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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 labor[1] 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 penalty[8] 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 cases[14] 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 Lichtman[16] 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 Klein[17] and Zelig Preis[18] 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, *Lichtman* (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]

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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 ARBEITSSKLAVEN 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, Heydrich[42] 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. Obergruppenfuehrer 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

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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 Settlage, *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,

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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]

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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.