Advancing Human Rights? The Example of Holocaust-Era Class Actions in U.S. Courts

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In proceedings in United States courts, the tendency of plaintiffs' counsel in mass tort litigation in general and human rights litigation in particular is to go large. The impetus is in part plaintiffs' lawyers' impulse to stake out the largest possible territory, both to jostle for control and status in such litigation, and to confront defendants with the maximum potential liability. That tendency to push out the boundaries of a dispute as far as possible tends to be exacerbated in the human rights context, where victim advocates regularly use group litigation for multiple purposes, including bringing attention and pressure to bear on rights violators, and as placeholders for hoped-for political settlements. As such, the claims may be framed even more broadly than in other categories of mass tort litigation.

That set of impulses reached a high point in Holocaust-era class actions prosecuted in U.S. courts in the late 1990s against Swiss, German, Austrian and French private corporations that allegedly facilitated or profited from Nazi atrocities. Those cases ultimately produced settlements worth more than $7.5 billion, collectively. The largest settlement, brokered by the American and German governments, did not involve certification of a class or require defendants to submit to the jurisdiction of a U.S. court. That agreement led to the creation of the German Foundation for Remembrance, Responsibility and the Future, funded at approximately $5 billion, most of which went to pay surviving slave and forced laborers who had not been directly compensated by the German private sector. *See* http://www.state.gov/p/eur/rt/hlcst/c11379.htm. The most substantial class action settlement was with the Swiss banks; at $1.25 billion, it was the largest private "human rights" settlement in U.S. history. *See* www.swissbankclaims.com (court-approved website). Though the litigation was filed and pursued only against what were then the big-three Swiss banks, and focused primarily on dormant accounts, it was settled on an "all-

Switzerland" basis, covering all imaginable Holocaust-era claims (with a small carve-out for claims regarding identifiable pieces of looted art).

Based on their sheer size, the Holocaust-era settlements seem at face value to have justified the "go large" strategy that gave rise to them. But would a more targeted focus on triable claims have done more to advance human rights? Reflecting on that question, Professor Ratner critically examines the dominant narratives regarding Holocaust-era class actions; assesses the efficacy of that category of litigation, focusing in particular on the Swiss banks settlement; and compares the litigation to more recent Anti-Terrorism Act cases in U.S. courts, which have produced litigated judgments involving similarly dazzling dollar amounts, but for far smaller aggregates.

The Holocaust-era cases have generated three dominant narratives: Class action advocates cite the aggregate settlements as evidence of the importance of class actions to promote human rights. *See, e.g.*, Michael J. Bazyler, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (NYU Press 2005). Critics, including some Jewish victims of Nazi persecution, view the litigation as an affront to their individual experiences, and as providing defendants a false and undeserved sense of closure and "legal peace." *See* http://articles.chicagotribune.com/2001-08-12/news/0108120264_1_swiss-bank-accounts-holocaust-tiny/2 (quoting the Anti-Defamation League's Abe Foxman). A third narrative distinguishes the Holocaust-era cases as *sui generis*, and thus of little weight in debates about the role of collective action in advancing human rights. *See, e.g.*, Michael Thad Allen, *The Limits of Lex Americana: The Holocaust Restitution Litigation as a Cul-De-Sac of International Human Rights Law*, 17 WIDENER L. REV. 1 (2011) (http://widenerlawreview.org/files/2011/03/Allen.pdf).

These dominant narratives about Holocaust-era cases all have some merit, but are incomplete. The Swiss litigation was a success by many standards, and for some categories of claimants. But the payments made to other categories of claimants (e.g., one-time payouts of $1,450 to surviving slave laborers) bore no relationship to the severity of their injuries or, even, to the strength of their claims. Similarly, while some facets of the Holocaust litigation – including especially the political dimensions of it – can fairly be characterized as *sui generis*, in other respects the litigation followed a familiar mass tort litigation trajectory. As such, it is worth considering its efficacy.

Consistent with but gong beyond the dominant narratives, at least five yardsticks may be applied to assess the efficacy of the Swiss banks litigation:

(1) Compensation: The adequacy of compensation depended on the type of claim. Claimants with evidence backing up deposited asset claims received something approximating full value. Documented awards are publicized online. *See* http://www.crt-ii.org/_awards/index.phtm. The largest awards were in the millions of dollars. *See, e.g.*, http://www.crt-ii.org/_awards/_apdfs/Fuchs_Otto.pdf (in re accounts of Otto and Maria Fuchs, involving an award of approximately $4.8 million). But, as noted, other categories of claimants, including persons with slave labor, looted asset, and refugee claims, received relatively small sums or no direct compensation at all.

(2) Deterrence: Whether the Holocaust-era litigation deterred the Swiss banks in particular or multinational enterprises more generally from facilitating or profiting from human rights abuses is an open question.

(3) Norms: Some have persuasively argued that the Holocaust-era settlements generated useful norms. *See, e.g.*, Leora Bilsky, Rodger D. Citron, & Natalie R. Davidson, *From* Kiobel *Back to Structural Reform: The Hidden Legacy of Holocaust Restitution Litigation*, 2 STANFORD J. COMPLEX LIT. 139 (2014) (https://journals.law.stanford.edu/sites/default/files/stanford-journal-complex-litigation-sjcl/print/2014/01/vol.2.1_bilsky_citron_davidson.pdf). A counterargument is that the norms were never in doubt; the Swiss defendants, for example, denied the facts (e.g., the existence of large numbers of dormant accounts), rather than the import of those facts.

(4) Process values: The Holocaust litigation gave voice and forms of expression to tens of thousands of survivors, for example via the Initial Questionnaires they completed, telling their stories and expressing an intent to participate in the settlement. *See* http://www.swissbankclaims.com/Documents/DOC_13_%20notice_d.pdf. In other ways, the litigation disenfranchised individual claimants because, for example, settlement allocation choices were dictated by the court, or because individual proof was not considered with regard to some categories of claims (e.g., looted asset claims, which were paid only on a *cy pres* basis).

(5) Victim response: The response of victims was decidedly mixed. The dormant account claims process, which rested on the evaluation of individual submissions, was mostly praised; whereas pro rata payments to surviving slave laborers were met with some scorn,

especially from American and Western European survivors who considered the small payments to be too low.

To the extent we have doubts regarding the Swiss banks litigation's efficacy, those doubts stem at least in part from its expansiveness, including the mixing of relatively strong and triable claims (e.g., those involving dormant accounts) with those that could not be pursued in U.S. courts, or that lacked evidentiary support (e.g., the claims of refugees against the Swiss government, or most claims regarding plundered assets laundered through the banks).

It may be helpful to imagine how differently the Swiss banks litigation might have turned out had plaintiffs' counsel aggregated only those claims that could be tried, and as to which they thus had leverage. Consider recent Anti-Terrorism Act ("ATA") litigation *Sokolow, et al. v. The Palestine Liberation Organization and the Palestinian Authority, in the United States District Court for the Southern District of New York*, Case No. 1:04-cv-00397 (Judge Daniels). Plaintiffs were 40 American citizens who were injured or lost family members in six terrorist attacks in Israel between 2002 and 2004. Alleging that defendants facilitated these attacks, many of which were carried out by their employees, plaintiffs sued under the ATA, 18 U.S.C. §2331, *et seq*., which creates a private right of action and allows for treble damages. Plaintiffs' claims were consolidated (i.e., administratively aggregated) for pretrial and trial purposes. The jury rendered a verdict for all plaintiffs of $218.5 million, trebled for a total award of $655.5 million. The verdict is now on appeal.

There are many reasons to be cautious about a comparison of Holocaust-era class actions and modern ATA litigation. For example, the ATA plaintiffs had no choice but to keep their aggregates relatively small; had an arguably stronger evidentiary basis for their claims and fewer defenses to overcome (such as the justiciability and statute of limitations defenses that burdened Holocaust-era plaintiffs); and did not have the luxury of being able to settle their claims. Nevertheless putting the two categories of litigation side-by-side yields some insight into whether smaller, triable units of aggregation are capable of producing "better" litigation outcomes.