

# PRELIMINARY REFLECTIONS ON ASPECTS OF HOLOCAUST-ERA LITIGATION IN AMERICAN COURTS

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Aided by diplomatic initiatives by Germany and the United States, and by the vigorous support of many political figures and community organizations, Holocaust-related litigation in American courts against Swiss, German, Austrian, and French corporations over the past six years has resulted in the assemblage of a vast pool of assets valued in excess of \$8 billion for distribution to Holocaust victims around the world.<sup>1</sup>

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1. The recent Holocaust-era cases are described in Michael J. Bayzler, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L., 11 (2002); Michael J. Bayzler, *Litigating the Holocaust, Nuremberg in America: Litigating the Holocaust in American Courts*, 34 U. RICH. L. REV. 1 (2000); Michael J. Bayzler, [www.swissbanks.com](http://www.swissbanks.com): *The Legality and Morality of the Holocaust-Era Settlement with the Swiss Banks*, 25 FORDHAM INT'L L.J. S64 (2002) (Symposium Issue). I am grateful to Professor Bayzler for his thorough scholarship that makes it possible to discuss the Holocaust litigation on a more informed basis. For a helpful overview of Holocaust-related litigation, with particularly valuable commentaries by Stuart Eizenstat and Otto Graf Lambsdorff, respective heads of the United States and German delegations to the German negotiations, see Symposium, *Holocaust Restitution: Reconciling Moral Imperatives with Legal Initiatives and Diplomacy*, 25 FORDHAM INT'L L.J. 1 (2001).

Several books commenting on the Holocaust litigation have been written. Two journalists for *The Financial Times* have published a narrative of the Swiss and German litigation that emphasizes the participants' personalities. JOHN AUTHERS & RICHARD WOLFFE, *THE VICTIMS' FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST* (2002). Stuart Eizenstat has completed a manuscript that will, no doubt, provide valuable insight into the diplomatic process. Michael Bayzler's thoughtful manuscript dissects the legal and moral issues raised by the litigation from the perspective of a sympathetic member of the Jewish community.

For the perspective of lawyers for the German defendants, see Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L.J. 503 (2002). For criticism of that the settlement does not go far enough, see Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARV. J. ON LEGIS. 1 (2002). For an unremittingly hostile commentary on the Holocaust-related litigation, see NORMAN G. FINKELSTEIN, *THE HOLOCAUST INDUSTRY: REFLECTIONS ON THE EXPLOITATION OF JEWISH SUFFERING* (2000). Finkelstein has called for my disbarment. For a partial response to his charges, see the exchange of letters in *The Nation*. Letters, THE NATION, Feb. 18, 2002; Letters, THE NATION, Dec. 25, 2000; Letters, THE NATION, Oct. 23, 2000.

Although class action litigation in American courts provided the formal matrix within which the Holocaust-era issues were litigated and resolved, I have analogized the process to a three-legged stool, with each of the three legs crucial to the success of the enterprise. Class action litigation provided a crucial leg, permitting the development of a coherent theory of recovery and offering defendants a method of closure.<sup>2</sup>

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2. A chronological listing of major reported decisions and orders rendered during the recent Holocaust-era class action litigation follows:

*In re Holocaust Assets Litigation (Swiss Bank Litigation):*

*In re Holocaust Victim Assets Litig.*, 1998 U.S. Dist. LEXIS 18014 (E.D.N.Y. Oct. 7, 1998) (Joint Stipulation describing settlement in principle); *In re Holocaust Victim Assets Litig.*, 105 F. Supp.2d 139 (E.D.N.Y. 2000) (upholding fairness of settlement under Rule 23(e)); *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2d Cir. 2000) (upholding definition of plaintiff class); *In re Holocaust Victim Assets Litig.*, 2000 U.S. App. LEXIS 29529 (2d Cir. Nov. 20, 2000) (dismissing appeal for failure to comply with calendar); *In re Holocaust Victim Assets Litig.*, 2000 U.S. Dist. LEXIS 20817 (E.D.N.Y. Nov. 22, 2000) (accepting Special Master's allocation plan); *In re Holocaust Victim Assets Litig.*, 2001 WL 419967 (E.D.N.Y. Apr. 4, 2001) (defining membership in Slave Labor II class); *In re Holocaust Victim Assets Litig.*, 14 Fed. Appx. 132 (2d Cir. 2001) (upholding plan of allocation); *In re Holocaust Victim Assets Litig.*, 282 F.3d 103 (2d Cir. 2002) (vacating definition of Slave Labor II class; remand for determination of parties' intentions); *In re Holocaust Victim Assets Litig.*, 2002 U.S. Dist. LEXIS 20195 (E.D.N.Y. Oct. 23, 2002) (denying risk multiplier).

*German Slave Labor Cases:*

*Iwanowa v. Ford Motor Co.*, 67 F. Supp.2d 424 (D.N.J. 1999) (dismissing slave labor claims as non-justiciable because subsumed by Two-Plus-Four Treaty; dismissing German law claims under two-year statute of limitations); *Burger-Fischer v. Degussa AG*, 65 F. Supp.2d 248 (D.N.J. 1999) (dismissing slave labor claims as non-justiciable); *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000) (upholding voluntary dismissal of slave labor claims in connection with the establishment of the German Foundation); *In re Nazi Era Cases Against German Defendants Litig. (Frumkin)*, 129 F. Supp.2d 370 (D.N.J. 2001) (dismissing slave labor case in accordance with the Statement of Interest filed by the United States); *In re Nazi Era Cases Against German Defendants Litig.*, 213 F. Supp.2d 439 (D.N.J. 2002) (denying Rule 60(b) motion to enforce interest payments allegedly owed to German Foundation by German industry). *See also Deutsch v. Turner Corp.*, CV-4405 (C.D. Cal. 2000) (appeal pending).

*German and Austrian Banks:*

*In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp.2d 164 (S.D.N.Y. 2000) (upholding Austrian bank settlement under Rule 23(e)); *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) (affirming fairness of Austrian bank settlement under Rule 23(e)); *In re Austrian & German Bank Holocaust Litig.*, 2001 U.S. Dist. LEXIS 2311 (S.D.N.Y. Mar. 7, 2001) (denying motion to dismiss German litigation voluntarily); *Duveen v. United States District Court (In re Austrian & German Holocaust Litig.)*, 250 F.3d 156 (2d Cir. 2001) (granting writ of mandamus compelling voluntary dismissal of German bank litigation); *In re Austrian & German Bank Holocaust Litigation*, 2001 U.S. Dist. LEXIS 15573 (S.D.N.Y. Sept. 27, 2001) (denying motion to forfeit fees on the ground of conflict of interest) (appeal pending); *In re Austrian & German Bank Holocaust Litig.*, 2002 U.S. Dist. LEXIS 21433 (S.D.N.Y. Oct. 29, 2002) (denying motion to compel interest payments). *See also Ungaro-Benages v. Dresdner Bank AG*, No. 1:01 CV 2547 (S.D. Fla. June 18, 2001) (seeking damages from German banks for property seizures).

*Insurance Cases:*

*Cornell v. Assicurazioni Generali S.p.A.*, 2000 U.S. Dist. LEXIS 2922 (S.D.N.Y. Mar. 15, 2000); *Cornell v. Assicurazioni Generali S.p.A.*, 2000 U.S. Dist. LEXIS 11004 (S.D.N.Y. Aug. 2, 2000);

Diplomacy provided an indispensable second leg. Deputy Secretary Stuart Eizenstat's leadership at the U.S. State Department and the U.S. Department of the Treasury provided the impetus that launched the movement, and he was a source of wisdom and leadership that saw it to a successful conclusion. Otto Graf Lambsdorff's steady and forthright guidance of the German delegation made candid negotiations possible.

The third leg—community insistence on dealing with long-delayed issues arising from the Holocaust—was equally important. In my opinion, neither litigation nor diplomacy would have succeeded in the absence of an aroused public demanding justice for Holocaust victims.

Since I was a vigorous participant in much of the litigation,<sup>3</sup> I make no pretensions to academic neutrality in discussing the fascinating and difficult

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Cornell v. Assicurazioni Generali S.p.A., 2000 U.S. Dist. LEXIS 11991 (S.D.N.Y. Aug. 10, 2000); *In re* Assicurazioni Generali S.p.A. Holocaust Ins. Litig., Judicial Panel on MultiDistrict Litig., 2000 U.S. Dist. LEXIS 17853 (Dec. 4, 2000); Winters v. Assicurazioni Generali S.p.A., 2000 U.S. Dist. LEXIS 18193 (S.D.N.Y. Dec. 18, 2000); Gerling Global Reinsurance Corp. of Am. v. Gallagher, 267 F.3d 1228 (11th Cir. 2001); Haberfeld v. Assicurazioni Generali S.p.A., 2002 U.S. Dist. LEXIS 4391 (S.D.N.Y. Mar. 14, 2002); Schenker v. Assicurazioni Generali S.p.A., Consol., 2002 U.S. Dist. LEXIS 12845 (S.D.N.Y. July 11, 2002) (granting Basler and Winterthur motions to dismiss for lack of in personam jurisdiction); Gerling Global Reinsurance Corp. Am v. Low, 296 F.3d 832 (9th Cir. 2002); *In re* Assicurazioni Generali S.p.A. Holocaust Ins. Litig., 2002 U.S. Dist. LEXIS 18119 (S.D.N.Y. Sept. 25, 2002) (denying motion for order to suggest that multidistrict litigation panel remand cases to California courts); *In re* Assicurazioni Generali S.p.A. Holocaust Ins. Litig., 2002 U.S. Dist. LEXIS 18127 (S.D.N.Y. Sept. 25, 2002) (denying motion to dismiss Generali).

*French Bank case:*

Bodner v. Paribas, 114 F. Supp.2d 117 (E.D.N.Y. 2000) (denying motion to dismiss).

*French Railroad case:*

Abrams v. Societe Nationale Des Chemins De Fer Francais, 175 F. Supp.2d 423 (E.D.N.Y. 2001) (dismissed on sovereign immunity grounds; appeal pending in the Second Circuit).

3. Beginning in January 1997, at the suggestion of the district court, I served as cocounsel to all plaintiffs in the Swiss bank litigation and helped to organize the Plaintiffs' Executive Committee. On August 1, 1997, I argued the motions to dismiss before Chief Judge Korman. During the ensuing year, I participated in the settlement negotiations that culminated in an agreement in principle on August 12, 1998. Shortly after the formal settlement agreement was signed on January 26, 1999, Chief Judge Korman designated me as lead settlement counsel. Since that time, I have been deeply involved in the day-to-day defense and administration of the settlement.

Beginning in December 1998, I served as a principal lawyer in the slave labor cases against German industry. I argued the motions to dismiss before Judges Greenaway and Debevoise and participated in the negotiations that culminated in the establishment of the German Foundation "Remembrance, Responsibility and Future" (the German Foundation) as an alternative to continued Holocaust-related litigation in American courts. I played a minor role in the cases seeking relief from German banks and insurance companies. I played no role in the Austrian or French litigation.

On August 21, 2000, I was nominated by the United States to serve as a trustee of the German Foundation, established to provide compensation to Holocaust victims. Although I am proud of my role in the Holocaust cases, I acknowledge the dominant contribution by my colleagues, Melvyn I. Weiss and Michael Hausfeld, in conceiving the Holocaust litigation and driving it forward, as well as the valuable contributions of many other colleagues to the success of the enterprise.

legal issues raised by the cases.<sup>4</sup> Moreover, since we are midstream in distributing the assets, it is too early for a complete assessment of the success or failure of the litigation in providing relief to specific categories of Holocaust victims.

As of November 1, 2002, however, we have progressed to the point where a preliminary report on distribution is in order. Perhaps more importantly, we are far enough into the process to begin asking fundamental questions about the legal and moral issues raised by the litigation.

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4. To assist in discussion of the issues, I have lodged the following documents related to the litigation with the editors of the *Washington University Law Quarterly* in order to assure their ready availability to scholars and critics:

- (a) The Swiss Bank Settlement Agreement dated January 26, 1999 (including Amendment 1, Amendment 2, and Escrow Agreement);
- (b) Plaintiffs' June 1997 Memorandum of Law in the Swiss Bank case filed at the trial level;
- (c) Brief of Appellants to the Third Circuit Court of Appeals, dated January 2000, in the German slave labor cases;
- (d) Three declarations that I filed in November 1999 and June 2000, seeking approval of the Swiss bank settlement and its complex allocation plan;
- (e) A declaration that I filed dated November 13, 2000, in support of the German Foundation's allocation plan;
- (f) Special Master Judah Gribetz' two-volume Proposed Plan of Allocation and Distribution in the Swiss banks case;
- (g) The "Berlin Accords," establishing the German Foundation "Remembrance, Responsibility, and the Future," which consist of three documents: (i) the Joint Statement of the Negotiating Parties, (ii) the Executive Agreement between Germany and the United States, and (iii) the German Foundation Law;
- (h) The Austrian Bank Settlement Agreement, including amendments;
- (i) The transcript of the Fairness Hearing in the Austrian banks case;
- (j) United States District Judge Shirley Kram's March 20, 2001, Order declining to permit dismissal of the German bank cases;
- (k) Judge Kram's Order and transcript dated May 21, 2001, dismissing efforts to enforce the so-called "Austrian assignment";
- (l) The report of Special Master Charles Stillman in the German and Austrian Bank cases;
- (m) Various orders by United States District Judge Michael B. Mukasey dismissing the German insurance cases.
- (n) The Independent Committee of Eminent Persons' Report on Dormant Accounts of Victims Nazi Persecution in Swiss Banks ("Volcker Report"); and
- (o) Information on the Agreement Concerning Holocaust Era Insurance Claims dating back to the Era of National Socialism (1933-1945).

Additional information on the Swiss bank case can be found at [www.swissbankclaims.com](http://www.swissbankclaims.com). A helpful timeline of the Swiss banks litigation can be found in the *In re Holocaust Victim Assets Litig. ("Swiss Banks") Timeline*, 25 *FORDHAM INT'L L.J.* 287 (2001). See also *supra* note 2 for a list of reported cases.

I propose to begin by describing the status of distribution efforts as of November 1, 2002. I will then attempt a narrative description of the principal cases that led to the Holocaust settlements, including a description of the \$1.25 billion Swiss bank litigation that began the current round of Holocaust-related litigation and the establishment of the \$5.2 billion German Foundation “Remembrance, Responsibility and the Future” in response to litigation challenging the use of slave labor by German companies during World War II. I will close with some preliminary personal reflections on aspects of the legal and moral issues raised by the Holocaust litigation.

## I. A REPORT ON THE DISTRIBUTION OF FUNDS TO HOLOCAUST VICTIMS

The acid test of the Holocaust litigation is its ability to deliver funds to Holocaust victims. As of November 1, 2002, approximately \$2.85 billion has been distributed to defined categories of Holocaust victims.

### *A. Distributions to Former Slave and Forced Laborers*

The most successful distribution efforts have taken place in the context of the approximately one million persons who are still alive, and who were compelled to perform “slave” or “forced” labor for the Nazis during World War II.<sup>5</sup> A grisly terminology emerged from the negotiations. Laborers compelled by the Nazis to work in particularly horrific conditions in concentration camps or their equivalent were designated as “slave laborers.” Jews constituted the single largest class of slave laborers, although non-Jewish slave laborers, particularly Roma-Sinti, existed, as well. Laborers compelled to work in less horrific conditions were designated as “forced laborers,” with a corresponding diminution in the amount of compensation. The terminology reflected a Nazi view that slave laborers, usually racially defined as subhuman, were wasting assets not even worth keeping alive; forced laborers, mostly non-Jewish Slavs, were treated as depreciable assets, valuable enough to keep alive, albeit under dreadful conditions.<sup>6</sup>

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5. Slave labor and forced labor payments are made to survivors, not to heirs. A similar judgment was made reluctantly in 1988 in connection with congressionally authorized payments to Japanese-Americans who had been incarcerated in internment camps during World War II. *See* 50 U.S.C.S. Appx § 1989 (2002).

6. *See* BENJAMIN B. FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* 17-30 (2002).

The Swiss bank settlement has allocated between \$200 million and \$300 million for payments to laborers.<sup>7</sup> The Swiss bank settlement provides relief solely to surviving slave laborers compelled to work for Axis-headquartered companies, with the exception of a small number of forced laborers who were compelled to work directly for Swiss companies.<sup>8</sup>

The German Foundation, on the other hand, is designed to provide relief to all surviving persons who were slave laborers or forced laborers and has allocated DM 8.1 billion (approximately \$4 billion) for slave labor and forced labor claims.<sup>9</sup> Under the terms of the German Foundation, surviving slave laborers are entitled to a payment of DM 15,000 (or about \$7,500). Under the terms of the Swiss bank settlement, surviving slave laborers who were “victims or targets of Nazi persecution,” defined as Jews, Jehovah’s Witnesses, Roma-Sinti (gypsies), homosexuals, and the disabled, are entitled to an additional payment of \$1,450. Thus, each surviving slave laborer is entitled to a total of \$8,950 from a combination of the German Foundation and the Swiss bank settlement fund.

Surviving forced laborers, primarily citizens of conquered Eastern European nations who do not belong to one of the five defined victim groups, are entitled to a sliding scale of payments from the German Foundation designed to reflect the severity of the conditions under which they were forced to labor.

Thus far, 115,000 surviving Jewish slave laborers have been identified by the staffs of the German Foundation and the Swiss bank settlement fund<sup>10</sup> and have received payment from both the Swiss bank settlement fund (\$1,450 each) and the German Foundation (\$7,500 each). In addition, the claims of more than 750,000 surviving non-Jewish slave and forced laborers have been validated by the German Foundation, which has distributed more

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7. See *In re Holocaust Victim Assets Litig.*, 14 Fed. Appx. 132 (2d Cir. 2001) (approving allocation plan). See also *In re Holocaust Victim Assets Litig.*, 2000 U.S. Dist. LEXIS 20817 (E.D.N.Y. Nov. 22, 2000); Special Master Gribetz’ Proposed Plan of Allocation, *supra* note 4(f), at 15, 27-35.

8. See The Swiss Settlement Agreement, *supra* note 4(a). See also Special Master Gribetz’ Proposed Plan of Allocation, *supra* note 4(f), at 142-67.

9. See The Berlin Accords, *supra* note 4(g); see The German Foundation Legislation, §§ 11-1(1)-(2).

10. The Conference on Jewish Material Claims Against Germany (the Claims Conference), an umbrella group formed in 1951 representing Diaspora Jewry, has performed valuable staff work in the slave labor area for both the German Foundation and the Swiss bank settlement fund. It is estimated that as many as 50,000 to 75,000 additional surviving Jewish slave laborers remain to be compensated. Labor claims by non-Jews are handled by the International Organization for Migration (IOM), headquartered in Geneva, and by victims’ organizations in the various affected Eastern European countries working under the supervision of the German Foundation. The German Foundation has recognized the claims of more than 750,000 non-Jewish slave laborers and forced laborers.

than 2.5 billion Euros (approximately \$2.4 billion) to organizations of Holocaust victims for transfer to specified individual slave laborers and forced laborers in its first eighteen months of existence.

### *B. Distributions to Owners of Bank Accounts*

The Swiss bank settlement fund allocates up to \$800 million for the return of assets deposited in Swiss banks on the eve of the Holocaust.<sup>11</sup> The German Foundation has established a property fund of approximately DM 1 billion (\$500 million), a portion of which is available for the payment of claims related to unreturned German and Austrian bank accounts. An additional \$30 million to \$40 million is also available for Austrian bank accounts from the Austrian bank settlement.<sup>12</sup>

The Swiss bank settlement has made significant strides in returning bank accounts to their rightful owners. Under the leadership of Paul Volcker and Michael Bradfield, serving as Special Masters under the auspices and supervision of Chief Judge Korman, the Claims Resolution Tribunal II (CRT II), operating in Zurich as an arm of the district court, has, with the grudging cooperation of Swiss banking authorities and the Swiss banks, assembled a data base of 46,000 Swiss bank accounts identified by Mr. Volcker as having a probable or possible link to Holocaust victims;<sup>13</sup> has published identifying information relating to the 21,000 accounts with the highest probability of Holocaust connection; has received 32,000 claims as a result of the publication; and has generated 12,000 computer matches. The 12,000 matched accounts are now the subject of intense scrutiny by the CRT II to determine ownership.<sup>14</sup>

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11. See *In re Holocaust Victim Assets Litig.*, 14 Fed. Appx. 132 (2d Cir. 2001). See also *In re Holocaust Victim Assets Litig.*, 2000 U.S. Dist. LEXIS 20817 (E.D.N.Y. Nov. 22, 2000); Special Master Gribetz' Proposed Plan of Allocation, *supra* note 4(f), at 15.

12. See *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001).

13. The 46,000 accounts were identified as the result of an intensive audit of Swiss banks performed by the International Committee of Eminent Persons (ICEP), popularly known as the Volcker Committee. The findings of the Volcker Committee were published on December 8, 1999. See *Report of the International Committee of Eminent Persons Concerning Swiss Bank Accounts Related to the Holocaust*, available at [http://222.lcep-iaep.org/final report/](http://222.lcep-iaep.org/final%20report/) (last visited Oct. 13, 2002). Mr. Volcker initially sought access to a database consisting of the 4.1 million accounts opened during World War II for which records are available. The Swiss banks refused. The parties compromised on access to a database confined to the 46,000 highest probability accounts, with a willingness to assist in verifying additional claims if a reasoned basis exists. Plaintiffs have reserved the right to demand a broader database if Mr. Volcker deems it necessary.

14. For a description of the operation of the process, see William Glaberson, *Settling Accounts, but Not Minds*, N.Y. TIMES, Nov. 13, 2002, at B1.

Thus far, 400 bank account claims have been validated by CRT II and approved by Chief Judge Korman. Three seven-figure awards have been made to Swiss bank account claimants. The first 400 awards are averaging more than \$100,000 each. As of November 1, 2002, the Swiss bank settlement fund has distributed approximately \$50 million to bank account holders.

The bank account claims process has been complicated and slowed by the fact that the banks engaged in massive destruction of the relevant records. Of the 6.8 million accounts opened in Switzerland during the relevant period, all records for approximately 2.75 million accounts have been completely destroyed. Most of the transactional records relating to the remaining 4.1 million accounts have been badly damaged.<sup>15</sup> Despite the destruction of records, however, steady progress is being made in dealing with the pending claims.

Slower progress has been made in dealing with bank account claims by the German Foundation, in part because energy has been understandably concentrated on providing expeditious payments to surviving elderly slave laborers and forced laborers; in part because the German Foundation property fund is also responsible for insurance claims, which are still in a state of flux;<sup>16</sup> in part because many provable German bank account claims have already been paid; and in part because the claims process is so time consuming. Approximately 25,000 claims for property loss have been filed with the IOM in Geneva, which is acting as the Secretariat for the German Foundation's property commission.

Finally, payments averaging \$5,000 each to approximately 1,000 qualifying Austrian bank account claimants out of 58,000 applicants have been authorized by the Austrian settlement fund.<sup>17</sup>

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15. The destruction of records was pursuant to Swiss law, which requires that records be maintained for only ten years. Despite the ongoing controversy over the existence of unreturned accounts, the Swiss banks took full advantage of Swiss law by destroying vast quantities of data needed to validate claims. The Report of the Volcker Committee is critical of the banks' decision to destroy the records. See The Independent Committee of Eminent Persons' Report on Dormant Accounts of Victims Nazi Persecution in Swiss Banks ("Volcker Report"), *supra* note 4(n), at 12. See *also id.* at 6, 108-09, 111.

16. After two years of intensive negotiations between and among the German Foundation, the German Insurance Association, and the International Commission on Holocaust-Era Insurance Claims (ICHEIC), the parties announced agreement on a claims process. It is too early to forecast whether the process will be a success. Holocaust-era litigation continues against non-German insurance companies. See *In re Assicurazioni Generali v. S.p.A. Holocaust Ins. Litig.*, U.S. Dist. LEXIS 18127 (S.D.N.Y. Sept. 25, 2002). A description of the ICHEIC process has been lodged with the *Law Quarterly*. See *supra* note 4(o).

17. Austrian bank claims are being processed in connection with a Rule 23 class action settlement described *infra* at I.I.C. A substantial Holocaust compensation fund has been established by

### C. Distributions to Refugees

At the request of the Swiss defendants, the Swiss bank settlement fund is designed to make modest payments of up to \$2,500 each to targets or victims of Nazi persecution who were turned away at the border, expelled from Switzerland, or mistreated in Switzerland because of membership in one of the five victim groups.<sup>18</sup> As of November 1, 2002, approximately 550 individual refugee claims had been validated and paid by the Swiss bank settlement fund.

### D. *Cy Pres* Distribution of Looted Assets

The Swiss bank settlement is also designed to compensate those victims of Nazi looting who are: (1) members of one of the five groups defined as “victims or targets of Nazi persecution” and (2) whose property was knowingly “fenced” through a Swiss bank. The Special Master found that the vast potential size of the class, and the difficulty of linking particular items of looted property to a Swiss bank, made it impossible to administer the Looted Assets settlement class on an individualized basis.<sup>19</sup> Instead, the Court directed *cy pres* administration of the class on behalf of the poorest Holocaust victims throughout the world.

Accordingly, the district court has allocated \$145 million to the Looted Assets class and directed its distribution to agencies serving the poorest Holocaust survivors throughout the world.<sup>20</sup> A ten-year plan is in place to assure the poorest survivors receive continuing financial support during the waning years of their lives. The first two years’ payments have been completed.

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the Austrian government, but discussion of allocation criteria has not been completed. Since I played no role in the Austrian negotiations, I cannot comment on the Austrian Holocaust fund.

18. See Special Master Gribetz’ Proposed Plan of Allocation, *supra* note 4(f), at 15, 35-38.

19. See *id.* at 110-19.

20. See *In re* Holocaust Victim Assets Litig., 2000 U.S. Dist. LEXIS 20817 (E.D.N.Y. Nov. 22, 2000). See also *In re* Holocaust Victim Assets Litig., 14 Fed. Appx. 132 (2d Cir. 2001).

### *E. The German Foundation's "Future Fund"*

The terms of the German Foundation provide for the establishment of a substantial fund to support toleration in Europe in an effort to honor those who failed to survive the Holocaust. The initial size of the Future Fund is DM 700 million (approximately \$350 million), but the hope is that the fund will grow into a major force in European life. Annual grants from the fund's income to support worthy projects linked to the values of toleration and remembrance of the Holocaust are currently being made.

The good news is that approximately \$2.85 billion has actually been distributed to Holocaust victims in the past two years at minimal cost to the victims.<sup>21</sup> The bad news is that despite intense negotiations, it has taken almost two years to develop a claims process for unpaid Holocaust-era insurance policies,<sup>22</sup> payment of German property claims has not yet begun, and the massive destruction of records by the Swiss banks is complicating efforts to return Swiss accounts to rightful owners.

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21. The sole payment to counsel thus far has been an arbitration award of approximately DM 124 million (approximately \$52 million) paid by the German Foundation, apportioned between payment of modest incentive awards of DM 15,000 to each of 278 named plaintiffs, and payment of out-of-pocket costs and attorneys fees to 51 lawyers whose efforts were deemed instrumental by the arbitrators, Nicholas deß Katzenbach and Kenneth Feinberg, in bringing the German Foundation into being. In June 2001, I received an award of DM 10 million (\$4.3 million) from the arbitrators.

Payment of attorneys' fees by the German Foundation to certain lawyers has been challenged on the ground that the lawyers were in a conflict of interest situation with their role in the Austrian bank settlement. *See In re Austrian & German Bank Holocaust Litig.*, 2001 U.S. Dist. LEXIS 15573 (S.D.N.Y. Sept. 27, 2001).

As lead settlement counsel, I have recommended payment of a total of approximately \$6.5 million in attorneys' fees in connection with the \$1.25 billion Swiss bank settlement. The extremely modest fee structure in the Swiss bank case was made possible by the decision of Melvyn Weiss, Michael Hausfeld, and myself to represent the plaintiffs without fee in connection with achieving the settlement. Hourly payments for postsettlement work needed to administer the fund will be sought. *See In re Holocaust Victim Assets Litig.*, 2002 U.S. Dist. LEXIS 20195 (E.D.N.Y. Oct. 23, 2002) (denying risk multiplier).

22. *See supra* note 16. *See also* Information on the Agreement Concerning Holocaust Era Insurance Claims dating back to the Era of National Socialism (1933-1945), *supra* note 4(o).

## II. THE LITIGATION

### A. *The Swiss Bank Litigation*

#### 1. *Origins of Litigation*

The current legal effort<sup>23</sup> to secure redress for Holocaust victims began in late 1996 with the filing of multiple, overlapping Federal Rule of Civil Procedure 23 (Rule 23) class actions against several Swiss banks on behalf of persons alleging that funds deposited by Holocaust victims in Swiss banks in the years preceding the Holocaust had not been returned to their lawful owners.<sup>24</sup> In early February 1997, faced with multiple overlapping actions, Chief Judge Korman requested me to serve in a *pro bono* capacity as cocounsel for the plaintiffs in all actions and to assist in forming an Executive Committee to manage the litigation against the Swiss banks.<sup>25</sup> With the cooperation of virtually all plaintiffs' counsel,<sup>26</sup> a ten-person

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23. Earlier efforts to use the courts to seek relief for Holocaust victims had little success. *See, e.g.,* *Prinz v. Fed. Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994) (dismissing a suit by Jewish-Americans sent to concentration camps by Nazis on sovereign immunity grounds; Germany ultimately settled with the eleven plaintiffs for \$2.1 million); *Kelberine v. Soci t  Int'l*, 363 F.2d 989 (D.C. Cir. 1966) (dismissing as nonjusticiable slave labor class action against European corporation).

Although I believe that plaintiffs would have prevailed on the deposited assets claims against the Swiss banks and the slave labor claims against German corporations, the fact remains that no American court has yet ruled in favor of a Holocaust claimant on the merits. The closest that any Holocaust plaintiff has come to legal success was in *Bodner v. Paribas*, 114 F. Supp.2d 117 (E.D.N.Y. 2000), where Judge Sterling Johnson denied a motion to dismiss filed by several French banks, precipitating a settlement on the merits brokered by Secretary Eizenstat in the closing days of the Clinton administration.

24. *In re Holocaust Victims Assets Litig.*, Master Docket No. CV-96-4849 (ERK) (E.D.N.Y. 1998). The credibility of plaintiffs' allegations rested on an influential report compiled by Stuart Eizenstat for the State Department detailing Swiss bank complicity in financing Nazi operations. *See* U.S. Department of State, *Preliminary Study on U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany during World War II* (May 1997), available at [http://www.state.gov/www/regions/eur/prt\\_9705\\_ng\\_links.html](http://www.state.gov/www/regions/eur/prt_9705_ng_links.html) (last visited Oct. 13, 2002).

25. I had recently appeared before Chief Judge Korman as counsel for Steve Forbes in his successful effort to gain a place on the New York State Republican Presidential Primary ballot. *See* *Rockerfeller v. Powers*, 917 F. Supp. 155 (E.D.N.Y. 1996). Most recently, I had represented Senator John McCain before Judge Korman in his successful effort to appear on the 2000 New York State Republican Primary. *See* *Molinari v. Powers*, 82 F. Supp.2d 57 (E.D.N.Y. 2000). The case was assigned to Chief Judge Korman because it was related to the 1996 Forbes litigation. As young lawyers, Chief Judge Korman and I had occasionally opposed each other in the early 1970s, when Judge Korman served in the Solicitor General's Office and I worked on the legal staff of the American Civil Liberties Union.

26. Two sets of lawyers were involved. One team was headed by Melvyn Weiss and Michael Hausfeld. In my opinion, the extraordinary combination of the talents of Mel Weiss and Mike Hausfeld go a long way to explaining the success of the Swiss bank litigation. The other legal team was led by Robert Swift and Edward Fagan. I was originally asked in December 1996 to participate in the Holocaust-related case by Richard Emery, who was at that time a member of the Fagan/Swift team.

plaintiffs' Executive Committee was quickly formed,<sup>27</sup> and the Swiss bank litigation was vigorously pursued as a classic Rule 23 class action.

In April 1997, defendants filed a massive set of dismissal motions under Federal Rule of Civil Procedure 12 (Rule 12). The dismissal papers and supporting material were more than 2,000 pages long. Plaintiffs responded in June 1997.<sup>28</sup> During the last week in July 1997, at Chief Judge Korman's request, plaintiffs filed a series of four interrelated amended complaints clarifying the jurisdictional bases<sup>29</sup> and substantive legal theories<sup>30</sup>

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Morris Ratner, a young partner with Lief, Cabresser, Heimann & Bernstein who was allied with the Weiss/Hausfeld team, played a prominent role in developing the legal issues, as did Irwin Levin and Richard Shevitz of the Indianapolis firm of Cohn & Malad. Stephen Whinston, a lawyer with Berger and Montague who was allied with the Swift/Fagan team, also played a constructive role in the litigation.

27. The Executive Committee was structured to give the Weiss/Hausfeld team five votes and the Swift/Fagan team four votes, with the tenth vote cast by me. I did not want a tie-breaking vote because I did not want to direct the litigation. Instead, I opted for the power to deadlock, banking on the fact that as soon as both teams realized that the other could not be excluded, they would work together without the need for close votes. That is exactly what happened. Once the Executive Committee was organized in February 1997, it no longer became necessary to take close votes on issues. While the usual disagreements on strategy and tactics emerged, the disagreements were dealt with by discussion and compromise. The one dramatic failure of the Executive Committee occurred during the negotiation end-game, when Robert Swift and Edward Fagan publicly announced a willingness to accept a \$1.25 billion figure that was lower than the \$1.5 billion figure set by the Executive Committee.

28. Memorandum of Law filed on June 16, 1997, in opposition to the defendant banks' motion to dismiss, *supra* note 4(b).

29. The subject matter jurisdictional theories underlying the Swiss litigation are set forth in the Memorandum of Law filed on June 16, 1997, *supra* note 28. The banking claims were premised on 28 U.S.C. § 1332 (2002) alienage jurisdiction, since the several named plaintiffs were citizens of the United States and the banks were Swiss citizens. Noncitizen plaintiffs were tucked into a deposited assets class headed by a U.S. citizen since, under *Ben-Hur*, the citizenship of a class is measured by the citizenship of the named party. *See* Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921).

The international law claims were premised on federal question jurisdiction, 28 U.S.C. § 1331 (2002) and the Alien Tort Claims Act, 28 U.S.C. § 1350 (2002). *See* Kadic v. Kradzik, 70 F.3d 232, 250 (2d Cir. 1995). Plaintiffs argued that knowing participation in financing slave labor camps and knowing fencing of property looted by Nazis violated customary international law, giving rise to both federal question and Alien Tort Claims Act jurisdiction.

Given the Swiss banks' massive presence in New York, no issue of *in personam* jurisdiction existed. The banks did not assert a statute of limitations defense, no doubt fearing that plaintiffs would argue that the banks' behavior in concealing the accounts' existence had tolled the running of the statute of limitations, triggering a hearing in connection with which broad discovery would be almost certainly required. Rather than face that discovery, the Swiss banks waived the statute of limitations. The banks' *forum non conveniens* argument was blunted by the fact that, under Swiss pleading rules, the bulk of the bank account cases would be summarily dismissed because the plaintiffs were generally unable to specify the particular bank holding the family's assets. In the United States, Federal Rule of Civil Procedure 20(a) (Rule 20(a)) permitted multiple alternative bank defendants to be joined, subject to subsequent discovery designed to determine the correct one. Since Rule 20(a) is procedural, plaintiffs asserted the law of the forum governed pleading in the American courts, even if Swiss substantive law governed the merits.

30. Plaintiffs' substantive legal theories are described at length in the June 16, 1997

underlying the Holocaust cases. On August 1, 1997, after a full day of oral argument in connection with the complex legal issues raised by the litigation, Chief Judge Korman took the matter under advisement. His prolonged postargument silence placed significant pressure on both sides to settle.<sup>31</sup>

During the ensuing year, the parties, aided by Stuart Eizenstat, unsuccessfully discussed settlement with the defendants, who were locked into a final offer of \$600 million.<sup>32</sup> On July 28, 1998, about one year after oral argument, Chief Judge Korman reconvened the negotiations. After two weeks of continuous bargaining under his supervision, a \$1.25 billion settlement in principle was reached on August 12, 1998.<sup>33</sup>

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Memorandum of Law, *supra* note 4(c). The deposited assets claim was a garden-variety bailment issue, complicated by plaintiffs' argument that, given the circumstances of the deposits, the banks were constructive trustees, not mere bailors. The distinction was important, since a constructive trustee would be obliged to keep adequate records, make affirmative efforts to return the funds, and be subject to punitive damages for willful breaches of trust. The issue was further complicated by the choice-of-law question, since defendants claimed that neither constructive trust nor punitive damages existed under Swiss law. My research into Swiss law suggested that parallel concepts existed, but the case never progressed to a stage that required a decision on these issues.

The slave labor and looted assets claims were premised on violations of the Nuremberg Principles, made enforceable in an American court as a matter of federal common law under the Alien Tort Claims Act, *supra* note 29. Plaintiffs pointed to the Nuremberg convictions of Nazi bankers for providing knowing financial assistance to Nazi policies that constituted crimes against humanity. Defendants argued, *inter alia*, that the banks were involved in normal banking operations, and that international law did not apply to private corporations.

31. Although one can never be certain, I believed that Judge Korman's reaction to the oral argument made it likely that, if forced to issue an opinion, he would uphold the claim for bank deposits, including the significant claim that the assets were held in constructive trust. At the same time, I believed that he might well strike down plaintiffs' more adventurous claims premised on international law. In view of subsequent events, I assume that Judge Korman was quite content to leave both parties feeling apprehensive about his final decision.

32. I authored an opinion piece in *The New York Times* explaining why the \$600 million offer was inadequate. Burt Neuborne, *Totaling the Sum of Swiss Guilt*, N.Y. TIMES, June 24, 1998, at A25.

33. The crucial breakthrough occurred on August 11, 1997, when Chief Judge Korman persuaded the negotiating parties to meet for a dinner at Gage & Tollner's restaurant, a Brooklyn landmark. At the dinner, Chief Judge Korman asked plaintiffs' lawyer Michael Hausfeld to explain plaintiffs' estimate of the size of unreturned bank accounts and to reveal certain documentary support for his position. Mr. Hausfeld explained that an economic analysis of the flow of funds from Europe into Switzerland in the years preceding the Holocaust, together with an analysis of the wealth of prewar European Jewry, made clear that a significant proportion of portable Jewish wealth was deposited in Swiss accounts immediately prior to the outbreak of World War II. He disclosed an internal memo from one bank official to another, dated in 1937, that described large numbers of persons lined up outside Swiss banks seeking to place their property in safekeeping. Shortly after Mr. Hausfeld's presentation, Chief Judge Korman suggested \$1.25 billion as a settlement amount. Both sides accepted the amount in principle the next day. See *Settlement in Principle set out in In re Holocaust Victim Assets Litig.*, 1998 U.S. Dist. LEXIS 18014 (E.D.N.Y. 1998).

## 2. *The Settlement*

Over the next five months, the settlement in principle was painstakingly reduced to writing.<sup>34</sup> On January 26, 1999, an elaborate settlement agreement involving five classes and a carefully delineated set of beneficiaries was signed.<sup>35</sup> Five settlement classes were certified: (1) a Deposited Assets class of persons seeking the return of funds deposited in Swiss banks; (2) a Slave Labor I class of persons who were forced to perform slave labor for Axis-owned companies that were financially aided by Swiss banks; (3) a Slave Labor II class of persons who were forced to perform slave labor directly for Swiss companies;<sup>36</sup> (4) a Refugee class of persons who had been expelled from, been denied entry into, or been mistreated in Switzerland because they were Jewish or a member of some other victim group,<sup>37</sup> and (5) a Looted Assets class of persons whose property had been stolen by the Nazis and knowingly fenced through a Swiss bank.

After conferring with an informal group of advisors consisting of the heads of leading Jewish organizations, counsel unanimously insisted that the Swiss banks settlement agreement be open to Jews and non-Jews alike.

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34. Counsel for the Swiss banks insisted that the settlement be a comprehensive resolution of all potential Swiss liability for Holocaust-related activity. Accordingly, the five settlement classes track the potential theories of liability asserted against various categories of Swiss defendants. The nationwide reach of the Swiss settlement made it more politically palatable and permitted the banks to take credit for protecting Swiss interests generally. Unlike the German and Austrian governments, which provided both political and material assistance to resolving Holocaust-era claims, the Swiss government provided no support for the settlement.

The Swiss banks required every major Jewish organization in the world to endorse the settlement in writing as a precondition to going forward. Obtaining the endorsements accounted for at least a portion of the five-month lag between the agreement in principle on August 12, 1997, and the formal signing of a settlement agreement on January 26, 1999.

35. A helpful summary of the settlement agreement was prepared by Special Master Gribetz in connection with his development of a plan of allocation and distribution. The summary is set forth as an appendix to the Symposium Issue of the Fordham International Law Journal dedicated to the Swiss bank settlement. *See* Symposium, *Holocaust Restitution*, *supra* note 1.

36. During the negotiations, the defendants repeatedly represented that the Slave Labor II class would be very small, since very few Swiss companies had used slave labor. *See In re Holocaust Victim Assets Litig.*, 2001 WL 419967 (E.D.N.Y. Apr. 4, 2001). As the administration of the settlement unfolded, the size of the Slave Labor II class grew to more than 500 companies, with at least 11,000 “employees.” The parties are continuing to litigate the precise scope of the Slave Labor II class to determine whether so-called “after-acquired” companies that were German-owned during World War II, but were acquired by Swiss entities after the war, should be treated as Swiss or German companies. *See In re Holocaust Victim Assets Litig.*, 282 F.3d 103 92d Cir. 2002.

37. Sovereign immunity would have made it impossible to pursue claims arising out of its World War II immigration policies against Switzerland in an American court. That is why the United States has not been held liable for its appalling World War II immigration policies. The Refugee class was added at the insistence of the Swiss negotiators, presumably in response to Swiss judicial decisions indicating that Jewish refugees could pursue claims in Swiss courts. *See* Neuborne Declaration dated June 2000, *supra* note 4(d), at 8-9.

Accordingly, membership in the Deposited Assets, Slave Labor I, Refugee, and Looted Assets classes was opened to five categories of victims deemed to be core targets of Nazi racial and religious ideology: Jews, Jehovah's Witnesses, Sinti-Roma (gypsies), homosexuals, and the disabled. Slave Labor II membership was universal, including victims of national origin persecution and political persecution.<sup>38</sup>

Since no good deed goes unpunished, Chief Judge Korman appointed me as Lead Settlement Counsel on February 1, 1999, appointing the other members of the Executive Committee as cosettlement counsel. Settlement counsel unanimously adopted a bifurcated approach to the administration of the settlement agreement.

Phase I consisted of a massive, worldwide notice program designed to inform Holocaust victims of the contours of the settlement and of their right to opt out, followed by a fairness hearing under Rule 23(e). Phase II consisted of the appointment of a Special Master to develop and recommend a plan of allocation and distribution for consideration by the District Court at a second Rule 23(e) hearing.<sup>39</sup>

The bifurcated procedure posed several concerns. First, by structuring the opt-out procedure as part of the Phase I process, class members were asked to decide whether to opt out before they knew the precise details of the allocation plan. Second, by using a Special Master, plaintiffs hoped, despite the holding in *Amchem Products, Inc. v. Windsor*,<sup>40</sup> to avoid the appointment of separate counsel for each settlement class and the subsequent classic adversary struggle over allocation.

Both the early opt out<sup>41</sup> and the decision to avoid separate counsel for each settlement class were designed to minimize the emergence of contentious arguments between and among potentially competing categories of Holocaust survivors for access to the limited \$1.25 billion fund. It would, I believe, have been a tragedy of epic proportions if the Swiss bank Holocaust litigation had degenerated into an adversarial free-for-all among categories of surviving victims, each seeking a share of the pittance available. A more

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38. The Second Circuit rejected an effort by Polish victims to challenge the exclusion of national origin victims from the four principal settlement classes, holding that the excluded categories of victims remained free to bring their own litigation. *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2d Cir. 2000). The case is significant in holding that no attorney-client relationship exists between counsel for named plaintiffs and putative class members prior to the certification of an actual class.

39. For a defense of the two phases of implementation, see Neuborne Declarations submitted in support of Fairness of the Settlement, *supra* note 4(d).

40. 521 U.S. 591 (1997). The implications for *Amchem* are discussed later, *infra* Part III.C.

41. In *In re Agent Orange Prod. Liability Litig.*, 818 F.2d (2d Cir. 1987), the Second Circuit had upheld an early opt out in settings where it would be impossible to ascertain the precise recovery.

dignified and mutually respectful plan of allocation was imperative.<sup>42</sup>

Instead of resorting to a classic adversarial proceeding, settlement counsel sought to construct the settlement classes into *ad hoc* political entities with the attributes of “exit, loyalty, and voice.”<sup>43</sup> During Phase I, settlement counsel provided all Holocaust survivors with careful notice of the general contour of the settlement and a description of the procedure for developing a fair allocation plan, asking them to be bound by a fair process instead of waiting for a particular outcome. In short, settlement class members were asked to bind themselves to a process rather than an outcome, or to opt out of the settlement. Of the 580,000 written responses to the notice materials received by settlement counsel, fewer than 300 persons elected to opt out.

After a massive notice program involving mailings to more than 1 million persons and the receipt of questionnaires from 580,000 persons,<sup>44</sup> Phase I Rule 23(e) fairness hearings were held in Brooklyn and Jerusalem on November 29 and December 14, 1999, respectively.<sup>45</sup> The hearings concerned the basic fairness of the settlement and the proposed procedures for developing a plan of allocation.<sup>46</sup> While the overwhelming response of the plaintiff classes was positive, troubling criticism was leveled at several aspects of the settlement, including the mechanism for obtaining the information needed to administer it. Additional extensive negotiations were required during the first half of 2000 to deal with the issues raised at the fairness hearings. Most importantly, the parties discussed assuring access to information in the possession of Swiss banks that was needed to administer

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42. See Neuborne Declaration dated November 1999, *supra* note 4(d), at 20-21, for a discussion of counsel’s desire to avoid pitting one set of Holocaust survivors against another.

43. I have lodged a declaration filed with Chief Judge Korman in support of the settlement’s fairness setting forth the elements of “exit, loyalty, and voice.” A copy of the declaration is on file with the *Law Quarterly*; see *supra* note 4(d). Professor John Coffee has invoked the concepts, drawn from political theory, to describe the post-*Amchem* structure of a complex class action. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000).

44. My colleague, Morris Ratner, provided invaluable assistance to the plaintiff classes by organizing and supervising the massive and complex worldwide notice program.

45. I filed three declarations with the Court in my capacity as Lead Settlement Counsel urging acceptance of the basic settlement agreement as fair. I noted that the settlement amount of \$1.25 billion was not adequate to compensate plaintiffs for the injuries that they had suffered. Nevertheless, I argued the settlement amount reflected the limitations of the real world and should be accepted as a fair compromise. I defended the bifurcated settlement procedure as both pragmatically necessary and fundamentally fair. I noted that principles of “exit, loyalty, and voice” provided adequate protection to all class members.

Objections to the settlement generally took the form of concerns over adequacy of the settlement amount, objections to the bifurcated procedure, concerns that the separate counsel were not appointed for each settlement class, and premature concerns over fair distribution. See Neuborne Declaration, *supra* note 4(d).

46. See *supra* note 45.

the settlement agreement fairly, and they developed the means to pay for the elaborate bank account claims process, known as CRT II.<sup>47</sup>

The fairness of the Phase II allocation process depended on the existence of a neutral Special Master, Judah Gribetz, and the pledge by all settlement counsel that they would assist all Holocaust survivors, regardless of category.<sup>48</sup> Counsel agreed to present information and argument to the Special Master concerning allocation and to assist him in developing a plan of allocation and distribution.<sup>49</sup> The process could not work without a Special Master as extraordinary as Judah Gribetz.

Finally, on July 26, 2000, Chief Judge Korman approved the amended Swiss bank settlement agreement as fair and delegated to Special Master Judah Gribetz the responsibility for developing a fair plan of allocation and distribution.<sup>50</sup> Multiple appeals were filed from Chief Judge Korman's final order and judgment, upholding the fairness of the settlement. The appeals challenged (1) the adequacy of the settlement amount, especially in the light of the findings in the Volcker Committee Report; (2) the bifurcated settlement procedure, especially the failure to have appointed separate counsel for each settlement class; and (3) the failure to have achieved an insurance settlement. The principal appeal was initially dismissed by the

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47. The issue of funding the CRT II process was resolved by accelerating the final installment payments due from the Swiss banks in order to generate additional interest that could be used to fund the CRT II process. Delivery of the final installment of \$334 million was accelerated from November 23, 2001, to November 23, 2000, in order to generate the necessary interest. Negotiations dealt, as well, with technical amendments to the Settlement Agreement governing the return of looted art, explicitly permitting replevin actions either in the country where the art is located or in the country from which art had been stolen. Negotiations also concerned rules for access to data needed to administer a bank accounts claims program and the establishment of a very modest insurance claims process involving the two cooperating Swiss insurers—Swiss Re and Swiss Life. No releases will be provided to noncooperating Swiss insurance companies. The new provisions are set forth in Amendment 2 of the Settlement Agreement, *supra* note 4(a).

48. Since the principal counsel had waived fees, no structural conflicts related to fees precluded counsel from serving the needs of all survivors, regardless of which settlement class they fell into.

49. The basic contours of the allocation plan were upheld by the Second Circuit. *In re Holocaust Assets Litig.*, No. 00-9595 (2d Cir. July 26, 2001).

50. *In re Holocaust Victims Assets Litig.*, 105 F. Supp.2d 139 (E.D.N.Y. 2000). In order to assure the orderly administration of the Slave Labor II class, Judge Korman ordered all Swiss entities seeking a release under Slave Labor II to identify themselves to the Court within a reasonable period of time. The defendants eventually challenged the self-identification requirement, but the belated appeal was dismissed as untimely. See *In re Holocaust Victim Assets Litig.*, 282 F.3d 103, 105 (2d Cir. 2002), for reference to the belated appeal. As of November 2002, the parties were still at odds over the precise membership of the Slave Labor II class, disagreeing over whether a company must have been Swiss-owned during the war to qualify for an unlimited Slave Labor II release. See *supra* note 36. Chief Judge Korman recused himself on remand and the matter was randomly assigned to Judge Frederick Block. See Case No. CV-02-3314(FB) (related to Case No. CV-02-2981(FB)). The parties are also in disagreement over whether funds in the Swiss settlement escrow fund earn simple or complex interest. Approximately \$4 million is at issue. See Case No. CV-02-2981 (FB)

Second Circuit for failure to adhere to the Circuit's appellate schedule.<sup>51</sup> Inexplicably, the appeal was reinstated and persisted until approximately May 15, 2001, when it was withdrawn. The Second Circuit granted the motion to withdraw the appeal and issued its mandate on May 30, 2001, ending all legal challenges to the basic settlement structure.

### 3. *The Special Master's Plan*

Over a period of more than a year after Judge Korman's order approving the fairness of the settlement, Special Master Gribetz conducted an intensive investigation into the legal and factual basis for the claims of the five settlement classes and conferred personally with literally hundreds of class members who wished to be heard. At the close of the process, he issued a two-volume report in September 2000 that summarized the history of Holocaust reparations, assessed the legal and factual claims of the various categories of claimants, and recommended a plan of allocation and distribution.<sup>52</sup> The Special Master based his plan primarily on (1) the relative legal and factual strengths and weaknesses of the respective legal claims of the settlement classes and (2) the potential for administering each class in a fair and efficient manner. The Special Master's Report found that the claim for the return of Holocaust-era bank deposits was the legal heart of the case.<sup>53</sup> Accordingly, he recommended allocating up to \$800 million to pay bank deposit claims; approximately \$200 to \$300 million to pay Slave Labor I and II claims, in the form of payments of \$1,000 to each surviving slave laborer; and \$100 million for Looted Assets claims, to be administered *cy pres* to aid the poorest survivors.<sup>54</sup> Individual administration of the Looted Assets class was deemed impossible because of the difficulty in tracing particular looted property to a Swiss bank and the enormous number of persons who suffered looting.<sup>55</sup> The Special Master's choice of a \$1,000 payment to surviving slave and forced laborers (subsequently increased to \$1,450) was influenced by the payment of 15,000 DM (approximately \$7,500) to many of the same persons by the German Foundation "Remembrance, Responsibility and the Future" (the German Foundation).<sup>56</sup> Finally, the Special Master recommended that refugees denied access to Switzerland during WWII because of membership in a defined victim group were to receive a sliding

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51. *In re Holocaust Victim Assets Litig.*, 2000 U.S. App. LEXIS 29529 (2d Cir. Nov. 20, 2000).

52. *See* Special Master Gribetz's Proposed Plan of Allocation, *supra* note 4(f).

53. *Id.*

54. *Id.* at 8, 11-12.

55. *See* Special Master Gribetz' Proposed Plan of Allocation, *supra* note 4(f), at 22-23.

56. *See supra* note 3; *see infra* notes 86-103 and accompanying text.

scale of payments topping out at \$2,500.<sup>57</sup>

After a second round of notice and a second set of hearings, Chief Judge Korman approved the Special Master's proposed plan of allocation and distribution on November 22, 2000.<sup>58</sup> The Second Circuit upheld both the definition of the plaintiff classes, and the plan of allocation and distribution adopted by the District Court.<sup>59</sup>

Distribution of the \$1.25 billion Swiss bank settlement fund is currently underway.<sup>60</sup>

#### 4. *The German Slave Labor Cases*

Shortly after the August 1, 1997, oral argument in the Swiss bank case, I became aware of a potentially significant decision of the German Federal Constitutional Court in *Krakauer v. Federal Republic of Germany*,<sup>61</sup> abrogating the temporary immunity from suit for claims arising out of World War II (WWII) that had been granted to German industry by the London Debt Agreement of 1953.<sup>62</sup> Accordingly, in September and October 1997, I

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57. A copy of the document filed by the Special Master with the District Court describing the allocation plan in detail is annexed as an appendix to the 2001 Fordham International Law Journal Symposium Issue on the Swiss banks litigation. See Symposium, Holocaust Restitution, *supra* note 1.

58. *In re Holocaust Victim Assets Litig.*, 2000 WL 33241660 (E.D.N.Y. 2000).

59. See *In re Holocaust Victims Assets Litig.*, *supra* note 38 (upholding class definition); *In re Holocaust Victims Assets Litigation*, 2001 WL 868507 (2d Cir. July 26, 2001) (upholding plan of allocation). Several additional appeals were withdrawn after the filing of briefs on the merits.

60. Current distribution is described *supra* at pages 799-804.

61. *Krakauer v. Fed. Republic of Germany*, LG (trial court) Bonn, 1\* 134/92 (1997) (FRG), rev'd on other grounds, OLG [Court of Appeals] Cologne, 7 U. 222/97 (1998) (FRG)). I owe a debt to Deborah Sturman, whose knowledge of German reparations practice enabled me to understand the significance of the *Krakauer* opinion. The German slave labor litigation owes a good deal to her persistence in bringing the *Krakauer* case to the attention of counsel.

62. Inadequate recognition has been paid to the fact that the German judiciary's voluntary action in *Krakauer* opened the way to significant compensation for Holocaust survivors.

The London Debt Agreement of 1953 was, in effect, an international bankruptcy workout plan for postwar West German industry, deferring judicial consideration of liability for wartime behavior until the negotiation of a peace treaty at some indefinite time in the future. By 1953, the international community had realized that an economically viable West Germany was a crucial link in Cold War efforts to contain Soviet expansion. The fear was that immediate imposition of liability for wartime actions would make it impossible for a strong postwar German economy to flourish. The London Debt Agreement was designed to defer liability until the signing of a formal peace treaty, at which time West German industry would be stronger and the precise details of reparations could be provided for in the treaty. Unfortunately for Holocaust victims, the Cold War made it impossible to complete a peace treaty with Germany, rendering the deferral of German industrial liability for wartime actions virtually permanent. The 1991 Two-Plus-Four Treaty, *supra* note 69, that paved the way for German reunification, was as close to a peace treaty as the Allies managed to achieve. The importance of the *Krakauer* opinion was its recognition that the deferral provisions of the London Debt Agreement had been lifted by the signing of the Two-Plus-Four Treaty, which was treated by the German Court as a de facto peace treaty.

conducted extensive research in connection with efforts to secure relief for Holocaust victims who had been compelled to perform slave labor for German companies during WWII. By February 1998, the plaintiffs had completed research in connection with the slave labor issue. In March 1998, *Iwanowa v. Ford Motor Co.*, the first slave labor case filed against German industry, was filed before Judge Greenaway in the United States District Court for the District of New Jersey.<sup>63</sup> Numerous additional slave labor cases were filed against a series of major German companies in the ensuing three months.<sup>64</sup>

Plaintiffs argued that the London Debt Agreement's grant of temporary immunity from suit to German industry had acted to toll the running of the applicable statutes of limitations. With the lifting of that temporary immunity in *Krakauer*, plaintiffs argued that German corporate defendants became liable under both German law and principles of international law for having knowingly reaped huge profits by using slave and forced labor during WWII. Plaintiffs' German law claims were garden-variety contract and unjust enrichment claims, seeking compensation for the reasonable value of their coerced services and appropriate compensation for suffering caused by wretched conditions of confinement.<sup>65</sup> Plaintiffs' international law claims were premised on customary international law prohibiting the enslavement of conquered populations and on the Nurmberg Principles barring the commission of war crimes and crimes against humanity.<sup>66</sup>

Defendants argued that the German law claims were barred by the two-year statute of limitations governing employment contracts,<sup>67</sup> and that

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63. *Iwanowa*, *supra* note 2.

64. All told, fifty-four slave labor cases were filed against German industrial defendants. Most of the slave labor complaints were modeled on the *Iwanowa* complaint. *In re Nazi Era Cases Against German Defendants Litig.* (Frumkin) 129 F. Supp.2d 370 (2001).

65. For a further discussion of Plaintiffs' legal arguments, see the Brief of Appellants, on appeal to the Third Circuit Court of Appeals, *supra* note 4(c).

66. G.A. Res. 95 (I), U.N. Doc. A/64/Add.1 (1946).

67. Defendants argued that even if the German statute of limitations was tolled during the period of deferral imposed by the London Debt Agreement, the statute began to run in 1991 with the signing of the Two-Plus-Four Treaty, *supra* note 69. Plaintiffs argued that the earliest the statute of limitations could begin to run was in 1996, when the *Krakauer* decision was announced. Plaintiffs also argued that the applicable statute of limitations was the twenty-year statute governing unjust enrichment, or, at the least, the six-year statute governing tort.

Defendants also challenged the legal sufficiency of plaintiffs' international law claims, and the subject matter jurisdiction of an American court to grant relief against German defendants. See Brief of Appellants, on appeal to the Third Circuit Court of Appeals, *supra* note 4(c). See also German Civil Code (Bürgerliches Gesetzbuch) § 195 (30 year statute of limitations); § 196(1)(9) (two year statute of limitations); *Bartl v. Heinkel*, BGHZ [Supreme Court] 48 (1967) (F.R.G.). Compare *Iwanowa*, *supra* note 2, at 476-83.

international law claims involving war reparations were nonjusticiable.<sup>68</sup>

After an exchange of voluminous briefs and supporting documents, oral argument in the German company slave labor cases took place before Judge Greenaway in March 1999 and August 1999 and before Judge Debevoise in August 1999.

On September 13, 1999, both Judge Greenaway and Judge Debevoise dismissed the first series of German slave labor cases on the ground that the Treaty on the Final Settlement with Respect to Germany (the Two-Plus-Four Treaty)<sup>69</sup> had impliedly abrogated slave labor claims against German companies arising under international law. Moreover, held the New Jersey federal courts, the German law claims were barred by a shockingly short two-year limitations period governing employment contracts.<sup>70</sup> Plaintiffs immediately pursued a series of expedited appeals to the Third Circuit Court of Appeals, arguing that the district courts had erroneously interpreted the Two-Plus-Four Treaty and had misapplied German limitations law. Plaintiffs argued that the silence in the Two-Plus-Four Treaty concerning slave labor claims could not possibly be read as an implied destruction of the claims, especially in view of the earlier deferral of the claims by the London Agreement on Germany's External Debts (the London Debt Agreement). Silence in the Two-Plus-Four Treaty, argued the plaintiffs, merely returned the parties to the position they had been in immediately prior to the London Debt Agreement.<sup>71</sup>

The appeals were adjourned by Chief Judge Becker on June 15, 2000, on the eve of oral argument, in light of the imminent establishment of the German Foundation as an alternative to litigation. The slave labor appeals were ultimately voluntarily dismissed in May 2001 in connection with the establishment of the German Foundation.

While the slave labor cases were not litigated to completion, their vigorous prosecution against a broad array of German companies played a

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68. I have lodged with the *Law Quarterly* the Third Circuit brief in *Iwanowa*, containing plaintiffs' legal arguments on the merits, and on the jurisdictional issues. *See supra* note 4(c).

69. Treaty on the Final Settlement with respect to Germany (with Agreed Minute), Sept. 12, 1990, 1696 U.N.T.S. 124.

70. *Burger-Fischer*, *supra* note 2; *Iwanowa*, *supra* note 2.

Judge Greenaway's particularly disturbing holding that German law claims were barred by a two-year statute of limitations governing employment contracts purported to be required by a similarly shocking decision by the German courts in the mid 1950s applying a two-year statute of limitations to wartime slave labor claims. *Burger-Fischer*, *supra*. Plaintiffs unsuccessfully sought to persuade Judge Greenaway that modern German academic analysis recognizes that a much longer statute of limitations governs claims for World War II involuntary labor. *Id.* Apparently confused by German legal practice, which does not recognize the principle of stare decisis, Judge Greenaway deemed himself bound by the earlier decision, even though a German court would have been free to have disregarded. *Id.*

71. Abkommen über deutsche Auslandsschulden, v. 27.2. 1953 (BaB1.II S.333).

major role in persuading German industry to establish the significant German Foundation to pay compensation to Holocaust victims.<sup>72</sup> Unfortunately, the erroneous—at least to me—decisions of the District Court in dismissing the slave labor claims as time-barred and nonjusticiable eroded the bargaining position of counsel, reducing the sums ultimately available to victims by as much as DM 5 billion.<sup>73</sup>

### *B. The Austrian Bank Litigation*

I believe that Chief Judge Korman has handled the Swiss bank litigation as a model Rule 23 proceeding. Unfortunately, despite Judge Kram's earnest efforts, the same cannot be said for the Austrian bank litigation. In the wake of the Swiss bank settlement, several overlapping complaints were filed against Bank Austria Creditanstalt seeking relief against Austrian banks on behalf of Holocaust victims.<sup>74</sup> In contrast to the approach utilized by Chief Judge Korman in the Swiss bank cases, Judge Kram, before whom both the German and the Austrian bank cases were ultimately consolidated, did not seek to establish an Executive Committee representing all counsel in the several, overlapping cases pending before her. Instead, she appointed former

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72. Shortly after oral argument in the Swiss bank cases in August 1997, litigation was commenced by several sets of lawyers against German banks and German insurance companies on behalf of Holocaust victims. I played virtually no role in the litigation, except to secure voluntary dismissal. See *infra* notes 109-14 and accompanying text for a description of the complex mandamus proceedings that preceded dismissal of the German bank cases.

73. Although it has nothing to do with formal law, the strategic judgment of Chief Judge Korman to withhold decision in the Swiss case, thus putting inexorable pressure on the parties to settle, should be contrasted with the decision by judgment of Judges Debevoise and Greenaway to dismiss the German slave labor cases while the German Foundation negotiations were underway.

German industry and the German government initially expressed serious interest in a German Foundation as an alternative to litigation in early 1999, shortly before the argument of the *Iwanowa* case. During the next eighteen months, negotiations concerning the German Foundation proceeded on a parallel track to the slave labor litigation, with the temperature of the negotiations fluctuating depending upon signals flashed by the litigation. The obvious interest in the case shown by Judges Greenaway and Debevoise provided a significant spur to German industry. If no decision had been announced, the parties would, I believe, have replicated the Swiss experience and reached agreement at a figure to fund the German Foundation that would have approximated DM 15 billion. The dismissals poured ice water on plaintiffs negotiating position, despite efforts to establish a bold front by seeking expedited appeals and asking the United States to opine on the meaning of the Two-Plus-Four Treaty, *supra* note 69.

It is possible to defend the dismissals by arguing that the adverse decisions were necessary to force plaintiffs' counsel to adopt a realistic settlement figure. It is no coincidence that the DM 10 billion figure was agreed upon in December 1999, three months after the dismissals and immediately after plaintiffs filed the expedited appeal papers. It is also possible to defend the dismissals as principled acts by an independent judiciary that should remain aloof from the pragmatic issues surrounding the parties' negotiations.

74. See, e.g., *Elkan v. Creditanstalt*, CV 98-6996 (E.D.N.Y. 2000).

Senator Alfonse D'Amato, who had consistently sought to assist Holocaust victims during his years in public life,<sup>75</sup> as a Special Master charged with exploring settlement.

In the absence of a unified Executive Committee, counsel for the Austrian banks was able to conduct a classic “negative auction,” probing each overlapping plaintiffs’ lawyer to identify the one lawyer willing to accept the lowest settlement terms on behalf of a settlement class. In March 1999, the negative auction process culminated in a decision by certain counsel, headed by Edward Fagan and Robert Swift, to accept a payment of \$40 million to an Austrian bank settlement class in satisfaction of all claims by Holocaust victims against Austrian banks.<sup>76</sup>

In an effort to make the \$40 million cash payment appear more palatable, the Austrian banks executed the so-called “Austrian assignment,” an assignment of all claims which they purportedly possessed against German banks, primarily Deutsche Bank and Dresdener Bank, for the alleged looting and mismanagement of Austrian banks during the Nazi era.<sup>77</sup>

The Austrian assignment was described to Judge Kram and to Special Master D'Amato as providing a significant economic enhancement to the \$40 million cash payment. For example, an employee of counsel for the defendant banks testified as a witness for both the plaintiffs and the defendants at the Rule 23(e) fairness hearing, stating that the securities involved in claims underlying the Austrian assignment were currently valued at \$300 million.<sup>78</sup>

On January 6, 2000, Judge Kram upheld the Austrian bank settlement’s fairness under Rule 23(e), relying in part on the representations to her that the Austrian assignment provided additional economic value to the settlement class.<sup>79</sup> The Second Circuit affirmed the finding of fairness, also relying on representations that the Austrian assignment added value to the cash settlement.<sup>80</sup>

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75. As Chair of the Senate Banking Committee, Senator D'Amato was instrumental in urging both Swiss and German banks to deal justly with their Holocaust-era obligations. Senator D'Amato participated in the final day of negotiations in the Swiss banks case, aiding the parties in reaching agreement on the interest issue.

76. As initially negotiated, the Austrian bank settlement contemplated payment of \$30 million to the class, with \$10 million set aside for administrative costs and attorneys’ fees. Austrian Bank Settlement, *supra* note 4.

77. *See* Austrian bank settlement, *supra* note 4(h).

78. *See* Transcript of the Fairness Hearing in front of Judge Kram in November 1999, *supra* note 4(i), at 4-118.

79. *In re* Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164, 179 (S.D.N.Y. 2000).

80. *D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001).

Unfortunately, the Austrian assignment was legally worthless on the day it was made because the causes of action underlying the Austrian assignment had been explicitly extinguished by the Austrian State Treaty of 1955, which abrogated all legal claims of Austrians against Germans arising out of the Nazi era.<sup>81</sup> Moreover, it appears that the defendant banks knew, at the very moment the claims were being touted to Judge Kram as economically valuable, that the Austrian assignment claims had been extinguished by treaty some forty-five years earlier.<sup>82</sup>

Given the text of the Austrian State Treaty, it has proven impossible to enforce the claims underlying the Austrian assignment in any forum. The German Foundation refused to honor claims premised solely on the Austrian assignment because the claims are legally worthless. Judge Kram's appointment of special counsel to enforce the Austrian assignment ended in fiasco, with the court-appointed counsel seeking leave to discontinue his action in large part because the Austrian Ambassador to the United States had confirmed that the claims had been extinguished by treaty.<sup>83</sup> Judge Kram was left with the unenviable option of seeking to pressure the German Foundation to set aside funds to pay claims premised solely on the Austrian assignment despite the legal invalidity of the underlying claims. Her last ditch effort to salvage the Austrian assignment by holding the German Foundation hostage until it agreed to pay a ransom to holders of the Austrian assignment ended in the issuance of writ of mandamus by the Second Circuit directing her to let the German Foundation go.<sup>84</sup> The \$40 million cash settlement has not yet been distributed.<sup>85</sup>

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81. The operative language of Article 23(3) of the Austrian State Treaty of 1955 provides: Austria waives on its own behalf and on behalf of all Austrian nationals all claims against Germany and German nationals outstanding on 8<sup>th</sup> May 1945, except those arising out of contract and other obligations entered into, and rights acquired, before 13<sup>th</sup> March 1938. This waiver shall be deemed to include all claims in respect of transactions effected by Germany during the period of the annexation of Austria and all claims in respect of loss or damage suffered during the said period.

*See* U.S. Treaties and Other International Agreements in Force, 6 U.S.T. 2408, 2432.

82. For example, at the apparent behest of defendants, the Austrian bank settlement agreement was amended on May 14, 1999, to negate any warranty that the Austrian assignment of claims had value under Austrian law. In addition, officials of Bank Austria have publicly admitted that they knew the claims were valueless even as they assigned them to the Austrian settlement class. *See* Austrian bank settlement, *supra* note 4(h).

83. *See* Order with transcript dated May 21, 2001, *supra* note 4(k).

84. *In re Austrian & German Bank Holocaust Litig.*, 250 F.3d 156 (2d Cir. 2001).

85. *See infra* Part III.D.2.

## C. The Establishment of the German Foundation

### 1. Negotiating a Structure

In late January 1999, on the eve of oral argument in *Iwanowa*, the German Foundation Industrial Initiative, a consortium of seventeen major German corporations,<sup>86</sup> announced a willingness to seek a negotiated resolution of all Holocaust-related litigation against German companies. In early February 1999, German Chancellor Schroeder announced the willingness of the German government to contribute to a just settlement of Holocaust-related claims against German defendants. On March 8, 1999, cocounsel Mel Weiss and I presented oral argument before Judge Greenaway in *Iwanowa*. The District Court's careful questioning made it clear that the litigation was being taken very seriously.

The German defendants responded. In early March, immediately after oral argument in *Iwanowa*, the United States and Germany convened an international negotiation involving eight nations,<sup>87</sup> representatives of German industry,<sup>88</sup> nongovernmental organizations representing Holocaust victims,<sup>89</sup>

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86. The following German corporations are founding members of the German Industrial Initiative: Allianz AG; BASF AG, Bayer AG, BMW AG, Commerzbank AG, DaimlerChrysler AG, Degussa-Huls AG, Deutsche Bank AG, Deutz AG, Dresdener Bank AG, Hoechst AG, RAG AG, Robert Bosch GmbH, Siemens AG, VEBA AG, ThyssenKrupp AG, and Volkswagen AG.

87. In addition to Germany and the United States, the negotiators included representatives of the governments of Israel, Poland, Russia, the Czech Republic, the Ukraine, and Belarus. The United States delegation was headed by Stuart E. Eizenstat, Deputy Secretary of the Treasury. The German delegation was initially headed by Bodo Hambach. Leadership of the German delegation was ultimately assumed by Otto Graf Lambsdorff, a past German Minister of Finance, whose efforts were instrumental in reaching agreement. Stuart Eizenstat and Graf Lambsdorff were tireless in keeping the discussion alive and in finding ways to bridge seemingly irreconcilable differences. Helpful technical assistance was provided to the negotiations by demographers at the University of Florence who helped in estimating the number of Holocaust-survivors in various countries.

88. German industry was represented by the German Industrial Initiative, headed by Dr. Manfred Genz, Chief Financial Officer of Daimler-Chrysler. Dr. Genz, a skilled and tenacious negotiator, deserves credit for persuading German industry to support the German Foundation, and for his tireless efforts in raising funds from German industry to meet the DM 5 billion commitment. Of course, it did not hurt that the industry contribution to the German Foundation was tax deductible, resulting in a net 40% savings for each contribution. In fact, German taxpayers shouldered approximately 70% of the cost of the German Foundation.

The German Industrial Initiative was represented by Roger Witten, of Wilmer, Cutler & Pickering, whose imaginative approach to many issues provided valuable guidance. Mr. Witten also represented the Swiss banks in the Swiss bank litigation and deserves credit for evolving the idea of a German Foundation, reinforced by an Executive Agreement between Germany and the United States, as the primary vehicle for the German settlement.

89. The principal nongovernmental organization was the Conference on Jewish Material Claims Against Germany (the "Claims Conference"), an umbrella organization representing most established Jewish organizations, which, since the early 1950s, had negotiated with Germany on behalf of Diaspora Jewry concerning material losses caused by the Holocaust. See [www.claimscon.com](http://www.claimscon.com) for

and several lawyers representing Holocaust victims.<sup>90</sup> Negotiations under the joint auspices of Germany and the United States continued for the next eighteen months, rotating between Bonn, Germany, and Washington, D.C., on a monthly basis.<sup>91</sup>

The negotiations passed through four phases. During the Spring and early Summer of 1999, the parties discussed the form of a possible settlement. By the summer of 1999, the negotiating parties had reached agreement that a nonjudicial German Foundation would be preferable to a traditional Rule 23 settlement class in order to provide expeditious relief to the many thousands of Holocaust victims who were not in a position to sue a wartime German defendant, either because (1) the defendant no longer existed; (2) the

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further information about the Claims Conference. Representatives of victims' organizations in several Eastern European countries also participated.

90. The principal spokesman for the American lawyers was Melvyn I. Weiss, whose candid observations repeatedly punctured the posturing of the diplomats and the German negotiators. Weiss made it clear that talk about charity and humanitarianism was self-serving nonsense. According to Weiss, self-interest, driven by fear of the American courts, was the engine that drove the negotiations. Michael Hausfeld and I also played substantial roles during the discussions. Other American lawyers who participated constructively were Morris Ratner, Richard Shevitz, Irwin Levin, Robert Swift, Steven Whinston, Larry Kill, and Edward Fagan. Deborah Sturman provided valuable assistance to plaintiffs' negotiating team, repeatedly drawing on her knowledge of German law and society.

91. This is not the forum for an analysis of the extraordinary dynamics of the negotiations that culminated in the establishment of the German Foundation. The mixture of domestic and international concerns, coupled with the mix of public and private actors, rendered the negotiations unique. In particular, the direct participation of lawyers acting as classic advocates for specific clients in discussions between and among sovereign nations culminated in a hybrid "settlement" consisting of: (1) the establishment of a DM 10 billion German public foundation to aid Holocaust victims; (2) the signing of a formal Executive Agreement between Germany and the United States relating to future Holocaust-related litigation; and (3) the voluntary dismissal of numerous Holocaust-related actions pending in U.S. courts in return for the establishment of the German Foundation. It has already been the subject of one somewhat critical article, Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFFAIRS (Sept./Oct. 2000), and will doubtless be the subject of additional discussion. See also Daniel Wise, *Diplomacy Met Lawyering in Historic Pact*, N.Y. L.J., Aug. 7, 2000.

One obvious issue raised by the participation of lawyers representing clients in the German negotiations leading to the establishment of the German Foundation is whether the rigid conflict of interest rules governing the behavior of lawyers representing clients in an adversarial proceeding must be strictly adhered to in the complex give-and-take of an international negotiation involving sovereign entities and presided over by the Executive branch of the U.S. government. Allegations have been made that certain lawyers representing Austrian bank claimants were too willing to compromise during the international negotiations in order to advance the interests of Holocaust victims generally, rather than play traditional "hold-up" games designed to advance the interests of the particular category of Holocaust victims whom they represented. The allegations have ripened into an effort to force those lawyers who represented Austrian bank claimants and also participated in the international negotiations to forfeit all fees awarded in connection with the establishment of the German Foundation as a penalty for having placed themselves in a conflict-of-interest situation. The trial court dismissed the forfeiture motion on separation of powers grounds, ruling that the courts lacked power to use the disciplinary rules to second-guess the outcome of complex international negotiations presided over by the Executive branch. *In re Austrian & German Bank Holocaust Litig.*, 2001 U.S. Dist. LEXIS 15573 (S.D.N.Y. 2001). An appeal is pending in the Second Circuit.

defendant was a government instrumentality shielded by sovereign immunity; or (3) they lacked access to legal resources.<sup>92</sup> A nonjudicial vehicle was also thought to provide a speedier means of placing funds in the hands of victims with lower transaction costs and less chance of strategic delay.<sup>93</sup>

## 2. *Negotiating the Form of the Settlement*

Once agreement on form was reached, the parties negotiated vigorously over the size of the German Foundation fund. On December 14, 1999, after

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92. One obvious issue raised by the choice of a nonjudicial mechanism for administering the settlement is whether the allocation and administration phases of a Federal Rule of Civil Procedure 23 (Rule 23) class action can routinely be delegated to a nonjudicial entity capable of acting with efficiency and flexibility in distributing assets to beneficiaries. The wisdom of choosing a nonjudicial distribution mechanism is demonstrated by the speed with which the German Foundation has distributed more than 2.7 billion Euros to 850,000 persons in little more than one year. No judicially administered mechanism could have matched the speed of distribution. If the classic Rule 23 route had been chosen, I suspect that we would still be embroiled in litigation over fairness and allocation.

On the other hand, there is no ongoing American judicial check on the activities of the German Foundation to assure fairness and compliance with the obligations imposed by the settlement documents. For example, plaintiffs' claim that German industry has failed to pay the full interest due on its principal obligation must be litigated in an independent plenary proceeding, perhaps before a German court, as opposed to being routinely referred to a Rule 23 supervising judge. Plaintiffs are seeking to litigate the interest issue in the District of New Jersey. *Gross v. The German Found. Industrial Initiative*, MDL No. 1337, DNJ Lead Civ. No. 98-4104 (WGB).

Counsel, conscious of the potentially controversial nature of shifting the administration of the settlement to a nonjudicial German Foundation, provided that the basic fairness of the settlement must be passed upon by an Article III judge prior to the voluntary dismissal of the pending cases. Judge William G. Bassler performed that difficult function with great distinction in connection with the slave labor cases. See *In re Nazi Era Cases Against German Defendants Litig.*, *supra* note 64; *In re Nazi Era Cases Against German Defendants Litig.*, 198 F.R.D. 429 (D.N.J. 2000). The procedure almost backfired when Judge Kram, concerned over the failure of the German Foundation to pay claims under the Austrian assignment, declined to grant permission to dismiss the German banking cases. *In re Austrian & German Bank Holocaust Litig.*, 2001 U.S. Dist. LEXIS 2311 (S.D.N.Y. March 7, 2001), necessitating a writ of mandamus from the Second Circuit. *In re Austrian & German Bank Holocaust Litig.* *supra* note 79. See also *infra* text accompanying notes 109-14.

Judge Kram's effort to force the German Foundation to recognize claims under the Austrian assignment delayed the establishment of the Foundation for approximately six months. The parties are now bitterly divided over whether German industry is obliged to pay interest as a result of the unexpected delay in payment.

93. The negotiators were aware that although the Swiss settlement had been signed on January 26, 1999, as of the signing of the Berlin Accords in July 2000, little or no Swiss settlement funds had been distributed to Holocaust victims, despite the efforts of a superb district judge and dedicated settlement counsel. The notice period, Federal Rule of Civil Procedure 23(e) fairness hearing process, and resultant appeals consumed eighteen months before distribution could begin. Once the Swiss settlement became final on May 30, 2001, with the dismissal of the final appeal from the fairness hearing, and the Plan of Allocation and Distribution was approved by the Second Circuit on July 26, 2001, *In re Holocaust Assets Litig.*, *supra* note 49, its pace of distribution dramatically increased. See *supra* Part I.E.

fierce bargaining in the shadow of the slave labor litigation<sup>94</sup> and aided by the personal intervention of German Chancellor Schroeder and U.S. President Clinton, the parties reached agreement at a plenary negotiating session in Bonn, Germany, on a capitalization of DM 10 billion for the German Foundation. The money was to be paid in equal shares by the German government and by German industry.<sup>95</sup>

By May 15, 2000, the parties had agreed on a complex formula, initially proposed by the United States, for allocating the DM 10 billion among categories of Holocaust victims. The German Foundation allocated DM 8.1 billion for the payment of slave labor and forced labor claims to approximately one million eligible surviving victims.<sup>96</sup> One billion deutschmarks has been set aside for payment of banking and insurance property claims to victims of German industry who have not been previously eligible for compensation. Seven hundred thousand deutschmarks has been set aside for a “Future Fund,” designed to foster tolerance in Europe.<sup>97</sup> Another DM 200,000 has been set aside for administrative expenses, including attorneys’ fees.

The allocation discussions were particularly difficult since, although the DM 10 billion fund was substantial, it could not begin to provide full compensation to all deserving Holocaust victims with strong legal and moral claims. Accordingly, lawyer-participants in the negotiations, borrowing standards developed in the Second Circuit to govern the allocation of complex class action recoveries, were careful to assure that all payments by the German Foundation were linked to viable legal claims involving

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94. The victims’ bargaining position was seriously eroded by the decisions of Judges Greenaway and Debevoise, issued on September 13, 1999, dismissing plaintiffs’ slave labor claims against major German companies. *Burger-Fischer*, *supra* note 2; *Iwanowa*, *supra* note 2. According to the District Courts, the Two-Plus-Four Treaty, *supra* note 69, had impliedly abrogated private international law claims for compensation arising out of German use of slave labor during World War II, and the German law claims were barred by an absurdly short two-year statute of limitations. *Burger-Fischer*, *supra* note 2; *Iwanowa*, *supra* note 2.

I believe that the decisions were almost certainly wrong in holding that the failure of the 2+4 Treaty to have explicitly made provision for the slave labor claims caused their implied demise. Once the Two-Plus-Four Treaty lifted the bar to litigation imposed by the London Debt Agreement of 1953, no affirmative action was needed to preserve the preexisting international law claims for compensation. I believe the United States Department of Justice supports my view.

95. *See* Berlin Accords, *supra* note 4(g).

96. The amounts of slave labor payments are carefully allocated by country. Within each country, a “partner organization,” often government supported, has the responsibility for assembling the names of recipients and transferring funds to the recipient. No funds are transferred to the partner organizations until verified names of recipients are submitted to the German Foundation. Periodic audits are conducted to assure prompt distribution of the funds to victims. Thus far, funds have been distributed to 850,000 victims without serious incident.

97. *See* Berlin Accords, *supra* note 4(g).

Holocaust-related injuries.<sup>98</sup>

In the context of the allocation discussions, the negotiating parties carefully considered the relationship between members of the Austrian bank settlement class and the German Foundation. The parties quickly agreed that, given German control of Austria during the *Anschluss* (Nazi Germany's annexation of Austria), Austrian bank class members should be eligible to supplement payments from the \$40 million Austrian bank cash settlement by seeking relief from the property claims panel established by the German Foundation on the same terms and conditions as any other claimant. The panel was established to distribute funds to Holocaust victims who had suffered uncompensated property damage at the hands of German industry. The German negotiators adamantly refused, however, to allocate funds from the German Foundation for the payment of claims premised solely on the Austrian assignment, arguing that the claims had been abrogated by the Austrian State Treaty of 1955. Additionally, concerns were raised over whether claims underlying the Austrian assignment, which appeared to be garden-variety intercorporate looting, should qualify as Holocaust-related injuries, and whether the Austrian assignment, if it had value at all, could be enforced elsewhere.

Several counsel who had been instrumental in the negotiation of the Austrian bank settlement agreement vigorously, but unsuccessfully, attempted to persuade the negotiating parties to set aside German Foundation funds for the payment of Austrian assignment claims, warning that Judge Kram, who was presiding over the Austrian bank litigation, would seek to block the German Foundation unless funds were allocated to the Austrian assignment claims.

Counsel who had played no role in the Austrian bank settlement argued that it would be wrong to shift scarce German Foundation funds from Holocaust victims with viable legal claims to Austrian assignment claimants who lacked a viable legal claim, especially when the claims underlying the Austrian assignment did not appear to be Holocaust-related and could, in any event, be enforced elsewhere. After hearing the various arguments, Deputy Secretary Stuart Eizenstat, who chaired the United States delegation, urged the parties to accept an allocation formula that remitted Austrian assignment claimants to independent enforcement of their claims. All counsel ultimately acceded to Secretary Eizenstat's suggestion.

In June 2000, the negotiating parties then turned to the final phase of the

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98. See *In re Holocaust Victims Assets Litig.*, *supra* note 49; *In re Agent Orange Prod. Liability Litig.*, *supra* note 41, at 183-84. See also *Curtiss-Wright Corp. v. Helfand*, 687 F.2d 171, 174 (7th Cir. 1982).

negotiations, the provision of so-called “legal peace” to German industry in return for the establishment of the German Foundation. The German negotiators insisted upon legal peace as a precondition to the establishment of the German Foundation.<sup>99</sup> Attaining legal peace, the parties agreed, entailed two concepts: (1) deferring the actual payment of German Industry’s DM 5 billion financial commitment to the German Foundation until the dismissal of all Holocaust-related litigation pending in American courts<sup>100</sup> and (2) signing an Executive Agreement between Germany and the United States committing the United States to file a Statement of Interest in future Holocaust-related litigation against German defendants that urged the courts to consider the German Foundation as the exclusive forum for the resolution of Holocaust-related claims.<sup>101</sup>

On July 17, 2000, the agreements establishing the German Foundation were formalized in three documents referred to as the Berlin Accords: (1) a Joint Statement of the Negotiating Parties, including a detailed allocation formula and a definition of “legal peace”; (2) an Executive Agreement between Germany and the United States committing the United States to file a Statement of Interest in connection with future Holocaust-related litigation against German defendants; and (3) a statute of the Bundestag (the Foundation Law), enacted on August 12, 2000, bringing the German

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99. Counsel initially attempted to persuade German industry that a Federal Rule of Civil Procedure 23 class action would provide the most enduring “legal peace.” Since the German negotiators had an aversion to class actions, the idea went nowhere. In the end, the German side was willing to trade less enduring “legal peace” for freedom from an American class action.

100. The claims of named plaintiffs were to be dismissed voluntarily with prejudice. Claims of putative class members were to be dismissed without prejudice. Almost all individual dismissals were voluntary. *In re Nazi Era Cases Against German Defendants Litig.*, 213 F. Supp.2d 439, 442 (D.N.J. 2002). The few involuntary individual dismissals were based on the Statement of Interest filed by the United States in accordance with the U.S-German Executive Agreement discussed *infra* note 104. Several Holocaust-era cases against German defendants remain pending. *See Gerling Global Reinsurance Corp. v. Low*, *supra* note 2; *Gerling Global Reinsurance Corp. v. Gallagher*, *supra* note 2. *See also Deutsch v. Turner Corp.*, CV-4405 (C.D. Cal. 2000) (appeal pending); *Ungaro-Benages v. Dresdner Bank AG*, No. 1:01 CV 2547 (S.D. Fla. June 18, 2001).

101. Power to enter into an Executive Agreement binding the Executive branch to ask the Article III courts to defer to the German Foundation in connection with future Holocaust-era litigation was premised on *Dames & Moore v. Regan*, 453 U.S. 654 (1980), upholding an Executive Agreement with Iran arising out of the hostage crisis that extinguished causes of action against Iran and remitted plaintiffs to an international claims program at The Hague. Unlike *Dames & Moore*, no effort was made to extinguish the underlying cause of action against German defendants. Instead, the Executive branch committed to filing a precatory suggestion that Article III courts treat the German Foundation as the exclusive forum for resolving Holocaust-related claims against German defendants. Such a precatory Statement of Interest has no preclusive effect. It leaves to the discretion of an Article III court whether additional Holocaust-era litigation should be entertained. *See, e.g., Kadic*, *supra* note 29; *Am. Int’l Group, Inc. v. Islamic Republic of Iran*, 657 F.2d 430 (D.C. Cir. 1981). *See generally* *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221 (1986). *See also In re Nazi Era Cases Against German Defendants Litig.* (Frumkin) 129 F. Supp.2d 370 (2001).

Foundation into existence as an instrumentality of the German government and codifying the parties' agreements as German law.<sup>102</sup> On August 21, 2000, the United States appointed me to the *Kuratorium* (Board of Trustees) of the German Foundation to fill the seat reserved for a lawyer representing victims of the Holocaust.<sup>103</sup> The position is uncompensated.

### 3. *Dismissing Class Actions in American Courts*

Beginning in September 2000 counsel began the process of securing dismissals of pending Holocaust-era litigation against German defendants<sup>104</sup> in order to fulfill the precondition to the payment of funds to the German Foundation by German industry.<sup>105</sup> After a searching inquiry, Judge William G. Bassler of the U.S. District Court for the District of New Jersey upheld the voluntary dismissal of virtually all pending slave labor cases against German defendants.<sup>106</sup> Shortly thereafter, Chief Judge Michael Mukasey upheld the voluntary dismissal of all pending Holocaust-era insurance cases against German defendants, characterizing counsels' work as "remarkable."<sup>107</sup> On December 28, 2000, Special Master Charles Stillman, who had been

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102. Copies of the basic documents that make up the Berlin Accords have been deposited with the *Law Quarterly*. See *supra* note 4(g).

103. The Board of Trustees of the German Foundation consists of representatives of the eight founding nations, representatives of five nongovernmental organizations serving Holocaust victims, four representatives of German industry, representatives of all major political groups in the Bundestag and Bundesrat, representatives of the German Executive, and one private lawyer representing Holocaust victims. The Board is chaired by Ambassador Dieter Kastrup, Germany's past-Permanent Representative to the United Nations and currently Chancellor Schroeder's Foreign Affairs advisor. Otto Graf Lambsdorff serves as Chancellor Schroeder's personal representative and as Vice Chair of the Board of Trustees. Pursuant to German law, the day-to-day management of the Foundation rests with a three-person Board of Directors elected by the trustees.

104. The Joint Statement requires the dismissal with prejudice of all pending individual actions and the dismissal without prejudice of claims of putative members of uncertified classes as a precondition to the payment of the German industry contribution of DM 5 billion, plus at least DM 100 million in interest. Unfortunately, disagreement has arisen concerning the meaning of the interest clause. German industry views it as establishing a ceiling; plaintiffs insist that it sets a floor. The District Court recently refused to entertain a Rule 60(b) motion designed to enforce the settlement agreement, holding that it lacked jurisdiction. An independent action seeking to enforce the settlement agreement is pending. *In re Nazi Era Cases Against German Defendants Litig.*, 213 F. Supp.2d 439 (D.N.J. 2002).

105. The German government's DM 5 billion payment to the German Foundation was made on schedule in two equal payments on October 31, 2000, and December 31, 2000. As discussed *supra* note 104, German industry's payment of DM 5 billion, plus DM 100 million in interest, was begun in June 2001 and completed in October 2001. The parties disagree over whether an additional interest payment of approximately DM 100 million is payable.

106. *In re Nazi Era Cases Against German Defendants Litig.*, *supra* note 64. On March 1, 2001, Judge Bassler dismissed the remaining cases, giving weight to the Statement of Interest filed by the United States. *Id.*

107. See various orders of Judge Mukasey, *supra* note 4(m). See also *supra* note 16.

appointed by Judge Kram to investigate the fairness of the German Foundation, warmly recommended the dismissal of all pending Holocaust-era cases against German banking defendants, thereby achieving legal peace and opening the way for immediate establishment of the German Foundation.<sup>108</sup>

Unfortunately, Judge Kram, deeply concerned over the refusal of the German Foundation to set aside funds to pay claims under the Austrian assignment,<sup>109</sup> declined to permit voluntary dismissal of the German bank cases unless the German Foundation altered its position with respect to the Austrian assignment.<sup>110</sup> Judge Kram was concerned that class counsel in the Austrian bank case had agreed to the establishment of the German Foundation without insisting upon payments to Austrian bank claimants under the Austrian assignment. She suggested that Austrian class counsel had abandoned the interests of the Austrian bank claimants in favor of other Holocaust victims. After a fruitless series of efforts to persuade Judge Kram to permit the German Foundation to come into being without setting aside funds to pay worthless Austrian assignment claims, counsel filed a petition for a writ of mandamus with the Second Circuit on March 20, 2000, seeking an order compelling Judge Kram to permit dismissal of the German bank cases in order to allow the German Foundation to come into being.<sup>111</sup>

Judge Kram vigorously resisted the applications, retaining David Boies to represent her personally in the Second Circuit, and appointing separate counsel to protect the rights of holders of the Austrian assignment. Heated language was exchanged in the mandamus papers, with Judge Kram's lawyers alleging ethical lapses by plaintiffs' counsel, and plaintiffs' counsel alleging that Judge Kram, in an effort to salvage a failed class action settlement in the Austrian bank case, was engaging in a form of "hold up," designed to force the German Foundation to recognize legally worthless claims under the Austrian assignment as the price of its existence.

On May 17, 2000, the Second Circuit issued a writ of mandamus directing dismissal of the German bank cases, holding that principles of Separation of Powers deprived the District Court of power to seek to interfere with the activities of the German Foundation.<sup>112</sup> On May 18, 2001, in response to the writ, Judge Kram entered an order unconditionally dismissing

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108. See Report of Special Master Charles Stillman, *supra* note 4(l).

109. The Austrian assignment is described *supra* note 79 and accompanying text.

110. Judge Kram codified her refusal to permit voluntary dismissal of the German bank cases in two opinions, dated March 7, 2000, and March 20, 2000. See *In re Austrian & German Bank Holocaust Litig.*, 2001 U.S. Dist. LEXIS 2311 (S.D.N.Y. Mar. 7, 2001).

111. *In re Austrian & German Holocaust Litig.* (Duveen), 250 F.3d 156 (2d Cir. 2001).

112. *In re Austrian & German Bank Holocaust Litig.*, *supra* note 79.

the German bank cases. On May 21, 2001, Judge Kram abandoned the effort to appoint separate counsel to enforce the Austrian assignment, noting that the Austrian Ambassador to the United States had expressed doubt over the legal viability of the underlying claims and that the action of the German Foundation in opening its property compensation fund to Austrian bank claimants had conferred a significant benefit on the Austrian bank settlement class.<sup>113</sup>

On May 30, 2001, the German Bundestag announced the achievement of legal peace, paving the way for the speedy transfer of German industry's DM 5 billion (plus at least DM 100 million in interest) commitment to the German Foundation.<sup>114</sup> Distribution of the German Foundation's assets to Holocaust victims began virtually immediately. Between June 2001 and August 2002, the German Foundation distributed more than DM 3.5 billion in connection with payments to 850,000 Holocaust victims.

### III. SOME PRELIMINARY REFLECTIONS

#### *A. Should the Cases Have Been Brought?*

This brief overview of the Holocaust litigation makes it clear that a broad array of difficult substantive and procedural issues are raised by the cases, ranging from federal jurisdiction to complex issues of international law. Perhaps more importantly, the cases raise profound moral and strategic questions. Did the litigation unduly "monetize" the horrors of the Holocaust, reducing the appalling reality from a moral to a material event?<sup>115</sup> Did the litigation force survivors to re-live horrible experiences that they had managed to surmount?<sup>116</sup> Did it give the impression that survivors were

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113. See Judge Kram's Order and Transcript, *supra* note 4(k).

114. Between June and October 2001, German industry completed the transfer to the German Foundation of virtually its entire DM 5 billion financial obligation, plus a DM 100 million interest payment. See *supra* notes 104-05. Disagreement also exists over payments of approximately DM 63 million to the International Commission on Holocaust Era Insurance Claims (ICHEIC), for which certain German insurance companies claim a credit.

115. Debates over the wisdom of seeking restitution from Swiss, German, Austrian, and French companies for their Holocaust-related behavior mirrors the bitter disputes during the 1950s in Israel and the Diaspora over whether to accept reparations from Germany. Professor Bayzler identifies ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES*, 9, 23-27 (2000) and TOM SEGEV, *THE SEVENTH MILLION: ISRAELIS AND THE HOLOCAUST* 189-252 (1991), as helpful descriptions of the early debates. The early debates ended in favor of accepting reparations. Germany estimates that it has paid at least DM 100 billion in reparations for Nazi atrocities.

116. Criticism has been leveled at the questionnaires circulated as part of the Swiss banks settlement. Questionnaires seeking information from potential class members were sent to approximately one million Holocaust victims and their families. The questionnaires, which asked

interested in blackmail?<sup>117</sup> Did it result in increased anti-Semitism?<sup>118</sup> Did the lawyers profiteer?<sup>119</sup> Were the settlements adequate?<sup>120</sup> Were the allocations fair?<sup>121</sup> Can the litigation be replicated in other areas, such as reparations for black slavery?

I am too close to the process to respond fully to many of these questions, especially the moral and strategic ones. Apart from the emotional drive to assist Holocaust victims whose claims had been ignored for more than fifty

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recipients to describe the nature of their monetary losses, had a twofold purpose: (1) to allow potential class members to express support for or opposition to the settlement; and (2) to gather information needed to assist the Special Master in designing a fair plan of allocation. Approximately 580,000 questionnaires were returned, demonstrating overwhelming support for the settlement. Only 300 persons elected to opt out of the class.

Filling out the questionnaires was undoubtedly a painful process for many Holocaust survivors. On the other hand, the information gleaned from the questionnaires was important in structuring the allocation plan, and will, I believe, be a priceless trove of information for historians. The questionnaires will be placed in an appropriate historical archive at the close of the case.

117. Some, notably Norman Finklestein, have claimed that the Holocaust-related litigation was a form of blackmail. The blackmail critique is puzzling and very unfair. The legal and factual claims against Swiss banks and German industry for profiteering at the expense of Holocaust victims were clearly well-founded. I do not understand why the vigorous assertion of a well-founded legal claim can be equated with blackmail. Surely, the test for legitimacy in litigation cannot be certainty of victory. Perhaps the blackmail critique is aimed at the use of political and public pressure to force the German and Swiss corporations to the bargaining table. If that is blackmail, though, most of what goes on in a democracy is blackmail. When I boycotted grapes to support farm workers seeking a union contract, was that blackmail? Is a strike by a labor union blackmail? Was the boycott of apartheid South Africa blackmail? If, as I believe strongly, the legal claims underlying the Holocaust-related litigation were well founded, nothing that occurred during the litigation aimed at forcing the defendants to take the claims seriously can remotely be equated with blackmail.

118. The recent Holocaust-related litigation does appear to have stimulated anti-Jewish feeling in Switzerland. On the other hand, the German Foundation appears to have the broad support of the German people. My response to the anti-Semitism argument is that refusal to suffer injustice without fighting back is the best way to fight anti-Semitism. It is, in my opinion, much more dangerous for Jews to remain silent in the face of injustice than to challenge it openly.

119. One of the infuriating aspects of press coverage of the Holocaust litigation has been the constant harping on greedy lawyers out to make a fast buck on the suffering of Holocaust victims. Most of the lawyers behaved responsibly. Thus far, the only grant of fees has been a total of approximately \$50 million payable to fifty-one lawyers by the German Foundation at the recommendation of Nicholas deß Katzenbach and Kenneth Feinberg. In the interest of full disclosure, the arbitrators awarded me approximately \$4.3 million for my efforts on behalf of the German Foundation. In connection with the Swiss bank case, Mel Weiss, Mike Hausfeld, and I have waived fees in connection with obtaining the settlement in the Swiss case, leading to a total fee structure in that case for achieving the settlement of approximately \$6 million, of which \$1.6 million is being donated to Columbia Law School. If that is profiteering, we could use more of it.

120. I have repeatedly conceded that the amounts involved are far too small to even begin to approach real compensation. But, given the limits of the real-world, I believe \$8 billion is an acceptable figure.

121. Gabriel Schoenfeld has been critical of the Holocaust-related litigation, arguing that it overlooks the interests of individual survivors in favor of organizations and distorts the historical record. Gabriel Schoenfeld, *Holocaust Reparations—A Growing Scandal*, COMMENTARY, Sept. 1, 2000, at 25. I can only reply that every effort has been made to provide funds to survivors, not to organizations, and that the cases have strengthened the historical record, not distorted it.

years, I felt the litigation was necessary to close a hole in international jurisprudence. In the years since the Nuremberg Tribunals, we have moved slowly, but inexorably, towards a conception of transnational law that holds actors responsible for violations of norms of human decency, regardless of local law.<sup>122</sup> The United Nations war crimes tribunals for the former Yugoslavia and Rwanda, and the existence of a treaty ratified by almost sixty nations (but not the United States) establishing the International Criminal Court in Rome, bears witness to the maturation of the idea that international law is finally learning how to deal with the monster who establishes and operates death camps. Such a monster is guilty of crimes against humanity and should be tried before an international tribunal for violation of the Nuremberg Principles.

But there has been no parallel discussion about how to deal with the person who manufactures and sells the poison gas or the barbed wire for use in the death camps, knowing that the profit-making activity aids and abets in the commission of a crime against humanity. As the appended June 16, 1997, memorandum of law in the Swiss case<sup>123</sup> demonstrates, I went back to Aristotle and asked why general principles of unjust enrichment and restitution, derived from Nichomachean Ethics, do not compel recognition of a general principle of international law that causes the profits of genocide or crimes against humanity to be held in constructive trust for the victims. In short, I wanted to take the profit out of cooperating with war criminals. In fact, the theme that links the Swiss bank cases, the German slave labor cases, the German bank cases, and the German insurance cases is an attempt to identify the unjust enrichment derived by private defendants and to force restitution to the victims or their heirs of the unjust profit. Establishing that principle seemed to me of sufficient importance to warrant the risk of tainting the memory of the Holocaust with materialism.

As I became more deeply enmeshed in the litigation, questions of allocation complicated my early, naive vision of the cases as premised on a simple desire to force the disgorgement of unjust profits. I badly underestimated the difficulty of the question of to whom the profits should be disgorged to, and I underestimated the quintessential lawyer's challenge of how to work out a mechanism to develop a fair allocation plan. The various

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122. For more discussion on the development of transnational law, see Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991). 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 (1997); Curtis A. Bradley, *STEFAN S. RIESENFELD SYMPOSIUM 2001: World War II Compensation and Foreign Relations Federalism*, 20 BERKELEY J. INT'L L. 282 (2002).

123. See Plaintiffs' Memorandum of Law dated June 1997, *supra* note 4(b).

documents that I filed in support of the fairness of the Swiss settlement and the German Foundation forced me to confront the fairness of a series of possible allocations and the alternatives available to lawyers in attempting to evolve allocation mechanisms. I rejected the classic adversary model as a means of developing an allocation plan because I refused to pit Holocaust survivors against one another in an undignified scramble for a piece of a legally sufficient, but morally inadequate, settlement fund. Instead, I sought to develop an allocation procedure that respected democratic theory by using “exit, loyalty, and voice” in order to create *ad hoc* political entities in the form of Swiss settlement classes and the German Foundation capable of binding members of the survivor community to decisions reached by fair procedures.

Moreover, as the factual record became richer and more compelling, I realized that another reason for bringing the cases was to speak to history—to build a historical record that could never be denied. I now believe that the remarkable outpouring of memory that took place in the 580,000 questionnaires returned in the Swiss bank case may well be a priceless trove of history, constituting the last and only poll of the surviving Holocaust generation. The historical data uncovered by the Volcker Committee, the Bergier Committee, and the CRT II process have forever changed the way Switzerland can view its World War II experience. Finally, the factual material developed in connection with the German slave labor litigation, and the data assembled in connection with allocation, forced the recognition of the massive evil at the heart of the Nazi industrial complex.

I remain convinced the litigation was both morally and strategically worthwhile, especially since it has brought economic relief to so many poor survivors in Eastern Europe. But I will leave that question for others—it is toward more mundane lawyers’ issues that I want to turn in closing: (1) Was it appropriate to litigate the cases in an American court? (2) Was the task of allocation adequately performed?

### *B. Should the Cases Have Been Brought in an American Court?*

I want to avoid the temptation to advance a technical answer to this question. The appended briefs<sup>124</sup> discuss the complex issues of general jurisdiction, venue, *forum non conveniens*, act of state doctrine, and equitable abstention that would underlie any effort to shift the Holocaust-related litigation to another country. We can do that dance if we wish to. But I

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124. See *id.* See also Brief of Appellants to the Third Circuit, *supra* note 4(c).

believe that the technical answers are driven by something deeper—a sense of the moral obligation of foreign defendants to live by American rules of fundamental fairness, both substantive and procedural, if they wish to participate in the remarkable success of this economic, social, and political culture. The fact is that alternative forums are simply inadequate to give the victims a fighting chance at justice.

At the risk of hubris, I want to remind us all of the astonishing success of our economic and political models. Measured by prosperity, freedom, innovation, tolerance, and the simultaneous achievement of social mobility and political stability, the American experiment is a remarkable success.<sup>125</sup> It is so successful that no major economic player on the world stage can hope to succeed without participating vigorously in our market and reaping the benefits of our economic prosperity.

But that market, and the resulting prosperity, did not spring up by accident. Our success flows from a social and political commitment to fairness and the values of decency that find their expression in the American respect for the rule of law—a virtually unique legal system that provides a genuinely level playing field for a poor Holocaust survivor seeking to confront a corporate giant. In short, I believe that we are prosperous in large part because we have enjoyed—and dispensed—the blessings of “Equal Justice under Law” and have built a legal system that provides the weak with a fair chance at victory, at least sometimes. When a foreign corporation wishes to reap the benefits of our economic and social system, I am not the slightest bit embarrassed to insist that the foreign corporation agree to live by the legal rules that allowed the social and economic system to flourish.

Thus, there is a choice to be made: remain provincial and shield yourself from American values as expressed in the American legal system or seek to play on the American stage and learn to live by them. In short, I do not apologize to foreign defendants who want to reap the benefits of the American dream without agreeing to play by American rules.

Having made my jingoistic point, I would rather have litigated the Holocaust cases in the countries where the evil took place. Effective litigation in those countries would have been more educational and would have contributed to the growth of a world in which reoccurrence of the Holocaust is unthinkable. That is why I believe that the 1996 *Krakauer*

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125. I have spent too many years as Legal Director of the American Civil Liberties Union to pretend that the system is perfect or even close to perfect. We have our problems of race, gender, and intractable pockets of poverty. Moreover, there is much to deplore in our culture’s acceptance—indeed embrace—of sex and violence and the growth of a popular culture that coarsens our lives by celebrating material values to the exclusion of almost everything else.

decision by the German Federal Constitutional Court that lifted the bar of the London Debt Agreement of 1953 and made the slave labor litigation possible was so important. It was a German decision that helped make possible a German Foundation constituting a German response to the problem, a response that has widespread support among the German people. More than six thousand German companies have contributed to the German Foundation, many of which had no possible exposure to an American lawsuit, but simply wanted to help right a historic wrong.

Unfortunately, *Krakauers* are in short supply. The legal systems of Switzerland and Germany are so stacked in favor of defendants and so hostile to the claims set forth in the Holocaust cases that it would have been suicidal to litigate in those forums. Swiss pleading law would have ended the Swiss bank litigation before it began. German procedure would have made it impossible to sue effectively on behalf of classes of slave laborers. “Discovery” is a dirty word in both Germany and Switzerland. Class actions are perceived as a symptom of American madness. The mindset of the judiciary is timid and rigidly locked into the status quo. In short, the European courtroom is not currently a level playing field; it is a fortress for the powerful. Until European justice evolves into a level playing field, lawyers have no choice but to resort to an American courtroom as the only game in town.

### *C. Were the Procedures Surrounding Allocation Adequate?*

*Amchem*<sup>126</sup> and *Ortiz v. Fibreboard Corp.*<sup>127</sup> warn that mass resolution of disputes must be sensitive to fairness in the allocation process. The allocation issues posed by the Holocaust litigation were extraordinarily difficult. The Swiss settlement has five classes, as noted above. Moreover, except for the Slave Labor II class, the Swiss settlement only benefits Jews, Jehovah’s Witnesses, Sinti-Roma, homosexuals, and the disabled. National origin and political persecutees are excluded and are free to bring their own lawsuit.

The Second Circuit upheld the exclusion of national origin and political persecutees from the class definition.<sup>128</sup> Moreover, the Circuit also upheld the allocation of \$800 million to bank accounts; approximately \$200 million to Slave Labor I and Slave Labor II; \$100 million to Looted Assets, administered *cy pres* for the poorest survivors; and up to \$80 million for

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126. See *supra* note 40.

127. 527 U.S. 815 (1997). See also *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001), *cert. granted*, *Dow Chemical Co. v. Stephenson*, 2002 U.S. LEXIS 8078 (U.S. Nov. 4, 2002).

128. See *In re Holocaust Victim Assets Litig.*, 225 F.3d 191 (2d Cir. 2000).

Refugees, as well as approximately \$50 million to \$75 million for administrative expenses, including an enormously ambitious worldwide notice program and an expensive claims facility in Zurich under the auspices of Paul Volcker to determine claims to bank accounts.<sup>129</sup> As my appended declarations in support of the allocation process<sup>130</sup> recites, I believe that the use of a Special Master, with careful, unbiased consideration of the claims of each class, satisfies the fairness concerns presented by *Amchem* and *Ortiz*. It would, I believe, have been terrible social policy, and very bad law, to have pitted the elderly survivors against each other in a classically adversary struggle for the settlement proceeds. I vowed that we would avoid a situation where the last thing a survivor would remember was fighting with another survivor for a pittance. But avoiding a classic adversary proceeding entails risk. I believe that one of the challenges of *Amchem* and *Ortiz* is to explore allocation procedures that do not replicate war but assure fairness to the class members. The technique that we used in the Swiss bank case of a neutral Special Master, open access to the Special Master, and commitment by each lawyer to assist all persons seeking access to the Special Master was the right one for the social context of this case.

The allocation mechanism in the German Foundation avoided the judicial process entirely.<sup>131</sup> Instead, it took place in the context of international negotiations involving a hybrid of diplomacy, settlement talks, and humanitarianism. A double allocation was required. First, it was necessary to allocate the DM 10 billion among the categories of claimants. Eventually, DN 8.1 billion went to slave labor, DM 1 billion to property loss, DM 700 million to a Future Fund to support tolerance in Europe, and DM 200 million for administration, including legal fees.<sup>132</sup> Then, it became necessary to allocate the slave labor funds by country and the banking and insurance funds between persons with “hard” claims and persons whose documents were destroyed or who died heirless. Should we seek to replicate the German Foundation allocation process by taking the allocation process out of the judiciary in complex class actions? Is it possible to develop allocation

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129. Subsequent to the Second Circuit’s order, the district court increased funds allocated to the Slave Labor and Looted Assets classes by 45%. *Id.* at 812.

130. See *supra* note 4(e).

131. The process is described in my appended declaration seeking leave to dismiss the German slave labor cases in order to permit the German Foundation to come into being. See Nov. 13, 2000, document in support of the German Foundation’s allocation plan, *supra* note 4(e).

132. Legal fees were negotiated as part of the international agreement establishing the Foundation. The parties agreed that a maximum of DM 125 million, and a minimum of DM 100 million would be allocated by arbitrators, Nicholas deß Katzenbach and Kenneth Feinberg, on the basis of time charges and the relative value of the services.

mechanisms in which government plays a role at the negotiating table, thereby enabling the parties to reach an agreement on allocation pursuant to a fair process without engaging in classic adversary proceedings that would render the process unmanageable?

## CONCLUSION

This preliminary paper merely scratches the surface of the legal and political issues raised by the Holocaust cases. For example, what is the effect of the Statement of Interest filed by the United States pursuant to the Executive Agreement between Germany and the United States that brought the German Foundation into being?<sup>133</sup> Will the notion of a nationwide release of all Swiss defendants survive collateral attack? Most importantly, is the Holocaust litigation a model for other efforts to enforce international norms in an American court? Does the theory of unjust enrichment and restitution at the heart of the Holocaust cases transfer to other great historical injustices such as corporate unjust enrichment from slavery?

Efforts to replicate the success of the Holocaust litigation in the context of victims of Japanese crimes against humanity are currently underway. Can Korean “comfort women” forced into prostitution by the Japanese government find justice in an American courtroom after fifty years?<sup>134</sup> Armenian plaintiffs are exploring actions against insurance companies arising out of the great historical injustices perpetrated against the Armenian people. Debates over reparations for black slavery dominated the recent United Nations gathering in Durban, South Africa.

Finally, given the success of the Holocaust litigation in playing a significant role in generating \$8 billion in compensation for Holocaust victims, what role does law—and American justice—have in dealing with such issues in the context of victims who cannot marshal the political and social clout displayed by victims of the Holocaust?

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133. The issue is currently pending in *Deutsch v. Turner Corp.* and in *Ungaro-Benages v. Dresdner Bank AG*, *supra* note 101. See also *In re Nazi Era Cases Against German Defendants Litig.* (Frumkin), 129 F. Supp.2d 370 (2001).

134. *Hwang Geum Joo v. Japan*, 172 F. Supp.2d 52 (D.D.C. 2001) (appeal pending).