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Austin Owen Lecture: Litigating the Holocaust

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AUSTIN OWEN LECTURE

The Austin Owen Lecture was established in honor of the Honorable Austin E. Owen through the generosity of his daughter, Dr. Judith O. Hopkins, W'74, and son-in-law, Dr. Marbry B. Hopkins, R'74. The Honorable Austin E. Owen attended Richmond College from 1946-47 and received his law degree from the University of Richmond School of Law in 1950. During his distinguished career, Judge Owen served as an Assistant U.S. Attorney for the Eastern District of Virginia; a partner in Owen, Gray, Rhodes, Betz, Smith and Dickerson; and was appointed Judge of the Second Judicial Circuit of Virginia where he served until his retirement in 1990. Professor Michael J. Bazzyler presented this address at the Seventh Annual Austin Owen Lecture on April 12, 1999, at the University of Richmond School of Law.

LITIGATING THE HOLOCAUST

*Michael J. Bazzyler**

The subject of the Holocaust is very close to my heart. My formative life experiences come from growing up in postwar Poland, in the city of Lodz, the site of the infamous Lodz Ghetto. I still remember, as a young boy, walking during the 1960s

* Professor of Law, Whittier Law School; Associate, Davis Center for Russian Studies, Harvard University. B.A., 1974, University of California, Los Angeles; J.D., 1978, University of Southern California Law Center. I thank the University of Richmond School of Law for inviting me to deliver the Seventh Annual Austin Owen Lecture. I am honored to follow in the footsteps of distinguished professors, judges, and government officials who have given the lecture in the past. I am also grateful to Drs. Judith and Marbry Hopkins, who have established the Austin Owen Lecture.

past streets where remnants of the barbed wire from the Ghetto remained and from where almost all inhabitants were shipped to their death in Auschwitz.

Most of my parents' friends were Holocaust survivors. As a child, it was not unusual to see numbers tattooed on the arms of the adults visiting our home. My parents always feared another war in Europe, and this fear led us to emigrate from Poland to the safety of America. It is with great sadness that I now see another war being waged in Europe. The refugees fleeing Kosovo and the inhabitants of Belgrade are experiencing today the events that my parents feared most.

I want to turn now to the subject of my comments: litigating the Holocaust in the United States.

I. INTRODUCTION

It has been said that the Holocaust¹ was not only the greatest murder, but also the greatest theft in history. Not only were six million Jewish men, women, and children murdered, but historians estimate that the Nazis stole between \$230 billion and \$320 billion in assets, in today's dollars, from the Jewish population in Europe.²

1. "Holocaust" is the word that "Jews themselves have chosen to describe their fate during World War II. At the most superficial level, the word 'holocaust' means a great destruction and devastation, but its etymological substratum interposes a specifically Jewish interpretation. . . . The Holocaust, then, becomes another link in the historic chain of Jewish suffering." LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933-1945*, at xxxvii (1986).

More specifically, the Holocaust refers to "the systematic attempt [by the Nazis] to destroy all European Jewry," resulting in the death of six million Jews. MARTIN GILBERT, *THE HOLOCAUST* 18 (1985). For a more recent study, see *THE HOLOCAUST AND HISTORY* (Michael Berenbaum & Abraham J. Beck eds., 1998). Another synonymous term used is the Hebrew word "Shoah."

2. Jewish losses during World War II ranged from \$23 billion to \$32 billion in 1945, according to the World Jewish Congress. See Marilyn Henry, *U.S. Report On Neutral Countries' War-Time Conduct Due Tomorrow*, *THE JERUSALEM POST*, June 1, 1998, at 3, available in 1998 WL 6530479. For today's values, the figures are multiplied tenfold.

According, however, to Neil Sher, former director of the Justice Department's Office of Special Investigations, which investigates Nazi war crimes, all estimates of losses should be suspect because "it's impossible to know how much was plundered. We can only make rough estimates." See Henry Weinstein, *"This Is A Campaign for Truth . . . For Justice" Conference: Efforts To Compensate Holocaust Survivors for*

For over one-half century, most of these losses remained uncompensated. While postwar West Germany, since the 1950s, paid reparations amounting to approximately \$70 billion to some Jewish victims of Nazi persecution, the amounts to each individual were small and came nowhere close to compensating for the suffering endured by the victims and the actual monetary losses suffered by European Jewry.³

The financial books of the Holocaust are only being settled now. Surprisingly, the accounting is not being done in Europe, where the Holocaust took place, but in the United States. Why here?

The answer lies with the American legal system. It is a tribute to the United States system of justice that our courts can handle claims which originated over fifty years ago in another part of the world. Long-established principles of judicial jurisdiction, choice-of-law, equity, our independent judiciary, the American belief in jury trials, our system of evaluating damages, the ability to file class action lawsuits, and American-style discovery have made the United States the most attractive and, in most cases, the only, forum in the world where Holocaust-era claims can be heard today.

Diplomacy, individual pleas for justice by Holocaust survivors and various Jewish organizations for the last fifty years, and even suits in foreign courts, have not worked. It is only now, with the intervention of American courts, that elderly Holocaust

Financial Losses Are Discussed. Tales Of Greed And Heroism Abound, L.A. TIMES, Mar. 2, 1998, at A3 (reporting on the Nazi Gold and other assets of the Holocaust conference held at Whittier Law School).

3. See Ian Traynor, *Schroeder Tries to Hammer Out Settlement For Slave Labourers*, THE GUARDIAN, Oct. 23, 1998, at 19, available in 1998 WL 18673022. But see Roger Cohen, *German Companies Adopt Fund for Slave Laborers Under Nazis*, N.Y. TIMES, Feb. 17, 1999, at A1 (citing figure of \$80 billion); *Talks On Holocaust Reparations Held*, L.A. TIMES, Feb. 9, 1999, at A9 (citing figure of \$60 billion). In addition, Germany "more recently . . . has paid [1.5 billion deutsche marks] into trust funds set up in eastern Europe, in Moscow, Minsk, Kiev and Warsaw for Nazi victims, including those forced to work for German industry." John Authers et al., *Unsettled Business*, FIN. TIMES, Aug. 25, 1998, at 14. For a discussion of German reparation payments, see generally CHRISTIAN PROSS, *PAYING FOR THE PAST: THE STRUGGLE OVER REPARATIONS FOR SURVIVING VICTIMS OF THE NAZI TERROR* (Belinda Cooper trans., 1998).

survivors⁴ see their last great hope to obtain compensation being fulfilled.

The beginning date of this phenomenon of Holocaust survivors and their heirs suddenly bringing successful suits in the United States's courts to recover compensation for losses suffered during World War II can be traced to October 1996, with the filing of three federal class action lawsuits in New York, not against German companies, but against the three largest Swiss banks for failure to return money deposited with the banks on the eve of, or during, World War II.⁵

Since then, the floodgates of litigation have opened, with over fifty more civil lawsuits filed in both federal and state courts against various foreign and American corporate and individual defendants arising from Holocaust-era events. The number is still rising. Each month brings news of the filing of another Holocaust-era lawsuit in the United States. The field is so dynamic that some law firms have been labeled, depending upon their size, as now having either the entire firm or an entire department engaged in a "war crimes practice."

4. There are approximately 100,000 survivors of the Holocaust still alive in the United States and 360,000 more in Israel. See Tom Tugend, *Jewish Leaders Optimistic About Swiss Settlement Offer*, THE JERUSALEM POST, Aug. 14, 1998, at 5. The average age of the survivors is 81. See John J. Goldman, *Insurer OKs \$100-Million Holocaust Payoff Settlement: Deal Between Survivors, Families and Top Italian Firm Could Set Precedent*, L.A. TIMES, Aug. 20, 1998, at A17.

5. See *World Council of Orthodox Jewish Communities, Inc. v. Union Bank of Switz.*, No. 97-CV-0461 (E.D.N.Y. Jan. 29, 1997) (class action by Jewish group on behalf of Holocaust survivors and heirs against same three banks); *Friedman v. Union Bank of Switz.*, No. CV-96-5161 (E.D.N.Y. Oct. 21, 1996) (Am. Compl. filed July 30, 1997 as *Trilling-Grotch v. Union Bank of Switz.* and *Sonabend v. Union Bank of Switz.*) (class action by heirs of Holocaust victims against same three banks); *Weisshaus v. Union Bank of Switz.*, No. CV-96-4849 (E.D.N.Y. Oct. 3, 1996) (Am. Compl. filed Jan. 24, 1997) (class action by Holocaust survivors against Union Bank of Switzerland, Swiss Bank Corporation, Credit Suisse (three largest Swiss banks) and others). Swiss Bank Corporation and Union Bank of Switzerland later merged, leaving two defendants.

For law review articles discussing the Swiss bank litigation, see Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325 (1998); Stephanie A. Bilenker, Comment, *In re Holocaust Victims' Assets Litigation: Do the U.S. Courts Have Jurisdiction Over the Lawsuits Filed by Holocaust Survivors Against the Swiss Banks?*, 21 MD. J. INT'L L. & TRADE 251 (1997); Jodi Berlin Ganz, Note, *Heirs Without Assets and Assets Without Heirs: Recovering and Reclaiming Dormant Swiss Bank Accounts*, 20 FORDHAM INT'L L.J. 1306 (1997).

In contrast to the slew of lawsuits filed in the last two-and-one-half years, between 1945 and October 1996, less than a dozen lawsuits were filed involving Holocaust claims.⁶ Most were dismissed.

The filing of such lawsuits only now, over one-half-century after the events took place, is astounding. In the history of American litigation, as far as I am aware, a class of cases has never appeared in which so much time had passed between the wrongful act and the filing of a lawsuit.

Whenever I give a talk on this subject, one question always arises: Why now? There is no single reason. Rather, the answer involves a combination of factors that have made these lawsuits possible.

As an international human rights lawyer and a law professor, I can proudly state that an important factor in making a Holocaust lawsuit brought in the United States viable today was the victory achieved by the human rights bar in 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*,⁷ the landmark 1980 Second Circuit Court of Appeals opinion which held that the Alien Tort Claims Act⁸ can allow a victim of state-sanctioned torture to bring suit against the torturer in the United States even though the torture took place on foreign soil.

Since 1980, a number of other human rights victims injured abroad have been able to successfully sue in the United States. These lawsuits include a suit against the indicted Serbian war

6. See, e.g., *Prinz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994) (defendant prevails in suit by American citizen against present German state for treatment by former Nazi regime); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij (Chemical Bank & Trust Co.)*, 210 F.2d 375 (2d Cir. 1954) (plaintiff eventually prevails after State Department intervenes in suit seeking to recover business seized by the Nazis); *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij (Chemical Bank & Trust Co.)*, 173 F.2d 71 (2d Cir. 1949); *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947); *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985) (defendant prevails in suit for human rights violations against former official of pro-Nazi government of wartime Croatia); *Buxbaum v. Assicurazioni Generali*, 33 N.Y.S. 2d 496 (1942) (plaintiffs prevail in suit seeking payment of insurance policy proceeds).

7. 630 F.2d 876 (2d Cir. 1980).

8. 28 U.S.C. § 1350 (1994).

criminal Rodovan Karadzic,⁹ a suit against the estate of former Philippine dictator Ferdinand Marcos,¹⁰ and various other lawsuits against both foreign countries,¹¹ corporations,¹² and individuals¹³ for human rights violations committed abroad. Congress has also accepted the right of victims of foreign torture to sue in our courts by enacting in 1991 the Torture Victim Protection Act ("TVPA").¹⁴

Without the groundwork laid out by these cases and the TVPA legislation, the recently-filed Holocaust suits, seeking damages for wrongs inflicted in Europe over a half-century ago and sometimes filed by foreigners, would have been laughed out of court.

Political and social changes also have had a great deal to do with making the timing right for filing Holocaust-era suits. In a recent interview, Abraham Foxman, head of the Anti-Defamation League and himself a Holocaust survivor, explained:

We have to remember why . . . we're dealing with it now . . . [T]here are some practical reasons, and that is, after 50 years, the British opened some of their books. The Soviet Union's disarray has made [more] documents available. . . .

But there's another reason that we didn't deal with this issue for 50 years—because the trauma of the human tragedy was so tremendous, so enormous, so gargantuan, that nobody wanted to talk about material loss for fear that it will lessen the human tragedy. Because when you begin talking about property, then what about life? And so for at least two generations—yeah, Israel decided to take reparations, it needed it—but individually we didn't deal with it. Not that we didn't know that there were bank accounts, that there was insurance, that there was property. My mother's family had a factory in Warsaw. My father had

9. See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

10. See *In re Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994); *In re Estate of Marcos*, 978 F.2d 493 (9th Cir. 1992).

11. See *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699 (9th Cir. 1992).

12. See *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

13. See *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Paul v. Avril*, 812 F. Supp. 207 (S.D. Fla. 1993); *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988).

14. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified as amended at 28 U.S.C. § 1350 (1994)).

some stores in Baranowicz. But nobody ever raised it. Nobody ever said, look what we lost. I don't remember conversations of material loss. Now I realize how significant the loss was, but nobody talked about it. Because what they talked about was that they lost 16 members of their family.¹⁵

Cases filed beginning in 1996, with the emergence of Holocaust-era litigation, can be divided into five types: (1) claims against the Swiss; (2) claims against the European insurance companies; (3) claims arising from the use of slave labor; (4) claims against German and Austrian banks for their dealings with the Nazis; and (5) claims stemming from Nazi-stolen art.

II. CLAIMS AGAINST THE SWISS

The first set of cases are claims filed in the Eastern District of New York against the three major Swiss banks on behalf of Holocaust survivors and their heirs who deposited money in Switzerland for safekeeping.

As the tragedy of World War II began unfolding, Jews and other persecuted minorities in Europe, under the inducement of Swiss bank secrecy laws, began to deposit money in neutral Switzerland. After the war, when the survivors or heirs asked for their money back, they were refused.

The claims filed had a simple legal theory: unjust enrichment. The Swiss banks held on to the money for over fifty years and should now give it back. Three lawsuits were filed and consolidated in April 1997, under the title *In re Holocaust Victims' Assets Litigation*, before Judge Edward Korman, the King Solomon of this litigation.

The lawsuits also sought for the Swiss banks to disgorge profits that they made from their financial dealings with the Nazis. Specifically, the claims sought disgorgement of profits from assets looted by the Nazis, including gold and proceeds

15. *We Bludgeoned Them and Bludgeoned Them . . . But at What Price?*, FORWARD, Sept. 4, 1998, at 7, available in 1998 WL 11416531 (interview with Abraham Foxman).

from slave labor which the Nazis "fenced" through Swiss banks to raise Swiss francs to support the German war effort.

The litigation against the Swiss banks has been settled for \$1.25 billion, the largest settlement of a human rights case in United States history. At first, the banks refused to make any settlement offers. Instead, they filed extensive motions to dismiss, totaling over 500 pages and covering every possible ground for dismissal of the suits, including lack of jurisdiction, non-justiciability, forum non conveniens, and statute of limitations.

Having received the lengthy briefs from both sides, Judge Korman did something brilliant. He did nothing. Rather than ruling on the motions, he sat on them for close to one year and waited for the parties to reach a settlement.

State and local governments then put on the pressure by announcing that if the banks did not negotiate in good faith, they would withdraw their investments from the Swiss banks and do business with other financial institutions.

Interestingly, state and local officials made the threat of sanctions against the advice of our State Department. The State Department claimed that such actions amounted to interference with American foreign policy.

The gambit worked. The Swiss first announced their "take-or-leave-it" offer of \$600 million,¹⁶ and then one month later, in mid-August 1998, with the threat of sanctions looming only two weeks away, they doubled their offer to \$1.25 billion.¹⁷ The crucial event was a dinner meeting conducted by Judge Korman at a Brooklyn restaurant where he persuaded the two sides to come together and settle for this amount.¹⁸

16. See *Swiss Banks Offer \$600 Million to Close Holocaust Claims*, L.A. TIMES, June 20, 1998, at A5 ("Switzerland's three biggest banks offered \$600 million Friday [June 19, 1998] to settle claims that they stole assets of Holocaust victims. The banks called it their top offer; outraged Jewish leaders called it insultingly low.")

17. See John Authers & William Hall, *Holocaust Deal Ends Sanctions Threat*, FIN. TIMES, Aug. 14, 1998, at 2; Joseph P. Fried, *Swiss Banks Reach Holocaust Accord*, N.Y. TIMES, Aug. 13, 1998, at A1; John J. Goldman & Henry Weinstein, *2 Swiss Banks to Pay \$1.25 Billion in Holocaust Suits*, L.A. TIMES, Aug. 13, 1998, at A1; Stephen D. Moore, *Choices Few to Swiss Banks on War Claims*, WALL ST. J., Aug. 14, 1998, at 12.

18. For discussions of the behind-the-scenes maneuvers leading to the settlement,

So far, none of the money has been paid to survivors.¹⁹ The Swiss banks made the first installment payment of \$250 million in November 1998, but the money is sitting in a trust account awaiting resolution of how it should be distributed.²⁰

III. CLAIMS AGAINST THE EUROPEAN INSURANCE COMPANIES

The second set of cases involve claims against European insurance companies. The insurers collected extensive premiums from Jews in the years preceding the Holocaust, but they never paid off on the policies.²¹

see Stewart Ain, *How the Swiss Deal Was Done: Inside the Historical Bank Settlement Talks Carried Out in a Steamy Brooklyn Restaurant*, JEWISH WK., Aug. 21, 1998, at 1, available in 1998 WL 11411115; John Authers et al., *Banks Pay a High Price for Putting the Past Behind Them*, FIN. TIMES, Sept. 9, 1998, at 4; James D. Besser, *Behind the Scenes: A Curious Synergy*, JEWISH J., Aug. 21, 1998, at 8; Susan Orenstein, *Gold Warriors: The Inside Story of the Historic \$1.25 Billion Settlement Between Holocaust Victims and the Swiss Banks*, AM. LAW., Sept., 1998, at 62.

19. The \$1.25 billion figure was not a lump sum settlement. Rather, under the agreement struck between the parties, the two Swiss banks, Union Bank of Switzerland and Credit Suisse, agreed to pay out the \$1.25 billion in four installments. An initial payment of \$250 million was to be paid ninety days after Judge Edward Korman formally approved the settlement, and the next three payments of \$333 million each were to be paid on the first, second, and third anniversary of Judge Korman's approval order.

Pursuant to a settlement agreement subsequently signed by the parties on January 26, 1999, more than five months after the settlement was orally agreed upon and preliminarily approved by Judge Korman in open court, the \$1.25 billion would be fully paid off by the Swiss banks on November 23, 2001. See *In re Holocaust Victims' Assets, Settlement Agreement*, Aug. 12, 1998, ¶ 5.1 [hereinafter Settlement Agreement].

20. The Settlement Agreement contemplates for Judge Korman to appoint "a Special Master . . . [who] shall develop a proposed plan of allocation and distribution of the Settlement Fund, employing open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution. The proposed allocation and distribution plan must be approved by the Court before the Settlement Fund may be distributed." Settlement Agreement, ¶ 7.1. Manhattan attorney Judah Gribetz has been appointed "Special Master." See Marilyn Henry, *Swiss Holocaust Agreement Finalized. Terms Reached for Defining Eligible Victims*, THE JERUSALEM POST, Jan. 24, 1999, at 4, available in 1999 WL 8998755.

For a discussion of the distribution issues in the Swiss bank settlement, see James D. Besser, *Seeking Moral Restitution*, JEWISH J., Dec. 4, 1998, at 22; Charles Krauthammer, *Reducing the Holocaust to Mere Dollars and Cents*, L.A. TIMES, Dec. 4, 1998, at B9; Daniel Kurtzman, *Money: Last Word on the Holocaust?*, JEWISH J., Dec. 11, 1998, at 26; Barry Meier, *Jewish Groups Fight for Spoils of Swiss Case*, N.Y. TIMES, Nov. 29, 1998, at A1.

21. See, e.g., *"That Day They Told Me: That Policy Is Toilet Paper"* ("Quel Giorno Mi Dissero: Quella Polizza E Carta Igienica"), CORRIERE DELLA SERA, Aug. 21, 1998,

In the time between the two world wars, life insurance policies and annuities were popular investments. They have, in fact, been called the "poor man's Swiss bank account." It has been estimated that in the prewar years, "Jewish families bought policies worth an estimated \$2 billion to \$2.5 billion in today's dollars,"²² and that the insurance companies made a fortune on these policies.

The European insurers have made a number of arguments in support of their denial of legal liability. First, like the Swiss banks, the companies have argued that U.S. courts lack subject matter jurisdiction over these claims. Even if jurisdiction exists because the companies do extensive business in the United States, the companies argue that, based on *forum non conveniens* grounds, any dispute about the policies should be settled in the courts of the Eastern European countries where the policies were written.

Third, the insurance firms have argued that because the postwar Communist governments of Eastern Europe nationalized their branch offices where the policies were issued, their obligations on the policies have ended. Finally, the companies claim that the policies, denominated in then hyper-inflated currencies, presently have little or no value.²³

In March 1997, a class action lawsuit was filed in the Southern District of New York against sixteen European insurance companies. The lawsuit sought \$1 billion from each company for refusing to pay out on their policies.²⁴

at 9, available in 1998 WL 8550732 (describing an interview with a Holocaust survivor who was refused payment on a life insurance policy taken out by his father with Italian insurer Assicurazioni Generali, Italy's largest insurance company, which did extensive business in prewar Eastern Europe).

22. *Making Amends*, LIFE INS. INT'L, Oct. 1, 1998, at 7, available in 1998 WL 12138659.

23. See *Generali's Open Account*, THE JERUSALEM POST, Sept. 24, 1998, at 10, available in 1998 WL 6535583 (discussing defenses made by Generali insurance).

24. See Compl., *Drucker Cornell v. Assicurazioni Generali S.p.A.*, No. 97 CIV. 02262 (S.D.N.Y. Mar. 31, 1997). In December 1998, another set of lawyers filed a second class action lawsuit against the insurance companies. See Compl., *Winters v. Assicurazioni Generali S.p.A.*, No. 98 CIV. 9186 (S.D.N.Y. Dec. 30, 1998). One commentator described the frustration of a Holocaust survivor's attempt to collect on a life insurance policy:

In 1945, Marta Cornell returned from the Nazi concentration camp with only the rags on her back. The teenager and her grandmother had no

Judge Michael Mukasey in Manhattan borrowed Judge Korman's approach from the Swiss bank cases. In response to the insurance companies' motions to dismiss, he has not ruled on the motions, hoping that the matter will settle instead.

Meanwhile, a number of individual heirs of policy holders have filed their own individual actions. One of those, *Stern v. Assicurazioni Generali S.p.A.*,²⁵ was filed in California before a state judge in Los Angeles, who recently ruled that she has subject matter jurisdiction over the suit.²⁶ In March 1999, she also fined Generali, the defendant insurance company, more than \$14,000 for hiding from the court that the company had been a plaintiff in California courts in over two dozen lawsuits.²⁷

Because the business of insurance is regulated individually by each state, the various state insurance commissioners have entered the picture. Under the threat of being expelled from the United States insurance market, five of the European insurance companies, who are parents to some of the most well-known insurance companies in the United States, have agreed with the National Association of Insurance Commissioners to set up an International Commission on Holocaust Era Insurance Claims, headed by former U.S. Secretary of State Lawrence Eagleburger.²⁸ The companies are discussing the establishment of a fund, ranging from \$90 million to \$2 billion, to pay on the disputed policies through the Commission. The insurance com-

place to live. She tried to collect on some of the 10 life insurance policies taken out by her father, who was killed in a concentration camp. She was told she was entitled to nothing. "I would have settled for peanuts," says Mrs. Cornell, now a resident of Flushing, N.Y.

Ron Scherer, *Payment for Past: Survivors May Finally Collect Claims*, CHRISTIAN SCI. MONITOR, Aug. 21, 1998, at 5.

25. No. BC 185376, 1999 WL 167546 (Cal. App. Dep't Super. Ct. Jan. 25, 1998).

26. See *Stern*, 1999 WL 167546, at *1.

27. See *id.* at *2. Generali, in support of its motion to dismiss, filed a declaration stating that it could not "locate any records of ever having filed a lawsuit in the California state courts." *Id.*; see also Denise Levin, *Judge Sanctions Italian Insurance Firm*, L.A. DAILY J., Mar. 24, 1999, at 2.

28. See Carole Landry, *44 Countries Pledge to Return Holocaust-era Assets*, AGENCE FRANCE-PRESSE, Dec. 3, 1999, available in 1998 WL 16652355. The five companies, representing approximately 25 to 30% of the prewar European insurance market, are: France's Axa, Germany's Allianz, Italy's Generali, Switzerland's Winterthur (owned by Credit Suisse), and Zurich. See *id.*

panies hope that the International Commission process will supersede the class action litigation.

IV. SLAVE LABOR CLAIMS

A. Overview

The third set of cases involve suits against German companies that utilized slave laborers during World War II. Between eight to ten million persons²⁹ were forced to work as slave laborers³⁰ in factories in Germany and throughout occupied Europe³¹ during World War II. Historians estimate that approxi-

29. See Authers et al., *supra* note 3, at 14 (indicating eight million); *German Ex-Slave Workers Plan Action*, AP ONLINE, Nov. 6, 1998, available in 1998 WL 22415808 (indicating nine million); Traynor, *supra* note 3, at 19 (indicating ten million).

According to the Nuremberg judgment, "the German occupation authorities did succeed in forcing many of the inhabitants to work for the German war effort, and in deporting at least 5,000,000 persons to Germany to serve German industry and agriculture." The Nurnberg Trial, 6 F.R.D. 69, 123 (1946). The Tribunal quotes Himmler as stating: [W]e have 6-7 million foreigners in Germany" *Id.* at 124.

30. The term slave is a misnomer. As explained by Benjamin Ferencz, one of the American prosecutors at Nuremberg, in his incisive treatise:

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

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

The Germans used the term "zwangsarbeiter" to describe their slave laborers. See Authers et al., *supra* note 3, at 14. For a summary discussion of the slave labor policies of the Nazis, found in the judgment of the Nuremberg Tribunal, see The Nurnberg Trial, 6 F.R.D. 69, 123-126 (1946).

31. As explained by Miles Lerman, chairman of the Washington Holocaust Memorial Council and himself a Holocaust survivor:

It was not coincidental that IG Farben or any other industrial complex in Germany settled themselves around Auschwitz-Birkenau. They were getting labour for 10 cents a day.

We are interested not in the dollars and cents but the fact that it was by design. They were trying to utilize and benefit from every aspect of the prisoners. First, their labour, then they were gassed for their hair, their gold teeth and even their bones were crushed and used as fertilizer.

Richard Wolfe, *Putting A Price On The Holocaust—Aggressive Campaigning to Win Compensation for Holocaust Victims Is Provoking Moral Turmoil and Could Inadvertently Be Fostering Anti-Semitism*, IRISH TIMES, Mar. 16, 1999, at 15, available in 1999 WL 14002124.

mately 700,000 of these forced slave laborers are still alive, and some estimates place the number of slave labor survivors as high as 1.6 million.³²

While postwar West Germany paid reparations to some Jewish victims of Nazi persecution,³³ slave laborers were specifically excluded from receiving payment. Former German slave laborers found themselves in a catch-22 situation. The German government claimed that it was not obligated to make payments to them because the laborers worked during the war for private German industry. German industry, on the other hand, argued that any payments should come from government coffers because the postwar German regime was the legal successor to the Third Reich. The German firms maintained that the Nazi regime forced them to use slave laborers to support the German wartime economy during World War II.³⁴

32. See Authers et al., *supra* note 3, at 14. *But see* Cohen, *supra* note 3, at A1 (citing the figure of 1.6 million surviving slave laborers, with over 500,000 living in Poland alone).

In November 1998, the American television program *Dateline NBC* profiled the slave labor issue. The program featured interviews with former slave laborers living in the United States. See *Dateline NBC: Profile: Just Rewards? German Companies That Used Jewish Slave Labor Being Sued Now for Damages* (NBC television broadcast, Nov. 10, 1998), available in 1998 WL 22610135.

33. Since the 1950s, Germany has paid approximately \$70 billion in reparations. See Traynor, *supra* note 3, at 19. *But see* Cohen, *supra* note 3, at A1 (citing figure of \$80 billion); *Talks On Holocaust Reparations Held*, *supra* note 3, at A9 (citing figure of \$60 billion). See also Authers et al., *supra* note 3, at 14.

No German industrialist was brought to trial at Nuremberg for use of slave labor. After Nuremberg, the United States initiated prosecutions of representatives of three German firms: the Flick Concern, I.G. Farben, and the Krupp firm. Found guilty, the corporate defendants, however, served short prison terms. By the early 1950s, they were released and allowed to return to lead their firms in postwar West Germany. See Mathew Lippman, *War Crimes Trials Of German Industrialists: The "Other Schindlers"*, 9 *TEMPLE INT'L & COMP. L.J.* 173 (1995). Moreover, "[t]he [German] industrialists left prison and almost immediately regained their place at the pinnacle of power." *Id.* at 266.

34. See *Germany to Compensate Nazi Slave Laborers, 'Forgotten Victims'*, *L.A. TIMES*, Oct. 21, 1998, at A8 ("Since World War II, Germany has paid billions in compensation to Holocaust victims: Yet it rejected claims of back wages for slave laborers, saying the companies involved were responsible. Most German firms, though, argued that the government, as legal successor to the Nazi regime, should be accountable.").

According to Bernard Graef, head of Volkswagen archives, "[f]rom a legal position the crimes of the Nazis were a state crime, and the issue of slave labour compensation must be addressed to the [German] government." Adam LeBor, *Holocaust Slaves Set To Gain Compensation*, *THE INDEP.*, Aug. 22, 1998, at 15.

In October 1998, the new center-left Chancellor of Germany, Gerhard Schroeder, reversed his predecessor, Helmut Kohl,³⁵ and announced the creation of a joint German government-industry fund to compensate former slave laborers and others not covered under existing German reparation law.³⁶

By that time, however, plaintiffs' lawyers in the Swiss bank litigation, buoyed by the success of their \$1.25 billion settlement, already began filing suits in American courts against various German and even American companies. The lawsuits sought damages for the companies' use of slave labor during World War II.³⁷

Even announcements by some German companies in late 1998 that they would set up commissions to investigate their role during the Nazi era³⁸ and voluntarily make payments to

35. See Kohl: *No More State Money for Holocaust Victims*, XINHUA ENG. NEWSWIRE, Aug. 21, 1998, available in 1998 WL 12179218; see also Jerry H. Meldon, *Dirty Secrets As Germans Go To The Polls*, BOSTON GLOBE, Sept. 26, 1998, at A19.

36. See Traynor, *supra* note 3, at 19. The new chancellor appointed his key aide, Bodo Hombach, to head the joint government-industry group. *Id.* Among those participating in the group are heads of Allianz Insurance Company, the Dresdner and Deutsche banks, the auto giants BMW and Volkswagen, and the Siemens, Krupp, Degussa and BASF industrial concerns. *Id.*

In November 1998, some former slave laborers living in the United States announced that they would fight plans to set up the compensation group, desiring instead to "settle their claims individually or on a class-action basis" in United States courts. *German Ex-Slave Workers Plan Action*, *supra* note 29.

37. See Authers et al., *supra* note 3, at 14. Commentators have observed:

Anyone who thought [that the Swiss bank settlement] marked the end of the campaign by Jewish organisations for restitution has had a rude awakening. Far from dying down, the number of European banks, insurance companies and industrial companies that are under pressure to make similar settlements is snowballing.

According to Edward Fagan, the New York attorney who first sued the Swiss banks: "We all did a disservice to survivors when we allowed the public perception to be focused towards just looking at the Swiss banks as the Nazi banks. They weren't the only ones, and the origin was back in Germany."

. . . According to Mr. Fagan, many of his clients want "another Nuremberg," preferably with a German bank or industrial company.

See also Mitchell Danow, *Swiss Settlement Adds Momentum to Holocaust-era Claims in Europe*, JEWISH TELEGRAPHIC AGENCY, Aug. 18, 1998, at 3, available in 1998 WL 11404011.

38. A favorite method taken up by German and American companies to counter the class action litigation and to shore up their public image, in the wake of accusations of Nazi-era dealings, has been to "try to come clean" by hiring prominent academics to research the companies' roles during the Hitler era and issue a report of

their former slave laborers who were still alive³⁹ did not dissuade “slave labor” plaintiffs and their lawyers from continuing with their lawsuits.⁴⁰

Hoping to stop the litigation in its tracks, German government and industry representatives announced in February 1999, the establishment of a \$1.7 billion fund to compensate slave laborers.⁴¹ German Chancellor Gerhard Schroeder made it obvious that the fund was being established as a means to shortcut lawsuits filed against German industry in the United States.⁴² Such an admission is astounding because it explicitly demonstrates the strength of the American system of justice. Fear of American litigation led the Germans to capitulate and agree to pay the slave laborers.

The slave labor fund is being financed entirely by German industry, with twelve prominent German companies participat-

their findings. As reported by the New York Times, “the lawsuits have also created a mini-boom for . . . [World War II-era] historians and research specialists.” Barry Meier, *Historians Are in Demand to Study Corporate Ties to Nazis*, N.Y. TIMES, Feb. 18, 1999, at C2.

The Swiss and American companies are emulating a strategy invented by Switzerland, which set up the “Independent Commission of Experts,” an independent group of internationally recognized historians chaired by Professor Francois Bergier to examine Switzerland’s relationship with Nazi Germany.

39. See *German Industry Under Pressure To Compensate WWII Slave Laborers*, DALLAS MORNING NEWS, Aug. 21, 1998 at 13A; LeBor, *supra* note 34, at 15; Carol J. Williams, *VW Setting Up Fund to Pay Nazi-Era Slave Laborers*, L.A. TIMES, Sept. 12, 1998, at A6.

40. The London-based *Economist* indicates that the fear of American-style litigation is, in part, a reason why German government and industry are finally paying attention to the claims of slave laborers. *The Economist* writes, “Why now? Partly because of the claims now being made against German firms by lawyers, particularly in America, acting on behalf of former slave labourers under the Nazis.” *Germany: Can It Be Normal?, The More The Germans Try To Look To The Future, The More Their Past Seems To Return To Haunt Them*, THE ECONOMIST, Dec. 12, 1998, at 51, available in 1998 WL 11700921.

41. According to a German lawyer representing the slave laborers, the estimated 1.6 million slave labor survivors of World War II (with more than 500,000 living in Poland) would receive only \$1,000 each if payments were divided equally. See *Cohen supra* note 3, at A1 (quoting attorney Michael Wittl).

42. Schroeder explicitly stated that the fund was being established “to counter lawsuits, particularly class action suits, and to remove the basis of the campaign being led against German industry and our country.” *Cohen, supra* note 3, at A1. According to the New York Times, the announcement of the fund “was clearly aimed at stopping a wave of lawsuits in American courts against German companies that used slave labor and forced labor during World War II.” *Id.*

ing.⁴³ The German government made no contribution to the fund but is expected to establish a state "German Federal" fund in the future.⁴⁴

To the distress of the German government and industry, the announcement of the fund did nothing to stop the lawsuits. In fact, on the very day the fund was announced in Germany, a new federal class action lawsuit was filed in the United States against Bayer, one of the twelve fund companies, alleging that it had participated in cruel medical experiments conducted by the infamous Dr. Josef Mengele at Auschwitz.⁴⁵

The Germans, however, still want to avoid repeating the mistakes of the Swiss. Rather than dragging through prolonged litigation and the attendant bad publicity and threat of sanctions experienced in the Swiss bank litigation, the Germans made the offer to settle soon after the suits against them were filed. The expectation is that the ongoing suits will not reach the trial stage and will be resolved in the near future. It is also expected that the global "rough justice" payout that the Germans will have to make will be sufficiently greater than the \$1.7 billion now on the table.⁴⁶

43. The 12 companies include: three German automotive giants, DaimlerChrysler, Volkswagen and BMW; two German banks, Deutsche Bank and Dresdner Bank; two German chemical and pharmaceutical concerns, Bayer and Degussa; one German insurance company, Allianz; and three other blue chip German industrial companies, Krupp, BASF and Hoechst. The 12 participants invited other German companies to join the fund and make a contribution. See Cohen, *supra* note 3, at A1.

44. See *id.*

45. See Compl., *Kor v. Bayer AG*, No. TH99-036-C M/H (S.D. Ind., Feb. 17, 1999); see also Henry Weinstein, *Suit Alleges Bayer Role in Holocaust Experiments*, L.A. TIMES, Feb. 18, 1999, at A22.

46. As explained in a recent editorial in the *Wall Street Journal*:

German companies are racing to follow the Swiss banks in paying up because they want their brand names to be acceptable globally. Deutsche Bank is in the process of buying Bankers Trust [of New York]; Volkswagen has launched a new Beetle; DaimlerChrysler doesn't want Jeeps and Lebarons to become "Nazi" cars in the eyes of the public.

Holman W. Jenkins, Jr., *Once More into the Dock with 'Nazi' Companies*, WALL ST. J., Mar. 24, 1999, at A27.

B. *Slave Labor Action Against Ford Motor Company*

Surprisingly, the first slave labor action filed was not against a German company, but against the American automotive giant Ford Motor Company. In a federal class action in Newark, New Jersey, filed in March 1998, Ford Motor Company and its German subsidiary Ford Werke were accused of “knowingly accepting substantial economic benefits” from the use of forced labor in Nazi Germany during World War II and to have “knowingly earned enormous profits from the aggressive use of forced labor under inhuman conditions.”⁴⁷

According to the complaint, Ford Werke, doing business in Germany since 1925 and headquartered in Cologne, was an aggressive bidder for forced laborers dragooned into Germany by the Nazi war machine from occupied Europe. The complaint indicated that “[b]y 1942, 25% of the work-force utilized by Ford Werke A.G. were unpaid, forced laborers. By 1943, the percentage of unpaid, forced laborers at Ford Werke A.G. had grown to 50%, where it remained for the remainder of the war years.”⁴⁸

The suit claims that Ford Werke, unlike subsidiaries of other American-owned companies, was never nationalized or confiscated by the Nazis, and that the parent, Ford, maintained a controlling 52% interest in the German subsidiary during the war years.⁴⁹

The plaintiff, Elsa Iwanowa, a citizen and resident of Belgium, is alleged to have performed, from 1942 to 1945, unpaid “forced labor under inhuman conditions for Ford Werke A.G.” at its Cologne plant.⁵⁰ In October 1942, Iwanowa, at age sixteen and residing in Russia, is alleged to have been “abducted by Nazi troops and transported to Germany with approximately 2,000 other children . . . [and] purchased, along with 38 other children . . . by a representative of Ford Werke A.G.” to work

47. Compl. ¶ 2, *Iwanowa v. Ford Motor Co.*, No. 98 CIV 00959 (D.N.J. Mar. 4, 1998).

48. *Id.* ¶ 10.

49. *See id.* ¶ 15.

50. *Id.* ¶ 1.

at the Cologne plant.⁵¹ The plaintiff's class action is "on behalf of herself and all members of the Class, that is, all persons who were compelled to perform forced labor for Ford Werke A.G. between 1941 and 1945."⁵² The suit seeks disgorgement of "all profits and other economic benefits"⁵³ earned by Ford and its German subsidiary from forced labor as well as punitive damages "arising out of defendants' knowing use of forced labor under inhuman conditions."⁵⁴

In a public response to the lawsuit, Ford countered that "the plant was under Nazi control during the war and that, although 'dividends were accumulated from German operations' on the parent company's behalf, Ford never received them."⁵⁵ A company spokesperson added, "[i]t must be said that by anyone's measure this was one of the darkest periods of history mankind has known."⁵⁶

Ford filed a motion to dismiss. The motion was not heard until March 8, 1999, almost exactly one year after the filing of the lawsuit. At the hearing and in its motion papers, Ford argued, like the German companies, that the German government, rather than the private automaker, should pay compensation to its former slave laborers. Ford also contended that the question of compensation, having arisen from World War II, is nonjusticiable and should be dismissed. Finally, Ford argued that the statute of limitations barred Iwanowa's action.

The district court took the extraordinary step of holding a full-day hearing on the motion and requested further documen-

51. *Id.* ¶ 25.

52. *Id.* ¶ 29.

53. *Id.* ¶ 38.

54. *Id.* at Prayer for Judgment, subpara. (4).

55. Thomas S. Mulligan, *Lawsuit Alleges Ford Profited from Forced Labor in WWII*, L.A. TIMES, Mar. 5, 1998, at D1.

56. *Id.* Ironically, "Holocaust historians [have] said that since the war Ford has compiled a distinguished record in its relations with the American Jewish community and Israel, and in memorializing the Holocaust. Ford took the extraordinary step [in 1997] of sponsoring the film, 'Schindler's List,' which was broadcast on NBC without commercials." Blaine Harden, *Suit Alleges Ford Unit Used Forced Labor in WWII*, WASH. POST, Mar. 5, 1998, at A4.

tation and briefing from the parties.⁵⁷ No decision on the motion to dismiss has been issued as of May 1999.⁵⁸

C. *Consequences of Filing the Slave Labor Actions*

The filing of the suits against German companies has led to enormous positive effects. First, until the lawsuits in the United States were filed, German industry denied for over a half-century the slave laborers' claims. Only after the German industrialists began to feel the pressure of American litigation did they agree to pay their still-uncompensated slave laborers.

Second, the filing of the lawsuits led directly to exposing the widespread complicity of German, Austrian, and even American industry with the Nazi war machine. Facts about participation of these industrialists with the Nazis, solely for the sake of profit, either came to light for the first time, or were resurrected from the long-forgotten Nuremberg trials of a half-century ago, as a result of the accusations made against these corporate defendants in the lawsuits filed in the United States.

The slave labor lawsuits are also important for another reason. It is significant that the next step in international human rights litigation in the United States is a focus on liability of corporations for gross human rights abuses, both for ongoing and past violations. Two oil multinationals, Royal Dutch Shell and Unocal, have been sued in the United States for their alleged ongoing participation in human rights violations through their investments abroad. The action against Shell stemmed from its investment in Nigeria;⁵⁹ Unocal's investment was in a

57. Interview with Burt Neuborne, Plaintiff's Attorney, Professor of Law, New York University School of Law (Mar. 19, 1999). Professor Neuborne argued the motion on behalf of the plaintiffs. *Id.*

58. In March 1999, a second slave labor lawsuit was filed against Ford. The suit, filed in California state court in San Francisco, also names General Motors, through the actions of Opel, its German subsidiary, as a defendant, as well as several German companies doing business in California that are alleged to have used slave laborers during the Second World War. The suit seeks "unspecified restitution for [slave] laborers who later become [California] state residents." *Davis Joins Holocaust Lawsuit Targeting U.S. Auto Makers*, L.A. TIMES, Apr. 1, 1999, at A3. California Governor Gray Davis, in his private capacity, joined the lawsuit a few days after its filing. *Id.*

59. See *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 08386 (S.D.N.Y. Sept.

joint venture with other multinationals and the military government of Burma to build a pipeline in that country.⁶⁰

Obtaining compensation from bankers and industrialists who profit from human rights abuses sends a message to such entities that they cannot hide behind the "business as usual" cloak when they become joint venturers with a dictatorial regime.

The German corporations' argument that they had no choice but to participate in the economic crimes should be rejected on the same basis as the argument by the ordinary foot soldier that he was merely following orders—and even more so, because the soldier, in contrast to the industrialist, does not profit from his acts. The slave labor lawsuits, dealing with the nefarious past conduct of the world's corporate giants, sets an important precedent for the corporate behavior of multinationals in the future.

V. CLAIMS AGAINST GERMAN AND AUSTRIAN BANKS

The fourth set of claims involve German and Austrian banks. During the Second World War, German and Austrian banks maintained close business relationships with the Nazi war machine and appear to have profited handsomely from such dealings.

In February 1999, Deutsche Bank, Germany's largest bank, issued an explosive announcement that an independent historical commission reviewing the bank's wartime activities discovered that Deutsche Bank financed the building of Auschwitz.⁶¹ Earlier, in August 1998, the historical commission confirmed

25, 1998). For a discussion of the case, see Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT'L L. 41, 42-49 (1998).

60. See *Doe v. Unocal Corp.*, 963 F. Supp. 880, 884-85 (C.D. Cal. 1997).

61. "Deutsche Bank disclosed that officials discovered documents showing a branch of the bank in Nazi-occupied Katowice, Poland, had provided loans to construction companies with contracts for facilities at Auschwitz, as well as an adjacent IG Farben chemicals plant." Brian Milner, *Auschwitz Role May Derail Bank Deal*, GLOBE & MAIL, Feb. 6, 1999, at A16. "The documents . . . also show that the Gestapo secret police and IG Farben, an industrial conglomerate involved in implementing the Holocaust, had accounts at Deutsche Bank." *Deutsche Admits Auschwitz Role*, IRISH TIMES, Feb. 5, 1999, at 51.

that Deutsche Bank profited from gold plundered from Holocaust victims.⁶² A historical report of the Dresdner Bank, the second-largest bank in Germany, found that in Nazi-occupied lands the saying went, "Right after the first German tank comes Dr. Rasche from the Dresdner Bank."⁶³

The first class action filed against the German banks for their wartime activities was filed in June 1998 in federal court in Manhattan.⁶⁴ Plaintiffs, three elderly Holocaust survivors and all United States citizens,⁶⁵ sued on behalf of themselves and on behalf of 10,000 Holocaust survivors and victims' rela-

62. Deutsche Bank's profiteering from plundered gold was extensive. Specifically, [Deutsche Bank] had bought more than 4.4 tons of gold from the Reichsbank, the onetime central bank. "This gold business was normal business during the war," [stated Ronald Weichert, a Deutsche Bank spokesman]. At wartime values and exchange rates, the gold was worth some \$5 million, about one ninth of its estimated worth today.

. . . .
Deutsche Bank channelled gold transactions with the Reichsbank through branches in occupied Austria and Turkey, then a self-avowed neutral power. Of purchases totaling 4,446 kilograms of gold, the [historical] report concluded, 744 kilograms [1,637 pounds] were dental gold taken from Jews' teeth, wedding bands and personal jewelry amassed in Berlin by an SS officer named Bruno Melmer.

Alan Cowell, *Biggest German Bank Admits and Regrets Dealing in Nazi Gold*, N.Y. TIMES, Aug. 1, 1998, at A2 (emphasis added). This gold is commonly known as the "Melmer gold." John Schmid, *Deutsche Bank Says It 'Regrets' Nazi Deals*, INT'L HERALD TRIB., Aug. 1, 1998, at 1. According to the historical report:

Gold played a deciding role in financing the import of strategic goods essential to the Nazi war efforts. . . . The vast majority of the gold that Germany sold was stolen: from central banks of vanquished countries, but also from individuals, especially the victims of the Nazis' racist persecution—above all Jews

Stolen Gold Tied To Top German Bank, CHIC. TRIB., Aug. 1, 1998, at 10 (quoting the Deutsche Bank historical report). Even though the report found no "hard evidence" that Deutsche Bank officials were aware that they were dealing in victims' gold, the report found that the officials "could have known that the gold originally belonged—and . . . still belongs—to victims of Nazi Germany." *Id.* (emphasis added).

Moreover, "[t]rading most of the gold through its only overseas subsidiary, in Istanbul, the bank made a profit from 1941-43 of \$378,000, or \$3.4 million today. The historians said the profit represented 0.15 percent of the bank's total profits during that period." *Id.* Deutsche Bank stated that it "fully acknowledges its moral and ethical responsibility for the darkest chapter of its history." Cowell, *supra*, at A2.

63. Jenkins, Jr., *supra* note 46, at A27.

64. See Compl., *Watman v. Deutsche Bank*, No. 98 CIV. 3938 (S.D.N.Y. June 3, 1998). The complaint was filed by a group of attorneys led by Edward Fagan of New York and Robert Swift of Philadelphia. Both attorneys were involved in the Swiss bank litigation.

65. See *id.* ¶¶ 4-6.

tives.⁶⁶ Named as defendants were Deutsche Bank and Dresdner Bank AG,⁶⁷ both headquartered in Frankfurt, Germany. The lawsuit charged the two banks with profiting from the looting of gold and other personal property from Jews.⁶⁸ The complaint sought a total of \$18 billion in compensatory damages⁶⁹ and unspecified exemplary damages.⁷⁰

In October 1998, the lawsuit was amended to add as defendants two Austrian banks, Creditanstalt and its parent bank, Bank Austria.⁷¹ Creditanstalt was accused both of profiting from the proceeds of slave labor during the war and of participating and profiting from the looting, or "Aryanization," of Jewish-owned assets in Austria.⁷² The Austrian banks claimed that they should not be held legally responsible for participating in the theft of gold and other assets of Jewish victims because Creditanstalt was taken over by Deutsche Bank in 1938 as part of Germany's annexation of Austria.⁷³

Later that same month, the German banks were hit by a second class action lawsuit filed in federal court in Brooklyn,

66. See *id.* ¶ 12.

67. See *id.* ¶¶ 7-8.

68. See *id.* ¶¶ 27-31.

69. See *id.* ¶¶ 40, 45, 49, 52.

70. See *id.* at Prayer for Judgment, ¶ C.

71. See *Austrian Bank Still Hopes for Out-Of-Court Settlement Over Nazi Gold*, AGENCE FRANCE-PRESSE, Oct. 7, 1998, available in 1998 WL 16614262.

72. See Henry Weinstein, *Austrian Bank Agrees to Pay \$40 Million in Settling Holocaust-Related Lawsuit*, L.A. TIMES, Mar. 9, 1999, at A21. Specifically,

[a] document . . . filed last year in federal court in Brooklyn described how Creditanstalt officials, after the German annexation, set up a "Control Bank" to efficiently seize Jewish-owned property in Austria that was deemed economically significant. The basic purpose of the Control Bank, according to the suit, was to acquire as trustee significant Jewish properties for later sale to appropriate "Aryan buyers." The suit also noted that the buyers were required to pay a "dejeweling fee" to the Control Bank to acquire the property.

Id. According to later reports, citing plaintiffs' attorney Edward Fagan, the amount of the settlement was "between 30 million and 40 million dollars." *Two Austrian Banks Agree To Pay Jewish Plaintiffs*, AGENCE FRANCE-PRESSE, Mar. 17, 1999, available in 1999 WL 2565240. Earlier, Fagan claimed that the settlement was \$92 million. See *Bank Offers \$92M for Holocaust Restitution*, DAYTON DAILY NEWS, Feb. 1, 1999, at 8A, available in 1999 WL 3951902.

73. See *Austria's Creditanstalt Bank To Face Suit in Nazi Gold Case*, AGENCE FRANCE-PRESSE, Aug. 20, 1998, available in 1998 WL 16582007.

New York, by a another group of attorneys representing a different set of Holocaust survivors and heirs.⁷⁴ The lawsuit named Germany's Deutsche Bank, Dresdner Bank, and Commerzbank as defendants. The lawsuit accuses the banks of refusing to return assets of Jewish survivors and of financing and profiting from Nazi slave labor.⁷⁵

In March 1999, the two Austrian banks reached a separate settlement with plaintiffs' attorneys. This became the third out-of-court settlement in the modern era of Holocaust litigation.⁷⁶ The amount of the settlement, however, was small, estimated between \$30 and \$40 million.

VI. CLAIMS INVOLVING NAZI-STOLEN ART

The fifth and, to date, final set of claims stems from art looted by the Nazis. The Nazis stole an estimated 220,000 pieces of art from both museums and private collections throughout Europe.⁷⁷ The value of this plundered art exceeded the total value of all artworks in the United States in 1945.⁷⁸ The worth of the art stolen by the Nazis is astounding: an estimated \$2.5 billion in 1945 prices, or \$20.5 billion today.⁷⁹

74. See Compl., *Duveen v. Deutsche Bank A.G.*, No. CV 98 06620 (E.D.N.Y. Oct. 27, 1999). The group of lawyers filing this suit is headed by attorneys Melvin Weiss of New York and Michael Hausfeld of Washington, D.C. Both attorneys are also involved in the Swiss bank litigation.

75. See *id.* Eventually, a total of eight cases were filed against the German and Austrian banks. All were consolidated before Judge Shirley Wohl Kram in the Southern District of New York, and the plaintiffs filed a consolidated complaint applicable to all actions. See Compl., *In re Austrian & German Bank Holocaust Litigation*, No. 98 CIV. 3938 (SWK) (S.D.N.Y. Mar. 17, 1999) (consolidated class action complaint).

76. The first out-of-court settlement was the \$1.25 billion class action settlement of the Swiss bank case. The second was the settlement of the case involving a Nazi-stolen Degas painting, in which the plaintiffs obtained one-half ownership of the painting valued at \$1.1 million. See *infra* note 85 and accompanying text. Both cases were settled in August 1998.

77. See Norman Kempster, *Tracking the Nazi Plunder*, L.A. TIMES, Nov. 30, 1998, at F1.

78. See Authers et al., *supra* note 3, at 14 (citing Edgar Bronfman, president of the World Jewish Congress); *List Reveals Names of Nazi-Era Art Looters*, WASH. POST, Nov. 7, 1998, at C3 (citing Francis Taylor, director of the New York Metropolitan Museum of Art).

79. See *List Reveals Names of Nazi-Era Looters*, *supra* note 78, at C3. In November 1998, the World Jewish Congress announced that it found in the U.S. National Archives a list of 2,000 people involved in the Nazi looting of art and that the list

Museums suspected of currently possessing Nazi-stolen art include the Louvre in Paris and the Hermitage in St. Petersburg, Russia.⁸⁰ Museums in the United States also have not been immune. Since 1997, a number of prominent American museums have been embarrassed to discover that their collections include Nazi-stolen art which made its way to the United States after the war.⁸¹

According to experts, the disposition of art found to be looted during World War II is even more complex than the issue of Nazi-stolen gold and other Holocaust-era claims. First, so much art is at stake that a large-scale return of such World War II-looted art "could disrupt the art market, especially for French Impressionist paintings, which were a favorite target of Nazi looters."⁸² Second, unlike in the claims of Nazi-stolen gold, dormant Swiss accounts, or use of slave labor, where the perpetrators knew, or at least should have been substantially aware that they were engaging in wrongful activities, many (though not all) present owners of Nazi-looted art bought the artworks in good faith and without any knowledge or suspicion of their controversial heritage.⁸³ Finally, these good faith purchasers are often pitted against claimants who may not even be the original owners from whom the artworks were stolen, but surviving and sometimes distant relatives of the victims.⁸⁴ To

includes nationals of "Germany, Austria, France, Switzerland, Holland, Belgium, Italy, Spain, Portugal, Sweden and Luxembourg, and some of the most prominent art dealers in Europe. . . ." *Id.*

80. See Verena Dobnik, *Art Looted by Nazis May Be in Louvre*, THE INDEP., Nov. 11, 1998, at 13, available in 1998 WL 21743330.

81. For an excellent discussion of the problem of Nazi-stolen art found in the United States and possible solutions, see Lee Rosenbaum, *Will Museums in U.S. Purge Nazi-Tainted Art?*, ART IN AM., Nov. 1, 1998, at 37, available in 1998 WL 13812646.

To deal with the problem of Nazi-stolen art, the U.S. Department of State and the U.S. Holocaust Museum hosted a conference in November 1998, in Washington, D.C. Forty-four nations sent representatives to the conference. See Kempster, *supra* note 77, at F1.

82. Kempster, *supra* note 77, at F1.

83. Rabbi Marvin Hier, Dean of the Simon Wiesenthal Center for Holocaust Studies in Los Angeles, conveyed "sympathy for owners who innocently bought paintings without knowing they had been stolen. 'In no way should these people be faulted,' Hier said. 'They were probably misled themselves. It is not the same as the Swiss bankers who knew in advance that it was Nazi gold' they were acquiring." *Id.*

84. For instance, in the claim of "Dead City III," the Nazi-looted painting by Egon Schiele, held by an Austrian museum and detained in the United States in

date, unlike in the other Holocaust-era claims litigation, less than a handful of lawsuits have been filed in the United States involving World War II-looted art. Because each lawsuit involves a specific artwork, all have been individual lawsuits rather than class action litigation.

In August 1998, the first case to reach trial for Nazi-stolen art, *Goodman v. Searle*,⁸⁵ settled on the eve of trial. The case involved a Nazi-stolen Degas painting which made its way to the United States. The plaintiffs, grandchildren of the Jewish owner whose art was taken and who was murdered by the Nazis, and the present owner of the painting, a Chicago pharmaceutical magnate who claimed to have bought the painting in good faith, agreed to divide the ownership of the painting and to donate it to the Chicago Art Museum, with the grandchildren receiving one-half value of the painting from the museum.

Another case, this one involving a Nazi-stolen Matisse, is proceeding against the Seattle Art Museum in federal court in Washington State.⁸⁶

A third case has been filed against the New York Museum of Modern Art (MOMA) by New York District Attorney Robert Morgenthau to prevent the departure from New York of two Egon Schiele paintings which were on loan to MOMA from an Austrian museum. A New York state appellate court recently reversed the trial court's decision that the paintings must be returned to Austria.⁸⁷

1998 while on loan to the Museum of Modern Art in New York, the claimants to the painting are the widows of the sons of the victim's cousin; they are not even the blood relatives of the victim from whom the Nazis stole the painting and who perished in the Holocaust. See Rosenbaum, *supra* note 81, at 37.

85. *Goodman v. Searle*, No. 96 C 6459 (N.D. Ill. Feb. 9, 1998).

86. See Compl., *Rosenberg v. Seattle Art Museum*, No. C98-1073D (W.D. Wash. July 31, 1998).

87. See *People v. Museum of Modern Art*, 1999 N.Y. Slip Op. 02325, 1999 WL 145904, at *4 (N.Y. App. Div. Mar. 16, 1999).

VII. ATTORNEYS' FEES AND OTHER DISTRIBUTION ISSUES

A. Attorneys' Fees

In a scathing editorial, nationally syndicated columnist Charles Krauthammer accused attorneys representing Holocaust victims of being "shysters" out to commit a "shakedown of Swiss banks, Austrian industry, [and] German auto makers."⁸⁸ Krauthammer warned that "[t]he scramble for money by lawyers could revive anti-Semitism [in Europe]."⁸⁹

88. Krauthammer, *supra* note 20, at B9.

Some Holocaust survivors also object to lawyers charging fees for their services, contending that the lawyers should be working on the cases pro bono. See Niles Latham & Christopher Francescani, *Holocaust Survivors Blast Own Attorneys*, N.Y. POST, Mar. 23, 1999, at 5. The survivors are especially upset that the lawyers who represented the plaintiffs in the class action against the Swiss without a fee are now seeking fees in the subsequent cases they filed. Specifically,

A group of Holocaust survivors says that lawyers working on class action lawsuits to recover Holocaust-era property should not charge fees for their services.

The American Gathering of Jewish Holocaust Survivors passed a resolution this month saying that awarding such legal fees "demeans the rights and memories" of Holocaust victims and survivors. At least one of the lawyers responded by calling the resolution "inflammatory" and a "cheap shot."

Elissa Gootman, *Holocaust Survivors Criticize Lawyers for High Fees*, FORWARD, Mar. 26, 1999, at 4.

89. Krauthammer, *supra* note 20, at B9. A Swiss government report, issued in November 1998, found that anti-Semitism in Switzerland had grown as a result of the claims made against the Swiss banks and other Swiss institutions by World War II Jewish survivors. See SWISS FEDERAL COMMISSION AGAINST RACISM, ANTI-SEMITISM IN SWITZERLAND 7, 9-10 (1998). According to the government report:

During the debate on unclaimed Jewish assets in Swiss banks and the role of Switzerland in World War II, the [Federal Commission Against Racism] established that the readiness to express anti-Semitic sentiments had increased. In the public arena, a distinction between "the Swiss" and "the Jews" began to emerge.

. . . .

In early 1995 old-fashioned anti-Semitism resurfaced in new form in the wake of the debate over Switzerland's role in World War II. . . . During the course of 1997 a wave of anti-Semitism manifested itself in letters to newspapers, in threatening letters to prominent Jewish figures and organizations and in everyday situations in which Jews were and continue to be insulted and ostracized. . . . "The Jews" were made the villains, the "Swiss" the victims. Comments by various politicians and a few flame-fanning newspaper headlines helped to heat up the situation. Opinion polls registered an increase in negative attitudes towards Jewish fellow

There are, however, mechanisms that may be employed to fairly address the issue of attorneys' fees. The \$1.25 billion Swiss settlement and the \$1.7 billion German settlement offer indicate that upcoming settlements or verdicts of the Holocaust suits may reach into the single or double-digit billions. In such instances, of course, it would be unfair for the attorneys to charge a standard contingency fee, based upon a simple percentage, even if the percentage, as some attorneys are now declaring, would only be in the single digits.⁹⁰ Rather, the attorneys should be paid for their actual time spent on the cases based upon their normal, or even reduced, hourly fees.⁹¹

Another alternative is to apply the so-called lodestar approach first developed by the Third Circuit in the 1970s to calculate a reasonable attorney fee for mass litigation cases.⁹² Under the lodestar approach, "[i]n determining [the] amount of statutorily authorized attorneys' fees, 'lodestar' is equal to number of hours reasonably expended multiplied by prevailing hourly rate in [the] community for similar work, and is then adjust-

citizens.

Id.

90. See Lathen & Francescani, *supra* note 88, at 19.

Washington lawyer Michael Hausfeld, who worked free of charge on the Swiss bank case, has said lawyers would seek fees in slave-labor cases against German companies.

"We are trying to keep it to the single digit percentage—if possible," he said.

It's believed the settlement could be as high as \$2 billion, which would mean legal fees could top \$100 million.

Id. A \$100 million payment to attorneys for the work done in the German slave labor lawsuits would be unconscionable.

91. Already, one prominent lawyer working on the Holocaust suits, who is not charging a fee in the Swiss bank litigation, has indicated that he will be seeking hourly charges for his work on the subsequent Holocaust-era cases.

Mr. [Melvin] Weiss said he took on the Swiss bank cases on a pro bono basis but that in the subsequent class action lawsuits he has filed—such as against German banks and companies that profited from slave labor during the Holocaust—he may ask for fees. . . . He said he will not request a percentage, but that the most he would ask for is his "straight hourly billable rate," which he would not disclose.

Gootman, *supra* note 88, at 4.

92. See *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3rd Cir. 1973).

ed to reflect other factors such as contingent nature of suit and quality of representation."⁹³

Either a lodestar-type payout to the attorneys or payment based upon hourly fees should make it worthwhile for the attorneys to work on the cases and, at the same time, assure elderly Holocaust survivors that they are not being taken advantage of by their attorneys.

B. *Is It All About Money?*

Charles Krauthammer, in the same December 1998, nationally syndicated editorial, also suggested that "[i]t should be beneath the dignity of the Jewish people to accept [money], let alone to seek it."⁹⁴ Abraham Foxman, head of the Anti-Defamation League and himself a Holocaust survivor, also worries about the undignified nature of the litigation, decrying that this is making money the century's last word on the Holocaust. According to Foxman, this is a "desecration of the victims, a perversion of why the Nazis had a Final Solution, and too high a price to pay for justice we can never achieve."⁹⁵

With all due respect to Mr. Foxman, I think he is wrong. Swiss banks profited enormously during World War II at the expense of the survivors. Allowing the Swiss banks to keep the funds deposited with them by European Jews and others along with proceeds earned from their dealings with the Nazis amounts to unjust enrichment. Similarly, the still-uncompensated slave laborers who kept German and Austrian industry alive during World War II should be paid for their labor by companies that benefited from such labor. Allowing the German and Austrian concerns to escape financial liability for benefits earned on the backs of the slave laborers is simply unjust.

Equally significant, forcing a wrongdoer to pay up is a form of retributive justice. As stated by Undersecretary of State Stuart Eizenstat, "I think there is a certain symbolic quality that only money can convey to repair the injustices."⁹⁶ Israel

93. BLACK'S LAW DICTIONARY 941 (6th ed. 1990).

94. Krauthammer, *supra* note 20, at B9.

95. Abraham H. Foxman, *The Dangers of Holocaust Restitution*, WALL ST. J., Dec. 4, 1998, at A18.

96. Richard Wolfe, *Putting A Price On the Holocaust*, IRISH TIMES, Mar. 16, 1999

Singer, rabbi and a leader of the World Jewish Congress, puts it this way:

I don't want to enter the next millennium as the victim of history. . . . Himmler said you have to kill all the Jews because if you don't kill them, their grandchildren will ask for their property back. The Nazis wanted to strip Jews of their human rights, their financial rights and their rights to life. It was an orderly progression. I want to return to them all their rights.⁹⁷

Moreover, allowing Holocaust profiteers to keep funds earned by them also sends a wrong message both to existing and future dictatorships throughout the world. In contrast, obtaining compensation for survivors of the Nazi horrors more than a half-century after they were conducted, serves as a warning to despots that their human rights abuses, even economic ones, will not remain unpunished.

VIII. CONCLUSION

It is an honor, rather than a disgrace, for humanity to begin the new century by finally reconciling the financial books for the most heinous atrocities committed during the twentieth century. The Holocaust-era lawsuits filed in the United States are playing a critical part in this process.

at 15, available in 1999 WL 14002124.

97. *Id.*

