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Restituting Justice: Applying the Holocaust Restitution Process to Subsequent Genocides and Human Rights Violations

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NOTE

RESTITUTING JUSTICE: APPLYING THE HOLOCAUST RESTITUTION PROCESS TO SUBSEQUENT GENOCIDES AND HUMAN RIGHTS VIOLATIONS

*Zahava Moerdler**

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What we have accomplished has helped to establish the principle of accountability for violations of human rights and will act as a catalyst to expand and legitimize the task of inquiring into historical wrongs. In this I take pride.¹

INTRODUCTION

On January 16, 2006, an arbitration panel ruled that Austria was legally obligated to return six paintings, including the famous “Woman in Gold,” to Maria Altmann, a then ninety-year-old woman.² Mrs. Altmann’s story has captured the world’s attention and imagination, as evidenced by the recent film, *Woman in Gold*, starring Helen Mirren.³ Altmann had been struggling for the return of her

1. STUART EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 357 (2004) (discussing his feelings concerning the success of the Holocaust restitution process).

2. See Michael McNay, *Maria Altmann Obituary*, *GUARDIAN* (Feb. 11, 2011, 12:19 PM), <http://www.theguardian.com/artanddesign/2011/feb/11/maria-altmann-obituary?INTCMP=SRCH> (providing an obituary after Mrs. Altmann’s death and detailing her life experiences); see generally William Grimes, *Maria Altmann, Pursuer of Family Stolen Paintings, Dies at 94*, *N.Y. TIMES* (Feb. 9, 2011), http://www.nytimes.com/2011/02/09/arts/design/09altmann.html?_r=0 (discussing Mrs. Altmann’s life and memorializing her death).

3. See *THE WOMAN IN GOLD* (Origin Pictures 2015) (dramatizing Mrs. Altmann’s story for a motion picture production); see generally ANNE-MARIE O’CONNOR, *THE LADY IN GOLD: THE EXTRAORDINARY TALE OF GUSTAV KLIMT’S MASTERPIECE, PORTRAIT OF ADELE*

family's assets seized by the Austrian government and Nazi officials after the Anschluss since the end of World War II.⁴ After the fall of the Soviet Union in 1991, formerly closed archives were opened, giving historians and researchers access to previously unavailable documents.⁵ The access to new resources, coupled with the surge of Holocaust memory in the United States, created the perfect storm.⁶ Survivors like Altmann, with access to these newly available documents, pushed once more for the repatriation of their property, art, and bank accounts.⁷ In 2000, Altmann, having faced adversity in the Austrian courts, filed in the US District Court for the Central District of California under the Foreign Sovereign Immunities Act.⁸ The Supreme Court ruled in 2004 that Austria was not immune from

BLOCH-BAUER (providing a historical overview of Vienna leading up to the commission of the painting, through the creation of the portrait until its reunion with Mrs. Altmann).

4. The Anschluss was the German annexation of Austria during World War II. *See Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001) *aff'd and remanded*, 317 F.3d 954 (9th Cir. 2002) *opinion amended on denial of reh'g*, 327 F.3d 1246 (9th Cir. 2003) *aff'd on other grounds*, 541 U.S. 677 (2004) (providing the procedure and progression of the Altmann case as it passed through federal district court and eventually made it up to the Supreme Court to rule on the Foreign Sovereigns Immunity Act); *see also* David Wissbroecker, *Six Klimts, A Picasso & A Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DEPAUL-LCA J. ART & ENT. L. 39, 44-62 (2004) (analyzing three different looted art cases and the ways in which they progressed in US courts).

5. *See* Avi Beker, *Introduction to THE PLUNDER OF JEWISH PROPERTY DURING THE HOLOCAUST* 4, 1-32 (Avi Beker ed., 2001) (providing a brief history and understanding of European mythmaking in explanation of the difficulty European countries had with facing their Holocaust-era history and memory); *see generally* MICHAEL MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S* (2009) (analyzing the rise of Holocaust litigation and memory in the 1990s through the vast media attention and new resources available after the conclusion of the Cold War).

6. *See* Beker, *supra* note 5; *see generally* PETER NOVICK, *THE HOLOCAUST IN AMERICAN Life* (1999) (explaining the history of American memory and understanding of the Holocaust from the immediate postwar period through the 1990s).

7. *See generally In re Holocaust Victims Assets Litig.*, 424 F.3d 132 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006) (affirming the role of the Special Master and approving the Special Master's funds allocation plan); *see generally Altmann*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001) *aff'd and remanded*, 317 F.3d 954 (9th Cir. 2002) *opinion amended on denial of reh'g*, 327 F.3d 1246 (9th Cir. 2003) *aff'd on other grounds*, 541 U.S. 677 (2004) (providing the procedure and progression of the Altmann case as it passed through federal district court and eventually made it up to the Supreme Court to rule on the Foreign Sovereigns Immunity Act).

8. *Altmann*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001) *aff'd and remanded*, 317 F.3d 954 (9th Cir. 2002) *opinion amended on denial of reh'g*, 327 F.3d 1246 (9th Cir. 2003) *aff'd on other grounds*, 541 U.S. 677 (2004) (providing the procedure and progression of the Altmann case as it passed through federal district court and eventually made it up to the Supreme Court to rule on the Foreign Sovereigns Immunity Act); *see* Wissbroecker, *supra* note 4, at 54-62 (analyzing three different looted art cases and the ways in which they progressed in US courts).

this lawsuit in the United States.⁹ The ruling forced Austria to return to the negotiating table, and eventually Altmann's paintings were returned.¹⁰

Altmann's story is both typical and atypical.¹¹ Although media coverage of many of the Holocaust restitution lawsuits was quite extensive, the Supreme Court heard very few Holocaust-era cases, and no other Supreme Court ruling resulted in favor of the plaintiffs.¹² However, the Supreme Court heard Altmann's case and eventually provided a successful negotiation between Altmann and the Austrian government, making Altmann's case atypical.¹³ On the other hand, Altmann's case is typical in that her struggles with the Austrian government were futile and she was forced to pursue litigation to instigate a settlement.¹⁴ Most Holocaust restitution lawsuits began

9. *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) (holding narrowly that FSIA did not apply in this particular case and looking at the jurisdictional rather than substantive questions brought before the court); see Wissbroecker, *supra* note 4, at 54-62 (discussing the Altmann litigation in the American courts).

10. See generally Charles H. Brower II, *Republic of Austria v. Altmann*, 99 AM. J. INT'L L. 236-42 (2005) (describing the factual and historical background behind the Altmann case as well as the Supreme Court's holding); see Wissbroecker, *supra* note 4, at 54-62 (predicting that Austria would not return to the negotiating table and that Austria would "fight any attempt to return the paintings to Altmann").

11. See MICHAEL J. BAZYLER & KEARSTON G. EVERITT, HOLOCAUST RESTITUTION LITIGATION IN THE UNITED STATES: AN UPDATE, ACLU INT'L CIVIL LIBERTIES REPORT (2004), <https://www.aclu.org/files/iclr/bazyler.pdf> [hereinafter Bazyler Update] (discussing the successes of the Altmann case and how few cases there were like that); see also Brower II, *supra* note 10 (discussing the background of the Altmann case and how Mrs. Altmann worked for the return of her paintings through negotiations and litigation before finally they were returned through a settlement agreement).

12. See Bazyler Update, *supra* note 11, at 1-6 (focusing on *Garamendi* and *Altmann* in a recent Supreme Court analysis); see generally MICHAEL BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (2003) [hereinafter HOLOCAUST JUSTICE] (providing an analysis and perspective on the various Holocaust-era litigation of the 1990s and early 2000s). The Supreme Court also heard *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (ruling that the Executive branch's foreign policy regarding Holocaust-era insurance claims settlements through the International Commission on Holocaust Era Insurance Claims (ICHEIC) "preempted any California state statutes that would require European insurers doing business in the state to reveal their Holocaust-era insurance records"); see generally Bazyler Update (providing an update about recent Holocaust litigation and the results of that litigation).

13. See Bazyler Update (providing an update about the Altmann case successes in the Supreme Court); see generally Brower II, *supra* note 10, at 236-42 (discussing the Altmann case and the media surrounding it).

14. See *In re Holocaust Victims Assets Litig.*, 424 F.3d 132 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006) (affirming the role of the Special Master and approving the Special Master's funds allocation plan); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164 (S.D.N.Y. 2000) (describing the class action settlement and analyzing the fairness of the settlement reached).

because local governments were unwilling or unable to provide the support or restitution survivors needed and deserved.¹⁵

In the mid-1990s, Holocaust restitution cases began to take on more force in the United States leading to global media attention and creating a social movement around Holocaust memory.¹⁶ In the early 1990s, a number of Holocaust related events occurred: first, the blockbuster drama *Schindler's List* debuted in theaters in March, 1993; second, construction of the US Holocaust Memorial Museum ("USHMM"), which had been unanimously approved by Congress in 1980, was finished in April 1993; third, by the late 1980s, Holocaust education bills were enacted in both California (in 1985) and Illinois (in 1989).¹⁷ These events, compounded with the rising victimhood culture of the 1990s, ushered in an era of increased attention to the Holocaust and corresponded with the exacerbation of Holocaust-era litigation.¹⁸

Holocaust restitution was conducted predominantly through two mechanisms: class actions and international political negotiations.¹⁹ The goal of this Note is twofold: (1) to understand the particular legal mechanisms available in the pursuit of Holocaust restitution and (2) to explain which mechanism was more effective. This Note will focus on three particular restitution cases—the Swiss Bank litigation and the Austrian Bank litigation—and the Austrian international political

15. See EIZENSTAT, *supra* note 1, at 4 (discussing how the United States became involved in negotiating settlements and agreements between survivors and foreign governments); see also MARRUS, *supra* note 5, at 11-13 (describing the Swiss path to litigation and the invisibility of restitution claims until the outbreak of the class actions in the 1990s).

16. HISTORY OF THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10005782> (last visited Jan. 24, 2016); SCHINDLER'S List (Universal Studios, 1993) (portraying the story of Oskar Schindler who saved hundreds of Jews during the Holocaust).

17. In 1991 and 1994, bills were passed promoting Holocaust education in New Jersey and New York, respectively. These bills required curriculum centered not only on the Holocaust but also human rights and genocide. *Beyond Our Walls: State Profiles on Holocaust Education*, <http://www.ushmm.org/educators/beyond-our-walls-state-profiles-on-holocaust-education> (click on each state to see when legislation was passed on Holocaust education, how the state mandates the curriculum, and other available resources) (describing the Holocaust education resources available in each state); NOVICK, *supra* note 6, at 258-61 (discussing Holocaust curricula).

18. See generally EVA ILLOUZ, *OPRAH WINFREY AND THE GLAMOUR OF MISERY: AN ESSAY ON POPULAR CULTURE* (2003) (discussing the rise of victimhood culture in the United States); NOVICK, *supra* note 6, at 280 (noting that "the most powerful collective memories re usually memories of deep grievances").

19. See *infra* Parts I and II (analyzing the use of class action litigation and international political negotiations, respectively).

negotiation process. This Note analyzes the Swiss and Austrian Banks litigations to demonstrate the disparate approaches to judicial oversight in negotiating class action settlements and the varied strategies chosen in negotiating these settlements. This Note also examines the Austrian international political negotiation process because it demonstrates the complexity of international negotiations and the many dynamic personalities involved in those processes.

Holocaust restitution is now essentially over, with the only remaining cases involving looted art, yet the processes of the movement can be applied to subsequent historical wrongs.²⁰ This Note will analyze the Holocaust Restitution Movement of the 1990s to determine the most successful strategy in order to understand how victims of the subsequent genocides and human rights abuses can use the Holocaust Restitution Movement as a rubric for pursuing restitution.²¹ It will also examine whether an international approach is applicable or necessary.

Part I provides general background on Holocaust restitution leading up to the 1990s as well as background on the class action and international agreements mechanisms. Part II provides two examples of how class actions were used for Holocaust restitution in the 1990s, namely the Swiss banks and Austrian banks litigations. Part III analyzes the implementation of international agreements in Holocaust-era claims regarding Austrian restitution. Part IV demonstrates a framework for how survivors of subsequent genocide and mass human rights violations can use the Holocaust Restitution Movement as a framework for subsequent pursuits. The goal of this Note is to discuss how the application of the mechanisms laid out in the early sections of the Note can be used to create a multi-pronged

20. See *infra* Part III (discussing application of the Holocaust Restitution Movement strategies to victims of subsequent genocides); *infra* note 199 (discussing the limitations placed on the Austrian settlements for further Holocaust-era claims, excluding looted art); *infra* note 60 (discussing current looted art cases).

21. The Holocaust Restitution Movement has been referred to as a Movement by many scholars. See e.g., Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKLEY J. INT'L L. 11 (2002) [hereinafter *Comparative Perspective*] (comparing the Holocaust Restitution Movement with cases and strategies from other movements); see also Vartges Saroyan, *A Lesson from the Holocaust Restitution Movement for Armenians: Generate Momentum to Secure Restitution*, 13 CARDOZO J. CONFLICT RESOL. 285 (2011) (discussing how the Holocaust Restitution Movement strategies can be used by survivors of the Armenian genocide); Jurisdictional Immunities of the State (Ger. V. Italy), Judgment, ICJ Rep. 2012, at 199 (Feb. 2012) (J. Yusuf, dissenting) (discussing examples of individual claimants seeking compensation and restitution for violations of humanitarian law, including the Holocaust Restitution Movement).

and sophisticated restitution and compensation system for victims of subsequent genocide and mass human rights violations.²²

I. BACKGROUND: HOLOCAUST RESTITUTION IN HISTORICAL PERSPECTIVE AND THE CLASS ACTION AND INTERNATIONAL NEGOTIATIONS MECHANISMS

This Section will provide background on the Holocaust restitution processes leading up to the 1990s as well as background on two of the critical mechanisms used for these processes in the 1990s.²³ Part I.A. will look at the types of Holocaust restitution processes prior to the 1990s. Part I.B. will provide a brief background on the class action mechanism. Part I.C. will provide a brief background on the international political negotiations mechanism.

A. Background of Holocaust Restitution

To best understand the context surrounding the Holocaust Restitution Movement in the 1990s, a brief background on restitution litigation and processes preceding the massive litigation of the 1990s is necessary.²⁴ In the 1950s, most restitution programs were focused on welfare.²⁵ Although there was no real restitution “movement” yet, a number of restitution programs were established in the late 1940s and 1950s.²⁶ The Restitution from the Western Allied Zones program

22. Although there can never be true justice in the wake of egregious wrongs, the successes of the Holocaust Restitution Movement can help provide a measure of justice, a form of imperfect justice, and, importantly, recognition for other victims.

23. See *infra* Part I.A. (discussing Holocaust restitution background leading up to the 1990s); *infra* Part I.B. (discussing the class action mechanism); *infra* Part I.C. (discussing the international agreements mechanism).

24. See *infra* Part II (discussing the class action mechanism as a restitution strategy); *infra* Part III (discussing the international negotiation process as a restitution strategy).

25. See MARRUS, *supra* note 5, at 62 (describing the focus of restitution in the 1950s as providing relief for the “newly liberated”); see generally SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2012) (explaining how human rights programs were not a completely new and innovative process in the 1940s and 50s, but rather drew upon earlier processes like welfare programs established in the 1920s). For example, In the Universal Declaration of Human Rights of 1948, articles 12 and 16-29 stipulate an individual’s right to social security, education, social order, and involvement in community life. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) (providing articles on how States should protect their citizen’s individual rights).

26. See NOVICK, *supra* note 6, at 84 (describing American Jewish policies and intentions to care for Displaced Persons (DPs) in the aftermath of the war); see generally HOLOCAUST ERA ASSETS CONFERENCE, *SOCIAL WELFARE FOR JEWISH NAZI VICTIMS* (Prague, June 2009) (discussing welfare programs and needs).

was established in the late 1940s and was adjudicated through the 1950s.²⁷ The program provided payments to Holocaust survivors from the proceeds of selling restituted property.²⁸ Payments were made to residents of the United States, Germany, Israel, and Great Britain.²⁹ The only requirement was that the recipients be former property owners or their heirs.³⁰ Another program, the Bundesentschaedigungsgesetz (“BEG”), was established pursuant to the Luxembourg Agreement with Claims Conference Protocol 1.³¹ Payments were made between 1953 and 2000, but the filing deadlines

27. The Western Allied Zones refers to restitution programs in West Germany (including parts of Berlin). *In re Holocaust Victims Assets Litig.*, No. 96-4849 (ERK)(MDG) (Sept. 11, 2000) (interim Special Master’s report) (providing a summary of major Holocaust Compensation Programs); *see generally* HOLOCAUST ERA ASSETS CONFERENCE, SOCIAL WELFARE FOR JEWISH NAZI VICTIMS (Prague, June 2009) (describing the Restitution from Western Allied Zones program).

28. *In re Holocaust Victims Assets Litig.*, No. 96-4849 (ERK)(MDG) (Sept. 11, 2000) (interim Special Master’s report) (listing a number of compensation programs from the 1950s, including the Restitution from the Allied Zones program); *see generally* HOLOCAUST ERA ASSETS CONFERENCE, SOCIAL WELFARE FOR JEWISH NAZI VICTIMS (Prague, June 2009) (describing the requirements of the Restitution from Western Allied Zones Program and other compensation programs).

29. *See* HOLOCAUST ERA ASSETS CONFERENCE, SOCIAL WELFARE FOR JEWISH NAZI VICTIMS (Prague, June 2009) (describing Holocaust restitution programs including the establishment of the Claims Conference); Benjamin Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi-Looted Art Claims*, 43 HOUS. L. REV. 193, 199 (assessing international agreements and reparations settlements in the immediate postwar period); *see* Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT’L L. J. 503, 507 (2002) (describing early reparations and restitution programs in West Germany).

30. *See* HOLOCAUST ERA ASSETS CONFERENCE, SOCIAL WELFARE FOR JEWISH NAZI VICTIMS (Prague, June 2009) (discussing Holocaust restitution programs and their scope and duration); Vagts & Murray, *supra* note 29, at 507 (describing early reparations and restitution programs in West Germany).

31. *In re Holocaust Victims Assets Litig.*, No. 96-4849 (ERK)(MDG) (Sept. 11, 2000) (interim Special Master’s report) (providing a summary of major Holocaust Compensation Programs); *see generally* HOLOCAUST ERA ASSETS CONFERENCE, SOCIAL WELFARE FOR JEWISH NAZI VICTIMS (Prague, June 2009) (describing the BEG restitution program). The Luxembourg Agreements formed the basis of German federal restitution and indemnification programs for Holocaust survivors. It was signed by the Federal Republic of Germany (“FRG”), the State of Israel and the Claims Conference, a program created to mediate claims between the FRG and Holocaust survivors. The agreements recognized West Germany’s individual debts to survivors as well as its debts to the “Jewish world.” The FRG, under the accord, had to pay DM 3 billion to Israel in annual installments in the form of goods and services. *See 60 Years of the Claims Conference*, CLAIMS CONFERENCE, <http://forms.claimscon.org/Claims-Conference-60-Years.pdf> (discussing the work of the Claims Conference over the course of sixty years); *see generally* Karen Heilig, *From Luxembourg Agreements to Today: Representing a People*, 20 BERKLEY J. INT’L L. 176 (2002) (describing the Luxembourg Agreements and the work of the Claims Conference in general).

expired in 1969.³² The goal was to provide compensation for survivors and to help them relegate “the Holocaust to history.”³³ The types of payments consisted of six different programs including a hardship fund providing a pension of DM5,122 annually to 1,757 recipients as of 1998.³⁴ While Europe struggled to provide some form of compensation for the victims of National Socialism, survivors themselves focused on returning to normalcy.³⁵

Restitution programs in the 1950s and 1960s predominantly relied on international diplomacy.³⁶ One of the main considerations that led to improved relations between Israel and Austria in the 1950s was the payment of restitution to the Austrian Jewish community by

32. *In re Holocaust Victims Assets Litig.*, No. 96-4849 (ERK)(MDG) (Sept. 11, 2000) (interim Special Master’s report) (summarizing various compensation programs including scope and duration); Pollock, *supra* note 29, at 199 (discussing slave and forced labor compensation funds in the 1950s).

33. Cf. EIZENSTAT, *supra* note 1, at 2 (discussing the focus of Holocaust survivors on moving on with their lives); NOVICK, *supra* note 6, at 84 (describing the United States’ and Israel’s goal of integrating survivors into society so as to relegate “the Holocaust to history”).

34. See *In re Holocaust Victims Assets Litig.*, No. 96-4849 (ERK)(MDG) (Sept. 11, 2000) (interim Special Master’s report) (providing a summary of major Holocaust Compensation Programs). Other programs included the Professional Damage fund which provided a pension of DM 11,584 annually to 8,382 recipients (as of 1998) for those with “no adequate subsistence;” the Loss of Freedom fund, a one-time payment of DM 5 for every day that the recipient had been imprisoned in a concentration camp or ghetto, subjected to forced labor, wore a Star of David (a form of restricting liberty), or who lived in hiding; other funds included Loss of Health, Loss of Life and Loss of Possessions or Property. See *In re Holocaust Victims Assets Litig.*, No. 96-4849 (ERK)(MDG) (Sept. 11, 2000) (interim Special Master’s report) (providing a summary of major Holocaust Compensation Programs); see generally HOLOCAUST ERA ASSETS CONFERENCE, SOCIAL WELFARE FOR JEWISH NAZI VICTIMS (Prague, June 2009) (discussing describing the requirements to qualify for BEG restitution).

35. See EIZENSTAT, *supra* note 1, at 2 (describing how many survivors did not want to “dwell on the horrific past but to marry, raise a family and ‘make a living from ground zero’”). Survivors searched for missing relatives through radio programs, letters to friends they had been reunited with in displaced person camps (“DP camps”), and bulletins. See Interview with Haim Gouri, Israeli poet, in Jerusalem (Mar. 14, 2012) (discussing the Eichmann trial and how working with DPs in Vienna influenced Gouri’s perception and understanding of Holocaust memory). For more on National Socialism, see generally REVISITING THE NATIONAL SOCIALIST LEGACY (Oliver Rathkolb, 2004); WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY (1960); RICHARD J. EVANS, THE THIRD REICH IN POWER (2005); Peter Caldwell, *National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate Over the Nature of the Nazi State, 1933-1937*, CARDOZO L. REV. (1994); Hubert Rottleuthner, *Legal Positivism and National Socialism: A Contribution to a Theory of Legal Development*, GER. L.J. (2011).

36. EIZENSTAT, *supra* note 1, at 26 (describing the creation of the Claims Conference as a vehicle for negotiations between Israel and Germany); see generally Ronald Zweig, *Jewish Issues in Israeli Foreign Policies: Israeli-Austrian Relations in the 1950s*, 15 ISR. STUD. 47 (2010) (discussing international diplomacy between Austria and Israel in the aftermath of World War II).

the Austrian government.³⁷ The focus of restitution in the 1950s was entirely on the “urgency of relief for the newly liberated.”³⁸ According to US diplomat Sumner Welles, “[t]he efforts today to right the wrongs which have been committed will be of all too little avail . . . but such measure of recompense as can be offered surely constitutes the moral obligation of the free people of the earth.”³⁹ This approach, through negotiations and diplomacy, would frame the use of international negotiations in the restitution movement of the 1990s.⁴⁰

Although there were restitution litigation claims prior to the 1990s, they reached neither the scale nor the scope of the massive class action litigation of the 1990s.⁴¹ There were a number of reasons for this trend.⁴² First, in the postwar period Jews were virtually powerless and dispersed.⁴³ Second, during the 1950s and 1960s, there was a focus predominantly on German restitution as evidenced by the establishment of German-Israeli reparations programs and the Claims Conference.⁴⁴ Third, many archives and documents were inaccessible

37. Zweig, *supra* note 36, at 47 (describing Israeli political relations soon after the creation of the state); *see also* EIZENSTAT *supra* note 1, at 26 (discussing how a non-governmental organization, the Claims Conference, facilitated negotiations between two sovereign states).

38. MARRUS, *supra* note 5, at 62 (discussing providing relief to the survivors who had only recently been liberated); Zweig, *supra* note 36, at 49 (describing the allocation of restitution for DP resettlement and rehabilitation).

39. Literature concerning the issue of early restitution attempts details issues such as Israel’s acceptance of reparations from Germany, the welfare aid in European countries, and the influence of American diplomacy on these attempts. These policies mirror the overarching public consciousness of the time. *See* MARRUS *supra* note 5, at 62-75 (quoting Sumner Welles) (discussing reparations processes from the 1940s until the 1990s); *see generally* Zweig, *supra* note 36 (describing the allocation of restitution for DP resettlement and rehabilitation).

40. *See infra* Part III (discussing the use of international negotiations).

41. *See* MARRUS, *supra* note 5, at 75-81 (describing the global developments that shaped the pursuit of restitution in the 1990s); Beker, *supra* note 5, at 1-32 (discussing national myth making as it relates to the Holocaust restitution process). *See e.g.*, *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1168 (D.C. Cir. 1993); *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985).

42. *See infra* notes 43-47 (discussing the various reasons for the restitution process in the 1990s reaching the scope and scale that it did).

43. *See* MARRUS, *supra* note 5, at 70 (discussing why restitution took a “backseat” to reparations to the Allies); Beker, *supra* note 5, at 1-32 (providing a brief history and understanding of European mythmaking in explanation of the difficulty European countries had with facing their Holocaust-era history and memory).

44. *See* MARRUS *supra* note 5, at 72 (explaining how the creation of the Claims Conference was revolutionary and paved the way for negotiations between Israel and Germany); Beker *supra* note 5, at 1-32 (providing a brief history and understanding of

until after the fall of Communism.⁴⁵ Fourth, a new generation harbored in a period of reflection on the relative goods and evils of their parents.⁴⁶ And fifth, in the 1990s the historical narratives of the Holocaust made room for those that had seemed like “minor” aspects, such as the despoliation of Jewish assets.⁴⁷

The earlier focus on international political negotiations as a method of restituting funds and property began to change in the 1980s and 1990s when the first class action suit was filed in 1985.⁴⁸ Holocaust survivors from Jasenovac, a concentration camp in former Yugoslavia, filed *Handel v. Artukovic* in the United States against a Croatian Ustase official in violation of war crimes, crimes against humanity, the Geneva and Hague Conventions, and the Yugoslavian Criminal Code.⁴⁹ The case was dismissed for lack of subject matter

European mythmaking in explanation of the difficulty European countries had with facing their Holocaust-era history and memory). Although technically the Claims Conference was established to facilitate restitution from Germany, its role has expanded to mediate restitution claims in other countries and contexts. See Heilig, *supra* note 31; *60 Years of the Claims Conference*, CLAIMS CONFERENCE, <http://forms.claimscon.org/Claims-Conference-60-Years.pdf> (discussing the founding of the Claims Conference for the purposes of German restitution, but that the Claims Conference’s role expanded over time).

45. See MARRUS, *supra* note 5, at 77 (discussing how “the lifting of the Iron Curtain also made available new documentary sources to solve old puzzles”); Beker, *supra* note 5, at 1-32 (providing a brief history and understanding of European mythmaking in explanation of the difficulty European countries had with facing their Holocaust-era history and memory).

46. See MARRUS, *supra* note 5, at 77-78 (discussing the follow of the Soviet bloc as a catalyst for the new states to deal with past wrongs); Beker, *supra* note 5, at 1-32 (discussing the influence of a new generation on memory politics in Europe).

47. See MARRUS, *supra* note 5, at 79 (describing the ways in which globalization brought to the fore formerly marginalized memories); Beker, *supra* note 5, at 1-32 (discussing the rise of alternative memory narratives after the fall of Communism). Additionally, because survivors were aging and dying at a rate of ten percent per year, there was a feeling of urgency to address individual reparations. MARRUS *supra* note 5, at 79 (describing the impact of age on the push for a restitution movement).

48. See William Schabas, *Foreword in* MICHAEL MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S* ix, xi (2009) (providing perspective on the historical trends that facilitated a Holocaust movement in the 1990s, namely a judicial atmosphere for class action, the end of the Cold War, and the opening of new archival documents); Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 22 (2000) [hereinafter *Nuremberg in America*] (discussing the *Handel* case in the early 1980s).

49. The Ustase were Croatian fascists who controlled Croatia between 1929 and 1945. They were in league with the Nazis, like Hungary, Romania, and Bulgaria. They remained relatively autonomous and implemented many of the Nazi regime’s policies against minorities by rounding up Jews, Roma, and Croat dissidents. The government was considered a Nazi Puppet State. See generally *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985) (bringing a criminal class action lawsuit against Nazi officials in the United States). See *Nuremberg in America*, *supra* note 48, at 22 (describing the factual and legal background for the *Handel* case). See also *Balkan ‘Auschwitz’ haunts Croatia*, BBC NEWS (April 25, 2005,

jurisdiction.⁵⁰ Although the case was unsuccessful, the strategies and perspectives gathered from the case framed and shaped litigation strategies that followed, most specifically because the focus shifted from criminal litigation to civil claims.⁵¹

Princz v. Federal Republic of Germany was filed soon after *Handel*, and although it was not a class action lawsuit, it also provided strategies for subsequent litigation.⁵² In 1984, Hugo Princz, a US citizen who had been a forced laborer in Germany during World War II, began negotiations and inquiries through the State Department with Germany for the return of wages for his forced labor during World War II.⁵³ However, the German government did not provide a resolution for Princz.⁵⁴ Even with the involvement of the Clinton Administration, there was no change in the German government's stance.⁵⁵ In response, Princz brought a lawsuit in federal court claiming "false imprisonment, assault and battery, negligent and intentional infliction of emotional distress and quantum meruit."⁵⁶ The suit failed because of the strict Foreign Sovereign Immunities Act standards and was again dismissed on appeal.⁵⁷

17:03 GMT), <http://news.bbc.co.uk/2/hi/europe/4479837.stm>; *Croatian Holocaust Still Stirs Controversy*, BBC NEWS (Nov. 29, 2001, 11:04 GMT), http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/1673249.stm.

50. See generally *Handel*, 601 F. Supp. 1421 (dismissing the case with prejudice); see *Nuremberg in America*, *supra* note 48, at 22 (describing the factual and legal background for the *Handel* case).

51. See *infra* Part II (discussing the Swiss Bank Litigation); Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (explaining that the same plaintiffs' lawyers who brought the Jasenovac case later brought the Swiss Bank litigation).

52. See *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1168 (D.C. Cir. 1993) (discussing the background to the legal proceedings); *Nuremberg in America*, *supra* note 48, at 23-25 (discussing the *Princz* case and its progression through both legal and diplomatic channels).

53. See generally *Princz*, 26 F.3d 1166 (discussing the background political discussions prior to the legal proceedings); *Nuremberg in America*, *supra* note 48, at 23 (discussing the *Princz* political negotiations).

54. *Nuremberg in America*, *supra* note 48, at 23.

55. See *Princz*, 26 F.3d at 1169 (holding that the FSIA is applicable for jurisdiction over a foreign State and that none of the exceptions, neither commercial activity nor the direct effect exception, applied to Princz's case); *Nuremberg in America*, *supra* note 48, at 23 (discussing the *Princz* case and its progression through both legal and diplomatic channels).

56. See *Princz*, 26 F.3d at 1168 (discussing Princz's complaint and allegations); *Nuremberg in America*, *supra* note 48, at 24 (describing the factual and legal background for the *Princz* case).

57. See *Princz*, 26 F.3d at 1176 (providing the court's holding that the district court lacks jurisdiction); *Nuremberg in America*, *supra* note 48, at 24 (discussing the district court's denial of defendant's motion to dismiss, stating "it is totally mystifying to this Court why the German

Princz ultimately won, although not in court.⁵⁸ When Congress undertook efforts to allow Princz's litigation to go forward, the German government settled with him and twenty-one others who had been US citizens during the Holocaust for US\$2.1 million.⁵⁹ This turn in focus towards litigation (more specifically class action litigation) combined with international negotiations foreshadows the strategies of the Holocaust litigation movement of the 1990s.⁶⁰

The Holocaust Restitution Movement of the 1990s was a multipronged and sophisticated movement that worked to restitute property, compensate survivors for forced labor, and retrieve dormant bank accounts, to name a few.⁶¹ The success of the movement stemmed from its ability to work within the judicial and executive branches.⁶² As a result of the intense push to resolve many of the outstanding claims and historical injustices, most Holocaust-era claims are now closed.⁶³ Yet the lessons learned from trial and error

Government not only wants to attack this Court's jurisdiction, but also wants to reserve the right to contest the substance of Plaintiff's claims. . . . Of course, if the German Government wants to try the Holocaust, this Court has no choice but to accommodate its wishes").

58. See HOLOCAUST JUSTICE, *supra* note 12, at 73 (describing the slave labor payouts in 1998 as a result of the litigation Princz filed in 1993); *Nuremberg in America*, *supra* note 48, at 25 (summarizing the outcome and the legal objectives of the *Princz* case).

59. HOLOCAUST JUSTICE, *supra* note 12, at 73 (2003) (describing the slave labor payouts in 1998 as a result of the litigation *Princz* filed in 1993); *Nuremberg in America*, *supra* note 48, at 25 (discussing the allocation of slave labor funds as a result of the *Princz* litigation and subsequent negotiations). "Holocaust-era" refers to all Holocaust related issues, claims, and litigation. It is a term used by academics and practitioners alike to refer to any claims that came out of the Holocaust, regardless of when they were resolved or litigated.

60. See *infra* Part II.A. (discussing the Swiss Banks litigation); see *infra* Part III (discussing the use of international negotiations).

61. See *infra* Part II.A. (discussing the Swiss Banks litigation); see *infra* Part III (discussing the use of international negotiations). For specific examples of application of Holocaust strategies, see Parts II and III, respectively detailing the use of litigation and international agreements.

62. See *Nuremberg in America*, *supra* note 48, at 31-37 (discussing the vast sums plaintiffs won in the Swiss Bank litigation); see generally Wissbroecker, *supra* note 4, at 54-62 (providing three examples of looted art cases including the Altman case, which could only proceed after the Executive Agreement with Austria was signed).

63. See Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York (Mar. 17, 2014) ("[A]nd I'm not sure there is anyone left. I can give you a list but I don't think they're alive. But even the notion of civil relief is something that's probably past. Its no longer ripe, its overripe. Time to be discarded and move on to something else."); HOLOCAUST JUSTICE *supra* note 12, at 286 (discussing the legacies of the Holocaust Restitution Movement). The Executive Agreements barred all future litigation in the American court system relating to Holocaust-era claims against the governments who were signatories to the agreements. However, today there are still many looted art cases that remain and are still considered legally viable. See Wissbroecker, *supra* note 4, at 54-62 (discussing three looted art cases that involved high profile litigation in the early 2000s); William D. Cohan, *The*

and the strategies employed have long-term implications for the survivors of subsequent genocides and mass human rights violations.⁶⁴

B. The Class Action Mechanism: The US Litigation Tool

Many Holocaust victims used the US class action mechanism to pursue restitution because it allowed consolidation of many small claims into a single action.⁶⁵ Class action litigation allows for increased efficiency because it provides cases with “large aggregate damages to proceed even when individual damages are small.”⁶⁶ Class actions also allow for lower litigation costs because courts can avoid hearing multiple small claims, and instead hear one consolidated class action.⁶⁷ The class action procedure is governed by Rule 23 of the Federal Rules of Civil Procedure.⁶⁸ In order to consolidate actions into a class, Rule 23(a) requires

Restitution Struggle: Malaise, Indifference, and Frustration, ARTNews, <http://www.artnews.com/2013/09/11/the-restitution-struggle/> (Sept. 11, 2013, 8:00 AM) (“[D]ecades after the effort began, hundreds of thousands of artworks and other objects looted from victims of the Holocaust have yet to be returned to the owners of their heirs.”); Elizabeth Campbell Karlsgodt, *Why are Museums Holding on to Art Looted by Nazis?*, NEWSWEEK, <http://www.newsweek.com/why-are-museums-holding-art-looted-nazis-330393> (May 10, 2015, 12:24 PM) (discussing the recent film *The Woman in Gold* and the looted art remaining in museums today); *Remarks by Ronald S. Lauder in Zurich: ‘A Crime Committed 80 years ago continues to Stain the World of Art Today*, WORLD JEWISH CONGRESS (Feb. 2, 2016), <http://www.worldjewishcongress.org/en/news/remarks-by-ronald-s-lauder-in-zurich-a-crime-committed-80-years-ago-continues-to-stain-the-world-of-art-today-2-2-2016>.

64. See *infra* Part IV (discussing application of Holocaust strategies to other genocides).

65. Jade Brewster, *A Kick in the Class: Giving Class Members a Voice in Class Action Settlements*, 41 W. ST. U. L. REV. 1, 3 (2013) (providing a brief overview of the class action mechanism and then analyzing the problems inherent to class actions); see generally Jack B. Weinstein, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* (1995) (providing an overarching analysis and discussion of the class action mechanism for tort litigation and its application).

66. J. Brewster, *supra* note 65, at 3-14 (analyzing the class action mechanism’s inherent problems like agency issues, problems with collective action, and judicial estimation of value and its “overall undemocratic system of litigation”); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (discussing the class actions’ ability to overcome problems with small recoveries, which would deter individuals from bringing solo actions).

67. J. Brewster, *supra* note 65, at 3-14 (analyzing the class action mechanism’s inherent problems like agency issues, problems with collective action, and judicial estimation of value and its “overall undemocratic system of litigation”); see generally Weinstein, *supra* note 65 (providing an overarching analysis and discussion of the class action mechanism for tort litigation and its application).

68. See FED. R. CIV. P. 23 (providing each of the rules governing the class action mechanism); see also Morris A. Ratner, *The Settlement of Nazi-Era Litigation Through the*

(1) the class [to be] so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of class; and (4) the representative parties will fairly and adequately protect the interests of the class.⁶⁹

A class action can be maintained if the above requirements from Rule 23(a) are satisfied and if any of the three elements outlined in Rule 23(b) can be satisfied.⁷⁰ Rule 23(b)(1)(A) provides that a class can be certified if there would be inconsistent results or adjudication among class members that would create an incompatible standard by opposing that class.⁷¹ Rule 23(b)(1)(B) provides that a class could otherwise be certified if separate adjudication would impede the members' "ability to protect their interests."⁷² Rule 23(b)(2) applies, like 23(b)(1), for classes pursuing injunctive relief where "the party opposing the class has acted or refused to act on grounds that apply generally to the class" so relief is appropriate for the class as a whole.⁷³ By contrast, Rule 23(b)(3) looks at whether there are questions of law or fact common to the class members that predominate over any questions affecting individual members and where a class action would be superior to other methods of "fairly and efficiently adjudicating the controversy."⁷⁴

Executive and Judicial Branches, 20 BERKLEY J. INT'L L. 212 (2002) (discussing the use of the class action mechanism in Holocaust restitution litigation).

69. See FED. R. CIV. P. 23(a) (providing the prerequisites for certifying a class action); see also *Amchem*, 521 U.S. at 613 (explaining the requirements to meet the prerequisites for application of Fed. R. Civ. P. 23).

70. See FED. R. CIV. P. 23(b) (providing that there are additional prerequisites aside from 23(a) that must be satisfied for a class to be maintained); Weinstein, *supra* note 65, at 134 (describing Rule 23(b)(1) and (b)(2) as "mandatory class actions that do not allow class members to opt out and bring their own suits").

71. See FED. R. CIV. P. 23(b)(1)(A) (providing that inconsistent adjudications could be problematic because of inconsistencies they would cause); Weinstein, *supra* note 65, at 135 (discussing application of Rule 23(b)).

72. FED. R. CIV. P. 23(b)(1)(B) (providing another element that would make a class action more desirable as compared to individual adjudications); Weinstein, *supra* note 65, at 135 (discussing attempts to certify a class under Rule 23(b)(1)(B) as unsuccessful because of a "failure or inability to prove the existence of a limited fund—and even when a limited fund was shown, some appellate courts and some plaintiff's attorneys favor bankruptcy over the class action").

73. See FED. R. CIV. P. 23(b)(2) (providing of instances when injunctive relief would be appropriate); see generally Weinstein, *supra* note 65, at 135 (discussing the application of Rule 23(b)(2) class certification).

74. See FED. R. CIV. P. 23(b)(3) (providing elements of commonality, predominance, and superiority as necessary for class certification); Weinstein, *supra* note 65, at 135 (1995)

A key provision of the class action process is the notice procedure.⁷⁵ Rule 23(c)(2) provides that the court may “direct appropriate notice to the class” depending on what is “practicable under the circumstances.”⁷⁶ Notice requires, in clear and concise language: (1) the nature of the action, (2) a definition of the class, (3) the claims, issue or defenses of the class, (4) that class members may employ an attorney to appear for him or her, (5) that exclusion from the class may be requested, (6) the time and procedure for requesting exclusion, and (7) that class judgments are binding on members under Rule 23(c)(3).⁷⁷ These features of the class action mechanism allow potential class members to first and foremost learn about a potential class action suit, and to respond appropriately should they wish to be excluded.⁷⁸ Another important feature of the class action mechanism, particularly for Holocaust restitution claims, is the settlement provision in Rule 23(e).⁷⁹ For the application of a class action settlement, Rule 23(e) requires directed notice to the members who would be affected by the proposal and a ruling on whether the settlement is “fair, reasonable and adequate.”⁸⁰

There is extensive case law developing the scope and application of Rule 23.⁸¹ In *Weinberger v. Kendrick*, the court analyzed whether

(asserting that 23(b)(3) claims are more common because they allow for claims of money damages, and allow for class members to opt out and bring individual claims).

75. See FED. R. CIV. P. 23I(2) (providing the relevant procedures to satisfy the notice requirement); Ratner, *supra* note 68, at 217 (discussing the notice process for the Swiss bank litigation).

76. See FED. R. CIV. P. 23(c)(2) (providing the relevant procedures to satisfy the notice requirement); *cf.* Ratner, *supra* note 67, at 217 (outlining the notice requirements and the process of satisfying those requirements in the Swiss Bank litigation).

77. See FED. R. CIV. P. 23(c)(2)(B) (providing the components necessary in a notice to potential class members); *see also* Ratner, *supra* note 67, at 217 (discussing the notice process for the Swiss bank litigation).

78. See FED. R. CIV. P. 23(c)(2)(B) (providing the components necessary in a notice to potential class members); *see also* Ratner, *supra* note 67, at 217 (discussing the notice process for the Swiss bank litigation).

79. See FED. R. CIV. P. 23(e) (providing the notice, finding and approval requirements for a class action settlement); *see generally* Weinstein, *supra* note 65 (providing an overarching analysis and discussion of the class action mechanism for tort litigation and its application).

80. See FED. R. CIV. P. 23(e)(1)-(2) (providing the notice requirement and the fairness hearing requirement); *see generally* *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982) (discussing the settlement hearings for two bank class actions).

81. *See generally* *Amchem Prod. Inc. v. Windsor*, 521 U.S. 591 (1997) (analyzing an asbestos class action based on predominance and adequacy considerations); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001) (attacking a class action settlement asserting that appellants were not adequately represented during settlement); *Weinberger v. Kendrick*, 698

the settlement notice met Rule 23 requirements and whether class certification simultaneous with settlement precluded approval of the settlement.⁸² The court found that notice must “fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings.”⁸³ The court held that class members had ample opportunity to investigate the settlement further and were informed in notice of this right as well as the settlement components.⁸⁴ Appellants also argued that contemporaneous settlement and class approval was problematic.⁸⁵ The court, however, found that temporary settlement classes can be “quite useful in resolving major class action disputes,” even though their use is still controversial.⁸⁶ The court decided not to adopt a *per se* rule prohibiting the approval of class action settlements when settlement classes are certified after settlement. The court then underscored that it falls on the district judges to decide whether to employ the procedure and who are then bound to scrutinize the fairness of the settlement agreement at a higher level than they usually would.⁸⁷

F.2d 61 (2d Cir. 1982) (discussing application of a class action settlement where appellants raised issues with notice and certification of class and settlement simultaneously); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) (responding to questions concerning excessiveness of attorney’s fees); *Haley v. Medtronic, Inc.*, 169 F.D.R. 643 (C.D. Cal. 1996) (applying Rule 23 prerequisites like numerosity, commonality, typicality, adequacy of representation, and predominance, but not meeting superiority requirements).

82. *Weinberger*, 698 F.2d at 72 (1982) (analyzing whether the simultaneous class and settlement certification would invalidate a settlement); see Henry J. Reske, *Making Class Distinctions Critics Say Class Action Proposals Encourage Collusion As Well As Settlements*, ABA J., January 1997, at 22 (raising potential problems with simultaneous class and settlement approval, like collusion between plaintiffs’ attorneys).

83. *Weinberger*, 698 F.2d at 70 (1982) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)) (defining the necessary components for notice); see generally FED. R. CIV. P. 23(c)(2) (providing notice requirements).

84. *Weinberger*, 698 F.2d at 70-71 (1982) (describing the court’s holding on appellant’s opportunity to review notice); Reske, *supra* note 81, at 22 (analyzing the potential issues where notice is not effective for simultaneous class and settlement certification).

85. *Weinberger*, 698 F.2d at 72 (1982) (discussing whether appellant’s contention of problematic simultaneous certification of class and settlement was problematic); see Reske, *supra* note 81, at 22 (describing potential problems with simultaneous approval like plaintiff’s attorneys colluding and defense “seeking protection from future claims”).

86. *Weinberger*, 698 F.2d at 72-73 (finding use in temporary class certification and settlement approval); see generally *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 145-46 (E.D.N.Y. 2000) (discussing the court’s acceptance of the class action settlement).

87. *Weinberger*, 698 F.2d at 73 (1982) (discussing the court’s ruling that settlement classes should not be prohibited but must undergo higher scrutiny for fairness); *Plummer v. Chem. Bank*, 668 F.2d 654, 657 (2d Cir. 1982) (noting that “although tentative designations of

Although the court in *Weinberger* noted benefits to contemporaneous approval of class and settlement, the Supreme Court found that class actions should not be litigated so that in the same day the court would be presented with a complaint, an answer, a proposed settlement, *and* a joint motion for conditional class certification.⁸⁸ The Court held that although the parties reached a global compromise, there was no assurance that the diverse group of individuals affected were fairly or adequately represented.⁸⁹ Thus, while class action settlements had become more commonplace and acceptable by the time of the Holocaust Restitution Movement, limitations were set on the procedural applications of the class action settlement.⁹⁰

C. International Political Negotiations: Creating International Agreements in Austria and the United States

Holocaust restitution claims frequently involved the use of international agreements, both bilateral and multilateral, through international negotiations.⁹¹ The most successful international agreements involve political acceptance from the beginning of the

class for settlement purposes are not uncommon, they have been the subject of considerable controversy”).

88. See *Amchem*, 521 U.S. at 601-02 (discussing the court’s finding that such application of the class action mechanism is inappropriate); see generally George F. Sanderson III, Congressional Involvement in Class Action Reform: A Survey of Legislative Proposals Past and Present, 2 N.Y.U. J. LEGIS. & PUB. POL’Y 315 (1999) (providing a survey of Congressional actions undertaken to respond to the court’s *Amchem* holding).

89. See *Amchem Prod. Inc. v. Windsor*, 521 U.S. at 620 (describing the representation problems that arose due to the settlement procedure); Sanderson III, *supra* note 88, at 315-16 (discussing the court’s reluctance to apply the procedural mechanisms used by the district court as a clear indication of necessary Congressional intervention).

90. See e.g., *Amchem Prod. Inc. v. Windsor*, 521 U.S. 591 (1997) (analyzing an asbestos class action based on predominance and adequacy considerations); *Weinberger v. Kendrick*, 698 F.2d 61 (2d Cir. 1982) (discussing the settlement hearings for two bank class actions).

91. See e.g., 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,” Ger.-U.S., (July 17, 2000), http://www.swissbankclaims.com/Documents/DOC_18_german_f.pdf (providing the agreement between the United States and Germany concerning the slave labor reconciliation agreement); Agreement Between the Government of the United States of America and the Government of France Concerning Payments of Certain Losses Suffered During World War II, Fr.-U.S., Jan. 18, 2001, available at <http://www.state.gov/documents/organization/28994.pdf> (providing an agreement between the United States and France concerning returning bank accounts, providing compensation for losses suffered during World War II, and compensating elderly survivors abroad); see *infra* Part II.B (discussing the Austrian negotiation process and subsequent international agreements).

negotiations so as to build consent early on.⁹² Successful agreements require domestic constituent support in the states involved in the negotiation.⁹³ These include political parties, civil society groups, and governmental bureaucracies.⁹⁴ Within the context of human rights agreements, States enter into these agreements not out of altruism, but rather by acting in a capacity that they perceive as required of them.⁹⁵ Governments enter into negotiations over human rights agreements because they see potential gains such as improving their position vis-à-vis other international actors, improving their relationship vis-à-vis domestic actors, improving their reputation, or attaining domestic goals.⁹⁶

92. See Rachel Brewster, *The Domestic Origins of International Agreements*, 44 V. J. INT'L L. 501, 506 (2004) (describing the importance participation by governmental and non-governmental associations in international human rights so that “domestic internalization of the norms can occur through a variety of means, including incorporation into the legal system through judicial interpretation, acceptance by political elites, and the like”); Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935, 1961 (2002) (analyzing the importance of “domestic internalization of the norms can occur through a variety of means, including incorporation into the legal system through judicial interpretation, acceptance by political elites, and the like.”).

93. See R. Brewster, *supra* note 92, at 510 (discussing how “[t]reaty arrangements need domestic support and not all agreements that enhance general welfare will be able to garner such support”); Hathaway, *supra* note 92, at 1961 (arguing that “[d]omestic institutions thereby enmesh international legal norms, generating self-reinforcing patterns of compliance”).

94. R. Brewster, *supra* note 92, at 506 (discussing the way in which domestic interest groups lobby governments to comply with international agreements); Anne Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 242 (2000) (explaining that “International society is a society of states; international law seeks to achieve the goals and values of that society; it does so primarily by regulating states”).

95. See R. Brewster, *supra* note 92, at 506 (describing the “demand for treaties as being driven by opportunities for mutual gain at the international level); see also Hathaway, *supra* note 92, at 2005-06 (explaining that ratifying an international human rights treaties “declares to the world that the principles outlined in the treaty are consistent with the ratifying government’s commitment to human rights”).

96. See Hathaway, *supra* note 92, at 1941 (discussing how human rights treaties “declare or express to the international community the position of countries that have ratified. The position taken by countries in such instances can be sincere, but it need not be”). *But see* Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1135 (1999) (explaining that “a reputation for compliance with international law is not necessarily the best means—and certainly not the only means—for accomplishing foreign policy objectives”). The Holocaust restitution agreements and negotiations can be understood as international bilateral human rights agreements that ensured restitution and compensation for historical wrongs and sought to fill a gap in the welfare available to aging survivors both within the countries signing the agreements, like Austria, and within other countries, like Poland, Ukraine, and Belarus. See e.g., 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,” Ger.-U.S., July 17, 2000,

This Note will focus on how these international agreements become law and how they interact with judicial structures in the United States and Austria. In the United States, international agreements are conducted through the Executive Branch.⁹⁷ There are three types of executive agreements: sole executive agreements, pre-authorized executive agreements, and implied executive agreements.⁹⁸ The Executive approves sole executive agreements unilaterally, without any congressional consent, where authority for the agreement arises from the Executive's power to determine foreign policy.⁹⁹ Pre-authorized executive agreements, or "ex ante congressional-executive agreements," are negotiated by the President with authority delegated to him by Congress.¹⁰⁰ They require no subsequent congressional approval and may enter into force once executed by the President or his representative.¹⁰¹ Implied executive agreements derive from implied executive authority.¹⁰² In these instances, Congress has

available at http://www.swissbankclaims.com/Documents/DOC_18_german_f.pdf (providing the agreement between the United States and Germany where slave labor compensation would be given to survivors abroad as well); Agreement Between the Government of the United States of America and the Government of France Concerning Payments of Certain Losses Suffered During World War II, Fr.-U.S., Jan. 18, 2001, *available at* <http://www.state.gov/documents/organization/28994.pdf> (providing an agreement between the United States and France where compensation would be provided for survivors in Eastern European countries); Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (discussing his role in the international negotiations as "representing individuals. I was also representing the governments of Belarus, Czech Republic, Poland, Russia, Ukraine").

97. 2 *Litigation of International Disputes in U.S. Courts* § 10:3 (discussing the Executive's disposition to using Executive Agreements); Hathaway, *supra* note 92, at 153 (describing a number of agreements entered into by the US government with express Congressional approval).

98. 2 *Litigation of International Disputes in U.S. Courts* § 10:3 (discussing the Executive's disposition to using Executive Agreements); Hathaway, *supra* note 92, at 153 (describing a number of agreements entered into by the US government with express Congressional approval).

99. 2 *Litigation of International Disputes in U.S. Courts* § 10:3 (describing implications of Executive execution of unilateral agreements); Hathaway, *supra* note 92, at 146 (explaining that the President should be a leading actor but not the sole actor in executing Executive Agreements).

100. 2 *Litigation of International Disputes in U.S. Courts* § 10:3 (discussing the potential failings with delegated agreements: "(1) the delegations are often broad and often lack time limits; (2) there are few, if any, provisions specifically addressing congressional oversight; and, (3) even if a majority of the Congress were to object to an executive's agreement, that objection would likely be subject to potential veto"); Hathaway, *supra* note 92, at 149 (explaining that ex ante agreements make up the majority of current executive agreements).

101. 2 *Litigation of International Disputes in U.S. Courts* § 10:3.

102. 2 *Litigation of International Disputes in U.S. Courts* § 10:3 (asserting that implied agreements can often be derived out of necessity); *see generally* Daniel Abebe, Eric A. Posner,

affirmed the executive authority, but there are still implementation considerations that the Executive needs to work out.¹⁰³

In the Holocaust-era related issues agreements, the US government acted more as a mediator between specific claimants and foreign governments.¹⁰⁴ Instead of facilitating an agreement that would bind US foreign policy and conduct (with or without congressional approval), the Holocaust-era executive agreements bound specific claimants, whether or not they are US citizens, who might use the US judicial system to file claims against foreign governments.¹⁰⁵ The international agreements limited all future legal actions against the countries bound by the agreement and obligated the US government to file Statements of Interest in all pending and future Nazi-era claims.¹⁰⁶

By contrast, in the Austrian Federal State, the *Bund*, or Federation, has the power to conclude international treaties without being bound by “the allocation of powers between the States and the Federation.”¹⁰⁷ Additionally, Austrian States have limited power to accept international treaties based on Article 16 of the Federal Constitution.¹⁰⁸ In either event, the Federal President has the final

The Flaws of Foreign Affairs Legalism, 51 VA. J. INT’L L. 507 (2011) (arguing that judicial deference should be given to executive agreements involving foreign policy).

103. 2 Litigation of International Disputes in U.S. Courts § 10:3.

104. EIZENSTAT, *supra* note 1, at 366 (discussing how the US government “urged other countries to provide justice to victims as a moral imperative”); Ratner, *supra* note 68, at 225 (describing the various parties involved in the negotiation process).

105. See EIZENSTAT, *supra* note 1, at 366 (asserting that the negotiations could stand as precedent for how to address injustices outside the judicial system); Ratner, *supra* note 68, at 231 (describing the inadequacies of the negotiations in comparison to the class action settlements).

106. Ratner, *supra* note 68, at 227 (discussing the requirements placed on the United States government as a signatory to the agreements); see e.g., Statement of Interest of the United States, *In re Austrian and German Bank Litigation*, 80 F. Supp. 2d 164 (S.D.N.Y. 2000) *aff’d sub. nom.*, *D’Amato v. Deutsche Bank* 236 F.3d 78 (2d Cir. 2001) (No. 98-3938) (describing the American statement in the Austrian and German bank litigation as a result of the Executive Agreement).

107. Soja Neudorfer & Claudia Wernig, *Implementation of International Treaties into National Legal Orders: The Protection of the Rights of the Child within the Austrian Legal System*, Max Planck UNYB 14, 414 (2010) (discussing the process by which international treaties become binding law in Austria); see BUNDES-VERFASSUNGSGESETZ [B-VG] BGBl. No. 1/1920, as last amended by Bundesverfassungsgesetz [BVG] BGBl. | No. 2/2009, art. 15(a), ¶ 3, https://www.constituteproject.org/constitution/Austria_2009.pdf (Austria) (providing that “[t]he principles of international law concerning treaties shall apply to agreements within the meaning of para I above”).

108. See BUNDES-VERFASSUNGSGESETZ [B-VG] BGBl. No. 1/1920, as last amended by Bundesverfassungsgesetz [BVG] BGBl. | No. 2/2009, art. 16, ¶ 1, https://www.constituteproject.org/constitution/Austria_2009.pdf (Austria) (providing in

responsibility of and authority for binding Austria to an agreement.¹⁰⁹ In certain cases, like political treaties, international treaties that amend the fundamental treaties of the European Union, and treaties that modify or supplement existing laws, parliamentary approval is also required.¹¹⁰

Examples of early restitution agreements dealing with Holocaust restitution stem back to the immediate postwar period.¹¹¹ Reparations projects in West Germany in the 1950s, for example, focused on compensating those who lost their lives, health, or freedom due to National Socialism.¹¹² These compensation programs, however, were limited both in the scope of funds available and geographically to certain territories.¹¹³

pertinent part “In matters within their own sphere of competence the Laender can conclude treaties with states, or their constituent states, bordering on Austria”); Neudorfer et. al, *supra* note 107, at 414 (discussing the incorporation of international treaties into local state-level law).

109. See BUNDES-VERFASSUNGSGESETZ [B-VG] BGBl No. 1/1920, as last amended by Bundesverfassungsgesetz [BVG] BGBl | No. 2/2009, art. 65 ¶ 1, https://www.constitute-project.org/constitution/Austria_2009.pdf (Austria) (providing in pertinent part, “The Federal President represents the Republic internationally, receives and accredits envoys, sanctions the appointment of foreign consuls, appoints the consular representatives of the Republic abroad and concludes state treaties. Upon the conclusion of a state treaty not falling under Art. 50 or a state treaty pursuant to Art. 16 para I which neither modifies nor complements existent laws, he can direct that the treaty in question shall be implemented by the issue of ordinances.”); Neudorfer et. al, *supra* note 107, at 414 (describing the Federal President’s role in binding Austria to international agreements).

110. See BUNDES-VERFASSUNGSGESETZ [B-VG] BGBl No. 1/1920, as last amended by Bundesverfassungsgesetz [BVG] BGBl | No. 2/2009, art. 50, ¶ 1, https://www.constitute-project.org/constitution/Austria_2009.pdf (Austria) (providing in pertinent part, “the conclusion of (1) political state treaties and state treaties the contents of which modify or complement existent laws and do not fall under Art. 16 para 1, as well as (2) state treaties by which the contractual bases of the European Union are modified, require the approval of the National Council”); Neudorfer et. al, *supra* note 107, at 414-15 (discussing instances where parliamentary involvement is necessary prior to incorporation of a treaty into Austrian law).

111. See *supra* Part I.A. (discussing the background of Holocaust restitution programs).

112. Pollock, *supra* note 29, at 199 (assessing international agreements and reparations settlements in the immediate postwar period); see Vagts et. al, *supra* note 28, at 507 (describing early reparations and restitution programs in West Germany).

113. It is estimated that DM 100 billion was paid in accordance with compensation laws and bilateral treaties but did not provide a final or comprehensive settlement. See Pollock, *supra* note 29, at 199 (discussing the limitations of restitution projects in the immediate postwar period); see MARRUS, *supra* note 5, at 67 (explaining that some complained about the German payments “frittering away” on “a winter coat here or a soup kitchen there” while the money should be used for reconstructing Jewish life). Programs in this period provided parameters for compensation like that only for those survivors who remained in Germany could receive payment under West Germany’s Federal Compensation Law of 1956. Furthermore, the compensation program only allowed for survivors of forced or slave labor to receive compensation. Thus, both the scope in terms of geography and survivor group was

II. APPLYING THE CLASS ACTION MECHANISM: THE SWISS AND AUSTRIAN BANKS CASES

This Section will discuss the application of the class action in two particular cases studies.¹¹⁴ Part II.A. will develop the analysis of the class action mechanism through the context of the Swiss Banks litigation and Part II.B. will do so through the Austrian Banks litigation.¹¹⁵

A. The Swiss Banks Litigation: The Involvement of the Court Dictating Negotiations

In October 1996, the same group of plaintiffs' lawyers who fought diligently in *Handel* brought a similar class action suit against the Swiss Banks claiming restitution.¹¹⁶ Unlike *Handel*, the case settled and the survivors received compensation.¹¹⁷ The Swiss Banks

limited. See Pollock, *supra* note 29, at 199 (describing restitution projects within West Germany); Vagts & Murray *supra* note 29, at 507 (2002) (describing reparations processes in the 1950s, such as the Agreement on German External Debts (the London Agreement) and the West German Federal Compensation Law of 1956).

114. See *infra* Part II.A. (discussing the Swiss Banks litigation); *infra* Part II.B. (discussing the Austrian Bank litigation).

115. See *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164 (S.D.N.Y. 2000) (describing the class action settlement and analyzing the fairness of the settlement reached); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164 (S.D.N.Y. 2000) *aff'd sub nom.* D'Amato v. Deutsche Bank, 236 F.3d 78 (2d Cir. 2001) (discussing the Austrian bank litigation and the appointment of a Special Master). See *In re Holocaust Victims Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (discussing the fairness of the class action settlement reached by the parties after initiation of class action litigation and establishing the role of a Special Master); *In re Holocaust Victims Assets Litig.*, 424 F.3d 132 (2d Cir. 2005), *cert. denied*, 547 U.S. 1206 (2006) (affirming the role of the Special Master and approving the Special Master's funds allocation plan).

116. *Nuremberg in America*, *supra* note 48, at 31 (providing a summary of the Swiss Bank litigation and demonstrating how the claims consisted of "a consolidated federal class action against the three largest Swiss banks for failure to return monies deposited with them during World War II and for other damages, an individual action against the same Swiss banks filed in California state court and a suit against the central bank of Switzerland accusing the bank of accepting looted-assets from Nazi Germany"); Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (providing perspective on the Austrian Holocaust restitution cases and negotiations in the context of his work as a litigation lawyer). See e.g., Complaint, *Weisshaus v. Union Bank of Switzerland*, No. CV-96-4849 (E.D.N.Y. filed Oct. 3, 1996 & Amended Complaint filed July 30, 1997) (filing of a class action by Holocaust survivors against the three largest Swiss banks, including Union Bank of Switzerland, Swiss Bank Corporation, Credit Suisse, and others). See also Jodi Berlin Ganz, *Heirs Without Assets and Assets Without Heirs: Recovering and Reclaiming Dormant Swiss Bank Accounts*, 20 FORDHAM INT'L L.J. 1306 (1996).

117. Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (providing perspective on the Austrian Holocaust restitution cases

class action was a critical juncture for the future of the Holocaust Restitution Movement.¹¹⁸ Although the consolidated class action was the second filed in the United States dealing with the Holocaust, it was the first ever Holocaust-era class action lawsuit to result in success.¹¹⁹ Additionally, the extensive motions to dismiss and plaintiffs' counter-motions remain useful tools for any future or ongoing Holocaust-era restitution attorneys.¹²⁰ The court's decision on whether to grant or deny a defendant's motion to dismiss is, apart from the trial itself, the most important stage in an international litigation lawsuit.¹²¹ Finally, the Swiss Banks litigation is an important milestone in the Holocaust Restitution Movement because it "resulted in the largest settlement of a human rights case in the history of United States litigation."¹²² The settlement also exposed the various issues that arise when determining how to allocate and disperse funds.¹²³ Some distribution issues include assessing how to distribute the settlement funds to varied classes with differing criteria

and negotiations in the context of his work as a litigation lawyer); see Melvyn I. Weiss, *A Litigator's Postscript on the Swiss Banks and Holocaust Litigation Settlements: How Justice Was Served*, in *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* 105 (Michael J. Bazzyler & Roger Alford eds. 2006) (describing the Swiss bank litigation and its compensation to survivors).

118. See Weiss, *supra* note 117, at 105 (describing the reasons why the Swiss Bank settlement was unprecedented); *Nuremberg in America*, *supra* note 48, at 31 (discussing the importance of the Swiss Banks litigation).

119. The consolidated class action included a class so numerous, that it would be difficult to find a precise number of plaintiffs. Each individual case, prior to consolidation, included between seven and fifteen named plaintiffs, and hundreds of unnamed plaintiffs. See Beker, *supra* note 5, at 145-46 (Avi Beker ed., 2001) (outlining the sums of money paid in the settlement action and the extent to which Switzerland had to be pushed to acknowledge their wartime actions); *Nuremberg in America*, *supra* note 48, at 32 (discussing the class action settlement and emphasizing the relative successes of the litigation).

120. And potentially any genocide related restitution cases. See generally Bazzyler, *supra* note 21 (comparing the Holocaust Restitution Movement with other restitution movements). See generally Alfred de Zayas, *The Principle of Reparation in International Law and the Armenian Genocide*, *ARMENIAN GENOCIDE CONF. 1* (2010) (discussing the applicability of Holocaust restitution claims in claims by survivors of the Armenian genocide).

121. See *Nuremberg in America*, *supra* note 48, at 32 (describing various successful elements of the litigation); see generally *Comparative Perspective*, *supra* note 21, at 11 (providing rubrics and comparisons for the Holocaust litigation techniques and methods).

122. *Nuremberg in America*, *supra* note 48, at 32 (discussing the vast impact of the Swiss Bank litigation). See also Beker, *supra* note 5, at 142-163 (Avi Beker ed., 2001) (describing the "demystification" of Swiss neutrality during the war and the successes of the Holocaust Restitution Movement to resurge that part of Swiss history).

123. See *Nuremberg in America*, *supra* note 48, at 32 (discussing issues like allocating funds for attorneys' fees and the various parties vying for the funds); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 142-43 (E.D.N.Y. 2000) (describing the allocation of funds to various classes of beneficiaries).

and class members living around the world, methods to comply with the notice requirement, and how much would eventually be distributed to the survivors themselves.¹²⁴ Along with the distribution problem, the Swiss Banks settlement also raised for the first time the ethical question of whether lawyers in cases like the Holocaust restitution cases should take a fee for their services.¹²⁵

The Swiss Banks litigation began when several separate class actions were filed against a number of Swiss Banks in the US District Court for the Eastern District of New York.¹²⁶ The Swiss Banks were accused of the following: first, of collaborating with the Nazis by “knowingly trading ‘Nazi gold,’ laundering Nazi seized (‘looted’) assets, [and] profiteering from slave and forced labor”¹²⁷; second, of concealing the extent and nature of their unlawful conduct following the Holocaust¹²⁸; and third, of participating in a scheme to retain the assets Holocaust victims deposited voluntarily in Swiss accounts and safe deposit boxes in anticipation of World War II.¹²⁹

124. See *Nuremberg in America*, *supra* note 48, at 32 (discussing issues like allocating funds for attorneys’ fees and the various parties vying for the funds); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 142-43 (E.D.N.Y. 2000) (describing the allocation of funds to various classes of beneficiaries). In response to the notice published in May 2000, 550,000 individuals from around the world submitted questionnaires, the suggested method for participating in claims processes. See Ratner, *supra* note 68, at 218 (discussing the allocation and distribution of settlement funds); *Nuremberg in America*, *supra* note 48, at 91 (discussing the allocation of funds and how from US\$1.25 billion, two percent went towards legal fees and two percent went to legal fees and costs).

125. See *Nuremberg in America*, *supra* note 48, at 33 (describing how the class action raised concerns over the allocation of attorneys’ fees); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 146 (E.D.N.Y. 2000) (discussing the claims concerning allocation of attorneys’ fees).

126. See *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000) (providing background on the Swiss Banks litigation); Weiss, *supra* note 117, at 104 (explaining from the plaintiff’s perspective how the litigation process unfolded).

127. Nazi gold encompasses gold looted by the Nazis from the treasuries of conquered countries and individuals. Weiss, *supra* note 117, at 104 (describing the various claims against the Banks that led to the creation of different classes); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000) (describing the complaint and the classes listed in the complaint). See Weiss, *supra* note 117, at 104 (discussing Swiss concealment of looted assets); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000) (describing Plaintiff’s allegations that the Swiss concealed looted assets).

128. Weiss, *supra* note 117, at 103 (discussing the accusations against the Swiss for knowingly concealing information); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000) (discussing how the Swiss concealed relevant facts and documents concerning involvement in Nazi looting).

129. Weiss, *supra* note 117, at 104 (describing the accusations lodged against the Swiss Banks); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 155 (E.D.N.Y. 2000) (discussing the “Deposited assets Claims” against the Swiss Banks).

The Swiss Banks cases were consolidated into one class action and brought before Chief Judge Edward R. Korman in the Eastern District of New York.¹³⁰ Defendants filed motions to dismiss, arguing that plaintiffs failed to state claims under international and Swiss law, lacked subject matter and personal jurisdiction, failed to join indispensable parties, and lacked standing.¹³¹ Defendants also argued that the Court should abstain from adjudicating so that ongoing non-judicial initiatives to redress plaintiffs' claims could continue and that Switzerland, rather than the United States, was the proper forum for relief.¹³²

In July 1997, the plaintiffs filed amended complaints by dropping certain parties, adding others, and reconfiguring a few of the named parties.¹³³ The following month, Judge Korman heard oral arguments on the motions to dismiss.¹³⁴ Instead of ruling on the motions, Judge Korman made no decision for over a year.¹³⁵ Without ever having to rule on the dismissal motions, Judge Korman achieved a settlement, which was "all-inclusive and require[d] plaintiffs to dismiss every lawsuit filed against the Swiss banks and the Swiss government as a condition of the settlement."¹³⁶

130. See Bazyley, *Nuremberg in America*, *supra* note 47, at 40-58 (summarizing the extensive motions and defenses brought by the Swiss Banks' defense team); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 149 (E.D.N.Y. 2000) (describing the lengthy process towards settlement and defenses raised).

131. See *Nuremberg in America*, *supra* note 48, at 40-58 (summarizing the extensive motions to dismiss); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 142 (E.D.N.Y. 2000) (describing the lengthy defendants' motions to dismiss).

132. *Id.* Interestingly, the Swiss Banks' motions to dismiss for jurisdiction did not include FSIA. Those motions included Forum Non Conveniens, lack of subject matter jurisdiction, and lack of jurisdiction under the Alien Tort Claims Act. See *Nuremberg in America*, *supra* note 48, at 40-49 (discussing defendants' procedural motions to dismiss).

133. See Ratner, *supra* note 68, at 214-15 (discussing the motions and discussions that occurred in the year long gap before settlement); *Nuremberg in America*, *supra* note 48, at 61-62 (describing the factors leading up to settlement).

134. See Ratner, *supra* note 68, at 214-15 (discussing Judge Korman's involvement in the settlement process); *Nuremberg in America*, *supra* note 48, at 61-62 (describing Judge Korman's extensive involvement in the settlement process).

135. See Ratner, *supra* note 67, at 216 (describing the settlement agreement reached in the court's chambers in August 1998); *Nuremberg in America*, *supra* note 48, at 62 (discussing Judge Korman's involvement in the settlement process and decision to wait a year before ruling on any motions).

136. *Nuremberg in America*, *supra* note 48, at 62 (describing aspects of the settlement agreement); see generally Settlement Agreement, *In re Holocaust Victims Assets*, No. CV-95-4849 (E.D.N.Y. filed Jan. 26, 1999) (hereinafter Settlement Agreement) (describing the components of the settlement between the parties). The Settlement laid out the following elements: (1) the Settlement Fund: the defendants agreed to pay US 1.25 billion in four installments over three years between 1998 and 2001; (2) Defenses Waived: the defendants

Although the litigation process began in 1996, the stage for seeking the return of assets from Switzerland was set the preceding year.¹³⁷ Researchers for the World Jewish Congress (“WJC”) informed Edgar Bronfman Sr., former head of the WJC, about the dormant Swiss bank accounts.¹³⁸ Soon thereafter in 1996, US Senator Alfonse D’Amato began holding hearings before the Committee on Banking, Housing, and Urban Affairs.¹³⁹ Popular media began to publish the story and portrayed the Swiss negatively in books and newspaper articles.¹⁴⁰ The Swiss struggled to respond, but a May

agreed to forgo dispositive legal and factual defenses; (3) Revival of Claims: the settlement protected class members whose claims may otherwise have expired under applicable statutes of limitation and repose; (4) Distribution: the settlement did not preordain a distribution plan. It merely required a “fair and open mechanism” to determine criteria pursuant to distribution and allocation determination that were subsequently made; (5) Settled Claims: settling class members and plaintiffs agreed to “irrevocably and unconditionally” release, discharge and acquit any claims related to the Holocaust, World War II, its prelude or aftermath, and more; (6): Class Beneficiaries: the parties agreed that the settlement should benefit those deemed to have been targets of systematic Nazi oppression on the basis of religion, race, or personal status. *See In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 142 (discussing the settlement agreement).

137. *See* HOLOCAUST JUSTICE, *supra* note 12, at 2 (discussing the Swiss Banks litigation and the history leading up to it along with the other prominent Holocaust-era litigation); Roger Witten, *How Swiss Banks and German Companies Came to Terms with the Wrenching Legacies of the Holocaust and World War II: A Defense Perspective*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 81 (Michael J. Bazylar & Roger Alford eds. 2006) (explaining the World Jewish Congress’ (“WJC”) involvement in bringing claims against Swiss Banks).

138. HOLOCAUST JUSTICE, *supra* note 12, at 2 (discussing the Swiss Banks litigation and the history leading up to it along with the other prominent Holocaust-era litigation); *see generally* Edgar Bronfman & Israel Singer, *Foreword in THE PLUNDER OF JEWISH PROPERTY DURING THE HOLOCAUST* at viii (Avi Beker ed., 2001) (illustrating the WJC’s role in the resurgence of Holocaust-era memory and the vast Holocaust-era litigation in the 1990s). Many scholars are skeptical about the WJC’s involvement in the Holocaust Restitution process and claim that the organization was looking for something to keep their mission relevant. Holocaust restitution then became the new driving force behind the WJC, maintaining its relevance and prestige. *See* EIZENSTAT, *supra* note 1, at 56 (“The WJC needed a niche to make itself distinctive among the pantheon of Jewish organizations.”); MARRUS, *supra* note 5, at 83 (describing Bronfman’s reasons for getting involved in the Holocaust restitution process).

139. *See e.g.*, *Swiss Banks and Attempts to Recover Assets Belonging to the Victims of the Holocaust: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 115th Cong. 1-3 (1997) (statement of Sen. Alfonse D’Amato, Chairman, S. Comm. on Banking, Housing, and Urban Affairs) (engaging in the first session on the inquiry into the assets of the Holocaust victims deposited in Swiss Banks and the issues surrounding the recovery and restoration of gold and other assets looted by Nazi Germany during World War II, and the acts of restitution which must follow); *see* HOLOCAUST JUSTICE, *supra* note 12, at 3 (discussing the Swiss Banks litigation and the history leading up to the class action litigation).

140. *See* HOLOCAUST JUSTICE, *supra* note 12, at 3 (discussing the media storm surrounding the Swiss Banks litigation); Edgar Bronfman & Israel Singer, *Foreword to THE PLUNDER OF JEWISH PROPERTY DURING THE HOLOCAUST* at viii (Avi Beker ed., 2001)

1997 report issued by the US government, which had been looking into Switzerland's activities during the war through its own archived documents, further damaged Switzerland's public image and Holocaust narrative.¹⁴¹ The Report became known as the First Eizenstat Report for Stuart Eizenstat, the Assistant Secretary of State who had been selected by President Bill Clinton to head a commission on the issue.¹⁴² The report provided extensive details about Swiss wartime profiteering, which continued into the postwar period when Switzerland kept more than half of looted assets and stonewalled the return of assets in accordance with the Washington Accord.¹⁴³ The 1946 Washington Accord was an agreement between the United States and Switzerland.¹⁴⁴ In the Accord, the Swiss agreed to return US\$58 million in looted gold and promised to contribute CHF50 million to a reparations fund created by the Allies for resettlement and relief for refugees.¹⁴⁵ In return, their frozen assets in the United States were returned and they won the right to keep half of the liquidated German assets.¹⁴⁶

In response to the First Eizenstat Report and the growing international pressure, the Swiss Bankers' Association, a trade organization comprised of Swiss banks, created the Independent Committee of Eminent Persons ("ICEP") and persuaded Paul Volcker, the former chairman of the US Federal Reserve Bank, to

(illustrating the WJC's role in the resurgence of Holocaust-era memory and the role of the media in creating interest in the resurgence).

141. HOLOCAUST JUSTICE, *supra* note 12, at 3 (discussing the Swiss Banks litigation and the history leading up to it along with the other prominent Holocaust-era litigation); Beker, *supra* note 5, at 142-43 (Avi Beker ed., 2001) (discussing the rise of the Swiss Banks litigation and the process by which plaintiffs' lawyers and survivors fought for restitution).

142. HOLOCAUST JUSTICE, *supra* note 12, at 3 (discussing the Swiss Banks litigation and the history leading up to it along with the other prominent Holocaust-era litigation); Avi Becker, *Why was Switzerland Singled Out? A Case of Belated Justice*, in *THE PLUNDER OF JEWISH PROPERTY DURING THE HOLOCAUST* 142-43 (Avi Beker ed., 2001) (discussing the rise of the Swiss Banks litigation and the process by which plaintiffs' lawyers and survivors fought for restitution).

143. *See* HOLOCAUST JUSTICE, *supra* note 12, at 2 (discussing the Swiss Banks litigation and the history leading up to it along with the other prominent Holocaust-era litigation); Roger Witten, *supra* note 137 (describing the Swiss perspective on how and why they approached the litigation the way they did).

144. *See* EIZENSTAT, *supra* note 1, at 106 (describing the Washington Accord and its affect on interactions with the Swiss in the 1990s); Roger Alford, *The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks*, 20 BERKLEY J. INT'L L. 212, 252 (2002) (discussing the Washington Agreement of 1946 as obligating the Swiss to assist the Allies in identifying heirless assets).

145. EIZENSTAT, *supra* note 1, at 106.

146. *Id.*

lead the committee.¹⁴⁷ Then, in December 1996, the Swiss created a six-person historical commission to investigate Switzerland's Holocaust-era actions.¹⁴⁸ However, by this time the Swiss bank litigation was already underway and the Swiss would have to face the class action lawsuit, which some have deemed to be the most effective weapon in enduring resolution of Holocaust-era claims.¹⁴⁹

The US government was involved in the Swiss Bank litigation in a limited capacity by issuing the First Eizenstat report and pushing for the creation of Swiss historical commissions.¹⁵⁰ However, this influence was limited because ultimately the focal point for restitution became the class action rather than political negotiations.¹⁵¹ Plaintiffs' attorneys understood the importance of implementing the class action mechanism as a tool.¹⁵² Thus, the class action mechanism can be seen as strategic either as (1) a threat in order to facilitate a quicker settlement resolution, (2) an actual litigation strategy that they pursued until a final class settlement, or (3) a bargaining chip at longstanding negotiation tables.¹⁵³

147. Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (discussing Volcker's involvement and acceptance of the role as Committee chairman); HOLOCAUST JUSTICE, *supra* note 12, at 3 (discussing the Swiss Banks litigation and the history leading up to it along with the other prominent Holocaust-era litigation); Witten, *supra* note 137, at 82 (describing the two investigative processes established to analyze Swiss involvement in the war).

148. HOLOCAUST JUSTICE, *supra* note 12, at 3 (discussing the Swiss Banks litigation and the history leading up to it along with the other prominent Holocaust-era litigation); Witten, *supra* note 137, at 81-82 (discussing the effectiveness of the historical commissions established by the Swiss).

149. HOLOCAUST JUSTICE, *supra* note 12, at 2 (discussing the Swiss Banks litigation and the history leading up to it along with the other prominent Holocaust-era litigation); *see also* Witten, *supra* note 137, at 84 (discussing the futility of the historical commissions and negotiations).

150. HOLOCAUST JUSTICE, *supra* note 12, at 2 (discussing the Swiss Banks litigation and the history leading up to it along with the other prominent Holocaust-era litigation); *see also* Witten, *supra* note 137, at 84 (discussing the futility of the historical commissions and negotiations).

151. HOLOCAUST JUSTICE, *supra* note 12, at 2 (discussing the Swiss Banks litigation and the history leading up to it along with the other prominent Holocaust-era litigation); *see also* Witten, *supra* note 137, at 84 (discussing the futility of the historical commissions and negotiations).

152. *See* Telephone Interview with Charles Moerdler, Partner, Stroock, Stroock & Levan (May 16, 2014) (describing the effectiveness of the class action mechanism); Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center (Mar. 17, 2014) (comparing the Swiss litigation process to the Austrian and German settlement processes).

153. *See e.g.*, *In re Holocaust Victims Assets Litig.*, 105 F.Supp. 2d (E.D.N.Y. 2000) (demonstrating the class action settlement accomplished as a result of pursuing the class action mechanism for resolution of historical injustices); *In re Austrian & German Bank Holocaust*

B. Austrian Banks Litigation: Negotiation with Limited Court Involvement

In October 1998, claims against Creditanstalt AG (“Creditanstalt”) and its parent bank, Austria AG (“Bank Austria”), were amended to a pending class action against German banks in the US District Court for the Southern District of New York.¹⁵⁴ Plaintiffs alleged that defendants, including Bank Austria and Creditanstalt (collectively, “the Austrian Banks”), and Deutsche Bank, Dresdner Bank, Commerzbank, and Hypo Bank (collectively, “the German Banks”), had violated international law and committed various torts as a result of Nazi activities during and after World War II.¹⁵⁵ The actions were transferred to the purview of the Honorable Judge Kram in the Southern District of New York, who in December 1998 appointed former Senator Alfonse D’Amato as Special Master to work with the parties to reach a settlement.¹⁵⁶ In March 1999, the plaintiffs officially filed a consolidated class action complaint.¹⁵⁷ Plaintiffs alleged that the Austrian and German Banks profited from forced and slave labor, and converted assets from those persecuted by the Nazis.¹⁵⁸ Along with his colleague Viet Dinh, the Special Master worked with the various parties for months to negotiate a

Litig., 80 F. Supp. 2d 164 (S.D.N.Y. 2000) (providing an example of a class action suit pursued, whose threat pushed the parties to the negotiating table); *In re Austrian, German Holocaust Litig.*, 250 F.3d 156 (2d Cir. 2001) (providing an example of a class action litigation dealing with Austrian and German slave labor that was dismissed because of negotiations where the threat of the class action was used when negotiating the international agreement).

154. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 167 (describing the class consolidation and background to the case); *Nuremberg in America*, *supra* note 48, at 238-40 (describing the claims filed prior to consolidation as *In re Austrian & German Bank Holocaust Litig.*).

155. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 167 (discussing plaintiffs’ complaint); *Nuremberg in America*, *supra* note 48, at 238 (describing the claims against the Austrian Banks for profiting from slave labor, participating in, and profiting from looting, also known as “Aryanization” of Jewish property).

156. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 168 (describing the class action settlement and analyzing the fairness of the settlement reached); *Nuremberg in America*, *supra* note 48, at 240 (discussing D’Amato’s duties as Special Master).

157. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 168 (describing the class action settlement and analyzing the fairness of the settlement reached); *Nuremberg in America*, *supra* note 48, at 240 (discussing the consolidation of the class).

158. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 168 (describing the class action settlement and analyzing the fairness of the settlement reached); *Nuremberg in America*, *supra* note 48, at 239 (explaining the different claims raised against the Banks).

settlement.¹⁵⁹ The two Austrian Banks reached a separate settlement with the plaintiffs' attorneys in March 1999.¹⁶⁰ The settlement became the third out-of-court settlement reached in modern Holocaust-era litigation.¹⁶¹ However, it garnered some negative media attention because the settlement amount of US\$40 million was relatively small and a fourth of the settlement was allocated to administrative expenses and attorneys' fees, leaving only a negligible amount for survivors.¹⁶²

Newspapers around the world published notice in September 1999 announcing the proposed class action settlement against the Austrian Banks.¹⁶³ Notice included:

- (1) the key terms of the settlement, (2) how to obtain a claim form, (3) that members of the Settlement Class would be bound by the Settlement if they did not inform class counsel that they wished to opt-out by October 18, 1999, and (4) that members of the Settlement Class were permitted to comment on or object to the Settlement in writing and at the Fairness Hearing so long as written objections were received by the Court post-marked no later than October 18, 1999.¹⁶⁴

Like the notice issued in the Swiss Banks litigation, the court utilized varied modes of notice so as to reach the widely dispersed class

159. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 168-69 (describing the class action settlement and analyzing the fairness of the settlement reached); Telephone Interview with Charles Moerdler, Partner, Stroock, Stroock & Levant (May 16, 2014) (discussing the engagement of a Special Master and his advisor in the Austrian Banks litigation).

160. Telephone Interview with Charles Moerdler, Partner, Stroock, Stroock & Levant (May 16, 2014) (discussing Moerdler's insistence on settling the claims as quickly and efficiently as possible as prerequisite for taking the case); *Nuremberg in America*, *supra* note 48, at 240 (discussing the process of reaching a settlement).

161. *Nuremberg in America*, *supra* note 48, at 240-41 (describing the settlement and the controversy surrounding the relatively small amount of money actually allocated to survivors); Ratner, *supra* note 68, at n.5 (discussing the exceptions to the Austrian international agreements, including the Austrian Banks litigation).

162. See MARRUS, *supra* note 5, at 124-25 (describing how Judge Kram sanctioned Fagan, one of the plaintiffs' lawyers, who was later disbarred for his "wrongdoing in a multibillion-dollar Holocaust-related lawsuit"); *Nuremberg in America*, *supra* note 48, at 242 (discussing the US\$40 million settlement paid by the Austrian Banks).

163. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 169 (describing the court's order of certification and the notice requirements); *Nuremberg in America*, *supra* note 48, at 241 (discussing the notice process).

164. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 169 (discussing notice requirements and notice process); *Nuremberg in America*, *supra* note 48, at 241 (describing the court's notice requirements).

members.¹⁶⁵ A fairness hearing was held in November 1999 and Judge Kram approved the settlement in January 2000.¹⁶⁶ The settlement was eventually accepted and the funds were distributed without extensive bureaucratic interference or controversy.¹⁶⁷ The involvement of the court in the settlement negotiation process was far more limited than it had been in the Swiss Banks litigation.¹⁶⁸ After witnessing the media storm, the political backlash and the massive litigation that the Swiss Banks endured, the Austrian Banks and Austrian government sought an alternative to the Swiss Banks approach.¹⁶⁹

III. INTERNATIONAL AGREEMENTS IN HOLOCAUST RESTITUTION: APPLYING INTERNATIONAL NEGOTIATIONS

This Section will analyze the international agreements mechanism and its application in the Austrian negotiations.¹⁷⁰ Part III.A. will situate the analysis of international agreements through the

165. See *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 169 (describing the modes of notice including paid newspaper advertisements in countries with large survivor populations, direct mailings to organizations and individuals, promotional announcements in key cities around the world, and the creation of a “homepage” on the web); see also *In re Holocaust Victims Assets Litig.*, 105 F. Supp. 2d 139, at 144-45 (E.D.N.Y. 2000) (describing the notice plan and elements of notice required by the court for proper Rule 23 process).

166. See *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d at 169-71 (describing the settlement fund and the fairness hearing); *Nuremberg in America*, *supra* note 48, at 241-42 (discussing the court’s fairness hearing and eventual acceptance of the proposed settlement).

167. See Telephone Interview with Charles Moerdler, Partner, Stroock, Stroock & Levan (May 16, 2014) (explaining that there were funds left over once the period for distribution ended and that Judge Kram allocated the residual to a charity in Manhattan); *Nuremberg in America*, *supra* note 48, at 241-42 (describing the approval of the settlement by Judge Kram on January 10, 2000).

168. Telephone Interview with Charles Moerdler, Partner, Stroock, Stroock & Levan (May 16, 2014) (discussing the negotiations between plaintiffs’ and defendants’ attorneys in reaching a settlement); see Ratner, *supra* note 67, at 225 (discussing an alternative to the class action mechanism through executive agreement whereby court involvement in settlement would be limited).

169. Telephone Interview with Charles Moerdler, Partner, Stroock, Stroock & Levan (May 16, 2014) (describing Bank Austria’s fear of massive litigation and acceptance of a quick settlement process); Ratner, *supra* note 68, at 226 (discussing the German negotiation process as the alternative to the Swiss Banks litigation).

170. See *infra* Part III.A. (describing the Austrian negotiations); *infra* Part III.B. (discussing the potential application of international restitution in the International Court of Justice).

Austrian negotiations and Part III.B. will analyze potentially applicable international principles on restitution.

A. The Austrian Negotiations: Application of the International Agreements

While class actions certify a class, negotiate a settlement, and obtain a class-wide judgment, international agreements lead to limited “legal peace.”¹⁷¹ The United States filed Statements of Interest for legal proceedings involving Holocaust-era claims and, in exchange, the Austrian government established two compensation funds, the General Settlement Fund (“GSF”) and the Reconciliation, Peace and Cooperation Fund (“Reconciliation Fund”).¹⁷² Additionally, provisions were put in place to require legal change in Austria pursuant to the establishment and implementation of the GSF.¹⁷³

As a result of the litigation in the 1990s, the US government became involved in the negotiation of international agreements between the Holocaust claimants and a number of foreign States.¹⁷⁴ In

171. Ratner, *supra* note 68, at 226 (describing how the Executive Agreement acted as an alternative to litigation); *see also* *Nuremberg in America*, *supra* note, 48 at n.817 (discussing the use of Statements of Interest in the German legal proceedings). “Legal peace” is the term used in the General Settlement Fund agreements to allude to the completion of all Holocaust related claims, covered by the agreement. *See* Joint Statement and Exchange of Notes Between the United States and Austria Concerning the Establishment of the General Settlement Fund for Nazi-Era and World War II Claims, Austria-U.S., Jan. 17, 2001, *published in* 40 I.L.M. 565 (2001) [hereinafter GSF Agreement] (providing the Joint Statement, Exchange of Notes and Annexes A-C).

172. *See generally* GSF Agreement, *supra* note 171 (providing the Joint Statement, Exchange of Notes and Annexes A-C); Agreement between the Government of the United States of America and the Austrian Federal Government Concerning the Austrian Fund “Reconciliation, Peace and Cooperation” (Reconciliation Fund), Austria-U.S., Oct. 24, 2000, *available at* <http://www.state.gov/documents/organization/129563.pdf> [hereinafter Reconciliation Fund Agreement] (providing for the establishment of the Reconciliation Fund to compensate slave and forced laborers).

173. *See* GSF Agreement, *supra* note 171, at 567 ¶ a (providing “Austria will propose the necessary legislation to establish the General Settlement Fund in conformity with the principles set forth in Annex A”); Reconciliation Fund, *supra* note 172 (providing in Annex A the “Principles Governing the Operation of the Fund” including the legislation governing the fund).

174. The Executive Agreements entailed meetings on regular and alternating bases in the host country (Austria, Germany, or France) and the United States. Participants included representatives from the host country, the United States, Israel, the World Jewish Restitution Organization, plaintiffs’ counsel, several Central and Eastern European countries (in the case of the German negotiations), and, depending on the case, representatives from private industries for companies that were potential defendants in litigation occurring in the United States. *See* Ratner, *supra* note 68, at 225 (describing the process of Executive Agreement negotiation between the United States and Austria, Germany, or France); *see also* Interview with

order to best describe the application of this mechanism, it must be placed within the context of the Holocaust-era discussions.¹⁷⁵ President Clinton appointed Stuart Eizenstat for the US government as the Special Envoy for Holocaust Issues.¹⁷⁶ Eizenstat dealt specifically with “encourag[ing] the return of property confiscated . . . by the Nazis . . . concentrat[ing] primarily on the Jewish communities facing the greatest barriers.”¹⁷⁷ Eizenstat’s role was to resolve political problems, and as such acted as a mediator.¹⁷⁸ Negotiations were framed as an alternative to the Rule 23 class action settlements and became the preferred method of settlement after the Swiss Bank litigation settlement of the late 1990s.¹⁷⁹ One of the results of the international agreements was that the United States filed Statements of Interest in the legal proceedings that involved Nazi-era claims.¹⁸⁰ Thus, instead of certifying a settlement class and receiving a class-wide judgment with release in exchange for payments made by the settling defendants, the defendants would sign a joint statement with the United States and all parties involved in the negotiation, which would stand as the “exclusive remedy and forum for the resolution of all claims” against that particular country.¹⁸¹

Martin Mendelsohn, Attorney, Simon Wiesenthal Center (Mar. 17, 2014) (discussing Mendelsohn’s involvement in orchestrating agreements between the United States and a number of Central and Eastern European countries).

175. The application of this method will further be explained in *infra* Part III.B.2.

176. See EIZENSTAT, *supra* note 1, at 23 (discussing Eizenstat’s appointment as Special Envoy); see also Ratner, *supra* note 68, at 225 (explaining the American representative in negotiations with foreign countries for Executive Agreements).

177. See EIZENSTAT, *supra* note 1, at 23 (discussing Eizenstat’s appointment as Special Envoy); see also Ratner, *supra* note 68, at 225 (explaining the American representative in negotiations with foreign countries for Executive Agreements).

178. Ratner, *supra* note 68, at 225 (discussing the failings of the Executive Agreements process); see generally Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center (Mar. 17, 2014) (describing some of Eizenstat’s failings as a mediator in negotiating the Executive Agreements).

179. Ratner, *supra* note 68, at 226 (describing the Executive Agreements as an alternative mechanism to the class action); see *supra* Swiss Banks litigation, at Part I.B.

180. Ratner, *supra* note 67, at 226; see October 24, 2000 Executive Agreement between the Government of the United States and the Austrian Federal Government, <http://reconciliationfund.at/index-2.html>; Statement of Interest of the United States, *In re* Austrian and German Bank Litigation, 80 F. Supp. 2d 164 (S.D.N.Y. 2000) *aff’d sub. nom.*, *D’Amato v. Deutsche Bank* 236 F.3d 78 (2d Cir. 2001) (No. 98-3938) (describing the American statement in the Austrian and German Banks litigation as a result of the Executive Agreement).

181. Ratner, *supra* note 68, at 226 (describing the Executive Agreement with Germany entitled “Remembrance, Responsibility and the Future”); see also EIZENSTAT, *supra* note 1, at 214 (discussing the German agreement and the different funds established as a result of the agreement).

It is important to note that Mr. Eizenstat neither acted in a judicial capacity, nor evaluated the class action cases as litigation.¹⁸² Due to his longstanding government career and his relationship with the Clinton Administration, Mr. Eizenstat understood his role in the negotiations as dealing with “a political problem.”¹⁸³ Yet he orchestrated a negotiation that allowed for resolution of slave labor litigation, property disputes, and even looted art in States across Europe.¹⁸⁴

Interestingly, the Joint Statement for the GSF frames the discussion of the fund similar to the class action requirements.¹⁸⁵ For example, the parties declare that “based on the circumstances, the participants consider the overall result fair to the victims and their heirs.”¹⁸⁶ They also declare that given the advanced age of survivors at the time, “the primary humanitarian objective of the provision of immediate compensation for survivors . . . [is] a cooperative, fair and non-bureaucratic manner to ensure that payments reach the victims quickly.”¹⁸⁷ The GSF required a “good faith” effort to implement the measures described in the Annex to the Joint Statement

182. Ratner, *supra* note 68, at 225 (outlining the limitations of Eizenstat’s role in the negotiation processes); Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (describing Eizenstat’s limitations in the negotiation process and some of the failings that limitation led to).

183. One particularly problematic example involves the settlement against Germany. The US government promoted a 10 billion DM (about US\$4.5 billion) settlement with half paid by German industry and the other half paid by the Germany government. This amount was never suggested by plaintiffs’ counsel and had no relationship to plaintiffs’ claims. Once Mr. Eizenstat put his support behind the number during settlement discussions, the amount became first a ceiling that did not allow for further discussion about the true property value of the claims. See Ratner, *supra* note 68, at 225 (providing an understanding of how viewing the negotiations from a political perspective hampered the process). Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (describing how plaintiffs received less compensation because of Eizenstat’s insistence on supporting certain measures); Ratner, *supra* note 68, at 225 (discussing the German fund payouts as an example of Eizenstat’s limitation as a mediator).

184. See generally EIZENSTAT, *supra* note 1, at 293-314 (discussing Eizenstat’s role in negotiating settlements and agreements concerning Holocaust assets). But see Ratner, *supra* note 68, at 225 (describing the limits of Eizenstat’s role as a government official).

185. See *supra* Part I.B. (discussing the class action mechanism).

186. See GSF Agreement, *supra* note 171, at 566 ¶ 1, 2 (describing fairness evaluations when creating, negotiating, and managing the Fund); see FED. R. CIV. P. 23(b)(3), *supra* note 74 (describing the fairness evaluations in the class action mechanism). See also Reconciliation Fund, *supra* note 172, at 2 (“Believing that the Fund will provide as expeditious as possible a mechanism for making fair and speedy payment to now elderly victims.”) and at Annex B, ¶ 8 (providing that “[the] Fund is fair and equitable based on . . .” a number of criteria including the age of survivors, the level of funding and more).

187. See GSF Agreement, *supra* note 171, at 566.

and also required that Austria fund in advance “appropriate publicity concerning the establishment of the General Settlement Fund.”¹⁸⁸

The Austrian government became involved in negotiations with Mr. Eizenstat, plaintiffs’ counsel, multinational corporations, and the Jewish community of Austria.¹⁸⁹ These discussions concerned a myriad of issues including slave or forced labor payments, looted assets, and individual and communal property.¹⁹⁰ Although the negotiations that led to the international agreement with Austria were initially focused on slave labor issues, Mr. Eizenstat took the slave labor negotiations as an opportunity to settle property claims as well.¹⁹¹ Acting as an intermediary, Mr. Eizenstat began negotiations with the Austrian government, represented by Ernst Sucharipa; the dean of the Austrian Diplomatic Academy, Hannah Lessing; the head of the Austrian National Fund, which had been providing funds to Austrian Holocaust survivors since 1995; and Ariel Muzicant, the head of the Austrian Jewish community.¹⁹² These negotiations led to “bitter battles” that would ultimately complicate not only the property claims but the labor negotiations as well.¹⁹³ Personalities clashed

188. See GSF Agreement, *supra* note 171, at 56 ¶ e (describing the requirement to publicize the establishment of the fund); see FED. R. CIV. P. 23(c)(2), *supra* note 75 (discussing notice requirements under the Federal Rules of Civil Procedure). See also Reconciliation Fund, *supra* note 172, at 3 (providing “Austria agrees to ensure that the Fund shall provide appropriately extensive publicity concerning its existence, its objectives and the availability of funds”).

189. See EIZENSTAT, *supra* note 1, at 279-92 (describing the negotiation process in Austria); Interview with Ariel Muzicant, head of the Austrian Jewish Community, in New York, NY (Aug. 7, 2015) (discussing Mr. Muzicant’s involvement in the Executive Agreement negotiations with the US and Austrian governments).

190. See EIZENSTAT, *supra* note 1, at 287-290 (describing the variety of claims being negotiated).

191. See EIZENSTAT, *supra* note 1, at 289 (describing the property claim dispute and Eizenstat’s involvement in the negotiations); Interview with Ariel Muzicant, head of the Austrian Jewish Community, in New York, NY (Aug. 7, 2015) (describing how negotiations only began when the new government with Chancellor Schuessel was formed).

192. See EIZENSTAT, *supra* note 1, at 291 (describing the various parties at the negotiating table); Interview with Ariel Muzicant, head of the Austrian Jewish Community, in New York, NY (Aug. 7, 2015) (discussing Muzicant’s involvement in the negotiations and why he saw the property disputes as integral for the longevity of the Austrian Jewish Community as a way of “righting wrongs” and as a way of really representing Jewish interests); Cf. *Nuremberg in America*, *supra* note 48, at 195-96 (describing the German government’s fear of litigation as a factor for entering negotiations on slave labor disputes).

193. See EIZENSTAT, *supra* note 1, at 292 (explaining, from Eizenstat’s perspective, Muzicant’s biases, personality, and distrust of many of those involved in the negotiations, including the Austrian government and some of the plaintiffs’ lawyers); Interview with Ariel Muzicant, head of the Austrian Jewish Community, in New York, NY (Aug. 7, 2015)

during the negotiations and while Eizenstat was looking for a quick resolution to the negotiations, other parties focused on more substantive issues and drew out the negotiation process.¹⁹⁴ Mr. Eizenstat met with Chancellor Schuessel, Mr. Muzicant, and plaintiffs' counsel who had filed claims in the United States involving the Austrian government or Austrian corporations.¹⁹⁵ The Jewish community wanted a number of concessions including the right to pursue Jewish communal property claims, a lump sum to support the community, and Austrian maintenance of "known and unknown" cemeteries.¹⁹⁶ The GSF provided that the Jewish communal organizations, including the Israelitische Kultusgemeinde ("IKG"), represented by Muzicant, would be eligible for restitution *in rem* for "losses of immovable and tangible moveable property (e.g., cultural or religious items)" provided that they meet a number of criteria.¹⁹⁷ The IKG would have to satisfy the following: (1) that all property be "publically-owned," as defined by the text of the agreement, and (2)

(describing Eizenstat's insistence on resolving the negotiations quickly and acting in the interests of the Claims Conference rather than in the interests of all parties).

194. See EIZENSTAT, *supra* note 1, at 292 (explaining, from Eizenstat's perspective, Muzicant's issues and the ways in which his personality clashed with others involved in the negotiations); Telephone Interview with Charles Moerdler, Partner at Stroock, Stroock & Levant (May 16, 2014) (discussing the ways in which Eizenstat clashed with others present at the negotiations).

195. These meetings were often held as large group discussions in Austria, where Chancellor Schuessel was represented by Mr. Sucharipa. Some of the lawyers present at these meetings included Martin Mendelsohn, who represented a number of Eastern European governments, Michael Hausfeld, who represented individual claimants from the United States, Edward Fagan (later involved in a malpractice suit and disbarred), who represented some of the US claimants, Randol Schoenberg, who represented Maria Altmann's claims for the return of Klimts, and Charles Moerdler, who represented the Austrian Jewish community. See EIZENSTAT, *supra* note 1, at 302-13 (describing the tense negotiations that involved the Austrian government and the lawyers); Interview with Ariel Muzicant, head of the Austrian Jewish Community, in New York, NY (Aug. 7, 2015) (discussing his reservations with the negotiation process); Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (discussing his involvement in the negotiations); Telephone Interview with Charles Moerdler, Partner at Stroock, Stroock & Levant (May 16, 2014) (describing the tense relationship between him and Eizenstat).

196. EIZENSTAT, *supra* note 1, at 310-12 (discussing the concessions made to the Austrian Jewish community); Interview with Ariel Muzicant, head of the Austrian Jewish Community, in New York, NY (Aug. 7, 2015) (describing the various issues the community viewed as integral to a viable settlement).

197. GSF Agreement, *supra* note 171, at 576 (discussing generally the parameters for restitution of property to the Austrian Jewish community); Interview with Ariel Muzicant, head of the Austrian Jewish Community, in New York, NY (Aug. 7, 2015) (discussing the process by which the Austrian Jewish community and specifically the IKG negotiated for the return of property as well as compensation in a lump sum).

that the property was owned by the Jewish communal organization, or for defunct groups by its legal predecessor, at the time of the loss, and (3) the claims were not previously decided or settled or no consideration or compensation had been received for the property except where there was a unanimous decision by the GSF that the compensation constituted “extreme injustice,” or (4) that the claim was denied for a failure to produce evidence under prior legislation in cases where the evidence was once inaccessible but had since become accessible.¹⁹⁸

Eventually, all parties signed the agreement, closing the chapter on Holocaust restitution in Austria for many survivors, but allowing the process to continue for others.¹⁹⁹ The final settlement allowed Randol Schoenberg, Maria Altmann’s attorney, to file a claim in the United States and pursue the return of Ms. Altmann’s Klimt paintings.²⁰⁰ The Joint Statement to the GSF notes that the US\$210 million made available by Austria and Austrian companies would act as both a ceiling and a final amount for all compensation and restitution concerning Austria.²⁰¹ However, the Joint Statement acknowledged that two types of claims were excluded from the GSF parameters: (1) all those claims covered by the Reconciliation Fund and (2) any “*in rem* claims for works of art.”²⁰² Thus, while all subsequent claims against the Austrian government and companies

198. GSF Agreement, *supra* note 171, at 576 (describing the criteria for the Jewish community to claim restitution of property); Interview with Ariel Muzicant, head of the Austrian Jewish Community, in New York, NY (Aug. 7, 2015) (describing the inadequacy of the GSF with regards to its consideration of Jewish communal needs).

199. EIZENSTAT, *supra* note 1, at 313-14 (describing the tension in the signature process when the Austrian Jewish community seemed to “hijack the negotiations” because they did not believe the community would receive adequate compensation); Interview with Ariel Muzicant, head of the Austrian Jewish Community, in New York, NY (Aug. 7, 2015) (discussing the inadequacies of the settlement because they did not entail lump sum payments to sustain the Austrian Jewish community).

200. *See supra* note 4 (describing Maria Altmann’s journey for the return of her property); *supra* note 8 (discussing Altmann’s litigation process).

201. *See* GSF Agreement, *supra* note 171, at 566; Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (placing limits on the fund, including the amount to be distributed); Telephone Interview with Charles Moerdler, Partner at Stroock, Stroock & Levant (May 16, 2014) (describing the distribution of the GSF Fund as incredibly fair but that it took years to give out the payments).

202. *See* GSF Agreement, *supra* note 171, at 566 (discussing the limitations in scope of the GSF Fund); Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (discussing Randol Schoenberg’s involvement in the GSF negotiations and his request that works of art not be covered by the Fund).

closed as a result of the agreements, looted art cases became the last available avenue for Holocaust restitution.²⁰³

The negotiations facilitated a resolution for many different parties dealing with varied issues across vast geographic borders.²⁰⁴ The settlement resolved many of the claims filed against the Austrian government in the United States and allowed for quick distribution of funds in an effective and timely manner.²⁰⁵ By contrast, the Swiss Bank litigation took much longer to resolve and there were litigation matters pending for more than a decade, including the allocation of funds from certain settlement classes.²⁰⁶ However, the negotiations were limited by the politics involved in settling the dispute as an international negotiation, and by the lack of an impartial judge assessing the settlement.²⁰⁷

203. See GSF Agreement, *supra* note 171, at 566 (discussing the limitations in scope of the GSF Fund); Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (discussing Randol Schoenberg's involvement in the GSF negotiations and his request that works of art not be covered by the Fund).

204. See GSF Agreement, *supra* note 171, art. n (providing compensation and property allowance for the IKG); Reconciliation Fund, *supra* note 172, at ¶ 15, at 4 (Principles Governing the Operation of the Fund) (providing “[t]he Reconciliation Fund legislation will enter into force no later than when the funds of the Fund are made available to it and the bilateral agreements between Austria and the Governments of Belarus, the Czech Republic, Hungary, Poland, Russia, Ukraine, and the United States have been signed”).

205. Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center (Mar. 17, 2014) (discussing his quick implementation, distribution, and completion of the Austria Reconciliation Fund); see generally AUSTRIAN RECONCILIATION FUND, <http://reconciliation.fund.at/> (last visited Feb. 7, 2016) (describing the Fund and providing a history of both the Fund and the Austrian restitution process). See EIZENSTAT, *supra* note 1, at 314 (describing the participants' happiness at the resolution of the negotiations, including Schoenberg who would later litigate Altmann's looted art case in the United States).

206. See generally *In re Holocaust Victims Litig.*, No. 14-CV-00890 ERK JO, 2014 WL 2547582 (E.D.N.Y. May 30, 2014) (pertaining to a request received by the court from the Conference on Jewish Material Claims Against Germany for “approval of the budget for the vital humanitarian services to be provided in 2014 from funds allocated to the neediest victims of Nazi persecution from the Swiss Banks Settlement Fund”); *In re Holocaust Victims Assets Litig.*, No. 14-CV-00890 ERK JO, 2014 WL 2171144 (E.D.N.Y. May 23, 2014) (pertaining to a request received by the court from the American Jewish Joint Distribution Committee for “approval of the budget for the vital humanitarian services to be provided in 2014 from funds allocated for the neediest victims of Nazi persecution from the Swiss Banks Settlement Fund”); Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (discussing the efficiency of the Austrian negotiations and distribution of funds as compared to other negotiation and litigation processes).

207. See Ratner, *supra* note 68, at 225 (describing the differences between the Swiss Banks litigation and the Executive Agreements); *Nuremberg in America*, *supra* note 48, at 70-71 (discussing the Swiss Banks settlement and Judge Korman's intimate involvement in the settlement process). For more on the politics involved in negotiations, see generally EIZENSTAT, *supra* note 1, at 293-314 (describing the politics involved in settling the negotiations including Eizenstat's need to verify with the White House, to discuss settlement

B. International Principles: Possible Contemporary Solutions

Another important avenue for engagement in creating and supporting restitution movements could be through international mechanisms and courts.²⁰⁸ The International Law Commission in the Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles”) codifies wrongful conduct by States.²⁰⁹ Article 31 of the ILC Articles provides for full reparations for material injury or damage caused by a State’s wrongful act.²¹⁰ The International Court of Justice (“ICJ”) confirmed the application of this article in the *LaGrand* case, demonstrating the power international courts have to afford remedies, even when the treaty providing such remedies does not explicitly give the court such power.²¹¹ Furthermore, Article 33 of the ILC Articles provides that the articles are without prejudice to “any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State.”²¹² In his article “Lost and Regained,” Antoine Buyse argues

options with the Claims Conference, and the involvement of the WJC); Ratner, *supra* note 65, at 225 (describing Eizenstat’s involvement as “resolv[ing] what he viewed, at least in part, as a political problem”).

208. See Antoine Buyse, *Lost and Regained?: Restitution as a Remedy for Human Rights Violations in the Context of International Law*, HEIDELBERG J. INT’L L. 129, 130 (2008) (describing various forms of international legal engagement for responding to violations of international law and the remedies to those violations); see generally Report of the International Law Commission, fifty-third session, UN Doc. A/56/589 (discussing state responsibility for internationally prohibited acts).

209. See U.N. Doc. A/56/589, *supra* note 208, at 5-11.

210. See Buyse, *supra* note 208, at 130 (describing various forms of international legal engagement for responding to violations of international law and the remedies to those violations). See generally Report of the International Law Commission, fifty-third session, UN Doc. A/56/589, art. 31 (providing that a state must “make full reparation for the injury caused by the internationally wrongful act”). The Permanent Court of International Justice (“PCIJ”) has recognized this tenant in the *Chorzów Factory* case. See Buyse, *supra* note 208, at 130 (discussing the foundation for reparations under international law). See generally *Chorzów Factory (Germany v. Poland)*, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26, 1927) (recognizing international remedies for violations of international wrongful acts). See also UN Doc. A/56/10, Ch. II (discussing reparations and restitution, spelling out in further detail the general principle stated in article 31 and establishing the differences between various forms of reparations like restitution, compensation, and satisfaction).

211. See Buyse, *supra* note 208, at 130 (discussing the basis for international legal remedies and application through international courts). See generally *LaGrand Case (Germany v. United States of America)* Judgment, I.C.J. Reports 2001, 466 (finding that an international remedy could be provided for individuals).

212. See Buyse, *supra* note 208, at 134 (discussing the application of restitution within the context of human rights law); Report of the International Law Commission, fifty-third session, UN Doc. A/56/589, art. 33 (providing that “[t]his Part is without prejudice to any

that there is a possibility for human rights treaties to apply to individuals and that State responsibility can be invoked by individuals at an international level.²¹³ Buyse further contends that there are arguments to be made for extending state responsibility rules to individuals.²¹⁴ He argues that the ICJ, in its Advisory Opinion, *Reparations for Injuries Suffered in the Service of the United Nations*, found that the United Nations, a non-state entity, had the right to claim reparations at an international level from a State.²¹⁵ As such, individuals could also be recognized as subjects of international law and could thus have the possibility to claim reparations at an international level.²¹⁶

right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State”).

213. See Buyse, *supra* note 208, at 134 (describing the application of international law for violations of individual human rights). *But see* Emanuela-Chiara Gillard, *Reparations for Violations of International Humanitarian Law*, IRRC 529, 530 (2003) (describing that “with regard to individual victims of violations of human rights law and international humanitarian law the position remains more uncertain”).

214. See Buyse, *supra* note 208, at 135 (arguing that “This argument starts with three basic assumptions. The first is the general principle that every violation of a substantive rule of international law requires a remedy. The second is that states are under a general obligation to respect and ensure human rights. The third is that individuals, as stated in the previous paragraph, are the main beneficiaries towards which the duty of human rights observance is owed. If one accepts these three assumptions, there can be no other logical conclusion than the following: individuals should have a right to reparation applying the ILC Articles by analogy”). See *generally* *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of the International Court of Justice (discussing “whether the sum of the international rights of the Organization comprises the right to bring an international claim to obtain reparation from a State in respect of the damage caused by the injury of an agent of the Organization in the course of the performance of his duties”).

215. See Buyse, *supra* note 208, at 135 (arguing that “This argument starts with three basic assumptions. The first is the general principle that every violation of a substantive rule of international law requires a remedy. The second is that states are under a general obligation to respect and ensure human rights. The third is that individuals, as stated in the previous paragraph, are the main beneficiaries towards which the duty of human rights observance is owed. If one accepts these three assumptions, there can be no other logical conclusion than the following: individuals should have a right to reparation applying the ILC Articles by analogy”). See *generally* *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of the International Court of Justice (discussing “whether the sum of the international rights of the Organization comprises the right to bring an international claim to obtain reparation from a State in respect of the damage caused by the injury of an agent of the Organization in the course of the performance of his duties”).

216. See *generally* 1949 I.C.J. 8 (discussing “whether the sum of the international rights of the Organization comprises the right to bring an international claim to obtain reparation from a State in respect of the damage caused by the injury of an agent of the Organization in the course of the performance of his duties”).

*IV. A MODEL FOR THE FUTURE: ACCESSING THE
INTERNATIONAL REALM*

This Section will discuss the various applications of the Holocaust restitution processes to subsequent violations and the importance of strategizing based on the community's needs.²¹⁷ Part IV.A. will discuss which process was more successful: class action or international agreement. Part IV.B. will describe the limitations of impact litigation through the *Khulumani* case and Part IV.C. will discuss how the Holocaust Restitution Movement can act as a rubric for subsequent movement building for survivors of other genocide and mass human rights violations. Part IV.C.1 will discuss the Cambodian genocide and Part IV.C.2 will discuss the Armenian genocide.

A. Finding Success: A Combination of Multiple Strategies

Although there are many important strategies to be learned from the Holocaust Restitution Movement, the most successful path would incorporate the domestic strategies outlined by the Movement, like class action lawsuits and welfare based strategies, and incorporate stronger elements of engaging international law and international courts.²¹⁸ This Note has documented a particular historical moment and the legal principles that formed a movement; however, the strategies are not restricted to Holocaust restitution.²¹⁹ Just as the Holocaust movement of the 1990s was a sophisticated and multipronged project, so too must be any restitution movement endeavoring to achieve recognition, social, and legal success.²²⁰

The Holocaust Restitution Movement successfully made use of US domestic litigation mechanisms and political negotiations.²²¹ The class action mechanism served the plaintiffs well, providing huge

217. *See infra* Part IV.A. (assessing which was more successful, the negotiations or litigation); *see infra* Part IV.B. (describing a case where class action mechanisms were applied unsuccessfully in a subsequent case); *see infra* Part IV.C. (discussing two particular examples where application can be useful).

218. *See supra* Parts I and II (describing the importance of combining strategies for a successful movement).

219. *See infra* Part III.C. (discussing the application of Holocaust restitution strategies to subsequent movement building).

220. *See supra* note 6 (discussing Altmann's implementation of multiple strategies before resolution of her claims); *infra* Part IV.C. (discussing the application of Holocaust restitution strategies to subsequent restitution movements).

221. *See supra* Part II.

class payouts and widespread media attention.²²² By employing an impartial judge to assess the fairness of the settlement, the litigation proceedings demonstrated clearer and better-articulated settlement classes and overall fairness.²²³ However, although the class action reached a quicker settlement, subsequent proceedings dragged on well past a decade after the initial pleadings were filed.²²⁴ Additionally, due to the scope of the class, survivors only received nominal compensation.²²⁵ Although litigation typically takes longer to reach resolution, that can be considered one of the fallbacks with regards to engaging only with litigation mechanisms.²²⁶

By contrast, the political negotiations were mired with politicking, tension, and big personalities who vied not only for the best settlement for their clients but also for personal attention.²²⁷ Despite this, the negotiations were resolved more efficiently, funds were allocated more effectively, and a myriad of issues were resolved, like individual property returns, forced labor wages, and communal claims.²²⁸ The class action litigation focused solely on the Swiss Banks.²²⁹ While there were clear benefits and detriments to each

222. See Beker, *supra* note 5, at 145-46 (Avi Beker ed., 2001) (discussing the use of class actions for plaintiffs); *Nuremberg in America*, *supra* note 48, at 32 (discussing why the Swiss Banks litigation was so successful).

223. See Ratner, *supra* note 68, at 225 (describing the elements of impartiality and fairness in the Swiss Banks litigation). EIZENSTAT, *supra* note 1, at 164 (explaining that “Judge Edward Korman played the Swiss Banks cases like Jascha Heifetz played the violin”).

224. See EIZENSTAT, *supra* note 1, at 362 (describing the slow dispensation of Swiss settlement funds); *supra* note 148 (providing two examples of subsequent litigation relating to *In re Holocaust Victims Assets Litig.*).

225. See *Nuremberg in America*, *supra* note 48, at 91 (discussing the allocation of funds, including two percent to attorneys’ fees and two percent towards legal fees out of the US\$25 million settlement); Ratner, *supra* note 68, at 218 (describing how 550,000 submitted questionnaires as an indication that they wanted to be considered part of the class action).

226. See EIZENSTAT, *supra* note 1, at 362 (describing how slowly funds were dispensed following the Swiss Banks litigation); *supra* note 148 (providing two examples of subsequent litigation relating to *In re Holocaust Victims Assets Litig.*).

227. See generally EIZENSTAT, *supra* note 1 (describing the big personalities of the lawyers involved in the Holocaust Restitution Movement, including Charles Moerdler). *But see* Telephone Interview with Charles Moerdler, Partner at Stroock, Stroock & Levan (May 16, 2014) (describing Eizenstat’s personality and the difficulty he had working with Eizenstat on behalf of the IKG).

228. Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (discussing the efficiency and resolution of the Austrian restitution claims as a result of the negotiations). EIZENSTAT, *supra* note 1, at 358 (discussing Austria’s “particularly good record” in making payments).

229. See *In re Holocaust Victims Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (providing the court’s ruling on the Swiss Banks litigation settlement). See EIZENSTAT, *supra*

strategy, it was the combination of the two that created and fostered a successful movement around Holocaust litigation.²³⁰

B. The Limitations of Impact Litigation: The Khulumani Case

Khulumani v. Barclay National Bank demonstrates the importance of looking beyond impact litigation towards multipronged strategies.²³¹ In November 2002, the first apartheid-era suit was filed in the Eastern District of New York, not long after the first Holocaust restitution claim was settled.²³² Many of the plaintiffs' attorneys who had litigated in the Holocaust restitution cases, and in particular the Swiss Banks litigation, took a leading role in *Khulumani* as well.²³³ Interestingly, Judge Korman, who presided over the Swiss Banks litigation, also presided in the *Khulumani* appeal in the Second Circuit.²³⁴ The case involved consolidated claims by ninety-one named victims claiming arbitrary detention, extrajudicial killings,

note 1, at 120 (discussing the committee and lawyers working on exposing "the Swiss' ill-gotten gains" and fears that certain examinations and reports would not be sufficient).

230. Furthermore, the early losses sustained by the movement, like *Handel* and *Princz*, provided clear parameters for how to engage with various mechanisms and allowed the movement to reassess their strategies so as to "win through losing." See generally Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011) (describing the ways in which various movements use their early litigation losses to create successful campaigns around their movements later on). But see generally Gerald Rosenberg, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (discussing the problems with perceived "wins" in litigation and the ways in which those victories can actually be losses).

231. See *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542 (S.D.N.Y. 2004) *aff'd in part, vacated in part, remanded sub nom.* *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) *aff'd sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (describing the South African apartheid litigation); Michael Thad Allen, *The Limits of Lex Americana: The Holocaust Restitution Litigation As A Cul-De-Sac of International Human-Rights Law*, 17 WIDENER L. REV. 1, 56-57 (2011) (discussing the *Khulumani* litigation as an extension of the Holocaust-era litigation tactics).

232. Allen, *supra* note 231, at 58.

233. Michael Hausfeld and Edward Fagan were both involved in the Swiss Banks litigation and the *Khulumani* case. See *In re S. African Apartheid Litig.*, 346 F. Supp. 2d at 540 (listing the attorneys representing the plaintiffs, including Michael Hausfeld and Edward Fagan); see Allen, *supra* note 231, at 56 (discussing the similarities between the Holocaust restitution cases and the *Khulumani*).

234. *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007) *aff'd sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (laying out the plaintiffs' attorneys and indicating the panel of judges presiding over the case); Allen, *supra* note 231, at 61 (describing Judge Korman's role in looking into international law, Judge Katzmman's role in looking into international law standards, and Judge Hall's role in looking into common law torts).

sexual assault, and other violence.²³⁵ The District Court Judge dismissed the claims, finding no subject matter jurisdiction on the defendants' 12(b)(1) motion to dismiss.²³⁶ On remand, Judge Scheindlin dismissed all claims.²³⁷

The *Khulumani* case developed with many of the same factors as the Holocaust restitution litigation: similar attorneys, similar judges, and even similar claims.²³⁸ The case also shared much of the historical scope and complexity of the Holocaust-era claims litigation.²³⁹ Additionally, the plaintiffs had the support of the US Executive, the governments of South Africa, Canada, Germany, the United Kingdom, and Switzerland.²⁴⁰ Yet even with international support, impact litigation on its own was not enough without an international agreement.²⁴¹

235. *Khulumani*, 504 F.3d at 258 (describing the plaintiff's claims as "apartheid related" claims); Allen, *supra* note 231, at 57 (discussing the plaintiff's allegations against fifty named multinational corporations "conducting business in apartheid-era South Africa," as well as "hundreds of corporate Does").

236. *Khulumani*, 504 F.3d at 259 ("Ruling on the defendants' motions to dismiss, the district court held that the plaintiffs failed to establish subject matter jurisdiction under the ATCA."); Allen, *supra* note 231, at 58-59 (discussing the district court's dismissal of the case on a 12(b)(1) motion to dismiss for no subject matter jurisdiction).

237. *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 241 (S.D.N.Y. 2009) (finding that "defendants' motion to dismiss is granted in part and denied in part [and] [p]laintiffs' motion to re-solicit the views of the governments is denied" after six years of litigation); Allen, *supra* note 231, at 62-63 (describing Scheindlin's analysis of the claims and concluding dismissal for insufficient factual detail for some, but that certain allegations could prevail at trial on limited grounds).

238. *Khulumani*, 504 F.3d at 258 (outlining the plaintiffs' attorneys and judges on the circuit panel); Allen, *supra* note 216, at 63 (describing the similarities between the *Khulumani* case and the Holocaust-era litigation, but that in *Khulumani*, restitution claims were either ignored, dismissed, or dropped).

239. Allen, *supra* note 231, at 63.

240. See Allen, *supra* note 231, at 61-64 (discussing political support for the *Khulumani* case and political disappointment when the court did not take into account the US government's foreign policy interest); Kristen Hutchens, *International Law in the American Courts - Khulumani v. Barclay National Bank Ltd.: The Decision Heard "Round the Corporate World*, 9 GERMAN L.J. 639, 652 (2008) (quoting Thurgood Marshall Jr. as saying "[a]t best, the litigation interferes with executive branch leadership in matters of American foreign policy").

241. See Allen, *supra* note 231, at 65-67 (describing both the political will for holding multinational corporations accountable, and the legal means to do so, and yet barriers to legal justice); Hutchens, *supra* note 240, at 681 (describing the double abuse the victims faced, both by the corporate and individual abusers and also by the South African government, who has yet to pay reparations). Cf. EIZENSTAT, *supra* note 1, at 366 (asserting that "while the developments of 2003 have made it increasingly clear that our Holocaust negotiations may offer little legal precedent for others to correct broader and more historical injustices through US courts, the negotiations do provide lessons on how to address these injustices outside the judicial system").

Plaintiffs petitioned for a writ of certiorari, but the Supreme Court could not reach a quorum and denied the writ in May 2008.²⁴² Although impact litigation was unsuccessful in the US courts, other processes were still at work within South Africa. For example, in 1995, the South African Parliament established the South African Truth and Reconciliation Commission.²⁴³ The goal of the Commission was to work to heal the wounds created during decades of discrimination and racial violence.²⁴⁴ The Commission engaged in reconciliation processes and evaluated restitution claims.²⁴⁵ Thus, the South African Apartheid restitution process, although not successful in the US courts, employed a number of different strategies.²⁴⁶

C. Application of Movement Building for Other Genocides and Mass Human Rights Abuses

The lessons of the Holocaust Restitution Movement can be applied to survivors of other genocides and mass human rights abuses.²⁴⁷ The first step is understanding that a successful campaign for restitution requires acknowledgement that the campaign must function like a movement.²⁴⁸ Inevitably not all strategies will be

242. See *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (denying a writ of certiorari); Allen, *supra* note 231, at 64 (discussing the likelihood of the Supreme Court granting certiorari after the number of defendants decreased).

243. See Hutchens, *supra* note 240, at 648 (discussing reconciliation processes in place within South Africa); Julian Simcock, *Unfinished Business: Reconciling the Apartheid Reparation Litigation with South Africa's Truth and Reconciliation Commission*, 47 *STAN. J. INT'L L.* 339, 246-47 (2011) (discussing the goals of the Commission: (1) to look into human rights violations, (2) to work on gathering and evaluating evidence regarding these violations, and (3) facilitate granting amnesty).

244. See Simcock, *supra* note 243, at 246-47. (discussing the goals of the Commission: (1) to look into human rights violations, (2) to work on gathering and evaluating evidence regarding these violations, and (3) facilitate granting amnesty).

245. See Simcock, *supra* note 243, at 246-47 (discussing the nature of reparations under the Commission and its controversy); Hutchens, *supra* note 240, at 648 (describing the establishment of the Human Rights Violations Committee and the Reparations and Rehabilitation Committee for reparations proceedings).

246. See Simcock, *supra* note 243, at 254-55 (discussing litigation strategies engaging with the Alien Tort Statute); Hutchens, *supra* note 238, at 651-52 (discussing the controversial nature of engaging in litigation outside of South Africa).

247. See *infra* Part IV.A. (discussing application to the Cambodian genocide); see *infra* IV.A. (discussing application to the Armenian genocide).

248. See NeJaime, *supra* note 230, at 945 (discussing how "litigation loss may, counterintuitively, produce winners"); see e.g., *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985) (standing as an example of an early Holocaust restitution litigation loss that helped shape the trajectory of the movement); *Prinz v. The Federal Republic of Germany*, 26 F.3d

successful, but learning from losses can be an effective mechanism for bringing about long-term legal and social change.²⁴⁹ Next, the movement must determine what the survivor community really needs.²⁵⁰ This Section will discuss the application of Holocaust strategies to two particular genocides as examples of how strategists should consider which tools to implement based on community needs.²⁵¹

1. The Cambodian Genocide: A Welfare-Based Approach

In 1975, the Khmer Rouge, led by Pol Pot, declared a new history for Cambodia when they captured Phnom Penh.²⁵² Over the next four years, the government instituted a regime of terror.²⁵³ The Khmer Rouge singled out all minorities, urban groups, and all those who had not supported the Khmer during the civil war, also called “New People.”²⁵⁴ The “Old People,” mostly those living in the countryside in Khmer-controlled regions, were also targeted if

1166 (1993) (providing an example of an early litigation loss that subsequently influenced the German slave labor reparations funds).

249. See NeJaime, *supra* note 230, at 946 (“[T]he limitation and constraints of court-centered strategies . . . may function within a dynamic, multifaceted process of law and social change.”). *But see* ROSENBERG, *supra* note 230, at 422 (arguing that the courts do not bring about social change or reform, and that there is little evidence that litigation victories produce indirect effects that influence reform).

250. See *e.g.*, *supra* note 31 (discussing the various welfare programs created in the aftermath of World War II to benefit survivors); *see e.g.*, *supra* note 31 (describing how restitution was not as prominent in certain periods but became more prominent in others).

251. See *infra* Part IV.A. (discussing application of Holocaust strategies to the Cambodian genocide); *infra* Part IV.A. (discussing application of Holocaust strategies to the Armenian genocide).

252. The Khmer Rouge, also known as the Communist Party of Kampuchia, was founded in 1968 and seized power in 1975. See Ben Kiernan, *The Cambodian Genocide—1975-1979*, in *CENTURY OF GENOCIDE: CRITICAL ESSAYS AND EYEWITNESS ACCOUNTS* 339, 339-374 (Samuel Totten et al. eds., 2004) (discussing Pol Pot’s rise and the start of his regime); Theresa Klosterman, *The Feasibility and Propriety of a Truth Commission in Cambodia: Too Little? Too Late?*, 15 *ARIZ. J. INT’L & COMP. L.* 833, 845 (1998) (discussing the Khmer Rouge’s brutal rise to power).

253. See Kiernan, *supra* note 252, at 339 (describing how between 1975 and 1979, Democratic Kampuchea (DK) was a prison camp State, with 8 million prisoners spending their time in solitary confinement); Klosterman, *supra* note 252, at 845 (discussing the rise of Pol Pot’s totalitarian State beginning with resistance from the jungle and eventually ascension to power in 1975).

254. See Kiernan, *supra* note 252, at 339-74 (discussing the various groups targeted by the Khmer Rouge including Buddhists, dissenters, and Chinese); Klosterman, *supra* note 252, at 848 (describing the victims of the genocide as cultural and religious minorities, including Chams, Chinese, Thai, and Vietnamese).

the Khmer perceived them as traitors.²⁵⁵ Between one-and-a-half to two million people were murdered during those four years.²⁵⁶ The genocide ended when the Vietnamese army invaded Cambodia and removed the Khmer Rouge from power in 1978.²⁵⁷ In 1997, the United Nations organized elections within the country that resulted in a hybrid government.²⁵⁸ After a bloody coup, Hun Sen overthrew his co-prime minister and won new elections in 1998.²⁵⁹ From 1975 well into the 1990s, the country was politically and economically unstable.²⁶⁰ The country was wrought by civil war, unrest, and terror.²⁶¹

In 2003, the Extraordinary Chambers in the Court of Cambodia (“ECCC”) was established through an agreement between the international community and Cambodia.²⁶² The goal was to try the

255. See Kiernan, *supra* note 252, at 347 (describing how DK initially divided the country into “New People” and “Old People,” but with dissent, the lines were blurred); Klosterman, *supra* note 252, at 849 (acknowledging that the purges did not stop with minorities, but that four out of five of those slaughtered were Khmer Rouge personnel).

256. See Kiernan, *supra* note 252, at 348 (providing a table with statistics of the number murdered from each targeted group, totaling 1.6 million); Klosterman, *supra* note 252, at 849-50 (asserting that estimates of the total number killed under the Khmer Rouge is between 1.7 and 2 million).

257. See Kiernan, *supra* note 252, at 348 (discussing the US bombing of Cambodia and Vietnamese invasion); Klosterman, *supra* note 252, at 849 (discussing the victory of Vietnamese over the Khmer Rouge).

258. See Kiernan, *supra* note 252, at 353 (discussing the eventual surrender of all Khmer Rouge personnel and establishment of elections); Klosterman, *supra* note 252, at 862 (discussing the Cambodian elections as forthcoming in July 1998).

259. See Kiernan, *supra* note 252, at 353 (describing the fall of the last of the Khmer Rouge outposts including the December 1998 surrender of the top surviving Khmer Rouge leaders); Neha Jain, *Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice*, 20 *DUKE J. COMP. & INT’L L.* 247, 252 (2010) (discussing the eventual withdrawal of Vietnamese troops and the signing of a comprehensive peace agreement in 1991).

260. See Kiernan, *supra* note 252, at 350-53 (discussing the continued struggles to eliminate Khmer Rouge pockets in the Cambodian jungles); Klosterman, *supra* note 252, at 853-54 (describing how Pol Pot’s own troops eventually seized him and tried him in a “People’s Trial”).

261. See Kiernan, *supra* note 252, at 353 (describing pockets of unrest in the northern Cambodian jungles); Jain, *supra* note 259, at 261 (discussing the Prime Minister’s threat to plunge the country back into civil war during peace negotiations).

262. See Renee Jeffrey, *Beyond Repair?: Collective and Moral Reparations at the Khmer Rouge Tribunal*, 13 *J. HUM. RTS.* 103, 113 (2014) (discussing how one of the provisions brought by victims to the ECCC was for “social services, support for agriculture and ‘justice’”); Susan Dicklitch and Aditi Malik, *Justice, Human Rights, and Reconciliation in Postconflict Cambodia*, 11 *HUM. RTS. REV.* 515, 523 (2010) (asserting that a culture that

perpetrators of crimes against humanity, genocide, and war crimes.²⁶³ The ECCC was devoted to criminal proceedings as well as reparations.²⁶⁴ According to Scholar Renee Jeffrey, “reparations seek to repair damage or harm that has been unjustly inflicted on an individual, group or state. At their ideal extreme they are a form of restitution.”²⁶⁵ The ECCC established a provision in order to allow victims to participate “in the criminal proceedings as civil parties.”²⁶⁶ According to the Internal Rules of the ECCC, victims had the capacity to “seek collective and moral reparations.”²⁶⁷ However, the court made no effort to define what collective and moral meant, and reparations were not awarded in any of the ECCC cases.²⁶⁸

Scholars have asserted that the ECCC was unsuccessful not only because of rampant corruption, but also because the court did not address the needs of the Cambodian survivors, namely to establish social welfare programs.²⁶⁹ According to Scholar Renee Jeffrey, one

secures “both civil and political rights, as well as economic, social and cultural rights (as outlined in the Universal Declaration of Human Rights)” is necessary); Kristen Ainley, *Transitional Justice in Cambodia: The Coincidence of Power and Principle*, in *TRANSITIONAL JUSTICE IN THE ASIA-PACIFIC* 125, 127 (Renee Jeffrey & Hun Joon Kim eds., 2013) (discussing the formation of the ECCC through international agreement in 2003).

263. See Jeffrey, *supra* note 262, at 103 (discussing the crimes charged at the ECCC); Ainley, *supra* note 262, at 127 (describing the goal of the ECCC as to “try ‘senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom and international conventions recognized in Cambodia’”).

264. See Ainley, *supra* note 263, at 128 (describing the ECCC as having both restorative and retributive justice elements); Jeffrey, *supra* note 263, at 108 (discussing the interplay between reparations and retributive justice).

265. See Jeffrey, *supra* note 262, at 104 (describing the reparations component at the ECCC but that assessment of moral reparations was difficult); Ainley, *supra* note 262, at 141 (asserting that there is no provision for providing individual restitution, only for “moral” restitution).

266. See Jeffrey, *supra* note 262, at 107.

267. Internal Rules, (Rev. 8) of the Extraordinary Chambers in the Courts of Cambodia, 2011. 23[1][a]&[b] (providing the general principles of victims’ participation as civil parties); see Jeffrey, *supra* note 262, at 104 (discussing the ability of victims to appear at trial proceedings and engage in those proceedings).

268. See Ainley, *supra* note 262, at 141 (discussing one of the problems with the ECCC as its reluctance to award reparations); Jeffrey, *supra* note 262, at 104 (asserting that the ECCC fell short of its initial expectations with regards to reparations).

269. See Jeffrey, *supra* note 262, at 112 (discussing how the court disregarded a petition brought by victims for welfare-based initiatives); Dicklitch & Malik, *supra* note 262, at 518 (asserting the importance of economic, social, and cultural rights).

of the provisions brought by victims to the ECCC was for “social services, support for agriculture and ‘justice,’ vaguely define[d].”²⁷⁰ Cambodians wanted to return to a world of relative normalcy, to begin working again, and to be given the tools to begin rebuilding their society.²⁷¹ Surveys conducted during the ECCC found that priorities from Cambodian citizens were socioeconomic, rather than related to justice in terms of prosecution and punishment.²⁷² A restitution strategy focused on the needs of the community would be most responsive and successful long-term.²⁷³

Holocaust restitution processes began long before the litigation battles and negotiations of the 1990s.²⁷⁴ Those programs focused on providing welfare for survivors.²⁷⁵ Additionally, provisions in both Austria’s GSF and the Swiss Banks settlement provided compensation for elderly survivors in need in Israel and Eastern Europe.²⁷⁶ The survivors of the Cambodian genocide require similar

270. Jeffrey, *supra* note 262, at 113 (discussing how survivors of the Cambodian genocide wanted welfare-based support rather than criminal proceedings); see Dicklitch & Malik, *supra* note 262, at 519 (explaining that “[t]he Khmer concept of justice is rooted more firmly in traditional, moral practices of mutual understanding and agreement than in state laws or legal practices” and that “a more restorative approach to justice seems to emanate from Khmer history”).

271. See Jeffrey, *supra* note 262, at 109 (describing survey results from 2008 and 2010 that called for greater tools to rebuild the Cambodian society); Dicklitch & Malik, *supra* note 262, at 519 (explaining that “[t]he most extreme form of punishment within the E.C.C.C. involves incarceration,” and that “[g]iven the impoverished living conditions for most Cambodians, this punishment would hardly rebalance the ‘dharma’ for perpetrators of mass injustice”).

272. See Jeffrey, *supra* note 262, at 109 (describing surveys collected from Cambodians requesting greater socioeconomic support rather than prosecution of criminals); Dicklitch & Malik, *supra* note 262, at 521 (noting that not only was the court behind schedule but, since its mandate allowed for the trial of major Khmer officials only, it was not able to bring the majority of perpetrators to justice).

273. See MARRUS, *supra* note 5, at 63 (discussing early welfare programs for Holocaust restitution); HOLOCAUST ERA ASSETS CONFERENCE, SOCIAL WELFARE FOR JEWISH NAZI VICTIMS, I. 22-32 (Prague, June 2009) (describing various welfare programs from the 1950s and 60s).

274. See *supra* Part I.A. (discussing Holocaust restitution programs prior to the 1990s).

275. See *supra* note 27 (discussing the Restitution from Western Allied Zones Program); *supra* note 31 (describing the BEG restitution program).

276. See *In re Holocaust Victims Assets Litig.*, 105 F. Supp. 2d 139, 143-44 (E.D.N.Y. 2000) (discussing the settlement provisions, and providing compensation for survivors who fit within one of the settlement classes, even if they have never lived in Switzerland or the United States); GSF Agreement, *supra* note 171, at 570 (Annex A) (discussing immediate

programs.²⁷⁷ In fact, survivors demanded such programs at the ECCC.²⁷⁸ Although the ECCC, like the Nuremberg Trials before them, focused on retributive justice, unlike the progression of Holocaust restitution after 1945, there has been little attention given to the demands of survivors who have pushed for the improvement of their basic living.²⁷⁹ Therefore, the focus of the Cambodian restitution movement should be on welfare-based programs within Cambodia to bolster survivors' socioeconomic status.²⁸⁰

2. The Armenian Genocide: Fighting for Restitution One Hundred Years Later

In 1915, the Young Turk government, a reformist movement against the former Turkish absolutist sultan Abdul-Hamid, shifted its policy towards the Armenian population within Turkey from oppression to deportation and premeditated extermination amounting to genocide.²⁸¹ On April 24, 1915, 235 Armenian doctors, clergy,

compensation to survivors, regardless of where they live today so long as they originate from or are living in Austria).

277. See Jeffrey, *supra* note 262, at 113 (discussing the tension between what the civil parties requested, reparations in the form of socioeconomic measure, and what they received, memorials and apologies); Ainley, *supra* note 262, at 140 (discussing the trial court's lack of imagination as providing reparations).

278. See Jeffrey, *supra* note 262, at 110-11.

279. The Nuremberg Trials of 1945 tried various high-ranking Nazi officials in front of a tribunal of judges from the United States, the United Kingdom, France, and Russia. The crimes charged included crimes of war, crimes against peace, and crimes against humanity. The trials focused on retributive justice. See generally Lawrence Douglas, *The Didactic Trial: Filtering History and Memory into the Courtroom*, 14 EUROPEAN REV. 513 (2006) (discussing the innovations of the Nuremberg trials, including the "notion that perpetrators could be made to answer for their conduct before international courts"); Leora Bilsky, *Transnational Holocaust Litigation*, 23 EUR. J. INT'L L. 349 (2012) (describing how publicized the Nuremberg trials were).

280. See Jeffrey, *supra* note 263, at 113 (discussing the request for socioeconomic programs as restitution from the ECCC); Ainley, *supra* note 263, at 141 (describing the lack of focus on restitution at the ECCC).

281. Prior to 1915, the Turkish government systematically discriminated against the Armenian minority population. There were numerous pogroms against the Armenian populations in the 1890s, however, none reached the scale or scope of the genocide. The Young Turks initially promised reform but quickly shifted to xenophobic policies once in power. See DANIEL BLOXHAM, *THE GREAT GAME OF GENOCIDE: IMPERIALISM, NATIONALISM, AND THE DESTRUCTION OF THE OTTOMAN ARMENIANS* 70 (2005) (discussing context of the Armenian genocide as originally a means of promoting an ethnic war outside Turkey); Jeffrey W. Stempel et. al., *Stoney Road Out of Eden: The Struggle to Recover Insurance for Armenian Genocide Deaths and Its Implications for the Future of State*

lawyers, politicians, and teachers were arrested and murdered in Constantinople, leaving the Armenian community leaderless and vulnerable.²⁸² The Turkish government began transferring Armenian soldiers from the Turkish army into labor battalions where they were either killed or worked to death.²⁸³ Between late May and early June 1915, Armenians were deported from Turkey into the desert where they were intended to die from starvation, dehydration, and heat.²⁸⁴ Non-Armenian populations were exempt from the deportations.²⁸⁵ Approximately 1.5 million people were deported over the course of eight months.²⁸⁶ As the convoys traveled into the desert, men aged fifteen and older were taken aside and stabbed with daggers or shot; many women were kidnapped, forced to convert to Islam, and taken as sex slaves.²⁸⁷ Many children were kidnapped and converted so as to destroy and eliminate the Armenians as a group.²⁸⁸ One-half to

Authority, Contract Rights, and Human Rights, 18 *BUFF. HUM. RTS. L. REV.* 1, 25 (2012) (discussing the growing discrimination policies against the Armenian community in Turkey); Saroyan, *supra* note 21, at 290-91 (discussing the situation in Turkey for Armenians prior to 1915).

282. See Robert F. Melson, *The Armenian Genocide as Precursor and Prototype of Twentieth-Century Genocide*, in *THE GENOCIDE STUDIES READER* 234, 235 (Samuel Totten & Paul R. Bartrop eds., 2009) (describing the progression of anti-Armenian policy in Turkey from targeting elites to full-scale genocide); Stempel et al. *supra* note 281, at 26 (discussing the arrest and murder of Armenian leaders in Turkey's capital).

283. See Melson, *supra* note 282, at 235 (discussing the shift in Turkish ideology and the start of the Armenian genocide); Bloxham, *supra* note 281, at 69-70 (analyzing the Armenian genocide as ethnic cleansing and providing background on Turkish actions leading up to the genocide).

284. See Bloxham, *supra* note 281, at 69 (describing the "Armenian fate" as "composed of two elements: ethnic cleansing, or forced collective displacement, and direct physical annihilation"); Melson, *supra* note 283, at 235 (describing the progression from targeting Armenian men within the Turkish army to targeting Armenian civilians); Stempel et al., *supra* note 281, at 26-27 (describing the mass deportations of the Armenian community).

285. Stempel et al., *supra* note 281, at 26.

286. See Bloxham, *supra* note 281, at 81 (discussing the first deportations from Zeytun, which began in 1915 as incremental deportations and turned into a flood); Melson, *supra* note 282, at 235 (discussing the mass deportations instituted by the Turkish government).

287. See Bloxham, *supra* note 281, at 83 (discussing the early deportations as a regional policy rather than national and that deportations conditions varied across groups); Melson, *supra* note 283, at 235 (discussing the horrendous treatment of the Armenian civilian population).

288. See Bloxham, *supra* note 281, at 90 (discussing that as of June 1915, Talat authorized killing escapees or resisters in deportation columns and that deportees were not intended to return); Melson, *supra* note 282, at 235 (discussing the specific atrocities Armenian children faced); Saroyan, *supra* note 281, at 292-93 (describing the Armenian

three-quarters of the Armenian population living in the Ottoman Empire were murdered between 1915 and 1923.²⁸⁹

While all these atrocities were occurring in Turkey, the United States, Great Britain, and France were in the midst of World War I fighting against Germany, the Austro-Hungarian Empire, and Turkey.²⁹⁰ At the close of World War I in August 1920, the Allies sat down with Turkey to draft the Treaty of Sevres.²⁹¹ The Treaty memorialized a number of concessions including Turkey's recognition of an independent Armenia, its obligation to assist survivors through repatriation, restoration, and the rescue of women and children held in Muslim households, and its commitment to prosecuting the perpetrators of the Armenian genocide.²⁹² The Treaty was annulled fourteen days later and Turkish forces attacked the Armenians and annexed nearly all Armenian land within a matter of months.²⁹³

Efforts were made after the Armenian genocide, similar to those made after the Holocaust, to prosecute perpetrators of the genocide.²⁹⁴ Great Britain urged for a Turkish military court to try the Young Turk leaders for their role in perpetrating the Armenian genocide.²⁹⁵ This

genocide as a "massive and systematic operation against Armenians throughout almost all of the empire").

289. See Bloxham, *supra* note 281, at 70-71 (discussing how the genocide did not originate as a calculated policy of murder, but progressed to murdering millions); Melson, *supra* note 283, at 235-36 (describing the number of Armenians murdered during the genocide).

290. See Stempel et al., *supra* note 281, at 21 (discussing the rise of the Young Turks in the Ottoman Empire and the start of World War I); Saroyan, *supra* note 21, at 293 (discussing the victory of the Allies in World War I over the Turks).

291. See Saroyan, *supra* note 21, at 293 (discussing the aftermath of WWI); Stempel et al., *supra* note 281, at 33 (describing the Treaty of Sevres).

292. See Saroyan, *supra* note 281, at 293-94 (describing the concession Turkey made in the draft of the Treaty of Sevres); Stempel et al., *supra* note 281, at 34 (discussing the requirements the Turkish government had by signing the treaty).

293. See Saroyan, *supra* note 21, at 294 (discussing the Turkish offensive when the Treaty of Sevres failed); Stempel et al., *supra* note 282, at 34 (describing the failures of the Treaty of Sevres).

294. See *supra* note 278 (discussing the Nuremberg Trials); *supra* note 291 (discussing efforts in the Treaty of Sevres to include provisions for an International Tribunal).

295. See Saroyan, *supra* note 21, at 285, 294 (discussing the British plan for prosecution of the perpetrators of the Armenian genocide); Stempel, et al., *supra* note 281, at 34-35 (2012) (discussing the Treaty of Luasanne, subsequent to the Treaty of Sevres, which focused on economic relations between Turkey and Europe but took discussion of the Armenian genocide

initiative became known as “the Nuremberg that failed” because none of the judgments were enforced.²⁹⁶ Additionally, like survivors of the Holocaust, most of the survivors of the Armenian genocide lived in diaspora communities.²⁹⁷ A large portion of that community moved to the United States, generations after the genocide pushed for recognition of the Armenian genocide by the US government.²⁹⁸ That community also began talking about what happened only years after the event.²⁹⁹ Like Holocaust survivors, many survivors of the Armenian genocide wanted to put the event behind them and rebuild their lives.³⁰⁰ Thus, recognition even within the community only began years later.³⁰¹

Twelve elderly Armenians brought the first Armenian genocide lawsuit in 2000 regarding insurance claims against a US company,

off the table); Daphne Anayiotos, *The Cultural Genocide Debate: Should the UN Genocide Convention Include A Provision on Cultural Genocide, or Should the Phenomenon Be Encompassed in A Separate International Treaty?*, 22 N.Y. INT’L L. REV. 99, 122-23 (2009) (discussing the failure of the Treaty of Lausanne, which abandoned the plan for an international tribunal to prosecute the Ottoman Turks for the Armenian genocide).

296. See Saroyan, *supra* note 21, at 294 (2011) (describing how the failed initiative led to Armenian forces assassinating Young Turk leaders throughout Europe of their own accord); Daphne Anayiotos, *The Cultural Genocide Debate: Should the UN Genocide Convention Include A Provision on Cultural Genocide, or Should the Phenomenon Be Encompassed in A Separate International Treaty?*, 22 N.Y. INT’L L. REV. 99, 122-23 (2009) (noting the failure to include provision to try the Turks for the Armenian genocide).

297. See NOVICK, *supra* note 6, at 79 (discussing the proportions of Holocaust survivors living in the United States and Israel); Stempel, et al., *supra* note 281, at 37 (2012) (discussing the large Armenian diaspora community living in the United States).

298. Stempel et al., *supra* note 281, at 39 (2012) (discussing how subsequent to the 50th commemoration of the Armenian genocide, survivors and their offspring sparked a political movement where Congressmen made speeches commemorating the anniversary of the genocide); see generally NOVICK, *supra* note 6, at 209 (discussing the sources that pushed for Holocaust memory commemoration from the 1970s through the 1990s, including the famous miniseries *Holocaust*).

299. Stempel et al., *supra* note 281, at 38 (2012) (discussing the rise of a new generation focused on civil rights and anti-Vietnam War protests that sought historical justice); see NOVICK, *supra* note 6, at 207 (discussing how the Holocaust began to “loom so large” in the United States’ consciousness in the 1990s).

300. Stempel et al., *supra* note 281, at 39 (2012) (discussing the April 24, 1965 commemoration of the Armenian genocide as a turning point for talking about and memorializing the genocide); see generally NOVICK, *supra* note 6 (discussing the shift in Holocaust memory in the United States from silence in the postwar period to public commemoration in the 1990s).

301. See NOVICK, *supra* note 6, at 84 (describing the United States’ and Israel’s goal of integrating survivors into society so as to relegate “the Holocaust to history”); Stempel et al., *supra* note 281, at 36-37 (2012) (describing how survivors sought to build a new life for themselves in the United States after the Armenian genocide).

New York Life Insurance.³⁰² The suit was filed as a class action in *Marootian v. New York Life Ins. Co.*, similar to the Holocaust restitution class actions, and sought the payment of policies by New York Life.³⁰³ Although New York Life found policy cards in their archives and did not dispute the insurance policies themselves, it argued that the policies contained forum selection clauses for dispute resolution in French or English courts.³⁰⁴ New York Life also argued that the suit was time-barred since the policies were written and allegedly unpaid almost a century prior.³⁰⁵ In response, the California legislature enacted a statute similar to one it passed in response to Holocaust-era insurance and slave labor litigation, using the Holocaust Restitution Movement as a model for actions relating to the Armenian genocide.³⁰⁶ The case settled in May 2001, although negotiations for the specific settlement amount were not finalized until January 2004.³⁰⁷ The parties settled for US\$20 million, with US\$11 million set aside for potential claims by the heirs of 2,400 policyholders, US\$3 million distributed to nine Armenian charitable organizations, and US\$6 million allocated for attorneys' fees and administrative costs.³⁰⁸ Similar to Holocaust restitution cases before it, the amount individual policyholders received was quite small.³⁰⁹

For survivors of the Armenian genocide, the focal point of the movement must be different from that of the Cambodian genocide for

302. See *Comparative Perspective*, *supra* note 21, at 33 (discussing the insurance lawsuit brought against New York Life Insurance Company); Stempel et al., *supra* note 281, at 46 (describing the lawsuit brought by survivors in 2000 against New York Life Insurance).

303. Stempel et al., *supra* note 281, at 46.

304. See *Comparative Perspective*, *supra* note 21, at 33 (describing the defendant's motions to dismiss); Stempel et al., *supra* note 281, at 46-47 (describing procedural issues like the defendant's 12(b)(3) motion to dismiss).

305. Stempel et al., *supra* note 281, at 47.

306. See *Comparative Perspective*, *supra* note 21, at 33-34 (discussing the California legislature's statute allowing courts to hear Armenian genocide-era policy claims despite forum selection clauses and time limitations); Stempel et al., *supra* note 281, at 49 (describing California Senate Bill 1915, which extended the statutory limitations for Armenian genocide-era insurance claims).

307. See *Comparative Perspective*, *supra* note 21, at 34 (discussing the settlement between plaintiffs and New York Life); Stempel et al., *supra* note 281, at 54 (discussing the final settlement agreement between plaintiffs and New York Life).

308. Stempel et al., *supra* note 281, at 54.

309. *Id.* Each individual policyholder would get approximately US\$4,583.33 based on the estimate of 2,400 policyholders.

historical and social reasons.³¹⁰ According to Scholar Alfred de Zayas, “[b]earing in mind that there is no prescription in international law in cases of Genocide and crimes against humanity, the Armenian entitlement for reparation has certainly not lapsed.”³¹¹ He argues that the Armenians should continue to demand “reparations in the form of restitution of their cultural and religious heritage,” because although the genocide occurred in 1915, its consequences still reverberate today.³¹² De Zayas claims that in order to create a change in the process of Armenian restitution, “political will” must materialize.³¹³ Only with the creation of a political and financial pressure will there be any change for Armenian restitution.³¹⁴ As a result, the focus of the movement should be on engaging media and pursuing high power litigation in the United States to draw attention to the genocide.³¹⁵ This would allow for a resurgence of memory in the United States and potentially push the US government to engage the Turkish government in acknowledging the historical injustice even though a century has passed since the event.³¹⁶

310. Michael J. Bazylar *The Post-Holocaust Restitution Era: Holocaust Restitution as a Model for Addressing Other Historical Injustices*, Working Paper no. 2-03, at 14 (2003); de Zayas, *supra* note 120, at 1 (discussing the status of Armenian restitution today).

311. *See* de Zayas, *supra* note 120, at 1 (discussing the importance of restitution regardless of the time that has elapsed since the genocide); *see Comparative Perspective*, *supra* note 21, at 33 (describing a suit brought in 2000 by twelve elderly Armenians against the New York Life Insurance Company).

312. *See* de Zayas, *supra* note 120, at 1 (discussing the application of restitution regardless of the time that has elapsed since the genocide); *see Comparative Perspective*, *supra* note 21, at 33 (describing a suit brought in 2000 by twelve elderly Armenians against the New York Life Insurance Company).

313. *See* de Zayas, *supra* note 119, at 1 (discussing the application of restitution regardless of the time that has elapsed since the genocide); *see Comparative Perspective*, *supra* note 92, at 33 (describing a suit brought in 2000 by twelve elderly Armenians against the New York Life Insurance Company).

314. Vartges Saroyan calls for a process similar to that of the restitution for Holocaust survivors. *See* Saroyan, *supra* note 21, at 298 (2011) (discussing political barriers to Armenian restitution, namely that the Turkish government continues to call the event “unfortunate wartime killings” rather than a genocide); de Zayas, *supra* note 120, at 1 (calling on the Turkish government to recognize the event as a genocide and formally apologize).

315. *See Comparative Perspective*, *supra* note 21, at 34 (describing the importance of movement building and creating momentum through impact litigation like Holocaust restitution claims). *But see* Saroyan, *supra* note 21, at 287 (analyzing momentum building through the lens of ADR principles like assessing a party’s reservation price and best-alternative-to-a-negotiated-agreement (BATNA)).

316. Vartges Saroyan calls for a process similar to that of the restitution for Holocaust survivors. *See* Saroyan, *supra* note 21, at 287 (discussing the disparity between the Holocaust Restitution Movement and the lack of momentum for the Armenian genocide); *Comparative*

CONCLUSION: CREATING MOMENTUM FOR FUTURE STRATEGIES

Holocaust restitution claims facilitated the creation of a successful movement.³¹⁷ Plaintiffs' attorneys learned from their early mistakes and built continued pressure through both litigation and political negotiations.³¹⁸ The men and women involved in the process, whether they were looking for a large class action payout, world-wide recognition, or were merely interested in pursuing a measure of justice, worked to create a framework through which Holocaust survivors could find peace.³¹⁹ Although the payments from settlements themselves were not particularly large, the attention created by the litigation and political negotiations through the vast media attention spread Holocaust memory and consciousness.³²⁰

Just like the Holocaust Restitution Movement employed a variety of strategies, so too must any subsequent restitution movement.³²¹ Maria Altmann, when pursuing the return of her

Perspective, *supra* note 21, at 34 (discussing the success of an Armenian insurance claim suit that implemented similar strategies to the Holocaust Restitution Movement).

317. *See supra* Part III.A. (discussing the successes and failures of the class action and negotiation strategies); GSF Agreement, *supra* note 171 (providing an example of a negotiation that led to a successful agreement between Austria and the United States); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 145-46 (E.D.N.Y. 2000) (providing an example of a class action litigation that successfully yielded a settlement).

318. *See generally* NeJaime, *supra* note 230, at 941 (discussing instances where early litigation loss can create long term success through restructuring strategies). *But see* ROSENBERG, *supra* note 230, at 422 (discussing the problems with perceived "wins" in litigation and the ways in which those victories can actually be losses).

319. *See* Interview with Martin Mendelsohn, Attorney, Simon Wiesenthal Center, in New York, NY (Mar. 17, 2014) (providing the perspective of one litigator on the Holocaust Restitution Movement and his involvement in order to right historical wrongs); Telephone Interview with Charles Moerdler, Partner, Stroock, Stroock & Levan (May 16, 2014) (discussing his involvement not only as a litigator but also as a Holocaust survivor speaking for and supporting other survivors); *see generally* EIZENSTAT, *supra* note 1 (explaining why Eizenstat became involved in Holocaust restitution negotiations, how he became involved, and the immense value he gained through his involvement).

320. *See* HOLOCAUST JUSTICE, *supra* note 12, at 3 (discussing the media storm surrounding the Swiss bank litigation); Edgar Bronfman & Israel Singer, *Foreword in THE PLUNDER OF JEWISH PROPERTY DURING THE HOLOCAUST* at viii (Avi Beker ed., 2001) (illustrating the World Jewish Congress's role in the resurgence of Holocaust-era memory and the role of the media in creating interest in the resurgence).

321. *See Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001) (providing the procedure and progression of the Altmann case as it passed through federal district court and eventually made it up to the Supreme Court to rule on the Foreign Sovereigns Immunity Act); *see* Wissbroecker, *supra* note 4, at 54-62 (discussing Altmann's use of litigation and negotiations as tools). *But see* Allen, *supra* note 231, at 63 (discussing the failures of the Holocaust restitution strategies in a subsequent case).

family's property, tried negotiations, working within Austria's legal structure, and finally used the US legal system to her advantage.³²² Her attempts demonstrate how important it is to not only implement a multipronged strategy but also to learn from early mistakes.³²³

Survivors of other mass human rights abuses can use the lessons of the Holocaust Restitution Movement.³²⁴ Survivors can bring claims not only in the United States, which provides an interesting and nuanced system for engaging with class action and political diplomacy, but also in the international arena.³²⁵ *Khulumani* demonstrates how sometimes class action litigation with political support might not be enough for resolution.³²⁶ Understanding these mechanisms and structuring a mass movement around them will enable restitution processes to progress on many levels and lead to successful outcomes.³²⁷

This Note provides a number of tools available to future strategists working on restitution.³²⁸ The ILC Principles, although not implemented by the Holocaust Restitution Movement, could be pursued as an interesting and innovative approach for claiming restitution at an international level.³²⁹ Additionally, although impact

322. See *supra* Introduction (describing Maria Altmann's process in pursuing the restitution of her looted property).

323. See *supra* Parts I and II (describing the two effects tools used by those pursuing Holocaust restitution: class action litigation and looted art).

324. See *supra* Part III.C. (discussing application of Holocaust restitution strategies to the Cambodian and Armenian contexts).

325. See *supra* Part I.C. (describing the potential application of international legal principles to individual restitution claims).

326. See Buyse, *supra* note 208, at 135 (arguing that application of the ILC Principles from state-based restitution to individual restitution at an international level is possible). See *generally* *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1948 I.C.J. 174 (Apr. 11) (inquiring as to the ability to extend international principles of restitution to individual cases).

327. See Jeffrey, *supra* note 262, at 113 (discussing the need for a welfare based approach after the conclusion of the ECCC). Vartges Saroyan calls for a process similar to that of the restitution for Holocaust survivors. See Saroyan, *supra* note 21, at 287 (discussing the importance of implementing similar strategies from the Holocaust Restitution Movement to the Armenian genocide restitution movement).

328. See *supra* Part IV.C. (discussing ways of implementing Holocaust restitution strategies in two specific cases).

329. See Buyse, *supra* note 208, at 135 (arguing that "This argument starts with three basic assumptions. The first is the general principle that every violation of a substantive rule of international law requires a remedy. The second is that states are under a general obligation to respect and ensure human rights. The third is that individuals, as stated in the previous paragraph, are the main beneficiaries towards which the duty of human rights observance is owed. If one accepts these three assumptions, there can be no other logical conclusion than the following: individuals should have a right to reparation applying the ILC Articles by

litigation has been successful in the Holocaust Restitution Movement, there have also been instances where litigation alone could not be the answer.³³⁰ *Khulumani* is merely one example where impact litigation alone was not sufficient to pursue restitution for the crimes committed during Apartheid.³³¹ The most important step for creating momentum and building a movement is determining the needs of the community.³³² For the survivors of the Cambodian genocide that meant welfare-based programs, but for the descendants of the Armenian genocide, recognition of a historical wrong and creating stronger memory and consciousness of the event may be a more appropriate strategy.³³³ Each case is unique and nuanced, as evidenced by the specific historical, political, and social considerations needed to assess the communities' needs.³³⁴ Although

analogy"). *See generally* Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1948 I.C.J. 174 (Apr. 11) (discussing "whether the sum of the international rights of the Organization comprises the right to bring an international claim to obtain reparation from a State in respect of the damage caused by the injury of an agent of the Organization in the course of the performance of his duties").

330. *See* Allen, *supra* note 231, at 63 (describing both the political will for holding multinational corporations accountable, and the legal means to do so, and yet barriers to legal justice); Hutchens, *supra* note 240, at 681 (describing the double abuse the victims faced, both by the corporate and individual abusers and also by the South African government, who has yet to pay reparations). *Cf.* EIZENSTAT, *supra* note 1, at 366 (asserting that "while the developments of 2003 have made it increasingly clear that our Holocaust negotiations may offer little legal precedent for others to correct broader and more historical injustices through US courts, the negotiations do provide lessons on how to address these injustices outside the judicial system"). Eizenstat describes applying the framework he used for Holocaust-era negotiations to "stabilize postwar Iraq." He would create similar commissions to those used to compensate survivors of Nazi oppression by earmarking "a small percentage of Iraq's oil revenue. . . to compensate Saddam Hussein's victims of torture and assassination in exchange for waiving any claims against a post-Saddam government." *See* EIZENSTAT, *supra* note 1, at 366 (envisioning the application of the commissions set up to compensate victims of Nazism and the subsequent legal peace created from the international agreements).

331. Hutchens, *supra* note 240, at 686.

332. *See supra* Part IV.C. (describing the differences between the needs of the survivors of the Armenian and Cambodian genocides and how those needs should inform restitution strategies).

333. *See* Jeffrey, *supra* note 262, at 113 (discussing how survivors of the Cambodian genocide wanted welfare based support rather than criminal proceedings); Dicklitch et. al, *supra* note 262, at 519 (explaining that "[t]he Khmer concept of justice is rooted more firmly in traditional, moral practices of mutual understanding and agreement than in state laws or legal practices. Hence, a more restorative approach to justice seems to emanate from Khmer history."). *See de Zayas, supra* note 120, at 1 (discussing the application of restitution regardless of the time that has elapsed since the genocide); *see Comparative Perspective, supra* note 21, at 33 (describing a suit brought in 2000 by twelve elderly Armenians against the New York Life Insurance Company).

334. *See supra* Part IV.C. (describing the differences between the Armenian genocide and the Cambodian genocide and how those differences inform restitution strategies).

there can never be full justice for such egregious violations and horrific trauma, the strategies illustrated herein can provide a semblance of imperfect justice, but justice nonetheless.³³⁵

335. *See supra* Part IV (discussing the application of Holocaust strategies to groups seeking restitution subsequently). *See supra* Part III (discussing the success of the international negotiations in yielding two agreements with Austria concerning Holocaust-era claims); Part II (discussing the success of the Swiss Banks and Austrian Bank cases in providing compensation and media attention to Holocaust related claims).