THE LIMITS OF LEX AMERICANA: THE HOLOCAUST RESTITUTION LITIGATION AS A CUL-DE-SAC OF INTERNATIONAL HUMAN-RIGHTS LAW

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INTRODUCTION: THE HEROIC NARRATIVE AND THE POVERTY OF UNJUST ENRICHMENT

In class action law suits filed at the end of the 20th century, Holocaust survivors sought remedy in American federal courts for damages suffered as slave laborers over fifty years earlier.[1] Some also tried to recover identifiable assets such as sequestered bank accounts, looted artwork, or other converted property.[2] Plaintiff's attorneys[3] and legal scholars[4] have contributed to a

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1. *See generally* Justin H. Roy, Comment, *Strengthening Human Rights Protection: Why the Holocaust Slave Labor Claims Should be Litigated*, 1 SCHOLAR 153 (1999).

2. Sean D. Murphy ed., *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT'L. L. 879, 883-92 (1999).

3. *See generally* Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U.L.Q. 795 (2002) [hereinafter Neuborne, *Preliminary Reflections*] (discussing the legal and moral consequences raised by the litigation from counsel's perspective). *See also* Lee Boyd, *Unholy Profits: Holocaust Restitution and the Vatican Bank, in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, 152, 154-57 (Michael J. Bazyler & Roger P. Alford eds., 2006) (plaintiff's lawyer in suit against the Vatican Bank argued that judicial remedies offer a more appropriate response to human rights violations than negotiation among state parties); Melvyn I. Weiss, *A Litigator's Postscript to the Swiss Banks and Holocaust Litigation Settlements: How Justice Was Served*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra*, at 103, 103.

4. The foremost advocate of the plaintiffs' role in the Holocaust-era litigation has been Michael Bazyler. *See, e.g.*, MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS 328-34 (2003) [hereinafter BAZYLER, HOLOCAUST JUSTICE]. *See generally* Thomas Buergenthal, *International Law and the Holocaust*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 3, at 17 (ICJ judge celebrating awareness of Holocaust as spur to human rights law generally). *See also* Shimon Samuels, *The French Bank Holocaust Settlement*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 3, at 145, 149 (Holocaust litigation "provides lessons for jurists in their treatment of war crimes and crimes against humanity in other theatres of genocidal behavior."); Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 121 (2002) ("[S]lave labor cases will have longstanding impact on human rights litigation . . . ."); Ralph Steinhardt et al., *The Lawyers Speak: Actions Against Swiss Banks and European Insurance Companies in United States Courts*, 20 WHITTIER L. REV. 47, 48 (1998) ("The Nazi loot cases should succeed to the extent that they fit into a much larger movement–a movement towards corporate liability for complicity in human rights violations that occur

heroic narrative of this litigation and praised it as a model for international human rights torts. Professor Burt Neuborne, a key plaintiff's attorney,[5] extolled an era of "Lex Americana" in which multinational corporations (MNCs) have a "moral obligation . . . 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."[6] Professor Michael Bazyler is equally enthusiastic: "American law . . . has become *Lex Americana*, imitated throughout the world, with the Holocaust restitution cases becoming the principal model for victims and their representatives seeking to right past wrongs."[7]

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abroad."); Darcie Christopher, Note, Jus Cogens*, Reparation Agreements, and Holocaust Slave Labor Litigation,* 31 L. & POL'Y INT'L BUS. 1227, 1251 (2000) (asserting that Holocaust-era litigation represents a "next step" in international human rights litigation). *But see* Maria Ellinikos, *American MNCs Continue to Profit from the Use of Forced and Slave Labor Begging the Question: Should America Take a Cue from Germany?*, 35 COLUM. J.L. & SOC. PROBS. 1, 17-24 (2001) (arguing that Holocaust litigation was largely unsuccessful and international agreements are a more promising avenue than domestic litigation).

5. Neuborne started as counsel to all plaintiffs in the Swiss Bank litigation, arguing the motion to dismiss on 1 Aug. 1997. Neuborne, *Preliminary Reflections*, *supra* note 3, at 797 n.3. After formal settlement in January 1999, Judge Korman appointed him settlement counsel. *Id.* Starting in December 1998, he served as principle counsel to plaintiffs in the German slave labor litigation, arguing the motion for dismissal before Judges Greenaway and Debevoise. *Id.* Even experienced judges who ruled against Neuborne describe him as "superb." Telephone Interview with Judge Dickinson Debevoise (Apr. 16, 2009); Telephone Interview with Judge Joseph Greenaway (May 11, 2009).

6. Neuborne, *Preliminary Reflections*, *supra* note 3, at 831. *See also* Burt Neuborne, *A Tale of Two Cities: Administering the Holocaust Settlements in Brooklyn and Berlin*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 3, at 60, 74 [hereinafter Neuborne, *A Tale of Two Cities*] ("As a matter of theory, the Holocaust-era litigation model should travel. . . . But it will never happen."). The doubt following the early enthusiasm was a result of decisions in the New Jersey District Court, which will be discussed later in this article.

7. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 328. *But cf.* Telephone Interview with Judge Dickinson Debevoise (Apr. 16, 2009). Judge Dickinson stated:

> I'm not sure that they [the Holocaust-era lawsuits] would be a vehicle for more general application. They were so tied to the wrongs of the Nazi period. The Nazi government worked hand in glove with corporations, maybe forcing them, maybe not, maybe a little of both. It was so unusual. I do not know if those facts could be applicable to other corporations.

Id. Judge Edward Korman expressed different doubts from Judge Debevoise, namely that international human rights cases often have difficulty linking particular plaintiffs to particular defendants in the traditional way. Telephone Interview with Judge Edward Korman (Apr. 23, 2009). When asked the same question, Judge Joseph Greenaway emphasized "*Iwanowa*, in my judgment, presented a unique set of circumstances and a unique set of facts." Telephone Interview with Judge Joseph Greenaway (May 11, 2009). He was even reluctant to discuss connections between *Iwanowa* and the Swiss bank litigation, of which he claimed to know little. *Id.*

In the past, international law would have relegated issues of compensation for wrongs incident to a global conflict like World War II to state parties;[8] governments would have settled through negotiations, and individuals would have had little recourse except through petitions directed at their State Departments or Foreign Offices, assuming they were not stateless persons.[9] In the Holocaust-era suits, however, activists and litigators teamed up with victims, some of them aliens, to vindicate the rights of individuals by acting directly through U.S. courts.[10] Their lawsuits prompted the U.S. government as well as Germany to push private MNCs toward large settlements, an example of what Anne-Marie Slaughter and David Bosco have identified as "Plaintiff's Diplomacy."[11] In plaintiff's diplomacy, individuals use lawsuits to directly shape the foreign affairs of states and bypass the traditional political branches.[12]

Yet this article argues that the political branches contributed more to successful settlements than plaintiff's diplomacy through litigation. It contributes to existing scholarship in two ways: first, it displaces the emphasis of Neuborne and Bazyler on heroic litigation and instead underscores the survivors' successful mobilization of political support. The role of state parties remained paramount. Second, this article undertakes an original analysis of the survivors' claims, sounding mostly in restitution. Because of the large settlements of the 1990s, it is often taken for granted that these claims were strong; however, they were actually weak. Legal scholars have not probed the merits of the restitution theories at the heart of the Holocaust-era lawsuits in any meaningful way.[13] And no legal scholar has analyzed the historical evidence upon which they rested.[14] This article concludes that theories of restitution offer little promise for future human-rights suits.

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8. Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept.-Oct. 2000, at 102, 104.

9. *See id.* at 108.

10. *See id.* at 102.

11. *Id.* at 103.

12. *Id.* at 102-03.

13. *Compare* Anthony J. Sebok, *Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two,* 58 N.Y.U. ANN. SURV. AM. L. 651 (2003) (discussing the weakness of the unjust enrichment theories at the heart of the Holocaust-era litigation), *with* Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L.J. 503 (2002) (defendant's lawyers arguing for the strength of the defendant's case) *and* Owen C. Pell, *Historical Reparation Claims: The Defense Perspective, in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 3, at 331, 339-40 (exploring defenses to which the historical human-rights suits are prone, such as statutes of limitations, sovereign immunity, and the political questions doctrine).

14. Some historians who conducted research into Nazi-era business and industry have raised objections about the thin evidence in support of the plaintiffs' case. *See, e.g.*, Peter Hayes, *Corporate Profits and the Holocaust: A Dissent from the Monetary Argument*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 3, at 197, 197-99 (historian of German business and industry discussing the meager profits earned by Nazi-era corporations).

Regardless of the weaknesses in their legal theories, the plaintiffs achieved extraordinary success by any measure. Swiss banks agreed to pay $1.25 billion.[15] Litigation against German corporations eventually ended in an Executive Agreement between the United States and Germany establishing the Foundation "Remembrance, Responsibility and the Future" (known as the "German Foundation").[16] This foundation oversaw a fund of ten billion Deutschmark (between $4.8 and $5.2 billion, depending upon fluctuating exchange rates) to be paid to survivors of Nazi slave labor as well as those who held Nazi-era insurance claims.[17] Austrian and French banks reached smaller settlements.[18]

The publicity surrounding the litigation—including controversy surrounding lawyers' fees[19]—has obscured what, if anything was truly innovative about the lawsuits. What law or transnational process did the class actions actually advance? In particular, how did the Holocaust-era litigation contribute to ongoing efforts to hold MNCs liable for human rights violations in American courts? This article concludes that the Holocaust-era litigation represents more of a cul-de-sac than an Appian Way to an era of *Lex Americana*.

Section I briefly reviews Holocaust-era litigation in U.S. federal courts before the spectacular successes of the late 1990s, which has been covered in detail by Michael Bazyler.[20] Bazyler identifies the beginning of a "modern era of Holocaust asset litigation" with the Swiss bank lawsuits of the 1990s,[21] because these were "the first Holocaust-era case[s] to reach the settlement stage."[22] Bazyler stresses discontinuity, but unfortunately gives little analysis. Presumably, all lawsuits before the 1990s belonged to a "pre-modern" era, yet why is not clear. Suits before the cluster of Swiss bank cases also ended in

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15. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 25-28.

16. *Id.* at 72.

17. *Id.* at 80.

18. *Id.* at 106-09 (discussing the Austrian settlement); *Id.* at 192-98 (discussing the French Settlement). *But see* Boyd, *supra* note 3, at 152-53 (discussing the failure of similar suits against the Vatican Bank).

19. The total of all lawyers' fees came to $6 million in the Swiss bank litigation (.05% of the settlement) and $59.9 million in the German Foundation settlement (1.2%). BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 45, 93; Weiss, *supra* note 3, at 111. By contrast, accounting fees to audit the Swiss Banks came to $200 million and notification cost to $25 million (ca: 2%). *Id.* at 31. *See also* STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II 72 (2003). On the controversy surrounding fees, see BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 92-95.

20. *See, e.g.*, BAZYLER, HOLOCAUST JUSTICE, *supra* note 4; Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1 (2000) [hereinafter Bazyler, *Nuremberg in America*].

21. Bazyler, *Nuremberg in America*, *supra* note 20, at 31.

22. *Id.* at 32.

settlement, however, and plaintiffs had attempted class actions before the 1990s as well.[23]

Instead of distinguishing a "modern" and "pre-modern" era, this article emphasizes continuity. Holocaust survivors have repeatedly raised the same types of claims, primarily sounding in restitution. They have usually sought to recover converted property and assets or the value of their slave labor in quantum meruit. In addition, they have sought to recover for ordinary torts like wrongful death or assault. Section I explores these claims in several exemplary cases as well as the reasons why they have repeatedly failed. Judge Korman emphasized the tenuousness of the survivors legal claims in a fairness hearing with the Swiss bank litigants when he warned that "those . . . who believe that strong moral claims are easily converted into successful legal causes of action" potentially needed a "reality check."[24] Courts almost invariably dismissed Holocaust-era suits on the pleadings.

Nevertheless, although dismissal was the norm, the few successes illustrate an additional common thread. Powerful support from the political branches of government, rather than meritorious restitution claims, provided the key to success. What Bazyler calls the "modern era" did not differ from any previous era in this regard.

Section II discusses the legal and factual weakness of the plaintiffs' claims, which generally fell in two categories. First, most had credible claims in quantum meruit as former slave laborers. Quantum meruit is also referred to as "quasi-contract" because courts may imply a labor contract and award damages for the (implied) breach by non-payment.[25] If this was an express contract, there would actually be expectation damages for lost wages; a damage suffered by the worker, who may still recover regardless of whether employers have benefited from the labor or not.[26] This is not equivalent to the restitution of unjust enrichment. Restitution of an enrichment, as the name implies, returns to plaintiffs a benefit enjoyed by the defendant.[27]

Quantum meruit conveys no right to profits, only to the fair market value of labor. It is also subject to numerous defenses explored in Section II. For

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23. *Id.* at 25-28.

24. *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 148-49 (E.D.N.Y. 2000). In a telephone interview, Judge Korman reemphasized this point. Telephone Interview with Judge Edward Korman (Apr. 23, 2009) ("I made clear at oral argument that the only claims that could survive a motion to dismiss were the bank account claims [tied to identifiable assets].") *Id.*

25. Howard J. Alperin, Annotation, *Judgment in Action on Express Contract for Labor or Services as Precluding, as a Matter of Res Judicata, Subsequent Action on Implied Contract (quantum meruit) or Vice Versa*, 35 A.L.R.3d 874 (1971).

26. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 344(c) (1979) (defining restitution interest as interest in restoration of any benefit conferred to another party); *Id.* at § 370 (stating there is no restitution when no benefit is conferred); *Id.* at § 373 (stating no right to restitution when no performance by defendant remains due other than payment of a definite sum of money).

27. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (Tentative Draft No. 5, 2007).

example, in 1999, the New Jersey District Court dismissed the first quantum meruit claim in what Bazyler calls the "modern era," on the ground that the statute of limitations had run.[28] This section also calculates the probable recovery in quantum meruit based upon historical evidence of World-War-II-era wages in Germany. The numbers are considerable, but the lion's share is due to the time value of money. If not for accrued interest on backed wages during the fifty intervening years, recovery would have been very modest.

The second category of survivors' claims sounded in wrongful enrichment, a more tenuous theory. But plaintiffs hoped to use it to recover the profits of the MNCs. This article will adopt the distinction between "wrongful" and "unjust" enrichments that Cambridge Professor Peter Birks has sought to establish.[29] In American courts, the conflation of unjust enrichment, wrongful enrichment, quasi contract, and quantum meruit is not uncommon.[30] Nevertheless, Birks' terminology helps distinguish the survivors' claims from other, more common restitutionary claims.[31] For Birks, the archetypal example of "unjust enrichment" is the mistaken payment.[32] Turpitude does not attach

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28. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999). Both cases are discussed *infra*, Part III.

29. PETER BIRKS, THE FOUNDATIONS OF UNJUST ENRICHMENT 25-45 (2002). *Cf.* Brice Dickson, *Unjust Enrichment Claims: A Comparative Overview*, *in* THE LIMITS OF RESTITUTIONARY CLAIMS: A COMPARATIVE ANALYSIS 1, 6-7 (William Swadling ed., 1997) (rooting unjust enrichment in a paradigm of an abortive contract claim and failure of consideration). *See also* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 210-59 (2004) [hereinafter DAGAN, ETHICS] (reviewing principles of wrongful enrichment in the common law).

30. *See, e.g.*, Paschall's, Inc. v. Dozier, 407 S.W.2d 150 (Tenn. 1966). The Tennessee Supreme Court explained:

> Actions brought upon theories of unjust enrichment, quasi contract, contracts implied in law, and quantum meruit are essentially the same. Courts frequently employ the various terminology interchangeably to describe that class of implied obligations where, on the basis of justice and equity, the law will impose a contractual relationship between parties, regardless of their assent thereto.

Id. at 154. *See also* BIRKS, *supra* note 29, at 19-22 (noting confusion of terminology). *But see* Stephen A. Smith, *Unjust Enrichment: Nearer to Tort than Contract*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT 181, 199 (Robert Chambers et. al eds., 2009) ("[E]ven those who defend the existence and integrity of the subject [of unjust enrichment law] cannot agree on its name.").

31. *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (Tentative Draft No. 5, 2007). The current Restatement (Third) of Restitution and Unjust Enrichment does not draw the clear distinction that Birks draws although Birks' distinction is a useful heuristic.

32. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 47 (Tentative Draft No. 5, 2007) ("The recipient of a payment in respect of the claimant's property is liable to the claimant for the payment so received."); *Id.* at § 48 ("The recipient of a payment to which the claimant has a superior legal or equitable entitlement is liable to the claimant for the amount of the payment so received."). *See also Id.* at § 34 (limiting restitution in failure of consideration on a contract to value of the plaintiff's performance, potentially less any losses

to such mistakes and they convey only a right to recover the fair-market value of benefits conferred.[33] By contrast, "wrongful enrichments" arise exclusively out of wrongs, whether tortious, criminal, or merely based in willful breach of contract.[34] The common law expresses disapproval by extending recovery beyond the fair value of the benefit and may authorize the disgorgement of profits, whichever is more.[35]

The potential to recover profits made wrongful enrichment attractive to Holocaust survivors. It seemed self-evident that MNCs had engorged their balance sheets by using unpaid slave laborers who were sometimes forced to work up to 72 hours a week.[36] Wrongful enrichment seemed to offer a suitable cause of action to recover ill-gotten gains. It is easy to confuse this claim with quantum meruit because most survivors argued that the wrong giving rise to enrichment was slave labor.[37] Quantum meruit could only give rise to a claim for lost wages arising from the work, whereas wrongful enrichment arose out of illegal exploitation, not out of the act of labor.

There can be no doubt about the wrong, but plaintiffs' lawyers wildly exaggerated the benefits supposedly derived from slave labor. Neuborne testified before the House Committee on Banking and Financial Services on September 14th, 1999:

> Imagine the economic benefit to a wartime economy of being relieved from the obligation of paying wages to more than 50% of your labor force. The fruits . . . were realized in enormous wartime profits, most of which was paid out to large shareholders as dividends, much of it was reinvested in capital equipment that paved the way for [German] postwar corporate profitability.[38]

This statement far exceeded any accusation leveled at a single MNC defendant. Neuborne and his clients asserted that lucre gained in the Holocaust had

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incurred by defendant due to mistake or supervening change of circumstances). These Restatement sections do not convey the rights to disgorged profits.

33. BIRKS, *supra* note 29, at 40, 42.

34. *Id.* at 29.

35. DAGAN, ETHICS, *supra* note 29, at 253 (indicating that recovery in wrongful enrichment for the wrong of slavery should include the greater of fair market value and profits from that wrong).

36. MICHAEL THAD ALLEN, THE BUSINESS OF GENOCIDE: THE SS, SLAVE LABOR, AND THE CONCENTRATION CAMPS 293-94 (2002).

37. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (Tentative Draft No. 5, 2007).

38. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 59 (alteration in original) (citation omitted). *See also* Burt Neuborne, *Holocaust Reparations Litigation: Lessons for the Slavery Reparations Movement,* 58 N.Y.U. ANN. SURV. AM. L. 615, 618 (2003) [hereinafter Neuborne, *Holocaust Reparations Litigation*] ("Plaintiffs hoped . . . to develop a parallel set of international norms designed to eliminate the possibility of profit from knowingly cooperating in the commission of crimes against humanity by finding all such [unjust enrichment] 'profits' to be merely held in constructive trust for the victims.").

catapulted Europe's leading economy into post-war prosperity,[39] the victims wished to lay claim to this enrichment.

Yet, contrary to common perception, slave labor was not particularly profitable, and there can be no recovery in wrongful enrichment without enrichment. As opposed to quantum meruit, wrongful enrichment provides no cause of action for (implied) damages. In the end, little historical evidence suggests that the gross human rights violations of the Holocaust produced enormous gains for MNCs, and no evidence suggests that this fueled Germany's post-war economic boom. Plaintiff's lawyer Melvin Weiss was surely correct to condemn "profit-motivated complicity with the Nazi regime."[40] Cupidity and avarice abounded in the Third Reich. As a macroeconomic system, however, the Holocaust was a fiscal bust, far more destructive of productive capacity than the plaintiffs' theories of wrongful enrichment imply.

Furthermore, to suggest that German industry engorged itself on Holocaust profits fundamentally misunderstands gross human rights violations, which rarely follow the profit motive. The Nazis did not act primarily in pursuit of profit; rather they pursued an ideologically-driven racial supremacy.[41] Both can and could be pursued at the same time, but in Nazi Germany there was a clear "primacy of politics."[42] Hitler did believe that the dividends of slavery would far exceed the debts of the Reich,[43] but this says more about his ignorance of macroeconomics than it does about the German war economy. The Nazis enslaved, tortured, and murdered the Jews because they were Jews; they starved and enslaved the Slavs of Eastern Europe because Hitler embarked upon a war of racial-supremacist imperialism. Theories of wrongful

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39. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 59. Legal scholars have taken such statements largely at face value and repeated them.

40. Weiss, *supra* note 3, at 109-10.

41. MICHAEL BURLEIGH, THE THIRD REICH: A NEW HISTORY 6 (2000) (emphasizing the quasi-religious fervor with which Nazi activists pursued their racial utopia and its roots in a genuine mass-social movement in Germany). *See also* JEFFREY HERF, THE JEWISH ENEMY: NAZI PROPAGANDA DURING WORLD WAR II AND THE HOLOCAUST (2006) (emphasizing radical ideological indoctrination in the Third Reich); Michael Burleigh, *Political Religion and Social Evil*, TOTALITARIAN MOVEMENTS AND POL. RELIGIONS, Autumn 2002, at 10-14 (2002).

42. TIM MASON, NAZISM, FASCISM AND THE WORKING CLASS 53-76 (Jane Caplan ed., 1995) (arguing for the "primacy of politics" in Nazi Germany).

43. Cornelia Rauh-Kühne, *Hitlers Hehler?: Unternehmerprofite und Zwangsarbeiterlöhne*, 275 HISTORISCHE ZEITSCHRIFT 1, 30 (2002) (F.R.G.). *See also* ALLEN, *supra* note 36, at 101-02. The Reichsführer SS Heinrich Himmler remarked that "if we do not fill our camps full with slaves . . . we will not have the money after the long years of war in order to furnish the [German] settlements in such a fashion that truly German men can live in them and can take root in the first generation." *Id.* at 101 (citation omitted). Such beliefs are indicative of the economic ignorance of top Nazi leadership. More significantly for the argument here, they also betray Nazi expectations that the benefits of slavery should accrue not to private German industry but to the Nazi state.

enrichment will fail in the face of destructive ideological crimes because there is little profit to restitute.

Section III highlights the limited contribution that shaky legal claims and tenuous litigation made to the billion-dollar settlements of the late 1990s. It points out that larger transnational legal processes provided the key to success, sometimes working with and sometimes despite the lawsuits. Non-governmental organizations (NGOs) such as the World Jewish Congress collaborated with the U.S. Department of Commerce to initiate the Swiss Bank settlement in advance of any litigation. The German Foundation would not exist without the intervention of the U.S. State Department, the House, and Senate, not to mention the sympathetic partner the Clinton administration found in German Chancellor Gerhard Schröder.

Michael Bazyler has argued that "the 'one-two punch' of American lawyers first filing the class action lawsuits against the European defendants [MNCs] and American officials at the state and local levels then threatening to exclude the defendants from profitable U.S. [business] deals . . . was the perfect strategy."[44] This captures the importance of transnational process but only hints at the variety of players involved.[45] As Bazyler's own careful research shows, diplomatic negotiations and the initiatives of NGOs sparked the litigation, not vice versa.[46]

Section IV traces theories of wrongful enrichment in subsequent international human rights litigation against MNCs. The repeated failure or irrelevance of these theories demonstrates that neither lawyers nor plaintiffs have gained much by modeling lawsuits on the Holocaust-era litigation.

SECTION I: DIPLOMACY AND HOLOCAUST LITIGATION IN U.S. COURTS

As Michael Bazyler has detailed, Holocaust survivors sought justice in U.S. courts long before the lawsuits of the late 1990s.[47] Victims sued to recover stolen and converted assets even before the end of World War II.[48] Arnold Bernstein filed the most significant early suit in 1946, discussed in subsection

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44. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 53-54.

45. *See generally* Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI. LEGAL F. 279 (emphasizing transnational process in human rights class actions).

46. *See* BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 11 ("The lawyers filing the lawsuits were essentially following the headlines."). The headlines were predominantly created by the U.S. State Department, the World Jewish Congress and its World Jewish Restitution Organization. *Id.* at 11-14. *Cf.* Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 VAND. L. REV. 2211, 2223 (2004) (arguing that government support was crucial to Holocaust-era cases which may have owed "as much, or more, to the political climate of their time . . . than to the 'objective' merit of their cIaims [sic]").

47. *See generally* Bazyler, *Nuremberg in America*, *supra* note 20 at 19-30.

48. *Id.* at 19 (identifying the first lawsuit filed in 1942 against Assicurazioni Generali S.p.A).

A below.[49] Bernstein, a German-Jewish entrepreneur who immigrated to the United States, had owned and operated various shipping companies.[50] Although he could not initially prevail in U.S. courts, the State Department intervened and enabled him to proceed to settlement.[51]

Bernstein set the broad pattern for all future Holocaust litigation. If litigants secured support from the Executive, Congress, or both, they frequently gained the leverage needed to prompt defendants to settle. Without help from the political branches, however, most suits met with speedy dismissal. The first class action brought by Holocaust survivors was *Kelberine v. Societe Internationale* (discussed in subsection B), which exemplifies a failed suit that lacked political support.[52] Finally, subsection C discusses the survivor Hugo Princz's suit against the Federal Republic of Germany (F.R.G.).[53] Princz's experience in many ways recapitulated that of Arnold Bernstein forty years earlier. Princz first failed at the pleadings stage, but he received restitution in a settlement negotiated between Germany and the United States after the political branches took up his cause.[54]

A. Bernstein's Cases

The Gestapo arrested Arnold Bernstein in 1937, tortured him, beat him, and threatened his life.[55] His treatment was typical of the early phases of what the Nazis called "Aryanization," a policy of eradicating any Jewish presence in German economic life.[56] Nazi policy aimed first to strip Jews of their property and compel them to immigrate. Before 1938, the authorities did not typically murder and plunder the Jews outright but coerced them to sell their assets to Germans.[57] Extortion was the rule, with a veneer of legality.[58] Thus, after threatening Bernstein, the Gestapo had a certain Marius Boeger pose as someone willing to render him assistance, and Bernstein signed away his companies under severe duress.[59]

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49. *See generally* Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).

50. *Id.* at 247.

51. Bazyler, *Nuremberg in America*, *supra* note 20, at 21.

52. *See generally* Kelberine v. Societe Internationale, 363 F.2d 989 (D.C. Cir. 1966).

53. *See generally* Princz v. F.R.G., 26 F.3d 1166 (D.C. Cir. 1994).

54. Bazyler, *Nuremberg in America*, *supra* note 20, at 25.

55. *See id.* at 20.

56. *See* AVRAHAM BARKAI, FROM BOYCOTT TO ANNIHILATION: THE ECONOMIC STRUGGLE OF GERMAN JEWS, 1933-1943, at 69 (William Templer trans., 1989).

57. *See id.* at 69-77.

58. *Id.* at 71.

59. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71, 73 (2d Cir. 1949); Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 247 (2d Cir. 1947).

If Bernstein's plight was typical of "Aryanization," his first lawsuit in the United States court system several years later was surprising because it did not target German companies or Boeger, but rather the Belgian and Dutch shipping lines that had eventually acquired the converted assets.[60] Bernstein filed his first claim against Van Heyghen Freres Societe Anonyme.[61] Thus, from the start, Holocaust-era suits targeted MNCs that had opportunistically dealt with the Nazis at the expense of Jews and other victims. Bernstein alleged that Van Heyghen acquired his assets with full knowledge of his duress, and he appeared to have a solid case for wrongful enrichment linked to identifiable assets.[62]

The basic principle of restitution appeals to common sense: "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other."[63] Nevertheless, legal scholars generally acknowledge that restitution law is unsettled at best, prompting John Dawson to quote Lord Justice Scutton's remark that "'the whole history of this particular form of action has been what I may call a history of well-meaning sloppiness of thought.'"[64] Claims sounding in restitution are generally weaker than in contract or tort.[65]

Some legal scholars argue that restitution should be available to serve "rough justice" when judges wish to find for a plaintiff or punish a defendant but can find no orthodox doctrine of law to justify doing so.[66] This view has not received widespread support, and others condemn it as a thinly veiled argument for uninhibited judicial discretion.[67] Restitution is not punitive; it

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60. *See Bernstein*, 163 F.2d at 246-47.

61. *Id.* at 247. The company in question was called the Arnold Bernstein Line and the ship in question was the *Gandia*. *Id.*

62. *Id.* at 247. Because Van Heyghen allegedly had full knowledge of the wrong, the defense of bona fide purchaser was not available. *See id.* According to Hanoch Dagan, wrongful enrichment law denies priority to purchasers who act with actual knowledge or presumed suspicion in order to "pressure . . . the party who is the cheapest cost avoider of the legal accident" and imposes a "retributive measure . . . upon one who . . . fails to show respect for the autonomy of potential competing parties." DAGAN, ETHICS, *supra* note 29, at 257.

63. RESTATEMENT (FIRST) OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS, § 1 (1937).

64. JOHN P. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS 18 (1951) [hereinafter UNJUST ENRICHMENT] (quoting Lord Justice Scrutton from 1923). *See also* John P. Dawson, *Restitution Without Enrichment*, 61 B.U. L. REV. 563, 564 (1981) [hereinafter *Restitution Without Enrichment*] (characterizing restitution as a muddy field of American common law which has been "met for many decades with disbelief"); Mitchell McInnes, *The Measure of Restitution*, 52 U. TORONTO. L.J. 163, 163 (2002) ("Terminologically, the area seems almost designed to defy comprehension.").

65. *See* Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts, and Torts*, 2001 WIS. L. REV. 695, 706-07, 720 (2001).

66. *See generally id.*

67. *Id.* at 772. The "rough justice" view of unjust enrichment seemed to gain some ground around the time of the Holocaust-era litigation. *See id.* at 708-18. Whether there was some connection is unclear. *Id. But cf.* DAGAN, ETHICS, *supra* note 29, at 24-25 (countering that this argument "ends up as an outright cloak for decision by fiat, rather than by reason").

merely serves to restore misappropriated gains.[68] The "unjust" in "unjust enrichment" usually refers to nothing more than a misappropriation, thus the distinction made in this paper between "unjust" and "wrongful" enrichment. Restitution seldom allows plaintiffs to recover anything in excess of the fair-market value of the tangible benefits they conferred to the defendant.[69] Theoretically, wrongful enrichment can provide an exception, following the principle that wrongdoers should not retain ill-gotten gains. For example, in Bernstein's case where the wrong involved duress, black letter restitution law states that plaintiffs may recover *either* the market value of the benefit conferred *or* the wrongdoer's profit—*whichever is more.*[70] Wrongful enrichment may also entitle a plaintiff to recover specific assets *in rem.*[71] Yet judges do not necessarily follow the black letter doctrine. Upon surveying the common law in 1981, Dawson found that plaintiffs typically could recover nothing more than the measurable benefit they had conveyed.[72] Contrary to the *Restatement (First) of Restitution* and regardless of defendants' conscious wrongdoing, Dawson argued, "profit will be awarded, if it is, because it has been shown and to the extent it is shown that the [plaintiff's] interest invaded [by the defendant] contributed to producing the profit."[73]

Bernstein's case illustrates some of the limits of restitutionary claims to profits,[74] because he satisfied the basic elements of wrongful enrichment. Van

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68. Andrew Kull, *Restitution's Outlaws* 78 CHI.-KENT L. REV. 17, 17 (2003) (identifying the only punitive dimension of restitution as the absence of certain defenses for wrongdoers). This view was more or less the view of John Dawson nearly a quarter century earlier. *See Restitution Without Enrichment*, *supra* note 64, at 620.

69. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (Tentative Draft No. 5, 2007).

70. *Id.* Nevertheless, the intent of wrongful enrichment remedies is not punitive: "The object of restitution in such cases is to eliminate any profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty. Restitution remedies that pursue this object are often called 'disgorgement' or 'accounting.'" *Id.*

71. RESTATEMENT (FIRST) OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS, § 202 cmt. c (1937) ("If . . . the wrongdoer were permitted to keep the profit, there would be an incentive to wrongdoing . . . ."). Section 202 addressed only property rights, however, not conveyance of services. Subsequent restatements strengthened this language. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 (Discussion Draft 2000) ("A person who interferes with the legally protected rights of another, acting without justification and in conscious disregard of the other's rights, is liable to the other for any profit realized by such interference.").

72. *See Restitution Without Enrichment*, *supra* note 64.

73. *Id.* at 620. *See also* DAGAN, ETHICS, *supra* note 29, at 247 (analyzing restitution law in slave labor litigation in light of the precondition "that a plaintiff can link a specifically named defendant to the . . . ill-gotten profits made by that defendant from this wrong"). *Cf.* HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES 103-04 (1997) [hereinafter DAGAN, STUDY] (providing cases that allow recovery of profits for wrongs, but indicating they are exceptional).

74. *See generally* Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).

Heyghen did not dispute that the Nazis had unjustly appropriated Bernstein's shipping lines by duress or that he had suffered impoverishment.[75] Nor did Van Heyghen deny that it benefitted from the wrongful appropriation.[76] Bernstein sued to reclaim his ships, to recover Van Heyghen's profits.[77]

Even if Bernstein had prevailed, however, he would have gained only the right to profits directly linked to assets of the Arnold Bernstein Line.[78] Had the claim survived dismissal, Van Heyghen would have also had numerous defenses available. Van Heyghen could have asserted a "change of position" defense: that the company actually made no profit or suffered a net loss (as is often the case when an asset is destroyed, for example, one of Bernstein's ships was sunk during the war). Unjust or wrongful enrichment liability is generally limited to enrichment remaining with the defendant.[79] For instance, Van Heyghen could have sought to deduct any improvement it had made to the ships.[80] If defendants realize much greater earnings than a plaintiff could have made if the wrongly appropriated asset had never been lost, they may claim a "proportional accounting."[81] Even in a wrongful enrichment, "proportional accounting" entitles defendants to retain profits attributable to their skill, entrepreneurial savvy, or independent investments.[82] These defenses seem to have been dubious in Van Heyghen's case, based upon Bernstein's allegations, but many MNCs in the Holocaust-era litigation might have prevailed on the merits of "change of position" or "proportional accounting" defenses, as will be shown below.

Bernstein's case did not reach the merits of his restitutionary claims in either the trial court or the Second Circuit.[83] Instead, Judge Learned Hand affirmed dismissal based on the Act of State Doctrine.[84] The court condemned the Nazi state as universally execrable and noted that it had perished in a ruinous total war, but Germany had caused Bernstein's harm by acting in its sovereign capacity through its agent, the Gestapo.[85] United States courts would not condemn "the validity under the municipal law of another

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75. *See id.* at 246-48 (setting out the allegations of the parties).

76. *Id.* at 246-48.

77. *See id.* As one ship had sunk during the course of the war, Bernstein also sought to recover insurance proceeds that a third party held on behalf of Van Heyghen.

78. *Id.* at 248. *See* DAGAN, STUDY, *supra* note 73, at 12-14, 17-22 (stating that a plaintiff is entitled only to profits or proceeds tied to the misappropriated asset or right).

79. *See* BIRKS, *supra* note 29, at 123-45.

80. *See id.* at 128-29 ("[T]he defendant is allowed to set against the enrichment any disenrichment which would not have happened but for the enrichment.").

81. For a good summary of proportional (also called equitable) accounting, see *Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 706-707 (S.D. Tex. 2002).

82. *See, e.g.*, Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 405-06 (1940) (finding that deliberate plagiarism did not make defendant liable to restore all profits earned when it turned plaintiff's play into a motion picture). *See also* Daniel Friedmann, *Restitution for Wrongs: The Measure of Recovery* 79 TEX. L. REV. 1879, 1889-90 (2001).

83. *See* Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 252 (affirming District Court's dismissal).

84. *Id.* at 252.

85. *See id.* at 248, 250.

state of the acts of officials of that state, purporting to act as such."[86] Judge Hand appeared uneasy with the Act of State Doctrine, and seemed to invite the intervention of the Supreme Court: "if we have been mistaken, the Supreme Court must correct it."[87] His opinion also stated that, in such cases, the court should entertain statements of intent from the Executive: "the only relevant consideration is how far our Executive has indicated any positive intent to relax the doctrine that our courts shall not entertain actions of the kind at bar; some positive evidence of such an intent being necessary."[88] In the absence of the Executive's express consent to an exception to the Act of State Doctrine, the court held that Bernstein's case was a matter properly settled by treaty law.[89]

At the time of Bernstein's first appeal, he had not secured the political branches' support, but this changed two years later in an almost identical lawsuit against the Holland America Line.[90] Jack B. Tate, Acting Legal Advisor of the U.S. State Department, wrote the court to declare the U.S. "Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls."[91] The letter continued:

> [I]t is this Government's policy to undo the forced transfers and restitute *identifiable property* to the victims of Nazi persecution wrongfully deprived of such property; and [the Executive] sets forth that [its] policy . . . is to relieve

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86. *Id.* at 249. The classic formulation of the Act of State Doctrine is given in *Underhill v. Hernandez*:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

Underhill v. Hernandez, 168 U.S. 250, 252 (1897).

87. *Bernstein,* 163 F.2d at 249.

88. *Id.* at 251.

89. *Id.* ("It seems to us that that is a consequence so at variance with the control which must be exercised jointly by the victorious powers in making peace, that only the most explicit evidence of a willingness so far to divest themselves, can support the action at bar.").

90. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71, 71 (2d Cir. 1949). The Holland America Line had acquired ships from Marius Boeger during the liquidation of Bernstein's Red Star Line. *Id.* at 73. The claims were almost identical, including recovery of insurance payments for a sunken ship. *Id.* In this lawsuit Bernstein also received repeated leave to amend his complaint in an attempt to make a showing that parties other than agents of the Nazi state had been responsible for his duress. *Id.* Justice Hand ultimately found these attempts unsuccessful, but nevertheless granted Bernstein leave to amend his complaint a fourth time. *Id.* at 76.

91. Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954) (per curiam).

> American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.[92]

On the strength of Tate's clear statement, the Second Circuit found that "this supervening expression of Executive Policy" allowed for a case-by-case exception to the Act of State Doctrine; Bernstein's suit could thus proceed.[93] So began the Bernstein Letter exception. Thereafter, federal courts would find an exception to the doctrine upon the Executive's submission of letters of interest, which became generically known as "Bernstein Letters."[94]

Thus, while Bernstein's case was strong, he could not survive dismissal without intervention from the political branches.[95] This would become typical for Holocaust restitution suits for the next fifty years. At first, Bernstein's wrongful enrichment claims failed, despite a strong case that clearly identified the wrong of duress and traced the misappropriation of identifiable assets to the defendant.[96] Bernstein alleged specific, readily calculable gains that the defendant enjoyed at his expense.[97] Nevertheless, the foreign shipping companies could initially escape liability because the root cause of the wrongful enrichment lay in the sovereign acts of a criminal state (an all too common phenomenon in gross human rights violations).[98] However, once Bernstein secured support from the political branches, he could by-pass the affirmative defense available in the Act of State Doctrine.[99] Strong barriers to wrongful enrichment suits arising from human rights violations will block them in the courts without support from the political branches. "Plaintiff's diplomacy," at least in this case, was less about private parties initiating

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92. *Id.* (emphasis added).

93. *Id.*

94. *See* THOMAS M. FRANCK ET AL., FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS, AND SIMULATIONS 337-39 (3d ed. 2008). *See also* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954) (per curiam). Jack Tate was responsible for the so-called "Tate Letter" of 1952 which established a commercial exception to the doctrine of Foreign Sovereign Immunity, later codified in the Foreign Sovereign Immunities Act. *See* 28 U.S.C. § 1605 (2003). The use of the Tate Letter and its modification of the Act of State Doctrine is discussed at length in *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 487-88 (1983). The letter is reprinted in full in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976). *See also* Bazyler, *Nuremberg in America*, *supra* note 20, at 21. Deference is typically given to the Executive in cases that implicate foreign relations in federal courts. *Accord* Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773, 773-75 (2008) *with* Aron Ketchel, Note, *Deriving Lessons for the Alien Tort Claims Act from the Foreign Sovereign Immunities Act*, 32 YALE J. INT'L L. 191, 196-99 (2007) (indicating that deference to the Executive increased under the Bush administration).

95. *See* Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, 252 (2d Cir. 1947).

96. *Id.* at 246-48.

97. *Id.*

98. *Id.*

99. *See* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).

lawsuits to influence traditional diplomacy as it was about securing the support of the State to influence the courts.

B. Kelberine, the First Holocaust-era Class Action

Defendant MNCs easily stifled private litigation that lacked political support. *Kelberine v. Societe Internationale*[100] provides an example. Moreover, *Kelberine* illustrates an attempt to recover lost slave labor wages in quantum meruit, another common strategy in Holocaust-era suits.[101]

Kelberine again involved an MNC of a non-belligerent nation.[102] A Swiss corporation, Societe Internationale (Interhandel), had recently recovered $120 million from the auction of a German corporation in an unrelated lawsuit against the United States Alien Property Custodian (which held the assets of enemy aliens in trusteeship during the war).[103] The *Kelberine* plaintiffs alleged that Interhandel was a successor corporation to I.G. Farbenindustrie, a German chemical cartel, whose leading executives had been convicted at Nuremberg for war crimes.[104] The plaintiffs claimed to represent themselves and all similarly situated survivors whom I.G. Farben had forced to endure slave labor.[105] They claimed the $120 million owed to Interhandel in compensation.[106] Unlike Bernstein's cases, however, *Kelberine* advanced no credible claims to identifiable assets. No plaintiff argued that the liquidated German corporation or any other Interhandel assets had ever belonged to her. Rather, the plaintiffs targeted Interhandel's alleged wrongful enrichment as "a creature of Farbenindustrie," which had been "an integral part of the Nazi conspiracy, participat[ing] in it, and profit[ing] from it."[107] They also claimed unpaid wages in quantum meruit.[108]

The courts exercise great discretion in deciding the measure of remedy in restitutionary suits, but this has its limits. Both the *Restatement (Second) of Contracts* and the *Restatement (Third) of Restitution* limit recovery to the measurable benefit conferred *or* the value of services, *whichever is more.*[109] If a

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100. Kelberine v. Societe Internationale, 363 F.2d 989 (D.C. Cir. 1966).

101. *Id.* at 992.

102. *Id.* at 991.

103. *Id.* (Interhandel had owned a 90% share in the German corporation).

104. *Id.* at 992.

105. *Id.*

106. *Kelberine*, 363 F.2d at 992. Plaintiffs also sought recovery for wrongful death and other harms as traditional torts as well as remedy "upon inherent natural law," however, only the restitution claims will be dealt with here. *Id.*

107. *Id.* at 992.

108. *Id.* at 991-92.

109. RESTATEMENT (SECOND) OF CONTRACTS § 370 (1981) ("A party is entitled to restitution under the rules stated in this Restatement only to the extent that he has conferred a benefit on the other party by way of part performance or reliance."); RESTATEMENT (SECOND) OF CONTRACTS § 371 (1981); RESTATEMENT (THIRD) OF UNJUST ENRICHMENT AND

quantum meruit case is without fault, the defendant is only liable for the calculable benefit services conveyed *or* their market worth, *whichever is less.*[110] If the *Kelberine* plaintiffs had prevailed in quantum meruit, their remedy would have been the market value of their labor (plus interest on that sum during the intervening years). If they had prevailed in their wrongful enrichment claim arising out of the crime of slavery, they could have laid claim to profits from that crime.

The burden of proof, however, rests with the plaintiff. The *Kelberine* survivors would have had to trace the ill-gotten gains of I.G. Farben to Interhandel's ownership of a third corporation. Interhandel would not have been liable for all of I.G. Farben's alleged profits from slave labor, but only those traceable to its subsidiary. Interhandel would have doubtlessly appealed to the Act of State Doctrine, arguing that it relied upon the legality, under international law, of a sovereign nation's right to structure its own labor laws. In addition, Interhandel could have claimed the defense of "remoteness," that is, "there comes a point beyond which an infringer's profits, from its enterprises as a whole, cannot legally be attributed to a particular act of infringement."[111] Profits earned from combining labor with myriad other factor inputs are too are "too attenuated and too speculative"[112] to qualify for restitution.[113] The doctrine of remoteness conforms to the general theory of

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RESTITUTION § 51(2) (Tentative Draft No. 5, 2007) ("The unjust enrichment of a wrongdoer is not less than the market value of the benefits wrongfully obtained.") & § 51(3) ("Unless the rule of subsection (2) imposes a *greater* liability, the unjust enrichment of a conscious wrongdoer . . . is the net profit attributable to the underlying wrong. The object of restitution in such cases is to eliminate any profit from wrongdoing *while avoiding, so far as possible, the imposition of a penalty.*") (emphasis added). *But see* RESTATEMENT (FIRST) OF RESTITUTION, QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 134 (1937) (services tortuously obtained entitle plaintiff to either the value of the services or the benefits received by the defendant, without according priority). *See also id.* at § 40 cmt. f ("If . . . the recipient of the services is more at fault than the giver, the measure of the restitution may be the reasonable value of the services rendered, irrespective of the value to the recipient."); *id.* at §151 (wrongful acquisition of property entitles plaintiff to restitution of value at the time of taking or its appreciated value, whichever is more); *id.* at § 152 (recovery for wrongful acquisition of services limited recovery to the fair market value of services conveyed).

110. DAGAN, STUDY, *supra* note 73, at 102-05 (discussing theories of remedy for unjust enrichments normally characterized by contractual relationships for non-unique goods). It is generally acknowledged that labor or services have no value unless performed for another, usually for one who intends to combine them for personal gain. It is also generally acknowledged that producing a gain is generally beneficial. Thus remedy in such cases seeks to encourage the "sharing" of the benefit of labor: the plaintiff will be restituted, but not above and beyond the value of his services, therefore discouraging any claim for profits. *Id.* at 104. A defendant will have to pay, but not above and beyond the value of the misappropriated labor. This seeks to avoid any chilling effect on those who wish to add value to the services rendered. *Id.*

111. *Id.* at 1920 (quoting Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545, 1553 (9th Cir. 1989)).

112. Friedmann, *supra* note 82, at 1920 (quoting Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545, 1553 (9th Cir. 1989)).

113. *Id.* at 1919-20.

restitution, which holds that plaintiffs have a right only to profits readily traceable to their infringed rights.[114]

But, as with the Bernstein cases, the *Kelberine* court never reached the merits and instead found the whole issue of Holocaust-era restitution non-justiciable.[115] The D.C. Circuit affirmed in a seven-page opinion:

> [T]he [plaintiffs'] problem is not within the established scope of judicial authority. . . . [A]djudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power . . . is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed. . . . The events, the witnesses, the guilty tortfeasors, their membership in the conspiracy are all so potentially vague at this point as to pose an insoluble problem if undertaken by the courts without legislative or executive guidance, authorization or support. The whole concept is too uncertain of legal validity to sustain the self-establishment of the proceedings by a court in the absence of specific legislative or executive formulation. It seems to us that the trial court correctly dismissed the action for failure to state a claim upon which relief can be granted.[116]

Although *Baker v. Carr* had been decided four years earlier, the court did not invoke its now-canonized "'political question' doctrine."[117] Nevertheless, *Kelberine*'s reasoning relied upon several *Baker* factors. The court declared the entire matter was one for the political branches, that adjudication promised no consistent legal standards upon which the court might decide, and that the

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114. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (Tentative Draft No. 5, 2007) ("In measuring the unjust enrichment of conscious wrongdoers . . . the court may apply such tests of causation and remoteness, may make such allocations, may recognize such credits or deductions, and may assign such evidentiary burdens, consistent with the object of the remedy, as reason and fairness dictate.").

115. Kelberine v. Societe Internationale, 363 F.2d 989, 995 (D.C. Cir. 1966).

116. *Id.* (expressing clear discomfort with the then newly emerging American class action).

117. *See* Baker v. Carr, 369 U.S. 186, 210 (1962). The Supreme Court stated:

> [A] political question [is] . . . essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

Constitution did not commit the issue to the courts.[118] The early *Kelberine* class action, like almost all Holocaust-era litigation, foundered at the pleadings stage in the absence of what the court called "legislative or executive guidance."[119]

C. Hugo Princz's Case

A suit brought by the survivor Hugo Princz against the Federal Republic of Germany demonstrated that this overarching pattern had not changed by the mid-1990s.[120] Since the first cases of the 1940s, the United States courts had undergone a sea-change in the adjudication of international human-rights law.[121] Many United States courts had come to see international law as not merely governing the relations among states parties, but as extending human rights to individuals, even against their own governments.[122] Some judges recognized these rights as granting a private cause of action to litigants against MNCs.[123]

Princz resided with his family in Slovakia at the time of the Holocaust, but enjoyed American citizenship.[124] Slovakia deported him to Nazi Germany nonetheless, where he endured slave labor working for I.G. Farben and the airplane manufacturer Messerschmitt.[125] He was the sole survivor among his immediate family, and he continued to endure misfortune after the war.[126] Although the German government set up reparations programs for numerous groups, including the remnant of German Jewry, Czechoslovakian Jews, and Israeli Jews, Princz was repeatedly declared ineligible due to his American citizenship.[127] In 1992, he sought to recover through the courts what state diplomacy had denied him, by suing for false imprisonment, assault and battery, and negligent and intentional infliction of emotional distress.[128] He also sought "the value of his labor in the I.G. Farben and Messerschmidt plants" in quantum meruit.[129]

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118. *Kelberine*, 363 F.2d at 995.

119. *Id. Cf.* Bazyler, *Nuremberg in America*, *supra* note 20, at 28-30 (recognizing that early suits to recover identifiable property succeeded, for instance, to recover looted artworks).

120. *See generally* Princz v. F.R.G., 26 F.3d 1166 (D.C. Cir. 1994).

121. *See generally* Bazyler, *Nuremberg in America*, *supra* note 20.

122. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (granting cause of action to an individual against agent of sovereign government for infraction of human rights); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991) (describing *Filartiga* as the "Brown v. Board of Education" of the human rights movement).

123. *Cf. Princz*, 26 F.3d at 1177-78 (Wald, J., dissenting) (stating that plaintiff's case against Germany is analogous to an individual's case against a multinational corporation). *See also* Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (overturning the California District Court's dismissal and remanding of the case); Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997) (dismissing human rights tort action against multinational corporation).

124. *Princz*, 26 F.3d at 1168.

125. *Id.* at 1168.

126. *Id.*

127. *See id.* at 1172-73.

128. *Id.* at 1168.

129. *Id.*

Princz survived a first motion to dismiss in the District Court of the District of Columbia,[130] where the Federal Republic of Germany claimed sovereign immunity.[131] Judge Stanley Sporkin found that the current German state was the successor to "a merciless government in flagrant disregard of international law, the laws of civilized societies and all principles of human decency."[132] Sovereigns that commit gross violations of human rights, Sporkin ruled, had no entitlement to immunity under the Foreign Sovereign Immunities Act (FSIA) and could be held liable for violating individuals' rights.[133]

In a 2-1 split decision, the D.C. Circuit reversed.[134] Exploring FSIA's various exceptions, Judge Ginsburg held that slave labor was not sufficiently like commercial activity to qualify for the FSIA's commercial exception.[135] FSIA also specifies that foreign sovereigns are subject to suit for "property taken in violation of international law,"[136] but the court held that violations of human rights did not convey subject matter jurisdiction under this exception either:

> We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong.[137]

Finally, even if the sovereign government of Germany was not immune under the FSIA, Ginsburg wrote, Princz's tort and quantum meruit claims fell under state law and did not raise federal questions sufficient to confer jurisdiction under FSIA.[138]

Although Princz's litigation faltered, political process could succeed. The United States House and Senate reacted by passing resolutions urging the Executive to "take all appropriate steps necessary to ensure that this matter

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130. Princz v. F.R.G., 813 F. Supp. 22, 23 (D.D.C. 1992), *rev'd*, 26 F.3d 1166 (D.C. Cir. 1994).

131. *Id.* at 25. Germany claimed immunity pursuant to the Federal Sovereign Immunities Act. *Id.* (citing 28 U.S.C. §§ 1602-1611 (2006)). Under the Federal Sovereign Immunities Act, the court would then have no jurisdiction over the case. *Id.* (citing 28 U.S.C. § 1330 (2006)).

132. *Id.* at 25-26.

133. *Id.* at 26.

134. *See generally* Princz v. F.R.G., 26 F.3d 1166 (D.C. Cir. 1994).

135. *Id.* at 1171-73 (citing 28 U.S.C. § 1330(a) (2006)).

136. 28 U.S.C. § 1605(a)(3) (2003).

137. *Princz*, 26 F.3d at 1175 n.1. *But see id.* at 1178 (Wald, J., dissenting) (arguing that violations of *jus cogens* norms should constitute an exception to sovereign immunity under the FSIA).

138. *Id.* at 1176 (citing 28 U.S.C. § 1331 (2006)).

will be expeditiously resolved and that fair reparations will be provided Mr. Princz."[139] Both houses introduced legislation to strip Germany of sovereign immunity so that suits like Princz's could proceed.[140] Germany responded with traditional diplomacy. It sought to quiet Princz's claims through an Executive Agreement with President Clinton,[141] establishing a $2.1 million fund to be distributed to Princz and ten other Holocaust survivors, all of whom had been American citizens during the Holocaust.[142]

The Princz case, with its mix of litigation and intervention by the political branches recapitulated the pattern long set by the *Bernstein* cases. Although Judge Sporkin's first ruling appealed to deeper changes in American law that recognized individual causes of action in international human rights claims, Princz failed upon appeal. He and those similarly situated could succeed only after concerted action by the political branches led to a negotiated settlement.

SECTION II: LESS THAN SLAVES AND LESS THAN PROFITS

Bernstein, Kelberine and *Princz* introduced the three kinds of restitution claims raised in all subsequent Holocaust-era litigation: restitution of identifiable assets, quantum meruit, and wrongful enrichment. The last two are easily confused because the crime of slavery may give rise to both, but they are distinct. Plaintiffs claimed a right to back wages in quantum meruit. Their claim to MNCs' profits from that labor arose in wrongful enrichment. If the Holocaust-era lawsuits are to serve as a model for future international human rights litigation, these restitutionary theories deserve far more analysis than they have so far received. Because eventual settlements amounted to billions of dollars, it is often assumed that the merits of the claims were strong.[143] Yet this assumption rests on a two-fold mistake. First, litigation was not the key to success; rather transnational processes that were primarily political made the settlements possible. Second, claims to the profits of MNCs had little basis in historical fact, and even the quantum meruit claims were vulnerable to strong defenses.

The survivors' plight evinced all the ingredients of a straightforward tort: duty, breach of duty, causation, and harm. The common law states that

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139. H.R. Res. 323, 103d Cong. (1994); S. Res. 162, 103d Cong. (1993). Both resolutions are identical.

140. *See* S. Res. 825, 103d Cong. (1993). *See also* 104 CONG. REC. H9156 (Mar. 23, 1995) (statement of Rep. Schumer) (referring to these legislative efforts on behalf of Hugo Princz and vowing to reintroduce this legislation in the 104th Congress).

141. Foreign Claims Settlement Commission of the United States, 1995 Yearbook, at 10, 11-13 (agreeing to pay Princz and similarly situated claimants damages for harms they had suffered but excluded restitution for slave labor).

142. *Americans Win Holocaust Reparations*, FACTS ON FILE: WORLD NEWS DIGEST (Sep. 21, 1995), http://www.2facts.com/wnd_story.aspx?PIN=1995061538; Laurette Ziemer, *Germany Pays US Jews £1.4m*, EVENING STANDARD, Sept. 20, 1995, at 5.

143. *See, e.g.*, Jessica Amanda Burdick, Note, Burger-Fischer v. DeGussa AG, *"[T]he Greatest Robbery in the History of Mankind:" Holocaust Victims Once Again Victimized, This Time by the American Courts,* 16 T.M. COOLEY L. REV. 449 (1999).

employers owe an affirmative duty to exercise reasonable care to avert danger or harm to employees within the scope of employment.[144] Although the Holocaust did not originate in corporate boardrooms, Germany's leading companies undeniably participated. As complicit, often eager parties alongside the Nazi regime, MNCs committed acts that intentionally and proximately caused the plaintiffs harm. The MNCs that had benefited financially from wrongs should have been held liable to disgorge their ill-gotten gains, whether they arose from slave labor or other intentional torts.

Sensationally, plaintiffs linked these theories to speculation about enormous 'profits' and the wealth of West Germany's post-war capitalist economy.[145] Yet there is little evidence that the crimes of the Holocaust generated vast wealth. Although it is still popular among some historians to allege that "German corporations . . . consumed with greed"[146] fueled the National Socialist regime, no credible economic historian would support this claim. The Nazi regime undertook its slave labor program in a desperate attempt to prop-up war production after exhausting all other reservoirs of labor. For precisely this reason, it was also relatively short lived. The vast majority of companies that employed slave laborers did so only in the last years of war, from mid-1942 to 1945. The murderous peak of the Holocaust occurred between early 1942 and mid-1943. But German companies generally enjoyed the highest profit rates

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144. The Restatement of Torts provides:

> If a servant, while acting within the scope of his employment, comes into a position of imminent danger of serious harm and this is known to the master or to a person who has duties of management, the master is subject to liability for a failure by himself or by such person to exercise reasonable care to avert the threatened harm.

RESTATEMENT (SECOND) OF TORTS § 314B(1) (1965). Liability may even have extended to MNCs' employment of SS guards who harmed prisoners. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 41(b)(3) (Proposed Final Draft No. 1, 2005). *See also id.* at § 40(b)(4)(a-b) (stating that an actor in a special relationship with another owes a duty of reasonable care with regard to risks that arise in the scope of that relationship, including the relationship of an employer to employees).

145. *See also* Neuborne, *Holocaust Reparations Litigation*, *supra* note 38, at 618.

146. *Hearing on World War II Assets of Holocaust Victims Before the H. Comm. on Financial Servs.*, 106th Cong. (1999) [hereinafter *Hearing on World War II Assets*] (testimony of Burt Neuborne, Professor, New York University Law School), *available at* http://financialservices.house.gov/banking/91499bn.shtml (last visited Nov. 10, 2010). For similar debates among contemporary historians, see GÖTZ ALY, HITLERS VOLKSSTAAT: RAUB, RASSENKRIEG UND NATIONALER SOZIALISMUS (2005). *See also* Götz Aly, *Nicht Falsch, Sondern Anders Gerechnet*, DIE TAGESZEITUNG (Mar. 15, 2005), http://www.taz.de/1/archiv/archiv/?dig=2005/03/15/a0190; J. Adam Tooze, *Einfach Verkalkuliert*, DIE TAGESZEITUNG (Mar. 12, 2005), http://www.taz.de/1/archiv/archiv/?dig=2005/03/12/a0289; J. Adam Tooze, *Doch Falsch Gerechnet – Weil Falsch Gedacht*, DIE TAGESZEITUNG (Mar. 16, 2005), http://www.taz.de/1/archiv/archiv/?dig=2005/03/16/a0205.

during the first two years of war (1939-40 and 1940-41), before either the slave-labor program or the killing campaigns.[147]

This section investigates the historical basis for Holocaust slave-labor restitution claims, both in quantum meruit and wrongful enrichment. It does so by assuming (as United States courts have not) that these were not barred at the outset due to political questions, statutes of limitations, post-war treaties, or various sovereign immunity doctrines. Plaintiffs had a plausible case to recover the value of their labor in quantum meruit, dealt with in subsection A below. However, the likely recovery would have been uneven and subject to various defenses and offsets. Section B turns to the survivors' more sensational wrongful enrichment claim, which fares more poorly in the light of history. In 1979, Benjamin Ferencz argued that the victims of Nazi Germany had been "less than slaves."[148] His larger point was that Nazi Germany behaved even more irrationally than traditional slave holders, who preserved their chattels—if not for their humanity—then at least for their property value.[149] By contrast, the Nazis wantonly destroyed human life, even when this made no economic sense. What was true for the Nazi period is applicable to contemporary human rights litigation discussed in section IV: because gross human rights violations are not noted for enormous profitability, wrongful enrichment is unlikely to provide recovery in ongoing efforts to hold MNCs accountable.

A. Quantum Meruit

Victims of slave labor had the strongest cause of action in quantum meruit for lost wages, however, profits were irrelevant to this claim. Employers are liable for wages, whether loosing or making money. But the sums in 1945 were not enormous. A man's average industrial wage in Germany was 51 Reichmark (RM) a week (about $128); in low paying sectors like construction it was 38 RM ($95), and for women it was around 22 RM ($55).[150] Since slave labor in the German war economy usually lasted no more than the three year period from mid-1942 to May, 1945, 150 weeks is a reasonable estimate for the maximum recovery in quantum meruit. This yields labor value of 7,650 RM (about $19,000) for skilled men, 5,700 RM (about $14,000) for unskilled men, and 3,300 RM (about $8,000) for women. Because the RM was worth roughly 2.5 times the dollar for most of this period, these were meaningful sums, roughly twice as much as the German Foundation's typical payouts of between

147. *See* ADAM TOOZE, THE WAGES OF DESTRUCTION: THE MAKING AND BREAKING OF THE NAZI ECONOMY 561 (2007).

148. *See generally* BENJAMIN B. FERENCZ, LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION (1979) (arguing that whereas slave owners value their chattels as property, the Nazis destroyed their victims).

149. *See generally id.*

150. R.L. BIDWELL, CURRENCY CONVERSION TABLES: A HUNDRED YEARS OF CHANGE 22-24 (1970).

15,000 DM and 5,000 DM (roughly $10,000 and $3,333 at the relatively high exchange rate of 1.5 DM per U.S. dollar).[151]

Survivors may have also been entitled to reasonable interest on back wages that German employers had wrongfully retained over the intervening fifty years.[152] A recovery of value plus interest would have led to far larger recoveries, even if one assumes an interest rate of only 4% (approximate of average inflation between 1945 and 1999).[153] An industrial laborer should have been able to recover over $250,000 and an unskilled woman almost $110,000.[154]

Table of Lost Wages[155]

	Skilled Men, Industry	**Unskilled Men**	**Women, Industry**
Weekly Wage	51 RM	38 RM	22 RM
Max. for 150 Weeks	7,650 RM	5,700 RM	3,300 RM
Total in Dollars	$30,600	$22,800	$13,200
At 4% in 1999	$254,403	$189,555	$ 109,742

These calculations indicate that the roughly eight to nine billion dollars in total settlements for all Holocaust-era litigants in the late 1990s was low and would not have sufficed to restitute more than 36,000 skilled male workers in quantum meruit.

Yet eighty-eight percent of this hypothetical recovery is due to the time-value of money and assumes that claimants could have recovered over fifty-years' worth of interest. Quantum meruit is based upon an award of damages for lost wages on an implied contract, but prejudgment interest, the interest that accrues from the time a cause of action arises, is a purely restitutionary claim. It is meant to restore a benefit unjustly retained by the defendant rather than harm suffered by the plaintiff. American courts award prejudgment

151. Gesetz zur Errichtung Einer Stiftung "Erinnerung, Verantwortung und Zukunft" §§ 9, 11, BGBl. I S. 1263 (Aug. 2, 2000) *amended by* Sept. 1, 2008, BGB1. I S. 1797. The United State's typical letter of interest submitted in Holocaust restitution cases cited an exchange rate of 2.2 DM/dollar, but in the 1990s the exchange rate fluctuated at rates approaching 1.5 DM/Dollar. *See* Lawrence H. Officer, *Exchange Rates Between the United States Dollar and Forty-one Currencies*, MEASURING WORTH (2009), http://www.measuringworth.com /exchangeglobal/. *See* United States Statement of Interest, 01 cv 02547-WTH, Dk.# 59 at 8, n.3, Ungaro-Benages v. Dresdner Bank AG (S.D. Fla. Jan. 1, 2002).

152. MARK SPOERER, ZWANGSARBEIT UNTER DEM HAKENKREUZ 152, 185-86 (2001).

153. *Id.* The Swiss Bank settlement employed a figure in this ballpark, roughly equal to an APR of 4.2%. The negotiators used, as a rule of thumb, a factor of 10, i.e. such that a dollar in 1945 would be worth 10 in 1998 when the case was settled. *See* Telephone Interview with Judge Edward Korman (Apr. 23, 2009). This is equivalent to an APR of 4.187%. *Id.*

154. SPOERER, *supra* note 152, at 185-86.

155. Based on *id.* at 152, 185-86.

interest as a default, especially in cases involving back pay,[156] but they also have broad discretion to deny it or adjust the interest rate.[157] It is therefore uncertain that human rights plaintiffs can consistently recover interest.

The paradigmatic case that establishes judicial discretion over this issue, *Board of County Commissioners v. United States*, denies prejudgment interest for a historic wrong.[158] A Kansas county had illegally assessed two decades' worth of taxes on Indian lands in violation of federal treaty.[159] The Supreme Court reversed an interest award on the restituted tax proceeds, stating that "interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable."[160] Although the Court expressed sympathy for the American Indians' cause, the Court held that disgorgement would inequitably burden the Kansas county in question.[161]

Board of County Commissioners still serves as good law supporting the courts' broad authority to award or withhold interest. Such decisions are reviewable only for abuse of discretion.[162] The courts will deny prejudgment interest from a bankrupt company which has suffered a change of position,[163] and, like restitution remedies generally, interest awards are not punitive; they merely

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156. *See, e.g.*, Gierlinger v. Gleason, 160 F.3d 858, 873 (2d Cir. 1998) (quoting Saulpaugh v. Monroe Cmty. Hosp., 4 F.3d 134, 145 (2d Cir. 1993) (stating that to the extent damages awarded to the plaintiff represent compensation for lost wages, "it is ordinarily an abuse of discretion not to include pre-judgment interest.")).

157. *See* SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1476 (2d Cir. 1996). The usual rate of interest awarded for disgorgement is the IRS underpayment rate. *Id.* This rate has historically been around 8%, and 10% for large corporations. It is now around 4%. But courts may set rates lower. *See, e.g.*, Rivera v. Baccarat, Inc., 95 Civ. 9478, 1999 U.S. Dist. LEXIS 1243, at *3 (S.D.N.Y. Feb. 5, 1999) (lost wages case under Title VII allowed recovery of prejudgment interest at average Treasury Bill rate of 5.495%). The Second Circuit established a standard for weighing whether the award of interest is appropriate. *First Jersey Sec.*, 101 F.3d at 1476 (citing Wickham Contracting Co. v. Local Union No. 3, 955 F.2d 831, 833-34 (2d Cir. 1992)). Courts should consider "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." *Wickham Contracting Co.*, 955 F.2d at 833-34. The Swiss bank settlement involved a dispute over interest, but only that which would accrue upon the structured payments of the settlement money from the time of judgment. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 28-29. Although different from prejudgment interest, the figure the parties arrived at (3.78%) had little relation to the actual proceeds earned by the banks on deposits. *Id.* Capturing how uncertain interest negotiations can be, an anonymous speaker is quoted by Michael Bazyler as stating that the negotiation for an agreement to a rate of 3.78% was "'one of the enduring mysteries of the world.'" *Id.*

158. Bd. of Cnty. Comm'rs v. United States, 308 U.S. 343, 353 (1939).

159. *Id.* at 348-49.

160. *Id.* at 352.

161. *Id.* at 352-53.

162. *See* Gierlinger v. Gleason, 160 F.3d 858, 873 (2d Cir. 1998); SEC v. First Jersey Sec., Inc., 101 F.3d 1450, 1476 (2d Cir. 1996).

163. Fed. Deposit Ins. Corp. v. Rocket Oil Co., 865 F.2d 1158, 1161 (10th Cir. 1989) (upholding the denial of interest in the case of damages owed by a bankrupt corporation).

return a wrongful or unjust enrichment.[164] With such wide latitude and such imprecise standards,[165] it is by no means certain that Holocaust survivors could have recovered billions in interest for harms suffered half a century earlier for historical injustices addressed by several waves of reparations agreements and treaties between the states party to World War II.[166]

German MNCs would also have argued that survivors, who had recovered via various German reparations programs totaling roughly 100 billion in contemporary dollars,[167] should not be allowed a double recovery. Defendants in quantum meruit may claim a defense if the services rendered benefited the plaintiff. Unsurprisingly, the highest-value labor in the German slave labor program tended to be the safest. For example, prisoners engaged in the assembly lines of the V-2 rockets, a high-priority project in the late-war period, received extra rations and suffered relatively low attrition rates.[168] Meanwhile, their fellow prisoners assigned to low-skill construction work died by the tens

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164. *See* Rodgers v. United States, 332 U.S. 371, 373-74 (1947); Whitfield v. Lindemann, 853 F.2d 1298, 1306 (5th Cir. 1988). As with many restitutionary claims, the courts are not consistent, sometimes treating the restitution of interest as if it redressed a harm suffered by the plaintiff; sometimes as an unjust or wrongful enrichment illegitimately enjoyed by the defendant. *Compare Rodgers,* 332 U.S. at 373-74 (theory of interest award is to make plaintiff whole for damages suffered), *with Gierlinger,* 160 F.3d at 874 (stating that "[a]warding prejudgment interest . . . prevents the defendant . . . from attempting to 'enjoy an interest-free loan' . . . "). For a discussion of prejudgment interest in restitution claims, see Smith, *supra* note 30, at 184-87 (stating that recovery of interest is tenuous in restitutionary suits and no "damages" lie for failure to make restitution).

165. The Fifth Circuit includes "peculiar circumstance" among the reasons for denying interest. See Probo II London v. Isla Santay MV, 92 F.3d 361, 363 (5th Cir. 1996) (noting that denial of interest may be justified if the court finds "peculiar circumstances"). Fed. Deposit Ins. Corp. v. Rocket Oil Co., 865 F.2d 1158, 1161 (10th Cir. 1989) (upholding the denial of interest in the case of damages owed by a bankrupt corporation). Plaintiffs must also bring suits without "undue delay." Gen. Motors Corp. v. Devex Corp., 461 U.S. 648, 657 (1983). *See also* City of Milwaukee v. Cement Div., Nat'l Gypsum Co., 515 U.S. 189, 196 (1995) (courts rarely catalogued reasons for denying interest, however, Justice Marshall discusses that undue delay in bringing a lawsuit could be grounds for denying interest).

166. *See* Gross v. German Found. Indus. Initiative, 499 F. Supp. 2d 606, 609 (D.N.J. 2007), *aff'd* 549 F.3d 605 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 2384 (U.S. 2009). The history of *Gross* addressed restitutionary interest claims in the context of the German Foundation. Two classes of plaintiffs brought suit to recover "interest on all funds the Initiative [of MNCs] collected from the time of their receipt of those funds until payment to the Foundation," claiming this belonged to survivors. 499 F. Supp. 2d at 609. Judge Dickinson Debevoise dismissed. *Id.* at 677 (finding the Berlin Accord establishing the Foundation to be a diplomatic agreement not a binding contract.). Among other theories, the appellate court considered the claims in restitution, holding that they "would surely fail." 549 F.3d at 616. Although the case did not raise issues of prejudgment interest, it nevertheless shows the tenuousness of restitutionary interest claims in cases necessarily settled by political processes.

167. Declaration of Stuart Eizenstat at 18, Ungaro-Benages v. Dresdner Bank AG, No. 01-2547, 2003 LEXIS 27693 (S.D. Fla. Mar. 11, 2003), *available at* http://www.state.gov/documents/organization/16561.pdf.

168. ALLEN, *supra* note 36, at 228.

of thousands.[169] Industrialists had strong incentives to shield scarce and productive workers from the brutality of the regime. Protection was always qualified and tied to productivity, but it was nevertheless real. Historians have long known that the victims' chances of survival increased to the extent that they could secure industrial employment.[170] Defendant MNCs would have argued grotesquely that they "benefited" plaintiffs by "helping" them survive, and some historical evidence supports this, despite the fact that MNCs behaved atrociously as willingly participants in Hitler's genocidal regime.

Because quantum meruit is not a punitive remedy, it does not necessarily facilitate recovery for evil wrongs.[171] The deadliest labor, low-skilled construction work or quarry work, for example, was also the least valuable. Quantum meruit would have inevitably led to smaller recoveries in such cases, just as it would provide little remedy for the squalid, menial labor alleged in contemporary slave labor suits against oil companies in Sudan or Myanmar where wages can be less than one dollar a day.[172] Plaintiffs who had suffered most would have received the least. Moreover, plaintiffs would have had to carry the burden of identifying the employers they worked for, assuming these companies still existed fifty years later, as well as proving fair-market wages.[173] Only then would the burden shift to MNCs to sustain defenses or refute factual allegations.[174]

B. Wrongful Enrichment

The heart of the Holocaust-era litigation was the wrongful enrichment claim to ill-gotten profits of MNCs, but historical research has demonstrated that MNCs' ill-gotten gains were modest at best and sometimes non-existent.[175] When threatened with lawsuits, many German corporations hired professional historians, granted them free access to their archives, and requested accurate histories in order to assess their liability.[176] Plaintiffs'

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169. *See id.* at 222-32.

170. See the classic article of Ulrich Herbert, *Von Auschwitz nach Essen. Die Geschichte des KZ-Außenlagers Humboldtstraße*, *in* SKLAVENARBEIT IM KZ, 13 (Wolfgang Benz & Barbara Distel 1993). *See* ALLEN, *supra* note 36, at 222-32.

171. DAGAN, ETHICS, *supra* note 29, at 249 ("[R]estitution claims are not about forcing the slaves to labor, but rather about failing to pay for the work they did," and thus "resorting to restitution law requires buying into a vocabulary of 'lost wages'" instead of emphasis on the violation of human rights.).

172. *See* Doe v. Unocal Corp., 395 F.3d 932, 939 (9th Cir. 2002) (discussing the use of slave labor for road clearing and other menial manual labor). *See also* Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

173. *See*, DAGAN, ETHICS, *supra* note 29, at 247 (acknowledging that it is a daunting task for a plaintiff/laborer to link a defendant/employer to the crime of enslavement).

174. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 38 (Tentative Draft No. 3, 2004).

175. Peter Hayes, *The Ambiguities of Evil and Justice: Degussa, Robert Pross, and the Jewish Slave Laborers at Gleiwitz, in* GRAY ZONES: AMBIGUITY AND COMPROMISE IN THE HOLOCAUST AND ITS AFTERMATH 7, 8 (Jonathan Petropoulos & John K. Roth eds., 2005).

176. *See id.* at 7-8.

lawyers and their advocates among legal scholars tended to rely upon whatever dubious historical research supported their cause.[177] Some, like Michael Hausfeld, endeavored to base pleadings on archival research but never tempered their claims when this produced little evidence of engorged profits.[178] Others, like Neuborne, simply repeated, sometimes before Congress, the most exaggerated statements drawn from the pleadings regardless of their foundation in historical fact.[179]

It is easy to understand why Holocaust survivors believed that their labor had enriched corporations. They received nothing, or at best next to nothing, while working longer hours than German civilians.[180] It appears self-evident that slave labor must have led to large profits, especially if, as it seemed, corporations did not pay for it. But this common-sense impression actually rests upon a misunderstanding that survivors, who lived in squalid work camps, had no way to know. German industry did pay for slave labor; it paid the Third Reich.[181] Documents to this effect were published as early as 1946 by the survivor of Buchenwald and historian Eugon Kogon, listing daily labor

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177. See, for instance, the discussion of litigation directed against IBM based on the work of Edwin Black. Michael J. Bazyler & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK. J. INT'L. L. 683, 777-86 (2003). Edwin Black has become somewhat notorious for threatening lawsuits against historians and scholarly journals that publish reviews of his books that accurately point out flaws in his research, including the author of this piece. No credible historian of business, economics, or the Third Reich would credit Black's work with much accuracy. Law scholars of the Holocaust-era litigation and plaintiffs lawyers consistently remain indifferent to the factual basis of such claims. *See* Michael Allen, *Stranger than Science Fiction: Edwin Black, IBM, and the Holocaust*, 43 TECH. & CULTURE 150 (2002), *available at* http://michaelthadallen.com/Homepage.pages/articles/Black_Review.pdf.

178. *See generally Hearing on the Swiss Banks and the 1946 Washington Accords Before the S. Comm. on Banking, Housing & Urban Affairs*, 105th Cong. (1998) [hereinafter *Hearing on the Swiss Banks*] (prepared testimony of Mr. Michael D. Hausfeld, Esq., Counsel representing the Holocaust victims), *available at* http://banking.senate.gov/98_07hrg/072298/witness/hausfeld.htm (the entire record puts forth no evidence of engorged profits).

179. *See Hearing on World War II Assets*, *supra* note 146 (testimony of Burt Neuborne, Professor, New York University Law School). Neuborne asserts that workers were sold to MNCs at Nazi slave auctions by the SS. *Id.* In fact, the vast majority of workers from Eastern Europe were forced into labor by the General Plenipotentiary for the Labor Action, headed by Fritz Sauckel, therefore no workers were ever "owned" as chattels in the Third Reich. *See* ULRICH HERBERT, FREMDARBEITER: POLITIK UND PRAXIS DES "AUSLÄNDER-EINSATZES" IN DER KRIEGSWIRTSCHAFT DES DRITTEN REICHES 270 (2d ed., Verlag J.H.W. Dietz Nachf. 1986) (describing the structure of Nazi slave labor organization in the Third Reich). Recall too that Hausfeld admitted to Stuart Eizenstat that his unjust enrichment claims lacked evidentiary foundation. EIZENSTAT, *supra* note 19, at 143.

180. *See* ALLEN, *supra* note 36, at 222-32 (detailing reorganization of SS labor operations for total war).

181. *Id.* at 253.

rents to industry of 6-8 RM, though rates during the height of the slave-labor program could be as low as 4 RM per day and rarely greater than 6 RM.[182]

The common-sense belief that slave labor was enormously lucrative also fails to account for the complexity of modern industry in general, and Germany's workforce in particular. At the outset of World War II, Germany relied, as it does today, on a skilled workforce engaged in capital-intensive production.[183] Despite some sectors such as construction or, to some extent, women's labor in the textiles,[184] German industry was ill-adapted to unskilled labor. Profits came from a relatively high-wage workforce, which businesses valued for its continuity, dedication, and flexibility at the worksite.[185] Total war put an unbearable strain on this resource, not least because the German armed forces continued to call up laboring men, whom the Red Army killed in great numbers on the Eastern Front.[186] By the end of 1941, there were simply not enough German workers to keep the Nazi war machine running.

By early 1942, Hitler empowered special officials to dragoon workers in Eastern Europe into German factories. The vast concentration camp system, whose victims suffered the worst atrocities, also came under pressure to deploy prisoners in war-related industries.[187] By August of 1944, compulsory labor made up just over twenty-six percent of the total workforce, although in sectors like construction, airframe manufacture, and mining it was much higher.[188] German corporations had to change over from a skilled and highly-motivated workforce to one in which many workers came from agricultural regions of Eastern Europe and had never been inside a modern factory.[189] These workers' motivation to contribute to Germany's war effort was understandably dismal. Slave labor also occasioned extra expenses, like one-time construction costs for work camps that bore no connection to normal industrial enterprise.[190] MNCs also had to invest repeatedly in training

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182. EUGEN KOGON, THE THEORY AND PRACTICE OF HELL: THE GERMAN CONCENTRATION CAMPS AND THE SYSTEM BEHIND THEM 269 (Heinz Norden trans., 1979).

183. Michael Thad Allen, *Flexible Production in Ravensbrück Concentration Camp*, 165 PAST & PRESENT 182, 188, 205 (1999).

184. *Id.* at 187, 205.

185. On German industrial production and ideologies of skilled labor, see generally MARY NOLAN, VISIONS OF MODERNITY: AMERICAN BUSINESS AND THE MODERNIZATION OF GERMANY (1994); CAROLA SACHSE, SIEMENS, DER NATIONALSOZIALISMUS UND DIE MODERNE FAMILIE: EINE UNTERSUCHUNG ZUR SOZIALEN RATIONALISIERUNG IN DEUTSCHLAND IM 20 JAHRHUNDERT (1990); Allen, *supra* note 183.

186. *See* RICHARD OVERY, WHY THE ALLIES WON 208-42 (1995).

187. *See* ALLEN, *supra* note 36, at 222-32 (detailing reorganization of SS labor operations for total war).

188. HERBERT, *supra* note 179, at 270.

189. *See* Hayes, *supra* note 14, at 202 (explaining that Germany would take whatever workers it could get for labor).

190. *Id.* at 200-03 (discussing difficulties in earning profits from slave labor in Nazi Germany).

workers, but lost this investment when workers fell ill or died under brutal conditions.[191]

From the perspective of a modern factory manager, the worst problem was productivity cost. When the German economy converted to slave labor in the winter of 1941, productivity among forced laborers fell forty percent below that of German civilians.[192] The industry adjusted quickly. Historians Lutz Budraβ and Manfred Grieger have found that productivity rates for women forced to work in German aircraft production achieved levels comparable to skilled German workers by the end of the war.[193] Given that employers had to pay female "Eastern Workers" less than half the wages of German men, it is hard to imagine that firms did not benefit.[194]

Yet many firms did not make the transition. Historian Mark Spoerer has undertaken the most thorough synthesis of German productivity studies during World War II.[195] Predictably, these varied widely, including by gender and national group. Unsurprisingly, workers subjected to the worst treatment performed the worst, mirroring the racial hierarchies of Nazi ideology.[196] Polish men rarely achieved productivity rates above eighty percent that of German men, but performed better than concentration camp prisoners.[197] Semi-skilled concentration camp prisoners were frequently only 40% as productive, and sometimes, as low as seventeen percent.[198] Thus, while it is true that some private corporations could reap profits from forced labor, poor performance often destroyed those gains in many firms.[199] Moreover, those laborers who experienced the worst treatment—concentration camp prisoners or Soviet prisoners of war—contributed the least to their employers' profits.[200] In terms of wrongful enrichment, this meant they deserved the least remedy.

The reasons for low productivity were obvious to contemporary German corporations. A manager of the Mitteldeutsche Motorenwerke recorded, "[i]n the manufacturing processes of an armaments plant it is simply not possible suddenly to exchange a man, who has been operating a special piece of machinery, with another worker."[201] An economic officer of the German

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191. *See*, *e.g.*, *id.* at 202 (providing an example of how untrained male laborers who were put to work on dangerous construction became exhausted).

192. SPOERER, *supra* note 152, at 164-65 (discussing how some firms achieved higher productivity rates with piece rates).

193. Lutz Budraß and Manfred Grieger, DIE MORAL DER EFFIZIENZ. DIE BESCHÄFTIGUNG VON KZ-HÄFTLINGEN AM BEISPIEL DES VOLKSWAGENWERKS UND DER HENSCHEL FLUGZEUG-WERKE 89-135 (1993).

194. SPOERER, *supra* note 152, at 153-54.

195. *Id.*

196. *Id.* at 153, 186.

197. *Id.* at 186.

198. *Id.* at 186. ALLEN, *supra* note 36, at 340 n.39.

199. SPOERER, *supra* note 152, at 153.

200. *Id.* at 153.

201. TOOZE, *supra* note 147, at 520 (quoting SPOERER, *supra* note 152).

armed forces summarized the dilemma with a brutal calculation so typical of the Third Reich:

> It is illusory to believe that one can achieve the same performance from 200 inadequately fed people as with 100 properly fed workers. . . . [T]he 100 well-fed workers produce far more and their employment is far more rational. By contrast, the minimum rations distributed simply to keep people alive, since they are not matched by any equivalent performance, must be regarded from the point of view of the national war economy as a pure loss, which is further increased by the transport costs and administration [involved in recruiting them].[202]

In many cases forced laborers were simply too malnourished to perform. Complaints echoed throughout the war economy, though rarely on behalf of the suffering victims. An accountant with Krupp Steel was hardly an exception when he complained about how high the costs of foreign workers were when considering their productivity, noting that German workers are now, as ever before, the cheapest labor power.[203]

This Krupp manager was also complaining because German corporations never got forced labor for free. Nazi Germany charged employers roughly seventy-six percent of the wages of a German laboring man from Eastern Europe.[204] From these "wages," the German Financial Office deducted hefty taxes, as did social welfare offices, subsidizing civilian benefits at the expense of foreign workers.[205] A German industrial worker could expect to receive an average of fifty-one RM per week, of which the state deducted about twelve RM for social services and taxes.[206] By comparison, employers paid an average of thirty-nine RM for Eastern Workers, from which 10.50 RM went to room and board (whether or not actual room and board were adequate), and 23.60 RM flowed directly to state coffers.[207] The maximum possible payout to the forced laborer amounted to barely more than 6.5 RM.[208] Concentration camp prisoners occupied the lowest rung in the slave labor hierarchy, but their fees were only marginally less. The SS labor lords of the concentration camps charged German industry fees ranging from 18 RM per week for unskilled to 36 RM per week for skilled labor.[209]

The chart below synthesizes some of Spoerer's findings regarding productivity costs, with each vertical bar representing the money a German firm had to pay to get the same production from each group of laborers. Estimates of productivity varied widely in any given sector and even within

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202. *Id.* at 540 (alteration in original) (citing DIETRICH EICHHOLTZ & JOACHIM LEHMANN, GESCHICHTE DER DEUTSCHEN KRIEGSWIRTSCHAFT. BAND 2: 1941-43 (1985)).

203. Rauh-Kühne, *supra* note 43, at 38.

204. *Id.*

205. *Id.*

206. SPOERER, *supra* note 152, at 159.

207. *Id.*

208. *Id.* at 158-59.

209. *Id.* at 159.

individual plants.[210] The dark bars represent the low range of productivity for each class of workers and the light bars represent the highest range.[211] The cluster to the left compares estimates for industrial workers, in this case from a relatively high-wage Ruhr coal and steel operation. Although an average man's wage was 51 RM per week these Ruhr workers made up to 63 RM per week.[212] Thus, the graph is purposely biased to make slave labor seem more profitable by comparing it to German wage earners who earned nearly twenty-four percent above normal.[213] A second cluster of bar graphs to the right compares costs for construction work, a low-skill sector in which the Third Reich deployed a disproportionate number of the most brutalized workers. Below the line in each cluster was more profitable than German civilian labor; above the line was less profitable.[214]

The most productive Eastern Workers offered some advantages in the industrial sector, especially those (like the women documented by Lutz Budraβ in airplane manufacturing) whose productivity rates approached German labor.[215] Their productivity costs could be as low as two thirds that of civilian men (68.6%).[216] For every other group, however, the gains remained modest at best, and slave labor often cost firms more than German civilian labor.[217] Moreover, the majority of workers who achieved high productivity rates for slave labor were women. Defendant MNCs would have almost certainly argued that German women's wages provided the appropriate fair-market value not male wages. Contrary to the impression given by the plaintiffs' lawyers, German women were also highly mobilized in the German workforce,[218] but the highest paid female industrial workers (in the electrical industries) earned about thirty-three percent *less than* fees charged for Eastern Workers.[219]

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210. *See Id.* at 185-86.

211. *Id.*

212. SPOERER, *supra* note 152, at 159.

213. *See id.* at 185-86.

214. *See id.*

215. *See id.*

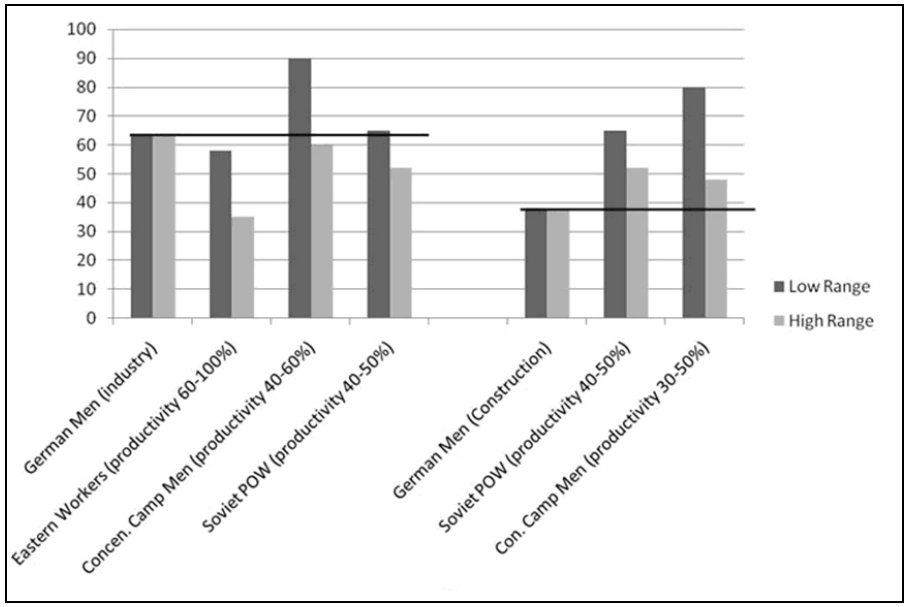
216. *See id.*

217. ALLEN, *supra* note 36, at 232-39 (discussing SS slave labor policy toward industry).

218. Burt Neuborne repeats the fallacy that the Third Reich did not mobilize women workers. *See Hearing on World War II Assets*, *supra* note 146 (testimony of Burt Neuborne, Professor, New York University Law School). Mobilization rates of German women in the workforce were higher than any other belligerent, both before the war and higher at the war's end, other than the United States. ROBERT GELLATELY, BACKING HITLER: CONSENT AND COERCION IN NAZI GERMANY 151-152 (2001). When the Nazis refused to mobilize *even more* women, this decision was made in consideration of mobilization rates that were already very high.

219. SPOERER, *supra* note 152, at 153, 186.

Figure 1[220]



Any defendant opposing a wrongful enrichment claim would also have the usual defense of remoteness and proportional accounting. Labor represented only one input in any sophisticated industrial operation, and investment in capital equipment could dwarf labor costs. Unlike the suit brought by Arnold Bernstein, in which a straightforward calculation could demonstrate the gains realized by the use of his ships, the tie between labor factors and profit is much more difficult.[221] Consequently, it would be much harder to recover in wrongful enrichment.

And what of plaintiffs whose suffering and slavery actually conferred no real benefit? The SS, the Nazi organization that ran the concentration camps, utilized prisoners in an industrial empire of its own. By the end of the war, however, these industries were bankrupt, and even their managers recognized the shaky fiscal foundations of slave labor:

> The [Jewish] Ghetto industries are uneconomical, the average productivity per work day and labor power are minimal, and the profits are only a mirage. The only reason for the further operation of Ghetto industries through the SS … lies in the increasing necessities of our war economy. With all respect to the personal abilities and dedication of those who have been charged with the

220. Dividing weekly wages by productivity yields productivity costs: what a German firm would have to pay each group of workers to produce the same volume of work. Based on SPOERER, *supra* note 152, at 153, 185-86.

221. *See generally* Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).

> management of these factories . . . the Ghetto industries mean a substantial financial risk.[222]

Not only was SS slave labor wasteful, its brutality usually far surpassed any other employer.[223] What could wrongful enrichment offer those who suffered in such enterprises?

Or what of the labor of genocide itself, in which the concentration camps compelled Jewish men to toil at the annihilation of their own people?[224] The main economic effect was the destruction of productive capacity—namely workers—not outrageous profits.[225] The Nazis robbed the murdered victims of their last possessions, even dental gold, but the highest estimates of this wealth comes to twenty-three million RM, which did not match the total capitalization of some individual subsidiaries of the SS's own companies (themselves paltry compared to industrial giants like Siemens, I.G. Farben, or Krupp).[226] What can human rights litigation gain from pursuing remedies that differentiate among victims in ways that only magnify already horrible injustices? By contrast the German Foundation strove to encompass all victims of the Nazi's slave-labor program and compensated those who had suffered the most with larger payments.[227]

Neither existing scholarship nor Holocaust-era restitution case law yields any evidence that plaintiffs' lawyers or their advocates among scholars ever undertook these kinds of calculations. For the most part they predicated their theories of recovery on little more than sensational assertions.[228] In response to the research of professional historians demonstrating that Nazi-era profits

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222. SS Factory Management "Führer" Maximillian Horn, 24 Jan. 1944, as cited in WOLFGANG BENZ AND BARBARA DISTEL, DER ORT DES TERRORS: GESCHICHTE DER NATIONALSOZIALISTISCHEN KONZENTRATIONSLAGER (2008). I thank Peter Klein for providing me with a copy of this manuscript.

223. *See generally* ALLEN, *supra* note 36. Furthermore, a large number of companies which had priority access to slave laborers were state owned enterprises, especially in the armaments sector. *Id.* at 208-14. The most notorious, Mittelwerk GmbH, where the V-2 rockets were assembled, was owned by the Armaments Ministry. *See id.* at 214-22. Such corporations, when they did not cease to exist without survivorship after the war, would be immune under the Foreign Sovereign Immunities Act. *See* 28 U.S.C. §§ 1602-11 (2006).

224. ERIC FRIEDLER ET AL., ZEUGEN AUS DER TODESZONE: DAS JÜDISCHE SONDERKOMMANDO IN AUSCHWITZ (2002).

225. *See* BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 59-62.

226. Allen, *supra* note 36, at 249. *See also* WILLIAM Z. SLANY, DEPARTMENT OF STATE, U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II: PRELIMINARY STUTDY 160-69 (1997) *available at* http://www.state.gov/www/regions/eur/ngrpt.pdf.

227. Gesetz zur Errichtung Einer Stiftung "Erinnerung, Verantwortung und Zukunft" §§ 9, 11, BGBl. I S. 1263, (Aug. 2, 2000) *amended by* Sept. 1, 2008, BGBl. I S. 1797.

228. *See* BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 293 ("Financial giants are sitting on billions of dollars of profits made on the backs of World War II victims, which they then invested and reinvested many times over during the last half-century.").

were modest, if they existed at all, plaintiffs' advocates merely resorted to impugning the objectivity of historians.[229] It is easy to share the indignation of Bazyler and others that the criminality of modern corporations in the Holocaust "was an injustice that cannot be ignored."[230] However, this is a poor substitute for the historical evidence that survivors would have needed to carry the burden of proof at trial.[231]

SECTION III: CONTINUITY IN HOLOCAUST-ERA RESTITUTION SUITS

In the late 1990s, Holocaust-era litigation came to involve hundreds of thousands of plaintiffs, divided roughly into two clusters. The first involved the Swiss commercial banks discussed in subsection A. By the mid-1990s, the banks had entered into negotiations over the sequestered accounts of Holocaust survivors with NGOs and the United States. Impatient of the outcome, several classes of plaintiffs sued in wrongful enrichment, claiming a right not only to sequestered accounts, but also to ill-gotten gains allegedly earned in transactions with Nazi-era MNCs. Subsequently, in a second cluster of lawsuits discussed in subsection B, plaintiffs sued Nazi-era MNCs directly for their participation in slave labor, seeking recovery in quantum meruit and wrongful enrichment. The eventual settlements totaled between seven to nine billion dollars, depending upon whose estimate one uses.[232] These eye-popping sums have contributed to a heroic image of plaintiffs slaying the Goliath of MNCs in international human rights litigation. It is a compelling story and contains a kernel of truth.

While European courtrooms were "fortress[es] for the powerful,"[233] argued Neuborne, the United States offered "a virtually unique legal system that provides a genuinely level playing field for a poor Holocaust survivor seeking to confront a corporate giant."[234] Professor Michael Bazyler has been even more enthusiastic: "[t]he real hero of this story is the American justice

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229. *Compare See* Stephen Whinston, *Can Lawyers and Judges Be Good Historians?: A Critical Examination of the Siemens Slave-Labor Cases,* 20 BERKELEY J. INT'L L. 160, 162 n.13 (2002) (inveighing against alleged distortions of the historical record and casting doubt upon the objectivity of University of Pennsylvania economic historian Jonathan Steinberg's history of the Deutsche Bank), *with* JONATHAN STEINBERG, THE DEUTSCHE BANK AND ITS GOLD TRANSACTIONS DURING THE SECOND WORLD WAR (1999) (finding little evidence of enormous profits from unjust enrichment).

230. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 293.

231. *See* Whinston, *supra* note 229, at 161-62.

232. *See* Robert A. Swift, *Holocaust Litigation and Human Rights Jurisprudence*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 3, at 50, 58 (estimating all settlements totaled $7.5 billion); Weiss, *supra* note 3, at 110 (estimating the figure at $7.25 billion); BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 286 (putting the figure at "more than $8 billion").

233. Neuborne, *Preliminary Reflections*, *supra* note 3, at 832.

234. *Id.* at 831.

system."[235] He singles out the ability of plaintiffs to initiate suits, the federal class action under Federal Rules of Civil Procedure Rule 23, contingency fees, the jury trial for civil litigation, and "an independent judiciary that does not 'take marching orders' from the political branches of government."[236] This fosters the impression that heroic class action lawyers took on plutocratic corporations in federal court in defiance of United States government "marching orders" or, at the very least, callous indifference. Given the undeniable suffering of Holocaust survivors, it is difficult not to applaud.

On closer inspection, however, the litigation of the late 1990s deviated little from the pattern long set by the *Bernstein* cases.[237] As a rule, restitution suits failed at the pleadings, *unless* the political branches stepped in to give strong guidance.[238] Lawsuits to recover identifiable assets or tangible property sometimes succeeded, most prominently in *Austria v. Altmann*.[239] There, Maria Altmann sued to recover paintings by Gustav Klimt stolen from her family during the Third Reich, which Austrian museums still held after the war.[240] The Supreme Court upheld the California district court's holding that her suit could proceed and Austria thereafter entered into arbitration.[241] But *Altmann* was the exception, not the rule.

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235. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at xii. The contemporary class action was created by Advisory Committee changes to FED. R. CIV. P. 23 in 1966. DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 35 (2000). It was especially designed to enable civil rights class actions, but has also greatly facilitated FED. R. CIV. P. 23(b)(3) actions which aggregate claims for damages. *Id.* at 70. This has its champions, like Neuborne, Bazyler, and others, but also its critics. One committee member who was party to the 1966 revisions remarked, not without dismay, that 23(b)(3) had questionable utility because of "the aroma of gross profiteering, and the transactional costs to the court system." *Id.* at 35.

236. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at xii-xiii.

237. *See generally* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954); Bernstein v. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d. Cir. 1949); Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2d Cir. 1947).

238. *See, e.g.*, *Bernstein*, 210 F.2d at 376.

239. Republic of Austria v. Altmann, 541 U.S. 677, 700-02 (2004) (The FSIA applied retroactively to conduct that took place even before 1976 and to states whose museums held stolen artwork and could not assert a defense in the "'act of state' doctrine"). Ms. Altmann's suit eventually proceeded to settlement and she recovered her artworks. *See* Carol Vogel, *Launder Pays $135 Million, a Record, for a Klimt Portrait*, N.Y. TIMES, Jun. 19, 2006, at E1. *See also* Alperin v. Vatican Bank, 410 F.3d 532, 538 (9th Cir. 2005), *aff'd*, 360 F. App'x 847 (9th Cir. 2009) (dismissing all claims for restitution from Vatican Bank for alleged wrongful enrichments during the Holocaust except those tied to lost or looted identifiable assets).

240. *Altmann*, 541 U.S. at 683-85.

241. *Id.* at 686-88, 700 (overruling *Kelberine* and, to some extent *Princz*, holding through Justice Stevens that looted artwork satisfied the FSIA exception for property taken in violation of international law). *See also In re* Assicurazioni Generali S.P.A. Holocaust Ins. Litig., 228 F. Supp. 2d 348, 375 (S.D.N.Y. 2002), *aff'd*, 592 F.3d 113 (2d Cir. 2010) (allowing a case to proceed based upon Holocaust-era insurance policies and refusing to honor contractual selection of foreign forum).

It is also a misperception that litigants prompted the government to act. As discussed below, talks between the Swiss banks, NGOs, and the political branches of the U.S. government preceded the class actions by nearly three years.[242] The vast majority of cases settled, not in the courtroom, but in heated negotiations championed by diplomats and powerful U.S. politicians, among whom disdain for the class action lawyers was not uncommon.[243] Congress, especially Senator Alfonse D'Amato of New York, and other politicians, such as New York's Comptroller Alan Hevesi, likely did more for the eventual settlements than the class actions.[244] In any event, the litigation fit into a fluid stream of transnational interactions. Overemphasis on litigation easily obscures what exactly the lawsuits accomplished.

As discussed in subsection C, the settlement of the German lawsuits actually strengthened the influence of the Executive over the Holocaust-era litigation. This is ironic. The heroic narrative of Holocaust-era restitution offered by scholars such as Bazyler celebrates litigation as a model for future human rights activism.[245] However, the settlements and the subsequent quieting of the lawsuits has dampened the prospects for what Anne-Marie Slaughter and David Bosco have called "plaintiff's diplomacy," the effort of private litigants to take their activism in foreign policy to the courthouse, bypassing the political representatives of states.[246] The Holocaust-era suits increased judicial deference to the political branches, especially the Executive.[247]

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242. *See* EIZENSTAT, *supra* note 19, at 23-28. This included negotiations for looted assets that never involved litigation, such as the return of gold held by the Czech Republic as well as other property held by Lithuania, Poland, and Hungary. *See generally id.* Negotiators like Stuart Eizenstat firmly believed they were contributing not only to the remedy of historic wrongs but to shoring up the legal culture of these new Eastern European democracies: "[t]o the degree that property restitution becomes a regular process and is broadened . . . to cover private as well as communal property, it will help the countries of Eastern Europe to become healthier democracies." *Id.* at 45. This was confirmed in post-settlement litigation in which plaintiffs sued to recover interest on payments that MNCs had allegedly delayed paying to the German Foundation. Gross v. German Found. Indus. Initiative, 449 F. Supp. 2d 606, 609 (D.N.J. 2007), *aff'd*, 549 F.3d 605 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 2384 (2009).

243. EIZENSTAT, *supra* note 19, at 212.

244. *See* BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 13-14, 21-22.

245. *Id.* at 328-34.

246. Slaughter & Bosco, *supra* note 8, at 103. *See also* Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 434-35 (2002) (arguing that individuals, as opposed to states exclusively, have historically played a prominent role in initiating the enforcement of international law "through nonjudicial means such as lobbying, demonstrating, political organizing, and nonviolent resistance").

247. *See, e.g.,* Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954).

A. The Swiss Bank Settlement

A class represented by Edward Fagan filed the first lawsuit against the Swiss banks on October 3, 1996 in the Eastern District of New York.[248] Just as the *Bernstein* cases had targeted the MNCs of third party States (Belgium and the Netherlands) rather than Germany or its national corporations, Fagan first targeted Swiss companies: the Union Bank of Switzerland (UBS) and the Swiss Bank Corporation (SBC). A second class action filed by Michael Hausfeld also included Credit Suisse.[249]

The litigation increased political pressure on the Swiss banks after a series of scandals in the early 1990s revealed how much Nazi Germany had relied upon Switzerland.[250] Although Switzerland remained neutral during World War II, its economy was inextricably bound to the Axis powers, and its connections to the Holocaust reached far deeper than business transactions. For instance, the Germans had introduced the infamous "J" in every Jewish passport starting in 1938 in cooperation with the Swiss to control Jewish flight into Switzerland.[251]

Such scandals led first to inquiries by NGOs into identifiable assets held by Swiss banks in accounts rightfully belonging to Holocaust survivors and their heirs.[252] After the war, survivors tried to recover these assets, but the banks

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248. EIZENSTAT, *supra* note 19, at 78. This was followed quickly by a second suit filed by Michael Hausfeld in the Eastern District of New York. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 10.

249. EIZENSTAT, *supra* note 19, at 81-82. A full list of the lawsuits filed against German companies can be found in *In re Holocaust era German Industry, Bank & Insurance Litigation*, No. 1337, 2000 U.S. Dist. LEXIS 11650, at *9-12 (Judicial Panel on Multidistrict Litigation Apr. 4, 2000).

250. *See* BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at xv-xvi.

251. INDEPENDENT COMMISSION OF EXPERTS SWITZERLAND, SWITZERLAND AND REFUGEES IN THE NAZI ERA 73-75 (1999), *available at* http://www.uek.ch/en/index.htm (follow "Interim Reports 1997-2000" hyperlink, then follow "Switzerland and Refugees in the Nazi Era" hyperlink). Specialized historians had long known of the "J" stamp and its introduction in Switzerland, which was reported in Switzerland as early 1954 when the Swiss Federal Council ordered an investigation of refugee policy during the Nazi years. CARL LUDWIG, DIE FLÜCHTLINGSPOLITIK DER SCHWEIZ IN DEN JAHREN 1933 BIS 1955 (1957) (report to the Federal Council for the attention of the Federal Parliament); INDEPENDENT COMMISSION, *supra*, 73-85. In the 1990s, this scandal was reported anew worldwide when a Swiss court overturned a 55-year old conviction of a provincial police officer in St. Gallen who had broken Swiss law and allowed an estimated 3,000 Jews fleeing Germany to enter Switzerland illegally. *See* Peter Capella, *Hopes of Pardon for Police Chief Who Saved 3,000 Jews; Paul Gruninger*, THE TIMES, Nov. 28, 1995, at 1. The scandal in Switzerland precipitated a national debate akin in intensity to the contemporaneous "culture wars" in the United States. *See generally* ADOLF MUSCHG, WENN AUSCHWITZ IN DER SCHWEIZ LIEGT (1997).

252. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 11-14. Contrary to the popular impression that litigation prompted diplomatic negotiations, negotiations preceded and triggered the lawsuits. The parties came close to a settlement with the Swiss Bankers Association as early

consistently stonewalled.[253] A favorite technique was to require a "death certificate" as proof that an account holder was truly deceased in order to release the account.[254] Since camps like Auschwitz did not provide their victims with death certificates during the extermination of the Jews, survivors found themselves in a cynical bureaucratic trap.[255]

No one played a larger role in piercing this bureaucratic recalcitrance than Edgar Bronfman, heir to the Seagram fortune and President of the World Jewish Congress (WJC) since the 1970s.[256] Bronfman also headed the World Jewish Restitution Organization (WJRO), which was an organization within the WJC.[257] He and his top aid, Israel Singer, first sought meetings with the Swiss Bankers Association in 1995.[258] Their aims were modest: the WJRO wanted the banks to reveal survivors' dormant accounts and return sequestered assets to their rightful owners.[259]

What should have been straightforward quickly generated an international controversy. First, Bronfman felt personally rebuffed. The President of the Swiss Bankers Association arrived late to their first meeting after making Bronfman wait for an excessively long time (at least by his standards, namely ten minutes).[260] Moreover, Bronfman had to wait in a reception room with no chairs, only increasing his irritation.[261] When the banking official finally arrived, he treated Bronfman to a perfunctory speech about a meager 774 dormant accounts and assured him that all possible measures were being taken to rectify the situation.[262] Bronfman had good cause for anger. Independent audits later revealed almost four times the number of sequestered accounts, not to mention systematic attempts to destroy evidence of their existence and outright fraud.[263] Bronfman quickly explored alternative routes to achieve restitution but he did not threaten a lawsuit. Instead, he contacted Senator D'Amato, then chair of the Senate Banking Committee.[264] Eventually Bronfman also involved Hillary Clinton, and through her, the President.[265]

Thus the snub of Bronfman generated greater political pressure. Senator D'Amato held hearings on the Holocaust-era accounts on April 23, 1996,

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as December of 1995. EIZENSTAT, *supra* note 19, at 52-61. *Accord* BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 11 ("The lawyers . . . were essentially following the headlines.").

253. EIZENSTAT, *supra* note 19, at 50. *See generally* Peter Gumbel, *Secret Legacies: Heirs of Nazis' Victims Challenge Swiss Banks on Wartime Deposits*, WALL ST. J., June 21, 1995, at A1.

254. *See* BAZYLER, HOLOCAUST JUSTICE *supra* note 4, at 15.

255. *Id.*

256. *Id.* at 11-14. *See also* EIZENSTAT, *supra* note 19, at 52-53.

257. EIZENSTAT, *supra* note 19, at 52.

258. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 11-12. *See also* EIZENSTAT, *supra* note 19, at 52.

259. EIZENSTAT, *supra* note 19, at 59.

260. *Id.* at 58.

261. *Id.*

262. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 13.

263. EIZENSTAT, *supra* note 19, at 73.

264. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 13.

265. *Id.* at 14.

during which Bronfman raised new, headline-grabbing claims.[266] He produced a document from the United States National Archives demonstrating that the death camps had shipped stolen gold, including the fillings from their victims' teeth, through the Swiss National Bank (SNB).[267] It did not matter that the commercial banks had played a minor role in processing looted gold and were distinct from the SNB. As Switzerland's central bank, the SNB was an agent of the Swiss state, enjoyed broad immunity under the FSIA, and was never sued.[268] Nevertheless, very quickly all the big Swiss commercial banks stood accused of being "Hitler's Bankers" and "Fences for the Führer."[269] The WJRO demanded compensation for looted assets, notwithstanding that almost all of these had been handled by the Swiss National Bank.[270] This new claim vastly extended the pool of potential plaintiffs. Jews with sufficient means and sophistication to hold Swiss bank accounts numbered in the low thousands,[271] whereas those plundered of their last meager possessions by the Nazis numbered in the millions.

The timing could not have been worse for the Swiss bankers. UBS and SBC were then entering merger negotiations, and these had to pass muster under United States anti-trust regulation in order for the banks to operate in the global capital markets of Wall Street.[272] The banks had to secure the goodwill of Senator D'Amato's Banking Committee, the Securities and Exchange Commission, and Federal Reserve Chairman Alan Greenspan.[273] Bad publicity also hurt them with institutional investors such as the large state pension funds.[274] This provided Bronfman and the WJC with considerable leverage and set the stage for a transnational settlement involving private corporations, NGOs, states like New York and California, and the federal political branches.[275] Plaintiff's lawyers, lawsuits, and slave labor restitution initially had nothing to do with these negotiations. The early talks revolved around

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266. *Id.* at 14. *See also* EIZENSTAT, *supra* note 19, at 63-64.

267. EIZENSTAT, *supra* note 19, at 68.

268. The Swiss National Bank would have undoubtedly claimed Foreign Sovereign Immunity, as had the Central Bank of Nigeria. *See* Verlinden B. V. v. Central Bank of Nigeria, 488 F. Supp. 1284, 1302 (S.D.N.Y. 1980) (dismissing due to lack of personal jurisdiction over foreign national bank due to Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 (1976)).

269. Rauh-Kühne, *supra* note 43 (using "Hitlers Hehler" as the title of the scholarly article after drawing it from popular culture). *See Hearing on the Swiss Banks*, *supra* note 189 (statement of Michael D. Hausfeld, Counsel for Holocaust Victims).

270. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 22-29.

271. *Id.* at 32.

272. EIZENSTAT, *supra* note 19, at 125.

273. *See id.*

274. *See id.* at 125, 144-47.

275. For a argument of how international human rights convey positive resources and rights claims to individuals vis-à-vis states, see generally LOUIS HENKIN, THE AGE OF RIGHTS (1990).

identifiable assets covered by legal claims of breach of contract, breach of fiduciary duty, or the tort of conversion.

Stuart Eizenstat, then United States Ambassador to the European Union and Special Envoy on Property Restitution in Central and Eastern Europe for the Secretary of State (shortly to become Special Representative of the President and the Secretary of State on Holocaust Issues),[276] believed that the Swiss could have ended the entire matter in 1996. Had the Swiss state decided to play a role—as the German government did in a later phase—the entire affair might have wrapped up in a way resembling traditional diplomacy.[277] The Banks and the WJC/WJRO came close to a quiet settlement agreement on May 2, 1996, shortly after D'Amato's hearings.[278] Despite testy nerves and several missed opportunities, the Swiss Bankers Association had agreed to an audit of accounts led by former Chairman of the United States Federal Reserve, Paul Volcker.[279]

Into these delicate and charged negotiations, the American class action lawyers lobbed a new raft of sensational claims to recover wrongful enrichments from slave labor. There was no doubt that German companies depended upon slave labor by the end of World War II.[280] Some corporate executives had even been tried and convicted for this in the Nuremberg Trials.[281] The class actions now demanded that Swiss banks disgorge any profits they had earned vicariously from this modern industrial slavery.[282] The questionable merits of these claims prompted Eizenstat to comment, "[t]he lawyers hijacked the Swiss bank dispute."[283] The bankers suspended negotiations with Eizenstat and the NGOs.[284]

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276. Eizenstat switched posts several times over the course of the Holocaust-era litigation, but carried the portfolio with him as President Clinton's special representative, a title he received in 1999.

277. EIZENSTAT, *supra* note 19, at 59-61 (discussing how the Swiss turned a blind eye to what was going on and did not actively involve themselves).

278. *Id.* at 68-69. Negotiations were formalized in a signed "Memorandum of Understanding." *Id.*

279. *Id.* at 69.

280. *See* BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 60 (estimating that 20,000 German companies used slave labor during the war).

281. *See generally The Flick Case*, *in* TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, VOL. 6 (1950) (trial of steel cartel executives); *The Krupp Case*, *in* TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, VOL. 9 (1950) (trial of steel cartel executives). *See* Kyle R. Jacobson*, Doing Business with the Devil: The Challenges of Prosecuting Corporate Officials Whose Business Transactions Facilitate War Crimes and Crimes Against Humanity* 56 A.F. L. REV. 167, 177-99 (2005) (reviewing World War II-era corporate cases at Nüernberg as well as defendants tried by the Allies in separate proceedings).

282. *See* BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 10-11 (stating that the Swiss Banks were initially sued for $20 billion dollars from their assets from World War II).

283. EIZENSTAT, *supra* note 19, at 75.

284. *See* BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 12-14.

The Swiss bank cases were consolidated in the Eastern District of New York under Judge Edward Korman.[285] Eventually, largely due to the efforts of Stuart Eizenstat and Judge Korman, the parties brokered a settlement for $1.25 billion.[286] Under Federal Rules of Civil Procedure, Rule 23(e), the federal courts may certify class actions for the purposes of settlement only.[287] Judges may do so even in cases where doubt exists about whether a class could ever be certified for trial or where the merits are dubious.[288] Parties must propose agreements to the court, and judges initially review them for fairness[289] and instruct notice to be served on members of the class. If a settlement passes muster in a final fairness hearing after notice and an opportunity for class members to opt out, it is entered as binding upon class members.[290] Judge Korman made clear to the plaintiffs, however, that despite his approval of the $1.25 billion settlement, he found serious weaknesses in the plaintiffs' cases.[291] "Deposited assets claims rested on a solid legal claim beyond unjust enrichment. No one ever doubted that they [claimants] had a right to be repaid," he later remarked, but "[t]he plaintiffs threw everything but the kitchen sink into [the category of restitution]. They often never stated a cause of action at all."[292]

Korman's non-descript statement in his opinion ("[t]he alternative to this settlement was prolonged, complex and difficult litigation, in which plaintiffs' chance of success as a class was uncertain")[293] fails to convey the doubts that he and Eizenstat repeatedly voiced about the wrongful enrichment claims.[294]

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285. *See generally In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000).

286. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 28. *See also In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 142; EIZENSTAT, *supra* note 19, at 166.

287. FED. R. CIV. P. 23(e).

288. HENSLER ET AL., *supra* note 235, at 115-16 (discussing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), which established settlement-only class actions). *See* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 143-67 (1986) (discussing Judge Jack Weinstein's engineering of settlement in the Agent Orange toxic torts although it was by no means obvious how a potential claim could have been defined at trial).

289. *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 146. As of May 8, 2000, plaintiffs sent out 550,000 questionnaires to potential class members worldwide. *Id.* at 147. Of the 32,000 responses received, only 401 individuals opted out, of which some later withdrew their objects or clearly had not understood the nature of the notice. *Id.*

290. FED. R. CIV. P. 23(e)(1-5).

291. Telephone Interview with Judge Edward Korman (Apr. 23, 2009).

292. *Id.* Judge Korman said he "always thought that these [deposited assets claims] were the most meritorious." *Id.*

293. *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 148. Among the issues mentioned are justiciability due to preexisting diplomatic settlements of Holocaust-era claims in the wake of World War II, statutes of limitation, and the difficulty of estimating damages with any precision on the slave labor claims. *Id.* at 148-49.

294. *See* Neuborne, *A Tale of Two Cities*, *supra* note 6, at 78-79 n.17 (noting that Korman expressed his opinion that plaintiffs' international law claims were "worthless").

The plaintiffs' lawyers and many legal scholars have consistently overlooked these objections.[295] Stuart Eizenstat—very sympathetic to the survivors and independent of the Swiss banks—referred to the plaintiffs' claims as based on "quicksand"[296] and believed, "the evidentiary essence . . . that could have lent legitimacy to the massive settlement was utterly lacking."[297]

It is important to separate claims for identifiable assets from the slave labor/wrongful enrichment claims. Independent audits yielded hard documentary evidence that backed up thousands of claims for dormant accounts.[298] Moreover, the Swiss banks' egregious behavior in destroying records only created a further legal presumption of truth to the plaintiffs' allegations.[299] But in restitution, plaintiffs still bore the burden of proving the two basic elements of a wrongful enrichment: 1) that the defendant had gained 2) at the plaintiff's expense.[300] Only after the plaintiff met this burden would the burden have shifted to the defendant MNCs to sustain defenses or to attack the plaintiff's facts.[301] Michael Hausfeld, the plaintiffs' lawyer who made the most systematic use of historical research, merely alluded to a study by Helen Junz that documented the overall wealth of the Jews of Europe before the Holocaust.[302] He then argued that the remedy for wrongful enrichment

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295. *See, e.g.*, Vivian Grosswald Curran, *Competing Frameworks for Assessing Contemporary Holocaust-Era Claims*, 25 FORDHAM INT'L L.J. S-107 (2001) (exemplifying a work critical of the legal process as a forum for creating public memory but which does not delve into substance of legal claims); Stuart M. Kreindler, Comment, *History's Accounting: Liability Issues Surrounding German Companies for the Use of Slave Labor by Their Corporate Forefathers*, 18 DICK. J. INT'L L. 343 (2000) (providing brief historical summary of Nazi-Germany's slave labor program and claims arising from it that expresses great sensitivity for the victims but does not scrutinize the weaknesses of many of their claims); Kara C. Ryf, Note, Burger-Fischer v. Degussa AG*: U.S. Courts Allow Siemens and Degussa to Profit from Holocaust Slave Labor*, 33 CASE W. RES. J. INT'L L. 155, 174 (2001) (failing to address the weaknesses of the plaintiffs' claims); Burdick, *supra* note 143, at 453 (arguing that *Burger-Fischer v. Degussa* was decided wrongly). *See also* Morris A. Ratner, *The Settlement of Nazi-era Litigation Through the Executive and Judicial Branches*, 20 BERKELEY J. INT'L L. 212, 226, 230-32 (2002) (stating that Rule 23 Class Actions are superior to the US-German Executive Agreement because it would not have resulted in "mooting much of the discussion about the true potential value of property claims," with the assumption that these were strong).

296. EIZENSTAT, *supra* note 19, at 122-23.

297. *Id.* at 177.

298. *Id.* at 69-74.

299. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 17-21. According to the common law doctrine of spoliation of evidence, if a party destroys evidence that may be relevant to a cause of action—regardless whether done in anticipation of any lawsuit—the court will presume that the evidence prejudiced the party which destroyed it. Edward R. Korman, *Rewriting the Holocaust History of the Swiss Banks: A Growing Scandal, in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 3, at 115, 128-29.

300. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (Tentative Draft No. 5, 2007).

301. *Id.* at § 51(4)(d). The Restatement does note that cases of doubt should be resolved against the wrongdoer. *See* Friedmann, *supra* note 82, at 1904-05.

302. EIZENSTAT*, supra* note 19, at 167-68. Telephone Interview with Judge Edward Korman (Apr. 23, 2009). I thank Judge Korman for pointing out to me that Junz's study was written for the Bergier Commission and the Volker Commission. *Id.*

should roughly equal this sum, entitling victims to upwards of $1.5 billion.[303] Junz's study is undeniably sound, but mere allegations that all Jewish assets must have, in some way, passed through Swiss commercial banks can hardly count as a sophisticated factual argument. By contrast, the WJC—hardly a mouthpiece of Swiss MNCs—estimated that the private Swiss banks had handled no more than twenty million dollars in German looted assets.[304] Neither the Swiss banks nor their shareholders took the wrongful enrichment claims seriously as legal arguments, although they showed a healthy fear of bad publicity,[305] and even Hausfeld admitted to Eizenstat that "he could not supply a connection that would stand up in court."[306]

B. The German Foundation Settlement

Parties to the Swiss Bank litigation reached an agreement in 1998, with the final fairness hearing concluded on August 9, 2000.[307] Parallel to these negotiations, many of the same lawyers filed class actions against German MNCs based almost entirely upon restitution theories of slave labor.[308] Elsa Iwanowa, representing a class of similarly situated plaintiffs, filed the first suit in New Jersey District Court against the Ford-Werke AG, the German subsidiary of Ford Motor Company.[309] Two more classes of plaintiffs brought suit against Deutsche Gold- und Silber-Scheide Anstalt (Degussa), the firm that had smelted dental gold and other precious metals plundered from the murdered Jews of Europe.[310] Additionally, Degussa had also owned a share in firms that marketed Zyklon B, the poison used in the gas chambers.[311] The District of New Jersey consolidated the Degussa lawsuits with two more class actions against the electrical manufacturer Siemens.[312] Siemens had operated a plant at Auschwitz and other concentration camps.[313] *Iwanowa* and *Degussa*

303. *See* EIZENSTAT, *supra* note 19, at 167-68. This kind of slap dash approach is vastly different than Hausfeld's careful testimony before Congress in which he relied extensively on National Archives documents. *But see Hearing on the Swiss Banks, supra* note 189 (statement of Michael D. Hausfeld, Counsel for Holocaust Victims). This testimony did not raise wild speculation about enormous wrongful profits, but focused specifically on identifiable assets. *Id.*

304. EIZENSTAT*, supra* note 19, at 142.

305. *Id.* at 152-53.

306. *Id.* at 143. The Swiss Banks believed the slave labor claims were "'worth zero' in court." *Id.* at 142. *See also* Vagts & Murray, *supra* note 13, at 509-10. Similarly, plaintiffs' lawyer Robert Swift admits that the unjust enrichment claims "never developed in discovery." Swift, *supra* note 232, at 53.

307. *See* BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 33.

308. *See, e.g.*, Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999).

309. *See generally id.*; BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 63.

310. *See generally* Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999).

311. *Id.* at 250.

312. *Id.* at 250, 253.

313. *Id.* at 253.

were the first to reach any judgment in the wave of Holocaust-era litigation of the late 1990s, if only on the pleadings.[314] They became the most prominent of over fifty lawsuits against German corporations at around the same time.[315]

Elsa Iwanowa, born in Rostov, Russia and living in Belgium, sued as an alien under the Alien Tort Claims Act.[316] She alleged that the Ford-Werke AG had "purchased her" and transported her to work in Cologne, where she suffered torts of bodily and emotional harm in violation of customary international law.[317] Iwanowa coupled her straightforward tort claims to wrongful enrichment and quantum meruit, alleging that Nazi Germany had "encouraged German industries to bid for forced laborers in order to . . . increase their profits."[318] She sought "disgorgement of all economic benefits which have accrued to Defendants as a result of her forced labor, [and] compensation for the reasonable value of her services."[319]

The New Jersey District Court found that Iwanowa could sue Ford-Werke in any federal district pursuant to 28 U.S.C. 1391(d), and extended diversity jurisdiction.[320] However, Judge Joseph Greenaway noted a major weakness of restitution as a basis for international human-rights suits: the ATCA conveys jurisdiction over aliens suing in tort only, but says nothing about wrongful enrichments incident to those torts.[321] Moreover, aliens cannot sustain ATCA claims against an alien company unless the defendant has minimum contacts to the United States.[322] The Fifth Amendment's "Due Process Clause protects an individual's liberty interest" in being exempt from binding judgments in fora to which he has no meaningful contacts.[323] Although Ford had such

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314. *Iwanowa*, 67 F. Supp. 2d at 491; *Degussa*, 65 F. Supp. 2d at 285.

315. All other suits were dismissed with prejudice after a global settlement was reached in an executive agreement between Germany and the United States. *See, e.g.*, *In re* Austrian & German Holocaust Litig., 250 F.3d 156 (2d Cir. 2001).

316. *Iwanowa*, 67 F. Supp. 2d at 433-34, 438. The Alien Tort Claims Act provides federal jurisdiction when an alien brings suit in tort only, alleging "violation[s] of the law of nations or a treaty of the United States." *Id.* at 438-39.

317. *Id.* at 433-34, 437. Neither Eastern European workers nor Jews were purchased by German corporations, although they were subjected to compulsory labor. *See* SPOERER, *supra* note 152, at 151-72. Corporations had to pay fees to the Third Reich for the laborers; workers were never chattel. *Id. See* KLAUS DROBISCH & GÜNTHER WIELAND, SYSTEM DER NS-KONZENTRATIONSLAGER 1933-1939, at 82-87 (1993). Slavery is a violation of *jus cogens* norms of customary international law. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

318. *Iwanowa*, 67 F. Supp. 2d at 445, 470.

319. *Id.* at 432.

320. *Id.* at 470, 470 n.57. In a diversity suit such as against Ford-Werke, "[a]n alien may be sued in any district." 28 U.S.C. § 1391(d) (2006).

321. *Iwanowa,* 67 F. Supp. 2d at 462 n.44.

322. *See, e.g.*, Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 329-31 (2003). Thus, the Chinese National Petroleum Company that owned the controlling shares of the subsidiary responsible for aiding and abetting the human rights violations were almost wholly immune from suit, while its non-controlling partner, Talisman is not. *See id.* at 353-54.

323. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471 (1985). Individuals must have "'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign

contacts, many businesses, such as the numerous construction companies that employed the bulk of concentration camp prisoners, were strictly domestic German corporations. U.S. courts could exercise no jurisdiction over claims against these defendants. By contrast, the eventual German Foundation settlement, achieved by states parties, sought to restitute as many potential claimants as possible regardless of the companies they worked for.[324]

Iwanowa's sensational allegations about the defendants' enrichment was the heart of her case,[325] and her pleadings to this effect are frequently cited as if they were historical fact, without reference to well-established historical scholarship:

> "[T]he use of unpaid, forced laborers by Ford Werke AG was immensely profitable' to the extent that 'Ford Werke A.G.'s annual profits doubled by 1943.' Following the war, Ford Werke A.G. continued to flourish, owing to its free labor supply . . . 'benefiting from economic reserves and production capacity that had, in large part, been derived from the work of unpaid, forced laborers."[326]

Neuborne, for instance, merely paraphrased and generalized Iwanowa's claims in testimony before Congress,[327] alleging not only that MNCs had harmed the plaintiffs (something beyond dispute), but also that human rights violations had laid the foundation of Germany's post-war economic boom.[328]

Judge Greenaway recognized slavery as an action universally proscribed under international law, qualifying for jurisdiction under ATCA, but he disposed of Iwanowa's wrongful enrichment claim incident to the "inhuman conditions [at] Ford Werke" on three different grounds.[329] First, he concluded that her claims were barred by various reparations treaties that provided for peace after World War II, especially the London Debt Agreement of 1953.[330] Second, Greenaway found that claims for war reparations were non-justiciable

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sovereign.'" *Id.* at 472 (alteration in original) (quoting Shaffer v. Heitner, 433 U.S. 186, 218 (1997) (Stevens, J., concurring)). *See also* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984) (stating that events giving rise to litigation must arise out of or be related to the defendant's contacts to the forum).

324. Declaration of Stuart Eizenstat, *supra* note 167, at 13.

325. *See Iwanowa*, 67 F. Supp. 2d at 433.

326. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 63 (quoting Iwanowa's complaint).

327. *See Hearing on World War II Assets*, *supra* note 146 (testimony of Burt Neuborne, Professor, New York University Law School).

328. *Id.*

329. *Iwanowa*, 67 F. Supp. 2d at 432.

330. *Id.* at 447-67. Greenaway reasoned that the language of the London Debt Agreement indicated that the Allies contemplated a comprehensive settlement of their agencies and their nationals as well as between them and other neutral countries. *Id.* at 452-54. How could this kind of coordination ever take place in an environment in which "worldwide individual litigation were to take place?" *Id.* at 461.

because they touched upon policies constitutionally committed to the political branches.[331] Moreover, the United States government as well as other foreign powers had expressly reserved these matters for "government-to-government negotiations."[332]

Finally, Greenaway found that restitution claims against American Ford were time barred.[333] Iwanowa had filed her suit in March 5, 1998, over fifty years after the events for which she sought recovery.[334] She argued that various post-war treaties had tolled the statutes of limitations relevant to her cause.[335] An analysis of these treaties is beyond the scope of this essay, but the parties stipulated to Iwanowa's argument that the limitation had tolled from 1945 until 1991, when the Federal Republic of Germany and the Democratic German Republic concluded the treaty that reunified Germany (the "Two-Plus-Four" treaty, entered into effect March 15, 1991).[336] Nevertheless, Greenaway found that the maximum statute of limitations was six years, even after granting a tolling of forty-six years and regardless of whether one applied the law of Germany (residence of Ford-Werke), Michigan (headquarters of American Ford), or Delaware (place of Ford's incorporation).[337]

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331. *Id.* at 485-86.

332. *Id.* at 486. Greenaway also gave a rationale for these interlocking judgments: The Allies had not only endeavored to defeat Germany militarily, after the war they also continued to struggle to remake a peaceful Europe, restart the economy of a ruined continent, and find homes for millions of displaced persons. *See id.* at 447-61. Consequently, the Allies' policies led to the creation of Israel and the division of Germany. In short, they had remolded much of the world's political landscape as well as its economy. Not the least of their efforts had included numerous reparations agreements. *See id.* at 447-60. "If nationals of the Allied nations could file individual actions in different courts in different nations, the claims of the neutral countries, and their nationals," Greenaway asked, how would this not disrupt these efforts? *Id.* at 461. Could any reparations negotiations take place predictably if "worldwide individual litigation were to take place?" *Id.* (discussing the London Debt Agreement in particular). The relevant treaties Greenaway discussed included:

> (1) Agreement on Reparations From Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold . . . . (2) Convention Between the United Kingdom of Great Britain and Northern Ireland, France, the United States of America and the Federal Republic of Germany on the Settlement of Matters Arising Out of the War and the Occupation . . . . (3) Agreement on German External Debts . . . and (4) Treaty on the Final Settlement with Respect to Germany . . . .

Id. at 447.

333. *Iwanowa*, 67 F. Supp. 2d at 466-68. *See also* DAGAN, ETHICS, *supra* note 29, at 254 n.153 (2004) ("[W]rongful enrichment is usually treated as contractual for the purposes of limitations."). Dagan discusses how some defendants have hoped that wrongful enrichment lawsuits would escape the statute of limitations (about which Dagan had some skepticism). *See id.* at 210-59.

334. *Iwanowa*, 67 F. Supp. 2d at 433, 466.

335. *Id.* at 463, 465-67.

336. Treaty on the Final Settlement with Respect to Germany, Sept. 12-Oct. 1, 1990, 29 I.L.M. 1186.

337. *See Iwanowa*, 67 F. Supp. 2d at 466-68.

As discussed above, the survivors' most meritorious claims in quantum meruit could potentially yield large recoveries, but only because of the time value of money. But the short statute of limitations usually imposed on quantum meruit recovery is another factor suggesting that the Holocaust-era suits will be poor models for other human rights litigation. Another suit very similar to Iwanowa's also found that Holocaust-era slave-labor suits were time barred (applying California law).[338] These cases suggest that any contemporary plaintiffs seeking recovery of lost wages due to the wrong of slavery must bring their claims quickly. But without the accrual of multiple decades of prejudgment interest, recovery will be very limited.

Greenaway came to the issue of justiciability last and declared that the Constitution committed both war and foreign affairs to the political branches.[339] After reviewing contemporary and historical statements made by the states party to World War II, Greenaway also concluded that they intended to settle the claims of their nationals in "government-to-government negotiations."[340] Contravening this intent would risk embarrassing a coordinate branch of government.[341] Other courts have criticized this last aspect of the *Iwanowa* decision. In an opinion interpreted by some as rejecting it,[342] the Ninth Circuit warned that courts following Greenaway's analysis might convert "every dispute over the proper application of a treaty into a political question, because treaties inherently involve foreign affairs."[343] This mischaracterizes the *Iwanowa* opinion, in which Greenaway limited discussion

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338. Deutsch v. Turner Corp., 324 F.3d 692, 716-17 (9th Cir. 2003) (finding that (1) California's three-year statute of limitation for tort claims barred suits, and (2) a California law that allowed restitution suits to individuals seeking restitution from Nazi era companies or their successors was unconstitutional because it intruded on the foreign affairs powers of government to wage and conclude war). *See also* Neuborne, *A Tale of Two Cities*, *supra* note 6, at 76, 78 n.16 ("[E]very appeals court that has considered the matter has rejected the New Jersey decisions as wrong."). Neuborne cited the *Deutsch* case, despite it's almost identical finding on statute of limitations grounds and that the negotiation of war reparations are a uniquely political function of government not committed to the judiciary. *Id.* at 78 n.16. The other case he cites, *Ungaro-Benages v. Dresdner Bank AG*, does not actually criticize the New Jersey cases of *Iwanowa* or *Burger-Fischer*. Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1236 n.12 (11th Cir. 2004).

339. *Iwanowa*, 67 F. Supp. 2d at 485.

340. *Id.* at 486.

341. *Id.* at 487-88.

342. *See generally* Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003). "[E]very appeals court that has considered the matter has rejected the New Jersey decisions as wrong." Neuborne, *A Tale of Two Cities*, *supra* note 6, at 76. Just as Greenaway had done, Neuborne ignores that the *Deutsch* case also dismissed slave labor claims on grounds of an expired statute of limitations, and thus upholds the decision. Neuborne mentions *Iwanowa* in only a single footnote. *Id.* at 78 n.14.

343. *Deutsch*, 324 F.3d at 713 n.11. *See also* Stephens, *supra* note 94, at 786 (citing *Ungaro-Benages*, 379 F.3d at 1236) (*Ungaro-Benages* court found ATCA suit justiciable, despite a letter of interest from the Executive, which was entitled to deference).

of the political question doctrine to war reparations.[344] Furthermore, dismissal for non-justiciability was redundant and merely reinforced a careful analysis of post-war treaties.[345] The court underscored the weakness of Holocaust-era restitution claims because *Iwanowa* could not survive dismissal on multiple grounds.[346]

In the parallel case to *Iwanowa*, the *Degussa* plaintiffs fared no better.[347] Their slave labor and tort claims were almost identical.[348] The *Degussa* plaintiffs sought to recover for common-law torts of assault and battery, wrongful death, and false imprisonment.[349] They also sued to recover the value of their forced labor in quantum meruit as well as the wrongful enrichment earned from that labor, the sale of Zyklon B, and the looting of dental gold.[350] As remedy, they sought "disgorgement of illicit profits" and "a constructive trust upon all assets . . . traceable to the systematic use of slave labor, together with reasonable interest thereon."[351]

The constructive trust is a remedy for wrongful enrichments dating back to nineteenth century courts of equity.[352] It entitles the plaintiff to the assets gained in a wrongful enrichment *as if* the defendant held them in trust from the moment of misappropriation.[353] Like other restitution remedies, however, it does not entitle even the most deserving plaintiffs to profits or proceeds indiscriminately, only those traceable to the wrongful enrichment.[354] Neither Siemens nor Degussa would have been liable for profits earned from industrial units that did not use slave labor. A defendant may raise the defense of remoteness and may retain proportional profits if he can show that his own assets are comingled with ill-gotten gains.[355] Even in uncomplicated industrial processes, the contribution of labor to profits is difficult to trace. Defendants can also avail themselves of the change of position defense, that is, by showing that they actually earned no profits. Any defendant corporation could escape liability for unprofitable slave-labor enterprises regardless of the victims' suffering.

As with restitutionary claims generally, the plaintiffs' quantum meruit and wrongful enrichment claims were weaker in comparison to traditional tort or

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344. *Iwanowa*, 67 F. Supp. 2d at 485.

345. *See id.* at 447-60.

346. *Id.* at 491.

347. Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 285 (D.N.J. 1999).

348. *See generally Iwanowa*, 67 F. Supp 2d 424; *Degussa*, 65 F. Supp. 2d 248.

349. *Degussa*, 65 F. Supp. 2d at 252, 254.

350. *Id.* at 252-53. Plaintiffs also sought punitive damages and attorney fees. *Id.* at 253-54.

351. *Id.* at 253, 254. The *Degussa* and *Siemens* complaints were substantially the same, thus leading to the consolidation of the cases in the first place. *See id.* at 250, 253.

352. UNJUST ENRICHMENT, *supra* note 64, at 28-32.

353. *See id.* at 32-33.

354. *See id.* (stating that the constructive trust is to be used as a remedy for restitution).

355. *See* Margalynne Armstrong, *Reparations Litigation: What About Unjust Enrichment?*, 81 OR. L. REV. 771, 779-81 (2002); Friedmann, *supra* note 82, at 1912-13.

contract claims for damages.[356] Any demonstrable tie to identifiable assets (such as Degussa's macabre trade in dental gold) would have strengthened such claims, but the *Degussa* plaintiffs all but abandoned their common law tort claims and claims to the restitution of looted property.[357] Instead, they invoked wrongful enrichments in "the wealth of the corporations which benefited from their participation in the Nazi persecution."[358] Debevoise therefore focused on these claims.[359]

Judge Dickinson Debevoise dismissed *Degussa* on the same day that Judge Greenaway dismissed *Iwanowa*, September 13, 1999.[360] Using very similar reasoning, Debevoise found that the Constitution firmly commits the negotiation of war reparations to the political branches: "[r]eparations were but one facet of an extraordinarily critical series of negotiations concerning the future of a war-devastated Europe" and "the court . . . would lack any standards to apply" to remedy the bewildering political problems of post-war Europe.[361] In sum, both the *Degussa* and *Iwanowa* plaintiffs faltered, as had all previous Holocaust-era plaintiffs, on political questions, issues of state sovereignty, and technicalities such as statutes of limitation.[362]

Neuborne believed that "the erroneous . . . decisions of the District Court [of New Jersey] in dismissing the slave labor claims as time-barred and nonjusticiable [in *Iwanowa* and *Degussa*] eroded the bargaining position of counsel, reducing the sums ultimately available to victims by as much as DM 5 billion."[363] However, Judge Debevoise believed that "the best thing that ever happened to the plaintiffs was losing in the District of New Jersey because it introduced a note of realism to the plaintiffs' lawyers, so they would listen to those who were working on the settlement."[364]

The plaintiffs' lawyers undoubtedly overestimated the strength of their claims, which would have fared little better on the factual merits. For instance,

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356. *See generally* Linzer, *supra* note 65.

357. Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 272 (D.N.J. 1999). "The briefs, exhibits and oral arguments have addressed almost exclusively the claims on behalf of slave laborers, barely mentioning the claims relating to the refining of seized gold and to the manufacture of Zyklon B." *Id.*

358. *Id.* at 271.

359. *Id.* at 272. Debevoise refused to reach the issue of statute of limitations but merely assumed, without finding, that the claims were not time barred. *Id.* at 255 n.2. "At the hearing . . . plaintiffs suggested that the relief they seek is . . . confined to disgorgement of unjust profits earned by defendants from plaintiffs' uncompensated labor." *Id.* at 282.

360. *Degussa*, 65 F. Supp. 2d 248; Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999).

361. *Degussa*, 65 F. Supp. 2d at 284.

362. *See generally id.*; *Iwanowa*, 67 F. Supp. 2d 424.

363. Neuborne, *Preliminary Reflections*, *supra* note 3, at 816.

364. Telephone Interview with Judge Dickinson Debevoise (Apr. 16, 2009). Judge Debevoise had been stationed in Germany and witnessed the end of World War II, including the Concentration Camp Nordhausen, an especially brutal slave labor camp. *Id.*

far from being a major beneficiary of the Nazi war economy, the Nazis repeatedly discriminated against Ford-Werke in favor of German auto manufacturers and had marginalized Ford by the end of the war.[365] By sidelining a formidable competitor, this may have contributed to the rise of German auto companies after 1945.[366] But this is not to say that Ford-Werke ceased operations. Its Cologne plant employed slave laborers from April 1942 until the utter collapse of Nazi Germany, peaking at 1,932 out of a total of over 5,000 employees (37.1%).[367]

When Iwanowa sued, the Ford Motor Works hired a team of historians and social scientists as well as the accounting firm Price Waterhouse Cooper to take on "the vagaries of . . . sixty-year-old German accounting entries and techniques [with] modern auditing methods."[368] The team found that Ford-Werke had paid no dividends from 1939 to the end of the war, and the balance of evidence suggested that "neither the American parent company nor the German subsidiary benefitted financially" from slave labor.[369] This does not suggest that Iwanowa and similarly situated plaintiffs deserved no remedy for their suffering. But the disjunction between their harm and the meager remedy in wrongful enrichment is precisely the point: Gross violations of human rights are not particularly profitable.[370] Therefore, legal theories that depend upon an imagined nexus between human-rights abuses and lucre will usually fail.

The historical record yields more support for the wrongful enrichment claims of the *Degussa* plaintiffs.[371] Degussa was Nazi Germany's central processor for looted dental gold and other precious metals, and there can be no question that the firm took part in the most horrendous crimes of spoliation.[372] One Degussa employee reported on German television in 1998:

> [T]he crowns and the bridges, there were those where the teeth were still attached. . . . That was the most depressing . . . . It was probably just like it had been when broken out of a mouth. The teeth were still there and sometimes still bloody and with pieces of gum on them.[373]

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365. Simon Reich, *Corporate Social Responsibility and the Issue of Compensation: The Case of Ford and Nazi Germany*, *in* BUSINESS AND INDUSTRY IN NAZI GERMANY 104 (Francis R. Nicosia & Jonathan Huener eds., 2004) [hereinafter Reich, *Corporate Social Responsibility*]. *See also* SIMON REICH, THE FRUITS OF FASCISM: POSTWAR PROSPERITY IN HISTORICAL PERSPECTIVE (1990) (a more extensive treatment of Ford's position in German industry during the Third Reich and beyond).

366. Reich, *Corporate Social Responsibility, supra* note 365, at 111.

367. *Id.* at 119.

368. *Id.* at 122.

369. *Id.*

370. *See, e.g.*, Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999).

371. *See generally* Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999).

372. PETER HAYES, FROM COOPERATION TO COMPLICITY: DEGUSSA IN THE THIRD REICH 192-93 (2004).

373. *Id.* at 193 (alteration in original).

Unlike Ford, Degussa's profits rose during the war, especially during the Holocaust.[374] Like many German firms hit by litigation, the company hired an experienced business historian, Northwestern University Professor Peter Hayes, to vet its record of Nazi-era transactions.[375]

Hayes delved into the most grisly aspect of Degussa's business, its trade in dental gold pried from the mouths of murdered Jews.[376] Bloody and putrefying dental work arrived at Degussa's facilities by the crate load from 1942-1944 at precisely the time that proceeds from refining and smelting rocketed up (seventeen percent in 1942 and another eighteen percent in 1943).[377] Nevertheless, these morally reprehensible transactions represented one of the firm's least lucrative segments, generating a mere six percent of Degussa's precious metals business.[378] "[I]t would appear that Degussa's gross profits from the plundering of the Jews . . . come to a minimum of around 2 million Reichsmarks" (about five million in 2000 U.S. dollars—less than a dollar per victim of the Holocaust).[379] The quantities of dental fillings, gold wire-rimmed glasses, jewelry, and other personal keepsakes required to create such a sum beggars the imagination yet falls far short of the billions demanded in the Holocaust-era lawsuits.[380] The sums would have been ridiculously small in comparison to the magnitude of the victims' devastation.

The wrongful enrichment claim arising from slave labor was far weaker, subject to the usual defenses of remoteness and proportional accounting. Inexplicably, the plaintiffs concentrated on this, rather than on restitution of identifiable assets, and the record is silent as to why. But Judge Debevoise noted that "[t]he briefs, exhibits and oral arguments . . . addressed almost exclusively the claims on behalf of slave laborers, barely mentioning the claims relating to the refining of the seized gold and to the manufacture of Zyklon B," and as such, the "[d]isposition of the forced labor claims [would] govern disposition of the other claims."[381]

Hayes' research revealed that lower labor costs due to slave labor, combined with a firm-wide push for efficiency, did contribute something to profits.[382] "But to what degree . . . is unknowable," as "the sums that result from such calculations are startlingly small when set against the corporation's overall earnings."[383] Finally, the firm could have also raised the usual defense

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374. *Id.* at 268.

375. *See id.*, at xv-xviii.

376. *Id.* at 193.

377. *Id.* at 189.

378. HAYES, *supra* note 372, at 189.

379. *Id.* at 190.

380. *Id.* at 333 (the Holocaust-era suit was claiming $1.25 billion whereas Degussa made approximately $29.2 million dollars from the precious metals).

381. Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, at 272 (D.N.J. 1999).

382. HAYES, *supra* note 372, at 268.

383. *Id.* at 269.

of remoteness or embroiled the court in calculations alleging that its investments of capital and managerial skill had produced the gains, not slave labor.

C. The U.S.-German Executive Agreement and the "Anti-Bernstein" Letter of Interest

Given the weaknesses of the restitutionary claims, it is unsurprising that the slave-labor litigation against German MNCs reached settlement only due to diplomatic support outside the courtroom. Stuart Eizenstat brokered a ten billion Deutschmark deal sealed by an Executive Agreement between President Clinton and Chancellor Gerhard Schöder of Germany, signed July 17, 2000.[384] This established the German Foundation, to which German industry and the German government each agreed to contribute half the total sum.[385] In exchange the Germans insisted upon legal peace.[386] In other words, similar to a settlement-only class action, the defendants wished to bind all plaintiffs to the deal in order to extinguish any similar future claims.[387]

It is long established precedent that the federal government has the authority to settle the private claims of its nationals when these are essential to foreign policy.[388] President Clinton might have followed the example set by President Jimmy Carter, when he issued an executive order directing all claims of U.S. nationals against the Iranian government to be settled after the Iran hostage crisis in 1981.[389] The Supreme Court held that the President had the authority to direct the settlement of United States nationals against Iranian

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384. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 80, 82-83.

385. *See generally* Statement of Interest, *In re* Austrian and German Bank Holocaust Litigation, No. 98 Civ. 3938 (S.D.N.Y. Nov. 8, 2000) [hereinafter Statement of Interest, *In re* Austrian and German Bank Holocaust Litigation].

386. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 347 n.30. Bazyler characterizes "legal peace" as some kind of German "euphemism," of which Germans are allegedly overly fond, for "dropping . . . all lawsuits against Germany." *Id.* In reality, class action lawyers commonly refer to "legal peace" when discussing the quieting of claims in settlement. *See id.* at 83-88. Bazyler also characterizes "Nazi" as a euphemism for National Socialist. *Id.* at 347 n.30. It is actually a simple abbreviation, in the same way "Dems" is a simple abbreviation of Democrats—euphemism has noting to do with it and this characterization is unfortunately typical of legal scholars who do not understand either the history of the Third Reich or the German language. On the use of terms like "global peace" in class action parlance, *see* HENSLER ET AL., *supra* note 235, at 109-10, 114-15.

387. *See* HENSLER ET AL., *supra* note 235, at 114-15 (discussing settlement only class actions).

388. *See* Dames & Moore v. Regan, 453 U.S. 654, 679-80 (1981) (stating that it is the established practice of the United States to settle claims of nationals, even without their consent, in the interest of the nation as a whole); Ware v. Hylton, 3 U.S. (1 Dall.) 199, 229-30 (1796) (stating that state parties can extinguish the claims not only against each other but of their nationals that arise from warfare). *See also* Medellin v. Texas, 552 U.S. 491, 530-31 (2008) (delimiting the President's authority to impose foreign policy by enacting international agreements by executive order, but nevertheless upholding the claims settlement cases, such as *Dames & Moore*).

389. *See Dames & Moore*, 453 U.S. at 660, 662-63, 669-70 (citing International Emergency Economic Powers Act, 50 U.S.C. § 1702(a)(1) (1976)).

nationals as well and not only the Iranian state.[390] It appears President Clinton hesitated to settle the Holocaust-era litigation by executive order in any similar way.[391]

The Clinton Administration did not seek, as it could have done, either a congressional-executive agreement by passing and signing legislation or a formal bilateral treaty. By contrast, the German Bundestag backed Chancellor Schröder with its full authority by passing legislation formally establishing the German Foundation as sole remedy for restitutionary claims against German companies arising out of World War II.[392] Despite extensive involvement of United States politicians in the House and Senate (dating to Alfonse D'Amato's personal interest in the Swiss bank litigation), President Clinton did not seek approval of the German Foundation in Congress. Instead, he pledged the United States to submit letters of interest to the courts clearly stating that it was "in the foreign policy interests of the United States for the [German] Foundation" to provide "exclusive remedy" for all claims arising against German companies as a result of World War II.[393] These letters concluded by requesting United States courts to dismiss Holocaust-era suits "'on any valid legal ground.'"[394]

Fifty years earlier, the Executive had used "Bernstein letters" to clearly express United States' foreign policy interests in allowing suits to survive dismissal under the Act of State Doctrine.[395] The Clinton-era letters expressed the unambiguous interest of the Federal government in dismissing suits and had the desired effect, leading to dismissal in subsequent slave-labor restitution cases. As with the *Bernstein* cases, United States courts have followed the Executive's lead.

The case of *Frumkin v. JA Jones*[396] illustrates this point. Simon Frumkin sued a German company and its two United States subsidiaries for the value of his slave labor in quantum meruit and the wrongful death of his father.[397] Dissatisfied with the Executive Agreement of 2000, he argued that his case could not be dismissed notwithstanding the German Foundation as an

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390. *Id.* at 679-80, 688.

391. *See* EIZENSTAT, *supra* note 19, at 220 (hesitating due to the recognition of no Constitutional power to issue such an executive order).

392. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 89-90.

393. Joint Appendix On Writ of Certiorari at 53, Am. Ins. Ass'n, Am. v. Garamendi (9th Cir. 2002) (No. 02-722), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/02-722/02-722.mer.ja.pdf. *See also* EIZENSTAT, *supra* note 19, at 257; Neuborne, *Preliminary Reflections*, *supra* note 3, at 824-25.

394. *In re* Nazi Era Cases Against German Defendants Litig., 129 F. Supp. 2d 370, 382 (D.N.J. 2001).

395. *See* Bernstein v. Van Heyghen Freres Societe Anonyme, 210 F.2d 375, 376 (2d Cir. 1954).

396. *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d. 370 (also referred to as *Frumkin v. JA Jones, Inc.*).

397. *Id.* at 371-72.

alternative remedy.[398] The federal government submitted a "statement of interest" urging dismissal on "any valid legal ground,"[399] but Frumkin argued that the Executive could not be allowed to unilaterally extinguish his claims.[400] This, he alleged, would constitute an unlawful taking of property in violation of the Fifth Amendment.[401] Finally, Frumkin maintained that his claims could not be dismissed as a political question, because he had brought suit against a private corporation only, not a foreign state or political entity.[402]

Judge William Bassler disposed of Frumkin's Fifth Amendment claim, holding that the Executive had proposed no property taking and no Fifth Amendment violation.[403] "[R]ather than extinguish the claims pending in this Court by treaty or executive order, the government leaves it to the Court to dismiss . . . ."[404] Judge Bassler then dismissed the rest of Frumkin's suit under the political questions doctrine after invoking the Executive letter of interest and finding a non-justiciable question of foreign policy.[405] In particular, the letter demonstrated that allowing Frumkin to proceed would: 1) contravene stated policy determinations; 2) lead to multiple policy determinations by coordinate branches of government; and 3) risk embarrassment to a coordinate branch of government.[406] Finally, because the letter identified "the United States' strong interests in the success of the Foundation"[407] and because that success depended upon the dismissal of the suit, Bassler indicated that dismissal served United States' foreign policy interests, which the Constitution committed to the Executive, not the Judiciary. [408]

If the United States Judiciary was not exactly taking "marching orders"[409] from the Executive, it proved very pliant in cases like *Frumkin*.[410] But this fit

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398. *See id.* at 372.

399. Statement of Interest, *In re* Austrian and German Bank Holocaust Litigation, *supra* note 385, at 2.

400. *In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d. at 378.

401. *Id.* at 384.

402. *Id.* at 377.

403. *Id.* at 384-86.

404. *Id.* at 382.

405. *Id.* at 388-89.

406. *See In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d. at 386-88.

407. Statement of Interest, *In re* Austrian and German Bank Holocaust Litigation, *supra* note 385, at 2.

408. *See In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d at 380-81, 388-89.

409. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at xiii.

410. *See* Graham O'Donoghue, *Precatory Executive Statements and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation*, 106 COLUM. L. REV. 1119, 1123, 1154 (2006) (stating that the executive "letter of interest" and judicial deference in Holocaust-era litigation may upset the separation of powers); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute* 2004 SUP. CT. REV. 153, 188, 208-12 (2005) (noting that in Holocaust-era litigation courts stepped in to preempt the conduct of foreign policy through private cause of action). Ingrid Brunk Wuerth, *The Dangers of Deference: International Claim Settlement by the President*, 44 HARV. INT'L L.J. 1, 19-20 (2003) (arguing that the letter of interest

the pattern of Holocaust-era litigation throughout the post-war era. Holocaust-era restitution suits had never overcome motions to dismiss without the support of the political branches.[411] President Clinton's letters of interest made already tenuous suits nearly impossible.

SECTION IV: THE POVERTY OF UNJUST ENRICHMENT IN INTERNATIONAL HUMAN RIGHTS TORTS

Plaintiffs in human-rights litigation continue to rely upon theories of restitution, which seemed to succeed so spectacularly in the Holocaust-era cases, but typically these litigants continue to make the same mistakes. They advance claims to profits or constructive trusts in wrongful enrichment based on the belief that human-rights violations profited MNCs, but they usually fail to advance arguments connecting specific wrongs to the alleged enrichments they seek to recover.[412] As an example, this section explores *Khulumani v. Barclay National Bank*,[413] a consolidation of ten class actions against fifty international corporations and banks that participated in apartheid-era South Africa.[414]

Khulumani v. Barclay National Bank shared much in common with the Holocaust-era litigation, especially its historical scope and complexity. Like the Holocaust-era litigants of the late 1990s, plaintiffs sought damages in United States federal courts for harms suffered on the other side of the globe under a regime that had, thankfully, passed into history.[415] Many of the same plaintiffs' attorneys took a leading role in both litigations, especially Michael Hausfeld and Edward Fagan.[416] *Khulumani* therefore illustrates how attorneys fared

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permits the executive to achieve what it could not otherwise do without majority approved congressional-executive agreement or treaty).

411. *See, e.g.*, Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954).

412. *See, e.g.*, Sarei v. Rio Tinto PLC, 487 F.3d 1193 (9th Cir. 2007) (seeking disgorgement of profits earned at a mine where Papua New Guineans had allegedly been forced to labor in "slave-like" conditions and because their human rights were violated at the behest of MNC).

413. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007).

414. *Id.* at 258. Although legal scholars have explored the implications of *Khulumani*'s holding, that aiding and abetting liability may lie under ATCA, no one has explored the continuity between this suit and the restitutionary theories of the core of the Holocaust-era litigation. *See, e.g.*, Shriram Bhashyam, Note, *Knowledge or Purpose? The Khulumani Litigation and the Standard for Aiding and Abetting Liability under the Alien Tort Claims Act*, 30 CARDOZO L. REV. 245, (2008); Teddy Nemeroff, Note, *Untying the* Khulumani *Knot: Corporate Aiding and Abetting Liability Under the Alien Tort Claims Act After* Sosa, 40 COLUM. HUM. RTS. L. REV. 231, 250-58 (2008).

415. *Khulumani*, 504 F.3d at 258-59.

416. BAZYLER, HOLOCAUST JUSTICE, *supra* note 4, at 324-326. Hausfeld is named as lead counsel in the suit, but by the time the case was appealed to the Second Circuit, Fagan had been charged with ethics violations for alleged misappropriation of clients' funds. John Covaleski*, Ethics Charges Leveled at Lawyer Who Fostered Holocaust Settlement*, N.J. L.J., Jan. 17, 2005.

when they sought to extend the model of the Holocaust-era litigation to other international human rights lawsuits.[417]

Khulumani consolidated ten class actions, representing millions of South Africans who suffered under apartheid, including ninety-one named victims of arbitrary detention, sexual assault, extrajudicial killings, and other violence.[418] Defendants were fifty MNCs that conducted business in apartheid-era South Africa, as well as "hundreds of 'corporate Does,' . . . [who] [t]he plaintiffs argue[d] . . . actively and willingly collaborated with the government of South Africa in maintaining a repressive, racially based system known as 'apartheid,' which restricted the majority black African population in all areas of life while providing benefits for the minority white population."[419] If successful, their sweeping claims against hundreds of "corporate Does" could potentially implicate almost any MNC doing business with South Africa in the latter half of the twentieth century. Legal scholars have focused on the controversial per curium decision of the Second Circuit, which found that aiding and abetting liability can lie for MNCs that substantially assist the perpetrators of crimes universally proscribed under international law.[420] To date, no scholarship has

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A special ethics master recommended Fagan's disbarment on 24 Jan. 2008. Maria Vogel-Short, *Lawyer for Holocaust Victims Faces Disbarment for Trust Fund Violation*, N.J. L.J., Feb. 4, 2008, at 9. The case is now proceeding to the New Jersey Bar's Disciplinary Review Board. *Id.* Fagan was sanctioned by the Eastern District of New York. Molefi v. Oppenheimer Trust, No. 03 CV 5361(FB)(VVP), 2007 WL 538547, at *4 (E.D.N.Y. Feb. 15, 2007). He was also disqualified before the Southern District of New York when Judge Shira Scheindlin found "Fagan has engaged in a pattern of unethical behavior." *In re* Ski Train Fire in Kaprun Austria, No. 03 CV 8960, at *3 (S.D.N.Y. Aug. 16, 2007). Judge Scheindlin also gives a brief history of Fagan's troubles before the bar as well as his termination in the South African Apartheid litigation. *Id.* at *3-5.

417. *See* Second Consolidated and Amended Complaint, *In re* South African Apartheid Litig., 346 F. Supp. 2d 538, No. 02 MDL 1499 (S.D.N.Y. 2004). South Africa "was based on pseudo-scientific concepts of racial purity similar to those of the recently defeated Hitler tyranny." *Id.* at 3. Judge Dickinson Debevoise expressed great doubt that the Holocaust-era litigation could provide a model for human rights litigation. Telephone Interview with Judge Dickinson Debevoise (Apr. 16, 2009). Judge Joseph Greenaway emphasized the uniqueness of the facts of the Holocaust-era cases but refused to comment on whether it could provide a model for future human rights litigation. Telephone Interview with Judge Joseph Greenaway (May 11, 2009).

418. *Khulumani*, 504 F.3d at 258, 258 n.1.

419. *Id.* at 258.

420. *See id.* at 274, 280. The first *Khulumani* decision is reviewed extensively on remand. Ntsebeza v. Daimler AG, 617 F. Supp. 2d 228, 242-44 (S.D.N.Y. 2009) (reviewing on remand the Second Circuit's first ruling on *Khulumani* and the lowest common denominator among the three judges and under international law for aiding and abetting liability). *See also* Bhashyam, *supra* note 414, at 262-64 (exploring differing standards of knowledge or purposeful intent for aiding and abetting liability in the *Khulumani* decision as drawn from common law and international law); Kristen Hutchens, *International Law in the American Courts* – Khulumani v. Barclay National Bank Ltd.*: The Decision Heard 'Round the Corporate World*, 9 GERMAN L.J. 639, 657-63 (2008) (reviewing *per curiam* decision's standards for aiding and abetting in light of *Sosa v. Alvarez-Machain*); Nemeroff, *supra* note 414, at 264-79 (arguing that the Second Circuit misapplied).

addressed the restitutionary theories that the plaintiff's modeled directly on the Holocaust-era lawsuits.

The first apartheid-era suit was filed in the Eastern District of New York soon after the settlement of the Holocaust claims, on November 12, 2002.[421] Others followed in eight separate federal courts. The Judicial Panel on Multidistrict Litigation eventually transferred and consolidated them in the Southern District of New York under Judge John Sprizzo. Edward Fagan's Second Consolidated & Amended Complaint tried to make a direct connection between MNCs' role in the Holocaust and their role in South Africa,[422] clearly hoping that the court would look to the Holocaust-era litigation as a precedent. The complaint also tried to extend wrongful enrichment claims modeled on those of Holocaust survivors, alleging that defendants had benefited from forced labor[423] and asking for "disgorgement of illicit profits."[424] Plaintiffs requested $400 billion, $100 billion more than South Africa's total GDP in 2009.[425]

To sustain a wrongful enrichment claim, plaintiffs must first demonstrate a wrong. The *Khulumani* plaintiffs grouped allegations of torture, extra-judicial killing, and other torts, as well as criminal contracts under TVPA, RICO, and ATCA.[426] District Court Judge Sprizzo dismissed all of these charges on a

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421. *In re* South African Apartheid Litig., 346 F. Supp. 2d 538, 546 (S.D.N.Y. 2004).

422. The plaintiffs' Second Amended Complaint tied Nazi-era corporations to Apartheid:

> [D]efendants named in the instant and other apartheid related reparations complaints . . . are the same financial institutions and companies as those . . . identified in the Holocaust related class action litigations against certain US banks and companies, Swiss banks, German banks and companies, Austrian banks and companies, British banks, French banks, European insurance companies accused of profiteering from the Holocaust.

Second Consolidated and Amended Complaint at 8 n.1, *In re* South African Apartheid Litig., 346 F. Supp. 2d 538, No. 02 MDL 1499 (S.D.N.Y. 2004) [hereinafter Second Amended Complaint]. Although this commission, as conceived by Fagan, had affirmative action-like characteristics that played no role in the German Foundation, the idea of a massive settlement fund for social, public purposes clearly owed something to the Holocaust-era settlement with Germany. *See id.* at 12-16.

423. *Id.* at 12-13.

424. *Id.* at 107. Fagan and other lawyers clearly fashioned their pleading on other aspects of the Holocaust-era settlements, asking for the creation of an independent international historical commission as well as "educational and training programs through which plaintiffs and members of the plaintiffs class may increase their work abilities and opportunities for advancement." *Id.* at 13.

425. *In re South African Apartheid Litig.*, 346 F. Supp. 2d at 546. *See* CIA, The World Factbook: South Africa, Economy, https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html (last visited Aug. 5, 2010) (lists the 2009 GDP of South Africa as 287.2 billion).

426. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 258, 258 n.1 (2d Cir. 2007).

12(b)(1) motion, finding no subject matter jurisdiction to hear any claims.[427] The Torture Victim Prevention Act (TVPA) creates a cause of action in federal court for the victims of torture and extrajudicial killings.[428] These are limited to individuals who act "under actual or apparent authority, or color of law, of any foreign nation."[429] It also requires that victims exhaust all alternative remedies before coming into federal court.[430] Judge Sprizzo found none of these prerequisites were satisfied.[431] The court also found the Racketeer Influenced and Corrupt Organization Act (RICO)[432] to operate extraterritorially only in the event that the alleged harmful conduct either occurred in the United States or had a direct and substantial effect in the United States.[433] Finding insufficient contacts, the court dismissed these claims too, adding that "this [RICO] claim borders on the frivolous."[434]

Finally, the court dismissed the ATCA claims. Following the Supreme Court's ruling in *Sosa v. Alvarez-Machain*,[435] Sprizzo noted that ATCA only provided a cause of action for violations of international law "defined with a specificity comparable to the features of the 18th-century paradigms" at the time of the Judiciary Act of 1789, which established the ATCA.[436] These were few, namely "offenses against ambassadors, . . . violations of safe conducts, . . . and piracy."[437] Sprizzo did not like the expansion of human-rights litigation to encompass new offenses such as torture, genocide, or slavery, and regretted that "it would have been unquestionably preferable for the lower federal courts if the Supreme Court had created a bright-line rule that limited the ATCA to those violations of international law clearly recognized at the time of its enactment."[438] In dicta, he expressed his opinion that the inclusion of human-rights norms in ATCA jurisdiction made the matter "ripe for non-meritorious and blunderbuss suits."[439] The court held that the mere conduct of business with South Africa did not meet the *Sosa v. Alvarez-Machain* standard as a violation of "'a norm of international character.'"[440] Sprizzo

427. *Id.* at 259.

428. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73 (1992).

429. *Id.*

430. *Id.* at § 2(b). The TVPA has been included as a note to 28 U.S.C. § 1350 (2001).

431. *In re South African Apartheid Litig.,* 346 F. Supp. 2d at 555.

432. 18 U.S.C. §§ 1962-1968 (2008). RICO declares that "[i]t shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity." *Id.* at § 1962(a).

433. *In re South African Apartheid Litig.*, 346 F. Supp. 2d at 555-56.

434. *Id.* at 556.

435. 542 U.S. 692 (2004).

436. *In re South African Apartheid Litig.*, 346 F. Supp. 2d at 547.

437. *Sosa*, 542 U.S. at 720.

438. *In re South African Apartheid Litig.*, 346 F. Supp. 2d at 547.

439. *Id.* at 550.

440. *Id.* at 547 (quoting *Sosa*, 542 U.S. at 725).

acknowledged the restitution claims only once,[441] but did nothing more to address them.

The restitution claims were simply ignored, not least because of their weak basis in evidence. The plaintiffs briefed it once again on appeal: "[l]ike Nazi-era firms that profited from forced labor during World War Two, defendants actively sought cooperation with the regime to secure profits."[442] Again the plaintiffs failed to allege any specific events or operations that had led to calculable gains on behalf of MNCs. On appeal, the Second Circuit ignored both the plaintiffs' quantum meruit claims arising from "near-enslavement"[443] and their wrongful enrichment claims; the opinion simply does not mention them.

To sustain their quantum meruit claim, the plaintiffs would have had to show that MNCs either did not compensate them or undercompensated them.[444] The basis for comparison, however, would have been similarly situated workers in Africa, accompanied by evidence that wages were depressed or unpaid by South African MNCs as opposed to elsewhere. An argument could plausibly be made, for instance, that white wages in South African mines were about four times that of black African workers, whereas in Namibia they were "only" roughly three times higher.[445] The *Khulumani* plaintiffs might have argued that they were entitled to the difference. They would have encountered difficulties laying claim to "white" wages, unless the work performed was substantially similar. Unskilled workers are not entitled in quantum meruit to the wages of skilled workers, for instance. Whether broad sociological and economic arguments of this nature could ever sustain restitution suits is questionable and beyond the scope of this article. What is relevant here is that the *Khulumani* plaintiffs did not make allegations approaching even this level of specificity.[446]

To sustain their wrongful enrichment claims, the plaintiffs had to demonstrate that intentional wrongdoing had directly enriched the defendants.[447] MNCs would have all the defenses at their disposal discussed above. But *Khulumani* merely alleged that vague "cooperation" of MNCs with

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441. *Id.* at 545.

442. Brief for Plaintiffs-Appellants at 13, *In re* South African Apartheid Litig., 238 F. Supp. 2d 1379 (2d Cir. 2005) (No. 05-2326-cv).

443. *In re South African Apartheid Litig.,* 346 F. Supp. 2d at 543.

444. *See generally*, Alperin, *supra* note 25 (quantum merit relies on the idea that there has been an implied breach of non-payment since there is no contract).

445. Neil Andersson & Shula Marks, *Work and Health in Namibia: Preliminary Notes*, 13 J. S. AFR. STUD. 274, 280 (1987) (providing statistics for wage rates in Namibia from 1981 and S. Africa from 1983); Fred Curtis, *Contradiction and Uneven Development in South Africa: The Constrained Allocation of African Labour-Power*, 22 J. MOD. AFR. STUD. 381, 382 (1984).

446. *See generally* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254 (2d Cir. 2007).

447. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 (Tentative Draft No. 5, 2007).

"the regime" had "secure[d] profits."[448] None of these allegations possessed merit sufficient to prompt the court to address them. The Second Circuit touched upon dubiously earned financial gains only once, but in the most unflattering light for the plaintiffs.[449] The dissent by Judge Edward Korman favorably quoted the derision heaped on the fees earned by plaintiffs' lawyers by South Africa's Minister of Trade and Industry Alec Erwin. Minister Erwin condemned "attempts to use unsound extra-territorial legal precepts in the [United States of America] to seek personal financial gain in South Africa."[450] At least in Minister Erwin's opinion, the only cause advanced by wrongful enrichment claims was that of the American plaintiffs' bar.[451]

As the South African Trade Minister's objection made clear, *Khulumani* lacked any support from the political branches of either South Africa or the United States.[452] Both governments roundly condemned the litigation, arguing that it threatened the fragile stability of South Africa's transitional regime.[453] Far from heroic lawyers prodding states to act through "plaintiffs' diplomacy," the *Khulumani* litigants secured only official condemnation.[454] Ironically, the *Khulumani* court conformed to one of the strongest precedents set by the Holocaust-era restitution cases: even strong international human-rights suits can fail without political support, and almost inevitably fail in the face of political opposition.[455]

On remand, Judge Shira Scheindlin decided the case on April 8, 2009, now under the name *Ntsebeza v. Daimler AG*.[456] She faced the daunting task of divining standards for aiding and abetting liability under ATCA from the Second Circuit's per curiam decision in *Khulumani*.[457] In *Khulumani*, Judge Robert Katzmann had looked to international law standards, Judge Peter Hall to common-law tort, and Judge Edward Korman looked to international law, but wrote that it provided little clarity and urged dismissal on prudential grounds.[458] Like Judge Korman, Judge Scheindlin found international legal

448. Brief for Plaintiffs-Appellants at 13, *In re* South African Apartheid Litig., 238 F. Supp. 2d 1379 (2d Cir. 2005) (No. 05-2326-cv).

449. *Khulumani*, 504 F.3d at 300.

450. *Id.* at 300 (Korman, J., concurring in part and dissenting in part) (alteration in original). Because this case was still pending, Judge Korman would not discuss *Khulumani* when interviewed. Telephone Interview with Judge Edward Korman (Apr. 23, 2009).

451. *See Khulumani*, 504 F.3d at 300.

452. *See id.*

453. *Id.* at 296-98.

454. *See id.* at 259 (Ministery of Justice and Constitutional Development for South Africa and U.S. State Department submitted declarations expressing disapproval of the lawsuits and recommending dismissal). Judges Hall and Katzmann emphasized that allegations of harm had to pass the relatively high standards of *Sosa*. *Id.* at 261-64.

455. *See id.* at 263-64.

456. 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

457. *See id.*

458. *Id.* at 244, 255 n.129 (discussing how Judge Katzmann, Judge Hall and Judge Korman each filed their own lengthy opinion). *See Khulumani*, 504 F.3d at 264-321.

standards uncertain,[459] but nevertheless saw a common denominator, concluding "that customary international law requires that an aider and abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations."[460] The motives of the perpetrator and aider and abettor MNCs need not therefore be aligned in a common criminal enterprise.[461] It would suffice that the MNC knew or should have known that a crime would occur and lent substantial assistance to the criminal.

Judge Scheindlin limited this standard, by imposing strict *actus reus* requirements.[462] "[S]imply doing business with a state or individual who violates the law of nations is insufficient," she wrote, excluding the mere extension of financing or the sale of commodities.[463] She required plaintiffs to delve into the facts of their cases. To prove liability for aiding and abetting, they must show that defendants "specifically designed" their merchandise or services to contribute to human rights violations.[464] They must also demonstrate a "closer causal connection to the principal crime."[465] While she expressed doubt about whether The *Ntsebeza/Khulumani* allegations could prevail at trial,[466] she allowed the suit to proceed on these limited grounds on the strength of plaintiffs' pleadings, tying specific products such as weapons[467] or data-processing technology[468] to specific acts of torture or extrajudicial killing committed by the apartheid regime. Judge Scheindlin dismissed other claims, however, for insufficient factual detail[469] and dismissed all claims

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459. *Ntsebeza*, 617 F. Supp. 2d at 252 (finding no international crime of apartheid by a non-state actor). *See also id.* at 259-62 (inconsistent standards of international criminal tribunals for knowledge and intent in aiding and abetting liability).

460. *Id.* at 262.

461. *See id.* at 257-59.

462. *Id.*

463. *Id.* at 257, 258 (discussing an idea from the Nuremberg Trials from the International Military Tribunal).

464. *Id.* at 258.

465. *Ntsebeza*, 617 F. Supp. 2d at 258. Scheindlin allowed for instances in which ordinary wares were put to criminal purposes, such as Zyklon B in the concentration camps of Nazi Germany, but the *mens rea* element would allow courts to distinguish between those who were liable and those who were not: if aiders and abettors knew or should have known of the purpose and outcome of the use of their products or services, they could be liable even for the sale of otherwise innocuous products. *Id.* Even if those goods have legitimate uses, the distinction can also be drawn with the "mens rea element." *Id.* at 258 n.157.

466. *See id.* at 265 (stating that allegations were "somewhat thin").

467. *Id.* at 264 (noting "production and sale of specialized military equipment" by Daimler, Ford, and GM). *See also id.* at 269-70 (noting armaments sales by Rheinmetal).

468. *Id.* at 265, 268 (noting information and technology provided by IBM and Fujitsu).

469. *Id.* at 266-67 (dismissing allegations by *Khulumani* plaintiffs against Ford and GM for merely selling parts and automobiles to South African military).

against financial institutions that had merely provided funding but otherwise remained distant from the criminal acts alleged by the plaintiffs.[470]

Judge Scheindlin's opinion suggests that future courts will redouble their attention to well-pled facts. Breezy allegations that a defendant sought to "'acquire a stake in the criminal venture'" or had simply profited by dealing with a regime cannot carry the burden of proof in international human-rights litigation.[471] The case also demonstrates that the restitutionary theories of the Holocaust-era litigation were of no use to the plaintiffs, disappearing from the case on remand. Khulumani's First Amended Complaint dropped them entirely and instead asked for relief in the form of damages only.[472] Judge Scheindlin also dismissed claims against Barclays Bank for its employment practices, casting doubt on whether the court would even entertain well-pled quantum meruit claims.[473] Considering that the ATCA's plain language extends jurisdiction for "torts only," it is doubtful whether courts will ever find jurisdiction to rule on restitutionary claims arising from those torts.[474]

This article has argued that governments are decisive in human-rights litigation. Yet the *Ntsebeza* ruling contravened the express opposition of the United States Executive, the government of South Africa as well as the governments of Germany, Canada, the United Kingdom, and Switzerland.[475] Scheindlin's opinion therefore seems to temper one of this article's central theses. Yet one factor distinguishes *Ntsebeza*: the plaintiffs produced statements of interest by the Commissioners of the Truth and Reconciliation Commission and its chairman Desmond Tutu, who wrote that "absolutely nothing in the TRC [Truth and Reconciliation Commission] process, its goals, or the pursuit of the overarching goal of reconciliation, linked with truth . . . would be impeded by this litigation. To the contrary, such litigation is entirely consistent with these policies."[476] The institutions of the South African government thus do not currently speak with one voice on the matter. There is also much speculation about the stance that the Obama administration will take. It may be that the plaintiffs are securing political support, which they will need to prevail.

Furthermore, cases like that of Hugo Princz also survived dismissal in the trial court only to fail on appeal. Whether *Ntsebeza* will follow the pattern of

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470. *Id.* at 266 ("Although the systemic denial of job opportunities on the basis of race is abhorrent, Barclays' employment practices do not meet the *actus reus* requirement of aiding and abetting apartheid.").

471. *Ntsebeza*, 617 F. Supp. 2d at 270 n.238 (citing to *Khulumani* Brief). *See* First Amended Complaint and Demand for Jury Trial at 44, Khulumani v. Barclay Nat'l Bank Ltd., No. 03-cv-04524 (2d Cir. Oct. 24, 2008) (containing everything from vague allegations that banks earned profits in dealing with Apartheid South Africa to the more precise allegations, sometimes naming exact programs and efforts to evade the law in order to provide weapons to the South African regime by Rheinmetal AG) [hereinafter First Amended Complaint].

472. First Amended Complaint, *supra* note 471, at 98.

473. *Ntsebeza,* 617 F. Supp. 2d at 266.

474. 28 U.S.C. § 1350 (2010).

475. *Ntsebeza,* 617 F. Supp. 2d at 276.

476. *Id.* at 279.

Princz is yet to be determined, but the Supreme Court is very likely to weigh in on whatever the Second Circuit eventually rules.[477] In 2008 the Supreme Court declined to hear *Khulumani* only because the Court lacked a quorum after four justices recused themselves because they owned stock in various companies among the fifty-one MNC defendants.[478] Now that the number of defendants is considerably fewer, the Supreme Court seems likely to accept a petition for *certiorari*, and it has already expressed itself regarding *Khulumani* in *Sosa*: "[i]n such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."[479]

It is therefore far too early to judge whether *Ntsebeza* will actually alter standards of deference to the express interests of the United States and foreign governments in such suits. Whatever the future holds, the theories of restitution that enthusiasts of the Holocaust-era litigation hoped might form a model for future human-rights litigation contributed little to the success of Ntsebeza, as evidenced by the fact that the plaintiffs abandoned their restitutionary claims. To the extent they have prevailed, they have concentrated on allegations that fit the historical facts.

CONCLUSION

In retrospect, it is a small wonder that experienced executives and lawyers representing defendant German MNCs in the Holocaust-era litigation "had never given much credence to the legal case against them."[480] Their skepticism should serve as a warning that wrongful enrichment theories offer few advantages in international human rights litigation. Gross violations of human rights are not notable for their profitability. Where slavery still flourishes in an industrial setting, it remains marginal and overwhelmingly associated with sweat shops rather than MNC enterprise.[481] Even if plaintiffs can recover in

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477. As of October 2010, this case is still pending appeal.

478. Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424, 2424 (2008) (the Court affirmed under 28 U.S.C. § 2109, stating that "under these circumstances the Court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided Court.").

479. Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004). The Court cited to the Declaration of Penuell Mpapa Maduna, who is the Minister of Justice and Constitutional Development in the Republic of South Africa. *Id.* at 733 n.21 (citing Appellate Brief for Government of Commonwealth of Australia et al. as Amici Curiae, *In re* South African Apartheid Litigation, 238 F. Supp. 2d 1379 (2002)).

480. EIZENSTAT, *supra* note 19, at 246. Among the plaintiffs it has been common to consider that the *Ford* and *Degussa/Siemens* cases cost the plaintiffs in the settlement. *See id.* at 246-47. In Eizenstat's estimation, however, the impact of the litigation was to demonstrate to the plaintiffs' lawyers how exaggerated their claims had been. *See id.* at 246-48.

481. *See generally* Doe v. Unocal Corp., 963 F. Supp. 880 (C.D. Cal. 1997). Advanced modern production of even moderate complexity depends upon highly skilled workforces.

quantum meruit, the sums involved must be measured by prevailing lawful market wages where the crimes took place. In places like Sudan, this can be less than a dollar a day.

Restitution has never been a legal remedy for harms inflicted by a wrong; it is a remedy to recover benefits conferred by the wrong. Its usual purpose is to allow a plaintiff to recover ill-gotten gains when these are larger than the damage she has suffered.[482] Because it is not a punitive remedy, however, it is powerless to serve the cause of justice when ill-gotten gains are non-existent or meager in comparison to the harm. Most gross infractions of human rights are instances of the latter rather than the former.

It is hard to imagine venture capitalists rushing to invest in widespread and systematic genocide, enslavement, murder, torture, rape, or disappearances because there is little lucre to be gained. Corporations have sought profit through transactions with criminal states, and corporate revenues have undoubtedly lent crucial resources to the most egregious regimes.[483] However, criminal regimes typically seek the revenue generated by MNCs to fund widespread and systematic attacks upon civilians; MNCs do not seek human-rights depredations to generate revenue. Historically, this was the role played

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Unsurprisingly, slavery is not noted for fostering skill and dedication at work. *See, e.g.*, *id.* The sectors in which it flourishes therefore tend to be those in which brute manual labor is the main input in production: unsophisticated extraction operations, agricultural labor, or stone and earth industries. *See* U.S. DEP'T OF STATE, OFFICE TO MONITOR AND COMBAT TRAFFICKING IN PERSONS, TRAFFICKING IN PERSONS REPORT: TOPICS OF SPECIAL INTEREST *7 (June 4, 2008), http://www.state.gov/g/tip/rls/tiprpt/2008/105379.htm. The slave labor at issue in the *Unocal Corp.* dispute, for instance, involved not oil rig workers but peasants from the Tenasserim region of Myanmar building roads and other relatively simple infrastructures. *Unocal Corp.*, 963 F. Supp. at 883, 885.

482. DAGAN, STUDY, *supra* note 73, at 20 (asserting that profit as remedy in unjust enrichment intelligible only if profits exceed fair market value of the right or asset misappropriated).

483. *See*, *e.g.*, Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88 (2d Cir. 2000) (upholding jurisdiction over ATCA claims that oil company participated in state human rights violations); Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006) (denying MNC motion to dismiss after a showing of aiding and abetting gross human rights violations in Sudan); Presbyterian Church of Sudan v. Talisman Energy, Inc., 453 F. Supp. 2d 633 (S.D.N.Y. 2006), *judg. entered* No. 01 Civ. 9882, 2006 WL 3469542 (S.D.N.Y. Dec. 1, 2006) (granting summary judgment to defendant MNC after discovery produced little evidence of the MNC's direct involvement in gross human rights violations in Sudan, although much direct involvement by MNCs over which the court did not have jurisdiction). ATCA claims were also dismissed although common law tort claims could proceed. Saleh v. Titan Corp., 580 F.3d 1, 5 (D.C. Cir. 2009). On aiding and abetting liability under the ATCA, see Ralph G. Steinhardt, Corporate Complicity and the Alien Tort Claims Act: Litigating the Human Rights Responsibilities of Multinational Corporations after *Sosa* (2008) (unpublished manuscript) (on file with author). *See also* Neuborne, *Holocaust Reparations Litigation*, *supra* note 38, at 619 (tempering earlier enthusiasm for the heroic narrative: "the Holocaust litigation was an untidy mixture of law, politics and raw emotion. Law provided the roadmap for the proceedings, but did not necessarily provide the fuel."); Ramasastry, *supra* note 4, at 93-94 (distinguishing between Nazi-era corporations that utilized slave labor directly and many contemporary cases in which MNCs are not direct perpetrators, but more like joint venturers with human rights violators).

by Germany's leading MNCs in the Holocaust. They lent willing and eager assistance but were not the authors of the Nazis' worst excesses.

Human rights plaintiffs will succeed only with theories anchored in evidence, as demonstrated by the *Khulumani* suit. As it evolved, the plaintiffs jettisoned Holocaust-era restitution theories and instead focused on claims based in aiding and abetting liability. These more closely fit the facts. Contemporary corporations are more likely to appear in the role of aiders and abettors who render "substantial assistance or encouragement," rather than marauding institutions that violate human rights due to simple-minded greed.[484]

The *Khulumani* plaintiffs sought to suggest that Holocaust-era corporations have their counterparts in the present, which hits on a kernel of the truth. For example, during the acquisition of a subsidiary in 1998, the Canadian company Talisman discovered that its oil-field development in southern Sudan "would increase Government oil revenues and tip the military balance [in the midst of civil war] in the Sudan in favor of the Government."[485] Litigation against Talisman yielded clear evidence that the company owned a minority position in a consortium, Greater Nile Petroleum Operating Company Ltd. Greater Nile lent knowing assistance to the Sudanese regime, which used the oil company's airfields, roads, and other resources to conduct ethnic cleansing.[486]

But *Talisman* illustrates once again the more typical role of profit-seeking corporations in gross human rights violations. There was and is strong evidence that the militant Islamic-Arabic state of Sudan perpetrated war crimes, disappearances, and the forced relocation of Christian and animist populations in Southern Sudan. But it was the mutual interest in the development of an economic resource—in this case oil—that connected the MNC to the criminal regime. MNCs wanted to profit from the oil fields and the Sudanese government wanted to transform that resource into revenue in pursuit of its ideological and political aims. The motives of the two parties were clearly distinct but mutually reinforcing. Nevertheless, little evidence suggests that MNCs profited directly from the wrongs of the regime.

Wrongful enrichment is a poor legal theory for establishing MNCs' liability to the victims in such cases. In an ongoing lawsuit, the *Talisman* plaintiffs belatedly included a demand for "restitution and disgorgement of the revenues and profits obtained by Defendants as a result of the actions described herein and a declaration that such revenues and profits are held in constructive trust

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484. RESTATEMENT (SECOND) OF TORTS § 876(b) (1979).

485. *Presbyterian Church of Sudan*, 453 F. Supp. 2d at 647.

486. *Id.* at 651-52. The corporations apparently most responsible (for instance a Chinese 40% shareholder and a Sudanese state corporation with no contacts to the forum) were beyond the jurisdiction of the court. *Id.* at 646.

for the benefit of the Class."[487] Although, despite detailed findings gained through discovery, they offered no evidence that war crimes, slavery, disappearances, and relocations had conferred benefits upon any corporations involved.[488] Rather, detailed allegations concentrated on how oil revenue had increased the deadly force available to the Sudanese military.[489] Relief should be available in American courts for the harm done in such cases, but legal theories will be strongest when they accurately incorporate historical fact and credible evidence rather than speculation about enormous profits.

The Holocaust-era cases of the late 1990s have had few progeny. Despite their spectacular settlements, they are a legal cul-de-sac.[490] Charges that MNCs engorged their balance sheets during the Holocaust proved sensational enough and the historical abomination of the Nazi regime proved potent enough that law professors and plaintiffs' attorneys could testify about such things with little knowledge, even before Congress, without really being challenged. The plaintiffs themselves were also sympathetic, articulate, and their historical suffering was beyond question. In consequence, they gained widespread political support. However, it was the backing from the Executive and Congress that led to the large settlements, not the merits of the litigation.

The *Khulumani* and *Saleh* class actions suggest that future plaintiffs are unlikely to garner this kind of a "perfect storm" of support. Human rights litigation is a weapon of the weak. Aliens who come to American courts to sue their oppressors can very rarely count upon rich or well-connected allies such as Edgar Bronfman, Alan Hevesi, President Clinton, Stuart Eizenstat, or Alfonse D'Amato. The only leverage that victims may have in the pursuit of justice is the truth of their allegations. This is all the more reason why human-rights plaintiffs should take care not to distort history. It should not be forgotten that those who manipulate the truth about the Holocaust—in the name of whatever political cause—will quickly find themselves in the most

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487. Second Amended Class Action Complaint at 37, *Presbyterian Church of Sudan*, 2003 WL 25461349, No. 01 CV 9882.

488. *See generally id.* The first pleading contained only detailed allegations of aiding and abetting and no unjust enrichment claim. *Id.* at 32, 36.

489. *Id.* at 30. The Sudanese military spending moved steadily upwards in connection to the oil revenue that was skyrocketing and thus contributing to the violence.

> According to Talisman's Annual Report for 2000, under its agreement with the [Sudanese] Government, thirty-nine percent (39%) of Talisman's revenues from its Sudanese operations went to pay royalties to the Government of Sudan, an increase from the 23% royalties paid in 1999. In 2000 alone, this amounted to $195 million. In the first half of 2001, royalty payments have risen to over 40%. Military expenditures by Sudan have skyrocketed along with oil revenues. For 2000, Government oil revenues were $526 million while military expenditures were $242 million. For 2001, projections are for oil revenues of $596 million and military expenditures of $362 million.

Id.

490. Pell, *supra* note 13, at 334-35 (reviewing failure of all the other historical human-rights litigation over Japanese slave labor, Black slavery, Armenian genocide, crimes of communist governments, and apartheid-era litigation).

bizarre of company.[491] Litigation that exaggerates the truth or even fabricates history to score political advantage may, in the long run, undermine the credibility of international human-rights litigation in general. Restitutionary claims seem likely to do just that.

491. This terrain is usually occupied by Holocaust deniers. *Holocaust Denial on Trial: Using History to Confront Distortions, Holocaust Denial and the 2000 Libel Trial in the U.K.*, http://www.holocaustdenialontrial.com/en/trial/(last visited Nov. 13, 2010). *See generally* Maxine D. Goodman, *Slipping Through the Gate: Trusting* Daubert *and Trial Procedures to Reveal the 'Pseudo-Historian' Expert Witness and to Enable the Reliable Historian Expert Witness—Troubling Lessons from Holocaust-Related Trials*, 60 BAYLOR L. REV. 824 (2008) (examining Holocaust deniers' treatment under expert witness rules).