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Abstract

This Essay discusses the post-settlement process following the claims made against Union Bank of Switzerland ("UBS") and Credit Suisse by survivors of the Holocaust and their heirs. The author analyzes the settlement and provides both a legal and moral accounting of this litigation. This Essay is a continuation of the author's earlier writings on the subject.

www.swissbankclaims.com: THE LEGALITY AND MORALITY OF THE HOLOCAUST-ERA SETTLEMENT WITH THE SWISS BANKS

*Michael J. Bazyler**

INTRODUCTION

August 13, 1998 marks a milestone in American law. On that day, Union Bank of Switzerland ("UBS") and Credit Suisse, the two largest banks in Switzerland and one of the largest banking concerns in the world, announced that they would pay U.S.$1.25 billion to settle three class action lawsuits brought against them two years earlier in federal court in Brooklyn, New York. The settlement was remarkable for a number of reasons. First, at the time, this was the largest settlement of a human rights case in United States history.[1] Moreover, the settlement involved events over a half-century old, going back prior to World War II. In no other case in the history of American litigation had so much time passed between the events upon which the claims were based and the settlement of the litigation. Finally, the Swiss banks settlement led to a throng of other lawsuits filed against European—and even American—corporations for their nefarious activities during the war.[2] In the next three-and-one half years, these other Holocaust restitution lawsuits also concluded. The Holocaust-era restitution litigation—began by the Swiss banks lawsuits—has now yielded settlements of over U.S.$8 billion.

I have detailed elsewhere the claims made against the Swiss

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1. It has since been surpassed by another Holocaust-era restitution settlement: the agreement by German companies and the German government in December 1999 to pay ten billion German marks (approximately U.S.$5 billion) arising from the companies' use of slave labor and related activities during World War II. *See* Michael J. Bazyler, *Nuremberg in America: Litigating The Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 191-236 (2000).

2. For a discussion of these other lawsuits, *see* Michael J. Bazyler, *Holocaust Restitution in Comparative Perspective*, 21 BERKELEY J. INT'L. L. (forthcoming 2001).

banks.[3] Briefly, the banks were accused of failing to return to their rightful owners or heirs monies deposited with them for safekeeping prior to, and on the eve of, World War II. The depositors, it was alleged, were victims of the Holocaust, primarily European Jews. The banks were also accused of earning substantial profits in their dealings with the Nazis; by acting as launderers of (1) gold stolen by the Nazis from the central banks of occupied Europe and individual victims (the so-called "Nazi gold"); (2) other assets stolen by the Nazis which made their way into Switzerland; and (3) goods produced by slave labor which the Nazis also sold in Switzerland. According to a United States government report, the Swiss role as "bankers for the Nazis" prolonged the war by at least one year, since it enabled the Nazi regime to purchase goods and other war materiel, which otherwise would have been unavailable to it.[4]

This Essay begins where my previous writings left off. Part I discusses the post-settlement process, which took longer than the actual litigation itself. Part II analyzes the settlement and provides both a legal and moral accounting of this litigation.

The most important documentation of the settlement, including the post-settlement pleadings and documents, is located in the court-created website—http://www.swissbankclaims.com—authorized by Judge Edward Korman, the federal judge presiding over the litigation. Hence, the title of this Essay.

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3. *See* Michael J. Bazyler, *Holocaust Restitution in the United States: The Search for Justice, in* REMEMBERING FOR THE FUTURE: THE HOLOCAUST IN AN AGE OF GENOCIDE 845-59 (John K. Roth & Elisabeth Maxwell eds., 2001); Bazyler, *supra* note 1, at 31-91 (2000); Michael J. Bazyler, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 607-09 (1999).

4. *See* William Z. Slany, *U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II* (May 1997), *available at* http://www.state.gov/regions/eur/rpt_9705_ng_links.html. The Swiss-government created Bergier historical commission reached a similar conclusion. *See* Michael Maupin, *Passive Facilitation (Bergier Commission Studies Swiss Role in WWII)*, SWISS NEWS, Oct. 1, 2001, *available at* 2001 WL 17841946 ("The Bergier Commission assigned the task of re-assessing Switzerland's role during World War 2, has come to the conclusion that Switzerland facilitated Nazi Germany and the Axis forces through its financial services provided during the war"). In addition to the accusations against both the private Swiss banks and the government's Swiss National Bank for their financial dealings with the Nazis, the wartime Swiss government was accused of closing the Swiss border to many refugees of Nazi occupied lands and also ejecting some of the refugees who were lucky enough to make their way into neutral Switzerland. As I explain elsewhere, these refugee claims became part of the Swiss banks settlement, even though the Swiss government was not a party to the settlement. Bazyler, *supra* note 1, at 81.

I. *THE PROBLEMS OF DISTRIBUTION: "IT'S NOT OVER TIL IT'S OVER"*

As the settlement negotiations with the Swiss banks were coming to a close, one lawyer intimately involved with the process worried that, following the settlement, the worst was yet to come.

> You've got the general European Jews, the Eastern European Jews. You've got the government of Israel; you've got thousands of individual survivors; you've got all kinds of other groups, arguing that portions of the money should be set aside for different purposes in the Jewish community. It's not going to be an easy task. The fight against the Swiss is going to be nothing compared to the attempt to mediate the various interests.[5]

Unfortunately, the lawyer was right, but only partially. It took over three years to finalize the settlement and distribute the monies to the claimants, longer than the actual litigation against the Swiss banks. Some of the delays were avoidable; others were not. Many factors contributed to the delays; infighting, however, was not one of them.

As the parties envisioned the settlement in mid-August, 1998, distribution of the funds to survivors would start soon after the Swiss banks would make each of their four installment payments, beginning with the first payment on November 23, 1998. The elderly claimants would not have to wait until November 23, 2001, when the banks would make the final installment, to collect the funds. Professor Burt Neuborne, special counsel for the plaintiffs whom Judge Korman later appointed as plaintiffs' lead settlement counsel,[6] strongly believed at the time of the settlement that the banks would make their payments ahead of schedule, thereby putting the matter behind them.

Nothing of the sort happened. While the Swiss banks dutifully made their four scheduled payments, they nevertheless interjected significant obstacles that delayed distribution.[7] As a re-

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5. Susan Orenstein, *Gold Warriors: The Inside Story of the Historic $1.25 Billion Settlement Between Holocaust Victims and the Swiss Banks*, AM. LAWYER, Sept. 1998, at 62, 64 (quoting a lawyer on the executive committee handling the case for the survivors).

6. Neuborne, law professor at New York University School of Law, reviewed a draft of this Essay and provided helpful written comments. I cite to those comments in the course of this essay.

7. *See infra* text following notes 43-50.

sult, the monies remained stuck in a court-created escrow account.

By the time the first payments went out in late 2001, many of the survivors who joyously hailed the settlement in mid-1998 had died, still awaiting their check. Others just gave up, exasperated not only by the numerous delays, but also with the complicated forms they were made to fill out in order receive the settlement proceeds.

Some of the seeds causing the long delays were planted at the time of the settlement. Essentially, the parties failed to work out many of the critical details when they announced the historic settlement in August 1998. These details later came to haunt them. Of course, with the September 1, 1998 deadline for the issuance of further sanctions against the Swiss banks looming just two weeks away, the parties in the litigation cannot be blamed for settling the case without first working out these thorny issues. This mentality, however, of "let's just take the money and run" created a host of problems, which haunted Judge Korman and all the parties over the next three years.

Other delays just could not be avoided, being the usual consequence of having to follow U.S. federal court rules, especially complex requirements dealing with class action litigation. These rules, with their emphasis on assuring fairness and avoiding prejudice to any actual or potential claimant, naturally slowed down the post-settlement process and delayed distribution of any settlement funds.[8] Lawyers are accustomed to these post-settle-

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8. Another unavoidable delay was the ability of any potentially aggrieved claimant to appeal the settlement. For example, three claimants, two appearing *pro se*, filed an appeal to Judge Korman's November 22, 2000 order approving the plan of distribution of the settlement proceeds. That appeal was not decided by the Second Circuit until July 26, 2001. *See* In re Holocaust Victim Assets Litigation, Nos. 00-9595(CON), 00-9597 (CON), 2001 WL 868507 (2d Cir. 2001) (unpublished opinion) (citations omitted). Earlier, a group of ethnic Polish survivors filed an appeal, objecting to the exclusion of ethnic Poles from the settlement. That appeal was dismissed on September 21, 2000. *See* In re Holocaust Victim Assets Litigation, 225 F.3d 191 (2d Cir. 2000).

According to Professor Neuborne, "Distribution could not take place until the close of the fairness appeals process. It took us almost a year to navigate the fairness appeals process. . . . Frankly, it is a minor miracle that the legal and practical hurdles were surmounted in three years." Email memo from Burt Neuborne to author (Nov. 27, 2001) para. 1, at 1 (on file with author).

Neuborne also explains:

> [One cannot] underestimate the enormous difficulty in implementing the settlement. [Paragraph] The delays were attributable to: (1) the difficulty of drafting an unprecedently complicated settlement agreement covering five

ment delays; laymen find them frustrating.

The post-settlement resolution process had an inauspicious start, a sign of worse things to come. It took the parties more than five months after the settlement was orally agreed upon and preliminarily approved by Judge Korman in open court in August 1998 to finalize the written settlement agreement.

After the settlement agreement was finally signed on January 26, 1999, Judge Korman laid out a timetable under which the nearly 900,000 potential beneficiaries, the class members on whose behalf the suits were filed, were to be notified of the settlement. The class action notices went out in early summer 1999. A potential claimant had until October 22, 1999 to opt out of the settlement if the claimant still wanted to pursue an individual action against the Swiss banks.

The duty to notify potential beneficiaries of a class action settlement is legally required for all U.S. class actions. In this case, however, the notification process was, as described by the *Los Angeles Times*, "the most ambitious effort ever to notify potential beneficiaries of a legal settlement."[9] Since the potential recipients of the Swiss funds could be anywhere in the world, advertisements announcing the settlement were published in 500 newspapers, in over forty countries, and in languages ranging from Albanian to Yiddish. Toll-free telephone information lines were created in each of the countries. For the computer literate, an official website was created, http://www.swissbankclaims.com, in which every court document, beginning with the January 1999 Settlement Agreement, was posted. The website itself is translated into twenty languages. A San Francisco-based company specializing in class action notification was hired as a Notice Administrator to interface with the claimants.

Judge Korman allocated U.S.$25 million, or two percent of

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classes and an entire nation; (2) fierce resistance by the Swiss banks to providing information that would help us find account holders and other claimants; (3) the need to coordinate with the Volcker process; (4) the enormous task of notifying potential claimants; (5) the need to hold complex fairness hearings involving five classes; (6) the need to develop an allocation program that would be both fair and capable of administration; (7) the effort to coordinate the allocation plan with the emerging German Foundation; and (8) the need to deal with three waves of appeals to the Second Circuit.

Id.

9. Henry Weinstein, *Search Opens for Holocaust Claimants*, L.A. TIMES, June 29, 1999, at A3.

the U.S.$1.25 billion settlement, for notification and other distribution expenses. Before the case was finally concluded, the entire U.S.$25 million was spent.

On June 9, 1999, Professor Neuborne, chief settlement counsel, sent the first in a series of letters to the claimants. In the letter, Neuborne apologized for the delays that had already taken place, and warned of further impediments in the future:

> All of us who have worked on this Settlement regret that we cannot move more quickly in distributing the funds. It is our duty, however, to assure that everyone affected by the Settlement is given a chance to comment on its fairness, and to have an opportunity to express an opinion about the fairest way to allocate and distribute the funds. That takes time . . . [b]ecause we all feel so deeply about the Holocaust, we want this process to treat every survivor with scrupulous fairness.[10]

Two days later, on June 11, 1999, the official "Notice of Pendency of Class Action and Proposed Settlement and Hearing," likewise required by class action court rules, was mailed out to every person responding to the newspaper notices or contacting the website. The notice contained an "Initial Questionnaire," which claimants were asked to fill out to register their claim.

The questionnaire immediately came under heavy criticism. It was long and complicated; most seriously, it asked claimants to recount in detail their Holocaust experiences. Elihu Kover, director of a New York agency helping aging survivors fill out the questionnaire, explained: "Clients look at this twenty page thing and they don't understand it. It's not like filling out a welfare application. It's an emotional issue. This is pretty complicated and stressful."[11]

Eventually, a total of 580,000 Initial Questionnaires were

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10. Letter to potential claimants from Burt Neuborne (June 9, 1999), *available at* http://www.swissbankclaims.com.

11. Marilyn Henry, *Notification Plan Misleads Survivors*, JERUSALEM POST, Aug. 15, 1999, at 3 (quoting Elihu Kover). Kover was exaggerating when he stated that the Initial Questionnaire was 20 pages. It fact, it was six pages. An elderly couple in Los Angeles, both Auschwitz survivors, asked me to help them fill out the form. It took a few hours. The wife started to cry when she began to recount her arrival, and the selection process, at Auschwitz. That was the last time she saw her mother and infant nephew, who perished in the gas chambers. We were all exhausted when the evening ended.

submitted.[12]

On November 29, 1999, Judge Korman held a "fairness hearing," to determine whether the U.S.$1.25 billion settlement was "fair, adequate and reasonable"—again a requirement of class action rules. Of course, in this case, the result was preordained. Since Korman back in August 1998 approved the settlement in principle, it would be unlikely that he would now reject it—unless, of course, the parties had made substantial revisions to the settlement they presented to him in open court fifteen months earlier.

Nevertheless, the hearing brought up problems that had not been envisioned when the parties were finalizing their deal.[13]

In addition to the court hearing in his Brooklyn courtroom, Korman also scheduled a hearing the next month, a supplemental hearing for the Holocaust survivors in Israel. The hearing was held through a teleconference, so the Israeli survivors would not have to come to the United States to be heard.

On August 9, 2000, two years after the initial settlement, Korman signed his final order and judgment approving the Settlement Agreement as fair, adequate, and reasonable.[14]

As Judge Korman discusses in his memorandum opinion approving the settlement, the journey to reaching this stage was not an easy one, including a last minute threat by the Swiss banks to pull out of the settlement agreement.[15]

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12. Letter from Judah Gribetz and Shari C. Reig to author (Dec. 19, 2001), at 2 (on file with author).

13. For example, individuals appeared at the hearing claiming that the Swiss were still holding Nazi-stolen art belonging to them. Under the Sttlement Agreement, these art claims would be extinguished through the Swiss banks settlements. Judge Korman, in response, modified the settlement to keep open these art claims. In re Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 158-60 (E.D.N.Y. 2000).

14. *Id.*

15. "[J]ust as I was ready to release this opinion last week, counsel for the defendant banks threatened to repudiate the modifications [to the Settlement Agreement] because he was unhappy with certain good faith obligations imposed upon the releasees information necessary to allow members of the plaintiff class to obtain the benefits of the Settlement Agreement. . . . My initial discussion of the Settlement Agreement assumes that defendants Union Bank of Switzerland and Credit Suisse will act responsibly and adhere to the modifications."

Id. at 145. Subsequently, they did. For discussion, in Judge Korman's opinion, of other delays caused by the Swiss banks on the road to final approval of the settlement, *see infra* note 45.

The thorniest issue now was how to allocate the U.S.$1.25 billion. To assist him with this task, in 1998, Judge Korman appointed Judah Gribetz, a respected Jewish community leader and counsel to former New York Governor Hugh Carey, as "Special Master" to work out an allocation plan.[16] Gribetz's unenviable task was to receive written suggestions about how to divide the funds and issue a plan of allocation which Korman would then approve. Anyone could submit a suggestion, and Gribetz received over 1,000 comments on how to allocate the funds.

In September 2000, Gribetz submitted to Judge Korman his Proposed Plan of Allocation and Distribution; the plan totaled over 900 pages.[17]

In setting out his allocation plan, Gribetz did not have free reign on how to distribute the U.S.$1.25 billion. Rather, he was constrained by the limitations on distribution already set out in the Settlement Agreement finalized by the parties in January 1999.

That Agreement contained terms which both surprised and angered many who were following the litigation. Most curious, the Agreement did not just limit eligible claimants to Jews. Rather, in addition to Jewish victims or heirs, it added four other groups persecuted by the Nazis who would share in the settlement proceeds: (1) homosexuals; (2) physically or mentally disabled or handicapped persons; (3) the Romani (Gypsy) peoples; and (4) Jehovah's Witnesses. These five categories of eligible claimants[18] were given the lauded status in the Agreement as "Victims or Targets of Nazi Persecution" ("VTNP").

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16. Gribetz and his colleague Shari C. Reig reviewed a draft of this Essay and provided very helpful suggestions. I have attempted to incorporate those suggestions throughout the Essay.

17. To help elderly claimants understand the long and detailed distribution plan, Gribetz issued a 38-page overview and a seven-page summary of the plan. In addition, a set of "Frequently Asked Questions" and answers were posted on the Swiss banks settlement website, http://www.swissbankclaims.com.

18. The Settlement Agreement did not limit the Victims or Targets of Nazi Persecution ("VTNP") claimants to individuals. Rather, VTNP "means any individual, corporation, partnership, sole proprietorship, unincorporated association, community, congregation, group, organization, or other entity persecuted or targeted for persecution by the Nazi Regime because they were or believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped." Settlement Agreement, sec. 1 (entitled "Definitions"). For significance of this expanded definition, *see infra* note 30.

The expansion to these four other groups, however, was both over- and under-inclusive.

It was over-inclusive because throughout the course of the litigation, the common understanding was that the lawsuits against the Swiss banks were filed on behalf of Jewish victims. All of the named plaintiffs in the lawsuits before Judge Korman were Jewish survivors.[19] Also, only Jewish groups participated in the litigation and settlement negotiations. Lastly, the parties' briefs uniformly labeled the class members as being victims of "the Holocaust"—the term referring to the killing and persecution of European Jewry during World War II.[20]

This belief—that only Jews would recover in the Swiss class action litigation—continued even at the time of the August 1998 settlement. Press releases announcing the settlement lauded the benefits that Holocaust survivors would be receiving from the resolution of the litigation.[21]

Little attention was paid, however, to the fact that the class of plaintiffs designated in all but one of the complaints against the Swiss banks (the World Council of Orthodox Jewish Communities was filed only on behalf of Jewish victims), categorized the claimants as being both Jewish and non-Jewish. Credit or blame goes to the plaintiffs' lawyers. Not able to predict which categories of plaintiffs would ultimately succeed in the litigation, the lawyers, upon filing the suits, took the safest route and defined the class members on whose behalf they were suing as broadly as possible.

After the settlement was announced, these broad allegations in the complaints and pressure by non-Jewish victims to receive a

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19. In the late stage of the litigation, to increase pressure upon the Swiss banks, a parallel lawsuit was filed against the Swiss banks in California. That lawsuit contained one named plaintiff who was not Jewish, an elderly Romani (Gypsy) victim of the Nazis, now living in California. Bazyler, *supra* note 1, at 58. As part of the overall Swiss settlement, that California lawsuit was later dismissed. This was the only non-Jewish named plaintiff in any of the suits against the Swiss banks. Moreover, none of the suits ever contained any of the other three classes of VTNP claimants—homosexuals, physically or mentally handicapped, or Jehovah's witnesses—as plaintiffs.

20. *See* Bazyler, *supra* note 1, at 6 n.4 (discussing the meaning of the term "Holocaust").

21. For instance, the press release from one of the leading law firms announcing the August 13, 1998 settlement stated: "[i]n a historic, unprecedented legal settlement, *Swiss private banks will pay Holocaust survivors* $1.25 billion to settle legal claims arising from the banks' conduct during and after World War II." Cohen et al., E-Journal, *at* http://www.cmht.com/ipsltmt.htm (emphasis added).

portion of the funds prompted the settling parties to expand the categories of beneficiaries of the Swiss settlement to include some—but not all—non-Jewish victims.[22]

Having opened the door for non-Jewish victims to share in the Swiss settlement, the settling parties excluded groups who also rightly fit the VTNP label. Most significantly, the settlement excluded the entire category of Slavic peoples—primarily Poles and Russians—who suffered horribly at the hands of the Nazis.[23] These individuals, of course, were just as entitled to the share of the proceeds as the individuals labeled in the Settlement Agreement as VTNPs.[24]

The decision to include some non-Jewish victims and exclude others was made by the plaintiffs' lawyers and senior

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22. Professor Neurborne disagrees with my analysis. He states:

> It is inaccurate to trace the existence of non-Jewish beneficiaries to outside pressure, to strategic judgment by lawyers. It was a moral judgment by the lawyers, coupled with the desire by the Swiss banks to obtain the broadest possible releases. The notion that the inclusion of non-Jews in the settlement was a surprise is simply inaccurate. The negotiators never considered limiting the settlement to Jewish victims. We tested that idea with the leaders of the Jewish community and received unanimous support for the idea of opening the settlement fund to gypsies, Jehova's Witnesses, gays and the disabled.

Email memo from Burt Neuborne to author (Nov. 27, 2001) para. 2, at 1 (on file with author).

23. Of the more than 19 million Slavic persons murdered by the Nazis, 12.2 million came from the USSR and 5.4 million from Poland. R.J. RUMMEL, DEATH BY GOVERNMENT 12 (1994).

24. Professor Neuborne disagrees.

> Your suggestion that Poles or Russians had a 'right' to participate in the settlement is wrong as a matter of law, and wrong as a matter of morality. It's wrong to state that the excluded victims were remitted to the German Foundation. We made certain that Slavs were not precluded from bringing their own lawsuit against the Swiss banks. Indeed, we offered to make all of our research available to Slavs who wished to file a parallel suit on behalf of their community. Judge Korman urged the Slavs to file a separate complaint. The Second Circuit made it clear that excluding Slavs under those conditions was perfectly legal. I believe that it was moral as well.

Email memo from Burt Neuborne to author (Nov. 27, 2001) para. 2 at 2 (on file with author). For the Second Circuit decision affirming Judge Korman's exclusion of ethnic Poles from the settlement, see In re Holocaust Victim Assets Litigation, 225 F.3d 191 (2d Cir. 2000). The Second Circuit pointed out that ethnic Poles could still file their own separate lawsuit against the Swiss banks, and, as Professor Neuborne points out, were encouraged to do so by Judge Korman. *Id.* at 199. The ethnic Poles never did. Whether they could have forged another settlement with the Swiss banks on top of the U.S.$1.25 billion settlement already obtained in this litigation remains unknown. I would think it unlikely that the Swiss banks would have been willing to pay anything more after agreeing to this settlement.

World Jewish Congress ("WJC") officials. Professor Burt Neuborne explained how the cut-off was made:

> We had to walk a line between everyone harmed by the Nazis—which is virtually all of Europe—or only the Jews. Both extremes were unacceptable. The first would have so diluted the recovery it would have rendered the whole suit meaningless. The second would have made it unfairly parochial.[25]

The excluded victims had to console themselves with the hope of future recovery from the ongoing slave labor litigation against the German firms. As it turned out, the actual distribution of funds from both the Swiss and German settlements occurred at about the same time, even though the Swiss banks settled a year-and-a-half before the German firms.[26] Because of the various delays in the distribution of the Swiss settlement funds, the non-Jewish VTNPs in the Swiss settlement did not fare any better than the non-Jewish beneficiaries of the German settlement. Jewish survivors, eligible to receive funds from both the Swiss and German settlements, received their settlement checks almost concurrently—even though the Swiss litigation concluded eighteen months earlier.

Gribetz's actual dollar figure allocations for each VTNP class also followed closely the categories of claimants set out in the Settlement Agreement.

The first set of claimants were individuals seeking to recover monies deposited with the Swiss banks for safekeeping prior to, or during, the war. Claimants to these dormant accounts were designated in the Settlement Agreement as the "Deposited Assets Class." Since the original purpose of the Swiss banks litigation was to obtain the return of these funds, Gribetz felt bound

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25. Henry Weinstein, *Holocaust Survivors, Swiss Banks OK Settlement*, L.A. TIMES, Jan. 23, 1999 at A13. Neuborne further explains:

> The principle of victim solidarity was very important to me. If the Swiss banks had increased the settlement, I would gladly have included Slavs, as well. We just couldn't do it with $1.25 billion. I sought to compensate by assuring that Slavs were treated fairly in the German Foundation settlement. I don't purport to be an expert, but I challenge the idea that only Jews suffered in the Holocaust.

Email memo from Burt Neuborne to author (Nov. 27, 2001) para. 2, at 2 (on file with author).

26. *See* Roger Cohen, *Last Chapter: Berlin to Pay Slave Workers Held by Nazis*, N.Y. TIMES, May 31, 2001, at A1; *see also Key Dates in Nazi Slave Labour Talks*, JERUSALEM POST, May 31, 2001, at 7, *available at* 2001 WL 6608267.

to allocate the largest portion of the settlement—U.S.$800 million—to this class of claimants.[27] The amount may turn out to be more than needed to cover all the bank claims. One early indicator: only about twenty percent of those who completed the Initial Questionnaire made a claim for deposited bank assets, but with only six percent being able to name the Swiss bank purportedly holding the dormant deposited assets.[28] To cover that

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27. Gribetz aimed to give priority to these bank claimants; and Judge Korman agreed with this position. "As contemplated by the Settlement Agreement, the Proposed Plan appropriately placed priority upon returning to their rightful owners the sums that Swiss banks have been holding for them for more than half a century. *Proposed Plan* at 12." In re Holocaust Victim Assets Litigation, 2000 WL 33241660 (E.D.N.Y. 2000) (Judge Korman's November 22, 2000 Order confirming Plan of Allocation). Gribetz adopted the U.S.$800 million cap for the payout on these accounts based upon the Volcker Report estimate that the total value of these dormant accounts ranges between U.S.$643 million and U.S.$1.254 billion. The U.S.$800 million figure is an amount closer to the lower end of the range in the Volcker Report. Judge Korman adopted Gribetz's estimate. *Id.*

Following the approval of Gribetz's plan by Judge Korman, three claimants filed an appeal, two challenging the allocation of U.S.$800 million to the "deposited assets" class. The Second Circuit rejected the challenge, explaining as follows:

> We also find that the district court did not abuse its discretion in allocating $800 million to the "Deposited Assets" class. The existence and estimated value of the claimed deposit accounts was established by extensive forensic accounting. In addition, these claims are based on well-established legal principles, have the ability of being proved with concrete documentation, and are readily valuated in terms of time and inflation. By contrast, the claims of the other four classes are based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately valuate. Any allocation of a settlement of this magnitude and comprising such different types of claims must be based, at least in part, on the comparative strengths and weaknesses of the asserted legal claims.

In re Holocaust Victim Assets Litigation, Nos. 00-9595(CON), 00-9597 (CON), 2001 WL 868507 (2d Cir. 2001) (unpublished opinion) (citations omitted).

The Second Circuit also dismissed the argument that the U.S.$1.25 billion was an inadequate settlement.

> The settlement sum of $1.25 billion, which was the result of more than a year of negotiations conducted among the parties and moderated by the district court, was premised in part on economic analyses that estimated the Jewish wealth likely to have flowed into Swiss banks on the eve of the Holocaust. The district court's approval of the sum after such extensive negotiations and considered analysis was not an abuse of discretion.

Id.

28. Marilyn Henry, *Over Half a Million Claimants Against Swiss Banks Settlement*, JERUSALEM POST, Mar. 19, 2000, at 3, *available at* 2000 WL 8255267. Of course, both the low figure of the total number of claimants seeking return of deposited funds, and the inability of many of those seeking those funds to name a specific Swiss bank where the monies are being held, is due to the banks' refusal to issue more complete lists of their wartime dormant accounts. Without a complete list of such dormant accounts, heirs or

contingency, which now appears likely,[29] Gribetz recommended that any unused portion of the U.S.$800 million be allocated to the other groups of claimants.[30]

While the gravamen of the original complaints was to accuse the Swiss banks of failing to return monies deposited with them

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survivors may never learn whether monies belonging to them are being held in Switzerland in some dormant account. As Judge Korman explained in his opinion approving the settlement:

> Indeed, it is only the successful campaign that the Swiss banks waged to prevent disclosure before records were destroyed [citing the Volcker Report] that gave rise to the legal and practical impediments to the successful litigation of this case by the vast majority of individuals to whom money is justly due.

In re Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 153-54 (E.D.N.Y. 2000). Further, had all the records been available on the dormant accounts opened in Swiss banks between 1933-1945, "the value of the deposited assets held by the Swiss banks could exceed the $1.25 billion settlement amount." *Id.* at 153 (citing to the Volcker Report).

It is puzzling why the Swiss banks would now decline to publish more complete lists. Under the settlement, their financial exposure is limited to U.S.$1.25 billion, regardless of how many dormant account claimants appear as a result of increased publication and dissemination of information regarding Swiss wartime dormant accounts.

29. As the *Financial Times* reported,

> [t]his week marked the closing date for people who thought they might have one of the [Swiss] dormant accounts to submit a claims. . . . Only 25,000 claims were received by the deadline. . . . This was a surprisingly low number as 85,000 people had answered an earlier questionnaire saying they might have a claim to a Swiss account. Of the 25,000 claims made by this week's deadline, only 20%, or about 5,000, staked a claim to one of the account names that had been published. Thus, at least 16,000 of the 21,000 accounts published earlier this year appear to have gone unclaimed. . . . Even more problematically, there are 20,000 people who believe they have accounts not included in the list published earlier this year. While some have already waited 56 years for their money, all the indications are that the mess could take at least another two years to resolve.

John Authers, *Judgment Day For Swiss Banks*, FIN. TIMES, Aug. 11, 2001, *available at* 2001 WL 25576994. Earlier, Burt Neuborne, plaintiffs' chief settlement counsel, predicted that "as many as 36,000 survivors may file claims for lost bank accounts . . . ." Daniel Wise, *Panel Affirms Swiss Holocaust Settlement*, N.Y.L.J., July 31, 2001, at 1. With additional claims coming in close to, and after, the filing deadline, Neuborne's estimate appears to be correct: over 30,000 claims appear to be made for dormant wartime Swiss bank accounts.

30. Many Holocaust survivors are greatly troubled by this result, fearing that the unused portion of the U.S.$800 million will not be going to Holocaust survivors, or directly for their benefit, but for such projects as building Holocaust memorials, restoring Jewish communities in Eastern Europe, or other Holocaust education-type expenditures. *See* Nacha Cattan, *Survivors Seek More Say In Claims Fight*, FORWARD, Feb. 16, 2001, at 4. Organizations seeking funds for such projects can claim, of course, that the Settlement Agreement contemplates their receipt of moneys from the Swiss settlement for this work, since organizations and other groups are included under the Settlement Agreement as "Victims or Targets of Nazi Persecution." *See supra* note 17.

for safekeeping, the complaints also blamed the banks of engaging in three other types of wrongful conduct during wartime.

First, the Swiss banks were accused of knowingly trading goods made by slave labor with the Nazis. The banks either purchased those goods directly from the Nazis or financed the importation of such goods into Switzerland. These allegations were based on the various books published at the time, which exposed the Swiss banks as being the secret bankers for the Nazis. This class was designated in the Settlement Agreement as "Slave Labor I."[31]

Second, the lawsuits also alleged that some Swiss companies directly owned or controlled factories that used slave labor in Germany or Nazi-occupied Europe. Individuals who worked for such Swiss-run companies were designated as a separate class, known as "Slave Labor II."[32]

Third, the Swiss banks were also accused in the suits of helping the Nazis to launder profits earned from goods looted from Jews. This class was designated as the "Looted Assets Class."[33]

In their pleadings, plaintiffs alleged that the defendant Swiss banks earned more than U.S.$75 million by knowingly trafficking in looted assets and in assets produced by Nazi slave labor, and that the current value of such profits earned by the defendant banks was in excess of U.S.$1 billion dollars.

Finally, the Swiss government had earlier admitted that it denied entry to Jews and other persecuted groups fleeing the Nazis. The private Swiss bank defendants insisted this so-called "Refugee Class" be included in the Swiss banks settlement.[34]

Now came the hardest part: how to divide up the remaining U.S.$450 million and accrued interest of approximately U.S.$100 million among these non-deposited assets groups?

As it turned out, almost all of those who returned initial questionnaires made claims based upon these latter allegations, and not for the return of monies deposited in the Swiss banks. Many of these non-deposit claims came not from survivors themselves, but individuals claiming a share as heirs.

Gribetz, along with Neuborne, quickly realized that the list

31. Settlement Agreement, sec. 8.2(c).
32. *Id.*
33. *Id.* sec. 8.2(b).
34. *Id.* sec. 8.2(e).

of eligible persons for these latter claims would need to be drastically reduced. As they explained,

> [T]here is simply not enough money available to make direct payments to most heirs in the slave labor, refugee and looted assets classes. Otherwise, so many payments would be required and so much of the Settlement Fund would be used up for costly eligibility determinations that everyone essentially would get nothing.[35]

Another practical problem was that none of the Holocaust survivors named as plaintiffs—or for that matter any other survivor—could prove that the benefits the Nazis earned from their slave labor or looted assets made their way into the Swiss banks' coffers.

To avoid these practical difficulties, Gribetz recommended that every person who was a former slave or forced laborer under the Nazis—and who fit one of the VTNP categories—receive the same amount: somewhere between U.S.$500 and U.S.$1,000. The final figure would depend on the number of VNTP claimants applying for these funds. No link to the Swiss needed to be made by the claimant.[36] Proof of being a forced or slave laborer under the Nazis would suffice.[37] Heirs of such former laborers would be excluded. One exception was if an eligible claimant

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35. *In re Holocaust Victim Assets Litigation* (Swiss Banks), *Frequently Asked Questions* (Apr. 17, 2001) at 10, *available at* http://www.swissbankclaims.com.

36. The elderly members of this class therefore are relieved of the burden of demonstrating precisely which company enslaved them and whether and how that company channeled revenues or proceeds of their slave labor through a Swiss entity. The fortuity that the apparent Swiss banking relationships of many slave labor-using entities has been documented should not prejudice those class members who performed slave labor for enterprises whose financial ties to Swiss entities may not yet have been demonstrated with the present state of research and scholarship. As the Initial Questionnaires make clear, many former slaves cannot even identify the name of the corporation for which they labored; they know only what they did, where they did it, and the generally sub-human conditions in which they were forced to do so.

PLAN OF ALLOCATION [hereinafter PLAN], at 147-48 (footnote omitted). The proposed Plan of Allocation and Distribution ("Plan") is available at http://www.swissbankclaims.com. The Plan is also published at 25 Fordham Int'l L.J. ___ (2001). Page number references in this Essay are to the version available on the Internet.

37. Individuals applying as Slave Labor II claimants—those claiming to have performed slave labor for a Swiss-run company—could receive payment even if they did not fit one of the VTNP categories. For example, a non-Jewish Pole or Russian would be eligible, but only if the claimant could show that he or she performed labor for such a Swiss company.

was alive on February 15, 1999, but subsequently died, the decedent's heirs could collect the payment.[38]

For the looted claims, Gribetz took another tack. Concluding that every VTNP claimant must have had some assets stolen from them by the Nazis, and the impossibility of tracing such assets or proceeds to benefits earned by the Swiss banks from the Nazi-stolen loot, the proposed Plan of Allocation and Distribution ("Plan") simply excluded payment to claimants seeking individual compensation for looted assets.[39] Rather, Gribetz allocated U.S.$100 million to this category, which would then be disbursed through existing charity programs to needy VTNP survivors. Most of the funds went to aid elderly Jewish survivors in the former Soviet Union. They were so-called "double victims," since they were excluded from prior German reparations programs while living behind the Iron Curtain[40] and were now in dire need in the aftermath of the economic collapse of the post-Soviet republics.

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38. The date chosen was linked to the date of the comprehensive German Foundation settlement. In that settlement, only heirs of former German slave laborers who were alive on February 15, 1999 could receive a payout owed to their deceased relative. *See* PLAN, *supra* note 36, at 18 n.32.

39. As Gribetz explained:

> "There is scarcely a victim of the Nazis who was not looted, and on nearly an incomprehensible scale. . . . Plundered loot took a variety of paths once it had been seized. . . . With only limited exceptions, however, the current historical record simply does not permit precise documentations even as to the material losses in total, much less the nature and value of the loot traceable to Switzerland or to Swiss entities. . . . It is neither justifiable nor appropriate to select which looting victims may be entitled to recompense from this U.S.$1.25 billion Settlement Fund based entirely upon the happenstance of where the Nazi Regime chose to direct which loot, which records of the plunder happen to survive, and which items one may hazard a guess may have found their way to or through Switzerland. . . . The Special Master has considered, but rejected, two options for allocation and distribution to the Looted Assets Class: the use of a claims resolution facility to determine individual claims on a case-by-case basis, or, alternatively any equal *pro rata* distribution to each claimant. Each of these options would deplete the Settlement Fund with little, if any noticeable benefits to class members. . . . Under these circumstances, the Special Master believes that one *cy pres* remedy to benefit the entire class and a second *cy pres* program targeting the neediest elderly members of the class should be applied."

PLAN, *supra* note 36, at 111-15.

40. These individuals surely fit within the category of victims of looted assets, since their properties or other belongings were stolen by the Nazis or the local population in the aftermath of the Nazi occupation. For a discussion of the "double victims," see PLAN, *supra* note 36, at 122-30 (Section III, B 4(a)(i)).

Still living refugees who were denied entry into, or expelled from, Switzerland during wartime were allocated U.S.$2,500 per person. This group was small, totaling no more than a few thousand. Each such refugee claimant could eventually receive a greater amount.

On November 21, 2000, Judge Korman held a second court hearing, this time to obtain reactions to Gribetz's allocation plan.

The Israeli daily *Ha'aretz* reported that the hearing

> turned into an ugly verbal battle between Jewish survivors, representatives of Jewish organizations, and others. Claimants testifying were frequently interrupted by angry shouts from Holocaust survivors in the packed Brooklyn courtroom. Many survivors were angry at the various organizations pleading their case for a share of the funds, saying they feared the money would benefit organizations rather than individuals.[41]

Some Jewish survivors were angry that non-Jewish survivors would participate in the settlement. The eligible non-Jewish survivors, in turn, argued that they should be receiving a larger share of the settlement. The non-eligible, non-Jewish survivors (those excluded from the VTNP categories) argued that they also should be included in the settlement. Non-eligible heirs argued that they should be allowed to assert the claims of their deceased relatives. A senior World Jewish Congress ("WJC") official labeled the hearing "a most unfortunate experience. Everyone involved showed an insensitivity that deserves to be condemned."[42]

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41. *Angry Wrangling Mars Hearing on Swiss Holocaust Payments*, HA'ARETZ, Nov. 22, 2000. Both Neuborne and Gribetz disagree with this characterization. According to Neuborne:

> My recollection of the . . . hearing on the Gribetz plan is not nearly as negative as you depict. There were clashes over how the money should be distributed. But, given the passion that infuses the issue, I remain proud of the behavior of the survivor community. The allocation process was difficult, but fundamentally civil.

Email memo from Burt Neuborne to author (Nov. 27, 2001) para. 3, at 2 (on file with author). Gribetz agrees. I was not present at the hearing, and so must rely on descriptions made by those who were there. Gribetz also points out that "it is telling that while some 580,000 Initial Questionnaires were filed, only six appeals were filed against the order approving the Distribution Plan. Each of these six appeals either was withdrawn or was rejected by the Second Circuit in its July 26, 2001 decision." Letter from Judah Gribetz and Shari C. Reig to author (Dec. 19, 2001), at 3 (on file with author).

42. *Angry Wrangling Mars Hearing*, *supra* note 41.

Korman rejected all objections or proposed modifications. In November, 2000, he approved Gribetz's Plan of Allocation and Distribution in full.

With an allocation scheme in place, the next step was to begin the claims process and, when that was completed, to begin the actual distribution of the funds. Unfortunately, more delays arose.

The Swiss banks refused to issue a complete list of possible dormant accounts. The Volcker audit of the Swiss banks determined that 53,886 accounts from fifty-nine Swiss banks could have belonged to victims of Nazi persecution, with 21,000 "probably" so linked. Volcker's report urged that the names of all these account holders be published.[43] Judge Korman concurred.[44] He also severely chastised the Swiss banks for their

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43. "Volcker initially wanted Swiss banks to create a database with 4.1 million accounts. This would have allowed research not only into accounts with names of victims but also of names of intermediaries, such as Swiss lawyers, who deposited money for their clients." Elizabeth Olson, *Swiss to List Bank Accounts Unclaimed since Holocaust*, N.Y. TIMES, Nov. 26, 2000, at A28. *See also* PLAN, *supra* note 36, at 58-59 (setting out Volcker's recommendations regarding the identification and publication of dormant accounts, presented by Volcker to the House Committee on Banking and Financial Services, February 9, 2000).

American Jewish groups urged the broader database, even when the account had only fragmentary information, with the hope that more account holders could be identified.

"But the March [2000] agreement by Swiss regulators [to waive Swiss bank secrecy rules] allowed the publication of the accounts most likely related to Holocaust victims." Elizabeth Olson, *Internet Site to Publish Holocaust-Era Accounts*, SOUTH FLORIDA SUN-SENTINEL, Nov. 26, 2000, at 31A, *available at* 2000 WL 28995897.

44. Even the figure issued by the Volcker Committee (53,886 accounts) is probably underestimated. As the Israeli newspaper *Ha'aretz* pointed out, the Committee auditors were "able to examine only 4 million out of a total of 6.7 million accounts in Swiss banks at the end of the war. Details of the remaining accounts were not kept." Yair Sheleg, *Israel: Volcker Panel Numbers Too Low*, HA'ARETZ, Dec. 7, 1999. The auditors then matched the names of holders of the discovered dormant accounts to lists of those who perished in the Holocaust kept by the U.S. Holocaust Museum and the Yad Vashem Holocaust Center in Israel. Both these victims' lists, however, are incomplete. For example, "the list of victims maintained by Yad Vashem includes only about half of all those who died in the Holocaust." *Id.*

As Judge Korman explained, "[t]he bottom line of this is that the 54,000 matched accounts that were identified as "probably" or "possibly" belonging to victims of Nazi persecution is based on an audit of approximately one-third of the accounts opened in Switzerland during the relevant period." In re Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 155 (E.D.N.Y 2000).

While the Volcker Committee report cleared the Swiss banks of any criminal wrongdoing, the actions of the banks "led the Committee to question whether their duty of due care in their dealings with customers was observed by a number of banks

lack of cooperation, and especially the non-defendant Swiss cantonal and private banks, which wanted to be included in the settlement, but without having to reveal information about their dormant wartime accounts.[45]

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and their officers in the special situations following World War II." INDEPENDENT COMMITTEE OF EMINENT PERSONS, REPORT OF DORMANT ACCOUNTS OF VICTIMS OF NAZI PERSECUTION IN SWISS BANKS, Dec. 6, 1999, at 14, *available at* http://www.icep-iaep.org/final_report/.

> In a section entitled "Concluding Comment," that report summarized its findings:
>
> The record is clear, certainly by today's standards, that the handling of these funds was too often grossly insensitive to the special conditions of the Holocaust and sometimes misleading in intent and unfair in result. Our inquiry is one reflection of a willingness by Switzerland to deal with that heritage more forcefully and openly.

Id. at 23.

> 45. On March 30, 2000, after an inordinately long and unexplained delay of four months following the publication of the Volcker Report, the Swiss Federal Banking Commission ("SFBC") authorized publication of relevant information relating to approximately 26,000 of the accounts referred to in the Volcker Report that were identified as having a 'probable' link to Holocaust victims [citation omitted]. No authorization was given by the SFBC for the publication of information relating to the approximately 28,000 remaining accounts identified in the Volcker Report as "possibly" related to Holocaust victims. Moreover, unlike earlier SFBC rulings concerning publication of information relevant to Holocaust-related accounts, the SFBC merely "authorized" publication of much of the relevant information, but did not mandate complete publication. Perhaps even more disturbing was the failure of the SFBC to mandate the creation of a central database of 4.1 million accounts that were opened in Switzerland between 1933-45. In sum, the SFBC, by its actions, has made it much more difficult to carry out the mandate of the Volcker Committee that 'victims who have been long denied justice by circumstances beyond their control—often poor and now aged—deserve every reasonable assistance in establishing a claim.' [quoting Volcker Report, para. 70] . . . The unwillingness of the SFBC to mandate compliance with the recommendations of the Volcker Committee is inexplicable . . . It also amounts to nothing less than a replay of the conduct that created the problems addressed in this case.

Holocaust Victim Assets, 105 F. Supp. 2d at 155-57.

Turning to the behavior of the non-defendant cantonal and private banks, which wanted to be included in the settlement, Judge Korman explained:

> It is disturbing, to say the least, that, having participated in creating the problem that the Volcker Committee was attempting to address, the Swiss private and cantonal banks do not feel a moral obligation to the victims of Nazi persecution. Nevertheless, if they seek the benefit of releases under the Settlement Agreement, these banks cannot legally continue to conceal from the class information needed to take advantage of the benefits conferred by the Settlement Agreement. . . . In sum, my hope is that the Swiss Confederation, if not the SFBC, will take the steps necessary to compel the cantonal and private banks to comply with the Volcker Committee's recommendations to the same extent as the defendant banks have agreed to comply.

Id. at 158.

The banks' position was untenable. Without a full disclosure of all suspected dormant accounts, potential heirs would never know whether monies belonging to them may be sitting in a Swiss bank. Only with the publication of a complete list of names could someone believing that they may be entitled to dormant account monies determine whether a deceased relative in fact opened an account with the Swiss banks. Previous experience already bore this out. In 1997, when the Swiss Bankers Association published two lists of pre-war dormant accounts, Madeline Kunin, U.S. Ambassador to Switzerland, discovered her mother's name on the list. Secretary of State Madeline Albright likewise found out that her Czech grandparents, who perished in the Holocaust, opened a Swiss bank account prior to the war.

Unfortunately, there was no leverage to apply against the banks. In February 2001, after some hard-fought negotiations, the Swiss banks agreed to publish only the names of the 21,000 probable account holders, in addition to the two lists of names of dormant account holders published in 1997. As a compromise, a person could still make a claim even if his or her name was not on the list, and such a claim would be investigated.[46]

To process the dormant account claims under the settlement, Judge Korman brought onboard the Zurich-based Claims Resolution Tribunal ("CRT"), created in 1997 by the Swiss Bankers Association ("SBA") and led by Paul Volcker, to process the claims stemming from the banks' publication of their initial two lists. Judge Korman formally made the CRT part of the court settlement process by appointing Volcker and Michael Bradfield, his chief legal counsel, as Special Masters for the resolution of the dormant account claims.[47]

Disputes about disclosure arose also with regard to the class of claimants entitled to compensation for having worked for

46. A description of the process that will be conducted if such a request is made is found in Exhibit 1 to the Plan of Allocation, entitled "Memorandum to the File," dated August 9, 2000, para. 3, negotiated by the parties as a supplement to the Settlement Agreement and executed by attorneys for both sides. The process appears both convoluted and vague, making it extremely unlikely that a lost wartime bank account not appearing on the official list released by the Swiss banks would ever be found.

47. Since the CRT had been transformed into a court-sanctioned body, it is now called CRT II, with CRT I being the tribunal created by the Swiss Bankers Association ("SBA") in 1997 to process the claims submitted in response to the SBA's original publication that year of the two lists of dormant account names. The website for CRT II is available at http://www.dormantaccounts.ch or http://www.crt-ii.org.

Swiss-owned or controlled companies which may have used slave labor. Swiss companies did not employ slave labor in Switzerland during the war. However, many Swiss companies had branches in Germany or Nazi-occupied Europe, and were suspected of having used slave laborers. The Swiss bank defendants insisted on having such companies included in the settlement release, but neither the banks, the Swiss government, nor the Swiss companies themselves wanted to reveal the identity of such companies. Judge Korman balked, insisting that if a Swiss company wanted to be released from such slave labor claims it must come forth and reveal itself. Moreover, the identity of such Swiss companies was critical to identifying potential claimants, since former slaves of such companies might not know that the company they toiled for in wartime Germany or Nazi-occupied Europe was Swiss-owned.[48] The Swiss objected to full disclosure

48. As already noted, the class of claimants to this slave labor class (Slave Labor II) was not limited to VTNPs, but could be any World War II survivor. *Holocaust Victim Assets*, 105 F. Supp. 2d at 161 ("The membership of Slave Labor Class II, unlike the other classes, is not limited to victims of Nazi persecution who were Jewish, Romani, Jehovah's Witnesses, homosexual, or physically handicapped"). In a supplemental order of December 8, 2000, Judge Korman ordered those companies which have identified themselves as possibly using slave labor during World War II and seeking to be included in the Swiss banks settlement to "notify the Special Master as to whether they possess the names of former slave laborers and, if so, to provide such names to the Special Master." As Judge Korman explains in a subsequent order of April 4, 2001, charting the painful process of getting the Swiss to disclose such information:

> Several companies responded to this Order, among them Georg Fischer and Nestle, each of which helpfully provided lists of thousands of individuals who worked for those companies (and their affiliates) during the War era, many of whom may have performed slave labor. Other companies updated their research reports and promised to supplement the data as information becomes available. Many companies also offered to assist in identifying former laborers as part of the claims process. . . .

Order of Apr. 4, 2001, at 3. The Swiss also wanted the settlement to release Swiss companies which were German- and Austrian-owned prior to the war but acquired by the Swiss after the war. Judge Korman refused. *Id.* at 7 ("In sum, slave-labor using companies acquired by Swiss entities after 1945 plainly are excluded as 'releasees' under the Settlement Agreement"). The Swiss are now appealing that ruling.

Why so much effort spent on this class? Judge Korman explains: "When this class was included in the Settlement Agreement, the defendant banks represented that Slave Labor Class II consists of an extremely small number of Swiss companies during World War II. Since then, they have backed off this representation." *Holocaust Victim Assets*, 105 F. Supp. 2d at 162. Besides Nestle, other name-plate Swiss companies identifying themselves to Gribetz as possibly employing slave labor during World War II include Ciba-Geigy, Clariant (a spin-off from Sandoz), Novartis, and Roche. Exhibit 1 to Annex I of Gribetz's Plan lists companies which had self-identified in response to Judge Korman's order.

and threatened to scuttle the settlement if forced to reveal the information.[49] They reluctantly offered a partial list of such Swiss companies, in response to Judge Korman's July, 2000 directive that:

> those Swiss entities that seek releases from Slave Labor Class II are directed to identify themselves to the Special Master within 30 days. . . . The failure of Swiss entities seeking releases from Slave Labor Class II claims to identify themselves will result in the denial of a release and permit those who have claims against those entities to pursue such claims independently of this lawsuit.[50]

Along with partial information about Swiss companies which employed slave laborers, the Swiss issued another partial list of refugees expelled from, or denied entry into, Switzerland during the war.

In mid-April 2001, five months after Korman approved Gribetz's plan, the claims process for the Swiss settlement formally began. Unfortunately, claimants in all categories were required to complete another form to formally apply for funds, even if they earlier had completed the June 1999-issued "Initial Questionnaire."

In July 2001, five years after the start of the litigation against the Swiss banks and close to three years after the settlement was

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49. *See Holocaust Victim Assets*, 105 F. Supp. 2d at 163-67 (Section entitled "The Defendant Banks' Threat to Repudiate the Amendments to the Settlement Agreement").

50. *Id.* at 162. Gribetz describes the consequences of Judge Korman's order:

> "Within the thirty-day period fixed by the Court, the Special Master received correspondence from thirty seven Swiss entities, seeking releases for themselves and for hundreds of their subsidiary companies. The companies writing to the Special Master included small businesses bankrupted after the War as well as some of the largest industrial conglomerates in Switzerland, and they range across many disparate industries, including, prominently, firms manufacturing pharmaceuticals, aluminum and armaments, among other things. . . . In addition to the corporate self-examinations discussed above, Chief Judge Korman's directive appears to have prompted additional public discussion of the employment by Swiss firms of forced laborers. On August 24, 2000, the National Swiss Press Agency released a news report entitled '*Firms with Swiss Capital and Forced Labor in Germany,*' written by its Head of Operations, Roderick von Kauffungen. . . . Based on the evidence von Kauffungen uncovered, the National Swiss Press Agency estimated that 'firms in Germany with Swiss capital employed over 11,000 forced laborers,' adding that '[i]t must nevertheless be assumed that the actual numbers are greater.'"

PLAN, *supra* note 36, Annex I, at 3, 6 (footnote omitted).

joyously announced at the Brooklyn federal courthouse, payments of approximately U.S.$1,000 finally began to dribble in to aging survivors.[51] By then, all involved had been thoroughly exhausted by the ordeal.[52]

II. *"THE MOTHER OF ALL HOLOCAUST RESTITUTION SETTLEMENTS": THE LEGALITY AND MORALITY OF THE SWISS BANKS SETTLEMENT*

The Swiss banks settlement produced an enormous impact upon both (1) the entire Holocaust restitution process and (2) claims for other historical wrongs.

The Holocaust restitution campaign began in 1995 and focused exclusively on the Swiss banks. The goals then were modest: to ferret out the monies deposited primarily by European Jews with the Swiss banks in the pre-war era for safekeeping, and to return the monies to the rightful heirs. Six years later, the results achieved were astounding. Not only did the Swiss banks agree to pay U.S.$1.25 billion, but, overall, more than U.S.$8 billion had been pledged for Holocaust restitution payments. The payers included European multinationals, numerous European

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51. *Swiss Sends First Direct Payments to Holocaust Survivors*, AGENCE FRANCE-PRESSE, Aug. 3, 2001, *available at* 2001 WL 24983540. As for the slave labor claimants receiving only U.S.$1,000, Professor Neuborne explains:

> I share your concern over the limited recoveries going to Jewish slave laborers. Of course the amount is too low. But, to be fair, you should note that the $1,000 figure was chosen because the German Foundation will provide an additional $7,500 to each slave laborer, and that additional distributions are highly likely if the bank account fund is not fully exhausted. [Paragraph] It is also unfair to characterize the Swiss recovery as $1,000 per survivor, when many thousands of bank account recoveries will be far greater. I believe that an award of more than than $1 million has already been made, and we expect several large recoveries.

Email memo from Burt Neuborne to author (Nov. 27, 2001) para. 4, at 2 (on file with author).

52. Of course, those who could prove a right to a dormant Swiss bank account (i.e., the "deposited assets" claimants) received payouts of much higher amounts. As of November 1, 2001, 24 awards have been issued by the court-supervised Claims Resolution Tribunal (CRT-II) to such claimants, totaling over $3.4 million. One of the awards was over U.S.$1 million. An updated list of the Claims Resolution Tribunal's awards can be located at the Tribunal's website, specifically at www.crt-ii-org/_awards/index.phtm. Additionally, the original Claims Resolution Tribunal created by the Swiss Bankers Association in 1997 (CRT-I), which was then conflated into CRT-II, paid SF16 million (U.S.$10 million) to Holocaust victims' heirs by the time it finished its work on September 30, 2001, which it distributed to 3,121 successful claimants. *See* http://www.crt.ch/statistics.html.

governments, and even American corporations and the U.S. government.

When the first lawsuits were filed against the Swiss banks in 1996, it would have been unthinkable that this would be the end result of the litigation.

This remains the most important legacy of the Swiss banks litigation. Not only did the litigation yield an over U.S.$1 billion settlement payout from the Swiss banks, but also opened the floodgates for all the Holocaust restitution settlements to follow. Surely, if the campaign against the Swiss had failed, the Holocaust restitution movement would have gone nowhere. Success against the Swiss banks emboldened lawyers, politicians, and Jewish activists in the United States to take on other corporations which had profited from the miseries of the Holocaust victims. In a very real sense, therefore, the Swiss banks settlement can be called the mother of all Holocaust restitution settlements, yielding not only the U.S.$1.25 billion from the Swiss banks, but also leading to an additional U.S.$7 billion being called for other restitution claims.[53]

One example—one which would have been totally unthinkable in 1995—illustrates this point well. The initial accusations that the Swiss banks failed to return monies deposited with them for safekeeping by Holocaust victims led to inquiries about whether banks in other countries might also be holding such pre-war and wartime dormant accounts. One surprising answer: Israel.

In the 1930's, thousands of European Jews opened accounts at the Anglo-Palestine Bank in British Palestine. These accounts typically contained 1,000 British pounds (approximately U.S.$1,500), the amount required to be eligible to receive an entry permit into British Mandate Palestine. As World War II

53. In addition to forcing European and American corporations to pay restitution for their wartime activities, the Swiss settlement also led museums throughout the world to confront the fact that they had in their collections art stolen by the Nazis. *See* Bazyler, *supra* note 1, at 161-89. As explained by Elan Steinberg, executive director of the World Jewish Congress in New York and one of the top negotiators in the Holocaust restitution arena, "[u]ntil the Swiss bank scandal, frankly, museums were indifferent on this issue." Michael Ollove, *Museums Tracing Nazi-Looted Art*, PITTSBURGH POST-GAZETTE, Apr. 18, 2000, at A4, *available at* 2000 WL 10896235. To the additional U.S.$7 billion collected in the aftermath of the Swiss settlement, there must be added the value of the various pieces of Nazi-stolen art, numbering in the tens of millions of dollars, returned to their rightful owners.

unfolded, Great Britain classified these deposits as belonging to enemy aliens, since the European Jewish depositors came from Germany, Austria, and eventually, nations conquered by Nazi Germany. The fate of these deposits remained a mystery for over a half century—until the onset of the campaign against the Swiss banks. In January 2000, Bank Leumi, Israel's largest bank and the Anglo-Palestine Bank's successor, admitted to holding approximately 13,000 dormant accounts, many of which are believed to have belonged to victims of Nazi persecution. Like the Swiss banks, Bank Leumi initially refuted the accusations that it might be holding such funds. This led to Bank Leumi being accused of being no better than the Swiss banks. Bank Leumi soon gave up the fight. Embarrassed into following the model adopted by the Swiss banks and other European corporations, it created a claims settlement process by which survivors and heirs entitled to these funds would be eligible to receive them.[54]

The Bank Leumi episode illustrates an important legacy of the Swiss campaign. Restitution claims made by Holocaust survivors—or for that matter any other historical claims for financial

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54. Information about Bank Leumi's Holocaust-era dormant accounts and claims process can be located at http://www.unclaimedassets.com/israel.html. For discussion of Israeli companies and the Israeli government's efforts at Holocaust restitution, see Allyn Fisher-Ilan, *Israel's Unfinished Holocaust Business*, JERUSALEM POST, Jan. 21, 2000, at 7B, *available at* 2000 WL 8252339; Jack Katzenell, *Writer: Israel Has WWII Assets*, AP ONLINE, Apr. 13, 2000, *available at* 2000 WL 19049913 (discussing publication of treatise in Israel, *Forgotten Property* by Israeli professor Yossi Katz, regarding "land, houses, and other assets in what was then British Mandatory Palestine [ ] purchased by European Jews, many of whom later died in the Holocaust"); Nina Gilbert, *Panel to Probe Holocaust-era Assets*, JERUSALEM REPORT, Apr. 20, 2001, at 5A, *available at* 2001 WL 6606176.

In 1999, the Israel Museum in Jerusalem, Israel's premier art institution, was discovered to be holding a Pisarro painting stolen by the Nazis from its Jewish owners. The Pisarro made its way into the post-war New York art market, where it was purchased by an American couple, who then donated it to the Israel Museum. The museum had been displaying the painting since 1997. After some wrangling (see *Israel Museum Drags Its Feet Over Its Looted Pisarro*, JERUSALEM POST, Aug. 2, 1999, at 4, *available at* 1999 WL 9688061), the elderly heir of the pre-war owners (now living in Great Britain) and the Israel Museum reached an agreement allowing the museum to display the painting on a long-term loan. *See* Rebecca Trounson, *After Circuitous Journey, Painting Lost to Nazis Finds a Home in Israel*, L.A. TIMES, Feb. 19, 2000, at A6.

In November, 2001, an Israeli parliamentary commission concluded that the total value of unclaimed Holocaust-era assets held by Israeli banks, the Israeli State and various Israeli public institutions amounted to approximately 25 billion shekels, or U.S.$6.25 billion, a much larger figure than previously believed. Most of this was land purchased by European Jews in pre-war mandate Palestine. When these individuals perished, the land remained unclaimed. Edgar Lefkowitz, *Dormant Holocaust-Era Assets Valued at NIS 25b*, JERUSALEM POST, Nov. 9, 2001.

wrongs—can no longer be ignored by those accused of benefiting from those wrongs. Such accusations are now taken seriously.

The Swiss campaign also made other important contributions. In the face of allegations being made against them, the Swiss banks and the Swiss government created, respectively, the Volcker Committee and the Bergier Commission to ferret out the truth about Switzerland's financial shenanigans during World War II. The Swiss model is now the prototype used by both other European governments and private corporations when confronted with accusations about their wartime role. After a half-century of silence, the full historical record is only now coming out about how German, Austrian, French, British and even American companies profited from the Holocaust. The historical black hole of how commerce was conducted in Europe between 1933-45 is finally being filled in by Holocaust historians who, as the *New York Times*[55] reported, are now much in demand to staff the historical commissions being created by governments and private companies to research and issue reports about their financial dealings with the Nazis.[56] All of this is being done in

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55. Barry Meier, *Historians are in Demand to Study Corporate Ties to Nazis*, N.Y. TIMES, Feb. 18, 1999, at C1. *See also* Dan Glaister, *Shadow of Shame*, THE GUARDIAN, Dec. 22, 1998, at 2, *available at* 1998 WL 24896170:

> The words "independent critical review" have become a mantra for German companies attempting to cope with the past. Giant industrial concerns such as Flick, Krupp, IG Farben, Volkswagen and Daimler-Benz have all commissioned "independent critical reviews" of their records in the Nazi period. Constructive self-criticism has in itself become something of a growth industry in Germany, with bodies such as the Society for Business History and the Institute for Bank Historical Research springing up to help companies come to terms with their past.

Id.

56. In 1998, Deutsche Bank, which had been accused of profiting in their close dealings with the Nazis and which had been sued in U.S. courts over such dealings, hired five outside historians to examine its role during the Nazi era. To date, two of the historians from its "Historical Commission Appointed to Examine the History of the Deutsche Bank in the Period of National Socialism" have issued their findings: one on Deutsche Bank's collusion with the Nazi regime in the theft of gold looted from both occupied nations and victims (JONATHAN STEINBERG, THE DEUTSCHE BANK AND ITS GOLD TRANSACTIONS DURING THE SECOND WORLD WAR (1999)); and the second on the role of Deutsche Bank in the expropriation of Jewish-owned assets in Nazi Germany (HAROLD JAMES, THE DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS (2001)).

Allianz, Germany's largest insurance company and owner of the Fireman's Fund Insurance Company in the United States, commissioned Professor Gerald Feldman of U.C. Berkeley to investigate its dealings with the Nazis. Professor Feldman published

the aftermath, and as a consequence, of the Swiss campaign.

Second, the Swiss campaign showed the enormous power that sanctions, or more precisely, the mere threat of sanctions can play in influencing the behavior of foreign corporations that do business in the United States. As important as the lawsuits against the Swiss banks in getting the Swiss banks to the bargaining table was the regime of rolling sanctions instituted against the banks by New York City Comptroller Alan Hevesi's Executive Monitoring Committee.[57] The threats by Hevesi and his financial officer counterparts in other cities and states throughout the

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his report in the latter half of 2001. *See* GERALD D. FELDMAN, ALLIANZ AND THE GERMAN INSURANCE BUSINESS, 1933-1945 (2001).

Bertelsmann, Germany's leading publisher, the biggest publisher in the English language and owner of U.S. publisher Random House, hired famed Holocaust historian Saul Friedländer of UCLA to research its wartime history, after it was revealed "that Bertelsmann did some very despicable things, not only publishing books for the German Army and the SS, but also publishing some very anti-Semitic works." Glaister, *supra* note 55 (quoting John Friedman). Professor Friedländer is scheduled to issue his findings in 2002.

In 1998-99, American automakers Ford and General Motors became the first American companies to allow historians to examine their wartime records for possible complicity with the Nazis.

In 1998, Ford Motor Company began an in-house study of the wartime role of Ford Werke, Ford's German subsidiary, which exploited the vast pool of slave labor that the Nazis made available to German private industry during the war. *See* Bazyler, *supra* note 1, at 203-206. The study was reviewed by Lawrence Dowler, a former archivist and librarian at Harvard and Yale universities, and Simon Reich, a University of Pittsburgh political scientist. In December, 2001, Ford released the study, which concluded that the parent company did not profit from its German subsidiary's operations in Nazi Germany. Concurrent with the study's release, Ford announced that it would be "donating the documents for this project, along with a searchable database, to the Benson Ford Research Center at Henry Ford Museum & Greenfield Village, where they will be available for research [by the public]." Press Release, Ford Issues Report on Ford-Werke Under the Nazi Regime, (Dec. 6, 2001), *available at* http://media.ford.com/newsroom/release_display_test.cfm?article_id=10374&id=77&art_ids=10550,10543,10542,10540,10685,10481,10374,10375,10376,10377&sec=77. *See also* Henry Weinstein, *Ford Says WWII Study Clears Firm*, L.A. TIMES, Dec. 7, 2001, at A1. "Ford, the world's second-largest auto maker, also said it will donate $4 million toward human rights studies, primarily focusing on slave and forced labor." *Id.*

In 1999, General Motors hired Yale University historian Henry Turner to identify, collect and catalog documents relevant to the role of its German subsidiary, Adam Opel AG, during the Third Reich. The documents will soon be deposited at the Yale Library's Manuscripts and Archives Collections for use by researchers, and Professor Turner is presently writing a book on the subject. Email from H.A. Turner to author (Nov. 22, 2001) (on file with author).

57. For discussion of the involvement of Alan Hevesi and other state and local officials in the Swiss banks litigation, including the creation of the Executive Monitoring Committee, *see* Bazyler, *supra* note 1, at 65-68.

United States to stop doing business with the Swiss banks unless they settle the lawsuits against them were critical to the banks' capitulation. Hevesi's success also demonstrated that Stuart Eizenstat, the Clinton Administration's "point man" on the Holocaust restitution issues, who was urging on behalf of the federal government that talk of sanctions be dropped lest it lead to a trade war with Switzerland, was wrong.[58] Sanctions and boycotts, and their threats, were not counter-productive to getting European multinationals to settle the wartime claims against them. Rather, the "one-two punch" of the American lawyers first filing the class action lawsuits against the European defendants, and American officials at the state and local levels then threatening to cut out the defendants from profitable U.S. deals unless they come to the bargaining table to settle the suits, was the perfect strategy to resolve the claims. The strategy was repeated, and worked perfectly time and again, against succeeding claims made against the German, Austrian, French, and Dutch defendants. To the displeasure of Eizenstat, Hevesi became an important—but unwelcome—partner in the federal government's efforts to have the other European defendants follow the Swiss banks' example in resolving Holocaust-era claims against them. An announcement by Hevesi that his Executive Monitoring Committee would be holding a hearing to determine why a certain Holocaust-era claim was not being resolved would often be the only push needed to have a recalcitrant defendant come forward with a new proposal to conclude the matter.[59]

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58. Eizenstat held a number of posts during the Clinton Administration, working on issues ranging from the environment to international finance. Nevertheless, he credits his most important accomplishment as having "brought back the unfinished business of World War II and the Holocaust to the public's eye, of doing some measure of justice to the elderly survivors, and creating a greater sense of memory for those who perished." Sharon Samber, *A Priceless Effort*, JERUSALEM POST, Jan. 5, 2001, at 7B, *available at* 2001 WL 6600727. Despite getting it wrong on the sanctions issue, Eizenstat should be credited with being the prime mover in the U.S. government of the Holocaust restitution movement. He is one of the heroes of this movement.

59. For example, one day before the Executive Committee's meeting to discuss the issue, Austrian and U.S. negotiators in January 2001, agreed to a deal by Austria to compensate Holocaust survivors. Sometimes, Hevesi would resort to bluffing. Thus, in 1998, he announced that the Executive Monitoring Committee would examine the proposed purchase by Deutsche Bank of New York-based Banker's Trust, in light of Deutsche Bank's failure to resolve its Holocaust-era claims. Even though New York had no authority to review this purchase—a matter wholly within the province of the U.S. Federal Reserve Board—Hevesi's rumblings led Deutsche Bank to renew its efforts to settle the claims.

Finally, there is the significant impact of the Swiss banks litigation upon American law. On first blush, it appears that the lawsuits filed against the Swiss banks could not be handled by U.S. courts. The activities in question occurred in Europe, not in the United States. The parties sued were foreign corporations. Many of the plaintiffs also were foreigners. And the acts complained of originated over a half century ago. With such facts, the Swiss banks suits appeared to many as one of those hopeless lawsuits filed more for publicity purposes than for any hope for success. The actual course of the litigation showed otherwise.

An important reason why the Swiss banks litigation was taken seriously both by the Swiss bank defendants and Judge Korman, despite the above-mentioned factors, was the victory achieved by the human rights bar over the last two decades in convincing American courts that human rights victims injured abroad can sue in the United States. That step began with *Filartiga v. Pena-Irala*, a landmark decision issued in 1980 by the Second Circuit Court of Appeals, in New York, holding that the perpetrator of State-sanctioned torture in Paraguay can be sued in the United States by the relatives of the deceased torture victim.[60] The court of appeals allowed the case to go forward even though the torture was committed in Paraguay, and all the parties in the litigation were Paraguayan. In a ringing endorsement of the principle of universal jurisdiction—that certain human rights violations are so abhorrent to modern society that its perpetrators can be brought to justice anywhere in the world—the court found that "for purposes of civil liability, the torturer [today] has become like the pirate and slave trader before him[:] *hostis humani generis*, an enemy of all mankind."[61]

For the twenty years preceding the Swiss banks litigation, various human rights victims injured abroad have come to the United States to successfully sue their perpetrators under the *hostis humani generis* principle. These lawsuits included a suit against former Philippine dictator Ferdinand Marcos, a suit against the indicted Serbian criminal Rodovan Karadzic, and va-

60. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980). Since the Swiss banks lawsuits were filed in the Second Circuit, the *Filartiga* decision was binding precedent for any decision issued by Judge Korman.

61. *Id.* at 890.

rious other lawsuits against foreign countries, corporations, and individuals for human rights violations committed abroad.[62]

In 1987, the prestigious American Law Institute, which publishes summaries of American law in books known as restatements, recognized the *hostis humani generis* principle as being part of American law in its latest edition of the Restatement of Foreign Relations Law.[63] In 1992, Congress also came onboard by enacting the Torture Victim Protection Act ("TVPA"), extending the right of victims of foreign torture to sue in American courts to include American torture victims.[64]

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62. For the foreign defendant to be sued, the courts required the defendants be present in the United States, even momentarily. Thus, Rodovan Karadzic was served with court papers when he came to the United States as part of the Serbian delegation invited to the United States to end the war in Bosnia. Kadic v. Karadzic, 70 F.3d 232, 237 (2d Cir. 1995). In the mid-1990's, a Guatemalan general was sued and served with court papers while on a visit to Harvard University. Xuncax v. Gramajo, 886 F. Supp. 162, 169 (D. Mass. 1995). It turned out that the general was also a torturer, and was sued by his victims, both Guatemalan and American, when they learned of his U.S. visit. In August, 2000, Li Peng, the Premier of China at the time of the Tiananmen protests and massacre, likewise was served with a lawsuit filed under the *hostis humani generis* principle during a visit to the United States. The case is still in litigation.

63. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404.

64. In an odd quirk of American law, until the Torture Victim Protection Act ("TVPA") was enacted, only foreigners could sue their *hostis humani generis* perpetrators; the TVPA now gives American nationals the same right to sue. The pre-TVPA oddity existed because the *Filartiga* court found jurisdiction existing in the Alien Torts Claim Act ("ATCA"), a federal law enacted by the first U.S. Congress in 1789, giving federal courts the right to hear suits filed by aliens for torts which amount to violations of "the Law of Nations," the older term for international law. *See* 28 U.S.C. §1350. The first Congress enacted the law as part of its effort to have the former 13 colonies join the then-existing international community of nations, which recognized the international law principle that international outlaws can be brought to justice wherever they are caught. Hence, the *Filartiga* court's reference likening the modern torturer to the pirate and slave trader of the 19th century, the two most common international outlaws of that time. The Restatement of Foreign Relations Law added three modern outlaws to the *hostis humani generis* category: perpetrators of genocide, individuals involved in "attacks on or hijacking of aircraft," and "perhaps certain acts of terrorism." RESTATEMENT, *supra* note 63.

The ATCA was long forgotten until the New York-based Center for Constitutional Rights resurrected it by filing the *Filartiga* suit to claim jurisdiction over Pena, the Paraguayan torturer. The trial court initially would have none of it, dismissing the suit as falling outside the ATCA. The Second Circuit reversed, finding that jurisdiction was proper. On remand, the same trial judge, now following the mandate of the court of appeals, found in favor of the Paraguayan victims and issued a U.S.$10.4 million judgment against Pena. *Filartiga*, 577 F. Supp. at 860. Unfortunately, by that time Pena was long gone, having been deported back to Paraguay for overstaying his tourist visa.

Articles on the ATCA are now legion. A good collection is found in THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY (Ralph G. Steinhardt & Anthony D'Amato eds., 1999). Critiques of this litigation can be found in Ann-Marie Slaughter

By the time the Swiss bank cases were filed, therefore, American judges were familiar with suits being presented to them involving acts committed on foreign soil against foreign defendants, and were amenable to finding that U.S. courts possessed jurisdiction over such suits when the acts complained of comprised gross violations of human rights law committed by foreign defendants who were present in the United States. All that was necessary was for the lawyers of the Holocaust survivors suing the Swiss banks to fit their allegations within the existing *hostis humani generis* principle. It was not difficult. The Swiss banks could hardly argue that their acting as active collaborators with one of the most despised regimes in the history of mankind, and enriching themselves in the process, did not amount to a gross violation of human rights law.[65] Moreover, here were the same Swiss banks doing extensive business in New York, the locale where the suits were filed.

For the dormant account claims, the lawyers relied on a simple legal principle recognized by all legal systems of the world: unjust enrichment. Taken from ancient Roman law, the rule of unjust enrichment requires judges to expunge from the wrongdoer assets wrongly taken from, or not properly returned to, the victim. Here, the lawyers alleged that for over fifty years, the Swiss banks kept monies deposited with them which they were obliged to return to the depositors or their heirs. Instead, the lawsuits alleged that the banks wrongfully kept the funds and invested them over the years to make millions.

The lawyers suing the Swiss banks, however, were not only the passive recipients of the two-decade precedent done largely by others.[66] Rather, as a result of their settlement, they also ex-

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& David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF. Sept./Oct. (2000) (noting that Slaughter is a Harvard law professor) and Peter H. Schuck, *Benched*, WASH. MONTHLY, Dec. 1, 2000, at 35, *available at* 2000 WL 4656842 (noting that the author is a Yale law professor).

65. In their motions to dismiss, the Swiss banks argued that their activities of being the bankers for the Nazis amounted to "business as usual." The banks, the Swiss banks' lawyers argued, were merely performing for Hitler and his cohorts financial activities regularly conducted by international financial institutions: accepting deposits from abroad, exchanging currency (in this case, Reich deutschmarks not accepted by most nations into freely convertible Swiss francs), and purchasing gold presented to them for sale by the Nazi regime. It was a specious argument.

66. Of more than 40 lawyers participating in the Swiss bank lawsuits, only one, Robert Swift of Philadelphia, had previously been involved in ATCA/TVPA litigation, having represented one set of victims suing Ferdinand Marcos for torture committed in

tended *hostis humani generis* law in the United States.

A major practical problem faced by many of the *hostis humani generis* lawsuits was that the plaintiffs, upon receiving a multi-million judgment in the United States against the defendant perpetrators, were then unable to collect upon the judgment. The defendant did not possess any assets in the United States which could be executed upon to satisfy the judgment. Moreover, international law currently has no mechanism for collecting the funds obtained in a U.S. suit in a defendant's home country.[67] The successful plaintiffs in the *Filartiga* case, for instance, over twenty years after the end of the litigation, still retain only a paper judgment against the torturer defendant Pena. Similarly, two multi-million dollar judgments against Rodovan Karadzic remain uncollected.

Plaintiffs and their lawyers in the *hostis humani generis* litigation have had to satisfy themselves with a moral victory. At least the suffering of the foreign victims has been recognized by an American court, the most prestigious in the world, and the actions of the perpetrator condemned. The lawyers involved in the litigation had always hoped, however, that they could win a case where the money judgment could be collected as well.[68]

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the Philippines during the Marcos dictatorship. Swift, like most of the other lawyers suing the Swiss banks, went on to represent Holocaust survivors or heirs in suits filed against German corporations for slave labor, European insurance companies for failure to honor insurance policies, and other corporate defendants for their profit-making activities arising out of the Holocaust. He is now one of the lawyers suing Japanese companies for their use of American POWs and Asian civilians as slave labor during World War II. A number of the other lawyers involved in the Holocaust-era suits also began filing suits on behalf of the former wartime Japanese slaves in their suits against the Japanese companies. In the interest of full disclosure, I note that I am assisting in this litigation. I did not participate in the Holocaust-restitution litigation.

67. Under the international law principle of comity, a foreign court can, but does not have to, recognize a judgment obtained in the United States. To remedy this problem, a draft treaty is now being worked on for nations to recognize each other's court judgments.

In *Filartiga* and its progeny, comity does not work, since the nation where the *hostis humani generis* violation took place is usually a dictatorship where the perpetrator is protected rather than prosecuted. Thus, in *Filartiga*, the father and daughter of the torture victim came to the United States to pursue Pena, whom they learned, by chance, was in the United States. They did so only after their efforts to obtain justice in Paraguay were thwarted by the dictatorial regime for whom Pena worked as a police official. *Filartiga*, 630 F.2d at 877-79.

68. *See Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988). In one of the cases, filed against Argentine Colonel Alfredo Suarez-Mason, responsible for the disappearance of plaintiff's mother during the "dirty war" years of military rule in Argentina in

The Swiss bank litigation turned out to be that case. The wealthy Swiss banks had plenty of assets in the United States to satisfy any judgment issued against them. Hence, another beneficial legacy of the U.S.$1.25 billion settlement with the Swiss. This time, the *hostis humani generis* litigation yielded both a favorable result and actual payment.

Another significant legacy of the Swiss banks litigation (and the other Holocaust-era restitution suits which followed) was to extend the *hostis humani generis* precedent to the corporate arena. The defendants in the Swiss banks litigation were not some former dictators or foreign government officials now living in lonely exile in the United States, nor drop-in foreign dignitaries caught in the web of the American justice system while visiting the United States. Rather, these defendants were some of the most powerful corporations in the world. The Swiss banks, in direct contrast to the staid and honest image they developed over the years, were being exposed as Hitler's secret bankers. Later, German companies also with sterling corporate images, names like Mercedez-Benz, BMW, VW, Siemens, and Allianz Insurance, faced similar accusations of being active collaborators with the Nazis. For the first time, therefore, the *Filartiga* precedent was being applied to hold corporations responsible for their activities.

The Swiss banks settlement and the subsequent corporate lawsuits it fostered are currently being used by legal advocacy groups seeking to make multinationals into good global citizens. The first to be sued have been the corporate oil giants.[69] Multinationals like Exxon Mobil, Texaco, Royal Dutch/Shell, Chevron, and Unocal are now fighting suits in U.S. courts accusing them of engaging in human rights and environmental abuses in foreign countries.[70] The suit against Unocal, for example, al-

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the 1970s, the plaintiffs believed that they found assets in the United States owned by Suarez-Mason on which they could collect after winning a judgment against him. It turned out to be not so.

69. *See* Jota v. Texaco, Inc., 157 F.3d 153 (2d Cir. 1998); Wiwa v. Royal Dutch Petroleum, 226 F.3d 88 (2d Cir. 2000); Doe v. Unocal Corp., 110 F. Supp. 2d 1294 (C.D. Cal. 2000); Bowoto v. Chevron Corp., Civ. No. C99-2506 (N.D. Cal. 1999); Doe v. Exxon Mobil Corp., Civ. No. 1:01CV01357 (D.C. 2001).

70. For a legal analysis of such suits, *see* Pamela A. Maclean, *The Court of Last Resort*, CALIFORNIA LAWYER 36 (Sept. 2001); Margaret G. Perl, *Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations*, 88 GEO. L. J. 773 (2000); Kathryn L. Boyd, *Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at*

leges that the oil company participated with its investment partner, the military dictatorship in Burma, in enslavement and forced resettlement of the local population in the Burmese countryside where the joint venture project was being conducted.[71] The lawsuit against Exxon Mobil is being pursued by local Indonesian villagers who contend that they have been victims of torture, kidnapping, rape, and murder of their relatives, at the hands of the Indonesian military unit guarding Exxon Mobil's natural gas field.[72] The Swiss banks litigation and the other Holocaust-era cases are being cited as precedent in these suits.

What is different in this latest round of international human rights law litigation from the Swiss Banks litigation is that these multinationals are being hauled into American courts for activities stemming from ongoing investments today rather than for conduct of years ago. The settlement with the Swiss banks for long-forgotten but then resurrected conduct remains a powerful warning to the world's corporate giants: your activities today may be judged many years in the future.

A final significant legal legacy of the Swiss banks litigation was to push back the time line for which wrongful acts can be adjudged by a U.S. court. Until the Swiss banks litigation, legal dogma held that activities which took place over a half century ago could not overcome the problem of the limitations period built-in into every civil action filed in the United States. The claims were just too old, it was believed, to be litigated now. In fact, prior to the Swiss banks litigation, civil suits filed over Holocaust-era events were dismissed by American courts as being time-barred.[73]

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the Corporate Level, 1999 B.Y.U.L. REV. 1139 (1999); Sarah H. Cleveland, *Global Labor Rights and the Alien Tort Claims Act*, 76 TEX. L. REV. 1533 (1998); Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335 (1997).

71. Doe v. Unocal, 963 F. Supp. 880, 884-85 (C.D. Cal. 1997). In August, 2000, the trial judge dismissed the lawsuit (Doe v. Unocal Corp., 110 F. Supp.2d 1294 (C.D. Cal. 2000)), and the case is now on appeal.

72. Neela Banerjee, *U.S. Lawsuit Snares Exxon, Oil Firm is Cited in Indonesian Human Rights Abuses*, INT'L HERALD TRIB., June 22, 2001, at 19.

73. For example, in the 1980s, a class action lawsuit was filed by plaintiff Handel, an elderly Holocaust survivor from Yugoslavia, against defendant Artukovic, a former high-ranking official in the puppet government of Nazi-occupied Croatia. The lawsuit was dismissed. The trial judge based her dismissal on the ground that the suit was barred by the California statute of limitations. *See* Handel v. Artukovic, 601 F. Supp. 1421 (C.D. Cal. 1985).

Here, there was no such dismissal. Despite the claims stemming from events originating in the 1930s and 1940s, the Swiss banks were paying a significant sum to settle the claims. As a result of this victory, suits began to be filed against other corporate defendants for their activities during World War II. And not only against European companies. Japanese multinationals are now defending American suits for their use of American POWs and foreign civilians as slaves during the war.[74]

Other movements—seeing the success of the Swiss banks litigation—tried to push the international human rights litigation time line back even further. In early 2000, elderly victims of the Armenian genocide sued New York Life Insurance Company for failure to honor insurance policies issued to the Armenians at the beginning of the twentieth century. New York Life offered to settle for U.S.$15 million.[75]

The African-American reparations movement, seeking payments from both the U.S. government and private American companies involved in the slave trade, was given fresh impetus from the Swiss banks litigation and subsequent Holocaust-era settlements.[76] Reparation proponents specifically point to the

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74. In re World War II Era Japanese Forced Labor Litigation, 114 F. Supp. 2d 939 (N.D. Cal. 2000), 164 F. Supp. 2d 1160 (N.D. Cal. 2001) (federal court dismisses claims against Japanese companies for wartime slave labor); Court's Ruling re: Defendants' Second Motion for Judgment on the Pleadings, Jeong v. Onoda Cement Co., Ltd., No. BC 217805 (Cal. Superior Ct., Nov. 29, 2001) (California state court upholds claims against Japanese companies for wartime slave labor); *see also* K. Connie Kang, *Slave Labor Lawsuit Against Japanese Firms to Continue*, L.A. TIMES, Dec. 1, 2001, at B-4 (article summarizes suits filed to date). Congress also held hearings on the subject. *See Former U.S. World War II POW's: A Struggle for Justice, Hearing before the Senate Comm. on the Judiciary*, 106 Cong 14 (2000). For a discussion of this litigation see *Holocaust Restitution in Comparative Perspective, supra* note 2.

75. Nathan Vardi, *Settling a Case—After 85 Years*, FORBES, May 14, 2001, at 120. The lawyers in the Armenian case paid homage to the Swiss banks settlement and other Holocaust-era lawsuits by citing them as inspiration for their suit. *See* Beverly Beyette, *He Stands Up in the Name of the Armenians: Attorney's Quest to Collect Insurance for Genocide Victims' Heirs Starts to Pay Off*, L.A. TIMES, Apr. 27, 2001, at E1. Suits are now being contemplated against other American insurance companies that sold policies to Armenians in Ottoman Turkey. *Id.* For a discussion of this litigation, see *Holocaust Restitution in Comparative Perspective, supra* note 2.

76. *See* Tamar Lewin, *Calls for Slavery Restitution Getting Louder*, N.Y. TIMES, June 4, 2001, at A15. In an obvious parallel between the two movements, the *New York Times*, in trying to explain the growing call for African-American slavery restitution, sought the comments of Stuart Eizenstat, the U.S. government's chief envoy on Holocaust restitution issues. Eizenstat was not optimistic.

> For slavery *qua* slavery, I think the appropriate remedy is affirmative govern-

payments now being made for World War II-era wrongs as precedent for their cause. In the face of accusations that theirs is an empty gesture with no chance of success, they point out that the Swiss banks litigation was also viewed by most legal observers as a "sure loser" when filed in October 1996. Less than two years later, the Swiss banks were ready to shell out U.S.$1.25 billion to end the litigation.

Having painted the beneficial consequences of the Swiss banks litigation, I must concede that not all is positive. In fact, looking at the amounts obtained from the claims made against the Swiss banks, it may appear on first blush that the process was a failure. After six years of hard work, most elderly survivors received only a token sum of U.S.$1,000.[77] For this sum, they were made to dredge out once again their painful wartime horrors—

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ment action in general, rather than reparations. . . . And if 100 years from now the great-great-grandson of a Holocaust laborer asked for reparations, I don't think that would be appropriate, unless there was some specific property that had been confiscated that they wanted to recover.

Id. The *New York Times* came late into the picture. By the time of the *Times* story, every other major U.S. newspaper and all national TV networks had featured stories about the growing call for African-American reparations. All referred to the Holocaust-era settlements as precedent. In 2000, the *ABA Journal*, the leading American law magazine, ran a cover story on the subject. *See* Jeffrey Ghannam, *Repairing the Past*, 86 A.B.A.J. 39 (Nov. 2000). In late 2000, Johnny Cochran, of the O.J. Simpson trial fame (together with Harvard law professor Charles J. Ogeltree, Jr. and famed trial lawyer Alexander J. Pires, Jr.) announced the creation of a new "dream team" to file a class action suit seeking restitution for African-American slavery. Michael A. Fletcher, *Putting A Price on Slavery's Legacy*, WASH. POST, Dec. 26, 2000, at A1. Cochran also became a full-fledged member of the wartime restitution bar by joining Hausfeld's team of Holocaust lawyers, which previously settled with the Swiss banks, to now prosecute a suit for restitution against Japan and Japanese corporations for their *hostis humani generis* activities during World War II.

77. Those claimants finding their names—or the names of their deceased relatives—on any of the Swiss banks' dormant account lists benefited the most from the Swiss banks litigation, obtaining, in many instances, awards through the CRT much higher than U.S.$1,000. *See supra* note 52 and accompanying text. These claimants, while constituting the smallest category of recipients of the Swiss banks settlement, had the strongest legal claims against the Swiss banks. As explained by the Second Circuit, "these claims are based on well-established legal principles, have the ability of being proved with concrete documentation, and are readily valuated in terms of time and inflation. By contrast, the claims of the other four classes are based on novel and untested legal theories of liability, would have been very difficult to prove at trial, and will be very difficult to accurately valuate." In re Holocaust Victim Assets Litigation, Nos. 00-9595(CON), 00-9597 (CON), 2001 WL 868507 (2d Cir. 2001) (unpublished opinion). Moreover, as discussed earlier, the claims for the return of dormant account assets provided the impetus for the entire Swiss banks litigation and led also to the filing of the subsequent non-Swiss Holocaust-era claims.

all in the service of receiving a U.S.$1,000 check. Moreover, their expectations were raised and then lowered as the harsh reality sunk in that the payments received would only be minimal.

This reality was made even more painful when compared to the benefits received by other parties involved in the Swiss banks claims—none of whom were the actual victims of the wartime misdeeds.

First, the lawyers. A few received fees in the millions. Others, who took on the cases pro bono, earned their million dollars and more fees from the subsequently filed German slave labor litigation.[78] To some cynics, the Swiss banks litigation was seen as a "loss leader"—building the reputation of these lawyers so that they could take on the subsequent Holocaust-era cases for a fee.[79]

Second, the Jewish organizations. The WJC and other Jewish NGOs (non-government organizations) used their work on the Swiss campaign (and the subsequently-filed claims) not only to build their prestige in the Jewish community, but also as a fund-raising tool, headlining their involvement with Holocaust

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78. *Profits of Doom*, HA'ARETZ, June 29, 2001, *available at* 2001 WL 21430692.

> Fifty-one lawyers . . . will receive about $53 million in legal fees, according to an agreement with the German fund for compensation of Holocaust-era slave laborers. Nine of these lawyers (all of them Jewish, as are most of the 51) who were involved in class action suits and in pressuring various firms to reach general settlements, will pocket over $1 million each.

Id.

79. Professor Neuborne disagrees with my assessment.

> I will not defend the morality of the legal fees. I believe that some lawyers received more than they deserved. In the name of accuracy, though, no fees have been awarded for the Swiss case. When Judge Korman decides the fee issue, I predict that almost no fees will be awarded in connection with the settlement itself, and only hourly fees for time actually expended will be paid to lawyers for post-settlement work. The net fees in the Swiss case will be very low. [Paragraph] Calling work on the Swiss case a 'loss leader' is absurd. No one expected the cases to develop beyond the Swiss litigation, and the German cases were always a huge long shot. [Paragraph] Finally, measured as a percentage of wealth generated, the fees are far below the industry norm. Moreover, under the arbitration agreement pursuant to which fees were paid by the German Foundation, all fees were based on time expended, and an assessment of the value of the services. Generating over $6 billion through a series of vigorous litigation that consumed more than five years of intense effort deserves compensation.

Email memo from Burt Neuborne to author (Nov. 27, 2001) para. 5, at 2-3 (on file with author).

restitution to solicit funds from their members.[80]

Last, the politicians. Getting on the Holocaust restitution bandwagon became a popular means to getting votes. Sometimes, it worked (as in the case of Florida Insurance Commissioner—now U.S. Senator Bill Nelson) and sometimes it did not (as in the case of Senator Alfonse D'Amato's failed reelection campaign).

To set out the above is not to take away from the hard work committed by many sincere and dedicated individuals, found in all these three groups, which forced the Swiss to confront their wartime past. However, examining what the non-survivors received from the Swiss campaign makes the survivors' benefits seem quite meager.

The campaign also reignited the in-fighting between some Holocaust survivors and the Claims Conference, the organization created after World War II to deal with the postwar claims against Germany and Austria. Bitter feelings arose among various Jewish groups and individual survivors about how to best distribute the Swiss settlement funds and other monies received from the later Holocaust-era settlements.

The in-fighting among the various Jewish constituencies over the restitution settlement spoils, coming on the heels of the pressure put on the Swiss banks and other European corporations to make restitution payments, also contributed to the negative impression that this was all about Jews fighting over money. A 1998 Swiss government study, for example, found that anti-Semitism increased in Switzerland in the wake of the campaign against the Swiss banks.[81]

Lastly, there is one major injustice in the Swiss banks settlement. The settlement unfairly lets the government-owned Swiss

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80. A World Jewish Congress ("WJC") mailing began, in bold print: "New U.S. Government Report Confirms World Jewish Congress' Findings." It continued:

> But much work still needs to be done. Your membership contribution today will help WJC researchers continue their efforts as they examine millions of files recently declassified by the U.S. government. . . . And your gift will help WJC diplomats to meet with top American, British and French officials to ensure that U.S.$70 million in Holocaust gold currently in U.S. and British banks is returned for the benefit of survivors.

Id.

81. SWISS FEDERAL COMMISSION AGAINST RACISM, ANTI-SEMITISM IN SWITZERLAND: A REPORT ON HISTORICAL CURRENT MANIFESTATIONS WITH RECOMMENDATIONS FOR COUNTER-MEASURES (1998).

National Bank ("SNB") completely off the hook, even though it was SNB, and not the private Swiss banks, which was the largest purchaser of gold stolen by the Nazis.

In 1998, soon after the Swiss-government created Bergier Commission shone the spotlight on the extensive dealings the SNB had with the Nazis, plaintiffs' attorneys filed a lawsuit against SNB.[82] The lawsuit detailed both the May 1998, findings of the Bergier Commission and findings from the 1997, U.S. government about how the SNB blatantly took in gold from the Nazis, which it knew to be stolen.[83]

Unfortunately, less than two months later, the same lawyers who filed the SNB lawsuit with its shocking allegations, and the WJC representatives, who expressed outrage when the Bergier Commission findings of SNB's Nazi dealings were issued, now agreed, in return for the U.S.$1.25 billion, not only to dismiss the litigation against UBS and Credit Suisse, the two private banks paying the settlement amount, but also the litigation against SNB. In fact, the release obtained by the two private banks went substantially beyond just a dismissal of the New York federal class action litigation. In addition to releasing the two class action defendants, the release also insulates from any future litigation stemming from World War II "the government of Switzerland, the Swiss National Bank, all other Swiss banks, and all other members of the Swiss industry, except for the three Swiss insurers who are defendants in the [federal class action Holocaust insurance litigation]."[84]

One can surely understand the eagerness of the two largest private Swiss banks—whose fortunes are so closely intertwined and identified with Switzerland—to purchase legal peace for the

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82. Rosenberg v. Swiss National Bank, No. 98CV01647 (D.C. Cir. filed June 29, 1998).

83. *See* Slany, *supra* note 4, at 4-5.

84. Settlement Agreement, In re Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000). It can also be questioned why Swiss industry also did not participate in the settlement by making a contribution to the U.S.$1.25 billion fund. In the German slave labor settlement, which bought legal peace for Germany and all its private enterprises from bothersome U.S. litigation stemming from World War II, over 500 German companies contributed to the U.S.$4.8 billion settlement fund. The Swiss companies, unlike the German companies, obtained legal peace without having to give anything in return. The Swiss industry's only financial contribution were token payments made in 1997 to the U.S.$200 million Swiss Humanitarian Fund, created by the Swiss government.

entire Swiss nation for all past activities stemming from World War II.[85] However, plaintiffs' representatives, in their eagerness during the settlement discussions to conclude the New York litigation against the Swiss banks, gave away too much. Neither the SNB, nor any other branch of the Swiss government, was even a party to the New York litigation. Later, when the Swiss government was invited to participate in the settlement discussions before Judge Korman, it declined, claiming that the litigation was a purely private matter between the two Swiss banks and the Holocaust survivors.[86] It would have been perfectly reasonable, therefore, for plaintiffs' representatives to reject the inclusion of SNB in the settlement.

It can, of course, be debated whether U.S.$1.25 billion sufficiently covers, in today's dollars, the dividends earned by Credit Suisse and UBS, and the other private Swiss banks which they acquired during the post-war years, from their wartime dealings

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85. *Id.* The Settlement Agreement defines the scope of claims settled by this litigation in the following broad terms:

> "*Claims or Settled Claims* means any and all actions . . . whether in law, admiralty, or equity, whether class or individual, under any international, national, state, provincial, or municipal law, whether now accrued or asserted or hereafter arising or discovered, that may be, may have been, could have been, or could be brought in any jurisdiction . . . by reason of, or in connection with any act or omission *in any way relating to the Holocaust, World War II and its prelude and aftermath, Victims or Targets of Nazi Persecution, transactions with or actions of the Nazi Regime, treatment of refugees fleeing Nazi persecution by the Swiss Confederation . . . or any related cause or thing whatever* . . . .

Id. (emphasis added); The language is ironclad: Switzerland or any Swiss entity, on the one hand, and World War II or the Holocaust, on the other hand, cannot be mentioned in the same breath in any litigation anywhere in the world.

86. Immediately after the settlement, the Swiss government issued a statement in which it both distanced itself from the result and took pains to confirm that it would not be contributing any monies to the settlement.

> The Federal Council noted today that a settlement was finalized last night between CS (Credit Suisse) Group, UBS (Union Bank of Switzerland) AG, and the American plaintiffs. It hopes that this settlement calms the tense situations of recent months and promotes good economic relations. The precise content of the settlement is not yet known. *The Federal Council has always stressed that negotiating such a settlement is a matter for the parties affected. Accordingly, it did not take part in these negotiations. For this reason no obligation ensues for the Swiss Confederation from the settlement.* . . .

Declaration of the Swiss Federal Council (Aug. 13, 1998) (emphasis added). Pascal Couchepin, the Swiss Economics Minister, flatly squelched any hope that the Swiss government would make a contribution to the U.S.$1.25 billion settlement in return for being given immunity from further civil prosecution as part of the deal: "[T]here is no reason for the Swiss Government to pay anything." Elizabeth Olson, *Swiss Are Relieved, But Sour, at Banks' Holocaust Accord*, N.Y. TIMES, Aug. 16, 1998, at 8.

with the Nazis. Some have argued that the figure is too small, failing to take into account the actual profits made by the banks. Others have claimed that the U.S.$1.25 billion settlement is fair, arrived at through hard-fought negotiations with the two banks over how much they should pay for their dealings with the Nazis and failure to return dormant accounts. However, there can be no dispute that the U.S.$1.25 billion fails to cover the profits earned by SNB in their "Swiss francs for looted Nazi gold" money-laundering scheme.

The Swiss government-created Bergier Commission estimated that SNB took in from Nazi Germany more than U.S.$2.5 billion in stolen gold (in today's dollars), U.S.$1.2 million of which could be identified "as being melted down by the Nazi bankers into gold bars from teeth fillings and wedding rings." Nevertheless, the Swiss government maintains that the U.S.$68.2 million contribution made by SNB in 1997 to the U.S.$200 million Swiss Humanitarian Fund sufficiently covers its obligations.[87]

Most furious at the exclusion of SNB from the settlement were the Holocaust survivors in Israel, the largest group of survivors in the world. Moshe Sanbar, chair of the Center of Organizations of Holocaust Survivors in Israel and the former governor of the Bank of Israel, protested vehemently at this unfair result. In a September 1998 letter to Judge Korman, Sanbar urged that the SNB not be released from liability in the Swiss banks settlement.[88] His pleas went unheeded. The lawyers who had earlier touted the lawsuit against SNB, were now disowning it.[89] Sanbar

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87. William Hall, *Swiss Bank Spurns Nazi Gold Deal*, FIN. TIMES, Aug. 22, 1998, at 2, *available at* 1998 WL 23267472.

88. Marilyn Henry, *Israeli Survivors Seek To Keep Options Open Against Swiss National Bank*, JERUSALEM POST, Sept. 20, 1998, at 4.

89. Of course, going after the SNB created an additional obstacle not present in the litigation against the private Swiss banks: as a government-owned bank, SNB could assert the defense of sovereign immunity, which the private Swiss banks could not. Since the lawsuit against SNB was dismissed as part of the overall private Swiss banks settlement, it is unknown whether SNB's sovereign immunity defense would have been successful. While sovereign immunity may appear to be a strong defense argument, it would not necessarily be fatal to the success of the lawsuit. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) (Argentine National Bank could not avail itself of the defense of sovereign immunity because its commercial activities, which formed the basis of the suit, had a "direct effect" in the United States, and therefore Bank not immune under clause 3 of Section 1605(a)(2) of the Foreign Sovereign Immunities Act, 28 U.S.C. Sec. 1330, 1603 *et seq.*, to litigation in United States).

attempted to have the Jewish groups, specifically the Claims Conference (for which he was Treasurer) fund further studies about how SNB handled Nazi-looted gold. The WJC, however, vetoed the proposal. Feeling pressure from all sides, and being accused of delaying payment to elderly Holocaust survivors due to them from the Swiss settlement, Sanbar gave in and dropped his formal objections to the settlement.[90]

To allay criticism of its failure to participate in the Swiss banks settlement, the Swiss government began making vague promises about selling gold in its reserves and using the proceeds to establish a so-called "Solidarity Foundation" to finance charitable projects, including aid to impoverished Holocaust survivors throughout the world. However, it maintained that such sales of the Swiss gold reserves required approval through a referendum from Swiss voters. The proposal, first floated in March 1997 in the wake of the embarrassing disclosures of Swiss wartime complicity, was abandoned by mid-1999,[91] as the focus of the Holocaust restitution campaign turned from the Swiss to German, Austrian and French companies, and their governments. The Swiss politicians and bureaucrats were relieved. Without ever having to defend itself in court and without contributing anything to the settlement, the Swiss government—the largest money launderer for the Nazis—once again escaped responsibility for its acts.[92]

CONCLUSION

While acknowledging the above-discussed drawbacks of the Swiss settlement—and conceding their significance—I still conclude that the accomplishments of the Swiss campaign outweigh its faults. The campaign was an unqualified triumph on the legal and political front, showing the enormous power of both the American system of justice and the American political process.

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90. Sanbar later put his criticisms in a monograph, published in Israel and translated into English. *See* RAUL TEITELBAUM & MOSHE SANBAR, HOLOCAUST GOLD—FROM THE VICTIMS TO SWITZERLAND: TRAILS OF THE NAZI PLUNDER (2001).

91. In 1999, the Swiss right-wing parties made a strong showing in parliamentary elections. That same year, the parties managed to defeat a constitutional amendment in the Swiss parliament that would have funded the "Solidarity Foundation." *See Swiss Parliament Stalls Gold Foundation*, JERUSALEM POST, June 20, 1999, at 4.

92. In March, 1999, Switzerland, no longer under scrutiny for its wartime acts, felt safe enough to disband the special World War II task force it created to deal with the wartime activities. *See* http://www.switzerland.taskforce.ch.

Combining forces, the lawyers, Jewish activists, and both Jewish and non-Jewish politicians forced Switzerland and its most powerful industry to confront long-forgotten wrongs and make some recompense to right those wrongs. In 1995, when the first soundings of Switzerland's wartime past were coming to light, no one would have imagined that the powerful Swiss banks would be forced to disgorge over a billion dollars for their wartime and post-war misdeeds or that the Swiss government would create historical commissions, task forces, and conduct studies to reevaluate events over a half-century old.

Even more startling was the ability of the Swiss campaign to open the floodgates to the settlements achieved with Germany and its industry, Austria and its industry, French banks, European insurance companies, and even American corporations for their nefarious wartime activities. The worldwide movement for the return of Nazi-stolen art also was born out of the Swiss banks settlement. The Swiss campaign—judging by how it is already being emulated by other movements seeking redress for historical wrongs—will serve as a model for a long time to come.

The survivors themselves may have won very little. Everyone else won a lot.