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Secrets and Lies? Swiss Banks and International Human Rights

Anita Ramasastry

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Secrets and Lies? Swiss Banks and International Human Rights

Anita Ramasastry*

ABSTRACT

This Article explores the relationship of Swiss banks and their tradition of bank secrecy to the activities of a particular group of depositors: war criminals and other human rights violators. The Article focuses on litigation brought in U.S. courts by plaintiffs seeking access to Swiss bank deposits made by the Nazis and Ferdinand Marcos. The Article examines the possibility of holding banks accountable under international law for assisting a customer who has committed a serious breach of international law.

Part I introduces the role of bank secrecy in the current litigation. Part II describes the Swiss tradition of bank secrecy. Part III examines the continued popularity of Swiss banks as loci for the "retirement accounts" of dictators, despite Swiss reform efforts. Part IV analyzes the Holocaust Victims Asset Litigation and discusses the claims in detail. Part V describes the Marcos human rights litigation as an example of claims that Swiss banks were functioning as agents of a dictator. Part VI discusses the possible establishment of "indigenous spoliation" as an international crime, and its possible application to culpable bankers. Part VII summarizes the lessons of the Marcos and Holocaust cases, and notes especially the need for clearer legal standards and effective international legal mechanisms.

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"There is no such thing as good money or bad money, there's just money."

Lucky Luciano, gangster

I. INTRODUCTION

What do Hitler and Marcos have in common? Their bankers. Both leaders used numbered Swiss accounts in order to deposit ill-gotten gains. Why? Bank secrecy. In its basic form, bank secrecy refers to the obligation of a bank and its employees to keep information about their customers strictly confidential.¹ Switzerland has been an attractive place to store money because it has historically offered customers confidentiality and security.²

The term bank secrecy denotes different things to different people. For some, bank secrecy means the ability of banks to protect an individual's right to financial privacy. People even refer to bank secrecy and financial privacy as human rights or fundamental rights.³ Banks are seen as guardians, institutions that protect assets and prudently manage money.⁴

In Switzerland, bank secrecy was established to protect individuals who were vulnerable to government intrusion. Article 47 of Swiss Federal Banking Law provides that bank employees shall be subject to criminal prosecution if they divulge confidential information about their customers.⁵ Some commentators suggest that Swiss banks enacted Article 47 in the 1930s when they sought to make their banking industry more attractive to Jews and other targets of persecution by enacting

1. See ROBERT KINSMAN, *YOUR NEW SWISS BANK BOOK* 7-41 (rev. ed. 1979) (discussing secrecy, security, and stability as reasons why depositors are attracted to Swiss banking); see also Melanie Warner, *How to Open a Swiss Bank Account (Try It, You'll Like It)*, *FORTUNE*, Mar. 31, 1997, at 166 (discussing various types of clients who can open bank accounts, from deposed dictators to individual consumers wanting to keep funds away from ex-spouses).

2. *Id.*

3. The Author uses these phrases generally, rather than referring to "fundamental rights" as the term might be used by constitutional law scholars.

4. The benevolent face of bank secrecy is associated with protecting people from the threat of asset confiscation. A less benevolent but more accepted rationale for bank secrecy is to protect private money from the tax authorities.

5. Article 47(a) of Swiss Federal Banking Statute states:

1. Whoever discloses a secret that was entrusted to him, or of which he has knowledge in his capacity as a member of an organ of the bank, as an employer, agent, liquidator, trustee, observer of the Banking Commission, or director or as an employee of a chartered accounting or audit firm, and whoever instigates another to such violation of the professional secrecy shall be punished by way of imprisonment or by a fine

comprehensive bank secrecy laws designed to shield the identities of their depositors and protect them from the Gestapo.⁶ Prior to World War Two, European Jews became increasingly worried about their fate under the Third Reich. They brought their savings to Switzerland, traveling directly or using agents to store their valuables. These customers were attracted by promises of confidentiality offered by the Swiss.⁷ Article 47 thus was created both as a means of attracting wealth and as a way of safeguarding individuals in great need of protection.

Ironically, bank secrecy has proven to be a powerful tool whereby dictators, despots, and war criminals can hide their loot with impunity. Among the notorious leaders who have stashed away money in bank secrecy jurisdictions are the Philippines' Ferdinand Marcos, Romania's Nicolai Ceausescu, Haiti's Jean Claude "Baby Doc" Duvalier, and Zaire's Mobutu Sese Seku.⁸ Many of these leaders also have violated the human rights of their citizens.⁹ International public opinion displays discomfort with

6. See Lutz Krauskopf, *Regents' Lectures: Comments on Switzerland's Insider Trading, Money Laundering, and Banking Secrecy Laws*, 9 INT'L TAX & BUS. LAW. 277, 293 (1991). Another Swiss lawyer notes:

[T]here were various references made [in the Swiss legislative bodies] to the fact that the major purpose of Article 47 was to guard against 'foreign espionage'. These statements were directed against the attempts of the Hitler regime to discover and repatriate funds held by Germans abroad. A considerable amount of Nazi spying had developed in Switzerland, and cases had been reported in which pressure was brought to bear on Swiss banks by foreign tax authorities to obtain the disclosure of German assets.

Hermine Herta Meyer, *The Banking Secret and Economic Espionage in Switzerland*, 23 GEO. WASH. L. REV. 284, 290 (1954-1955) (footnotes omitted). See also Werner De Capitani, *Banking Secrecy Today*, 10 U. PA. J. INT'L BUS. L. 57, 59-60 (1988). De Capitani states that, after Hitler took power, a law was enacted that confiscated Jewish property. *Id.* at 60. In addition, German citizens were forced to sign waivers that permitted German authorities to gain access to Swiss bank information. *Id.* De Capitani also notes that while Swiss bank secrecy did protect Jewish and German account holders from the German government, there is also a less beneficent reason for the enactment of Article 47: the Swiss Penal Code drafts also contained secrecy provisions, and because it took a long time for that Code to be enacted (this finally occurred in 1942), "it was possibly merely a question of time saving that Switzerland had its secrecy provision in the Banking Act." *Id.*

7. TOM BOWER, NAZI GOLD 42-43 (1997).

8. In the early 1980s, an ex-Mobutu Minister revealed a list of Mobutu's estimated holdings including \$143 million in a Swiss bank. See Jonathan Kwitny, *Out of Zaire: Where Mobutu's Millions Go*, NATION, May 19, 1984, at 606; Edward Cody, *Swiss Show More Readiness to Freeze Assets of Despots; Ceausescu and Noriega are latest targets*, WASH. POST, Jan. 31, 1990, at A1; Samantha McArthur, *Revolutions Rout Dictators But Their Funds Look Unassailable*, REUTERS, Jan. 30, 1990.

9. Kwitny also cites a 1980 Amnesty International Report that lists Mobutu's human rights violations, which include: detention of political

the thought of Swiss banks depositing and profiting from funds that are placed there by such notorious individuals. Perhaps even more egregious is the thought that war criminals have been able to store their spoils in secret accounts. As Chairman of the World Jewish Congress (WJC) Edgar Bronfman declared: "Nobody should be allowed to make a profit from the ashes of the Holocaust."¹⁰ The roles of Swiss banks in relation to the Third Reich and the Marcos regime have been brought into the spotlight due to two recent cases being litigated in U.S. courts. These cases highlight the more problematic aspects of bank secrecy.

At the same time, these cases also demonstrate that awareness of bank secrecy and the role of bankers has evolved. Swiss banks that accepted Nazi assets during World War Two did so under a distinctly different set of international norms. As scrutiny of non-state actors has grown, so has the understanding of the role of corporate enterprises under international law. Swiss banks and multinational banks generally are held to much higher legal standards today.

A. *Introduction to the Marcos and Holocaust Assets Litigation*

On February 26, 1986, attorney Marvin Belli filed a suit in Hawaii on behalf of eight Filipinos who were U.S. residents claiming to have been tortured by the Marcos government.¹¹ The suit was filed while Marcos and his entourage were fleeing Manila

opponents without trial for long periods, imprisonment of political prisoners convicted at trials that do not conform to international standards, torture, high frequency of deaths in custody due to torture, use of the death penalty in criminal and political cases, and extrajudicial executions. Kwitny, *supra* note 8, at 607. See Stephen J. Solarz, *The U.S. Should Tell Zaire's Mobutu His Time is Up*, CHRISTIAN SCI. MONITOR, Oct. 25, 1991, at 18. Congressman Solarz writes: "Unfortunately, Mobutu's transgressions go well beyond personal corruption and greed. It is widely acknowledged that his government engages in systematic abuses of human rights. Detention, beatings, and torture are the all-too-frequent fare of Zaire's citizens." Solarz, *supra*; see also *Justice; Dictators Beware; Torture Victims May Finally See Money From the Marcos Vaults*, ASIaweek, Oct. 13, 1995, at 48, available in LEXIS, News Library, ASIawk File (discussing various human rights violations committed by Marcos including murder, torture and involuntary detention) [hereinafter *Justice; Dictators Beware*].

10. *The Disposition of Assets Deposited in Swiss Banks by Missing Nazi Victims: Hearing Before the House Comm. on Banking and Fin. Services*, 104th Cong. 35 (1996) (statement of Edgar M. Bronfman) [hereinafter Bronfman Statement].

11. For detailed and thoughtful analyses of the Marcos human rights litigation, see Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65 (1995); Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789*, 67 ST. JOHN'S L. REV. 491 (1993); see also *Justice; Dictators Beware*, *supra* note 9.

and were en route to Hawaii after a democratic uprising forced them to leave the country.¹² Marcos was served when he landed at Hickam Air Force base. In all, five cases were filed against Marcos.¹³ These cases were eventually consolidated by the Judicial Panel on Multidistrict Litigation and assigned to Judge Manuel Real in the federal district court in Hawaii.¹⁴

Marcos died in Hawaii in 1989, but the litigation against his estate continued.¹⁵ In 1995, after receiving a two billion dollar judgment,¹⁶ the Marcos plaintiffs (Marcos Plaintiffs) tried to gain access to more than five hundred million dollars that Marcos had deposited in Swiss accounts.¹⁷ The Marcos Plaintiffs alleged that Swiss banks as agents for the Marcos estate had done more than accept funds—they had actively helped Marcos conceal his wealth. Those who had suffered under Marcos's rule sought compensation for torture, summary execution, disappearance, and prolonged arbitrary detention.¹⁸

At the same time, the Philippine government has attempted to retrieve the same funds from Switzerland through international diplomatic efforts. At some times, the Philippine government has been hostile to the human rights litigants.¹⁹ Thus, there have been competing claims for the same assets. In December 1997, the Swiss Supreme Court ordered several Swiss banks to transfer a fifth of the Marcos funds to an escrow account in the Philippine

12. *In re Estate of Ferdinand Marcos Human Rights Litigation*, 94 F.3d 539, 542 (9th Cir. 1996) [hereinafter *Marcos Litigation*].

13. *Clemente v. Marcos*, 878 F.2d 1438 (9th Cir. 1989); *Hilao v. Marcos*, 878 F.2d 1438 (9th Cir. 1989); *Ortigas v. Marcos*, 878 F.2d 1439 (9th Cir. 1989); *Sison v. Marcos*, 878 F.2d 1438 (9th Cir. 1989); *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989) (all five unpublished decisions were reversed and remanded).

14. Order of Sept. 5, 1990 (D. Haw. 1990) (MDL No. 840).

15. See McArthur, *supra* note 8.

16. *Justice; Dictators Beware*, *supra* note 9. The judgment was not easily achieved. It took more than six years of pretrial activity, multiple appeals to the Ninth Circuit, and two weeks of trial before the Marcos estate was found liable to the class of ten thousand Filipinos. See Steinhardt, *supra* note 11, at 65 n.2.

17. See *Justice; Dictators Beware*, *supra* note 9 (noting a federal district court in Hawaii gave plaintiffs effective title to the Marcos estate's Swiss bank accounts).

18. *Marcos Litigation*, 94 F.3d 539 at 542.

19. See *Manila Says Its Claim on Marcos Money Superior to Victims' Claim*, Deutsche Presse-Agentur, Apr. 15, 1997, at 1, available in LEXIS, News Library, DPA File. In April 1997, then Swiss Federal Councillor and Economic Minister Jean-Pascal Delamuraz visited the Philippines and urged the claimants to settle their dispute with the Philippine government. *Id.* Previous attempts at negotiation between the Philippine Government, the Marcos heirs, and the human rights victims, hosted by the Swiss banks in Hong Kong in 1995, had failed. *Id.* In response to the renewed call for settlement, Philippine President Fidel Ramos stated that "[t]he claim of the Philippine government is superior because this is taxpayers' money." *Id.*

National Bank.²⁰ How and if the money will be distributed to human rights claimants is uncertain.²¹

More recently, several class action lawsuits have been filed by Holocaust survivors and the relatives of Holocaust victims in an effort to recover money deposited in Swiss bank accounts prior to and during World War Two.²² Joined in these lawsuits are: (1) Holocaust survivors who were forced by the Nazis to engage in slave labor and (2) Holocaust survivors and the heirs of Holocaust victims who had property looted by the Nazis.²³ These Holocaust assets plaintiffs (Holocaust Plaintiffs) allege that Swiss banks knowingly accepted profits derived from slave labor as well as looted assets. Additionally, the Holocaust Plaintiffs claim that Swiss banks actively financed such efforts. In these capacities, the Swiss banks are alleged to have violated customary international law.

Both of these cases are similar in several respects. First, the Marcos Plaintiffs and the Holocaust Plaintiffs seek compensation for violations of their human rights. Second, these cases are class actions whereby plaintiffs seek some form of redress for human rights injuries under the Alien Tort Claims Act (ATCA), which grants federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."²⁴ In effect,

20. *Ramos Denies Trip to Switzerland Aimed at Marcos Wealth*, Deutsche Presse-Agentur, Jan. 7, 1998, at BC Cycle, available in LEXIS, News Library, DPA File.

21. In February 1998, Marcos heirs lodged an appeal with the Swiss Supreme Court in Lausanne seeking to freeze the transfer of the Marcos assets. The petition was formally lodged by four Lichtenstein foundations that manage the Marcos funds who are acting on behalf of the Marcos heirs. The Swiss Supreme Court rejected this appeal in March 1998. See *Swiss Court Rejects Appeal Against Marcos Fund Repatriation*, Agence France Presse, Mar. 25, 1998, available in LEXIS, News Library, AFP File.

22. *Weissshaus v. Union Bank of Switz.*, No. 96-CV-4849 (E.D.N.Y. Oct. 3, 1996) (Am. Compl. Jan. 24, 1997) [hereinafter *Weissshaus Compl.*]; *Friedman v. Union Bank of Switz.*, No. 96-CV-5161 (E.D.N.Y. Oct. 21, 1996) (Am. Compl. 1997) [hereinafter *Friedman Compl.*]; *World Council of Orthodox Jewish Communities, Inc. v. Union Bank of Switz.*, No. 97-CV-0461 (E.D.N.Y. Jan. 29, 1997) (Am. Comp. July 1997) [hereinafter *WCOJC Compl.*]. These are all class action suits filed on behalf of Holocaust survivors and their descendants against three Swiss banks: Union Bank of Switzerland, Credit Suisse, and Swiss Bank Corporation as joint defendants.

23. The Holocaust Plaintiffs eventually amended their complaints and separated the classes of plaintiffs to some extent by claims. In their amended complaints, the deposited asset claims are separate from the looted assets and slave labor claims. See *infra* notes 241-51 and accompanying text. See Holocaust Plaintiffs' Reply to Defendants' Post Hearing Memorandum of Law and Declaration of Pierre Tercier, Master Docket No. CV-96-4989 (filed Sept. 12, 1997) [hereinafter *Holocaust Plaintiffs' Post Hearing Reply*].

24. 28 U.S.C. § 1350 (1994).

the Marcos and Holocaust cases both involve class action lawsuits for alleged violations of international human rights. Finally, in each of these lawsuits, Swiss banks are alleged to have played an active role in shielding the wealth of the wrongdoers. Switzerland's bank secrecy laws, furthermore, are portrayed as the reasons why: (1) the Nazis and Ferdinand and Imelda Marcos placed their stolen wealth in Swiss banks; and (2) it has been difficult to reconstruct accurately the trail of assets that ended up in Switzerland.

B. *Swiss Bank Secrecy and the Current Litigation*

Why is bank secrecy so entwined with these questions? Bank secrecy has previously enabled war criminals and corrupt heads of state (who may or may not have also committed grave human rights violations) to secrete their wealth in a safe jurisdiction. In other words, the existence of numbered Swiss bank accounts has previously encouraged wrongdoers to secrete their plunder in Switzerland.

To address these issues, the Swiss have amended their laws over the years to provide for information in criminal matters. Based on current legislation, it appears more difficult for a criminal to deposit his ill-gotten gains in Switzerland today and to be guaranteed confidentiality in the event that he is indicted or prosecuted in another country.²⁵ Nonetheless, the issue still remains—should Switzerland be in the business of accepting these funds in the first place? One could argue that Swiss bank secrecy has made it more difficult for governments and claimants to recover funds once they have been placed in Swiss vaults.

Swiss banks are not to be held responsible for being global policemen.²⁶ They might bear some responsibility, however, for actively assisting wrongdoers who are culpable of more than fiscal

25. See *infra* Part II.B.

26. As one commentator who has written on the history, vagaries and benefits of the Swiss banking system notes:

Such are the vagaries of Swiss banks. They simply cannot be a monolithic blotch of diligence, honesty, hard work and utter secrecy. Arguments that Swiss banks are generally blind acceptors of illegal funds are just as specious as arguments that Swiss banks can't collapse in that Swiss banks never harbor funds which have been illegally obtained under Swiss law. It should come as little surprise at this point in the book, that Swiss bankers have their own notions of ethics. . . . It is the elder of Swiss banking which has built an image not wholly correct, and which I have subjected to some factual tests. The lure remains primarily the banking secrecy system and one might fairly say that it attracts all forms of funds, legal and illegal.

KINSMAN, *supra* note 1, at 37-38.

crime. A line needs to be drawn between the bank as repository and the bank as a facilitator. Additionally, to the extent that human rights victims have a legal cause of action against a leader or head of state, the question remains largely unanswered as to how such victims might gain civil redress if the wrongdoer has placed his or her assets in bank accounts within bank secrecy jurisdictions.

There are several categories of wrongdoers who use or have used the services of Swiss banks.²⁷ These wrongdoers include war criminals, political criminals, organized criminals, and individual criminals.²⁸ One can distinguish at least five separate types of criminal bank customers. First, there are war criminals, such as the Nazis, who used Swiss banks to hide the assets they systematically plundered from occupied nations and wealth they amassed from extermination of Jews and other victims during the Holocaust. Second, there are leaders of nations or "political" criminals, often dictators or heads of totalitarian states, who may also be guilty of human rights violations. These same leaders often secrete their wealth and funds from the nations' treasuries in Swiss bank accounts. Ferdinand Marcos would fit into this category.²⁹ A third category involves the politician or head of state who has stolen money or received illegal funds (e.g., through taking bribes) and stores such money in Switzerland. The Author draws a distinction between category two and three because a corrupt politician does not necessarily engage in violations of human rights (e.g., torture, unlawful detention, murder). A fourth category involves a politician or government official who is guilty of accepting bribes or stealing money but on a smaller scale than systematic plunder. A fifth category is criminals such as organized criminals and drug traffickers who may also hide their bounty in bank secrecy jurisdictions.³⁰

Bank secrecy can shield the assets of these different wrongdoers equally well. It is impractical, however, for Switzerland and other bank secrecy jurisdictions to have the

27. "[C]rime money of all sorts finds its way into Switzerland. Swiss banks receive money generated through political crime, war crime, individual crime (e.g., tax violations, insider trading, illegal laundering, and undisclosed corporate payments) and organized crime. . . ." Pieter J. Hoets & Sara G. Zwart, *Swiss Bank Secrecy and the Marcos Affair*, 9 N.Y.L. SCH. J. INT'L & COMP. L. 75, 76 (1988).

28. *Id.*

29. Barry James, *Swiss Facing Suit on Holocaust Gold*, INT'L HERALD TRIB., July 11, 1997, at 5; Thomas Netter, *Swiss Take New Look at Secrecy*, CHI. TRIB., Jan. 18, 1997, at C1.

30. John F. Brown, *In Bhutto's Wake, Pakistan Finds Trial of Corruption*, AUSTIN-AM. STATESMAN, Jan. 11, 1998, at A8; Alan Riding, *New Rule Reduces Swiss Banking Secrecy*, N.Y. TIMES, May 6, 1997, at D1. See also Netter, *supra* note 29.

same level of legal responsibility for accepting funds from each of these sources. Furthermore, the gravity of a war criminal's actions is quite different from that of a politician who has taken petty bribes. At some point, however, Swiss banks, and banks in other jurisdictions, may cease being passive repositories of illegally obtained wealth and become active participants in concealing funds belonging to someone who has violated international law. As a U.S. government document characterized Swiss banks during World War Two: "[I]t should be pointed out that their aid to the enemy in the banking field was clearly beyond the obligations under which a neutral must continue to trade with a belligerent, and dictated solely by the profit motive of Swiss banks."³¹

By examining the Marcos and Holocaust assets litigation, this Article explores the role of Swiss banks and their relationship to war criminals and leaders who commit egregious violations of human rights. These two lawsuits contemplate the notion that a bank's complicity should create legal responsibility under international law when a bank actively and knowingly assists clients who are war criminals or who have violated human rights.³² There has been a growing jurisprudence concerning the role of non-state actors such as corporations under international law.³³ Banks, however, have been largely omitted from this analysis.³⁴ Although the Holocaust assets and Marcos cases both have internal weaknesses,³⁵ these cases pave the way for further

31. FOREIGN ECON. ADMIN., THE WAR TRADE OF GERMANY AND THE NEUTRALS (1944) (cited in Friedman Compl. ¶ 117).

32. The Holocaust assets litigation also focuses on questions related to assets deposited by Holocaust victims and thus raises additional issues as to the legal and moral responsibilities of the Swiss banks with respect to these deposits.

33. See, e.g., Douglass Cassel, *Corporate Initiatives: A Second Human Rights Revolution?*, 19 *FORDHAM INT'L L.J.* 1963 (1996); Mark Gibney & R. David Emerick, *The Extraterritorial Application of United States Law and the Protection of Human Rights: Holding Multinational Corporations to Domestic and International Standards*, 10 *TEMP. INT'L & COMP. L.J.* 123 (1996); David Weissbrodt & Marci Hoffman, *The Global Economy and Human Rights: A Selective Bibliography*, 6 *MINN. J. GLOBAL TRADE* 189 (1997).

There is no equivalent literature concerning the role of international banks or bank secrecy jurisdictions in safeguarding international human rights. Scholars have often discussed the role of "development" banks, such as the World Bank and the Asian Development bank, with respect to human rights responsibilities. These "banks", of which many nations are members, loan money for development projects in various nations. They differ from commercial banks in that they do not provide traditional account-related services and do not have "depositors".

34. Nevertheless, as discussed below, the role of bankers as individuals capable of breaching international law originates at Nuremberg where several bankers and financiers were prosecuted for war crimes, crimes against humanity, and crimes of peace. See *infra* notes 397-436 and accompanying text.

35. The Holocaust assets litigation asks us to explore the status of customary international law prior to and during World War Two. At that time, the

analysis of the responsibilities of banks in relation to international law and human rights.

This Article will examine whether banks, particularly those in jurisdictions with strong bank secrecy laws, can ever be held accountable under international law for assisting customers who have themselves committed a serious breach of international law—as in the case of war criminals such as the Nazis, or a head of state who orchestrates mass torture like Marcos. If banks are not directly accountable, to what extent should they be obligated to compensate victims of human rights violations in situations where wrongdoers have placed their money into these banks? Additionally, this Article will examine to what extent banks should be held accountable under international law for assisting dictators or other leaders to abscond with their nations' funds. This has been referred to by commentators as "indigenous spoliation."³⁶

Finally, this Article suggests that an international mechanism should be used to deal with the aforementioned situations. Switzerland has been forthcoming in providing legal assistance to various nations who are seeking lost wealth. As in the Marcos case, however, this procedure has taken over a decade. Furthermore, bilateral assistance does not resolve the problem of human rights victims who may seek redress for injuries caused by the wrongdoer availing himself of a Swiss bank account. This Article advocates, therefore, the use of an

legal status of corporate entities such as banks was not developed to the extent it is today. The Marcos litigation is the first attempt to redefine banks as active participants and agents who facilitate violations of international law. The Marcos Plaintiffs, however, had to compete with the Philippine government's claims to the Marcos funds.

36. In 1989, Professor Michael Reisman suggested there was a growing need to address international spoliation by national leaders. W. Michael Reisman, Comment, *Harnessing International Law to Restrain and Recapture Indigenous Spoliations*, 83 AM. J. INT'L L. 56, 56-59 (1989). He refers to a government official's draining a country of its wealth as "indigenous spoliation". *Id.* at 56. Reisman notes that:

The ritual condemnation of foreign corporations' spoliations of the resources of developing countries and their elevation to the level of international concern have obscured the problem of spoliations by national officials of the wealth of the states of which they are temporary custodians.

Id.; see also Ndiva Kofele-Kale, *Patromicide: The International Economic Crime of Indigenous Spoliation*, 28 VAND. J. TRANSNAT'L L. 45 (1995). Kofele-Kale defines indigenous spoliation as "an illegal act of depredation committed for private ends by constitutionally responsible rulers, public officials, or private individuals." Kofele-Kale, *supra*, at 56 (emphasis added).

international convention and claims resolution procedure for dealing with deposed kleptocrats and war criminals.³⁷

C. *Alternatives to Litigation*

The Author recognizes that, in certain circumstances, diplomatic resolutions and settlements may provide the resolution of claims involving war crimes or human rights violations.³⁸ For example, the Swiss Bankers Association (SBA) and the World Jewish Restitution Organization (WJRO) have signed a Memorandum of Understanding which provides for the creation of the Independent Committee of Eminent Persons (ICEP) to examine

37. While this Article focuses primarily on the activities of Swiss banks, it is meant to address the problem of bank secrecy jurisdictions in a much broader context. Switzerland is not the only nation to have benefited from bank secrecy and perhaps has been more open than other countries when challenged. See *Suspicions and Explanations*, SWISS REV. WORLD AFF., Nov. 1, 1996 (stating that "the only way to form an appropriate conception of the role played by Swiss financial markets before and during the war is to understand how money and other assets were being transferred throughout the international financial system at that time. Britain, Canada, the United States and South American banks functioned then and still function now as safe havens for money escaping the grasp of governments."). Other countries with bank secrecy laws that provide for criminal sanctions against violators include Austria, Denmark, Finland, Mexico, Norway, Portugal, Sweden and Turkey. See De Capitani, *supra* note 6, at 60-61.

38. The United States has applauded efforts of the Swiss Bankers Association and an Independent Committee of Eminent Persons headed by former Federal Reserve Chairman Paul Volcker to review the account records of major Swiss banks and establish a claims resolution procedure in Switzerland for dormant account funds. See, e.g., Press Statement of Nicholas Burns, Spokesman for the U.S. Department of State, Feb. 5, 1997 (visited Mar. 13, 1998) <<http://secretary.state.gov/www/briefings/9702/970205.html>>. Burns stated:

The United States applauds the announcement by three Swiss banks of a new private sector humanitarian fund to alleviate the plight of Holocaust victims and their heirs. This is an important demonstration of good will by the major banks of Switzerland. . . .

More broadly, we've been encouraged . . . by a number of actions undertaken by the Swiss. You know that they've lifted their bank secrecy rules; that they have established the Volcker Commission to investigate dormant accounts from the Second World War and after. They've also created a Historical Commission to look into Switzerland's entire relationship with Nazi Germany and the Nazi-seized assets before, during, and after the Second World War.

We believe that these actions demonstrate a willingness to examine the past and to let the facts, however uncomfortable, speak for themselves.

the fate of dormant accounts.³⁹ This committee is chaired by former Federal Reserve Chairman Paul Volcker.⁴⁰

The ICEP will supervise an audit of Swiss banks with respect to the historical and present status of dormant accounts. While the ICEP is nongovernmental, it has received the support of the Swiss Federation and the U.S. government.⁴¹ Thus, it might be viewed as part of a diplomatic solution. The Philippines has been involved in protracted negotiations with Swiss authorities over Marcos's assets. The United States has officially supported these negotiations.

39. Memorandum of Understanding between the World Jewish Restitution Organization, the World Jewish Congress and the SBA, May 2, 1996 (copy on file with Author). As part of the Memorandum, the parties stipulated that:

(1) An Independent Committee of Eminent Persons will be appointed. Three persons will be appointed by the World Jewish Restitution Organization (WJRO) and three persons by the Swiss Bankers Association (SBA). The Committee of six will jointly appoint an additional person as Chairperson. . . .

(1) The Committee of Eminent Persons will appoint an international auditing company; this company must be licensed by the Federal Banking Commission (FBC) to operate in Switzerland. The SBA will assure the auditors' unfettered access to all relevant files in banking institutions regarding dormant accounts and other assets and financial instruments deposited before, during and immediately after the Second World War.

(1) The parties of the agreement will cooperate to assure that the Swiss Government will deal with the question of looted assets in Swiss banks or other institutions which were not reported or returned under the relevant laws during the years before, during and immediately after the Second World War.

Id.

The ICEP has appointed several international accounting firms to conduct the audit. As part of the audit, the auditors are charged to determine the scope and effectiveness of the methodologies used by the Swiss Ombudsman and by Swiss banks in previous searches for dormant accounts as well as the number and value of dormant accounts that were opened between 1933 and 1945. The auditors are also asked to determine whether there has been any deliberate or inadvertent recordkeeping errors by Swiss banks as well as any lapses in ethical standards. ICEP Memorandum, "Audit Firm Mandate and Instructions—The First Phase," Nov. 19, 1996 (on file with Author).

40. Other members of the ICEP include Reuben Beraja, Abraham Burg, Professor Dr. Curt Gasteyer, Professor Rene Rhinow, Professor Dr. Klaus Jacobi, and Ronald Lauder.

41. For example, on June 25, 1997, the ICEP, the SBA and the Swiss Federal Banking Commission (SFBC) reached an agreement concerning a comprehensive claims resolution process for dormant accounts. Joint Press Release of Kurt Hauri, Chairman of SFBC and Paul Volcker, Chairman of ICEP, June 25, 1997 (on file with Author).

The Swiss government has also enacted special laws to permit the ICEP audit to occur through a waiver of bank secrecy laws. ICEP Press Release 2, Jan. 31, 1997 (on file with Author).

Diplomatic channels may provide ways to deal with Swiss banks or other bank secrecy jurisdictions. Such channels, however, are not always readily available. Furthermore, human rights claimants may not always trust government-sponsored forums or mechanisms to deal with their concerns and interests.⁴² More generally, individual victims of human rights violations have fewer mechanisms for seeking enforcement of their rights or redress for past violations.⁴³ Consequently, it is important to analyze alternative methods for dealing with the paradoxes inherent in bank secrecy and its relationship to global human rights.

Part II of this Article describes the tradition of bank secrecy in Swiss law and recent legislative changes to that tradition. Part III discusses several discoveries of hidden funds of corrupt political leaders in Swiss banks. Part IV explores the history of the Holocaust assets litigation and discusses in detail the current claims. Part V describes the Marcos human rights litigation as an example of claims that the Swiss banks were functioning as agents of a dictator. The characterization of spoliations as an international crime is discussed in Part VI. Finally, Part VII gleans lessons from the Marcos and Holocaust Assets Litigation and proposes recommendations for the future.

II. RULES OF THE GAME: SWISS BANK SECRECY AT A GLANCE

A. *Bank Secrecy: Honor Thy Customer*

Swiss banking secrecy has a long tradition in Swiss law and is encompassed within a more general notion of a right to

42. As counsel for the Holocaust Plaintiffs noted at a hearing on defendant Swiss Banks' motion to dismiss: "There is a lack of trust among the client population in this situation." This remark was made in response to questions by the court concerning the role of the ICEP and the Volcker supervised arbitral panel. Transcript of Civil Cause for Oral Argument Before the Honorable Edward R. Korman, U.S. District Judge, at 64, in *In re Holocaust Victims' Assets* CV-96-4849, CV-96-5161, CV-97-461 (July 31, 1997) [hereinafter *Holocaust Assets Oral Argument*].

43. Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 591 (1997). Stephens notes that U.N. human rights bodies complaint proceedings are of limited impact. Regional human rights bodies such as the European Court of Human Rights (ECHR) offer more useful forums. Individuals may seek legal redress from the ECHR (in addition to Member States) and the court's decisions are considered final and legally binding. *Id.* at 591-92.

personal privacy, which would include one's economic holdings.⁴⁴ The Swiss duty of confidentiality with respect to a bank's clientele was enshrined in the Swiss Federal Banking Statute of 1934.⁴⁵ As stated above, Article 47 is perhaps the core tenet of Swiss bank secrecy laws.

A banker may be criminally prosecuted if he or she reveals confidential information about a customer either intentionally or negligently.⁴⁶ Bankers have a duty of confidentiality with respect to the customer's name, the banker's relationship with the customer, the type of bank account, the transactions that take place with the account, and any information supplied by the customer in connection with the account.⁴⁷ A banker may be prosecuted under Article 47 even if the injured party (the customer) does not file a complaint.⁴⁸ In addition, Article 273 of the Swiss Penal Code makes it a crime for a person to divulge secret business information to a foreign government authority or its agents.⁴⁹ Breach of the duty of confidentiality could subject a

44. See Krauskopf, *supra* note 6, at 293; De Capitani, *supra* note 6, at 59; Meyer, *supra* note 6, at 288. Meyer notes:

Each "secret" is considered intangible property and its violation is an actionable tort under the general principles of Article 28 of the Civil Code and Articles 41 and 49 of the Code of Obligations. . . . Up to 1935 there were no statutory provisions regulating the banking secret. It was based on usage and its violation subjected the banks only to civil liability for damages under the tort provisions just cited and for breach of contract since the courts ruled that a bank's duty to observe silence about the affairs of its clients was an implied contractual obligation on the part of the bank, even if nothing was said in the contract.

Id.; see SCHWEIZERISCHES ZIVILGESETZBUCH [hereinafter ZGB] [Swiss Civil Code] art. 28; SCHWEIZERISCHES OBLIGATIONENRECHT [hereinafter OR] [Swiss Code of Obligations]. For an English translation of the Swiss Civil Code, see IVY WILLIAMS, *THE SWISS CIVIL CODE* (Sigfried Wyler & Barbara Wyler eds., rev. ed. 1987); for an English translation of Code of Obligations, see SWISS CONTRACT LAW (Swiss-American Chamber of Commerce trans., 2d. ed. 1984).

45. Some commentators note that the duty of confidentiality has existed as a customary principle which pre-dates the 1934 law. Elliot A. Stultz, *Swiss Bank Secrecy and United States Efforts to Obtain Information from Swiss Banks*, 21 VAND. J. TRANSNAT'L L. 63, 67 (1988).

46. See Krauskopf, *supra* note 6, at 294.

47. *Id.*

48. *Id.*

49. Article 273 states:

Any person who seeks to discover a manufacturing or business secret with a view to making it available to a foreign official or private organization or to a foreign private enterprise or to the agents thereof or any person who makes available a manufacturing or business secret to a foreign official or private enterprise or to the agents thereof shall be punished by imprisonment or in serious cases to "reclusion." The judge may, in addition, impose a fine.

banker to civil liability in both contract and tort.⁵⁰ Finally, the Swiss Banking Act permits the Swiss Bank Commission to impose administrative sanctions upon a Swiss bank for violations of a customer's right to confidentiality.⁵¹ These sanctions include revocation of a bank's license or suspension of a bank executive convicted of a secrecy violation.⁵²

The banker's duty of confidentiality, however, is not absolute.⁵³ Customers may give their consent to disclosure of their account information. Customer consent, however, requires an affirmative act such as a written waiver.⁵⁴ In the absence of consent, there are other circumstances under which Swiss bankers may provide customer information to third parties—who in most instances are Swiss government authorities rather than individual parties. For example, Article 47 states that a bank's obligation to maintain bank secrecy is subject to "the provision of federal and cantonal law providing for the obligation to report to its authorities and give evidence in legal proceedings."⁵⁵

In Swiss criminal proceedings, bank secrecy may be set aside.⁵⁶ In civil proceedings, "[g]enerally secrecy is preserved by the federal judiciary. Moreover, in six cantons, the rules are similar to the federal civil procedures."⁵⁷ The heirs of a deceased account holder are also legally entitled to information about the decedent's bank account.⁵⁸

Swiss bank secrecy often has been viewed as an impediment to tracing the assets of criminals. Over the past two decades, however, Switzerland has amended its laws to ease its previously rigid secrecy restrictions. For example, foreign government authorities may now obtain assistance in criminal matters by invoking a Swiss treaty on mutual assistance.⁵⁹

In 1981, the Swiss Federal Assembly enacted the Law on International Judicial Assistance in Criminal Matters (IMAC).⁶⁰

SCHWEIZERISCHES STRAFGESETZBUCH [hereinafter STGB] [Swiss Penal Code] art. 273, reprinted in Krauskopf, *supra* note 6, at 295.

50. Krauskopf, *supra* note 6, at 296.

51. *Id.* at 297.

52. *Id.*

53. Beat Kleiner, *Banking Law*, in INTRODUCTION TO SWISS LAW 173, 176 (Francois Dessemontet & Tugrul Ansay eds., 1981) (discussing how banks must inform persons such as guardians, administrators, and executors of wills).

54. See Krauskopf, *supra* note 6, at 298.

55. BG art. 47; see also Krauskopf, *supra* note 6, at 298.

56. *Id.*

57. *Id.* at 299. At the time of this presentation, Lutz Krauskopf was a Deputy Attorney General in the Swiss Federal Office of Justice.

58. See De Capitani, *supra* note 6, at 62.

59. Federal Law on International Assistance in Criminal Matters, Mar. 20, 1981, 20 I.L.M. 1339 (1981) [hereinafter IMAC].

60. *Id.* The United States had previously negotiated a similar bilateral legal assistance treaty in 1973 that became effective in 1977. This treaty also

The law went into effect on January 1, 1983. Part three of the IMAC deals with acts of assistance, obtaining of records and documents, and the obtaining of evidence.⁶¹ Swiss authorities will provide information only in connection with foreign crimes that also constitute criminal offenses under Swiss law.⁶² If there is no equivalent crime in the Swiss penal code, the Swiss authorities are not obliged to waive their secrecy laws. For example, Swiss authorities will not provide assistance with respect to tax evasion, which is not criminalized in Switzerland.⁶³ Swiss authorities will, however, provide assistance with respect to tax fraud. A law criminalizing money laundering finally was passed in 1990, making mutual assistance possible for a broader range of criminal acts.⁶⁴ Article 18 of the IMAC provided for the freezing of a bank account's assets pending review after a request for assistance.⁶⁵ Furthermore, all mutual assistance treaties signed by Switzerland exclude judicial assistance for the purpose of prosecuting political or military offenses.⁶⁶ The Swiss Federal Government amended IMAC in 1995 because of the delays experienced in the Philippine request to recover Marcos assets. The amendment unified the procedures used in various cantons and limited certain procedural remedies.⁶⁷

B. *Know Your Customer*

Various aspects of Swiss banking law and practice require commercial banks to ascertain the identity of their customers and to cease relations if the customer is suspected of having obtained his or her funds through illegal activity. This has been seen as a

included a specific chapter dealing with assistance in cases involving organized crime. Treaty on Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019 [hereinafter Criminal Assistance Treaty].

61. IMAC art. 63(1).

62. Article 64 of IMAC states:

Measures according to Article 63 which involve the application of compulsory measures may be ordered only if the statement of the relevant facts shows that the offense prosecuted abroad contains the objective elements of an offense punishable under Swiss law.

IMAC art. 64.

63. The Swiss Supreme Court has stated that the tax fraud exception does not apply to all tax offenses.

64. Franco Taisch, *Swiss Statutes Concerning Money Laundering*, 26 INT'L LAW. 695 (1992).

65. IMAC art. 18.

66. See Criminal Assistance Treaty, *supra* note 60, art. 2.

67. John R. Schmertz & Mike Meier, *Switzerland to Revise Law on International Judicial Assistance in Criminal Matters with Effects on the Swiss-American MLAT*, 1 TRANSNAT'L L. UPDATE, Oct. 1995, available in LEXIS, News Library, ARCNWS File.

way in which banks can prevent criminals from using numbered accounts to store their loot.

The SBA has taken some of its own measures to improve its image and to prevent illicit use of its banking system. In 1977, it adopted a "Convention of Diligence" (Convention) that is also referred to as a "Know Your Customer"⁶⁸ Agreement. The Convention is monitored by the Swiss Federal Banking Commission. Swiss banks promise not to help foreigners violate foreign exchange control regulations or speculate against the Swiss franc. Consequently, Swiss banks are obligated to exercise "due diligence" in ascertaining the true beneficiaries of bank accounts. Swiss banks are required under the terms of the Convention to ascertain the identity of the "beneficial owner" of a bank account. Banks, therefore, must request proof of the customer's identity, which may include official documents or letters of reference from trustworthy persons. In the spring of 1988, the SBA established a requirement that bank chiefs must handle the applications of foreign statesmen or "strongmen" and supposedly "turn them down at the first sign of trouble."⁶⁹

The main exception to this requirement was for accounts opened by Swiss individuals who are bound by professional secrecy. Professional secrecy means the duty of confidentiality required of certain professionals, such as lawyers or bankers, toward their customers. Thus, the Convention previously provided that attorneys and others protected by professional secrecy could simply complete a document labeled Form B when opening an account on behalf of a client.⁷⁰ Form B did not reveal the identity of the beneficial account owner. Instead, Form B was a declaration that the attorney or other professional knew the account holder and that no forbidden or illegal transaction was

68. Hoets & Zwart, *supra* note 27, at 78-79 (citing Agreement of the Signatory Banks and the SBA with the Swiss National Bank on the Observance of Care by the Banks in Accepting Funds and on the Practice of Banking Secrecy of July 1, 1977). The Diligence Agreement has a five year term and has been renewed subsequently. See, e.g., Bankers Code of Conduct Agreement 1982 Concluded Between the Swiss Bankers' Association and the Swiss National Bank, *reprinted in* 1 COM. LAWS OF EUR. 195-209 (Luisa Ten Kate ed., 1984). The convention was renewed and amended in 1987 and 1992. See Agreement on the Swiss Bank's Code of Conduct with Regard to the Exercise of Due Diligence between SBA and the Signatory Banks of July 1, 1987, *reprinted in* BOSTON U. L. SCH., MATERIALS FROM CONFERENCE ON TRENDS AND FORCES IN INTERNATIONAL BANKING LAW 95-108 (1990).

69. David Lawday, *PST—Swiss Accounts are no Secret*, U.S. NEWS AND WORLD REP., July 4, 1988, at 47. Furthermore, absconding with national funds is a crime under Swiss law, paving the way for foreign countries to seek assistance under the IMAC. Ellen Wallace, *Swiss Banks: Private or Secret?*, CHRISTIAN SCI. MONITOR, Dec. 5, 1986, at 1.

70. Hoets & Zwart, *supra* note 27, at 87.

being concluded. The use of Form B was abolished by federal regulation on April 25, 1991.⁷¹

The Swiss enacted a new federal law on money laundering in 1990.⁷² Article 305, one of the new provisions for the Swiss Penal Code, came into force on March 23, 1990. Under this provision, "[a]ny person who professionally accepts, keeps on deposit, manages or transfers assets belonging to a third party, and fails to establish with all due diligence the identity of the beneficial owner, shall be punished by imprisonment up to one year, detention, or fine."⁷³ Based on this law, when a customer opens an account, a banker has a duty to ascertain the customer's identity and to take action if the customer appears to be opening a bank account to store proceeds of criminal activity.⁷⁴

In 1992, Swiss legislation was enacted that prohibited banks from opening truly anonymous accounts. Banks were required to ascertain the identity of the account holder even if keeping that information confidential and restricted to just a few members of banking management.⁷⁵ Swiss banks were not always receptive to these changes. Union Bank of Switzerland, for example, stated in its 1990 annual report: "We reject any additional moves toward imposing policing tasks on the banks."⁷⁶ Robert Studer, then president of the bank, stated in a newspaper interview: "We do not refuse the money of political leaders as a matter of principle. That would be extraordinarily unjust. But before we do business with a political leader, it first must be approved by a member of the executive board."⁷⁷

71. Steven Mufson, *Swiss to End Anonymous Bank Accounts; 57-Year Tradition Provided Haven for Dictators and Drug Dealers*, WASH. POST, May 4, 1991, at A20.

72. See Taisch, *supra* note 64, at 695.

73. STGB art. 305, *reprinted in* Taisch, *supra* note 64, at 695 (English translation provided by Author). Taisch also mentions that Article 305 applies not only to offenses committed with intent but also to situations he terms "quasi-negligence" where the banker or person accepting funds is aware of his or her duty and acts recklessly in not performing due diligence inquiry. Taisch, *supra* note 64, at 709.

74. Mufson, *supra* note 71 (stating that Swiss banks should take appropriate steps if they have reason to believe there is an illegal transaction taking place either at beginning of bank-customer relationship or subsequently). For example, banks should refrain from doing business with money launderers, sever existing relationships, and block accounts.

75. See Nicolas Killen & Nicolas Piérard, *Regional Development: Switzerland*, 26 INT'L LAW. 545 (1992) (discussing the regulation passed by the Swiss Federal Banking Commission on April 25, 1991 stating that attorneys, notaries, trust administrators, and money managers could no longer rely on Form B when opening bank accounts on a fiduciary basis).

76. *Id.*

77. Rone Tempest, *Ex-Despots Can't Bank on the Swiss; The World's Dictators are Being Put on Notice—If You're Ousted, Don't Expect Your Nest Egg to be Waiting in Zurich or Basel*, L.A. TIMES, Jan. 31, 1990, at A1.

Swiss bank secrecy still remains a potent obstacle with respect to civil legal proceedings and even diplomatic negotiations. Furthermore, it is unclear where human rights violations fit within the current Swiss legal framework. Other problems with Swiss bank secrecy also remain. For example, it is not mandatory for Swiss officials to report money laundering and suspicious transactions to Swiss authorities under Article 47(a). Therefore, illegal money has still been deposited in Swiss accounts.⁷⁸ The multilateral Financial Action Task Force on Money Laundering (FATF) recently commissioned an international mission to draw up a report on the status of antimoney-laundering initiatives in Switzerland.⁷⁹ The three person delegation included Anne-Marie Moulin, a leading civil servant at the Bank of France; Fritz Zehder, an Austrian legal and financial expert, and Jean-Claude Delepierres, the chief of Belgium's national antimoney-laundering agency.⁸⁰ The delegation interviewed fifty Swiss officials, examining magistrates, and officials from the Swiss federal finance department and Swiss banks.⁸¹

The FATF delegation found that the Swiss had made some progress with respect to the fight against money laundering. The report also noted, however, that Switzerland still does not have requirements for banks to report suspicious transactions to the federal banking authorities.⁸² Switzerland had promised such legislation three years ago.⁸³ In response to the FATF report, Switzerland has proposed to implement a requirement in April 1998 that would require banks to report suspicious transactions to the Office of Federal Organized Crime.⁸⁴ This legislation was passed in October 1997 and will oblige bankers, asset managers, investment advisers, trust companies, life insurers, currency

78. "Discretion is still the watchword of Swiss banking, and Swiss law encourages it. Bankers may report fishy-smelling deposits, but they are not obliged to. If the stench of dirty money gets too strong, they can close suspect accounts without telling the authorities." *Banking Secrecy. Keeping Mum*, *ECONOMIST*, Feb. 17, 1996, at 71; see also *FT Guide to Gold*, *FIN. TIMES*, Sept. 16, 1996.

79. *Swiss Under Fire by FATF*, *INTELLIGENCE NEWSL.*, Sept. 11, 1997, available in *LEXIS*, News Library, *CURNWS* File. FATF was established by the G-7 summit in Paris in 1989 to examine measures to combat money laundering. In April 1990, FATF issued a report which contains 40 recommendations that institutions can take to prevent money laundering. The FATF recommendations are not a binding international convention. At present, FATF has 30 member countries. Switzerland is a member of FATF. The FATF Web Site is located at <<http://www.oecd.org/fatf>>.

80. See *Swiss Under Fire by FATF*, *supra* note 79.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

exchanges, and financial intermediaries to report suspicious transactions.⁸⁵

At this juncture, it is unclear what effect the reporting of suspicious customer information will have upon the Swiss banking industry. First, it is unclear whether the reporting requirement will cause Swiss banks to identify when existing customers may have crossed the line with respect to illegal activity. Furthermore, it will be important for the Swiss government to use the information gathered to prosecute customers for money laundering in the event their deposited funds are the result of illegal activity.

The evolution and changes in Swiss banking legislation demonstrate that the Swiss have taken positive steps toward correcting problems associated with bank secrecy and criminal activity. Nonetheless, one legacy of bank secrecy is that criminals have previously deposited funds that are now quite difficult to extricate. As the discussion below reveals, it is an open question whether banks have knowingly or recklessly accepted funds that they perhaps should have rejected.

III. SAVING FOR A RAINY DAY

Ironically, many of the headlines that emerged in 1997 and early 1998 about the end of Swiss banking secrecy have been seen before. In the late 1980s and early 1990s, commentators hailed the end of Switzerland's role as a safe haven for dictators' retirement funds.⁸⁶ In 1990, Deputy Director of the Swiss Banking Commission Daniel Zuberbuhler stated: "If you are a dishonest leader of a country, you better not put your money here in Switzerland."⁸⁷ With each such assertion, however, new stories appear in the press about dictators who have Swiss accounts.

Furthermore, each time a new dictator is deposed, one learns that he has Swiss bank accounts. Mr. Zuberbuhler stated in 1990: "It would seem now that if some bank has Mr. Mobutu's money, they should get rid of it as soon as possible."⁸⁸ Swiss

85. Stephanie Nebehay, *Top Swiss Prosecutor Seeks National Anti-Crime Body*, AAP NEWSFEED, Dec. 31, 1997 in LEXIS, News Library, CURNWS File. As of April 1998, the new Swiss money laundering legislation went into effect. See Balz Brupacher, *New Swiss Law Closes Banking, Financial Loopholes*, AAP Newsfeed, Apr. 1, 1998, available in LEXIS, News Library, CURNWS File.

86. *Id.*

87. Tempest, *supra* note 77, at A1.

88. *Id.*

banks did not heed Zuberbuhler's advice.⁸⁹ During the early summer of 1997, Swiss bankers first insisted that Zaire dictator Mobutu Sese Seko did not have any money in Swiss accounts.⁹⁰ In June 1997, Swiss banking officials found \$3.4 million in six of the nations' banks.⁹¹ A day later, they found additional funds.⁹² At present, the Swiss claim they are unable to locate more without bank account names, numbers, and information about Mobutu's crimes. Mobutu died in exile on September 7, 1997.⁹³

Switzerland has been a popular location for dictators' retirement accounts. After Marcos was deposed in 1986, the

89. In 1997, commentators were still seeking details concerning dictators' accounts:

Three client accounts held by Swiss banks, those of the late Nicolae Ceausescu, Ferdinand Marcos and Baby Doc Duvalier, ought also to be brought into the open. In the light of his murderous record, the banks should also be put under pressure to disclose the finances of Saddam Hussein—rather than, as they have done in the past, blocking the efforts of those who seek to track down his treasure.

Dirty Money that Stains Swiss Vaults, OBSERVER, Aug. 4, 1996, at 27.

90. See Elizabeth Olson, *Swiss Resist Disclosing any Mobutu Funds*, N.Y. TIMES, May 6, 1997, at A14.

In Mr. Mobutu's case, the Swiss Banking Commission took the unusual step of reporting last month that the 12 largest banks have denied holding Mobutu deposits. "Either banks have chucked him out, or he has left himself," said Daniel Zuberbuhler, managing director of the [Swiss Banking] Commission. "There's no excuse to take money from someone who is known to be corrupt. And it certainly would not be billions in Swiss banks."

Id.

Another commentator asks:

Here is a \$4 billion question. It has to do with secret accounts in Swiss banks, but it has nothing to do with Nazi gold.

The question: What will happen to the staggering sums that Zaire's President Mobutu Sese Seko looted from his country, and from international lenders?

Mobutu's billions are believed to be largely hidden in secret Swiss accounts, as well as invested in European properties held by front companies. So far, Swiss bankers claim they aren't holding any of his lucre, but that denial is so thin that the Swiss Federal Banking Commission has just promised to look harder.

Trudy Rubin, *West Should Help Track Down Mobutu's Millions. Former Leader Looted Zaire*, RECORD, May 20, 1997, at L13, available in LEXIS, News Library, NJREC File.

91. *Swiss Find Mobutu Money*, FIN. TIMES (London), June 4, 1997, at A3.

92. *Id.*

93. J.Y. Smith, *Congo Ex-Ruler Mobutu Dies in Exile*, WASH. POST, Sept. 8, 1997, at A1 (noting that "[s]tealing was so widespread [in the Mobutu regime] that the word 'kleptocracy' was coined to describe the regime.").

Swiss seemed willing to aid countries that sought to trace his assets.⁹⁴ Previously, the Swiss had refused to cooperate in political cases.⁹⁵ At this time, the Swiss government froze the assets of dictators from the Philippines, Haiti, Panama, Paraguay, and Romania.⁹⁶ Each of these cases, however, must wind its way through the judicial system of the home country, as well as through Swiss courts. The Swiss require that the country seeking the assets of a deposed dictator hold a "legally binding" criminal trial in the home country before the Swiss approve a transfer of funds.⁹⁷ In the case of the Philippines, a Swiss court in 1990 gave the country one year to start criminal proceedings.⁹⁸ After the criminal proceedings, the Philippine government initially faced the prospect of having to prove its claim to the Marcos funds through protracted civil proceedings.⁹⁹

When the Swiss governing council requires banks to freeze the assets of an account holder, the account holder is legally obliged to come forward and report which accounts are in the person's name and how much money is in the accounts. Swiss banks are also required to know the identity of their depositors. This does not, however, guarantee full disclosure. Dictators and criminals can use false names or send relatives or friends to make deposits. This was the strategy used by Raul Salinas de Gortari, the brother of Mexico's former president.¹⁰⁰ He used a fake passport with a pseudonym when he made deposits at Geneva's Banque Pictet & Cie. His wife was later arrested when she attempted to close the eighty-four million dollar account.¹⁰¹

Benazir Bhutto is the latest leader to be accused of large scale theft and corruption. In December 1997, the Swiss

94. In order to avoid challenges and disputes over the Marcos wealth, the SFBC ordered Swiss banks to freeze Marcos's accounts when Marcos was deposed by a popular democratic uprising. See Oliver Dunant & Michele Wassmer, *Swiss Bank Secrecy: Its Limits Under Swiss and International Laws*, 20 CASE W. RES. J. INT'L L. 541, 564 (1988).

95. For example, when Ethiopia's Haile Selassie was dethroned in 1974, the Swiss refused to open his account to the new Ethiopian government. John Tagliabue, *The Swiss Stop Keeping Secrets*, N.Y. TIMES, June 1, 1986, at F4. Similarly, the Swiss declined a request to freeze the funds of the Shah of Iran. Tempest, *supra* note 76, at A1.

96. See, e.g., Tagliabue, *supra* note 95, at F4 (noting the Swiss had frozen Marcos's and Duvalier's assets and were willing to cooperate).

97. *Swiss Court Rules for the Philippines. Manila Can Claim Marcos Millions*, SAN DIEGO UNION-TRIB., Dec. 27, 1990, at A3.

98. *Id.* at A3. The Swiss Supreme Court further declared that the Philippine trial had to conform to the standards set forth in the Swiss constitution and the European Human Rights Convention, which discuss the judicial independence and impartiality. *Id.*

99. *Id.*

100. Olson, *supra* note 90, at A14.

101. *Id.*

government froze bank accounts of Bhutto and her family.¹⁰² The Pakistani government has filed charges of corruption against Bhutto and her husband, Asif Ali Zardari.¹⁰³ At present, more than one hundred million dollars of bank deposits and properties linked to Bhutto's family have been identified overseas.¹⁰⁴ These assets are alleged to have resulted from secret payments made by foreign companies seeking favor in Pakistan with respect to business opportunities and government contracts.¹⁰⁵ While Bhutto's husband has been directly linked as the originator of various illegal schemes, the role that Bhutto played in these activities remains unclear.¹⁰⁶

Some issues remain problematic despite the evolution of Swiss law to provide greater transparency and cooperation. First, why have banks previously accepted the assets of dictators? Second, once it is known that a dictator is suspected of human rights violations, why do the banks continue to safeguard his assets?¹⁰⁷ Nonetheless, it is commendable that Switzerland has been willing to freeze the assets of deposed dictators and to respond to nations seeking mutual assistance in tracing national funds with which the dictator absconded.¹⁰⁸

Only the Philippines and Mali though have recovered any money through the use of mutual assistance. In both instances, the proceedings extended for multiple years. In April 1997, Mali was the first nation to receive funds of a deposed leader via

102. *Swiss Authorities Confirm Freeze on Bhutto Bank Accounts*, BBC SUMMARY OF WORLD BROADCASTS, Dec. 23, 1997, available in LEXIS, News Library, BBOSWB File; see also Eric Margolis, *Pakistan's "Princess" Dethroned; Once Idolized By the Western Media, The Ugly Truth About Benazir Bhutto Is Now Revealed*, TORONTO SUN, Jan. 18, 1998.

103. John F. Burns et al., *Bhutto Clan Leaves Trail of Corruption*, N.Y. TIMES, Jan. 9, 1998, at A1.

104. *Id.*

105. *Id.* The Pakistani Government purchased a cache of documents that allegedly detail the extent of corruption and bribery that occurred while Bhutto was in power. *Id.*

106. *Id.*

107. As one journalist writes:

Mr. Grobet, who practices law in Geneva, noted that despite Swiss laws that limit bank secrecy, questions crop up repeatedly about financial dealings with dictators from developing nations. One of the most notorious cases was that of the late Philippines dictator, Ferdinand Marcos, whose \$500 million in Switzerland provoked a decade-long legal battle over whom it rightfully belongs to now.

Other foreign leaders who have availed themselves of Swiss bank accounts include the former Haitian dictator, Jean Claude Duvalier, former President Moussa Traore of Mali and the former Romanian leader Nicolae Ceausescu.

Olson, *supra* note 90, at A14.

108. See Kwitny, *supra* note 8.

mutual assistance. On April 25, 1997, Mali received approximately \$2.3 million based on a request for mutual assistance lodged in 1991.¹⁰⁹ The funds belonged to ex-Malian dictator Moussa Traore, who was overthrown in a 1991 military coup.¹¹⁰ In 1991, when Traore was deposed, the funds he and Malian managers had stashed in Switzerland were estimated at more than one billion Swiss francs.¹¹¹ Thus, mutual assistance may not be the most practical solution to the problem of the leader who has engaged in indigenous spoliation. Furthermore, if the leader simultaneously engaged in human rights violations, as in the Marcos situation, the need for the funds becomes more acute.

The next two Parts discuss the Holocaust assets litigation and the Marcos litigation in turn. In each instance, Swiss banks are alleged to have knowingly played a role in protecting illegally obtained assets. The role of the Swiss banks has paved the way for interesting new approaches to liability of the commercial enterprise.

IV. THE PARADIGM OF BANKER AS AGENT AND FACILITATOR: THE HOLOCAUST VICTIMS ASSET LITIGATION

A. *Show Me the Money: Prelude to the Holocaust Victims Assets Litigation*

During the summer of 1997, three separate lawsuits were filed against three major Swiss banks in an effort to recover bank deposits of Nazi victims that remain unclaimed in Swiss vaults. Why were plaintiffs suing the Swiss banks? In recent years, it has become increasingly apparent that the Swiss have not fully disclosed the status of assets belonging to the Third Reich and to Holocaust victims. Furthermore, critics assert that the Swiss government did not live up to its pledge with respect to the liquidation of German assets after World War Two. Allegedly, Holocaust survivors around the globe have received less financial support than they would have had the Swiss kept their original agreements with the Allies at the end of the war.

109. Sylvia Passelaigue-Merle, *Mali Wins Payback from Switzerland in Embezzlement Procedures*, Agence France Presse, Apr. 25, 1997, available in LEXIS, News Library, AFP File.

110. *Id.*

111. *Id.* Swiss lawyers assisting Mali assert the Swiss accounts could have been partly emptied by Traore's colleagues during the 1991-1997 waiting period. *Id.*

Moreover, Holocaust victims feel that the assets, which belong to them, are still held in Swiss vaults. The plaintiffs seek an accounting. They want the banks to open their ledgers and make them public.¹¹² The truth-telling function of both the Volcker inquiry and the litigation will put to rest many suspicions and doubts held by victims. Ambassador Eizenstat, the U.S. Special Envoy for Property Claims of Nazi Victims and Undersecretary for Commerce, recently noted:

We must acknowledge, although attempts have been made to revisit this issue ever since, the frustration of Holocaust survivors and their heirs that this issue now almost 50 years later is still with us . . . [T]here are many tragic accounts in which these survivors or their heirs have been stymied in efforts to obtain information about dormant accounts or other assets in Switzerland. Many have lately questioned why it has taken nearly 50 years to obtain a comprehensive and transparent accounting of this issue.¹¹³

The lawsuits are the culmination of several partial attempts by Swiss banks and the Swiss government to deal with the issue of dormant accounts as well as German assets situated in Switzerland at the end of the war.¹¹⁴ This section discusses the search for dormant accounts as well as property confiscated from Jews by the Nazis, which allegedly were hidden in Swiss bank accounts. In contrast to victims of forced labor or those who had property confiscated, the plaintiffs who are suing to recover

112. See Weissshaus Amended Complaint, *infra* note 241, ¶ 16 and accompanying text. Plaintiffs ask for an accounting of the status of dormant bank accounts of Holocaust victims as well as assets deposited by the Nazis and German industrialists during World War Two.

113. *Prepared Statement by Stuart Eizenstat, Undersecretary of Commerce, Before the House Banking and Financial Services Committee*, FED. NEWS SERV., Dec. 11, 1996, available in LEXIS, News Library, FEDNWS file [hereinafter Eizenstat Testimony].

114. As noted in one government report:

Over the years, the inflexibility of the Swiss Bankers' Association and other Swiss banks made it extremely difficult for surviving family members of Nazi victims to successfully file claims to secure bank records and other assets. This overall pattern of apparent Swiss bankers' indifference to the needs of the victims of the Holocaust and their heirs persisted until the current international pressures came to bear. . . .

WILLIAM Z. SLANY, U.S. DEP'T 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 STUDY, at viii (coordinated by Stuart E. Eizenstat) (May 1997) [hereinafter EIZENSTAT REPORT]. For a general discussion of the current dormant accounts controversy, see Jodi Berlin Ganz, Note, *Heirs Without Assets and Asset Without Heirs: Recovering and Reclaiming Dormant Swiss Bank Accounts*, 20 FORDHAM INT'L L.J. 1306 (1997), which surveys international dispute resolution mechanisms and recommends general international claims resolution tribunals or panels as a means of resolving dormant account claims.

dormant accounts do not bring their claims under international law. Nonetheless, the dormant accounts controversy illustrates the manner in which bank secrecy can serve as a potential obstacle to the truth. Furthermore, the existence of the dormant accounts engendered the related controversy over looted assets and Nazi wealth accepted and retained by Swiss banks. An analysis of the manner in which claims to dormant accounts, as well as Nazi assets, have been handled after World War Two illustrates some problems of bank secrecy and restitution to Holocaust survivors and human rights plaintiffs.

It is important to remember that there are several distinct but related Swiss actors that historically have been involved with the issue of dormant accounts and German assets that were deposited in Switzerland.¹¹⁵ For example, the Swiss Central Bank dealt with Hitler and his agents with respect to foreign exchange and gold exchange during the war. These government actors have often taken steps that impacted Swiss commercial banks. Swiss banks were also involved in Swiss fiscal policy during World War Two to the extent that they accepted deposits from Jewish customers as well as Nazis.¹¹⁶

It is unclear, however, whether one can characterize Swiss banks as agents of the Swiss government merely due to their fiscal relationships with Germany and German customers. The banks' actions were often constrained and limited by treaties and regulations promulgated by the Swiss government. Swiss banks also had their conduct prescribed by the SBA. The Swiss Central Bank and Swiss commercial banks were separate entities with different responsibilities. Despite the tendency to lump together all "banking" activity, one must remember that the role of a government-supervised central bank is quite different from that of a commercial banking operation.

1. Allies' Requests for Identification of German Assets in Swiss Accounts

Prior to the end of World War Two, the United States had requested that Switzerland identify German assets located in Swiss accounts. From the very beginning, bank secrecy laws were a formidable obstacle for all concerned. Orvis A. Schmidt, the Director of Foreign Funds Control for the U.S. Treasury Department, was part of the Currier mission to Bern in January

115. See, e.g., EIZENSTAT REPORT, *supra* note 114, at 32-33 (discussing role of Swiss Government and Swiss Central Bank with respect to German gold purchases during World War Two).

116. For a general discussion of the alleged role of Swiss banks with respect to German assets during World War Two, see EIZENSTAT REPORT, *supra* note 114, at 3-5.

1945 which discussed Switzerland's agreement to halt trade with Germany. With respect to lifting bank secrecy, Schmidt stated:

Even at this late date, the Swiss Government is loath to take the necessary steps to force banks and other cloaking institutions to disclose the owners of assets held in or through Switzerland. This means that German assets held in or through Switzerland will not be identified. Thus, the true picture of German financial and industrial penetration throughout the world will be kept a secret. By the same token, Swiss banks will continue to profit by protecting, through their secrecy laws, Germany's war potential—the hidden assets of it[s] financiers and industrialists.¹¹⁷

In 1946, the Allied powers met in Paris and signed the Paris Reparations Agreement (Paris Agreement). The parties to the Paris Agreement charged the United States, the United Kingdom, and France with recovering German assets retained in neutral countries and making the net proceeds available to the Inter-Allied Reparation Agency. These funds were earmarked for stateless Holocaust victims who needed aid but were unable to claim the assistance of any government directly.¹¹⁸ The Paris Agreement provided that neutral countries were to make available heirless assets of individual Nazi victims for the inter-governmental committee on refugees. At the 1946 Paris meeting, it was also decided that ninety percent of dormant account funds recovered in neutral countries would be used for the rehabilitation and resettlement of Jewish refugees.¹¹⁹

Separate agreements were subsequently negotiated with each of the neutral countries that held Nazi assets at the end of World War Two—Sweden, Switzerland, and Portugal.¹²⁰ In 1946, the Allies and the Swiss government entered into the Washington Accord. The Accord dealt primarily with the issue of monetary gold and external German assets. Under this agreement, the Swiss agreed to transfer approximately sixty million dollars (in 1946 value) in gold. The Allies dropped any further claims to monetary gold after reaching this settlement.¹²¹

117. EIZENSTAT REPORT, *supra* note 114, at 33 (citing July 24, 1945 telegram to Bern).

118. Eizenstat Testimony, *supra* note 113, at 28-29.

119. This was to be achieved via the Inter-Governmental Committee on Refugees. *Id.* at 29.

120. EIZENSTAT REPORT, *supra* note 114, at xxvii-xxx.

121. See *Frontline, A Chronology of Events Surrounding the Lost Assets of Victims of Nazi Germany* (visited Mar. 14, 1998) <<http://www.pbs.org/wgbh/pages/frontline/shows/nazis/etc/cron.html>> [hereinafter *Frontline Chronology*]. Another chronology has been prepared by the Swiss Federal Assembly. See *Chronology: Unclaimed Assets/Switzerland and the Second World War* (visited Mar. 14, 1998) <<http://www.parliament.ch/Poly/Framesets/E/Frame-E.htm>> [hereinafter *Swiss Chronology*].

The Swiss government initially disputed the Allies' claims to all German assets in Switzerland and eventually settled upon a fifty percent split. They did not, however, live up to this agreement. After protracted negotiations, a second and final settlement was reached in 1952. The Swiss transferred approximately thirty-four million dollars of German assets (in 1952 dollars) to the Allies. These funds were used for reparations and refugee relief.¹²² The Allies relinquished any further claim concerning German assets retained in Switzerland.

Dormant accounts were only tangentially addressed as part of the Washington Accord. These accounts formed the subject of a side letter to the Accord in which the head of the Swiss delegation pledged that the Swiss government "would examine sympathetically possibilities for making available for relief and rehabilitation proceeds of property found in Switzerland which belonged to Nazi victims who died without heirs."¹²³

Current commentary is critical of Switzerland's stance during post-war negotiations. In May 1997, the U.S. government released an official report on "U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II."¹²⁴ The 1997 report was prepared by the U.S. government under the supervision of Undersecretary of Commerce Stuart Eizenstat and is therefore referred to as the "Eizenstat Report". It states:

Switzerland's "business as usual" attitude persisted in the postwar negotiations. . . . The Swiss team were obdurate negotiators, using legalistic positions to defend their every interest, regardless of the moral issues also at stake. Initially, for instance, they opposed returning any Nazi gold to those from whom it was stolen, and they denied having received any looted gold.¹²⁵

122. See Eizenstat Testimony, *supra* note 113.

123. *Id.*; see also EIZENSTAT REPORT, *supra* note 114, at 194 ("The Swiss responded on September 11, 1946 that they were studying the matter sympathetically and conducting an investigation into the number and amounts of heirless estates.").

124. EIZENSTAT REPORT, *supra* note 114. Negotiations were influenced by (1) Switzerland's belief it was entitled to keep certain assets as the bounty of war and (2) the Allies eagerness to conclude negotiations and lack of meaningful leverage. *Confusions Over the Washington Agreement*, SWISS REV. WORLD AFF., Nov. 1, 1996, available in LEXIS, Europe Library, SWSWLD File.

125. EIZENSTAT REPORT, *supra* note 114, at vii. The Report continues:

But the other part of the [Washington] Accord, the liquidation of hundreds of millions of dollars in German assets, was neither promptly nor ever fully implemented. The Swiss raised one objection after another, arguing over exchange rates, insisting that German debt settlements be included, and demanding that the U.S. unblock assets from German companies seized during the war but which the Bern government claimed were actually

The United States, however, did not broach the issue with the Swiss government during the post-war years. As the Eizenstat Report documents, the question of heirless assets "did not appear to have a high priority among Senior State Department officials."¹²⁶

2. Jewish Organizations' Discussions with the Swiss Government

The lack of U.S. action caused Jewish organizations to raise the issue with the Swiss government directly. In 1949, discussions were held in Bern. The main issues in these discussions

involved finding a way to penetrate Swiss bank secrecy in a manner that would enable the identification of heirless assets as well as establishing whether Switzerland or the country of the decedent had a right to dispose of such assets. Another concern among Jewish groups was that the Swiss Bankers' Association had established rules for proving ownership of bank accounts that made it virtually impossible for surviving family members of Nazi victims to file claims.¹²⁷

For example, Swiss banks sometimes required that relatives of persons murdered in the Holocaust provide a death certificate before they could have access to bank records of the deceased.¹²⁸

Swiss-owned. They refused to make an exemption for the assets of surviving Jews from Germany and heirless German Jewish assets, and continued to make them subject to liquidation. They refused to recognize any moral obligation to return looted Dutch gold when evidence became available after the conclusion of the 1946 negotiations. U.S. negotiators concluded by 1950 that the Swiss had no intention of ever implementing the 1946 Washington Accord. Secretary of State Dean Acheson remarked that if Sweden was an intransigent negotiator, then Switzerland was intransigence "cubed."

Id.

126. *Id.* at 199.

127. *Id.*; see also JACQUES PICARD, *THE ASSETS OF THE MISSING VICTIMS OF THE NAZIS* (1993), reprinted in *The Disposition of Assets Deposited in Swiss Banks by Missing Nazi Victims: Hearing before the House Committee on Banking and Fin. Servs.*, 104th Cong. 236 (1996) [hereinafter PICARD REPORT]. Dr. Picard was commissioned by Lawrence Lever, the financial editor of a newspaper and a BBC film producer, to examine Switzerland's administration of Holocaust victims' assets. The Picard Report states: "The former Western allies seldom showed any interest in the promises made by Switzerland in the Washington Agreement to examine the question of assets of former Nazi victims, if indeed they returned to the subject at all in any serious way." *Id.* § 5.1, at 252.

128. Edgar Bronfman, when testifying before the House Committee on Banking and Financial Services, noted:

Numerous letters of appeal to the State Department after the War from Jews seeking to recover family funds from Swiss banks [] have been located at the National Archives. As an example, in 1947 Frances

Additional obstacles for the heirs of Holocaust victims included demonstrating a right to inheritance and identifying the location of the assets.¹²⁹ Negotiations between Jewish groups and the Swiss did not produce positive results.

Greenfield contacted U.S. officials requesting assistance in locating an account in a Zurich bank belonging to her sister, Gisella Tuttmann, who perished in a concentration camp. On August 15, 1947 the American Legation in Berne noted that the Swiss Federal Political Department had indicated [that] there is evidence of certain assets in Switzerland, "but that if Mrs. Greenfield desires to obtain detailed information she will be obliged to supply proof of the decease of the person or persons in whose names the account or accounts are recorded, as well as documentation that Mrs. Greenfield is either the sole heir or represents the heirs of the deceased."

The Disposition of Assets Deposited in Swiss Banks by Missing Nazi Victims: Hearing Before the House Comm. On Banking and Fin. Servs., 104th Cong. 108 (1996) (prepared testimony of Edgar M. Bronfman, President World Jewish Congress, World Jewish Restitution Organization) [hereinafter Bronfman Testimony]. The Nazis did not keep a record of victims they exterminated at concentration camps, and Swiss inheritance law itself was quite complicated following World War Two. Authorities were required to declare a person missing and dead. This involved registering assets, a publication of a notice and a lengthy process for officially declaring the person missing and presumed dead. See PICARD REPORT, *supra* note 127, at 240.

129. See PICARD REPORT, *supra* note 127, § 4.2.2, at 246. Another report prepared by Swiss historians outlines situations in which claimants had difficulty obtaining information about the assets of their relatives had perished during the Holocaust:

It was only in halting steps that the [Swiss] legal authorities addressed themselves to the problems which resulted from the crimes of the German State, over and above the fact of its collapse.

This distance is revealed also in the context of the abandoned wealth of Nazi victims in Switzerland. No special legislation was passed until 1962, yet an abundance of estates left by both Nazi and war casualties remained to be settled. The following case examples shed light on the legal and administrative problems which resulted.

The claimants who most easily succeeded in retrieving properties of Nazi and war victims which were located in Switzerland, were those who knew their rights and could prove their right of entitlement with a death certificate and document of inheritance, as illustrated in the *Reginek* case. In the case of *Berliner* the petitioner was in possession of notarized inheritance documents, but did not know in which Swiss bank the presumed wealth might be located. In the cases of *Courten*, *Beetschen*, and the *District Court of Kreuzlingen* there was a legitimate claim to a known estate, but it was not legally clear whether the testator, a non-Swiss national, was indeed missing and presumed dead. The situation became even more difficult when the claimant could not prove the death of the testator, nor entitlement to inherit, nor even the existence of an estate (the cases of *Mastbaum*, *Wohlin*, and *Schimschon*). The *Trachsel* case demonstrates that there were banks which stopped payment of interest on deposit balances in the absence of contact with the client, and which absorbed those balances into their reserves upon elapse of a limitation period. The *Dunajewski* case shows that Swiss authorities could receive information several times about vacated assets without passing along the

The Jewish community was further outraged when later press reports announced a Swiss-Polish agreement regarding heirless assets of Polish origin which were being held in Switzerland. This secret agreement was concluded on June 25, 1949.¹³⁰ It allowed the Polish State to acquire the assets of deceased Polish citizens without heirs. These assets were then used to compensate Swiss citizens who had expropriation claims against Poland. By 1975, Switzerland had transferred 480,000 Swiss francs to Poland in fulfillment of its 1949 obligations.¹³¹

Jewish leaders and U.S. politicians have expressed consternation that Switzerland was able to identify the dormant accounts of Polish citizens with some certainty while remaining unable to provide a proper accounting of other Holocaust victims' assets. Furthermore, in 1949, the U.S. Legation in Bern notified the Swiss government that its Polish agreement was inconsistent with its previous declarations concerning the disposition of heirless assets.¹³²

In 1952, the Swiss Jewish Communities Association (SJC), a Jewish humanitarian organization that provided relief to Jewish refugees, met with the SBA. The SJC and the WJC had met with the Swiss government as early as 1946 to request the release of

information. This case also provides a precedent that the Clearing house should not provide custodial trusteeship for such assets.

PETER HUG & MARC PERRENOUD, ASSETS IN SWITZERLAND OF VICTIMS OF NAZISM AND THE COMPENSATION AGREEMENTS WITH EAST BLOC COUNTRIES, *reprinted in The Disposition of Assets Deposited in Swiss Banks by Missing Nazi Victims: Hearing Before the House Comm. on Banking and Fin. Servs.*, 104th Cong. 357 (1996) [hereinafter SWISS HISTORIANS' REPORT].

130. As detailed in the Swiss Historians' Report, on June 25, 1949:

In an exchange of confidential side letters in the context of the Swiss-Polish compensation agreement, the Swiss delegation gave the Polish delegation assurances that assets of Polish nationals who were resident in Poland on September 1, 1939, and of whom there had been no news since May 9, 1945, would be made available to the Polish state in accordance with an agreed procedure. The Polish Government accepted a guarantee obligation in respect of these moneys. On the basis of unchecked statements by the [Swiss] Bankers' Association, the Swiss delegation indicated to the Polish delegation that unclaimed assets of a very wide range of Polish owners could be expected to amount to SFr. 2 million. Under pressure from the [SBA], the government initially treated the exchange of letters as confidential, against its original intention.

SWISS HISTORIANS' REPORT, *supra* note 129, at 14.

131. EIZENSTAT REPORT, *supra* note 114, at 200. The report also notes that, "[a]lthough defensible under international law, (since the Poles committed themselves to restore these heirless assets to any surviving Polish claimants), there was no Swiss follow through. Switzerland failed to provide Poland with the names of Polish heirless accounts until a few months ago." SWISS HISTORIANS' REPORT, *supra* note 129, pt. I, at 18.

132. EIZENSTAT REPORT, *supra* note 114, at 200.

any heirless assets.¹³³ At the 1952 meeting, the SBA objected to the idea of specific legislation for the problem of dormant accounts or heirless assets.¹³⁴ Specifically, the SBA made it clear that it did not support the enactment of special legislation that would require compulsory registration by banks of unclaimed World War Two-era assets. At the same time, the banks assured the SJC that the banks were merely custodians of assets and had no intention of making any legal claim to the assets themselves.¹³⁵

According to one commentator, the SBA and the SJC agreed as to the need for a solution to the problem of unclaimed heirless assets remaining in Swiss banks. The parties differed, however, on the following issues:

- (a) the question of necessity: the [SJC] regarded the adoption of legislative measures as absolutely essential; the [SBA] felt that the existing arrangements were adequate;
- (b) the tracing of heirless assets: obligatory registration which would affect banking secrecy was completely ruled out by the [SBA], whereas the [SJC] demanded it on considerations of fundamental rights;
- (c) Extent of the assets: The banks considered the survey they had made showed that the total worth of the assets in Switzerland of former Nazi victims was trivial, whilst the [SJC] suspected that far larger amounts were involved.
- (d) Finally the [Swiss Foreign ministry] and the [SBA] feared that the exclusion of claims by foreign countries to the heirless assets would give rise to difficulties and that to take such a step could have negative consequences for Switzerland in the areas of both foreign relations and foreign trade.¹³⁶

3. Swiss Response to Concerns about Heirless and Dormant Accounts

The Swiss did not take further actions concerning heirless or dormant accounts until 1962. In 1957, Swiss Federal Councilor Harold Huber introduced a motion in the federal Parliament asking that the Swiss government address this issue.¹³⁷ In

133. PICARD REPORT, *supra* note 127, § 2.2, at 244.

134. *Id.* § 4.4, at 247.

135. *Id.*

136. *Id.* § 4.4, at 248-49.

137. *Id.* § 4.5, at 249. Huber commented on some of the problems faced by bankers and notaries who were hindered by practical and legal considerations:

The administrator may know that his clients were in a concentration camp, but knows nothing about their subsequent fate. He does not know whether or how or when they lost their lives. Nor does he know whether there are any surviving children and, if so, where they are living; and of course he has no idea where these assets may be in Switzerland and particularly under what pseudonym they are being held. Banks and

response, the Swiss government passed the Federal Resolution of December 20, 1962 (1962 Resolution) in order to safeguard heirless assets for their legal owners.¹³⁸

The 1962 Resolution created procedures for declaring persons missing or dead, determining their heirs, and transferring heirless assets to a special unclaimed assets fund.¹³⁹ The resolution covered any assets whose "last known owners are foreign nationals or stateless persons about whom no reliable information has been received since the May 9, 1945 and who are known or presumed to have fallen victim to racial, religious or political persecution. . . ." ¹⁴⁰ The 1962 Resolution required that private individuals and private and commercial companies (including financial institutions) "administering, possessing, holding in safekeeping or overseeing such assets" register with the Swiss government and "furnish all facts known to him or her which could serve to establish the identity, the domicile or other place of residence, and the fate of the owner or his or her legal successors or representatives."¹⁴¹ Furthermore, the duty to report assets preempted any legal obligations for preserving bank secrecy.¹⁴²

lawyers have an obligation to maintain professional secrecy. They are not allowed to issue public notices asking for information on the persons concerned, in the hope of begin able to make contact with third parties, because to do so would risk infringing banking and professional secrecy. The administrator may himself be totally convinced that the rightful owners are no longer living, but such a subjective conviction is not sufficient justification for going any further in the matter.

Id. § 4.5, at 250. Huber also acknowledged that there were always untrustworthy administrators as well but distinguished them from other professionals who would not intentionally seek to gain from the Holocaust victims' assets but who might eventually end up in a situation of inaction. *Id.*

138. *Id.* § 4.6, at 251; see also Federal Resolution on the Assets in Switzerland of Foreigners or Stateless Persons who have been Victims of Racial, Religious and Political Persecution (1962), reprinted in *The Disposition of Assets Deposited in Swiss Banks by Missing Nazi Victims: Hearing Before the House Comm. on Banking and Fin. Servs.*, 104th Cong. 264 (1996) [hereinafter 1962 Resolution].

139. See Tibor Sallay, Comments: New Legislation, 12 AM. J. COMP. L. 87 (1963) (analyzing the 1962 Act on Assets of Victims of National Socialism). The Swiss Banks estimated that assets in question represented an insignificant amount of funds. At the time, less than \$230,000 worth of assets had been discovered. *Id.*

140. 1962 Resolution, *supra* note 138, art. 1(1), at 264. The 1962 Resolution also required that safe deposit boxes be opened if they might contain relevant assets or papers that would establish the existence of such assets. *Id.* art. 1(2).

141. *Id.* art. 3, at 265.

142. *Id.* art. 7. Article 7 stated: "The obligation to report to the registration authority and to provide information takes precedence over any obligation to secrecy, in particular of banks, insurance companies, fiduciary companies, lawyers, notaries and legal advisors." *Id.* art. 7(1). The Swiss registration

The issue of specific regulations dealing with the dormant or "heirless" accounts was first raised in 1949 by the Swiss Foreign Ministry and the Swiss Justice Ministry.¹⁴³ The Swiss Justice Ministry was the site of the newly-created registration authority under the 1962 Resolution.¹⁴⁴ Enforcement of the resolution may have been minimal.¹⁴⁵ The inquiries made, however, were not reviewed or questioned by the Swiss government.¹⁴⁶ Criticism has also been raised about the level of reporting by Swiss banks.¹⁴⁷ The Registry strictly defined its jurisdiction to

authority was authorized to divulge information "about the circumstances of the missing owners only to their legal successors and their authorized representatives. Private individuals may for special reasons be given summary information about the existence of assets, if these private individuals are able to prove that they have a credible claim to inheritance." *Id.* art. 7(2).

143. PICARD REPORT, *supra* note 127, § 4, at 245.

144. *Id.* § 6.2, at 254.

145. SWISS HISTORIANS' REPORT, *supra* note 129, pt. I, at 38.

146. In his opening statement before the House Committee's hearing regarding the disposition of assets deposited in Swiss banks by missing Nazi victims, Congressman James Leach stated:

[A] 1962 Swiss proposal to compel banks to register dormant accounts started out as a genuine attempt to get at the truth. But after bankers and lawyers groups objected, the law that was enacted ended up excluding a large class of potential claimants and demanded of heirs exact details and unambiguous proof of claims—standards difficult to meet because of the Gestapo confiscation of personal property and records and SS refusal to issue death certificates at the gas chambers of Buchenwald and Auschwitz and Majdanek.

The Disposition of Assets Deposited in Swiss Banks by Missing Nazi Victims: Hearing Before the House Comm. on Banking and Fin. Servs., 104th Cong. 96 (1996) (opening statement of Rep. James A. Leach, Chairman, House Committee on Banking and Financial Services) [hereinafter Leach Testimony].

Plaintiffs contended that the Swiss Banking Association objected to the legislation. Compl. at ¶ 149, *Friedman* (No. 96-5161) (citing U.S. Embassy Airgram to Bern (Oct. 5, 1996)).

147. As the Swiss Historians' Report indicates, many of the major Swiss banks requested large volumes of claims reporting forms. Despite the high volume of requests for forms, the SBA and the Association of Swiss Insurance Companies conducted a survey of members to determine the total amount of unclaimed assets located in Switzerland. They came up with a figure of approximately 1 million Swiss francs. Hug and Perrenoud seem skeptical of this figure:

Just how far this result was influenced by speculation that, based on the results nothing be undertaken, e.g. that the whole affair not warrant setting special standards, can better be judged on the basis of the evidence emerging today. One can not avoid the assumption that the managers of unclaimed assets simply were not ready to cooperate. How else could the enormous orders of forms by the largest banking institutions be explained, if not by the fact that considerably more unclaimed assets were present, than had at first been reported.

SWISS HISTORIANS' REPORT, *supra* note 129, § III(3)(b), at 77.

encompass “only a very specific category of foreign and stateless assets.”¹⁴⁸ Therefore, anyone who died a “natural” death due to hunger and inadequate medical care would not fall under the scope of the 1962 Regulation.¹⁴⁹ Thus, “if persons were involved whose disappearance had nothing to do with the persecution specified in the law, who instead had disappeared due to other causes, for instance, military service, bombardments, emigration, natural death, etc., then the law would not apply to [them].”¹⁵⁰ Additionally, money that was deposited by Eastern European depositors was disqualified from the search.¹⁵¹

As a result of the 1962 Resolution, a total of SF 7.5 million in 961 accounts was turned over to claimants and an additional two million Swiss Francs given to Swiss Jewish communities and a Swiss refugee organization.¹⁵² As the Eizenstat Report comments: “After long denying the possession of any heirless assets, some Swiss banks then found over \$2 million in bank accounts, most of which was not transferred to Jewish and other relief organizations until the 1970s. The Unclaimed Assets Fund was finally dispersed in 1975 with a distribution of two-thirds of the fund to the Swiss Association of Jewish Communities and one-third to the Swiss Central Office for Refugee Aid.”¹⁵³ It is

148. *Id.* § III(3)(c), at 77.

149. *Id.* § III(3)(c), at 78.

150. *Id.* § III(3)(c), at 77.

151. The Swiss Historians’ Report comments:

Of even more far reaching significance was the decision to refrain from any process whatsoever for declaring a person missing or for calling for heirs and instead, directly to credit any assets originating in Albania, Bulgaria, Hungary, Poland, the German Democratic Republic, Romania, the Soviet Union, Czechoslovakia and Yugoslavia by administrative decision to the “unclaimed assets” fund.

SWISS HISTORIANS’ REPORT, *supra* note 129, § III(3)(e), at 82.

The Department of Justice decided in the late 1960s that, as a general rule, no procedures for declaring a person missing would be implemented for persons in Eastern Europe. The Department reasoned that sending a letter into an Eastern Europe country implying that an Eastern European national had had contact with a Swiss Bank could endanger the national’s life. *Id.* § III(3)(c), at 83. As Perrenoud and Hug indicate, this decision had no valid legal basis. Rather, Article 8, paragraph 3 of the 1963 Registration Decree stated that the Swiss could dispense with declaring a person missing “[i]f grounds existed for assuming that the persons sought might experience unwelcome difficulties.” *Id.* This provision was included to protect residents in Eastern Europe from adverse consequences of contact from a Swiss bank. The decree was silent, however, on how to handle unclaimed assets in the absence of a process for declaring a person missing. *Id.* Nowhere did it state that no contact should be made with Eastern European claimants or that their property should revert quickly to the unclaimed assets fund. *Id.* § III(3)(e), at 83.

152. See WORLD JEWISH CONGRESS, POLICY DISPATCH NUMBER 10, located at <<http://www.virtual.co.il/orgs/orgs/wjc>>.

153. SWISS HISTORIANS’ REPORT, *supra* note 129, pt. III(3)(f), at 86, 88.

estimated, however, that more than five million Swiss Francs remained with the assets managers (including banks) because the Claims Registry declared itself not competent to handle those claims.¹⁵⁴ Some of these claims, however, may well have been paid out later to claimants directly by the asset managers.¹⁵⁵ The Swiss Federal Finance Commission closed the Unclaimed Assets Fund account on August 20, 1980.¹⁵⁶

4. Questions about Dormant Bank Accounts between 1980-1995

Recently, many questions have been raised about what happened from 1980 to 1995 regarding the dormant bank accounts. As the Swiss Historians' Report indicates, many accounts that went unpaid belonged to Eastern European citizens who were unable to claim their property while living in a socialist country.¹⁵⁷ Furthermore, banks may not have been furnished with the ability to locate missing customers. Bank secrecy also prevented the banks from publishing the names of dormant accountholders. Thus, it was necessary for claimants to come forward to inquire about an account.¹⁵⁸

In 1995, the SBA adopted its own guidelines regarding dormant accounts in an effort to relax the requirements for heirs seeking to recover funds of their deceased relations.¹⁵⁹ Specifically, the SBA would assist heirs even if they did not

154. *Id.* at 91. The distribution was made pursuant to the Federal Decree on the Use to be Made of the Assets in Switzerland Belonging to Foreigners or Stateless Persons Persecuted for Reasons of Race, Religion or Political Beliefs, approved on March 3, 1975.

155. *Id.*

156. *Id.* para. I, at 14, 18.

157. The Swiss Historians' Report is sensitive to difficulties the Swiss banks faced with respect to Eastern European account holders, but nonetheless asserts that the bankers should not have decided to deliver these funds to the Unclaimed Assets Fund:

The failures and omissions depicted in this chapter in the Registration Decree of 1962 and the states of Eastern Europe in respect of identifying legitimate claimants to registered unclaimed assets, and to pay them their due, can now be put right at least in part. In the Swiss Federal Archives are to be found the very well preserved documents on 1048 owners of bank accounts and the assets situated in Switzerland, concerning which there had been no contact with the customer since the end of the war. Among these are the assets belonging primarily to Eastern European depositors which were incorporated "administratively" into the Unclaimed Assets Fund without serious inquiries being made. . .

SWISS HISTORIANS' REPORT, *supra* note 129, pt. II (4), at 86, 89.

158. See *Swiss Banks Under Pressure*, SWISS REV. WORLD AFF., Nov. 1, 1996, available in LEXIS, Europe Library, SWSWLD File.

159. See *Swiss Chronology*, *supra* note 113; see also Ganz, *supra* note 114, at 1350.

possess the requisite documentary evidence establishing the existence of an account or the heir's right to an inheritance.¹⁶⁰

The SBA Guidelines also created the Contact Office for the Search for Dormant Accounts Administered by Swiss Banks.¹⁶¹ A Swiss banking Ombudsman, Hans-Peter Hani, was appointed in 1995 to handle claims of Nazi victims and their heirs. His work was financed by a foundation established by Swiss banks.¹⁶² The Ombudsman was only able to uncover eight thousand dollars in accounts during his initial efforts.¹⁶³

According to data provided by the Ombudsman's office in September 1996, from a survey of 892 questionnaires received by the Ombudsman, only eleven cases led to a positive result.¹⁶⁴ Of these claimants, three were accountholders murdered by the Nazis and two other customers were Jews who lived in Romania and were dispossessed during World War Two because of discriminatory legislation.¹⁶⁵ WJC Chairman Edgar Bronfman reacted to this attempt by stating: "It is not merely pathetic but an indictment of his methods. Indeed, fees he charged holocaust survivors, and the families of holocaust victims, to process their claims far exceeds the \$8,000 he found."¹⁶⁶

The Central Contact Office attributes the disappointing results to several factors. First, the Contact Office claims that, in

160. See Ganz, *supra* note 114, at 1350.

161. See Geneva Private Bankers Association (GPB), *The Swiss Banking Ombudsman and the Contact Office for the Search for Dormant Accounts* (visited Mar. 15, 1998) <<http://www.geneva-finance.ch/En/Ombudsman.htm>>. The Ombudsman works independently of other organizations and assists persons in search of dormant accounts at any of the Swiss banks. Before the Ombudsman will initiate a search, however, a claimant must meet the following criteria:

1. Substantiate that an account might exist in Switzerland;
2. Supply the name of the person whose account is sought;
3. Explain that the bank customer has been dead or presumed dead for ten years or more;
4. Substantiate his claim to the existing account;
5. Explain in which region of Switzerland to search.

GPB, *Who May Introduce a Search and How?* (visited Mar. 15, 1998) <http://www.geneva-finance.ch/En/Contact_OfficeQ3.htm>.

162. See Arnold Kemp, *Swiss Lies and Nazi Gold*, OBSERVER, Sept. 15, 1996, at 17. In an interview with a newspaper, Hani stated: "I think the banks did their job in 1962. They delivered what could be seen to be from Holocaust victims, and I fear we won't find much for people who are searching now." *Id.*

163. See GPB, *What are the Results Already Reached?* (visited Mar. 15, 1998) <http://www.geneva-finance.ch/En/Contact_OfficeQ8.htm>.

164. *Id.*

165. *Id.*

166. Bronfman Testimony, *supra* note 128, at 36. Bronfman also stated: "During the past six months, we have been undertaking research in the U.S. archives to determine the facts behind what is undoubtedly the greatest robbery in the history of mankind." *Id.*

accordance with the 1962 Regulation, Swiss banks had previously to hand over dormant assets to the Swiss government if they had originally belonged to victims of racial, religious, or political persecution.¹⁶⁷ Some investments, such as World War Two era securities or bonds, are now worthless.¹⁶⁸ Finally, a lack of documentation has complicated the Ombudsman's task: under Swiss law, records of bank accounts which are closed by a customer or other authorized party need only be maintained for ten years.¹⁶⁹ Thus, if the account was closed and a balance withdrawn, there may be no trace at all of the account's existence.¹⁷⁰

5. Recent Investigations in the United States and Switzerland

In 1996, Senator Alfonse D'Amato of New York consulted with the head of the WJC and decided to undertake an in-depth search of the National Archives to uncover more about Nazi gold and the assets of Holocaust victims.¹⁷¹ With Senator D'Amato as its chair, the U.S. Senate Banking Committee held hearings on April 23, 1996 concerning the status of dormant accounts and called for the United States to declassify various World War Two era documents.¹⁷² The U.S. House Committee on Banking and Financial Services had a second round of hearings on December 11, 1996.¹⁷³

Facing growing international pressure, the Swiss responded with their own efforts. In October 1996, the Swiss government commissioned a report entitled *Assets in Switzerland of Victims of Nazism and the Compensation Agreements with East Bloc Countries* (Swiss Historians' Report) concerning the claims filed prior to and after the enactment of the 1962 Regulation. The Swiss Historians' Report also focused on public allegations that the Swiss had used the unclaimed bank accounts of Holocaust

167. See GPB, *How Can These Disappointing Results be Explained?* (visited Mar. 15, 1998) <http://www.geneva-finance.ch./En/Contact_OfficeQ9.htm>.

168. *Id.*

169. See GPB, *What are the Main Difficulties Encountered by the Central Contact Office?* (visited Mar. 15, 1998) <http://www.geneva-finance.ch./En/Contact_OfficeQ6.htm>.

170. *Id.*

171. See Greg Bradsher, *Searching for Documents on Nazi Gold*, (visited Mar. 15, 1998) <<http://www.nara.gov/nara/research/nazigold.html>>.

172. *Hearings on Banking Deposits of WWII Jews in Swiss Banks before Sen. Comm. on Banking, Housing and Urban Affairs*, 104th Cong. 2d Sess. (Apr. 23, 1996) available in LEXIS, Legis Library, CNGTST File [hereinafter *Hearings on Banking Deposits*]. The testifiers included Stuart Eizenstat, Edgar M. Bronfman, President of the WJC, and President of the WJRO, Hans J. Baer, Chairman of Baer Holdings Ltd. on behalf of the SBS, and Greta Beer, a Holocaust survivor.

173. See SWISS HISTORIANS' REPORT, *supra* note 129.

victims from Eastern European nations to compensate Swiss citizens for property seized in Eastern Europe.¹⁷⁴

On December 13, 1996, the Swiss Parliament passed a Federal Decree Concerning Historical and Legal investigations into the fate of "assets which reached Switzerland as a result of National Socialist Rule" (Swiss Historical Decree).¹⁷⁵ The Swiss Historical Decree calls for a broad investigation extending to all assets belonging to the victims of Nazi persecution that were deposited in Switzerland and have not been claimed from their beneficial owners. In addition to dormant accounts and deposited assets, the investigation would try to determine the amount and date of assets deposited in Switzerland that were confiscated from their rightful owners under racial laws or other discriminatory measures of the Nazi regime.¹⁷⁶ Finally, the investigation would review all financial transactions entered into by Switzerland with members of the National Socialist Party, with the German Reich, and with its institutions, representatives, and persons with close

174. *Id.*; see also *Holocaust Probe Ordered*, FIN. TIMES, Oct. 31, 1996, at 2.

175. Swiss Fed. Dep't of Foreign Affairs, *Federal Decree Concerning the Historical and Legal Investigation of the Fate of Assets Which Reached Switzerland as a Result of National Socialist Rules* (visited Mar. 15, 1998) <http://www.switzerland.taskforce.ch/doc/961213_e.htm> [hereinafter Swiss Historical Decree]; see also *Frontline Chronology*, *supra* note 121; GPB, *The Federal Decree on Historical and Legal Investigations* (visited Mar. 15, 1998) <http://www.geneva-finance.ch/En/arr_fed.htm> [hereinafter GPB Website].

176. Article 1(1) of the Historical Decree sets forth the scope of the historical investigation:

1. The Investigation covers the extent and fate of assets of all kinds which were transferred to banks, insurance companies, attorneys, notaries, fiduciaries, asset managers, or other physical or legal persons or groups of persons residing or headquartered in Switzerland for deposit, investment or transfer to third parties, or were acquired by such physical or legal persons or groups of persons or were received by the Swiss National Bank and

1. belonged to persons who became victims of National Socialist rule or about whom, because of this rule, reliable information is not available, and whose assets have since then not been claimed by legitimate claimants;

2. as a consequence of the racial laws or other discriminatory measures within the sphere of the National Socialist German Reich were taken from their rightful owners; or

3. originate from members of the NSDAP, from the National-Socialist German Reich, its institutions or representatives as well as physical or legal persons closely connected with it, including all financial transactions which were carried out with these assets.

ties to the German Reich.¹⁷⁷ At the same time, the Swiss Parliament waived Swiss bank secrecy laws for five years to facilitate the work of the historical experts as well as the ICEP.¹⁷⁸

Several days later, a Swiss Historical Committee of Inquiry was assembled, with Swiss Professor Jean-François Bergier, a Professor at the Federal Polytechnic School of Zurich, as Chairman of the Commission.¹⁷⁹ The Independent Commission of Experts (ICEC) also known as the Bergier Commission, is comprised of nine historians who will investigate Switzerland's wartime activities.¹⁸⁰

In late December 1996, outgoing Swiss President Jean-Pascal Delamuraz accused the WJC of extortion and blackmail in its attempts to secure restitution for Holocaust victims.¹⁸¹ This prompted Jewish groups to consider publicly a boycott of Swiss banks.¹⁸² Delamuraz, in the wake of public outcry, soon thereafter issued an apology.¹⁸³

During the escalation of international pressure, the Swiss faced further embarrassment concerning related actions. On January 14, 1997, a Swiss night watchman at the Union Bank of Switzerland rescued documents dating from the Second World War from the shredder. These documents were records from a smaller Swiss bank that had been acquired by Union Bank of Switzerland (UBS).¹⁸⁴ UBS claimed that an in-house historian had previously reviewed these documents and had found them to be of minimal significance.¹⁸⁵ Others claimed that these documents consisted of records of a Swiss bank subsidiary that had extensive dealing with the Third Reich.¹⁸⁶ The guard turned the documents over to Jewish leaders and was promptly

177. See GPB Website, *supra* note 175. This would also include an examination of transactions made by the Swiss National Bank. See *id.*

178. *Id.*

179. GPB, *The Members of the Commission*, (visited Mar. 15, 1998) <http://www.geneva-finance.ch/En/Commission_Composition.htm>.

180. *Id.* The other members of the ICEC include Historians Wladyslaw Bartoszewski (Poland), Saul Freidlaender (Israel), Harold James (United Kingdom), George Kreis (Switzerland), Sybil Milton (United States), Jacques Picard (Switzerland), Jakob Tanner (Switzerland), and Lawyer Joseph Voyaume (Switzerland). *Id.*

181. See Alan Cowell, *How Swiss Strategy on Holocaust Fund Unraveled*, N.Y. TIMES, Jan. 26, 1997, at A6.

182. *Id.*

183. See Jim McGee, *Plan for Swiss Bank Boycott Dropped; Congressional Jewish Leaders Hail Creation of Holocaust Fund*, WASH. POST, Feb. 7, 1997.

184. See Carl Mortished, *Swiss Banks Face Secrecy Shake-Up*, TIMES, May 19, 1997, available in LEXIS, News Library, TTIMES File.

185. See Edmund L. Andrews, *The Rescuer of Swiss Bank Ledgers*, N.Y. TIMES, Jan. 17, 1997, at A6.

186. *Id.*

terminated from his post by a private security firm—not by UBS.¹⁸⁷ He was also threatened with prosecution under the bank secrecy laws for making the documents public.¹⁸⁸ Ultimately, it was revealed that some of the larger group of records involved the sale of Jewish-owned property in Berlin.¹⁸⁹

In February 1997, three major Swiss banks announced the creation of a seventy million dollar humanitarian fund to benefit Holocaust victims.¹⁹⁰ This fund had grown to almost three hundred million dollars by May 1997.¹⁹¹ In the same month, the Swiss government, under growing international pressure, renewed the searches for dormant accounts and found an additional thirty-two million dollars in 775 dormant accounts.¹⁹² As former Federal Reserve Chairman Paul Volcker noted, however, “the survey left doubts about its methods and result.”¹⁹³

In March 1997, Swiss President Arnold Koller proposed the creation of a \$4.7 billion “Swiss Foundation for Solidarity.” The Solidarity foundation would provide funding to victims of genocide and other severe breaches of human rights including Holocaust victims.¹⁹⁴ The Swiss Parliament would first have to pass several pieces of legislation in order to revalue the gold. Additionally, there potentially would be referendums with respect to the gold revaluation for the necessary amendments to the Swiss Federal Constitution.¹⁹⁵ There has been some question as to whether the

187. See Louise Jury, *Saved From Shredder in a Swiss Bank: Are the Victims Still Alive?*, INDEP., Dec. 7, 1997, at 15.

188. See *id.*; see also Fredy Rom, *Fired Bank Guard May Need New Attorney in Switzerland*, Jewish Telegraphic Agency, July 1, 1997 at <<http://www.jta.org/jul97/01-meili.htm>> (noting that Meili was fired because he turned documents over to a third party in violation of secrecy laws. Zurich District Attorney asked for Meili to return to Switzerland for questioning as well).

189. *More Swiss Fumbling*, INT'L HERALD TRIB., Aug. 4, 1991, at 8.

190. *Frontline Chronology*, *supra* note 121.

191. *Id.*; see also Geneva Financial Center, *Steps Taken: Historical and Legal Inquiry into the Fate of Assets deposited in Switzerland during the Nazi Regime* (visited Mar. 15, 1998) <<http://www.geneva-finance.ch/En/Measures.htm>> (chronology of actions taken by Swiss Government and Swiss banks with respect to dormant accounts and gold controversies).

192. *Id.* at 2.

193. *The Disposition of Assets Deposited in Swiss Banks by Missing Nazi Victims: Hearing Before the Committee on Banking and Financial Services*, 104th Cong. 50 (1996) (statement of Paul A. Volcker, Chairman of the Independent Committee of Eminent Persons) [hereinafter Volcker Testimony].

194. Washington, D.C. Embassy of Switzerland, *Switzerland in World War II: President of the Swiss Confederation Addresses a Joint Meeting of the Federal Assembly* (visited Mar. 15, 1998) <<http://Swissemb.org/pr970305.html>> [hereinafter Koller Address].

195. See Letter from Alan G. Hevesi, Comptroller of the City of New York, to His Excellency Alfred Defago, Swiss Ambassador to the U.S. (June 24, 1997) (on file with Author) (stating the Swiss have misrepresented the nature of the Solidarity Fund and the timeliness with which it will be created).

Solidarity Fund, if created, will be used to assist Holocaust survivors.¹⁹⁶

In May 1997, the United States released the Eizenstat Report. The report suggests that, by acting as bankers for the Nazis, the Swiss prolonged the war.¹⁹⁷ The Eizenstat Report identifies specific ways in which the Swiss helped the Nazis move gold and other financial assets out of Germany.¹⁹⁸ The report also criticizes the U.S. role in recovering the assets of Nazi victims and looted gold during and after World War Two.¹⁹⁹

196. Comptroller Hevesi further states:

[Y]our comments concerning the Solidarity Funds are totally counter to what Swiss officials said to me when I was in Switzerland. They made it clear that the Solidarity Fund was not designed as restitution for Holocaust victims.

The goal of this humanitarian fund, according to the Swiss President, is to "aid people in need, victims of catastrophes in Switzerland and abroad, victims of genocide, torture and other violations of human rights (including victims of the Holocaust and needy descendants)" In order to implement this proposal, the Swiss will revalue Swiss gold reserve to current market value, which will net Switzerland many billions of francs.

The interest earned as a result of the gold revaluation will be distributed half to the needy in Switzerland and half to humanitarian projects and the needy around the world. Though Switzerland should be commended for this humanitarian activity, the fund is not connected to the Holocaust. Every Swiss official I met with made sure I understood the difference, and that any connection to the Holocaust is incidental. It is very troubling that you have highlighted this tenuous connection to Judge Korman.

Id. at 2.

197. See *Frontline Chronology*, *supra* note 121.

198. The Office of Strategic Services uncovered data concerning Swiss/German trafficking in gold and other financial assets. X-2, a U.S. counter-intelligence unit, "provided the OSS and Washington with an extensive summary of Nazi gold and currency transfers arranged via Switzerland through most of the war." According to X-2 these included:

- * Gold and bonds looted by the Nazis from all over Europe and received by certain Swiss banks;
- * Funds sent by the Deutsche-Verkehrs-Kreditbank of Karlsruhe to Basel;
- * Securities held in Zurich by private firms for the Nazi party;
- * Large quantities of Swiss francs credited to private accounts in various Swiss banks;
- * Money and property held in Liechtenstein;
- * More than 2 million francs held by the Reichsbank in Switzerland;
- * Forty-five million Reichsmarks held in covert Swiss bank accounts[.]

EIZENSTAT REPORT, *supra* note 114, at 40.

Apparent from the obvious official transactions, these sums were brought in by German and Swiss banks and business organizations. Eizenstat Testimony, *supra* note 113, at 40.

199. "[T]he report raises serious questions about the U.S. role. American leadership at the time, while greater than that of our Allies, was limited. There was a demonstrable lack of senior-level support for a tough U.S. negotiating position with the neutrals. Moreover, there was an even greater lack of attention

The Swiss Federal Council officially responded by stating that the report was "one-sided" and that some of its conclusions were "unsupported."²⁰⁰ In particular, the Swiss Federal Council noted that the foreword to the Eizenstat Report "contains political and moral judgments that go beyond the historical report."²⁰¹ Additionally, the report, as well as other public accounts that have been critical of the Swiss, may overlook the historical complexity of the situation—specifically Switzerland's proximity to Germany and Italy and its "survival strategy" of neutrality to avoid invasion.²⁰²

The Swiss government has established a task force on the Assets of Nazi Victims, headed by Ambassador Thomas Borer, to look into the matter of dormant accounts and has also agreed to let the ICEP oversee a wide-scale audit of Swiss bank records.²⁰³ Finally, the Swiss have agreed to remove the veil of Swiss bank secrecy to assist with the ICEP investigation.²⁰⁴ The investigation

to ensuring implementation of negotiated agreements." Eizenstat Testimony, *supra* note 113, at ix.

200. Marilyn Henry, *Swiss Slam Eizenstat Report*, JERUSALEM POST, May 25, 1997, at 12.

201. William Drozdiak, *Swiss Defend Wartime Policy, Reject Criticism; Bern Calls U.S. Report 'One-Sided' Judgment*, WASH. POST, May 23, 1997, at A31.

202. See *Responses to the Eizenstat Report*, SWISS REV. WORLD AFF., June 2, 1997, available in LEXIS, Europe File, SWSWLD File. Cf. *Switzerland's Past Under the Magnifying Glass*, SWISS REV. WORLD AFF., Dec. 1, 1997, available in LEXIS, Europe Library, SWSWLD File (noting the intensity of the debate can be fully comprehended only in light of Switzerland's neutrality).

203. Chairman Volcker described the procedures as follows:

International accounting firms selected by the committee from among those with offices and individuals licensed to audit Swiss banks will conduct the committee's investigative order. The use of these audit firms will permit the investigation to proceed within the framework of Swiss bank secrecy laws. Laws specifically designed to protect the identity of holders of individual bank accounts from disclosure. The committee and its members will not themselves have access to names associated with particular dormant accounts. Nor is that necessary. Public reporting of relevant data about the totals and distribution of the dormant accounts and their nature will not be impeded. Specific account data can be made available to appropriate Swiss authorities.

Volcker Testimony, *supra* note 193, at 51.

204. Swiss Ambassador Thomas Borer, at a hearing before the House Banking Committee, stated that:

[T]he government of Switzerland has proposed new legislation of unprecedented nature, that was put on a fast track, and unanimously passed by both houses of the Swiss Parliament . . .

In fact, the law takes the bold and unprecedented step of lifting the banking and other professional secrecy laws for a maximum of five years. Some have suggested a shorter period. Yet the government argued that

by the ICEP, however, will not look into the records of lawyers, life insurance companies, investment advisors, and others who were agents for Holocaust victims.²⁰⁵ Furthermore, the ICEP investigation and claims adjudication is limited to claims relating to dormant bank accounts. The ICEP will not look into the issue of whether Nazi assets, such as property looted from occupied countries or forcibly taken from Jews, remains in Swiss accounts; nor will it provide restitution to Holocaust survivors who were deprived of their property. Neither issue is part of the ICEP's mandate.

On July 23, 1997, the SBA published the names of approximately 1800 World War Two era dormant accounts of non-Swiss individuals. The publication of this list was required by the Memorandum of Understanding, and signed by the ICEP and the SBA.²⁰⁶ The revelation of new names has caused renewed skepticism about the sincerity of Swiss banks' previous efforts to locate dormant accounts. On October 29, 1997, the SBA published a second list of names, including 3687 foreign (*i.e.*, non-Swiss) and 10,000 Swiss accountholders.²⁰⁷ The October publication brought the tally for dormant funds discovered in Swiss vaults in the past two years to fifty-four million dollars.²⁰⁸

The Simon Wiesenthal Center later asked Swiss banks to freeze fifty-two of these dormant accounts, which may belong to Nazi war criminals.²⁰⁹ The Wiesenthal Center derived the fifty-two names from the October 29 list—both the first and last names of the fifty-two identified accountholders matched the names of Nazi war criminals.²¹⁰ The new list confirmed the Center's belief

anything less would run the risk of depriving it of a unique opportunity to discover all the truth.

The Disposition of Assets Deposited in Swiss Banks by Missing Nazi Victims: Hearing Before the Committee on Banking and Financial Services, 104th Cong. 33 (1996) (statement of Thomas Borer, Swiss Ambassador) [hereinafter Borer Testimony].

205. Volcker Testimony, *supra* note 193, at 54-55.

206. *Swiss Banks Commence Global Claims Process to Identify Owners of Dormant World War II Era Accounts*, N.Y. TIMES, July 23, 1997, at A12 (advertisement put out by the SBA); see also Barry Bearak, *Swiss Bankers, List Throws Light on Pain and Intrigue of Wartime*, N.Y. TIMES, July 25, 1997, at A1 (discussing reactions of various persons whose names or names of relatives appeared on dormant accounts list).

207. *List of Dormant Accounts* (last modified Oct. 29, 1997) <http://www.dormantaccounts.ch/oct_list.htm>.

208. Alan Cowell, *Further Swiss Bank Lists Fail to Calm Uproar*, N.Y. TIMES, Oct. 30, 1997, at A8.

209. Tom Tugend, *Wiesenthal Center Asks Swiss Banks to Freeze Suspected Nazi Accounts*, JERUSALEM POST, Dec. 7, 1997, at 4.

210. Included in the list were the names of Gestapo official Karl Bauer; George Schwarz, an officer at Auschwitz; Emil Bauman, accused of murder and

that only a full-fledged investigation would reveal the extent of Nazi assets held by Swiss banks.

In the fall of 1997, the ICEP also agreed to found and supervise an Independent Claims Resolution Foundation, which would undertake a claims settlement process for resolving claims to published dormant accounts. The trustees of the foundation include Paul Volcker; Rhene Rhinow, a Swiss Senator; and Israel Singer, Secretary General of the WJC.²¹¹ Up to fifteen independent arbitrators will be appointed to resolve claims disputes.²¹² The claims resolution panel will use relaxed evidentiary rules for resolving the claims. Uncomplicated claims will be placed on a fast track and will be heard by one arbitrator.²¹³ More complex claims will be heard by a panel of arbitrators.²¹⁴ By late September, over 2700 claims had been submitted by individuals claiming to be named beneficiaries of the bank accounts that have been published by the SBA.²¹⁵

In late 1997, several U.S. state regulators imposed economic sanctions against Swiss banks in an attempt to press the Swiss Government and banks to settle with Holocaust victims more expeditiously. During the summer of 1997, the State of California stopped its official dealing with Swiss banks with respect to its investment activities.²¹⁶ On October 10, 1997, Alan Hevesi, the comptroller of New York City, excluded UBS from a loan syndicate, which UBS had previously led, for the disposition of a city loan.²¹⁷ Prompted by Hevesi's actions, New York State Comptroller H. Carl McCall and Massachusetts State Treasurer Joseph Malone imposed similar restrictions.²¹⁸ In response to California and New York's actions, Ambassador Eizenstat wrote an open letter to the Honorable George Voinovich, Chairman of the National Governors Association, asking the states to refrain

torture at the Srtuthof/Natzweiler concentration camp; and Alfred Meyer, gauleiter of Westphalia. *See id.*

211. *Members of Independent Committee of Eminent Persons Will Become Trustees of Claims Foundation*, PR NEWSWIRE, Sept. 29, 1997, available in LEXIS, News Library, PRNEWS File.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Thousands File Claims on Dormant Nazi-Era Swiss Bank Accounts*, Agence France Presse, Sept. 29, 1997, available in LEXIS, News Library, AFP File.

216. *See Swiss Chronology*, *supra* note 121.

217. *UBS Denied Role in Letter of Credit by New York City; Others Follow*, SWISS MONITOR: AN UPDATE ON SWITZERLAND'S PROGRESS IN MAKING RESTITUTION TO HOLOCAUST SURVIVORS, Nov. 1997, at 1 (copy on file with Author); *see also Swiss Chronology*, *supra* note 121.

218. *See UBS Denied Role*, *supra* note 216; *Mass. Cuts Ties to Swiss Banks*, U.P.I., Oct. 21, 1997, available in LEXIS, News Library, UPI File.

from imposing sanctions against Switzerland or its bank.²¹⁹ Ambassador Eizenstat met with Swiss banks in Davos, Switzerland in late January 1998 to urge a settlement of the class action lawsuits.²²⁰

California eventually withdrew its moratorium on December 4, 1997, and agreed to a waiting period of three months to see if the Swiss made further advances toward compensating claimants. New York Comptroller Hevesi hosted a conference of state financial regulators on December 8, 1997 in an attempt to achieve a uniform waiting period among the fifty states.²²¹

B. Game Theory: The Holocaust Victims Assets Litigation

1. The Holocaust Assets Plaintiffs

Recent litigation against Swiss banks has suggested a stronger link between bank secrecy and human rights violations. As Representative James Leach, when chairing hearings before the House Banking and Financial Services Committee on the assets of Nazi victims, stated:

[A]ll of this leads to a general principle; there is a great deal of disturbance, I think, in the world and in the U.S., that people who act in commission of political crimes and crimes against humanity have safe havens and it is continuing even to this present day where dictators escape from their country and loot their treasury

219. Letter from Ambassador Stuart Eizenstat, U.S. Undersecretary of State for Economic, Business and Agricultural Affairs to the Honorable George Voinovich, Chairman of the National Governors Association (undated), reprinted in *U.S. Under Secretary of State Eizenstat Continues Efforts Against Summers*, Dialogue (Embassy of Switzerland, Washington, D.C.) (on file with Author); see also *U.S. Official Opposes Sanctions on Swiss Banks*, WASH. POST, Jan. 31, 1998, at A16.

220. William Hall, *U.S. Urges Speed on Holocaust Claims*, FIN. TIMES, Jan. 31, 1998, at 4. On March 27, 1998, the three defendant banks, UBS, CS and SBC agreed to negotiate a global settlement with Holocaust victims. The banks pledged to set up a special Holocaust fund. The plaintiffs' attorneys and defendants negotiated a six-page confidential agreement. Allegedly, the fund would be supervised by the federal District Court in Brooklyn and would pay claims to victims whose Swiss accounts cannot be located or who had property looted by the Nazis. The fund is estimated to be somewhat between \$1 and \$3 billion. See David E. Sanger, *Swiss Banks Plan Restitution Fund for Nazis' Victims*, N.Y. TIMES, Mar. 27, 1998, at A1. As of March 31, 1998, it was unclear whether the settlement would include compensation for looted assets and profits derived from Nazi slave labor. Swiss bank officials have stated that their main emphasis is dormant accounts. See Alan Cowell, *Swiss Seek to Narrow List of Holocaust Funds to Be Recovered*, N.Y. TIMES, Mar. 31, 1998, at A15.

221. See *Swiss Chronology*, supra note 121.

and the fund repositories. Some in Switzerland, some in other areas of the world.²²²

In the midst of Swiss and U.S. efforts to reopen the issue of dormant accounts, the Holocaust Plaintiffs filed their lawsuits in federal district court in the Eastern District of New York.

a. The Weissshaus Complaint

In October 1996, Holocaust survivor Gizella Weissshaus filed a twenty billion dollar class-action lawsuit in federal district court in the Eastern District of New York against UBS and Swiss Bank Corporation (SBC).²²³ Weissshaus sought disclosure of any dormant accounts and restitution for all Nazi victims whose assets vanished in Switzerland.²²⁴ Weissshaus filed an amended complaint on January 24, 1997, which named UBS, SBC, CS, the

222. Questions by Chairman Leach to Ambassador Thomas Borer at House Hearings, during Borer Testimony, *supra* note 204. Leach continued:

I'm talking about political criminals, criminals against humanity, people that there aren't any laws for, reasons why we have the Nuremberg trial. I mean we have dictators leaving their countries and looting their treasuries and some of them having been very violent people, to have funds in your country and other countries of this world, have allowed to live in luxury and be very protected and there's a great deal of resentment, I think, in the U.S. and by a lot of free people of this world, that this is aiding and abetting a felon. But a felon of the worst kind, a felon against humanity.

Id.

223. See *Gizella Weissshaus vs. The Swiss Banks*, INST. INVESTOR (Int'l Ed.), Nov. 30, 1996, at 15, available in LEXIS, Banking Library, INVEST File.

224. According to the Weissshaus Complaint, Weissshaus is a 66-year-old U.S. citizen residing in Brooklyn. She was born into a family of Hasidic Jews. She lived in Sighet, Romania until 1944 when she was transported by sealed boxcar to a concentration camp in Auschwitz, Poland. The Complaint further states:

Before being separated from her father, he confided in her that he had deposited significant assets in a bank account with Union Bank of Switzerland. Her father and 55 other relatives died in German concentration camps in 1944 and 1945. Weissshaus survived the German concentration camps and emigrated to the United States in 1950. At the end of World War II, Weissshaus requested that defendant Union Bank of Switzerland acknowledge her father's account and pay her the proceeds deposited therein. The defendant bank failed and refused to do so.

Weissshaus Compl. ¶ 4; see also James A. Gillaspay, *A Cause that Goes Beyond Money*, INDIANAPOLIS STAR, Feb. 22, 1997.

Estelle Sapir, another New York resident, originally from Poland, has a similar story. The bankers told Sapir that they indeed had her father's account but could do nothing unless she could produce a death certificate. See Weissshaus Compl. ¶ 11.

SBA, and the Bank of International Settlements as joint defendants.²²⁵ The amended complaint also included three new representative plaintiffs.²²⁶ Plaintiffs in the Weissshaus suit are all Holocaust survivors. Plaintiffs and their heirs and beneficiaries claim to have initiated a lawsuit

to obtain an accounting and recover damages arising out of defendants' participation in a common scheme and course of conduct (1) to conceal and convert assets deposited in accounts with the defendant banks prior to 1946; and (2) to be a depository of and profit from the looting of personal property by the Nazi Regime and its allies between 1933 and 1945.²²⁷

To support these allegations, the Weissshaus plaintiffs stated six causes of action upon which relief could be granted: breach of contract,²²⁸ accounting,²²⁹ breach of fiduciary duty,²³⁰ conversion,²³¹ conspiracy,²³² and unjust enrichment.²³³

b. The Friedman Complaint

After the Weissshaus suit was filed, another Holocaust survivor, Jacob Friedman, filed a new suit on October 21, 1996, along with four people whose parents were killed in Nazi concentration camps.²³⁴ The Friedman suit alleged that three

225. See Weissshaus Compl. ¶¶ 8-12,

226. The following plaintiffs were added as representatives of the class. Joshua Lustmann is a 55-year-old Israeli citizen who resides in Jerusalem. Lustmann avoided arrest by the Nazis by hiding and obtaining false identification papers. See *id.* ¶ 6. His father and other relatives perished in a concentration camp. Estelle Sapir is a 70-year-old permanent resident of the United States who resides in Queens, New York. Sapir survived her 1943 arrest and placement in a detention camp and lost her father in a concentration camp. See *id.* ¶ 7.

227. See Weissshaus Compl. ¶ 1.

228. See *id.* ¶¶ 29-42.

229. See *id.* ¶ 41.

230. See *id.* ¶¶ 40-42.

231. See *id.* ¶ 43.

232. See *id.* ¶¶ 56-59.

233. See *id.* ¶ 43.

234. Friedman Compl. Jacob Friedman is a 75-year-old U.S. citizen who lives in Brooklyn, New York. Both of Friedman's parents were gassed at Auschwitz in the spring of 1944. *Id.* ¶ 16. Plaintiff Lewis Salton, an 85-year-old citizen who resides in New York City, lost his father to Nazi gunfire in 1942. *Id.* ¶ 21. Plaintiff Charles Sonabend is a 65-year-old British citizen who resides in England. Sonabend's parents died at Auschwitz. See *id.* ¶ 32. Plaintiff David Boruchowicz is a 71-year-old Canadian citizen who resides in Toronto. *Id.* ¶ 40. Boruchowicz performed slave labor for a German company from 1940 to 1943. *Id.* ¶ 41. His parents and five sisters were transported to the Majdanak concentration camp where they are believed to have perished. *Id.* ¶ 42. Fourteen plaintiff law firms were listed on the Friedman complaint. See also *Big Suits*, AM. LAW., Jan./Feb. 1997, at 102 (discussing the case of *Friedman v. Union Bank of Switzerland*). The plaintiffs are from New York, California, Britain and

banks, UBS, SBC, and CS, laundered money stolen from the Jews by the Nazis and affirmatively prevented the heirs of Holocaust victims from accessing money deposited in Swiss accounts by their deceased relations.

The Friedman complaint names three classes of plaintiffs:

- (a) Rightful owners of Nazi Regime looted assets or their heirs (e.g., people who had their assets looted prior to being sent to the camps);
- (b) Slave laborers and/or their heirs (e.g., people who worked at no pay for German companies to avoid being sent to concentration camps or to avoid being gassed while in those camps); and
- (c) Certain Swiss bank depositors and/or their heirs (e.g., people who made deposits prior to and during the war and who have been unable to reclaim those assets).²³⁵

Plaintiffs alleged that defendant Swiss banks participated in a common scheme and course of conduct to

- (1) Launder Nazi Regime . . . money, and fund and profit from Nazi World War II atrocities; (2) knowingly and/or recklessly accept looted or cloaked assets stolen or forcibly taken by the Nazi Regime during World War II; (3) knowingly and/or recklessly accept profits generated by Nazi Regime forced slave laborers; and (4) act intentionally and in concert to conceal and prevent the recovery of assets deposited in Swiss banks by victims of the Nazi Regime.²³⁶

The Friedman claims are perhaps the most elaborate. Their claims include: conspiracy to violate and/or complicity in violations of international law; breach of fiduciary duty; breach of special duty; breach of contract; conversion; unjust enrichment; negligence; violations of Swiss Federal Banking Law; violation of Swiss Commercial Code of Obligations; conspiracy; fraud; and fraudulent concealment.²³⁷

c. The World Council of Orthodox Jewish Communities Complaint

The Philadelphia law firm of Berger & Montague initiated a third lawsuit in January 1997 on behalf of the World Council of Orthodox Jewish Communities (WCOJC) and other nongovernmental groups whose members are Holocaust

Canada. See *Swiss Banks Face Second Holocaust Suit*, REUTERS FIN. WIRE, Oct. 24, 1996, available in LEXIS, News Library, REUFIN File.

235. See *International Law—Class Action Filed Against Swiss Banks for Withholding Illegal Nazi Assets*, COHEN MILSTEIN HAUFELD & TOLL'S E-JOURNAL (visited Mar. 15, 1998) <<http://www.cmht.com/cwswsgld.htm>>.

236. Friedman Compl. ¶ 1.

237. *Id.* ¶¶ 207-94.

survivors.²³⁸ Like the Friedman plaintiffs, these plaintiffs sought to classify four separate classes of plaintiffs.²³⁹ The lawsuits were consolidated by Brooklyn federal district court Judge Edward Korman on March 7, 1997.²⁴⁰

d. The Amended Complaints

Subsequent to the filing of the complaints, plaintiffs restructured and amended their complaints to achieve required jurisdiction and to consolidate various classes of plaintiffs. The dormant accounts claims were kept separate from the claims concerning violations of international law for the Swiss banks (i.e., alleged acceptance of looted assets and the profits of slave labor).

In amending the complaints, plaintiffs from the original Friedman Complaint including plaintiffs Sonabend and Trilling-

238. WCOJC Compl. Plaintiff Ireen Zarkowski is a U.S. citizen residing in Brooklyn, New York who was born in 1927. Zarkowski survived deportation and the Lunz A sea work camp, and was eventually liberated from the Reisenstadt concentration camp in 1945. *Id.* ¶¶ 12-15. Plaintiff Joseph Wiedner was born in 1923 and is now a U.S. citizen residing in Brooklyn, New York. Wiedner survived forced labor at Auschwitz and Bochum and was liberated from Buchenwald in 1945. *Id.* ¶¶ 16-19. Plaintiff Erwin Hauer was born in 1925 and is now a U.S. citizen residing in Brooklyn, New York. Hauer survived deportation, forced labor and also internment in the Strasshoff concentration camp, from where he was liberated in 1945. *Id.* ¶¶ 20-22. Plaintiff Lillie Ryba was born in 1924 and is now a U.S. citizen residing in Brooklyn, New York. She survived the Auschwitz and Husnfeld work camps. *Id.* ¶¶ 23-25. Wendy Liebowitz, *Swiss Bank Lawsuits are Consolidated*, NAT'L L.J., Mar. 24, 1997, at A6.

239. Class A includes "Swiss Bank Depositors and/or Their Heirs." WCOJC Compl. ¶ 96. Class B includes "Rightful Owners of Nazi Regime Looted Assets and/or Their Heirs." *Id.* Class C includes "Rightful Owners of Nazi Regime Looted Communal Assets and/or Their Heirs." *Id.* Class D includes "Slave Laborers and/or Their Heirs" *Id.* The main distinction between the classes in the Friedman Complaint and the WCOJC Complaint is Class C: the rightful owners of Nazi Regime looted communal assets. The WCOJC Complaint describes these plaintiffs as "all communities that are presently identified by their descendance from communities that previously existed in Europe, whose communal assets were looted by the Nazi Regime, or its agents, which assets were in whole or in part the subject of any transaction executed by or through the Swiss banks." *Id.* at 96.

The WCOJC claims include: Count I: Breach of Fiduciary Duty; Count II: Breach of Contract; Count III: Conversion; Count IV: Unjust Enrichment; Count V: Negligence; Count VI: Conspiracy; Count VII: Accounting; and Count VIII: Conspiracy to Violate and/or Complicity in Violations of International Law. WCOJC Compl. ¶¶ 102-48.

240. The lawsuits have been consolidated for pretrial purposes only. Terry Carter, *Accidental Allies: While Fighting for Return of Stolen Assets, Lawyers for Holocaust Victims Spar over Leadership and Fees*, 83 A.B.A. J. 30 (June 1997).

Gotch were moved into separate and distinct groupings. The restructured complaints were thus regrouped as the Weissshaus, Sonabend, Trilling-Gotch and WCOJC Complaints. The Complainants who filed the second amended Weissshaus Complaint are those plaintiffs from the original group of "deposited assets" (i.e., dormant accounts) plaintiffs who are not alleging any violations of international law.²⁴¹ The amended complaint reduces the number of legal claims to: (1) breach of contract; (2) obligation and fiduciary duty under New York and Swiss law; (3) fraud; and (4) unjust enrichment.²⁴²

The amended Sonabend complaint seeks redress for defendant banks' "knowing participation and complicity in crimes against humanity, crimes against peace, and war crimes, directed against plaintiffs and their close family members by the Nazi regime."²⁴³ The named Sonabend plaintiffs are all citizens of foreign states who assert their claims under federal common law as it incorporates customary international law.²⁴⁴ Plaintiffs characterize themselves as a "looted assets/slave labor class."²⁴⁵

The amended Trilling-Gotch complaint plaintiffs also assert claims arising under customary international law.²⁴⁶ Plaintiffs there are U.S. citizens rather than foreign residents. Their claims mirror those in the Sonabend Amended Complaint. The WCOJC Complaint still groups deposited assets and looted assets/slave labor plaintiffs together.²⁴⁷

The ICEP and the Swiss government have opposed the continuation of the class action lawsuits and have supported defendants' motions to dismiss.²⁴⁸ Various Jewish organizations, nonetheless, have continued to support the litigation. The Simon

241. See *Weissshaus v. Union Bank of Switz.*, (No. CV-96-4849) (July 30, 1997) [hereinafter *Weissshaus Am. Compl.*]. The new Weissshaus plaintiffs include Weissshaus, Jacob Friedman (formerly Friedman plaintiff), Estelle Sapir (former and current Weissshaus plaintiff), and Miriam Stern (new plaintiff).

242. *Id.* at ¶¶ 39-43.

243. *Sonabend v. Union Bank of Switz.*, (No. CV-96-5161) (E.D.N.Y., filed July 30, 1997), ¶ 1 [hereinafter *Sonabend Am. Comp.*]. The Sonabend plaintiffs include Charles Sonabend (formerly a Friedman plaintiff), David Boruchowicz (formerly a Friedman plaintiff), and Joshua Lustmann (formerly a Weissshaus plaintiff).

244. *Id.* ¶ 9(a).

245. *Id.* ¶ 20.

246. See *Trilling-Gotch v. Union Bank of Switzerland* (No. CV-96-5161) (July 30, 1997) [hereinafter *Trilling-Gotch Am. Compl.*]. The Trilling-Gotch plaintiffs include Elizabeth Trilling-Gotch a U.S. citizen who is the only surviving heir of her parents, who died while in the hands of the Nazis; Lillie Ryba; and Jacob Friedman (formerly a Friedman plaintiff).

247. See WCOJC Compl.

248. Catherine Crocker, *Holocaust Survivors Argue for Swiss Banks Lawsuit; Judge Must Decide On Allowing Class Action*, RECORD, Aug. 1, 1997, at A4, available in LEXIS, News Library, NJREC File.

Wiesenthal Center, which tracks Nazi War criminals, continues to support the suit and at a minimum has stated that the Swiss government agrees to the jurisdiction of the U.S. courts for “a final review of possible collaboration of Swiss banks with Nazi Germany.”²⁴⁹

This Article concentrates on the original Friedman complaint and the amended and consolidated Sonabend and Trilling-Gotch claims because they focus on the international law and human rights claims being raised in this litigation.²⁵⁰ The three classes of plaintiffs that were initially joined in the litigation seek equitable and compensatory relief including an accounting and disgorgement of three classes of assets that correspond to the different types of plaintiffs. The assets included “looted” assets, “cloaked” assets, and “deposited” assets.²⁵¹ First, the Author will discuss the looted and cloaked assets classes as they help to clarify the Holocaust Plaintiffs’ legal claims with respect to Swiss bank complicity in Nazi activity.

249. Simon Wiesenthal Center, *Lawsuit Information and Mandates* (visited Mar. 15, 1998) <www.wiesenthal.com/itm/mandates.html>.

The Simon Wiesenthal Center supports the involvement of American courts as a necessary measure to prevent Swiss banks from exploiting Swiss laws or delaying and blocking action on claims. *Id.*

250. See Holocaust Plaintiffs’ Post Hearing Reply.

251. See Friedman Compl. ¶¶ 1-2. Looted assets are further defined as property:

that was illegally taken from the ownership or control, of an individual, organization or entity, by means including but not limited to, theft, forced transfer and exploitation, during the period of 1933 through 1946 by any person, organization or entity acting on behalf of or in furtherance of the acts of, the Nazi regime, its officials of related entities, in connection with crimes against humanity, war crimes, crimes against peace, genocide, or any other violations of fundamental human rights.

Id. ¶ 9.

Cloaked assets are defined as:

any and all capital and/or assets owned by, controlled by or held for the benefit of, any German corporation doing business from 1933-46 and the identity of which was disguised in the bank of any neutral country, which capital or assets include the profits of entities which were engaged in the use of force or slave labor during this period.

Id. ¶ 10.

Deposited assets are defined as “any and all assets deposited in Swiss banks . . . by persons who were persecuted for religious, racial or political reasons by the Nazi regime.” *Id.* ¶ 12.

e. Links to the Past: Connecting the Holocaust Plaintiffs to Defendant Banks

As of March 1998, the federal court had not ruled on Defendants' motions to dismiss. It is therefore unclear whether the lawsuits will go forward and whether New York or Swiss law will govern the Holocaust Plaintiffs' claims. The Holocaust Plaintiffs allege that defendants have a nexus with New York. Several pages of the complaint contain allegations that, "[e]ither as a result of their concerns about the safety of looted assets in Switzerland and/or a mere desire to move these assets outside of Switzerland, Swiss banks transferred the looted assets into concealed accounts in the State of New York."²⁵² The Eizenstat Report has also noted that among "additional unresolved issues[,] . . . one which has arisen recently concerns the disposition of heirless assets in United States banks, and indeed, whether there may have been looted Nazi assets in United States banks—including the American affiliates of Swiss-owned banks."²⁵³ Furthermore, New York courts may conclude that, as an international financial center and the residence of many plaintiffs, the United States has a great interest in this dispute and thus New York law will govern.²⁵⁴

The Holocaust Plaintiffs have formulated novel theories of collective or joint liability because the they have had difficulties matching individual plaintiffs with banks. These theories stem from the notion of the Swiss banking industry's collective facilitation of cloaking, looting, and obstructing access to German assets and bank account records. In an attempt to bridge the gap, the Holocaust Plaintiffs espouse two arguments. First, they assert that defendants engaged in "a conspiracy . . . to, at a minimum, deny, block, and/or obstruct access to, or knowledge concerning, deposited and looted assets and profits derived from slave labor."²⁵⁵ Second, and more interesting, is the Holocaust

252. *Id.* ¶ 97. Plaintiffs cite Treasury Department documents concerning SBC and Swiss banks generally stating that they held securities and funds in New York without revealing the identity of the true owner in violation of an Executive Order. *See id.* ¶¶ 98-101.

253. EIZENSTAT REPORT, *supra* note 114, at xi.

254. Recently, the First Circuit Court of Appeals applied the Sherman Act to a Japanese corporation's price-fixing activities which took place entirely in Japan. *See U.S. v. Nippon Paper Industries Co.*, 109 F.3d 1 (1st Cir. 1997).

255. Plaintiffs' Memorandum in Opposition to Defendants' Motions to Dismiss for Lack of Standing, Failure to State Claims Upon Which Relief Can be Granted, Failure to Join Indispensable Parties, and Motion to Strike Punitive Damages at 5, Consolidated Holocaust Plaintiffs Cases CV-96-4849 (filed July 30, 1997) [hereinafter Holocaust Plaintiffs' Opp. Memo I].

Plaintiffs' other basis for joining the three defendants—alternative or “market share” liability. Alternative liability is based upon a notion of collective liability. Under New York law, plaintiffs must assert: (1) that problems unique to the case make it impracticable to prove which defendant caused the injury; (2) that all defendants engaged in tortious conduct; (3) that the problems of proof are related to the conduct itself; and (4) the absence of another effective remedy.²⁵⁶

The Holocaust Plaintiffs further contend that the level of specificity necessary with respect to their claims is reduced by virtue of alternative liability. In support of this, they cite *Hymowitz v. Eli Lilly*, in which a New York court held that “liability is based here in the overall risk produced and not on causation in a single case.”²⁵⁷ The Holocaust Plaintiffs argue that it is exceedingly difficult to determine which Swiss banks accepted cloaked or looted assets. Furthermore, the Holocaust Plaintiffs allege that the problems of proof are related directly to defendant banks' actions because they “negligently failed to maintain and/or purposefully concealed proofs which exist or may have existed and affirmatively obstructed access to such proofs.”²⁵⁸

Defendants have two main responses to the Holocaust Plaintiffs' theory of collective liability. First, they argue that alternative or collective liability merely eases plaintiffs' burden of proof. Defendant banks assert that the Holocaust Plaintiffs must still offer tangible evidence that each defendant was engaged in the alleged wrongdoing.²⁵⁹ Their main argument is that courts have only applied collective liability a “handful of times” and only in product liability actions.²⁶⁰ Furthermore, defendant banks note that, in order to seek disgorgement of assets due to unjust enrichment, plaintiffs must be able to trace assets directly that relate to their injuries and connect their claims to individual defendant banks. The Holocaust Plaintiffs' response is that, since Nazi assets were often commingled, there is no way to extricate the identification of individual property owners. Instead, they argue that “[t]here is no question . . . that the amount and value of the total property that was looted and disposed of by the banks

256. See *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1329 (E.D.N.Y. 1996).

257. 73 N.Y.2d 487, 512 (1989).

258. Holocaust Plaintiffs' Opp. Memo. I, at 10.

259. See Defendants' Reply Memorandum in Support of Defendants; Partial Motion to Dismiss Common-Law Claims for Failure to State a Claim, *In re Holocaust Assets Litigation* (CV-96-4849), at 15 [hereinafter Defendants' Common Law Reply]; see also Defendants' Memorandum of Law in Support of Defendants Partial Motion to Dismiss for Lack of Standing to Sue, *In re Holocaust Assets Litigation* (CV-96-4849), at 7-11 [hereinafter Defendants' Standing Reply].

260. Defendants state that most cases that have proceeded on grounds of collective liability are DES cases. See Defendants' Common Law Reply, at 15 n.45.

[] can be identified quantified and traced from its origins to the banks."²⁶¹

Collective liability is indeed a controversial theory.²⁶² Nonetheless, the Holocaust Plaintiffs' assertion of this theory in the context of a very historically situated case may provide new avenues for its use. The Holocaust Plaintiffs are using a collective action theory primarily because of the difficulty of matching plaintiffs with specific banks. According to the Holocaust Plaintiffs, the three defendant banks, UBS, CS, and SBC, represent between seventy-five and eighty percent of the market share.²⁶³ Consequently, these banks may retain the largest share of assets connected to the dispute. Defendant banks contest this figure. They state that the ICEP's current audit has shown that other banks including cantonal, regional, and private banks held two-thirds of Swiss banking system liabilities in 1939 and about sixty-one percent in 1946. Defendant banks argue that, since deposits are the typical source of bank liabilities, defendant banks held only between thirty-three percent and thirty-nine percent of the deposit-related liabilities during the period between 1939 and 1946.²⁶⁴

The most direct evidence of negligent or active concealment relates to the dormant accounts. Defendant banks have repeatedly found new dormant accounts when subject to renewed pressure. Consequently, one could argue that their own negligence or intentional disinterest has impeded the Holocaust Plaintiffs' access to necessary facts. The requirement, for example, that relatives of deceased account holders produce death certificates for persons killed in concentration camps might possibly be characterized as willful obstruction.

With the publication of the most recent list of dormant accounts, plaintiffs may at least be able to show that these three banks, UBS, SBC and CS, are connected to a significant portion

261. Holocaust Plaintiffs' Post Hearing Memorandum in Opposition to Defendants' Motions to Dismiss (CV-96-4849), at 12 [hereinafter Holocaust Plaintiffs' Post Hearing Memo.].

262. See, e.g., *Hymowitz*, 73 N.Y.S.2d at 520 (describing collective liability as a "radical departure from fundamental tenets of tort law.") (Mollen J., concurring and dissenting).

263. See Holocaust Plaintiffs' Post Hearing Memo., at 12. Holocaust Plaintiffs claim that "defendant banks, being the largest of the private banks, disposed of more than 75% of such loot." *Id.* at 12. This figure is derived on the basis of the size of the Defendant banks, not the number of banks which they subsequently acquired. Based on this approximation, plaintiffs claim that the Defendants held approximately 75% of private deposits during the period in question. Holocaust Plaintiffs' Post Hearing Reply, at 5.

264. *In re Holocaust Victims Assets Litigation*, Defendants' Post Hearing Replies to Plaintiffs' Submissions, at 12, No. CV-96-4989 (filed Nov. 10, 1997) (citing letter from ICEP Chairperson Paul Volcker to the court dated October 30, 1997).

of heirless or dormant accounts.²⁶⁵ Plaintiffs may need to further establish that this activity occurred at the other two banking institutions or at the defunct Swiss banks that they have acquired.

2. Cloak and Dagger

Cloaking refers to the hiding or masking of property that belongs to another—in essence concealing the identity of the true beneficial owner. The Holocaust Plaintiffs assert in the Friedman and WCOJC complaints that defendant Swiss banks engaged in cloaking for many German companies who wished to shield and protect their assets during World War Two.²⁶⁶ Additionally, the Holocaust Plaintiffs state in the Friedman, WCOJC, Sonabend, and Trilling-Gotch complaints that defendant banks accepted deposits from German companies that used slave labor in their factories and workshops. Furthermore, the Holocaust Plaintiffs assert that the Swiss have never revealed the true identity of the owners of accounts or the amount of assets deposited as a result of slave labor.²⁶⁷

In general, the Holocaust Plaintiffs assert that the Swiss banks “knew that the Nazi regime, its representatives and agents were depositing capital in disguised accounts in Switzerland, a portion of which was composed of profits of slave labor.”²⁶⁸ Furthermore, the same banks supposedly “knowingly hid, cloaked, liquidated and laundered such funds and items, falsified records pertaining to such funds and items and illegally channeled such funds and items to third parties on behalf of the Nazi regime.”²⁶⁹

The factual allegations in the complaint are numerous. This section will focus on a few examples as illustrative of plaintiffs’ claims.²⁷⁰ According to the Holocaust Plaintiffs, in 1945, the U.S. Foreign Economic Administration cited that SBC, CS, UBS, and several other banks engaged in cloaking German assets.²⁷¹ SBC,

265. See *Swiss Banks Commence Global Claims Process to Identify Owners of Dormant World War II Era Accounts*, *supra* note 206, at A12.

266. See, e.g., Friedman Compl. ¶¶ 156-99.

267. See *id.* ¶¶ 122-42.

268. *Id.* ¶ 211.

269. *Id.* ¶ 212.

270. The Friedman Complaint contains background information on various German companies that used slave labor. See *id.* ¶¶ 122-42.

271. *Id.* ¶ 138 (citing Foreign Economic Administration document based on intercepts by Otto Flesicher on *Safe Haven and Other Financial Warfare Objectives in Switzerland* (Jan. 27, 1945)). Plaintiffs further allege: “It was also noted that there were instances of misconduct of Swiss firms in the United States concerning cloaking by Swiss insurance and pharmaceutical companies and agencies of

in particular, is alleged to have cloaked assets for German companies. The Holocaust Plaintiffs cite a report prepared during World War Two by the U.S. Treasury Department which states: "[SBC] of Basel, with assets of approximately \$385,000,000, is the largest joint stock bank in Switzerland. Its directors and managers have for many years maintained intimate connections with German industry. Of the 24 officers of the [SBC], at least 15 are known to have such affiliation at present . . . [sic] is among those listed as having accepted located gold."²⁷² The report continues:

it should be borne in mind that the business affiliations and political sympathies of these individuals (the Board of Directors) are of the utmost importance. . . . [SBC] has consistently maintained an impenetrable secrecy with respect to the deposits of alien nationals and corporations. The quality of its management is therefore a vital clue to its policy. Affiliations should indicate the attitude of the Bank toward acceptance of German property and the sheltering of German subsidiaries. . . . The integrity of bank officials has been the sole guarantee of any dubious transaction.²⁷³

The Holocaust Plaintiffs provide further evidence that specific German industrialists, who were convicted at Nuremberg, deposited their profits in Swiss banks. Alfried Krupp, notorious businessman who produced armaments for Hitler, was convicted at Nuremberg and sentenced to twelve years imprisonment and the forfeiture of his property.²⁷⁴ Krupp supposedly amassed his fortune through the use of slave labor and deposited these funds in Swiss bank accounts.²⁷⁵ In 1959, Krupp agreed to pay \$2.38 million in restitution to former Jewish slave laborers.²⁷⁶ This evidence establishes a rudimentary link between the Swiss banks and German industrialists who reaped the benefits of illegal slave labor.

Swiss banks." *Id.* ¶ 139 (citing undated document from the U.S. State Department's Swiss Accord Negotiation Book, 1946).

272. *Id.* ¶ 62 (citing U.S. Treasury Report *Summary: Swiss Bank Corp.*, Basel Switzerland, undated (p. 1 of summary)).

273. *Id.* ¶ 63 (citing U.S. Treasury Report at 3-4). The Friedman Complaint also claims that 15 of the 24 officers of SBC were known to have abetted the German strategy of avoiding confiscation of their property through fictitious sale to a Swiss holding company. *See id.* ¶ 64. The complaint also lists the name of several SBC directors who served on the board of German companies or their Swiss subsidiaries. *See id.* ¶ 65.

274. *United States v. Alfried Krupp*, IX TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL at 1327 (1949). His property was restored to him, however, after two years. *Id.*

275. *Friedman Compl.* ¶ 54.

276. *See id.* ¶ 132 (citing BENJAMIN FERENEZ, LESS THAN SLAVES 100, 210 (1979)).

The Holocaust Plaintiffs seek an accounting of all accounts that have contained, between 1933 and the present, the cloaked assets of the Nazi regime, and also details of which may contain profits derived from slave labor. The Holocaust Plaintiffs also seek a constructive trust and disgorgement of those same funds if the bank is still in possession of them.²⁷⁷

Furthermore, the Holocaust Plaintiffs assert that the Swiss have never fully accounted for stolen or looted property that was channeled into Swiss banks by the Nazis. In 1945, the United States reported that:

The Swiss indicated that they propose to leave the matter [of looted property] entirely to a case by case juridical determination and the Swiss stolen property procedure is singularly inappropriate. This, in effect, means that the Swiss have taken no measures whatsoever to fulfill the pledge given by them on March 8 [date of the Washington Accord] to enact such legislation as necessary to assure the return of this property to the legitimate owners.²⁷⁸

Further accounts mentioned that Germany purchased gold from Switzerland during the 1930s in exchange for assets that had been forcibly taken from German citizens.²⁷⁹ The Holocaust Plaintiffs, therefore, seek an accounting of all looted assets that were deposited in, liquidated by, or laundered through Swiss banks from 1933 to 1945 and also a constructive trust and disgorgement of any looted assets still retained by plaintiffs.²⁸⁰

In addition to claims arising from Swiss banks' receipt of looted or cloaked assets, the third class of plaintiffs are Holocaust survivors and descendants of Holocaust survivors, who deposited their money in Switzerland from 1933 to 1945 and who were subject to "racial, religious or political persecution by the Nazi regime."²⁸¹ Moreover, the Holocaust Plaintiffs seek an accounting of all existing dormant accounts that were opened between 1933 and 1946.

3. Reclaiming the Past

Are any looted and cloaked assets still in Swiss vaults? This is perhaps the most difficult question to answer and presents a large obstacle for the Holocaust Plaintiffs. As the Holocaust

277. Friedman Compl., Prayer for Relief, ¶ F.

278. *Id.* ¶ 161.

279. SIDNEY ZABLUDOFF, INST. OF WORLD JEWISH CONGRESS, MOVEMENTS OF NAZI GOLD: UNCOVERING THE TRIAL 12 (1997) (Policy Study No. 10). Zabludoff is a retired CIA and White House Economist. For a summary of the report, see <<http://www.wjc.org.il/polstudy10.htm>> (visited Apr. 5, 1998) (World Jewish Congress website).

280. Friedman Compl. ¶ 105.

281. *Id.* ¶144.

Plaintiffs explain, “[s]ince the Swiss banks have never disclosed which accounts reflected cloaked assets, nor accounted for what portion of those cloaked assets are directly attributable to the use of slave labor, there are no presently available, accurate estimates of the amount of cloaked assets.”²⁸² Swiss bank secrecy may have created a knowledge barrier with respect to the very factual questions that plaintiffs need to prove.

Nonetheless, there are indications that the Swiss government and Swiss banks retained German assets after the war. In February 1945, French, British, and American negotiators were dispatched to Switzerland in an attempt to negotiate with the Swiss about ceasing activities with the Germans. The head of the delegation was Lauchlin Currie, Assistant to the U.S. President and former FEA Deputy Administrator.²⁸³ The Swiss, in reaction to the proposed visit, passed two decrees. The Swiss agreed to block the assets of Axis powers and satellite governments and to facilitate the return of looted property to its true owners. The Swiss decrees also made the cloaking of German assets illegal and required banks to investigate ownership of numbered accounts and to turn such information over to the Swiss government.²⁸⁴

There was some question at first as to whether the Swiss would comply with their own decrees.²⁸⁵ While the Swiss government had prohibited the cloaking of German assets in March 1945, the government was not empowered to violate bank

282. *Id.* ¶ 57.

283. See EIZENSTAT REPORT, *supra* note 114, at 31.

284. *Id.* at 32-33.

285. Ambassador Currie noted in a letter to Secretary of Treasury Morgenthau:

The action taken by the Swiss to date represents a formal gesture to satisfy the U.S. which by itself has some value. However, it carries no guarantee that German assets in Switzerland will in fact be frozen.

Germans in Switzerland are permitted by the decree to freely dispose of their assets for “normal” professional and personal transactions, and no authorization is required, among other things for “normal administration” of German assets. . . . Unless the Swiss are strict in their interpretation of “normal” and vigorous in their investigation of ostensibly innocent professional, personal and commercial transactions, agents in Switzerland will be able to freely use German assets to further Nazi underground activities.

The decree delegated to the appropriate Swiss officials authority to request information from banking institutions, with respect to the ownership of accounts within Switzerland. Much will depend here again, on how vigorously this authority is exercised to remove German assets from the Swiss protective law.

Letter from Ambassador Currie, to Secretary Morgenthau, Feb. 21, 1945, *cited in* Friedman Compl. ¶ 166.

secrecy laws.²⁸⁶ Thus, the Swiss government could not compel the release of customer information from Swiss banks. Consequently, the decree was a self-enforcing law that relied on the candor and cooperation of the banking industry.

Before Germany surrendered in 1945, the Senate Subcommittee on Military Affairs, chaired by Senator Harley Kilgore of Tennessee, launched an investigation concerning the role of Swiss banks and bank secrecy laws in cloaking the financial activities of the Third Reich. Senator Kilgore testified that the Swiss were able to violate their agreement with the Allies "by the willingness of the Swiss government and banking officials . . . to make a secret deal with the Nazis."²⁸⁷

As stated above, the Swiss initially wanted to use blocked German assets to satisfy their reparation claims against Germany. The United States and the Allied Powers took a contrary view—that this action would violate Switzerland's neutrality. As part of the Washington Accord, the Swiss agreed to turn over fifty percent of German assets (after liquidation) to the Allied Reparation Agency. This agreement was never fulfilled.²⁸⁸

286. The bank secrecy laws even prevented the Swiss government from ascertaining the identity of German depositors during World War Two.

The Swiss Government issued an interim report concerning the blocking of assets. In reaction to the report, a U.S. Treasury representative, James Mann commented:

[T]he Swiss have furnished the [American] Legation with an interim report on the progress being made under the blocking and census decrees which is a joke (and which to me clearly proves, if any proof is needed, that the Swiss have no intention of really doing anything in connection with the discovery and immobilization of German assets except to stall as long as they possibly can).

Letter from James Mann, U.S. Treasury representative, to Harry White, Assistant Secretary of the Treasury (Oct. 10, 1945), *cited in* Friedman Compl. ¶ 184.

287. CHARLES HIGHAM, *TRADING WITH THE ENEMY: AN EXPOSÉ OF THE NAZI AMERICAN MONEY PLOT 1933-1949*, at 218 (1983) (citing a statement by Senator Kilgore).

288. The Eizenstat Report notes:

[T]he other part of the Accord, the liquidation of hundreds of millions of dollars in German assets, was neither promptly nor ever fully implemented

[O]ver a six-year period before the final 1952 settlement, the Swiss government had made only a token 20 million Swiss franc advance (\$4.7 million then or \$31 million today) for resettlement of stateless victims. Finally, in 1952, after a lengthy and frustrating effort, Switzerland and the Allies agreed to a total payment of \$28 million—far less than the agreed 50 percent of the value of German assets in their country. The amount of German assets in Switzerland after the War ranged between press accounts of \$750 million, U.S. and Allied estimates of \$250 - \$500 million, and Swiss estimates of around \$250 million.

It was, however, renegotiated. The Swiss, therefore, have technically fulfilled their legal obligations under their treaties with the Allies with respect to any German assets retained at the end of World War Two.

4. Maneuvers: Bankers as Joint Venturers under the Alien Tort Claims Act

a. Background: The Alien Tort Claims Act

Swiss bank secrecy can form a general impediment to parties' bringing law suits. It is difficult for the Holocaust Plaintiffs to plead with particularity, when Swiss law prevents plaintiffs from obtaining factual information needed to support such pleadings. At present, the legal claims of the dormant holders seem much stronger than the claims of the slave labor and looted assets plaintiffs.

This Article focuses on the Holocaust Plaintiffs' international law claims, as they are perhaps the most contentious and far-reaching in terms of extending notions of human rights to banks and commercial actors. As stated previously, the other major branch of the litigation involves common and civil law claims pertaining to dormant accounts.

The Holocaust Plaintiffs are bringing their human rights claims under the ATCA, as well as under international law generally.²⁸⁹ The ATCA has become a powerful tool whereby plaintiffs who have suffered human rights violations can seek redress within a U.S. federal court.²⁹⁰ Originating in 1789, the

EIZENSTAT REPORT, *supra* note 114, at vii.

289. ATCA, 28 U.S.C. § 1350, gives a non-U.S. citizen the right to seek redress in U.S. courts for certain violations of international law. A separate issue remains as to whether U.S. citizens can bring claims for the same violations pursuant to 28 U.S.C. § 1331 as a federal question. This issue hinges, to some extent, on whether a legal dispute arising under international law has the status under federal common law to create a right of action under § 1331. Previous courts, such as the Second Circuit in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), have evaded the issue because the plaintiffs were aliens and thus could invoke § 1350 jurisdiction. In this case, many of the Holocaust Plaintiffs are naturalized U.S. citizens. The Author does not address the issue of § 1331 jurisdiction here, but instead focuses on the threshold question that must first be answered before proceeding to a § 1331 analysis—Do any of the Swiss banks' alleged activities rise to the level of violating customary international law?

290. The statute reads:

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

ATCA permits an alien to sue in federal court for a "tort" committed "in violation of the law of nations."²⁹¹ The violation of international law must amount to a violation of "well-established universally recognized norms of international law."²⁹² The ATCA has its origin in Section Nine of the Judiciary Act of 1789.²⁹³ At that time, Congress appeared to believe that it was part of the new American Republic's duty as a member of the community of nations to provide remedies in federal court for aliens who had been victimized by violations of international law.²⁹⁴ Furthermore, civil forfeiture had long applied to individuals who violate international law.²⁹⁵

28 U.S.C. § 1350 (1993) (enacted 1948).

291. The term "law of nations," used at the time the ATCA was enacted, has been replaced by the term "international law". RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 1 (1986) [hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW]. The ATCA confers jurisdiction when (1) an alien sues (2) for a tort (3) committed in violation of the law of nations. *Kadic*, 70 F.3d at 237 (citing *Filartiga*, 630 F.2d 876, 887). There is some debate about whether a plaintiff must allege a violation of a common law or municipal tort that also constitutes a violation of the law of nations, or if some actions meld together to create a category of "international torts". In *Forti v. Suarez-Mason*, for example, the court stated that "[t]he Court thus interprets 28 U.S.C. § 1350 to provide not merely jurisdiction but a cause of action, with the federal cause of action arising by recognition of certain 'international torts' through the vehicle of § 1350. 672 F. Supp. 1531, 1540 (N.D. Cal. 1987). One commentator has criticized the U.S. Court of Appeals discussion of the ATCA elements in *Filartiga*, which blended together the tort and international law requirements to create an "international tort." Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute*, 18 N.Y.U. J. INT'L L. & POL. 1, 32 (1985). Randall notes that, "[u]nder the first element of the Alien Tort Statute, plaintiff can allege any municipal tort, so long as plaintiff also alleges a violation of the law of nations or a treaty." *Id.* at 35. Randall labels this the minority view. By contrast, the majority view, as expressed in *Filartiga*, requires a violation of the law of nations as the basis for § 1350 jurisdiction. *Filartiga*, 630 F.2d at 887.

292. *Filartiga*, 630 F.2d at 888.

293. For a discussion of the historical origins of the ATCA, see William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 488-510 (1986); see also William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP L. REV. 221, 225-37 (1996).

294. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 475-80 (1989).

295. See Beth Stephens, *Conceptualizing Violence*, *supra* note 42, at 587. Stephens notes that "the law of prize, for example, not only details the rules governing the legality of enemy and neutral ships, but also provides for compensation for damage to individuals or property during the capture." *Id.* at n.43 (citing Dodge, *supra* note 293, at 243-44, 246). Stephens also states, "In general, jurisdiction on the basis of universal interests has been exercised in the criminal law, but international law does not produce the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy." *Id.* at 587.

Some courts now accept as a well-settled principle that the law of nations is part of U.S. federal common law.²⁹⁶ The ATCA remained in a state of near dormancy until the 1980s. At that time, there seemed to emerge in the United States a growing interest in protecting human rights, and human rights plaintiffs' actions revived the statute.²⁹⁷ This trend began with the landmark case *Filartiga v. Pena-Irala*.²⁹⁸ Dr. Joel Filartiga and his daughter Dolly, Paraguayan nationals who resided in the United States, sued the alleged torturer of Dr. Filartiga's son in a U.S. court.²⁹⁹ The court considered on appeal whether the ATCA provided a basis for jurisdiction of the case. The court held that the ATCA did authorize a claim for violations of accepted norms of international law and stated that "deliberate torture perpetuated under color of official authority violates universally accepted forms of the international law of human rights."³⁰⁰ Thus, the transformation of international law and the ATCA occurred in 1980 in *Filartiga*.³⁰¹

The ATCA, however, is not without its critics. The most common criticism questions the legitimacy of U.S. courts' redressing foreign human rights violations when personal jurisdiction over the defendant is based solely on the subsequent presence of the defendant within the United States.³⁰² Furthermore, there continues to be debate over what constitutes "the law of nations" and whether federal courts are competent to determine the scope of such law and of international law generally.³⁰³

Other critics of the ATCA question the validity of using a 1789 statute as the basis for adjudicating international human rights cases in U.S. courts. In 1985, the D.C. Circuit, for example, dismissed claims brought by survivors of victims

296. *In re Estate of Ferdinand Marcos Litigation*, 978 F.2d 493, 502 (9th Cir. 1992) [hereinafter Estate I] (citing *The Paquete Habana*, 175 U.S. 677 (1900) and *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820)).

297. *See, e.g., Filartiga*, 630 F.2d 876; *In re Estate of Ferdinand Marcos*, 25 F.3d 1467, 1474 (9th Cir. 1994) [hereinafter Estate II].

298. 630 F.2d 876 (2d Cir. 1980).

299. For a detailed analysis of the manner in which *Filartiga* changed the manner in which U.S. courts approaches human rights violations occurring abroad, see Jeffery M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53 (1981).

300. *Filartiga*, 630 F.2d at 878.

301. *Id.*; see Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. CAL. L. REV. 833, 885 (1990) (stating that *Filartiga* exemplifies the post-Nuremberg transformation of international law).

302. *See Steinhardt, supra* note 11, at 70-72 (discussing criticisms of subject matter jurisdiction under the ATCA).

303. *See Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 823-27 (D.C. Cir. 1984) (Robb, J., concurring).

murdered in a Palestinian Liberation Organization attack on a civilian bus in Israel. *Tel-Oren v. Libyan Arab Republic* is cited as a case that questions the validity of a broad interpretation of Section 1350.³⁰⁴ The three judges, Judge Edwards, Judge Bork, and Senior Judge Robb, each authored concurrences providing different reasons for their dismissal of the claims. Judge Edwards expressed concern over the use of international law to determine standards of liability under the ATCA. He dismissed the claims because the PLO was not a state actor and thus could not be held accountable under international law.³⁰⁵ Judge Bork's opinion rejects the premise of *Filartiga* outright and states that the ATCA gave plaintiffs no right to sue.³⁰⁶ He also criticizes expansive ATCA jurisdiction as violating separation of powers. Judge Robb dismissed plaintiffs' claims as nonjusticiable. For some commentators, it seems misplaced to use civil tort-based litigation for a gross violation of international human rights.³⁰⁷ Nonetheless, international law has never prohibited a state's decision to provide a civil tort remedy for conduct that is classified as an international crime.

As stated above, the Holocaust Plaintiffs must allege that defendant banks committed a tort, which is also a violation of the law of nations. In the Friedman complaint, where the Holocaust Plaintiffs merged their international law and common law claims, plaintiffs alleged that defendant banks were liable for negligence, breach of a special duty, and conversion. Of these torts, conversion is the most directly linked to the plaintiffs' international claims, which involve the use and concealment of assets plundered by Nazis from Holocaust victims.³⁰⁸

In the Friedman complaint, the Holocaust Plaintiffs state: "Defendants Swiss banks received property belonging to plaintiffs from the Nazi Regime as a result of the illegal activities of the Nazi Regime . . . including the looting of assets and the use of slave labor."³⁰⁹ The banks' acts, they allege, constitute conversion because they "amount to an unauthorized assumption and exercise of the right of ownership over the goods belonging to

304. *Id.*

305. *Id.* at 775-98 (Edwards, J., concurring).

306. *Id.* at 798-823 (Bork, J., concurring).

307. See, e.g., Farooq Hassan, *Panacea or Mirage? Domestic Enforcement of International Human Rights Law: Recent Cases*, 4 HOUS. J. INT'L L. 13, 31-33 (1981).

308. In essence, conversion relates more directly to the allegations concerning looted and plundered property. Interestingly, the tort of conversion was used as a legal claim in the Republic of Haiti's suit against Jean-Claude Duvalier in a civil suit to recover \$5.5 million deposited by Duvalier in a New York City bank account. See *Torts: Haiti Established Case of Conversion*, N.Y. L.J., May 12, 1995, at 25.

309. Friedman Compl. ¶ 238.

others” and defendants “intended to deal[] with the subject property in a way which is inconsistent with plaintiffs’ rights.”³¹⁰ Conversion is defined under the Restatement of Torts (Second) as “an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may be justly required to pay the other the full value of the chattel.”³¹¹

The Holocaust Plaintiffs claim that the Swiss banks have violated international law because they:

*knowingly aided and abetted the Nazi regime by providing them with the financing necessary to continue World War II for at least a year longer than it otherwise might have lasted; that the banks knowingly engaged in transactions with the Nazi regime that furthered criminal activities; that the banks knowingly accepted and disposed of assets they knew, or should have known, were the result of looting, plunder and slave labor engaged in by or on behalf of the Nazi regime; and that the banks knowingly took advantage of the chaos during and after the war to unjustly enrich themselves at the expense of the very victims to whom they held out their institutions as safe havens. These claims sufficiently state a violation of international law principles against knowingly aiding, abetting and assisting genocide, slave labor, discriminatory treatment based on race and the plundering of public and private property.*³¹²

The Holocaust Plaintiffs allege that the Swiss banks’ cloaking and looting violated “numerous international treaties, customary international laws, and fundamental human rights laws prohibiting genocide, war crimes, crimes against humanity, crimes against peace, slavery, slave and forced labor and slave trade. . . .”³¹³ The Holocaust Plaintiffs state that defendant banks violated the law of nations:

310. *Id.* ¶¶ 240-41.

311. 18 AM. JUR. 2d *Conversion* § 1 (1996) (citing RESTATEMENT (SECOND) OF TORTS § 222A).

312. Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motions to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim under International Law, at 49 (No. CV-96-4849) (emphasis added) [hereinafter Holocaust Plaintiffs’ Int’l Law Reply].

313. Friedman Compl. ¶ 215. Plaintiffs cite the following treaties and conventions:

The Genocide Convention; the United Nations Charter; the Universal Declaration of Human Rights; the Geneva Convention of 1929; the supplemental Geneva Convention on the Treatment of Non-Combatants During War Time; the Nuremberg Principles; the Slavery Convention of 1926; the Supplementary Convention on the Abolition of Slavery; the Slave Trade, and Institutions and Practices Similar to Slavery; the International Labor Conventions and Recommendations; the Covenant on Economic, Social and Political Rights; and the Hague Convention of 1907.

In essence, the alien plaintiffs charge defendants with Holocaust victims remaining in Switzerland; participating in, aiding and abetting and complicity in, the Nazi Regime's illegal war of aggression; committing crimes against humanity; and looting civilian assets, as well as independent post-war looting of assets of Holocaust victims remaining in Switzerland.³¹⁴

In the amended Sonabend Complaint, the Holocaust Plaintiffs further allege that the defendant banks "knowingly assumed" the role of "fence" for assets looted by the Nazi regime and laundered these funds and assets for large profits.³¹⁵ Specifically, defendant banks allegedly "were paid substantial commissions by the Nazis for knowingly laundering and depositing vast quantities of assets looted from targets of Nazi persecution with full knowledge that the assets had been acquired in violation of customary international law."³¹⁶

The Holocaust Plaintiffs state that this creates a cause of action because the defendant banks, when "trafficking in and hiding the assets looted from targets of Nazi persecution with knowledge that the assets had been obtained pursuant to systematic persecution and murder . . . [,] violated . . . customary international law."³¹⁷ Additionally, the Holocaust Plaintiffs claim that defendant banks "by trafficking in goods produced by Nazi slave labor and exchanging and/or hiding the profits of slave labor with knowledge that the goods and profits had been

Id. ¶ 215.

314. Plaintiffs assert that the following constitute compensable tortious conduct:

Count I: Knowingly facilitating the conversion and disposal of assets looted by the Nazi regime from Jews and other target racial or political groups into hard currency and knowingly facilitating transactions involving profits derived from Nazi-Regime related parties from slave labor.

Counts II, III and VII: Converting assets deposited with defendants for safekeeping by victims of Nazi persecution and obstructing the return of such assets to their rightful owners.

Counts X: Conspiracy to convert deposited and looted assets and to obstruct claims of rightful owners.

Counts XI and XII: Fraudulent Misrepresentations regarding the status of deposited, looted and cloaked assets in order to induce class members to abandon their potential claims.

Holocaust Plaintiffs' Int'l Law Reply, *supra* note 208, at 23.

315. Sonabend Am. Compl. ¶¶ 36-37.

316. Holocaust Plaintiffs' Post Hearing Memo. at 7-8 (citing to amended complaints). The Holocaust Plaintiffs also allege: "The defendant banks and their predecessor entities, having knowingly laundered the looted assets of targets of persecution, then knowingly provided Nazi Germany with foreign currency in return for goods produced by Jewish slave labor and knowingly accepted the profits of slave labor as deposits to the accounts of the companies exploiting such labor." *Id.* at 8.

317. *Id.* ¶ 43.

produced under conditions that constituted violations of international law, violated . . . customary international law.”³¹⁸

The Holocaust Plaintiffs’ claims have evoked criticism—specifically as to the characterization of bankers as collaborators. Walter J. Rockler, an American prosecutor at Nuremburg, was responsible for prosecuting the two German bankers, Karl Rasche and Emil Puhl, who were tried before the tribunal. Rockler states:

The charge that Swiss banks accepted moneys looted by the Nazis is probably true. So did French banks, Italian banks, Swedish banks, and so would any other banks, including American and British banks, were these countries not at war with the Nazis. A substantial aspect of the business of banking for profit is acceptance of deposits without regard to the history of the money being deposited. Swiss bankers are not unusual in this practice. . . .

[I]n the matter of the claims or survivors to deposits of the murdered persons in Swiss banks, the Swiss bankers seem to have behaved badly, but like bankers. They would not part with the money except upon strict proofs—proofs that of course were not available anywhere. As to many of these accounts, there were and are no claimants and that undoubtedly has pleased the bankers. . . . [H]ave they been insensitive and glad to profit? Of course. Why would anyone expect otherwise.³¹⁹

Rockler’s comments are insightful and emphasize the problem of line drawing with respect to the activities of a commercial bank. It remains debatable, however, whether knowingly participating in the finance of war crimes or accepting looted assets of Holocaust victims might constitute a violation of international law.

b. Don’t Look Back

Plaintiffs’ ATCA claims focus primarily on the argument that defendant banks’ actions are violations of customary international law.³²⁰ Defendant banks’ primary objection to plaintiffs’ ATCA

318. Sonabend Am. Compl. ¶ 44.

319. Walter J. Rockler, *Bankers Not Collaborators*, WASH. POST, July 22, 1997, at A15; see also Walter J. Rockler, *Les Suisse N’Ont Pas Agi Plus Mal Que Les Autres*, LE NOUVEAU QUOTIDIEN, July 24, 1997, reprinted at Switzerland Task Force on Holocaust Assets website <http://www.switzerland.taskforce.ch/doc/Rockler_f.htm> (stating that Swiss banks acted no differently than other banks with respect to accepting deposits from the Nazis and also discussing the neutrality of the Swiss).

320. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987). Plaintiffs also contend that customary international law is part of U.S. federal common law, citing *Kadic*, 70 F.3d at 246 (It is a “settled proposition that federal common law incorporates international law”); *Estate I*, 978 F.2d at 502 (“It is . . . well settled that the law of nations is part of federal common law.”). As such, plaintiffs assert their claims arise under the laws of the United States as well as

and international law claims is that the banks did not violate any norm of customary international law in place in the 1930s or 1940s. Thus, the main issues are: (1) what was the status of international law during World War Two and (2) did defendant banks' activities as bankers constitute violations of customary international law?

According to the doctrine of intertemporality, courts should apply the international law that was in force at the time the alleged violations occurred. This doctrine applies specifically to international criminal law rather than to civil lawsuits.³²¹ Nonetheless, as a matter of interpretation, a court that was hearing a case arising under the ATCA might look to the status of international law at the time the alleged tort occurred.³²² Thus, the plaintiffs in the Holocaust victims' litigation find themselves stepping back in time to examine customary international law before and during World War Two. This leads to an examination primarily of the Nuremberg Principles and the trials of war criminals before both the International Military Tribunals (IMT) and U.S. Military Tribunal (USMT).

under the ATCA. Furthermore, because of this doctrine, courts are obliged to enforce customary international law. Holocaust Plaintiffs' Int'l Law Reply, at 26-27.

As Professor Louis Henkin states:

International law is not merely binding on the U.S. internationally, but it is also incorporated into U.S. law. It is "self-executing" and is applied by courts in the U.S. without any need for it to be annexed or implemented by Congress, and the principles of that law are determined by judges for application in cases before them, customary international law has often been characterized as "federal common law" and has been lumped with authentic federal common law . . .

Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984).

321. Aff. of Holocaust Plaintiffs International Law Expert, Professor John M. Van Dyke, at 7, Consolidated Holocaust Plaintiffs cases (Master Doc. No. CV-96-4849) [hereinafter Van Dyke Aff.]; see also Article 11(2) of the Universal Declaration of Human Rights (stating "No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offence, under national or international law, at the time it was committed"). 3 U.N. GAOR, C.3 Annex, Agenda Item 58, at 535, U.N. Doc. A/777 (1948).

322. See, e.g., *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987). Pursuant to the ATCA, plaintiffs sued a former Argentine general on behalf of themselves and their relatives for his alleged acts of torture, murder, and prolonged arbitrary detention during Argentina's so-called "Dirty War" in the 1970s. The District Court noted in a footnote that, "in the opinion of the Court, the international law to be considered is that on which a consensus existed at the time of the alleged violations." *Id.* at 1540 n.5. It is unclear whether the court mentioned this in an effort to state that international law must be analyzed in a more modern context or whether it was limiting its analysis to norms in place between 1977 and 1984, the period during which plaintiffs alleged that the human rights violations had occurred.

In the summer of 1945, representatives from the United States, the United Kingdom, the Provisional Government of France, and the Soviet Union met in the United Kingdom to establish procedures for dealing with Nazi war criminals. The result of the conference was the Protocol for the Prosecution and Punishment of Major War Criminals of the European Axis, which included in an annex the Charter of the International Military Tribunal (Nuremberg Charter).³²³ Together, the Protocol and the Nuremberg Charter are referred to as the Charter of London or the London Agreement. The Nuremberg Charter set forth four counts under which accused war criminals would be indicted: (1) crimes against the peace, (2) war crimes, (3) crimes against humanity, and (4) common plan or conspiracy.³²⁴ The subject matter jurisdiction of the IMT was drawn from the Hague Conventions of 1888 and 1907, the Geneva Conventions of 1925 and 1929,³²⁵ and the Kellogg-Briand Pact of 1928.³²⁶ It is unclear whether these conventions embodied customary international law at the time of the Nuremberg trials.³²⁷

323. Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57, 63 (1995) (citing Prosecution and Punishment of Major War Criminals of the European Axis, 59 Stat. 1544 (1945)).

324. Charter of the International Military Tribunal, Aug. 8, 1945, art. 14, 3 BEVANS 1239, 1241-42.

325. See Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacterial Methods for Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65 [hereinafter Geneva Protocol]; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 BEVANS 932 [hereinafter Geneva Convention].

326. Chaney, *supra* note 323, at 63.

327. Today, there is greater agreement that these conventions are evidence of customary international law. As Theodor Meron notes:

That "part of conventional international humanitarian law which has beyond doubt become part of customary international law," according to the Secretary General [of the United Nations], is the law of armed conflict embodied in the Geneva Conventions for the Protection of War Victims of Augusts 12, 1949, the Hague Convention (No. IV) Respecting the Laws and Customs of War on Land and annexed Regulations of October 18, 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948; and the Charter of the International Military Tribunal of August 8, 1945. The Geneva Conventions constitute the "core of the customary law applicable in international armed conflicts."

Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 79 (1994) (quoting Report of the Secretary General U.N. SC Res. 808, paras. 2, U.N. Doc S/25704 and Annex (1993), reprinted in 32 I.L.M. 1159, 1170 (paras. 35 & 37) (1993)). German legal scholars have raised concerns about the application by the Tribunal of ex post facto law. This line of reasoning states that the doctrine of *rebus sic stantibus* or the nullification of binding treaties due to circumstances applied to Germany during World War Two. Thus, the Hague Conventions of 1800 and 1907, and the Geneva Conventions of 1925

The law of human rights at the time of Nuremberg was not clearly defined according to some scholars and historians. After World War Two, articulated principles of international human rights became more readily apparent.³²⁸ In the aftermath of World War Two, a series of declarations were issued concerning international human rights.³²⁹ *Filartiga* advised courts construing the ATCA to apply the "law of nations" not as it existed at any particular time in the past, but "as it has evolved and exists among the nations of the world today."³³⁰ This is helpful to the Holocaust Plaintiffs only insofar as defendant banks' continuing actions after World War Two amount to violations of international law.

The Holocaust Plaintiffs' international law claims rest in many respects on the fate of two bankers who were tried at Nuremberg, Karl Rasche and Emil Puhl.³³¹ Both the Holocaust Plaintiffs and defendant banks have found themselves parsing historical texts and trying to impart significance to each line of various decisions.

The Holocaust Plaintiffs invoke the Nuremberg Principles as a chief source of customary law.³³² The Nuremberg Principles to which the Holocaust Plaintiffs refer are the principles drafted by

and 1929 would have ceased to bind Germany once it was at war with the other signatories to these. Chaney, *supra* note 323, at 71.

328. See Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 3, 4-5 (Hurst Hannum ed., 2d ed. 1992).

329. See, e.g., Universal Declaration of Human Rights, Dec. 8, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 49, at 135, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 165, U.N. Doc. A/6316 (1966).

330. See also *Amerada Hess Shipping Corp. v. Argentina Republic*, 830 F.2d 421, 425 (2d Cir. 1987) (stating that "[t]he evolving standards of international law govern who is within the [Alien Tort] statute's jurisdictional grant as clearly as they govern what conduct creates a jurisdiction") *rev'd on other grounds*, 109 S. Ct. 683 (1989).

331. For a personal account of the prosecutions of Rasche and Puhl, see Walter J. Rockler, *Prosecuting Bloodless War Crimes*, 18 LITIG. VOL. 2, 18-21, 59-60 (1992). Rockler prosecuted both Rasche and Puhl at Nuremberg.

332. For a discussion of the definition of customary international law, see, for example, *The Paquete Habana*; *The Lola*, 175 U.S. 677, 700 (1900) (courts must look to the "customs and usages of civilized nations, and as evidence of these, to the works of jurists and commentators"); *Filartiga*, 630 F.2d at 881 (relying on declarations and treaties as evidence of the existence of customary international law prohibiting torture). Customary international law is derived from numerous sources including international treaties, the customs and usages of civilized nations, individual nation court decisions, U.N. General Assembly Resolutions, international pronouncements that reflect the actual practice of states, international declarations, and the work of scholars and jurists well-acquainted with international law.

the International Law Commission that restated a formulation of the international legal principles, recognized in the Nuremberg Charter as well as in the judgments of the IMT that prosecuted Nazi war criminals. The Nuremberg Principles are widely considered to encapsulate principles of customary international law.³³³

Plaintiffs invoke Nuremberg Principles VI and VII. Nuremberg Principle VI states:

The crimes hereinafter set out are punishable as crimes under international law:

a. Crimes against peace:

(I) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances;

(II) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (I).

b. War crimes

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation of slave-labor, or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population or persecutions on political, racial or religious grounds, when such persecutions are carried on in execution of or in connection [sic] with any crime of peace of any war crime.

Nuremberg Principle VII states: "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."³³⁴

Based on Principles VI and VII, the Holocaust Plaintiffs assert that Swiss banks aided and abetted the commission of war crimes and crimes against humanity. The Holocaust Plaintiffs also urge that the Nuremberg Charter and Nuremberg Trials codified and applied the essential underlying principle that: "perpetrators and aiders and abettors would be held criminally responsible for their acts."³³⁵

333. See Fogelson, *supra* note 301, at 868. The Nuremberg Principles crystallized the preexisting international condemnation of persecution and enslavement of civilians on the basis of race or religious belief and indicated that certain fundamental rights may never be transgressed. *Id.*

334. *Report of the International Law Commission*, U.N. GAOR, 5th Sess., Vol. 6, Supp. No. 12, at 11-14, U.N. Doc. A/1316 (1950).

335. Holocaust Plaintiffs' Int'l Law Reply, at 31.

c. Lack of Personality: The Status of Banks under International Law

The Swiss banks are described as the "principal means of the liquidation, disposal and conversion of that wealth into currencies usable by Nazi Germany to purchase its necessary war materials and conduct its extermination of Jews."³³⁶ Thus, the Holocaust Plaintiffs characterize defendant banks' conduct as an essential and material part of the Nazi war machinery.³³⁷

One of the criticisms levied with respect to ATCA claims is that international law does not provide a basis for claims against private non-state actors. This argument is based upon the notion that private non-state actors do not have obligations under international law (as contrasted with states). Thus, some courts have dismissed ATCA cases where the defendants were non-state actors.³³⁸ The issue of private individuals becomes more pronounced in the Holocaust assets litigation because the defendant banks are corporate entities rather than individual actors. Furthermore, to the extent that defendant banks are allegedly guilty of collective or "group" activity, the use of the

336. *Id.*

337. At oral argument on Defendant Swiss Banks' Motion to Dismiss, Professor Burt Neuborne of the New York University School of Law, an expert for the plaintiffs, characterized plaintiffs' claims as follows:

What we have alleged and what we are prepared to prove is the banks knowingly acted as the receiver of looted property, knowing that the property had been obtained under circumstances that sink to the level of war crimes [Swiss banks] were the entity that permitted the final consummation of the plunder. The purpose of the plunder wasn't to take . . . the goods just to take the goods. The goods had to be converted into foreign currency so that they could be used to buy war material. If the banks knowing that this plunder had been taken under conditions that sink to the level of war crimes, collaborated with the criminals and essentially fenced the assets, yes, I think that the least that we can request is that they have to disgorge the profits that they earned from knowingly participating in the consummation of what were found to be war crimes.

Holocaust Assets Oral Argument, at 201.

338. See, e.g., *Sanchez Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985) (dismissing plaintiffs' claims of torture and rape against Nicaraguan contras because court was "aware of no treaty that purports to make the activities here at issue unlawful when conducted by private individuals. As for the law of nations—so called 'customary international law' . . . we conclude that this also does not reach private, non-state conduct of this sort"); *Tel-Oren*, 726 F.2d at 791 (Edwards, J, concurring), *cert. denied*, 470 U.S. 1003 (1985) (stating that Palestine Liberation Organization being a non-state actor and not recognized as member of community of nations had at most obscure violations of international law); *Forti*, 672 F. Supp. at 1541 ("Of course purely private torture will not normally implicate the law of nations, since there is currently no international consensus regarding torture practiced by non-state actors.").

Anglo-American legal theory of conspiracy at Nuremberg has been strongly criticized by scholars and commentators.³³⁹

Defendants argue that granting subject matter jurisdiction under the ATCA would create a slippery slope. Their expert on public international law, Professor John Norton Moore of the University of Virginia, asks: “[A]re Swedish steel interests to be liable in U.S. courts for the extensive transfer of iron ore from Swedish mines in Kiruna to the Germans during World War II, despite Sweden’s neutrality, also in a climate of coercion?”³⁴⁰ Moore further queries:

More broadly, if Plaintiffs’ Complaints are entertained in this case, what might the future liability of commercial banks or other businesses, doing business with, including accepting deposits from, the former Soviet Union, China, Japan, Germany, the former Yugoslavia, Vietnam, Cambodia, North Korea, Turkey or other Nations whose Governments have in the past contributed to massive “democide” in the Twentieth Century—not to mention the lesser human rights violators?

Given the overwhelming need for developing more effective international enforcement mechanisms against governments which engage in genocide or other human rights violations, are such more effective mechanisms more or less likely if the applicable underlying norms are broadened to include banking and other commercial transactions?³⁴¹

Perhaps the time has come to view certain types of banking activities—such as the use of bank secrecy to aid a war criminal—as a violation of international human rights. There must, of course, be a threshold. A difference exists between merely opening a bank account for a dictator or criminal and taking affirmative steps to aid him in shielding his assets. Furthermore, the issue of redress for human rights victims is directly linked to the existence of bank secrecy jurisdictions. Leaders such as Duvalier, Ceaucescu, and Marcos have all deposited funds in Switzerland. These leaders have also been identified as perpetrators or orchestrators of human rights violations that occurred under their leadership.

(i) The Non-State Actor under the ATCA

One of the major questions examined by courts in recent litigation under the ATCA is the extent to which private actors

339. See Chaney, *supra* note 323, at 70. Not surprisingly, German legal scholars have raised the broadest criticism. Other critics include English and American historians.

340. Affidavit of Professor John Norton Moore in support of Defendants Motions, ¶ 39, CV-96-4849 (submitted May 15, 1997) [hereinafter Moore Aff.].

341. *Id.*

may be held accountable for violations of international law.³⁴² A recent Second Circuit decision, *Kadic v. Karadžić*,³⁴³ establishes precedent for trying private individuals under the ATCA for certain violations of international law.³⁴⁴ In *Kadic*, plaintiffs Jane Doe I and Jane Doe II alleged specific incidents of human rights abuse by Bosnian-Serb forces. The class of plaintiffs included "all women and men who suffered rape, summary execution, other torture or other cruel inhuman or degrading treatment inflicted by Bosnian-Serb military forces under the command and control of defendant [Karadžić] between April 1992 and the present."³⁴⁵ The *Kadic* court noted that Karadžić was the President of "Srpska," the "self-proclaimed Bosnian-Serb Republic within Bosnia-Herzegovina."³⁴⁶ Reversing the district court, the Second Circuit stated that private non-state actors may be sued for violations of customary international law.³⁴⁷ Specifically, the court held that Karadžić "may be found liable for genocide, war crimes, and crimes against humanity in his private capacity."³⁴⁸ Furthermore, the court concluded that other "alleged atrocities" constituted valid ATCA claims either "to the extent they were

342. For discussion of how a private entity might be civilly liable for breach of customary law pursuant to an action "in delict," see D.J. Devine, *International Customary Law as a Possible Source of Actions in Delict*, 106 S. AFR. L.J., 309, 309-18 (1989). The term "delict" refers generally to a state's breach of a duty under international law owed to other states. Devine argues that if the rule of customary law appears to be one to be observed by individual actors and is reasonably capable of being observed by them then it would be reasonable to infer a duty to observe the rule "and a breach of it could then lead to a delictual remedy against them at the instance of aggrieved parties." *Id.* at 314-15.

343. 70 F.3d 232 (2d. Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996). This action was a consolidation of two class action lawsuits originally filed during the spring of 1993 in the U.S. District Court for the Southern District of New York. *Doe v. Karadžić* and *K. v. Karadžić*, respectively. Plaintiffs "Doe I" and "Doe II" did not use their real names at the time the action was filed. Plaintiff "K" initially used only that initial due to safety concerns. The initial "K" represents the name "Kadic" which was used on appeal.

344. For a general discussion of the claims raised in *Kadic*, see Michele Brandt, *Doe v. Karadžić: Redressing Non-State Actors of Gender Specific Abuse Under the Alien Tort Statute*, 79 MINN. L. REV. 1413, 1413-14 (1995) (citing Pl. Doe's Compl.).

345. Yolanda S. Wu, *Genocidal Rape in Bosnia: Redress in U.S. Courts Under the Alien Tort Claims Act*, 4 U.C.L.A. WOMEN'S L.J. 101, 107 (1993). Karadžić is alleged by plaintiffs to have controlled large amounts of territory within Bosnia-Herzegovina and to have had command authority over Sprska's military forces. *Id.* Plaintiffs asserted that Karadžić directed the groups under his command to engage in "a pattern of systematic human rights violations" either as President of Srpska or in collaboration with the government of the former Yugoslavia (*i.e.*, Serbia and Montenegro). *Id.*

346. *Kadic*, 70 F.3d at 237.

347. See *Doe v. Karadžić*, 866 F. Supp. 734, 735 (S.D.N.Y. 1994), *rev'd sub nom.*, *Kadic*, 70 F.3d 232, *cert. denied*, 116 S. Ct. 2524 (1996).

348. *Kadic*, 70 F.3d at 236.

committed in pursuit of genocide or war crimes"³⁴⁹ or "to the extent Karadžić is shown to be state actor."³⁵⁰

This holding accords with precedents established in the Nuremberg Trials, which "clearly established that private non-state actors can be held responsible for war crimes under international law."³⁵¹ In an amicus brief filed in the *Kadic* case, the International Human Rights Law Group and a group of prominent professors of international law and human rights stated:

The United States and its wartime allies indicted 43 German industrialists and financiers for committing war crimes and crimes against humanity before and during World War II. These private individuals were charged with such crimes as forced deportation of concentration camp inmates and prisoners of war to toil under inhuman conditions and enslavement and mistreatment of prisoners of war, deportees and concentration camp inmates. . . . The Nuremberg Tribunal resoundingly rejected the argument that private individuals acting in their private capacity could not be indicted for war crimes or crimes against humanity³⁵²

The *Kadic* court agreed with many of these arguments. First, the court recognized that private individuals might also be held accountable for violations of international law:

[W]e hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application

349. *Id.* at 244.

350. *Id.*

351. See Brief of Amici Curiae, the International Human Rights Law Group and Professors Deborah Anker, David Bederman, Richard Falk, Joan Fitzpatrick, Paul Kahn, Cynthia Lichtenstein, Richard Lillich, Oscar Shachter, Anne-Marie Slaughter, and Henry Steiner, at 9, *Doe v. Karadžić*, 866 F. Supp. 734 (S.D.N.Y. 1994) (No. Civ-93-0878) [hereinafter IHRLG Amicus].

352. *Id.* at 9-10 (citing *U.S. v. Flick*, VI TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS [hereinafter TRIALS OF WAR CRIMINALS] at 303 (indictment of steel magnate and five principal associates); *U.S. v. Krupp*, IX TRIALS OF WAR CRIMINALS, at 307 (indictment of private industrialist and eleven top aides); *U.S. v. Carl Krauch*, VII TRIALS OF WAR CRIMINALS, at 313 (indictment of 24 directors and officers of I.G. Farben-Industrie A.G.); *U.S. v. Weizaecker*, XII TRIALS OF WAR CRIMINALS, at 319, 331 (indictment of prominent ministers, including Karl Rasche, chairman of the Dresden Bank for his actions as a private banker)).

The Amici also note:

The precedent for charging private non-state individuals with war crimes extends at least as far back as World War I. After that War prominent Saar industrialists Hermann and Robert Roehling and several associates were convicted by a French military tribunal of violating the laws of war by plundering French property. The convictions were overturned on a technicality, and the defendants were never retried.

IHRLG Amicus, at 9 n.6.

of the law of nations to the acts of private individuals is the prohibition against piracy.³⁵³

The court further noted that “[t]he liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II.”³⁵⁴

The *Kadic* decision has paved the way for a greater recognition that non-state actors may be sued under the ATCA for war crimes and acts of genocide. Nonetheless, the debate still continues as to the historical purposes of the ATCA and whether its scope can be expanded to encompass private individuals.³⁵⁵ Even more controversial is the question of whether commercial entities may be held liable under international law and the ATCA.

(ii) Unocal: The Commercial Entity as Joint Venturer

As Professor Moore’s comments suggest, one rarely thinks of a corporation as an actor capable of human rights violations. Recent litigation, however, has established the viability of asserting ATCA claims against individuals and multinational enterprises. These actors are allegedly implicated in human rights violations through their role in foreign direct investment, which may encourage governments to institute forced labor, torture, and other human rights abuses. Jennie Green, a lawyer for the Center for Constitutional Rights, which handles ATCA cases, states: “[H]uman rights law doesn’t only apply to government and individuals. Multinational corporations also must be held accountable “when they violate such fundamental rights.”³⁵⁶

Defense attorneys object strenuously to corporate liability under ATCA. Corporations would be denied a fair trial, they argue, if they were held liable simply through membership or association with a government that may have a problematic human rights record.³⁵⁷ To date, no U.S. court has awarded damages against a multinational corporation for human rights

353. *Kadic*, 70 F.3d at 238. Other jurisdictions have adopted the Second Circuit’s approach with respect to private rights of action. See, e.g., *Clemente v. Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994); *Abebe-Jora v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996); *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993).

354. *Kadic*, 70 F.3d at 243.

355. See Charles F. Marshall, *Development in Immigration Law: Re-Framing the Alien Tort Act After Kadic v. Karadzic*, 21 N.C.J. INT’L L. & COM. REG. 591 (1996) (stating that a clear legislative pronouncement rather than use of the antiquated ATCA statute is necessary in order for U.S. courts to provide a forum for aliens to obtain relief for offenses such as war crimes and genocide).

356. Pratap Chatterjee, *Shell Faces Lawsuit for Nigerian Activities*, IPS, Nov. 8, 1996, available in LEXIS, News Library, CURNWS File.

357. See ROBERT E. CONOT, *JUSTICE AT NUREMBERG* 455-57 (1983).

violations. This era may, however, be about to end.³⁵⁸ Recently, a federal district court judge in California held that Burmese plaintiffs could sue Unocal, a California corporation, under the ATCA.³⁵⁹

The *Unocal* plaintiffs contend that Unocal's joint venture with Burmese government enterprises, involving construction of a gas pipeline, caused plaintiffs to suffer death of family members, assault, rape, torture, forced labor, and the loss of their homes and property in violation of federal and state law, as well as customary international law.³⁶⁰ Plaintiffs seek injunctive, declaratory, and compensatory relief including damages stemming from forced labor and the loss of property.³⁶¹ The President of Unocal, John Imle, and the Chief Executive Officer of Unocal, Roger C. Beach, are both named as defendants. Both of them are alleged to have:

participated in, directed and/or authorized the tortious conduct resulting from the unlawful conspiracy between Unocal, Total, [Myanmar Oil and Gas Enterprise] (MOGE) and [Burmese State

358. Other current litigation includes a lawsuit against Texaco for environmental pollution during oil exploration in Ecuador and another against Freeport McMoran for environmental and human rights abuses on the western half of the island of New Guinea. See Chatterjee, *supra* note 356.

359. The *Unocal* Plaintiffs' complaint alleged the following:

Plaintiffs are informed and believe, and on that basis, allege, that at all times herein material each of the defendants was the agent, employee and/or joint venturer, or working in concert with his/her co-defendants and was acting within the court and scope of such agency, employment and/or joint venture or concerted activity

See Plaintiffs' Compl. for Damages and Injunctive and Declaratory Relief, *Doe v. Unocal Corp.*, (C.D. Cal. 1996) (Civ. 96-6959) [hereinafter *Unocal* Compl.]. Plaintiffs' complaints sought relief for the following: Racketeering and Corrupt Organizations Act, Forced Labor, Crimes Against Humanity, Torture, Violence Against Women, Arbitrary Arrest and Detention, Cruel, Inhuman or Degrading Treatment, Wrongful Death, Battery, False Imprisonment, Assault, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Negligence Per Se, Conversion, Negligent Hiring, Negligent Supervision, Violation of Business and Professions Code Section 1720. See Yindee Lertcharoenchok, *U.S. Court to Hear Yadana Rights Abuses Claim*, EMERGING MARKETS DATAFILE, Apr. 23, 1997, available in LEXIS, News Library, CURNWS File.

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

361. With respect to injunctive relief, plaintiffs seek "an order directing defendants to cease payment to SLORC, and order directing defendants to cease their participation in the joint enterprise until the resulting human rights violations in the Tenassari region cease." *Id.* at 883; Karen Loew, *Lawsuit Targets Companies Benefiting from Alleged Abuse in Burma*, Agence France Presse, Oct. 3, 1996, available in LEXIS, News Library, AFP File.

Law and Order Restoration Council] (SLORC) alleged herein, or he specifically knew or reasonably should have known that some hazardous condition or activity under his control could injure plaintiffs and negligently failed to take or order appropriate action to avoid the harm. . . . [His actions] violated international, federal and state law and are outside the scope of his duties as an officer of the corporation.³⁶²

A second suit was filed against Unocal in September 1996 by the self-proclaimed government in exile and the Federation of Trade Unions of Burma.³⁶³ The second *Unocal* case is part of a grass-roots effort by supporters of opposition leader Nobel Laureate Aung San Suu Kyi, whose government was elected in 1992 but was prevented from taking office by military rulers who had seized control of the country several years before. Unocal recently moved to dismiss this action as well.³⁶⁴

In its motion to dismiss, Unocal argued it is not subject to the ATCA because it is not a state actor. The court concluded that "to the extent a state action requirement is incorporated into the ATCA, courts look to the standards developed under 42 U.S.C. § 1983,"³⁶⁵ a federal civil rights statute that regulates discriminatory conduct of state actors. The court cited *Kadic* for the proposition that "[a] private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid."³⁶⁶

One of the approaches that the U.S. Supreme Court has taken with respect to state action is the "joint action" approach.³⁶⁷ In *Unocal*, the court elaborated on the notion of

362. *Unocal* Compl., at ¶¶ 15-16.

363. *Unocal: Recent Court Ruling on Burma Not Significant*, Apr. 18, 1997, PLATT'S OILGRAM NEWS, at 6, available in LEXIS, News Library, CURNWS File.

364. *H-Rights suit Hits Unocal*, POWER IN ASIA, Sept. 16, 1996, available in LEXIS, News Library, PASHA File. Boston attorney John Bonifaz who represents plaintiffs is also representing a group of Amazon Indians and settlers in a class action suit against Texaco accusing the corporation of damaging the environment in the Amazon region. Bonifaz stated that Unocal, through its joint venture, is liable for human rights violations committed during the construction of the pipeline. He also stated that the corporation has violated the U.S. federal money laundering statute by working with a regime that has profited from forced labor. Eleven Irritant, *Dissidents of Myanmar File Rights Suit Against Unocal Energy; They accused the firm of Violations, Money Laundering Through the Pipeline Project*, L.A. TIMES, Sept. 4, 1996, at D2.

The same article quotes Robert Benson, a professor at Loyola Marymount University and a specialist in human rights and environmental law, as follows: "The case is not only about Unocal and Burma The bigger question is, is corporate capital going to be responsible for the human rights consequences in the countries where it is going to invest?" *Id.*

365. *Unocal*, 963 F. Supp. at 890 (citing *Kadic*, 70 F.3d at 245).

366. *Id.*

367. *Id.* (citing *George v. Pacific-CSC Work Furlough*, 91 F.3d 1227, 1230 (9th Cir. 1996), cert. denied, 513 U.S. 374 (1997)).

“joint action,” finding that “where there is a substantial degree of cooperative action between the state and private actors in effecting the deprivation of rights, state action is present.”³⁶⁸

The court also contended that “private actors might be liable for violations of international law even absent state action”³⁶⁹ asserting that “[the] recent decision . . . in *Kadic* provides a reasoned analysis of the scope of a private individual’s liability for violations of international law. . . . [P]articipation in the slave trade “violates the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”³⁷⁰ Consequently, the court concluded that a corporation could be held liable under the ATCA either under a theory of joint action or as an individual actor that engaged in slave trade or forced labor:

The allegations of forced labor in this case are sufficient to constitute an allegation of participation in slave trading. Although there is no allegation that SLORC is physically selling Burmese citizens to the private defendants, plaintiffs allege that, despite their knowledge of SLORC’s practice of forced labor, both in general and with respect to the pipeline project, the private defendants have paid and continue to pay SLORC to provide labor and security for the pipeline, essentially treating SLORC as an overseer, accepting the benefit of and approving the use of forced labor.

368. *Id.* at 891 (citing *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1142, 1453 (10th Cir. 1995)). The *Unocal* court also stated:

Under the joint action approach, private actors can be state actors if they are ‘willful participant[s] in joint action with the state or its agents.’ *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). An agreement between government and private party can create joint action. *See, e.g., Fonda v. Gray*, 707 F.2d 435, 437 (9th Cir. 1983) (“A private party may be considered to have acted under color of state law when it engages in a conspiracy or acts in concert with state agents to deprive one’s constitutional rights.”). 91 F.3d at 1231; *see also Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (where state “insinuates” itself into position of interdependence with private party, it is joint participant in challenged activity); *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113-14 (5th Cir. 1988) (assuming, without deciding, that ATCA confers jurisdiction over private parties who conspire in, or aid and abet, official acts of torture by one nation against the citizens of another nation); *Dennis*, 449 U.S. at 27 (“Private person, jointly engaged with state officials in the challenged action, are acting [] ‘under color’ of law for purposes of § 1983 actions”).

Id. at 890-91.

369. *Id.* at 891 (citing *Estate I*, 978 F.2d at 501 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring) (rejecting notion that purely private actors have responsibilities under international law)).

370. *Id.* at 892 (citing *Kadic*, 70 F.3d at 239).

These allegations are sufficient to establish subject-matter jurisdiction under the ATCA.³⁷¹

Unocal also argued that adjudicating the case would interfere with congressional and presidential efforts to pressure Burma to reform its human rights practices.³⁷² The court felt that its adjudication would not undermine the coordinate branches' efforts with respect to Burmese human rights violations. Furthermore, the court recognized that plaintiffs contend that "Unocal, rather than encouraging reform through investment, is knowingly taking advantage of and profiting from SLORC's practice of using forced labor and forced relocation, in concert with other human right violations . . . to further the interests of the Yadana gas pipeline project."³⁷³ Plaintiffs' contentions thus provide a basis for moving forward under a joint action theory.

Unocal claimed that it had nothing more than a business relationship with MOGE and SLORC, and that plaintiffs had failed to state a claim against Unocal. The court rejected this argument, writing:

First, plaintiffs allege that Unocal and its officials *knew or should have known about SLORC's practices of forced labor and relocation* when they agreed to invest in the Yadana gas pipeline project, and that, despite this knowledge, they agreed that SLORC would provide labor for the joint venture In addition, plaintiffs assert that Unocal and its officers "were aware of and benefited from . . . the use of forced labor to support the Yadana gas pipeline project." Plaintiffs also allege that Unocal knew that SLORC "committed human rights

371. *Id.* at 891. As a result of having subject-matter jurisdiction under the ATCA, the court also found jurisdiction over plaintiff's supplemental law claims. *Id.*

372. *Id.* Unocal states:

While vigorously attempting to encourage democratic reform and respect for human rights, Congress and the President have refrained from taking precipitous steps, such as prohibiting all American investment, that might serve only to isolate the Burmese government (i.e., SLORC) and actually hinder efforts toward reform. This careful approach is reflected in the that fact, after a spirited debate, Congress recently granted the President conditional authority to prohibit only "new investment" in Burma, and even then only if the President certifies that Burma is once again committing certain serious human rights abuses. . . . Against this backdrop, this lawsuit represents an unprecedented attempt to enmesh the federal courts in setting American foreign and economic policy toward Burma.

Id. at 895 (citing Unocal Memorandum of Points and Authorities in Support of Motion to Dismiss at 1).

373. *Id.* at 895 (citing Unocal Compl. ¶ 51).

abuses, including forced labor and forced relocation, in connection with the Yadana gas pipeline project."³⁷⁴

Consequently, the court concluded, "plaintiffs could conceivably prove facts to support their allegations and thereby demonstrate the very connection between Unocal and SLORC that Unocal denies, namely that Unocal and SLORC have either conspired or acted as joint participants to deprive plaintiffs of international human rights in order to further their financial interests"³⁷⁵

On October 29, 1997, a federal district court upheld the second suit filed against Unocal by the National Coalition Government of the Union of Burma and the Federation of Trade Unions.³⁷⁶ As in the previous *Unocal* case, the court applied to a joint venture theory of liability, noting that

the allegations of forced labor in this case may be sufficient to state a claim for participation in slave trading. Although plaintiffs do not allege that SLORC is physically selling Burmese citizens to the private defendants, plaintiffs allege that [] Unocal [] has knowingly accepted the benefit of and approved the use of forced labor in connection the [p]roject.³⁷⁷

Commentators suggest the court may have created a "conscious avoidance standard" whereby Unocal may be held liable even if it looked the other way while the Burmese/Myanmar government used slave labor on the pipeline project.³⁷⁸

Shell Oil faces a similar lawsuit in New York City for its alleged complicity in the hanging of nine Nigerian environmentalists. Two of the plaintiffs in the Shell suit are Owens Wiwa and Ken Wiwa, the brother and son of Ken Saro-Wiwa, the writer and environmental activist who was hanged on November 10, 1995, after a Nigerian military tribunal convicted him of assisting in the murder of four Nigerian elders. Environmental activists believe that Saro-Wiwa was executed because he led a grassroots environmental campaign to prevent devastation of the Ogoni region through oil exploration.³⁷⁹ Part of the Shell lawsuit rests on the notion of "joint action" with respect to human rights violations by the Nigerian government—specifically that Shell quietly assisted the Nigerian police.³⁸⁰

374. *Id.* at 896 (citing *Unocal Compl.* ¶ 52) (emphasis added).

375. *Id.*

376. *National Coalition Government of the Union of Burma v. Unocal*, CV 96-6112, 1997 U.S. Dist. LEXIS 0975.

377. *Id.*

378. Gregory J. Wallace, *Linked to Slavery*, LEGAL TIMES, Dec. 1, 1997, at 24.

379. See Chatterjee, *supra* note 356.

380. As one journalist notes:

[I]n recent months, evidence that Shell was quietly helping the Nigerian police has come to light. Official company documents obtained by the IPS

Explaining the suit, Judith Chomsky, a lawyer for the plaintiffs, states: "Companies that profit from crimes against humanity should not get to do business as usual in the United States."³⁸¹

(iii) Are Swiss Banks Joint Venturers?

At first glance, the *Unocal* decision seems to bode well for the Holocaust Plaintiffs. The claims asserted by the Holocaust victim plaintiffs are strikingly similar to those in *Unocal*. The Holocaust Plaintiffs assert that the Swiss banks knowingly aided the Third Reich in using slave labor and assisting them in disguising their ill-gotten gains. The *Unocal* court seemed to apply a standard of constructive knowledge to defendants. This also helps the Friedman plaintiffs, as their pleadings assert that the Swiss banks either knew or should have known that the assets and deposits they were receiving were not lawfully obtained.

Swiss banks might be agents in two capacities. First, they have retained war victims' assets deposited in Switzerland for safekeeping. Second, they safeguarded assets of the Nazi regime, money that included the spoils of war and illegally seized valuables.³⁸²

show that Shell imported Beretta handguns and ammunition to supply the Nigerian police through a company called Humanitex Nigeria.

The Britain-based Observer newspaper recently quoted Shell spokesmen as acknowledging the purchase of handguns on behalf of the Nigerian police who guard Shell's facilities.

"But once imported, the arms remain the property of the Nigerian police, who store, guard, and use them," the Shell officials were quoted as saying.

The newspaper also revealed a May 1994 memorandum from the Nigerian Chairman of Internal Security, Major Paul Okuntimo, to the Military Administrator of Rivers State (which includes Ogoni territory). The memo reads: "Shell operations still impossible unless ruthless military operations are undertaken for smooth economic activities to commence."

Id.

381. *Id.*

382. As Ambassador Eizenstat stated in his testimony before the House Banking Committee:

Permit me to review now what we mean by "Nazi assets" because there is confusion over the term "Nazi gold."

In fact . . . there are three main categories:

The first is monetary gold which was looted by the Nazis from the central banks of those countries they occupied, was recovered, at least in part, by the Allies, distributed by the tripartite Gold Commission of the United States, the United Kingdom and France, to 10 claimant countries.

Second is other private German and Nazi property which was blocked in Switzerland by the U.S. Government and others at the end of the war, which includes assets looted from victims—individual victims—of Nazis. This includes everything from personal jewelry, life insurance accounts,

Some suggest that Swiss banks played a more knowing role in retaining Jewish assets seized by the Nazis. For example, the Eizenstat Report notes that German authorities obtained large sums of foreign exchange by extorting ransom from Jews who wanted to emigrate from occupied territories.³⁸³ "The victims, or their friends and relatives abroad, were instructed to pay the ransom into accounts in Swiss or Dutch banks."³⁸⁴ The U.S. Legation in Bern identified UBS in Zurich as one of the possible sites for ransom deposits but "warned that it was difficult to gain information regarding the names of the banks that were used, and thus it had not been possible to identify the individual accounts into which the ransom sums were paid."³⁸⁵ As stated previously, there is preliminary evidence concerning the knowing role that the banks played in cloaking the assets of German financiers—some of whom used slave labor in their factories and plants.

The *Unocal* litigation involves the activities of a multinational oil company in the 1990s. The Swiss banks, however, are being sued for their conduct during World War Two—*more than fifty years ago*. Theories of state action were not developed at that point in time.

The Holocaust Plaintiffs state that *Unocal* is relevant insofar as the court ruled that the ATCA lawsuit could proceed against the two private companies because plaintiffs had alleged that the private companies "are jointly engaged with the state officials" of the pipeline project.³⁸⁶ Nonetheless, the joint venturing theory posited in *Unocal* is one that is dependent upon a relatively recent civil rights doctrine concerning private non-state actors who engage in collective activity with state actors.

The only "organizations" that were tried at Nuremberg before the IMT, as opposed to the USMT, were Nazi organizations that were part of the Nazi's larger plan to carry out criminal activities on a grand scale. The six institutions that were charged by the IMT were the SS or Elite Guard,³⁸⁷ the Gestapo,³⁸⁸ the SA,³⁸⁹ the

and most ghoulish, even the teeth of those who were killed in the death camps.

Third is heirless and unclaimed assets of Holocaust victims. At the moment, we are focusing on those which were deposited in Swiss banks between 1933 and 1945, in which there has been no action on that account for at least 10 years. We call these dormant accounts

Eizenstat Testimony, *supra* note 113, at 27-28.

383. See EIZENSTAT REPORT, *supra* note 114, at 12.

384. *Id.*

385. *Id.* (citing Dispatch from Bern, Oct. 28, 1942, 862.5151/2387).

386. Van Dyke Aff., ¶ 14.

387. In German, *Schutzstaffel Sicherheitsdienst*. Otto Kranzbuhler, *The Nuremberg War-Crimes Trial*, 14 DEPAUL L. REV. 333, 335 (1965).

Reich Cabinet, the Leadership Corps of the Nazi Party, and the General Staff and High Command of the Nazi Party.³⁹⁰ These organizations were not excused because their activities were state-sanctioned.³⁹¹ Upon a finding of organizational guilt, persons who were members of the organization became liable and punishable without proof of their individual acts in furtherance of the organization.³⁹² Thus, the charges against Nazi organizations and the related offense of membership in a criminal organization were akin to a charge of conspiracy. Commentators have noted that the declaration of an organization as criminal was unprecedented under international law.³⁹³ Thus, the more limited notion of organizational complicity was itself controversial at Nuremberg. This seems to be one of the Holocaust Plaintiffs' largest obstacles with respect to ATCA jurisdiction—the problem of holding a commercial entity liable as a non-state actor under international law as it existed prior to and during World War Two.³⁹⁴

The other way in which collective liability was expressed at Nuremberg involved the conviction of individuals who collectively engaged in conspiracy to commit crimes against peace. Again, the Holocaust Plaintiffs allege that defendant banks have breached customary international law by acting as a fence for the Nazis, and by collaborating with them. This type of language

388. The Gestapo was also referred to as the Secret State Police. *Id.*

389. The S.A. were the German Storm-Troopers (*Sturmabteilung*). *Id.*

390. Arguments were made and evidence was taken with respect to each of these accused organizations. See 42 IMT 1, 1153 (1949). Each of the organizations also had defense counsel.

391. See CHARTER OF INTERNATIONAL MILITARY TRIBUNAL [hereinafter I.M.T. CHARTER], arts. 7 & 8, XV TRIALS OF WAR CRIMINALS, 10, 12 (1949).

392. See *id.* arts. 9 & 10; Allied Control Council Law No. 10 [hereinafter Control Council Law No. 10] art. II, 1(d) & 2(e), in XV TRIALS OF WAR CRIMINALS 23, 24-25.

393. ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 210-11 (1962); see also Kranzbuhler, *supra* note 387, at 355-56 (Kranzbuhler was Chief Counsel for Friedrich Frick, Nazi Interior Minister, at the Nuremberg International War Crimes Trials) (noting that the International Tribunal refused to depict the S.A. as a criminal organization because many members were not engaged in criminal plans for waging war; similarly, the tribunal refused to declare the German cabinet, the General Staff and the High Command criminal organizations).

394. At best, the Swiss banks' conduct might be viewed as an *ongoing* pattern of obstruction and obfuscation. Their activity with respect to dormant accounts, and cloaked and looted assets, continues to this day. Thus, it may also be possible to analyze some of their conduct according to more contemporary principles of international law. Our own jurisprudence for state action and the notion of joint action or acting under the color of law has become more fully developed. Thus, one could possibly assess the conduct of the Defendant banks as joint venturers who have continued to benefit from their roles.

implies some form of common plan or conspiracy on the part of the banks.

The use of conspiracy as a basis for liability was narrowly tailored at Nuremberg. The IMT adopted a narrow test for conspiracy, which required a knowing agreement or concrete plan to wage an aggressive war.³⁹⁵ The subsequent proceedings narrowed the scope of liability for conspiracy even further, and judges were reluctant to find guilt on membership counts.³⁹⁶ One of the principal objections to the use of Anglo-American criminal

395. *United States v. Krauch*, in VIII TRIALS OF WAR CRIMINALS 1127 (1952). The origins of the use of Anglo-American common law conspiracy came from Colonel Murray Bernays, a member of the personnel branch of the U.S. Army General branch and a New York lawyer working for the War Department. Bernays proposed the use of conspiracy doctrine as a way to punish German prewar crimes and also as a procedure for dealing with "hundreds of thousands of members of the SS and other Nazi organizations implicated in Nazi atrocities." TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS*, 35-36 (1992). Bernays suggested that the Anglo-American law of criminal conspiracy be used to charge Nazi organizations and their leading members "not merely with atrocious violations of the laws of war, but with conspiring . . . to commit such violations." Thus, as Telford Taylor notes:

In Anglo-American law, criminal conspiracy consists of an agreement by two or more persons to engage in unlawful conduct. Bernays reasoned, therefore, that if members of the Nazi organizations had agreed among themselves prior to the war to commit violations of the laws of war when war came, their preparatory conduct before the war would be punishable as a part of the conspiracy to commit the wartime atrocities.

Id. at 36.

Taylor also notes that the "Tribunal crushed Bernays's intended use of 'conspiracy' by interpreting the Charter so as to confine its use to 'crimes against peace.'" *Id.* at 637. Eight defendants were convicted under Count One for conspiracy to commit crimes against peace. *Id.* at 687-38. Taylor was then assigned to the American prosecution staff under Justice Robert H. Jackson and occupied a significant role in both the international trial of major war criminals and the subsequent trials in the American occupied zone.

One of the confusions about whether conspiracy to commit war crimes and crimes against humanity arose from the Nuremberg Charter itself. As Taylor explains:

The availability of conspiracy was provided for only in Article 6(a) of the Charter, dealing with crimes against peace, and not in Articles 6(b) and 6(c). The paragraph following Article 6(c) referred to "conspiracy to commit any of the foregoing crimes," but the only "foregoing" conspiratorial crime remained conspiracy to commit crimes against peace.

Id. at 582.

396. *See, e.g., United States v. Flick*, VI TRIALS OF WAR CRIMINALS 25, 1223 (1952) (finding that only defendant Steinbrinck was guilty of membership in the S.S.).

conspiracy doctrine was that this doctrine was not part of European civil legal systems.³⁹⁷

As stated above, while private individuals were found liable at Nuremberg, the notion of corporate complicity was not addressed. The only organizations that fell under the ambit of the IMT were criminal organizations. Thus, while the facts presented in the Holocaust assets litigation might be treated differently today if the case involved a bank or company aiding war criminals, the argument with respect to Nuremberg is more tenuous.

Thus, the *Unocal* and *Kadic* decisions may pave the way for an evolving theory of corporate complicity under international law for grave violations of human rights. If commercial banks knowingly aid and abet war crimes or violations of other universally recognized norms, the *Unocal* standards may provide a basis for ATCA jurisdiction. The *Unocal* case, and the *Marcos* case discussed below, suggest that, in contemporary society, commercial enterprises that knowingly profit from violations of human rights may be held accountable as agents or accomplices.

Furthermore, conspiracy to commit war crimes and crimes against humanity may now be recognized as a violation of customary international law. Article 7(1) of the Statute of the International Tribunal for the former Yugoslavia is more specific with respect to individual responsibility for any person who "planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution" of one of the enumerated offenses.³⁹⁸ More generally, the concept of common plan or conspiracy has been included in many multinational

397. See TAYLOR, *supra* note 395, at 36; WOETZEL, *supra* note 393, at 206-17; Hans Erhard, *The Nuremberg Trial Against the Major War Criminals and International Law*, 43 AM. J. INT'L L. 223, 227 (1949) (stating that Anglo-American concepts of conspiracy were unknown in continental law and that the concept of common plan was unknown even in Anglo-Saxon law). Erhard was Minister-President of Bavaria after World War Two. Carl Haensel, *The Nuremberg Trial Revisited*, 13 DEPAUL L. REV. 248, 254-55 (discussing use of conspiracy at U.S. Military Tribunal recordings under Control Council Law No. 10). Haensel was Chief Counsel for the SS and the SD at Nuremberg.

U.S. Prosecutor Taylor has recently explained in his book *Anatomy of the Nuremberg Trials* that the omission of conspiracy for crimes against war and humanity from the Nuremberg Charter may have been more a matter of inadvertence and hasty draftsmanship than a conscious policy to limit conspiracy to crimes against peace. TAYLOR, *supra* note 395, at 116. Taylor also notes that prosecutors indicted defendants with conspiracy to commit war crimes and crimes against humanity. *Id.* The Tribunal, however, found itself constrained by the Charter.

398. M. SHARIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 340 (1996); Howard S. Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT'L L. & COM. 1, 11 n.60 (1995).

conventions since Nuremberg, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which serves as a source of subject matter jurisdiction for the Yugoslavia Tribunal.³⁹⁹

d. A Tale of Two Bankers

Beyond the threshold issue of whether commercial banks could be subject to customary international law during World War Two is the issue of whether their actions themselves constitute breaches of a universally recognized norm of international law. The Holocaust Plaintiffs point to the trial of two bankers and many industrialists as the source for liability for actions which, while commercial in nature, nonetheless aided the Nazis in committing genocide and in concealing the profits made therefrom.

The USMT tried the German bankers and industrialists. After the major war crimes trials at Nuremberg, each of the Allies assumed responsibility for trying prisoners it held within the zone it occupied.⁴⁰⁰ The Allied Powers adopted Control Council Law No. 10 in December 1945 "in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders."⁴⁰¹

The Holocaust Plaintiffs allege that defendant banks assisted the Nazis in war crimes, crimes against humanity, and crimes against peace. These categories of alleged acts are certainly violations of international law.⁴⁰² Subsidiary actions also would properly be characterized as such offenses.⁴⁰³

399. See Chaney, *supra* note 323.

400. See Report to the President by Mr. Justice Jackson, Oct. 7, 1946 (Document LXIII) in Report of Robert H. Jackson, Representative to the International Conference on Military Trials 246, 436 (1945).

401. Control Council Law No. 10. The Nuremberg Charter was made an integral part of Control Council Law No. 10, and incorporated crimes against peace, war crimes, and crimes against humanity. *Id.* art. II.

402. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987).

403. The Restatement (Third) of Foreign Relations § 702, which describes customary international law of human rights, states that:

A state violates international law if, as a matter of state policy, it practices, encourages or condones:

- (a) genocide,
- (b) slavery or slave trade,
- (c) the murder or causing the disappearance of individuals,
- (d) torture or other cruel, inhuman, or degrading treatment or punishment,
- (e) prolonged arbitrary detention,
- (f) systematic racial discrimination, [and]
- (g) a consistent pattern of gross violations of internationally recognized

As one scholar acknowledges, the problem with jurisdiction under the ATCA is not in “identifying the core, but in defining the margins.”⁴⁰⁴ The Holocaust Plaintiffs’ ATCA claims attempt to define the margins—they are revisiting the issue of banking and commercial activity as performed by non-state actors whose assistance may have facilitated war crimes, crimes of peace, and crimes against humanity.

(i) Karl Rasche

Karl Rasche was the Chairman of Dresdner Bank, a private bank in Germany that served in many respects as the bank for the Third Reich.⁴⁰⁵ Rasche was the only private banker to be tried under the Nuremberg Charter.⁴⁰⁶ Rasche has also been characterized as a high ranking Nazi official.⁴⁰⁷

Rasche was tried on four counts: (1) war crimes and crimes against humanity; (2) war crime and crimes against humanity relating to looting; (3) war crimes and crimes against humanity related to slavery; and (4) membership in the SS.⁴⁰⁸ Rasche was convicted for war crimes and crimes against humanity relating to looting and also for membership in the SS. It is Rasche’s role as a banker and his role in looting which form the basis for the Holocaust Plaintiffs’ invocation of Rasche’s trial.

Rasche was an “Untersturmbannfuhrer” in the SS and a close associate of Himmler.⁴⁰⁹ The USMT noted that, as a board member of Dresdner, Rasche was intimately involved in loaning “large sums of money to various SS enterprises which employed large numbers of inmates of concentration camps, and also to Reich enterprises and agencies engaged in the so-called resettlement programs.”⁴¹⁰

human rights.

Id.

This list is not exhaustive and does not foreclose the evolution of additional customary norms of human rights; however, what makes these human rights norms similar is that no state openly asserts a legal prerogative to violate them. Steinhardt, *supra* note 11, at 81.

404. *Id.* at 82 (citing Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT’L L. 607 (1984)).

405. See *United States v. Weizsaecker (Ministries Case)*, XIV TRIALS OF WAR CRIMINALS 621-22 (Rasche and Emil Puhl, discussed *infra*, were tried jointly with 19 other defendants).

406. *Id.*

407. *Id.*

408. *Id.* at 621, 772, 852, 863.

409. *Id.* at 863. “Untersturmbannfuhrer” is the SS equivalent to a colonel rank.

410. *Id.* at 621.

The USMT concluded that Rasche had knowledge as to the purposes for which loans were sought.⁴¹¹ Ultimately, the USMT concluded that, despite having such knowledge, Rasche's granting of loans was not a violation of international law.

The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does he stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit which the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law, nor has our attention been drawn to any ruling to the contrary.⁴¹²

Rasche was convicted of looting and spoliation in contravention of Article II, paragraph 1(b) of War Crimes Control Council Law No. 10.⁴¹³ This provision prohibited "atrocities or offenses against persons or property constituting violations of the laws or customs of war, including, but not limited to . . . plunder of public or private property . . ." ⁴¹⁴

Rasche, in particular, was indicted for plunder of public and private property in Czechoslovakia.⁴¹⁵ It was alleged that he took control of several financial institutions and absorbed various branch banks into the Dresdner empire. He also was alleged to have "further participated in, facilitated and sought advantages from, the program of Aryanization introduced into countries occupied by Germany, designed to expel Jews from economic life and involving threats, pressures and coercion to force Jews to transfer their properties to Germans."⁴¹⁶

It was adduced at trial that Rasche knew of and condoned the process whereby Jews were given exit visas only after transferring their properties to German banks.⁴¹⁷ Additionally,

411. *Id.* at 622.

412. *Id.*

413. *Id.* at 784. This was the document governing the principles of international law under which the USMT tried defendants.

414. *Id.* at 682.

415. *Id.* at 772.

416. *Id.*

417. *Id.* at 776.

he was said to have financed the spoliation agencies in eastern occupied territories.⁴¹⁸ Rasche was eventually found guilty of participating in spoliation in Bohemia-Moravia.⁴¹⁹ One of the grounds for his conviction was Rasche's use of "coercive police-state measures, including the use of threats" and coercive holdings.⁴²⁰

Furthermore, Rasche was charged with slave labor.⁴²¹ This charge resulted from his approval of loans used to finance slave labor. Again, the USMT noted: "We cannot go so far as to enunciate the proposition that the official of a loaning bank is chargeable with the illegal operations alleged to have resulted from loans or which may have been contemplated by the borrower."⁴²²

Not surprisingly, defendant banks in the Holocaust victims' litigation place great emphasis on Rasche's acquittal for lending money for slave labor.⁴²³ This, defendant banks claim, is "directly relevant" to the Holocaust victims' litigation because it demonstrates that the "[sale of] money or credit"—did not violate customary international law, even where the financial institution knew that the recipient of these services was utilizing the services as part of an ongoing war crime or crime against humanity.⁴²⁴

When analyzing the conduct of Swiss banks, a federal court might well reach the same conclusion as the USMT, specifically because Rasche was acquitted for his financing activities. Thus, the USMT drew a distinction between providing capital and actively participating in Nazi looting efforts. A different result might obtain today. If, for example, a commercial bank knowingly financed the building of an internment camp today, might that bank be considered a joint venturer and thus in breach of international law?

The Holocaust Plaintiffs, however, do not focus on the Swiss banks' role as lenders. Rather, they focus on the active role that Swiss banks played in masking the spoils of war and the profits of slave labor as the basis for violations of international law. The Rasche trial provides a tentative basis for the Holocaust Plaintiffs' assertions in that Rasche was convicted for his active participation in looting and plundering. A threshold question remains, however, with respect to the Swiss banks' activities.

418. *Id.* at 772.

419. *Id.* at 784.

420. *Id.* at 774.

421. *Id.* at 852.

422. *Id.* at 854.

423. Defendants' Reply Memo, in Support of Defendants' Motion to Dismiss the Int'l Law Claims for Failure to State a Claim, at 19-30, *In re Holocaust Victim Assets* (No. CV-96-4849) [hereinafter Defendants' Int'l Law Reply].

424. *Id.* at 26.

Swiss bankers did not work actively in the field to seize the assets of Jews and other citizens of occupied nations. Rather, their conduct falls into a gray area. Through the use of the pen rather than the sword, they were able to secrete assets that men like Rasche acquired. Thus, their liability for spoliation is at best derivative.

(ii) Emil Puhl

The Holocaust Plaintiffs base their claims in part upon the conviction of Emil Puhl, deputy to the President of the German Reichsbank, who had extended dealings with the Swiss banks during World War Two. The German Reichsbank engaged in the systematic plundering of the nations it occupied and took valuable items from Jewish victims.⁴²⁵ Puhl's job was to arrange for gold, jewelry, and foreign currency from Nazi victims to be deposited at the Reichsbank and for gold teeth and crowns to be recast into gold ingots.⁴²⁶ Some of these ingots were sold to Switzerland.⁴²⁷ Puhl testified that it was Reichsbank practice to resmelt all of the gold it received, which made it impossible to trace the original owner.⁴²⁸ The resmelting and renumbering—often with a pre-war date stamp—“meant that a bank in a neutral country could claim to have received no ‘tainted’ gold.”⁴²⁹ By 1943, however, the Allies were aware that Germany had sold more gold than the country had possessed in 1939, leading to the conclusion that all purchases Germany made were with looted gold.⁴³⁰ “Puhl's role in arranging for the receipt, classification, deposit, conversion and disposal of properties taken by the SS from victims exterminated in concentration camps” formed the basis for his prosecution before the USMT of Nuremberg. He was subsequently sentenced to five years imprisonment.⁴³¹ The tribunal noted, however, that:

[Puhl's] part in this transaction was not that of mere messenger or businessman. He went beyond the ordinary range of his duties to give directions that the matter be handled secretly by the appropriate departments of the bank. It is to be said in his favor that he neither originated the matter and that it was probably repugnant to him.⁴³²

425. *Weizsaecker*, XIV TRIALS OF WAR CRIMINALS, at 160.

426. *See EIZENSTAT REPORT*, *supra* note 114, at 160.

427. *BOWER*, *supra* note 7, at 82-83.

428. *Weizsaecker*, XIV TRIALS OF WAR CRIMINALS, at 163.

429. *Id.*

430. *EIZENSTAT REPORT*, *supra* note 114, at 5.

431. *Weizsaecker*, XIV TRIALS OF WAR CRIMINALS, at 169.

432. *Id.* at 620-21.

The Holocaust Plaintiffs point out an important passage in Puhl's conviction, which states:

It would be a strange doctrine indeed, if, where part of the plan and one of the objectives of murder was to obtain the property of the victim, even to the extent of using the hair from his head and the gold of his mouth, he who knowingly took part in disposing of the loot must be exonerated and held not guilty as a participant in the murder plan. Without doubt all such acts are crimes against humanity and he who participates or plays a consenting part therein is guilty of a crime against humanity.⁴³³

Puhl's conviction arguably might form the basis for the conviction of a banker who knowingly facilitated the disposal of assets obtained from victims of the Holocaust.

The Puhl conviction still raises questions as to whether there is a threshold of liability. Puhl directed a Nazi program of spoliation and transfer of assets. The Swiss did not direct such a program, but did willingly accept the shipments that were presented to them. Puhl also was the primary Reichsbank contact with the Swiss government and banking community. He arranged for looted gold to be sold in Switzerland. Puhl negotiated with the Swiss when they blocked German accounts, and was able to circumvent Swiss exchange controls. Thus, Swiss banks performed core functions for Puhl and as such may have been part of his infrastructure. There remain open questions as to the level of knowledge possessed by the Swiss banks.

As for the role of the Swiss banks with respect to Nazi assets and the gold transferred by Puhl and his accomplices, the Eizenstat Report offers conflicting evidence. With respect to gold looted from occupied countries, the Report notes:

Clearly, the evidence presented in this report is incontrovertible: the Swiss National Bank and private Swiss bankers knew, as the (w)ar progressed, that the Reichsbank's own coffers had been depleted, and that the Swiss were handling vast sums of looted gold. The Swiss were aware of the Nazi gold heists from France of Belgian gold as well as from other countries.⁴³⁴

As stated previously, with respect to victim gold, however, the Eizenstat Report states that "there is no evidence that Switzerland or other neutral countries knowingly accepted victim gold."⁴³⁵ Senator D'Amato has reported that the Nazis allegedly placed sympathizers inside Swiss banks during the war to ferret out account numbers and information. The Nazis supposedly used

433. *Id.* at 621.

434. EIZENSTAT REPORT, *supra* note 114, at vi-vii.

435. *Id.* at ix.

this information to extort money from Jews and other account holders in Germany.⁴³⁶

A major conclusion reached by the Eizenstat Report is:

[T]he massive and systematic plundering of gold and other assets from conquered nations and Nazi victims was no rogue operation. It was essential to the financing of the German war machine. The Reichsbank itself—the central bank of the German State—was a knowing and integral participant. It was the Reichsbank that knowingly incorporated into its gold reserves looted monetary gold from the governments of countries occupied by the Nazis. Judging by the German reserves at the beginning of the War, the majority of gold was looted from central banks. It is also evident from the documents we have uncovered and reviewed that some amount was confiscated from individual civilians, including victims of Nazi atrocities, and incorporated into Reichsbank gold stocks. It was the Reichsbank that assisted in converting victim gold coins, jewelry and gold fillings into assets for the SS “Melmer account.” The Reichsbank organized the sale or pawning of this concentration camp loot, and the resmelting of a portion of this gold into gold ingots—with their origins often disguised and therefore indistinguishable by appearance from that looted from banks.⁴³⁷

The Allies examined German bank records and interrogated former Reichsbank officials to discover how loot had been converted into “more orthodox financial assets.”⁴³⁸ Albert Thoms, Chief of the Precious Metals Department and a Reichsbank official for the Nazi party, explained that booty seized by the Wehrmacht went to the Treasury, and loot seized by the SS went to the Reichsbank where it was placed in a holding account with the name of “Melmer.”⁴³⁹

The Puhl and Rasche convictions create an uncertain framework with respect to the role of Swiss banks. Plaintiffs rely on Puhl as the basis for their international law claims. Defendant banks rely on Rasche as the reason the Holocaust Plaintiffs’ claims should be dismissed. Questions remain as to the knowledge and role of Swiss banks in facilitating Nazi activities. The cases, however, require a seemingly high level of knowledge

436. See *Frontline Chronology*, *supra* note 121, at 2-3. The Eizenstat Report also states that, “[a]s U.S. officials received reports that in the early 1930s the Germans had placed French-speaking Nazis in leading Swiss banks, they grew increasingly concerned that Nazi elements [might] have infiltrated the Swiss banking system.” EIZENSTAT REPORT, *supra* note 114, at 5 (citing Letter from Harold Glasser, Assistant Director, Monetary Research, U.S. Treasury Department, to James Mann, U.S. Treasury Representative, U.S. Consulate General, Zurich, May 28, 1945, U.S. Treasury Document).

437. EIZENSTAT REPORT, *supra* note 113, at iv.

438. Nazi Gold: Information from the British Archives, HISTORY NOTES, (2d. ed. Jan. 1997), available at <<http://britain.nyc.ny.us/bis/misc/nazigold.txt>>.

439. *Id.*

with respect to the collection, conversion, and disposal of looted assets taken from Jewish victims of the Holocaust.

e. The Industrialists

The Nuremberg trials of German industrialists are perhaps more relevant when analyzing the claims of Holocaust victims.⁴⁴⁰ The treatment of industrialists involves further inquiry into the issue of whether systematic and continuous cloaking, looting, and retention of assets amounts to a violation of international law. These cases are therefore instructive with respect to the role of property crimes in international law, especially property and profits reaped as a result of atrocities and war crimes.

(i) Friedrich Flick

Friedrich Flick was a German industrialist who owned steel plants in Germany. According to the IMT, "at the height of his career . . . he had voting control of a dozen companies, employing at least 120,000 persons engaged in mining coal and iron, making steel and building machinery and other products which required steel as raw material."⁴⁴¹ During World War Two, Flick was a member of the advisory council of the Economic Group of the Iron Producing Industry.⁴⁴²

Flick was convicted of war crimes and crimes against humanity because he had knowledge of and approved of certain unlawful activities of his deputy Bernhard Weiss. Weiss actively participated in the "solicitation of increased freight car production quota for the Linke-Hofmann Werke, a plant in the Flick Concern."⁴⁴³ Weiss also "took an active and leading part in securing an allocation of Russian prisoners of war for the use in the work of manufacturing such increased quotas."⁴⁴⁴ Flick was also convicted of spoliation and plunder of occupied territories. Specifically, Flick took control of a French cement plant in Lorraine in 1940.⁴⁴⁵ In this regard, the IMT noted:

Charles Laurent as a witness testified that he was expelled from Lorraine in 1940 and that the Flick administration had nothing to do therewith. . . . A corporation called Rombacher Huettenwerke,

440. For a detailed account of the various Allies trials of industrialists, see Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 TEMP. INT'L. & COMP. L.J. 173 (1995) (discussing, among others, trials of Friedrich Flick and members of I.G. Farben).

441. *Flick*, VI TRIALS OF WAR CRIMINALS, at 1192.

442. *Id.* at 1194.

443. *Id.* at 1198.

444. *Id.*

445. *See id.* at 1206.

G.m.b.H., was organized by Flick to operate the plant. Operations continued from March 1941 until the Allied invasion about 1 September 1944. All the profits were invested in repairs, improvements, and new installations. As the Allied armies approached Rombach, the German military authorities gave orders to destroy the plants which were disobeyed by the officials of the trustee [Flick]. When the French management returned, the plants were intact. . . . The evidence satisfied us that the trustee left the properties in better condition than when they were taken over.⁴⁴⁶

The IMT also stated:

Flick saw the possibilities resulting from the [Nazi] invasion and sought to add the Rombach property to his concern. But governmental policy was otherwise. It does not appear upon what grounds this decision was based. There may have been thought of the Hague Regulations under which private property must be respected and cannot be confiscated. But we recall no hint in the evidence that Flick or his associates gave any thought to the international law affecting the transaction. The Flick management of Rombach was conservative, not, however, with the intent of benefiting the French owners. . . . His expectation of ownership caused him to plow back into the physical property the profits of operation. This policy ultimately resulted to the advantage of the owners. In all of this we find no exploitation either for Flick's present personal advantage effort or to fulfill the aims of Goering.⁴⁴⁷

The IMT noted that, "[w]hile the original seizure may not have been unlawful, its subsequent detention from the rightful owners was wrongful."⁴⁴⁸ The IMT cited Hague Regulation 46, which provides that private property in an occupied territory must be respected, and noted that Flick's actions were not the "systematic" plunder Hitler conceived.⁴⁴⁹ Flick was nonetheless found "guilty in respect to the Rombach matter" although the IMT took "fully into consideration in fixing his punishment all the circumstances under which he acted."⁴⁵⁰

Flick also was convicted of contributing funds and influence to support Himmler and the SS with knowledge of their criminal activities. Flick was sentenced to seven years for his offenses.⁴⁵¹

446. *Id.*

447. *Id.* at 1207.

448. *Id.* Article 46 of the Hague Convention obligates an occupying power to protect the family, honor, rights and lives of civilians. Convention (No. IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 46, 36 Stat. 2277, 2306-07, 1 T.S. 631, 651 [hereinafter Hague Regulations]. Other articles that relate to private property include Articles 47 (forbidding pillage), 53 (forbidding appropriation of property of private individuals) and 55 (occupying power must safeguard public buildings, real estates, forests and agricultural estates). 36 Stat. 2306-09, 1 T.S. 651-53.

449. *Id.*

450. *Flick*, VI TRIALS OF WAR CRIMINALS, at 1208.

451. *Id.* at 1223.

Although Flick was convicted for his approval of Weiss's recruitment of Russian slave labor, he was acquitted, based on a defense of necessity, for using slave labor in his factories.⁴⁵²

Defendants cite *U.S. v. Flick* for the proposition that crimes against humanity did not encompass the taking of property. Defendant banks quote from one portion of the IMT's decision which states that such taking does not amount to a crime against humanity:

Under the basic law of many states the taking of property by the sovereign, without just compensation, is forbidden, but usually it is not considered a crime. A sale compelled by pressure or duress may be questioned in a court of equity, but, so far as we are informed, such use of pressure, even on racial or religious grounds, has never been thought to be a crime against humanity. The "atrocities and offenses" listed [in Control Council Law No. 10 and the Nurnberg Charter] "murder, extermination," etc. are all offenses against the person. Property is not mentioned Compulsory taking of industrial property, however reprehensible, is not in that category.⁴⁵³

Defendants are correct with respect to Flick's conviction for property crimes. The IMT did not equate these with crimes against humanity. The IMT did, however, find that Flick had violated the Hague Regulations by retaining the property of a civilian in occupied territory. His seizure and continued operation of the Rombach factory and was a violation of international law. Flick's activities were in many respects akin to ordinary commercial operations. He operated the mill for profit, and, as the IMT noted, preserved and enhanced the property. Flick's conviction for the unlawful retention of property is instructive to the Holocaust Plaintiffs. First, Flick initially neither seized the factory nor expelled its owner forcefully. Other German officials did this. Rather, Flick accepted and then continued to manage plundered property. This is analogous to the role of Swiss bankers "who merely accepted German assets and then retained and managed them."⁴⁵⁴ Second, Flick was not involved in systematic pillage or plunder. In comparison, the Swiss banks' conduct might be characterized as more egregious.

452. *Id.* at 1196-1202.

453. Defendants' Memorandum of Law in Support of Defendants' Motion to Dismiss the International Law Claims in *Friedman* and *WCOJC* for Failure to State a Claim, at 45 (No. CV-96-4849) (quoting *Flick*, VI TRIALS OF WAR CRIMINALS, at 1214) [hereinafter Defendants' Int'l Law Memo].

454. *Flick*, VI TRIALS OF WAR CRIMINALS, at 1206-07.

(ii) The I.G. Farben Trials

Defendants assert that “international law has not—and does not—impose responsibility on corporate entities for the offenses at issue in this case.”⁴⁵⁵ What defendant banks overlook, however, is that the trial of corporate officers from the German company I.G. Farben can be viewed as the first attempt to impose liability upon a group of persons responsible for the management and oversight of a corporate entity. Although the law of the modern or multinational corporation did not exist in 1945, the USMT explored the role that a corporation could have in assisting the Nazi war effort. Twenty-three directors and officers of a German company were tried together before the USMT.⁴⁵⁶ Of those tried, twelve defendants were convicted of either spoliation and plunder or slave labor charges.⁴⁵⁷ A single defendant was found guilty under both counts and the other defendants were acquitted.

I.G. Farben was a major German chemical and pharmaceutical manufacturer. The defendants in the Farben case were prosecuted for “acting through the instrumentality of Farben.”⁴⁵⁸ The defendants were eventually convicted of plunder and spoliation. The USMT’s decision, however, bases much of its factual findings on the role of Farben as a corporate entity or corporate personality. For example, the USMT notes:

While the Farben organization, as a corporation, is not charged under the indictment, with committing a crime and is not the subject of prosecution in this case, it is the theory of the prosecution that the defendants individually and collectively used the Farben organization as an instrument by and through which they committed the crimes enumerated in the indictment.⁴⁵⁹

The indictment also charges that Farben, “through its foreign economic policy, participated in weakening Germany’s potential enemies and that Farben carried on propaganda intelligence and espionage activities for the benefit of the Reich.”⁴⁶⁰

455. Defendants specifically state that the *Unocal* decision is not consistent with other international law authority. Defendants’ Int’l Law Memo, at 36.

456. See *Krauch*, VII TRIALS OF WAR CRIMINALS, at iii.

457. See *Krauch*, VIII TRIALS OF WAR CRIMINALS, at 1081, 1205-09.

458. *Krauch*, VII TRIALS OF WAR CRIMINALS, at 14.

459. *Id.* at 1108.

460. *Id.* at 1122. In another portion of the decision, the Tribunal notes:

The indictment further charges: “Farben marched with the Wehrmacht and played a major role in Germany’s program for acquisition by conquest. It used its expert technical knowledge and resources to plunder and exploit the chemical and related industries of Europe, to enrich itself from unlawful acquisitions, to strengthen the German war

Farben officials were convicted as accessories to the Nazi program of spoliation and plunder. As noted in the Farben decision:

Where private individuals . . . proceed to exploit . . . military occupancy by acquiring private property against the will and consent of the former owner, such action . . . is in violation of international law. The payment of a price or other adequate consideration does not . . . relieve the act of its unlawful character. Similarly, where a private individual or juristic person becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of the Hague Regulations.⁴⁶¹

Defendants were required either to have participated in the spoliation or to have knowingly authorized or approved of these acts in order to be found guilty of these offenses.⁴⁶² Furthermore, company officials were not charged with constructive knowledge of all corporate activity. Thus, defendants were not criminally culpable for appropriation of funds or approving activities unless they knew the program was criminal in nature.⁴⁶³

Defendants in the Holocaust assets litigation argue that plaintiffs would have to sue individuals rather than a corporation for violations of international law. Thus, under defendants' reasoning, plaintiffs would have to charge the individual Swiss bankers who might have participated in looting, cloaking, or unlawful retention of property. Swiss secrecy laws, and the passage of time, however, make it difficult to ascertain the identities of these individuals. Moreover, many are now deceased. These problems suggest courts should hold corporations liable for the acts of their agents.

5. Spoliation and Plunder as a Matter of Customary International Law

The tribunal in the *Flick* case found that spoliation and plunder constituted war crimes but not crimes against humanity.⁴⁶⁴ Such cases establish a framework for

machine and to assure the subjugation of the conquered countries to the German economy."

Id. at 1128-29.

461. *Id.* at 1132-33.

462. *Id.* at 1153.

463. *Id.*

464. See *Flick*, VI TRIALS OF WAR CRIMINALS, at 1203. The tribunal stated: "No crimes against humanity are here involved. Nor are war crimes except as may be embodied in the Hague Regulations." *Id.* For a useful discussion of the

understanding property crimes under international law. The Nuremberg tribunals used the terms spoliation, plunder, and exploitation interchangeably in their decisions.⁴⁶⁵ These terms refer to the “widespread and systematic acts of dispossession and acquisition of property in violation of the rights of the owners, which took place in territories under the belligerent occupation or control of Nazi Germany during World War II.”⁴⁶⁶

Generally, the Nuremberg tribunals were reluctant to categorize property crimes as crimes against humanity. Under certain circumstances, however, property crimes may rise to the level of crimes against humanity. The *Flick* tribunal made a distinction between “industrial property and the dwellings, household furnishings, and food supplies of a persecuted people.”⁴⁶⁷ Schwerin von Krosigk, German Minister of Finance in the Third Reich, levied special revenue assessments on Jewish businesses in Germany. These revenues were used to finance the German war effort. Judge Leon Powers dissented in the von Krosigk case and stated that his acts could not be viewed as a crime against humanity because “merely depriving people of their property is not such a crime. There must be some mistreatment of the person. . . .”⁴⁶⁸ The Israeli district court in the trial of Eichman also analyzed the status of property crimes:

[T]he plunder of property may only be considered an inhumane act within the meaning of the definition of “crime against humanity”, if it is committed by pressure of mass terror against a civilian population, or if it is linked to any of the other acts of violence defined by the Law as a crime against humanity or as a result of any of those acts . . . murder, extermination, starvation, or deportation of any civilian population, so that the plunder is . . . part of a general process.⁴⁶⁹

The threshold issue thus rests on whether the Swiss banks’ acknowledgment that the funds they received were derived from genocidal activity would create liability for their role in the disposal or conversion of such assets. At one level, the Nuremberg decisions can be interpreted to state that actors must themselves engage in heinous activity.

A more systematic analysis of the IMT and USMT decisions indicates that, for the majority of cases, spoliation was considered

status of property crimes under international law as a result of Nuremberg tribunals, see Matthew Lippman, *Anniversary Essay: Fifty Years after Auschwitz: Prosecution of Nazi Death Camp Defendants*, 11 CONN. J. INT’L L. 199, 260-62 (1996).

465. See Lippman, *supra* note 464, at 262.

466. *Krauch*, VIII TRIALS OF WAR CRIMINALS, at 1133.

467. *Flick*, VI TRIALS OF WAR CRIMINALS, at 1214.

468. See Lippman, *supra* note 440, at 264.

469. Attorney General of Israel v. Eichmann, 36 I.L.R. 5, 241 (D.C. of Jm. 1961).

a war crime when it involved a systematic program of plunder. Nonetheless, Flick's conviction supports the theory that legal prosecution may be predicated on the unlawful retention of illegally seized property. Furthermore, the Holocaust assets litigation is a civil action, so the factual predicate for defendants' liability need not be as substantial as a criminal case.

Flick's conviction, therefore, may form a stronger predicate for the Holocaust Plaintiffs' international law claims. The Swiss banks, as the Holocaust Plaintiffs allege, not only accepted looted property; they continued to retain and safeguard it. Thus, their actions are analogous to Flick's. Even if defendant banks' actions did constitute spoliation, a crucial question must be answered—*can a neutral commercial bank be held liable for a violation of the Hague Regulations (which apply more directly to belligerents)?*

6. Neutrality and the Hague Regulations

Defendant banks argue that the Hague Regulations apply solely to belligerents during a war and not to neutral nations or their citizens.⁴⁷⁰ The Hague Convention Respecting the Rights and Duties of Neutral Power and Persons in Case of War on Land states at the outset that the provisions contained in the Regulations "do not apply except between Contracting Powers, and then only if all belligerents are parties to the Convention."⁴⁷¹ One might argue, however, that the banks in their capacity as agents of Germany were not neutrals but agents of a belligerent engaged in spoliation.

As defendants note, The Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of the War on Land provides that neutrals are not acting in favor of a belligerent for "supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him and that the supplies

470. Defendants' expert, Professor Moore, states:

The law of war defines the rights and duties of belligerent parties and their armies during wartime and other armed hostilities. Hague Convention IV Respecting the Laws and Customs of War on Land . . . was relied on by the International Military Tribunal as evidence of the prevailing customary international law rules of the law of war. Hague IV is by its terms applicable to the conduct of belligerents. . . . I am not aware of any instance in which the law of war has been applied to hold that the commercial acts of neutral nationals on neutral territory were war crimes.

Moore Aff., ¶ 99(a).

471. Hague Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, Oct. 18, 1907, art. 128, 36 Stat. 2310 [hereinafter Hague V].

do not come from those territories."⁴⁷² A neutral, however, can lose its neutrality for acts committed in favor of a belligerent.⁴⁷³

Detlev Vagts has recently considered Switzerland's role as a neutral country during World War Two with respect to the allegations currently being levied against it.⁴⁷⁴ Vagts's main argument is that Switzerland substantially complied with then applicable principles of international law with respect to the status of a neutral nation. As Vagts notes, "[O]f course, to reach a judgment that the behavior of Switzerland was compatible with the rules of international law then in effect does not dispose of issues of humanity and morality. But it does contribute to explaining Swiss behavior, particularly since the Government in Bern was quite legalistic in its approach to the questions of the time."⁴⁷⁵

As part of his analysis, Vagts examines the role of the Swiss with respect to financial matters. Vagts states:

During the war, the Swiss Government, the Swiss national bank and private institutions entered into dealings with the German Government and German individuals. There was nothing inconsistent with the status of neutrality in those activities per se. However, the origins of the German assets transferred to Switzerland were in some cases of such a shadowy character as to raise questions. For one thing, there were movements to Switzerland of the monetary gold reserves of the governments and central banks of states that had come under Nazi control in 1940. This practice has evoked many expressions of shock in recent discussions of "looted gold" and Switzerland's behavior.⁴⁷⁶

Vagts points out that the "illegality under the rules then in place" for Switzerland's acquisition of looted gold or other Nazi assets "is not that clear."⁴⁷⁷ Those rules in place were stated in the Hague Regulations annexed to the 1907 Hague Convention on the Laws and Customs of War on Land.⁴⁷⁸ For example, Switzerland might have relied on Article 53 of the Hague Regulations, which says that "[a]n army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State."⁴⁷⁹ In effect, Switzerland

472. *Id.* at 18.

473. *Id.* art. 17.

474. Detlev F. Vagts, *Switzerland, International Law and World War II*, 91 AM. J. INT'L L. 466 (1997).

475. *Id.*

476. *Id.* at 473.

477. *Id.*

478. Hague Convention on the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2777, 1 BEVANS 631.

479. Vagts, *supra* note 474, at 473.

would be relying on the traditional "to the victor belong the spoils" notion.⁴⁸⁰

On the other hand, Vagts also points out that Article 46 of the Hague Regulations prohibits the confiscation of private property. There is some room for debate over whether the central bank holdings seized by the Nazis in each country of occupation were "strictly the property of the State" (Article 53) or were private (Article 46).⁴⁸¹

Vagts also suggests that there is "some possible argument" that Swiss [asset] seizures violated Article 55 of the Hague Regulations. This provision limited occupying states in their use of the wealth of defeated countries to that of a usufructuary or lifetime tenancy. Thus, as Vagts suggests, "[t]aking the wealth of an occupied country in such a way as to deprive it permanently of these resources might violate that provision."⁴⁸²

Vagts' reasoning is similar to the assessment of Flick's liability in Nuremberg violating Article 46 of the Hague Regulations. Flick was found to have engaged in spoliation and the wrongful seizure and possession of private party. In particular, Flick's wrongdoing included his unlawful retention of a factory with the intention to retain ownership indefinitely. Thus, Swiss liability might similarly rest on their possession and retention of private assets. As Vagts points out, however:

Swiss responsibility would be derivative of the German. Although the law of involvement in international wrongs by states that in municipal legal systems might be categorized as co-conspirators, joint tortfeasors, aiders and abettors, or receivers of stolen property was not well developed in the 1940s (and is not far advanced today), it could be argued that Switzerland did incur such responsibility.⁴⁸³

Switzerland, however, might still be able to claim as a valid defense that it had acted in good faith and did not know the precise origins of the looted gold.⁴⁸⁴

Even if the Swiss did violate the Hague Regulations with respect to their retention of looted gold, Vagts notes that as a matter of "strict international law," such questions became moot when the Swiss and the Allies negotiated the Washington Accord in 1946. At that time, the Swiss settled their gold claims with the Allies, collected German assets located in Switzerland, and gave

480. *Id.*

481. *Id.*

482. *Id.*

483. *Id.*

484. Vagts also points out that the Swiss bankers had obtained an opinion in 1944 about legal questions from an eminent Swiss international lawyer, Dietrich Schindler. They obtained a second expert legal opinion in 1946 in preparation for negotiations with the Allies. *Id.*

part of those assets to the Allies. Vagts does suggest one qualification to this, he notes that

[w]e have recently learned that there was a postwar agreement between Switzerland and Poland transferring Polish assets in Switzerland to the Swiss Government, which used them to compensate Swiss citizens whose assets in Poland had been expropriated Unlike the Washington Accord this agreement was secret and acknowledgment of its existence had to be wrung out of the Berne government inch by inch.⁴⁸⁵

Vagts states fleetingly that perhaps the Washington Accord might be invalid under international law because the Allies entered the agreement under fraud or mistake (*i.e.*, with ignorance of the Washington Accord).⁴⁸⁶ Vagts's analysis underscores the problems with trying to categorize neatly the actions of Swiss banks during World War Two. Their actions in many respects parallel those of the industrialists and bankers who were tried at Nuremberg. Furthermore, their activities in furtherance of the Nazis' campaign of spoliation and plunder may constitute a violation of the Hague Regulations. Nonetheless, questions remain as to the status of conspirators or aiders and abettors during the war. While in hindsight the Swiss banks' activities seem problematic, they may still have strictly complied with international law at the time of the actions.

Notwithstanding these objections international law has evolved. If similar activity occurred today, as in Unocal, more contemporary notions of derivative liability, and a greater understanding of how commercial entities can assist spoliation would create a different backdrop for an analysis of the banks' actions.

A parsing of the trials of the bankers and industrialists provides some indication that knowing assistance in genocide-related spoliation, plunder, and conversion can rise to the level of a cognizable claim in certain circumstances. Encompassing the activities of the Swiss banks within that liability, however, is troublesome. In fact, German scholars are critical of the trials of the industrialists with respect to allegations and convictions for spoliation. They criticize the Flick conviction because Flick was found guilty of spoliation despite having improved the property he acquired and despite the fact that his acquisition of the property

485. *Id.* at 474.

486. Vagts states that the Vienna Convention on the Law of Treaties sets up several reasons for invalidating treaties including the parallel defenses to the municipal law doctrines of coercion, fraud and mistake. There is little authority on "fraud" or "mistake" under international law *Id.*

initially could be justified on the grounds of necessity.⁴⁸⁷ Similarly, the I.G. Farben decisions have been criticized for extending the crime of spoliation to include contractually acquired property, because Farben often acquired property through contractual purchase from German officials or by dealing directly with business enterprises in occupied areas.⁴⁸⁸

V. THE MARCOS HUMAN RIGHTS LITIGATION: SWISS BANKS AS AGENTS OF A DICTATOR

The Marcos human rights litigation also illustrates the intersection between bank secrecy and human rights. Recently, attorneys for human rights plaintiffs have alleged that Swiss banks acted as agents for Marcos by aiding and abetting his efforts to hide his illegally amassed fortune. Unlike the Holocaust Plaintiffs, the Marcos Plaintiffs did not initially name the Swiss banks as defendants. Rather, they sued Marcos himself under the ATCA. After obtaining a judgment against the Marcos estate, plaintiffs sought a worldwide injunction on the disposition of Marcos' assets. The Swiss banks were the subject of this injunction as part of an interpleader action. At this point, they were named by the court as agents of the Marcos estate. The Marcos litigation does not contain voluminous accounts of the role of the Swiss banks because the banks were not initially named as defendants. The litigation is instructive nonetheless because it is the first to characterize Swiss banks as agents and facilitators in an ATCA lawsuit.

A. *Background: The Deposed Dictator and His Purloined Riches*

Marcos was sued not for his political corruption but for his supervision of human rights violations. Marcos came to power as President of the Philippines in 1965.⁴⁸⁹ By the early 1970s, during his last term of his presidency under the Philippine Constitution, Marcos had declared martial law and suspended the

487. Hellmuth Dix, *Judgments in the Nuremberg Trials of Economists*, in NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS 160, 168-69 (Wilbourn Benton & George Grimm eds., 1955).

488. *Id.* at 172. For example, Dix mentions that the Tribunal refused to exonerate defendants despite their having paid adequate consideration for property acquired in occupied areas. Dix states: "This standpoint of the Tribunal exceeds both the concept of spoliation generally prevailing in the Nuremberg trials and that of extortion prevailing not alone in Germany, since there is no enrichment of the perpetrator." *Id.*

489. STERLING SEAGRAVE, *THE MARCOS DYNASTY* 180 (1988).

constitution.⁴⁹⁰ He continued to rule until he was ousted in 1986. During Marcos's time in office, he apparently accomplished one of the greatest thefts of the twentieth century.⁴⁹¹ Documents found in his abandoned palace indicate he smuggled vast amounts of money and other valuables into Switzerland.⁴⁹² Marcos and his wife Imelda used the pseudonyms William Saunders and Jane Ryan for their accounts.⁴⁹³ Marcos is alleged to have opened accounts with Swiss banks in Zurich, Geneva, Fribourg, Lucerne, and Lausanne.⁴⁹⁴ Additionally, several Liechtenstein Foundations were created to shield Marcos assets. The use of these shell corporations provided the Marcoses with further confidentiality; the beneficial owners of the accounts were the corporations, with boards of directors often consisting of attorneys or other professionals.

During his self-declared martial rule, Marcos had control of the Philippine Treasury.⁴⁹⁵ He also created government monopolies for most commercial activities. Furthermore, there is evidence that Marcos transferred government money to his personal bank accounts.⁴⁹⁶ It was difficult for the Philippine government to estimate with accuracy how much money Marcos

490. *Id.* at 243-46.

491. *Id.* at 194-95.

492. See Hoets & Zwart, *supra* note 27, at 82; see also *Pursuing the Assets of Former Dictators*, 1987 AM. SOC'Y INT'L L. PROC. 394; Maria Shao et al., *Hot on the Trail of the Marcos Billions*, BUS. WK., Aug. 17, 1987, at 52 (detailing list of Marcos's wealth as traced by Philippines Commission on Good Government); Eliot Brenner, *Washington News*, U.P.I., Mar. 22, 1986, available in LEXIS, News Library, UPI File. Brenner details the contents of documents found in Marcos's palace:

The foot-high stack of documents Ferdinand Marcos carried out of Manila suggests he stashed millions of dollars in Swiss banks as long as 12 years ago and used business fronts to shunt money to and from his palace. The nearly 2,100 pages of papers—some as trivial as gas slips and others as potentially damning as bank accounts . . . included letters to Marcos accompanying negotiable cashier's checks, stock certificates, and checks from businessmen, with interest, in return for sugar sale quotas . . .

Id.

493. Hoets & Zwart, *supra* note 27, at 82 (citing *Progress Reported on Marcos Swiss Money*, N.Y. TIMES, Oct. 12, 1986, at 6).

494. *Id.*

495. See SEAGRAVE, *supra* note 489, at 194-95.

496. Hoets & Zwart, *supra* note 27, at 83. The authors state: "There are also instances of direct transfers from the Philippine treasury of money earmarked for official purposes such as the Intelligence Fund, to Marcos's personal secret bank accounts in Switzerland." *Id.*

had secreted abroad.⁴⁹⁷ Bank secrecy, in particular, impeded a full accounting of his estate.⁴⁹⁸

At the same time that Marcos was fleeing the Philippines, his agents had attempted to transfer hundreds of millions of dollars deposited in CS out of Switzerland.⁴⁹⁹ In response, the Swiss Federal Council ordered a freeze on all Marcos's assets, including those of his family and other persons or organizations closely affiliated with him.⁵⁰⁰ The freeze initially worried the Swiss government because it had taken this measure prior to receiving a formal request for assistance.⁵⁰¹ Furthermore, Marcos had not yet been charged with a crime.

The Swiss government found itself in a difficult position. It wanted to act quickly after being alerted that a Marcos cohort was trying to remove funds from Switzerland.⁵⁰² Its response seemed to be a reaction to worldwide public opinion supporting Corazon Aquino rather than a specific request for assistance from the Philippine government. Some commentators viewed the decision as one that stripped Swiss banks of any independence. Finally, the Swiss authorities acknowledged that at least initially, it was difficult to ascertain which bank accounts belonged to Marcos and his relatives or associates.⁵⁰³

On April 7, 1986, the Philippine government requested that the freeze be maintained.⁵⁰⁴ This request was made through the Presidential Commission on Good Government (PCGG). President Corazon Aquino created the PCGG on February 28, 1986, and

497. Thomas Netter, *Swiss Bank Accounts Keeping 1 of Marcos' Biggest Secrets*, CHICAGO TRIB., Mar. 1, 1987, at 16.

498. *Id.*

499. Hoets & Zwart, *supra* note 27, at 80.

500. *Id.* (citing Glynn, *Is Time Running Out for Bank Secrecy*, INST. INVESTOR, Nov. 1986, at 97). It is interesting to note that the Swiss also froze the assets of the deposed President of Haiti, Jean-Claude Duvalier, less than a month later. This freeze occurred in response to an official request from Haiti. Specifically, the Haitian government sent a telex and asked that the accounts of eight individuals including Duvalier, his family, and some other relatives be frozen. The Haitian government also informed the Swiss authorities that Duvalier would be formally charged with criminal embezzlement. See James Sterngold, *Swiss Worried About Freeze on Marcos Assets*, N.Y. TIMES, Apr. 21, 1986, at D10.

501. See Sterngold, *supra* note 500, at D10.

502. See John Parry, *Swiss Freeze Marcos' Bank Accounts, Citing Withdrawal Attempt Monday*, WASH. POST, Mar. 26, 1986, at A27. Records indicate that Marcos's close associates also engaged in Swiss banking. *Id.* For example, Glyceria R. Tantoco, wife of the former Philippine Ambassador to the Vatican was alleged by U.S. and Philippine investigators to be a "front" for Imelda Marcos and transferred \$3.2 million from August to January 1986 to an account at Credit Suisse from a New York bank account. *Id.*

503. *Id.*

504. Hoets & Zwart, *supra* note 27, at 80.

vested it with the task of searching for assets illegally acquired and misappropriated by Ferdinand and Imelda Marcos.⁵⁰⁵

On April 18, 1986, the Philippine Embassy in Bern filed a request pursuant to the IMAC for judicial assistance.⁵⁰⁶ The Philippines requested that Switzerland freeze and disclose all of the Marcos assets held in Swiss banks.⁵⁰⁷ On April 25, 1986, the Philippines provided supplementary evidence obtained from Marcos's palace and a memorandum drafted by Swiss attorneys.⁵⁰⁸ Moreover, the Philippines stated that they would soon charge Marcos with criminal and civil offenses in a court that had been created by Marcos for trying public officials on charges of corruption and graft.⁵⁰⁹

By 1992, the Philippine government had won a request for a preliminary injunction prohibiting the transfer or disposition of Marcos assets located around the globe. The Philippine government had previously learned that Marcos had deposited at least \$375 million in Swiss banks, which has since grown to more than \$475 million.⁵¹⁰

B. Marcos Human Rights Litigation: Swiss Banks as Agents

In January 1995, U.S. District Court Judge Manuel Real awarded the Marcos human rights plaintiffs \$1.9 billion in damages.⁵¹¹ Swiss banks were not defendants in the initial litigation. Evidence introduced at trial, however, showed that the banks held an estimated \$475 million in Marcos-connected funds under the names of shell Liechtenstein corporations, Marcos

505. *Id.* at 95. Mr. Jovito Salonga was appointed the Chairman of the PCGG. *Id.*

506. *Id.* at 96.

507. *Id.*

508. *Id.*

509. *Id.* Pursuant to Article 2 of the IMAC, the Philippines are required to provide Marcos with a trial that meets the procedural requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950. IMAC, *supra* note 59, art. 2. To date, Marcos has not been put on trial. Marcos' attorneys have mounted legal battles in Switzerland stating that the freeze on the Marcos assets is both procedurally and substantively unfair. The Swiss Supreme Court agreed to lift the injunction in January 1998 and funds are supposed to be transferred into an escrow account in the Philippines while the Philippines government reaches an agreement with various parties as to how to distribute the proceeds. See *infra* notes 556-73 and accompanying text.

510. Henry Weinstein, *Judge to Order To Swiss Banks to Release Marcos Millions*, L.A. TIMES, Dec. 9, 1995, at A14.

511. *Dictators Beware: Torture Victims May Finally See Money From the Marcos Vaults*, ASIaweek, Oct. 13, 1995, at 48.

cronies, and aliases used by Marcos and his wife Imelda.⁵¹² The Marcos Plaintiffs' evidence of complicity was a letter from SBC to President Marcos from May 1983. Marcos was ill and hospitalized at that time after a kidney transplant. The letter, which includes information about dummy corporations that had been set up to shelter the Marcos fortune states:

Dear Excellency:

First of all I hope that you and your family are keeping well. It is a long time since I had a chance to communicate with you and take the opportunity of the presence in Geneva of our mutual friend to remit this letter and enclosures under a sealed letter for a strictly private delivery to you. . . .

As we had hardly possibilities in the past to contact you with sufficient discretion, we took the decisions of some basic changes in order to protect you and your family in the best way possible. Therefore, following the changes in the Swiss banking law, the two attorneys of your companies, associated with the Bank [name omitted and myself] Java resigned and we appointed in our stead for the Liechtenstein company a lawyer in Geneva, [name omitted], who is enjoying our full confidence and, for the Bahamian company (ARMELA), [name omitted] and two of his partners. Anyway, I keep on controlling all operations for the companies. In this manner, we have the best arrangement we can namely:

- An independent lawyer offering the additional protection of his professional secrecy
- Control by the delegates of the Bank, as originally planned.⁵¹³

In July 1995, Judge Real awarded the Marcos assets in Swiss bank accounts.⁵¹⁴ In November 1995, the defendant banks and the plaintiffs' attorney held negotiations in Hong Kong concerning the possibility of reaching a settlement regarding the \$475 million of Marcos funds on deposit in Switzerland.⁵¹⁵

In December 1996, Judge Real ordered UBS and CS to hand over the Marcos accounts in partial satisfaction of the \$1.9 billion judgment against the Marcos estate by a federal jury in Hawaii.⁵¹⁶ The funds were to be used to resolve conflicting claims made by the torture victims as well as other claimants. The Swiss government protested Judge Real's order concerning the \$475 million located in Swiss banks. The Swiss filed diplomatic letters as part of legal briefs lodged with the Ninth Circuit when

512. Michael Miller, *Swiss Banks Plan Talks on Marcos Cash*, REUTER WORLD SERV., Nov. 27, 1995, available in LEXIS, News Library, REUWLD File.

513. Letter from Officer, SBC to President Marcos (May 19, 1983) (submitted as part of Marcos litigation) (copy on file with Author). The chart in Appendix A diagrams how the Marcoses' were able to shield and disguise their wealth with the assistance of Swiss bankers.

514. See Miller, *supra* note 512.

515. *Id.*

516. See *In re Estate of Marcos Human Rights Litigation*, 910 F. Supp. 1470, 1473 (D. Haw. 1995).

defendants appealed Real's injunction.⁵¹⁷ The U.S. State and Justice Departments also supported the Swiss government and opposed Real's order stating that it undermined the sovereign interests of Switzerland.⁵¹⁸

Judge Real did not provide extensive legal analysis of his decision that the Swiss banks were agents and aiders and abettors of the Marcos regime. In issuing the permanent injunction, however, "[t]he MOL Court found the Swiss banks to be agents and representatives of the Marcos Estate and authorized a Permanent Injunction and Judicial Assignment as to the assets held by the Swiss Banks."⁵¹⁹ The injunction restrained the Marcos Estate, its agents, representatives, and aiders and abettors from transferring or otherwise conveying any funds or assets held for or on behalf of Marcos. On appeal, the Ninth Circuit also acknowledged that Judge Real had characterized the Swiss banks as agents of Marcos.⁵²⁰

The Swiss banks responded by appealing Judge Real's order in the Ninth Circuit. They argued that the U.S. court's attempt to enforce the injunction would conflict with Swiss sovereignty, international law, and Swiss criminal law.⁵²¹

The Swiss government had previously frozen all Marcos's assets in 1986 in response to a request from the Philippine government after Ferdinand Marcos fled the country. The Swiss banks argued that complying with the U.S. court order might subject them to liability in Switzerland. The U.S. State Department agreed with the Swiss government's concerns about Judge Real's order, stating that the order "improperly threatens important interests of the U.S., Switzerland and the Philippines."⁵²²

After a victory against the Marcos estate, plaintiffs sought to enforce the judgment against two Swiss banks where Marcos allegedly maintains accounts.⁵²³ Plaintiffs served a writ of

517. See Henry Weinstein, *Swiss Threaten Retaliation over L.A., Judge's Order in Marcos Case; Courts: U.S. Seeks to Pacify Individuals Who Complained About Ruling That They Should Turn Over \$475 Million Linked to Dictator*, L.A. TIMES, Feb. 11, 1996, at A3.

518. *Id.*

519. Plaintiffs/Real Parties in Interest Response in Opposition to Petitioners' Petition for Writ of Mandamus, Prohibition and/or Other Extraordinary Relief at 1, *Credit Suisse v. United States Dist. Ct., Cent. Dist. Of Calif.*, 130 F.3d 1342 (9th Cir. 1997) (No. 97-70193).

520. See *Hilao v. Estate of Marcos*, 95 F.3d 848, 855 (9th Cir. 1996).

521. Weinstein, *supra* note 517.

522. *Id.*

523. As one report noted:

[I]t is hardly surprising that, for foreigners with money to hide, the Swiss remain the bankers of choice. One such foreigner was the late Ferdinand Marcos, president of the Philippines: he is thought to have stashed \$475

execution upon the California branches of SBC and CS.⁵²⁴ Both banks appealed the writs, stating that their California branches contained no Marcos deposits. The Ninth Circuit vacated Judge Real's order, citing Federal Rule of Civil Procedure (FRCP) 69(a), which requires that the execution of a judgment be in accordance with the practice and procedure of the state in which the district court is located.⁵²⁵

Consequently, the Ninth Circuit looked to California law, which requires that in levying upon a deposit account, "the levying officer shall personally serve a copy of the writ of execution . . . on the financial institution with which the deposit account is maintained."⁵²⁶ In this instance, the Marcos accounts are in Switzerland. The Ninth Circuit, therefore, ruled that the notice of levy upon the California branches was ineffective.⁵²⁷

The Court of Appeals noted that Judge Real should have granted the defendants' previous motions to vacate the notices of levy.⁵²⁸ The court also agreed with plaintiffs' statement that the district court had found defendants to be "agents and representatives" of the Marcos.⁵²⁹ The Ninth Circuit noted: "Even if this finding presents an 'exceptional circumstance,' it is outweighed by the fact that the Banks were not parties before the court in this case in which such a finding was made."⁵³⁰ They disagreed, however, the Marcos Plaintiffs' assertion that the defendant banks were helping the Marcos Estate consummate agreements with the Philippine government concerning the division of the bank account assets.

After failing to execute their judgment in California, plaintiffs served SBC and CS with garnishment summonses on their branch offices in Chicago, Illinois.⁵³¹ Defendants moved to quash, vacate, and dismiss the summonses in federal district court in Illinois,⁵³² stating the Chicago branches did not hold any Marcos funds.⁵³³ The court thus had to decide whether the

million in two banks, Credit Suisse and Swiss Bank Corporation [two of the banks being sued in the Holocaust Victims Asset Litigation.] But other foreigners are less keen on Swiss traditions. The two banks are fighting a legal action brought by thousands of Filipinos who are claiming compensation for persecution under Marcos's rule.

Banking Secrecy. Keeping Mum, ECONOMIST, Feb. 17, 1996, at 71.

524. *Hilao*, 95 F.3d 848 at 850.

525. *Hilao*, 1997 WL 428544 *1 (N.D. Ill.).

526. *Hilao*, 95 F.3d at 851 (citing Cal. Civ. Proc. § 700.140(a)).

527. *Id.* at 853-54.

528. *Id.* at 854.

529. *Id.* at 855.

530. *Id.*

531. *Hilao*, 1997 WL 428544, *1.

532. *Id.*

533. *Id.*

garnishment summonses served on Chicago branches could reach assets held in the main offices in Switzerland.

In Illinois, intangible property such as debts does not need to be located within the state for a court to have jurisdiction over the garnishee. In *Park v. Towson & Alexander, Inc.*,⁵³⁴ an Illinois Appellate Court stated that a debt is "intangible and jurisdiction does not depend on the situs of the debt. Instead, a foreign corporation having property and transacting business here may be garnished in our courts for a debt, regardless of the situs of the debt."⁵³⁵

Plaintiffs relied on *Park* and stated that they could lawfully garnish the defendants' assets located in Switzerland by serving their summonses upon the Chicago branches.⁵³⁶ Plaintiffs reasoned that because bank accounts and deposits are "debts," they constitute intangible debts, have no situs, and are subject to garnishment anywhere.

The district court disagreed with plaintiffs' reasoning.⁵³⁷ The court noted that a similar case, *Fidelity Partners, Inc. v. Philippine Export and Foreign Loan Guarantee Corp.*,⁵³⁸ had been considered recently in federal district court in New York City. In *Fidelity Partners*, plaintiff filed an action in a New York court seeking a post-judgment attachment and execution against bank accounts of the defendant located at the Philippine Nation Bank (PNB). Defendant was an agency of the Philippine government. PNB had a New York branch linked to a system that allowed money deposits to be withdrawn instantly from an automatic teller machine located in the Philippines. Plaintiffs argued that because a bank account is a debt and because PNB had a New York location, the accounts were subject to attachment in New York. In other words, the debt did not have a specific situs, and the PNB branch presence made New York an appropriate place for garnishment.

The *Fidelity Partners* court rejected plaintiffs' argument:

By characterizing the accounts as PNB's debt rather than as [defendant's] assets, [plaintiff] apparently believes it can avoid an analysis of the location of the accounts under the principles of sovereign immunity discussed above. However, the weakness in [plaintiff's] argument is that any right to execute on debts owing to [defendant] from debtors located in the United States is but the flip

534. 679 N.E. 2d 107 (Ill. App. Ct. 1997).

535. *Id.* at 109 (holding that Illinois court had jurisdiction in garnishment action against corporation headquartered in Illinois over accounts payable by an out-of-state corporate branch to an out-of-state debtor).

536. *In re: Estate of Ferdinand Marcos Litigation*, 1997 WL 528544, *1 (N.D. Ill. 1997).

537. *Id.* at *2.

538. 921 F. Supp. 1113, 1118 (S.D.N.Y. 1996).

side of [plaintiff's] right to execute on [defendant's] assets in the United States. [Plaintiff] cannot gain "additional" rights merely by characterizing the same bank accounts as a "debt" rather than as an "asset." Because a bank account is always the depositor's asset as well as the bank's debt, [plaintiff's] motion for execution upon PNB's "debt" must also be viewed as a motion for execution upon [defendant's] "asset."⁵³⁹

The Illinois district court stated that while "Marcos's bank deposits can be described as debts of the [Defendants], they must also be considered as assets of the Estate. Those assets are tangible, are held outside of the United States, and are not subject to garnishment here."⁵⁴⁰

In most jurisdictions, branches of banks are treated as separate legal entities for the purposes of attachment. This is known as the "separate entity" or New York rule and was articulated in a 1950 New York decision, *Cronan v. Schilling*.⁵⁴¹ Plaintiffs argued that the separate entity doctrine was not followed in Illinois. To support this position, they cited a 1903 Illinois Appellate Court opinion, *Bank of Montreal v. Clark*.⁵⁴² In *Bank of Montreal*, plaintiff was able to serve a garnish summons on a branch bank in Chicago to access funds located in another bank account in Toronto, Canada. In this decision, the court held that, despite the fact that two branches had no control over one another's affairs, they were "but agencies of the [main bank]."⁵⁴³

The Illinois court ultimately refused to follow Illinois appellate court's *Bank of Montreal* decision stating that an opinion was not "binding on a federal court if the decision is not a good predictor of what the state's highest court would do in a similar case."⁵⁴⁴

539. *Id.* at 1118.

540. *In re: Marcos Litigation*, 1997 WL 428544 at *3.

541. 100 N.Y.S.2d 474 (App. Div. 1950). The *Cronan* decision articulated the following reason for the separate entity doctrine:

Unless each branch bank is treated as a separate entity for attachment purposes, no branch could safely pay a check drawn by its depositor without checking with all other branches and the main office to make sure that no warrant of attachment had been served upon any of them. Each time a warrant of attachment is served upon one branch, every other branch and the main office would have to be notified. This would place an intolerable burden upon banking and commerce, particularly where branches are numerous, as is often the case.

Id. at 476.

542. 108 Ill. App. 163 (Ill. Ct. App. 1903).

543. *Id.* at 167.

544. *In re: Marcos Litigation*, 1997 WL 428544 at *4. Judge Gettleman was quick to distinguish *Bank of Montreal* from the *Marcos* garnishment action:

The appellate court opinion . . . was very fact specific. Approximately one-half hour after the defendant in the main action had been personally served in Chicago, the Chicago branch of the Bank of Montreal was served

The court reasoned that the *Bank of Montreal* decision was limited to the facts of that case. Additionally, the court noted that "the court's implicit holding that the branch banks are agents of the main bank for all purposes has been rejected generally by numerous courts"545 The court dismissed plaintiffs' summonses. It did, however, note some discomfort with the notion that modern bank branches were truly "separate entities" with the advent of modern technology:

The court recognized that most of the concerns of the Cronan court that led to the adoption of the separate entity rule have been eliminated by modern technology. In this age of the computer, it is likely that any branch could immediately enter receipt of a garnishment summons into its main computer file which could then (theoretically, at least) prevent any branch from improperly or unlawfully honoring a check. 546

Despite this recognition that multinational banks are interconnected, the court stated that, because the Chicago branches of the Swiss banks did not have access to the Marcos accounts, they should be treated as separate entities.547

After the Ninth Circuit reversed Judge Real's order, human rights victims filed a new lawsuit against the Swiss banks directly, in an attempt to enforce the judgment that Judge Real had handed down. The new complaint seeks to obtain "preliminary and permanent injunctive relief prohibiting defendants from transferring or dissipating" the Marcos assets on deposit at SBC and CS.548 Among other claims, plaintiffs alleged that the "Swiss banks have laundered and invested the assets of Ferdinand E. Marcos for decades."549 Plaintiffs further alleged that:

as garnishee. The defendant had no account in that branch, but did have an account in a branch in Toronto. He went immediately to Toronto and withdrew his assets from that branch the following day. The court of appeals, affirming the trial court, held that even though the branch in Chicago had no relation to the branch in Chicago, the evidence showed that the Chicago manager was aware of the defendant's accounts in Toronto, and therefore, had a duty to notify the Toronto branch of the garnishment in the shortest practicable time.

Id.

545. *Id.*

546. *Id.* at *5.

547. *Id.*

548. [Proposed] Second Am. Compl. at 1, *Tizon v. Credit Suisse* (D. Haw. 1997) (MDL No. 840; see also *Marcos Victims File Complaint in U.S.*, UPI, Sept. 14, 1996, available in LEXIS, News Library, UPI File.

549. Plaintiffs/Real Parties in Interest Response in Opposition to Petitioners' Petition for Writ of Mandamus at 1, *Credit Suisse v. U.S. Dist. Ct. for Cent. Dist. of Calif.* (9th Cir. 1997) (No. 97-70193).

For a period of many years, defendants have acted as agents and representatives of Ferdinand E. Marcos, and now his Estate and its legal representatives. Marcos gave the banks the unlimited power to effect, upon their sole judgment, all transactions with regard to his assets, and this power survived his death.

The defendants played an active role in concealing and disguising the assets, creating Liechtenstein foundations which they controlled to prevent any creditor from gaining access thereto. . . . Defendants have acted and continue to act as agents and representatives of the Estate and to hold hundreds of millions of dollars on which they earn fees.

Unless preliminarily and permanently enjoined and restrained from transferring the Estate's assets pending collection of the judgment, it is believed that the defendants will transfer the assets to the heirs and the family of Ferdinand E. Marcos or others, all to the irreparable harm of the Plaintiff Class.⁵⁵⁰

CS and SBC initially asked the district court to dismiss the *Rosales* action under FRCP 12(b) on the ground that the injunctive and declaratory relief that plaintiffs sought would violate the Act of State doctrine. The district court denied the defendants' motion to dismiss.⁵⁵¹ Defendants CS and SBC petitioned the Ninth Circuit for a writ of mandamus.⁵⁵² They claimed, essentially, that the current litigation is merely an attempt by plaintiffs to sidestep the requirement that a notice of execution be levied on the banks in Switzerland.⁵⁵³

On June 24, 1997, Imelda Marcos moved to dismiss a motion by the Marcos Plaintiffs to enforce the two billion dollar judgment in a Manila court. She asserted that the Manila court had no jurisdiction to enforce the foreign judgment and that it conflicted with Philippine law and jurisprudence.⁵⁵⁴ The Ninth Circuit also dismissed the Marcos Plaintiffs' lawsuit against the Swiss banks

550. [Proposed] Second Am. Compl. at 10-11, *Tizon* (MDL No. 840).

551. As the Ninth Circuit noted:

The district court never issued an "order" refusing to dismiss the *Rosales* action. Instead, the district court orally denied the Banks' motion to dismiss, without specifying the grounds on which such denial was based. To date, no signed order has been entered in this case indicating the disposition of the Banks' motion to dismiss.

Credit Suisse v. U.S. Dist. Ct. for Cent. Dist. of Calif., 130 F.3d 1342, 1345 n.5 (9th Cir. 1997).

552. A writ of mandamus is an order of a federal court to restrict a court to a lawful exercise of its jurisdiction or to compel it to exercise its authority. The court "must be 'firmly convinced that the district court has erred and that the petitioner's right to the writ is clear and indisputable.'" *Id.* at 1345 (quoting *Valenzeula-Gonzalez v. U.S. Dist. Court.*, 915 F.2d 1276, 1279 (9th Cir. 1990)).

553. See Petition for Writ of Mandamus at 4-5, *Credit Suisse* (No. 97-70193).

554. See *Imelda Marcos Seeks to Dismiss motion of Rights Victims in Manila*, Deutsche Presse-Agentur, June 24, 1997, available in LEXIS, News Library, DPA File.

on December 3, 1997.⁵⁵⁵ The court ruled that the suit could not proceed because it conflicted with action taken by Switzerland as a sovereign nation with respect to the disputed funds. The Ninth Circuit invoked the Act of State doctrine whereby "[e]very 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."⁵⁵⁶

In particular, the court pointed to the Swiss Executive Order issued in 1986 that froze the Marcos bank accounts and the subsequent actions of the cantonal governments pursuant to the IMAC. The Ninth Circuit stated that the Swiss government's 1986 action forestalled any parallel U.S. litigation on the same issue: "Any order from the [U.S.] district court compelling the Banks to transfer or otherwise convey Estate assets would be in direct contravention of the Swiss freeze orders. Subjecting Estate assets held by the Banks to the district court's further orders would thus allow a United States court to . . . 'declare invalid the official act of a foreign sovereign'."⁵⁵⁷ The court also noted that the District Court's order to the Swiss banks to reveal information about the Marcos accounts would violate Swiss bank secrecy laws.⁵⁵⁸ The Marcos Plaintiffs were asked to challenge the Swiss order via the Swiss judicial system.

The Philippine government stated that it would negotiate with the 10,000 human rights victims involved in the litigation in an attempt to reach a settlement when the Swiss government releases the Marcos funds.⁵⁵⁹ Just several days later, on December 12, 1997, the Swiss Federal Supreme Court ordered Swiss banks to return the Marcos assets to the Philippines.⁵⁶⁰

555. See *Credit Suisse*, 130 F.3d at 1342; *Court Deals Blow to Rights Victims of Marcos's Reign*, WASH. POST, Dec. 4, 1997, at A27; Henry Weinstein, *Court Says Judge Can't Seek Freeze on Marcos Funds*, L.A. TIMES, Dec. 4, 1997, at B3. Plaintiffs' attorney Robert Swift reacted to the decision: "It makes what has been a difficult struggle for human rights victims a much longer and harder struggle. The evidence shows a concerted pattern of the Swiss banks and the Marcoses concealing assets over decades." *Id.*

556. *Credit Suisse*, 130 F.3d at 1346 (quoting *Underhill v. Hernandez*, 1268 U.S. 250, 252 (1987)).

557. *Id.* at 1347 (quoting *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l*, 493 U.S. 400, 405 (1990)).

558. *Id.* at 1346.

559. *U.S. Court Ruling Benefit Philippine Government's Marcos Claim*, Agence France Presse, Dec. 7, 1997, available in LEXIS, News Library, AFP File.

560. Judgment By the Swiss Federal Supreme Court, 1A.87/1997/err, *In re* Federal Office for Police Matter v. District Attorney's Office IV for the Canton of Zurich, Dec. 10, 1997 (English translation on file with Author) [hereinafter *Swiss Supreme Court Judgment*]. See *Swiss Banks Must Return Marcos Assets*, Dec. 13, 1997, UPI, available in LEXIS, News Library, UPI File.

The Swiss had previously asserted that they needed a binding order from a Philippine court, essentially convicting Marcos of criminal offenses relating to his theft of state funds.⁵⁶¹ This never occurred. The Swiss Federal Office for Police Matters, International Mutual Assistance Division, and the Philippine government asked for advanced surrender of the funds prior to a final and binding judgment against Marcos.⁵⁶² The Swiss Supreme Court noted that Article 74a of the revised IMAC permits a court to surrender restrained assets in advance of a final judgment against the owner of the assets unless the rights of third parties demand retention of the assets.⁵⁶³ The other requirement is that the rights of third parties must not demand retention of the assets.⁵⁶⁴

The Swiss Supreme Court noted that, with respect to the Marcos monies, "[t]he illegal origin of the restrained moneys cannot be seriously doubted" and that the predominant share of the money was "obviously tortious in origin."⁵⁶⁵ Consequently, the court granted the advance release of the Marcos funds "under the condition that the Philippines assures that a decision on the forfeiture or restitution to the entitled parties will be reached only

561. See IMAC, Principle 67, *supra* note 5; see also Swiss Supreme Court Judgment, at 3-4 (summarizing Swiss rulings concerning Marcos and Philippines request under IMAC).

562. Swiss Supreme Court Judgment, at 6-8.

563. *Id.* at 13-14. The Swiss Supreme Court noted:

Art. 74a, Par. 3 IMAC demands the presence of a final and enforceable ruling by the requesting state only as a rule. Thus, the law allows the authority applying the law to disregard the requirement in certain cases, whereby the advance surrender must remain the exception and may not become the rule.

Id. at 14. The court also pointed out that the revision of the IMAC meant that the forfeiture or restitution need not be effected by a criminal court. Rather, Article 74a requires that the forfeiture relate to tortiously acquired objects and that the order come from a court. Therefore, it is appropriate for the Philippines to resolve the forfeiture and distribution of Marcos assets in a civil case. *Id.* at 28-29.

564. Article 74a, para. 4 of Revised IMAC states that objects or assets can be withheld if:

- (a) the injured party has his habitual residence in Switzerland and they are to be restored to him;
- (b) an authority asserts rights to them;
- (c) a person not involved in the punishable act whose rights are not safeguarded by the requesting state substantiates that he acquired, in good faith, the rights to such objects or assets in Switzerland or, if her has his habitual residence in Switzerland, abroad; or
- (d) the objects or assets are needed for criminal proceedings that are pending in Switzerland or are suitable for forfeiture in Switzerland.

IMAC, *supra* note 59, art. 74a.

565. Swiss Supreme Court Judgment, at 24-25.

in judicial proceedings that satisfy the procedural principles set out in the U.N. Convention II. . . ."⁵⁶⁶

The Swiss government wants the Philippine government to apprise it of steps taken with respect to legal proceedings as well as efforts to compensate the human rights victims.⁵⁶⁷ The Swiss Supreme Court recognized that the human rights claimants should be taken into consideration as part of the mutual assistance process because the "IMAC must be exercised with due observance of the fundamental values of the IMAC and of the Swiss legal regime and Switzerland's legal obligations. This includes specifically the safeguarding of human rights"⁵⁶⁸ The Swiss Supreme Court also noted that both Switzerland and the Philippines, as signatories to the U.N. International Convention on Civil and Political Rights, had obligations to "take necessary steps . . . to lend effectiveness to the rights recognized in the convention."⁵⁶⁹ While the court did not make the funds absolutely contingent upon restitution to the Marcos Plaintiffs, the court strongly suggested that this should take place because "requested mutual assistance should make the Philippines which is bound by international law to provide indemnification to the victims, capable of deciding on the fate of the contested assets, which are claimed by the victims on the basis of liability."⁵⁷⁰

Interestingly, while the Swiss banks argued in the United States that their branch bank assets should be shielded due to the Act of State doctrine, and also that the branches were entities separate from the parent, they argued the converse in Switzerland. As the Swiss Supreme Court summarized: "The banks assert that if the assets are transferred to the Philippines then they could be charged in the "USA with 'contempt of court' and be punished with high fines."⁵⁷¹ The banks also claimed that the victims could attempt to collect their claims from the U.S. branches.⁵⁷² The court made reference to the Ninth Circuit's previous dismissal of the Marcos Plaintiffs' claims against the banks on December 3, 1997.

The court also noted that "[i]t is primarily the responsibility of the legislature and ordinance-issuing bodies, and of the banks and their professional organizations, to ensure that the head of

566. *Id.* at 28.

567. *Cf.* John Templeman, *Marcos's Hoard Heads Home*, *BUS. WK.*, Dec. 29, 1997, at 66.

568. Swiss Supreme Court Judgment, at 36.

569. *Id.* at 38. The court noted that among the rights in the Convention were the right to the prohibition of torture, cruel and inhumane or degrading treatment or punishment and personal liberty. *See id.*

570. *Id.* at 43.

571. *Id.* at 44-45.

572. *Id.* at 45.

state of dictatorial regimes cannot—as in this case—deposit millions of obviously dishonest origin in Swiss bank accounts.”⁵⁷³ The court specifically mentioned that both parties were also signatories to the U.N. Accord on Torture, and other Cruel, Inhumane and Degrading Treatment or Punishment of December 10, 1984.⁵⁷⁴ Based on these provisions, the court concluded that “victims of serious human rights violations are entitled to compensation and a fair trial, in which they can assert their claims for compensation.”⁵⁷⁵

The court noted that while the procedural rights of human rights victims were guaranteed under Philippine law (thus presupposing that they could have sued Marcos in the Philippines), “the Philippine judiciary is reputed to be ponderous and susceptible to corruption and political influence.”⁵⁷⁶ This is the first release of funds that have been frozen after a political leader has been deposed. One hundred million dollars of the five hundred million dollars in Marcos assets is due to be released initially. The human rights plaintiffs led by spokeswoman Marie Hilao-Enriquez have made a public plea against splitting the assets between the government and the Marcos family.⁵⁷⁷

This is because the parties have not fully explored the issue of agency or aider-and-abettor liability. Why? Because the Swiss banks have been opposing plaintiffs’ attempts to enforce their judgment on purely procedural grounds. The litigation is nonetheless significant. It represents the first time that a U.S. court has recognized a Swiss bank as an agent or partner of a dictator who has engaged in serious human rights violations.

The Marcos Plaintiffs have followed the path of the Holocaust Plaintiffs. They have sued the defendants directly and in doing so have begun to assert fuller theories of joint action and collaboration. As stated above, the theories and claims espoused in the Holocaust assets and Marcos human rights litigation may prove instructive for contemporary litigation.⁵⁷⁸

573. *Id.* at 23.

574. *Id.* at 39 (citing U.N. Accord on Torture and Other Cruel, Inhumane and Degrading Treatment of Dec. 10, 1984 (SR.O.105)).

575. *Id.* at 30.

576. *Id.* at 42. The court also noted that criminal prosecutors’ offices were understaffed, that delays in the justice system existed, and that many perpetrators get off “scott free.” *Id.*

577. *Philippine Victims Call for Talks on Marcos Assets*, Deutsche Presse-Agentur, Dec. 14, 1997, available in LEXIS, News Library, DPA File. In March 1998, the Philippine government announced that it would attempt to arrive at a formula sharing the \$500 million with the human rights plaintiffs. See *Philippines to Share Marcos Wealth with Human Rights Victims*, Deutsche Presse-Agentur, Mar. 9, 1998, available in LEXIS, News Library, DPA File.

578. In a related action, plaintiffs’ attorney filed a separate suit against the Swiss banks seeking to recover millions of dollars in gold that Marcos purportedly

VI. DRAINING THE COFFERS: SPOILIATION AS AN INTERNATIONAL CRIME

As stated above, the Marcos and Holocaust assets cases both implicate human rights violations in some fashion, rather than political corruption alone. Are there situations where the draining of a nation's treasury amounts to a violation of international law and of citizens' human rights? Indigenous spoliation has been defined by one scholar, Ndiva Kofele-Kale, as "destruction of a state's endowment, the laying waste of the wealth and resources belonging by right to her citizens, and the denial of their heritage."⁵⁷⁹

Why should indigenous spoliation be considered a serious and egregious violation of international human rights? The effects of indigenous spoliation are devastating. As Kofele-Kale comments: "What has taken place in the last three decades is planned, organized, and deliberate looting on a massive scale. . . . [It is an] unprecedented movement of national wealth from states that can least afford such extensive financial hemorrhage into private accounts in capital-rich states for safekeeping."⁵⁸⁰

Kofele-Kale suggests three other criteria for indigenous spoliation. First, indigenous spoliation is characterized by a great mobility in wealth and the ability of leaders to conceal and disguise looted assets.⁵⁸¹ Second, he points to the magnitude of spoliation—often billions of dollars are stolen from a nation's

had stolen from the Philippine Central Bank and deposited in Swiss bank accounts. Bank Julius Baer was implicated for alleged wrongdoing. Baer was able to show that documents purportedly showing that Baer assisted Marcos with respect to shielding and selling gold stolen from the Philippines were not genuine. *Marcos-Linked Lawsuit Dropped Against Swiss Bank*, Agence France Presse, Nov. 14, 1997, available in LEXIS, News Library, AFP File.

579. Kofele-Kale, *supra* note 36, at 58; see also NDIVA KOEFLE-KALE, INTERNATIONAL LAW OF RESPONSIBILITY FOR ECONOMIC CRIMES 111-62 (1995) (characterizing indigenous spoliation as a breach of international customary law of fiduciary relations).

580. Kofele-Kale, *supra* note 36, at 116; see also Kwitny, *supra* note 8 (stating that Mobutu received huge kickbacks which were channeled into European bank accounts and that "such thievery . . . strips Third World countries of needed money" and noting western complicity in corruption). As U.S. Congressman Stephen Solarz has noted, dictators such as Haiti's Jean-Claude Duvalier, Ferdinand Marcos, and Zaire's Mobutu Sese Seko have ruined their national economies, looted their treasuries and corrupted their political systems. See Solarz, *supra* note 9, at 18.

581. See Kofele-Kale, *supra* note 36, at 58 (citing *Pursuing the Assets of Former Dictators*, *supra* note 492, at 395 (remarks by Abram Chayes)).

coffers.⁵⁸² Finally, the cost of current spoliation can be devastating, especially for developing nations.⁵⁸³

Michael Reisman emphasizes the international aspects of indigenous spoliation. Reisman states that spoliation is international in terms of both means and consequences. Misappropriated funds are channeled out of a nation into safe offshore or bank secrecy havens.⁵⁸⁴ Thus, the means for achieving misappropriation are international. The consequences of spoliation are also international, as the burden of reconstruction of spoliated economies falls on the international community in the form of development assistance and humanitarian aid.⁵⁸⁵ Nonetheless, a tension still exists between contemporary visions of international law and "persisting" features of the classical state system including deference to the finality of a governing leader's acts occurring within a nation's own territory, and sovereign immunity in foreign judicial matters. In fact, Reisman points out, bank secrecy jurisdictions are an outgrowth of the classical state system:

Indeed, the autonomy of national jurisdiction and the rights of states to choose their own form of economic organization have been invoked in defense of states whose bank secrecy laws have shielded spoliation. Some of these states insist that bank secrecy laws, rather than shielding the guilty, generally benefit persecuted peoples whose wealth is targeted for expropriation by vicious governments. Even when spoliations that all would condemn are taking place, the continuing crisis and competition of the international political system inevitably press other states to adjust the application of high principles to current exigencies. The *locus classicus* is Franklin D. Roosevelt's cryptic comment on Anastasio Somoza: "He may be an S.O.B., but he's our S.O.B."⁵⁸⁶

Kofele-Kale states that indigenous spoliation violates the rights of peoples in a nation to "dispose freely of their national wealth and natural resources."⁵⁸⁷ This right, he argues, is derivative of the right of permanent sovereignty and self-determination.⁵⁸⁸ Therefore, Kofele-Kale ultimately states that

582. See Kofele-Kale, *supra* note 36, at 59.

583. See *id.* "As resources are funneled into private bank accounts abroad, governments, state enterprises, central banks and private-sector companies are forced to borrow from foreign lenders." *Id.*

584. See Reisman, *supra* note 36, at 56.

585. See *id.* at 56-57.

586. *Id.* at 57-58.

587. *Id.* at 75.

588. Kofele-Kale argues that state leaders have a duty of loyalty, a fiduciary duty, and a duty to preserve state resources held in public trust for the benefit of the nation's citizens. See *id.* at 93-100. Kofele-Kale states that fiduciary relationships have been used in the international sphere and points to the U.N.

indigenous spoliation must be treated as more than a simple property dispute. Rather, he suggests that indigenous spoliation violates fundamental human rights because “[t]he right of a people not to be dispossessed of their wealth and natural resources is not just any ordinary human right, but *the* fundamental human right. . . . A people’s enjoyment of the other rights within the pantheon of human rights is dependent on their access to national wealth.”⁵⁸⁹ Consequently, he states that indigenous spoliation needs to be viewed as an extension of *Filartiga* and elevated to the level of a human rights violation and a breach of a universal norm such that any state can bring an action against high-ranking officials who engage in acts of spoliation:

Constitutionally responsible rulers should be held individually accountable before the law of nations for their acts of spoliation. Achieving this goal will require adopting the approach of the Genocide Convention and the Nuremberg war crimes prosecutions. This development would open the door for individual criminal liability to attach to those who engage in the proscribed acts.⁵⁹⁰

Peter Weiss, a human rights and civil rights attorney who helped the Philippine government recover Marcos’s loot under the auspices of the Center for Constitutional Rights, also explains the connection between human rights and spoliation with respect to the Marcos situation:

Why did the Center take this case? Because we saw it as a human rights case. What makes it a human rights case? The fact that people have rights not only as individuals, but also as peoples, or, if you prefer, as nations. This case, therefore, which involves the rape of an entire nation, seemed to us to be a logical extension of the *Filartiga* principle, which makes egregious torts in violation of international law justiciable in domestic courts.⁵⁹¹

Reisman also states that previously a nation’s sovereign or head of state was able to alienate or liquidate parts of his or her national coffers and “cache it in a convenient financial center elsewhere in the world.”⁵⁹² As Reisman notes, however, “the incorporation of democratic ideals into international law and into transitional notions of political legitimacy, which has found its most authoritative expression in the United Nations Charter,

Trusteeship System as an example of the public trust doctrine in international relations. *See id.* at 100-02.

589. *Id.* at 113.

590. *Id.* at 117.

591. *Pursuing the Assets of Former Dictators*, *supra* note 492, at 397 (remarks by Peter Weiss).

592. Reisman, *supra* note 36, at 57.

changes, by necessary implication, the competence of national officials to dispose of the assets of a nation-state."⁵⁹³

Thus, as Reisman notes, "[o]ne of the anomalies of these cross-currents has been confusion and paralysis about the status of national funds spoliated by high government officials and cached abroad."⁵⁹⁴ Reisman argues that both the agents who assist with spoliation (who are themselves nationals of the country being plundered) and the foreign bank secrecy jurisdiction that accepts the plunder violate international law. Kofele-Kale argues that international actors are also complicit in indigenous spoliation: "The destruction of national economies . . . can therefore be attributed not only to the leaders who treat their national treasuries as their personal accounts, but also to their foreign backers and aid donors who overlook their excesses for one reason or another."⁵⁹⁵ Moreover, much of the wealth that is spoliated ends up in other nations, often ones that also give leaders political asylum.⁵⁹⁶

As Kofele-Kale and Reisman suggest, the treatment of indigenous spoliation under international law is all but certain.⁵⁹⁷ The magnitude of current spoliation and the frequency with which it recurs, however, have given rise to a reexamination of the practice of political plunder. To the extent that the international community moves to condemn indigenous spoliation, bankers who assist with the large-scale and systematic plunder of a nation's resources might similarly be liable under the "joint venturing" concept set forth in *Unocal*.

Furthermore, as discussed below, to the extent that indigenous spoliation can be treated within an international convention or mechanism, it should be considered alongside situations where leaders engage in human rights violations that are more universally acknowledged. Finally, to the extent that we recognize spoliation, one must take into account the role of bankers and other financial institutions who willingly serve as the repositories for purloined funds.

593. *Id.*

594. *Id.* at 58.

595. Kofele-Kale, *supra* note 36, at 102.

596. *See id.* at 107.

597. *See Pursuing the Assets of Former Dictators, supra* note 492, at 397 (remarks by Peter Weiss) (stating that no one is sure what principal of international law is involved and that the idea of suing heads of government is relatively new).

VII. BANKING ON IT: LESSONS FROM THE MARCOS AND HOLOCAUST ASSETS LITIGATION

The Holocaust assets and Marcos cases are important in that they attempt to challenge the role that commercial banks play with respect to international human rights. In both instances, plaintiffs challenge the assertions that banks are always neutral actors engaged in purely commercial activities. Ultimately, however, each case has problems that have made it difficult for claimants to seek redress through civil litigation. These cases, nonetheless, form the foundation for future efforts to challenge the role of bank secrecy jurisdictions in their relationships with clients who have violated the law of nations. Furthermore, the existence of bank secrecy is what has encouraged criminals to deposit their funds in Switzerland and other secrecy jurisdictions.

Evidence suggests that banks have been able to act without much accountability previously, because their actions have often been cloaked by secrecy. Until recently, the active duty to report suspicious transactions or customers was voluntary. Thus, while a duty to cooperate eventually arises if a criminal is exposed (as in the case of Marcos), the ability of Switzerland and other bank secrecy nations to accept the deposits and to profit from such transactions could still take place without any negative repercussions.

The Holocaust Plaintiffs may have difficulty proceeding with their international law claims because they are predicated upon notions of conspiracy to commit violations of international law. Conspiracy was recognized by the Nuremberg Tribunals only for limited actions pertaining to crimes against peace. Moreover, the notion of enterprise liability or corporate complicity had not been fully developed. The Nuremberg trials, however, provide useful factual guidance with respect to banking activities that constitute violations of customary international law. To the extent that bankers actively work to help war criminals conceal and dispose of looted, confiscated, and otherwise plundered property, they may be liable for spoliation. Thus, if a bank can be categorized as a "joint venturer" or co-conspirator under a more contemporary legal analysis, the Holocaust assets litigation helps fashion a theory of liability for banks with respect to international human rights.

The Marcos litigation is different from the Holocaust Assets litigation because the Marcos Plaintiffs did not initially sue the Swiss banks. Nonetheless, both the district court and the appellate courts in categorizing the banks as "agents" of the Marcos Estate acknowledged that the banks played a role in shielding the Marcos plunder. Judge Real's decisions did not

provide a legal rationale for his description of the banks. His actions, however, provide an important precedent. His decision to subject the banks to the worldwide injunction and to vest title with the bank accounts in the Marcos Plaintiffs' attorneys demonstrates a view that the banks were not just repositories of wealth, but entities that had played a more active role for their client.

Furthermore, the Marcos litigation illustrates the conflict inherent in the current bilateral mutual assistance program that Switzerland uses to trace the assets of deposed leaders. To the extent that a state has a competing claim to a dictator's loot, human rights claimants will be unable to enforce a civil judgment against the leader. Under the Act of State doctrine, Switzerland's negotiations with the sovereign state will always trump subsequent civil judgments. Thus, it is unclear whether victims will ever receive compensation or relief. Even if a Swiss bank actively assisted a leader to conceal his or her wealth, Switzerland's mutual assistance efforts would shield the bank from turning over assets to claimants. If the Marcos Plaintiffs had not brought their ATCA suit, one wonders whether Switzerland would have imposed a requirement that the Philippine government settle with the human rights claimants as a precondition to release of the Marcos funds.

The Marcos and Holocaust assets cases underscore the need for additional mechanisms for resolving such human rights claims. This would eliminate the uncertainty created by bank secrecy laws which makes it difficult to stop the transfer of illegally obtained wealth and to trace the existence of such assets with certainty.

Human rights litigation against former heads of state is likely to continue given the success that the Marcos Plaintiffs had with their lawsuit. Thus, the issue of how to access funds in Swiss bank vaults and bank secrecy jurisdictions will continue to be an issue of concern—not only to successor governments but also to individuals who suffered during these leaders' rule.⁵⁹⁸ The

598. Steinhardt notes:

Four months after the exemplary damage award in *Marcos*, another court held a former head of state liable in an action alleging similar violations; similar suits will probably emerge from the crises in Bosnia, Rwanda, Haiti, Somalia, and Afghanistan, among others. Paramilitary groups operating under color of state authority may face similar liability in accordance with the expansion in the class of defendants of choice.

Steinhardt, *supra* note 11, at 100-01. Steinhardt refers to the case of *Paul v. Avril*, No. 91-399-CIV (S.D. Fla. 1994), a 1994 case where Judge Wilkie Ferguson awarded \$41 million to six Haitians who alleged that they were tortured by members of the military regime of former dictator Prosper Avril. Steinhardt, *supra* note 11, at 101 n.158. He also refers to *Balance v. Front for the Advancement of*

Holocaust assets and Marcos human rights cases provide an important first step in recognizing the nexus between bank secrecy and human rights violations. The cases provide a public forum whereby the legal and moral actions of Swiss banks may be examined and evaluated under common law principles and, more importantly, under international law principles.

Civil litigation also achieves other goals for human rights victims. Lawsuits such as the Marcos human rights litigation, and perhaps the current Holocaust assets litigation, provide for "investigation leading to identification of those responsible, punishment of the wrongdoers and compensation for their injuries."⁵⁹⁹ The role of Swiss banks and the trail of funds shielded in Switzerland are part of the story in both the Marcos and Holocaust assets cases. To this extent, civil lawsuits provide plaintiffs with an accounting of facts and also with compensation for their injuries. As human rights lawyer and scholar Beth Stephens notes:

[T]he fact that civil litigation is a private remedy provides some advantages to the plaintiffs, because they control the timing and direction of the case. They need not interest public prosecutors or diplomats in their demands, but can file a lawsuit on their own terms. Even where a money judgment is not immediately collected, the victims may feel some satisfaction from the judicial proceeding, the opportunity to tell their story in a formal setting and the finding of liability.⁶⁰⁰

Steinhardt noted that the Marcos litigation is the "first class action to view human rights abuses in effect as mass torts, in which plaintiffs establish that they are victims of a single orchestrated and illegal policy."⁶⁰¹ The Holocaust assets litigation can be classified as a similar type of lawsuit—aimed at identifying an orchestrated policy of Swiss banks to assist the Third Reich with financing its war efforts and acts of genocide.

Steinhardt, in his analysis of the Marcos litigation, concludes that there are problems with human rights class actions.⁶⁰² Some of these problems are already apparent with the Holocaust assets litigation. Steinhardt advocates the creation of an international convention for the redress of human rights violations. Steinhardt states that

[s]uch a multilateral document might specify what gross human rights violations are actionable in the domestic courts of

Progress in Haiti, No. 94-CIV-2619 (E.D.N.Y. June 1, 1994); and *Mushikiwabo v. Barayagwiza*, No. 94-CIV-3627 (S.D.N.Y., May 17, 1994) as examples of cases filed against paramilitary groups. See Steinhardt, *supra* note 11, at 101 n.159.

599. Stephens, *supra* note 43, at 604.

600. *Id.* at 605.

601. Steinhardt, *supra* note 11, at 68.

602. *Id.* at 101-03.

signatories, the choice of law approach that should govern particular issues in such actions, the calculus for determining the availability and measure of compensatory and especially punitive damages, and the obligation to enforce foreign judgments against human rights violators wherever their assets might be.⁶⁰³

One of the reasons that Steinhardt advocates an international approach is that, “[a]lthough the courts of the United States will continue to have the power to conduct human rights litigation consistently with the general standards of procedural and remedial law, the resulting judgments will not necessarily command the approval of other governments or secure foreign cooperation in assuring compensation for victims.”⁶⁰⁴

While the Author agrees with Steinhardt’s call for an international solution to the problem of victim redress and compensation, the Author differs slightly with his statement that ATCA litigation will impede foreign cooperation. To some extent, one might argue that the human rights victims in the *Marcos* case would never have had any recognition by the Swiss government when it released the funds in December had it not been for the class action litigation. In addition to using a multilateral or international convention and mechanisms for dealing with the issue of leaders and others who violate the human rights of entire classes of victims, the Author would suggest that such a convention be expanded to include indigenous spoliation within its scope.

In 1989, Reisman posed the question: Has not the time come for the international community to address this issue directly? He proposed that

as a first step, an international declaration be drafted (1) characterizing unequivocally, spoliations by national officials as breach of national trust and of international law; (2) imposing on other governments an obligation of supplying information and cooperation; and (3) characterizing the failure of other governments to prevent such funds from being cached in their jurisdiction and

603. *Id.* at 69 (emphasis added). Steinhardt also comments that the difficulties involved in a mass human rights tort trial include:

[c]onfusion of causation issues and the consequent impairment of the jury function, profound extrapolation from the experience of nine victims to that of ten thousand, distortion of the relationship between counsel and client (especially when the attorney has taken the case on a contingency fee), and overreaching by judges in pre-trial management and the coercion of settlement. Designation of the class counsel as lead attorney in the trial can also cause sharp disagreements about the fundamental trial strategy, the admission and order of evidence, and the preparation of witnesses.

Id. at 93. In the *Marcos* litigation, the class mechanism became problematic during the damage phase of the trial.

604. *Id.* at 101.

to aid in their recapture as complicity, after the fact, and as itself an international delict.⁶⁰⁵

More than seven years have passed since Reisman made this proposal. In that time, more national leaders have been deposed or forced to leave their countries. They also appear to have taken their countries' wealth with them. The Marcos litigation and the Holocaust assets litigation illustrate very well the problem of spoliation and the role played by outside agents and bank secrecy jurisdictions as active participants in a larger process.

Reisman's proposal suggests that indigenous spoliation may already constitute an international delict or violation of international law. Reisman's proposal also touched more directly upon the role of states which fail to prevent another nation's leader from, or otherwise assist in, stealing the second state's assets. It does not, however, directly address the role of non-state actors such as banks who may sometimes be primary participants in the spoliation process. As Reisman suggests, agents of leaders who engage in spoliation are liable and the banking jurisdiction's exercise of its secrecy laws to conceal funds is an international delict.

When one combines those two factors, the issue remains open as to what level of accountability financial institutions have under international law. Weiss suggests that a convention on the duty of states to make restitution of property purloined by heads of state might assist nations in dealing with the problem of indigenous spoliation.⁶⁰⁶ Reisman states that

[t]he United Nations should consider forming an international high commission for the retrieval of diverted national wealth. The commission would be charged with responding to the requests of member governments to identify the location of purloined funds and to secure their return by negotiation or, where appropriate, by judicial action. The statute of the agency would grant it international legal personality and authorize it to cover its reasonable expenses from the funds regained.⁶⁰⁷

605. Reisman, *supra* note 35, at 58. Reisman states that the authority for such an endeavor could be based in the Resolution on Permanent Sovereignty, the U.N. Charter, various human rights declarations, and Article 19 of the Universal Declaration of Human Rights regarding freedom of information. *See id.* Other relevant human rights instruments include the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) (especially Art. 1(2)) and the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp., No. 16, at 52, U.N. Doc. A/6316 (1966) (especially Art. 1(2)); *see* Reisman, *supra* note 35, at 58 n.5.

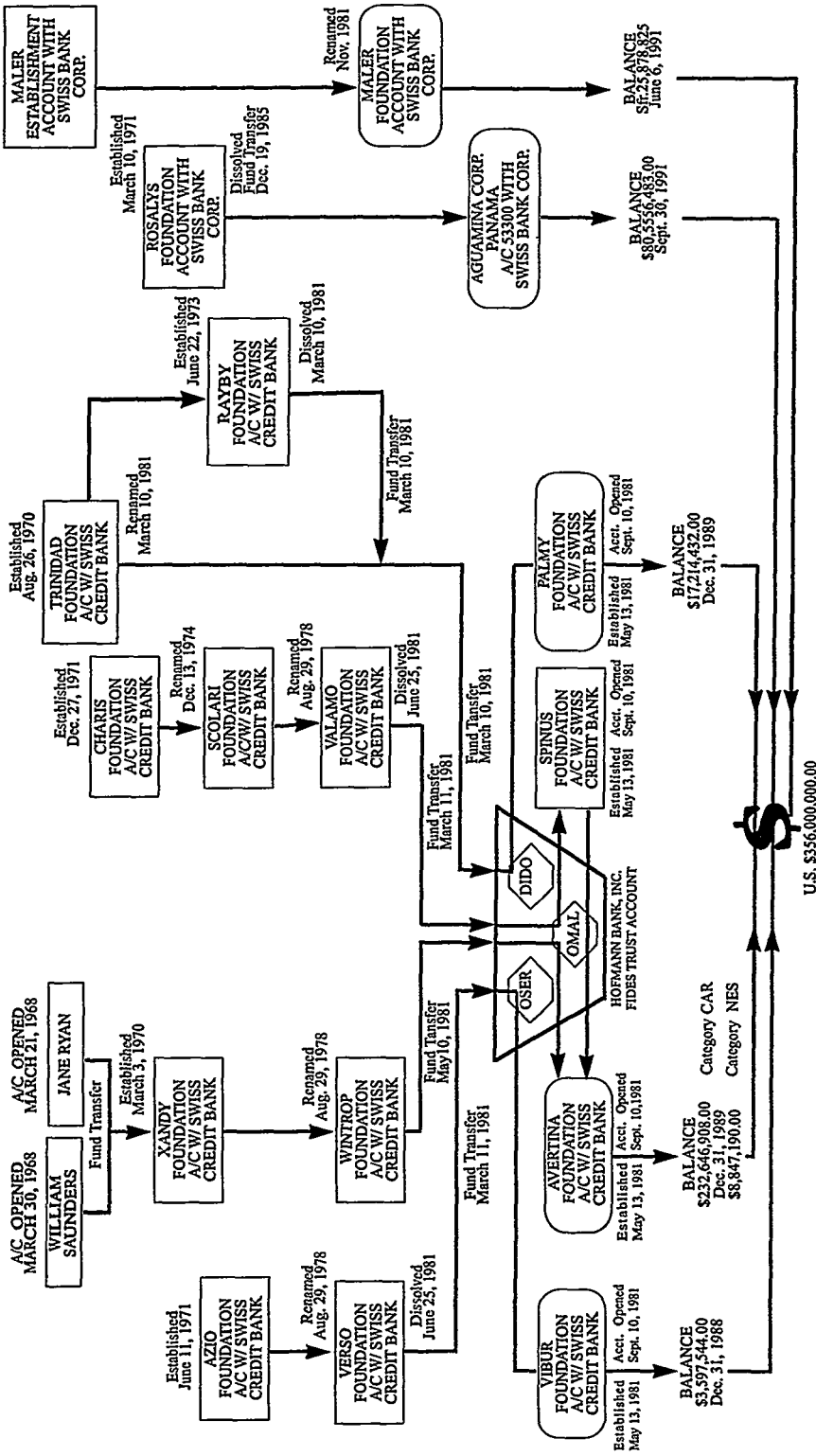
606. Interestingly, Weiss also calls for a greater confluence of economic rights and human rights theory. *See Pursuing Assets of Former Dictators, supra* note 492, at 397 (remarks by Peter Weiss).

607. Reisman, *supra* note 36, at 58-59.

The Author's final recommendation is that banks and financial institutions be encompassed within any international or multinational efforts to address the problems of war crimes and human rights violations committed by high-ranking officials. Bank secrecy jurisdictions are deeply involved in the economic activities of such individuals and their actions have the potential to rise to the level of active facilitation or complicity. The current structure of bilateral mutual assistance provides for prolonged negotiations between impoverished nations and the Swiss government. These negotiations do not contemplate the inclusion of human rights victims. Bank secrecy provides too much discretion to individual banks creating an inconsistent approach to recovering purloined assets.

Thus, the Author urges that the international community address problems of bank secrecy, bank complicity with human rights violations, and the ability of human rights victims to recover funds from a perpetrator whose assets are located in a bank secrecy jurisdiction. That a bank's active assistance of the actions of war criminals and dictators may create jurisdiction under the ATCA or international human rights law would serve as an effective deterrent to banks' assisting serious breaches of human rights. Thus, the Holocaust assets and Marcos cases pave the way for attributing legal responsibility to banks in two ways. The cases suggest legal theories of derivative liability for banks under the ATCA. While the liability under international law did not clearly exist in 1945, one can look at the actions of banks from that point onward and heightened legal responsibilities placed on banks as indicia of how far international opinion has changed on these topics. Moreover, the litigation underscores the need for more clearly defined legal standards for those financial institutions that assist criminal activity.

APPENDIX A



APPENDIX B

Abbreviations Used in Article

ATCA	Alien Tort Claims Act
EIS	Bank of International Settlements
CS	Credit Suisse
FATF	Financial Action Task Force of Money Laundering
FEA	Foreign Economic Administration, U.S. Treasury
FRCP	Federal Rules of Civil Procedure
ICEC	Independent Commission of Experts (Bergier Commission)
ICEP	Independent Committee of Eminent Persons (Volcker Committee)
IMAC	Law on International Judicial Assistance in Criminal Matters
IMT	International Military Tribunal at Nuremberg
MOGE	Myanmar Oil and Gas Enterprise
PCGG	Philippine Commission on Good Government
PLO	Palestine Liberation Organization
PNB	Philippine Nation Bank
SA	German Storm Troopers (Stürmabteilung)
SBA	Swiss Bankers Association
SBC	Swiss Bank Corporation
SJC	Swiss Jewish Communities Association
SLORC	Burmese State Law and Order Restoration Council
UBS	Union Bank of Switzerland
USMT	U.S. Military Tribunal at Nuremberg
WCOJC	World Council of Orthodox Jewish Communities
WJC	World Jewish Congress
WJRO	World Jewish Restitution Organization