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Compensation for Survivors of Slave and Forced Labor: The Swiss Bank Settlement and the German Foundation Provide Options for Recovery for Holocaust Survivors

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* J.D., University of the Pacific, McGeorge School of Law, to be conferred May, 2002; B.A., History, University of San Diego. This Comment is dedicated to my Mom, Myra Doms, 1947-1997. I would like to thank my Dad, Christopher, and Carrie for the encouragement, love, and friendship they constantly provide. Additionally, I am very grateful to Professor Brian Landsberg, Claire Crowson, and Evy Posamentier for their insightful comments.

"Arbeit Macht Frei" — "Work Will Make You Free"
—Inscription over the gates of Auschwitz and other camps.[1]

I. INTRODUCTION

The Nazis used three methods of extermination during the Holocaust: gassing, shooting, and slave labor.[2] In 1942, while Allied bombing began devastating German production creating a high demand for manpower, a proposal presented to Hitler outlined the use of extermination by labor.[3] Under this proposal, Jews brought to concentration camps would be sorted into two categories, those who could work and those who could not.[4] Jews in the first category would be spared so that they could work while those in the second category would be killed.[5] Concentration camp commanders were told, "[T]his employment must be in the true meaning of the word, exhaustive, in order to obtain the greatest measure of performance."[6] Through this plan, the Nazis could exercise complete control over Jewish labor while working toward the goal of annihilation of Jewry.[7]

Private companies agreed to pay the *Shutzstaffel* (SS) for skilled and unskilled laborers in order to ease the problem.[8] Foreign laborers, prisoners of war, and concentration camp inmates were forced into labor throughout Germany and occupied territories during World War II.[9] The workers included hundreds of thousands of Jews and prisoners of all nationalities who worked while waiting for

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1. BENJAMIN FERENCZ, LESS THAN SLAVES 25 (1979).

2. *See* Stuart E. Eizenstat, Deputy Secretary of the Treasury and Special Representative of the President and Secretary of State for Holocaust Issues, Address at the 12th and Concluding Plenary on the German Foundation (July 17, 2000), http://www.state.gov/www/regions/eur/holocaust/000717_eizenstat_german.html (recognizing that the Holocaust was probably the "gravest crime against humanity in recorded history").

3. *See* FERENCZ, *supra* note 1, at 17 (explaining that this plan would entail building armament plants inside the concentration camps and putting able-bodied inmates to work). The lack of a workforce was so problematic for the Nazi regime that it gave second thoughts to "the wholesale slaughter of the Jews which was taking place." *See id.* In March 1942, Minister Goebbels wrote the following in his diary:

> The Jews in the General Government are now being evacuated eastward. The procedure is a pretty barbaric one . . . not much will remain of the Jews. On the whole it can be said that about 60% of them will have to be liquidated whereas only about 40% can be used for forced labor.

Id. at 18.

4. *See id.* (noting that putting inmates to work was a compromise between "the ideological demands that the inferior race of Jews be eliminated and the economic demands for productive labor").

5. *See id.* (stating that Lieutenant General Oswals Pohl reported to Himmler in June 1942 that he had reorganized the concentration camps and mobilized all prisoners who were fit for work). It is estimated that "at least two out of three [inmates] went straight to the gas chambers. *Id.*

6. *Id.*

7. *See id.* at 23.

8. *See id.* at 24 (relating that the private companies paid millions for "the privilege" of using camp inmates).

9. *See id.* at 24 (stating that Polish workers and prisoners of war (POWs) were used at the Farben construction site in violation of the Hague Convention and were later replaced by concentration camp inmates).

deportation or death.[10] Workers were under the control of the SS, but were supervised and prevented from escaping by the companies that used them.[11] Profits gained by German banks and companies using slave labor are estimated at approximately US$95 billion.[12]

One example of the conditions in which laborers worked can be found in German industrialist I.G. Farben's construction site near Auschwitz.[13] Once the directors of the company realized that the long march from the camp was unproductive, a camp was built near the construction site to house workers.[14] A building intended to house 162 people was filled with 400, forcing three inmates to share one wooden bunk covered with a thin layer of dirty straw.[15]

All of the inmates realized that they were being worked to death.[16] They were forced to run while carrying 100-pound cement bags and if a prisoner fell, he was kicked and beaten to determine if he was still alive.[17] With inadequate food, contaminated drinking water, and sparse clothing, many froze to death or died of starvation.[18] While all the forced laborers experienced terrible conditions, prisoners of war and foreign laborers stated that Jews at the Farben site encountered the worst, in part because they were constantly threatened that "they would be gassed and turned into soap."[19] More than half of the concentration camp inmates died while forced into labor at the Farben site.[20]

In reaction to experiences at the Farben site and many others, beginning in 1996, survivors of the Holocaust filed cases against businesses that used slave labor and

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10. *See id.* at 25 (explaining that hundreds of new forced labor camps were built throughout Germany and occupied territories in order to accommodate all the workers).

11. *See id.* (stating that the companies were required to provide adequate security arrangements including extra guards and barbed wire enclosures).

12. *See* Tamar Hausman, *World War II-era Slave Labor Profits Estimated at $95 Billion*, JERUSALEM POST, Nov. 15, 1999, at 3 (citing a report released by the Foundation for Social History of the 20th century, a non-governmental research institution in Germany).

13. *See* FERENCZ, *supra* note 1, at 9 (explaining that I.G. Farbenindustrie chose to build a new plant to manufacture synthetic rubber needed by the German air force and army once they discovered that the 7000 Jews and few thousand Poles would be removed from their "ramshackle wooden homes" and placed in a newly expanded concentration camp).

14. *See id.* at 24 (noting that by October 1942, inmates from the main camp at Auschwitz were transported to new barracks located closer to the Farben construction site).

15. *See id.* (adding that the conditions of the barracks created outbreaks of dysentery and diarrhea).

16. *See id.* (stating that in addition to terrible living and working conditions at the Farben site, inmates were humiliated when forced to "trot like dogs behind the bicycles of their amused German masters").

17. *See id.* (relating the story of a British POW who witnessed concentration camp inmates at work at the Farben site).

18. *See id.* at 25 (explaining that if German civilians saw POWs giving soup comprised of an "inedible watery brew" to the inmates, the civilians would kick the bowl of soup over).

19. *Id.*

20. *See id.* (stating that even Himmler considered the death rate in the camps too high because it was impossible to keep up the working capacity of the inmates).

the banks that aided the Nazis in handing the profits of slave labor.[21] After pleas for compensation to foreign courts were fruitless, survivors turned to the courts of the United States.[22] The independent judiciary, the belief in jury trials, the system of damages, the class-action lawsuit rules, and the discovery rules made the United States the most attractive forum for Holocaust litigation.[23] Most of the cases asserting Holocaust claims were dismissed for a variety of reasons,[24] but *In re Holocaust Victim Assets Litigation*,[25] a case involving Swiss businesses and banks, stands apart because of the historic US$1.25 billion settlement reached between the survivors and members of Swiss industry.[26] In addition to compensating slave labor survivors, the Swiss banks' settlement compensated refugees who were refused entrance into Switzerland, persons who deposited assets in Swiss banks, and survivors whose assets were looted.[27]

In reaction to the suits filed in U.S. courts and the US$1.25 billion Swiss banks settlement, an alternative to the litigation approach for compensation arose when the German government and German industry worked with the United States to establish a US$10 billion foundation for victims of slave labor entitled "Remembrance, Responsibility, and the Future" (hereinafter referred to as the "Foundation").[28] In exchange for the establishment of the Fund, the United States agreed to urge the dismissal of Holocaust slave labor cases filed against German industry in U.S. courts.[29] While Germany had previously paid more than US$60

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21. *See generally* Stephanie Levy, *Holocaust Litigation: Asking the Courts to Right a Historic Wrong*, 36 TRIAL 12 (July 2000) (outlining several types of Holocaust litigation in U.S. courts). Three lawsuits were filed in 1996 and consolidated in 1997. *Id.*

22. *See* Michael J. Bazyler, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 607-08 (1999) (noting that "diplomacy, individual pleas for justice by Holocaust survivors and various Jewish organizations for the last fifty years, and even suits in foreign courts have not worked").

23. *See id.* at 603 (arguing that American courts are the most attractive forum, and for some cases American courts are the only forum).

24. *See, e.g.*, Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999) (stating that the plaintiff sued Ford and its German subsidiary to recover compensation and damages for forced labor, but the case was dismissed for several reasons including the statute of limitations, the political question doctrine, and the principles of comity); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (providing that plaintiffs sued German companies seeking compensation for forced labor and the claim was dismissed because of the political question doctrine and the effect of an earlier treaty); *In re* Austrian and German Bank Holocaust Litigation, 80 F. Supp. 2d 164 (S.D.N.Y. 2000) (indicating that a smaller settlement of US$40 million was reached in January 2000).

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

26. *See generally id.* (outlining the settlement between Swiss companies and Holocaust survivors in several classes).

27. *See In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d at 143-44 (discussing the five classes established by the settlement).

28. *See* William Drozdiak, *Payments for Ex-Slaves of Nazi Regime; Germany to Pay Aged Survivors*, WASHINGTON POST, Mar. 24, 2000, at A13 (noting that the "specter of worldwide boycott of German products" caused German companies to propose the Foundation).

29. *See* Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-F.R.G., State Dep't No. 00-129, *available at* http://www.usembassy.de/policy/holocaust/agmt_anna.htm [hereinafter Agreement Concerning the Foundation] (noting that the U.S. government will file a Statement of Interest in any case regarding Holocaust claims against German industry or the German government in order to

billion to Holocaust survivors, the Foundation was Germany's first effort to compensate slave labor survivors.[30] It was intended to allow German industry to avoid litigation and serve as an efficient means to compensate Holocaust victims.[31]

This Comment will discuss two approaches through which survivors of Holocaust slave and forced labor may collect compensation for the violation of their human rights.[32] Section II examines *In re Holocaust Victims Assets Litigation*,[33] wherein a United States District Court approved a settlement agreement between Holocaust victims and two leading Swiss banks that established a fund for US$1.25 billion in exchange for broad releases of liability for Swiss entities and businesses.[34] Section III considers the merits of the German Foundation, established through negotiations between the United States and Germany, which provides for a fund of approximately US$10 billion in exchange for the dismissal of pending and future Holocaust slave labor claims cases in U.S. courts.[35] Section IV compares the two approaches to compensation. Finally, this Comment concludes that while each approach presents significant legal and moral issues, the Foundation approach appears to be the best alternative to slave labor compensation and should serve as a model for resolution of future human rights violations compensation.

II. THE US$1.25 BILLION SWISS BANK SETTLEMENT AGREEMENT

In 1996 and 1997, survivors of the Holocaust filed several class action suits against Union Bank of Switzerland and Credit Suisse.[36] The plaintiffs generally alleged that the banks participated in the persecution carried out by the Nazi regime

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fulfill their responsibilities under the Agreement).

30. *See Remarks on Action by Germany to Compensate Nazi Regime Victims of Forced Labor and an Exchange with Reporters*, 35 WKLY COMP. PRES. DOC. 50 (Dec. 20, 1999) [hereinafter *Remarks on Action by Germany*] (noting that the Foundation is an important gesture to those who endured forced labor, whose insurance policies were not honored, and whose property was taken).

31. *See* Agreement Concerning the Foundation, *supra* note 29 (stating that both parties sought a resolution that was "non-adversarial and non-confrontational, outside of litigation. . . .").

32. Slave labor refers to labor conducted while in confinement in a concentration camp, ghetto, or other place of confinement while forced labor refers to labor conducted while the laborer was held in prison-like or extremely harsh living conditions. *See* Agreement Concerning the Foundation, *supra* note 29, Annex A. Slave laborers were often worked to death. *See* FERENCZ, *supra* note 1, at 25 (explaining that the Nazi ideology and the need for manpower led to extermination through work). In German, slave labor was known as *"Vernichtung durch Arbeit,"* or "extermination by labor." *See* Eizenstat, *supra* note 2. The terms are often used interchangeably.

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

34. *Id.*

35. *See* Agreement Concerning the Foundation, *supra* note 29, art. 2(stating that in exchange for Germany establishing the Foundation, the U.S. must file a Statement of Interest that urges U.S. courts to dismiss Holocaust slave labor claims against German companies and the German government).

36. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 141 (explaining that the case was originally filed as four separate actions that were later consolidated). Only two Swiss banks were named in the litigation, but the court expanded the group of companies eligible for a release to any Swiss company that used forced labor and came forward with information. *See* Reuters, *More Swiss Firms Come Forward on Nazi Slave Labor*, JERUSALEM POST, Aug. 1, 2000, at 6. *See generally* Levy, *supra* note 21 (outlining several types of Holocaust litigation in U.S. courts).

through the use of genocide, looting of personal and business property, and slave labor.[37] The plaintiffs sought to establish liability for slave labor on the theory that when the banks knowingly accepted and laundered funds procured through the use of slave labor, the banks aided and collaborated with the Nazi regime's exploitation of slave labor.[38]

Settling the case allowed the companies involved to avoid costly and lengthy litigation that would cause damaging publicity while hurrying compensation and justice for the elderly survivors involved in the case.[39] The District Court began with a summary of the major terms of the Settlement Agreement.[40] It then employed a three-step evaluation process to determine the sufficiency of the Settlement Agreement.[41] In the third and final step of that process, the court focused on the most important issue of the case by discussing whether the settlement plan was fair and reasonable.[42] After addressing comments and objections to the Settlement Agreement, the court granted final approval of the Settlement Agreement.[43]

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37. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 141 (setting bases for expansion of entities seeking releases by stating that the plaintiffs' theory applied not only to the individual defendants, but also to other Swiss institutions and entities).

38. *See id.* (including additional allegations of war crimes, crimes against humanity, crimes against peace, breach of fiduciary duty, breach of contract, conversion, unjust enrichment, negligence, fraud, conspiracy, violation of international law, Swiss banking law, and Swiss commercial code of obligations). Plaintiffs sought a disgorgement of the profits of Nazi-looted assets and the proceeds from slave labor that the Nazis placed in Swiss banks to raise Swiss francs to fund the Nazi war effort. *See* Bazyler, *supra* note 22, at 607-08 (stating that the general legal theory used by the plaintiffs was based upon unjust enrichment).

39. *See generally Testimony of Deputy Secretary Stuart E. Eizenstat Before the House Banking Comm. on Holocaust Related Issues*, 105th Congress (1999), *available at* http://www.treas.gov/press/releases/ps96.htm [hereinafter *Eizenstat Testimony*] (explaining that the average age of survivors of the Holocaust is 80 years old and that when claims are handled using litigation, there is a risk that survivors will not live long enough to see justice or collect payments).

40. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 142 (recognizing that the discussions resulting in the Settlement Agreement were initially facilitated by Stuart Eizenstat, former U.S. Under Secretary of State and current Deputy Secretary of the Treasury, and later by Judge Korman himself).

41. *See id.* at 143-45 (reporting that the three-step process of the Settlement Agreement evaluation included preliminary approval and class certification, dissemination of notice, and fairness hearings).

42. *See id.* at 141 (explaining that the views of class members were considered when the court analyzed the procedural and substantive fairness of the Settlement Agreement).

43. *See id.* at 167 (granting final approval to the Settlement Agreement and instructing the defendant banks to advise the court whether they intended to agree to the amendments to the agreement). A Final Order and Judgment was issued on Aug. 9, 2000, incorporating the two amendments to the Settlement Agreement. *See* Final Order and Judgment, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (No. CV-96-4849), *available at* http://www.swissbankclaims.com (copy on file with *The Transnational Lawyer*). The court refers to the Proposed Settlement Agreement, but because it was approved, this Comment will refer to it as the Settlement Agreement.

A. Terms of the Settlement Agreement

Discussions regarding the terms of the Settlement Agreement occurred after the defendants filed a motion to dismiss the litigation in May 1997.[44] Key terms of the Settlement Agreement include designation of the fund's amount, waiver of defenses, revival of claims, distribution of the Settlement Fund, release of claims against the defendant, and definitions of class beneficiaries.[45] The amount of the Settlement Fund is US$1.25 billion to be paid in four installments over three years.[46] In November of 1998 and 1999, the defendants deposited the first and second payments into an escrow fund, and the remaining two payments, scheduled for November of 2000 and 2001, were accelerated and paid to the fund as part of an amendment to the Settlement Agreement.[47]

The waiver of defenses by the defendants is an essential element of the settlement. As part of the Settlement Agreement, the defendants agree to waive legal and factual defenses to the plaintiffs' claims.[48] When the defendants waived their

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44. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 142 (explaining that the basis for the motion to dismiss, or in the alternative, for a stay, was that plaintiffs did not state a claim under Swiss and international law, failed to join indispensable parties, lacked personal and subject matter jurisdiction, and lacked standing). Additionally, defendants argued that non-judicial means should be used to address the plaintiffs' grievances and the claims should be heard in Switzerland. *See id.*

45. *See id.* at 142-43 (outlining key terms of the Settlement Agreement and providing details as to how each issue was resolved by the parties).

46. *See id.* at 142 (presenting the final amount as agreed by the parties and the scheme for payment of installments over a course of years); *see also id.* at 153 (reviewing the findings of the Volcker Committee, the organization which conducted an audit and thereby discovered that the 45,000 to 50,000 Swiss bank accounts had "probable" or "possible" connections to Holocaust victims). The amount of money in the accounts is greater than the US$1.25 billion settled upon. *See id.* However, given the cost of litigation, the need for quick and efficient resolution, and the imprecise nature of the economic analysis, the amount settled upon by the parties is roughly proportional. *See id.*; *see also* Daniel Wise, *$1.25 Billion Dealt Set On Holocaust Claims*, N.Y.L.J., July 27, 2000, at 1 (stating that the estimated value of the accounts discovered by the Volcker Commission exceeded the US$1.25 billion). The final agreement on US$1.25 billion was reached after a dinner meeting held by Judge Korman at a Brooklyn restaurant. *See* Bazyler, *supra* note 22, at 608 (explaining that the original "take it or leave it offer" by the Swiss was US$600 million but the offer was doubled as the threat of sanctions approached).

47. *See In re* Holocaust Assets Litigation, 105 F. Supp. 2d at 142 (stating that the first and second installments were paid into an escrow fund in November of 1998 and 1999, but the payments scheduled for November 2000 and 2001 were accelerated in order to generate additional interest payments payable to the Settlement Fund). In January of 1999, US$250 million had already been deposited by the Swiss banks. *See* Henry Weinstein, *Holocaust Survivors, Swiss Banks OK Settlement*, L.A. TIMES, Jan. 23, 1999, at A13. The money was kept in a trust account where it would gain interest until distribution to class members. *See* Bazyler, *supra* note 22, at 609.

48. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 142 (explaining that the defenses waived by the defendants had the potential to be dispositive). According to the Agreement, the defendant waives its rights to defenses including the following: "(i) whether this dispute is justiciable, (ii) whether plaintiffs' claims are barred under applicable foreign law, (iii) whether plaintiffs have standing to assert various claims and (iv) whether the claims are time-barred under applicable statutes of limitation and repose, or by the doctrine of prescription." *Id.*

right to defenses, class members' ability to file claims, which would otherwise be barred under statutes of limitation, was revived under the Settlement Agreement.[49]

The Settlement Agreement does not include a plan for distribution of the money in the Settlement Fund.[50] Instead, there is an "open mechanism for the development of criteria pursuant to which distribution and allocation determinations will be made."[51] Thus, the determination of a plan for distribution of the Settlement Fund occurred after the finalization of the Settlement Agreement.[52]

The Agreement provides that when the defendants make payments to members of the settlement classes, those class members must release the defendants of liability.[53] The implications of the agreement became far-reaching when other companies were joined as defendants to resolve all Holocaust claims against Swiss government and business entities in *In re Holocaust Victim Assets Litigation.*[54]

A heavily contested aspect of the settlement was the identification of its beneficiaries.[55] Negotiators had to name a group somewhere between all people harmed by the Nazis and only the Jews because both of these extremes were unacceptable and would have rendered the settlement useless.[56] Upon the agreement of the parties, the settlement is aimed to benefit "persons recognized as targets of systematic Nazi oppression on the basis of race, religion, or personal status."[57] Thus, the Agreement benefits groups recognized by the United Nations as targets of

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49. *See id.* (explaining that class members' claims may have expired due to statutes of limitation and repose).

50. *See id.* (pointing out that the lack of a specific distribution plan in the Agreement is intentional and that a specific plan will be created later).

51. *Id.*

52. Finalization of the distribution plan occurred in a Memorandum and Order on December 8, 2000. *See* Memorandum and Order of Dec. 8, 2000, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 1999) (No. CV-96-4849), *available at* http://www.swissbanksclaims.com (copy on file with *The Transnational Lawyer).*

53. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 142 (addressing the requirement that plaintiffs release defendants from all claims related to the Holocaust and World War II). Specifically, the class members must "acquit and forever discharge certain releasees from any and all claims relating to the Holocaust, World War II and its prelude and aftermath. . . ." *Id.* The settlement also resolves all related cases in other places including California and Washington D.C. *See id.*

54. *See id.* (reporting that even those entities not named in the litigation may still resolve their claims through the Settlement Agreement). Entities not named in the suit against the Swiss banks that desired to resolve legal claims against them regarding slave labor could use this settlement to escape future suits based on Holocaust claims. *See id.* at 142-43.

55. *See generally* Weinstein, *supra* note 47 (stating that the identification of class members was difficult due to the nature of the events comprising the Holocaust).

56. *See id.* (discussing one of the points that held up negotiations between the parties because of the importance of defining class members).

57. *Id.*

systematic Nazi persecution including Jews, homosexuals, Jehovah's Witnesses, the Romani,[58] and the disabled.[59]

B. The Three-Step Evaluation Process

The Federal Rules of Civil Procedure require that before a class action is dismissed, the court must grant approval.[60] The District Court outlined three steps in the evaluation of the class action settlement. Those steps are as follows: (1) preliminary approval of the settlement and class certification; (2) dissemination of notice of the settlement; and (3) court-held fairness hearings after which the court determines whether the settlement is fair, reasonable, and adequate.[61]

1. Preliminary Approval and Class Certification

In the first step of the evaluation process, preliminary approval and class certification, the court approved five settlement classes.[62] The five classes were listed as follows: (1) Deposited Assets Class, (2) Looted Assets Class, (3) Slave Labor Class I, (4) Slave Labor Class II, and (5) Refugee Class.[63] Members of Slave Labor Class I are "victims or targets of Nazi persecution and their heirs, executors, administrators, and assigns who actually or allegedly performed slave labor for companies or entities that actually or allegedly deposited the revenues or proceeds of that labor with, or transacted such revenues or proceeds through releasees. . . ."[64] Additionally, members of Slave Labor Class I performed slave labor for companies or entities that deposited the revenues or proceeds in the defendant banks.[65] Slave Labor Class II is more inclusive than the definition of Slave Labor Class I, including those who actually or allegedly performed labor for a corporation or business

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58. The Romani are commonly referred to as Gypsies. *See id.* For information regarding the persecution of the Romani, *see generally* Associated Press, *Romanian Gypsies Wait for Slave Labor Payment*, N.Y. TIMES, July 24, 2000, at A4 and Barry A. Fisher, *No Roads Lead to Rom: The Fate of the Romani People Under the Nazis and in Post-War Restitution*, 20 WHITTIER L. REV. 513 (1999).

59. *See In re* Holocaust Victims Assets Litigation, 105 F. Supp. 2d at 143 (explaining that four of the five settlement classes benefit targets of Nazi persecution).

60. *See* FED. R. CIV. P. 23(e) (adding that notice of the dismissal be given to all class members in the manner that the court directs).

61. *See id.* (summarizing each step required for the court to approve a settlement agreement). *See generally* Bronson v. Board of Educ. of City School Dist. of City of Cincinnati, 604 F. Supp. 68 (S.D. Ohio 1984) (outlining the three steps required for approval of a class action suit).

62. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 143 (stating that certification of the five settlement classes occurred in an order dated March 30, 1999).

63. *See id.* at 143-44 (setting out classes in the Settlement Agreement and providing details on the qualifications for each class). As this Comment focuses solely on claims regarding slave labor, it will only discuss the two Slave Labor Classes set up by the Settlement Agreement.

64. *Id.* at 143

65. *See id.* (specifying that the members of this class must have worked for companies that actually deposited the money earned from the labor into Swiss banks).

headquartered, organized, or based in Switzerland, regardless of whether they were members of a Nazi-targeted group.[66] The facility or work site at which the individual performed slave labor did not have to be located in Switzerland, but the business must have been headquartered, organized, or based in Switzerland.[67] In both Slave Labor Classes I and II, the individual must also assert a claim regarding slave labor or cloaked assets against the defendant banks when bringing a suit.[68]

2. *Notice to Settlement Class Members*

In the second step of the evaluation process, the District Court addressed the plan for giving notice of the settlement to class members.[69] The notice plan adopted by the Settlement Agreement had to satisfy due process and had to be practical.[70] Due to the length of time that had passed since the Holocaust and the fact that class members were located world wide, the court employed a multifaceted plan utilizing several means of notice.[71] The approved notice plan was successfully implemented, thereby satisfying the second step of the class action settlement evaluation process.[72]

3. *Fairness Hearings*

The last step in the evaluation process requires the court to conduct fairness hearings and then determine the fairness, reasonableness, and adequacy of the plan.[73] A fairness hearing open to all settlement class members convened in November

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66. *See id.* at 144 (identifying "individuals and their heirs, executors, administrators, and assigns who actually or allegedly performed slave labor . . ." as members of Slave Labor Class II).

67. *See id.* (pointing out that the slave laborer must have "actually or allegedly performed slave labor at any facility or work site, wherever located, actually or allegedly owned, controlled, or operated by any corporation or business concern headquartered, organized, or based in Switzerland or any affiliate thereof. . . .").

68. *See id.* (recognizing that in order to join the class, individuals must have an actual claim against the defendant banks).

69. *See id.* (explaining that certain requirements for a notice plan existed under FED. R. CIV. P. 23(c)). The plan "is believed to be the most ambitious effort ever to notify potential beneficiaries of a settlement." *See* Henry Weinstein, *Search Opens for Holocaust Claimants*, LOS ANGELES TIMES, June 29, 1999, at A3 [hereinafter Weinstein, *Search*] (outlining the components of the worldwide notice plan).

70. *See In re* Holocaust Assets Litigation, 105 F. Supp 2d at 144 (stating that the notice plan was approved by Judge Korman by order in May 1999). For information regarding notice requirements, *see generally* Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) (discussing Constitutional notice requirements in the context of judicial settlement of a common trust fund).

71. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp 2d at 144-45 (reporting that the means used to successfully implement the notice plan included: "1) world-wide publication, 2) press coverage, 3) an extensive community outreach program, 4) a direct mail program that included the sending of more than 1.4 million notice packages directly to potential class members in at least 48 countries and 5) an internet notice effort."). The notice plan also included a toll free number and a Web site. *See generally* Weinstein, *Search*, *supra* note 69 (explaining that the notice plan employed was extensive and far-reaching).

72. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 144 (affirming that the notice plan worked effectively and efficiently to provide notice of the Settlement Agreement).

73. *See id.* (introducing the third and final step in the evaluation of the Settlement Agreement). Federal law requires this step for the settlement of a class action suit. *See* FED. R. CIV. P. 23(e).

1999.[74] Supplemental fairness hearings, electronically held in Israel in December 1999, were open to a random sampling of Israeli settlement class members.[75] The court considered information obtained at these fairness hearings as part of the analysis of procedural and substantive fairness necessary to find that the Settlement Agreement was fair, reasonable, and adequate.

a. Procedural Fairness

In the context of a settlement agreement, the "negotiating process by which the settlement was reached" determines procedural fairness.[76] Factors considered in the determination of whether the settlement is fair include the experience of the counsel involved, the manner in which the case was prosecuted, and the presence of any collusion or coercion in the settlement negotiations.[77] Other factors contemplated by the court included the fiduciary duty of the judge overseeing the settlement process and the existence of arm's length negotiations.[78]

In a class action settlement as large as this, suspicion regarding the economic self interest of the attorneys involved often arises.[79] The District Court removed any such suspicion when it stated that most of plaintiffs' counsel would not financially benefit from the settlement.[80] In addition, Chief Judge Korman's personal

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74. *See In re* Holocaust Assets Victim Litigation, 105 F. Supp. 2d at 145 (recognizing the fairness hearing as part of the third and final step in the class action settlement evaluation process). Fairness hearings are required for class action settlement approval under federal law. *See* FED. R. CIV. P. 23(e).

75. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 145 (stating that the hearings were conducted and presided over by "electronic hookup" and the random sampling of Israelis was taken from those who submitted Initial Questionnaires in response to the notice of the settlement).

76. *Id.*

77. *See id.* at 145-46 (stating that the agreement must be examined "in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred negotiations themselves"). For a discussion of how a court determines procedural fairness, *see generally* Malchman v. Davis, 706 F. 2d 426, 433 (2nd Cir. 1983) (approving settlement of a class action antitrust suit).

78. *See In re* Holocaust Victims Assets Litigation, 105 F. Supp. 2d at 146 (stating that the judge has a fiduciary duty to ensure against collusion and will grant a strong initial presumption of fairness when the negotiation process maintains the integrity of arm's length relations).

79. *See id.* (recognizing that the tension between obtaining an "untainted settlement process" and the "financial interest of counsel" creates a substantial impediment to the settlement process); *see also* John C. Coffee Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371-72 (2000) (outlining how the financial interest of counsel clouds the settlement process in class action suits).

80. *See In re* Holocaust Victims Assets Litigation, 105 F. Supp. 2d at 146 (outlining the financial interest of plaintiffs' counsel). The interests were characterized as follows:

> Key members of the plaintiffs' Executive Committee who negotiated this settlement are providing their services on a pro bono basis, at most requesting that, in lieu of attorneys' fees, payments be made to law schools to endow Holocaust Remembrance Chairs in honor of class members who did not survive, and to foster international human rights law designed to prevent similar human tragedies in the future.

Id. Others among the plaintiffs' counsel waived all attorney's fees. *See id.* Even those who are seeking fees "have agreed to limit their fee applications to the traditional 'civil rights' standard of lodestar for time actually expended that materially advances the litigation, and all fees are capped at no more than 1.8% of the settlement fund with discretion to award a lower sum." *Id.*

involvement provided the assurance that the agreement was "reached as the result of lengthy, well-informed, and arm's length negotiations by competent and dedicated counsel who provided loyal and effective representation to all parties."[81] After concluding that the Agreement was procedurally fair, the court considered substantive fairness.

b. Substantive Fairness

When considering the substantive fairness of the agreement, the court employed the factors set forth in *City of Detroit v. Grinnel Corp*[82] to support its finding in favor of substantive fairness.[83] Particularly important factors considered by the court included the reaction to the settlement by class members and the alternative if the Settlement Agreement were not approved.[84] The District Court did not consider all of the factors, but they appeared throughout the Court's discussion.[85] The court began its discussion on substantive fairness by stating that expressions of interest in participation in the settlement characterized the reaction among the class members.[86] In its determination of fairness, the court considered expressions of support for a settlement from organizations around the world and prominent U.S. officials including Senator Alfonse D'Amato, Deputy Treasury Secretary Stuart Eizenstat, and James Gilligan of the U.S. Department of Justice.[87]

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81. *Id.* Judge Korman complimented the attorneys for their competence and outlined some of their credentials. *See id. But see* Barry Meier, *An Avenger's Path: A Special Report; Lawyer in Holocaust Cases Faces Litany of Complaints*, N.Y. TIMES, Sept. 8, 2000, at A1 (stating that one plaintiffs' attorney, Edward Fagan, broke many promises to current and former clients during his involvement in the settlement process).

82. City of Detriot v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974).

83. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp.2d at 146-47. The factors for determining substantive fairness in a class action settlement are as follows:

> (1) The complexity and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of maintaining the class action through trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

Id.

84. *See id.* at 147-48 (noting that in addition to considering the reactions of class members, the court also considered responses from Jewish and Holocaust survivors' organizations worldwide).

85. *See id.* at 146-47 (recognizing that the factors are a part of the discussion of substantive fairness but do not serve as the framework for the court's discussion of substantive fairness).

86. *See id.* at 147 (mentioning that on May 8, 2000 approximately 550,000 Initial Questionnaires had been received). In addition, the court received 32,000 letters and 401 opt-out requests. *See id.* Correspondence was received by notice administrators, commenting on the allocation and distribution of the settlement funds. *See id.* Only a small fraction of the correspondence expressed dissatisfaction. *See id.*

87. *See id.* Groups that expressly endorsed the Settlement Agreement included the American Gathering/Federation of Jewish Holocaust Survivors, the American Jewish Committee, the Anti-Defamation League, the Centre of Organizations of Holocaust Survivors in Israel, the Conference on Jewish Material Claims Against Germany, the Simon Wiesenthal Center, the Jewish Agency for Israel, and the World Jewish Congress. *See id.* In addition, several other groups implicitly endorsed the agreement including Jehovah's Witnesses, Disability

An important consideration by the District Court was of the practicality concerning the alternative to the settlement.[88] The alternative was "prolonged, complex and difficult litigation, in which the plaintiffs' chance of success as a class was uncertain."[89] A timely resolution was important in light of the age of many of the class members and the legal problems they would encounter.[90] Plaintiffs' counsel argued that while the plaintiffs should receive a much larger sum, the recovery of US$1.25 billion in exchange for releases was a practical resolution to the plaintiffs' claims.[91]

The District Court concluded its consideration of the substantive fairness of the Settlement Agreement with an analysis of the objections and comments offered at the fairness hearings by settlement class members and others regarding the

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Rights Advocates, the International Gay and Lesbian Association, and several groups that represent the interests of the Romani. *See id.* Senator Alfonse D'Amato participated in the settlement negotiations as an advocate for Holocaust victims. *See id.* Deputy Treasury Secretary Eizenstat, who at the time of the negotiations was Under Secretary of State, participated actively in the settlement discussions as a representative for the United States. *See id.* at 148. James Gilligan of the U.S. Department of Justice testified on behalf of the United States at the Fairness Hearings held by the District Court. *See id.* at 147-48. Each of the U.S. officials who participated in the negotiations of the Agreement characterized it as fair, just, and reasonable. *See id.*

88. *See id.* (adding that concerns include the passage of time, the destruction of records, and the death of witnesses).

89. *Id.*

90. *See id.* (discussing the defendants' argument that it is uncertain that plaintiffs have the ability to state claims under either international or state law). *Iwanowa v. Ford Motor Co.* and *Burger-Fischer v. DeGusssa* were similar cases which were dismissed, creating concern that victims in this case would face dismissal of their case at or before trial. *See id.* In *Iwanowa v. Ford Motor Co.*, the plaintiff sued Ford and its German subsidiary to recover compensation and damages for forced labor, but the case was dismissed for several reasons including the statute of limitations, the political question doctrine, and principles of comity. *See generally* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999). In *Burger-Fischer v. Degussa AG*, plaintiffs sued German companies seeking compensation for forced labor and this claim was dismissed because of the political question doctrine and the effect of an earlier treaty. *See generally* Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999); *see also* Jessica Amanda Burdick, *Burger-Fischer v. Degussa A.G., "The Greatest Robbery in the History of Mankind:" Holocaust Victims Once Again Victimized, This Time by the American Courts*, 16 T.M. COOLEY L. REV. 449 (1999) (discussing several issues surrounding the case including jurisdiction, justiciability, and misapplication of the law). *But see generally In re* Austrian and German Bank Holocaust Litigation, 80 F.Supp. 2d 164 (S.D.N.Y. 2000) (approving a Settlement for US$40 million between victims of Nazi persecution and Austrian banks charged with conversion of victims' assets and various violations of international law but not charged with furthering Nazi war crimes).

91. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 149 (stating the conclusion of plaintiffs' counsel regarding the fairness of the Settlement). When considering the fairness of the Settlement Agreement, plaintiffs' counsel balanced:

> [T]he powerful legal and moral claims of the members of the plaintiff classes against (i) the defendant banks' vigorous defense of this action, including the prospect of extensive appellate delays before any judgment could be enforced; (ii) the intransigence of the government of Switzerland and the Swiss National Bank in refusing to contribute to the settlement fund, and in interposing obstacles to the effective prosecution of plaintiffs' legal claims; (iii) the litigation uncertainties surrounding plaintiffs' claims against the defendant banks, especially the difficulty in gaining access to the Swiss banking records needed to establish plaintiffs' claims; (iv) the need for speedy distribution of funds to aged victims, many of whom are in great distress; and (v) the substantial legal and factual uncertainties that would have complicated effective pursuit of legal claims against the Swiss National Bank, the Swiss government and the remaining non-party releasees.

Id.

Settlement Agreement.[92] In the analysis of the objections and comments, the court considered problems that could occur regarding the allocation of settlement funds to the slave labor classes.[93] However, the District Court ruled that these objections and comments were not sufficient to compel a denial of the motion for approval of the Settlement Agreement.[94]

C. *Swiss Litigation Settlement Allocation and Distribution*

The Settlement Agreement did not contain provisions for allocation and distribution.[95] However, the court discussed several concerns regarding how such a plan would be administered.[96] In the opinion, the court outlined special problems concerning administration of the slave labor classes.

1. *Administration of Slave Labor Class I*

The Special Master, Judah Gribetz, the official assigned to establish a distribution and allocation plan, expressed one main concern regarding the administration of Slave Labor Class I.[97] Administration of this class requires information on which German companies fall within its definition.[98] The Special Master questioned whether there should be a presumption that all German companies that employed slave labor also "deposited" or "transacted" the revenues in Switzerland.[99] However, the Swiss Federal Archives agreed to provide the

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92. *See id.* at 149-66 (outlining objections and comments raised during the Settlement Agreement negotiations). Objections and comments pertained to the following subjects: (1) deferring the establishment of a plan for distribution and allocation until after the Settlement Agreement is approved; (2) administration of the classes; (3) threats of repudiation of the Agreement by the defendant banks; (4) concerns regarding notice; and (5) concerns regarding attorney's fees. *See id.*

93. *See id.* at 161-63.

94. *See id.* at 149 (adding that in addition to the insufficiency of the objections raised in the hearings, Judge Korman's intimate familiarity with the competing interests of the parties required a finding that the Settlement Agreement be approved).

95. *See id.* at 149 (explaining that the Settlement Agreement provides for the appointment of a Special Master to create a plan of allocation and distribution).

96. *See id.* at 161-63 (outlining specific problems associated with finding members of the slave labor classes).

97. *See id.* at 161 (summarizing concerns expressed by Special Master regarding allocation to Slave Labor Class I). The Special Master was appointed to "develop a proposed plan of allocation and distribution of the Settlement Fund, employing open and equitable procedures to ensure fair consideration of all proposals for allocation and distribution." *Id.* at 149. The court appointed Judah Gribetz, Esq. to be Special Master. *See id.* at 161. Gribetz served as Counsel to the Governor of the State of New York and as Deputy Mayor of the City of New York. *See id.* In addition, he has an understanding of Holocaust issues through his involvement on the Board of the Museum of Jewish Heritage. *See id.*

98. *See id.* at 161 (expressing the concerns voiced by the Special Master).

99. *See id.* (explaining that a presumption that German companies that employed slave labor also utilized Swiss banks when depositing the funds related to the slave labor, would simplify the administration of the Settlement Fund because it would relieve from the claimants of the responsibility to prove that the German company they worked for used a Swiss bank).

necessary information regarding which German companies involved in slave labor actually "deposited" or "transacted" the revenues in Swiss banks to aid administration of this class.[100]

2. *Administration of Slave Labor Class II*

The broader nature of Slave Labor Class II creates several distinct areas of concern regarding allocation and distribution of the fund to members of this class.[101] The Special Master expressed concern regarding the administration of this class because there is no available information regarding the identities of people who performed labor for Swiss companies and their affiliates.[102] In addition to a lack of records on who performed slave labor, another concern was that those who labored would not know that the company they worked for was Swiss.[103] As a result, there were fears that the Special Master would be unable to make a reasonable estimate of how much of the Settlement Fund should be allocated to Slave Labor Class II.[104]

As a solution to the problems raised by the paucity of information regarding members of this class, the Court ordered that those Swiss entities seeking protection from claims by those who qualify for Slave Labor Class II to identify themselves to the Special Master by July 26, 2000.[105] The District Court argued that this condition was not a material alteration of the Settlement Agreement.[106] Imposing this burden on the companies was not unreasonable because it would be improper for the companies involved to withhold their identity from those needing the information to claim the portion of the fund to which they are entitled.[107]

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100. *See id.* (commenting that the Swiss Federal Archives was ready to make the information available for the use of the Special Master).

101. *See id.* at 162 (stating that this class is not limited to Jewish, Romani, Jehovah's Witness, homosexual, or disabled persons who were victims of Nazi persecution, but extends to anyone who performed slave labor).

102. *See id.* Originally, the defendant banks asserted that this class was composed of an extremely small number of persons. *See id.* However, the banks later declared that their estimates had been based on the best information available and that no investigation regarding this issue exists. *See id.* Research into the number of persons who performed slave labor for Swiss companies conducted by the Swiss Federal Archives was unsuccessful. *See id.*

103. *See id.* (explaining that members of the class would not know they qualified as class members because they would not know that the company they worked for was Swiss and information reflecting who worked for Swiss companies cannot be found).

104. *See id.* (pointing to the practical issues that arise in the absence of the information necessary to determine the members of Slave Labor Class II).

105. *See id.* (ordering that Swiss entities seeking releases from Slave Labor Class II members must identify themselves in order to gain the releases). If a Swiss company failed to identify itself by July 26, 2000, it will be denied protection from claims asserted by members of Slave Labor Class II. *See id.* at 162-63.

106. *See id.* at 163 (noting that this requirement seeks only minimal cooperation from Swiss companies in exchange for releases).

107. *See id.* (reasoning that since the Swiss companies want enforceable releases, they cannot in good faith withhold information about involvement). Lawyers for the Swiss banks complained that forcing Swiss companies to identify their own use of slave labor was unfair to the companies. *See generally* Wise, *supra* note 46 (stating that the lawyers found this order so unacceptable that they threatened to take steps designed to set the negotiations back).

Through the use of the three-step evaluation process used for class action suits, the court considered the terms of the Settlement Agreement, the effectiveness of procedures to provide notice to the class members, and the fairness of the Settlement Agreement. Based on its finding that the Settlement Agreement was fair, reasonable, and adequate, the court granted final approval.[108] The court entered the Final Order and Judgment on August 9, 2000, dismissing the case with prejudice against all members of the plaintiff classes.[109] However, the court retained jurisdiction over several aspects of the settlement, including the distribution of the settlement fund.[110]

3. *The Special Master's Allocation and Distribution Plan*

Allocation of the Settlement Fund was a foundational issue addressed after approval of the Settlement Agreement. The Special Master submitted a proposed plan of allocation and distribution that was later approved in its entirety by the court.[111] The plan outlines in detail how much money each of the settlement class members is to receive and the means by which they will receive the funds.[112] As a result of the negotiations and the discovery that the amount of money in dormant Swiss banks accounts may in fact exceed the Settlement Fund amount, the plan places priority upon distributing two-thirds of the allocated fund to the Deposited Assets class.[113] The Special Master then proceeded to divide the remaining one-third of the Settlement Fund between the other four classes of plaintiffs.

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108. *See In re* Holocaust Assets Litigation, 105 F. Supp. 2d at 166-67 (approving the Settlement Agreement).

109. *See* Final Order and Judgment, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (No. CV-96-4849), *available at* http://www.swissbankclaims.com (copy on file with *The Transnational Lawyer)* (dismissing the case on its merits and stating that unless they have opted out, all plaintiffs agree to the terms of the Agreement).

110. *See id.* (retaining jurisdiction over several aspects of the settlement without affecting the finality of the Final Order and Judgment). The court retained jurisdiction over the following:

> a. the implementation of the settlement and distributions to the plaintiff class members; b. the disposition of the settlement fund; c. this action until each and every act agreed to be performed pursuant to the Settlement Agreement, as amended, including the covenant of good faith, has been performed; and d. all parties to this action and the plaintiff class members for the purpose of enforcing and administering the settlement.

Id. The ongoing supervision of the Settlement Fund and its distribution is required by law. *See generally* In re Agent Orange, 818 F. 2d 179 (2d Cir. 1987) (requiring that the court maintain supervision).

111. *See* Memorandum and Order of Nov. 22 , 2000, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 1999) (No. CV-96-4849), *available at* http://www.swissbanksclaims.com (copy on file with *The Transnational Lawyer*) (adopting the Special Master's Proposed Plan of Allocation and Distribution of the Settlement Fund in its entirety); *see also* Summary of Special Master's Proposed Plan of Allocation and Distribution of Settlement Fund at 29, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (No. CV-96-4849), *available at* http://www.swissbanksclaims.com (copy on file with *The Transnational Lawyer*) (outlining the Special Master's plan for allocation and distribution of the Settlement Fund).

112. *See* Memorandum and Order of Nov. 22, 2000 at 4 (recognizing that the plan reflects "the myriad of complexities" of the task of dividing the money among hundreds of thousand of claimants).

113. *See id.* at 5 (reflecting upon the findings of the Volcker Committee that while the amount of money exceeds the fund, the nature of the accounts makes it impossible to locate each owner of an account, resulting in allocation of two-thirds of the fund to the Deposited Assets class).

a. Slave Labor Class I

The allocation of funds to Slave Labor Class I is based primarily on the German Foundation's allocation plan, established by an agreement between the United States, the German government, and German industry as an alternative to litigation.[114] The Foundation was created after the settlement, but before the Special Master completed his plan for allocation and distribution, thus enabling the Special Master to draw upon the substance and procedures of the Foundation when creating his own plan.[115] Under the allocation plan approved by the Court, Jewish, Roma, Jehovah's Witness, disabled, and homosexual former slave laborers who receive a payment from the Foundation can also receive an additional payment from the Swiss Banks Settlement Fund.[116] Current estimates state that approximately 200,000 Jewish, Roma, Jehovah's Witnesses, disabled, and homosexual former slave laborers will be eligible under the Special Master's plan to receive payments from both the Swiss Banks Settlement Fund and the German Foundation.[117]

Under the German Foundation allocation plan adopted by the Special Master for allocation of the Settlement Fund, slave laborers may receive up to approximately US$7500 each.[118] Forced labors may receive up to US$2500 each.[119] Based upon the Special Master's plan, Slave Labor Class I members may receive up to US$1000 from the Swiss Banks Settlement Fund in addition to the payment from the German Foundation.[120]

Due to the overlapping nature of Slave Labor Class I and the German Foundation, the distribution mechanisms utilized by the German Foundation, specifically the International Organization for Migration (IOM) and the Claims Conference, will be utilized for distribution of the Swiss Banks Settlement Fund.[121] These are independent organizations that will handle the administrative aspects of

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114. *See* Summary of Special Master's Proposed Plan of Allocation and Distribution of Settlement Fund at 29 (noting that the German Foundation was created to compensate the individuals included in Slave Labor Class I, but due to the timing of the establishment of the Foundation, the Special Master created his own plan of allocation distribution based upon the Settlement Agreement that was reached between the parties).

115. *See id.* (noting that the Special Master drew upon the Foundation classes and procedures in order to promote efficiency and streamline the claims process for Holocaust survivors).

116. *See id.* at 30 (adding that if a Slave Labor Class I member died after February 15, 1999, certain heirs may be able to collect payments).

117. *See id.* (explaining that if more than 200,000 persons are eligible for payments, the Court may have to reconsider the amounts in the Special Master's plan).

118. *See id.* at 29 (stating that 140,000 Jewish former slave laborers and thousands of Roma, Jehovah's Witnesses, disabled, and homosexual former slave laborer are expected to receive up to US$7500 each).

119. *See id.* (noting that approximately 30,000 Jewish former forced laborers and thousands of Romani, Jehovah's Witnesses, disabled, and homosexual former slave laborers are expected to receive up to US$2500 each).

120. *See id.* at 30 (noting that the payment from the Swiss Banks Settlement will be given in addition to any payment from the Foundation and may be made to certain heirs if the class member died before February 15, 1999).

121. *See id.* at 30-31 (explaining that the Special Master consulted with both the IOM and the Claims Conference, both of which intend to minimize administrative burdens for persons receiving payments from the German Foundation).

distribution to survivors.[122] Through this consolidation of distribution, the Special Master sought to achieve the most rapid, efficient, and cost-effective means of distribution among the members of Slave Labor Class I.[123]

b. Slave Labor Class II

Allocation and distribution to Slave Labor Class II differs due to the nature of the class. The definition of this class refers broadly to individuals who performed slave labor at any facility owned by a business headquartered, organized, or based in Switzerland.[124] Thus, claimants must plausibly demonstrate through documents, statements, or otherwise, that they performed slave labor for one of the Swiss companies that came forward.[125] The court asked companies within this definition to come forward in good faith and contribute to the fund in order to gain releases.[126] Any companies that did not come forward are still vulnerable to litigation regarding Holocaust slave labor claims.[127] The Special Master anticipated a class limited to several thousand members and, likewise, predicted a minimal number of companies that would be willing to come forward.[128]

Each person who qualifies as a member of Slave Labor Class II will receive up to US$1000.[129] In both Slave Labor Classes, an initial payment of up to US$500 is

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122. *See id.* (stating that the IOM and the Claims Conference will handle all the issues concerning distribution with speed and efficiency).

123. *See id.* at 31 (noting that since extensive preparations for the German Foundation were already underway, the Claims Conference and the IOM provided the best means of distribution).

124. *See id.* (clarifying that Slave Labor Class II is not limited to the "Victims or Targets of Nazi Persecution" required under Slave Labor Class I); *see also In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 144 (providing definitions for all five settlement classes).

125. *See* Summary of Special Master's Proposed Plan of Allocation and Distribution of Settlement Fund at 34 (acknowledging that this requirement is necessary because of the dearth of evidence reflecting which companies participated in slave and forced labor).

126. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 162-63 (adding that this order does not materially affect the terms of the Settlement Agreement because if class members were not notified of the names of entities that employed slave labor, releases against those companies would be worthless); *see also* Alexander Higgins, *Swiss Firms Seek Protection from Slave Labor Suits*, JERUSALEM POST, Sept. 17, 2000, at 3, *available at* 2000 WL 8263886 (stating that firms include manufacturers of pharmaceuticals, aluminum, and armaments). Nestle admitted to seven German plants that used slave labor and pledged US$14.1 million to the Settlement Fund. *See id.*

127. *See* Summary of Special Master's Proposed Plan of Allocation and Distribution of Settlement Fund at 33 (noting that if a former slave or forced laborer finds that the Swiss owned or controlled a company for which he performed labor for is not on the list of companies that came forward, that company has not obtained a release and may be amenable to independent claims); *see also* Final Order and Judgment, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y 2000) (No. CV-96-4849), *available at* http://www.swissbanksclaims.com (copy on file with *The Transnational Lawyer*) (dismissing claims of the plaintiffs as to settling defendants).

128. *See* Summary of Special Master's Proposed Plan of Allocation and Distribution of Settlement Fund at 33 (adding that companies that came forward include a wide range of businesses from small-sized to large industrial conglomerates).

129. *See id.* at 34 (noting that although this is the same amount the Swiss Settlement pays to the members of Slave Labor Class I, most of these persons do not qualify for the German Foundation, and thus the US$100 is the only payment they will receive).

made and a second payment of up to US$500 will be made once all claims have been processed.[130] Due to the smaller size of Slave Labor Class II, an individualized claims process through the International Organization for Migration (IOM) will be utilized for distribution of the allocated funds.[131] The IOM is charged with determining whether the claimant performed slave labor for one of the Swiss businesses that has come forward.[132] In order to qualify for a distribution within either Slave Labor Class I or II, a claimant must apply for payment under the Swiss Bank Settlement by the deadline set by the German Foundation, August 11, 2001.[133] However, payments may be made sooner if IOM approves a claimant's application for payment before the deadline.[134]

D. Analysis of Swiss Bank Settlement Approach to Compensation

Five main issues arose from the debate surrounding the use of litigation to compensate Holocaust slave labor survivors. The first major weakness in the settlement of Holocaust claims concerns the underlying question of whether any amount of money could compensate those who endured the Holocaust.[135] For many Holocaust survivors, putting the horror of their experience into monetary terms is seen as "a profit motivated desecration of the memory of those who perished."[136] Special Master Gribetz acknowledged this shortcoming, but stated that he received communications from survivors who considered the settlement to be "a further step along the tortuous path toward accountability and remembrance."[137] The philosophy

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130. *See id* at 29, 34 (explaining that due to uncertainty of the exact number of persons eligible to collect, it is necessary to distribute an initial payment of up to only US$500, followed by an additional payment once all claims are processed and it is clear how much of the Fund remains).

131. *See id.* at 33 (defining the claimant as one who performed slave labor for one of the Swiss entity that has come forward for identification).

132. *See id.* at 33-34 (stating that the claimant must plausibly prove he performed slave labor by producing "documents, a statement or otherwise").

133. *See* Memorandum and Order of Dec. 8, 2000 at 6-7, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 1999) (No. CV-96-4849), *available at* http://www.swissbanksclaims.com (copy on file with *The Transnational Lawyer*) (explaining that using the deadline set by the foundation avoids "confusion posed by numerous conflicting compensation program deadlines").

134. *See id.* (noting that the same rule applies to eligibility under the German Foundation, permitting claimants to receive payments without first waiting for the deadline for applications to pass).

135. *See* Summary of Special Master's Proposed Plan of Allocation and Distribution of Settlement Fund at 2 (characterizing the Settlement Fund as "historic, yet limited").

136. Derek Brown, *Litigating the Holocaust: A Consistent Theory in Tort for the Private Enforcement of Human Rights Violations*, 27 PEPP. L. REV. 553, 555 (2000).

137. Summary of Special Master's Proposed Plan of Allocation and Distribution of Settlement Fund at 2, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (No. CV-96-4849), *available at* http://www.swissbanksclaims.com (stating that while the Settlement Fund may be limited by its amount, it is still fair and equitable). In acknowledging the moral issue, Gribetz recognized:

> No amount of money could begin to compensate the millions of victims of Nazi persecution for the horrors they suffered during the Holocaust, that no amount of money could restore the generations that were lost, that no amount of money could right the injustice perpetrated by Nazi Germany that has been termed "one of the greatest thefts by a government in history."

reflects that some form of compensation is better than no compensation at all. Thus, it is necessary to embrace the settlement as an attempt to provide a modicum of compensation for an experience for which there can be no compensation.

Second, criticism has been aimed directly at the defendants in the Swiss banks case. Commentators accuse companies of entering into the settlement to protect their business interests, and in doing so they compromised Switzerland's honor.[138] In addition, some Swiss also felt that when the banks agreed to the US$1.25 billion sum, they made an admission of guilt that many Swiss were not ready to make.[139] The reluctance to accept guilt for Swiss wartime activities arises from a rejection of the notion that neutrality during World War II was, in itself, a choice to aid the Nazi war effort.[140] Many Swiss believe that the defendant banks should have defended their wartime actions rather than compromising the country's honor and admitting guilt for actions which many Swiss believe are defensible.[141]

In response to this argument, one critic stated that it is "the worst kind of armchair moralizing" for the United States to criticize Swiss actions during World War II five decades after the actions occurred.[142] While it is clear that Switzerland benefitted from the allied war effort, if they had entered the war effort, it is possible that conditions would have worsened.[143] Jews in Switzerland could have been rounded up and shipped away had Switzerland abandoned its neutrality because the

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Id.

138. *See* Elizabeth Olsen, *Swiss Squirm at What Holocaust Payout Implies*, CHRISTIAN SCIENCE MONITOR, Aug. 21, 1998, at 5 (discussing the agreement for Swiss banks to pay US$1.25 billion one week after the parties agree upon that sum).

139. *See id.* (noting that while the Swiss banks entered into the agreement to end a chapter of history, closing that chapter will not be an easy task); *see also* Brown, *supra* note 136, at 578 (discussing Swiss public resentment and the founding of the "Switzerland Alliance," a group established to rebut criticism of Switzerland and emphasize the country's contribution to human rights and international policy).

140. *See* Olsen, *supra* note 138 (explaining that a prevalent view among the Swiss is that because war is the absence of all rules, it is impossible to judge actions that transpired during that era); *see also* Thomas G. Borer, *Assets of the Holocaust: The Swiss Perspective*, 20 WHITTIER L. REV. 649, 651-56 (discussing positive steps taken by the Swiss to compensate individuals for Swiss actions during World War II),

141. *See* Olsen, *supra* note 138 (summarizing the position of many Swiss in response to the Settlement Agreement). *But see generally* Christoph Meili, *Christoph Meili Tells his Story*, 20 WHITTIER L. REV. 43 (1998) (relating the story of the security guard for the largest Swiss private bank who found books documenting bank business from 1864 to 1970 in the shredding room of the bank). Meili saved the documents and turned them over to representatives of the Jewish community who in turn gave the documents to the police. *See id.* If Meili had not saved the documents, the banks would have destroyed the evidence of the accounts and the banks' war-time actions would never have been addressed. *See id.*

142. Gabriel Schoenfeld, *Holocaust Reparations - A Growing Scandal*, COMMENTARY MAGAZINE, Sept. 2000 (arguing that when the United States criticizes Swiss actions, it does so without considering the alternatives that the Swiss faced during the war); *see also* Brown, *supra* note 136, at 579 (noting that the Swiss President stated that Switzerland made mistakes during the war, but "strongly cautioned against the American tendency to view any altercation as a battle between good and evil by reminding that 'headlines can also kill'").

143. *See* Schoenfeld, *supra* note 142 (arguing that it is indisputable that the Swiss were "free riders on the Allied war effort"). *See generally* Pierre Th. Braunschweig, *In the Eye of the Hurricane: Switzerland in World War II*, 20 WHITTIER L. REV. 659 (1999) (discussing Switzerland's role in World War II and arguing that characterizations of the Swiss role in World War II are inaccurate).

country would have ultimately been conquered in a short amount of time.[144] Thus, criticism aimed at the defendants' action and the implications on Switzerland may be defended by viewing the situation from a different perspective.

Third, the litigation approach created conflict regarding the allocation and distribution of the Settlement Fund. The Special Master received proposals from Jewish organizations, health care organizations, homosexual organizations, Jehovah's Witness organizations, Romani organizations, disabled persons organizations, and individuals concerning how the fund should be allocated and distributed.[145] Regarding allocation, each group asserted that its constituency had an important claim to the fund.[146] Concerning distribution, groups argued where the money should go first and what the amount of payment should be.[147]

With the majority of the Settlement Fund reserved for persons who were denied access to their bank accounts after the war, slave labor claims are relegated to the position of taking whatever is left over.[148] In a practical sense, all groups with deep concerns regarding allocation and distribution could not possibly be pleased with the results. Therefore, the nature of the limited Settlement Fund requires that the interests of some groups and individuals must be placed above the interests of others.

Fourth, a major criticism aimed at the litigation approach is the role that attorneys play. When private attorneys spearheaded the Holocaust litigation, some interpreted it as "a belated attempt by plaintiffs' lawyers to profit from a historical atrocity."[149] Some law firms have filed so many Holocaust claims that they have either an entire firm or a department dedicated to war crimes practice.[150] Edward Fagan, an attorney in the Swiss Bank Settlement, epitomizes attorney exploitation,

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144. *See* Schoenfeld, *supra* note 142 (postulating that had Switzerland contributed to the war effort by fighting, it would have been conquered in a matter of days). Switzerland had value to the Allies as a gold-trading partner, a place for espionage, and a safer place for German-held Allied prisoners of war. *See id.*; *see also* Braunschweig, *supra* note 143, at 669-74 (noting that Switzerland had to deal with Germany in order to get its raw materials and fuel, and arguing that Switzerland was very useful for American intelligence during the war).

145. *See generally* Summary of Special Master's Proposed Plan of Allocation and Distribution of Settlement Fund, Summaries of Proposals Received by the Special Master at A-1, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (No. CV-96-4849), *available at* http://www.swissbanksclaims.com (copy on file with *The Transnational Lawyer*) (listing each organization that submitted a proposal and a summary of the proposal).

146. *See id.* (outlining the proposal of many museums, educational institutions, and associations that sought endowments from the fund).

147. *See id.*(listing the interests of the organizations and using the language of the proposal itself where possible).

148. Memorandum and Order of Nov. 22 ,2000 at 5, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 1999) (No. CV-96-4849), *available at* http://www.swissbanksclaims.com (noting that the original agreement required two-thirds of the Settlement Fund to go to members of the Dormant Bank Accounts class).

149. Brown, *supra* note 136, at 555-56.

150. *See* Bazyler, *supra* note 22, at 604 (noting that since 1996, over 50 civil lawsuits filed in federal and state court arose out of Holocaust claims).

having turned in a bill for US$4 million, which breaks down to US$640 per hour.[151] This figure is ironic and repugnant when compared with the US$640 per year average pension a Holocaust survivor receives from the German government.[152] Courts have, however, fashioned many options in dealing with attorneys' fees, including requests to work pro bono, to work for reduced hourly rates in lieu of contingency fees, and to work at a rate imposed by the courts' own calculations of reasonable costs of services.[153] In contrast to Edward Fagan, the majority of the attorneys involved in the Swiss Banks litigation either worked pro bono or accepted reduced fees.[154]

Finally, using American courts to litigate Holocaust claims creates several advantages and disadvantages for the litigation approach due to the nature of the American judicial system. When Holocaust-related litigation ensued in American courts, diplomacy and individual pleas in foreign court were to no avail.[155] The plaintiffs turned to American courts because they can rely upon the principles of an independent judiciary, the jury trials, the system of damages, the class action lawsuit, and the discovery process.[156] In the United States, when litigation is settled and the plaintiffs sign releases, the defendants may not be sued again on the issue of the litigation.[157] Thus, companies who join the defendants can rest assured that they will not be subject to future claims regarding Holocaust slave and forced labor.[158] American courts initially present a forum where survivors have the best chance of success, but several legal issues exist that make the chances of success

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151. *See* Schoenfeld, *supra* note 142 (characterizing Fagan as an "obscure personal injury attorney from San Antonio, Texas, who claimed to have signed up 31,000 clients in record time"); *see also* Meier, *supra* note 81 (stating that one plaintiffs' attorney, Edward Fagan, broke many promises to current and former clients during his involvement in the settlement process).

152. *See* Schoenfeld, *supra* note 142 (arguing that Holocaust suit attorneys are unfairly profiting from the cases they take on).

153. *See* Bazyler, *supra* note 22, at 627-28 (outlining approaches that have previously been used by courts to avoid awarding unreasonable or exorbitant attorney's fees).

154. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 146 (E.D.N.Y 2000) (acknowledging that "those 'relatively few' members . . . who are seeking personal fees agreed to limit their fee[s] using the lodestar approach which measures time actually expended that materially advances the litigation, and that all fees are capped at 1.8% of the settlement fund, with discretion [retained by the court] to award a lower sum").

155. *See* Bazyler, *supra* note 22, at 603-04 (arguing that claims in U.S. courts are the last great hope for Holocaust survivors).

156. *See id.* at 603 (outlining long established principles in the American judicial system that led it to be the most attractive forum for litigating Holocaust claims).

157. *See generally* Final Order and Judgment, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y 2000) (No. CV-96-4849), *available at* http://www.swissbanksclaims.com (copy on file with *The Transnational Lawyer)* (approving the Settlement Agreement and dismissing the action on its merits with prejudice as to all members of the plaintiff classes and as to all claims, thus rendering all future Holocaust claims res judicata against defendants).

158. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139, 142-43 (E.D.N.Y. 2000) (stating that plaintiffs must give an irrevocable and unconditional release in exchange for the settlement amount they are paid).

uncertain, including the statute of limitations, the effects of foreign law, and the standing requirements.[159]

III. THE GERMAN FOUNDATION: REMEMBRANCE, RESPONSIBILITY, AND THE FUTURE

In March and April of 1998, several lawsuits against German companies were filed in U.S. Courts on behalf of slave and forced laborers.[160] Later that year, German Chancellor Gerhard Schroeder announced his support for a fund that would compensate those not covered by past German compensation for Holocaust survivors.[161] Shortly after this political support for the foundation, then Under-Secretary of State Stuart Eizenstat became involved in creating a foundation at the request of the German government.[162] Specifically, the German government asked

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159. *See In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d at 142 (stating that in exchange for the releases of the plaintiffs, the defendants waived their rights to potentially dispositive legal and factual defenses). Regarding the statute of limitations issue, it is possible that estoppel could apply because it would be inequitable to allow one to take advantage of one's own wrong. *See* Leonid Krechmer, *Holocaust Related Claims and Limitations: Familiar Issues in a New Context*, 67 DEF. COUNS. J. 80, 88-90 (2000) (arguing that since most of the litigation regarding the Holocaust will be brought in New York, the New York statute of limitations could affect lawsuits brought by Holocaust victims). The establishment of standing is achieved through use of the Alien Tort Claims Act, which allows a victim of state-sanctioned torture to bring suit against the torturer in the United States, even if the torture took place on foreign soil. *See* Bazyler, *supra* note 22, at 605 (noting that a number of other human rights victims found success in U.S. courts against foreign countries, corporations, and individuals).

160. *See* U.S. Embassy in Germany, *German Foundation Chronology of Key Events*, *available at* http://usembassy.de/policy/holocaust/chronology.htm (last visited Feb. 9, 2001) [hereinafter *Foundation Chronology*] (beginning the chronology of events leading to the establishment of the foundation with the statement that "plaintiff's attorneys filed lawsuits in U.S. courts on behalf of slave and forced labor victims"); *see also generally In re* Austrian and German Bank Holocaust Litigation, 80 F.Supp. 2d 164 (S.D.N.Y. 2000) (approving a Settlement for US$40 million between victims of Nazi persecution and Austrian banks charged with conversion of victims' assets and various violations of international law, but not charged with furthering Nazi war crimes); *see also* Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999) (dismissing claims against German corporations brought by survivors of forced labor because the question of whether reparations should be given raises political questions that are not subject to judicial resolution and the claims were subsumed by Convention on the Settlement of Matters Arising out of the War and the Occupation). *See generally* Brown, *supra* note 136, at 582-83 (noting that the Degussa was charged with smelting golden teeth taken from prisoners and manufacturing the Zyklon-B cyanide capsules used in Nazi gas chambers).

161. *See Foundation Chronology*, *supra* note 160 (explaining that this foundation would cover the slave and forced laborers who have not received compensation under previous German Government payments to Holocaust survivors and victims of Nazi persecution). The German Government previously paid US$60 billion to other Holocaust survivors and victims of Nazi persecution. *See Remarks on Action by Germany*, *supra* note 30 (explaining that while payments have previously been made to other persons, this Foundation is an important gesture to forced and slave laborers, holders of insurance policies, and persons whose property was confiscated).

162. *See Foundation Chronology*, *supra* note 160 (stating that Eizenstat first worked with Federal Minister Bodo Hombach and then worked with the Chancellor's envoy, Otto Count Lambsdorff); *see also* Eizenstat Testimony, *supra* note 176 (discussing Eizenstat's working relationships with Hombach, who was asked to head the European Union's efforts in South Eastern Europe, and Count Lambsdorff, one of Germany's leading elder statesmen).

Eizenstat to facilitate resolution of the suits filed against German companies pending in U.S. courts.[163]

In early 1999, German industry became publicly involved in the Foundation plans when the German government and twelve German companies confirmed Chancellor Schroeder's plan to establish a fund.[164] The statement also announced that the German Federal Legislature (Bundestag) intended to establish, through legislation, a publicly funded federal foundation that would cover claims not redressed by the companies.[165]

In May of 1999, the first of twelve multilateral meetings was held to address forced and slave labor claims against German companies.[166] The first proposal for the Foundation, presented in June 1999, created two foundations, one for the private sector and one for the public sector.[167] However, three months later, the German government proposed a single national foundation created by the legislature under public law.[168]

In December 1999, the negotiations produced an agreement capping the fund at US$5 billion, with the German government and the German companies each

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163. *See Foundation Chronology*, *supra* note 160 (relating that one of Eizenstat's main goals when entering the talks was to work toward the dismissal of claims against German companies in U.S. courts). Germany wanted to learn from the mistakes of the Swiss and avoid bad publicity and prolonged litigation. *See* Bazyler, *supra* note 22, at 616 (noting that Germany made an effort to settle claims filed on the same day that the Foundation was announced).

164. *See Foundation Chronology*, *supra* note 160 (explaining that the Foundation announcement was given by both the German Government and German companies). The statement was given on Feb. 16, 1999 after consultations in Washington. *See id.* Following the announcement, "[a] German Government working group [was] created to consult with other interested parties on the foundation." *Id.* Previously, German industry argued that it was not liable regarding slave labor because the Nazi regime forced the companies to use the slave labor while the government stated that it was not liable because private companies employed the laborers. *See generally* Drozdiak, *supra* note 28 (explaining that German reluctance to make payments was removed once litigation in American courts was a threat).

165. *See Foundation Chronology*, *supra* note 160 (specifying that the legislative approach is intended to handle claims not covered by the fund created by the German companies, including claims of forced labor in agriculture and the public sector). The legislation creating the Foundation was passed with a 90% majority vote of Germany's lower house of Parliament. *See* Lutz Niethammer, *An Aspect of the Forced-Labor Agreement* (Aug. 10, 2000), *available at* http://www.aufbau2000.com/issue1600/pages16/11.html (stating that when the legislation was passed, the agreement marked the conclusion of a year of negotiations).

166. *See Foundation Chronology*, *supra* note 160 (adding that other claims were also addressed at the multilateral meetings and that the meetings would take place over the course of a year). Parties at the multilateral planning meetings include: the German companies, the Jewish Claims Conference, the plaintiffs' attorneys, Israel, and five Central and Eastern European Governments. *See id.* Numerous informal meetings were also held. *See id.*; *see also Eizenstat Testimony*, *supra* note 39 (outlining the dates and contents of several meetings between the parties to the Agreement).

167. *See Foundation Chronology*, *supra* note 160 (noting that the German Government team was led by Otto Count Lambsdorff, who proposed that the single foundation would make payments to slave or forced laborers who worked for private companies, the German Government, or SS companies).

168. *See id.* (explaining that the proposal for the Foundation changed from two funds into one unified Foundation). After the decision to make a unified fund, Chancellor Schroeder and President Clinton exchanged correspondence relating to the details of the Foundation wherein they addressed the amount of money necessary to capitalize the Foundation and the mechanism for achieving the dismissal of Holocaust slave labor claims against German companies in United States courts. *See id.*

providing half.[169] A few days after the agreement on the capped amount of the fund, President Clinton announced confirmation from Chancellor Schroeder that the German government and members of German industry planned to establish a fund of more than US$5 billion to compensate Holocaust slave and forced laborers.[170] On July 17, 2000, the United States and Germany signed a document entitled "Agreement Concerning the Foundation, 'Remembrance, Responsibility, and the Future.'"[171]

A. Terms of the Agreement Establishing the German Foundation

While the United States and Germany were the only countries to sign the Agreement establishing the Foundation, several groups participated in the working groups that discussed the terms of the Foundation.[172] German federal law became the basis for the Foundation when the German Federal Parliament (Bundestag) passed legislation establishing the fund.[173] Under the terms of the agreement, the Foundation constitutes the exclusive remedy for the resolution of all claims arising out of Nazi actions during World War II.[174] The purpose of the Foundation is to make payments to persons who endured slave labor either in the public or private sector and to establish a "Remembrance and Future Fund" for the promotion of the ideals of the Foundation.[175] The Agreement provides for administration of the Foundation by establishing a Board of Trustees, consisting of an equal number of

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169. *See id.* (explaining that the US$5 billion would cover all WW II claims against German companies including slave and forced labor, insurance, banking, Aryanized property, and medical experiments). All the parties agreed that this sum would resolve the lawsuits. *See id.*; *see also* Marilyn Henry, *US and Germany Agree on Terms for Legal Peace on Slave Labor Claims*, JERUSALEM POST, June 14, 2000, at 7, *available at* LEXIS, News Library, JPORT file (noting how important it was to Germany that the Agreement creates a "legal peace," protecting companies from future claims).

170. *See Remarks on Action by Germany*, *supra* note 30 (commenting on the work of Stuart Eizenstat and that confirmation of the establishment of the fund arrived from Chancellor Shroeder).

171. Agreement Concerning the Foundation, *supra* note 29, Annex A.

172. *See Eizenstat Testimony*, *supra* note 39 (explaining that many nations worked intensively in working groups to determine the terms of the Foundation). Participants included Poland, the Czech Republic, the Ukraine, Belarus, Russia, the Conference on Jewish Material Claims Against Germany, plaintiffs' attorneys representing former slave laborers in U.S. class action suits, representatives of German corporations supporting the foundation, and representatives of the German and U.S. governments. *See id.*

173. *See generally* Agreement Concerning the Foundation, *supra* note 29 (stating that the Foundation was formed under German law to be an instrumentality of the German government and the German companies).

174. *See id.* (stating as the first provision in Article 1 that the scope of the Foundation would be far-reaching).

175. *See* Agreement Concerning the Foundation, *supra* note 29, Annex A (explaining that the "Remembrance and Future Fund" has the permanent task to financially support various projects). The projects must have the following goals:

> (a) serve to promote understanding between nations, and serve social justice and international cooperation in the humanitarian sector; (b) support youth exchange programs and keep alive the memory of the Holocaust and the threat posed by totalitarian, unlawful regimes and tyranny; and (c) also benefit the heirs of those who have not survived.

Id.

representatives appointed by the German government and the German companies, with the Chairman appointed by the Chancellor of Germany.[176]

The Agreement defines two main categories of companies included within the Agreement's definition of German companies.[177] The first group are those enterprises headquartered within the German Reich of 1937 or the Federal Republic of Germany.[178] Parent companies of these entities are also included, regardless of whether those parent companies were headquartered abroad.[179] The second group of companies includes those entities located outside the 1937 borders of the German Reich that since January 30, 1933, had a direct or indirect financial participation of at least twenty-five percent in the companies described in the first group.[180]

In exchange for the establishment and financing of the Foundation, the United States agreed to use its best efforts to urge U.S. federal courts to dismiss Holocaust claims of slave labor asserted against the German companies included in the definitions provided by the Agreement.[181] In order to meet this commitment, the United States agreed to file a Statement of Interest, a foreign policy statement, and the declaration of Deputy Treasury Secretary Stuart Eizenstat in all pending future cases in which a Holocaust claim is asserted against German companies.[182] The Agreement specifically states points that must be included in the Statement of Interest.[183] First, the Statement of Interest must acknowledge that the United States believes that the Foundation, rather than the courts, should be the arena for the pursuit of compensation and serve as the "exclusive forum and remedy for the resolution of all asserted claims."[184] Next, the Statement of Interest must include a

176. *See id.* (specifying that the size of the Board may be reduced after four years, that bylaws may be adopted by a two-thirds vote, and that the actions of the Board are to be made public).

177. *See* Agreement Concerning the Foundation, *supra* note 29, Annex C (separating the definition of "German Companies" into two groups and one exclusion).

178. *See id.* (defining the first group of enterprises that fit within the meaning of the phrase "German Companies" as it is used in the Foundation Agreement).

179. *See id.* (expanding the definition of the first group to include the parent companies of those companies headquartered in Germany, even if those parent companies were abroad in 1937).

180. *See id.* (stating the second definition for the phrase "German Companies"). The Agreement excludes companies headquartered outside the 1937 borders of the German Riech if the only slave labor claim against them has no connection with the German affiliate or its parent company's involvement in Nazi persecution. *See id.*

181. *See* Agreement Concerning the Foundation, *supra* note 29, art. 2 (noting the important goal, of achieving an "all-embracing and enduring legal peace").

182. *See* Agreement Concerning the Foundation, *supra* note 29, Annex B (providing that the United States agrees to file the documents regardless of whether the plaintiff(s) consent to the dismissal).

183. *See id.* (listing nine points required under the provisions of the agreement that are to be included in the Statement of Interest).

184. *Id.* (stating that the Foundation should resolve any claims based upon Nazi slave and forced labor, aryanization, medical experimentation, children's homes, other cases of personal injury, and damage or loss of property, including bank accounts and insurance policies).

description of why dismissal of the case is in the foreign policy interests of the United States.[185]

In addition, the Agreement requires that the Statement of Interest recognize the legal hurdles that plaintiffs face.[186] These include "justiciability, international comity, statutes of limitation, jurisdictional issues, forum non conveniens, difficulties of proof, and certification of a class of heirs."[187] Although U.S. law prevents a court from granting a dismissal solely on the grounds that a dismissal is in the interests of foreign policy, the government condoned dismissal upon legal grounds as furthering U.S. policy interests.[188]

The United States must point out that the Foundation is fair and equitable for a variety of reasons.[189] The Foundation is a result of a half century of work to resolve claims of Holocaust victims.[190] It will address the claims of aging victims in a quick, non-bureaucratic, open, and dignified manner.[191] Furthermore, the Foundation does all of this in a situation where any plaintiff would have serious legal hurdles to overcome in order to prove the liability of the German companies contributing to the Foundation.[192] Once the United States has addressed all of the preceding points in a Statement of Interest urging dismissal of a case against a German company in a U.S. court, the United States will have met its obligation under the Agreement.[193]

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185. *See id.* (noting that the U.S. policy interests served by the Agreement include promoting fair and prompt resolution of claims related to Nazi actions, bringing justice within the lifetimes of the victims, cooperating with Germany as an ally and economic partner, maintaining good relations with Israel and other nations which suffered under Nazi domination, and obtaining a "legal peace" for German companies).

186. *See id.* (explaining that the United States will not take a position concerning the merits of either the plaintiffs' or the defendants' case when acknowledging in the Statement of Interest that the plaintiffs face legal challenges).

187. *Id.*

188. *See id.* (recognizing that the United States does not suggest that its policy interests "provide an independent grounds for dismissal, but will reinforce the point that U.S. policy interests favor dismissal on any legal ground").

189. *See id.* (summarizing the reasons that the Agreement is fair and equitable). The Agreement states that the Foundation is fair and equitable when one considers the following:

> (a) the advancing age of the plaintiffs, their need for a speedy, non-bureaucratic resolution, and the desirability of expending available funds on victims rather than litigation; (b) the Foundation's level of funding, allocation of its funds, payment system, and eligibility criteria; (c) the difficult legal hurdles faced by plaintiffs and the uncertainty of their litigation prospects; and (d) in light of the particular difficulties presented by the asserted claims of heirs, the programs to benefit heirs and others in the Fund.

Id.

190. *See id.* (maintaining that the Foundation is "an effort to complete the task of bringing justice to victims of the Holocaust and victims of National Socialist persecution).

191. *See id.* (adding that these attributes of the Foundation are especially helpful to the elderly survivors).

192. *See id.* (noting that the United States must simply acknowledge the legal hurdles facing plaintiffs rather than taking a position on the merits of the plaintiffs' or defendants' case).

193. *See generally* Agreement Concerning the Foundation, *supra* note 29.

B. The German Foundation: Allocation and Distribution

Allocation of Foundation funds are divided into four categories based upon the type of injury suffered under the Nazi regime.[194] The first category includes persons held in a concentration camp, ghetto, or other place of confinement who endured forced labor.[195] These individuals are eligible for up to approximately US$7500 each.[196] The second category consists of persons who were deported from their homeland to the 1937 borders of Germany or to an area occupied by Germany and subjected to forced labor.[197] Members of this group are eligible for up to approximately US$2500 each.[198] In the third category are persons not deported who endured forced labor.[199] They are also eligible for up to US$2500 each.[200] The fourth category was created for those who suffered medical experimentation and other non-labor personal injury wrongs.[201] Once the final amount of the Fund is calculated, these individuals will receive a pro rata share of the amount allocated to this particular class.[202]

The Agreement contains several provisions relating to the distribution of funds to Holocaust slave labor survivors. First, eligibility decisions will be made using a relaxed standard of proof.[203] Second, where the individual who endured forced or slave labor is deceased, the Agreement provides for distribution to the heirs of the individual.[204] Third, the recipient of a payment from the Foundation will not suffer

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194. *See* Agreement Concerning the Foundation, *supra* note 29, Annex A (outlining the several categories for which the Foundation allocates funds).

195. *See id.* (noting that the first category is aimed at covering slave laborers).

196. *See id.* (using the term forced laborers and slave laborers interchangeably).

197. *See id.* (noting that the definition of this group is intended to include forced laborers).

198. *See id.* (providing that in order to qualify, the persons must have been held in prison-like or extremely harsh living conditions).

199. *See id.* (noting that if individuals do not fall into either of the slave or forced labor categories, the organizations distributing the money are still authorized to make payments to them if they endured slave labor under different conditions).

200. *See id.* (creating a broad category that does not require the survivor to have been deported before performing the forced labor).

201. *See id.* (specifying that while the category includes all persons who suffered non-labor personal injury wrongs, victims of medical experimentation are given priority, and eligibility for this category is not affected by whether or not the individual receives payments for forced labor).

202. *See id.* (explaining that the exact amount of payment to this class will be determined at a later time).

203. *See id.* (stating that this provision and all the other provisions of the legislation will be provided for in the legislation passed by the Bundestag). Of the 1.5 million people that are expected to receive compensation from the Foundation, about 10 % are expected to be Jewish. *See* Haim Shapiro, *Jews 10% of Beneficiaries of Slave Labor Fund*, JERUSALEM POST, Dec. 11, 2000, at 5 (explaining that there is a widespread misconception that a large percentage of Jews will receive compensation from the fund). In an explanation of why there were not more Jews collecting under the Foundation, one member of the steering committee for the Foundation stated, "Most of the Jews were killed." *Id.*

204. *See* Agreement Concerning the Foundation, *supra* note 29, Annex A (explaining that heirs eligible to collect payments include spouses and children). Where the spouse and children are not alive, payment may be made to grandchildren and in their absence to the decedent's siblings. *See id.* If the decedent is not survived by grandparents or siblings, then payment may be made to an individual beneficiary named in a will. *See id.* In order for the heirs to be eligible, the individual who suffered under the Nazi regime must have died after February 15,

consequences regarding eligibility for social security or other public benefits in his own country.[205] Last, when an individual receives payments from the Foundation, that individual must waive any and all Holocaust era claims resulting from Nazi actions against German companies and the German government.[206]

C. Analysis of the German Foundation's Approach to Compensation

The German Foundation presents many legal issues. However, lurking behind the legal issues arising from the establishment of the Foundation, there is the clear moral issue of whether compensation is even possible in response to the experience of slave and forced laborers.[207] The same issue also existed with the Swiss Banks litigation.[208] In response to this criticism, Stuart Eizenstat recognized that establishment of the Foundation does not end moral responsibility for the Holocaust.[209] However, Eizenstat also stated that the redeeming effect of the agreement was a step toward closing a chapter for those who endured persecution at the hands of Nazi Germany.[210]

While serving as an advocate of the Foundation, former U.S. President Clinton pointed out several general benefits of establishing the Foundation.[211] First, the

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1999. *See id.*

205. *See id.* (adding that where an individual previously received payments from German companies for forced labor or other Nazi actions, there will not be an offset if the previous payment was made by the German government). While the private companies argued that as successor to the Third Reich, the current German government was liable for slave and forced labor compensation, previous payments from the German government excluded compensation for slave laborers because the German government argued it was not liable for the actions of private companies. *See generally* Drozdiak, *supra* note 28 (stating that German companies felt that slave laborers were "foisted" on them).

206. *See* Agreement Concerning the Foundation, *supra* note 29, Annex A (explaining that the waiver does not preclude applicants from being eligible to receive payments from the Foundation for more than one wrong; thus, applicants can receive payments for a combination of wrongs); *see also generally* Drozdiak, *supra* note 28 (noting that the provision creating a "legal peace" was a hurdle during the negotiations creating the Foundation).

207. *See* Eizenstat, *supra* note 2 (recognizing the inherent moral issue in any attempt to compensate Holocaust survivors); *see also* Gabriel Schoenfeld, *supra* note 142 (discussing historical, political, and moral issues raised by Holocaust reparations).

208. *See supra* notes 132-56 and accompanying text.

209. *See* Eizenstat, *supra* note 2 (explaining that while the agreement does not seek to end moral responsibility for the Holocaust, it does seek to heal wounds arising out of the injustices that occurred during the war). Eizenstat clearly addressed the moral issue here by stating:

> Nothing can erase the memory of those who died, of the culture and potential achievements lost, of the suffering of those who survived, of the lessons the Holocaust must teach us about the importance of tolerance and rule of law, of the need for good people not to remain silent in the face of evil, of the need for prompt international response to human rights violations. All of this should remain in our hearts and minds as long as people occupy this planet.

Id.

210. *See id.* (noting that the historic agreement helps provide closure to persons who have waited a long time for justice).

211. *See Remarks on Action by Germany*, *supra* note 30 (stating that the Fund will allow the world to close the 20th century by bringing "an added measure of material and moral justice to the victims of this century's most terrible crime").

President stated that elderly survivors, who are passing away at a rate of ten percent per year, would benefit from the Foundation as an alternative to waiting for the outcome of lengthy litigation.[212] Second, the Foundation serves as a means of accepting responsibility for the injustices suffered by forced laborers.[213] Third, the Foundation will compensate those not compensated in previous payments made by Germany.[214] Fourth, the Foundation serves to reaffirm the German commitment to human dignity while reinforcing relations with the United States, Central and Eastern Europe.[215]

While the German Foundation is a unique approach to compensation of forced laborers, it may have a serious disadvantage. The U.S. government's main promise in the agreement is a commitment to the task of intervening on behalf of German corporations in U.S. courts so that future claims in federal courts will be barred.[216] The main representative of the United States at the negotiations, Stuart Eizenstat, acknowledged the uniqueness of the U.S. promise to file a Statement of Interest.[217] He stated that if the State Department were asked, it would indicate that dismissal of the lawsuit would be consistent with U.S. foreign policy.[218] He also urged that the

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212. *See id.* (explaining that while many of the elderly survivors who will benefit live in the United States, many also live in Central and Eastern Europe and endured both the Holocaust and the subsequent half century of communism).

213. *See id.* (pointing out that the step taken by the German government was "not an easy step for the German Government to take. . . ."). Through the Foundation, the German government and German industry ensure that the world will not forget that forced labor was a product of the Nazi ideology. *See* Anthony Sebok, *Un-Settling the Holocaust* (Aug. 9, 2000), *available at* www.europe.cnn.com/2000/LAW/08/columns/fl.sebok.nazi.08.29/ (pointing out that the German Foundation is remarkable for several reasons, but also raises several questions).

214. *See Remarks on Action by Germany*, *supra* note 30 (explaining that while Germany has paid over US$60 billion in compensation to Holocaust survivors and victims of Nazi persecution, this is the first time that forced and slave laborers, people whose insurance policies were not honored, and those who had property confiscated will be compensated). Slave laborers were specifically excluded from compensation because the German government and private German companies disagreed upon who should pay. *See* Bazyler, *supra* note 22, at 613 (noting that postwar West Germany made some payments to victims of Nazi persecution, but made no payments to slave laborers). The government claimed it was not responsible for laborers who worked for private companies, and the companies argued that the government should pay because it was the legal successor to the Third Reich. *See id.*; *see also* Drozdiak, *supra* note 28 (stating that German industry refused to pay because the businesses believed the slave laborers were "foisted" on them while the Government stated it was not liable for the actions of private companies).

215. *See Remarks on Action by Germany*, *supra* note 30 (stating that the President thanked the companies for "acknowledging their moral and historic responsibility").

216. *See* Sebok, *supra* note 213 (stating that this promise was necessary in order to establish the Foundation); *see also* John Burgess, *U.S., Germany Clear Impasse on Compensation for Nazi-era Slaves*, DALLAS MORNING NEWS, June 13, 2000, at 10A (explaining that the prevention of lawsuits cannot be guaranteed by the U.S. government "because the judicial system is independent in the United States. . . ."). According to the terms of the Agreement establishing the Fund, a Statement of Interest and foreign policy statement must be filed in all pending and future cases in U.S. courts involving Holocaust claims against German companies. *See* Agreement Concerning the Foundation, *supra* note 29, Annex B.

217. *See Eizenstat Testimony*, *supra* note 39 (commenting before the negotiations that led to the establishment of one unified fund rather than individual private and public funds).

218. *See id.* (stating that this promise would supply the German government with what they have termed "legal peace"). *See generally* Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 282 (D.N.J. 1999) (dismissing claims against German corporations brought by survivors of forced labor because the question of whether reparations should be given raises political questions that are not subject to judicial resolution and the claims were

German companies involved realize that statements of this type in open court by the U.S. government are extremely rare and the action would not be taken in the absence of the establishment of the Foundation.[219]

The promise to urge the dismissal of Holocaust claims against German companies begs the question of whether the U.S. government's actions inappropriately interfere with public access to the courts.[220] Threat of prolonged litigation and nightmarish publicity prompted big German companies to create the Fund.[221] In essence, they wanted to avoid a trial of the Holocaust. The question becomes whether survivors of forced labor feel that a trial of Holocaust slave labor claims should occur so that they may have their grievances addressed by a federal court, regardless of the implications for the companies involved.

However, it is possible that claimants could have access to the courts despite the Forced Labor Agreement reached by the U.S. and German governments.[222] In the United States, only a settlement of a lawsuit, like the Swiss Banks settlement, can provide protection from future claims because a class action settlement is supervised and approved by a federal judge and fairly represents all the members of a class.[223] When the United States agreed to file a Statement of Interest to urge the dismissal of claims against German companies, it may have made a hollow promise because the legal consequences of this Statement are questionable.[224]

Statements of Interest generally refer to prior executive acts as the basis for a dismissal rather than supplying a new reason for a dismissal.[225] Here, the Statement of Interest refers only to the Agreement reached between plaintiffs' and defendants'

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subsumed by Convention on the Settlement of Matters Arising out of the War and the Occupation).

219. *See Eizenstat Testimony, supra* note 176 (expressing the reluctance of the U.S. government to commit to filing the Statement of Interest because such a promise would be a concession to the German government); *see also* Henry, *supra* note 169 (stating that German industry wanted an "ironclad guarantee" from the United States against future suits regarding Holocaust claims).

220. *See* Sebok, *supra* note 213 (arguing that even if the deal made by the U.S. government was well intentioned, it may still be improper to interfere with access to the courts).

221. *See* Edmund Andrews, *Germans Sign Agreement to Pay Forced Laborers of Nazi Era*, N.Y. TIMES, July 18, 2000, at A3 (naming Daimler Chrysler and Deutsche Bank as companies that feared litigation and therefore joined the Foundation).

222. *See* Anthony J. Sebok, *Un-Settling the Holocaust (Part II)* (Aug. 29, 2000), *available at* http://writ.news.findlaw.com/commentary/20000829_sebok.html [hereinafter Sebok, *Part II*] (asserting that U.S. law does not protect German companies from future lawsuits).

223. *See id.* (explaining that the Foundation does not provide protection from future lawsuits because it does not meet the requirements of federal class action law); *see also* Final Order and Judgment, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y 2000) (No. CV-96-4849), *available at* http://www.swissbanksclaims.com (copy on file with *The Transnational Lawyer)* (approving the Settlement Agreement and dismissing the action on its merits with prejudice as to all members of the plaintiff classes and as to all claims).

224. *See* Sebok, *Part II*, *supra* note 222 (commenting on the uncertain effects of the Statement of Interest in the U.S. courts including whether the United States has standing to file the Statement).

225. *See id.* (explaining that normally Statements of Interest are "used to explain to a court how the private rights of the plaintiff to a lawsuit were extinguished by the United States in the course of conducting foreign policy").

lawyers, with no involvement of executive or Congressional power.[226] If the plaintiffs have no legal right to damages, the judge would not need a Statement of Interest as a basis to dismiss the case.[227] However, if the plaintiffs have a legal right to damages, then the Statement of Interest, as a private agreement which the United States helped to broker, could not provide a basis for dismissal on its own.[228] It is not clear that the Statement of Interest has any legal effect, which leads to the conclusion that the United States made a hollow promise in the Agreement with Germany.[229]

The effect of a Statement of Interest was tested in March 2001 in the courtroom of Federal Judge Shirley Wohl Kram, who refused to dismiss cases arising out of Holocaust slave labor after a Statement of Interest was filed.[230] However, the basis of this refusal was not that the judge questioned the legal effect of the Statement of Interest nor was it because she rejected the basic premise of the Foundation.[231] Instead, her refusal to dismiss the claims was based upon the fact that the money was not yet in the Foundations' fund to pay the claims and therefore dismissal would be premature.[232] The German companies responded by arguing that no money should be paid until all the cases in U.S. courts are dismissed.[233] A lawyer for the victims placed blame on the German companies themselves who feared being under the control of the American courts and thus depended on the wrong legal mechanism, the State of Interest, to gain legal peace.[234] The German companies planned to appeal Judge Kram's decision and the State Department criticized the decision.[235]

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226. *See id.* (citing that diplomatic resolution of a hostage crisis is an example of when an agreement is based upon the exercise of executive or Congressional power).

227. *See id.* (arguing that because the court would dismiss a case if the law requires it, without the filing of a Statement of Interest, the Statement of Interest is "an odd, and arguably meaningless, tool to invoke . . . .").

228. *See id.* (adding that it is not clear how the United States would have the legal right to intervene in the proceedings to present the Statement of Interest).

229. *See id.* (stating that the Statement of Interest is unlikely to provide the legal peace that Germany sought when entering into the Agreement).

230. *See* Edmund L. Andrews, *New Legal Disputes Put Holocaust Payments in Doubt*, N.Y. TIMES, March 9, 2001, *available at* http://www.nytimes.com/2001/03/09/world/09GERM.HTML (last visited Mar. 8, 2001) (copy on file with The Transnational Lawyer) (noting that a Statement of Interest was filed with the court, as the Foundation Agreement required).

231. *See id.* (explaining that neither of these issues were even addressed by the court).

232. *See id.* (stating that the Judge expressed particular concern that while the German industry is required to contribute 5 billion German marks, it has only raised 3.6 billion).

233. *See id.* (noting that Deutsche Bank and Daimler Chrysler circulated letters "arguing that no money should be paid until all pending court cases have been settled).

234. *See id.* (stating that Michael Witti, a German lawyer representing slave laborers said, "The reason we are in this position is that German industry and German parliamentarians insisted from the first day on using the wrong legal mechanism" and now it is inevitable that new suits will be filed because the U.S. government had no right to block the suits and had to depend on the rulings of each judge).

235. *See id.* (noting that the State Department's criticism focused on the fact that the decision was contrary to the interest of the parties and resulted in a delay of justice to the elderly survivors, many of whom are dying each month).

A second legal question arising from the Foundation is whether the German companies involved would have faced liability in U.S. courts.[236] Assuming that public access to the courts was not denied and that plaintiffs filed suit, the question that arises is whether the rights of American citizens to file tort claims against German entities regarding war claims were surrendered in post war treaties.[237] However, the German Foundation can be viewed from a different perspective. If Germany had not offered money and the United States had not offered protection from lawsuits, the plaintiffs would be left uncompensated due to the legal hurdles they would have faced.[238] This endeavor by the two governments could be an acknowledgment that previous treaties were not sufficient and it is surely a step toward justice for the victims of slave labor.[239]

IV. COMPARISON OF TWO APPROACHES FOR SLAVE LABOR COMPENSATION

The creation of the German Foundation and the settlement of the Swiss Bank litigation prompted a wide range of responses. Most commentators focused upon the advantages and disadvantages of each approach to compensation of slave and forced laborers. Others commented generally on the morality of any plan that purported to compensate persons who can never be made whole after the experience they endured.

Stuart Eizenstat directly compared the two approaches and asserted that the Foundation approach was superior for two reasons. First, the Foundation's quickness and efficiency are necessary due to the age of the survivors and such quickness and efficiency cannot be achieved through litigation.[240] Second, Eizenstat

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236. *See* Sebok, *Part II*, *supra* note 222 (claiming that the United States gave the impression that if the German government did not create the Foundation, it would face liability for a larger amount in U.S. courts).

237. *See id.* (noting that discussions regarding forced labor occurred in 1946 and 1953, with individuals losing the right to sue in 1990). *See generally* Agreement on a Plan for Allocation of a Reparation Share to Nonrepatriable Victims of German Action, June 14, 1946, U.S.-Fr.-U.K.-Czech.-Yugo., 4 U.S.T. 75; Agreement on German External Debts, Feb. 27, 1953, 333 U.N.T.S. 3, U.S-Belg.-Can.-Ceylon-Den.-Fr.Republic-Greece-Iran-Ir.-Italy-Liech.-Lux.-Pak.-Spain-Swed.-Switz.-S.Afr.-Gr.Brit.-N.Ir.-Yugo.; Convention on the Settlement of Matters Arising out of the War and the Occupation, May 26, 1952, U.K.-N.Ir.-Fr.-U.S.-F.R.G., 332 U.N.T.S. 219; Termination of Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, U.S.-F.R.G.-G.D.R.-Fr.-U.S.S.R.-U.K., 29 I.L.M. 1186. *See generally* Diane Foos, Note, *Righting Past Wrongs or Interfering in International Relations? World War II-Era Slave Labor Victims Receive State Legal Standing After Fifty Years*, 31 MCGEORGE L. REV. 221 (2000) (discussing treaties and agreements dealing with reparations executed after World War II).

238. *See* Sebok, *Part II*, *supra* note 222 (arguing that instead of affirming the power of the individual to sue private corporations, the Agreement affirms the power of the State because it would not have occurred without State intervention).

239. *See id.* (postulating that even though the legal effect of the Agreement is suspect, it is "no less than a reformation of an international peace treaty that evolved over forty years").

240. *See Eizenstat Testimony*, *supra* note 39 (explaining that the average age of survivors of the Holocaust is 80 years old). The Agreement itself states that "the Foundation will assure broad coverage of victims and broad participation by companies which would not be possible through judicial proceedings." Agreement Concerning the Foundation, *supra* note 29.

argued that since the Foundation covers a larger number of victims than the number covered by lawsuits pending in U.S. courts, it is a superior approach to compensate victims.[241] Eizenstat concludes with the bold statement that "uncertain and lengthy litigation" actually put Holocaust victims at risk, and establishment of the Foundation better serves the interests of justice.[242]

From another perspective, the Foundation is just as risky for Holocaust survivors as the litigation approach. As previously noted, the legal effects of the Foundation are questionable.[243] In contrast, the legal effect of the litigation approach is time tested.[244] While it is unclear whether the German Foundation will have the effect of creating legal closure to Holocaust slave labor claims, there is little doubt that the goal of closure can be achieved through use of litigation on an individual basis.

A possible motivation behind the establishment of the Foundation is that Germany sought to avoid repeating mistakes made by the Swiss in handling slave labor claims.[245] By establishing a fund with a larger amount of money and a broader eligibility, the German government and German industry aimed to avoid the time-consuming, costly, and publicity-creating litigation that could occur in American courts.[246] In addition, the Foundation is aimed primarily at slave and forced labor claims while the litigation approach gave dormant bank accounts the majority of the Settlement Fund.

The underlying issue of morality plagues both approaches to compensation. However, the filing of lawsuits and the establishment of the Foundation both brought to light what many companies denied for fifty years and exposed the widespread complicity with the actions of the Nazis.[247] If one accepts the idea that some compensation is better than no compensation, the moral issue may be acknowledged but not solved.

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241. *See Eizenstat Testimony*, *supra* note 39 (referring to the original framework for the Foundation, consisting of one foundation funded by German industry and one foundation funded by the German government).

242. *See id.* (comparing approaches and concluding that as a result of the two points mentioned, the Foundation better serves justice and provides a less risky means of compensation for victims).

243. *See* Sebok, *Part II*, *supra* note 222 (questioning the legal effect of the Statement of Interest required by the German Foundation and whether German companies would have faced liability).

244. *See id.* (noting that the Agreement establishing the Foundation did not have the same legal effect as settlement of the Swiss Banks lawsuit); *see also* Final Order and Judgment, *In re* Holocaust Victim Assets Litigation, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (No. CV-96-4849), *available at* http://www.swissbanksclaims.com (copy on file with *The Transnational Lawyer*) (approving the Settlement Agreement and dismissing the action on its merits with prejudice as to all members of the plaintiff classes and as to all claims).

245. *See* Bazyler, *supra* note 22, at 616 (arguing that Germany established the Foundation in order to avoid bad publicity and lengthy litigation).

246. *See id.*(adding that in addition to the costs and publicity of litigation the Swiss faced the prospects of sanctions as well).

247. *See id.* at 619 (explaining the consequences of the filing of slave labor actions).

V. CONCLUSION

The essential question is whether the litigation or Foundation approach should be used to handle compensation for human rights violations. While the German Foundation appears to offer a quick and efficient means to compensation, survivors could be denied access to the courts through the actions of the U.S. government when it acts to make the German Foundation the exclusive remedy for Holocaust claims. However, it is unclear whether allowing victims access to the courts would be useful due to the uncertainty of success of litigation. The litigation approach allows public access to the courts, but survivors may be denied compensation in their lifetime due to the extended amount of time that litigation entails, the money it costs to pay attorneys, and the legal hurdles plaintiffs would face.

Since many legal considerations place the success of litigation in doubt, the Foundation appears to be a superior solution. It creates a stable means to compensate victims and offers a larger amount of compensation to broader categories of persons. The German Foundation provides a model for compensation in future human rights violations cases.

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