claims Conference, with the active support of the United States Government, pushed for the continuation of the Federal Republic’s pre-reunification policy on restitution by the uni-

56. Benjamin Ferencz, Report to Board of Directors, Conference on Jewish Material Claims Against Germany (July 3, 1979).

57. *See id.*

58. CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, HISTORY OF THE CLAIMS CONFERENCE: A CHRONOLOGY 16 (2001) [hereinafter HISTORY OF THE CLAIMS CONFERENCE].

fied Germany.⁵⁹ Additionally, the Claims Conference urged the unified Germany to establish an additional fund for those Holocaust victims that had previously received little or no compensation. In accordance with these negotiations, the United German Government committed itself to further compensation in Article 2 of the Implementation Agreement to the German Unification Treaty.⁶⁰

Consequently in October 1992, after 16 months of negotiations, the German Government agreed to pay lifetime pensions of DM 500 per month to those persons who had experienced grievous persecution, were in pressing need, and had received little or no compensation.⁶¹ It was estimated at the time that about 25,000 Holocaust survivors would be covered by the criteria proposed by the German Government.⁶² Moreover, as with the Hardship Fund, the compensation program (which became known as “the Article 2 Fund”) was to be administered by the Claims Conference.⁶³

The Claims Conference faced a dilemma. It could either accept the narrow criteria of eligibility proposed by the German Government, or it could reject the offer as inadequate. After vigorous debate, the Board of Directors of the Claims Conference felt that it had no moral right to reject the proposed Article 2 Fund on behalf of those potentially eligible recipients. However, the Claims Conference insisted that it be entitled to continue to negotiate for the liberalization of the initial criteria.⁶⁴ In fact, due to liberalizations achieved since the establishment of the Article 2 Fund (such as the exclusion of social security payments

59. The United States Government did more than ask for a continuation of pre-unification policy. It supported the efforts of the Claims Conference for funds for victims that had received no or little previous compensation. The President of the Claims Conference wrote to Secretary of State James Baker III, “I write to express the thanks of the Claims Conference for your help in the issues of our concern. Your aid in making certain that the claims of survivors was placed on the agenda of issues to be dealt with after unification is very much appreciated. We were particularly gratified that your efforts led to Foreign Minister Hans-Dietrich Genscher’s letter to you affirming that the Federal Republic of Germany would seek to provide ‘expeditious and satisfactory resolution of claims of Jewish victims of the Nazi regime.’” Letter from Israel Miller, President, Conference on Jewish Material Claims Against Germany, to James A. Baker III, U.S. Secretary of State (Oct. 10, 1990) (on file with author).

60. For the text of the relevant provision, see THE CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, 1999 ANNUAL REPORT 18 (2000) [hereinafter ANNUAL REPORT 1999].

61. The U.S. Government was supportive during these difficult negotiations. In fact, after the completion of the negotiations, the Claims Conference formally thanked U.S. Ambassador to Germany Robert Kimmitt, for his assistance “in the final round of the negotiations when you personally intervened at the high levels of the German government to encourage a satisfactory conclusion.” Letter from Israel Miller, President, Conference on Jewish Material Claims Against Germany, to Robert M. Kimmitt, Ambassador, United States Embassy, Bonn, Germany (Nov. 17, 1992) (on file with author).

62. THE CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, 1997 ANNUAL REPORT 13 (1998) [hereinafter ANNUAL REPORT 1997].

63. Pursuant to the Agreement Between the German Federal Ministry of Finance and the Claims Conference, dated Oct. 29, 1992, the original eligibility criteria of the Article 2 Fund were that beneficiaries (a) were in a concentration camp for at least 6 months, or were in a ghetto for at least 18 months, or were in hiding for at least 18 months; and (b) had received less than DM 5000 in previous compensation; and (c) had an income less than US\$16,000 for a single or US\$20,000 for a couple.

64. ANNUAL REPORT 1997, *supra* note 62, at 13.

from the income limit of persons over seventy, the inclusion of a significant number of additional camps from those previously approved, etc.), over 53,000 persons have been approved to receive pensions under the Article 2 Fund.⁶⁵ Moreover, in 1999 a Fund based on the same eligibility criteria was negotiated by the Claims Conference for those residents of Central and Eastern Europe not previously covered by any compensation program, and an additional 15,000 Holocaust victims receive pensions of DM 250 per month under the Central and Eastern European Fund.⁶⁶

Consequently, one of the most significant demands of the Claims Conference during the negotiations for the establishment of the German Foundation "Remembrance, Responsibility and the Future," was that the German Government provide an undertaking that the negotiations on "open issues" concerning the liberalization of the Article 2 Fund would continue after the establishment of the German Foundation.⁶⁷ The Claims Conference obtained this commitment⁶⁸ and negotiations on the open issues continued in December 2000, six months after the establishment of the German Foundation.

B. *Return of Jewish Property located in the Former East Germany*

Following reunification, the United Germany prepared legislation for the restitution or compensation of property nationalized by the communist government of the German Democratic Republic. The Claims Conference successfully negotiated a provision in the legislation, the Property Law of 1990 ("*Vermögensgesetz*"), that provided for restitution or compensation of Jewish property sold under duress during the National Socialist regime or confiscated by the Nazi regime.⁶⁹ As a result, Jewish owners of aryanized⁷⁰ property and their heirs gained the right to file claims for their property located in the former East Germany.⁷¹ Furthermore, following the principle that restitution legislation should designate a "successor organization" for heirless property (as was enacted in the

65. ANNUAL REPORT 2000, *supra* note 2, at 19.

66. *Id.* at 20.

67. See Letter from Israel Miller, President, and Israel Singer, Vice President, Conference on Jewish Material Claims Against Germany, to Stuart E. Eizenstat, Deputy Secretary, U.S. Department of the Treasury (Nov. 15, 1999) (on file with author).

68. This commitment was contained in letters to the Claims Conference from the German Ministry of Finance—the German Government Ministry responsible for indemnification issues. Letter from Dr. Kurt Bley, Department Head, German Ministry of Finance, to Dr. Karl Brozik, Representative in Germany, Conference on Jewish Material Claims Against Germany (June 23, 2000) (on file with author); Letter from Dr. Kurt Bley, Department Head, German Ministry of Finance, to Dr. Karl Brozik, Representative in Germany, Conference on Jewish Material Claims Against Germany (July 3, 2000) (on file with author).

69. The Claims Conference negotiated for the adoption of the principles which governed property restitution in West Germany into the proposed legislation. For example, all properties sold after the enactment of the Nuremberg laws in 1935 are presumed to be forced sales, unless the sale can be shown to have been for market value. *Gesetz zur Regelung offener Vermögensfragen*, v.28.9.1990 (BGBl. II S. 889, 1159), §1, ¶6 [hereinafter *Vermögensgesetz 1990*].

70. The term "aryanized property" refers to property that was owned by Jews but which the National Socialist regime forced Jewish owners to sell to an Aryan (as defined under Nazi law), or where the property was confiscated from the Jewish owner and placed in the possession of an Aryan.

71. *Vermögensgesetz 1990*.

military legislation in the American, French and British zones—see section II above), the Claims Conference was designated under the legislation as the successor organization for unclaimed or heirless Jewish individual property and for the property of dissolved Jewish communities and organizations.⁷² These properties are sold by the Claims Conference and the proceeds distributed in accordance with the principles set out below.

C. Allocation of Funds Derived from the Designation of the Claims Conference as the “Successor Organization”

While the goal of helping Holocaust survivors remains the fundamental principle of the allocation and distribution of Claims Conference funds, the needs of Holocaust survivors have changed dramatically since the 1950s and 1960s. During the 1950s and 1960s, funding was concentrated (i) for the resettlement of Nazi victims throughout the world; (ii) in Western Europe to help displaced Jews rebuild their lives, communities and cultural institutions; and (iii) for the “relief in transit” program. Since 1995, the priority of the Claims Conference has been to provide elderly Holocaust survivors with food, shelter and basic medical needs to ensure that they are able to live the rest of their lives in dignity. Consequently, approximately 60% of the funding goes to Israel where the largest number of survivors live and significant funding goes to the Former Soviet Union, where the needs of Nazi victims are urgent and overwhelming.⁷³ Current funding priorities include old age homes, senior day centers, psychogeriatric institutions, basic food and relief programs, medical supplies and equipment and programs that provide social services such as the Jewish Family Service Agencies in the United States.⁷⁴ In addition, 20% of funds have been allocated for projects for the research, education and documentation of the Holocaust.⁷⁵ Overall, since 1995 more than \$400 million has been allocated for such welfare and cultural programs.⁷⁶

D. German Foundation Initiative: The Role of the Claims Conference

1. Negotiations

As representatives of the Jewish world, the Claims Conference actively participated in the negotiations that established the German Foundation “Remembrance, Responsibility and the Future” (known as the German Foundation). The Claims Conference met with President Rau in November 1999 concerning a declaration of moral responsibility by the German Government and industry for

72. *Vermögensgesetz 1990*, §2.1, sent. 3.

73. OVERVIEW OF ALLOCATIONS, *supra* note 28, at 2.

74. *Id.*

75. *Id.* at 6.

76. For further details of individual projects that received funding see THE CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, 1999 ANNUAL REPORT 23-38 (2000) [hereinafter ANNUAL REPORT 1999].

the morally unjustifiable use of slave labor during the Nazi regime.⁷⁷ The subsequent statement of President Rau on December 17, 1999 will be of lasting significance to German-Jewish relations.⁷⁸ Moreover, the Claims Conference vigorously advanced many of the fundamental principles of the final framework agreement: that there was an essential difference between slave and forced labor, that the payment not be based on the financial situation or country of residence of the slave or forced laborer, that the payment be paid to both those that performed slave labor for private companies and public companies, that there be no reductions in payments for those victims that had received the BEG,⁷⁹ and that payments not preclude or reduce eligibility or payments from other compensation programs or prevent the continuation of the negotiations on the Article 2 Fund "open issues" (discussed above).⁸⁰

In addition, the Claims Conference advocated that a specific portion of funds to be contributed to the German Foundation, agreed on December 17, 1999 to be DM 10 billion, should be allocated to insurance and banking claims. The final allocation of the funds was agreed on March 23, 2000, following an all night meeting in Berlin.⁸¹ In the final allocation just over 80% of the DM 10 billion was designated for payments to slave and forced laborers, 10% to insurance and banking claims, 7% to a future fund, and the remainder to administration (including lawyers fees).⁸² The necessary documents establishing the German Foundation were finalized and signed by the parties, including the Claims Conference, in Berlin on July 17, 2000.⁸³

77. See Joan Gralla, *Jewish Groups to Meet Germany's Rau on Holocaust*, REUTERS, Nov. 15, 1999.

78. President Rau stated, "I know that for many [survivors] it is not money that matters. What they want is for their suffering to be recognized as suffering and for the injustice done to them to be named injustice. I pay tribute to all those who were subjected to slave labor under German rule and in the name of the German people, beg forgiveness. We will not forget their suffering." President Johannes Rau, Remarks at the negotiations for the establishment of the German Foundation (Dec. 17, 1999), at http://www.claimscon.org/compensation_de/rau.asp (translation by author).

79. Under the BEG there was no payment for slave and forced labor. "The German Government refused to make any payment for the work performed for private German companies, or for the pain and suffering connected with such labor. There was thus a gap in the legislative program. No special recognition was accorded the fact that large numbers of human beings had been subjected to conditions of slavery." BENJAMIN FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* xvii (1979). The Claims Conference had presented to the Interior Committee of the German Parliament on June 15, 1987 a demand for compensation for Jewish slave laborers, based upon the premise that compensation for slave labor was a *lucrae* under existing German Government compensation programs. Letter from Dr. E. Katzenstein, Conference on Jewish Material Claims Against Germany, to Members of the Interior Committee of the German Parliament (June 15, 1987) (on file with author).

80. See Conference on Jewish Material Claims Against Germany, *Slave Labor Proposed Remembrance and Responsibility Fund* (June 15, 1999) (unpublished position paper, on file with author).

81. See Press Release, Treasury Deputy Secretary Stuart Eizenstat, Statement at the Conclusion of the 11th Plenary Meeting of the German Foundation Initiative (Mar. 23, 2000), http://www.state.gov/www/policy_remarks/2000/000323_eizenstat_berlin.html.

82. For the full details of the German Foundation "Remembrance, Responsibility and the Future" see <http://www.state.gov/www/regions/eur/holocaust/germanfound.html>.

83. *Id.*

Despite the fact that the majority of the negotiating committee of the Claims Conference are Holocaust survivors (affiliated with the two major organizations of Holocaust survivors in the United States and Israel), there have been, and will continue to be, criticisms of the German Foundation Agreement. For example, why are heirs generally excluded from slave labor payments? Is the sum of DM 15,000 appropriate for the degree of suffering endured by a slave laborer? The Claims Conference has faced these dilemmas before—in the 1950s, the 1980s, and again in the 1990s. However, when the Executive of the Claims Conference and Board of Directors of the Claims Conference endorsed the agreement, the Claims Conference was confident that, given the broad representation of the Claims Conference, the Claims Conference was implementing the collective consensus of not only Holocaust survivors but of the Jewish world.

2. *Distribution*

After establishment of the German Foundation, in addition to serving on the Foundation's Board of Trustees, the Claims Conference continued its historic responsibility of distributing and allocating indemnification funds and became involved in two aspects of the implementation of the German Foundation: distributing individual payments to former Jewish slave and forced laborers; and administering the Banking Humanitarian Fund. First, the Claims Conference was designated as the partner organization responsible for the distribution of payments to an estimated 160,000 eligible former Jewish slave and forced laborers worldwide, except those residing in the Czech Republic, Poland and the Former Soviet Union.⁸⁴

Second, the Claims Conference was designated to administer the Banking Humanitarian Fund. The banking component of the German Foundation consists of two sub-components. The sum of DM 200 million was allocated for the payment of specific individual banking-property claims to victims and their heirs to be administered by an independent panel.⁸⁵ A further sum of DM 276 million was allocated to Jewish victims of the Holocaust through the Banking Humanitarian Fund in recognition of the role and responsibility of German banks in the aryanization of Jewish property.⁸⁶ German banks were actively involved in and profited from the systematic aryanization of Jewish property throughout occupied Europe.⁸⁷ Overwhelmingly, the Jewish victims in Nazi-occupied Europe perished. In addition, although it can be surmised that the majority of victims of Nazi persecution alive today most likely have a claim against

84. Law Establishing the German Foundation "Remembrance, Responsibility and the Future", §9.2.7 (July 6, 2000), <http://www.state.gov/www/regions/eur/holocaust/foundationlaw.pdf> (translation by U.S. Dept. of State) [hereinafter *The German Foundation Law*].

85. *The German Foundation Law*, §§9.4.1 and 2.

86. *The German Foundation Law*, §9.4. A total of DM 300 million is allocated for the Banking Humanitarian Fund of which DM 24 million will be used for social projects to assist Roma and Sinti survivors.

87. See OFFICE OF MILITARY GOV'T FOR F.R.G. (U.S.), FINANCIAL DIVISION, FINANCIAL INVESTIGATIONS SECTION, REPORT ON THE INVESTIGATION OF THE DEUTSCHE BANK 5 (1946).

the banks, due to the profits or undue enrichment that systematically accrued to the banks from the aryanization process, it will almost be impossible for the vast majority of victims to prove such a case given the lack of documentation and the age of survivors.⁸⁸ Consequently, it was agreed that a portion of the banking component of the German Foundation would form a Banking Humanitarian Fund to be administered by the Claims Conference for social projects that will assist Holocaust survivors.⁸⁹ The designation of settlement funds that will assist needy Nazi victims reflects a continuation of the allocation principles developed by the Claims Conference following the Luxembourg Agreements.

E. Austria

During the negotiation of the Luxembourg Agreements, the Claims Conference proposed that Jewish victims from Austria should be entitled to claim under the German indemnification and compensation laws.⁹⁰ The Federal German Republic refused to accept this proposition, arguing that Austrians had been deeply involved in executing and implementing the Nazi program against the Jews, and consequently, Austria should be responsible for former Austrian Jews⁹¹—just as Germany was accepting responsibility for compensating former German Jews (as well as stateless persons and refugees). The Claims Conference then established the Committee for Jewish Claims on Austria in January 1953 to secure compensation directly from Austria.⁹²

The subsequent discussions with the Austrian Government were extremely difficult. The Austrian Government, relying on the Moscow Declaration of the Allied Powers in 1943 that Austria was the first National Socialist victim,⁹³ denied responsibility for the implementation of the Nazi policy in Austria and refused to enact indemnification legislation.⁹⁴ Nevertheless, the Austrians established a small “*Hilfsfond*” in 1956—a fund that distributed modest humanitarian payments.⁹⁵ In 1955, the Peace Treaty with Austria included a provision whereby Austria was obligated to enact property restitution legislation.⁹⁶ After the war, seven restitution laws were enacted, but the scope and implementation of the laws resulted in property restitution that can only be described as riddled with gaps and deficiencies—especially in comparison to the measures enacted in

88. See Special Master’s Report, *In re Austrian and German Bank Holocaust Litigation*, 80 F.Supp. 2d 164 (S.D.N.Y. 2000) (Master File No. 98 Civ 3938).

89. See The German Foundation Law, §9.4.

90. SAGI, *supra* note 6, at 205.

91. *Id.*

92. HISTORY OF THE CLAIMS CONFERENCE, *supra* note 58, at 11.

93. Certain commentators assert that this declaration was passed in 1943 in order to encourage Austrian resistance to the National Socialist regime. For one example, see THE PLUNDER OF JEWISH PROPERTY DURING THE HOLOCAUST: CONFRONTING EUROPEAN HISTORY 244 (Avi Beker ed., 2001).

94. ROBERT S. WISTRICH, AUSTRIA AND THE LEGACY OF THE HOLOCAUST 19-21 (1999).

95. The *Relief Fund Law* was promulgated by the Austrian Parliament on Feb. 24, 1956 and created the Fund to Assist Political Refugees (including those Austrians persecuted due to race, religion and nationality) who had their domicile and permanent residence abroad. See SAGI, *supra* note 6, at 209.

96. State Treaty for the Reestablishment of an Independent and Democratic Austria, May 15, 1955, art. 26, 6 U.S.T. 2369.

Germany.⁹⁷ One of the few measures obtained from Austria during this period was the inclusion of former Austrian Jews born prior to 1932 in the Social Security legislation.⁹⁸

During the last few years there have been some limited developments in both the attitude and actions of Austria in this area. In July 1991 Austrian Chancellor Franz Vranitzky told Parliament, "We must also not forget that there were not a few Austrians who, in the name of the Third Reich, brought great suffering to others, who took part in persecution and crimes of this Reich. . . . Our citizens cannot distance themselves even today from a moral responsibility for these deeds."⁹⁹ In 1995, on the fiftieth anniversary of the end of the war, the Austrian government established the National Fund that made a one-time humanitarian payment of Shillings 70,000—about \$6000 in current value—to each surviving Nazi victim from Austria, including 24,000 former Austrian Jews.¹⁰⁰ Following the election of the current government in February 2000, the Claims Conference was contacted by representatives of the Schussel Government with an indication that the government was interested in distributing a supplemental humanitarian payment to former Austrian Jews.¹⁰¹ In October 2000, the Claims Conference participated in the negotiations chaired by US Deputy Treasury Secretary Eizenstat that focused on property restitution in Austria.¹⁰² The negotiations were

97. For example, the historian Helen Junz valued the wealth of Austrian Jews, based upon the 1938 Property Declarations of Austrian Jews to be approximately RM 2.5-2.9 billion. Yet the fund to compensate former Austrian Jews for mortgages, bank accounts, stocks, cash and Jewish discriminatory taxes, created in 1961 under the *Abgeltungsfondsgesetz* (Compensation Fund) was capped at \$6 Million. Helen Junz, *Report on Pre-War Wealth Position of the Jewish Population in Nazi-Occupied Countries, Germany, and Austria*, in *REPORT ON DORMANT ACCOUNTS OF VICTIMS OF NAZI PERSECUTION IN SWISS BANKS A-152* (Paul A. Volcker ed., 1999).

98. From the mid-1980s onwards, representatives of the Claims Conference traveled to Austria about a dozen times to negotiate amendments to the Social Insurance Law (*Sozialversicherung-Uberleitungsgesetz*) that would enable former Austrian Jews to apply for social security benefits. Although the Austrian Government failed to enact comprehensive indemnification legislation, as Germany had, it nevertheless agreed that former Austrian Jews could apply for a pension under the Social Insurance Law. A consequence of using this mechanism was that beneficiaries were required to contribute to the pension fund and prove that they had worked in Austria. In the initial amendment, beneficiaries were required to have been 16 years old prior to leaving Austria. As a result of the Claims Conference negotiations, this age was reduced by a series of amendments to the Social Security legislation, until the Social Security legislation ultimately included all persons born prior to Dec. 31, 1932.

99. Henry Kamm, *Looking Back and Ahead, Austria Wins 2 Points*, *N.Y. TIMES*, July 19, 1991, at A3.

100. These payments are distributed to victims of National Socialism from Austria. Of the approximately 27,000 recipients in 1995 it is estimated that about 24,000 were Jewish. For details of eligibility for the payment, see National Fund, *Our Work in the Past, Present and Future*, at <http://www.nationalfonds.parlament.gv.at/English/aufgBeschreibung.html> (last visited Nov. 20, 2001).

101. As an example of the position of the Austrian Government on this issue, on Feb. 4, 2000 Chancellor Schussel sent a letter to Gideon Taylor, Executive Vice President of the Claims Conference expressing his commitment "to look into the question of Holocaust assets" and "adopt interim measures which would benefit the surviving victims." The letter was one of the first official documents sent by the newly established government, at a time when the new Chancellor's office did not yet possess its own letterhead. Letter from Wolfgang Schussel, Chancellor, to Gideon Taylor, Executive Vice President, Conference on Jewish Material Claims Against Germany (Feb. 4, 2000) (on file with author).

102. Press Release, Stuart Eizenstat, Deputy Secretary, U.S. Dept. of the Treasury, at <http://www.usembassy-vienna.at/rest5.html> (Oct. 25, 2000) (last visited Feb. 19, 2002).

extremely difficult and again the Claims Conference realized that hard choices had to be made. The ultimate agreement reached in January 2001 was the best that could be achieved under the circumstances. The major elements consisted of (i) a one-time payment of \$7000 to former Austrian Jews alive today, to be distributed by the National Fund (but this was conditioned upon such recipients waiving their rights to claim long term apartment and business leases and the personal possessions of their families that had not been covered by Austrian restitution law), (ii) amendments to the social security legislation,¹⁰³ and (iii) a modest supplemental property restitution program of \$210 million to be administered by an independent panel. The fact that associations of former Austrian Jews in Israel and in the United States were represented on the negotiating committee of the Claims Conference assisted the Claims Conference in reaching the difficult decision to sign the agreement.¹⁰⁴

F. Swiss Bank Settlement

Pursuant to the Plan of Allocation and Distribution of Settlement Proceeds by the Special Master to the Swiss Bank Settlement Agreement, approved by Judge Korman of the Eastern District of New York on November 22, 2000, the Claims Conference will be involved in the distribution of settlement proceeds to a number of class members covered by the Swiss Bank Settlement.¹⁰⁵ Under the Plan of Allocation and Distribution, the Claims Conference will be (i) distributing a payment to Jewish victims of Nazi persecution who performed slave labor for a German entity (since the settlement released Swiss Banks from any claims from Victims or Targets of Nazi Persecution who performed slave labor for companies or entities that deposited the revenues or profits from slave labor in Swiss banks),¹⁰⁶ (ii) distributing payments to Jewish refugees denied entry to or expelled from Switzerland or mistreated in Switzerland, and (iii) recommending programs to the Court for the distribution of part of the funds allocated to the looted assets class.¹⁰⁷

103. The Claims Conference was the primary advocate for a number of amendments to the social welfare legislation and it is estimated that the additional benefits to former Austrian Jews resulting from these amendments could be over \$100 million during the lifetime of the survivors. Press Release, Stuart Eizenstat, Deputy Secretary, U.S. Dept. of the Treasury, at www.austria.org/press/238.html (Jan. 22, 2001) (last visited Feb. 25, 2002).

104. The Joint Statement signed on Jan. 17, 2001 was signed by "The Conference on Jewish Material Claims" (including the Central Committee of Jews from Austria in Israel and the American Council for Equal Compensation of Nazi victims from Austria). See Joint Settlement Statement on Holocaust Restitution (Jan. 17, 2001), <http://www.usembassy-vienna.at/final.html>.

105. There are five sub-classes under the Swiss Bank Settlement Agreement. The full text of the Settlement Agreement can be found at http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf.

106. Special Master's Proposal, *supra* note 3, at 145-47. The Special Master recommended that the Court adopt a legal presumption that, due to three distinct financial relationships between Swiss financial institutions and German slave labor entities, all former slaves for German entities should be presumed to be covered by the settlement, thereby making it unnecessary for each claimant to prove a link between the German company for which the slave labor was performed and a Swiss Bank.

107. Special Master's Proposal, *supra* note 3, at 1-38.

The Swiss Bank Settlement covers those Victims or Targets of Nazi Persecution whose assets were stolen, expropriated, aryanized or confiscated by or at the instigation of the Nazi regime and whose property was sent through Switzerland or Swiss entities. This group is known as the “looted asset” class of the settlement. The court-appointed Special Master recommended that neither a claims resolution procedure nor pro rata payments be used to compensate this class of beneficiaries as these options could deplete the settlement fund with little, if any, noticeable benefits to class members (since individual payments could be small, due to the large number of potential beneficiaries, with large associated administrative costs).¹⁰⁸ The Special Master recommended that in dealing with this class of beneficiaries, the settlement should, *inter alia*, support programs designed to benefit the neediest of Holocaust survivors. The recommendation of the Special Master was based on both the decision of the Court of Appeals in the Agent Orange case (that utilized the *cy pres* doctrine to target those veterans most in need of assistance) and the historic precedent of directing bulk settlement of Holocaust-related claims to the neediest of Nazi victims¹⁰⁹—as described in sections IV (1) and VI (3) above.

G. *International Commission of Holocaust Era Insurance Claims*

In August 1998, the Claims Conference was one of the founding members of the International Commission of Holocaust Era Insurance Claims—chaired by former U.S. Secretary of State, Lawrence Eagleburger.¹¹⁰ The other members of the commission, created to establish a just process to address expeditiously the issue of unpaid insurance policies issued to victims of the Holocaust, include the National Association of United States Insurance Commissioners, several European Insurance Companies (Generali of Italy, Allianz of Germany, AXA of France and Zurich and Winterthur of Switzerland), representatives of the World Jewish Restitution Organization, and the State of Israel.¹¹¹ The Claims Conference is involved in negotiating the principles of the payment of

108. *Id.* at 114.

109. *Id.* at 116. The Proposal illustrates the reliance on current legal doctrine and the history of restitution policy. The Special Master quoted the Agent Orange Special Master Report: “The Fund is not large enough to provide meaningful cash compensation to all claimants, but tangible monetary benefits can be targeted to those veterans who are most severely disabled and thus in need of assistance.”

The Holocaust Victim Assets Special Master then noted:

There is also historic precedent for this recommendation. ‘Bulk’ settlement of Holocaust-related compensation claims with payments from the resulting settlement funds directed primarily to the needy dates back to the immediate post-War period, when successor organizations in the United States, British and French military zones utilized the proceeds of sales of apparently heirless or unclaimed property to resettle and rehabilitate survivors, including thousands remaining in ‘displaced persons’ camps.

Id. at 116-17 n.344.

110. Stuart E. Eizenstat, *The Need for Others to Join the International Commission on Holocaust Era Insurance Claims*, in PROCEEDINGS OF THE WASHINGTON CONFERENCE ON HOLOCAUST ERA ASSETS 427-28 (1998), available at <http://www.state.gov/wwwregions/eur/holocaust/heac3.pdf>.

111. See Memorandum of Understanding from the International Commission on Holocaust-Era Insurance Claims, in PROCEEDINGS OF THE WASHINGTON CONFERENCE ON HOLOCAUST ERA ASSETS 1043-48 (1998).

claims (valuation, standards of proof, independent appeals, and audit to ensure verification), publication of lists, and outreach.

It is relevant to note that the Memorandum of Understanding establishing the International Commission of Holocaust Era Insurance Claims created a general Humanitarian Fund for the benefit of needy victims of the Holocaust and other Holocaust-related humanitarian purposes. The memorandum stated explicitly that this provision represents the category of "heirless claims," i.e. unpaid policies issued by companies to Holocaust victims for which there is no living beneficiary or other living person entitled to receive the proceeds.¹¹² The establishment of this humanitarian fund followed the principles that were established immediately after the war: namely, (i) that assets for which there was no heir should be returned to the Jewish people (see U.S. Military Government Law No. 59); and (ii) that general settlement funds (from heirless property) should be directed primarily towards needy Nazi victims.

Despite the passage of fifty years, the legal principles and principles of allocation of funds that were established in the immediate post-war period remain the foundation of restitution and compensation programs and the distribution and allocation of funds.

This final chapter of Holocaust restitution has not been straightforward: difficult decisions and compromises have had to be made, especially given the age of the survivors and the imperative of delivering relief during the lifetime of the victims. The Claims Conference has and continues to assert that these payments and compensation programs are merely symbolic token payments that can only lead to a measure of justice for the survivors of the greatest crime known to humanity.

VII. CONCLUSION

The speech on which this article is based was presented on the Jewish festival of Purim, during which the Jewish people celebrate the failure of an attempt to physically destroy us during the time of the Persians. As a people, we have a long collective memory. However, on Purim we not only read the story of the victory during Persian times, but Jewish law also commands us to have a festive meal, donate to charity, and give gifts to friends. In doing so, we celebrate "life." It is appropriate, then, to conclude by noting that the enduring impact of the Claims Conference will be twofold: it will not only ensure, as a matter of justice, that the murderers and looters are unable to profit from their deeds; it will also be remembered for and judged by its ability to assist those Nazi victims to live a dignified life and to enrich the Jewish cultural and religious life that Hitler attempted to destroy.

112. *Id.* at §8(B).

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Restitution Negotiations— The Role of Diplomacy

Remarks By
H.E. Peter Moser*

Ladies and Gentlemen,

This symposium, *Fifty Years in the Making: World War II Reparation and Restitution Claims*, is a welcome opportunity to examine and assess the topic from an academic distance and free from partisan approaches. To look into the issues of reparations and restitutions from a mere legal point of view could be misleading and obscure one's view. Aspects of civil, criminal and international law, as well as human rights, are mixed together with economics, history and international and public relations, and all of them are subject to the eternal moral question: What is justice, what is a fair retribution?

It is thus significant and should not come as a surprise that solutions were considered and finally achieved with the instruments of diplomacy in a multidisciplinary effort. Isolated lawsuits or bilateral government to government negotiations, carried out without considering economic, social, historic, and, above all, human aspects and their interactions could not and cannot bring lasting results.

The recent agreement on restitutions, signed by Austria, the United States, representatives of the claimants, and individual lawyers on January 17, 2001 in Washington, D.C., together with the previous agreement of October 24, 2000 on Slave and Forced Labor, is a good example, and can serve as a case study of how multilayered the whole issue is.

The language of the "Exchange of Notes Between the Austrian Federal Government and the Government of the United States of America," as well as the introductory provisions of the "Joint Statement," embrace all the historic and legal aspects of Austria's past, and her efforts toward restitution measures after World War II.

To fully understand the bearing and importance of the January 17 agreement, one should examine its various elements. I shall briefly endeavor to guide you through this maze without creating too much confusion. I begin with historic facts and their legal consequences as far as reparations, slave and forced labor, and restitutions are concerned.

- Austria became part of Germany in March of 1938 through an act of aggression and violation of international law and of various bilateral and

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multilateral agreements. Germany was eager to create the appearance of legality, but it is a fact that the so-called *Anschluss* was also in violation of Austrian constitutional law.

- The international community, which in the beginning was stunned and accepted the incorporation of Austria into the German Reich, soon changed its attitude. Churchill declared already in 1940, and Roosevelt and Stalin followed suit in 1941, that it was one of their aims to liberate Austria, long before the Moscow Declaration in November 1943 stipulated this goal formally.
- After 1945 Austria thus was treated as a liberated, and not an enemy country. However, the Moscow Declaration stipulated Austria's responsibility for atrocities perpetrated by her citizens until 1945. Indeed, there is no distinction between Austrian and German individuals in this aspect, and Austria as well as Germany have carried out their respective de-nazification measures after the end of World War II.

As a consequence of the Allied Powers' policy that Austria was liberated, reparations were not demanded. (Art. 21 of the State Treaty 1955). Reparations in general are payments and compensations for violations of international law . . . are part of Peace Treaties between victors and defeated countries.

Slave and forced labor of civilians of an occupied country has been a violation of international law since the Hague Convention of 1907 (Art. 52). At the time of the Austrian State Treaty, the question of slave and forced labor was not discussed, as most of the victims had returned behind the Iron Curtain and could not be reached. The Soviet Union did not show interest in pursuing their claims due to obvious reasons.

Since Austria was treated as a liberated country and had not been able to act on her own between 1938 and 1945, the international community did not hold it responsible for the deportation of foreign civilians and their exploitation as enslaved and forced laborers. Yet, Austria has now agreed to establish a fund to compensate surviving foreign laborers who had been forced to work on the territory of today's Austria.

Here we have the first example of the fact that a single-discipline approach to a problem—in this case the strict application of international law—leads nowhere. More than 50 years have passed since the deportation of enslaved and forced laborers. Whereas Austria obtained its freedom from occupation by the Allied Powers in 1955 in the State Treaty, which explicitly states that Austria does not have to pay reparations, no peace treaty was ever concluded with Germany and the question of compensation for slave and forced labor thus was never dealt with. It took the lifting of the Iron Curtain, the reunification of both Germanies, and the substitution of the Soviet Union by independent successor states open to democracy to focus on the question of slave and forced labor.

Much has changed since 1955 inside Austria as well. Whereas immediately after WW II the Moscow Declaration of 1943 and Austria's role as a first victim of Hitler's aggression made nation building a matter of utmost and vital

importance for Austria, today's Austria, self-assured as a nation of its own, was looking at the question of slave and forced labor not with cold legal logic, but rather with an acceptance of a moral obligation to people who in many cases had been victimized a second time through communist rule. Some of the former communist countries, where most slave laborers presently live, will join the European Union sooner or later, and thus come even closer to Austria.

Nevertheless, the agreements with the East European nations and the United States, as well as the Austrian Federal Law carrying out those compensation payments, make it clear that, due to the existence of Act 21 of the State Treaty, no claim can be levied successfully against the Republic of Austria. The payments are therefore of a voluntary nature.

The explanation of Austria's readiness would, however, be incomplete without giving credit to another aspect which had an important impact—the role of American law which by its nature knows different and much wider-reaching possibilities than European tort laws. Class action suits, malpractice and product liability suits are carried out in a quite different way in the United States than they are in Europe. Law in Europe was historically handed down to the citizens by the top authorities: emperors, kings and other rulers. Whereas the sovereign—today the people—hands down the law to society, courts simply interpret and execute the laws; they do not create them. Here in the United States, however, you do not only have the tradition of common and case law, but law originates historically from the consensus of basically equal and free citizens. The role of courts and judges more often than in Europe is that of an arbiter who brings about settlements, rather than hands out verdicts. The cultural approach towards lawsuits is also different in the United States and in Europe, where everyone is still a bit afraid of the authorities and courts. Whereas European tradition is one of regulation, yours is one of litigation. To be sued in Europe still evokes a certain bad feeling as if one's honor is at stake. This is even more true in the Far East. In the United States, however, lawsuits are handled more businesslike and matter-of-factly.

With intensified business and economic links with the United States, private European enterprises, banks, and other entities are more exposed than ever before to lawsuits in the United States. This is even true when a business transaction with the United States is carried out by state owned enterprises, since in such cases states and governments cannot claim immunity from jurisdiction.

The prospect of lingering and costly lawsuits with clashes of European and American standards (such as: questions of forum shopping; questions regarding which law governs a case; different statutes of limitations; differences regarding the appointment of judges; a different role for juries; different ceilings for indemnities and—last but not least—different rules for the reimbursement of lawyers) have enhanced, or, if you will, created, the basis for the readiness of European banks and enterprises to enter into settlement negotiations in the United States. Nevertheless, absent the United States government's decision to participate in the negotiations as a moderator, enhancer and party, no result would have been achieved. The engagement of the United States government to

bring an enduring legal peace by “certifying” the results of the negotiations as being fair and adequate was the bridge that closed the gap between diverging and sometimes emotionally exacerbated arguments. Only through this mix of legal agreements, considerations of historic facts, negotiations of acceptable amounts, and political and intra-cultural sensibility, can one understand and appreciate what has been achieved. For example, in the case of slave and forced labor, both the Republic of Austria and Austrian businesses pay equal shares into a common fund.

The question of restitution for stolen Jewish property was dealt with by separate negotiations. The comments I made before regarding compensation for slave and forced labor also hold true for restitutions. However, what made the settlement more difficult and remarkable were the more complicated background, the more intense emotions, the higher degree of moral shame and responsibility on the Austrian side, as well as the greater influence of public opinion which has been mobilized sometimes to a degree of exaggeration and unfairness on both sides of the Atlantic.

From a strictly legal standpoint, Austria had already fulfilled her obligations by adopting restitution laws and by setting up funds under the provisions of the State Treaty. This has been acknowledged by the United States and the Claims Conference in 1961. It was clear to both sides, however, that there had been gaps and shortcomings which were regarded as negligible then, but which had to be remedied with growing insight and growing awareness, including among nations that had not been perpetrators of Nazi crimes themselves, but had in some way benefited from Nazi expropriations. This feeling of necessary reassessment grew with the determination of the second and third generations of victims who pursued these deficiencies with even deeper emotions than the generation of their parents. Historic commissions had been set up in various countries including the United States, France, the Netherlands and, of course, in Austria to examine these deficiencies in detail. One result of these efforts was an educative and healing process for all parties involved.

In Austria for instance, the process of understanding what had happened two generations ago—also at the hands of Austrian perpetrators—had never faded, but has receded gradually in the public memory. Now it became known what had been left out in the past, but also what Austria had done as a reborn state since 1945 to make restitutions and compensations with her then-limited resources. We should not forget that Austria was at the time one of the main recipients and beneficiaries of urgently needed help under the Marshall Plan. Austria’s past efforts, therefore, deserve credit, and should not be belittled and vilified.

What had been lacking in the past, apart from closing some obvious gaps, was general sensitivity for the true victims of the Nazi atrocities. The suffering from the war and struggle for reconstruction and independence was accompanied by a mostly legalistic approach in dealing with the atrocities and looting of properties on a case by case basis. The multilayered complexity which I noted

earlier was neglected. As a result, the society at large did not develop a general attitude of seeking atonement of what had been done to the Jews.

The legal and historic truth that the Republic of Austria had lost her independence in 1938 when Austria fell victim to Nazi Germany, a truth which had to be stressed again and again to remind the Allied Powers to live up to their promises to liberate Austria did not help to bring about such insights and sincere compassion among the public at large.

The agreement of January 17, 2001 is able to remedy this deficiency. It compensates for loss and damage to leased apartments and household goods, expands existing pension rights, and includes insurance claims and makes allowances for the restitution in kind of properties which have not been returned yet. The respective Austrian Federal Law was adopted unanimously by all political parties in the Austrian parliament. As in the case of compensation for slave and forced labor, the funds come from the Austrian Government as well as Austrian businesses. Enduring legal closure is also part of the agreement since the US administration has agreed to provide Austria with the best possible protection against further claims.

“Niemals vergessen”—never forget—is the most important lesson to be learned from the past. But never forget should not mean never forgive. Forgiveness and reconciliation are the ultimate goals to which we all should aspire. These goals transcend legal questions and claims.

I can tell you from my experience in the short time since January 17, 2001 that I feel relieved, and free to reach out to the Jewish communities in a far better way than before. When I point out what Austria has done and explain, for example, that Austria has continuously had a working Holocaust education program for almost 30 years, I no longer receive rejection and reproach that my stories are nothing else but fig leaves for restitution payments that are long overdue. The results of the January 17, 2001 agreement are the basis for a lasting reconciliation and a better future. The earlier settlements may have been an illusion. Let us work together so that the recent ones live up to our expectations.

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Confronting the Nazi Past at the End of the 20th Century: The Austrian Model[†]

By
Eric Rosand*

During the past two years, the United States Government facilitated discussions among foreign governments, multinational companies and representatives of Holocaust survivors and their heirs to establish humanitarian foundations that would make payments to certain of those who suffered at the hands of the Nazi regime and private companies during the Nazi era. Agreements have been reached with Germany, France, and Austria. While much attention was paid to the eighteen-month effort to establish the German Foundation “Remembrance, Responsibility, and the Future,” relatively little was given to the negotiations that led to the agreements with Austria.

These agreements will lead to the distribution of more than \$800 million to Nazi era victims and their heirs through the establishment of two different funds: the “General Settlement Fund” and the Austrian Fund: “Reconciliation, Peace and Cooperation.”¹ The latter will provide some \$400 million to Nazi era forced and slave laborers who worked on the territory of present day Austria, while the General Settlement Fund will provide approximately \$360 million to those who suffered losses or damages to property and, in appropriate circumstances, *in rem* restitution of publicly-owned property that was confiscated or “aryanized.”² The General Settlement Fund also calls for the amendment of Austrian social

† Delivered on March 9, 2001 at the Stefan A. Riesenfeld Symposium “Fifty Years in the Making: World War II Reparation and Restitution Claims.”

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1. Exchange of Notes Constituting an Agreement between the Government of the United States of America and the Austrian Federal Government, Jan. 23, 2001, Annex A, paras. 1, 2, *available at* http://www.usembassy-vienna.at/annex_a.html [hereinafter Exchange of Notes]; Agreement between the Government of the United States of America and the Austrian Federal Government concerning the Austrian Fund “Reconciliation, Peace and Cooperation,” Oct. 24, 2000, *available at* http://www.usembassy-vienna.at/rest_usfinal.html [hereinafter Agreement]; Joint Statement on the Occasion of the Signing Ceremony of the Bilateral Agreements Relating to the Austrian Reconciliation Fund, Oct. 24, 2000, para. 4(d), *available at* http://www.usembassy-vienna.at/rest_joint_statement.html [hereinafter Labor Joint Statement].

2. Exchange of Notes, *supra* note 1, paras. 1, 2.

benefits laws in order to provide an additional \$112 million in benefits to Holocaust survivors.³

With the negotiations now concluded, scholars and commentators will likely focus on the results, that is, the agreements and the benefits that will be made available to Holocaust victims and their heirs. Perhaps the most interesting aspect of this whole process, however, were the negotiations themselves. Conducted during the height of the Haider-phenomenon in Austria, both the current political situation in Austria and Austria's piecemeal post-war efforts to deal with its Nazi past shaped the structure and content of the negotiations. In addition, because Austria never achieved Germany's status as a state that atoned for its Nazi past, it was hoping to use successful resolution of these Nazi era issues as a means toward gaining a certain legitimacy on the international stage.

It is in this context that I will discuss some of the contentious issues that arose during the negotiations and the ways they were resolved, to the extent that they ever were.

* * *

In February 2000, Austrian Chancellor Wolfgang Schuessel announced his intention to establish an Austrian fund to make payments to some 150,000 surviving victims of the Nazi era. Over 80% of these survivors, now residing in Central and Eastern Europe, had performed forced or slave labor on present-day Austrian territory during the war.⁴ While Austria had already enacted a number of laws to provide restitution to victims of the Holocaust, this group of victims, as in Germany, had never received any compensation for their labor.⁵

A number of factors influenced Austria's decision to move promptly to establish this fund. First, the Austrian Historical Commission had recently published an interim report on forced and slave labor. This report highlighted the failure of the Austrian government and businesses to accept responsibility for and provide compensation to former Nazi era slave laborers.⁶ Second, through the then ongoing negotiations of the German Foundation, which would provide dignified payments to, among others, those who worked as forced or slave laborers during the Nazi era, Germany and German companies were acknowledging moral responsibility for these horrors.⁷ Thus, the public would soon be expecting Austria and Austrian companies to do the same. Third, Austria wanted to strengthen relations with its Central and East European neighbors who would

3. *Id.* at para. 4.

4. See Republic of Austria Historical Commission, "Work Programme," available at http://www.historikerkommission.gv.at/english_home.html [hereinafter Work Programme].

5. *Id.* See also Martin Eichtinger, *The Reconciliation Fund: Austria's Payments to Former Slave and Forced Laborers of the National Socialists Regime 2-5* (Harold F. Radday trans.) (2001) (unpublished manuscript on file with the Berkeley Journal of International Law) (describing unsuccessful efforts to secure compensation for former laborers) [hereinafter Eichtinger].

6. Eichtinger, *supra* note 5, at 6 (quoting Chancellor Schuessel's government's declaration).

7. These negotiations culminated in the establishment of the German Foundation, "Reconciliation, Responsibility and the Future." See Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation, "Remembrance, Responsibility and the Future," Feb. 16, 1999, available at <http://www.usembassy.de/policy/holocaust/agreement.htm> [hereinafter German Foundation Law].

soon become members of the European Union ("EU"). Such a fund would largely benefit current citizens of these countries.

Beyond these factors, the Austrians had another immediate and practical motivation to establish the fund. A number of class action lawsuits had recently been filed against Austria and Austrian companies in United States courts asserting Nazi era claims.⁸ The Austrian Government and companies were eager for the forced and slave labor claims to be dismissed as quickly as possible and recognized that to do so would require establishing an appropriate alternative remedy.

The Austrians sought to adopt the general approach that the German Government and companies followed in their own negotiations. Austria and Austrian companies proposed to contribute a capped sum to a fund, which would distribute the money to various partner organizations. These organizations would then make per capita payments to certain Nazi era victims.⁹ In return, Austria and Austrian companies demanded what is often referred to in the agreement texts as "legal peace," that is, an end to litigation in U.S. courts.¹⁰ Plaintiffs' attorneys who had filed forced and slave labor lawsuits against Austria and Austrian companies would agree to dismiss the lawsuits, while the United States would file Statements of Interest in all pending and future cases, indicating its foreign policy support for the Austrian fund as the exclusive remedy for such claims.

The structure of the labor fund was largely modeled on the forced and slave labor component of the German Foundation. The Austrians adopted payment levels for individual slave and forced laborers similar to those adopted by the German Foundation.¹¹ They also adopted similar distribution mechanisms, using already established organizations in Central and Eastern Europe to distribute the funds to individual victims.

Unlike the German approach, however, which was to address *all* potential Nazi era claims against Germany and German companies under one foundation, the Austrians insisted on initially addressing only those related to labor. For a number of reasons, there appeared to be limited public support in Austria to follow the German model and proceed with a single, comprehensive fund. First, in contrast to the labor issues, the Austrian Historical Commission had not yet prepared a report illuminating the property-related injustices of the Nazi era and the failure of Austria to adequately compensate these injustices. Second, in contrast to forced and slave labor, where it was accepted that those victims had never been compensated, Austria had provided some compensation or restitution for property-related losses.¹² Third, unlike the labor fund, where the vast major-

8. *Gutwillig v. Steyr-Daimler-Puch*, No. CV98-6336 (E.D.N.Y. filed Oct. 16, 1998).

9. *Eichtinger*, *supra* note 5, at 19, 28.

10. *Agreement*, *supra* note 1, at art. 3(1).

11. Under the Austrian labor fund, slave laborers and forced laborers will each receive the equivalent of ATS 105,000 and ATS 35,000 respectively. *Agreement*, *supra* note 1, at Annex A, para. 4; *German Foundation Law*, *supra* note 7, at para. 9(1).

12. *See* *Survey of Past Austrian Measures of Restitution, Compensation and Social Welfare for Victims of National Socialism*, Oct. 2000, sec. 2, para. 1, available at <http://www.bmaa.gv.at>

ity of benefits would go to non-Jewish Central and Eastern European victims, who had generally never received any payments for their suffering, the vast majority of the beneficiaries of a property fund would be Jewish victims and their heirs, some of whom had already received such payments.¹³ In 1995, Austria established the Austrian National Fund, which made payments to many of the same Jewish victims who would stand to benefit from a property fund.¹⁴ It did not matter that those payments were not for property-related losses.

Thus, Austria agreed to commence negotiations on a companion property fund only after it realized that many of the victims' groups would support the labor fund and dismiss their labor-related claims, and under the condition that property issues be addressed in an expedited fashion, i.e., by the summer of 2000.¹⁵

Two significant issues arose during the labor negotiations that threatened to derail the whole process. Both related to the victims' representatives' insistence that Austria acknowledge moral responsibility for the totality of the wrongs committed during the Nazi era on present-day Austrian territory. The first issue concerned the treatment of slave laborers. The second, as already noted, concerned obtaining sufficient assurances from the Austrian government that it would not neglect the remaining Nazi era issues, such as those related to property.

With respect to the treatment of slave laborers, the Austrian government did not want the labor fund to make payments to slave laborers who worked on the territory of present-day Austria. It argued that under the terms of the German Foundation Law that was being drafted (and was subsequently passed by the German Bundestag), those eligible included persons who were held in a concentration camp as defined in the German Indemnification Law.¹⁶ This included camps on the territory of what is now the Republic of Austria, for example Mathausen, its sub-camps, and certain Dachau sub-camps. Therefore, the

[oesterreich/restitution/past_measures.html.en](http://www.austro.org/victims.html) [hereinafter Past Measures]. It is worth noting that the Austrian Ministry of Foreign Affairs' compilation of all of Austria's legislative efforts to provide compensation or restitution to victims of the Nazi era does not include any mention of compensation for victims of forced or slave labor.

13. Since Jewish residents were the primary victims of the "aryanization" (which by definition involves the taking of Jewish property) campaign, it stands to figure that they would be the largest beneficiaries from any property fund designed to address such takings. Eichtinger, *supra* note 5, at 8; Work Programme, *supra* note 4.

14. The National Fund provides benefits to people who were persecuted by the National Socialist regime on the basis of race, religion, national origin, sexual orientation, politics, physical or mental handicap, asocial behavior, or who in other ways became victims of National Socialist wrongdoing, or who left the country to avoid such persecution. The Fund made lump sum payments to victims in amounts between ATS 70,000 and ATS 210,000. BG über den Nationalfonds der Republik Österreich für Opfer des Nationalsozialismus BGBl 432/1995. See also Victims of the National Socialist Terror in Austria, available at <http://www.austro.org/victims.html>.

15. Bericht und Antrag des Verfassungsausschusses betreffend den Entwurf eines Bundesgesetzes über die Einrichtung eines Allgemeinen Entschädigungsfonds für Opfer des Nationalsozialismus und über Restitutionsmassnahmen, Beilagen zu den stenographischen Protokollen des Nationalrates 476/2001, available at <http://www.parlinkom.gov.at/pd/pn/XXI/1/texte/004/100476.doc>.

16. German Foundation Law, *supra* note 7, at para. 11(1); See also Eichtinger, *supra* note 5, at 13.

Austrian government argued, the primary responsibility for paying these slave laborers should rest with the German Foundation, rather than the Austrian Reconciliation Fund. A number of victims' representatives in the negotiations, however, insisted that Austrian, rather than German, companies bore responsibility for these victims, since it was Austrian, and not German, companies that benefited from the work of this group of laborers.¹⁷ They refused to support an agreement unless the Austrian side in some way acknowledged this responsibility.

Thus, the negotiators were faced with a practical problem: how to obtain the support of all the victims' representatives, i.e., Claims Conference and the plaintiffs' lawyers, without Austria having to pay slave laborers covered under the German Foundation, but who worked on present-day Austrian territory. The Austrian side was only prepared to contribute six billion Austrian schillings to the labor fund and this amount was not sufficient to pay this group as well as those forced laborers from Central and Eastern Europe.¹⁸ Fortunately, a last-minute compromise was reached. The Austrians agreed to provide \$15 million to the Conference on Jewish Material Claims for, among other things, "payments for Jewish slave laborers, including former slave laborers of concentration camps, which the National Socialist regime had established on the territory of the present-day Republic of Austria."¹⁹ These funds were to be used, *inter alia*, to complement German Foundation funds to ensure that all such slave laborers received the full DM 15,000 provided for under the German Foundation law.²⁰

For different reasons, both the class action attorneys and the Jewish organizations insisted that Austria make certain commitments on the property side of the equation before they would agree to support the labor deal. The class action lawyers had filed a number of cases, which included both labor and property claims.²¹ The Austrians wanted the plaintiffs' attorneys to bifurcate their claims, and dismiss those related to labor, before any payments would be made by the labor fund. The plaintiffs' attorneys, however, would only agree to take such steps if Austria agreed to address property issues on an expedited, albeit separate track.²² They knew they could use their labor claims as leverage against an Austrian side that was most anxious to dispose of those claims.

For the Jewish organizations, the basis for controversy over the labor fund was simple. The labor fund would benefit mostly non-Jewish victims, whereas a property fund, if established, would largely benefit Jewish ones. As Chancellor Schuessel's Government was "reaffirming [its] commitment to a self-critical

17. Author Eric Rosand was intimately involved in the negotiations described. Many of the factual assertions in this article are based upon conversations Rosand had with the various participants in the negotiations.

18. Labor Joint Statement, *supra* note 1, at para. 4(d).

19. Letter from Dr. Maria Schaumayer, Special Representative of the Austrian Federal Government, to Stuart E. Eizenstat, Deputy Secretary of the U.S. Treasury (Oct. 24, 2000) (on file with the Berkeley Journal of International Law).

20. Interview with Gideon Taylor, Executive Director of the Claims Conference (October 2000).

21. See, e.g., Kluge v. Raiffeisen, No. CV-2851 (S.D.N.Y. filed Apr. 13, 2000).

22. Rosand, *supra* note 17.

scrutiny of the National Socialist past” and acknowledging its moral responsibility for what took place during the Nazi era, these groups did not want to allow Austria to ignore Jewish victims, particularly given the presence of Haider’s nationalistic Freedom Party in the government.²³ Moreover, with Holocaust survivors dying at a rate of 12% a year, these organizations insisted that Austria not only agree to address property issues, but make an immediate contribution to a property fund, which could be distributed on an expedited basis to each Holocaust survivor living in or originating from Austria.²⁴ It was generally agreed that nearly all such Holocaust survivors had lived in apartments in or around Vienna under long-term leases. These leases were confiscated by the Nazis and the Austrians had never provided restitution or compensation for these seizures, despite their apparent treaty obligation to do so.²⁵ Thus, both the victims’ and Austrian representatives agreed that this initial \$150 million payment could be viewed as final “compensation” for these losses.²⁶

Because of the close relationship between the members of the Claims Conference and a number of the class action attorneys, some attorneys would not agree to dismiss their labor claims absent Claims Conference support for the labor deal. For its part, as was the case in the German negotiations, the United States was only prepared to support the deal if there was broad-based support from the victims’ representatives.²⁷ Thus, it became quite clear to all those involved that the deal would not be completed without an Austrian commitment to move on property issues.

While this issue was repeatedly discussed during the first six months of the negotiations, it was not until October 2000, the seventh and final month, that it was finally resolved. The United States and Austrian Governments, as well as the class action lawyers, the Claims Conference, and the Austrian Jewish Community, reached agreement on the text of a political document titled the “Framework Concerning Austrian Negotiations Regarding Austrian Nazi Era Property/Aryanization Issues.”²⁸ Here, all participants agreed to support the labor deal and the prompt dismissal of all labor claims in U.S. courts.²⁹ In return, Austria agreed to make a \$150 million down-payment to a fund, which would be distributed on a per capita basis “to all Holocaust survivors originating from or living

23. *Id.*

24. *Id.*

25. *See, e.g.*, HOLOCAUST VICTIMS’ INFORMATION AND SUPPORT CENTER, SUMMARY OF CONFISCATED HOLOCAUST-ERA ASSETS AND AN ASSESSMENT OF SUBSEQUENT RESTITUTION OR COMPENSATION EFFORTS 23-24 (2000) (on file with the Berkeley Journal of International Law) [hereinafter Summary]; State Treaty for the Re-establishment of an Independent and Democratic Austria, May 15, 1955, art. 26(1), 217 U.N.T.S. 223, 279 [hereinafter State Treaty] (“[I]n so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13th March, 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories.”).

26. Framework Concerning Austrian Negotiations Regarding Austrian Nazi Era Property/Aryanization Issues, Oct. 6, 2000, para. 4 (on file with the Berkeley Journal of International Law) [hereinafter Framework].

27. Rosand, *supra* note 17.

28. Framework, *supra* note 26.

29. *Id.* at paras. 2, 3.

in Austria.”³⁰ At the last moment, the Austrian side insisted that this payment should constitute, for Holocaust survivors, the final compensation for the confiscation of apartment and small business leases, household property, and personal effects. Although the victims’ groups initially balked at the idea of expanding the categories of property covered by the Framework beyond apartment leases, they eventually acquiesced to this Austrian demand.³¹

Much of the stimulus for Austria’s willingness to address the apartment lease issue—and the contents of these apartments—in October 2000, was the same as that which led Austria to address labor issues earlier in the year: the Austrian Historians’ Commission was about to release a report which would highlight the losses suffered during the Nazi era. Specifically, that some 70,000 leased apartments were “aryanized” in Austria between 1938 and 1945 and that Austria failed to provide any restitution or compensation.³² In short, as with forced and slave labor, there would be ample public support in Austria for making such a payment to the victims.

In addition to the \$150 million down-payment, Austria agreed to commence negotiations on the full range of remaining property issues on the evening of October 24, 2000, the day of the signing of the labor agreement, and to make every effort to conclude them by December 31, 2000.³³ Thus, the negotiations would focus on issues such as insurance, banking, real estate, moveable property, discriminatory taxes, and liquidated businesses.³⁴

For a number of reasons, these remaining issues proved to be the most difficult to resolve. First, Austria had already passed a number of laws that provided some restitution or compensation for losses of or damage to property. Thus the negotiations focused on the adequacy of these measures, providing the victims’ representatives, long critical of Austria’s efforts to address its Nazi past, a forum for venting frustration and even anger with Austria’s incomplete restitution and compensation efforts. As was to be expected, this produced a defensive reaction from the Austrian side, which responded with an ardent defense of the adequacy of these measures.³⁵ Second, both Austria and the United States were parties to treaties that explicitly addressed Austria’s obligations to deal with Nazi era property issues.³⁶ Austria believed that these agreements supported its contention that its post-war measures, although not perfect, were approved by the Western Allies and did provide restitution or compensation for a significant number of properties looted during the Nazi era.

30. *Id.* at para. 4.

31. Thus, the final Framework includes these categories of claims. *Id.* at para. 4.

32. *See, e.g.,* Summary, *supra* note 25, at 1.

33. Framework, *supra* note 26, at para. 4.

34. *Id.*

35. Both the Austrian Foreign Ministry and the victims’ representatives produced lengthy documents supporting their positions. *See, e.g.,* AUSTRIAN MINISTRY OF FOREIGN AFFAIRS, AUSTRIA’S INTERNATIONAL LEGAL STATUS BETWEEN 1938 AND 1945 AND AUSTRIAN RESTITUTION EFFORTS, Sec. B. (Sept. 2000), available at http://www.bmaa.gv.at/oesterreich/restitution/legal_status.html.en [hereinafter Legal Status]; Past Measures, *supra* note 12; Summary, *supra* note 25.

36. State Treaty, *supra* note 25; Exchange of notes constituting an agreement relating to the settlement of certain claims under article 26 of the Austrian State Treaty of May 15, 1955, May 8 - 22, 1959, U.S. - Aus., 347 U.N.T.S. 3 [hereinafter 1959 Exchange of Notes].

In short, because the Austrian Historical Commission had not yet prepared a report on these issues, there was no “objective” source to counter the view held by many Austrians that Austria’s post-war legislation and post-war treaties had already adequately addressed these property losses and confiscations. Thus, there was little public support in Austria for moving forward with any further redress for victims of property-related damages.

With respect to Austria’s post-war restitution and compensation efforts, the participants in the negotiations engaged in heated historical debates concerning the adequacy of the laws Austria had enacted following the war.³⁷ In the Framework, the participants agreed that such measures would be fully taken into account during the subsequent property negotiations and that the negotiations would only address “the potential gaps and deficiencies” in these prior measures.³⁸ As might have been predicted, there were extreme differences of opinion between the two sides concerning the magnitude of these gaps and deficiencies.

The Austrian side focused on the text of the laws, noting that restitution or compensation had been possible, at least in theory, after the war for the vast majority of categories of confiscated or otherwise looted property.³⁹ The victims’ side, on the other hand, referred to the short period for filing claims and the lack of adequate notice provided under these laws, as well as the fact that, for the most part, they allowed only restitution in kind, making no provision for compensation where the property was liquidated or otherwise not traceable.⁴⁰ In addition, they focused on the implementation of the laws, noting, among other things, the pervasive anti-semitism in post-war Austria, which included Austrian restitution courts generally favoring the interests of the current possessors of looted property, the “aryanizers.” For example, they asserted that the courts required the victim-claimant to reimburse the “aryanizer” for the latter’s purchase price, even though the proceeds of the Nazi era forced sale had been placed in blocked accounts never accessible to the seller.⁴¹ One likely reason for the contentious debate over these issues was that each side believed the other was going to use its broad or narrow view concerning “gaps and deficiencies” to

37. Between 1946 and 1949 Austria enacted seven “Restitution Acts,” which laid down specific procedures for the return of various types of property that had been wrongfully taken from its previous owners during the Nazi era. For example, the First Restitution Act concerned the restitution of property seized by the German Reich which was administered after the war by the Republic of Austria or one of its federal states. BG uber die Ruckstellung entzogener Vermogen, die sich in Verwaltung des Bundes oder der Bundeslander befinden (Ertes Ruckstellungsgesetz) BGBl 156/1946. The Third Restitution Act was the general restitution law for the return of property wrongfully taken from its owners which had been transferred to private businesses or individuals. BG uber die Nichtigkeit von Vermogensentziehungen (Drittes Ruckstellungsgesetze) BGBl 54/1947, BGBl 148/1947. See also <http://www.bmaa.gv.at/oesterreich/restitution/rueckstellung.html> for a listing of all post-Second World War compensation and restitution legislation enacted by Austria between 1945 and 1998.

38. Framework, *supra* note 26, at para. 4.

39. Legal Status, *supra* note 35, at sec. B.

40. See Summary, *supra* note 25.

41. *Id.*

justify its high demand or low offer as a final Austrian contribution to a property fund.

Despite these sharp disagreements, a comprehensive resolution of the property issues was reached in January 2001, whereby Austria and Austrian companies agreed, among other things, to contribute an additional \$210 million to the \$150 million already pledged under the Framework.⁴² The difference of views concerning the adequacy of Austria's post-war efforts, however, was never, and probably will never be, finally resolved, given the historical and legal complexities involved. The text of the Joint Statement that accompanied the agreement, and was signed by representatives of the United States, Austria, Austrian companies, and the victims, merely recognizes that there *may* have been certain "gaps and deficiencies in the restitution and compensation" legislation, but does not specifically mention any.⁴³ As expected, once agreement was reached on the capped amount of the Austrian contribution to the property fund, Austria and Austrian companies largely deferred to the victims' representatives wishes for distribution of the funds.

As with Austria's post-war restitution and compensation legislation, the existence of language addressing these property issues in Austria's post-war treaties complicated the negotiations. Both the 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria ("State Treaty") and a subsequent 1959 Exchange of Notes between the United States and Austria ("1959 Exchange of Notes") contain provisions dealing with Austria's obligations to provide restitution or compensation for confiscated or otherwise looted property.⁴⁴

In Article 26(1) of the State Treaty, Austria undertook, "[i]n so far as such action has not already been taken," to provide restitution or compensation to those who, after March 13, 1938, had property confiscated or otherwise taken on account of the racial origin or religion of the owner.⁴⁵ As this language indicates, it was understood by all parties to the State Treaty, of which the United States was one, that the return of property to persecuted persons had already been, or would be, made according to the restitution laws passed since 1946. In addition, in the 1959 Exchange of Notes, Austria agreed to establish a Compensation Fund, which would make payments for confiscated bank accounts, securities, mortgages, money, and payment of discriminatory taxes.⁴⁶ In return, the United States agreed that it would "neither advance nor support through diplomatic channels against the Austrian Federal Government, any further [Nazi era] claims of persecutees [concerning these categories of properties, legal rights and interests] based on Article 26 of the State Treaty."⁴⁷ Thus, not only did the

42. Exchange of Notes, *supra* note 1, at paras. 1, 2.

43. Labor Joint Statement, *supra* note 1.

44. State Treaty, *supra* note 25, at art. 23; 1959 Exchange of Notes, *supra* note 36, at art. 3, sec. 1.

45. State Treaty *supra* note 25, at 279.

46. 1959 Exchange of Notes, *supra* note 36, at 9.

47. *Id.* at 22 (Diplomatic Note of May 16, 1959 from the American Ambassador to the Austrian Minister of Foreign Affairs).

United States and the other Western Allies approve of Austria's post-war restitution and compensation laws, regardless of their adequacy, but they even agreed not to present numerous categories of claims to Austria. Moreover, it appears that the United States has never formally asserted to Austria that it failed to abide by its commitments under these treaties.

As a legal matter, the treaty provisions had no impact on the property negotiations. Although the 1959 Exchange of Notes does constitute a waiver by the United States of its rights under Article 26 to support certain categories of private claims by diplomatic means, it does not affect the ability of victims to pursue their claims directly against the Austrians, for example, in U.S. courts. Moreover, it does not affect the ability of the United States to facilitate discussions between victims' representatives and the Austrians concerning the establishment of a humanitarian fund, particularly where the Austrians themselves requested the United States to assume this role.

Despite having no legal effect on the negotiations, the provisions of these treaties nevertheless did affect the negotiations in an important way. The Austrians invoked them to support their arguments concerning the adequacy of its post-war legislative efforts.⁴⁸ They frequently referred to the Allies' approval and commitment not to espouse a number of categories of property claims to support their contention that the gaps and deficiencies were not as significant as the representatives of the victims asserted. Otherwise, they argued, the Allies would not have given their approval and made such a commitment.⁴⁹ The victims' representatives responded by noting that, as the Austrian side often stated publicly, the present negotiations were focused solely on the moral, rather than the legal, responsibility of Austria and Austrian companies.⁵⁰ The magnitude of the Austrian response, the victims' representatives argued, had been inadequate acknowledgment of that responsibility and the negotiations were aimed at addressing this lacuna.

* * *

As this recounting of the recently concluded negotiations has shown, throughout the process, the Austrian Government moved forward very cautiously: first addressing labor, then apartment leases, and finally the remaining property issues. At each step in the process, the Austrian government was careful to ensure sufficient public support. This incremental approach resulted from an effort to balance the interests of two domestic political constituencies with divergent interests: the Chancellor's coalition partner, Haider's Freedom Party, which was reluctant to support any additional Austrian efforts to confront its Nazi past and those in Austria who were ashamed of their country's failure to fully address this dark chapter in its history.

48. Rosand, *supra* note 17; See also Ernst Sucharipa, *Austria's Measures of Restitution and Compensation for Holocaust Victims: Recent Negotiations and their Background* 10 (2001) (unpublished manuscript on file with the Berkeley Journal of International Law).

49. Rosand, *supra* note 17.

50. *Id.*

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The Settlement of Nazi-era Litigation Through the Executive and Judicial Branches

By
Morris A. Ratner*

Efforts to recover stolen assets and to address Nazi-era human rights violations benefited from a confluence of events beginning in the mid 1990s. Researchers of the Holocaust Museum in Washington, D.C. located recently declassified documents in the United States National Archives detailing Swiss accounts that had been in the names of Jewish victims. This produced renewed interest in the recovery of these assets. Using this new evidence, a team of the most experienced and prominent class action plaintiffs' counsel in the country filed related cases¹ in 1996 against Swiss banks, including Credit Suisse and Union Bank of Switzerland, and other Swiss entities to recover dormant bank accounts and to press human rights and other claims against the banks for their role in laundering gold and other assets taken from victims of Nazi persecution. Several of the cases also sought to force the banks to disgorge profits they obtained from the Nazi slave and forced labor program. The cases were filed in the United States District Court for the Southern District of New York, a jurisdiction which had over prior decades pioneered the use of Federal Rule of Civil Procedure 23 as a case management tool to permit the effective resolution of

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1. The original class action complaints were amended and re-filed in July 1997 as four separate actions, consolidated in the United States District Court for the Eastern District of New York under Master Docket No. 96-Civ-4849: *Sonabend, v. Union Bank of Switzerland*; *Trilling-Grotch v. Union Bank of Switzerland*; *Weisshaus v. Union Bank of Switzerland*; and *World Council of Orthodox Jewish Communities, Inc., v. Union Bank of Switzerland*. The consolidated case was captioned *In re Holocaust Victim Assets Litigation*, Master Docket No. 96-Civ-4849 (ERK) (MDG), and is referred to herein as the "*Swiss banks*" litigation.

mass claims.² As discussed in more detail below, this litigation was followed by the filing of similar class cases against German, Austrian, French and other European entities, all seeking to recover for Nazi-era misconduct.³

The credible threat of an involuntary judgment posed by the class action litigation combined with (1) intense media attention, (2) political pressure from well-situated victims' advocates,⁴ (3) the ongoing efforts of institutions such as the World Jewish Restitution Organization, and (4) mounting public support within Switzerland to face past wrongs, to produce immense pressure on the Swiss bank defendants to address their liability. These pressures, under the guidance of an engaged jurist, the Honorable Edward R. Korman, led to a \$1.25 billion settlement of the *Swiss Banks* litigation, using Fed. R. Civ. P. 23 to create multinational plaintiff classes. The settlement was historic because it was the first resolution of mass tort claims arising from Nazi-era conduct during World War II.

The same factors that produced the *Swiss Banks* Settlement, to varying degrees, facilitated the relatively prompt resolution of class action cases against German, Austrian, French and other entities that had potential liability for Nazi-era misconduct. In the German class cases, which were filed a few years after the *Swiss Banks* litigation commenced, the defendants insisted on a resolution of the litigation using the Executive Branch to reach an agreement between the governments of the United States and the Federal Republic of Germany. Most of the Austrian and French claims were resolved on a similar basis, thereby preventing substantial judicial involvement in the settlement of those cases.⁵

2. See, e.g., JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995).

3. German Nazi-era cases included cases against private companies for utilizing slave and forced labor during the Holocaust, which were consolidated in *In Re Holocaust Era German Industry, Bank and Insurance Litigation*, No. 1337, 2000 U.S. Dist. LEXIS 11650 (Aug. 4, 2000); insurance claims, consolidated into *In re Assicurazioni Generali S.P.A. Holocaust Insurance Litigation*, No. 1374, 2000 U.S. Dist. LEXIS 17853 (S.D.N.Y. 2000); and banking claims, *In re Austrian and German Bank Holocaust Litigation*, No. 98 Civ. 3938, 2001 U.S. Dist. LEXIS 15573 (S.D.N.Y. Sept. 27, 2001). Nazi-era cases against the French were limited principally to banking claims, including *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000). In total, during the period since 1996, more than 70 class action Nazi-era cases have been filed and successfully resolved, either through multinational settlements under Fed. R. Civ. P. 23, or pursuant to the Executive Agreement mechanism described herein.

4. Former United States Senator Alfonse M. D'Amato (R-NY), Chairman of the Senate Banking Committee, and then-New York City comptroller Alan Hevesy were among the political figures who most actively represented the interests of victims of Nazi persecution during the pendency of the class action cases.

5. See *An Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America Concerning the Foundation "Remembrance, Responsibility and the Future"* [hereinafter *German Agreement*], at <http://www.compensation-for-forced-labour.org>; *Agreement between the Government of the United States of America and the Government of France Concerning the Payments for Certain Losses Suffered During World War II*, at www.civ.gouv.fr/uk/information/washington01.htm; October 24, 2000 Executive Agreement between the Government of the United States and the Austrian Federal Government, at <http://www.reconciliationfund.at/en/index.htm>. The predominant use of the Executive Branch as a vehicle for achieving settlements in the Austrian and French cases had two notable exceptions. First, certain Austrian banks, including Bank Austria, that had been sued in United States District Court for the Southern District of New York before the Hon. Shirley Wohl Kram, settled on a Rule 23 class basis for \$40 million

This article addresses some of the principal differences between these two approaches from the perspective of fairness to the victims. Section I describes the Swiss settlement and the role of the United States courts in overseeing and policing the fairness of the settlement negotiations, the approval and evaluation process, and settlement implementation. Section II reviews the role of the Executive Branch in the German, Austrian, and French cases. Section III explains why victims were better protected by the Swiss model and why the Judicial Branch is best situated to guarantee the fairness of the settlement of mass human rights claims.

I.

THE SWISS MODEL: JUDICIAL OVERSIGHT OF SETTLEMENT NEGOTIATIONS AND IMPLEMENTATION, GOVERNED BY DUE PROCESS PRINCIPLES

A. *Judicial Involvement In Settlement Discussions*

Then-Undersecretary of State Stuart Eizenstat (who ultimately was appointed as Deputy Secretary of the Treasury, but who maintained his position in the Holocaust negotiations until the end of the Clinton Administration), with assistance from State and Justice Department personnel, served as a facilitator in all of the negotiations to resolve Nazi-era class action claims. In the *Swiss Banks* case, Mr. Eizenstat facilitated initial settlement discussions between the court-appointed Plaintiffs' Executive Committee (all of whom later became court-appointed Settlement Class Counsel) and Counsel for the defendant Swiss Banks, represented by U.S. Attorney Roger Witten from Wilmer, Cutler & Pickering.⁶

The Swiss settlement discussions, mediated informally by Mr. Eizenstat, terminated in June 1998 when the Swiss Banks declared they would pay only \$600 million USD to resolve the litigation and declared that they would not negotiate above that amount.⁷ Plaintiffs' Counsel, including, among others, Melvyn I. Weiss of Milberg Weiss Bershad Hynes & Lerach LLP, succeeded in creating a consensus among themselves and, as importantly, among other victims' advocates in support of a settlement of no less than \$1 billion USD.

Judge Korman actively monitored the litigation from the outset, appointing the Executive Committee of Plaintiffs' Counsel to manage the case, and regularly meeting with the parties on procedural and other issues. Judge Korman

USD. See, e.g., *In re Austrian and German Holocaust Litigation*, 80 F. Supp. 2d 164, 180 (S.D.N.Y. 2000), *aff'd. sub nom.*; *D'Amato v. Deutsche Bank*, 236 F.3d. 78, 87 (2d Cir. 2001). Two non-French banks—Barclays and J.P. Morgan—which had French offices in Paris during the Holocaust, also entered into small Rule 23 settlements in Nazi-era class cases against French banks in *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) and *Mayer v. Banque Paribas*, California State Court Civil Action No. 302226, in San Francisco County. (Collectively, these cases are referred to herein as the *French Banks* litigation.)

6. Mr. Witten, who was subsequently retained to represent the "German Economy" in discussions regarding settlement of Nazi-era claims against German entities, was among the most forceful advocates of minimizing the role of the judicial branch in the German negotiations.

7. The author participated extensively in the settlement negotiations.

and Magistrate Judge Marilyn Go⁸ demonstrated a willingness to grapple with the complex issues raised by the case, and were not overwhelmed by the sheer volume of paper the defendants filed seeking dismissal. In May 1997 defendants filed a motion to dismiss the *Swiss Banks* complaint, or, in the alternative, for a stay. The motions, supported by expert affidavits, argued that the action should be dismissed because plaintiffs allegedly failed to state claims under Swiss and international law, failed to join indispensable parties, lacked personal and subject matter jurisdiction, and lacked standing.⁹ The court heard a lengthy argument on defendants' motions on July 31, 1997. At argument, the court voiced concerns about the viability of certain causes of action, and identified several additional legal issues that the parties subsequently addressed in post-hearing memoranda.¹⁰ Burt Neuborne, the John Norton Pomeroy Professor of Law at New York University and an active member of the Plaintiffs' Executive Committee who was later appointed Lead Settlement Class Counsel, argued the motions, which were under submission while settlement negotiations took place. The court never decided the motions to dismiss.¹¹

Against this backdrop Judge Korman invited the parties to meet with the court to revive settlement discussions. At the pivotal meeting, Michael D. Hausfeld of Cohen, Milstein, Hausfeld & Toll, P.L.L.C., speaking for all plaintiffs, walked the court and defendants through a compilation of data suggesting that the banks' potential liability was many tens of billions of dollars. Because of the difficulty of reconstructing amounts improperly converted or otherwise obtained by the Swiss bank defendants from the bottom up by examining each account and illicit transfer, plaintiffs' counsel and their experts attempted to estimate class damages by considering aggregate estimates extrapolated from available historical data. Of course, most of the persons entitled to that disgorgement had perished in the Holocaust, along with most, if not all, of their potential heirs. The passage of 50 years, during which the banks had obstructed efforts to recover dormant accounts, made records scarce and difficult to assemble to prove individual claims.¹²

8. Magistrate Judge Go was also assigned to the Nazi-era cases against French banks discussed in note 5, *supra*. Working with Judge Sterling Johnson, Jr., Magistrate Judge Go was equally involved in the *French Banks* litigation, which was primarily resolved extra-judicially as discussed below.

9. *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139, 142 (E.D.N.Y. 2000).

10. *Id.*

11. *Id.*

12. The suits were filed two years after the World Jewish Restitution Organization initiated discussions regarding certain restitution issues. Such negotiations led to, among other things, the creation of the Independent Committee of Eminent Persons (ICEP). ICEP, chaired by Paul A. Volcker (and also referred to as the "Volcker Committee"), was established in May 1996 by the Swiss bankers association, the World Jewish Congress and other Jewish organizations to conduct an audit of the settling defendants and other Swiss banks to identify accounts from the World War II era that could possibly belong to victims of Nazi persecution. The Volcker Committee conducted what is likely the most extensive audit in history, employing five of the largest accounting firms in the world at the cost of hundreds of millions of dollars. *In re Holocaust Victim Assets Litigation*, 105 F. Supp. at 151. At the conclusion of its investigation, the Volcker Committee prepared a 100-plus page report which it released on December 6, 1999 (the "Volcker Report"), setting forth its findings in detail, which included the revelation that approximately 54,000 Swiss bank accounts were identi-

However, the top-down approach to the evidence articulated by Mr. Hausfeld was effective, and the court announced a range within which it thought the case should settle. It did settle in that range, specifically for roughly twice the \$600 million amount that the banks had declared to be their final offer during the settlement discussions mediated by Mr. Eizenstat. The court's involvement produced principled settlement discussions, based both on an assessment of the strengths and weaknesses of plaintiffs' claims as well as on evidence regarding defendants' exposure.

B. *The Court's Involvement in the Settlement Approval Process*

The parties reached an agreement in principle in the court's chambers on August 12, 1998.¹³ This agreement related only to the general scope of the class release to be provided and to the overall amount of the settlement, *i.e.* \$1.25 billion. It was left to the parties to convert that general agreement into a formal and complete Settlement Agreement, which the parties presented to the court for its preliminary review on March 22, 1999.¹⁴

The court followed the two-stage settlement evaluation procedure recommended by the Federal Judicial Center's *Manual for Complex Litigation*¹⁵ ("*MCL-3d*") and relevant jurisprudence detailing the review of settlements under Fed. R. Civ. P. 23(e).¹⁶ First, the court certified the proposed settlement classes under Fed. R. Civ. P. 23(a) and 23(b) and reviewed the settlement for the purpose of determining whether it had no obvious deficiencies, whether it was the product of collusion, and whether it was sufficiently fair and reasonable to warrant providing notice to the class of its terms.¹⁷

The key terms of the proposed Settlement Agreement were as follows:

1. *Settlement Fund.* Defendants agreed to pay \$1.25 billion USD.
2. *Defenses Waived.* Defendants waived potentially dispositive legal and factual defenses.
3. *Distribution.* The Settlement Agreement did not preordain a plan for distribution of the settlement fund. Instead, the settlement set forth a mechanism for the development of criteria pursuant to which distribution and allocation determinations were to be made, with direct input from all interested class members.

fied as having a "probable" or "possible" connection to a Holocaust victim. See http://www.icep-iaep.org/final_report/.

13. Joint Stipulation and Order Provisionally Approving Material Terms of Settlement Agreement Reached on August 12, 1998, *In re Holocaust Victim Assets Litigation*, No. 96-Civ-4849, 1998 U.S. Dist. Lexis 18014 at *2 (E.D.N.Y. Oct. 7, 1998).

14. *Id.*

15. (3d ed. 1995) § 30.41.

16. Rule 23 (e) provides that "a class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

17. March 30, 1999 Preliminary Approval Order, *In re Holocaust Victim Assets Litigation* (No. 165).

4. *Settled Claims*. In exchange for the \$1.25 billion settlement amount paid by the settling defendants, settling plaintiffs and class members agreed to release settling defendants and other Swiss releasees of liability for any and all claims relating to the Holocaust, World War II, and its prelude and aftermath.
5. *Class Beneficiaries*. The parties agreed that the settlement should benefit persons recognized as targets of systematic Nazi oppression on the basis of race, religion or personal status. Accordingly, four out of the five Settlement classes, defined below, were explicitly designed to benefit "victims of Nazi persecution," defined to include Jews, homosexuals, Jehovah's Witnesses, the disabled, and Romani—groups recognized by the United Nations as having been the targets of systemic Nazi persecution on the basis of race, religion or personal status.¹⁸

In its March 30, 1999 order, the court preliminarily approved the proposed settlement and certified five settlement classes under Fed. R. Civ. P. 23(a) and 23(b)(3). The five settlement classes included: (1) a deposited asset class of persons who were victims or targets of Nazi persecution and their heirs, who had claims relating to deposited assets in Swiss banks; (2) a looted asset class, consisting of victims or targets of Nazi persecution and their heirs, who had claims relating to looted or cloaked assets; (3) a slave labor class, including victims or targets of Nazi persecution and their heirs, who performed slave labor for companies or entities that deposited the revenues or proceeds of that labor with the Swiss Banks or other entities; (4) a second and distinct slave labor class, including individuals and their heirs who performed slave labor at any facility or worksite owned or controlled by a Swiss entity (this is the one class that is not limited to "victims or targets of Nazi persecution"); and (5) a refugee class consisting of victims or targets of Nazi persecution and their heirs, who sought entry into Switzerland to avoid Nazi persecution and were either denied entry or after gaining entry were deported, detained, abused or otherwise mistreated.¹⁹

In May 1999 after granting preliminary approval, the court appointed four notice administrators to implement an international notice campaign.²⁰ The campaign involved roughly \$6 million in paid advertising in newspapers in 40 countries and in multiple languages. In addition, the notice program involved Internet (including a web site available in 20 languages) and public relations outreach, as well as an intensive program of community outreach involving the enlistment of thousands of local organizations in 100 countries to make direct contact with even the smallest of survivor communities.²¹ The notice provided

18. *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 142-43.

19. *Id.* at 143-44.

20. *Id.*

21. See, e.g., November 5, 1999, Report of Notice Administrator Jerry Benjamin on Organizational Outreach, *In re Holocaust Victim Assets Litigation*, (No. 354); November 5, 1999, Report of Notice Administrator Todd B. Hilsee on Analysis of Overall Effectiveness of Notice Plan (No. 355); November 5, 1999, Report of the Notice Administrator: Poorman-Douglas Corporation Regarding the Implementation and Preliminary Results of the Notice Program (No. 356); November 5, 1999, Report of Notice Administrator Katherine Kinsella on Roma Outreach Program (No. 359); Novem-

through these means, pursuant to the jurisprudence surrounding notice of class action settlements under Fed. R. Civ. P. 23, informed potential class members of the terms of the proposed settlement, the method by which they could make objections or comments, the method by which they could provide suggestions regarding allocation and distribution issues, and the procedures for excluding themselves from the settlement to preserve their right to pursue individual claims.²² This notice was consistent with due process, as articulated by the United States Supreme Court in *Phillips Petroleum Co. v. Shutts*.²³ In response to that notice, and as of May 8, 2000, approximately 243 letters had been received containing comments upon or objections to the settlement, and approximately 448 letters had been received containing comments on or proposals regarding allocation or distribution.²⁴ Approximately 401 opt-out requests had been received, a few of which were subsequently withdrawn and a percentage of which were from persons who were not class members or did not understand the nature of the request. Also, as of that date in excess of 550,000 persons had submitted Initial Questionnaires, which was the suggested method for indicating a desire to participate in any claims process.²⁵

The next and final step in the class action settlement evaluation process was a final approval hearing, also known as a "fairness hearing." Pursuant to Fed. R. Civ. P. 23(e), the court held a fairness hearing in the United States District Court for the Eastern District of New York on November 29, 1999.²⁶ The hearing was open to all settlement class members. The court also conducted and presided (by electronic hook-up) over a supplemental fairness hearing that was held in Israel on December 14, 1999. The hearing was open to a random sampling of Israelis who submitted initial questionnaires in response to the notice.²⁷

"The central question raised by [a] proposed settlement of a class action is whether the compromise is fair, reasonable and adequate."²⁸ This determination involves consideration of both the process by which the parties reach settlement and the substantive terms of the settlement itself.²⁹

ber 5, 1999, Report of Notice Administrator Todd B. Hilsee on Paid Media Implementation (No. 360); November 5, 1999, Report of Notice Administrator Katherine Kinsella on Earned Media Program (No. 361); November 24, 1999, Update to the Report of the Notice Administrator: Poorman-Douglas Corporation Regarding the Implementation and Preliminary Results of the Notice Program (No. 406); November 24, 1999, Supplemental Report of Notice Administrator Todd B. Hilsee (No. 407); November 24, 1999, Declaration of Notice Administrator Jerry Benjamin Regarding Outreach to Disabled Holocaust Survivors (No. 408); December 14, 1999, Update to the Report of the Notice Administrator: Poorman-Douglas Corporation Regarding the Implementation and Preliminary Results of the Notice Program (No. 492); December 15, 1999, Amended Report of the Notice Administrator Todd B. Hilsee on Analysis of Overall Effectiveness of Notice Plan (No. 501).

22. See May 10, 1999 Order Appointing Notice Administrators, Approving Form of Notice, and Notice Plan, Scheduling Exclusion Requests and Objections Deadlines, and Scheduling Final Fairness Hearing, *In re Holocaust Victim Assets Litigation* (No. 277).

23. 472 U.S. 797, 105 S. Ct. 2965 (1985); see also *MCL-3d*, §30.212.

24. *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 147.

25. *Id.*

26. *Id.* at 145.

27. *Id.*

28. *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

29. *Id.* at 73-74

In its August 9, 2000 *Corrected Memorandum and Order* granting final approval to the proposed settlement, the court evaluated the Swiss Bank settlement negotiation process and determined that it was fair. The court held:

Moreover, based on my extensive personal involvement in the process, I know that the compromises were reached by the result of lengthy, well-informed and arm's-length negotiations by competent and dedicated counsel who provided loyal and effective legal representation to all parties.³⁰

In evaluating the substantive component of the fairness determination, the court was guided by the specific factors identified by the Second Circuit in *City of Detroit v. Grinnell Corp.*³¹ These factors, all or some of which may be relevant depending on the case, include:

(1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all of the attendant risks of litigation.³²

Other circuits have articulated similar standards.³³

The court's evaluation of the settlement was both critical and constructive, and resulted in several substantive improvements to the settlement. For example, the original Settlement Agreement provided for releases to a number of unidentified non-party Swiss insurance companies.³⁴ At the fairness hearing, the judge considered objections to the inclusion of insurers as releasees under the Settlement Agreement. The objections related to the effectiveness of notice to claimants against released Swiss insurers and the appropriateness of releasing such insurers in the absence of a mechanism to pay valid Holocaust-related insurance claims as part of the distribution of the settlement fund.³⁵ In response to these objections, and with the urging of the court, the parties and major Swiss insurers released under the Settlement Agreement, after extensive discussions, agreed on a mechanism to evaluate and pay Holocaust-related insurance claims. This agreement is embodied in Amendment No. 2 to the Settlement Agreement.³⁶

Amendment No. 2 specifically designates up to \$100 million USD (including up to an additional \$50 million in new money provided by the insurers themselves) for the resolution of unpaid insurance claims.³⁷ The mechanism provides for prompt and fair consideration of all insurance claims, appropriate multipliers for such claims, full cooperation of the participating insurers in pro-

30. *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 146.

31. 495 F.2d 448, 463 (2d Cir. 1974).

32. *Id.* (Internal citations omitted).

33. *Id.*

34. *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 160.

35. *Id.*

36. *Id.*

37. *Id.*

viding relevant documentary material to potential claimants, and assurance of payment from the settling defendants.³⁸ The amendment was made prior to the date on which the court granted final approval, and was submitted to the court. The court held in its August 9, 2000 Memorandum and Order granting final approval:

The Amendment also contains a provision that acknowledges my power to order participating insurers to disclose the holders of policies, with the consequence of an insurer's failure to comply being the exclusion of such insurer from all provisions of the Settlement Agreement. My power to order such disclosure is subject to the application of certain standards that are not inconsistent with the good-faith duty of a releasee to make disclosures necessary to permit class beneficiaries to obtain the benefits of the Settlement Agreement.³⁹

Similarly, the court made clear its intention to police the administration of the Refugee Class claims. In December 1999, the Independent Commission of Experts (ICEP)—an independent group of internationally-recognized historians chaired by Jean Francois Bergier established by the Swiss Confederation in 1996 to examine Switzerland's relationship with Nazi Germany (and referred to hereinafter as the "Bergier Commission")—released a report (the "Bergier Report") indicating that approximately 14,500 applications to gain entry into Switzerland were rejected by the Federal Foreign Police, and that more than 24,000 refugees were turned back at the border or expelled during the war years.⁴⁰ On March 31, 2000, the Swiss Federal Council authorized the Swiss Federal Archives to release to the Special Master a list of persons denied entry into or expelled from Switzerland during the relevant period.⁴¹ In its August 9, 2000 Memorandum and Order granting final approval, the court noted: "If it proves impossible to assemble the information needed because Swiss entities (including Cantonal entities) refused to provide information that they have in their possession that is needed for the fair administration of the Refugee Class, I will consider an application for modification of the enforceability of releases with respect to those entities."⁴²

With respect to the administration of the Slave Labor Class II, the court expressed concern over the ability to administer that class in the absence of information concerning the identities of persons who performed slave labor for a Swiss company or its affiliates during World War II. In its August 9, 2000 Memorandum and Order granting final approval, the court held:

[T]hose Swiss entities that seek releases from Slave Labor Class II are directed to identify themselves to the Special Master within thirty days of the date of this Memorandum and Order. The failure of Swiss entities seeking releases from Slave Labor Class II claims to identify themselves will result in the denial of a release and permit those who have claims against those entities to pursue such claims independently of this lawsuit.⁴³

38. *Id.*, See also http://www.swissbankclaims.com/PDFs_Eng/Amendment2.pdf.

39. *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 160.

40. *Id.* at 161.

41. *Id.*

42. *Id.* at 161.

43. *Id.* at 162-63.

The court noted that it was not altering the terms of the Settlement Agreement. Requiring minimal cooperation as a condition for a release simply meant that a party who seeks to enforce a contract for a release extinguishing the claims of a particular class, cannot in good faith withhold its identity from class members, who need that information in order to claim benefits to which they are entitled or which may reasonably be ordered pursuant to Fed. R. Civ. P. 23(d).⁴⁴

The foregoing are examples of the ways in which the court was involved at the settlement approval stage in guaranteeing that due process concerns were satisfied so that the class members actually received bargained-for benefits that justified the release of their claims. The process by which the court approved and improved upon the settlement also demonstrates the effectiveness of class member input in the settlement approval process. The court carefully considered class members' objections, and took them into consideration when making its determinations regarding whether to approve and how to prompt the parties to improve the settlement.⁴⁵

C. Court and Class Member Involvement in the Development of a Distribution Plan

The negotiating parties in the Swiss Bank Settlement did not make the allocation decisions. Instead, the Settlement Agreement, ¶7.1, called for the appointment of a Special Master to develop a proposed plan of allocation and distribution of the settlement fund employing open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution.⁴⁶ Once the parties negotiated the final disgorgement amount of \$1.25 billion, all class members were informed of the amount and asked to decide whether to stay in the class and be bound by the settlement.⁴⁷ Staying in the class required them to trust the mechanism of allowing a court-appointed Special Master to recommend the allocation plan with input from all interested class members in the decision-making process. The court held:

The appointment of a special master here also obviates the concern that hypothetical conflicts among class members relating to allocation and distribution would require separate representation, and thus call into question the adequacy of representation. This is so because the class members *represent themselves* on this key issue and have direct access to the special master and to me. The adequacy con-

44. *Id.* at 163.

45. *Id.* at 145, 149, 160.

46. As the Second Circuit has recognized:

[t]he formulation of the [distribution] plan in a case such as this is a difficult, time-consuming process. To impose an absolute requirement that a hearing on the fairness of a settlement follow adoption of a distribution plan would immensely complicate settlement negotiations and might so overburden the parties in the district court as to prevent either task from being accomplished.

In re "Agent Orange" Product Liability Litigation, 818 F.2d 145, 170 (2d Cir. 1987); MCL 3d § 30.212 (often the details of allocation and distribution are not established until after the settlement is approved).

47. See May 10, 1999 Order Appointing Notice Administrators, Approving Form of Service and Notice Plan, Scheduling Exclusion Requests and Obligations Deadlines, and Scheduling Final Fairness Hearing, *In re Holocaust Victim Assets Litigation*, (No. 277).

cerns that informed the Supreme Court's decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S. Ct. 2295 (1999), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231 (1997), are therefore absent from this case.⁴⁸

The court appointed Judah Gribetz, Esq., to serve as Special Master.⁴⁹

As noted above, the vast majority of class members opted to remain in the class, and trusted this procedural device as the means by which allocation and distribution decisions would be made. A substantial number of class members actually made specific proposals regarding allocation and distribution, all of which were forwarded to the Special Master and to the court.⁵⁰

The work of the Special Master in preparing a comprehensive draft plan of allocation and distribution⁵¹ was intimately tied to the multi-phased notice program in the case. Initially, in the most intensive and costly of the three phases, all class members were told of the settlement terms and informed how to provide proposals regarding allocation. Recipients of the first notice were also informed that to receive further notice of a draft plan of allocation once it was prepared by the Special Master, they should identify themselves either by filing an Initial Questionnaire or otherwise writing to the notice administrators.⁵² More than 580,000 class members ultimately responded to that notice, and all of them were mailed a summary of the Special Master's draft plan of allocation in approximately September 2000.⁵³ Class members were given a period of time within which to comment on that specific proposal. A number of class members and organizations representing victims of Nazi persecution commented on the draft plan. After a hearing at which the Court heard objections and argument regarding the plan, the Court adopted the plan in its November 22, 2000 order.⁵⁴ The class members were then provided yet a third wave of notice, by direct mail and through additional world-wide publication, announcing the adoption of a final plan of allocation and distribution, and describing the procedures by which claims could be made by each of the five different settlement classes, as well as how insurance claims could be made under Amendment No. 2 to the Settlement Agreement. Accordingly, class members had multiple opportunities in the *Swiss Banks* settlement for direct and consequential contact with the Court regarding allocation and distribution issues.⁵⁵

48. *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 150.

49. *Id.*

50. See Annex A to Proposed Plan of Allocation, Summaries of Proposals Received by the Special Master, at http://www.swissbankclaims.com/PDFs_Eng/671622.pdf.

51. A copy can be viewed at www.swissbankclaims.com.

52. See May 10, 1999 Order Appointing Notice Administrators, *In re Holocaust Victim Assets Litigation* (No. 277).

53. See November 17, 2000 Report of Settlement Class Counsel Regarding Implementation of Notice of Proposed Plan of Allocation and Regarding Response of Class Members, filed by Settlement Class Counsel Morris A. Ratner, *In re Holocaust Victim Asset Litigation* (No. 847).

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

55. The Special Master's Plan of Allocation and Distribution involved a rigorous analysis of available historical data. The Special Master conscientiously based his proposals on the weight of the claims, and on the evidence he collected during his intensive fact investigation, as explained in the Plan. See Plan of Allocation and Distribution, at http://www.swissbankclaims.com/media/index_media.asp.

The Plan of Allocation and Distribution was subjected to yet an additional level of scrutiny during the course of the *Swiss Banks* settlement implementation. Three class members appealed from the November 22, 2000 order of the district court approving the Special Master's proposed plan of allocation and distribution. The Second Circuit affirmed the district court's approval of the allocation plan, remarked favorably upon the Special Master's detailed recommendations, and rejected the appeal.⁵⁶

D. Court Involvement in the Settlement Implementation Process

Once a class action settlement is approved, courts remain active in the implementation and enforcement of the Settlement Agreement. The Second Circuit in *In Re "Agent Orange" Product Liability Litigation*,⁵⁷ a products liability settlement regarding injuries associated with the "Agent Orange" chemical utilized during the Vietnam War, set forth some useful guidelines regarding court oversight of settlement implementation: (1) "[d]istrict courts enjoy 'broad supervisory powers' over the administration of class-action settlements to allocate the proceeds among the claiming class members . . . equitably"⁵⁸; (2) the district court must "exercise its independent judgment to protect the interests of class absentees, regardless of their apparent indifference, as well as protect the interests of more vocal members of the class"⁵⁹; and (3) the court has "discretion to adopt whatever distribution plan he determine[s] to be in the best interests of the class as a whole notwithstanding the objections of class counsel or of a large number of class members."⁶⁰ The Second Circuit found that the district court also had within its power: (1) the flexibility to "alter the distribution plan in the future to simplify it more or clarify standards as concrete issues arise"⁶¹; (2) the freedom to determine an equitable allocation of the settlement fund without resolving issues of causality⁶²; and (3) the ability to "'provide [] broader relief [in an action that is before trial] than the court could have awarded after a trial.'⁶³ The district court's oversight duties endure "[u]ntil the fund created by the settlement is actually distributed."⁶⁴

These principles have animated the district court's approach to the Swiss Banks settlement. The district court has special masters to handle all aspects of settlement-administration, under the court's continuing supervision and control. For example, on December 8, 2000, the court appointed Paul Volcker and Michael Bradfield as Special Masters to establish, organize, and supervise the Deposited Asset Class Claims Resolution Process using the Claims Resolution

56. *Friedman v. Union Bank of Switzerland (In re Holocaust Victim Assets Litigation)*, 2001 U.S. App. LEXIS 17343 (2d Cir. July 26, 2001).

57. 818 F.2d 179 (2d Cir. 1987).

58. *Id.* at 181.

59. *Id.* at 182.

60. *Id.* (citations omitted).

61. *Id.* at 184.

62. *Id.* at 183-184.

63. *Id.* at 185.

64. *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972).

Tribunal.⁶⁵ They have developed detailed claims guidelines and disseminated claim forms to the class, which have been reviewed and approved by the court.⁶⁶

II.

THE GERMAN, AUSTRIAN AND FRENCH MODEL: SETTLEMENT THROUGH EXECUTIVE AGREEMENT, WITHOUT THE STRUCTURAL SAFEGUARDS OF FED. R. CIV. P. 23

The victims of Nazi persecution resolved their claims against German, Austrian, and French defendants through a dramatically different process than that described above with respect to the Swiss Banks litigation. The parties used Executive Agreements to reach settlements.⁶⁷ The level of judicial scrutiny of the Executive Agreements under Fed. R. Civ. P. 23(e) was limited and produced no improvements to any of the Executive Agreement settlements involving German, Austrian, or French entities. Allocation decisions were not subjected to public scrutiny or participation when they were made and were negotiated by only the persons and interests that happened to be represented forcefully at the political negotiations that led to the Executive Agreements. Finally, while attorneys for plaintiffs in litigation matters participated in the negotiations that resulted in the Executive Agreements resolving German, Austrian and French Nazi-era claims, the role of plaintiffs' counsel in the implementation was minimized. There was no appointment of Settlement Class Counsel as we saw in the *Swiss Banks* case to oversee the provision of notice and to coordinate with special masters appointed to administer claims. The Executive Agreement settlements have instead been implemented through boards often consisting of a majority of persons who represent the interests of entities other than victims of Nazi persecution.⁶⁸

65. *In re Holocaust Victim Assets Litigation* (No. 855).

66. See, e.g., March 18, 1998, Letter dated February 20, 1998 from Paul A. Volcker to Judge Korman informing the court of the status of the work of the Independent Committee of Eminent Persons, *In re Holocaust Victim Assets Litigation* (No. 139); October 5, 1998, Status Report dated September 16, 1998 submitted by Michael Bradfield and prepared by ICEP (No. 193); January 29, 2001, Letter dated January 18, 2001 from Michael Bradfield to Judge Korman requesting an extension of time for the publication of the list of accounts in Swiss Banks identified for publication by the ICEP (No. 907); February 7, 2001, Letter dated February 2, 2001 from Michael Bradfield to Judge Korman attaching a copy of the list of published accounts, the information booklet, claim form and instruction sheet (No. 913); March 20, 2001, Letter dated January 23, 2001 from Michael Bradfield to Judge Korman attaching proposed rules governing the claims resolution process setting forth a framework for the claims resolution tribunals adjudication of claims made by victims of Nazi persecution or their heirs under the claims program established under the Holocaust victim assets class action litigation (No. 949); August 30, 2001, Letter dated December 26, 2000 from Michael Bradfield to Judge Korman enclosing a binder containing an explanatory memorandum, tables and a computer program printout setting forth a draft proposed budget for the Claims Resolution Tribunal (No. 1064).

67. The author participated in the negotiations involving the Executive Agreement between Germany and the United States.

68. See Annex A to the *German Agreement* at <http://www.compensation-for-forced-labour.org/English%20Home.html>; Decree Creating a Commission for the Compensation of Victims of Spoliation Resulting From the Anti-Semitic Legislation in Force During the Occupation, at http://www.civs.gouv.fr/download/uk/decrees/10_09_99.pdf; Annex A to the January 17, 2001 Agreement

A. *The Executive Agreement Negotiation Process*

With the exception of the involvement of the court in the *French Banks* litigation, the courts in which Nazi-era German, Austrian and French class action cases were pending had nothing like the intensive involvement that Judge Korman had in the *Swiss Banks* litigation. Instead, the German, Austrian, and French claims were resolved through a series of conferences and negotiations organized by the United States and German, Austrian, and French governments. These conferences resulted in Executive Agreements between the United States and the settling countries and in the execution of "Joint Statements" by the negotiation participants, including plaintiffs' counsel.⁶⁹

The German negotiations set the pattern for the process of reaching the Executive Agreements. The parties held meetings on a regular and alternating basis in Germany and in the United States. The participants included representatives of the governments of the United States of America, Federal Republic of Germany, Israel, several Central and Eastern European countries, the World Jewish Restitution Organization, plaintiffs' counsel (including the author), and, depending upon the case, representatives of the private industry for financial companies that were potential subjects of litigation in the United States.

Mr. Eizenstat represented the United States government in each of the categories of Holocaust litigation. There is no doubt that he played a critical and constructive role in the resolution of these matters, and he deserves praise for accomplishing what many persons thought during the course of these negotiations would be impossible, i.e., settlements. However, Mr. Eizenstat was not acting as a judge, and he was therefore not charged with evaluating the class action cases as litigation matters; nor was he limited by the substantial body of case law under Rule 23 setting forth the court's role as guardian of the class members. Instead, Mr. Eizenstat's job was to resolve what he viewed, at least in part, as a political problem. Not surprisingly, the settlement discussions that resulted in the Executive Agreements in the German, Austrian and French cases, though often principled, were also affected by political issues and pressures.

For example, the U.S. government promoted the 10 billion DM (roughly \$4.5 billion USD) settlement amount (one-half paid by the German government, and one-half by the private German economy) as an appropriate amount for the settlement of all Nazi-era claims against any German entity. This number was not originally suggested by plaintiffs' counsel, and there is no evidence that it bore any particular relationship to the value of plaintiffs' claims, especially as to the property portions of the German settlement.⁷⁰ But, when Mr. Eizenstat (and, indeed, then-President Clinton) announced support for that number during the

between the Austrian Federal Government and the Government of the United States of America Concerning the Austrian Fund "Reconciliation, Peace and Cooperation", at http://www.ver-soehnungsfonds.at/vf_doc_en/exec_agree_en.pdf.

69. See *supra* note 5.

70. The slave and forced labor claims were settled on the most precise basis, with financial amounts negotiated on a per capita basis; the property and personal injury claims were negotiated more loosely, such that a wide variety of claims were discussed as a single bundle of claims.

settlement discussions, it became a ceiling (and, ultimately, a floor), mooting much of the discussion about the true potential value of property claims.

The German negotiations defined an alternative to Fed. R. Civ. P. 23 class action settlements which, after the *Swiss Banks* settlement was reached, became the preferred method for settlement by the German, Austrian and French defendants in class action cases in U.S. courts. Instead of certifying a settlement class and obtaining a class-wide judgment and release in exchange for the payments made by settling defendants, the defendants in the Executive Agreement settlements received only the more limited legal peace that resulted from the United States' filing of what are called "Statements of Interest" in legal proceedings involving Nazi-era claims. The terms of the Statements of Interest, and the United States government's obligation to file the Statements of Interest in Nazi-era cases, were embodied in documents titled Executive Agreements between the government of the United States of America and the German, Austrian and French governments.⁷¹

The German agreement is typical. It is titled an Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America Concerning the Foundation "Remembrance, Responsibility and the Future."⁷² This Executive Agreement is referenced in the Joint Statement on Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation "Remembrance, Responsibility and the Future," and was signed by all participants in the negotiations, including the author of this article, on July 17, 2000. The Joint Statement expressly states that the German Foundation is to be the "exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising out of the national socialist era and World War II."⁷³ The Statement also commits the plaintiffs' counsel that participated in the negotiations to dismiss their class actions with prejudice on a non-class individual basis. This legal peace was a condition precedent for the funding and implementation of the German Foundation Executive Agreement.⁷⁴

The Executive Agreement, signed on the same date, explains how the Statement of Interest is to be filed in pending and future Nazi-era cases against German entities. In Article 1, the Federal Republic of German commits to provide "appropriately extensive publicity concerning" the Foundation's existence and the availability of funds,⁷⁵ and notes that the Foundation "will be subject to legal supervision by a German governmental authority."⁷⁶

The Executive Agreement Annex A broadly summarizes the structure and function of the German Foundation as for the purpose of making payments through partner organizations to those who suffered as private and public sector

71. See *supra* note 5.

72. *German Agreement*, *supra* note 5.

73. *Id.*

74. *Id.*

75. The level of publicity was never defined to meet Fed. R. Civ. P. 23 or due process standards.

76. *German Agreement*, *supra* note 5.

forced or slave laborers and those who suffered at the hands of German companies during the national socialist era.⁷⁷ The Executive Agreement contemplated the adoption by the German Bundestag of Foundation legislation that would provide for a board of trustees consisting of an equal number of members appointed by the German government and German companies, and by other governments and victim representatives, except that the chairman was to be a person of international stature appointed by the Chancellor of the Federal Republic of Germany.⁷⁸ The Executive Agreement made it clear that the Foundation was to provide potential remedies to all persons who had any kind of Nazi-era claim and to set forth specific funds to pay various broad categories of claims, such as the 50 million DM amount that was to be set aside as a potential remedy for all non-racially motivated wrongs of German companies directly resulting in loss or damage to property during the national socialist era.⁷⁹ The Foundation legislation was to also provide for the establishment of a three-member committee for property matters, which would have authority to adopt rules and procedures regarding the evaluation and payment of property claims.⁸⁰ Subsequent to the signing of the Executive Agreement, the German Bundestag did adopt a Law on the Creation of a Foundation "Remembrance, Responsibility and Future" which did, on the whole, embody the principles set forth in the Executive Agreement.⁸¹

From the perspective of the German companies, one of the most important portions of the Executive Agreement was the portion that obligated the United States government to file Statements of Interest in pending and future cases relating to Nazi-era claims filed in U.S. courts. While such Statements are not binding on courts, they rarely fail to prompt dismissal.

B. The "Approval" or "Evaluation" Process for the Executive Agreements

The district courts that were presented with motions for voluntary dismissal of the named plaintiffs' claims in the German, Austrian and French cases played an extremely limited role in terms of the evaluation of those settlements. The Executive Agreements called for dismissal of Nazi-era class action and individual cases, but they were not class settlements. The court was not being asked to certify a settlement class, to release the claims of absent class members, or to enter a class judgment.

The role of the court was limited by jurisprudence regarding non-class settlements and dismissals of class action claims. By expressly making itself subject to Fed. R. Civ. P. 23(e), Rule 41(a)(1) appears to require a plaintiff to obtain leave of court before voluntarily dismissing an uncertified class action. Because voluntary dismissal of an uncertified class action does not preclude absent class members from continuing to pursue their claims, a district court is generally permitted to interfere with the plaintiff's desire to terminate the class litigation

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

on an individual basis on relatively narrow grounds.⁸² First, district courts generally review non-class dismissals of actions initially brought as class cases to determine that the dismissal is not tainted by collusion, such as might occur if the named plaintiff and its counsel obtain exaggerated payments in exchange for dismissal of the individual claim and abandoning class representation.⁸³ Second, district courts generally review to insure that pre-certification dismissal does not unfairly prejudice absent class members by making it impossible for them to pursue their individual claims, such as might be the case if the class case were to be dismissed without notice, or if absent class members had been relying on the pendency of the class case to toll the statute of limitations.⁸⁴ Given the foregoing, it is not surprising that the case law on the role of the trial court under Fed. R. Civ. P. 23(e) when confronted with a motion for voluntary dismissal tends to address almost exclusively whether there was collusion or whether there will be prejudice in the absence of notice to persons who would have been class members had the action proceeded through certification.⁸⁵ When Judge Kram, in considering motions for voluntary dismissal of the German Banks cases endeavored to provide a higher level of scrutiny of the actual substance of the Executive Agreement between the United States and Germany, the parties in that case were able to successfully pursue a petition for *writ of mandamus*.⁸⁶ The appellate court noted that the existence of the Executive Agreement persuasively established that the court lacked jurisdiction to set conditions on the dismissal of the claims in that case which would have required the German Foundation to take any action with respect to the treatment of any of the claims.⁸⁷

While each of the reviewing courts considered the Executive Agreements that were reached between the United States and Germany, Austria, and France, the courts had a limited ability to receive input from the beneficiaries or to attempt to modify the agreements. Instead, each court was informed that an agreement had been reached, that plaintiffs' counsel and the named plaintiffs (on the whole) supported the agreements, that the agreements provided substantial and immediate benefits, and that the settlements were not achieved by collusion, did not confer disproportionate benefits upon the class representatives compared to absent class members or in a way that would prejudice absent class members.⁸⁸

82. See Fed. R. Civ. P. 41 (a) and 23 (e); *In re Phillips Petroleum Securities Litigation*, 109 F.R.D. 602, 607 (D. Del. 1986) (noting limited scope of analysis).

83. *In re Phillips Petroleum Securities Litigation*, 109 F.D.R. at 607.

84. See, e.g., *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1314-17 (4th Cir. 1978).

85. See, e.g., *Diaz v. Trust Territory of the Pacific Islands*, 876 F.2d 1401 (9th Cir. 1989); *Shelton v. Pargo*, 582 F.2d 1298 (4th Cir. 1978).

86. *Duveen v. United States Dist. Court (In re Austrian & German Holocaust Litigation)*, 250 F.3d 156 (2d Cir. 2001)

87. *Id.*

88. Interestingly, plaintiffs' counsel actually fared better under the Executive Agreement settlements; their fees were paid more promptly, and their individual fee applications were subject to less public scrutiny than was the case in the *Swiss Banks* settlement. The German Foundation, for example, made fee payments to counsel after fee applications were confidentially evaluated by two

C. *Executive Agreement Allocation Determinations*

The German, Austrian, and French negotiations all had unique facts and circumstances, but negotiations regarding allocation in each of those matters followed the same essential pattern: fundamental allocation decisions were made by the negotiating parties without input from affected persons, who would have been class members had the cases been settled on a class basis. In the German Foundation negotiations, for example, a dollar amount was first negotiated. Once it was determined that the German litigation would be resolved for a specific amount, i.e., 10 billion DM or roughly \$4.5 billion USD, the parties to the negotiation then turned to the issue of how to allocate that 10 billion DM among the various categories of victims. The negotiation participants understood that the 10 billion would have to cover every category of claim that could possibly be raised relating to the Nazi-era in order to justify the filing of the Statement of Interest by the U.S. government to prompt dismissal of future-filed claims. The negotiation process was affected by the dominance of Eastern and Central European interests in the negotiations. Two of the more prominent plaintiffs' counsel involved in the negotiations—Michael D. Hausfeld of Cohen, Milstein, Hausfeld & Toll, P.L.L.C., and Washington D.C. attorney Martin Mendelsohn—represented the Eastern and Central European countries in the negotiations, and the Eastern and Central European countries had government delegations at the negotiations as well.

The slave and forced labor claims ended up consuming roughly 80% of the value of the German Foundation funds.⁸⁹ This is explained in part by the fact that unlike many categories of property claims, there had never been any restitution provided to survivors for slave and forced labor. The disproportionate payment to slave labor also reflects the fact that most survivors of the Holocaust at one time were forced to perform slave or forced labor, and non-Jewish victims of Nazi persecution who survived as of the date of the negotiations were also often young forced laborers during World War II. Thus, the slave labor payment was in essence a way of uniformly distributing settlement benefits to the vast majority of survivors. Almost every survivor who was entitled to payment for a property claim was also entitled to a slave or forced labor payment. One additional consideration in setting the amount allocated to pay forced and slave labor claims was the fact that, unlike many categories of property claims which were mainly capable of being asserted only by heirs (because the principal holders of the claims had perished), the payments to surviving slaves and forced laborers amounted to direct payments to living survivors and therefore seemed to have a peculiar moral weight and significance. It is also possible that the slave and forced labor claims had a better chance of success in the class litigation in U.S. courts, but the strength of the labor claims relative to the property claims did not determine allocation decisions and was not a prominent subject of

mediators, one chosen by the plaintiffs and one by the German government. It should be noted that fee payments in all of the Holocaust-era cases were relatively modest.

89. See *German Agreement*, *supra* note 5.

discussion during the negotiations that led to the creation of the German Foundation.⁹⁰

D. Implementation of the Executive Agreements

For slave and forced labor claims, allocation was relatively easy. In the German and Austrian agreements, the payments were made pursuant to a formula. For example, in Annex A to the Executive Agreement between Germany and the United States, Section 4, the amount to be provided to each category of eligible slave or forced laborer is expressly set forth, with each slave or forced laborer being entitled to receive up to a specific portion (*e.g.*, 15,000 DM for slave laborers). Foundations that have existed for decades in Eastern and Central Europe to provide benefits to survivors of Nazi persecution are distributing the money.⁹¹ For Jewish survivors, the World Jewish Restitution Organization has continued to play a role in distributing these funds, and for non-Jewish survivors outside of Central and Eastern Europe, the International Office of Migration has provided services relating to the distribution of slave and forced labor payments.⁹²

With respect to property claims, the settlements have been far more difficult to implement. Most of the settlements were reached without negotiating any detailed claims process. For example, in the German case, while substantial amounts were allocated to pay property claims, claims for medical experimentation, and other non-labor claims, the claims guidelines have been slow to develop. The claim forms, to the extent they even exist now more than a year after the German Foundation settlement was announced, have yet to be widely disseminated, and the vast majority of victims, who were the intended beneficiaries of the property components of these settlements, have yet to learn how or if they can make claims.

No court is monitoring the claims process to make sure that it is equitable, and plaintiffs' counsel, except for Professor Burt Neuborne, who is a member of the German Foundation Board, have been relatively disenfranchised from the implementation process by virtue of the fact that they have no formal role.

III.

THE SUPERIORITY OF RULE 23 SETTLEMENTS

In the Holocaust and Nazi-era litigation cases, it is still too early to conclusively determine how the different models used to achieve these settlements—

90. The author, Morris Ratner, participated in the negotiations in Washington, D.C., Cologne, and Berlin that resulted in the announcement in June 2000 of the establishment of the German Foundation.

91. See, *e.g.*, *German Agreement*, *supra* note 5. Claims program websites maintained pursuant to the German, Austrian and French Executive Agreements can be found at the following addresses: <http://www.compensation-for-forced-labour.org> (German); http://www.reconciliationfund.at/start_en.html or <http://www.claimscon.org> (Austrian Labor); <http://www.nationalfonds.org/english/index.htm> (Austrian Property); <http://www.civs.gouv.fr> or <http://www.wiesenthal.com> (French Banking); <http://www.icheic.org> (Insurance).

92. *Id.*

through the Judicial Branch and the Executive Branch—will play out in terms of settlement implementation. However, the early indication is that the settlements achieved through the Judicial Branch are better at guaranteeing the due process rights of and fairness to victims who are the intended beneficiaries of these settlements.

First, the Rule 23 settlement model has been more democratic. The extensive notice provided to class members in the *Swiss Banks* case gave them an opportunity not only to comment on the Settlement Agreement itself, and thereby change some of the fundamental terms of that Agreement; but, moreover, class members also had direct and substantial input in the shaping of the allocation of the settlement fund once a settlement amount had been negotiated by plaintiffs' counsel. Conversely, in the settlements negotiated by the Executive Branch, there were virtually no opportunities for comment or participation by large numbers of affected victims, and notice by the Foundations has been generally less intensive. The Executive Agreements were announced to the public after being approved by the Executive Branch and the participants in the negotiations and without room for further substantive review or improvement. The beneficiaries of the Executive Branch settlements had no input into the allocation process, except through the implementing bodies erected by governments in connection with the settlements, such as the German Foundation Board, whose connection with the victim groups can be described as attenuated at best.

Second, the *Swiss Banks* model, or Judicial Branch model, of effecting mass settlements of human rights claims under Fed. R. Civ. P. 23 is superior to the Executive Branch model in terms of its ability to guarantee scrutiny of the settlement negotiation process and of the settlement terms from a due process perspective. When considering motions for voluntary dismissal pursuant to the Executive Branch settlements, the various trial courts in which Holocaust cases were pending did have the obligation to ensure that there was no collusion and that absent class members would not be prejudiced by the dismissal of the named plaintiffs' claims. However, this level of scrutiny was nothing like the intense scrutiny provided in a Rule 23 class settlement by a judge charged with evaluating the settlement pursuant to Rule 23(e) standards for class action settlements. Judge Korman, for example, looked not only for evidence of collusion and prejudice, but also examined the process of the negotiations, determined that potential conflicts had been eliminated by the appointment of a Special Master to deal with allocation issues upon notice to the class, and helped the parties refine the settlement terms to guarantee due process when objections were raised that highlighted inadequacies in the settlement. Judge Korman was charged with being the ultimate guardian of the class members' interests. The Executive Branch, on the other hand, approached all of these settlements with multiple objectives in mind. It was concerned not only with protecting the interests of victims of Nazi persecution, but also was undoubtedly affected by its ongoing diplomatic relations with foreign countries who were being asked to contribute to the settlement funds.

Third, settlements effected through the Judicial Branch have a greater chance of being implemented fairly. In the Swiss case, Judge Korman has closely supervised all aspects of settlement administration and has appointed multiple settlement masters who report directly to the court to address the needs of the different settlement classes, including due process needs for information needed to make claims. Notice of the claims process has also been comprehensive.

The Executive Branch settlements of Nazi-era claims may ultimately prove to have fair implementation procedures. However, the process has been painful, and there is no single arbiter such as a judge, who has ultimate control over the process with an eye towards ensuring fairness to the claimants and the victims. Instead, there are foundation boards and periodic meetings of representatives of different interests, which have to date resulted in less notice to class members, delayed development of claims guidelines, and other problems with which the parties to these settlements are still grappling.

Finally, because of reporting requirements, settlements effected through the Judicial Branch are more likely to be the subject of continuing scrutiny by class members and the public. For example, in the *Swiss Banks* case, we have continuously updated the court with reports that are filed and a matter of public record regarding the provision of different phases of notice. Similarly, the special masters have filed reports with the court regarding the status of their efforts during the implementation phase.⁹³ While the Executive Branch settlements have certain reporting requirements built into them, the reporting has generally been less detailed, and the reports are not as easily accessed by members of the general public or victim classes.

The Executive Agreements reached between the United States and Germany, Austria, and France have produced substantial compensation to victims of Nazi persecution and of the misconduct of private corporations during World War II. However, the settlements reached in the United States federal courts under judicial supervision have been more transparent and have better protected the due process interests of the settlement beneficiaries.

93. See *supra* notes 21 and 53.

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Taking Responsibility: Moral and Historical Perspectives on the Japanese War-Reparations Issues[†]

By
Harry N. Scheiber*

I.

INTRODUCTION

A disturbing aspect of today's lawsuits and public controversies over World War II reparations claims by individuals and groups who suffered from war crimes is the fact that the issue has come to a climax only now—more than half a century after the war's end, and at a time when the people who indisputably were innocent victims of those crimes are so old that an estimated 10 per cent or more of them are dying each year.¹

There are common themes in the histories of the Axis powers' war crimes and of the long delay in facing the question of what obligations rest now on the perpetrators, corporate or individual, and on the governmental actors and their progeny. Not only Germany and Japan, but the Allied powers as well, have been painfully slow in allowing relevant facts to come to light.² Swiss banks, multinational corporations, and many national governments have kept ugly secrets in their vaults and archives, hidden from public scrutiny for these passing decades. In some measure, this process of covering up and hiding away was justified because of asserted imperatives of inter-Allied rivalries and the Cold War situation that emerged immediately after the war, but was already taking shape even before the German and Japanese forces had surrendered. This ex-

† Revision of an address presented at the Stefan A. Reisenfeld Symposium (Mar. 8-9, 2001).

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1. See generally Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 283 (2000) (Bazylar cites the figure of 10 per cent mortality per annum for Holocaust survivors, and it may be assumed that a similar proportion of World War II prisoners and civilian victims of atrocities are dying annually now). The article is a valuable review and analysis of the cases in American courts, but with abundant documentation of initiatives in the late 1990s by France and Germany in response to litigative and diplomatic pressures; see also the report of the Independent Commission of Experts chaired by Francois Bergier, a distinguished historian, which was established five decades after the war, in 1996, by the Swiss Government to provide a thoroughgoing professional historical investigation into the relationships of Swiss interests to the Nazi regime and its implications for claims against Swiss institutions by victims of German persecution, INDEP. COMM'N OF EXPERTS, SWITZ. – SECOND WORLD WAR, SWITZERLAND AND REFUGEES IN THE NAZI ERA (1999), <http://www.uek.ch/en/index/htm>.

2. Bazylar, *supra* note 1.

plains why the Western powers, led by the United States, hustled German rocket scientists and other scientific specialists out of their defeated country as the Allied troops advanced, seemingly with no concern as to how some of those scientists had directed the use of slave labor in their weapons development operations. Cold War “imperatives” also explain why the United States and presumably other Allied governments withheld for decades confirmed intelligence information and on-site information of Japanese atrocities in the form of medical experimentation conducted on her Allied prisoners of war as well as on civilians in conquered areas of Asia.³ Similarly, neither industrial corporations nor governmental agencies would release the evidence until virtually forced to do so by the recent-day controversy over restitution. The evidence revealed how they had used slave labor and prisoner-of-war forced labor and either cooperated actively or turned their eyes away from these actions as they did from the brutalities of the concentration camps.⁴

There are other explanations, too—even less defensible, boiling down to the question of simple greed. Having enjoyed for so many decades the use and income based on assets that came into their hands as the result of the Holocaust and its notorious crimes, the banks, insurance companies, and industrial firms of Europe stepped forward only after being subjected to enormous political and diplomatic pressures to compensate individuals who were victimized.⁵ A similar kind of simple greed is probably the full and uncomplicated explanation of why holders of art works well known to have been taken by Nazi forces and their collaborators in other governments and armies held out so long against any process or law of restitution.⁶

At least now we can say that on the European side there has been an acceptance of guilt and responsibility for what was done. Justice has not come in a timely way or in very generous measure, given the immeasurable depths of suffering that must be compensated in some way. Even so, the issue of responsibility has been confronted, however grudgingly.

With Japanese war crimes and responsibility, however, it is a different picture today—and it has been consistently so ever since the war. Successive Japanese government administrations, from even before the Occupation ended in 1952 to this very day, have resisted coming to terms with their country’s past. In standing firm against the judgments of history, Japan has had a tactical advantage that Germany did not: a peace treaty in which explicit obligations were set

3. RICHARD B. FRANK, *DOWNFALL: THE END OF THE IMPERIAL JAPANESE EMPIRE* 324-26 (1999) (on the brutal atrocities in the form of “medical” experiments and dissection of live human bodies committed by the notorious Unit 371 in Ping Fan, Manchuria); Abraham Cooper, *Tokyo Must Address the Actions of Its Wartime ‘Killing Machine’*, *LA TIMES*, Apr. 26, 1999, at B5, available at 1999 WL 2152705.

4. Beth Stephens, *The Amoralism of Profit: Transnational Corporations and Human Rights*, 20 *BERK. J. INT’L L.*, 45, 50 (2002).

5. Roger P. Alford, *The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks*, 20 *BERK. J. INT’L L.*, 4-10 (2002).

6. For a review of the recent-day efforts to identify works of art in museums and private hands taken from their original owners by the Nazi and other Axis controlled governments, see Bazyler, *supra* note 1, at 171, n. 697.

forth and important waivers specified, consistent with the extraordinarily generous terms of that treaty.⁷ Moreover, Japanese courts have held firm, on the whole, to the traditional doctrine that the Hague Convention and other international agreements on human rights, including slave traffic and prisoner-of-war conventions, are not a basis for claims by individuals, but only by governments.⁸ Nonetheless, Japan could have acted differently, accepting moral responsibilities in the interests of doing justice. It has not chosen to do so, even in the face of compelling evidence of terrible deeds and lasting harm to its wartime victims. After all, if the treaty contains a “waiver” clause on reparations, the clause can be voluntarily departed from and itself “waived” by the party that violated moral principles and transgressed against the norms of decent behavior in wartime.

II.

COMING TO TERMS WITH THE PAST

A. *The Treaty*

Where moral responsibility is concerned, the literal terms of positive law expressed in a peace treaty can be treated as the definition of minimum responsibilities; those terms need not be taken as a bar to voluntary action. In a case like Japan’s, coming to terms with the past may be expressed at three levels. First, the country must acknowledge the facts. When a nation has slaughtered civilians, enslaved hundreds of thousands of people, mistreated and killed its military and civilian prisoners, or subjected a conquered people to military conscription and to service as sex slaves (cynically known as “comfort women”), it is unacceptable for that nation to deny the relevance of such well-documented behavior and incidents.⁹ In such cases, the requirements of moral responsibility—above and beyond the outer limits of legal responsibility, defined by the Peace Treaty’s “waiver” provision on reparations—must be paramount. Yet successive Japanese governments engaged in systematic denial of wrong-doing, as, for example, in admitting the existence of the sex-slave “comfort-women” program only in January 1992,¹⁰ but denial is also evident at the more general level. This is most notable with respect to how the current Prime Minister and his government have endorsed official history textbooks that downplay or render altogether invisible these acts of the Japanese armed forces and government during the 1937-45 period of aggression, conquest, and warfare.¹¹

7. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 3180-81, 136 U.N.T.S. 45, 60-61.

8. See M. Igarashi, *Post-War Compensation Cases*, 43 JAP. ANN. OF INT’L. L. 45 at 47-48, 54.

9. See discussion of facts of the several cases in Japanese courts provided in Igarashi, *id.* at 49 et seq.

10. *Id.* at 49.

11. The textbook controversy centers on approval by the Ministry of Education, Science, Sports and Culture of a nationalistic and revisionist book glossing over Japanese war guilt in the large and giving little or no attention to now-well-documented instances of “massacres, sexual slavery, forced labor and the use of chemical and biological warfare” by Japan during the Asian and Pacific wars of 1937-45. Seth Mydans, *Japanese Veteran Writes of Brutal Philippine War*, NY TIMES, INT’L. SEC., Sept. 2, 2001, at 8. See also Howard W. French, *Shrine Visit and a Textbook*

Beyond simple acknowledgement of the facts, there is a second level of taking responsibility: an apology to the victims. In this regard, the Asian cultural template is of special relevance, as we were reminded when the Japanese government and families of victims demanded face-to-face apologies for a U.S. submarine's collision with a Japanese fishery-training vessel off the coast of Oahu.¹² A similar stress on the importance of taking responsibility and formal apology was evident, a short time later, in the case of the American "spy plane" forced to land on Chinese mainland soil after a mid-air collision that proved fatal to the pilot of a Chinese fighter plane.¹³ The contrast is indeed astonishing between the behavior of Japan in the Oahu submarine incident and the intransigent refusal of the Japanese government for more than fifty years to offer a formal apology, even without reference to any compensation or restitution, for World War II crimes. Even at the fiftieth anniversary of the Peace Treaty held in San Francisco in October 2001, the Japanese foreign minister spoke of the regrettable nature of acts committed by Japan in the war, but still stopped short of an outright apology.¹⁴ Secretary of State Colin Powell reinforced the significance of this half-admission of guilt by reiterating the U.S. government's position that the Peace Treaty "waiver" foreclosed any claim of reparations, such as those being sought in California litigation by former prisoners of war.¹⁵

The third level of coming to terms with the past is, of course, to offer restitution once the facts are acknowledged and responsibility is accepted in the form of an apology. Japan has never come to this level of accepting responsibility and acting upon the admission of an obligation to provide reparations. Japan's official position, firmly supported by the U.S. government, has been that the Treaty's waiver provision discharges it from taking on any such obligation.¹⁶

Japan's determination to stand by the treaty's allegedly definitive waiver provision is unsatisfactory on two counts. First, neither the specific language of

Weigh on Koizumi's Future, NY TIMES, INT'L. SEC., Aug. 12, 2001, at 3; *Koizumi Rejects Beijing's Demand for Text Revision*, JAPAN TIMES, May 18, 2001, at 1; Mark Schreiber, *Media Fans Textbook Flames*, JAPAN TIMES, May 20, 2001 at 12 (on South Korean press criticism of the government-supported textbook, and responses to criticism by Japanese revisionists "campaigning for [teaching] materials that nurture a more patriotic spirit among Japanese youths"). See generally JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* (1986), on the racism manifested by combatants and civilians on both sides.

12. Howard W. French, *U.S. Admiral Delivers Apology to the Japanese in Sub Sinking*, NY TIMES, Feb. 28, 2001, INT'L. SEC. at A4.

13. Fox Butterfield, *China's Demand for Apology is Rooted in Tradition*, NY TIMES, Apr. 7, 2001, at A6.

14. Charles Burrell, Ryan Kim & Elizabeth Fernandez, *War Memories Mar Peace Observance. Treaty with Japan is 50 Years Old, but Victims Can't Forget*, SF CHRON., Sept. 9, 2001 at A1.

15. *Id.* "'The treaty dealt with the matter 50 years ago,' Powell added, echoing U.S. government opposition to lawsuits filed by former POWs who were used as forced laborers by Japanese companies during the war. '... [A]t the same time, we have the utmost compassion for the veterans who suffered.'"

16. Congress has refused to reopen the peace treaty, citing that such efforts might undermine the Afghanistan war coalition. Charles Burrell, *Congressional Panel Kills Bill for Ex-POWs of Japan*, S.F. CHRON., Nov. 10, 2001, at A12.

the Treaty with regard to the waiver, nor the subsequent history of Japanese actions with respect to reparations, gives unqualified support to the U.S. and Japanese positions in recent litigation that the waiver is comprehensive and in effect conclusive as to Japanese obligations under international law. Chapter 5, Article 14 of the Treaty reads: "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 prosecution of the War . . ." ¹⁷ This provision serves as the legal anchor for Japanese (and U.S. government) resistance to the legitimacy of American war prisoners' and others' claims for wartime suffering. ¹⁸ Commonly known simply as "the waiver," arguably it has posed a barrier to the prosecution of numerous reparations claims such as those successfully imposed against Germany by the Allied governments and those later pursued by private litigants in civil actions against Germany, Austria, and the Swiss banks. ¹⁹

Other provisions of the Peace Treaty, however, also demand our attention. Of particular interest is the language that Japan is required to:

[E]nter into negotiations with Allied Powers, so desiring, whose present territories were occupied by Japanese forces and damaged by Japan with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question. Such arrangements shall avoid the imposition of additional liabilities on other Allied Powers, and where the manufacturing of raw materials is called for they shall be supplied by the Allied Powers in question, so as not to throw any foreign exchange burden upon Japan. ²⁰

This is an extraordinarily generous provision, with two features worth noting. First, it restricts the reparations to "repairing . . . damage," and makes no reference to harms done to the lives of individuals. There is no provision for money payments, and there is the curious provision protecting Japan from any new foreign exchange burdens—unquestionably to protect the United States foreign aid program for Japan, under which the entire Japanese economic recovery had been financed since the surrender, from additional burdens. ²¹

The generosity and non-punitive character of these provisions is attributable to the U.S. government's determination, throughout the negotiations that led up to the Treaty's signature at San Francisco in 1951, to conclude a treaty that

17. Treaty of Peace with Japan, Sept. 8, 1951, Ch. 5, art. 14, 3 U.S.T. 3169, 3180-81, 136 U.N.T.S. 45, 60-61.

18. See Michael Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERK. J. INT'L L., 11, 25-31 (2002); *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d (N.D. Cal. 2000).

19. In addition, of course, Germany voluntarily appropriated compensation funds by way of reparations to concentration camp survivors and families of those exterminated, in the form of payments to the government of Israel.

20. Treaty of Peace with Japan, *supra* note 17.

21. Similar concern to protect the U.S. from having the cost of reparations in effect transferred to the U.S. Treasury arose with respect to the German reparations question. See the extended discussion of U.S. policy and inter-allied issues in J. E. Farquarson, *Ango-American Policy on German Reparations from Yalta to Potsdam*, 112 ENG. HIST. REV. 904 (1997).

would protect Japan from any serious economic or fiscal burdens. To that degree, we should be mindful of the way in which the United States itself bears responsibility for the dilemma of the slave laborers and prisoners of war, as well as others terribly harmed by Japan, in the present day's controversies and lawsuits at home and in Asia. As one commentator who champions the war sufferers' claims has recently written, by designing a peace treaty that would prevent any reparations burden from being imposed on Japan, the U.S. diplomatic strategy of 1951 "also fostered a deliberate forgetfulness whose consequences haunt us today."²²

Obviously, the United States and Japan alike resort to a strict literalism today when it comes to the interpretation of the waiver provision and the Treaty's terms overall in these present-day confrontations. Ironically, Japan did not take so literal and restrictive a view of the Treaty in the past, when it engaged in post-1951 negotiations with the other Allied Powers. In those instances, it proved not only willing, but very eager, to depart from the literal terms of the Treaty, and to pay monetary compensation rather than to provide labor services for "production, salvaging, and other work" needed to "repair the damage" done in occupied Allied territories.²³ Moreover, with the cooperation of the United States in 1956, the Dutch government successfully pressed a claim on behalf of private citizens against Japan—albeit that the United States reportedly had to exert pressure on Japan to honor the claim. In the previous year, the British government reported two other deals by which Japan paid reparations of \$250 million to Burma and also paid Switzerland for "compensation for maltreatment, personal injury and loss arising from acts illegal under the rules of war."²⁴

The United States government thus has "played a role in Japan's historical amnesia" by failing to confront the question of war guilt and responsibility for war crimes. As reported by an officer of the New American Foundation in a recent edition of *The New York Times*, recently declassified U.S. government archived documents indicate the U.S. State Department intentionally kept news of the agreement under wraps. The agreements contain information that potentially discredits the U.S. government's arguments in favor of regarding the Treaty's waiver provision as absolute and definitive.²⁵

B. Japan's Different Postures Towards Citizens and Foreigners

The second way in which Japan's position with regard to the claims of foreign civilians and prisoners of war is unsatisfactory is that it is inconsistent with two recent responses of the Japanese government to comparable claims of mistreatment from their own citizens. One such case occurred in 1996, when a

22. Steven C. Clemons, *Recovering Japan's Wartime Past—and Ours*, *NY TIMES*, Sept. 4, 2001, at A27 (Op-Ed).

23. *See id.* Quotations are from the language of the treaty. Treaty of Peace with Japan, Sept. 8, 1951, 3 U.S.T. 3169, 3180-81, 136 U.N.T.S. 45, 60-61.

24. Clemons, *supra* note 22.

25. *Id.*

large group of Japanese hemophiliacs who were infected with AIDS as the result of irresponsible actions by Japanese health authorities were awarded a large monetary judgment. Under Japanese law, the national government (I have been assured by leading Japanese lawyers) was indisputably protected by the prevailing doctrine of sovereign immunity. Yet the government chose to pay the claimants, acknowledging the accuracy of the facts brought out in the trials and taking responsibility for the harm that had been done to the sufferers.²⁶ More recently, a similar case involved compensation payments to 127 plaintiffs who had leprosy and were among many thousands of lepers forced by government health officials to live in isolation for many years long after it was known that there were effective cures for the disease. After a trial court handed down a judgment of \$15 million, the government “made the announcement that [it] would abandon its usual conservative posture on legal rulings and not contest the decision.”²⁷ The government also issued an official explicit apology, declaring it was desirable to bring the case to a close and expedite payments “since the patients and former patients are already in advanced age.”²⁸

The action in the leprosy case was a departure from long-standing policy. Indeed, a former judge, who is now a prominent lawyer, recently termed the government’s decision a “violation of rule of law” because it was under no legal compulsion to accept responsibility.²⁹ It seemed strange to him that abstract considerations of justice should have trumped the standard resort to immunity claims that would have permitted the government to resist taking responsibility. For the Japanese government, it seems, acting out of the same kind of respect for considerations of justice and putting aside the advantages of the Peace Treaty waiver’s terms, is not acceptable when it comes to the claims of foreign victims—who were harmed only a few years before the 1953 adoption of the act under which lepers were confined. And, like most of the thousands harmed by the leper-segregation policy, now “in advanced age, too,” these foreign victims must be paid immediately if their claims are to be meaningfully recognized and reparations afforded. The disregard for public opinion and the specific claims of war-crimes victims in Asia and the Western Allied nations was underlined when Prime Minister Junichiro Koizumi visited the Yasukuni shrine, known as the “symbolic heart of Japanese wartime militarism.”³⁰ This is the shrine where Japan’s war dead are honored and where the remains of Hideki Tojo (the war-

26. Eric Feldman, *Blood Justice: Courts, Conflict, and Compensation in Japan, France, and the United States*, 34 *LAW & SOC’Y. REV.* 651, 679-82 (2000).

27. Calvin Sims, *Japan Apologizes to Lepers and Declines to Fight Isolation Ruling*, *NY TIMES*, May 24, 2001, at A3. At issue was their detention and isolation under a 1953 Leprosy Prevention Law not repealed until 1996, by which thousands of lepers were segregated and confined, some of them subjected to sterilization or abortion, despite the known availability of effective drugs to control the disease.

28. *Id.*

29. Statement at Tokyo international symposium on judicial reform in changing societies, (June 2001) (notes on file with author). The statement was made in a comment from the floor in discussion of a paper by the present author at that conference.

30. Doug Struck, *Japan Spurned by Neighbors*, *SF CHRON.*, Aug. 25, 2001, at A9.

time prime minister) and other leaders executed after conviction by the Tokyo War Crimes Tribunal are interred.³¹

The Japanese courts are ahead of the government in moving, albeit in small and hesitant steps, toward taking responsibility for war crimes. In a recent case a Tokyo court thus reportedly granted a judgment of \$166,000 in compensation to relatives of a Chinese man for his sufferings over a ten-year period as a slave laborer.³² Another court ruled in August 2001 that the national government should be held responsible for the deaths of fifteen Koreans caught in an explosion while being transported as slave laborers on a Japanese navy transport ship. It is expected that in another sixty cases involving claims of slave laborers in Japanese courts, this decision might have some precedential effect, so long as plaintiffs "can show damage caused not by the war itself but some related circumstance that could be construed as calling for 'normal compensation.'"³³ Meanwhile, however, the Japanese government continues, with full support of the U.S. State Department, to resist taking responsibility for the sufferings of Americans and other foreigners in the proceedings of claimants in California and other courts outside Japan.

III.

THE OCCUPATION LEGACY AND JAPANESE INTRANSIGENCE

Why, then, has the Japanese nation never been forthcoming in dealing with its own wartime past and with the demands of a just standard of restitution to victims of its war crimes? I believe that a large part of the answer to this deeply troubling question lies in the history of Allied-Japanese relations well before the Peace Treaty was signed. It is an answer that may be found in the legacy of the Occupation period, from 1945 to 1952, and in the way in which the Occupation regime under U.S. direction successfully insulated the Japanese people and their postwar leadership from the moral and political force of world opinion. It is my contention that the Occupation authority under General MacArthur laid down the foundation on which subsequent Japanese unwillingness to take responsibility for war crimes has developed. American complicity in the "historical amnesia" of Japan's governments and people since 1945 does not only consist of the U.S. role in writing the waiver into the Peace Treaty and hiding information of possible precedents for private claims against Japan by U.S. and other foreign citizens. It also consists of the entire fabric of the U.S.-Japanese relationship during the Occupation years.

There are two bookends, as it were, that bracket the history of American policy in the Occupation. The first consists of diplomatic correspondence exchanged in August 1945, at the very end of the war. Within the highest official circles in Japan, involving the Emperor himself as well as the military-led minis-

31. *Id.*; see also Stephanie Strom, *Japanese Premier Visits War Shrine, Pleasing Few*, NY TIMES, Aug. 14, 2001, at A1.

32. Mark Magnier, *Japan Ordered to Pay Koreans in 1945 Blast*, LA TIMES, Aug. 24, 2001, at A3.

33. *Id.* A spokesman for the government declared, "It is a very tough ruling for us." *Id.*

terial departments, there was a great deal of maneuvering to achieve two goals. The first was to distance the Emperor from any responsibility for the war, let alone supervision of operations that involved war crimes, in hopes (as proved indeed successful) of preserving the imperial court when surrender became inevitable.³⁴ The second goal was to extract important concessions from the Allied governments as to surrender terms, which previously had been announced as requiring “unconditional surrender” and in the Potsdam Declaration of July 26, 1945, as specifically requiring “just reparations in kind” as part of the proposed occupation terms.³⁵ Initially, the Japanese warlords responded to the Potsdam demands with a posture of *mokusatsu*, meaning literally “kill with silence,” but also defined as embracing the attitude and a tactic of “killing with silence” or “taking no notice.”³⁶ When surrender became the only choice, however, the Japanese proposed an alternative set of terms. Instead of unconditionally surrendering, they asked for priority in available shipping so as to bring home immediately to Japan their six million expatriates. They also sought priority in provision of available medical supplies and food for Japanese troops who would be cut off from their lines of supply.³⁷

General Douglas MacArthur, then commander of American forces and soon to be appointed the supreme commander for the allied powers in the Occupation—in effect proconsul in all matters of governance and policy in Japan—shot back to Washington a cable from Manila objecting to what he called “these proposed secret terms” as being “violative not only of allied policies but of the precedent set by Japan itself in occupying other countries.” He was appalled by Japan’s arrogant demands that priority be given to its own needs. “The incidents of Bataan and Singapore are still fresh in the minds of the world,” MacArthur wrote. He declared his outrage that “[t]he enemies’ suggestion even goes to the point of preferential repatriative treatment of Japanese soldiers. Suggested ameliorations would relieve Japan of much of the physical and psychological burdens of defeat.”³⁸

It is a great irony of the subsequent history—and of the reparations controversy since the signature of the Peace Treaty—that in MacArthur’s oversight of Japan in the Occupation era, he became the controlling figure in a process that in fact did work with great effectiveness to “relieve Japan of . . . the physical and psychological burdens of defeat.” As the Supreme Commander, Allied Powers (known as SCAP), MacArthur initially gathered power into his own hands. The Allies were effectively pushed aside at the Tokyo headquarters, with the Allied Council of big powers rendered of entirely nugatory importance almost from the

34. HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* 509-11 (2000). The Japanese imperial court’s and government’s efforts to immunize Emperor Hirohito from any accountability continued on an intensified basis after the surrender and throughout the Occupation period. With MacArthur’s support, these efforts were eminently successful. *Id.* at 556.

35. FRANK, *supra* note 3, at 231-37.

36. *Id.* at 234.

37. General of the Army Douglas MacArthur to the Chief of Staff (Aug. 17, 1945), 6 *FOREIGN RELATIONS OF THE UNITED STATES* 1945, at 671 (1969).

38. *Id.*

outset of the Occupation, ignored by MacArthur (who met with them personally only once and refused to do so again). The Far Eastern Council, made up fourteen of the Allied nations, though charged technically with setting occupation policies, was equally pushed out to the sidelines and deprived of all meaningful authority over SCAP.³⁹ Much of the story is nicely encapsulated in the phrase, "Defending Japan Against the Allies," which was used by one of MacArthur's high-ranking advisors as a chapter title in his memoir on the history of the Occupation.⁴⁰

In substantive policy, MacArthur initially did oversee vigorous prosecution of the war crimes trials, and he instituted the important constitutional reforms which have endured to the present day in Japanese governance. He also undertook democratizing initiatives in regard to land and fisheries reform, the extension of civil rights to organized labor, expansion of suffrage, and efforts to break up the great Japanese industrial-financial combinations (the *Zaibatsu*). Initially, too, MacArthur seemed to be supportive of the so-called Pauley commission sent by President Truman in December 1945 to study the reparations question. This commission recommended a severe set of reparations actions, requiring that about one-half of the industrial capacity of the country be dismantled and distributed to the Asian nations and to Britain and France. In a press release issued on December 7, 1945 (four years to the day after Pearl Harbor), Pauley declared that "Japan still retains, in workable condition, more plant and equipment than its rulers ever allowed to be used for civilian supply and consumption even in peaceful years . . ." and contended that it would be only just to remove the "surplus" capacity to countries that had suffered under Japanese rule. "All Japanese financial and economic penetration of other countries must be wiped out," including a seizure of all assets located outside Japan, of the Emperor and Government as well as individuals and private firms.⁴¹

The other book-end that I have mentioned dates from 1951, six years later, and was set in place as the peace treaty was being negotiated and the occupation era about to end. It was expressed in a speech by John Foster Dulles, President Truman's special ambassador in charge of the negotiations, delivered at Whittier College. In this 1951 address, Dulles declared: "Reparations were unthinkable. To dismantle Japanese industrial plants, or turn over such assets to the Allies, would arouse public bitterness in Japan" and besides it "[would] constitute an almost inhuman burden to bear."⁴²

39. MICHAEL SCHALLER, *THE AMERICAN OCCUPATION OF JAPAN 138-39* (1985); JOHN DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 79 (1999) (" . . . the imperious MacArthur until 1948 reigned as a minor potentate in the Far East."). See generally GEORGE H. BLAKESLEE, *THE FAR EASTERN COMMISSION: A STUDY IN INTERNATIONAL COOPERATION, 1945-1952* (1953) (the U.S. State Department's official history of the FEC); RICHARD B. FINN, *WINNERS IN PEACE; MACARTHUR, YOSHIDA, AND POSTWAR JAPAN* (1992).

40. THEODORE COHEN, *REMAKING JAPAN: THE AMERICAN OCCUPATION AS NEW DEAL*, chap. 8 (1987).

41. Various December telegrams, 6 *FOREIGN RELATIONS OF THE UNITED STATES 1945*, at 1010-1015 (1969).

42. John Foster Dulles, Address at Whittier College, Los Angeles, (Mar. 31, 1951), full text printed in *NY TIMES*, Apr. 1, 1951, at 46.

The path from MacArthur's refusal to grant concessions to Japan at the war's end, and from the Pauley Commission report calling for heavy reparations, down to the Whittier College speech of Dulles in 1951, was a path marked out by MacArthur himself almost before the ink on the Pauley Commission report had had a chance to dry. In only a matter of months after the occupation had commenced, MacArthur's attitude had become one of paternal concern and commitment to the rebuilding of the Japanese economy as part of the process by which Japanese sovereignty could be regained and the country restored to full status as an equal among equals in the community of nations. The general's dedication to this goal involved, among other things, overt opposition to the reparations policy. In 1947, for example, he won War Department support for dropping reparations, obtaining from the Department a report that ridiculed the original reparations program as one that would promote "wasted charity for undeserving Asians!"⁴³

Beginning in 1947-48, American policy on the Japanese Occupation goals shifted dramatically, with the emphasis on reform and on punishment abandoned in favor of a new emphasis on speedy economic recovery and restoration of Japanese autonomy. Eagerly embraced by MacArthur, these goals were pursued in SCAP headquarters in a relationship of tension and disappointment as far as the Allies were concerned. The partners in war were largely pushed aside, their views given little respect, and their interests often systematically subordinated to Japan's. This tendency was given massive additional impetus, of course, by the Cold War, and then at a dramatically higher level by the outbreak of the Korean War and the consequent deepening of polarization in East Asia. The Communist regime's take-over of mainland China reinforced the U.S. government's determination to restore Japan's economic strength. The United States' new policy orientation—which became known as "reverse course"—constituted part of a larger policy aimed at aligning Japan in the American-led camp in the Cold War confrontation in Asia.⁴⁴

MacArthur's modus operandi during the Occupation included a systematic insulation of Japan's government and its public-at-large from the impact of opinion in the Allied nations other than America itself. A lens through which to see how this occurred is offered by the history of Occupation policy on the reconstruction of marine fisheries and whaling, a major industry in Japan and a key source of food supply for the country's population in the Occupation years as it has always been.⁴⁵ In the months immediately following surrender, charged with feeding the Japanese people at survival levels, MacArthur decided to rebuild Japan's fleet of factory ships and catcher vessels for Antarctic whal-

43. SCHALLER, *supra* note 39, at 128.

44. On economic policies and the shifting orientation of U.S. goals, see generally WILLIAM S. BORDEN, *THE PACIFIC ALLIANCE: UNITED STATES FOREIGN ECONOMIC POLICY AND JAPANESE TRADE RECOVERY, 1947-1955* (1984) (a thoroughly documented study, from archival sources), stressing the importance of the "Reverse Course" policy by which the U.S. shifted in 1947-48 to a policy of all-out reconstruction and revival of the Japanese economy.

45. See generally HARRY N. SCHEIBER, *INTER-ALLIED CONFLICTS AND OCEAN LAW: THE OCCUPATION COMMAND'S REVIVAL OF JAPANESE WHALING AND MARINE FISHERIES* (2001).

ing. This activity required very large, modern steel ships; and MacArthur took that requirement as an excuse for reopening Japanese shipyards, ordering that war ships in progress of construction should be converted to fishing vessels or whaling factory ships. This brought forth violent protests from the other Allied powers. The Allies wanted the shipyards for reparations, and they were also opposed to any restoring of capacity that might be used for naval rebuilding by Japan at the expense of their own security.⁴⁶ Besides, Japan had refused to cooperate in prewar efforts to bring Antarctic whaling under modest conservationist regulation, and was now seen as being subsidized for purposes of competing with their own (Allied) whaling fleets in the southern seas at a time when they were at great expense to invest in ships to replace the vessels sunk by the Japanese and Germans during the war.⁴⁷

The whaling issue became a major irritant to inter-Allied relations. MacArthur fended off British, Norwegian, Australian, New Zealand, and other Allied nations' objections to the initial decision on whaling in winter of 1945-46 by declaring that it was a "one-time-only" emergency measure. The Allies would be fully consulted, he guaranteed, if additional expeditions were to be contemplated in future years. This promise, reiterated by the U.S. government in official Notes to the Allies, was to prove entirely false. In a word, the United States then and later dealt with the Allies on the Japanese whaling question in a manner that was consistently dissembling, dishonest, and manipulative. Each year a promise was made that the Allies, through the Far Eastern Council, would be fully consulted and have the final decision and authority; each year, as time went on, these assurances were shamefully violated and rendered meaningless. Thus successive whaling expeditions by the Japanese fleets were authorized under MacArthur's aegis without regard to the Allies' objections. The same process and policies were repeated with respect to the revival of Japan's marine fisheries. And the U.S. government also backed MacArthur's policy of authorizing Japanese participation, even before the Peace Treaty was signed and sovereignty restored, in the deliberations for formation and implementation of major international agreements that shaped the postwar structure of international economic relations.⁴⁸ All this was embittering, as the Allied governments recognized that they were being cast into the role of junior partners or worse, excluded from any real influence over the Occupation and subjected to heavy U.S. diplomatic pressure to accept the non-punitive terms of a generous peace treaty.⁴⁹

What I have found most striking in the diplomatic correspondence between the Allies and Washington in this period was the way in which U.S. efforts were

46. Harry N. Scheiber & Akio Watanabe, *Occupation Policy and Economic Planning in Post-war Japan*, in *ECONOMIC PLANNING IN THE POST-1945 PERIOD* 100, 103 (Erik Aerts & Alan S. Milward eds., 1990).

47. Memorandum of Conversation between Under-Secretary Lovett and British Embassy Counselors (July 1, 1947), 6 *FOREIGN RELATIONS OF THE UNITED STATES* 1947, at 245 (1972).

48. Secretary of State to Certain Diplomatic Offices (April 22, 1949), 7 *FOREIGN RELATIONS OF THE UNITED STATES* 1949, at 113-14 (1976); SCHEIBER, *supra* note 45, at 66-69. See also BLAKESLEE, *supra* note 39, at 105-22.

49. SCHEIBER, *supra* note 45, at 36-42, 187-195.

seen as a betrayal of common interests—especially with respect to the manner in which SCAP and the United States officialdom were insulating Japan from a recognition of how intensely other nations resented Japanese responsibility for a war of aggression and for a record of atrocities against innocent civilians and military prisoners. Thus a pattern of frustration, anger, and deeply felt bitterness was evident in many of the discussions that produced the peace treaty that the Americans had determined would be entirely non-punitive. Of course, MacArthur's approach and the U.S. government's view prevailed entirely. In this pattern of favoring Japan's recovery over what the Allied nations had hoped for in the occupation years, MacArthur became increasingly acerbic and hostile toward the wartime partners whose troops he had commanded. His rhetoric was as unrestrained, in some of these confrontations, as his policy was unyielding. MacArthur constantly declared that his was the high moral ground, and that opposition to his beneficent regime in Japan was evidence of a deplorable pursuit of sordid self-interest on the part of the Allied nations and his critics at home in America.⁵⁰ When Allied objections to his favoring of Japanese interests were made public, MacArthur was quick to denounce them as "distorted pronouncements and unwarranted criticism," while his own policies were, he claimed, "entirely just, humanitarian, and practical."⁵¹ With respect to economic recovery generally, MacArthur denounced the Allied governments as "shamelessly selfish and negative" toward Japan.⁵² On the matter of reparations more specifically, MacArthur won high-level State Department support for his views when, after meeting with the general in Tokyo, George Kennan, then head of the department's policy planning staff, denounced the reparations idea as "sheer nonsense . . . and basically inconsistent with the requirements of Japanese recovery."⁵³ Perhaps the most astonishing statement that MacArthur himself made on the matter was voiced in March 1948, when he demanded an abandonment of the reparations policy not only on economic grounds but also as a matter of justice because "Japan has already paid over fifty billion dollars by virtue of her lost properties in Manchuria, Korea, North China and the outer islands . . ."⁵⁴ One can easily imagine the reaction of the Asian-Pacific Allies to the idea that "lost properties" should be placed in the balance in this way.

The Japanese, for their part, accurately perceived MacArthur as their protector against vengeful and angry enemies. This did not escape notice among

50. Thus MacArthur denounced what he termed "[the] selfish and venal pressures" from the Allied governments whose "main objection" to Japanese whaling expansion actually was their "desire to maintain [a] monopoly of [the] whaling industry." The Political Advisor in Japan to the Secretary of State (May 20, 1947), 6 FOREIGN RELATIONS OF THE UNITED STATES 1947, at 212, ¶ 4. (1972).

51. Radiogram from SCAP to War Department, marked "Urgent, Pass to Secretary of State Marshall" (July 5, 1947), folder FEAC 276, MacArthur Archives, MacArthur Memorial and Library Norfolk, Va. On a later occasion, MacArthur self-righteously rejected "on the grounds of legality, morality, [and] logic" the objections voiced by the Allies against his expansion of Japanese fishing in the U.S. Trust Territory waters of present-day Micronesia. MacArthur to the Secretary of the Army (Oct. 3, 1948), copy in SCAP Records, Record Group 331, U.S. National Archives.

52. FINN, *supra* note 39, at 202.

53. *Id.* at 204.

54. *Id.* at 198.

the Allies. For example, the Philippine representative in the Far Eastern Commission said at one point, rather sardonically, "The [Far Eastern] Commission does not need, I am sure, to be told with what jubilation the news of the new United States policy was received in Japan . . ." ⁵⁵ Whereas it had been MacArthur himself who in August 1945 had invoked so eloquently the memory of Japan's atrocities of Bataan and Corregidor, it became commonplace after 1945 for the Allied diplomats to plead with MacArthur and the U.S. government to remember the common sacrifices of the war years and not throw away that legacy in favor of an undeviating preference for Japanese interests over their own. Typical of the Australian government's responses to MacArthur's policies was the statement by Canberra's representative on the Far Eastern Council in a 1947 session of that organization. Denouncing SCAP's reopening of the shipyards and construction of a whaling fleet that could easily be converted (as had been done by Japan in 1941) to military uses, he declared that he spoke for a country, in the minds of whose people the memories are still very vivid of the dark days in 1942 when we stood exposed and alone and watched the full force of Japanese aggression advancing rapidly toward us. The memories of the invasion of New Guinea and Portuguese Timor, and the destruction of our northern port of Darwin, are not erased from the minds of the Australian people overnight, and we are determined that the Japanese will not have the slightest opportunity to menace our security again. ⁵⁶

Similarly, in their diplomatic communications criticizing SCAP's fisheries and whaling policies, the Australian and other Asian-Pacific governments indicated the depth of their resentment with SCAP in 1946 by referring to Japan as having so recently perpetrated "many of the foulest atrocities in modern history, committed not only against the peoples of Eastern and Southeastern Asia but against nationals of Australia, the United States, and other Allied powers."⁵⁷ Perhaps the deepest resentment of all was directed at MacArthur for giving priority to relief of domestic food shortages in Japan at a time when global food and oil supplies were in desperately short supply. A diplomat representing India thus expressed his outrage over McArthur's favoring the Japanese in this way, declaring in 1946 that "barbarities committed by Japan" had been responsible for a famine in India three years earlier, resulting in the deaths of 1.5 million to 3 million of his people. ⁵⁸

As the Occupation wound down, with the San Francisco signing ceremonies scheduled for the peace treaty in 1951, a distinguished British diplomat, Sir Alvary Gascoigne, sent a long dispatch to the Foreign Office in London that is highly relevant to our consideration of the issues before this Symposium. Gas-

55. BLAKESLEE, *supra* note 39, at 166 (quoting the Philippine delegate in the FEC, Carlos Romulo).

56. Statement of Mr. Makin in "Extracts from Minutes of the 6th Meeting of the FEB," June 12, 1947, marked July 24, 1947, copy in Record Group EA1, folder. 268/5/5/ pt. 3, New Zealand National Archives, Wellington, NZ.

57. Draft telegram to the Australian Embassy, Washington, Sept. 30, 1946, Department of External Affairs Records, A 1067/1, P 46/10/10/3, in the Australian National Archives, Canberra.

58. Statement of Sir Girja Bajpai, in the Far Eastern Council. BLAKESLEE, *supra* note 39, at 177.

goigne had served throughout the Occupation as the United Kingdom's liaison with SCAP. On being recalled, as Japan prepared to resume its sovereignty, Gascoigne undertook a long interview with Japanese Prime Minister Shigeru Yoshida, seeking to learn Yoshida's views on the entire range of outstanding issues in international affairs. Preserved today in the British archives in Kew, this report offers an important insight into the Occupation's legacy in regard to Japan's posture since 1951 on the reparations issue.⁵⁹ Whatever the accomplishments of the Occupation, Gascoigne found, there had been an abject failure by the United States in getting the message across to the Japanese government that other nations did not view postwar Japan or its burden of moral responsibilities in the way that General MacArthur viewed them. The Japanese did not understand, therefore, the abiding bitterness and anger with regard to how Japan had been treated so favorably and its economic reconstruction given so high a priority by the Americans at a time when the Allied economies had hardly recovered from the blows dealt them by the war. Gascoigne reported that Yoshida "does not, or will not, appreciate that some time must pass before the British colonial subjects in the United Kingdom territories of South-East Asia overcome their hatred of the Japanese for the barbarous manner in which the latter behaved in Hong Kong and Malaya, as well as in North Borneo and Tarawak, during the second world war."⁶⁰

Gascoigne's report, which is consistent in its observations with the findings of all my own research in the Allied and Japanese archives of the occupation era, is indicative that Japan's misreading or ignorance of Allied opinion—or perhaps, for that matter, Japan's convenient deployment of the *mokusatsu* spirit in a new context, as an attitude consistent with resistance to coming to terms with the past and taking of responsibility for war crimes—was fully operative in 1951. Indeed, it was no less so than it had been when the Japanese war lords had misread Allied opinion so completely when they asked for special considerations in lieu of unconditional surrender six years earlier. Japan's obtuseness about the moral outrage that other nations and peoples felt, and from which they were so well protected by MacArthur's command and then by Dulles' stance on a non-punitive treaty, nurtured a mind-set that justified a refusal to come to terms with Japan's wartime past.⁶¹ It was reinforced, moreover, by the U.S. need for Japanese consent to a defense treaty aligning it with the Americans

59. *Conversation between His Majesty's Ambassador and the Japanese Prime Minister: Sir A. Gascoigne to Mr. Bevin* (Received 29 January 1951), printed copy in FJ 10198/4 (19521), United Kingdom Public Records Office, Kew, U.K.

60. *Id.* "In reality," Gascoigne wrote, "Yoshida feels hurt . . . that we are not at present actively wooing Japan to the same extent as the United States."

61. George Clutton, another officer in the U.K. Liaison Mission in Japan, informed London in October 1951 of his view, similar to Gascoigne's: "I can only say that the majority of Japanese have no idea of the legacy of hatred they may have left behind them in South East Asia and that if I, or any other British official, were to tell them of it, we should probably be thought to be lying. . . ." Clutto, Despatch No., 332, Oct. 2, 1951, FJ102.77/6, KU.K. Public Records Office, Kew.

against the Soviet bloc as part of the larger Peace Treaty diplomatic package.⁶² And it received the imprimatur of legality with that treaty's waiver provision.

That this mind-set is still in place in our time—evinced in Japan's determined resistance to accepting the legitimacy of claims against her government and industries advanced by those who suffered at her hands from 1937 to 1945—is evident from the consistent record of the Japanese government in the fifty years since Gascoigne filed his report.

IV. CONCLUSION

Even though the U.S. government continues to be officially committed to the permanent immunity of Japan and its citizens against any war-based claims asserted by the victims of slave labor policies, the Japanese military's sex-slavery regime for Korean "comfort women," and Japan's abuse of war prisoners,⁶³ the time has come for the Japanese to take responsibility for acts by their nation's imperialist wartime government that violated fundamental legal and moral norms in the conduct of war. A reparations policy was taken for granted in 1945. By the time the final peace agreement was reached, actual reparations had been dropped to only a shadow of what had originally been contemplated.⁶⁴ What had appeared to be a matter of simple justice in 1945 now had become the subject of a waiver provision in a non-punitive treaty—a document in which the relief afforded Japan from reparations was explicitly justified by reference to the distressed condition of the Japanese economy. Today, despite the long economic recession, Japan is in a very privileged position in terms of national economy and wealth. Today, the full record of actual reparations deals is becoming known, and the pretense that the waiver provision precluded any concessions can be set aside. Those who suffered and now claim reparations are of advanced years, just as are those who suffered at the hands of the government in Japan because of their affliction with leprosy and the callous policies that cost them their freedom for so many years. Today, it is time to fully come to terms with the moral imperatives of crimes committed in time of war, while the individuals who were personally affected are still able to prove their claims.

It is not necessary to even refer to the literal terms of the treaty, its waiver, or the deals that have been cut without regard to the waiver. Moral responsibility, especially in a cultural template that places so much importance on simple apology, requires a different kind of behavior now. Coming to terms with the nation's past is not too much to expect of Japan in light of all the treasure and favor lavished upon it by the victorious power that became its dedicated sponsor and benefactor during an occupation of unprecedented generosity leading to its

62. See generally WALTER LAFEBER, *THE CLASH: A HISTORY OF U.S.- JAPAN RELATIONS* (1997); RICHARD N. ROSECRANCE, *AUSTRALIAN DIPLOMACY AND JAPAN, 1945-51* (1962).

63. See Bazylar, *supra* note 18.

64. See BORDEN, *supra* note 44, at 61-82.

full restoration to the community of nations. To restore something of its victims' losses now is not asking a great deal of Japan in today's circumstances.⁶⁵

65. Some compensation has been extended to the "comfort women" by a private foundation (the Asian Women's Fund) to which Japan's government has granted some funding for that purpose. Also, Premier Kozumi wrote to women accepting such compensation a letter of apology indicating his acceptance of moral responsibility for Japan's sex slavery operations. *ASIAN WOMEN'S FUND, ACTIVITIES UPDATE*, at 1-8 and app. (Feb. 2002). However, only a few hundred women victims have been willing to accept such "remorse payments" because the Japanese Diet and Emperor have not acknowledged responsibility.

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The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks

By
Roger P. Alford*

It is a privilege to be able to participate in the Stefan A. Riesenfeld symposium on “Fifty Years in the Making: World War II Reparation and Restitution Claims.” The participants gathered for this symposium at Boalt Hall provide a wonderful collection of voices from government, the bar and the academy on a host of difficult issues concerning Holocaust claims.

The discussion regarding Holocaust reparation claims has focused primarily on the theoretical and policy implications of these claims or on specific lawsuits that have been filed against foreign corporations. However, this paper will focus on issues related to the the implementation of settlements for these claims. For example, once an agreement has been reached between the parties, how is this agreement implemented? What are the legal difficulties that arise? Just as Norbert Wühler and Karen Heilig have provided insights into the implementation process for German slave labor claims,¹ this paper will focus on Swiss banks, and in particular the measures taken by the Independent Committee of Eminent Persons (“Volcker Commission”) established to resolve claims to Holocaust-era Swiss bank accounts.²

Section I of this paper will provide a brief historical analysis of Holocaust claims against Swiss banks to address the fundamental question of why this process did not occur earlier.³ Section II will introduce procedures utilized by

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1. Norbert Wühler, Director, Claims Processing German Forced Labor Compensation Programme, Address at the Stephan A. Riesenfeld Symposium (Mar. 8-9, 2001); Karen Heilig, Counsel, Claims Conference on Jewish Material Claims Against Germany, Address at the Stephan A. Riesenfeld Symposium (Mar. 8-9, 2001).

2. INDEPENDENT COMMITTEE OF EMINENT PERSONS, REPORT ON DORMANT ACCOUNTS OF VICTIMS OF NAZI PERSECUTION IN SWISS BANKS, (Dec. 6, 1999) [hereinafter VOLCKER REPORT], available at http://www.icep-iaep.org/final_report/ICEP_Report_english.pdf; see also *In re Holocaust Victim Assets*, 105 F.Supp.2d 139 (E.D.N.Y. 2000) (There were a number of claims against Swiss banks that did not concern dormant accounts. The class action lawsuit filed against Swiss banks included five categories: dormant account claims, looted asset claims, slave labor claims, insurance claims, and refugee claims.).

3. See *infra* pp. 251-59.

the Claims Resolution Tribunal for resolving claims to accounts published in 1997 and in 2001.⁴ Section III will focus on some of the most difficult legal issues that have arisen in resolving Holocaust claims against Swiss banks.⁵ This discussion includes the definition of what constitutes a Holocaust account,⁶ issues concerning the applicable law,⁷ and difficulties with the burden of proof.⁸ This paper will conclude with thoughts on reparations and the moral accounting that is achieved through Holocaust restitution and reparation claims.⁹

I.

A HISTORY OF OBFUSCATION AND NEGLECT

One of the most common questions asked about the Holocaust litigation against Swiss banks is "Why now?" Why, after fifty years, are we only now acknowledging past injustices committed by Swiss banks against Holocaust victims for failing to turn over assets to their heirs? It is an important question, and the answer is complex.

The impetus for progress made in the 1990s is well documented.¹⁰ However, the reason so little was done for fifty years is less obvious and deserves mention. In my view, it relates directly to the obfuscation by the Swiss banks and inattention of the Swiss government. One can examine the historical surveys conducted by the Swiss of their Holocaust assets and the actual stories

4. See *infra* pp. 259-67.

5. See *infra* pp. 267-77.

6. See *infra* pp. 271-78.

7. See *infra* pp. 269-71.

8. See *infra* pp. 267-68.

9. See *infra* pp. 277-81.

10. While there were a number of elements that were critical in the movement, its origins can be attributed to Israel Singer and Edgar Bronfman of the World Jewish Congress. Johanna McGeary, *Echoes of the Holocaust*, TIME, Feb. 24, 1997, at 36. Reportedly Israel Singer became fascinated with the issue of Nazi gold smuggled out of the Third Reich based on a novel he read by Paul Erdman called *The Swiss Account*, as well as a Richard Immerman biography of John Foster Dulles that alluded to a U.S. war-time intelligence effort to trace Nazi looted assets code-named Project Safehaven. *Id.*; see also WILLIAM Z. SLANY, U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II, Preliminary Study Coordinated by Stuart E. Eizenstat (May 1997) [hereinafter SLANY REPORT], available at <http://www.state.gov/www/regions/eur/ngrpt.pdf>. In 1995, Singer received authorization from Edgar Bronfman, president of the World Jewish Congress, to begin investigating recently declassified U.S. reports on Project Safehaven. McGeary, *supra*. This eventually led to meetings with Swiss bankers regarding Holocaust-era bank accounts. *Id.* On September 12, 1995, Bronfman and Singer met in Berne, Switzerland with the Swiss Bankers Association requesting an independent audit of Swiss banks. *Id.* Swiss banks allegedly refused to offer Singer or Bronfman a seat. *Id.* Following unsuccessful negotiations and the Swiss publication of the 1995 self-audit in early 1996, Bronfman met with then-Senator Alfonse D'Amato and President Clinton to request action. *Id.* Sen. D'Amato agreed to hold congressional hearings on the matter. *Id.*; *Deposits By World War II Jews in Swiss Banks: Hearing of the Senate Banking, Housing and Urban Affairs Committee*, (Apr. 23, 1996) [hereinafter *Congressional Testimony*]. These hearings led to the establishment of the Volcker Commission. VOLCKER REPORT, *supra* note 2. In addition, under the leadership of Stuart Eizenstat, the Clinton Administration took active steps to investigate U.S. archives for the trail of Nazi assets. McGeary, *supra*. From these hearings and these U.S. archive investigations, the modern era of Holocaust litigation was born. See generally, Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in the United States Courts*, 34 U. RICH. L. REV. 1 (2000) (explains the general history of recent Holocaust litigation).

that have been established regarding their treatment of Holocaust survivors and their heirs. The inevitable impression is that Swiss banks and the Swiss government did far less than what was feasible to resolve this issue. The heirs of Holocaust victims have attempted for decades to secure information regarding the assets located in Swiss banks. However, the full extent of Holocaust-era bank accounts was unknown, and unknowable, until Swiss banks provided this information in the mid-1990s.

A. *Surveys of Holocaust Accounts*

One of the most unusual aspects about Holocaust claims against Swiss banks was that information regarding the scope and extent of Holocaust accounts was wholly within the control of the Swiss banks. Given the Swiss banks' prerogative and obligation to maintain bank secrecy, a conflict of interest existed regarding the publication of account information. Swiss banks and the Swiss government were the only entities that could provide the requisite information to claimants concerning the number and value of Holocaust accounts. Unfortunately, when memories were fresh and documentation still available, Swiss banks were not forthright and straightforward in their dealings with Holocaust victim accounts, and the Swiss federal government took halting and inadequate steps to force the banks to audit their books and establish an appropriate claims procedure. As a result, for decades claimants had no mechanism to prove that tens of thousands of accounts held by victims of the Holocaust existed and remained unclaimed.

Swiss banks conducted two early audits shortly after the Second World War that proved less than illuminating.¹¹ The first audit occurred in 1947, when the Swiss Bankers Association ("SBA") requested its members to identify so-called "heirless assets" in order to identify assets that belonged to victims of Nazi violence.¹² This survey originated from Switzerland's participation in the Washington Agreement of 1946, obligating Switzerland to assist Allies in identifying heirless assets.¹³ The Swiss banks reported an unknown number of accounts with a total value of 482,000 Swiss Francs.¹⁴ The second audit came in 1956 when various Jewish organizations were pressuring the Swiss Parliament to pass legislation requiring Swiss banks to report on the Holocaust-era dormant accounts.¹⁵ Because Jewish organizations could only find legislative support if the value of the dormant accounts exceeded four million Swiss Francs, Swiss banks undermined the legislation by reviewing their records and reporting only 86 accounts with assets totaling 862,000 Swiss Francs.¹⁶ The SBA sent a letter to its board members on June 7, 1956 stating that "[a] meager result from the survey will doubtless contribute to the resolution of this matter in our favor."¹⁷

11. VOLCKER REPORT, *supra* note 2, at 87-90.

12. *Id.* at 89.

13. *Id.*

14. *Id.* at 88-89.

15. *Id.* at 90.

16. *Id.*

17. *Id.* (alteration in original).

Subsequently, the SBA sent a letter to the Swiss President stating that the problem “by no means [had] the significance which the other side is constantly attempting to ascribe to it.”¹⁸

In the course of the 1960s, Switzerland was confronted with a second wave of diplomatic *démarches* concerning unclaimed assets of Holocaust victims.¹⁹ In 1962, the Swiss Parliament passed a law requiring banks and other financial institutions to report on the assets in Switzerland of foreign or stateless persons subject to racial, religious or political persecution.²⁰ The Swiss banks strictly construed the terms of the federal law to require only reports on persons who “died a violent death or were missing because of the reasons for persecution as specified in the law.”²¹ As a result, the Swiss banks reported only 739 accounts with 6.2 million Swiss Francs in assets.²² Nonetheless, the Federal Decree created a sensation, with claimants around the world seeking information on unclaimed assets. In 1963, the Swiss Consulate General in New York, Hans Wilhelm Gasser, reported that he anticipated “tens of thousands of claims” in New York alone.²³

The 1962 Federal Decree led to the establishment of a Claims Registry Office within the Swiss federal government.²⁴ Prior to the enactment of the Claims Registry Office, the Swiss federal government had always referred claimants to the Swiss Bankers Association. Following the establishment of the Registry Office, the Swiss Bankers Association referred all matters to the federal government, indicating that the SBA would no longer conduct a search for assets.²⁵ Over thirty years passed before there was another major self-audit of Holocaust-era dormant accounts.²⁶ As counsel for the Volcker Commission put it:

It is now well recognized, both outside Switzerland and in Switzerland, that a miserable job was done [in administering the 1962 law]. In the end, some 10,000 claims were made, and only 1,000 claims were recognized. . . . No serious attempt was made to compel the financial intermediaries, including the banks, to turn over all accounts. No one checked how banks complied with the law. Consequently,

18. *Id.* (alteration in original).

19. See Peter Hug and Marc Perrenoud, *Assets in Switzerland of Victims of Nazism and the Compensation Agreements with East Bloc Countries*, (hereinafter Hug-Perrenoud Report), available at http://www.switzerland.taskforce.ch/W/W3/W3a/a1_ei.htm.

20. VOLCKER REPORT, *supra* note 2, at 91. The relevant text of the Federal Decree provided that:

Assets of any type located in Switzerland whose last known owners are foreign nationals or stateless persons about whom no reliable information has been received since 9 May 1945 and who are known or presumed to have fallen victim of racial, religious or political persecution, shall within six months . . . be registered with an authority to be determined by the Federal Council of Minister with notification of all changes to the assets that have taken place since the disappearance of their owner or his or her absences without information as to his or her whereabouts.

Id. (quoting Swiss Parliament Federal Decree of Dec. 20, 1962).

21. *Id.* at 91-92.

22. *Id.* at 92.

23. Hug-Perrenoud Report, *supra* note 19.

24. VOLCKER REPORT, *supra* note 2, at 91.

25. Hug-Perrenoud Report, *supra* note 19.

26. VOLCKER REPORT, *supra* note 2, at 92-93.

there remained this terrible question that justice had not been done, that all of these assets had not been turned over to the Swiss Government, and that they remained in the banks. This issue continued to plague the Swiss.²⁷

Under pressure from Jewish organizations, the Swiss banks again conducted a survey of their accounts in 1995 to quell speculation that the 1962 survey was incomplete or inaccurate.²⁸ Edgar Bronfman, President of the World Jewish Congress, reported that he met with the SBA in 1995 to secure a commitment from the Swiss Bankers Association for an impartial audit of the Holocaust assets held by Swiss banks.²⁹ Instead, the Swiss banks conducted yet another self-audit, reporting that they had discovered 775 foreign dormant accounts with assets totaling 38.7 million Swiss Francs.³⁰ According to the SBA, the purpose of the 1995 survey was to establish that the 1962 survey “was done in a thorough fashion and to show that speculations which [said] that huge amounts were held back [was] at most a rumor . . . so that these partly unfounded press speculations [could] be refuted through a coordinated public affairs campaign.”³¹ This approach backfired. At congressional hearings in April 1996, Edgar Bronfman testified that the results of this “unilateral” survey “defy credibility,” representing another attempt of Swiss banks to say “trust us, we looked into our records and our own vaults and that’s all we could find.”³² In Bronfman’s view, what was “urgently needed” was “a transparent mechanism to conduct a verifiable audit of all Nazi-era assets, those deposited by Jews and those assets stolen from the Jews by the Nazis and also deposited in Switzerland and their disposition so that all the parties involved can be satisfied Justice has been served.”³³ Only through such a “full, fair and impartial audit can we uncover the truth” and “restore the reputation of the Swiss banking community that has been called into question by so many.”³⁴

In the face of tremendous public pressure for an independent audit, the Swiss banks relented.³⁵ In May 1996, the Swiss Bankers Association and the

27. Michael Bradfield, *The Role of the Independent Committee of Eminent Persons*, 14 AM. U. INT’L L. REV. 231, 232 (1998). Even the Swiss banks now acknowledge that the 1962 survey was seriously lacking. See *id.* See also Roger Witten, *Switzerland’s Response to the Claims of Holocaust Victims: A Mid-Term Report*, 20 CARDOZO L. REV. 527 (1998). Roger Witten, counsel for the Swiss Bankers Association, has described the 1962 survey as “certainly unsuccessful.” *Id.* at 532. He attributes much of the blame to the Swiss government, not the Swiss banks. *Id.*

28. VOLCKER REPORT, *supra* note 2, at 92.

29. Congressional Testimony, *supra* note 10 (testimony of Edgar M. Bronfman, President, World Jewish Congress and World Jewish Restitution Organization).

30. VOLCKER REPORT, *supra* note 2, at 93.

31. *Id.* (quoting SBA Board Minutes).

32. Congressional Testimony, *supra* note 10 (statement of Edgar M. Bronfman, President, World Jewish Congress and World Jewish Restitution Organization available at 1996 WL 10162515, 4).

33. *Id.* at 11.

34. *Id.*

35. *Id.* at 27.

Given questions raised concerning the amount of funds identified in response to the SBA directive and the likelihood that not all of these funds will be claimed under the process that is being overseen by the Ombudsman, the SBA recently has announced several further steps to resolve issues concerning the identification and ultimate disposition of unclaimed funds. These steps are responsive to requests and concerns

World Jewish Congress established the Volcker Commission with the authority to appoint an independent auditing company.³⁶ From its inception this independent auditing company was accompanied by assurances from the Swiss Bankers Association that the auditors would have “unfettered access to all relevant files in banking institutions regarding dormant accounts and other assets . . . deposited before, during and immediately after the Second World War.”³⁷ Under the supervision of the Volcker Commission, the Swiss banks agreed to immediately conduct another self-audit to identify all foreign accounts opened prior to May 1945 and dormant thereafter.³⁸ Having the accounts identified would allow the independent auditors to conduct a more thorough survey. The result of the 1997 self-audit was the revelation of 5,570 foreign accounts with assets totaling 74.5 million Swiss Francs.³⁹ The Claims Resolution Tribunal was established on June 25, 1997 to resolve claims to the accounts published in July and October 1997.⁴⁰

Finally, the result of the independent audit conducted by the Volcker Commission was announced in December 1999. This report was the result of a three-year investigation that included an independent audit of banking practices of 254 Swiss banks from the Second World War to the present.⁴¹ The Volcker Commission reported, in addition to the 5,570 accounts discovered from the 1997 self audit, an additional 53,886 accounts with a probable or possible relationship to victims of Nazi persecution.⁴² The Volcker Commission divided these claims in four categories. Of the newly discovered accounts, 10,471 had a close connection to the Holocaust in that they were open, dormant and matched the names of known Holocaust victims (category 1 accounts) or had other characteristics suggesting that there may be a probable or possible relationship be-

expressed by the World Jewish Congress and other interested persons, including you, Mr. Chairman [D'Amato]. First, an independent commission of distinguished individuals whose experience and integrity are well-known is being established . . . The independent commission will be authorized to retain an internationally recognized independent accounting firm and other experts, as necessary, to assist it. The accounting firm retained by the commission will review the methodology for identifying funds and property held by Swiss banks that may have belonged to Holocaust victims and, upon approval of the methodology, the independent commission, with the help of the accounting firm and the bank supervisors, will verify that the banks have properly implemented the methodology. After it completes its work, the commission will prepare a final report on the assets held by Swiss banks that belonged to Holocaust victims. The commission will operate in a sensitive, open and professional manner, and will obtain and disclose the truth about this complicated matter.

Id. (testimony of Hans J. Baer, Chairman, Julius Baer Bank, and Member, Swiss Bankers Association Executive Board available at 1996 WL 10162494, 9-10).

36. *Memorandum of Understanding Between The World Jewish Restitution Organization and the World Jewish Congress and The Swiss Banker Association*, reprinted in VOLCKER REPORT, *supra* note 2, at Appendix A, A-1.

37. *Id.*

38. VOLCKER REPORT, *supra* note 2, at 93.

39. *Id.* at 88, 93-95.

40. *Id.* at 115.

41. *Id.* at 57.

42. *Id.* at 10, n.33, 71.

tween the account holder(s) and Nazi persecution (category 2 accounts).⁴³ The Volcker Commission has reported that the accounts in categories 1 and 2 contained assets with an estimated value of 31.5 million Swiss Francs. However, it is difficult to put a valuation on these accounts because many of them lack fiscal information.⁴⁴ The Volcker Commission estimates that the value of category 1 and 2 accounts in 1945 would have been between 271 and 411 million Swiss Francs.⁴⁵ Category 3 accounts, totaling 30,692 closed accounts, had insufficient information to place a valuation upon them.⁴⁶ Category 4, consisting of 12,723 accounts, had the weakest Holocaust nexus and contained assets with an estimated value of 4.2 million Swiss Francs.⁴⁷

In sum, until the 1990s, Swiss banks were largely uncooperative in efforts to locate assets of victims of Nazi Persecution. In 1962, Swiss banks reported that they held approximately 750 Holocaust accounts valued at over 6 million Swiss Francs.⁴⁸ A generation later, as a result of the 1997 self-audit and the 1999 independent audit, the Volcker Commission reported that Swiss banks held almost 60,000 accounts with a possible Holocaust connection, and that the total *current* value of the approximately 26,000 bank accounts within the Tribunal's jurisdiction exceeded 100 million Swiss Francs.⁴⁹ Put differently, prior to the 1990s, Swiss banks reported only one percent of the actual number of Holocaust accounts held.

SUMMARY OF AUDITS OF HOLOCAUST ACCOUNTS⁵⁰

	1947	1956	1962	1995	1997 ⁵¹	1999 ⁵²
Number of Accounts	Unknown	86	739	775	5,570	53,886
Value (SFr. 000's)	482	862	6,219	38,700	74,386	35,744

Because what constitutes a "Holocaust account" depends on how that term is defined, there will never be a precise number of Holocaust accounts. A narrow definition will yield one result, while a broad definition will yield a dramatically different result. Nonetheless, the information obtained from the independent audit reveals that the early surveys were woefully inadequate. As the Volcker Commission concluded:

43. *Id.* at 10-11.

44. *Id.* at 72.

45. *Id.* at 72.

46. *Id.* at 75.

47. *Id.* at 71-75.

48. *See supra* notes 19-27 and accompanying text.

49. *See supra* notes 35-47 and accompanying text.

50. VOLCKER REPORT, *supra* note 2, at 71-75, 88.

51. *Id.* at 88. This includes only accounts where the domicile is known to be foreign. *Id.* It does not include 74,496 accounts totaling 12.8 million Swiss Francs for accounts of persons of Swiss or unknown nationality. *Id.*

52. *Id.* at 71, 75. The values include only the 35.7 million Swiss Francs estimated book value of new accounts discovered from the independent audit. *Id.* Over 30,000 accounts were closed for which no valuations were available. *Id.*

[O]n two opportunities that clearly could have been used to address this problem in a straightforward and forthright way in 1956 and 1962, when memories were fresh and much more documentation was then still available, banks either used these occasions to deliberately minimize the problem in an attempt to avoid the threat of legislation (1956), or responded inadequately or not at all to a law that was too narrowly drawn and very poorly enforced (1962).⁵³

B. *Swiss Banks' Treatment of Holocaust Accounts*

Statistics should not overshadow the moral and human implications of Swiss resistance to Holocaust-era claims. Throughout the postwar period there is evidence that the Swiss were, to use Ambassador Eizenstat's phrase, "obdurate negotiators, using legalistic positions to defend their every interest, regardless of the moral issues also at stake."⁵⁴ These actions had very real human consequences.

A famous case of Swiss resistance to a Holocaust survivor's attempts to recover assets is the story of Estelle Sapir. Estelle Sapir's father's last wish before falling victim to the Holocaust was that Estelle recover the assets in his Swiss bank account for the benefit of their family.⁵⁵ After the war, Estelle endured twenty trips to Credit Suisse from 1946 to 1957, each time being turned away empty handed.⁵⁶ In 1998, Credit Suisse admitted that it "found a card under the name of J. Sapir that appeared to confirm that he held an account without an indication of how much the account may have once contained."⁵⁷ Credit Suisse settled with Estelle Sapir for approximately \$500,000.⁵⁸

Another case involved a Russian Jew, who in 1930 opened a Swiss bank account with instructions that the bank invest in fixed-income securities.⁵⁹ The bank ignored the instructions, invested in equities and by 1962 the account contained a value of over one million Swiss Francs.⁶⁰ Given the account holder's instructions, the bank "creamed off" the returns on the investment, transferring the 488,600 Swiss Francs to its own account and recreated the value in the original account to reflect what it would have received had it been invested in fixed-income securities.⁶¹ This was described by internal bank memorandum as the

53. *Id.* at 81. The plaintiffs were even more critical, stating:

[O]f the vast sums that . . . flowed into Swiss banks in the years before the Holocaust, only a pittance has ever been acknowledged. The vast bulk of the assets have simply disappeared into the Swiss banking system, constituting the single most egregious example of unjust enrichment in banking history.

Bazyler, *supra* note 10, at 36.

54. Stuart Eizenstat, *U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II, Preliminary Study*, (May 1997), at vii available at <http://www.state.gov/www/regions/eur/ng rpt.pdf>.

55. Elaine Woo, *Estelle Sapir; First Holocaust Survivor to Recover Wartime Claim from Swiss Bank*, L.A. TIMES, Apr. 16, 1999, at A26.

56. *Id.*

57. David Sanger, *Crack in the Vault: Swiss Bank Yields to a Nazi Victim's Daughter*, N.Y. TIMES, May 5, 1998, at A27.

58. *Id.*

59. VOLCKER REPORT, *supra* note 2, at 83.

60. *Id.*

61. *Id.*

“usual way . . . to accumulate reserves.”⁶² When the account holder’s heirs inquired about the account, they were told that it was never published in the 1962 survey because the Holocaust victim had died of natural causes.⁶³

In some cases, bank documents establish that significant fees were charged for maintaining or closing accounts.⁶⁴ While the Volcker Commission has estimated that normal bank fees for fifty years should total approximately 665 Swiss Francs,⁶⁵ in *Case 2012*, a bank charged 6,212 Swiss Francs in fees, leaving only 9.60 Swiss Francs in the account.⁶⁶ In other cases, if the account was previously closed because of excessive bank fees, the banks informed inquiring claimants that there was no such open account at the time the claim was made, without revealing that an account had existed and was now closed because of bank fees.⁶⁷ The Volcker Commission found over 1,300 accounts closed due to bank fees.⁶⁸ In one case, the fee for closing the account was 4,761.70 Swiss Francs, depleting the balance of the account.⁶⁹ Bank closings also occurred to avoid claims from being submitted thereon. One bank closed accounts totaling 77,000 Swiss Francs in October 1962, just prior to the passage of the 1962 Federal Decree to avoid registering them with the federal government.⁷⁰

Swiss banks engaged in dozens of other questionable activities. Such activities included collecting fees and charges owed for the use of safe deposit boxes by opening the boxes and selling the jewelry and other valuables to cover prior unpaid and future rental charges.⁷¹ In some cases jewelry was sold to pay for “unpaid” rental costs for a number of years into the future. In other instances, Swiss banks deliberately narrowed their scope of inquiry to protect the assets in an account. For example, if a victim’s account was held in Basel and years later an heir sought information at the Zurich branch about the existence of the account, the bank would review the records, discover that the account was held in the Basel branch, and inform the heir that there was no account at this branch held by a person with that name.⁷² Occasionally, an account holder held two or more accounts with a bank, a current account and a securities account. The bank would reveal the existence of one of the accounts and pay this out to the account

62. *Id.*

63. *Id.* at 84.

64. *Id.* at 84-86.

65. Board of Trustees Independent Claims Resolution Foundation, *Rules on Interest, Charges and Fees, for Arbitral Decisions of the Claims Resolution Tribunal*, Schedule A, [hereinafter CRT I Rules on Interest] available at http://www.crt.ch/rules_interest.html.

66. Consolidated Docket No:2012/0498/MJ, available at http://www.crt.ch/decision_en/2012.html (The depletion of this account reflects significant additional fees for hold mail and numbered accounts.).

67. VOLCKER REPORT, *supra* note 2, at 83.

68. *Id.* at 85.

69. *Id.* at 84.

70. *Id.*

71. *Id.* at 85. While the banks may have had a contractual right to do this, it reflects a moral insensitivity to the Holocaust victims. As the Volcker Report noted, “in order to preserve the assets, the bank could have transferred the contents of these safes into a general safe when it became apparent that the account was inactive.” *Id.*

72. *Id.* at 82-83.

holder's heirs, but not reveal the existence of the other account.⁷³ Dormant accounts were also often ripe for embezzlement because no account holder would notice erratic behavior in an account. In 1990, one account at a large private bank contained a value of 65,850 Swiss Francs, but by the end of 1994 it held only 557 Swiss Francs.⁷⁴ The account was reported in 1997 as still having a balance of only 557 Swiss Francs.⁷⁵

In the first half-century after the end of the Holocaust, Swiss banks resisted the efforts of claimants to regain access to their accounts. As the Volcker Commission summarized, there was:

[C]onfirmed evidence of questionable and deceitful actions by some individual banks . . . , including withholding of information from Holocaust victims or their heirs . . . , inappropriate closing of accounts, failure to keep adequate records, . . . and a general lack of diligence—even active resistance⁷⁶—in response to earlier private and official inquiries about dormant accounts.

II.

THE CLAIMS RESOLUTION TRIBUNAL

The Volcker Commission was originally independent and separate from the New York class action litigation. The Volcker Commission was established based on an agreement between various Jewish organizations and Swiss banks with a mandate to:

[P]rovide the basis for restitution of monies owed to victims of Nazi persecution or their heirs who entrusted funds to Swiss banks for safekeeping before and during World War II, to make as full an accounting as feasible of the custody of these funds by Swiss banks, and to satisfy the historic need for a moral accounting for present and future generations of critical events surrounding World War II.⁷⁷

In furtherance of that goal, on June 25, 1997 the Volcker Commission announced the establishment of a comprehensive claims resolution process that included the creation of an independent and objective international claims resolution tribunal known as the Claims Resolution Tribunal for Dormant Accounts in Switzerland (“CRT” or “Tribunal”).⁷⁸ The Tribunal was intended to be an international arbitration tribunal established by private parties with the imprimatur of the Swiss government to resolve claims to Holocaust-era dormant Swiss bank accounts.⁷⁹ After the class action litigation was filed against the Swiss banks in New York, Paul Volcker wrote in opposition to the litigation, stating that it would cripple the resolution process being conducted by the Volcker Commission.⁸⁰

73. *See id.*

74. *Id.* at 84.

75. *Id.*

76. *Id.* at 13.

77. Press Release, ICEP Status Report From The Independent Committee of Eminent Persons (September 17, 1998) (*reprinted in* VOLCKER REPORT, *supra* note 2 app. D, at A14).

78. Joint Press Release, ICEP (June 25, 1997) (*reprinted in* VOLCKER REPORT, *supra* note 2 Appendix D, at A19).

79. *Id.*

80. Bazylar, *supra* note 10, at 283, n. 169.

The independence between the Tribunal and the New York class action suit changed in 1998. As part of the \$1.25 billion global settlement between the Swiss banks and New York class action claimants, the parties agreed that the Tribunal in Switzerland should continue to function, and any awards rendered by this Tribunal that had a Holocaust connection would be honored by reducing the remaining amount owed by the Swiss banks to the New York class action claimants.⁸¹ Thus, in a rare if not unique occurrence in international arbitration, an international tribunal was essentially folded into a domestic court litigation proceeding by consent of the parties. Judge Korman, responsible for the class action litigation in New York, approved this approach in August 2000, reserving \$800 million of the \$1.25 billion for payment of awards rendered by the Claims Resolution Tribunal.⁸²

The Claims Resolution Tribunal has had two distinct phases in its adjudicative process. During the first three years of its existence, the Tribunal resolved claims to accounts published by the Swiss Bankers Association in 1997 under the original procedure ("CRT I").⁸³ Beginning in February 2001, the Tribunal launched a second procedure under a new set of rules for resolving claims to the 21,000 newly published accounts derived from the independent audit conducted under the auspices of the Volcker Commission ("CRT II").⁸⁴

A. CRT I Procedure

Chairman Dr. Hans Michael Reimer described the procedure established for resolution of claims to accounts published in 1997 as an exceptional, even unique procedure in international arbitration.⁸⁵ The Claims Resolution Tribunal is a mass arbitration tribunal that resolves claims in "a judicial case-by-case manner rather than through an administrative procedure using predetermined criteria (as with certain types of claims before the United Nations Compensation Commission)."⁸⁶ As originally established, its jurisdiction was over accounts opened by non-Swiss nationals or residents that had been dormant since May 9, 1945, which were subsequently made public by the Swiss Bankers Association in 1997.⁸⁷

81. *In Re Holocaust Victim Assets*, 105 F. Supp. 2d 139 (E.D.N.Y., 2000), Class Action Settlement Agreement, art. 4.2 available at http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf ("Settling Defendants shall pay Matched Assets, together with interest and fees . . . to rightful claimants as and when determined by the ICEP or the Claims Resolution Tribunal. *Such payments of Matched Assets shall be deemed to be included in, and part of, the Settlement Amount and shall in no event cause the Settlement Amount to be increased.*") (emphasis added).

82. Press Release, ICEP Claims Process Underway in \$1.25 Billion Swiss Bank Settlement, (Apr. 17, 2001) available at http://www.swissbankclaims.com/pdfs_eng/pressreleasefinal.pdf.

83. See *infra* Part II(A) and accompanying notes.

84. See *infra* Part II(B) and accompanying notes.

85. Roger P. Alford & Peter H.F. Bekker, *International Courts and Tribunals*, 33 INT'L LAW. 537, 548 (1999).

86. *Id.*

87. *Id.*

The Tribunal received almost 10,000 claims to the 5,570 accounts published in 1997.⁸⁸ The Tribunal had three distinct procedures for resolving these original claims.⁸⁹ The “initial screening” procedure was a process designed to protect the banks’ obligation of confidentiality to account holders. This process established whether a claimant had submitted any information on his or her entitlement to the assets in the dormant account or whether it was otherwise apparent that he or she was not entitled to the account.⁹⁰ For example, many claimants would submit information based solely on the similarity of surnames, believing that this was sufficient information to secure the assets in the account.⁹¹ Others provided relevant information about the relative they believed to be an account holder, which invalidated their claims. This included information which clearly established a mismatch, such as the wrong gender, the wrong birth or death date, or the wrong names of parents, siblings or spouse.⁹² The Tribunal was able to maintain confidentiality of bank information while preventing unmeritorious claimants from securing access to bank documents by reviewing the bank documents in conjunction with the information submitted by the claimants. Approximately ninety percent of claims submitted to the Tribunal for initial screening did not go forward to arbitration because they did not pass the initial screening threshold.⁹³

If the bank or the Tribunal determined that the claimant should receive the information contained in the bank documents, the claims were subsequently submitted for consideration under either a “fast track procedure” or an “ordinary procedure.”⁹⁴ The “fast track” procedure was applied when a bank believed that the claimants were entitled to the assets in the account and requested the Tribunal to render an award or confirm a settlement agreement reached between the banks and the claimants.⁹⁵ Subject to confirmation that the request conformed with the claims resolution process, the Tribunal generally granted such requests.⁹⁶ Of particular concern to the Tribunal was a finding that there were no other possible heirs that could be adversely affected by an award to a claimant and that there was no information before the Tribunal that might render its plausibility suspect.

88. See Final Report (Sept. 30, 2001), available at <http://www.crt.ch/statistics.html>.

89. Rules of Procedure for the Claims Resolution Process, art. 10, (Oct. 15, 1997) [hereinafter CRT I Rules] (reprinted in VOLCKER REPORT, *supra* note 2, at A-31), available at http://www.crt.ch/rules_procedure.html.

90. *Id.* Article 10 of the Tribunal’s Rules provides that: “The Sole Arbitrator shall order that the name of the bank and the amount held in the dormant account be disclosed to the claimant, unless he or she determines in the initial screening that (i.) the claimant has not submitted any information on his or her entitlement to the dormant account, or (ii.) if it is apparent that the claimant is not entitled to the dormant account, in which case the Sole Arbitrator shall not accept the claim for further processing and shall not disclose to the claimant the name of the bank or the amount held in the dormant account.” *Id.*

91. Docket No: 6212/0898/LH, available at http://www.crt.ch/decision_en/6212.html.

92. Docket No: 3288/0498/NW/MJ, available at http://www.crt.ch/decision_en/3288.html.

93. Roger P. Alford, Peter H.F. Bekker, & Mark B. Rees, *International Courts and Tribunals*, 34 INT’L LAW. 651, 666 (2000).

94. *Id.*

95. *Id.*; see also, *supra* note 89, at arts. 11-13.

96. CRT I Rules, *supra* note 89, at arts. 11-13.

Case 7827 illustrates a typical fast track claim. Seven heirs of an account holder submitted claims seeking the assets held by the bank.⁹⁷ The bank reported that the account consisted of a safe deposit box containing 114 gold coins.⁹⁸ The claimants all agreed that they were the closest surviving relatives, and that the claims should be distributed based on their degree of relationship from the account holder.⁹⁹ The claimants and the bank requested that one claimant receive one-fourth of the assets in the account, three claimants receive one-sixth of the assets in the account, and three claimants receive one-twelfth of the assets in the account.¹⁰⁰ Based on this information, the Tribunal found that the settlement agreement between the claimants and the bank was consistent with the claims resolution process, and awarded one claimant twenty-seven gold coins, three claimants nineteen gold coins each, and the remaining three claimants ten gold coins each.¹⁰¹

Where the Tribunal was of the view that the claim should not be resolved by fast track, it referred the matter to ordinary procedure.¹⁰² For example, in *Case 5427*, the bank requested that a claim submitted by the nephew of the account holder be resolved by the Tribunal in the fast track procedure.¹⁰³ After reviewing the nephew's claim together with a claim submitted by the purported son of the account holder, the Tribunal denied the fast track request and referred both claims for resolution in the ordinary procedure.¹⁰⁴

All claims not resolved by the fast track procedure were resolved by the ordinary procedure.¹⁰⁵ This process involved a full review of the claims and all available evidence in an expedited procedure.¹⁰⁶ Recognizing the difficulty of establishing a claim given the destruction of documents and the passage of time, the burden of proof required is that it is "plausible in light of all the circumstances" that the claimant is entitled to the claimed account.¹⁰⁷ Because these claims presented the most difficult and interesting legal issues, they were re-

97. Docket No: 7827/1198/RO, available at http://www.crt.ch/decision_en/7827.html.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. CRT I Rules, *supra* note 89, at art. 13 ("A claim submitted to the fast track procedure shall be referred to a Claims Panel for decision in the ordinary procedure if the Sole Arbitrator . . . determines that (a.) the entitlement of the claimant cannot be verified by simple inquiries in accordance with art. 12 (i); (b.) the determination of the amount due to the claimant requires detailed and complicated calculations or inquiries; or (c.) a full review by a Claims Panel is appropriate for other reasons.").

103. Consolidated Docket No: 5427/0798/SR/KD/RO, available at http://www.crt.ch/decision_en/5427.html.

104. *Id.*; see also Docket No: 6088/0898/NI, available at http://www.crt.ch/decision_en/6088.html.

105. CRT I Rules, *supra* note 89, at art. 14.

106. *Id.*

107. *Id.* at art. 22 ("The claimant must show that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the dormant account. The Sole Arbitrators or the Claims Panels shall assess all information submitted by the parties or otherwise available to them. They shall at all times bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long time that has lapsed since the opening of these dormant accounts.").

solved by a panel of three arbitrators under procedures not unlike traditional international arbitration.

The arbitration panels confronted many challenging questions of law and fact. Frequently there were concerns that the claimants who had submitted claims were not the sole or closest heirs of the account holder.¹⁰⁸ Uncertainties arose where the claimant clearly had a relative with the same name as the account holder, but it was uncertain whether this person was in fact the account holder. In some cases, two competing claimants identified two distinct individuals with the same name as the account holder.¹⁰⁹ Numerous accounts were jointly held by two or more account holders, with one set of claimants related to one account holder and the other claimants related to the other account holder. Depending on which account holder survived the other and the terms of the contract with the bank, the assets generally would be distributed to only one set of claimants.¹¹⁰ On rare occasions a company held the account, and questions arose as to whether the assets in the account should be awarded to the successor entity or to the heirs of the original shareholders of the company.¹¹¹ In some cases, there was so little information contained in the bank documents that it was difficult for the Tribunal to determine if the claimant had a plausible claim of entitlement to the account. Given the general obligation of the banks to maintain account opening information, this frequently led to an award of the assets in the account to the claimant.¹¹²

Finally, if the Tribunal determined that the claimant was entitled to the assets in the account, it would render a partial award ordering the bank to distribute these assets to the claimant.¹¹³ The Tribunal would then determine whether the claimant was entitled to additional compensation reflecting unpaid interest on the account and reimbursement of bank fees.¹¹⁴ The claimant would receive the adjustment provided the account holder was determined to be a victim or target of Nazi persecution.¹¹⁵

Calculating the adjustment is complex, but essentially requires four major steps. The Tribunal's Rules on Interest, Charges and Fees stipulated that in calculating the adjustment, the Tribunal must: (1) determine the earliest known book value of the account; (2) back out estimated fees charged on the account from that date to determine the estimated value of the account in 1944; (3) for interest-bearing accounts, adjust this amount by a discount factor to reflect interest on the account from 1944 to the earliest known book value date; and (4) then

108. Consolidated Docket No: 5628/0798/SW/GD/PJ, available at http://www.crt.ch/decision_en/5628.html.

109. Consolidated Docket No: 2321/0498/JF/GD, available at http://www.crt.ch/decision_en/2321.html.

110. Consolidated Docket No: 5563/0798/RO, available at http://www.crt.ch/decision_en/5563.html.

111. Consolidated Docket No: 2012/0498/MJ, *supra* note 66, available at http://www.crt.ch/decision_en/2012.html.

112. Docket No: 6172/0898/NW/PJ, available at http://www.crt.ch/decision_en/6172.html.

113. CRT I Rules, *supra* note 89, at arts. 31-33.

114. *See id.* at art. 12.

115. *Id.* at art. 15.

apply a factor of 10 (more for managed accounts) from that amount to adjust for compound investment return from 1944 to the end of 1999.¹¹⁶ For example, if an account holder with a non-interest bearing current account having 1,000 Swiss Francs in 1986 was found to be a victim of Nazi persecution, the Tribunal would back out fees of 665 Swiss Francs (representing the amount of charges normally assessed on current accounts from 1944 to 1986), and then apply a factor of ten to 1,665 Swiss Francs, thus awarding the claimant a total of approximately 16,650 Swiss Francs. If the account was an interest-bearing savings or custody account, the Tribunal would apply Schedule B and discount 1,665 Swiss Francs by 2.99 (the discount factor that reflects appreciation from 1944 to 1986) to arrive at an original account value of 556.86 Swiss Francs, and then apply a factor of ten to this amount, awarding the claimant a total of approximately 5,568.60 Swiss Francs.

Most awards have been rendered for claims to accounts held by persons who were not identified as victims or targets of Nazi persecution. According to a Final Report of the Claims Resolution Tribunal published on September 30, 2001, the Tribunal had rendered 49 million Swiss Francs in awards to claimants to “non-Victim” accounts, while only 16 million Swiss Francs had been awarded to claimants of Victim accounts.¹¹⁷

B. CRT II Procedure

Beginning in February 2001, the Tribunal launched phase two of its procedure. In many respects CRT II is quite similar to the original procedure. Although utilizing a new set of rules, the Tribunal will continue to conduct a case-by-case analysis of each claim to determine if the claimant is plausibly entitled to the assets in the account.¹¹⁸ The burden of proof will continue to be the same: each claimant must demonstrate that it is plausible in light of all the circumstances that he or she is entitled to the claimed account.¹¹⁹ The Tribunal also will continue to make an initial determination of whether the claimant has provided any information as to the plausibility of the claim or whether it is otherwise apparent that the claimant is not entitled.¹²⁰ This is done in terms of “admissibility” of a claim rather than “initial screening,” but for practical purposes there is little difference. Under the former procedure the claimant was not invited to submit their claim to arbitration if they did not pass the initial screen-

116. CRT I Rules on Interest, *supra* note 65.

117. Final Report, *supra* note 88.

118. Rules Governing the Claims Resolution Process, [hereinafter CRT II Rules] available at http://www.crt-ii.org/_pdf/governing_rules_en.pdf.

119. *Id.* at art. 22.

120. *Id.* at art. 23(2) (“A claim to the Tribunal is inadmissible if (a) the Claimant has provided not plausible information indicating that the person he or she believes to be the Account Owner was a Victim, or (b) the claim is based essentially on a statement that the Claimant or his or her relative and the Account Owner have the same or similar last name, or (c) the Claimant has provided no relevant information and/or documentation regarding his or her relationship to the Account Owner, or (d) the Claimant has not asserted a relationship to the Account Owner that would justify an Award to the Account, or (e) it is apparent that the person the Claimant believes to be the Account Owner and the actual Account Owner are not the same person.”).

ing threshold; under the latter procedure the claim will be deemed inadmissible if it does not pass the relevant criteria. Finally, fifteen of the seventeen arbitrators and Secretariat that resolved claims under the first procedure will resolve claims under the new procedure. This will insure that qualified attorneys and staff members trained in resolving claims under the old procedure will be utilized for the new procedure.

However, there are several noticeable differences between the original and subsequent procedures. Most important, the CRT II procedure will be under the supervision of a federal district court judge in New York, whereas the first procedure was an international arbitration process conducted under the supervision of the Volcker Commission.¹²¹ Continuity of supervision will be maintained, however, because the federal district court judge appointed Paul Volcker and Michael Bradfield, respectively chairman and counsel of the Volcker Commission, as Special Masters under the new procedure.¹²²

Another significant difference is that only claims to accounts held by victims or targets of Nazi persecution will be admissible.¹²³ Article 15 of the CRT II Rules provides that the Tribunal "shall have jurisdiction to resolve claims to Accounts of Victims open or opened in Swiss banks during the Relevant Period and to certify to the Court for payment the value of Accounts."¹²⁴ This is a salutary development. In CRT I, the Holocaust connection had a remedial nexus. The only relevance that the Holocaust had to claims was that a Holocaust connection could be subject to the interest and fee adjustment.¹²⁵ As a result, the Tribunal and its Secretariat spent a tremendous amount of time and energy resolving claims to dormant accounts that had no Holocaust connection.¹²⁶ By making the Holocaust connection a jurisdictional requirement, the Tribunal can be confident that it will not waste valuable resources resolving claims that have no business before the Tribunal.

Finally, the nature of the proceeding is different from the original procedure. The first procedure was an international arbitration pursuant to an agreement between the parties. The procedure established under CRT II is arguably not arbitration, because the procedure is not established pursuant to an arbitration agreement between claimants and defendants and the arbitral tribunal is not empowered to determine the total liability of the defendants and the amount of damages owed by the defendants. Rather, it takes the form of a court-sponsored alternative dispute resolution process in which both banks and claimants agree to a set of procedures for resolution of claims and have certain rights and obliga-

121. See *supra* Part II and accompanying notes.

122. *In re Holocaust Victims Assets Litigation, Referral to Special Masters For Claims Resolution Process for Deposited Assets*, (E.D.N.Y. 2000) (No. CV 96-4849), available at http://www.specialmasters.org/press_releases/96cv4849ref12800.pdf.

123. CRT II Rules, *supra* note 118, at art. 15.

124. *Id.*

125. See *supra* Part II(A) and accompanying notes.

126. According to the Secretary General of the Tribunal, Alexander Jolles, seventy-nine percent of the accounts subject to the CRT I process were not Holocaust accounts. See Adam Sage and Roger Boyes, *Swiss Holocaust Cash Revealed to be Myth*, LONDON TIMES, Oct. 13, 2001.

tions.¹²⁷ The Tribunal has expressed the view that banks are not parties to the proceedings,¹²⁸ but this is only partially correct. In the settlement agreement between Swiss banks and the plaintiffs, the banks agreed to a procedure for resolution of these claims under the supervision of the federal district court judge. The Settlement Agreement provided for the Claims Resolution Tribunal to carry out the claims resolution process to distribute the Settlement Fund, and the banks committed to “good faith cooperation with the implementation of the settlement.”¹²⁹ In appointing the Special Masters, the court vested powers in these individuals to implement the claims resolution process in recognition that the Settlement Agreement supports the resolution of claims by the Claims Resolution Tribunal. Moreover, in the CRT II Rules, the banks are vested with certain rights and obligations, including the obligation to provide the Tribunal with access to bank documents and information, and the right to appeal certain decisions of the Tribunal to the New York federal district court.¹³⁰

The Tribunal has made numerous changes to its procedures to expedite the process. One important change is with respect to the distribution of assets among the claimants. In distributing assets, the Tribunal eliminated the concept of applicable law and resolves claims with a view of achieving the “result that is most fair and equitable under the circumstances.”¹³¹ While this suggests that the Tribunal shall render decisions *ex aequo et bono*, in reality, the Tribunal has dictated the methodology for distribution of the assets. According to the CRT II Rules, the Tribunal will award assets in the account only to persons who have submitted claims. “[A]s a general rule” the rights of individuals to an account

127. See Memorandum and Order, *In re Holocaust victims assets Litigation* (E.D.N.Y. 2000) (No. CV 96-4849), available at http://www.swissbankclaims.com/PDFs_Eng/96cv4849mo12800.pdf (“The . . . Claims Resolution Tribunal (“CRT”) will administer the Deposited Assets Class claims process on behalf of the Court. . . . I have decided to appoint CRT Special Masters [Paul Volcker and Michael Bradfield] to closely supervise the day-to-day supervision of the CRT and to regularly monitor its activities.”).

128. CRT II Rules, *supra* note 118, Introduction (“In this process, banks will not be parties to the proceedings but are cooperating by assisting in making certain information available for the claims resolution process.”).

129. Referral to Special Masters For Claims Resolution Process for Deposited Assets, *In re Holocaust victims assets Litigation* (E.D.N.Y. 2000), available at http://www.specialmasters.org/_press_releases/96cv4849ref12800.pdf.

130. CRT II Rules, *supra* note 118, at arts. 5-6. Not surprisingly, the essential obligation of the banks is to provide the Tribunal with access, albeit limited, to bank account information. For example, Article 5 provides that the banks must maintain a database and keep this information in secure facilities and at the disposal of the Tribunal. *Id.* The banks also must put the account database on a secure network that is available to the Tribunal. *Id.* The banks are also required to permit on-site inspection by Tribunal personnel of information not contained in the account databases. *Id.* Finally, Article 6 provides that for any information not made available under Articles 1-5, the Tribunal may seek the “voluntarily” assistance of the banks. *Id.* In terms of rights, the fundamental question of whether a claim matches information contained in a Swiss bank account is subject to a number of limitations. The relevant bank must be informed if the Tribunal initiates Article 26 matching and the bank may “appeal” a matching decision of the Tribunal to the Special Masters and the federal district court. *Id.* at art. 27. In submitting a claim for resolution, the claimant agrees that the claim “shall be adjudicated by the Claims Resolution Tribunal according to its Rules of Procedure” including a provision on bank immunity. Claim Form Instruction Sheet, available at http://www.crt-ii.org/_pdf/claim_instr_ro_en.pdf; see also CRT II Rules, *supra* note 118, at art. 50.

131. CRT II Rules, *supra* note 118, at art. 33.

who have not submitted claims will “not be considered.”¹³² Assuming claimants have correctly identified the account holder as their relative, the assets shall be divided only among those members of the family who submitted claims, with the order of priority being that of the account holder’s (1) spouse, (2) children, (3) grandchildren, (4) siblings and their descendants, and (5) grandparents and their descendants.¹³³

III.

SALIENT LEGAL ISSUES

There are a number of difficult legal issues that have arisen in resolving claims to Holocaust accounts. This section will focus on a few of the most problematic issues: the burden of proof, applicable law, and defining what constitutes a Holocaust account.

A. *Burden of Proof*

Perhaps the most difficult task of the Tribunal is determining whether a claimant has satisfied the burden of proof that he or she is entitled to the assets in the account. The burden of proof standard that is utilized by the Tribunal is quite unusual. Under Article 22 of the CRT I Rules, a claimant must show that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the dormant account.¹³⁴ The standard reflects the difficulty claimants face in establishing their claims due to the destruction of documents during and after the Second World War as well as the passage of over forty years when memories fade. Nonetheless, plausibility is an extremely difficult standard to apply. A few illustrations underscore this point.

In one case, an account holder was a Hungarian national who died in Auschwitz in 1945.¹³⁵ Two claimants came forward to procure the assets in the account.¹³⁶ One provided significant documentary support to clearly establish that he was the nephew of the account holder.¹³⁷ The other claimant alleged that he was the son of the account holder and had been separated from his family at the beginning of the war due to a serious head injury.¹³⁸ The only evidence he had to support his story was circumstantial.¹³⁹ He provided a statement by two witnesses who recalled a small boy in a foster home with a head injury who purportedly was Jewish and from Vespem, Hungary, the account holder’s home-town.¹⁴⁰ He also provided another witness who testified that she recalled that the account holder’s smallest child suffered a serious head injury in July

132. *Id.* at art. 30.

133. *Id.* at art. 29.

134. CRT I Rules, *supra* note 89, at art. 22.

135. Consolidated Docket No. 5427/0798/SR/KD/RO, available at http://www.crt.ch/decision_en/5427.html.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

1944.¹⁴¹ This claimant also provided physical evidence indicating that he had suffered a serious injury in the past. Additionally, he established that he was circumcised and, therefore, allegedly Jewish.¹⁴² Despite requests from the Tribunal, the claimant provided no documentary evidence, such as a birth certificate, in support of his claim.¹⁴³ Over the vigorous objections from the nephew, the Tribunal applied Article 22 and concluded that it is at least plausible that the claimant was the son of the account holder.¹⁴⁴ It further found that because a son has a better claim of entitlement to the assets in the account, the nephew should not receive any of the assets.¹⁴⁵

The plausibility standard can also have the unusual result of double payments to two competing sets of claimants. One element of the Article 22 plausibility analysis requires a finding that “no reasonable basis exists to conclude that . . . other persons may have an identical or better claim to the dormant account.”¹⁴⁶ In several cases, the Tribunal has been faced with scant bank records regarding the account holder. In many cases, the only information about the account holder that the claimant can produce is a signature and an address. Additionally, multiple claimants may come forward establishing that they have a relative with that name from that town, but who are clearly different persons. In cases where the relative of either claimant could plausibly be the account holder, the Tribunal has determined that the claims are not identical, but are equally plausible.¹⁴⁷ Therefore, the Tribunal has awarded the full amount in the account to both claimants.

In the CRT II Rules, the Tribunal has maintained the plausibility standard, but has clarified the result when dealing with competing claimants. According to Article 28 of the CRT II Rules, “[w]hen a number of related Claimants have established a plausible relationship to the Account Owner, the Tribunal will make an Award in favor of the Claimant who has established the closest relationship to the Account Owner.”¹⁴⁸ In addition, Article 32 provides:

In cases where the identity of the Account Owner cannot be precisely determined due to the limited information contained in the bank documents, and where several unrelated Claimants have established a plausible relationship to a person with the same name as the Account Owner, the Award will provide for a pro rata share of the full amount in the Account to each Claimant or group of Claimants who would otherwise be entitled under these Rules.¹⁴⁹

Although these rules provide helpful clarifications on the approach to be taken by the Tribunal in applying the plausibility standard, they do not alleviate the underlying difficulty of denying one strong claim of a distant relative be-

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. CRT I Rules, *supra* note 89.

147. Thomas Buergenthal, *Arbitrating Entitlement to Dormant Bank Accounts*, 15 FOREIGN INVESTMENT L. J. 301, 313 (2000).

148. CRT II Rules, *supra* note 118, at art. 28.

149. *Id.* at art. 32.

cause another dubious and yet plausible claim of a closer “relative” has been submitted.

B. *Applicable Law*

Another critical problem for the Tribunal concerns the applicable law. Pursuant to Article 16 of the CRT I Rules, the Tribunal is required to “apply the law with which the matter in dispute has the closest connection in deciding matters concerning the relationship between the published account holder . . . and the claimant.”¹⁵⁰ In several cases the Tribunal has faced difficulty in applying this standard.

Assume that an account holder, his spouse, and their children all were deported to a concentration camp in Poland and subsequently murdered. The nieces and nephews of the account holder claim the account, as do the nieces and nephews of the spouse of the account holder. All of these relatives are now scattered throughout Europe and the Americas. The question arises as to who is entitled to receive the assets in the account: the heirs of the account holder, the heirs of the account holder’s spouse, or some combination. The result may depend on who survived whom, or in the absence of such information, on the application of a *commorientes* presumption that there were no survivors of the common calamity. According to traditional rules, if the spouse survived the account holder, then their relatives should receive the assets in the account. But if one presumes that neither spouse survived the other, the account holder’s relatives should receive the assets in the account. In an attempt to resolve such a case, the Tribunal would first look to the facts to determine if there is any indication of survivorship, and in the absence thereof, it would then determine the applicable law and look to it to ascertain whether it adopts a *commorientes* presumption of no survivorship.¹⁵¹

Even assuming the choice of law is clear, one must also consider the temporal application of that law. For example, assume that a claimant submits a claim regarding the account of a national asserting that he or she is the heir of an illegitimate son of the account holder. While it may be clear that the law of the national applies, it is not clear whether one should apply the law of that country as it existed in 1945 or the law of that country as it exists today. Application of the old law would result in a finding that the heir of an illegitimate child has no inheritance rights. In contrast, modern law eliminates that distinction and would grant the claimant the assets in the account. Moreover, if one applies the old law, this may violate the public policy of Switzerland, and be subject to an enforcement challenge under the New York Convention.¹⁵² As Judge Burgerthal has put it:

150. CRT I Rules, *supra* note 89, at art. 16.

151. *Id.*; see also http://www.crt.ch/decision_en/5628.html.

152. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), June 10, 1958, art. V(2)(b), 21 U.S.T. 2517, 2519, 330 U.N.T.S. 38 (permitting a court to refuse recognition and enforcement where “the recognition or enforcement of the award would be contrary to the public policy of that country”).

Public policy considerations or laws which may in the past have discriminated against women or persons born out of wedlock . . . or which did not recognize common law marriages or had special rules applicable to adoptions, may also have been substantially modified or modernized. Some of the old laws may today also conflict with the provisions of applicable human rights treaties. . . . It is thus readily apparent that the formalistic application of the law in force at the time of the account holder's death could produce results difficult to square with the demands of a claims resolution process that is defined to do justice in a world far removed from that of the account holder.¹⁵³

The applicable law questions of CRT I were eliminated in the CRT II procedures, but unfortunately these procedures have created new problems. As noted above, under the new procedure the results are pre-ordained based on the methodology set forth in Article 29 of the CRT II Rules.¹⁵⁴ Under the new approach, preference is always given to the relative who submitted a claim, whether or not there are other living family members with a closer connection to the account holder.¹⁵⁵ This has the advantage of simplifying the distribution of assets in the account among relatives of the account holder, but creates undesirable results. First, no matter how strong the relationship to the account holder, if a relative does not submit a claim to the account, then more distant relatives will receive the assets in the account. Accordingly, it is to be expected that elderly, infirmed, unsophisticated and minority-language relatives who are less likely to submit claims will therefore be excluded from the process. Second, if a claimant is related to the surviving spouse of the account holder who has since deceased, that person has no claim to the account despite the fact that under most legal systems they would have a strong claim of inheritance. Third, the CRT II Rules presume the existence of general principles of inheritance law that are common to all nations.¹⁵⁶ Ignoring notions of applicable law, the Tribunal bases its determination on one set of inheritance principles to the exclusion of others. For example, in many Latin American countries preference is given to the children and parents of the deceased over surviving spouses.¹⁵⁷ The Tribunal's approach also ignores the relevance of any mandatory reserve requirements in the inheritance laws of various countries. These laws are designed to protect spouses and children from being excluded from a decedent's estate. Finally, the approach is problematic if the account holder left a Last Will and Testament. If the account holder has a Will that gives all of their assets to one family member who has not submitted a claim, the Tribunal will ignore the wishes of the account holder to disinherit other family members, and will award the assets to those family members who have submitted claims.

This approach may be justified as an expeditious mechanism to resolve a mass claims conundrum. But viable alternatives exist. The Claim Form and CRT II Rules could impose an obligation on claimants to distribute assets re-

153. Buergenthal, *supra* note 147, at 317.

154. CRT II Rules, *supra* note 118, at art. 29.

155. *Id.*

156. *Id.*

157. See, e.g., Consolidated Docket No. 5563/0798/RO, available at http://www.crt.ch/decision_en/5563.html.

ceived from the Tribunal to other relatives with a closer connection to the account holder. The Tribunal could apply a presumption that the applicable law is the country of the account holder's last known address. The Tribunal is well acquainted with the inheritance laws of the major countries, and could apply the appropriate law to determine the distribution of the account assets. Finally, the Tribunal could have given itself more discretion by simply adopting a provision authorizing it to resolve claims *ex aequo et bono* without the strictures of Article 29. However, none of these alternatives have been adopted.

C. Defining a "Holocaust Account"

If the purpose of the Claims Resolution Tribunal is to "provide for simple justice for those victims (and their heirs) with unsatisfied claims on accounts in Swiss Banks"¹⁵⁸ one of the key questions for the Zurich Tribunal is what constitutes a Holocaust account, or more accurately, precisely who is a victim of Nazi persecution? Under the Tribunal's Rules, a victim of Nazi persecution is defined as any person who was persecuted or targeted for persecution by the Nazi regime because he or she was, or was believed to be, Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped.¹⁵⁹

While this definition is useful and appropriate for the vast majority of cases, it has difficulties. The definition is arguably both under-inclusive and over-inclusive. One may view the definition as over-inclusive in that it includes within its ambit all persons who were within a targeted group, or believed to be within a targeted group, and yet evaded all forms of persecution. Despite the fact that they were unsuccessfully *targeted* for persecution, they are deemed a "victim of Nazi persecution." Such an over-inclusive definition may well be understandable given that such individuals likely were victimized from a well-founded fear of persecution, regardless of the fact that such persecution never materialized. More troubling is that the definition also is under-inclusive in that it excludes entire categories of individuals that were victimized by the Holocaust, including prisoners of war, political dissidents, and ethnic Slavs. The Tribunal has heard cases in which account holders were political dissidents who were murdered because of their opposition to the Nazi regime. Yet, under the Tribunal's under-inclusive definition, the Tribunal informs claimants to these accounts that the account holder was not a "victim of Nazi persecution." Undoubtedly many of these claimants find the news impossible to accept, when told their relative was not a "victim" of the Holocaust.

158. VOLCKER REPORT, *supra* note 2, at 2.

159. See CRT I Rules on Interest, *supra* note 65, at art. 2(I) (defining a victim of Nazi persecution to be "[a]ny individual, corporation, partnership, sole proprietorship, unincorporated association, community, congregation, group, organization, or other entity persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped"); see also CRT II Rules, *supra* note 118, at art. 52(27) (defining a Victim or Target of Nazi Persecution as "any person or entity persecuted or targeted for persecuted by the Nazi regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped").

The definition's under-inclusive and over-inclusive shortcomings have real implications. Under CRT I, a successful claimant of an account holder that was not a "victim of Nazi persecution" received only the assets currently in the account.¹⁶⁰ By contrast, a successful claimant who is the heir of a Holocaust victim received the assets in the account, plus reimbursement for fifty years of bank fees and payment of unpaid interest based on a special adjustment factor.¹⁶¹ The impact is even starker under CRT II procedure. Only an account holder who is a "Victim or Target of Nazi persecution" as defined above is subject to the Tribunal's jurisdiction.¹⁶² Accounts held by victims of the Holocaust that do not fall within the Tribunal's definition will not be adjudicated by the Tribunal at all.

Strictly applying these definitions can have seemingly unjust results. Imagine then, that you have two watchmakers who live in Nazi-occupied Holland. Prior to the war both watchmakers made occasional trips to Switzerland to purchase Swiss watches and as a result each had a Swiss bank account that had a balance in 1945 of 1,000 Swiss Francs. One family, whom we will call the Ten Boom family, live in Haarlem and are devout Catholics. They are active in the underground movement to smuggle Jews out of harm's way. The Germans discover this smuggling activity, expropriate the watchmaker's shop, murder the elderly watchmaker and his spouse on the spot, and send the rest of the family to a concentration camp. Only the youngest daughter survives the war. The other watchmaker and his family, whom we will call the Van Loos family, live in Amsterdam and are quiet but devout Jehovah's Witnesses. Living in fear of discovery, they do nothing to help the Jews or other persons seeking shelter from persecution. Try as they might, the Nazis never discover the true religious beliefs of this watchmaker and his family. The entire Van Loos family survives the war without incident. Fifty years later, the heirs of each watchmaker pursue claims before the Tribunal and seek the assets located in the respective Swiss bank accounts. The last known value of each account in 1986 was 335 Swiss Francs.

160. In some cases in which the account holder was not a victim or target of Nazi persecution but the account was an interest-bearing account or had been collectivized into a collective account, the Tribunal asked the banks to complete a Financial Information Checklist stating when interest was last paid on the account and to calculate how much interest was owed. For interest-bearing accounts, this was done to reflect the contractual obligation of banks to pay interest on these accounts and to be consistent with the assurances given to claimants that if the account was interest bearing, they would receive the appropriate interest that has accrued during the dormancy of the account. Interest was paid to claimants for collective accounts to reflect the benefit of the bank using these funds as if they were savings accounts. These claimants received adjustments for unpaid interest, but did not enjoy the significant benefits of victim claimants, who have fees backed out and a multiplying factor applied to the original account balance.

161. See CRT I Rules on Interest, *supra* note 65, at 4(a) ("The CVAF [Current Value Adjustment Factor] and FA [Fee Adjustment] shall apply to accounts of victims of Nazi persecution open or opened in the Relevant Period as provided in these Rules.").

162. See *supra* note 159 and accompanying text; see also CRT II Rules, *supra* note 118, at art. 15 (providing that "[t]he Claims Resolution Tribunal shall have jurisdiction to resolve claims to Accounts of Victims open or opened in Swiss banks during the Relevant Period.").

Under the CRT I Rules, the Ten Boom daughter will receive 335 Swiss Francs. If she inquires, she will be told that she could have received much more if only her father had been a victim of Nazi persecution. By contrast, the Van Loos family will be told that Mr. Van Loos was a victim of Nazi persecution because he was a Jehovah's Witness who was targeted by the Nazis. Therefore, his heirs are entitled to receive approximately 10,000 Swiss Francs.¹⁶³ Under the CRT II Rules, the Van Loos family would again received approximately 10,000 Swiss Francs, while the Ten Boom daughter would have her claim deemed inadmissible because it does not related to a Holocaust account. Clearly, the result is incongruous.

Although the above example is only a heuristic device, there are in fact many cases in which persecuted political dissidents or prisoners of war are not deemed victims while other less harmed account holders are deemed to be victims because they fell within a targeted category. There is no published information about the precise number of account holders who were persecuted by the Nazis but fell outside the Victim definition, nor of account holders who fell within the definition but suffered no actual persecution. However, the estimated number is not insignificant. At least to some degree, the moral credibility of the Tribunal is undermined by resolving cases in a manner insensitive to the true nature of the life experiences of the account holders.

There are a few cases that are available to the public. As briefly mentioned above, one of the most important is *Claim 2012*, in which the Tribunal addressed claims to a bank account held by a Jewish-owned company that was expropriated by Nazi-collaborators in Bucharest, Romania.¹⁶⁴ The bank reported that in 1998 the assets in the account totaled 9.60 Swiss Francs, but that in 1945 the assets totaled 6,212.00 Swiss Francs.¹⁶⁵ One of the claimants, Claimant 3, alleged that he and his sister were the sole heirs of the original founders and owners of the company.¹⁶⁶ This claimant provided evidence that his father and uncle were dismissed from the company by the Romanian government for being Jewish in 1940, the company and its assets were unlawfully and forcefully taken over in return for only a paltry sum.¹⁶⁷ Among the documents provided was a list published in a Romanian newspaper containing names of Jews fired by the Romanian government from their respective companies.¹⁶⁸ Included therein was the name of this claimant's father and uncle as persons fired from the company.¹⁶⁹ The Tribunal concluded that:

Based on the information provided by Claimant 3, which was not refuted by any of the other Claimants, and based on the fact that as of September 1940, a fascist

163. This is calculated based on an account balance in 1986 of 335 Swiss Francs, plus the backing out of fees from 1945 to 1986 of 665 Swiss Francs, and then applying a multiplying factor of 10 to the estimated original account balance of 1,000 Swiss Francs. See *supra* note 116 and accompanying text.

164. See *supra* notes 66 & 111 and accompanying text.

165. See *supra* note 66.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

government, made up of Iron Guard members, army officers and Nazi elements, was set up in Romania, the Claims Panel finds it plausible that the assets of the company, including those deposited in the Account, were looted from the M. family.¹⁷⁰

Accordingly, the Tribunal found that Claimant 3 had a valid claim to the assets in the account and that “compensation for special interest and bank fees previously deducted will be added on the basis of [the Rules on Interest].”¹⁷¹ The effect of this holding is that Claimant 3 and his sister will receive approximately 62,000 Swiss Francs, representing ten times the balance in the account as of 1945, notwithstanding that in 1998 the bank account had only 9.60 Swiss Francs.

Contrast this with other company accounts held in Swiss banks in which the original shareholders were not Jewish or among the other Victim classifications. The Tribunal has held that to the extent an account was held by a Nazi-expropriated company whose shareholders were not Jewish (or one of the other specified victim categories), then the successful claimants are entitled only to the assets in the account as of the date of the award.

However, the Tribunal is not responsible for this incongruity. It is subject to the rules established by the Volcker Commission, which expressly state that in deciding matters relating to interest, fees and charges, the Sole Arbitrators and Claims Panels shall apply the Rules on Interest promulgated by the Volcker Commission.¹⁷² In drafting the definition, the Volcker Commission relied on the identical definition set forth in the Settlement Agreement reached in the New York class action litigation.¹⁷³ Yet such wholesale reliance on the definition in the Settlement Agreement is problematic for several reasons.

The Volcker Commission and the Claims Resolution Tribunal were established prior to the signing of the class action Settlement Agreement. The Volcker Commission’s principal purpose was to conduct an investigation and establish a claims resolution process for dormant accounts of victims of Nazi persecution that were deposited in Swiss banks before and during World War II.¹⁷⁴ The Volcker Commission understood that “the persecution of minorities by the Nazis and others . . . made it likely that many of the victims sought to move their assets to safety in neutral or Allied countries.”¹⁷⁵ The Volcker Commission originally utilized a liberal definition of “Victim of Nazi Persecution,”

170. *Id.*

171. *Id.*

172. CRT I Rules, *supra* note 89, at art. 16 (“In deciding matters relating to interest, fees and charges, the Sole Arbitrators and Claims Panels shall apply the Interest Guidelines recommended by an international panel and as adopted by the Board of Trustees of the Claims Resolution Foundation.”).

173. Class Action Settlement Agreement, *supra* note 81, at art. 1 (states that a “Victim or Target of Nazi Persecution” is defined as “any individual, corporation, partnership, sole proprietorship, unincorporated association, community, congregation, group, organization, or other entity persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah’s Witness, homosexual, or physically or mentally disabled or handicapped.”).

174. *See supra* Part I(A) and accompanying notes.

175. Memorandum of Understanding, *supra* note 36.

recognizing that “in the past, this term has been narrowly construed so as to act as a barrier to a complete and just evaluation of the scope of the dormant account issue.”¹⁷⁶ Accordingly, the Volcker Commission concluded that the “[t]he term is to be construed broadly to cover all persons fairly within this concept.”¹⁷⁷ Unfortunately, this inclusive definition was later abandoned in favor of the definition utilized in the Settlement Agreement.¹⁷⁸

In the context of the Settlement Agreement, the justification for this unusual definition is understandable. Faced with the prospect of dividing \$1.25 billion in assets among millions of Holocaust victims, the parties sought a compromise between two extremes. To quote Professor Burt Neuborne, in the settlement negotiations:

[W]e had to walk a line between everyone harmed by the Nazis—which is virtually all of Europe—or only the Jews Both extremes were unacceptable. The first would have so diluted the recovery it would have rendered the whole suit meaningless. The second would have made it unfairly parochial.¹⁷⁹

However, the same justification does not apply to litigation before the Claims Resolution Tribunal. With litigation before the Tribunal, the heirs of a Holocaust victim are to be placed in the position they would be in if the assets were paid out in 1945 (i.e., reimburse all bank fees charged after 1945) and then that money was invested (i.e., compounded investment returns since 1945). The only question is whether or not the assets in a particular account should be subject to such a calculation depending on whether the account holder was, in the Tribunal’s determination, a Holocaust victim.

The Settlement Agreement reached between the Swiss banks and Holocaust claimants anticipated that the Claims Resolution Tribunal would utilize a broader definition of a Holocaust victim in rendering awards, than that of the class action, and that any such award would be set off from the \$1.25 billion settlement amount. Article 4.1 of the Settlement Agreement stipulates that the Swiss banks shall pay:

Matched Assets, *together with interest and fees* as determined pursuant to guidelines established by the ICRF [Independent Claims Resolution Foundation], to rightful claimants as and when determined by . . . the Claims Resolution Tribunal. Such payments of Matched Assets shall be deemed to be included in, and part of, the Settlement Amount¹⁸⁰

The Settlement Agreement further defines “Matched Assets” as “Deposited Assets,”¹⁸¹ which in turn is defined as:

(1) any and all Assets actually or allegedly deposited by the beneficial owner, fiduciary, or other individual or organization with any custodian, including, with-

176. Auditor Reporting Requirements, Dec. 1998, available at http://www.icep-iaep.org/final_report/ICEP_Report_Appendices_A-W.pdf; reprinted in VOLCKER REPORT, *supra* note 2, at app. N, A-79, A-81.

177. *Id.*

178. See *supra* note 159.

179. Henry Weinstein, *Holocaust Survivors, Swiss Banks OK Settlement*, L.A. TIMES, Jan. 23, 1999, at A3 (quoting Professor Burt Neuborne).

180. Class Action Settlement Agreement, *supra* note 81, at art. 4.2 (emphasis added).

181. *Id.* at art. 1 (“Matched Assets means Deposited Assets that the ICEP or the Claims Resolution Tribunal determines belong, and should be paid to, particular claimants.”).

out limitation, a bank . . . in any kind of account . . . prior to May 9, 1945, that belonged to a Victim or Target of Nazi Persecution . . . ; and/or (2) any and all Assets that the ICEP or the Claims Resolution Tribunal determines should be paid to a particular claimant or to the Settlement Fund because the Asset definitely or possibly belonged to *an individual . . . actually persecuted by the Nazi Regime or targeted for persecution by the Nazi Regime for any reason*. A determination by . . . the Claims Resolution Tribunal to award a special adjustment for interest or fees to a particular claimant pursuant to the guidelines . . . on Interest and Fees . . . shall be deemed to establish that the claimant was persecuted or targeted for persecution within the meaning of subsection (2) of this definition.¹⁸²

Thus, to the extent the Rules on Interest and Fees promulgated by the Volcker Commission in 1999 had followed the Settlement Agreement role anticipated for the Tribunal, the Claims Resolution Tribunal would have been authorized, on a case-by-case basis, to determine if an individual account holder was actually persecuted or targeted for persecution by the Nazi Regime *for any reason*. If so, the successful claimant to such an account would have received the amount in the account together with unpaid interest and reimbursement of bank fees.

Finally, the claimants who brought claims before the Claims Resolution Tribunal submitted their claims believing that the Tribunal was responsible for resolving all Holocaust claims to dormant accounts published by the Swiss banks in 1997. They signed an arbitration agreement submitting to the jurisdiction of the CRT and agreeing to abide by its rules of procedure,¹⁸³ including Article 16, which stipulates stipulating that “[i]n deciding matters relating to interest, fees and charges, the Sole Arbitrators and Claims Panels shall apply the Interest Guidelines.”¹⁸⁴ Only years later were these guidelines published, and for the first time were claimants informed of the Volcker Commission’s definition. The claimants are therefore bound by this *ex poste* definition by virtue of the arbitration agreement, with little recourse to challenge the procedure.

If the definition used by the Tribunal as mandated by the Volcker Commission is so problematic, why did they resort to it? Quite simply, the Volcker Commission’s approach reflected a difficult balance between the need for efficiency and the desire for fairness. The Holocaust claims process necessarily is performing an act of rough justice. After the Settlement Agreement was reached, it was natural for the parties who established the Tribunal to streamline the process (particularly the CRT II process), and have the Tribunal’s approach (including its definitions) parallel the approach used in the New York class action litigation.¹⁸⁵ Quite obviously the time involved in establishing a clear Hol-

182. *Id.* (emphasis added).

183. *See, e.g.*, Partial Award in Consolidated Docket No: 5427/0798/SR/KD/RO (Oct. 14, 1999), available at http://www.crt.ch/decision_en/5427.html (“The Bank and each of the Claimants (together, “the Parties”) have signed a Claims Resolution Agreement, thereby agreeing that this claim will be resolved by the Tribunal in accordance with the Rules.”).

184. CRT I Rules, *supra* note 89, at art. 16.

185. *See* Press Release, Special Master Files Proposed Plan of Allocation and Distribution of Settlement Proceeds in the Swiss Bank Ligation (Sept. 12, 2000), available at http://www.icep-iaep.org/final_report/slideshow.pdf. As the Volcker Commission recently stated, “The Committee recommends that any person with a valid claim to a dormant account of a victim . . . should be

ocaust connection on a case-by-case basis could result in a serious delay in the process and therefore a denial of justice for many. This, after all, is a mass claims procedure involving thousands of elderly claimants. The first stage involved over 5,500 account holders, with almost 9,500 claimants.¹⁸⁶ Although it was anticipated that it could be done in a matter of months, over four years to resolve these claims.¹⁸⁷ The second procedure involves 21,000 account holders and, if the previous pattern continues, will have over 25,000 claimants.¹⁸⁸ It is likely that the claims will be far greater in number, as the Court submitted information about the CRT II process to over 560,000 individuals.¹⁸⁹ With the average age of Holocaust survivors estimated to be eighty-one years old,¹⁹⁰ judicial efficiency must be recognized as a key element of procedural fairness.

Many factors must be balanced in considering how the Tribunal's resources can be most effectively used. Is it a legitimate use of Tribunal resources to require targeted persons to establish that they were in fact persecuted? Is it a legitimate use of Tribunal resources to dramatically expand the number of published accounts beyond 30,000 and undertake a case-by-case review of each claim to establish whether, for example, every Czech, Pole, or Hungarian account holder was in fact persecuted by the Nazis? In short, expanding the universe of Holocaust accounts and claimants too broadly would cripple the Tribunal's resources, seriously delaying the process and ultimately resulting in the denial of justice to hundreds of elderly Holocaust survivors and their heirs. In this context, achieving exactly the right result for certain claimants would mean getting no result for hundreds of other claimants. As a result, the Tribunal has placed a significant premium on speed and efficiency.

IV.

REPARATIONS AND A MORAL ACCOUNTING

The modern era of Holocaust investigation and litigation began out of a concern for reparation, not restitution.¹⁹¹ The movement aimed more for a

provided facilities for submitting such a claim. Claims already submitted to ICEP, new claims submitted to the Claims Resolution Tribunal . . . , claims filed with the Class Action Settlement, and claims from the New York Holocaust Claims Processing Office should be matched against the centralized database of accounts and resolved, as appropriate, by the CRT." *Id.*

186. See Final Report, *supra* note 88.

187. Joint Press Release, *supra* note 78 ("The international claims resolution panels will be required to decide claims, with interest or other appropriate adjustments related to fees or other charges, within 6 months after the end of the period for the submission of claims.")

188. See The Claims Resolution Tribunal for Dormant Accounts in Switzerland, *reprinted in* VOLCKER REPORT, *supra* note 2, at 119 ("The Tribunal received 9,776 claims to approximately half of the 5,570 accounts published in July and October 1997. . . ."); see also Claims Resolution Tribunal homepage at <http://www.crt-ii.org/>.

189. Press Release, ICEP, Special Master Files Proposed Plan of Allocation and Distribution of Settlement Proceeds in the Swiss Banks Litigation (Sept. 12, 2000), available at <http://www.swissbankclaims.com/media/pdfs/PressRelease091200.pdf>.

190. Bazylar, *supra* note 10, at 8 and n. 11.

191. Restitution is defined as the "act of restoring; restoration; restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury;" BLACK'S LAW DICTIONARY 1180 (5th ed. 1979). See also Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1279-80 (1989). Restitution originally meant to restore

moral accounting than a financial one.¹⁹² The Volcker Committee has described the process as satisfying a “historic need for a moral accounting for present and future generations of critical events surrounding World War II.”¹⁹³ Paul Volcker himself stated:

The Holocaust represents a terrible moral issue that should never be repeated. . . . There may never be a real sense of closure with respect to the horrors of the Holocaust. After fifty years, the generation with first-hand knowledge of the Holocaust is passing on, and there is clearly a need for some kind of final moral and financial accounting of what took place.¹⁹⁴

What moral impact then, does the Holocaust reparations process have on the parties?

Undoubtedly, the moral accounting impacts Swiss banks. Indeed, it has affected all of Switzerland. The Swiss are rethinking their role during and immediately after the Second World War. As Swiss Ambassador Thomas Borer stated,

Frankly, the debate surrounding Switzerland’s role during and after World War II caught us by surprise. . . . [F]or most of the war years, my country was surrounded on all sides by the Axis powers and under constant threat of being invaded by its powerful and merciless neighbors. For our own survival . . . we had to deal with them to some extent. That said, we Swiss have no desire to white-wash our history. We are determined to reexamine in depth our actions during the Nazi era and its aftermath, for we strongly believe that a country that cannot cope with its past will have difficulties in mastering its future.¹⁹⁵

For Swiss banks, there is an undeniable sense of frustration that their image has been tarnished. The indelible impression is that the banks “made it extremely difficult for surviving family members of Nazi victims to successfully file claims to secure bank . . . assets” and that “[t]his overall pattern of apparent Swiss bankers’ indifference to the needs of the victims of the Holocaust and their heirs persisted until the current international pressures came to bear.”¹⁹⁶ Swiss bankers ignored the moral implications of their actions, and at least some Swiss bankers now recognize as much. Jacques Rossier, managing partner of the oldest private bank in Geneva, has argued that the crisis of 1995 happened because:

something lost or taken away, and “continues to include remedies that restore to plaintiff the specific thing he lost or that undo disrupted transactions and restore both parties to their original positions in kind.” *Id.* Reparation is “the act of making amends for a wrong. Compensation for an injury or wrong, especially] for wartime damages or breach of an international obligation.” BLACK’S LAW DICTIONARY (7th ed. 1999).

192. Alfonse D’Amato, *Justice, Dignity and Restitution of Holocaust Victims’ Assets*, 20 CARDOZO L. REV. 427, 431 (1998). Sen. Alfonse D’Amato relates that when Edgar Bronfman first came to him in December 1995 he remarked, “Alfonse, this is not a question of settling for \$31.5 million. This is not a question of settling for \$150 million or \$250 million. This is a question of getting an accounting and getting justice.” *Id.*

193. Press Release, *supra* note 77.

194. Paul Volcker, *Dormant Accounts in Swiss Banks: The Independent Committee of Eminent Persons*, 20 CARDOZO L. REV. 513, 513 (1998).

195. Statement by Ambassador Thomas G. Borer (Dec. 8, 1997), available at http://www.switzerland.taskforce.ch/G/G2/G2b/971208_e.htm.

196. Stuart Eizenstat Report, *supra* note 54, at viii.

[T]he Swiss Bankers Association, dominated by the two big banks [UBS and Credit Suisse], had neglected the issue of World War II dormant accounts for decades. They had legal, political and administrative reasons for doing so, but they failed to understand the moral aspects of the issue. Moreover, they did not see the political and diplomatic crisis coming in 1995. Faced with the insistent demands of American Jewish and Israeli Organizations, they persisted for too long in their defensive attitude, brushing aside moral concerns.¹⁹⁷

For decades the *modus operandi* of many Swiss banks was denial and obfuscation, and one must say candidly that even now it is unclear whether the Swiss Bankers Association fully accepts this part of their past. Despite the Volcker Report's conclusion that there was "widespread lack of diligence in searching for victims' accounts" and that some Swiss banks engaged in a number of "questionable and deceitful actions,"¹⁹⁸ the chairman of the Swiss Bankers Association stated in response to the release of the Volcker Report that "with the exception of a few isolated cases . . . the banks' conduct during the period in question was correct."¹⁹⁹ Moreover, the reluctant conclusion one draws from the past fifty years is that Swiss banks would never have taken the steps they did had it not been for pressure from abroad, particularly from the World Jewish Congress and the United States.

To give credit where it is due, it must be recognized that once forced to act, the Swiss acted forcefully. The Swiss are said to get up early but wake up late.²⁰⁰ Since they have awoken to the reality of what needs to be done, the Swiss have taken the matter extremely seriously. Swiss banks have invested a tremendous amount of time, effort and money to try to redress some of their past wrongs, as is reflected in the \$1.25 billion settlement agreement, and the independent audit by the Volcker Commission that cost the Swiss banks over 310 million Swiss Francs, or approximately \$185 million U.S.²⁰¹ The Swiss banks have correctly described the Volcker audit as "probably the biggest banking audit ever undertaken,"²⁰² with over 650 forensic accountants searching the records of 254 banks in Switzerland spanning a period of more than 60 years.²⁰³ As Ambassador Eizenstat remarked, "Switzerland continues to take the lead among the wartime neutral nations in the commitment it has made to provide justice in concrete ways. It is important to recognize amidst all the criticism and

197. Jacques Rossier, Managing Partner of Darier Hentsch & Cie, Speech at the American Swiss Forum, "Switzerland, Gold and the Banks, Analysis of a Crisis," (May 26, 1999), available at <http://www.americanswiss.org/Rossier9.htm>.

198. VOLCKER REPORT, *supra* note 2, at 13.

199. Dr. Georg F. Kraye, Chairman of the Swiss Bankers Association, Speech in Zurich, Switzerland upon presentation of Volcker Report (Dec. 6, 1999), available at http://www.swissbanking.org/e/Pages/press/14_speech_kraye_e.html.

200. Rossier, *supra* note 197, available at <http://www.americanswiss.org/Rossier11.htm>.

201. VOLCKER REPORT, *supra* note 2, at 55. Regarding the degree of cooperation by the Swiss banks to this audit, the Volcker Report stated that "[o]verall the cooperation of Swiss banks with a detailed, intrusive, and very costly investigation has been adequate to allow the investigation to reach its goal of finding as much of the truth about the accounts of victims of Nazi persecution as can now be determined after the passage of more than 50 years." *Id.*

202. Press Release, Swiss Bankers Association, "Did You Know" (Dec. 12, 1999), available at http://www.swissbanking.org/e/Pages/press/11_did_know_e.html.

203. See <http://www.jewishsf.com/bk991210/iswissbanks.shtml>.

controversy, the breadth and depth of the Swiss effort.”²⁰⁴ He went on to note that “[w]e should be applauding Switzerland’s actions and encouraging its continued progress. Condemning the Swiss can only discourage them from moving on with the truly remarkable steps they have taken.”²⁰⁵ To their credit, the Swiss banks understand that public trust is a critical element of their success, and that they must address the problem correctly or tarnish their reputation.²⁰⁶ The Swiss recognized that their integrity and trustworthiness were in jeopardy, and they have taken long overdue steps. As for the claimants, their stories are not available to the public. However, when they become available, their claims will provide an important link in the ongoing historical effort of remembrance. The written and oral record paints a picture of unspeakable pain and suffering experienced by these Holocaust victims and their families which was only compounded by their inability to retrieve their assets after the Holocaust ended. The safe haven of Swiss banks was all too safe. “Indeed, *so* secure were [these accounts]—and so wrapped in the secrecy that is the selling point of the Swiss banking system—that in the years following the war they became for all practical purposes another windfall for Swiss bankers on top of the one offered by Nazi gold.”²⁰⁷ For this the Holocaust victims and their families are rightfully bitter.

My personal experience with Holocaust claims confirms that the claimants first and foremost are concerned about a moral accounting. They are not concerned about money. They want recognition that a wrong was done. If possible, they want an apology.²⁰⁸ There have been numerous occasions in which the Tribunal has provided bank documents to claimants indicating how little is in the bank account, yet they chose to continue on in the process. If these claimants were concerned about money, they would abandon their claim upon discov-

204. Delegation Statements, available at <http://www.state.gov/www/regions/eur/holocaust/heac3.pdf> (Switzerland Delegation quoted Stuart Eizenstat from the Washington Conference May 1998, at 353).

205. Stuart Eizenstat, Address to the United Jewish Appeal National Young Leadership Conference (March 23, 1998), available at http://www.state.gov/www/policy_remarks/1998/980323_eizenstat_ngold.html.

206. Dr. Georg Kray, Chairman of the Swiss Bankers Association, Speech to H.R. Committee on Banking and Financial Services, available at 1996 WL 13104434 (December 11, 1996) (“[T]he paramount goal of this process would be to establish truth, and, to be successful, it would have to embody principles of justice, trust and transparency.”).

207. Gabriel Schoenfeld, *Holocaust Reparations: A Growing Scandal*, Magazine Commentary (2000), available at http://search.britannica.com/magazine/print?content_id=183711.

208. Dr. Georg F. Kray, *supra* note 199. To his credit, Dr. Georg F. Kray, Chairman of the Swiss Bankers Association, has formally apologized. *Id.* “Whereas the age and attitude of 1956 and 1962 are more a matter for the committee of historians to address, I myself was in my present office in 1995 and will readily admit that, like other representatives of the Swiss banks, my knowledge about the subject was completely insufficient. It was insufficient for dealing with this problem as a whole, and it was inadequate in the face of the immense suffering endured by all the victims of the Second World War. I should like to apologize for all the disappointments and hurt feelings this inadequacy may have caused.” *Id.* See also Rossier, *supra* note 197, at 9 & 12. Other Swiss bankers have gone further. *Id.* “We deserved what happened first and foremost because we had treated the whole issue of Holocaust-related assets too lightly, and that is unforgivable. . . . I am sorry that the Swiss Bankers Association did not look actively and systematically immediately after the war for heirs of Holocaust victims.” *Id.*

ering how little was at stake. Yet again and again, they choose to continue. They write that they are pursuing their claim in the memory of their mother, or their grandfather, or their uncle who perished in the Holocaust. They realize how much is at stake.

Pursuing a claim before the Claims Resolution Tribunal can be physically and emotionally challenging. The Tribunal requires these claimants to provide information and documentation, if possible, to establish the validity of their claims. Although this procedure is necessary and legally sound, it can be taxing for claimants. The Tribunal has the difficult duty to request parties to relive the most painful parts of their past, and divulge details of their lives that have gone unmentioned for decades. As Judge Hadassa Ben-Itto, a former Israeli Supreme Court Justice and Tribunal arbitrator put it:

The claims process is about people, about faceless, not nameless but still anonymous account holders and their survivors, who have waited close to sixty years for this process which is meant to right a historical wrong. Unfortunately, we cannot boast that we are capable of doing full justice. What justice is there when people receive what is rightfully theirs fifty or sixty years too late? Some of them have known suffering and poverty and are now too old to enjoy this belated wind-fall. In effect we have thousands of people around the world who . . . are required to fill out forms which seem too complicated, even though an attempt has been made to make them as clear as possible. These claimants are asked to rummage in old cabinets, seek ancient documents, they are going through emotion upheaval, rekindling painful, sometimes unbearable memories, examining old letters and photographs, writing to authorities in other countries whose language they no longer speak, asking for old certificates from archives which sometimes no longer exist. This is the picture we arbitrators at the CRT face, this is what emerges from the individual files, as we are striving to discover the people behind the documents, the families behind the family tree. I saw one family tree, with scores of names, where the claimant a woman, wrote in matter-of-fact language that she had marked in red the names of all family members who had perished in the Holocaust. There were only three names not marked in red on that family tree.²⁰⁹

Speaking personally, it is a strange and remarkable experience for a lawyer working at an international tribunal to receive phone calls from claimants across the globe who weep when they discuss their family background. But it happens at the Claims Resolution Tribunal. Claimants write that in retelling their story, in pursuing their claim, there is a cleansing. Although the past can never be erased, the Claims Resolution Tribunal, even with its shortcomings, provides a measure of healing and justice for the victims of the Holocaust and their heirs.

209. Judge Hadassa Ben-Itto, Remarks to the Panel on Jurisdiction of the CRT and Different Types of Procedures, Claims Resolution Process on Dormant Accounts in Switzerland, *available at* http://www.swissbankclaims.com/PDFs_Eng/VolumeIPlan.pdf. at 102-03.

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World War II Compensation and Foreign Relations Federalism

By
Curtis A. Bradley*

In the past several years, numerous suits have been filed in U.S. courts seeking compensation for personal injury or loss of property relating to events associated with World War II. These suits have been brought against sovereign defendants, such as Germany and Japan, as well as private companies, such as companies that allegedly used slave labor during the War. In this essay, I consider some of the implications of this litigation for the relationship between federalism and foreign relations.

The starting point for my analysis is an article by Justice William Brennan that, at first glance, might seem to have little relevance to the topic. This article, published in the *Harvard Law Review* in 1977, is entitled *State Constitutions and the Protection of Individual Rights*.¹ Brennan argued in that article that, notwithstanding the dramatic expansion in federal rights during the Warren Court era, the protection of individual rights should not be viewed as the exclusive province of the national government. State constitutions, he argued, should be viewed as a source of independent—and potentially broader—individual rights. Under our federalist system, it is entirely proper, said Brennan, for the states to “thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms.”² This aspect of federalism was becoming increasingly important, Brennan explained, because the Supreme Court—by that time the Burger Court rather than the Warren Court—was becoming increasingly restrictive in its construction of federal rights.³

The conception of federalism outlined in Justice Brennan’s article, pursuant to which the states can take a more progressive role than the federal government in protecting rights, is relevant to a growing conflict in modern foreign relations

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1. See William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

2. *Id.* at 503.

3. *Id.* at 495-98. In a later article, Justice Brennan approvingly noted that “the state courts have responded with marvelous enthusiasm to many not-so-subtle invitations to fill the constitutional gaps left by decisions of the Supreme Court majority.” William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 549 (1986).

law. This conflict concerns two commitments, which I will call “one voice nationalism” and “human rights internationalism.” Many international lawyers and scholars purport to adhere to both of these commitments. These commitments, however, are increasingly at odds with one another, a phenomenon evident in some of the World War II compensation cases, especially the cases litigated in California.

I begin this essay by describing one voice nationalism and some of the Founding and Supreme Court materials often cited in support of it. I then describe two of the doctrinal components of this view—dormant foreign affairs preemption and the federal common law of foreign relations. As I explain, these doctrines have little support in the text and structure of the Constitution, the actual practices of the political branches, and Supreme Court precedent. Next, I describe human rights internationalism, and I explain how proponents of this view traditionally also have been committed to one voice nationalism. I then use the World War II compensation cases to illustrate a growing conflict between these two commitments. Drawing on Brennan’s conception of federalism, I conclude by suggesting several reasons why proponents of human rights internationalism might want to reconsider their allegiance to one voice nationalism.

I.

ONE VOICE NATIONALISM

Many foreign affairs scholars believe that federalism is, or at least should be, irrelevant to foreign affairs.⁴ Under this view, the nation must speak with one voice, not fifty voices, if it is to operate effectively in the international realm. In addition, if individual states are allowed to engage in foreign affairs activities, the argument goes, they will be in a position to impose harmful externalities on the entire nation—for example, by triggering retaliatory sanctions against the United States. For these reasons, as Professor Louis Henkin contends in his influential book on foreign affairs law, “Foreign relations are national relations.”⁵ This is the view I am calling “one voice nationalism.”

Proponents of one voice nationalism often rely on broad statements made during the Founding period.⁶ The constitutional Founders generally agreed that, during the Articles of Confederation period, the national government had not

4. See, e.g., LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 149-69 (2d ed. 1996); Brannon P. Denning & Jack H. McCall, Jr., *The Constitutionality of State and Local “Sanctions” Against Foreign Countries: Affairs of State, States’ Affairs, or a Sorry State of Affairs?*, 26 HASTINGS CONST. L.Q. 307 (1999); Martin S. Flaherty, *Are We to Be a Nation? Federal Power vs. “States’ Rights” in Foreign Affairs*, 70 U. COLO. L. REV. 1277 (1999); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald Neuman, *The Global Dimension of RFRAs*, 14 CONST. COMMENT. 33 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997).

5. HENKIN, *supra* note 4, at 149-50.

6. See, e.g., Denning & McCall, *supra* note 4, at 307, 325, 370; Golove, *supra* note 4, at 1319; Koh, *supra* note 4, at 1861; Stephens, *supra* note 4, at 404-08.

been given sufficient power to conduct foreign relations.⁷ The Founders thus often referred to the need for more national control in this area. In defending the constitutional grants of foreign affairs powers to the national government, James Madison stated in *The Federalist* that, "If we are to be one nation in any respect, it clearly ought to be in respect to other nations."⁸ Similarly, in defending certain grants of federal court jurisdiction over foreign affairs matters, Alexander Hamilton stated that "the peace of the WHOLE ought not to be left at the disposal of a PART."⁹ These statements are often quoted out of context to suggest that the Constitution disallows the states from doing anything that might affect foreign relations.

Supporters of one voice nationalism also typically rely on broad Supreme Court dicta from decisions during the late nineteenth century and the early to mid-twentieth century.¹⁰ They rely on the Court's statement in the 1889 *Chinese Exclusion Case* that, "For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."¹¹ And they quote *United States v. Belmont*, decided in 1942, for the proposition that, "in respect of our foreign relations generally, state lines disappear. As to such purpose . . . the State does not exist."¹² Professor Henkin, for example, ties this quotation from *Belmont* to the broad statements from the Founding, stating that, "At the end of the twentieth century as at the end of the eighteenth, as regards U.S. foreign relations, the states 'do not exist.'"¹³ The broad statements in these decisions, however, were all made in the context of applying federal enactments, such as a treaty, executive agreement, or statute, rather than some sort of dormant federal preemption.

Some aspects of national supremacy in foreign affairs are uncontroversial, in large part because they are supported by the text of the Constitution. Essentially everyone agrees that Congress has broad authority to regulate in the foreign affairs area, based on, among other things, its power to regulate foreign commerce, its power to define and punish offenses against the law of nations, and its power to do what is necessary and proper to carry into execution both its powers and the powers vested in the other branches.¹⁴ Thus, for example, Congress has, in the Foreign Sovereign Immunities Act, strictly limited the ability of

7. See generally BRADFORD PERKINS, *THE CREATION OF A REPUBLICAN EMPIRE, 1776-1865* (1993); FREDERICK W. MARKS III, *INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION* (1973).

8. *THE FEDERALIST*, No. 42, at 264 (Madison) (Clinton Rossiter ed., 1961).

9. *Id.*, No. 80, at 476 (Hamilton).

10. See, e.g., HENKIN, *supra* note 4, at 149; Golove, *supra* note 4, at 1319; Koh, *supra* note 4, at 1847; Stephens, *supra* note 4, at 438-40.

11. *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 606 (1889).

12. *United States v. Belmont*, 301 U.S. 324, 331 (1937). See also *United States v. Pink*, 315 U.S. 203, 233 (1942) (stating that "power over external affairs is not shared by the States; it is vested in the national government exclusively"); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) ("Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.").

13. HENKIN, *supra* note 4, at 150.

14. See U.S. Const. art. I, § 8, cls. 3, 10, 18.

litigants to bring claims in either state or federal courts against foreign sovereigns.¹⁵ Similarly, although there is debate over the precise scope of the treaty power,¹⁶ essentially everyone agrees that the President and Senate have broad authority to make international agreements, which, if self-executing, operate as supreme federal law.¹⁷ Finally, everyone agrees that states are forbidden from engaging in the foreign affairs activities expressly prohibited to them under Article I, Section 10 of the Constitution, such as entering into treaties and engaging in war.¹⁸

But one voice nationalism goes much further than this. Under this view, the national government has supremacy in foreign affairs matters even in the *absence* of a statute, treaty, or express constitutional prohibition. This view has many doctrinal components, only two of which I discuss here. First, one voice nationalists argue that state actions that intrude on foreign affairs should be invalidated by the federal courts on the ground that they are preempted by the dormant foreign affairs powers of the national government. Second, they argue that cases implicating foreign affairs should be heard by the federal courts, even if the cases do not involve diverse parties or federal claims, on the theory that these cases implicate a federal common law of foreign relations.

Neither of these doctrines—dormant foreign affairs preemption or the federal common law of foreign relations—is an inevitable reading of the Constitution, federal statutory law, or Supreme Court precedent. As for dormant foreign affairs preemption, the constitutional text does not contain any general foreign affairs power akin to the general commerce power granted to Congress. Moreover, as noted above, the Constitution expressly identifies the state foreign affairs activities that are prohibited and gives Congress and the federal treaty-makers broad power to preempt other state foreign affairs activities if they so choose. A natural implication of this structure is that state foreign affairs activities are not preempted unless they are in conflict with a constitutional prohibition, a federal statute, or a treaty. This implication makes sense from a federalism standpoint, because the states are represented in Congress but not in the federal courts.¹⁹

15. A number of World War II compensation cases have been dismissed on the basis of the Foreign Sovereign Immunities Act. *See, e.g.*, *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001); *Haven v. Polska*, 215 F.3d 727 (7th Cir. 2000); *Princz v. F.R.G.*, 26 F.3d 1166 (D.C. Cir. 1994); *Abrams v. Societe Nationale des Chemins de Fer Francais*, 175 F. Supp. 2d 423 (E.D.N.Y. 2001); *Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001); *Wolf v. Fed. Republic of Germany*, 1995 U.S. Dist. LEXIS 5860 (N.D. Ill. 1995).

16. For a recent debate over whether the treaty power should be subject to federalism limitations, compare Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998), and Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000), with Golove, *supra* note 4.

17. *See* U.S. Const. art. II, § 2, cl. 2; *see also id.* art. VI, cl. 2. For the requirement of self-execution, *see Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

18. *See* U.S. Const. art. I, § 10, cls. 1, 3.

19. *See City of Milwaukee v. Illinois*, 451 U.S. 304, 317 n.19 (1981) (noting that “the States are represented in Congress but not in the federal courts”).

Furthermore, recent scholarship suggests that historical materials relating to the constitutional Founding support this structural implication.²⁰

Nor is there much precedent supporting the dormant preemption doctrine. The Supreme Court has recognized dormant foreign affairs preemption only once, in its 1968 *Zschernig* decision, in which it invalidated an Oregon inheritance statute that in effect barred inheritance of Oregon property by heirs in Communist countries.²¹ Although the Court was unclear about the precise test for dormant foreign affairs preemption, it did state that the Oregon statute had “more than ‘some incidental or indirect effect in foreign countries,’” and that the statute had “great potential for disruption or embarrassment.”²² As many scholars have noted, the *Zschernig* decision created new constitutional doctrine.²³ The Supreme Court has not applied this doctrine in the thirty-three years since *Zschernig*, and its 1994 international tax decision, *Barclays Bank*, contains reasoning that is at least in tension with the reasoning of *Zschernig*.²⁴ In particular, the Court in *Barclays Bank* suggested that arguments about the need for “one voice” in foreign relations should generally be directed at Congress, not the courts. As the Court stated, “we leave it to Congress—whose voice, in this area, is the Nation’s—to evaluate whether the national interest is best served by tax uniformity, or state autonomy.”²⁵

There is similarly little textual or historical support for the so-called federal common law of foreign relations. Unlike some areas of federal common law, such as admiralty law and the law governing disputes between states, the federal common law of foreign relations is not tied to any particular grant of Article III jurisdiction. Nor was “foreign relations” recognized as a distinct body of federal common law throughout most of U.S. history. In addition, this doctrine appears to conflict with the Supreme Court’s longstanding construction of the federal question jurisdiction statute,²⁶ pursuant to which the federal law issue in a case must appear on the face of the plaintiff’s well-pleaded complaint.²⁷ That a case implicates foreign relations does not by itself show that the plaintiff’s case arises under federal law.²⁸

20. See, e.g., Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999).

21. *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

22. *Id.* at 434-35 (quoting *Clark v. Allen*, 331 U.S. 503, 517 (1947)).

23. See, e.g., HENKIN, *supra* note 4, at 163; Richard B. Bilder, *The Role of States and Cities in Foreign Relations*, 83 AM. J. INT’L L. 821, 825 (1989); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1649 (1997).

24. See *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994).

25. *Id.* at 330.

26. 28 U.S.C. § 1331.

27. See *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 152 (1908).

28. See *Patrickson v. Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001); *In re Tobacco/Governmental Health Care Costs Litigation*, 100 F. Supp. 2d 31, 34-38 (D.D.C. 2000). There is a “complete preemption” exception to the well-pleaded complaint rule. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22-24 (1983); *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560 (1968). The Court in *Zschernig* did not hold, however, that all state laws implicating foreign affairs are preempted. Moreover, the decisions invoking the federal common law of foreign relations for jurisdictional purposes do not appear to be applying any preemption; rather, they are simply holding that the case belongs in federal court.

The Supreme Court decision that one voice nationalists typically cite in support of the idea of a federal common law of foreign relations is the 1964 *Sabbatino* decision.²⁹ The federal common law holding in *Sabbatino*, however, was limited to the act of state doctrine, a doctrine that the Court concluded was based on “‘constitutional’ underpinnings.”³⁰ The Supreme Court has subsequently limited even the act of state holding of *Sabbatino*.³¹ Moreover, there was diversity jurisdiction in *Sabbatino*, and the Court had no reason to suggest, and did not suggest, that a case implicating foreign affairs automatically falls within federal question jurisdiction. The *Sabbatino* decision therefore does not provide support for a jurisdictional federal common law of foreign relations.

One voice nationalism is also inconsistent with the actual practices of the federal political branches. In many foreign relations situations, the political branches have given significant weight to federalism and states’ rights concerns. For example, when ratifying human rights treaties, the President and Senate routinely attach federalism understandings providing that the treaties will be implemented in a manner consistent with our federal system of government.³² They also attach non-self-execution declarations, thereby preventing the treaties from directly preempting state law.³³ Similarly, in a recent case involving a Paraguayan on death row in Virginia who was claiming that his rights had been violated under a treaty, both the State Department and Justice Department maintained that principles of federalism limited the ability of the national government to override state decisions on criminal punishment, even to enforce a treaty.³⁴ To take another recent example, the statutes implementing the General Agreement on Tariffs and Trade (“GATT”) and the North American Free Trade Agreement (“NAFTA”) provide that no state law may be declared invalid because of a conflict with these treaties except in a suit brought by the federal government.³⁵ As these examples demonstrate, federalism has a significant effect on U.S. foreign relations law.

Finally, it is far from clear that the federal courts have the necessary information, expertise, and democratic accountability to make the foreign relations judgments called for by these doctrines. Federal courts may not be well-situated, for example, to determine whether a state activity or lawsuit is likely to

29. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964). See, e.g., Koh, *supra* note 4, at 1833-34; Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 *FORDHAM L. REV.* 371, 375-76 (1997); Stephens, *supra* note 4, at 440-45.

30. *Banco Nacional de Cuba*, 376 U.S. at 423.

31. See, e.g., *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400 (1990).

32. See, e.g., U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, S. Res. 102d Cong., 138 *CONG. REC. S 4784(II)(5)* (1992) (stating that “the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments”).

33. See, e.g., *id.* at (III)(1).

34. See Curtis A. Bradley, Beard, *Our Dualist Constitution, and the Internationalist Conception*, 51 *STAN. L. REV.* 529, 562 (1999).

35. See 9 U.S.C. § 3512 (1994) (implementing GATT); 19 U.S.C. § 3312 (1994) (implementing NAFTA).

undermine the national government's conduct of foreign relations. From the perspective of separation of powers, therefore, a strong argument can be made that the jurisdictional and preemption decisions implicated by these doctrines should be left to Congress in the first instance.

II.

CONFLICT WITH HUMAN RIGHTS INTERNATIONALISM

Proponents of one voice nationalism are also typically proponents of broad domestic enforcement and promotion of international human rights standards, a view that I am calling "human rights internationalism." Under this view, the United States should ratify the major human rights treaties, and allow private enforcement of these treaties in its courts. Proponents of this view therefore criticize the United States' attachment of non-self-execution declarations to its ratification of the human rights treaties, which prevent these treaties from being judicially enforceable.³⁶ In addition, under this view the United States should allow for broad judicial enforcement of customary norms of human rights law, with respect to human rights abuses both inside and outside the United States.³⁷

At least until recently, academic commentators have perceived one voice nationalism as generally in alignment with human rights internationalism. Indeed, many academic proponents of human rights internationalism have invoked the tenets of one voice nationalism to argue for the preemption of state laws that are inconsistent with customary international human rights standards.³⁸ Other commentators have argued for a broad reading of federal court jurisdiction under the Alien Tort Statute,³⁹ pursuant to which federal courts would have jurisdiction over international human rights claims from around the world, regardless of any connections to the United States.⁴⁰ And still other commenta-

36. See, e.g., Lori F. Damrosch, *The Role of the United States Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 CHI.-KENT L. REV. 515 (1991); Louis Henkin, *U.S. Ratification of Human Rights Treaties: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); Jordan J. Paust, *Avoiding "Fraudulent" Executive Policy: Analysis of Non-Self-Execution of the Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311 (1993); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571 (1991). For a defense of the non-self-execution declarations and other conditions that the United States has imposed on its ratification of human rights treaties, see Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399 (2000).

37. See, e.g., Koh, *supra* note 4; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); Stephens, *supra* note 4.

38. See, e.g., Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295; Henkin, *supra* note 37; Koh, *supra* note 4; Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT'L L. 301 (1999); Stephens, *supra* note 4.

39. 28 U.S.C. § 1350.

40. See, e.g., Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Ken-

tors invoke one voice nationalism to argue that there are neither subject matter nor federalism limits on the treaty power, such that there are effectively no limits on the ability of the treaty-makers to regulate matters beyond the scope of Congress' regulatory powers.⁴¹

In recent years, however, there have been increasing strains between one voice nationalism and human rights internationalism. This is so for two reasons. First, whether constitutionally authorized to do so or not, neither the political branches nor the courts have shown much inclination to intrude on state prerogatives in an effort to enforce international human rights standards. The U.S. treaty-makers, for example, have declined to give human rights treaties the status of preemptive federal law. And courts have not been willing to give preemptive force to customary international law. As a result, one voice nationalism is not, in fact, advancing the cause of domestic enforcement of international human rights standards.

Second, and more importantly, some states have shown more inclination than the federal government to promote international human rights standards. The federal government has declined to ratify a number of important human rights treaties and has declined to pass implementing legislation for some of the human rights treaties that it has ratified.⁴² In addition, it has often responded to human rights problems around the world in limited and muted ways.

Some states and local governments, by contrast, have taken a more aggressive position on international human rights issues. This phenomenon was evident in a recent case involving sanctions imposed by the Commonwealth of Massachusetts. In response to human rights violations in Burma (now called Myanmar), Massachusetts enacted a statute generally prohibiting its state government from purchasing goods or services from anyone doing business with that country. Relying on *Zschernig*, as well as the above-discussed Founding rhetoric and Supreme Court dicta, the U.S. Court of Appeals for the First Circuit held that this state statute was preempted by the dormant foreign affairs powers of the national government.⁴³ The Supreme Court subsequently affirmed the First Circuit on narrow grounds, concluding that the Massachusetts statute was preempted by a more limited federal Burma sanctions statute.⁴⁴ The Court ex-

neth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1 (1985).

41. See, e.g., Louis Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012 (1968); Flaherty, *supra* note 4; Golove, *supra* note 4; Neuman, *supra* note 4; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 cmts. c, d (1987).

42. For example, the United States has not ratified the International Covenant on Economic, Cultural, and Social Rights, the Convention on the Rights of the Child, or the Convention on the Elimination of All Forms of Discrimination Against Women. Although it has ratified the International Covenant on Civil and Political Rights, it has not enacted any legislation to implement that treaty.

43. *National Foreign Trade Council v. Natsios*, 181 F.3d 38 (1st Cir. 1999).

44. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000). For discussions of the Supreme Court's statutory preemption holding, see Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175; Edward Swaine, *Crosby as Foreign Relations Law*, 41 VA. J. INT'L L. 481 (2001); Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA

pressly declined to reach the dormant preemption issue,⁴⁵ so the scope of *Zschernig* remains unsettled.⁴⁶

The Massachusetts case illustrates how one voice nationalism can conflict with human rights internationalism. In particular, the broad exclusion of state and local governments from foreign affairs that is envisioned by one voice nationalism may prevent them from acting more progressively than the federal government in protecting international human rights standards and promoting human rights reform.

III.

WORLD WAR II COMPENSATION CASES

This phenomenon—more progressive enforcement of human rights standards at the state and local levels than at the federal level—is also evident in some of the recent World War II compensation cases. A few years ago, for example, a number of U.S. states and municipalities threatened to impose sanctions on Swiss banks unless they resolved pending lawsuits involving holocaust-era accounts. In the face of this pressure, the banks agreed to settle the suits for \$1.25 billion.⁴⁷ More recently, in 1999, California enacted two sets of statutes relating to World War II reparations. One statute creates a right of compensation for slave and forced labor during World War II, and extends the statute of limitations period for seeking such compensation until the end of 2010.⁴⁸ The other statute, the Holocaust Victim Insurance Relief Act of 1999 and related provisions, requires insurance companies doing business in California to report on any policies they issued in Europe between 1920 and 1945, gives Holocaust victims and their heirs residing in California a right to sue under the policies, and extends the statute of limitations period for recovering under such policies until 2010.⁴⁹

A number of cases have been brought in California state court under the slave and forced labor statute. These cases, which involve claims by former

L.J. 11 (2000); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001); see also *Symposium, New Voices on the New Federalism*, 46 VILL. L. REV. 907-1395 (2001) (containing several essays discussing *Crosby*).

45. 530 U.S. at 374 n.8.

46. A precursor to the debate over the validity of the Massachusetts Burma statute was a similar debate in the 1980s over the validity of various state and local sanctions against South Africa. Approximately twenty-three states and eighty municipalities during this period enacted laws either restricting government investment in corporations doing business in South Africa, or restricting government purchases from companies doing business in South Africa. The Supreme Court never addressed the validity of these measures, and the lower courts were divided on the issue. See generally Bilder, *supra* note 22; Kevin P. Lewis, *Dealing With South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469 (1987); Peter J. Spiro, Note, *State and Local Anti-South Africa Action as an Intrusion Upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813 (1986).

47. John J. Goldman & Henry Weinstein, 2 *Swiss Banks to Pay 1.25 Billion in Holocaust Suits*, L.A. TIMES, Aug. 13, 1998, at A1; Amy Waldman, *Holocaust Accord Ends Plan for Sanctions*, N.Y. TIMES, Aug. 14, 1998, at A1.

48. CAL. CIV. PROC. CODE § 354.6.

49. CAL. INS. §§ 13800-13807, and accompanying regulations, CAL. CODE REGS. tit. 10 §§ 2278-2278.5; CAL. CIV. PROC. CODE § 354.5.

prisoners of war against Japanese companies, have often been removed by the defendants to federal court. The theory behind the removal is that, even though these cases involve state law claims, and even though a federal defense is not enough for removal, the cases implicate the federal common law of foreign relations and thus fall within the statutory subject matter jurisdiction of the federal courts. At least two federal district courts in California have accepted this removal argument.⁵⁰ These courts have reasoned that these cases implicate important foreign relations interests of the United States and thus should be deemed to fall within federal question jurisdiction. As one court explained: "If an examination of the complaint shows that the plaintiff's claims necessarily require determinations that will directly and significantly affect United States foreign relations, a plaintiff's state law claims should be removed."⁵¹

Some of the removed cases were consolidated before a single district judge, and the judge subsequently dismissed the claims. The judge first dismissed claims by plaintiffs who were American or Allied soldiers in World War II and were held as Japanese prisoners of war, on the ground that their claims were preempted by the 1951 peace treaty with Japan, which broadly waives reparations claims of the Allied powers and their nationals relating to actions taken by Japan and its nationals during the war.⁵² In a subsequent opinion, the judge dismissed claims by Filipino prisoners, finding that these claims also were preempted by the 1951 treaty, because the Republic of the Philippines had ratified the treaty and was specifically named in it.⁵³ Finally, the judge dismissed the remaining claims—by former prisoners of war from Korea and China—on the ground that the claims were subject to dormant foreign affairs preemption.⁵⁴ Neither Korea nor China were signatories to the 1951 treaty, so the court concluded that these plaintiffs' claims, unlike the claims of the U.S., Allied, and Filipino prisoners, were not subject to treaty preemption. Relying on *Zschernig*, however, the court concluded that the California slave and forced labor statute was "unconstitutional because it infringes on the exclusive foreign affairs power of the United States."⁵⁵

50. See *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939 (N.D. Cal. 2000); *Poole v. Nippon Steel Corp.*, No. 00-0189 (C.D. Cal. Mar. 17, 2000). In at least one of the cases, removal was not allowed. See *Jeong v. Onoda Cement Co.*, 2000 U.S. Dist. LEXIS 7985 (C.D. Cal. May 18, 2000). The court reasoned that the well-pleaded complaint rule was not satisfied because "no element of [the plaintiff's] claims depends on federal law." *Id.* at *20.

51. *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 943.

52. *Id.* at 948.

53. *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1153 (N.D. Cal. 2001).

54. *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160 (N.D. Cal., 2001). A somewhat similar pattern is evident in some of the recent international environmental law cases. These cases are brought in state court under state law theories, removed by the defendants on the basis of a federal common law of foreign relations, and then often dismissed by federal judges under doctrines that might not have been available in state court, such as a federal *forum non conveniens* doctrine or a vague "comity of nations" doctrine. See, e.g., *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994).

55. *In re World War II Forced Labor Litigation*, 164 F. Supp. 2d at 1168.

A federal district court also accepted the dormant preemption argument with respect to the reporting provisions of the California insurance statute.⁵⁶ Citing the broad one voice nationalism rhetoric from the Founding and Supreme Court dicta, as well as the First Circuit's decision in the Massachusetts Burma case, the court enjoined enforcement of the California statute. Among other things, the court concluded that the statute "interferes with the national government's exclusive power over external affairs."⁵⁷ The Ninth Circuit, however, recently reversed this decision.⁵⁸ Among other things, the Ninth Circuit adopted a narrow view of dormant foreign affairs preemption, in part because of the Supreme Court's decision in *Barclays Bank*.⁵⁹ Although distinguishable in some ways, the Ninth Circuit's decision is in tension with the First Circuit's decision in the Massachusetts Burma case. More importantly, the Ninth Circuit's decision confirms that there is nothing inevitable about one voice nationalism; it is quite plausible, as the Ninth Circuit recognized, to allow the states a role in foreign affairs, subject to the preemptive actions of Congress and the treaty-makers.

These cases, like the Massachusetts Burma case, show how increased state involvement in international human rights issues has created a conflict between human rights internationalism and one voice nationalism. Lawyers are making one voice nationalism arguments in this context in an effort to override state efforts to address international human rights issues. One voice nationalism may thus have the effect of undermining rather than promoting domestic incorporation and enforcement of international human rights standards.

IV.

RECONSIDERING ONE VOICE NATIONALISM

Given this conflict, human rights advocates may want to take a cue from Justice Brennan. Now that the Executive Branch and the Supreme Court are relatively conservative on international human rights issues, those who favor broad domestic enforcement of international human rights standards may not want to look solely to Washington. Just as Justice Brennan encouraged advocates of domestic individual liberties to look to the states in the face of increasing conservatism in Washington, advocates of international human rights may want to do the same.

This is not to say that the California statutes should be found valid. As noted above, the federal government has broad power to preempt state laws relating to foreign affairs. Perhaps the treaty-makers, Congress, or the President have preempted the California statutes—through, for example, the 1951 peace

56. See *Gerling Global Reins. Corp. of America v. Quackenbush*, 2000 U.S. Dist. LEXIS 8815 (E.D. Cal. June 9, 2000).

57. *Id.* at *30.

58. See *Gerling Global Reins. Corp. of America v. Low*, 240 F.3d 739, 753 (9th Cir. 2001). In that decision, the Ninth Circuit disagreed with the district court's dormant preemption holding, but it left the district court's preliminary injunction in place pending the district court's consideration on remand of the defendants' due process challenge to the California statute.

59. See *id.*; see also *id.* at 746-48 (discussing *Barclays Bank*).

treaty with Japan. In addition, states are obligated to comply with the federal Constitution, and there may be due process problems associated with certain state efforts to regulate human rights practices in other countries.⁶⁰ Indeed, a district court recently concluded that the California Holocaust insurance statute violates due process,⁶¹ and the Eleventh Circuit found a violation of due process with respect to a Florida insurance statute.⁶² Regardless of the validity of these particular statutes, many state laws that aim to protect international human rights will not be subject to treaty, statutory, or constitutional preemption.

If these state human rights protections do create foreign relations problems, Congress is fully equipped to preempt them. Although many legislative needs may escape Congress' attention, state activities that generate foreign relations difficulties are not likely to be one of them, since both foreign nations and the Executive Branch can be counted on to inform Congress of their concerns. Even when Congress does act to preempt, the state or local measure may have had the useful effect of putting a human rights issue on the national agenda, as may have happened with respect to South Africa, the Massachusetts Burma statute, and the World War II compensation cases.

There is of course one key difference between the situation I have outlined and the one addressed by Justice Brennan: states cannot give less individual rights protection than is required by the Constitution, but nothing in what I have said would preclude states from giving less international human rights protection than is required by international law. This likely would have been an important distinction to Justice Brennan. Indeed, he emphasized in his 1977 article that his vision of federalism was one in which there can be "a *double* source of protection for the rights of our citizens."⁶³

That is an important distinction, but it is not necessarily a compelling reason for human rights advocates to continue embracing one voice nationalism. Most obviously, Brennan was focused on constitutional rights, but international human rights standards do not have the status in the United States of constitutional rights. Almost all scholars agree, for example, that, for purposes of U.S. domestic law, these standards can be overridden by a federal statute. Thus, we should not necessarily be surprised if these international standards do not operate in the same one-way fashion in the United States as constitutional rights.

More importantly, in allowing for the possibility that states could violate international human rights standards without facing judicial preemption, human rights internationalists would not actually be giving up much. Unlike judicial enforcement of the Constitution, there is little reason to believe that courts will enforce international human rights standards against the states in the absence of preemptive action by Congress or the treaty-makers. For example, despite claims

60. The Supreme Court has indicated that there are due process limits, for example, on the ability of states to regulate conduct outside their borders. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (plurality); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

61. *Gerling Global Reins. Corp. v. Low*, 2001 U.S. Dist. LEXIS 16072 (E.D. Cal. Oct. 1, 2001).

62. *Gerling Global Reins. Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001).

63. Brennan, *supra* note 1, at 503 (emphasis added).

by many scholars that customary international law has the status of preemptive federal law, there are essentially no decisions in U.S. history actually using customary international law to preempt state law.

In addition, as both the Massachusetts Burma case and the World War II compensation litigation confirm, there is nothing in the logic of one voice nationalism that ensures that it will lead to pro-human rights outcomes. Unlike the Warren Court nationalism that served as the backdrop to Justice Brennan's article, it is difficult to ensure that one voice nationalism has a consistently rights-protective effect. As a result, by embracing one voice nationalism, human rights advocates may end up bolstering doctrines that are used to restrict progressive state and local protections of human rights.

Furthermore, one voice nationalism has other effects that proponents of human rights internationalism might find undesirable. In particular, it tends to centralize and enhance power in the Executive Branch. By excluding states from foreign affairs activities, one voice nationalism essentially gives the President a free hand—the President need not obtain the cooperation of Congress or the Senate to implement his or her views of foreign policy.⁶⁴ One voice nationalism is also used to justify broad abstention on international issues, including international human rights issues, through such devices as the political question doctrine and the act of state doctrine.⁶⁵ Advocates of human rights internationalism have often been critical of these doctrines.⁶⁶

Even without the dormant preemption and federal common law doctrines associated with one voice nationalism, the national government still has substantial power to override state violations of international human rights standards.⁶⁷ Thus, there are means other than judicial preemption for addressing state violations of international human rights standards. In any event, these one voice nationalism doctrines also are predicated on a sharp distinction between foreign and domestic affairs, a distinction that is becoming increasingly difficult to maintain in this age of globalization.⁶⁸

For these reasons—the low probability of courts using international human rights standards to override state prerogatives, the potential of one voice nationalism to undermine state and local efforts to protect human rights, and the broad power of the national government to preempt state foreign affairs activities that

64. See Ramsey, *supra* note 20, at 374-79. See also *Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001) (relying on political question doctrine as alternate ground for dismissal).

65. For example, several of the European World War II compensation cases have been dismissed under the political question doctrine. See, e.g., *Frumkin v. JA Jones, Inc.*, 129 F. Supp. 2d 370 (D.N.J. 2001); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999).

66. See Bradley, *supra* note 34, at 555 (documenting this point).

67. See Goldsmith, *supra* note 23. It is also arguable that national preemption of state foreign affairs activities is less necessary today, given the ability of foreign nations to target their reaction to sanctions at the state and local levels. See Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1266-68 (1999).

68. See, e.g., Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1468 (1994). If anything, the war on terrorism triggered by the attacks on the United States on September 11, 2001—including the new emphasis on “homeland security”—is likely to erode further the domestic versus foreign distinction.

conflict with the national interest—the preemption and jurisdiction doctrines associated with one voice nationalism may be both unnecessary and legally problematic. Proponents of human rights internationalism may want to reconsider their allegiance to these doctrines.

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The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945

By
Rudolf Dolzer*

I. INTRODUCTION

A. *Rewriting the Rules of Peacemaking?*

In the future, the appropriate treatment and resolution of war-related claims brought by individuals will depend on the doctrinal framework in which they are placed. The traditional approach assumes that war-related claims by individuals are dealt with in peace treaties or their functional equivalents. Another view holds that war-related claims by individuals are treated the same as individual claims against foreign governments arising in times of peace. A third position equates the status of war-related claims with human rights claims in general.

To assess these three alternative positions in their broader context, this article reviews World War II-related practice of nations and their underlying policies. The limited focus on World War II peacemaking may limit the representative value of the following observations; indeed, a broader empirical study would be desirable. However, in spite of the many wars and war-like situations after 1945, no subsequent war has been of the same magnitude, involved so many actors, and led to so many deliberations and negotiations. Moreover, the process of reparations related to World War II has spanned the entire period from 1945 to the present, with a recent emphasis on juridical pronouncements.

Each of the three approaches identified above creates distinct implications with respect to the mechanism of presenting a war-related claim. The traditional view of the resolution of individual war-related claims in peace treaties links individual claims and government claims to the concept of reparation, and requires their resolution on a government-to-government basis in the broader context of peace arrangements, typically in a peace treaty. The second view, which does not distinguish between claims arising out of peace or war, would require

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that war-related claims be treated in accordance with laws of diplomatic protection, and a claim of this kind would also have to be raised by a government. It is only under the third view, identifying war claims with human rights claims, that the affected individual himself would arguably have standing to raise a claim before a national court in a country other than that of the defendant government. Further, in order to be consistent with general rules of international law, this third approach would presuppose that domestic law, such as the Alien Tort Claims Act in the United States ("ATCA"), does not violate the accepted rules on territorial jurisdiction, sovereignty or international human rights conventions.

A decade ago, it would have been generally understood that only the classical approach, which considers war-related individual claims as being subsumed by the intergovernmental arrangements for peace, was consistent with international law as reflected in practice and doctrine.¹ However, the 1990s have witnessed a remarkable, and in some respects revolutionary, attempt to restructure the classical approach to peacemaking and the resolution of matters relating to the international consequences of war. In what may be described as an attempt to replace the traditional exclusive government-to-government process of negotiating a comprehensive peace treaty, efforts were undertaken to adjudicate claims by individuals before regular courts of law. These efforts were mainly undertaken before the United States courts, with the defendants such as the German state, the Japanese state, and German and Japanese companies that had been involved in war-related activities during World War II. Efforts of a similar kind were undertaken against Germany before the Greek juridical system.² Moreover, a number of lawsuits for individual claims were brought before German courts.³

No precedent exists for claims of this kind. Thus, the efforts to bring such claims before national courts were dependent upon the success of novel constructive reasoning by way of extension of existing types of claims or by analogy to such claims. First, violations of the laws of war or some reference to human rights in general were alleged. Thereafter, attempts were made to overcome the classical approach of relevant rules of international law, adding three additional levels. Previously, the laws of war had been understood to address states and not individuals. While the Nuremberg and Tokyo tribunals drew criminal consequences from violations of the laws of war, an individual seeking to bring a civil case based on this development in criminal law now argued that Nuremberg and Tokyo were not of singular kind, and also that these novel criminal proceedings reflected similar changes in the rules of civil law.

1. See, e.g., Ignaz Seidl-Hohenveldern, *Reparations*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 178 (Rudolf Bernhardt, ed., 2000) [hereinafter: 4 EPIL].

2. The highest Greek court (Aeropag) rendered a decision on May 10, 2000 in the case concerning German atrocities in the village of Distomo (on file with the author; no English translation is available). Altogether, it appears that more than 60,000 cases were pending in October 2001 before Greek courts dealing with the consequences of World War II.

3. For recent German court decisions in this context, see OLG Köln, 52 NJW 1555 (1999); OLG Stuttgart, 53 NJW 2680 (2000); OLG Hamm, 53 NJW 3577 (2000); Oberverwaltungsgericht NRW, 41 NJW 3202 (1988).

On a second level, the modalities of enforcement of international law in general, and humanitarian law in particular, came into play. While it was traditionally assumed that an internationally defined process would be appropriate and required for monitoring and enforcing the laws of war, the lawsuits in the United States were based on the assumption that the judicial organs of individual states may fashion appropriate remedies in accordance with the peculiarities of a domestic legal system.

Third, a major portion of the legal arguments of plaintiffs before U.S. courts drew upon recent domestic U.S. jurisprudence under the ATCA.⁴ For the past twenty years, the ATCA has been interpreted to allow U.S. domestic courts to enforce rules protecting human rights alleged to be violated by foreign governments in relation to their own citizens, and even foreign legal citizens. Whether or not the jurisdictional concept of unilateralism embodied in the ATCA would withstand the scrutiny test of an international court in light of the accepted rules on jurisdiction under international law is one matter.⁵ No human rights treaty patterned along the lines of the ATCA in terms of the rules of national definition and enforcement has ever been adopted, and it is doubtful that an effort to reach consensus based on the ATCA philosophy would find broad acceptance on the international level.⁶ Indeed, the serious difficulties of finding a common international basis for internationally defined criminal proceedings to counter violations of human rights point to a different conclusion. Even if the ATCA philosophy were to be an acceptable concept governing international relations, however, any legal argument attempting to deduce rules governing war-related conduct from general human rights norms would have to show that the transfer of norms designed to protect the individual in peace time

4. 28 U.S.C. § 1350.

5. According to the 2 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 713.2 (1986) a person of foreign nationality may pursue any remedy by the law of another state. In the relevant Reporters' Notes, under Nr. 3, no international case or authority is quoted; instead, reference is made to *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1963). The subsequent paragraph properly notes that the courts of other states "... have been less free in assisting nationals of third states." No foreign case or authority in support of a jurisdictional assertion along the lines of the ATCA is quoted.

When the United States passed the Torture Victim Protection Act (TVPA) of 1991 (Pub. L. 102-256, 106 Stat. 73), this was done in order to respond to certain issues which had arisen in the light of different interpretations of the ATCA. The TVPA provides explicitly for a ten year statute of limitation and also provides that a suit in the United States can be brought only after local remedies have been exhausted in the country where the act of torture has occurred.

These restrictions notwithstanding, the U.S. State Department, the Department of Justice and a number of Congressmen objected to the passage of the TVPA in light of the problems which could arise under the rules of international law, including issues related to sovereign immunity, national jurisdiction and retroactivity of legal action. See HOUSE REP. NO. 102-900, at 103, 702 (1991). Upon the signing of the Act, President George H.W. Bush issued a statement in which he warned against broad interpretations of the ATCA and the TVPA. See Geoffrey Watson, *The Death of a Treaty*, 55 OHIO ST. L. J. 781, 884 (1994).

6. The rules on diplomatic protection allow for the home state of the victim to determine, using its own political discretion, whether or not to pursue a claim against the state violating the rights of its national. It is through this process of discretion that the rules on diplomatic protection have long been accepted. The ATCA, if applied in a broad way, would operate so as to disregard the will of the home state and replace it with the will of the individual bringing a suit in the United States.

into the context of the laws of war is structurally appropriate in general, and is contextually legitimate for each individual rule in particular.

Obviously, surmounting each of these jurisprudential hurdles, and thus successfully bringing an individual war-related claim before a domestic court, amounts to a tall order. A review of the decisions by various courts indicates that the recent series of national proceedings has failed to overcome the relevant jurisprudential obstacles. The claims in the U.S., to the extent that they were considered by the courts, were denied, albeit not on the basis of concerns for the classical rules of international law, but rather on the basis of constitutional rules addressing the separation of powers as expressed in the political question doctrine.⁷ Through unpersuasive reasons, the Greek courts have allowed a claim against the German Government,⁸ and the German courts in turn have concluded, in principle, that public international law does not allow such individual claims.⁹

It is beyond the scope of this article to address the details of all relevant national juridical proceedings. The focus here concerns the basic issue of whether or not states' practice after 1945 can be said to have confirmed the classical rules of governmental peacemaking or whether these principles have been altered in a manner which today allows the pursuit of individual war-related claims before national courts. Such alteration of the classical rules however, would only be valid as a matter of international law to the extent that it would be based on corresponding practice. National courts do not have the capacity to unilaterally change the rules of international law. No effort will be made here to outline any special theory of the sources of international law that underlies the following observations. Instead, it is assumed that those sources which are laid down in Art. 38 of the ICJ Statute and generally accepted and applied by the International Court of Justice govern.

Following this route, the initial sections of this paper will briefly address the state of the law as it stood before 1945, defining as well the distinction between war claims and claims arising during peace. The main part of the paper

7. See, e.g., *Alice Burger-Fisher et al v. Degussa AG and Degussa Corp.*, 65 F. Supp.2d 248 (D.N.J. 1999): "Were the court to undertake to fashion appropriate reparations for the plaintiffs in the present case, it would lack any standards to apply. Concededly, the resources are lacking to provide full indemnification for the terrible wrongs which plaintiffs, the plaintiffs in related cases and those they seek to represent suffered at the hands of Nazi Germany and at the hands of the giants of German industry which played an integral part in the perpetration of those wrongs. Wrongs were suffered not only by the classes of persons represented in these proceedings, however, but also by many other classes of persons in many lands. They, too, had claims against German assets. By what conceivable standard could a single court arrive at a fair allocation of resources among all the deserving groups? By what practical means could a single court acquire the information needed to fashion such a standard? This was a task which the nations involved sought to perform as they negotiated the Potsdam Agreement, the Paris Agreement, the Restitution Agreement and the 2+4 Treaty. It would be presumptuous for this court to attempt to do a better job." *Id.* at 284.

8. See *supra* note 2.

9. The First Senate (First Chamber) of German Constitutional Court has noted in 2001 that no single final decision by a German court has ever recognized an individual claim by a person who was forced to labor in a camp or otherwise during the Second World War; see 54 NJW 2159 (2001); see also OLG Hamm, 53 NJW 3577 (2000); Hugo Hahn, *Individualausprüche auf Wiedergutmachung von Zwangsarbeit im Zweiten Weltkrieg*, 53 NJW 3521 (2000).

will review state practice after 1945, with an emphasis on the modalities of peace making of the Allied Powers with Germany and Japan, and brief reference to the 1947 Peace Treaties and the Austrian State Treaty (1955). Finally, against the background of this course of inter-governmental practice, the concluding sections of this piece will discuss whether the doctrinal considerations emanating from general developments in international law warrant the conclusion that the traditional rules of government-to-government resolution of the consequences of war are, under the *lex lata*, nevertheless open to modifications toward an individual-oriented approach. Beyond the outcome on the legal level, considerations of policy will also be briefly addressed.

B. *Reparations: A Category of the Laws of War*

The classical view of individual war claims as being covered by the process of negotiating and exacting reparations is based on the difference in the status of war and of peace in international law. In accordance with state practice, textbooks differentiate between war and peace when they set forth the rules for the relations among states. Wars, as understood in international law, exist between states, not within states and not between states and persons. During times of war, the validity of treaties among the parties is affected, as are contracts between states and citizens, and among citizens; diplomatic relations are severed, and special rules govern enemy subjects and property. Neutral states have to observe certain obligations in their relations with the parties at war. Altogether, the entire fabric of the peace-time relations between states as regulated by international law shifts to a different regime, the one in which interrelated rules address the conduct of hostile states.

Given this sharp distinction between the rules for war and peace, it is natural that international law has developed norms which allow distinctions between war and peace, and which promote the transition from war to peace. Thus, peace treaties are among the oldest and the most fundamental institutions of international law.¹⁰ Their objective is to end hostilities and establish the basis for durable accommodation and reconciliation, and to contribute to a new order of stability and security.¹¹ These integrated goals are typically promoted by the inclusion of territorial, political, economic, financial and juridical parts¹² which, in their entirety, form the conditions under which both sides anticipate that a new order will be possible and desirable. Obviously, the various elements amount to a “package deal” in which negotiated compromises are embodied not just for their individual components, but also as a whole. Indeed, peace treaties are permeated by the necessity of negotiated political compromise in order to allow adjustment and stabilization on both sides.

10. Wilhelm Grewe, *Peace Treaties*, in 3 EPIL 938 (1997) [hereinafter *Peace Treaties*]; see also Karl Doehring, *Peace Settlements after World War II*, in 3 EPIL 930 (1997); Krzysztof Skubiszewski, *Peace and War*, in 3 EPIL 912 (1997).

11. *Peace Treaties*, *supra* note 10, at 939.

12. *Id.* at 942.

Naturally, the historical circumstances of each war and of each peace differ, and the basic pattern of a peace treaty will be modified by the parties in light of the specific circumstances. Indeed, in a considerable number of smaller wars the parties have decided not to go through the often painful effort of negotiating a peace treaty, especially when they agreed that the limited consequences of a war did not warrant the effort of formal peace negotiations. In this context, however, it was rightly pointed out that peacemaking by way of peace treaties amounts to an art that must be preserved so as to promote peace and stability, and prevent lingering hostility and insecurity.¹³

The legal modalities of the peace arrangements with Germany and Japan after 1945 will be addressed below. As to the political circumstances that shaped the process and the details of peacemaking, various factors were expressed in subsequent phases. Both Germany and Japan capitulated, in May and August 1945 respectively, on the basis of an unconditional surrender and an occupation regime which left them temporarily without governments that could have negotiated peace treaties. In the case of Germany, this status was retained until 1949 when two separate entities were created—West and East Germany—by the Western Powers and the Soviet Union. In Japan, a new government came into power in 1952. Thus, the victorious states initially assumed the power to determine the modalities of peace, including reparations, without the consent of the defeated.

The second key factor in the process of peacemaking was extraordinary inasmuch as the war-time coalition among the victors broke down and turned into the Cold War before a peace treaty with Germany and Japan could be reached. In addition, the attitude of hostility on the part of the victors toward the defeated states also changed before peace was achieved; in particular, the Western Powers soon favored the political and economic restoration of West Germany and Japan, while the Soviet Union sought to gain acceptance in East Germany. As to the comparison of Germany and Japan, differences existed relating to the past war and to the evolving situation, resulting in substantially different approaches to peacemaking. Whatever the details of these differences, however, it remained necessary to make arrangements with both countries in all those areas covered by classical peace treaties, so as to make room for the new order consistent with the principle of finality.¹⁴

13. Christian Tomuschat, *How to Make Peace after War*, 72 *DIE FRIEDENSWARTE* 1 (1997).

14. In *Ware v. Hylton*, 3 U.S. 199 (1796), Justice Chase summarized the principle of finality of peace treaties as follows:

I apprehend that the treaty of peace abolishes the subject of war, and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can ever be revived, or brought into context again. All violences, injuries damages sustained by the government, or people of either, during the war are buried in oblivion; and all those things are implied by the very treaty of peace; and therefore not necessary to be expressed.

Id. at 230.

When the actions of governments were challenged in the context of reparations and war claims, U.S. courts held that sovereign immunity prevents suits against the states. See *The Schooner Exch. v. Mc Faddon*, 11 U.S. 7, 116 (1812), *Princz v. F.R.G.*, 26 F.3d 1166 (D. C. Cir. 1994), *cert. denied*,

The special status of the laws of war in international law entails that damages arising out of war must also be considered to be distinct and separate from damages that occur in peacetime, especially in regard to the mechanism of their resolution and enforcement. This difference is especially notable in the context of World War II reparations claims because plaintiffs in the recent proceedings have attempted to shape their arguments in a manner that explicitly or implicitly places war-related and non-war-related damages on the same footing. Thus, precedents were invoked involving the calculation of damages in civil war, damages by government abuses in peacetime, damages caused by multinationals abroad, or damages arising from terrorism outside of a war. None of these types of claims, however, is contextually comparable to a claim arising out of a war.

Damages in a civil war concern actions which took place in the course of hostilities among citizens belonging to the same nation; the problem of the preservation of a nation does not pose issues concerning peace between different sovereigns with respect to redistribution of wealth or territory, or the future of political relations between sovereigns. Where a government abuses its powers in peacetime and mistreats its citizens, the interests concerned are intrastate, distinct from an international configuration. In the case of damage caused by a government to a foreign national in peacetime, the contextual setting is again different from a war between states.

Individual claims do not pose the broad kind of economic, financial and political questions as do relations among states in the transition between war and peace, and their treatment does not have to be tailored in view of the broad horizon of government-to-government relations.¹⁵ Thus, because war claims necessarily affect nations as a whole, they must be seen as a distinct category of

513 U.S. 1121 (1995). Concerning the interpretation, application and enforcement of existing treaties, courts have assumed that such treaties were not enforceable by individuals. See *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1917); *Dreyfus v. von Finck*, 534 F.2d 24 (2d Cir. 1976), cert. denied, 429 U.S. 835 (1976).

The special setting of the rules on responsibility for unlawful acts in the context of armed conflict is also reflected in Art. 12 of the 1972 European Convention on State Immunity (11 I.L.M. 470) according to which immunity will be granted for periods of armed conflict, contrary to times of peace; the same position is expressed in a UN Draft Convention on Jurisdictional Immunities of States and their Property. See 2 Y.B. Int'l L. Comm'n 13, U.N. Doc. A/CN.4/SER.A/1991/Add. 1 (93.V.9). Neither of these Conventions has entered into force.

15. This context has been underlined, for instance, when peace was to be made in 1951 with Japan:

Reparation is usually the most controversial aspect of peacemaking. The present peace is no exception. On the one hand, there are claims both vast and just. Japan's aggression caused tremendous cost, losses and suffering. On the other hand, to meet these claims, there stands a Japan presently reduced to four home islands which are unable to produce the food its people need to live, or the raw materials they need to work. Under these circumstances, if the treaty validated, or kept contingently alive, monetary reparations claims against Japan, her ordinary commercial credit would vanish, the incentive of her people misery of body and spirit that would make them easy prey to exploitation. There would be bitter competition [among the Allies] for the largest possible percentage of an illusory pot of gold.

See U.S. Dept. of State, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan 82-83 (1951) cited in *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 942 (N.D. Cal. 2000).

claims. The resolution of claims within this category must, in turn, follow special procedures and special considerations which are, in their character and their sum, not present in claims arising out of civil wars or government abuse outside the context of war. In terms of legal reasoning for the purposes of conflict resolution, it follows that inferences and analogies from the context of civil war, or from cases of individual extra-war claims, will generally be inappropriate when applied in the context of claims that arise out of an international war. Reasoning by analogy requires the existence of a parallel nature and structure of interests in the contexts concerned, and the distinctness of war-related claims will be seen to be too great to allow a transfer of reasoning into this field.

C. *Types of War Claims*

Before turning to the doctrine of resolving individual war-related claims, it will be useful to outline different types of war claims, and to note their characteristics and distinctions. Indeed, in the recent litigation of war-related claims and the academic discussion of that litigation, there has been a great deal of confusion stemming from a failure to understand the doctrinal differences among different categories of claims.

The primary distinction that must be recognized is that between governmental claims and private claims that lie at the basis not just of the evolution of international claims practice in general, but also of war claims in particular. On a different level, the additional separation between claims raised by individuals on the basis of national law and those asserted under the rules of international law will point to different normative origins and different regimes which will also need to be kept apart. Within the domestic legal order, a third differentiation must be observed, between the general rules of responsibility of the government vis-à-vis the individual and those norms fashioned as special remedies for war-related wrongful acts. Finally, care must be taken to distinguish between payments made to victims of war as a result of legal obligations and those awarded *ex gratia*, in the absence of a corresponding rule of law requiring such a gesture of humanitarian morality and/or political good will.

Following the legal roadmap through these different paths of claiming and awarding payments for war-related actions after World War II requires concentration on the different origins and ratios that underlie the different categories of claims. In a real sense, most of the litigation in the past years dealing with war-related claims has been about distinguishing and separating the different categories of claims. For the public and sometimes even for those members of the legal profession not especially familiar with the evolution of international law, the distinctions between the claims, and the different results in their application to specific cases, may not always have been obvious. Moreover, innovative forensic legal advocacy has been tempted to deliberately blur the lines between the different categories, to blend them together, or even ignore these differences so as to better convince the courts of the merits of the presented cases.

In particular, one of the reasons for the numerous lawsuits in the United States after 1996 was presumably related to the confusion created by a misread-

ing of a judgment by the German Constitutional Court in 1996.¹⁶ The Court, in a lengthy *obiter dictum* on the system of rules concerning war claims, pointed out that individuals may, under certain circumstances, be entitled to sue the German Government or German companies involved in war damages. A careful reading reveals that the Court had in mind, in the relevant sentences, claims based on domestic German law.¹⁷ No ruling was made on the admissibility of claims before national courts based upon international law. Inasmuch as German law in force before and after 1994 has placed significant restrictions on war-related claims, the reference to German domestic law illustrated the tangible consequences of distinguishing the different types of claims. In substance, the Court's judgment stood in the way of the assertion of individual claims under international law before national courts.

As to the broader relevance of the distinction between the various categories of claims, obvious differences exist. Governments will necessarily render their decisions about the raising of a claim against another government in the broader context of the full web of their relations and their strategic concerns vis-à-vis each other. For a war-related claim, this means that the claim will be assessed in light of issues of reconciliation, punishment, assessment of the individual claim within the full range of potential claims, the ability of the other side to pay damages, and generally of the conditions for desirable peace, including the necessity and consequences of territorial changes. Typically, of course, these have been the issues negotiated at the tables of peace conferences, resolved in comprehensive agreements based on multifaceted considerations, and ultimately enshrined in peace treaties.

Needless to say, individual war victims would typically not be directly concerned with, or even fully aware of, the broader intergovernmental historical and political contexts. Rather, they would focus, in a much narrower way, on redressing the consequences of those acts of war by which they were individually affected. Similarly, courts deciding individual claims would not have access to the full specter of events, but only the setting and the contours of each individual case. Thus, the perspective and the approach of a court addressing an individual claim would by no means be necessarily identical to that of a government responsible for, and concerned with, the broad range of implications of a claim regarding the strategic elements of future relations with the counterpart country.¹⁸ These observations are by no means of a theoretical nature. Whoever reads through the archives and the protocols concerned with the issue of reparations to be paid after 1945 by Germany and Japan will constantly be reminded of a variety of strategic considerations, which necessarily form a constant part of governmental decision-making in the context of reparations and of peace-making.

16. Judgment of the German Constitutional Court, May 13, 1966, 94 BVerfGE 315.

17. *Id.* at 330.

18. See also Christian Tomuschat, *Individual Reparation Claims in Instances of Grave Human Rights Violations: The Position under General International Law*, in *STATE RESPONSIBILITY AND THE INDIVIDUAL* 1, 23 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

Beyond the distinction between governmental and private claims, the difference between claims based on international law and those based on domestic law played a central role after World War II. International law does not set any boundaries for the volume of reparation, and ultimately leaves the matter in the hands of those who negotiate peace. Courts addressing individual claims based upon international law would likely not be in a position to consider the total sum of claims to be paid by the defeated state, and neither the victor nor the defeated government would control the full financial dimension of peacemaking. In contrast, in the case of a claim based on statutory domestic law of the defeated state, the parliament or legislature enacting the relevant law will consider the range of potential claims, the number of claims, and the individual and total amounts to be paid. The parliament will balance these numbers and figures in light of the existing financial options and limitations, with the possibility to revisit the decision as the program for payments evolves and the financial situation changes.

In this context of domestic rules applicable to war-related damages, the issue has been raised as to whether the general rules regarding torts committed by governmental authorities may form the legal basis for claims by foreign soldiers affected by violations of the laws of war. If the general rules were to govern, this would amount to a self-contained automatic reparations regime. Thus, the general rules should not apply in favor of individuals. This result is consistent with the traditional laws of war, which do not allow claims by individuals. Moreover, the traditional understanding of general domestic tort law has not been in favor of individuals affected by the events of war. Finally, in case of the passage of special norms for redressing war-related claims, it must always be assumed that the legislative intent was to either derogate from the general rules, or, more likely, to fill the gap that was assumed due to the non-applicability of the general rules.

In some respect, payments based on general domestic laws enacted by the defeated state may be seen as comparable to ad hoc payments of lump sums based on humanitarian considerations. However, significant differences may also exist. Payments based on general domestic laws may reflect an understanding between defeated and victor states as to the broad profile of victims that are the intended beneficiaries, and of amounts to be paid. In 1952, for instance, the Allied Powers ceased to exact unilateral reparations from Germany and left it to the German Government to pay "appropriate compensation" based on German domestic law, while reserving the final resolution of reparations to a subsequent peace treaty.¹⁹ With this, a particular link between an international obligation in the context of a reparations concept and a domestic program based on national legislation was established. Lump sum payments might, in theory, be coupled in a similar way with international undertakings.²⁰ However, in many instances Germany made such payments without the formal framework of an international obligation.²¹

19. See *infra* at 327-28.

20. See generally Richard Lillich, *Lump Sum Agreements*, in 3 EPIL, *supra* note 10, at 268.

21. See *infra* at 337.

A unique intermediary approach was chosen in the negotiations leading to German payments after 2000.²² While the negotiations were conducted on the basis of voluntary payments on humanitarian grounds, Germany entered into a binding agreement with the United States, Central and Eastern European governments, and victims' organizations participating in the negotiations. From a legal standpoint, the special character of this arrangement, therefore, consisted in the negotiation of a voluntary payment by Germany and by German companies, which was in the end accepted as a binding commitment.

While it is thus obvious that the distinction between claims based on international law and those based on domestic law may to some extent be blurred by arrangements in practice, as may the difference between voluntary payments and those based on legal obligations, the differences in principle remain. Accordingly, it remains essential to separate the various categories of claims in order to understand the post-World War II practice and the existing law, and also to formulate prudent policies and recommendations for the future.

II.

CLASSICAL PUBLIC INTERNATIONAL LAW: WAR-RELATED ISSUES AS GOVERNMENT-TO-GOVERNMENT BUSINESS

Classical public international law governs the relationships between states, whereas the legal rights and duties of individuals are governed by the domestic laws of each state. The force and effect of public international law begins and ends at a state's borders; internal state matters are beyond the scope of international law. The rights and duties of the individual are attributed to the realm of the state's internal order. The individual could, therefore, bear no rights or duties on the level of international law. International law is seen to indirectly affect individual rights, but these rights are considered to be "mediated" by the state. In 1927, the Permanent Court of International Justice summarized this historical development in the famous sentence: "Public international law regulates relations between sovereign states."²³

This fundamental concept of the state and the individual was bound to find its most direct expression in the context of regulation of claims following the violation of rules addressing the interests of individuals. Prior to the Twentieth century, international law had gradually developed rules meant to protect individuals; however, only foreigners were covered by these rules, with the citizens of each state left to the legal order of their state.²⁴ Increasing international trade and communication meant that indifference of a state to the fate of its citizens abroad could not be maintained; as a result, so-called minimum standards of public international law developed which each state was required to observe once it admitted foreigners to its territory. However, in the formulation and

22. *Id.*

23. *The Lotus Case*, 10 PERMANENT COURT OF INTERNATIONAL JUSTICE, SERIES A 18 (1927) [hereinafter *PCIJ SERIES A*].

24. *See* EDWIN BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 11 (1915) [hereinafter *PROTECTION OF CITIZENS ABROAD*].

implementation of this body of rules, the primacy of the state in public international law was, and is, preserved and reconfirmed in the manner in which claims arising out of the violations of these standards are addressed. The right to enforce these rules is not vested in the foreign individual, but in the state of his citizenship, which is accorded the right to offer diplomatic protection to its nationals.

In an early textbook of international law published in 1758, the legal position is expressed as follows:

Whoever uses citizens ill, indirectly offends the state which is bound to protect this citizen; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible oblige him to make full reparation; since otherwise the citizen would not obtain the great end of the civil association, which is, safety.²⁵

This legal position thus described remains the same today. In 1970, the International Court of Justice expressed the principle as follows: “[I]n inter-state relations, whether claims are made on behalf of a state’s national or on behalf of the state itself, they are always the claims of the state.”²⁶

A leading international textbook today expresses the same rule: “[T]he subject matter of the claim is the individual and his property; the claim is that of the state.”²⁷

The Restatement (Third) of Foreign Relations, equally confirms this rule:

[A] state’s claim for violations that cause injury to rights or interests of private person is a claim of the state and is under the state’s control. The state may determine what individual remedies to pursue, may abandon the claim, or settle it. The state may merge the claim with other claims with a view to an en bloc settlement. The claimant state may settle these claims against it by the respondent state. Any reparation is, in principle, for the violation of the obligation to the state, and any payment made is to the state.²⁸

The laws of war as they developed historically and as they stand today have been based on the same notions and principles governing the state, the individual, and the protection of individual claims. From the viewpoint of the individual who suffers war damages, the consequence of this legal position is that only his state is empowered to seek redress in his name against the enemy state. During the First World War, the principle was described as such:

A long course of practice and the Hague Regulations have given some authority to certain rules for the treatment of alien enemies in the country of the territorial sovereign. But even a departure from these rules, which has occurred in several instances during the present European War, can hardly give rise to individual pecuniary claims in law. The alien enemy’s individual grievances are settled by the treaty of peace, and if his country should happen to lose in the war, he is without redress. If his country should be the conqueror, indemnities may be de-

25. EMERIC DE Vattel, *THE LAW OF NATIONS* (J. Schitty ed., 1985) (1785).

26. Case concerning the Barcelona Traction, Light and Power Company, Ltd., 1970 I.C.J. 3, 46 § 85.

27. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 482 (5th ed. 1998).

28. RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 902 (h), (i) (1987) (emphasis added.); see also *id.* at §§ 703(3), 713(a), 906(b) and 907(2).

manded from the defeated nation, but his pecuniary remedy then depends on the bounty of his own state.²⁹

Consistent with this legal position regarding states' and individual rights, the Hague Convention does not grant rights to an individual who has suffered an injury due to an enemy state's violation of international law. Indeed, the United States courts recognize to this day that Art. 3 of the Hague Convention, to which Hague Regulations are annexed, does not in any way grant individual rights.³⁰ ". . . [T]he cases are unanimous, however, in holding that nothing in the Hague Convention even impliedly grants individuals the right to seek damages for violation of (its) provisions."³¹

Events during the First and the Second World Wars, and their regulation in subsequent treaties, must be examined and understood against the background of this rule—that war claims for damages to individuals can only be raised by the individual's home state.³²

As to the type of actions covered by the rules regarding acts arising out of war, state responsibility also exists where a non-state actor, performing activity under the guidance and control of a government, acts contrary to rules of international law. Such governmental control need not be complete or comprehensive. So long as the government establishes the framework and the policies within which the actor performs, state responsibility follows. Thus, state to state reparations have been held to flow from a private actor's violation of international law in furtherance of a government policy.³³

29. PROTECTION OF CITIZENS ABROAD *supra* note 24, at 251; *see also id.* at 718 for the general position of the individual under international law.

30. *See Princz, supra* note 14. The original French text of the Hague Convention reads: "La partie belligérante qui violerait les dispositions audit Règlement sera tenue à l'indemnité, s'il y a bien. Elle sera responsable de tous actes commis par les personnes faisant partie de sa force armée." This norm is also based upon the position that rights are granted to the States parties, not to individuals. *See* Max Huber, *Die Fortbildung des Völkerrechts auf dem Gebiete des Prozess- und Landkriegsrechts durch die II. Internationale Friedenskonferenz im Haag (1907)*, in 2 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 570, 574 (1908); CUNO HOFER, *DER SCHADENSERSATZ IM LANDKRIEGSRECHT* 53 (1912); Alwyn Freeman, *Responsibility of States for Unlawful Acts of their Armed Forces*, in 88 RECUEIL DE COURS 267, 333 (1955).

31. *See also* Fishel v. BASF Group, No. 4-96-CV-10449, 1998 U.S. Dist. LEXIS 21230, at *14 (S.D. Iowa 1998)

32. A special issue highlighting the fundamental implications of judicial supplementation or correction of governmental peacemaking on the basis of considerations regarding individual claims. This concerns rulings by national courts which would affect the process of peacemaking agreed upon by third States outside the state of the court ruling in the individual case. Under such circumstances, the court with whom the complaint was filed would be asked to correct or to second guess the political decisions of two sovereign states; the sovereign right of these states to agree upon the appropriate conditions for peace would be negated by a court of a third state. In principle, the situation would not be different if the two states concerned would not have yet started their negotiations. This hypothetical consideration serves only to illustrate that in the specific context of war, peace and reparations, the replacement of the traditional government-to-government approach to peacemaking with one driven by individuals and courts would be inconsistent with the current foundations and the fabric of international law.

33. *See* Earnshaw Case (Great Britain v. United States) 4 R.I.A.A. 160 (1955); Stephens Case (U.S. v. United Mexican States) 4 R.I.A.A. 265 (1951). *See also* ROBERTO AGO, 2 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 262 (1977); PROTECTION OF CITIZENS ABROAD, *supra* note 24, at 213.

Under international law, a state is responsible and must assume liability for the acts of all of its organs and agencies. This rule is not limited to such persons or entities that have been entrusted with governmental functions through a formal document. At times, especially during war, a state may choose to delegate state functions to private citizens, thus creating modification of its formal order of governmental administration. Therefore, the definition of those entities for which the state is responsible is determined by the factual conditions under which a state organizes its domestic order and its governmental functions:

Thus on many occasions what constitutes an 'organ of state' is essentially a question of fact not related to the formal and regular tests provided by a constitution, or other pre-existing local law. It is this question of fact which is to be set against the relevant principle to international law in order to establish responsibility. This conclusion does not invoke an overturning of the principle of reference to criteria of domestic law: It is simply necessary to accept that not infrequently such reference will not give a conclusive answer, and other criteria must be resorted to.³⁴

The corollary of state responsibility under the circumstances thus described is the principle that no separate liability will be assumed on the part of the individual who, or the entity which, is considered to have acted on behalf of the state or has been empowered to exercise elements of governmental authority in furtherance of the war effort.³⁵ From the point of view of international law, private acts and governmental acts are distinct, and will be considered to be mutually exclusive in the context of war-related actions: the characterization of an act as one of government precludes its treatment as a private act, and vice versa. In other words, a finding of state liability excludes the existence of private liability of the actor who has acted on behalf of the government, or has been empowered to exercise elements of governmental authority in war-related efforts.

A. *The Concept of Reparations after World War I*

Up until the First World War, a general consensus had emerged which held the victor entitled to recover its war costs from the defeated state; the terms "war indemnities" or "war claims" were used at the time:

Many modern authors, without going into details, admit a right to war indemnities. Their view is that the victorious State is entitled to demand payments covering its general war costs after exhaustion of its own resources. However, these authors object to excessive war indemnity claims that appear in numerous peace treaties. In addition to the view of indemnities as a means of refunding the victor his general war costs, there is also a school of thought that sees indemnities as reparation for the commissions of war crimes and internationally wrongful acts.³⁶

34. IAN BROWNLIE, *STATE RESPONSIBILITY* 136 (1983).

35. See also *Alice Burger-Fisher*, 65 F. Supp. 2d at 72 (relating to Germany and German industry in WW II); *Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 942 (relating to Japan and Japanese industry).

36. *Reparations*, *supra* note 1, at 178; see generally BRUCE KENT, *THE SPOILS OF WAR* (1989).

After the First World War, the Allies chose to rely on new terminology, replacing “war indemnity” with “reparations”; the Versailles Peace Treaty with Germany (1919) did so, as did the peace treaties subsequently concluded with other enemy states in Neuilly (1919), in the Trianon (1920) and in Lausanne (1923). The aim of the Allies behind this change in terminology was to indicate their intention to force the defeated state to pay for all the damage to the state, *and* for the damage caused to their civilian populations.³⁷

The reasons behind this change of state practice were, on the one hand, that individuals had suffered major damage during the war, and, on the other hand, that the laws of war allowed the victorious states, but not the individuals themselves, to demand compensation for individual losses. Thus, state practice after World War I was fully consistent with the accepted rules of international law governing claims for war damage of individuals and, in turn, reconfirmed and strengthened these rules.³⁸

Details concerning the amount of compensation demanded from Germany after 1919 were left in Versailles to an inter-Allied reparation commission. In principle, it was assumed that Germany would have to pay for all of the damages which had been caused by its war operations. By 1924, the United States and Great Britain had come to believe that this burden surpassed Germany’s ability to pay. This led to the revision of German reparations in the Dawes Plan (1924); subsequently in 1930, the Dawes-Plan itself had to be revised, and Germany’s obligations were scaled down again in the Young Plan (1930). In hindsight, it is often considered that “the imposition of reparations after World War I provided unsatisfactory experience to all concerned”³⁹ given the magnitude of Germany’s obligations and their effect on the German and the world economies. This historical experience underlay the negotiations on reparations to be demanded from Germany as a consequence of World War II.

B. *Peace Treaties of 1947 and the Austrian State Treaty (1955)*

No effort is made here to comprehensively analyze the details of the peace treaties of 1947 and the Austrian State Treaty of 1955. All of these arrangements were of a special character inasmuch as the five wartime allies of Germany (Bulgaria, Finland, Hungary, Italy, Romania), which concluded the 1947 treaties with the Allied Powers, had already withdrawn from the alliance with Germany prior to the end of the war. The Austrian Treaty of 1955 was called a “state treaty” in light of the special circumstances of the German occupation of Austria during the war.⁴⁰

37. See *Reparations*, *supra* note 1, at 178.

38. A novel element was also that the Versailles Treaty included a clause by which Germany was forced to admit that she was guilty starting the war. For a discussion of the reparation arrangements concluded after World War I, see generally MARC TRACHTENBERG, *REPARATION IN WORLD POLITICS, FRANCE AND EUROPEAN DIPLOMACY, 1916-1923* (1980); RICHARD CASTILLON, *LES RÉPARATIONS ALLEMANDES, DEUX EXPÉRIENCES: 1919-1932, 1945-1952* (1953).

39. *Reparations*, *supra* note 1, at 180.

40. For details see *The Austrian State Treaty*, Department of State Publication 6437 (1957); GERALD STOURZH, *GESCHICHTE DES STAATSVERTRAGS 1945-55* (1980).

It is noteworthy for present purposes that when the 1947 treaties were concluded it was assumed that they would serve as a model for subsequent treaties with Germany and Japan;⁴¹ it was considered at the time that such treaties would be the suitable and appropriate instruments of terminating the state of war with all enemy countries, and that one basic pattern would be applied in all cases. The historical and legal continuity in the use of this pattern becomes apparent in the comparison with the Versailles Treaty: the framework of the 1947 treaty was nearly identical with the Versailles approach.⁴² In essence, the preamble of the treaties stated the responsibility of the five states for engaging in a war of aggression and acknowledged their subsequent withdrawal. The operative part contains provisions on territorial, political, military, economic, financial and juridical matters. Reparations were to be covered mainly on the basis of existing assets and current production, with the Western allies renouncing their war claims. Also, such matters as the use of German assets in the relevant countries, and questions of restitution and pre-war debt were covered. Romania, Hungary and Bulgaria waived all claims against Germany and German nationals, speaking, in each treaty, on their own behalf and on behalf of their nationals.⁴³

With regard to the Austrian State Treaty, it may suffice here to point out that, despite the special situation of Austria during the war, this agreement was based in substance, and in many instances literally, on the text and pattern adopted in the 1947 treaties. Thus, all of the treaties with the smaller Axis Powers not only followed the general approach adopted in Versailles, but also went as far as relying on the classical, basic structure of the peace treaties and even copied some of the details.

C. *Reparations by Japan after 1945*

After an initial post-war period of occupation of Japan by the Allied Powers, the victors announced their intention to impose reparations in the Potsdam Declaration of August 14, 1945. With regard to Japan, the declaration was aimed at the transfer of Japanese equipment and facilities suitable for rearmament ("interim reparation removals"), and, at the transfer of Japanese assets abroad, while allowing "a minimum civilian standard of living" for the Japanese, taking into account the State of destruction of the Japanese economy.⁴⁴

41. See Ernst Puttkammer, *Peace Treaties of 1947*, in 3 EPIL 953, 954 (1997) [hereinafter *Peace Treaties of 1947*].

42. *Peace Treaties of 1947*, supra note 41, at 955; see generally AMELIA LEISS & RAYMOND DENNETT, *EUROPEAN PEACE TREATIES AFTER WORLD WAR II* (1954).

43. One commentator has argued that such waivers of claims of nationals were in violation of the German domestic equal protection clause and rules of equality under international law. See *Alice Burger-Fisher*, 65 F. Supp. 2d at 30 n.7. This view has not won acceptance in theory or state practice.

44. See generally Tetsuo Ito, *Japan's Settlement of the Post-World War II Reparations and Claims*, 37 JAPANESE ANN. INT'L L. 38, 39 (1994) [hereinafter *Japan's Settlement*]; Stanley Metzger, *The Liberal Japanese Peace Treaty*, 37 CORNELL L. Q. 382 (1952); Leslie Green, *Making Peace with Japan*, in 6 YEARBOOK OF WORLD AFFAIRS 1(1952); D.P. O'Connell, *Legal Aspects of the Peace Treaty with Japan*, in 29 BRITISH YEARBOOK OF INTERNATIONAL LAW 423 (1952).

Subsequently, the desire of the victors to punish Japan and to call for reparations was modified by strategic considerations in the context of the Cold War and the growing concern of the United States to prevent a course of action which would have required it to in effect finance Japanese reparation payments to third states; in the U.S., Secretary of State John Foster Dulles articulated these concerns with respect to both Japan and Germany.

The key difference in the evolution of the legal position between Japan and Germany lay in the fact that the process of peacemaking with Germany occurred in several stages, while Japan was offered a formal peace treaty, which it accepted on September 8, 1951 in San Francisco. In its scope, this agreement again contained provisions for all subjects typical of a modern peace treaty: territorial issues, political matters, financial and economic elements were included.

As to reparations, the central provision established that Japan was to negotiate arrangements with former occupied countries, and that these negotiations would follow the principle of "viability." Thus, reparations would be limited to "services of the Japanese people in production, salvaging and other work," thereby excluding financial payments or reparations in kind:

It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering. . . . Therefore, Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done, by making available the services of the Japanese people in production, salvaging and other work for the Allied Powers in question.⁴⁵

This wording of the Peace Treaty set a clear framework and avoided the continuation of a broad discussion on the reparation issue.⁴⁶

The basic principle of subsuming individual claims in the inter-governmental arrangements for reparations was expressed in Art. 14 (b) of the San Francisco Treaty, patterned after Art. 2 of the 1946 Paris Agreement regarding German reparations, except that claims by the Japanese nationals were not explicitly covered in Paris. Art. 14 (b) states that, except as otherwise provided in the Treaty, "the Allied Powers waive all reparation claims of the Allied Powers (and) 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. . . ."⁴⁷

Japanese courts, when subsequently confronted with war-related claims by foreign nationals, consistently held that such claims could not be brought under the general norms of the Civil Code.⁴⁸ Also, the Japanese Courts consistently

45. Treaty of Peace with Japan, September 8, 1951, 3 U.S.T. 3169.

46. See *Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 945.

47. For details see *Japan's Settlement*, *supra* note 44, at 63; Japanese House of Councilors, 12th Extraordinary Session of the Diet, No. 14 (Nov. 9, 1951) at 5.

48. See Masahiro Igarashi, *Post-War Compensation Cases, Japanese Courts and International Law*, 43 JAPANESE ANN. INT'L. L. 64 (2000) [hereinafter *Post -War Compensation*].

found that the Hague and the Geneva Conventions, even if meant to benefit individuals, could not be interpreted so as to serve as the basis for individual claims.⁴⁹

Following the peace treaty, Japan negotiated a number of bilateral treaties tailored to the specific circumstances and issues with the formerly occupied states; Japan agreed, in various ways, to extend the principle of "services only" to include services for products and also the provision of loans. No precise data is available to indicate whether or not the recipient governments distributed payments and other types of reparations to their citizens with a view to satisfying the needs of those war victims who had been specially affected; however, a general review of this issue might indicate doubts in this respect.

In the case of the so-called comfort women, the Yamaguchi District Court (Kanpu Case), rendered a most remarkable decision in 1998. The court noted a trend to compensate grave violations of human rights, and based its decision to accept a claim on considerations of Japanese constitutional law rather than international law;⁵⁰ along these lines, the court assumed that the Japanese Government had a duty to enact legislation to compensate this group of victims. Also, humanitarian considerations led the Japanese Parliament to pay certain sums to special, narrow groups such as Koreans separated on Sakhalin Island from their families, Korean victims of the atomic bomb, and former soldiers from Taiwan injured while serving in the Japanese army during the war.⁵¹

An assessment of the San Francisco Peace Treaty as a confirmation or a rejection of classical peacemaking as government-to-government business yields a clear-cut conclusion. No doubt was left that the classical model was considered to be valid and appropriate. Indeed, the Treaty explicitly made clear, as did the Versailles Treaty, that the reparations arrangements were meant to pay damages not just to the victor states, but also to those states' citizens. Moreover, the parties clarified explicitly that the arrangements left no room for any claims against Japanese nationals who had been involved in the war activities.⁵²

D. Peacemaking with Germany

Peacemaking with Germany turned out to be much more complex, open-ended and lengthy than with Japan. The complexity stemmed from the absence

49. See *Japan's Settlement*, *supra* note 44, at 66; *Post-War Compensation*, *supra* note 48, at 69.

50. *Post-War Compensation*, *supra* note 48, at 45, 54.

51. *Japan's Settlement*, *supra* note 44, at 62.

52. For a retrospective assessment of the San Francisco Treaty, see *Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 948-49:

The Treaty of Peace with Japan, insofar as it barred future claims such as those asserted by plaintiffs in these actions, exchanged full compensation of plaintiffs for a future peace. History has vindicated the wisdom of that bargain. And while full compensation for plaintiffs' hardships, in 1949 in the purely economic sense, has been denied these former prisoners and countless other survivors of the war, the immeasurable bounty of life for themselves and their posterity in a free society and in a more peaceful world services the debt.

Id.

of a counterpart to the San Francisco Treaty with respect to the relations of the Allied powers with Germany.

In 1951, at the time of the conclusion of the San Francisco Treaty, the Allies were, for a number of reasons, not yet prepared to conclude a comprehensive peace treaty with Germany. Instead, a number of limited arrangements in typical fields of peace treaties were negotiated, initially provisional in nature. In 1990, at the end of the period of the war-based division of Germany, an arrangement was negotiated "covering all aspects of occupation," but this arrangement was designated as a "Treaty on the Final Settlement with respect to Germany," rather than "Peace Treaty." Thus, the story of peacemaking with Germany does not follow the Japanese pattern with a straight line and a definite end point, but is in the nature of a meandering curve, in some parts provisional, and without a single formal conclusory framework that would designate it as a "peace treaty."

1. Allied Reparation Practice from 1945 to 1952

During World War II, many respected persons shared the opinion that the mistakes of Versailles should not be repeated, and that, therefore, reparation obligations should not be imposed on Germany after the Second World War.⁵³ It was, hence, not surprising that at the first Allied conferences, in Casablanca in January 1943 and in Teheran in November 1943, the question of reparation was not discussed.⁵⁴

The reparation question was first addressed at the Quebec Conference of September 1944 by the American President and the British Prime Minister.⁵⁵ These discussions mainly addressed the dismantling of German industry after the end of the war and the requisition of German property abroad for purposes of reparations.⁵⁶ The Allies, due to the bad experience with the measures provided in the Treaty of Versailles, already recognized that not all of their claims could be satisfied.⁵⁷

On August 9, 1945, President Truman declared that the Allies did ". . . not intend to make the mistake of exacting reparations in Germany and lending Germany the money with which to pay."⁵⁸

The Soviet Union, however, suffered especially from the war. The number of Soviet soldiers and civilians killed and wounded by the Germans ran into the tens of millions, and the economic consequences of the war for the Soviet Union

53. See Jacob Viner, *German Reparations Once More*, 21 FOREIGN AFF. 659 (1943); NEHEMIAH ROBINSON, INDEMNIFICATION AND REPARATIONS: JEWISH ASPECTS 210 (1944).

54. See Gottfried Zieger, *Das Thema der Reparationen im Hinblick auf die besondere Lage Deutschlands*, 26 RECHT DER INTERNATIONALEN WIRTSCHAFT 11 (1980).

55. See Ignaz Seidl-Hohenveldern, *Kriegsentschädigung*, in 2 WÖRTERBUCH DES VÖLKERRECHTS 339 (Karl Strupp and Hans-Jürgen Schlochauer, eds., 1961) [hereinafter 2 WÖRTERBUCH].

56. See Hedwig Maier, *Demontage*, in 1 WÖRTERBUCH DES VÖLKERRECHTS 343 (Karl Strupp and Hans-Jürgen Schlochauer, eds., 1961) [hereinafter 1 WÖRTERBUCH].

57. See D. GINSBURG, THE FUTURE OF GERMAN REPARATIONS 44 (1947); Cf. John Keynes, *Activities 1941-1946 Shaping the Post-War World, Bretton Woods and Reparations*, in 26 THE COLLECTED WRITINGS OF JOHN MAYNARD KEYNES 352 (Elizabeth Johnson, ed. 1980).

58. Erich Kaufmann, *Die Reparationsschäden*, 88 ARCHIV DES ÖFFENTLICHEN RECHTS 1 (1963).

were far-reaching. Thus, the Soviet Union considered from the beginning that it had carried a major burden in the defeat of Germany.

At the insistence of the Soviet Union, the question of reparations was discussed at the Yalta Conference in early 1945, and a basic agreement was reached that Germany would have to pay reparations.⁵⁹ Against this background, an agreement was reached that mainly material, rather than cash contributions, would be exacted from Germany after the War.⁶⁰ Accordingly, the Allied Powers, through the Yalta Agreement of February 11, 1945, agreed: "We have considered the question of the damage caused by Germany to the Allied nations in this war and recognized it as just that Germany be obliged to make compensation for this damage in kind to the greatest extent possible."⁶¹ The lessons drawn from Versailles concerning limitations of Germany's ability to pay reparations were reflected in the Agreement at Section III B ("Economic Principles"), Nr. 19:

Payment of reparations should leave enough resources to enable the German people to subsist without external assistance. In working out the economic balance of Germany, the necessary means must be provided to pay for imports approved by the Control Council in Germany. The proceeds of exports from current production and stock shall be available in the first place for payment for such imports.⁶²

In addition to the official document from the Yalta Conference, a secret protocol was concluded between the Three Powers. In this "Protocol on German Reparations," details are recorded in 4 points. First, Germany would provide non-monetary ("in kind") compensation, and the states which carried most of the burden of the war, suffered most damage, and contributed most to the defeat of the enemy, would receive in kind reparation "in the first instance"; Second, reparations would be made by Germany in three forms: (1) removals of German national wealth both within and outside Germany within 2 years of the surrender, ("chiefly for purpose of destroying the war potential of Germany"), (2) delivery of goods from current production once a year for an unspecified period, and (3) use of German labor. Generally speaking, the volume of reparations was

59. For details, see *Protocol of the Proceedings, Crimea Conference, Feb. 11, 1945*, in DEPARTMENT OF STATE PUBLICATION 8484: 3 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 1013, 1016 (Charles Bevans, ed. 1969) [hereinafter TREATIES AND OTHER INTERNATIONAL AGREEMENTS]; See also WOLFGANG MARIENFELD, KONFERENZEN ÜBER DEUTSCHLAND 149 (1962); KLAUS-JÖRG RUHL, NEUBEGINN UND RESTAURATION 44 (2nd ed. 1984).

It is remarkable that at the time these conferences were held, it was the Soviet Union, not a party to the Treaty of Versailles, which was most critical of the treaty's reparation provisions. See FRIEDRICH JERCHOW, DEUTSCHLAND IN DER WELTWIRTSCHAFT 1944 BIS 1947: ALLIIERTE DEUTSCHLAND- UND REPARATIONSPOLITIK UND DIE ANFÄNGE DER WESTDEUTSCHEN AUßENWIRTSCHAFT 32 (1978) [hereinafter JERCHOW]. The Soviet Union took the clear position after World War II that only partial compensation was feasible. See 2 TEHERAN, YALTA, POTSDAM, KONFERENZDOKUMENTE DER SOWJETUNION 164 (1986); see also 3 TEHERAN, YALTA, POTSDAM, KONFERENZDOKUMENTE DER SOWJETUNION 359 (1986) for the Soviet position in Potsdam. Cf. Schlochauer, *Yalta-Konferenz von 1945*, in 1 WÖRTERBUCH, *supra* note 56, at 162.

60. See JERCHOW, *supra* note 59 at 32.

61. Crimea (Yalta) Conference Report, Feb. 11, 1945, reprinted in TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 59, at 1005.

62. *Amtsblatt des Kontrollrats* 30. April 1946, 1 ERGÄNZUNGSBLATT 4.

to be determined by Germany's ability to pay, not by covering the damages suffered.

Third, an Inter-allied Reparation Commission would be formed with headquarters in Moscow, and members representing the U.S.S.R., the U.S., and Great Britain, having the task of formulating a detailed reparation plan on the basis of the principles upon which the Allies had already agreed.

Fourth, the specific amount of reparations was discussed. On this point no agreement was reached. The Soviet Union proposed that the total sum should be U.S. \$ twenty billion, and that the Soviet Union should receive half of this amount. While the American delegation agreed to this proposal, the British delegation objected. Their dissent was recorded at point four.⁶³

The Reparation Commission mentioned in the third point of the secret protocol met only once, in Moscow in July 1945. The Soviet Union proposed, as it had at Yalta, that Germany should be responsible for reparation of U.S. \$ twenty billion, and that the Soviet Union should receive U.S. \$ ten billion, the U.S. eight billion, and the Great Britain two billion. Once again, no agreement was reached.

In July 1945, after Germany's military defeat, the United States, the United Kingdom and the Soviet Union met in Potsdam for their last major war conference, and German reparations were again on the agenda. The Allied Powers agreed upon a comprehensive structure for reparations. The victorious powers would take reparations in the form of German industrial equipment—with no distinction between public and private ownership—to be removed from their respective zones of occupation, and from German external assets. In addition, the Western Powers agreed to provide a percentage of the industrial assets from the Western Zones to the U.S.S.R., above and beyond the assets within the Soviet Zone. The Potsdam Agreement was written in terms of specific percentages of assets to be used for reparations, and provided time-tables for the removal of those assets.⁶⁴

63. The English text of the *Protocol on German Reparations* is reproduced in: 7 EUROPA-ARCHIV 4692 (1952).

64. The relevant part of the Potsdam Agreement reads in its entirety:

III. Reparations from Germany:

1. Reparations claims of the U.S.S.R. shall be met by removals from the zone of Germany occupied by the U.S.S.R., and from appropriate German external assets.

2. The U.S.S.R. undertakes to settle the reparations claims of Poland from its own share of reparations.

3. The reparation claims of the United States, the United Kingdom and other countries entitled to reparations shall be met from the Western Zones and from appropriate German external assets.

4. In addition to the reparations to be taken by the U.S.S.R. from its own zone of occupation, the U.S.S.R. shall receive additionally from the Western Zones:

(a) 15 percent of such usable and complete industrial capital equipment, in the first place from the metallurgical chemical and machine manufacturing industries as is unnecessary for the German peace economy and should be removed from the Western Zones of Germany, in exchange for an equivalent value of food, coal, potash, zinc, timber, clay products, petroleum products, and such other commodities as may be agreed upon.

The division of German reparations among the victorious powers was stated clearly in Part III, No. 8 and 9 of the Potsdam Agreement. According to Art. 8, the Soviet Union renounced “. . . all claims in respect of reparations to shares of German enterprises which are located in the Western Zones of Germany as well as to German foreign assets except those specifically listed.” Consequently, the U.S. and the U.K. renounced their reparations claims to shares of German enterprises in the Eastern zone of occupation, as well as to German foreign assets in some Central and Eastern European states.

Germany was thus divided into zones of occupation for economic purposes, as well as for the purposes of stationing troops and general aims of occupation. In principle, the scheme of reparations was also based upon the same zones of occupation, with the Western victorious powers receiving reparations from their Western Zone of occupation and the Soviet Union from the Eastern Zone. The scheme was modified only inasmuch as a certain sum of the reparations from the Western Zone was to be transferred to the Soviet Union.

No room was left for, and the considerations did not include, reparations for war-related claims via private lawsuits against the same private and public assets that were to be divided among the allied states. The decisions of the Potsdam conference were first put into effect in March 1946, when the Allied Council completed a common plan for industry in all four zones of occupation.⁶⁵

(b) 10 percent of such industrial capital equipment as is unnecessary for the German peace economy and should be removed from the Western Zones, to be transferred to the Soviet Government on reparations account without payment or exchange of any kind in return.

5. The amount of equipment to be removed from the Western Zones on account of reparations must be determined within six months from now at the latest.

6. Removals of industrial capital equipment shall begin as soon as possible and shall be completed within two years from the determination specified in paragraph 5. The delivery of products covered by 4 (a) above shall begin as soon as possible and shall be made by the U.S.S.R. in agreed instalments within five years of the date hereof. The determination of the amount and character of the industrial capital equipment unnecessary for the German peace economy and therefore available for reparation shall be made by the Control Council under policies fixed by the Allied Commission on Reparations, with the participation of France, subject to the final approval of the Zone Commander in the Zone from which the equipment is to be removed.

7. Prior to the fixing of the total amount of equipment subject to removal, advance deliveries shall be made in respect to such equipment as will be determined to be eligible for delivery in accordance with the procedure set forth in the last sentence of paragraph 6.

8. The Soviet Government renounces all claims in respect of reparations to shares of German enterprises which are located in the Western Zones of Germany as well as to German foreign assets in all countries except those specified in paragraph 9 below.

9. The Governments of the U.K. and U.S.A. renounce all claims in respect of reparations to shares of German enterprises which are located in the Eastern Zone of occupation in Germany, as well as to German foreign assets in Bulgaria, Finland, Hungary, Rumania and Eastern Austria.

10. The Soviet Government makes no claims to gold captured by the Allied troops in Germany.

Potsdam Declaration June 5, 1945, 68 U.N.T.S. 190.

65. For details see JERCHOW, *supra* note 59, at 202.

Later during the year of 1946, however, differences of opinion among the Allies began to emerge.⁶⁶ In May, 1946, the three western occupation powers decided to suspend the transportation, agreed to in the Potsdam Agreement, of dismantled industrial plants to the Soviet Union because the economic unity of the occupation zones had not yet been brought about.⁶⁷

The Potsdam Agreement was the last consensus between the four occupation powers on the question of reparation. By virtue of its political and economic foundations, that Agreement formed the basis for the practical execution of the reparation policies for the Allies. The Potsdam Agreement did not, however, contain final conclusions on reparation policies, because no agreement was achieved on the total amount of reparations, or on the period during which Germany would have to make such contributions.⁶⁸ This fact proved to be decisive in later developments. Thus, the division of the reparation area into eastern and western zones became the practical basis for future reparations considerations.

On January 14, 1946, in the so-called Paris Reparation Agreement,⁶⁹ the U.S., Great Britain and France, together with 15 other Allied states, reached an agreement concerning German reparations and the return of mint gold, forming an Interallied Reparation Agency.⁷⁰ According to the Potsdam Protocol, the amount due to the western Allies had been limited to approximately seventy-five percent of assets in the western zone. This share was divided among the 19 participating states. The Paris Reparation Agreement was based on the division of the reparations into two categories. Category B consisted of dismantled material, merchant, and inland ships, while Category A absorbed all other reparation assets, including assets located abroad. From each category, each signatory state (and only a state) was allotted a certain share.

The Interallied Reparation Agency ("IARA") was given the task of ascertaining the value of seized and confiscated German assets, and of dividing them among the contracting states. The Agency was unable to decide, however, on the amount to which each signatory state was entitled. The Agency maintained an account for each signatory state into which its claims and receipts were entered.

An upper limit to Germany's reparation obligations to the three Western Powers was mentioned for the first time in Art. 2(a) of the Paris Agreement of January 1946. Subject to the conclusion of a peace treaty, the parties agreed that the shares allotted to them from categories A and B in relation to the shares allotted to the other contracting parties would be final with respect to all claims

66. See Helmut Rumpf, *Die Deutsche Frage und die Reparationen*, 33 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 344, 365 (1973) [hereinafter Rumpf].

67. See JERCHOW, *supra* note 59, at 219.

68. See BERT-WOLFGANG EICHHORN, REPARATION ALS VÖLKERRECHTLICHE DELIKTSHAFTUNG 129 (1992) [hereinafter EICHHORN].

69. Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, Jan. 14, 1946, 555 U.N.T.S. 69 [hereinafter Paris Reparation Agreement].

70. For developments in the post war period see BRUCE KUKLICK, AMERICAN POLICY AND THE DIVISION OF GERMANY, THE CLASH WITH RUSSIA OVER REPARATIONS (1972).

of the creditor states and their citizens against Germany and German citizens. The unified consideration of the claims of the creditor states and their citizens was consistent with the previous practice in public international law.

Furthermore, the eighteen Allies recognized that certain stateless persons who “have suffered at the hands of the Nazis and now stand in dire need of aid to promote their rehabilitation . . . will be unable to claim the assistance of any Government receiving reparations from Germany”⁷¹

These persons were to receive a share of reparations from Germany pursuant to the Agreement. This was the only class of individual claimants addressed separately, rather than being subsumed entirely by payments to national governments. These particular claimants were allotted a share of reparations from Germany, but were not given a right to bring private actions of any kind.

Three of the underlying principles of the 1946 Paris Agreements deserve to be highlighted. First, the parties acted on the belief that Germany’s reparations would be calculated on the base of certain defined German assets, not on the basis of the full loss and injuries caused by the total war of Germany; thus, the notion of a duty of partial compensation on the part of Germany for the damages caused in World War II implicitly formed the basis of the agreements agreed upon in Paris. Second, the signatories expressly recognized that the reparations received by a government covered all claims of such government’s nationals against the Reich and agencies of the Reich—which were the only entities bound to pay reparations since claims against all private German citizens were subsumed in the claims against the Reich:

The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering *all its claims and those of its nationals against the former German Government and its Agencies*, of a governmental or private nature, arising out of the war (which are not otherwise provided for). . . .⁷²

Finally, the Allies did not intend the 1946 Paris Agreement to finally resolve all of their issues of reparation, and expressly reserved therein to each signatory state its rights “with respect to the final settlement of German reparation.” Final settlement of reparations was to occur either through a final multilateral peace treaty or earlier bilateral agreements, not by private action.⁷³

The policy behind the formula “all its claims and those of its nationals” was articulated in a statement by the U.S. Representative Angell:

The primary purpose of paragraph A, of Section 2, on the settlement of wartime claims, is to record the agreement between the signatory governments that all claims, of whatever nature, by a government for reparation from Germany are, in effect, consolidated into a single claim which has been considered at this Conference, and furthermore that the German reparation which is made available to each government in accordance with its agreed quota shall be the sole source of satisfaction of its consolidated reparation claim against Germany. If this were not the intention of paragraph A, a legion of reparation claims by individual governments would continue to exist to be presented for satisfaction outside the framework of

71. Paris Reparation Agreement, *supra* note 69, art. 9.

72. *Id.* at art. 2A (emphasis added).

73. *Id.* at art. 2B (ii).

the reparation program envisaged under the Potsdam Agreement. Under such circumstances, the reparation quotas we have been discussing would be meaningless because the quotas would have no relative significance whatever, and the work of the Paris Conference would be valueless.⁷⁴

In 1948, in a Memorandum written by the United States Secretary of State George Marshall to the Foreign Relations Committee of the U.S. Senate, the Secretary highlighted that the Paris Agreement was based on the recognition that Germany's ability to pay reparations was limited, and that each signatory state which had been at war with Germany declared to be satisfied with a certain quota of overall German reparations, without knowing their full amount.⁷⁵

The official records of the Paris Conference clearly indicate that the consequences of forced labor were also considered to be a part of the war damage which fell under the reparation arrangements; thus, in preparing the Agreement, the signatory states were explicitly asked to indicate the value which they attached to the forced labor that the Nazi regime had required of their nationals.⁷⁶

By the end of 1949, the IARA had, according to its own reports, assessed approximately U.S. \$517 million (at the 1938 exchange). At the 1949 exchange rate, this sum would be doubled. The general opinion was that the values ascertained by the IARA were too low.⁷⁷

The IARA report also sheds light on the reparation policies of the Soviet Union, the U.S., and England during this period. It shows that the occupation powers of the western zone had agreed on a revised level of industrial development for Germany in August 1947, and had prepared a new list of the industrial plants affected. According to this revised level, Germany was to achieve roughly the same industrial capacity as it possessed in 1936; originally this was to have been only 75 % of the 1936 level.

The United States Congress strove to ensure that the dismantling program would not conflict with the European redevelopment program initiated by the U.S.⁷⁸ On the whole, the IARA Report shows that the U.S. in particular, suc-

74. 3 FOREIGN RELATIONS OF THE UNITED STATES: 1945, at 1478-79 (1945) (emphasis added) [hereinafter FOREIGN RELATIONS 1945].

75. See *A Decade of American Foreign Policy: Basic Documents 1941-49*. Prepared at the Request of the Senate Committee on Foreign Relations by the Staff of the Committee and the Department of State (1950) (reprinted 1968), Doc. O. 207, at 994.

76. FOREIGN RELATIONS 1945, *supra* note 74, at 1269.

77. A list in which the total sum is divided between the individual states may be found in Wilhelm Cornides and Hermann Volle, *Der Abschluss der Westdeutschen Reparationsleistungen*, 8 EUROPA-ARCHIV 3281-82 (1953) [hereinafter *Der Abschluss*]. In the report of the IARA it is stated:

There can be no doubt that the Soviet Union took, for itself and Poland, more than the \$10 billion originally demanded as reparation, while all 19 of the IARA states together received only a fraction of this sum, irrespective of the manner in which the valuation is made. Among the recipients are Czechoslovakia, Yugoslavia and Albania, who together received approximately 10% of the reparation mediated through the IARA.

Id. at 3283 (translation by the author); a review of the activity of the IARA from 1946-1949 is found in 8 EUROPA-ARCHIV 3284-90 (1953); *Cf. Der Abschluss, supra*, at 3282.

78. See The Humphrey Committee, *Recommendation Concerning the Retention in Germany or Removal as Reparations of the German Industrial Plants*, Mar. 31, 1949, T.I.A.S. 2142.

cessively and deliberately reduced its reparation demands after 1946.⁷⁹ Operations of the IARA were concluded in 1959.

2. *Soviet Practice Toward Germany*

As noted above, the Potsdam Protocol awarded reparations to the Soviet Union—for itself and Poland—out of the Soviet occupation zone and the German assets in Eastern Europe. In addition, twenty-five percent of the industrial equipment from the Western Zone was to be delivered to the Soviet Union. In the period after Potsdam, the Soviet Union extracted considerable reparations from the Eastern zone of occupation. Also, the territory of Soviet Union was expanded at its Western border at the expense of Polish territory. However, the additional delivery of equipment from the Western Zone, contemplated at Potsdam, occurred to a very limited extent.⁸⁰ It is believed that the Soviet Union ultimately received goods and payments worth much more than the U.S. \$ ten billion that Stalin had demanded at Yalta.⁸¹

On August 15, 1953, shortly after an uprising in the Soviet occupied zone in East Germany, the Soviet Union declared in a note to the Western Powers that: “. . . Germany had already fulfilled most of its financial and economic obligations to the U.S.S.R., France, Great Britain and the U.S. . . .”⁸² The Soviet Union proposed that Germany be released from all further reparation obligations effective January 1, 1954. One week later, on August 22, 1953, a protocol to this effect was signed in Moscow by the Soviet Union and the German Democratic Republic.⁸³ In this protocol, the Soviet Union declared that it

79. The report also contains a review of activities concerning German assets abroad in the years 1945-1949. According to the report, the gross value of these assets in countries which were at war with Germany was approximately \$300 million, in neutral countries approximately \$125 million. By the end of 1949, the member states of the IARA had received approximately two-thirds of the assets available in their countries. In 1946, an agreement was made with Switzerland under which half of the proceeds of the realization of German assets there would be transferred to the Allies. At the time, this was thought to amount to approximately 250 Swiss francs. Also in 1946, an agreement was made with Sweden that estimated the value of German assets in Sweden at approximately 400 Million Swedish krone. In 1948, an agreement was made with Spain concerning German assets there, which were estimated to be approximately 650 million pesetas. See *Der Abschluss*, *supra* note 77, at 3289.

80. See generally 2 - 4 FOREIGN RELATIONS 1945, *supra* note 74; 2 - 4 FOREIGN RELATIONS OF THE UNITED STATES: 1946 (1960). The first adjustment to the Soviet policy of dismantling came in May 1950 when the Soviet Union declared that the German Democratic Republic had, by the end of 1950, made reparation of approximately \$3.6 billion. Having regard to the “efforts of the German people to restore and develop the peoples’ economy in Germany,” the remainder due (estimated by the Soviet Union at \$10 billion) would be reduced by 50% to approximately \$3.17 billion. See DOKUMENTE ZUR DEUTSCHLANDPOLITIK DER SOWJETUNION, VOM POTSDAMER ABKOMMEN AM 02.08.1945 BIS ZUR ERKLÄRUNG ÜBER DIE HERSTELLUNG DER SOUVERÄNITÄT DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK AM 25.03.1954, at 243 (1957).

81. See JÖRG FISCH, REPARATIONEN NACH DEM ZWEITEN WELTKRIEG 33 (1992) [hereinafter FISCH]; HERMANN-JOSEF BRODESSER, BERND FEHN, TILO FRANOSCH, WILFRIED WIRTH, WIEDERGUTMACHUNG UND FRIEDENSLIQUIDATION 63 (2000) [hereinafter WIEDERGUTMACHUNG].

82. 8 EUROPA-ARCHIV 5954 (1953).

83. Protocol Concerning the Discontinuance of German Reparations Payments and Other Measures to Alleviate the Financial and Economic Obligations of the German Democratic Republic Arising in Consequence of the War, August 22, 1953, 221 U.N.T.S. 129, *reprinted in* 8 EUROPA-ARCHIV 5974 (1953) [hereinafter Protocol Concerning the Discontinuance of German Reparations].

would cease collection of all reparation receipts from the German Democratic Republic by the end of 1953. The conclusion to this agreement reads: "In this context the Soviet Union further declares that Germany is released by the Soviet Union from repayment of post-war state debts."⁸⁴

The parties to this protocol were the Soviet Union and the German Democratic Republic. The wording, however, refers not only to the Soviet occupation zone, but to "Germany."⁸⁵ Against this background, it is generally accepted that the Protocol between the Soviet Union and the German Democratic Republic contains a waiver applicable to Germany as a whole.⁸⁶ The agreements made after the reunification of Germany to which the Soviet Union was a party confirm this.⁸⁷

Poland, too, waived its reparation claims, and those of its nationals, against Germany. In the Protocol concluded on August 22, 1953 between the Soviet Union and the German Democratic Republic, the two States agreed that the Soviet Government would no longer demand reparations from the GDR "in accordance with the Government of Poland."⁸⁸ The authentic Polish text of this protocol refers to "odszkodowan" in the designation of the waiver.⁸⁹ The same term was used in 1921 in the Peace Treaty between Poland, Russia and the Ukraine when the state parties waived their reparation-rights, including the rights of their nationals.⁹⁰

On August 23, 1953, Poland issued a binding declaration which states that:

In consideration of the fact that Germany has already complied to a significant extent with its obligation to pay reparations and the fact that the improvements of the economic situation of Germany lies in the interest of its peaceful development, the government of the People's Republic of Poland has resolved, effective

84. *Id.* at Part V, § 2.

85. The Chairman of the Council of Ministers of the U.S.S.R., on the occasion of the signing of this agreement, directed his address to the whole German people. See 3 ARCHIV DER GEGENWART 4128 (1953).

86. The Soviet Union again expressed its waiver of reparations with respect to Germany as a whole in a draft peace treaty with Germany July 10, 1953. This draft is reproduced in IV:1 DOKUMENTE ZUR DEUTSCHLANDPOLITIK 555. Art. 41 of this draft reads, "The question of payment by Germany of reparations for damage caused during the war to the Allied and united powers is deemed to have been fully settled, and the Allied and united powers waive all claims against Germany for any further payment of reparation." *Id.* See ALBRECHT RANDELZHOFFER & OLIVER DÖRR, ENTSCHÄDIGUNG FÜR ZWANGSARBEIT 69 (1994) [hereinafter ENTSCHÄDIGUNG]; Gottfried Zieger, *Das Thema der Reparation im Hinblick auf die besondere Lage Deutschlands*, 10 RiW 16 (1980).

87. The Soviet Union would return to the theme of a peace treaty with Germany and to the issue of reparations when it presented another draft peace treaty on January 10, 1959. Art. 41 of this document reads: "The question of payment of reparations by Germany for compensation of damages to the allied and united Powers is considered to be totally settled, and the allied and united Powers waive all claims against Germany regarding the further payment of reparations" (emphasis added). This draft also contained far-reaching military and other arrangements and was not accepted by the Western Powers. Nevertheless, its wording sheds light on the Soviet view and position in 1959, namely that the reparation issue had been previously settled. 14 EUROPA-ARCHIV 21 (1959).

88. See 9 EUROPA-ARCHIV 5974 (1954).

89. This term is translated as "compensation, damages, indemnity." The Polish-English Dictionary of Legal Terms 58 (Polish Academy of Sciences, Institute of State and Law ed., 1986); see ENTSCHÄDIGUNG, *supra* note 86, at 69.

90. Peace Treaty Between Poland, Russia, and the Ukraine, 6 LEAGUE OF NATIONS TREATY SERIES 51,123 (English translation).

January 1, 1954, to waive the reparation payments to Poland, in order to thereby make a further contribution to the resolution of the German question in the spirit of democracy and peace in accordance with the interests of the Polish and all peace-loving people.⁹¹

Poland confirmed the validity of this Declaration of December 7, 1970, in the context of negotiating a treaty with the Federal Republic of Germany.⁹²

In October 1999, Germany officially acknowledged Poland's waiver of its nationals' rights.⁹³ The Soviet Union was one of the six states which negotiated the Treaty on the Final Settlement with Respect to Germany, the so-called "2 + 4 Treaty,"⁹⁴ in 1990 with the GDR and with the Federal Republic of Germany. According to its Preamble, the Treaty is intended "to conclude the final settlement with regard to Germany." The Treaty states that the Four Powers terminate their rights and responsibilities relating to Berlin and to Germany as a whole, and that, accordingly, the united Germany was to have full sovereignty over its internal and external affairs.⁹⁵ In this context, no reparation claims of the Soviet Union are recognized or mentioned. This language again confirms that the Soviet Union considered that its claims had earlier been fulfilled or had been waived in 1953.

Also in 1990, the Soviet Union concluded a treaty "On Good Neighbourhood, Partnership and Cooperation" with Germany.⁹⁶ According to its Preamble, this Treaty was concluded "with the desire to finally put an end to the past and to make a substantial contribution to the partition of Europe by way of mutual understanding and reconciliation."⁹⁷ Moreover, the Preamble sets forth that the Treaty is "based upon the foundations which have been laid in the past years through the development of the cooperation of both Federal Republic of Germany and the German Democratic Republic with the Soviet Union." The operative text of the Treaty covers a wide spectrum of principles on which the two States agree and of areas in which they intend to cooperate. For instance, the respect for existing borders, the renunciation of every use of force, regular consultations, economic cooperation, scientific cooperation, improvement of transport between the two states, exchange among social groups, cultural corporations, the care for graveyards and other matters have been agreed upon. Also, it is stated that both states will conscientiously fulfil their treaty obligations.

91. Reprinted in Polish Institute for International Affairs, *172 German Affairs*, in 9 SERIES OF DOCUMENTS (1953).

92. See 1818 BULLETIN OF THE GERMAN FEDERAL GOVERNMENT 1819 (1970). For an explanation of the position adopted by Federal Chancellor Brandt in the official discussion with Poland after 1970, see WILLY BRANDT, *BEGEGNUNG UND EINSICHTEN* 538 (1976); see also KRZYSZTOF MISZCZAK, *DEKLARATIONEN UND REALITÄTEN* (1993); ARNULF BARING, *MACHTWECHSEL* 486 (1982).

93. 14/1786 BUNDESTAGSDRUCKSACHE 5 (1999). Poland has not consistently agreed with this position.

94. Treaty on the Final Settlement With Respect to Germany, 1990 BGBI. II, 1318 [hereinafter "2 + 4 Treaty"].

95. *Id.*

96. The Treaty On Good Neighborhood, Partnership and Cooperation, 1991 BGBI. II, 702 [hereinafter *The Treaty on Good Neighborhood*].

97. *Id.* at PmbI., para. 3.

Thus, Article 1 of the 1990 treaty incorporates the reparation waiver agreed upon earlier between the USSR and the GDR.

III.

THE PAYMENT OF REPARATIONS FOR NAZI OPPRESSION THROUGH MULTILATERAL AND BILATERAL AGREEMENTS (1952–1964)

The Allies, through various agreements, effected Germany's loss of its eastern territories worth an extraordinary economic value,⁹⁸ which constituted approximately one-third of the territory of the Federal Republic as it existed prior to the 1990 reunification. Beyond this lay financial reparations.

After the end of the war, the Federal Republic of Germany was not vested with legal capacity. It did not obtain such capacity until the framing of the Basic Law (Constitution) in 1949, and the establishment of the institutions for which that Constitution provided. The first phase of the reparations process, consisting of unilateral decisions by the Allies to appropriate assets, was succeeded after 1949 by a second phase, in which the Federal Republic had the legal capacity to enter into agreements with other nations. In certain domestic laws and international agreements, Germany granted limited rights to foreign citizens above and beyond those obligations imposed upon a state by international law.⁹⁹

Because of the immeasurable suffering inflicted on the Jews in Germany and in the occupied lands during the period of National Socialism, the first reparation agreement entered into by the Federal Republic was concluded with Israel. This "Luxembourg Agreement" came into legal effect on March 27, 1953.¹⁰⁰ In it, the Federal Republic of Germany declared that compensation for the victims of persecution should not be dependent on their nationality, and that the Jews of German nationality were thereby included.¹⁰¹

In concert with the agreement with Israel, both from the point of view of time and content, the Federal Republic also agreed to the so-called "Hague Protocols,"¹⁰² under which a fund of 450 Million Deutschemarks ("DM") was

98. See Ernst Deuerlein, *Die Verabschiedung der Deutschland-Bestimmungen des Potsdamer Abkommens*, 3 DEUTSCHLAND-ARCHIV 681 (1970).

99. The German domestic programs compensating war-related damages are summarized in BUNDESMINISTERIUM DER FINANZEN, DOKUMENTATION 3/99; WIEDERGUTMACHUNG, *supra* note 81. Between 1949 and 1981, a special journal "Rechtsprechung zum Wiedergutmachungsrecht" was devoted to this field of domestic German law. The U.N. has concluded that Germany's efforts to compensate victims were remarkable; see U.N. ECONOMIC AND SOCIAL COUNCIL, STUDY CONCERNING THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, U.N. Doc. E/CN.4/Sub 2/1993/8 (July 2, 1993).

100. Agreement Between the Federal Republic of Germany and Israel, September 10, 1952, 1953 BGBl. II, 37 [hereinafter the Luxembourg Agreement].

101. This is one example of the government of the Federal Republic going beyond its legal obligations under public international law. See EICHHORN, *supra* note 68, at 158.

102. 1953 BGBl. II, 85 (1953). See ERNST FÉAUX DE LA CROIX, 3 INTERNATIONAL-RECHTLICHE GRUNDLAGEN DER WIEDERGUTMACHUNG 194; see also Ernst Katzenstein, *Jewish Claims Conference and die Wiedergutmachung nationalsozialistischen Unrechts*, in Festschrift für Martin Hirsch 219 (Hans-Jochen Vogel, pub., 1981).

made available to the Claims Conference for distribution to aid individual victims of the Nazis.”

The Luxembourg Agreement was concluded by the Federal Republic with the “determination, within the limits of their capacity, to make good the material damage caused by these acts”;¹⁰³ that is, by the persecution policies of National Socialism. Correspondingly, the Federal Republic guaranteed to the State of Israel, on the basis of the claims invoked, payment of the costs of integration that Israel incurred in accepting Jewish refugees from Germany and the other territories formerly subject to German rule.¹⁰⁴ On this basis, a sum of 3 billion DM was paid to the State of Israel in the form of goods and services.¹⁰⁵

In addition to the creation of such international funds, Germany proceeded to implement domestic compensation legislation. This followed the new policy of the Western Powers “to integrate the Federal Republic of Germany into the community of free nations,” and the conclusion of the state of occupation of Germany in 1952.¹⁰⁶

This legislation followed international agreements and their nineteen Appendices, which were signed in May 1952, but could not at first be brought into force because of the failure of the related plans for a European Defense Community. After fresh negotiations in Paris in October 1954, these agreements were signed once more and came into legal effect on May 6, 1955.¹⁰⁷ This web of treaties is referred to as the Bonn and Paris Agreements.¹⁰⁸ While the Allied Powers themselves had until that time directly controlled and managed the reparation process, those Powers thereafter entrusted this task to Germany itself. The measure for Germany’s future policy was “adequate compensation.”

In detail, the Bonn and Paris agreements consisted mainly of a General Treaty,¹⁰⁹ a Forces Convention,¹¹⁰ a Financial and Taxation Agreement,¹¹¹ and a Transition Agreement.¹¹² The General Treaty dealt mainly with the ending of the state of occupation, the legal status of Germany, of Berlin and the stationing and security of the Allied armed forces. The Transition Agreement dealt with many questions arising in the context of the war and with the occupation issues. In this regard, many provisions were included on matters that are normally reserved for a peace treaty. For example, Chapter III of the Transition Agreement

103. The Luxembourg Agreement, *supra* note 100, Preamble.

104. *See id.*

105. *Id.* at art. 1(a).

106. *See Communiqué on Germany, September 19, 1950* (reprinted in 13 *EUROPA-ARCHIV* 3406 (1958)).

107. 1955 *BGBI.* II, 256.

108. *See* Wilhelm Kewenig, *Bonn and Paris Agreements on Germany (1952 and 1954)*, 1 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 422 (1992).

109. Convention on Relations between the Three Powers and the Federal Republic of Germany, October 23, 1954, 331 U.N.T.S. 327.

110. Convention on the Rights and Obligations of Foreign Forces and Their Members in the Federal Republic of Germany, October 23, 1954, 332 U.N.T.S. 3.

111. Finance Convention, October 23, 1954, 332 U.N.T.S. 157; Agreement on the Tax Treatment of the Forces and Their Members, 332 U.N.T.S. 219.

112. Convention on the Settlement of Matters Arising out of the War and the Occupation, 332 U.N.T.S. 219 [hereinafter the Transition Agreement].

dealt with the restitution of identifiable property to victims of the Nazi regime; Chapter IV stated the obligation of the Federal Republic to compensate the victims of the Nazi regime and Chapter V regulated the details for restitution of property seized abroad by Germany or its allies during the war.¹¹³

Chapter VI of the Transition Agreement states that the Federal Republic would not in the future “raise any objections to the measures taken or to be taken against German property abroad or otherwise which has been seized for the purposes of reparation or restitution or because of the state of war or on the basis of agreements made or which will be made by the Three Allied Powers with other allied states, with neutral states or with former allies of Germany.”¹¹⁴

Forbidden were “claims and suits against persons, international organizations or foreign governments which have acquired or transferred property on the basis of the measures mentioned in paragraphs 1 and 2.”¹¹⁵

The Federal Republic had already reached similar arrangements with Switzerland in August 1952.¹¹⁶ A special provision in respect of legal relations with Austria was included in the Transition Agreement.¹¹⁷

Chapter IX of the Transition Agreement expressed the waiver by Germany, subject to the provisions of a peace treaty, on its own behalf, and also on behalf of its citizens, of claims against foreign states and their citizens. This referred not only to claims arising from the war, but also to claims based upon events after June 5, 1945. Chapter X thereof addressed the question of foreign assets seized by Germany.

The Transition Agreement charged the Federal Republic with compensating previous German owners of property outside Germany seized by the Allied Powers: “The Federal Republic will ensure that the previous owners of the valuables, which have been seized on the basis of the measures stated in Art. 2 and 3 of this part, be compensated.”¹¹⁸

Under Art. 4 of Part 6 of the Transition Agreement, the right to negotiate claims concerning lost German property assets abroad was restored to the Federal Government to a certain extent. As a result, negotiations and agreements concerning remaining assets followed with certain countries, including some Latin American countries, Turkey and Switzerland.¹¹⁹ Discussions with the U.S. regarding such an agreement did not progress beyond the initial stage, and were then broken off. German assets in the U.S. were estimated at U.S. \$ 600 million in 1947.¹²⁰

113. *Id.*

114. *Id.* art. 3 § 1.

115. *Id.* art. 3 § 3.

116. 1953 BGBl. II, 15.

117. See EIKE BURCHARD, DER VÖLKERRECHTLICHE VERZICHT DES STAATES AUF RECHTSGÜTER SEINER STAATSANGEHÖRIGEN IM AUSLAND 44 (1972).

118. The Transitions Agreement, *supra* note 112, art. 5

119. See Rumpf, *supra* note 66, at 94.

120. See WILHELM GREWE, RÜCKBLENDEN 1976-1951, at 535 (1979); Martin Domke, *The War Claims Act of 1962*, 57 AM. J. INT'L L. 354 (1963).

A turning point for the further development of the reparation policies was manifested through the fact that Art. 1 of Part VI of the Transition Agreement provided that the Western Allies would waive deliveries for reparation purposes from current German production, and declared that the question of reparations should be dealt with in the peace treaty or, prior to that, through appropriate international agreements:

The problem of reparation shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements concerning this matter. The Three Powers undertake that they will at not time assert any claim for aggression against the current production of the Federal Republic.¹²¹

As to the general status of the reparations issue in 1952, the Allies could have demanded and forced the receipt of any particular reparation program, but by 1952, they had clearly come to understand that the reparation program after the First World War had contributed to, and not avoided, a future conflict. As the Cold War developed, any initial plans for a demilitarized and agrarian German economy ceased, having been replaced by a vision of an industrialized German economy serving as a key NATO partner.

As part of this process, Germany was to be left with the responsibility to create a restitution mechanism to compensate those injured by the Nazi horrors. As early as November 1947, the U.S. Military Government had enacted Law No. 59 on the Restitution of Identifiable Property, parallel to English and French ordinances with the same purpose. According to these regulations, identifiable property taken by the Nazis from their victims was returned, or, when no longer existent, the latter were compensated for the value of the property. In case no owners or heirs survived, the assets were restituted to Jewish "successor organizations." Through the Transition Agreement, the United States and its Allies assigned to Germany, and Germany acknowledged the need for and assumed:

[T]he obligation to implement fully and expeditiously and by every means in its power, the legislation referred to in Article I of this Chapter [Internal Restitution] and the programmes [sic] for restitution and reallocation thereunder provided. The Federal Republic shall entrust a Federal agency with ensuring the fulfilment of the obligation undertaken in this Article, paying due regard to the provisions of the Basic Law.¹²²

Thus, reparation was henceforth to be entrusted to international treaties, and restitution legislation enacted in Germany and adjudicated by a German court. It was understood that the standard for compensation would be imperfect, for no amount of restitution could compensate the victims of Nazi tyranny for the egregious wrongs committed. German internal legislation was built upon this premise.¹²³ The post-war regulation of German debt, national and international, was based on the fact that Germany's total debt amounted to an almost unimaginable figure of about 800 billion Reichsmark, and that, for all practical

121. See HANS KUTSCHER, *BONNER VERTRAG UND ZUSATZVERSICHERUNGEN* (1952).

122. The Transition Agreement, *supra* note 112, Art. 2.

123. See 2 *BUNDESTAGSDRUCKSACHE* 84 (1949).

purposes, Germany was bankrupt.¹²⁴ Thus the standard established by the United States and its allies in the Bonn Convention was to be “adequate” compensation, not full compensation:

The Federal Republic acknowledges the obligation to ensure in accordance with the provisions of paragraphs 2 and 3 of this Chapter *adequate compensation* to persons persecuted for their political convictions, race, faith or ideology, who thereby suffer damage to life, limb, health, liberty, prosperity, their possessions or economic prospects. . . .¹²⁵

In essence, the United States and the other allied governments reserved their rights to assert further reparations claims against Germany, but, for the time being, left to Germany the task of creating and implementing such programs for “adequate compensation.”

The status of forced labor in the process of Allied and German efforts to compensate Nazi victims was discussed in the context of Germany’s domestic legislation for compensation to Jewish victims, enacted in 1953. Inasmuch as forced labor, per se, was not to be treated as a separate category for which compensation was due under the legislation, it was suggested that Germany ought to change the legislation to add such a category. This initiative failed due to the position expressed by United States Secretary of State John Foster Dulles: “British proposal would open Federal Republic to liability for fantastic sums of money and indirectly would reopen entire reparation problem.”¹²⁶

This reaction on the part of the United States confirms the position that compensation for people being used as forced laborers during the war was a state-to-state reparations issue, a position fully consistent with the rules of general international law.

In the years 1959-1964, the Federal Republic agreed upon lump sum payments as compensation for the persecution under National Socialism with 12 states. These were Luxembourg, Norway, Denmark, Greece, Holland, France, Belgium, Italy, Switzerland, Austria, Great Britain and Sweden.¹²⁷ Overall, the sums included in these 12 agreements amounted to 971 million DM. From the total payments that the Federal Republic transferred, each of these states had to pay its own citizens who had suffered bodily injury, health damage or loss of freedom under National Socialist persecution.¹²⁸

124. See 15 BVerfGE 126, 141-42; decision of the Appellate Court of Cologne, 52 NJW 1555 (1999).

125. Transition Agreement, *supra* note 112, Chapter IV, §1 (emphasis added).

126. CONSTANTIN GOSCHLER, WIEDERGUTMACHUNG 303 (1992).

127. For details of the bilateral agreements see Ernst Féaux de la Croix, *Staatsvertragliche Ergänzungen der Entschädigung*, in DER WERDEGANG DES ENTSCHÄDIGUNGSRECHT 201 (Ernst Féaux de la Croix and Helmut Rumpf, eds., 1985) (3 DIE WIEDERGUTMACHUNG NATIONALSOZIALISTISCHEN UNRECHTS DURCH DIE BUNDESREPUBLIK DEUTSCHLAND (Bundesminister der Finanzen and Walter Schwarz, eds., 1985).

128. Also relevant in this context is the agreement for compensation of the victims of pseudo-medical experimentation which took place in Nazi run concentration camps. Previously, according to a cabinet decision of July 26, 1951, applications for compensation for such experimentation would only be accepted from victims residing either in Germany or in one of the states that maintained diplomatic relations with Germany. In 1960, however, compensation was extended to those who resided in states which did not maintain diplomatic relations with Germany. This compensation was

A. *The London Debt Treaty (1953)*

The London Debt Treaty addressed and regulated several categories of German debts—some from the First World War, some from the inter-war period, some from the Second World War, and some even from the post-war period: for all these categories of debt, new conditions were laid down.

The London Debt Treaty¹²⁹ distinguished between debts “to be settled”¹³⁰ and “claims excluded from the agreement.”¹³¹ Questions concerning claims arising out of the Second World War came under Art. 5, that is, among the debts which are excluded from the treaty. In other words, such issues were not to be settled under the treaty, but rather their state-to-state resolution would be deferred until the final settlement of the issue of reparation.

The text of the first three sections of Article 5 of the London Debt Treaty, as ratified by the United States, reads as follows:

(1) Consideration of governmental claims against Germany arising out of the first World War shall be deferred until a final general settlement of this matter.

Consideration of claims arising out of the second World War by countries which were at war with or were occupied by Germany during the war, and by nationals of such countries, against the Reich and agencies of the Reich, including costs of Germany occupation, credits acquired during occupation of clearing accounts and claims against the Reichskreditkassen shall be deferred until the final settlement of the problem of reparation.

Consideration of claims, arising during the second World War, by countries which were not at war with or occupied by Germany during that war, and by nationals of such countries, against the Reich and agencies of the Reich, including credits acquired on clearing accounts, shall be deferred until the settlement of these claims can be considered in conjunction with the settlement of the claims specified in paragraph (2) of this Article (except in so far as they may be settled on the basis of, or in connexion [sic] with, agreements which have been signed by the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America and the Government of any such country (emphasis added)).¹³²

In interpreting Art. 5 sec. 2, it bears emphasis that the “deferral” of consideration was not due to a lack of time or such other reasons on the part of the signatory states. The background to the formulation of Art. 5, together with its meaning, shows that the assertion and satisfaction of these deferred claims was

facilitated by an agreement with the International Committee of the Red Cross (“ICRC”) in Geneva. Through the intervention of the ICRC, the parties agreed that a neutral commission with quasi-judicial independence would determine the validity of the compensation applications and the amount to be awarded. Between 1965 and 1972, the Federal Republic of Germany concluded such compensation through this mechanism by entering into agreements with Yugoslavia, Hungary, Czechoslovakia and Poland. Payments by the Federal Republic were distributed among the affected victims through this commission. The total sum provided for compensation for pseudo-medical experimentation was approximately 175 million Deutsch marks, of which about 50 million were distributed in Eastern Europe by the ICRC. EICHORN, *supra* note 68, at 158.

129. Agreement on German External Debts, Feb. 27, 1953, 1953 BGBl. II, 333 [hereinafter the London Debt Treaty].

130. The London Debt Treaty, *supra* note 129, art. 4.

131. *Id.* at art. 5.

132. The equally authentic German text of art. 5 (3) does not fully correspond to the phrase “against . . . agencies of the Reich.”

not then considered possible. The common understanding among all parties was that the effectiveness of the London Debt Treaty was not to be endangered by an attempted resolution of the deferred claims. Regard was had to the ability of Germany to meet these claims.¹³³

Generally speaking, the entire Treaty reflected the wishes and intentions of the U.S. and the British governments. This was quite understandable given the role that these two governments had played during the war and in the evolution of policies vis-à-vis Germany since 1945. U.S. and British dominance is reflected in the manner in which claims of neutral states against Germany were regulated. In Art. 5 sec. 4, claims of neutral governments and their nationals arising during the Second World War were deferred, whether they were war-related or not. Thus, they were treated less favorably than the claims of those at war with Germany. For understandable reasons, the Allied creditors considered that states and creditors who had remained neutral in the war should not benefit from their position. The Allies deferred and did not waive their own reparation claims, in part because the Allies did not wish to stand at a disadvantage compared to other states and creditors who did not choose to be subject to the London Debt Treaty.¹³⁴ They did so notwithstanding the desire of the German side to be able to finally resolve the reparations question as soon as possible.

The content, meaning and purpose of the provisions of the London Debt Treaty can be judged only against the historical background of the 1950s. At that time, the most urgent task of domestic German politics was the rebuilding of the post-war economy. Financing through German resources was impossible. Therefore, Germany was dependent on foreign capital. The United States Marshall Plan had provided the decisive initial contribution. It was soon clear, however, that the United States was willing to support the rebuilding of the German economy with public U.S. funds only for a limited period. Both the American and the German side endeavoured to ensure that such support would be replaced by finances in the form of loans to Germany from the private sector. The fact that the question of Germany's foreign debts was still unresolved presented a serious impediment to this goal. Only the due servicing of the old debt could restore foreign confidence in German creditworthiness, and the London Conference was to open the path in this direction.¹³⁵

Closely related to the efforts to stabilize the German economy was the political goal of the Western Powers and the Federal Republic of regularising the legal standing of the Federal Republic under public international law. Against this background, the foreign ministers of France, Great Britain and the United States of America had already developed a position at a conference in New York from September 12 through 18, 1950, which produced fundamental changes in the West's policy toward Germany and, therefore, toward the issue of repara-

133. See 18 BGHZ 22, 27.

134. See 22 BGHZ 18, 29.

135. See ERNST FÉAUX DE LA CROIX, BETRACHTUNGEN ZUM LONDONER SCHULDENABKOMMEN, FESTSCHRIFT FÜR BILFINGER 27-8 (1954) [hereinafter FÉAUX DE LA CROIX].

tions.¹³⁶ The new principles aimed at integrating Germany into the community of free countries, at extending the authority of the Federal Government in the economic area, at revising the Statutes of Occupation, and, inter alia, re-examining the production restrictions which were still in force.¹³⁷

In the historical evolution of Allied reparation policy vis-à-vis Germany after 1945, the London Debt Treaty consolidated the two fundamental earlier steps by Allied Powers. First, it built upon the 1946 Paris Agreements which had stipulated that, for the time being, the reparations as assigned to the three powers would cover the entirety of war damage and losses for which Germany was responsible. Second, it confirmed the agreement reached earlier in the negotiations on the Settlement Convention that final resolution of reparations issues would be deferred until a peace treaty or earlier intergovernmental agreements were redacted. Standing upon these pillars, the London Debt Treaty reconfirmed that war claims of individuals had to be asserted, regulated and confirmed by agreements among governments.

U.S. Representative Kearney explicitly confirmed during the London Conference that its deliberations were based upon the decisions reached in the 1946 Paris Agreement.¹³⁸ This position was also expressed against the background of a Netherlands initiative in London to draft the Agreement in a manner which would have allowed individual states to deviate from the 1946 Agreement and to negotiate war claims with Germany before a final peace Treaty was reached.¹³⁹

136. The Communiqué of the Conference of September 19, 1950 is reprinted in 5 EUROPA-ARCHIV 3406 (1950).

137. The Allied High Commission had written to the Federal Government on October 23, 1950 calling on the Federal Government to clarify the state of its foreign debts in the future—after it had taken over responsibility for its foreign affairs. This request covered both the foreign debts from the pre-war period and the economic assistance that the occupying Allies had provided in the post-war period. The clear position of the Allies was that the servicing of post-war debts had to take priority over pre-war debts. Enclosed with this letter from the Allied Powers to the Federal Government was a draft agreement in which the liability of the Federal Republic for pre-war debts of the Germany Reich and for debts in respect of post-war economic assistance was articulated.

The letter of October 23, 1950 served as a starting point and laid a foundation for the negotiations at the London Debt Conference in February 1953. On March 6, 1951, the Chancellor of the Federal Republic of Germany sent a letter to the High Commission expressing his readiness to cooperate in the settlement of German's foreign debt in the manner suggested. See 1953 BGBI. II, 473.

On February 27, 1953, in addition to the London Debt Treaty, the Federal Republic of Germany signed an agreement with the United States concerning certain kinds of German bilateral debt and several bilateral agreements concerning economic assistance granted to Germany by the Allied side. At the same time, an agreement was reached between Germany and private U.S. and British creditors regarding loans granted in 1930. For details see, FÉAUX DE LA CROIX, *supra* note 135, at 37.

138. See *Protocol of the Final Negotiations*, reprinted in 4478 BUNDESDRUCKSACHE 54 §§ 5-7. In 1953, the parties agreed that that this Protocol would have special weight with respect to the interpretation of the Treaty [hereinafter Protocol].

139. Protocol, *supra* note 138, at 54 § 7; see also HERMAN ABS, 2 ENTSCHIEDUNGEN 223 (1991). The London Conference concluded that claims of forced laborers could only be pursued on the basis of domestic German legislation; see Conference Document, February 4, 1953, VI GENERAL DOCUMENTS 1.

B. *The Resolution of the Issue of Reparations in the "2 + 4 Treaty"*

A comprehensive and formal general peace treaty of peace or settlement was never negotiated between the Allies and Germany in any single document at the end of the Second World War. The necessary provisions were made step-by-step after 1945 and the final documents were agreed upon in the "2 + 4 Treaty."¹⁴⁰

Thus, the "2 + 4" Treaty will have to be considered the final element of a series of agreements which in their sum constitute the functional equivalent of a Peace Treaty with the consequences required under *Ware v. Hyllton*.¹⁴¹ (Were it otherwise, it would necessarily be the case that the bar against consideration of war claims contained in Article 5(2) and (3) of the London Debt Treaty would still be in operation.)

The United States supported Germany's position not to re-open the question of reparations in the context of a peace conference.¹⁴² Thus, the "2 + 4 Treaty" contains no express clauses on the reparation question. Nevertheless, clause 12 of the preamble states that the agreement contains the final settlement with Germany ("intending to conclude the final settlement with regard to Germany"). As indicated in the Preamble, the former Allied Powers no longer consider themselves as occupants of Germany. ("Recognizing that thereby, with the unification of Germany as a democratic and peaceful state, the rights and responsibilities of the Four Powers relating to Berlin and to Germany as a whole *lose their function*").¹⁴³ Any negotiations on war issues and reparations could have been undertaken only in the status of enemies or of an occupying power:

According to Clause 12 of the Preamble the Settlement Agreement contains the final settlement provisions with Germany. Thereby, it is clear that between Germany and the four major victorious powers, there are not further questions arising out of the war or the occupation to be settled, which have either not yet been mentioned or have not already been settled in earlier agreements or which are not settled by this agreement.¹⁴⁴

The "2 + 4 Treaty" nowhere mentions or addresses issues left open after the war in general, or reparations in particular. To the contrary, the Preamble

140. 1990 BGBl. II, 1318. For the background and content of the Agreement see Dietrich Rauschnig, *Beendigung der Nachkriegszeit mit dem Vertrag über die abschließende Regelung in bezug auf Deutschland*, DVBl 1275 (1990) [hereinafter Rauschnig]; Dieter Blumenwitz, *Der Vertrag vom 12. 09. 1990 über die abschließende Regelung in bezug auf Deutschland*, 43 NJW 3042 (1990); Wilfried Fiedler, *Die Wiedererlangung der Souveränität Deutschlands und die Einigung Europas*, 685 JZ 688 (1991); WLADYSLAW CZAPLINSKI, 35 DIE FRIEDLICHE REGELUNG MIT DEUTSCHLAND IN RECHT UND OST UND WEST 133 (1991).

141. See *Ware v. Hilton*, *supra* note 14.

142. The issue was discussed on February 24, 1990 at Camp David by President Bush and Chancellor Kohl. See DEUTSCHE EINHEIT: SONDEREDITION AUS DEN AKTEN DES BUNDESK-ANZLER-AMTES 1989/90, at 860 (Hanns Jürgen Küsters and Daniel Hofmann, eds., 1998) [hereinafter SONDEREDITION]. As to the German domestic deliberations, see *The Memorandum by Ministerial Director Horst Teltschik to the Federal Chancellor*, in SONDEREDITION, *supra*, at 955.

143. The "2 + 4 Treaty," *supra* note 94, Preamble (emphasis added).

144. Rauschnig, *supra* note 140, at 1279 (translation by the author).

clearly indicates that matters regarding the war shall no longer be on the agenda (“finally put an end to the past”).¹⁴⁵

It would be entirely unrealistic to assume that the reparations issue was forgotten in 1990. Moreover, a side agreement to the “2 + 4 Treaty” in fact addressed this subject and provided that Germany would continue its domestic programs for payments to those groups defined in earlier legislation and extend this program to persons living in the former German Democratic Republic.¹⁴⁶

As we have seen, the Soviet Union, as early as 1953, had waived reparations against Germany. The Western Allied Powers, on the contrary, had, in the Transition Agreement and the London Debt Treaty, left the “problem of reparation” to be settled by a peace treaty or earlier agreements. While advocates of the legitimacy of private claims see the absence of an express waiver thereof in the “2 + 4 Treaty” as evidence of their continuing existence, the stated position of the concerned governments indicates otherwise.

Specifically, the German Government has said:

Inasmuch as states have not waived their claims, such claims cannot be raised against the Federal Republic because such claims would necessarily have presupposed the conclusion of treaties on the level of international law. According to generally accepted international practice, reparation claims have always been regulated in their existence and amount by a treaty; usually they have been laid down in a peace treaty after the end of war operations. It follows from the meaning of a reparation agreement as a process securing and preserving peace that such arrangements will have to be concluded in an appropriate chronological context with the end of the state of war if they are meant to fulfil their purpose. 50 years after the end of the Second World War, far more than 30 years after the Allied Powers have declared the termination of war at different times, after decades of peaceful, and fruitful cooperation in mutual confidence of the Federal Republic of Germany with the international community and sizeable transfers for compensation purposes, the question of reparations has lost its justification.¹⁴⁷

This position was repeated by the Federal Government on October 27, 1997:

The London Debt Treaty had deferred consideration of war-related claims of states at war with Germany and their nationals until a final settlement of the question of reparations. Due to the well-known differences of the main victorious powers, such a settlement was never reached. Fifty years after the end of World War II, the question of reparations has become moot. The Federal Republic has based its agreement to the Treaty on the Final Settlement upon this understanding.¹⁴⁸ This understanding was reconfirmed by the current German Government in October, 1999.¹⁴⁹

In 1990, the “2 + 4 Treaty” on the Final Settlement With Respect to Germany” was presented to the United States Senate for ratification. The Treaty was referred to the Senate Foreign Relations Committee. Senator Claiborne Pell, the Chairman of the Committee, sought and received from the Congress-

145. The “2 + 4 Treaty,” *supra* note 94, Preamble.

146. Rauschnig, *supra* note 140, at 1279.

147. 13/4787 BUNDESDRUCKSACHE 2 (translation by the author).

148. 13/8840 BUNDESTAGSDRUCKSACHE 2 (translation by the author).

149. See 14/1786 BUNDESTAGSDRUCKSACHE 8, par. 23, Exhibit 94.

sional Research Service an analysis relating to the issues before the Committee. According to that report, the question of reparations was "no longer an issue on the agenda between Bonn and Washington."¹⁵⁰

C. *Payments Based on German Programs, 1980–2000*

Few, if any, of the reparations paid to the U.S.S.R. on its own behalf and on behalf of Poland were used to compensate individual victims of the Nazi regime. Thus, for a long time, persons residing in Central and Eastern Europe did not benefit from domestic German legislation, nor did Germany conclude any lump sum agreements which applied to such persons before the end of the Communist era, with the exception of agreements to benefit victims of pseudo-medical Nazi practices. As noted above, the Soviet Union had waived all possibly remaining reparations claims against Germany on behalf of itself and its nationals as early as 1953.¹⁵¹ Regarding Yugoslavia and Poland, Germany granted certain types of loans with special conditions in the 1970s that were considered to reflect, "in part," the German moral debt arising from the Second World War.¹⁵²

In 1980, Germany created a Hardship Fund with the Jewish Claims Conference to benefit those Jewish persons who had been able to emigrate from the Soviet Union and other Eastern European countries. The Fund was originally made up of 400 million DM, and was increased to 535 million DM in 1992.¹⁵³ Beneficiaries were those who had not been eligible for compensation under previous arrangements and were now living under difficult conditions.

In the negotiations of the "2 + 4 Treaty," Germany agreed to continue her national programs to benefit victims of Nazi persecution. Pursuant to a Law on Open Property Questions, amended in 1997,¹⁵⁴ property worth billions of German Marks was restored to former Jewish owners, their heirs, or the Claims Conference. The German program continues to operate.

Compensation claims based on domestic German law were not affected by the Treaty. The Notification of the Agreement of September 27-28, 1990 to the Agreement on Relations between the Federal Republic of Germany and the Three Powers (in its amended version), as well as the Agreement on the Settlement of War and Occupation Questions,¹⁵⁵ expressly stated that the German Indemnification Law and the Restitution Law and Compensation Law remained in force and also applied in the territory of the Former German Democratic Republic.¹⁵⁶ The Federal Government has since continued to apply and expand its domestic compensation legislation.

150. LEGAL ISSUES RELATING TO THE FUTURE STATUS OF GERMANY, SENATE COMM. ON FOREIGN RELATIONS (G.P.O. June 1990). The Report has referred generally to claims which remained subject to intergovernmental negotiations.

151. See *supra* at 323.

152. See Helmut Rumpf, *Die Regelung der deutschen Reparationen nach dem Zweiten Weltkrieg*, 23 ARCHIV DES VÖLKERRECHTS 74, 99 (1985).

153. WIEDERGUTMACHUNG, *supra* note 81, at 120.

154. 1997 BGBl. I, 1975.

155. 1990 BGBl. II, 386.

156. *Id.* at art. 3.

In October 1991, as part of its effort to meet its moral obligation, Germany agreed to pay to a Polish fund an amount of 500 million DM to benefit persons who have been persecuted by Nazis, experience serious health problems and are in a difficult economic situation. A Polish foundation administers the fund.

Similarly, in March 1993, Germany agreed with Russia, Byelorussia and the Ukraine to establish foundations to benefit persons persecuted by the Nazis. So far, about 1.5 billion German Marks has been committed to these foundations. An agreement with the Czech Republic that is primarily intended to benefit persons suffering from Nazi-persecution has established a so-called Future Fund with 140 million German Marks. Other former Eastern states received about eighty million German Marks between 1998 and 2000.

Also, in 1998 the German Government agreed to contribute an additional 200 million German Marks to the Claims Conference, in order to broaden benefits to Jewish persons persecuted by the Nazis in Eastern Europe. Germany's effort to meet its moral obligation is therefore ongoing.¹⁵⁷

As noted above, the last decade of the twentieth century saw the institution of lawsuits against Germany and certain of its private companies before national courts in, among other places, Germany and the United States, by victims of Germany's forced labor and other war-related programs. Although, as mentioned, no German or American court rendered a final judgment in favor of any such claimant, economic and political considerations led to arrangements intended both to continue Germany's moral atonement for the suffering inflicted at its hands, and to assuage perceived social forces positioned to potentially cause economic losses by, for example, boycotts and similar activities.

Thus, on July 7, 2000, the German Bundestag established a Foundation "Remembrance, Responsibility and Future"; the German Government and German industry each contributed five billion DM to the Foundation. The law entered into force subsequent to the signing of a Joint Statement on July 17, 2000 by representatives of the U.S., Germany, Israel, Poland, the Czech Republic, Byelorussia, the Ukraine, Russia and the Claims Conference, as well as representatives of German industry and claimants who had instituted suits before national courts, indicating their agreement as to the operations of the Foundation.¹⁵⁸

IV. HUMAN RIGHTS, HUMANITARIAN LAW AND WAR-RELATED INDIVIDUAL CLAIMS

A new era of international law was ushered in when the United Nations was created in 1945, with its Charter providing that the protection of human rights would be among the main purposes of the organization.¹⁵⁹ Step by step

157. In 1999, the German Ministry of Finance stated that more than 103 billion German Marks had been spent. See BUNDESMINISTERIUM DER FINANZEN, DOKUMENTATION 3/99, at 2, 38.

158. See *In re Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429, 432 (D.N.J. 2000).

159. See U.N. CHARTER art. 1 & 55.

thereafter, the individual became a subject of international law. Building upon the Declaration of Human Rights of 1948, the two Covenants of 1966 became the global foundation of the new architecture, with regional additional conventions in Europe, America and Africa. As to the universal rules, however, it has remained doubtful to what extent the individual is to be seen as a beneficiary rather than the holder of an entitlement within this new universe of rules.

Thus, in the United States, human rights treaties are considered to be non-self-executing, and they do not provide a cause of action for individuals,¹⁶⁰ this position also covers the Torture Convention and the Genocide Convention.¹⁶¹ Also, the modalities of enforcement, which rely on the machinery of state reporting and the separate legal existence of protocols for individual complaints, do not suggest that the status of individuals has been raised to the level of a subject with full rights. Of course, the basic normative structure and fabric of international law with the state as the central actor has not changed either. Thus, for instance, only states are entitled to be parties to proceedings before the International Court of Justice. Furthermore, the mere continued validity of the rules for diplomatic protection stands as a powerful sign for the continuous role of the state in the settlement of claims of foreign nationals.

From a perspective of pure legal logic, it is possible to consider the extension of the concept of human rights to the area of claims settlement in the sense of replacing the rules of diplomatic protection by granting direct standing to an individual to raise a claim against a foreign government. In practice, however, the international community has refrained from drawing such a conclusion, as is evident in every textbook of international law.¹⁶² As far as the specific rules of humanitarian law are concerned, no changes have been introduced in the post-war period which would indicate the will of the international community to alter the general lack of standing of individuals to raise a claim, even though this body of law was revisited by the states on several occasions.

All of these considerations notwithstanding, the broad argument in favor of (1) the applicability of human rights norms during times of war, and (2) a corre-

160. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l. L. 341 (1995).

161. See also Curtis Bradley & Jack Goldsmith, *The Current Illegitimacy of International Human Rights Legislation*, 66 FORDHAM L. REV. 319 (1997).

162. A leading British international lawyer has expressed the necessity to distinguish between international law and philosophical logic. He believes that this emphasis on the individual instead of the state is "to express the matter in that way is to abandon law for philosophy. For law is an artificial system which has its own concepts and principles, and anyone invoking the law will find himself confronted by these concepts and principles. Neither international nor municipal law treats the state merely as a convenient piece of machinery; and in international law it may make all the difference in the world to the individual that it is normally his state, not himself, who is the bearer of international rights and duties." See Humphrey Waldock, *General Course on Public International Law*, 106 RECUEIL DES COURS 1, 192 (1962).

The Permanent International Court of Justice confirmed, in the Peter Pazmany Case that it is "scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself." PCIJ Series A/B, No. 61. It is noteworthy that decisions of the U.N. Human Rights Committee in the context of individual complaints are in the nature of non-binding recommendations. See United Nations Human Rights Committee, Annual Report 1988, para. 646; D. GOLDRICK, THE HUMAN RIGHTS COMMITTEE 151 (1994).

sponding transfer of the enforcement machinery for the recovery of war-related damages, will have to be considered. Ultimately, the persuasiveness of any effort to base the enforcement of war-related individual claims upon a national law such as the ATCA will depend on the viability of such two-pronged arguments. As to the first part, it must be recognized that the rules *in bello*, i.e., the so-called Geneva and the Hague rules, have been negotiated and designed to protect individuals affected by actions of war. Indeed, these laws of armed conflict have often been called "humanitarian laws," although the relevant treaties do not rely on this term. In any event, the philosophical and legal origins of human rights and of humanitarian laws lie in the conviction that the classical approach of international law needs to be supplemented in certain areas and in certain ways for the benefit of each individual. This common foundation of human rights and of humanitarian law, however, does not imply that they are identical or interchangeable.¹⁶³ Obviously, the right to life of a soldier will not be protected in the same way under the rules of armed conflict during war as under the human rights norms applicable in peace times.

Generally speaking, humanitarian law has been negotiated separately from human rights documents, with a view of benefiting the individual within the framework set by the conduct of war and the recognition that each party to a war attempts to defeat the enemy on the battleground. The difference between the two areas has been appropriately summarized as follows: "Due to their diverse historical origins, their different fields of application, and certain variations of an ideological and systematic character . . . , one should neither regard the protection of human rights as a special field of humanitarian law . . . nor understand humanitarian law as a branch of human rights law."¹⁶⁴ While it is thus clear that human rights are distinct from humanitarian law, it is also beyond doubt that the process of enforcement of human rights on the international level has been negotiated and laid down by the international community in specific terms within the framework of a clearly defined international procedure, a procedure that includes no room for national decision-making. Thus, the evolution of universal human rights in their internationally accepted setting does not support an argument to the effect that universal human rights applicable in peacetime should be applied by domestic courts for purposes of enforcing the laws of armed international conflict.¹⁶⁵

163. See Kathryn Boyd, *Are Human Rights Political Questions?*, 53 *RUTGERS L. REV.* 277, 298, 320 (2001) [hereinafter *Are Human Rights Political Questions*]. Boyd asserts that the sole distinction between reparations claims and human rights claims is that the former relate to the future and the latter to the past. Boyd does not state any basis for this unorthodox view, and does not reconcile it with treaty practice covering individual claims. For Boyd's general view on the role of the state and the individual in current international law see *id.*, at 330.

164. See Karl Partsch, *Humanitarian Law and Armed Conflict*, in 2 *ENCYCLOPEDIA OF PUB. INT'L LAW* 933 (Rudolf Bernhard, ed., 1955).

165. *But see Are Human Rights Political Questions*, *supra* note 163, at 292. Boyd argues that decisions by national courts on war related claims would not interfere with ongoing treaty negotiations. *Id.* The issue, however, is not only whether future negotiations may be affected, but also whether a court ruling is consistent with an existing treaty. In this context, Boyd does not analyze the history of the treaties negotiated after 1945, including the 1946 Paris Agreement which, as noted, covers claims based upon harm to individuals.

V.
CONCLUSION

In general, the rules of international law reflect experiences and policies which have been considered valuable and worth preserving. The practice of subsuming war-related claims within the process of reparation, and thus not allowing the individual resolution of such claims by national courts, had a two-fold-basis. First, it was consistent with the broader classical rules of international law under which aliens must have their claims, whether arising from wartime or peacetime events, protected by their home countries. Second, it reflected the practical necessities of peacemaking, as the presence of claims controlled by individuals would further complicate the always difficult process of international peace negotiations.¹⁶⁶

The modern rules *in bello* to benefit the individual in war did not affect these two converging bases of the rules on reparation after World War II. Rather, when the victorious powers made their peace with states in Eastern and Central Europe in 1947, with Japan in 1951, and with Austria in 1955, they deliberately decided to follow the classical approach, notwithstanding the occasional arguments of individual countries (such as that of the Netherlands on the London Debt Treaty of 1953) that a new approach should be followed.

In the case of Germany, the unilateral approach of the victorious side of exacting what reparation it saw fit was ended in 1952 and replaced by a novel scheme under which Germany was obliged, on the basis of a treaty, to pay appropriate compensation within its domestic legal system. When all outstanding issues concerning war, peace and occupation were resolved in 1990 in the "2 + 4

166. "Not infrequently, in affairs between nations, outstanding claims by nationals of one country against the government of another country are 'sources of friction' between the two sovereigns." U.S. v. Pink, 325 U.S. 203, 225 (1942). To resolve these difficulties, nations have often entered into agreements settling claims of their respective nationals. As one treatises writer puts it, international agreements settling claims by nationals of one state against the government of another "are established international practice reflecting traditional international theory." Dames & Moore v. Regan, 453 U.S. 654, 679 (1981), citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 262 (1972).

Within the United States the practice of settling war claims began with the Jay Treaty of 1794 with Great Britain. See JOHN MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY Ch. IX and X (1898) [hereinafter HISTORY AND DIGEST OF INTERNATIONAL ARBITRATION]. The practice was continued after the French Revolution and the Napoleonic Wars, see Jesse S. Reeves, Note on Exchange v. M. Faddon, 18 AM. J. INT'L. L. 320 (1924), and the American Civil War. See U.S. v. Weld, 127 U.S. 51 (1888); HISTORY AND DIGEST OF INTERNATIONAL ARBITRATION, supra, Ch. XIV and XV. After World War I, the United States concluded a separate treaty with Germany to settle certain damages, see 42 Stat. 2200. A few years later, a treaty was concluded between the United States and Mexico in the wake of an Mexican revolution of 1912, again settling claims, 43 Stat. 1730; see also Oetjen v. Cent. Leather Co, 246 U.S. 297 (1918). After 1945 this tradition of settling claims continued. See HENRY STEINER, DETLEV VAGTS AND HOWARD KOH, TRANSNATIONAL LEGAL PROBLEMS 472 (4th ed. 1994).

In Dames & Moore v. Regan, 453, U.S. 654 (1981), the U.S. Supreme Court upheld the power of the President to enter into the Declaration of Algiers. Under this treaty, both Iran and the United States agreed to adjudicate claims of their governments and their nationals through the Iran-United States Claims Tribunal, despite the fact that this required suspending cases already filed by U.S. nationals in courts of the United States. See also RESTATEMENT (THIRD) FOREIGN RELATIONS § 902, Comment i (1987).

Treaty,” the adequacy of the results of this novel scheme were not explicitly addressed. Indeed, archives show that Germany deliberately declined to agree to a formal peace conference, or to agree to a formal peace treaty in order to avoid new demands for reparations. Along these lines, Germany would certainly have welcomed a specific clause on the issue of reparations in the “2 + 4 Treaty” instead of the broader provisions that were included in the Treaty. As to the reasons for the approach ultimately adopted in the Agreement, it is appropriate to assume that the Allied Powers, and the United States in particular, decided not to consent to more a specific language on reparations. Critically, however, neither the “2 + 4 Treaty” nor any of the agreements that preceded it purported to create yet another novel reparations scheme, under which individuals could directly assert claims under international law.

When, almost ten years after the “2 + 4 Treaty” came into effect, individual claims by U.S. citizens were brought before U.S. courts, complex negotiations led the German government and private companies to pay ten billion DM for the benefit of a broad range of victims. Throughout this process, the United States followed the same approach as in 1990, declining either to conclude a treaty with Germany to address the reparations issue, or to pass domestic legislation which would have terminated pending suits and prevented additional proceedings. Thus, the U.S. declined to adopt a final and explicit legal position on the German reparations issue in 1945, 1953, 1990 and 2000. The extraordinary length of time allowed for peacemaking with Germany resulted from the historical reasons underlying U.S. policymaking, including the unprecedented kind and degree of Germany’s atrocities during the war, the initial post-war Allied approach to peacemaking, the commencement and the end of the Cold War, and Germany’s rebirth as a valued ally.

Beyond its execution of an agreement with Germany and its participation in a Joint Statement, the only measure the United States was prepared to publicly take consisted of its filing of a “statement of interest” in all courts in which relevant law-suits were pending or would be filed in the future. It is generally accepted that such statements have considerable persuasive authority, but by their terms they do not claim to be legally dispositive. These statements of interest are in sharp contrast to similar documents filed by the U.S. in the parallel Japanese company U.S. litigation, which firmly rejected any continuing viability of private claims based on the language of the 1951 Peace Treaty. This contrast highlights that it is not a change in international law, but a perceived difference in the structure of peacemaking with Germany and Japan, which underlies American public policy.

The implications for peacemakers charged with negotiating strategies in connection with present and future conflicts having the potential for subsequent private claims for war-related damages are evident. Future negotiators must take into account the differing national court experiences of Germany and Japan. While, as a matter of international law, such private rights of action may not exist, the prudent peace-maker would likely insist on an express waiver of claims against both the defeated state and its nationals, even where, as in the

U.S., precedential legal authority would indicate that silence in a peace treaty reflects such a waiver.¹⁶⁷

A specific, central aspect of peacemaking concerns the nexus between the amount of reparations, their domestic distribution in the recipient country, and the timing of payment by the defeated state.¹⁶⁸ These modalities in the process of peacemaking have a direct and enormous impact on the effectiveness of the entire arrangements for peace. If victims of war receive only a small fraction of whatever is due to them, or if they receive it decades after the end of the war, the purpose of such payments is achieved to a much lesser degree than in case of prompt payment after the war. Moreover, from the point of view of peacemaking as an ending of political hostility and the beginning of friendly relations, any significant delay of reparations-related elements will necessarily stand in the way of an early normalization of the political atmosphere and of reconciliation. In the defeated country, public acceptance of the sacrifices required by reparations will be most likely to be accepted immediately after termination of armed hostilities, and support is therefore likely to decrease as time goes on and persons and circumstances change.

For any arrangement designed to organize peace and normal relations after a war, it is crucial to address the situation of those persons and groups of the victorious powers who have been most affected and who need to receive most benefits under the agreed-upon scheme of reparations. Thus, the political process in the recipient country during the period of negotiations for peace must in future cases focus not only on relations with the defeated state, but also on the necessity to lay the foundations for peace on the domestic front. To this end, those groups especially affected will need to be identified in the political process, and the amount of reparations and their domestic distribution must reflect the requirement of peacemaking within the domestic context. In the past, the weakest front of peacemaking and reparations has been on this domestic side of the victorious powers.

The attempt to privatize peacemaking at the end of a lengthy historical process of government-to-government negotiations in order to provide the appropriate satisfaction for specially affected groups is only a second or third best alternative to comprehensive peacemaking by governments at a time near the end of military hostilities. The lessons after the Second World War have indirectly reconfirmed the wisdom behind the classical rules of international law which place peacemaking into the hands of governments and not of individuals. In principle, governments were rightly prepared after 1945 to follow these rules. However, to the extent that these rules were in part modified and revised by way of adding elements of open-endedness, of permitting delay and of allowing incursions of uncertainty and unilateralism into government-to-government peace-

167. See *Ware v. Hilton*, *supra* note 14.

168. For the compensation scheme in the U.S. after 1945, see War Claims Act of 1948, 50 U.S.C. § 2001. U.S. courts have declined to interfere in the domestic allocation of reparation funds, see *Wolf v. F.R.G.*, 95 F.3d 536 (7th Cir. 1996); *Hirsh v. State of Isr.*, 962 F. Supp. 377 (S.D.N.Y. 1997).

making, the inadequacy of government-to-government action led to lawsuits by individuals, albeit unsuccessful ones. Thus, the central lesson from the long-belated end of the World War II peacemaking process is that governments must more effectively, promptly and carefully incorporate the legitimate concerns of groups and individuals particularly affected by a war into the inter-governmental process of making peace.

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Policy Implications of World War II Reparations and Restitution as Applied to the Former Yugoslavia

By
Mark S. Ellis & Elizabeth Hutton*

I. INTRODUCTION

*Reparation is not just about money, it is not even mostly about money; in fact, money is not even one percent of what reparation is about. Reparation is mostly about making repairs; self-made repairs, on ourselves.*¹

The focus on reparation and restitution claims is related to a fundamental shift in international law toward the plight of victims during conflicts. In the first half of the 20th Century, state sovereignty went unchallenged, and states were reluctant to give credence to the notion of victims' rights. As victims fought to restore their dignity, the typical state responses were disinterest and neglect.² World War II changed this. The international community witnessed a holocaust and vowed "never again." Citing this as a period of unprecedented human rights atrocities, victims and their representatives demanded justice.

The war crimes of World War II were unprecedented in their scope, their systematic nature, and their visibility to the international community. They were so horrific that they prompted the creation of a new term, "violations of international humanitarian law." As a result, the Nuremberg and Far East trials following World War II were legal landmarks in holding government officials accountable for atrocities. Nuremberg was the first major exception to state impunity for war crimes. The idea that victims of human rights violations are entitled to seek action against the responsible individuals or nation state is now

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1. Brandon Hamber, *Repairing the Irreparable: Dealing with Double-binds of Making Reparations for Crimes of the Past*, (Centre for the Study of Violence and Reconciliation, Johannesburg, South Africa), 1998, 1 (citing Professor Chinweizu, "Reparations and a New Global Order: A Comparative Overview," Paper presented at the First Pan-American Conference on Reparations, Abuja, Nigeria (April 29, 1993)).

2. JOHN BORNEMAN, *SETTLING ACCOUNTS: VIOLENCE, JUSTICE, AND ACCOUNTABILITY IN POSTSOCIALIST EUROPE* 117 (1997).

set forth in numerous international human rights treaties and conventions.³ These include the Universal Declaration of Human Rights,⁴ the International Covenant on Civil and Political Rights,⁵ the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,⁶ and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.⁷ By establishing this set of universal principles, the international community moved to legitimize interference by the “world community” in the “domestic affairs” of the state.⁸ The protection of victims’ rights would no longer be the sole domain of the sovereign state. The international community was becoming more vigilant in addressing the rights of victims.

In the decades following World War II, state conflicts have increased, and atrocities against innocent civilians continue to be committed.⁹ Genocide, crimes against humanity, war crimes, extra-judicial executions, torture and arbitrary arrest have become all too familiar. But international sensitivities and sensibilities to these events have continued to develop as well.

One aspect of the heightened recognition of victims’ rights is the current focus by the international community on victims’ claims against the state for reparations and restitution. In the absence of comprehensive legislation regarding restitution and reparation claims, the judgment of the Permanent Court of International Justice in the Chorzow Factory case provides a useful description of the ideology governing this concept. In that case, the court stated:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages of loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation for an act contrary to international law.¹⁰

3. VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1-11 (1995).

4. Universal Declaration of Human Rights, G.A. Res. 217A (111), U.N. GAOR, 3rd Sess., arts. 8,10, at 71, U.N. Doc. A/810 (1948).

5. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1996), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

6. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (1984), *opened for signature* Feb. 4, 1985, 23 I.L.M. 1027, 24 I.L.M. 368.

7. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/34 (Dec. 11, 1985).

8. See generally M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 584 (1996).

9. M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROBS., 9 (Fall 1996), n.2 (citing Erik Hobsbawm, THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991 (1995)).

10. LOVELL FERNANDEZ, *Possibilities and Limitations of Reparation for the Victims of Human Rights Violation in South Africa*, in CONFRONTING PAST INJUSTICES: APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY 65, 67 (1996) (citing

In essence, *restitution* attempts to re-establish the conditions existing prior to the human rights violation, and as such, encompasses *inter alia* the restoration of citizenship, employment, and liberty. It also refers to the return of confiscated or stolen goods.¹¹ *Reparation* is due to victims in instances where damage, including physical damage, emotional suffering, and the loss of opportunities and earning power, may be ascertained in economic terms. The term refers to material compensation for an un-returnable loss, such as the loss of human life.¹² *Rehabilitation* covers the various forms of care and service that may be required by victims, such as medical and legal care, in addition to "measures to restore the dignity and reputation" of individual victims.¹³ Together, these concepts encompass a means by which perpetrators can begin to amend past injustices against individuals and groups.¹⁴ They outline a process rather than a specific solution.

There is much debate among international legal experts about whether: 1) restitution and reparations can achieve reconciliation without some forum for accountability, and 2) recognition of victims' suffering can be separated from perpetrators' acknowledgement of the injustices they committed. Even token reparations may constitute symbolic recognition of an injustice committed and can prove powerful in the reconciliation process.¹⁵ However, it is difficult to imagine restitution and reparations without accountability. Alone, it is unlikely that they can offer satisfaction to either the victims or the world community. A state must demonstrate that it accepts moral responsibility for its past. Restitution and reparation must, at a minimum, be integrated with the distinct concepts of acknowledgement and accountability. Restitution and reparations can be seen as cultural concepts encompassing a "mosaic of recognition," undertaken with the ultimate goal of reconciliation, which must incorporate acknowledgement and accountability.¹⁶

The admission of wrongdoing and acceptance of responsibility by the perpetrators for injustices committed is absolutely essential to reconciliation. Without such admission and acknowledgement, the injustice, no matter how long ago it occurred, will fester and ultimately prevent reconciliation. Historical injus-

Concerning the Factory at Chorzów (Merits) (F.R.G. v. Pol.), 1928 P.C.I.J. (Ser. A) No. 17, at 47 (Sept. 13)). The Chorzow Factory case involved Polish expropriation of German owned industrial property outside of Poland. The vote was 10-3 with one dissenting opinion. The case established a certain basis for restitution, which remained in place until the 1970s. In its decision, the PCIJ set forth two standards: for takings or other acts which are illegal under international law, the "payment of a sum corresponding to the value which a restitution in kind would bear;" whereas for other takings which are not illegal, "the value of the undertaking at the moment of dispossession, plus interest to the day of payment."

11. ELAZAR BARKAN, *THE GUILT OF NATIONS* xix (2000).

12. *Id.*

13. FERNANDEZ, *supra* note 10, at 68 (citing UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUBCOMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES; STUDY CONCERNING THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, at 57, U.N. Doc. E/CN.4/Sub. 2/1993/8 (1993)).

14. BARKAN, *supra* note 11.

15. *See generally id.*

16. *Id.* at xix.

tices are continuous injustices if they are not purged; they will lead to cycles of retributive violence. By voluntarily admitting wrongdoing for past injustices, a state creates an environment in which citizens are forced to evaluate their own role vis-à-vis the atrocities committed. In turn, such an admission stimulates public discussion and debate; it often directly and forcefully contradicts citizens' perceptions of their country's history. It also helps the state purge its own guilt and create a new national identity through atonement.¹⁷

Existing restitution claims made by World War II victims and their representatives clearly demonstrate the fact that while some restitution cases have provided the groundwork for further reconciliation between victims and perpetrators, other attempts at gaining compensation have only succeeded in fostering new animosity.¹⁸ Germany and Japan represent the two extremes of this spectrum. This article will contrast and compare both models for lessons that may be applicable to the issue of reconciliation in the former Yugoslavia.

II.

GERMANY AND JAPAN

Germany's post-war response to the Jewish community was an important step in the re-building of the German Federal Republic.¹⁹ It also set the bar for the payment of reparations. In 1952, Germany began compensating not its victors, but its victims. By the year 2030, it is estimated that Germany will have paid over \$70 billion in the form of reparations to the state of Israel and indemnification to Holocaust survivors.²⁰ Total current payment of claims have far outstripped those made initially, in terms of both monetary value and acknowledgement of responsibility.²¹

17. *Id.* at 29.

18. *Id.* at xxiii-xxviii.

19. *Id.* at 8.

20. Hamber, *supra* note 1, at 5.

21. Motivation for participating in reparation programs, however, is not based solely on an appreciation of moral responsibility. For instance, the German Industry Foundation Initiative was created in February 1999 to provide assistance to surviving Nazi-era slave and forced laborers. Germany's government and industry agreed to each contribute DM 5 billion (equivalent to US\$ 2.28 billion) to fund the foundation. German companies had been reluctant to make donations, as the United States could provide no water-tight guarantee against further claims (as was evidenced in a March 2001 New York district court ruling that refused to throw-out a class action brought against German banks). However, in the past few months, the dismissals of important cases pending against German companies in the United States (including the consolidated class action suits against industrial companies, against insurance companies, and against banks) have been essential in establishing a satisfactory "legal peace" prompting German companies to finally pledge their contributions. Of particular interest was the dismissal by the United States Second Circuit of the Gutmann case (the last class action suit against German banks) on May 17, 2001. As a direct result, on May 30, 2001, the German Bundestag confirmed the existence of a sufficient measure of legal security for German companies in the US. This resolution not only allows the German fund to finally begin making payments to the estimated one million former forced laborers, but also served to alleviate the concerns of German industry regarding the possibility of new claims in the future. It has been suggested that this security, rather than an appreciation of moral responsibility, was the necessary and sufficient condition for Germany industry contribution to the compensation fund. *The Cheque Isn't in the Post*, *THE ECONOMIST*, March 15, 2001 at 49. See also German Economy Foundation Initiative Steering Committee at <http://www.stiftungsinitiative.de/eindex.html> (last visited Sept. 4, 2001); see

Even more striking is the degree to which the collective process of commemorating the Holocaust has become an entrenched feature of both Israeli and German identity. The claims paid to survivors are secondary to what has been a remarkable process of openly acknowledging German responsibility for crimes committed during the Holocaust. Despite continued tension on both national and individual levels, it is fair to say that restitution negotiations between Germany and the various governmental and non-governmental representatives of Holocaust survivors have succeeded in as much as they have enabled a dialogue between perpetrators and victims. Less than fifty years ago, the idea of such a dialogue would have been unthinkable.

One product of this dialogue is a version of the past acceptable to most people, Germans and Jews alike. While there may be disagreement over particular details of the past and about the way in which it informs the present and the future, there is general agreement that the Holocaust represented a deliberate attempt by German authorities to exterminate the Jewish community and, as such, was a crime against humanity for which there can never be complete compensation. In January 2001, a record number of Germans watched a television documentary on the Holocaust;²² years ago such an event would have been unlikely at best. Germany's acceptance of past criminal acts—at both state and popular levels—is a sign of maturity and growth for the German nation.²³

The unerring commitment to memory demonstrated by both perpetrators and victims effectively refutes the simplistic arguments that a nation's development requires that past injustices be consigned to history. German and Israeli behaviors indicate a shared belief that incorporating a narrative of the past into present-day life is a key component of national identity. The tremendous debate and struggle that such an effort entails suggests that successful reconciliation begins with self-accountability.

Japan, on the other hand, has adopted a very different attitude about its role in World War II, a mentality that has seriously compromised its ability to reconcile with the victims of its wartime aggression. Perhaps the most significant illustration of this fact is the status of restitution claims brought against the Japanese government on behalf of the *ianfu*, the military comfort women coerced into a government-organized system of sexual slavery during the war.²⁴

also The Conference on Jewish Material Claims against Germany at <http://www.claimscon.org> (last visited Sept. 4, 2001).

22. Allan Hall, *Germany Turns the Relics of its Nazi Past Over to Tourism*, SUNDAY TELEGRAPH, February 11, 2001, at 40.

23. *Id.*

24. In the closing months of World War II, American forces in Asia and the Pacific noted the existence of female survivors or some evidence of female occupation within or in close proximity to fallen Japanese holdings, even those on the frontline. Translators and survivors explained that these were the "comfort women" of the Imperial Forces, women whose responsibilities included the sexual, as well as domestic and medical, needs of the troops. Although a percentage of these women were Japanese, the vast majority were Koreans, with some Filipino, Taiwanese, Malay, Indonesian, and Chinese women, and a small number of European women from POW camps. GEORGE HICKS, *THE COMFORT WOMEN* 159 (1995); DAVID ANDREW SCHMIDT, *IANFU – THE COMFORT WOMEN OF THE JAPANESE IMPERIAL ARMY OF THE PACIFIC WAR* 12 (2000); Barkan, *supra* note 11, at xix.

In the post-war period, it was widely known that large numbers of women had provided sexual services to Japanese troops, and the term “comfort women” was integrated into popular narratives about World War II.²⁵ To an observer unfamiliar with the details of the *ianfu* cases, the far-reaching consequences and malignant implications of this familiar term may therefore seem surprising. The existence of the “comfort system” was a hidden feature of the war in Asia, and in this sense reflects a Japanese tendency to normalize events of the war and deny their current relevance.

For over fifty years, the Japanese government has denied any official role in the routine rape and enslavement of Asian and European women, a position reinforced by the relative invisibility of *ianfu* as a victim group. Increased activism concerning the issue of comfort women during the 1990s hit an impasse as the Japanese government remained staunchly opposed to any formal statement of accountability and continued to deny major aspects of the historical narrative as pieced together by scholars and survivors. When Kim Hak Sun, a Korean *ianfu*, filed a lawsuit against the Japanese government in 1991, the government’s responses to the trial ranged from indignation to shock to apathy.²⁶ Japan has not altered its position.²⁷

International reactions to the comfort system also tended to normalize wartime extremes. Allied authorities treated *ianfu* as professional sex workers rather than war victims, a stance often rationalized by Cold War considerations. The need to enlist a strengthened Japan as a pro-Western ally outweighed the need to investigate evidence of sexual slavery.²⁸ Meanwhile, Asian governments showed little interest in championing the issue, especially given the region’s growing dependence on the Japanese economy.²⁹ Normalization treaties between Japan and its neighbors completely side-stepped the issue of restitution for wartime victims in the interest of encouraging Japanese aid and investment.³⁰

The problem in Japan is not about possible compensation for victims; it is about Japan’s unwillingness to truly acknowledge the injustices committed. In 1992, the Voluntary Service Corps Problem Restitution Council, an organization

25. See generally HICKS, *supra* note 24; SCHMIDT, *supra* note 24.

26. See generally HICKS, *supra* note 24.

27. Hence, in late March 2001 the High Court overturned a 1998 ruling from a district court that ordered the government to pay compensation to three South Korean women. The Japanese government relies on these and other judicial pronouncements to question the legitimacy of reparation claims. As such, the Japanese government continues to contend that post-war international and bilateral treaties settled all wartime claims, the statute of limitations on such claims has expired, and international labor rules do not require compensation for sexual slavery. *Japan Court Rules Against ‘Comfort Women’*, CNN, March 29, 2001, at <http://europe.cnn.com/2001/WORLD/asiapcf/east/03/29/japan.comfort.women/index.html>.

28. Postwar documents recently declassified in the United States indicate the degree to which Allied powers were aware of Japanese government involvement in the comfort system and point to Allied complicity in the failure to investigate and prosecute its establishment as a war crime. SCHMIDT, *supra* note 24, at 19.

29. HICKS, *supra* note 24, at 196.

30. BARKAN, *supra* note 11, at 51-52.

working on behalf of the Korean *ianfu*, set forth a proposed restitution agreement that included the following components:

1. That the Japanese government admit the forced draft of Korean women as comfort women;
2. That a public apology be made for this;
3. That all barbarities be fully disclosed;
4. That a memorial be raised for the victims;
5. That the survivors or their bereaved families be compensated;
6. That these facts be continuously related in historical education so that such misdeeds are not repeated.³¹

The fact that the demand for compensation is vague and is not the first priority for *ianfu* indicates the relative unimportance of material restitution in light of more intangible demands. The most important message is that the greatest injustice is Japan's continued failure to acknowledge and respond appropriately to these war crimes.³² Without this acknowledgement, compensation is worth little.

Equally important is the fact that Japanese narratives of the war do not provide a context within which the *ianfu* experience can be acknowledged. Japanese discussion of the tremendous human suffering during and after the war years is framed by the images of Hiroshima and Nagasaki as symbols of ultimate victimization. This narrative places Japan in the role of victim rather than perpetrator and characterizes Japanese society as peace-loving and non-militant.

Representatives and advocates for the comfort women have presented an historical narrative very different from the "normalized" version of wartime events offered by Japan and accepted by the world community.³³ What emerges from government archives and personal testimony of survivors and perpetrators is a portrait of the "large scale, officially-organized system of rape by Japanese Imperial Forces."³⁴ Historian George Hicks writes, "The comfort system con-

31. Hicks, *supra* note 24, at 145.

32. While the initial position of the Japanese government was denial of any official involvement, the emergence of recent legal action has prompted a shift towards some limited acknowledgement. Japan continues, however, to deny any *legal* responsibility. Frustrated by the lack of engagement of these issues on the part of the government, survivors and non-governmental organisations from across Asia established the Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery (convened in Tokyo from December 8-12, 2000). In the interest of justice for the "comfort women" the Tribunal was called upon to determine the responsibility of various high-ranking officials of the Japanese government and military, including Emperor Hirohito for sexual slavery and rape as crimes against humanity. The People's Tribunal issued its findings in the final Judgment on March 8, 2001 (International Women's Day). See <http://www1.jca.apc.org/vaww-net-japan/> (lasted visited Aug. 23, 2001). See also Phyllis Hwang, *Oblige Japan to Pay Reparations to Former "Comfort Women"*, INTERNATIONAL HERALD TRIBUNE, December 13, 2000, at 8; *Discomforted Japan*, THE ECONOMIST, December 16, 2000, at 21.

33. *But see* recent statements issued from the All-China Lawyers Association, the All-China Women's Federation and the China Foundation for Human Rights Development (all government-supported groups) supporting court action. Five Chinese women from central China filed a lawsuit in Tokyo in 1995 demanding an apology and compensation from Japan for suffering caused by their sexual servitude during the war. The Tokyo District Court ruled against them. "*Sex Slaves*" Win Support Against Japan, CNN, June 20, 2001, at <http://www.cnn.com/2001/WORLD/asiapcf/east/06/20/china.sex.slave/index.html> (last visited Aug. 23, 2001).

34. Hicks, *supra* note 24, at xi.

sisted of the legalised military rape of subject women on a scale—and over a period of time—previously unknown in history.”³⁵

The fact that restitution for comfort women has become fraught with accusations of Japanese guilt is due to a complex interplay between national agendas, female activism, investigative scholarship, and individual testimony. A cause that merited minimal attention and elicited no real debate for most of the twentieth century has emerged in the past ten years as the symbolic focal point for new and urgent restitution claims against Japan. The success of these immediate claims depends on the willingness of the Japanese government and the Japanese people to reconsider a “closed” issue in full recognition of what this may entail for representatives of the comfort women, for other victims of Japanese aggression, and for Japanese nationalism. What is required of Japan is an “admission of guilt and demonstration of sincere contrition on behalf of the government with the support of the Diet and the Imperial family.”³⁶ Given the modest amount of the proposed financial compensation to *ianfu*, continued Japanese resistance to restitution should be understood as a response to its more symbolic and intangible content, rather than its material dimensions.³⁷

III.

YUGOSLAVIA

For the former Yugoslavia, restitution and reparations will be of secondary importance for achieving reconciliation among the region’s diverse peoples. Acknowledgement and accountability will be indispensable and fundamental to the reconciliation process, and it will be Serbia—and Croatia to a lesser extent—that will determine whether or not this goal will be achieved.

The legacy of World War II is evident in the ways in which the narratives of wartime experiences continue to inform national ideologies, most importantly among the Serbian population. Although it would be inaccurate to portray the disintegration of Yugoslavia as an inevitable result of the failure to deal with the injustices that swept the region during World War II, it is unlikely that these wartime experiences could have been invoked with the same degree of intensity had there been any substantive attempt towards reconciliation.

During World War II, the Ustashe Nazi puppet state in Croatia vowed to kill, deport, or convert Croatian Serbs to Catholicism. Particularly ingrained in Serbian narratives of wartime victimization is the murder of thousands of Serbian children at the Jasenovac concentration camp, children who would have been the contemporaries of Radovan Karadžić and Slobodan Milošević. It is no

35. *Id.* at xv.

36. SCHMIDT, *supra* note 24, at 5.

37. In 1996, the amount proposed by the Asian Women’s Fund, a private fund founded to commemorate the 50th anniversary of the end of the war and supported politically by the Japanese government, was two million yen, the equivalent of U.S. \$19,000. It is significant to note that most surviving *ianfu* have rejected the amount as an insult while only a relative few have accepted the offer. Most survivors and their representatives resented the fact that while the money came with a letter of apology from Prime Minister Tomiichi Murayama, the letter did not acknowledge responsibility of either the Japanese government or army. See BARKAN, *supra* note 11, at 46-64.

coincidence that Omarska, a concentration camp for Bosnian Muslims operational during the early 1990s, and infamous for reports of rape, torture, and mass murder, is located close to Jasenovac. Commenting on the atrocities committed at Omarska, one high-ranking Serbian official noted, "Write about the 11,000 Serb children killed in the Kozara Mountains in World War II. Perhaps you will have a deeper understanding of why this happened in 1992."³⁸ Clearly, from a Serb perspective, restitution and reparations for World War II victims have been insufficient to the degree that victim narratives continue to legitimate military aggression and violations of human rights. Serbian hostility, stemming from World War II, is exacerbated by international actions of the past decade, because Serbia still sees itself as a victim and sees these actions as continued attempts to victimize it.³⁹

In order to comprehend the difficulties faced by the former Yugoslavia in achieving reconciliation among its diverse peoples, it is necessary to understand the enormity of the atrocities committed during the Yugoslav wars. During the Kosovo conflict alone, the international community witnessed some of the most extensive human rights violations since the end of World War II. Forced displacements, killings, rape, sexual assault, arbitrary detention, pillaging of civilian property, use of "human shields," violations of medical neutrality, torture, and cruel and inhuman treatment were all acts documented between March 2 and June 10, 1999.⁴⁰ Approximately 86,300 refugees were displaced from Kosovo during this period, representing over 90% of the estimated Kosovar Albanian population.⁴¹ Summary and arbitrary killings were widespread, executed primarily by Serb forces against Kosovar Albanians.⁴² The total number of Kosovar Albanians killed exceeded 10,500.⁴³ Serb forces frequently used rape and sexual assault as instruments of intimidation.⁴⁴ The violations of medical neutrality included the expulsion of Kosovar Albanian medical personnel from hospitals, denial of health care services to Kosovar Albanian patients, and the wholesale destruction of approximately 100 hospitals, clinics and pharmacies by Serbian forces.⁴⁵

The International Criminal Tribunal for the Former Yugoslavia (hereinafter "ICTY") was not established by powerful victor nations, but by an international body that represents virtually all of the world's countries. It is founded on a more advanced body of international law than existed during the Nuremberg and

38. See Tina Rosenburg, *Defending the Indefensible*, THE NEW YORK TIMES MAGAZINE, Apr. 19, 1998, at 46.

39. *Id.*

40. These findings were documented in a definitive study conducted by the American Bar Associations' Central and East European Law Initiative (CEELI) and the Science and Human Rights Program of the American Association for the Advancement of Science (AAAS). ABA/CEELI, POLITICAL KILLINGS IN KOSOVA/KOSOVO (2000), available at <http://hrdata.aaas.org/kosovo/pk/toc.html> (last visited Aug. 4, 2001).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* Rape as a war crime was introduced in a case before the ICTR. See *Prosecutor v Jean Paul Akayesu*, ICTR 96-4-I (1998).

45. ABA/CEELI, *supra* note 40.

Far East Trials. The ICTY was established by a Security Council Resolution pursuant to its powers under Chapter VII of the UN Charter "to maintain or restore international peace and security."⁴⁶ Its enabling statute grants jurisdiction in four areas of substantive law which focus on *individual accountability* for (1) grave breaches of the 1949 Geneva convention, (2) violations of the laws or customs of war, (3) genocide, and (4) crimes against humanity.⁴⁷

In the former Yugoslavia, there has been no real official effort to focus on restitution and reparations for victims of the Bosnian and Kosovo conflicts. The ICTY was not intended to deal with victim compensation and it is not authorized to award victim compensation.⁴⁸ However, its focus on accountability for individual acts does not relieve the state from its obligation to provide compensation. Under Rule 106 of the Rules of Procedure and Evidence, the ICTY transmits to the competent authorities of a state its findings that the accused caused injury to the victim. The victim (or his/her representative) may bring an action in the national court or other competent body to obtain compensation.

This approach provides a way for victims to obtain compensation by relying on the ICTY's standing authority under the UN Security Council. The ICTY's statute authorizes the Trial Court to order the return of stolen property or proceeds from the sale of such property to the victim. In establishing the ICTY, the UN Security Council felt that people who were forced to leave their property behind as a result of ethnic cleansing should retain property ownership.⁴⁹ The ICTY's rules also allow the Trial Court to hold a special hearing to determine the matter of restitution of property or its proceeds.⁵⁰ The ICTY's authority extends over such property or its proceeds even to third parties not otherwise connected with the crime.⁵¹ It is ultimately, however, the national courts that will have jurisdiction over such claims. The ICTY is simply not set up to resolve property claims.⁵²

The new states of the former Yugoslavia have not themselves rectified past injustices by prosecuting wrongdoers, nor have they made efforts to restore the dignity of the victims. Accountability for the former Yugoslavia has been structured solely through the ICTY. However, Yugoslav federal and national leaders continue to contest the authority of the ICTY, so it is not apparent whether its judgments will offer a starting point for restitution of victims, let alone reconciliation. Under Milošević's regime, Yugoslavia simply refused to co-operate with the ICTY.⁵³ Even Milošević's successor, Vojislav Koštunica, has refused to assist in apprehending perpetrators indicted by the ICTY.⁵⁴ The current govern-

46. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/INF/49 (1993).

47. Rosenberg, *supra* note 38.

48. See generally SCHARF, *supra* note 3.

49. See S.C. Res. 779, U.N. SCOR, 47th Year, Res. & Dec. 1992, at 34, U.N. Doc. S/INF/48 (1992).

50. ICTY R. P. & EVID. 105.

51. *Id.*

52. SCHARF, *supra* note 3, at 258.

53. THE ECONOMIST, *supra* note 21, at 49.

54. *Id.*

ment has failed to adopt domestic legislation to allow the surrender of fugitives indicted by the ICTY.⁵⁵ The perception among Serbs is that the ICTY itself is another example of persecution of Serbia. Public opinion in Serbia regarding the ICTY and its ability to deliver justice reflects the belief that it is part of a witch hunt—charging the Serbian leadership on false grounds and conducted by the international community in order to weaken the Serbian state. The more time that elapses between human rights atrocities and public acceptance of perpetrator accountability, the more such events become normalized in the collective memory as inevitable, justifiable, or unremarkable.⁵⁶

As the primary perpetrator of the conflicts in the former Yugoslavia, Serbia must show a willingness to recognize and acknowledge the atrocities committed, particularly in Bosnia and Kosovo. It must abandon its attempts to “normalize” war crimes as an unremarkable by-product of war, accept responsibility, and atone for the acts committed in these two regions of the former Yugoslavia. Only by purging the ethnic nationalism formulated by the Milošević regime—and the violence that brought so much suffering to the region—can Serbia be reintegrated into the international community.

This task will not be easy, because Serbia has been isolated from the international community for the past ten years and still sees itself as a victim mistreated by the world community. Today, most Serbs are not concerned about whether individuals who committed crimes in Bosnia and Kosovo are held accountable.⁵⁷ This is a sure sign of Serbia’s continued self-perception as victim. The majority of Serbs continue to see themselves as part of a group persecuted by an unsympathetic international community. Groups that regard the narrative of victimization as the constitutive factor of collective identity demand security and sympathy, and use these demands as the basis for a relative standard of morality. This is the case in Serbia. There has been minimal recognition of victims and very little prosecution of wrongdoers in the former Yugoslavia.⁵⁸ There has been little or no justice, while accountability has been shifted from the state to outside forces.⁵⁹

In the final analysis, Serbia’s willingness to approach the negotiating table and acknowledge its own accountability will be the most essential component of restitution. It is certainly a step that the Japanese government has thus far been reluctant to take, and a step for which Yugoslav authorities demonstrate minimal enthusiasm. And while the recent cooperation between Yugoslav authorities and the international community signals important differences between the current administration and that of Milošević, it proceeds from a utilitarian recogni-

55. See statement by Prosecutor Carla Del Ponte, January 30, 2001. See Press Release, Office of the Prosecutor of the ICTY, Statement by Prosecutor, Carla Del Ponte, on the Occasion of her Visit to Belgrade (Jan. 30, 2001) at <http://www.pict-pecti.org/news/archive/months%202001/january/ICTY.01.30.ponte.html>.

56. See Maggie O’Kane, *Hunting Radovan*, THE GUARDIAN, Feb. 24, 2001.

57. Discussions between author and colleagues in Belgrade during numerous visits to Yugoslavia during and after the Bosnian and Kosovo wars.

58. BORNEMAN, *supra* note 2.

59. *Id.* at 105.

tion of the need for change rather than a desire to confront past injustice, both recent and historical. There has been a preference for “getting on with things,” rebuilding the economy and re-establishing relations with the European community.

As in Japan, Yugoslav leaders have argued too often that restitution for and criminal prosecution of war crimes is too time-consuming, too expensive, and too explosive. From their standpoint, the most viable path to reconciliation has appeared to be the speedy normalization of the present situation. However, World War II restitution and reparation claims demonstrate that “forgetting” past injustice in the interest of a normalized present is a politically expedient act that fails to acknowledge individual human responses to suffering. There is an enduring need among victims for recognition and accountability, and this need transcends the legal and pecuniary language in which their demands are articulated.⁶⁰

Accountability is not compatible with the impulse to rationalize or normalize past actions, and, therefore, it cannot occur in a political climate based on competing narratives of victimization. Serbian self-perceptions of victimhood must be modified in order to enable an admission of responsibility in the statements of its leaders, in its prosecution of war criminals, in its compensation to war victims and in its narratives about the conflict.

Recently, there have been some signs that Serbia is beginning to modify its long-standing position of ignoring the issue of accountability. The surrender of Slobodan Milošević by Serbian authorities to the ICTY was the most significant manifestation of this policy shift. It was a major step in starting the reconciliation process, but it was not without peril, as it caused a split within the Yugoslav government. The party of Yugoslav President Vojislav Koštunica, who declared the forced extradition of Milošević illegal, left the main parliamentary group. In contrast, the Serbian Prime Minister Zoran Djindjić ignored the Yugoslav Constitutional Court and moved forward to arrest and extradite Milošević to The Hague.⁶¹ Despite this split, a shift in policy that seems to embrace accountability has still emerged. With Milošević no longer part of the Yugoslav political landscape, key Yugoslav reformists are calling for an open debate within Yugoslavia about the atrocities committed by Serbs in Bosnia and Kosovo, and accountability for those responsible.⁶²

In one of the most significant developments in Yugoslavia’s current transition, the Serbian government is now supporting a major program to prepare the Yugoslav judiciary to hold domestic war crime trials. The program is premised on the need to hold individuals accountable for atrocities committed in order to begin the process of reconciliation. In doing so, the current Serbian authorities

60. See, for example, BRANDON HAMBER, ed., *PAST IMPERFECT: DEALING WITH THE PAST IN NORTHERN IRELAND AND SOCIETIES IN TRANSITION* (1998).

61. See *Extradition Sparks Belgrade Turmoil*, BBC News, June 29, 2001.

62. One of the leading proponents of this new emphasis is Nataša Kandić, of the Humanitarian Law Center in Belgrade.

are following the “German way” in agreeing that successful reconciliation begins with self-accountability.

During the past ten years, events in the Balkans have served as a vivid and horrifying illustration of the limits to coexistence when minimum guarantees of group security do not exist. In the Yugoslavia of the early 1990s, this minimum clearly had not been met. It remains to be seen whether Yugoslavia’s current leaders will see comprehensive restitution, based on acknowledgement and accountability, as the minimum requirement for future coexistence, however lengthy and expensive such a path might be.

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Closing Remarks— The Next Fifty Years

By
Jakob Finci*

I cannot avoid starting with a short story:

A long time ago, the synagogue in Berlin tried to find a rabbi. Two rabbis from a small Polish shtetl took the train to Berlin to get the good job. One was a really wise rabbi, as rabbis can be; the other one, well, it is not polite to say of a rabbi that he was dumb, but he was not so good. Since you always know in advance what the topic in the synagogue and shul will be, the not so good rabbi asked the wise one during the trip what he would talk about. The wise rabbi told him everything. In Berlin, the community leaders drew up the list of who would speak on Friday evening, and who would go next on Saturday morning. The not so wise rabbi got the first chance and said absolutely everything that he heard from the other rabbi. Now, the wise rabbi spent all night thinking about what he could say. In the morning, he decided the best solution was to repeat absolutely everything. So, he repeated the same story. The board of the community then met to decide which one to choose. They chose the second one. First, he was as wise as the first one, and second, he repeated everything, which meant that he was a fast learner.

So I must also be a fast learner because almost all my lines have already been delivered during last evening's and today's discussions. I have really a very difficult task because it is not easy to find a summary for everything that we have heard here, or even to predict what topics would appear in a similar seminar in twenty or fifty years. I hope that the topics would not be similar to the one today—reparations and restitutions to the victims of different conflicts. I think we learn not only from the past, but also from this symposium, the following lesson: these compensations have been, so to speak, too little and too late. In the period between 1952 and 1990, almost nothing was done. Now, the real question is: is this a legal problem, or a political problem? It seems that in this case, when we are talking about reparations for victims of the Holocaust and of the Second World War in general, the reasons were mainly political.

It is clear that Jews in Eastern Europe were victims, first of the Nazis, who looted everything, and caused the disappearance of more than seventy percent of the Jewish population, and then, of the communists, who nationalized almost

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everything. When the Claims Conference, with the Americans, as we heard a few minutes ago, arranged reparations for the survivors, it was only for the survivors in Western Europe, the United States, and Israel, not for those in Eastern Europe. Now, when the average survivor's age is over eighty-one, it is a little bit too late to start to do anything. Maybe it is clear that the money is not an issue. I think that the German President Johannes Rau said rightly, "It is not really money that matters. What they want is for their suffering to be recognized as suffering and for the injustice done to them to be named injustice." That is the reason why, as we heard a few minutes ago, even the International Organization for Migration Holocaust Victim Assets Programme got a few of the questionnaires back empty with a letter saying, "Thank you, that's enough, we don't need the money."

In 1945, the world said, "Never again." Yet, the world has not been able to prevent atrocities, or to stop wars in the last fifty years. We have been witnesses to what happened in Croatia, in Bosnia, Rwanda, Chechnya, Kosovo, and who knows who is next. So I hope that in twenty or thirty years time, we will not again be discussing what to do with the victims of all these conflicts and whom we should blame for doing nothing. It is also clear that the Geneva Convention, and UN declarations and resolutions cannot help a lot. They are international instruments but, as always, it is a question of how you apply these instruments.

Now my question is, "What can help in this situation, what can help us to face reality, the reality in which we live today and with which we should live tomorrow?" The idea in Bosnia is to try with a truth and reconciliation commission. For war crimes, we have the tribunal in The Hague. The tribunal will take care of between 120 and 140 war criminals. This is not enough for the ordinary people, however. Many people on different sides suffered a great deal. All of them think that they are victims because, particularly in regard to the Balkans, victimhood is almost a myth. Everyone is ready to be a victim and no one is ready to take even the smallest part of responsibility. The war in Bosnia was stopped by the Dayton Peace Accords. After a war it is always the winners who write the history. In our case we do not have winners and losers. Maybe it is fair to say that we have three losers, and that each of them wrote their own history. Now we have three different histories in our country. Now we are teaching our children three different histories in which it is written that our neighbors are our enemies. When you teach your children that your neighbors are your enemies, what can you expect in twenty or thirty years but a new war? It is clear that so long as NATO forces led by the U.S. are on the ground, we will have peace in Bosnia. As long as the Bosnian government is fulfilling, at least formally, all the obligations from the Dayton peace accord, we will have some kind of financial help from international financial institutions.

Yet without reconciliation between the people in Bosnia, all this is of little use. That is the reason why reconciliation is so important. I know that the truth cannot always help. Sometimes truth is painful and will not lead us toward reconciliation, but at least we should have a forum for the people to say what happened to them; for them to realize that they are not the only victims, that the

victims have also been from the other side. At the same time, lots of people who were drafted into the army, and who are not war criminals because they were regular soldiers, need a place to say what they did during the war. In Bosnia, a general amnesty was granted to everyone except the war criminals, so the reason why people will appear in front of such a commission will not be to get amnesty, but just to say what happened to them, or what they did, and why they cannot sleep well at night.

This individual acceptance of responsibility will be one thing that will appear from all these testimonies. Naturally, we also have a huge third group, besides victims and perpetrators, which is people who helped others, who helped people from ethnic groups other than their own. Just because of that, they are treated as traitors within their own ethnic group. They too need a place where they can talk about the good deeds they did during the war.

I think that religion can be one of the vehicles toward reconciliation. It is written in each of the holy books of our respective religions in the region that we have to forgive our enemies. Maybe now is the time for religion in Bosnia to play a positive role. Unfortunately, during the war, while religion was not a *casus belli*, was not a reason for the war, religion was misused by the politicians. A lot of the clergy accepted this misuse, thinking that, "Whatever is good for my people is good for my religion." It is clear that a crime in the name of a religion is the greatest crime against a religion.

All the religious communities are ready to support this idea of reconciliation, together with many NGOs and political parties. Definitely, it will be on us, the people of Bosnia Herzegovina to do something for reconciliation. I think that the work of the International Criminal Tribunal for the Former Yugoslavia will last for years and years, and that one day, the tribunal will be replaced by international criminal courts. This process is something which I think will last for years. Do not forget that the trials in Nuremberg were only the beginning of trials against the Nazi criminals. Three years ago there was the trial of Maurice Papon in France, two years ago that of Erich Priepke in Italy, and a year ago the trial of Dinko Šakić in Croatia. So, fifty-five years after the Second World War, these trials are continuing. Maybe something similar will happen for the war crimes in Bosnia Herzegovina and in the former Yugoslavia. It is clear, however, that we, or at least I, do not have fifty years to wait. We should do whatever is possible to compress the time and to reach some kind of reconciliation in a much shorter period.

When I was a law student, a long time ago unfortunately, one professor told us that a speech should last only so long as you can stand on one leg. This is as long as I can stand on one leg. Thank you for your attention.

