

HOLOCAUST REPARATIONS LITIGATION: LESSONS FOR THE SLAVERY REPARATIONS MOVEMENT

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Over the past six years, a wave of litigation in American courts has played an important role in generating almost \$8 billion for distribution to Holocaust victims.¹

Current Holocaust-related efforts to seek relief in American courts began in 1996 with the filing of three actions in the Eastern District of New York seeking recovery of Holocaust-era deposits

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1. For helpful descriptions of recent Holocaust-related litigation, see Michael J. Bayzler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 RICH. L. REV. 1 (2000); Michael J. Bayzler, *www.swissbankclaims.com: The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks*, 25 FORDHAM INT'L L.J. S-64 (2001); Michael J. Bayzler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11 (2002).

Several recent books describe aspects of the Holocaust-related litigation. See JOHN AUTHERS & RICHARD WOLFFE, *THE VICTIM'S FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST* (2002) (providing a narrative of the legal proceeding written by two reporters for the *Financial Times*); STUART EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* (forthcoming 2003) (providing a description of the American diplomatic initiatives on behalf of Holocaust victims written by the leader of the American delegation); MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* (forthcoming 2003) (providing a legal and moral assessment of the litigation written by a leading academic commentator).

I have attempted a preliminary overview of the litigation in connection with a symposium on class action litigation. See Burt Neuborne, *Preliminary Observations on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795 (2002). Since I was deeply involved in the Holocaust cases, I make no pretense of academic neutrality. I serve as court-appointed lead settlement counsel in the Swiss bank litigation, and argued the German slave labor cases. In addition, I argued the mandamus petition in the German bank cases, and serve as a United States representative on the German Foundation Board of Trustees. For the perspective of counsel representing the German industry, see Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L.J. 503 (2002). For a particularly unedifying exchange with Norman Finkelstein, a vigorous critic of my role in the Holocaust litigation, see Burt Neuborne, Letters, *About That Ad. . .*, THE NATION, Feb. 18, 2002 at 2, 23, Burt Neuborne, Letters, *Not 'Blackmail,'* THE NATION, Dec. 25, 2000 at 2, and Burt Neuborne, Letters, *The Holocaust Industry*, THE NATION, Oct. 23, 2000, at 2.

against several Swiss banks.² In August 1998, UBS and Credit Suisse settled the Swiss bank litigation for \$1.25 billion.³ In early 2001, numerous Holocaust-related cases against German banks, German insurance companies and German corporations were voluntarily dismissed as the quid pro quo for the establishment of a \$5 billion German Foundation “Remembrance, Responsibility and the Future,” jointly funded by the German government and German industry, designed to pay compensation to Holocaust victims.⁴ In its first full year, the German Foundation has distributed € 1.75 billion to more than 950,000 persons, the vast bulk of whom had been forced to perform slave and forced labor for German companies.

2. *In re* Holocaust Victims Asset Litig., Master Docket No. CV-96-4849 (E.D.N.Y. filed 1996). See *infra* note 3 for the subsequent history of this litigation.

3. The decision to limit membership in four of the five Swiss bank settlement classes to Jews, Jehovah’s Witnesses, Romani (gypsies), gays and the disabled as classic victims of Nazi persecution based on race, religion or personal status was upheld in *In re* Holocaust Victims Asset Litig., 225 F.3d 191, 193 (2d Cir. 2000). The fairness of the Swiss bank settlement was upheld by Chief Judge Korman in *In re* Holocaust Victims Assets Litig., 105 F. Supp. 2d 139 (E.D.N.Y. 2000). Although several appeals were taken from the fairness order, the last appeal was withdrawn on May 30, 2001, rendering the settlement final. The plan of allocation and distribution was upheld by the district court on November 22, 2000, and was affirmed by the Second Circuit. *In re* Holocaust Victims Asset Litig., 14 Fed. Appx. 132, 134 (2d Cir. 2001) (unreported). Litigation continues over the definition of the Slave Labor II settlement class. The parties disagree over the status of defendants who were German-owned during WWII, but were acquired by Swiss interests after the war. All agree that they are entitled to releases. The Swiss banks argue that they are entitled to so-called “Slave Labor II” releases available to Swiss-owned entities that release claims against the world. Plaintiffs argue that such “after-acquired” defendants are entitled to so-called “Slave Labor I” releases available to German-owned entities that bar claims by Jews, Jehovah’s Witnesses, Romani, gays and the disabled, but not by anyone else. See *In re* Holocaust Victim Assets Litig., 282 F.3d 103, 109-11 (2d Cir. 2002). Litigation also persists over the Swiss banks’ duty to pay compound interest on settlement funds temporarily lodged in an escrow fund at Credit Suisse.

4. The German slave labor complaints were dismissed on justiciability and statute of limitations grounds. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Burger-Fischer v. Degussa*, 65 F. Supp. 2d 248 (D.N.J. 1999). Appeals to the Third Circuit were voluntarily withdrawn on the eve of argument in connection with the establishment of the German Foundation. The remaining slave labor cases were dismissed in an effective quid pro quo for the establishment of the German Foundation. *In re* Nazi Era Cases Against German Defendants Litig., 198 F.R.D. 429 (D.N.J. 2000); *In re* Nazi Era Cases Against German Defendants Litig. (Frumkin), 129 F. Supp. 2d 370 (D.N.J. 2001). The German bank cases were dismissed only after the Second Circuit issued a writ of mandamus to the district court directing the court to permit voluntary dismissal. *In re* Austrian and German Bank Holocaust Litig. (Duveen), 250 F.3d 156 (2d Cir. 2001). The German insurance cases were voluntarily dismissed without incident.

In March of 1999, Holocaust-related litigation against Austrian banks was settled for \$40 million,⁵ followed in 2001 by the establishment of a billion dollar Austrian Foundation designed to provide compensation to Holocaust victims. A smaller settlement was reached in litigation against French banks.⁶

The Holocaust-related litigation challenged four patterns of exploitative behavior by private entities. First, claims against Swiss banks alleged that Holocaust victims, most of whom did not survive the Nazi death camps, had deposited vast sums on the eve of the Holocaust, only to have the banks fail to return the funds to surviving family members at the close of the war.⁷ Second, claims against German and Austrian banks alleged that the banks had knowingly profited from playing key roles in the Nazi Aryanization program which forced non-Aryans to sell businesses and property at a fraction of market value to persons of acceptable racial stock. Third, claims against German and Italian insurance companies alleged that the companies had failed to honor life and property insurance policies issued to Holocaust victims.⁸ Fourth, claims against German industry alleged that the German industrial sector had reaped massive unjust profits from the use of slave labor during the war.⁹

A single thread runs through the four categories of litigation. In each setting, a non-governmental entity—usually a bank, insurance company or corporation—unjustly enriched itself by taking advantage of the plight of victims of Nazi governmental oppression through shifting victims' assets to its own capital accounts. Accord-

5. *In re Austrian and German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 169 (S.D.N.Y. 2000), *aff'd sub nom*, *D'Amato v. Deutsche Bank*, 236 F.3d 78, 82 (2d Cir. 2001).

6. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000). Damage actions against the French National Railways for having cooperated in the transport of French Jews to death camps was dismissed on sovereign immunity grounds. *Abrams v. Société Nationale des Chemins de Fer Français*, 175 F. Supp. 2d 423 (E.D.N.Y. 2002) (appeal pending).

7. An audit of the Swiss banks conducted by Paul Volcker identified 46,000 accounts as "probably or possibly" belonging to Holocaust victims, and noted that all records had been destroyed in connection with at least two million wartime accounts. See INDEPENDENT COMMITTEE OF EMINENT PERSONS, REPORT ON DORMANT ACCOUNTS OF VICTIMS OF NAZI PERSECUTION IN SWISS BANKS (1999). For a summary of Plaintiffs' claims in the Swiss Bank Litigation, see Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds at 67-75, *In re Holocaust Victim Assets Litig.*, (E.D.N.Y. Sept. 11, 2000) (No. CV-96-4849), *available at* <http://www.nyed.uscourts.gov/pub/rulings/cv/1996/96cv4849-erk-smplan.pdf>.

8. For a summary of Plaintiff's insurance claims, see *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 2002 U.S. Dist. LEXIS 18127 (S.D.N.Y. Sept. 25, 2002).

9. See *D'Amato*, 236 F.3d at 81.

ingly, the plaintiffs sought recovery of the value of the misappropriated assets as a form of equitable restitution.

The legal bases for the claims were not controversial. The Swiss bank deposit claims made out a garden-variety bailment/constructive trust case. The German and Italian insurance cases were classic contract claims. The Aryanization claims against German and Austrian banks were somewhat more complex, moving towards unjust enrichment claims based on the banks having earned unjust profits by knowingly exploiting the plight of victims. The slave labor litigation raised quantum meruit and more straightforward unjust enrichment claims, arguing that private companies are not entitled to retain profits from slave labor without providing fair compensation.¹⁰

While each of the four categories of Holocaust-related cases raised traditional local law claims under German, Swiss and American law, the plaintiffs further alleged international law claims. Holocaust victims argued that if private defendants profited from assisting governments in carrying out state policies that violated customary international law, then as a matter of international law those private entities must be deemed to be holding any unjust profits in constructive trust for the victims.¹¹

The plaintiffs' international law arguments were designed to complement the growth of international criminal sanctions first recognized at the Nuremberg trials. The officials who established and operated the death camps were found to have committed crimes against humanity, and thus would clearly fall within the jurisdiction of the International Criminal Court in Rome today. But, the bankers who made money financing the camps, the contractors who sold the barbed wire, the companies that manufactured the poison gas, and the companies that used the camps as a source of unpaid slave labor, would probably fall outside the reach of traditional international criminal sanctions.

Plaintiffs hoped, by asserting international law claims as well as local law claims, to develop a parallel set of international norms designed to eliminate the possibility of profit from knowingly cooperating in the commission of crimes against humanity by finding all such "profits" to be merely held in constructive trust for the victims.

10. For a summary of the Plaintiff slave labor class membership, see *supra* note 3.

11. See Mem. of Law Submitted by Pls. in Resp. to Expert Submissions Filed by Legal Academics Retained by Defs. at 36-39, *In re Holocaust Victim Assets Litig.*, (E.D.N.Y. June 17, 1997) (No. CV-96-4849). A copy of the Memorandum of Law is on file with the *NYU Annual Survey of American Law*.

Only time will tell whether such a private right of action for damages premised on aiding and abetting in the commission of crimes against humanity will emerge as a powerful tool in the law.

Finally, no summary of the Holocaust-related litigation can overlook the decidedly mixed nature of the process. Although couched as traditional litigation, and carried on in classic legal terms, the litigation was as much about politics as it was about law. The Swiss banks' decision to settle was motivated both by the power of the plaintiffs' legal theory, and by the fear of political sanctions. The German government's decision to establish a German Holocaust Foundation and the decision of German industry to share in its funding was driven by concerns over potential liability, but also concerns about diplomatic relations with Germany's Eastern neighbors and fears of American boycotts of German products.

In short, the Holocaust litigation was an untidy mixture of law, politics and raw emotion. Law provided the roadmap for the proceedings, but did not necessarily provide the fuel.

The successful wave of Holocaust-related litigation may provide a model for similar efforts on behalf of the African-American descendants of American slave laborers, whose centuries of enslavement and exploitation resulted in massive unjust enrichment of slave-owners and their corporate partners. The critical question is whether litigation seeking restitution of the unjust enrichment flowing from slavery can replicate the three crucial components of the Holocaust litigation: (1) the identification of massive wealth transfers to identifiable recipients that unjustly enriched the recipients; (2) a demonstration that the wealth transfers were unlawful; and (3) the ability to reverse the transfers by requiring restitution of unjustly acquired profits to identifiable victims.

The first element—massive, unjust wealth transfers to identifiable recipients—does not pose a problem. Economic historians have carefully charted the vast transfer of wealth imposed by slavery.¹² It is commonplace to acknowledge that slavery was the indispensable core of the Southern plantation economy. It is less well

12. See Whitney Cunningham, Note, *Testing Posner's Strong Theory of Wealth Maximization*, 81 GEO. L.J. 141, 149-155 (1992) (pointing to the example of the economic wealth generated by African-American slavery as an instance in which the wealth maximization model did not determine public policy) (citing RICHARD POSNER, *THE ECONOMICS OF JUSTICE* 102, 110 (1981); Richard Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 85 (1985); ROBERT WILLIAM FOGEL & STANLEY ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 5-6, 66, 228 (1974)); see also EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (First Vintage Books 1976) (1972).

known that slavery and the slave trade provided a crucial underpinning for the emerging national economy. Kevin Phillips has demonstrated that the first crop of American millionaires was made up of slave owners and privateers.¹³ Southern colonies were the richest in North America because of slaves.¹⁴

Establishing the second element—the contemporaneous illegality of the unjust wealth transfers imposed by slavery—is more difficult. Unlike the Holocaust cases, where conventional domestic legal theories existed for each category of litigation, domestic law did not render the slave trade unlawful until 1808,¹⁵ and did not outlaw slavery itself until 1863, at the earliest.¹⁶ If illegality is to be established, therefore, it must be under international law. The success of an argument grounded in international law would then turn on the plaintiffs persuading a court that by a particular date, American chattel slavery was a violation of customary international law, enforceable in American courts as a form of federal common law under *Swift v. Tyson*.¹⁷ A combination of *Somerset's Case*¹⁸ and the universal rejection of slavery by Napoleonic Europe¹⁹ could provide a basis for finding that the prevalence of slavery in the United States long into the nineteenth century was a violation of universally accepted norms of civilized conduct. When, as established at Nuremberg, local law violates customary international law, local law must give way.²⁰ Of course, that would still leave the thorny problem of applying customary international law retroactively to an era which had not yet fully developed the concept, although in the nine-

13. KEVIN PHILLIPS, *WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH* 8-22 (2002).

14. *Id.* at 8.

15. *See* U.S. CONST. art. V.

16. THE EMANCIPATION PROCLAMATION, *reprinted in* 12 Stat. 1268 (1863). The Emancipation Proclamation was the first document freeing slaves, but only applied to the slaves in the Southern states. *Id.* at 1269. The formal freeing of all slaves occurred with the passage of the Thirteenth Amendment to the United States Constitution in 1865.

17. 41 U.S. (16 Pet.) 1 (1842). Until *Swift v. Tyson* was overturned by *Erie v. Tompkins*, 304 U.S. 64 (1938), federal courts were free to enforce federal common law without having to determine the source of the power.

18. Lofft's Rep. 1, 98 Eng. Rep. 499 (1772).

19. For a helpful discussion of the rejection of slavery in Napoleonic Europe, see Melvin Kranzberg, *The Napoleonic Code*, in *LAW IN A TROUBLED WORLD* 26, 27-38 (Western Reserve University ed., 1959).

20. *See* *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 2524 (1996); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2367 (1991).

teenth century piracy was already being condemned as violating customary international law.²¹

It is, however, the third element—the linking of identifiable victims with identifiable unjustly enriched beneficiaries—that poses the most difficult challenge to litigation seeking reparations for slavery. The problem has nothing to do with the merits. The victims and beneficiaries of slavery in the United States are as deserving, and as culpable, as were the victims and unjust beneficiaries of Nazi enslavement. However, the time frame of the litigation could not be more different. The Holocaust cases dealt with a first-generation effort to redress unjust enrichment by requiring the return of identifiable property from the unjustly enriched holder of the property to its true owner, or a close relative. If litigation seeking reparations for slavery had been brought prior to 1900, there would have been no difficulty in establishing a link between an identifiable victim and an identifiable unjustly enriched beneficiary. Generations later, however, the link is much more difficult to establish. The lines of identity have become so blurred that, like the German Holocaust Foundation or the “Looted Assets” class in the Swiss bank litigation,²² today’s remedy may be more political than legal. The quantifiable burdens and benefits of slavery may have become so diffuse over time that the only just result is an effort to redress its lingering consequences through political means.

In sum, the critical political value of widespread discussion of slavery-based reparations litigation may be to demonstrate that if timely justice had been done prior to 1900, the outcome should have closely paralleled the results of the Holocaust cases. Since the nation was simply not capable in 1885 of providing individualized justice to recently freed slaves in the form of restitution of unjust enrichment, and since the passage of time renders it impossible to re-capture that moment, the only just approach is to adopt political programs designed to cope with the lingering consequences of such a massive unjust enrichment of white America. Whether those programs are exercises in affirmative action, or more traditional social programs aimed at improving health, education and housing for the poor, the legacy of the Holocaust litigation should be a re-

21. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 162 (1820); see also G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT’L L. 727, 730 (1989); Bradley & Goldsmith, *supra* note 20, at 823 nn.38-39.

22. The Court found that it was impossible to link specific items of looted property to specific Swiss banks. Accordingly, it adopted a *cy pres* form of administration and distribution that distributed the \$100 million allocated to the Looted Assets class to the poorest survivors around the world.

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newed commitment to dealing with the unfinished business created by our current inability to reverse the massive exercise in unjust enrichment at the core of American slavery.