LITIGATING THE HOLOCAUST

By: Michael J. Bazyler

The subject of the Holocaust is very close to my heart. My formative life experiences come from growing up in postwar Poland, in the city of Lodz, the site of the infamous Lodz Ghetto. I still remember, as a young boy, walking during the 1960s past streets where remnants of the barbed wire from the Ghetto remained and from where almost all inhabitants were shipped to their death in Auschwitz.

Most of my parents' friends were Holocaust survivors. As a child, it was not unusual to see numbers tattooed on the arms of the adults visiting our home. My parents always feared another war in Europe, and this fear led us to emigrate from Poland to the safety of America. I joined The "1939" Club and became a member of the Board, and in 1999, I was elected as a vice president.

Historians estimate that the Nazis stole between $230 billion and $320 billion in assets, in today's dollars, from the Jewish population in Europe. For over one-half century, most of these losses remained uncompensated. While since the 1950s postwar West Germany has paid reparations amounting to approximately $70 billion to some Jewish victims of Nazi persecution, the amounts to each individual were small and came nowhere close to compensating for the suffering endured by the victims and the actual monetary losses suffered by European Jewry.

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

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

Diplomacy, individual pleas for justice by Holocaust survivors and various Jewish organizations for the last fifty years, and even suits in foreign courts,

have not worked. It is only now, with the intervention of American courts, that elderly Holocaust survivors (there are approximately 100,000 Holocaust survivors still alive in the United States and 360,000 in Israel) see their last great hope to obtain compensation being fulfilled.

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

Since then, the floodgates of litigation have opened, with over fifty more civil lawsuits filed in both federal and state courts against various foreign and American corporate and individual defendants arising from Holocaust-era events. The number is still rising. Each month brings news of the filing of another Holocaust-era lawsuit in the United States. The field is so dynamic that some law firms have been labeled, depending upon their size, as now having either the entire firm or an entire department engaged in a "war crimes practice." In contrast to the slew of lawsuits filed in the last two-and-one-half years, between 1945 and October 1996, less than a dozen lawsuits were filed involving Holocaust claims. Most were dismissed.

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

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

As an international human rights lawyer and a law professor, I can proudly state that an important factor in making a Holocaust lawsuit brought in the United States viable today was the victory achieved by the human rights bar in the last two decades in convincing American courts that human rights victims injured abroad can sue in the United States. That step began with *Filartiga v. Pena-Irala*, the landmark 1980 Second Circuit Court of Appeals opinion which held that a victim of state-sanctioned torture can bring suit against the torturer in the United States even though the torture took place on foreign soil.

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

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

But there's another reason that we didn't deal with this issue for 50 years—because the trauma of the human tragedy was so tremendous, so enormous, so gargantuan, that nobody wanted to talk about material loss for fear that it will lessen the human tragedy. Because when you begin talking about property, then what about life? And so for at least two generations—yeah, Israel decided to take reparations, it needed it—but individually we didn't deal with it. Not that we didn't know that there were bank accounts, that there was insurance, that there was property. My mother's family had a factory in Warsaw. My father had some stores in Baranowicz. But nobody ever raised it. Nobody ever said, look what we lost. I don't remember conversations of material loss. Now I realize how significant the loss was, but nobody talked about it. Because what they talked about was that they lost 16 members of their family.

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

Claims Against the Swiss

The first set of cases are claims filed in the Eastern District of New York against the three major Swiss banks on behalf of Holocaust survivors and their heirs who deposited money in Switzerland for safekeeping. As the tragedy of World War II began unfolding, Jews and other persecuted minorities in Europe, under the inducement of Swiss bank secrecy laws, began to deposit money in neutral Switzerland. After the war, when the survivors or heirs asked for their money back, they were refused.

The claims filed had a simple legal theory: unjust enrichment. The Swiss banks held on to the money for over fifty years and should now give it back. Three lawsuits were filed and consolidated in April 1997, under the title *In re Holocaust Victims' Assets Litigation*, before Judge Edward Korman, the King Solomon of this litigation. The lawsuits also sought for the Swiss banks to disgorge profits that they made from their financial dealings with the Nazis. Specifically, the claims sought disgorgement of profits from assets looted by the Nazis, including gold and proceeds from slave labor which the Nazis "fenced" through Swiss banks to raise Swiss francs to support the German war effort.

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

Having received the lengthy briefs from both sides, Judge Korman did something brilliant. He did nothing. Rather than ruling on the motions, he sat on them for close to one year and waited for the parties to reach a settlement. State and local governments then put on the pressure by announcing that if the banks did not negotiate in good faith, they would withdraw their investments from the Swiss banks and do business with other financial institutions. Interestingly, state and local officials made the threat of sanctions against the advice of our State Department. The State Department claimed that such actions amounted to interference with American foreign policy.

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

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

Claims Against the European Insurance Companies

The second set of cases involves claims against European insurance companies. The insurers collected extensive premiums from Jews in the years preceding the Holocaust, but they never paid off on the policies. In the time between the two world wars, life insurance policies and annuities were popular investments. They have, in fact, been called the "poor man's Swiss bank account." It has been estimated that in the prewar years, Jewish families bought policies worth an estimated $2 billion to $2.5 billion in today's dollars, and that the insurance companies made a fortune on these policies.

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

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

In March 1997, a class action lawsuit was filed in the Southern District of New York against sixteen European insurance companies. The lawsuit sought $1 billion from each company for refusing to pay out on their policies. Judge Michael Mukasey in Manhattan borrowed Judge Korman's approach from the Swiss bank cases. In response to the insurance companies' motions to dismiss, he has not ruled on the motions, hoping that the matter will settle instead.

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

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

Slave Labor Claims

The third set of cases involves suits against German companies that utilized slave laborers during World War II. Between eight to ten million persons were forced to work as slave laborers in factories in Germany and throughout occupied Europe during World War II. (The term *slave* is a misnomer, however. As explained by Benjamin Ferencz, one of the American prosecutors at Nuremberg, “The Jewish concentration camp workers were less than slaves. Slavemasters care for their human property and try to preserve it; it was the Nazi plan and intention that the Jews would be used up and then burned.”) Historians estimate that approximately 700,000 of these forced slave laborers are still alive, and some estimates place the number of slave labor survivors as high as 1.6 million.

While postwar West Germany paid reparations to some Jewish victims of Nazi persecution(since the 1950s, Germany has paid approximately $70 billion in reparations), slave laborers were specifically excluded from receiving payment and no German industrialist was brought to trial at Nuremberg for use of slave labor. Former German slave laborers found themselves in a catch-22 situation. The German government claimed that it was not obligated to make payments to them because the laborers worked during the war for private German industry. German industry, on the other hand, argued that any payments should come from government coffers because the postwar German regime was the legal successor to the Third Reich. The German firms maintained that the Nazi regime forced them to use slave laborers to support the German wartime economy during World War II.

In October 1998, the new center-left Chancellor of Germany, Gerhard Schroeder, reversed his predecessor, Helmut Kohl, and announced the creation of a joint German government-industry fund to compensate former slave laborers and others not covered under existing German reparation law. Schroeder appointed his key aide, Bodo Hombach, to head the joint government-industry group. Among those participating in the group are heads of Allianz Insurance Company, the Dresdner and Deutsche banks, the auto giants BMW and Volkswagen, and the Siemens, Krupp, Degussa, and BASF industrial concerns.

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

Anyone who thought that the Swiss bank settlement marked the end of the campaign by Jewish organizations for restitution has had a rude awakening. Far from dying down, the number of European banks, insurance companies and industrial companies that are under pressure to make similar settlements is snowballing. Even announcements by some German companies in late 1998 that they would set up commissions to investigate their role during the Nazi era and voluntarily make payments to their former slave laborers who were still alive did not dissuade “slave labor” plaintiffs and their lawyers from continuing with their lawsuits.

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

system of justice. Fear of American litigation led the Germans to capitulate and agree to pay the slave laborers.

The slave labor fund is being financed entirely by German industry, with twelve prominent German companies participating (including three German automotive giants, DaimlerChrysler, Volkswagen and BMW). The German government made no contribution to the fund but is expected to establish a state "German Federal" fund in the future. But to the distress of the German government and industry, the announcement of the fund did nothing to stop the lawsuits. In fact, on the very day the fund was announced in Germany, a new federal class action lawsuit was filed in the United States against Bayer, one of the twelve fund companies, alleging that it had participated in cruel medical experiments conducted by the infamous Dr. Josef Mengele at Auschwitz.

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

Slave Labor Action Against Ford Motor Company

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

According to the complaint, Ford Werke, doing business in Germany since 1925 and headquartered in Cologne, was an aggressive bidder for forced laborers dragooned into Germany by the Nazi war machine from occupied Europe. The complaint indicated that "[b]y 1942, 25% of the work-force utilized by Ford Werke A.G. were unpaid, forced laborers. By 1943, the percentage of unpaid, forced laborers at Ford Werke A.G. had grown to 50%, where it remained for the remainder of the war years." The suit claims that Ford Werke, unlike subsidiaries of other American-owned companies, was never nationalized or confiscated by the Nazis, and that the parent, Ford, maintained a controlling 52% interest in the German subsidiary during the war years.

In a public response to the lawsuit, Ford countered that “the plant was under Nazi control during the war and that, although ‘dividends were accumulated from German operations’ on the parent company's behalf, Ford never received them. A company spokesperson added, “It must be said that by anyone's measure this was one of the darkest periods of history mankind has known.”

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

The district court took the extraordinary step of holding a full-day hearing on the motion and requested further documentation and briefing from the parties. No decision on the motion to dismiss has been issued as of May 1999.

Since the filing of the lawsuit against Ford, over 30 more lawsuits have been filed by former slave laborers against individual German, Austrian, and American companies for their use of slave labor in Nazi-occupied Europe. In July, 1999, the State of California enacted a new law, allowing such suits to be filed in California state courts, and extending the time limit for filing such suits. This should bring a slew of new lawsuits being filed in our state.

Consequences of Filing the Slave Labor Actions

The filing of the suits against German companies has led to enormous positive effects. First, until the lawsuits in the United States were filed, German industry denied for over a half-century the slave laborers' claims. Only after the German industrialists began to feel the pressure of American litigation did they agree to pay their still-uncompensated slave laborers. Second, the filing of the lawsuits led directly to exposing the widespread complicity of German, Austrian, and even American industry with the Nazi war machine. Facts about participation of these industrialists with the Nazis, solely for the sake of profit, either came to light for the first time, or were resurrected from the long-forgotten Nuremberg trials of a half-century ago, as a result of the accusations made against these corporate defendants in the lawsuits filed in the United States.

The German corporations' argument that they had no choice but to participate in the economic crimes should be rejected on the same basis as the argument by the ordinary foot soldier that he was merely “following orders” and even more so, because the soldier, in contrast to the industrialist, does not profit from his acts. The slave labor lawsuits, dealing with the nefarious past conduct

of the world's corporate giants, sets an important precedent for the corporate behavior of multinationals in the future.

Claims Against German and Austrian Banks

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

In February 1999, Deutsche Bank, Germany's largest bank, issued an explosive announcement that an independent historical commission reviewing the bank's wartime activities discovered that Deutsche Bank financed the building of Auschwitz. (Deutsche Bank disclosed that officials discovered documents showing a branch of the bank in Nazi-occupied Katowice, Poland, had provided loans to construction companies with contracts for facilities at Auschwitz, as well as an adjacent IG Farben chemicals plant.) Earlier, in August 1998, the historical commission confirmed that Deutsche Bank profited from gold plundered from Holocaust victims. A historical report of the Dresdner Bank, the second-largest bank in Germany, found that in Nazi-occupied lands the saying went, “Right after the first German tank comes Dr. Rasche from the Dresdner Bank.”

The first class action filed against the German banks for their wartime activities was filed in June 1998 in federal court in Manhattan. Plaintiffs, three elderly Holocaust survivors and all United States citizens, sued on behalf of themselves and on behalf of 10,000 Holocaust survivors and victims' relatives. Named as defendants were Deutsche Bank and Dresdner Bank AG, both headquartered in Frankfurt, Germany. The lawsuit charged the two banks with profiting from the looting of gold and other personal property from Jews. The complaint sought a total of $18 billion in compensatory damages and unspecified exemplary damages.

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

Later that same month, the German banks were hit by a second class action lawsuit filed in federal court in Brooklyn, New York, by a another group of attorneys representing a different set of Holocaust survivors and heirs. The lawsuit named Germany's Deutsche Bank, Dresdner Bank, and Commerzbank as defendants. The lawsuit accuses the banks of refusing to return assets of

Jewish survivors and of financing and profiting from Nazi slave labor. Eventually, a total of eight cases were filed against the German and Austrian banks.

Claims Involving Nazi-Stolen Art

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

Museums suspected of currently possessing Nazi-stolen art include the Louvre in Paris and the Hermitage in St. Petersburg, Russia. Museums in the United States also have not been immune. Since 1997, a number of prominent American museums have been embarrassed to discover that their collections include Nazi-stolen art which made its way to the United States after the war. To deal with the problem of Nazi-stolen art, the U.S. Department of State and the U.S. Holocaust Museum hosted a conference in November 1998, in Washington, D.C. Forty-four nations sent representatives to the conference.

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

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

ownership of the painting and to donate it to the Chicago Art Museum, with the grandchildren receiving one-half value of the painting from the museum.

Another case, this one involving a Nazi-stolen Matisse, filed against the Seattle Art Museum also recently settled. The Seattle Museum agreed to give up the painting to the Holocaust victims' rightful heirs. A third case filed against the New York Museum of Modern Art (MOMA) by New York District Attorney Robert Morgenthau, has prevented the departure from New York of two Egon Schiele paintings loaned by an Austrian museum for a MOMA exhibition. The Schiele paintings are believed to have been stolen during World War II. The highest court in New York is now considering whether the paintings should be returned to Austria.

Conclusion

An editorial in the Israeli newspaper *Ha'aretz* succinctly explained the impact of various revelations being made today about the financial misdeeds stemming from the Holocaust:

The Holocaust proved that the murder of the Jews and the annihilation of whole communities was not only an outlet for monstrous anti-Semitism, it was also good business. But it is precisely the willingness of the world's nations today, some 55 years after the end of World War II, to make the material calculations and search for stolen property and return it, that raises questions which in the past were possible to ignore.

Undoubtedly, additional Holocaust lawsuits will be filed in the future. As long as one Holocaust survivor is alive and an individual or corporation doing business in the United States is discovered to have been involved in misdeeds during World War II, litigation of the Holocaust will continue in our courts.

The floodgates of Holocaust litigation will remain open into the 21st Century.
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