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## History's Accounting: Liability Issues Surrounding German Companies for the Use of Slave Labor by Their Corporate Forefathers

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## COMMENTS

# History's Accounting: Liability Issues Surrounding German Companies for the Use of Slave Labor by Their Corporate Forefathers

## I. Introduction

In the summer of 1998, two major Swiss banks agreed to settle claims with Holocaust survivors who had filed a federal class action lawsuit against them.<sup>1</sup> Credit Suisse and Union Bank of Switzerland agreed to pay claimants \$1.25 billion, the largest settlement in the history of human rights claims in the United States.<sup>2</sup> The settlement was made in response to allegations that the banks had improperly appropriated the assets of Holocaust victims who deposited money and valuables prior to, and during, World War II.<sup>3</sup> The Swiss Bank lawsuits and settlements have proven to be only the starting point for Holocaust related suits recently filed in American courts.<sup>4</sup> Lawsuits have been filed against many European insurance companies who refused to settle

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1. See Michael Bayzler, *A Measure of Justice for Holocaust Survivors; The American Court System's Willingness to Hear Lawsuits Against the Swiss Banks Leads to Historic Settlements*, ORANGE COUNTY REG., Aug. 23, 1998, at G02.

2. See *id.*

3. See *id.*

4. See *id.*

Holocaust-era claims.<sup>5</sup> The settlement by Assicurazioni Generali, an Italian insurance company, of a class action suit brought against it for \$100 million dollars indicates that an increasing number of these companies view these lawsuits as realistic threats to their business interests.<sup>6</sup>

Settlements such as the one made by Assicurazioni Generali have provided the impetus for the most recent slate of Holocaust related lawsuits filed in the United States. Lawyers in both New York and New Jersey have filed claims against a number of private German/multi-national corporations seeking compensation for Holocaust survivors who were forced to work as slave laborers for these companies during the war.<sup>7</sup> Thus far, the companies that have been sued include Volkswagen AG, Siemens AG, Bayerische Motoren Werke AG, Daimler Benz AG, Leica Camera AG and I.G. Farben AG.<sup>8</sup> These lawsuits, which have been filed on behalf of the former employees of these companies, are essentially claims for unpaid wages.<sup>9</sup>

This comment will examine why Holocaust related claims against corporations, specifically German corporations, are being brought now — more than fifty years after the end of World War II. Part II examines why Germany had a need for a slave labor system and what the experience was like for one such laborer. Part III focuses on how the slave labor system developed, the cooperation between private business and the government in utilizing laborers and the post war criminal penalties associated with these actions. Part IV focuses on the legal questions surrounding the statutes of limitations and jurisdictional issues that are relevant to these cases progressing to the trial stage.

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5. *See id.*

6. *See* Bayzler at G02.

7. *See* Christopher Rhoads, *German Companies Face U.S. Lawsuits Over Slave Labor*, WALL ST. J. (INT'L), Sept. 1, 1998, at A14.

8. *See id.* Suits have also been filed against insurance companies in France and Austria and also against a number of German banks including Deutsche Bank A.G. and Dresdner Bank A.G. *See* Christopher Rhoads, *Degussa Shares Drop 4.2% on Filing of Holocaust Suit*, WALL ST. J. EUR., Aug. 25, 1998, at 3.

9. *See* Richard Willing, *A Quest for Compensation Nazi's Forced Laborers File Suit to Seek What They Say is Due to Them*, USA TODAY, Sept. 15, 1998, at A3.

## II. A Typical Slave Labor Experience

### A. Background

In order to fully comprehend the issues governing these lawsuits, it is important for one to understand the context from which they have grown. World War II began in September 1939 with Germany's invasion of Poland.<sup>10</sup> As the war continued through the early 1940's, German corporations developed labor shortage problems when large portions of their traditional labor pool left industrial centers in order to fight for the Reich.<sup>11</sup> Slave labor became a tremendously important sector of the German economy: it was responsible for keeping the factories and plants operating.<sup>12</sup> By the middle of the war, slave laborers were involved in every facet of the German economy and over nineteen percent of the total workforce was composed of slaves.<sup>13</sup> The pervasiveness of slave labor usage is illustrated by the war time composition of the I.G. Farben workforce, approximately forty percent of which were slave laborers. Another example of this was the government's armament and aircraft company where at least fifty-eight percent of its workers were slaves.<sup>14</sup>

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10. *See id.*

11. *See* Compl., Hirsch and Blumenfeld v. Fried. Krupp A.G. Hoesch Krupp, No. 98 cv 4280 (JAG) (D. N.J. filed Sept. 11, 1998) at 5. (The complaint from this action is on file with the author.)

12. *See* CHRISTOPHER SIMPSON, *The Splendid Blond Beast: Money, Law and Genocide in the 20th Century* 86 (1993).

13. *See id.*

14. *See id.* Simpson explains that the exact number of slave laborers will likely never be known. *See id.* He points out that Germany's industrial complex had great incentive to destroy any and all evidence of employing slave laborers following the war. *See id.* A company could derive no possible benefit from maintaining such records and could have faced charges from Allied war crimes tribunals if it was discovered that they had used slaves. *See id.*

Simpson also states that the estimates available concerning the number of laborers come from internal Nazi documents in the Labor and War Production Ministries. *See id.* Simpson quotes Edward Homze, a German labor history expert, who suggests that a number as high as 10 million forced workers would be a conservative estimate. *See id.*

### B. *One Laborer's Experience*<sup>15</sup>

Elizabeth Hirsch was born in Uzhorod, Czechoslovakia in 1921 and remained there until 1944 when she was deported by German soldiers and sent by cattle car to Auschwitz.<sup>16</sup> The twenty-three year old was selected by employees of the Krupp A.G. munitions factory to be a worker in the plant.<sup>17</sup> The terrible treatment that Hirsch was subjected to at the Krupp factory was exacerbated by the fact that she was supplied with clothing and wooden clogs that did not provide her with the requisite protection from the elements.<sup>18</sup> The clothing and shoes were expected to last for an extended period of time and when they failed to endure, Hirsch was forced to find creative ways to extend their useful life.<sup>19</sup>

Hirsch's experience as a slave laborer worsened in the course of the war when she was transferred to another Krupp facility in Essen, Germany.<sup>20</sup> The transfer placed Hirsch in a camp with hundreds of other female prisoners who were housed in wooden barracks which provided little, if any, protection from the outside elements.<sup>21</sup> The situation deteriorated further during Allied bombing raids as the prisoners were forced to evacuate the barracks and live in thin, un-insulated tents.<sup>22</sup>

In addition to the substandard living arrangements, prisoners were provided with barely enough food to stay alive.<sup>23</sup> The women working for Krupp's received a bowl of watery soup once

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15. In compiling this section of the comment I relied on the testimony provided by Elizabeth Hirsch in her complaint filed against Krupp A.G. While many of the experiences she had can be independently verified by historians, it is important to acknowledge that her testimony is composed of allegations and is not accepted as fact. Therefore, many of the details of her testimony, which are provided to enhance the picture of a laborer's experience, are not necessarily provable assertions. SIMPSON, *supra* note 12, at 89-91, provides historical support for many of Hirsch's allegations.

16. See *Hirsch supra* note 11, at 9.

17. See *id.* at 10.

18. See *id.*

19. See *id.* at 10. Hirsch's statement included the following passage, "Plaintiff Hirsch was provided with wholly inadequate clothing, and was provided only with wooden clogs for footwear. Once the wooden clogs broke, they were replaced by newspaper tied with string to Plaintiff Hirsch's feet." *Id.*

20. See *id.*

21. See *Hirsch supra* note 11, at 10.

22. See *id.*

23. See SIMPSON *supra* note 12, at 90. As the war progressed workers in some factories received as little as 800 calories per day to exist on and by the winter of 1944-1945 mass-starvation had sent in at many labor camps.

per day, a slice of bread once per week and at Christmas were provided with a piece of cheese and an extra piece of bread.<sup>24</sup> The situation further deteriorated as the war continued and the barracks area of the factory complex was the target of allied bombing raids.<sup>25</sup> The already limited meals were further reduced as the bombing raids took their toll on the Krupp A.G. plant facilities. At the beginning of Hirsch's term as a laborer, workers were provided with a meal while at the plant — a soup that the workers referred to as "bunker soup."<sup>26</sup> This extra meal provided by Krupp A.G. ended during the October 1944 bombing raids; thereafter, the workers were not provided with any sort of substitute ration or meal.<sup>27</sup>

At different points during the conflict the barracks were decimated — first burning down in October 1944, then suffering further damage in December 1944.<sup>28</sup> In the course of these bombings, the bathroom facilities were destroyed (they were not rebuilt) and the kitchen facility was so damaged that the cooking stoves could no longer be used.<sup>29</sup> The Krupp company's inmates were often forced to sleep in tents, the bombed out remains of buildings or in dog kennels.<sup>30</sup> These problems were worsened by the fact that Krupp A.G. failed to abide by a Nazi mandate that required prisoners/laborers to be provided with two blankets — Krupp prisoners were only provided with one.<sup>31</sup> The bombings resulted in the closing of the washing facility, further compounding the sanitary problems.<sup>32</sup>

The workday for Ms. Hirsch and the other slave laborers at the Krupp A.G. Essen plant began at 4:00 a.m. with a wake up call.<sup>33</sup> The workers were required to be ready for a 4:30 a.m. roll call and work began at 6:00 a.m.<sup>34</sup> They worked seven days a week with the only reprieve being a shorter workday on Sundays.<sup>35</sup> In

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24. See *Hirsch supra* note 11, at 10.

25. See *id.* at 11.

26. See *id.*

27. See *id.*

28. See *id.*

29. See *Hirsch supra* note 11, at 11.

30. See *SIMPSON supra* note 12, at 91.

31. See *Hirsch supra* note 11, at 11.

32. See *id.* Hirsch's complaint also discusses the fact that the camp's toilet facilities were in poor condition. See *id.*

33. See *id.* at 12.

34. See *id.*

35. See *id.*

the early days of the Essen plant's use the workers were transported between the barracks and the factory by train, however, by October 1944 the railway line was destroyed and the workers were required to march the distance (estimated to be at least a mile and a half).<sup>36</sup>

As production ability decreased because of the extensive bombings, the work for the laborers did not end, rather it shifted in nature. The Krupp A.G. employees were no longer required to work in the factory but were instead required to remove rubble and help in the rebuilding of the destroyed plant.<sup>37</sup> The women were required to carry bricks and iron roofing sheets, this despite the fact that they possessed neither the requisite strength nor the proper clothing to complete the task safely.<sup>38</sup> Ms. Hirsch was forced to endure these circumstances until March 1945 when the women were removed from Essen and eventually liberated by Allied forces.<sup>39</sup>

The conditions that Ms. Hirsch was exposed to were not the exception but rather the norm of the slave labor experience.<sup>40</sup> Men and women from all corners of Europe were victims of Nazi Germany's labor needs.<sup>41</sup> In the course of the war, it is estimated that the Nazi government and private corporations used over seven million slave laborers.<sup>42</sup> Of the estimated seven million laborers who were used by numerous German companies, it is hypothesized that approximately 500,000 are still alive.<sup>43</sup> In the years since the war ended, there has been an ongoing debate between many of the companies who utilized slaves and historians as to whether the laborers were forced on the companies by a production oriented government or whether the laborers were requested by the corporations themselves.<sup>44</sup>

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36. See *Hirsch* at 12.

37. See *id.*

38. See *id.*

39. See *id.*

40. See *German Firms Consider Holocaust Victim Claims: The Pressure is on to Compensate Those Forced Into Slave Labor in Germany During World War II Now That Companies in Other Countries Have Made Settlements with Holocaust Victims*, GREENSBORO NEWS & REC., Aug. 21, 1998, at A11.

41. See SIMPSON *supra* note 12, at 88.

42. See GREENSBORO NEWS & REC. *supra* note 40.

43. See *id.*

44. See Meg Fletcher, *Holocaust Reparations Expanded*, BUS. INS., Sept. 7, 1998, at 2.

### III. Development of the Slave Labor System

#### A. Background

The slave labor system that existed in Nazi Germany developed from a combination of both government and corporate interests.<sup>45</sup> The two entities appear to have cooperated in order to fully utilize all of the possible labor sources available.<sup>46</sup> In reality, the government profited both from the sale of slave laborers and from the continued resources that were produced for the war machine.<sup>47</sup> Corporations, on the other hand, benefitted from the low overhead made possible by the cheap labor and from the increased demand for their products.<sup>48</sup>

The need for slave laborers developed as German workers were taken from the work force and placed into military roles.<sup>49</sup> The resulting shortage in the industrial workforce was offset by the use of 5,000,000 foreign laborers in German plants; of these workers, only 200,000 had voluntarily moved to German territories.<sup>50</sup> The need for workers was so extensive that the Nazis' "Final Solution," the government plan to eliminate Europe's Jewish population, was halted in order to provide a greater labor pool.<sup>51</sup> The workers were used in almost every imaginable industry and were distributed to individual businesses through a centralized system.<sup>52</sup>

German government agencies established quotas of manufacturing products and supplies that individual companies and plants were required to produce for the war effort; a failure to meet such quotas could result in both civil and criminal penalties.<sup>53</sup>

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45. See Daniel Zwerdling, *NPR: Weekend All Things Considered*, Sept. 6, 1998.

46. See *id.*

47. See *id.*

48. See *id.*

49. See Matthew Lippman, *Fifty Years After Auschwitz: Prosecutions of Nazi Death Camp Defendants*, 11 CONN. J. INT'L L. 199, 242 (1996).

50. See *id.*

51. See *id.* at 242-243.

52. See Robin Givhan, *Hugo Boss AG: Soldiers of Fortune*, JERUSALEM POST, Aug. 15, 1997, at 12..

53. See Lippman *supra* note 49, at 243. The Nazi government usually established the material quotas that companies needed to meet. From that number the manufacturing managers would estimate how many workers were needed to complete the job. The labor request would then be submitted to various industrial boards and would then be passed onto Ministry for Armaments and War Production. The request would then be given to Fritz Sauckel, the

Corporate officials, along with government bureau-crats, would determine the number of laborers needed to fulfill the established production quotas and then using this information, the companies would approach the military and make their request for laborers.<sup>54</sup> The historical record indicates that the workers were not forced onto the corporations as many companies may have claimed, rather the laborers were requested from the government by high level corporate directors and managers.<sup>55</sup> Furthermore, it is apparent that many of the companies were so eager to obtain laborers that they were willing to pay for the workers — pennies were paid for Jewish laborers and slightly larger amounts for Eastern and Western European workers.<sup>56</sup>

*B. Government and Corporate Cooperation in Use and Distribution of Laborers*

One of the slave labor related lawsuits filed in New Jersey federal court is against Volkswagen A.G. The complaint sets forth allegations of cooperation between the company's management and Nazi officials who were in charge of the labor force. These allegations, which are supported by historical and legal scholarship, illustrate how the slave labor system was organized to promote the efficiency of both the corporations and the Reich. Volkswagen began utilizing slave laborers at the outset of the war, using primarily Polish women as early as 1940.<sup>57</sup> In the course of the war, Volkswagen used laborers from all over Europe and at certain times the percentage of slave laborers reached 85 percent of the workforce.<sup>58</sup> In order to meet the government's established quotas, Volkswagen placed bids with Fritz Sauckel, the Nazi Labor Minister, for slave laborers because his ministry was in charge of "recruiting" foreign laborers.<sup>59</sup> Ultimately, in order to receive all the laborers that they required, Volkswagen dealt directly with SS Commandant Heinrich Himmler.<sup>60</sup> As the Allied Forces made inroads into the territory held by the Reich,

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Plenipotentiary General of Labor Allocation, to be completed. *See id.*

54. *See Zwerdling supra* note 45.

55. *See SIMPSON supra* note 12, at 85.

56. *See Zwerdling supra* note 45.

57. *See Compl., Gross and Klein v. Volkswagen A.G. and Volkswagen of America*, No. \_\_\_\_\_ (D. N.J. filed Aug. 31, 1998) at 6. (The complaint from this action is on file with the author.)

58. *See id.* at 6.

59. *See SIMPSON, supra* note 12, at 85-86.

60. *See Gross supra* note 57, at 6.

Volkswagen sought ways to protect their production ability despite being a target of Allied bombings.<sup>61</sup> To this end, the company decided to build fabrication facilities underground and Himmler provided Volkswagen with the additional laborers needed to both build the facility and transport the necessary equipment.<sup>62</sup> The utilization of slave laborers in daily production, combined with Volkswagen's use of laborers to build new factories, cut the company's overhead dramatically and allowed the company to make tremendous profits throughout the war.<sup>63</sup>

### C. *Criminal Punishment for Slave Labor Usage*

Volkswagen's reliance on the slave labor system is a representative example Nazi corporate war-time behavior. Volkswagen was just one of the many companies that took advantage of a situation that was presented to them. In addition to facing the current civil suits that have been filed against them, many of these companies and their wartime executives were forced to stand trial before the various war crimes tribunals that were empaneled by the Allied Forces.<sup>64</sup> The results from these tribunals varied greatly. In some cases, corporate executives were found guilty of violating international legal principles set forth in the Hague Convention and in other cases the businessmen were acquitted based on the common law principle of necessity.<sup>65</sup>

The executives of the Flick Company, essentially a conglomerate of the mining, transportation, steel and munitions interests controlled by Friedrich Flick, were charged with a variety of war crimes.<sup>66</sup> The company's executives were acquitted based on the necessity defense as it was decided that they had no choice but to utilize slave labor.<sup>67</sup> The judges determined that despite the executives opposition to slave labor, they would have been unable to meet governmentally imposed quotas without its use.<sup>68</sup> Despite the fact that the corporation was not found guilty of slave labor violations, two of the company's executives were convicted of such

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61. *See id.*

62. *See id.*

63. *See id.*

64. *See* Lippman *supra* note 49, at 245.

65. *See id.* at 246.

66. EB Online-Britannica Online, *Flick, Friedrich*, (visited Jan. 8, 1999) <<http://www.eb.com:180/cgi-bin/g?DocF=micro/732/59.html>>.

67. *See* Lippman *supra* note 49, at 246.

68. *See id.*

crimes.<sup>69</sup> Flick and Bernhard Weiss were convicted on criminal counts which included charges that the two men were responsible for Nazi increases in production quotas — the two men were thereby responsible for the increase in the number of laborers needed by the company.<sup>70</sup>

The executives who were employed by the I.G. Farben company faced extensive charges in criminal suits brought against them by the United States government. In 1953, before the Nuremberg Military Tribunal, twenty members of Farben's supervisory board and four executives were indicted on criminal counts including crimes against peace, spoliation, plunder and slave labor.<sup>71</sup> Farben utilized slave labor extensively and went so far as to construct manufacturing facilities adjacent to concentration camps in order to have easy access to the labor force that was present there.<sup>72</sup> Farben operated what is possibly the most infamous slave labor camps, Monowitz, a rubber and fuel plant located just a few kilometers away from Auschwitz.<sup>73</sup> At the conclusion of the trial, during which the necessity defense was presented, thirteen individuals were convicted of either spoliation, plunder or slave labor crimes.<sup>74</sup> The sentences that were handed down by the tribunal ranged from one to eight years in length.<sup>75</sup> The Farben panel chose not to accept the necessity defense in the case, holding that it was an inappropriate defense when invoked by the individual responsible for creating the necessity.<sup>76</sup>

In the years between the conclusion of World War II and the recent filing of lawsuits against private German corporations, very few companies have been willing to, or have attempted to, compensate the slave labor victims.<sup>77</sup> Historically, these corporations have been disinterested in settling claims or establishing funds to compensate victims of the labor programs.

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69. *See id.*

70. *See id.*

71. *See* Matthew Lippman, *War Crimes Trials of German Industrialists: The "Other Schindlers,"* 9 TEMP. INT'L & COMP. L.J. 173, 206 (1995).

72. *See id.* at 217.

73. *See* Lippman *supra* note 49, at 248.

74. *See* Lippman, *supra* note 71, at 221.

75. *See id.*

76. *See id.* at 247. Lippman writes, "The Farben tribunal clarified that the defense of necessity was not available in those instances in which 'the party seeking to invoke it was himself . . . responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative.'" *Id.*

77. *See* GREENSBORO NEWS & REC., *supra* note 40.

The recent settlements by the Swiss banks and Italian insurance companies have made it more difficult for the companies to avoid the public pressure to make settlements.<sup>78</sup> In the years immediately following the war, as many of these companies were rebuilding, their position had been that the compensation of laborers was the responsibility of the West German government which had already made payments totaling approximately \$56 million.<sup>79</sup>

The government assistance was not matched by most of the companies that employed slave laborers. There were, however, a few corporations which provided funds in an attempt to compensate war-era workers. Daimler-Benz, the largest industrial conglomerate in Germany, has paid out approximately \$15 million to former laborers in the course of the last decade.<sup>80</sup> In the 1960's, Siemens, the international electronics maker, voluntarily contributed \$1.8 million to the Conference on Jewish Material Claims Against Germany.<sup>81</sup> These funds were given to 2,200 former Siemens slave laborers.<sup>82</sup> The money was distributed in the form of one time payments, however, the funds were insufficient to provide compensation for all 50,000 laborers the company had employed.<sup>83</sup> Many of those who Siemens admits to have employed in the course of the war, individuals from Poland and the Soviet Union, were not compensated by the government's payments as money was not distributed to individuals who lived in communist countries.<sup>84</sup>

Since the conclusion of the war, those individuals who were forced to work as slave laborers have received compensation directly from the corporate entity in only very rare instances. Some of those who were not compensated directly received a payment/pension from the West German government. The filing

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78. *See id.*

79. *See Fletcher supra* note 44.

80. *See GREENSBORO NEWS & REC., supra* note 40.

81. *See German Firm's Celebration Raises Specter of Nazi Era's Slave Labor Survivors Protest, Demand Reparations from Electronics Company*, ST. LOUIS POST-DISPATCH, Oct. 13, 1997, at 11A. The Conference was a cooperative effort by world Jewish organizations established in 1951 to distribute funds from returned Jewish assets and war reparations. The money was distributed by the Conference to community rebuilding efforts. *See RONALD W. ZWEIG, GERMAN REPARATIONS AND THE JEWISH WORLD, A HISTORY OF THE CLAIMS CONFERENCE* 51(1987).

82. *See ST. LOUIS POST DISPATCH, supra* note 81.

83. *See id.*

84. *See id.*

of class action lawsuits in American courts by former laborers is an attempt to force those who employed laborers during the war to provide compensation that has been previously unavailable.

#### IV. Current Legal Issues

##### A. *Why were these lawsuits filed now?*

Upon the conclusion of World War II Germany lay in ruins after years of Allied bombings and occupation. The relations between the Allied powers were such that Germany and Berlin were divided into two segments, East and West.<sup>85</sup> In 1953 Germany entered into the London Agreement on German External Debt (also known as the London Debt Agreement) with the international community.<sup>86</sup> The purpose of this Treaty was to allow the German economy to stabilize and to re-establish itself before the country was required to settle its international debt obligations.<sup>87</sup> A source of contention between the parties involved in the slave labor lawsuits is whether this agreement barred the potential claims that could be brought by laborers or whether the agreement simply deferred the lawsuits to an indefinite date at which time claims could be heard.<sup>88</sup> The plaintiff's argument is that the claims were simply suspended until the moratorium on international debt was lifted.<sup>89</sup> The agreement itself stipulates that international claims were halted only until there was a final settlement of reparations issues.<sup>90</sup> The plaintiffs also argue that the German Supreme Court essentially ratified the deferral of

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85. See EB Online-Britannica Online, *Germany*, (visited Jan. 8, 1999) <<http://www.eb.com:180/cgi-bin/g?DocF=micro/232/24.html>>.

86. See *Iwanowa v. Ford Motor Company*, No. 98-959 (JAG) (D. N.J. filed July 23, 1998) (Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss) at 15. (This document is on file with the author.)

The purpose behind the London Debt Conference and the subsequent London Debt Agreement was to reduce some of Germany's Debt, thereby providing an economic situation which would allow the country to resume foreign trade. Germany had amassed debts to the Allies, Israel and the Claims Conference totaling 13.5 billion marks. The agreement reached by the parties also provided the mechanism which insulated Germany and German corporate entities for outstanding claims against them. See NANA SAGI, *GERMAN REPARATIONS: A HISTORY OF THE NEGOTIATIONS* 96-101 (1980).

87. See *Iwanowa supra* note 86, at 15.

88. See *id.*

89. See *id.*

90. See *id.*

potential law suits against private corporations in 1963.<sup>91</sup> At that time the court held that companies which used forced laborers were allowed to employ the same defense to claims that the government was using.<sup>92</sup> The laborers argue that the use of the London Agreement as the basis to deny claims lost its validity in 1990 upon the reunification of Germany, as the subsequent Final Settlement provided a resolution to the reparations issues.

In September 1990 in Moscow, the United States, the Federal Republic of Germany, the German Democratic Republic, France, the Soviet Union and Great Britain signed the Treaty on the Final Settlement with Respect to Germany.<sup>93</sup> The Treaty, which also became known as the 2+4 Treaty (the number and type of signatories, 2 signifying the two Germanies and 4 being the Allied powers), marked the end of the division of Germany and Berlin.<sup>94</sup> The preamble of the agreement provides explicit language which underscores the fact that the Treaty was intended to be the "final peace."<sup>95</sup> "Final peace" was a concept that had been alluded to in prior international agreements but had never actually been put into writing at the conclusion of the war.<sup>96</sup> There is no specific discussion within the Treaty concerning reparations by either private corporations or by the German government for outstanding claims by individuals or nations stemming from the war.<sup>97</sup> Despite the failure of the agreement to specifically mention this issue, there were commitments made between the Secretaries

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91. *See id.*

92. *See Iwanowa supra* 86, at 15.

93. *See* Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 85 AM. J. INT'L L. 155, 160-161 (1991).

94. *See id.* at 161.

95. *See* Jochen Abr. Frowein, *The Reunification of Germany*, 86 AM. J. INT'L L. 152, 162-163 (1992).

The Preamble of the 2+4 Treaty states the following:

"Recent historical changes have made possible the overcoming of the division of Europe; CSCE Helsinki Final Act principles; UN Charter obligations to develop friendly relations among nations based on principles of equal rights, self determination; readiness to reinforce security; German people's expression of will to bring about reunification; such unity causes Four Powers's rights and responsibilities relating to Berlin to lose their function."

*Federal Republic of Germany - German Democratic Republic - France - Union of Soviet Socialist Republics - United Kingdom - United States: Treaty on the Final Settlement with Respect to Germany*, 29 I.L.M 1186, 1187.

96. *See* Frowein, *supra* note 95, at 163.

97. *See id.*

of State of the two Germanies and the United States to resolve such claims.<sup>98</sup>

The plaintiffs in these lawsuits have made the argument that the adoption of the 2+4 Treaty, which signified a permanent resolution of World War II, has lifted the restrictions against suing German entities for wartime damages. The plaintiffs argue that the London Debt Agreement essentially placed a moratorium on claims against these companies, regardless of merit. Therefore, the plaintiffs make the argument that this is the first appropriate opportunity to make a claim against these companies because they are no longer shielded from liability.

### *B. For what damages are the plaintiffs suing?*

The plaintiffs are attempting to hold the defendant corporations liable for both the violations of human rights that occurred and for monetary damages stemming from the years of unpaid labor.<sup>99</sup> The class action suits seek back pay and damages for working with hazardous materials and poor working conditions.<sup>100</sup> The complaints also seek a disgorgement of all benefits the companies derived from violations of international law.<sup>101</sup> Additionally, the plaintiffs are seeking damages, both punitive and compensatory in nature, for the treatment the laborers endured while forced to work.<sup>102</sup>

### *C. Statute of Limitations*

The corporate defendants in these matters have argued thus far that the claims brought by former laborers lack validity since the appropriate statutes of limitations have expired.<sup>103</sup> The length of time since the conclusion of the war does create a statute of limitations problem for the plaintiffs to overcome, as it has been over fifty years since the conclusion of conflict. The plaintiff's attorneys have countered this issue with several distinct arguments that will be addressed individually.

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98. See Leich *supra* note 93, at 163.

99. See Compl., Klein and Pries v. Siemens A.G., No. \_\_\_\_\_ (D. N.J. filed Sept. 24, 1998) at 14. (The complaint from this action is on file with the author.)

100. See Eric Peters, *Don't Blame VW for Nazi Crimes*, WALL ST. J. EUR., Sept. 16, 1998, at 10.

101. See Klein *supra* note 99, at 15.

102. See *id.*

103. See Iwanowa *supra* note 86, at 34.

The first argument presented in the complaint filed by the plaintiffs is that the 1953 London Debt Agreement barred any claims until the ratification of the 2+4 Treaty, essentially tolling the applicable statutes of limitations.<sup>104</sup> The plaintiffs argue that, under basic legal principles, the statute of limitation could not begin to run until the plaintiffs had a reasonable amount of time to learn that the ability to sue existed once again.<sup>105</sup> The plaintiffs contention hinges on the idea that their suit is analogous to other cases in which courts have held that statutes of limitations could not be limited to very short periods of time.<sup>106</sup> In other words, the plaintiffs argue that following the 2+4 Treaty's adoption, the plaintiffs have an unquantifiable, yet reasonable, amount of time to file a claim since they are no longer precluded from doing so by the London Debt Agreement. The defendants will likely argue that the statute began to run in 1990 when the 2+4 Treaty was signed. The plaintiffs have countered this position with the argument that the German Supreme Court did not decide until 1997 that the Treaty actually lifted the ban imposed by the London Agreement.<sup>107</sup> Therefore, the plaintiffs contend that the statute of limitations did not actually begin to run until 1997 and in the past the United States Supreme Court has held that the periods of less than two years are too short to be a valid limitation.<sup>108</sup>

Another argument presented by the plaintiffs regarding the statute of limitations relates to the principle of equitable tolling of the statute of limitations.<sup>109</sup> This principle applies to situations where a defendant's wrongful conduct, or circumstances outside the control of the plaintiff, prevent the party from bringing the

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104. See *Klein supra* note 99, at 14.

105. See *Iwanowa supra* note 86, at 34.

106. See *id.* The plaintiffs contend that the suit is similar to paternity suits and that statute of limitations requirements should be the same. See *Iwanowa infra* note 108.

107. See *id.* at 18. In the case of *Krakauer v. Federal Republic of Germany*, which was decided by the Bonn State Court, it was held that the protection that the government once had from outstanding debts and lawsuits through the London Debt Agreement evaporated upon the signing of the 2+4 Treaty. Since the *Krakauer* decision other German civil courts have agreed with the precedent that was established. See *id.*

108. See *Iwanowa supra* note 86, at 34. As recently as 1988, the Supreme Court has held that six year statute of limitations periods in child paternity suits can be too short. *Clark v. Jeter*, 486 U.S. 456, (1988). The plaintiffs make the argument that they are essentially in the same position as those in a paternity suit because the ability to file a suit is new. See *id.*

109. See *id.*

claim within the appropriate time period.<sup>110</sup> The plaintiffs argue that the defendants should not be protected by the expiration of the statute of limitations as they would then be benefitting from statements which the companies made denying there was any economic gain derived from the use of slave labor.<sup>111</sup> These denials, the plaintiffs argue, could explain why lawsuits were not filed at an earlier date against these multi-national companies.<sup>112</sup> The plaintiffs contend that the defendant's denials of profiting from the use of slave labor are sufficient to satisfy the tolling requirements, and thereby negate any dismissal motions based on statute of limitations arguments.<sup>113</sup>

It appears that all of the companies being sued, at one point or another, have made the argument that they did not voluntarily employ slave labor or profit from it.<sup>114</sup> In deciding whether or not this argument is sufficient to suspend any statute of limitations arguments, the court must decide whether lying or misleading about profits made during the war is sufficient to constitute a wrongful act, thereby inducing an equitable tolling. In the past, American courts have been willing to find an equitable tolling of the statute of limitations when a defendant acts in a fraudulent manner;<sup>115</sup> it is questionable whether or not the private corporations' denials of improper activities and war time profits constitute actions significant enough to satisfy the standards that have been established. The defendants are likely to argue that the statements that were made were neither fraudulent nor wrongful in nature nor did they constitute extraordinary circumstances that would prevent an individual from filing suit. It is unlikely that a court would find that the extraordinary circumstances test is satisfied as the plaintiff class was not physically restrained nor denied access to file a suit earlier.<sup>116</sup> A court could find that the

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110. See Stephanie A. Bilenker, *In Re Holocaust Victims' Assets Litigation: Do U.S. Courts Have Jurisdiction Over the Lawsuits Filed by Holocaust Survivors Against the Swiss Banks?*, 21 MD. J. INT'L. L. & TRADE 251 (1997).

111. See *Iwanowa supra* note 86, at 40.

112. See *id.* at 41.

113. See *id.* The plaintiffs contend that the corporations who claim that they did not make a profit during the war as a result of the use of slave labor are false and that such statements have been made in the past with the intention of discouraging victims to sue.

114. This contention is based on complaints filed against Volkswagen, Siemens, Ford and Krupp.

115. See Bilenker *supra* note 110, at 10.

116. See *id.* The Federal District Court for the Northern District of California held in *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (1987), that plaintiffs must

limited information released by these companies to be misleading thereby constituting a significant enough fraud to toll the statute of limitations.

The third argument that the plaintiffs make is that the statute of limitations that should be used by the United States District Court is that of New Jersey, as set forth by the *Erie* Doctrine.<sup>117</sup> In addition to using New Jersey's statute of limitation, the plaintiffs argue that the court is also required to utilize New Jersey conflict of laws rules. These rules would require the case to be governed by German Civil Code limitations since it is the source of the cause of action.<sup>118</sup> This argument would require the federal court to apply not only New Jersey law, but the rules of international agreements and German civil law — areas which the court is likely to express a lack of expertise in adjudicating. This is arguably the most tenuous of the statute of limitations arguments because it compels the court to act outside of the scope of its usual business. Courts have, in the past, chosen not to hear matters that force them to interpret and rule on an other nation's legal matters if a more appropriate forum is available to hear the case.<sup>119</sup> Under this statute of limitations argument, the matter is of great complexity, and therefore, might be easier for a German court to hear. This is especially the case since a German court would be more familiar with the law that the plaintiffs are asking to have applied.

The number of arguments that the plaintiffs are making is perhaps the best indication of the fragility of their claim. It is quite possible that plaintiff's counsel has decided to approach the statute of limitations issue via a shotgun approach on the premise

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present evidence that proves that they were denied proper access to the courts. The plaintiffs would have to be able to present evidence that suits against private German companies were filed either in Germany or in the United States but were dismissed because of the London Debt Agreement provisions. *See id.*

117. *See Iwanowa supra* note 86, at 35. The *Erie* Doctrine is a principle derived from the Supreme Court Case *Erie v. Tompkins*, 304 U.S. 64 (1938). The case held that Federal courts must apply the law of the state in which they are seated in all matters, except those relating to the U.S. Constitution or Acts of Congress.

118. *See id.* at 39. The German Civil Code provides for a 30 statute of limitation to be used in claims developing under the laws of restitution.

119. In *Piper Aircraft v. Reyno*, 454 U.S. 235, 241 (1981), the Supreme Court held that. "... when an alternative forum has jurisdiction to hear the case . . . when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems' the court may, in the exercise of its sound discretions dismiss the case." The principle outlined in *Piper* seems to be especially true in cases where the nation where the case could be heard is not actually a party to the matter.

that even if all the arguments do not hit the target, one will and it will keep the case alive. This issue is further complicated by the fact that in the last two decades United States federal courts have dismissed two separate cases related to World War II claims on the basis of statute of limitations issues and conflict of international laws problems.<sup>120</sup>

#### *D. Jurisdictional Issues*<sup>121</sup>

The complaints filed by the plaintiffs in these matters against German corporations contend that the federal courts have jurisdiction pursuant to 28 U.S.C. § 1332(a)(2).<sup>122</sup> This jurisdictional rule requires that the parties have a diversity of citizenship and an amount in controversy exceeding \$75,000.<sup>123</sup> Furthermore, the plaintiffs complaint suggests that federal courts have subject matter jurisdiction under 28 U.S.C. § 1331, a code section which stipulates federal original jurisdiction in cases arising under treaties of the United States.<sup>124</sup> Additionally, through the conferring of original jurisdiction, the plaintiffs contend that the court then has supplemental jurisdiction over related claims developing out of the case.<sup>125</sup> Some of the plaintiffs can also argue that an additional basis of jurisdiction is available under the Alien Tort Claims Act 28 U.S.C. § 1350.<sup>126</sup> Each of these jurisdictional claims must survive motions to dismiss for these cases to move forward.

The plaintiffs, as they did with the statute limitations issue, have specified numerous grounds upon which they hope to keep the case in federal courts and avoid a dismissal for a lack of jurisdiction. Section 1332 (a) provides the federal district courts with original jurisdiction over disputes involving a diversity of

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120. See Willing *supra* note 9.

121. Lawsuits have been filed against many different companies in recent months and there have been a variety of plaintiffs. Some of these plaintiffs are citizens of the United States and some have Alien status. As a result of this citizenship issue, some plaintiffs in these matters have an additional jurisdictional argument that can be made on their behalf via the Alien Tort Claims Act. This option is not, however, available to all of the plaintiffs. For the sake of simplicity, all jurisdictional claims are discussed together in this section. It is important to be cognizant of the fact that U.S. citizens may not use the Alien Tort Claims Act as a jurisdictional base or as a cause of action.

122. See Gross *supra* note 57, at 6.

123. See 28 U.S.C. § 1332(a)(2)(1997).

124. See Gross *supra* note 57, at 3 and 28 U.S.C. § 1331(1997).

125. See Gross *supra* note 57, at 3.

126. See Iwanowa *supra* note 86, at 22.

citizenship and a damages amount exceeding \$75,000.<sup>127</sup> In these cases there appears to be a genuine diversity of citizenship as the plaintiffs are Americans and the corporate entities are foreign (this despite the fact that the companies have American divisions or subsidiaries). The amount in controversy, although not specified in the complaint, is clearly intended to exceed the \$75,000 threshold as indicated by the depth of the claims.<sup>128</sup> It is important to recognize that the mere ability of the federal court to hear the case on diversity basis does not create a cause of action in and of itself; the plaintiffs must still present significant evidence in order to avoid a dismissal on a motion for summary judgement.<sup>129</sup> It is important to note that if this jurisdictional argument is successful, other additional arguments need not be made.

The notion that federal courts have original jurisdiction over cases involving international law is a concept that has existed for as long as America itself.<sup>130</sup> The federal rules clearly stipulate that original jurisdiction exists in matters regarding a federal question and treaties of the United States.<sup>131</sup> The argument that the federal courts are the correct venue to hear these claims against German corporations is bolstered by the fact that the plaintiff's claims are made not only under American law but also under international treaty. Following a 1960's decision by the United States Supreme Court, a general understanding developed that international law issues would be decided under the auspices of the federal courts; additionally, any international law decision made by a state court would be eligible for review by the Supreme Court.<sup>132</sup> If the

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127. See 28 U.S.C. 1332 *supra* note 123.

128. See *Klein supra* note 99, at 2.

129. See *Bilenker supra* note 110, at 4.

130. See Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV 1555 (1984). Henkin wrote, "International law is part of our law.' Justice Gray's much quoted pronouncement in *The Paquete Habana* was neither new or controversial when made in 1900, since he was merely restating what had been made established principle for the fathers of American jurisprudence and for their British ancestors." *Id.*

131. See 28 U.S.C. 1331 *supra* note 124.

132. See *Henkin supra* note 130, at 1560. Henkin wrote, "As a result, there is now a general agreement that international law, as incorporated into domestic law in the United States, is federal, not state law; that cases arising under international law are 'cases arising under . . . the Laws of the United States' and therefore are within the judicial power to the United States under Article III of the Constitution; that principles of international law as incorporated in the law of the United States are Laws of the United States' and supreme under Article VI; that international law, therefore is to be determined independently by the federal courts, and ultimately by the United States Supreme Court, with its determination binding on the state courts; and that a determination of international

plaintiffs can satisfy the court that their claims are based on the provision of an international treaty, it will give the federal court automatic jurisdiction.

For a case such as this to proceed to trial, it is very important for the plaintiffs that the court accept their contention that the case revolves around international treaty law. Such a finding would automatically give the court original jurisdiction over their claims and would also give the same court supplemental jurisdiction over all connected claims raised in the course of the suit. The court, in deciding whether jurisdiction exists under § 1331, must decide whether the treaty (in this case 2+4 and the suspension of the London Debt Agreement) is self executing thereby giving the plaintiffs the right to sue another entity for treaty violations. Courts have previously held that if the treaty is not self executing then the plaintiff cannot sue on the basis of a treaty violation.<sup>133</sup> If the court rules that the Treaty was self executing then the plaintiffs have a basis to raise this original jurisdiction claim. A contrary ruling precludes a court from having such jurisdiction and prevents these claims being raised based on a violation of the treaty.

The last jurisdictional argument raised by the plaintiff is based on the premise that the Alien Tort Claims Act § 1350 provides federal courts with the jurisdiction to hear claims against private German companies. The Alien Tort Claims Act provides for a federal court to have original jurisdiction over a case, regardless of the amount in controversy, in a civil action by an alien, for acts committed in violation of international law or an American treaty.<sup>134</sup> Since its adoption, courts have chosen to view the law as a way for individuals to have a private cause of action in a federal court where aliens can recover based on international and treaty law violations.<sup>135</sup> Federal courts have also held that the

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law by a state court is a federal question subject to review by the Supreme Court." *Id.*

Additionally, the 1960's Supreme Court case referred to is *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398(1964).

133. See Bilenker *supra* note 110, at 4.

134. See 28 U.S.C. § 1350(1998). The statute states the following, "The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the laws of nations or a treaty of the United States." *Id.*

135. See *Abebe-Jira v. Negewo*, 72 F.3d 844, 847 (11th Cir. 1996).

Act provides federal courts with subject matter jurisdiction for crimes against humanity committed in a private capacity.<sup>136</sup>

The plaintiffs argue that their case clearly satisfies the requirements of § 1350 — the suing party is an alien, the cause of action is tort-based and the company's actions are a violation of international law.<sup>137</sup> The plaintiffs contend that the defendant's actions satisfy the last element of the statute as they acted in violation of numerous international laws against enslavement and fundamental human rights.

The defendants in this matter have countered these claims on two premises. First, international law may not be enforced by federal courts without specific Congressional authorization. Second, Section 1350 is limited in its application to nations and is not applicable to causes of action raised against private companies. The defendants argue that the Alien Tort Claims Act does not provide an explicit private cause of action unless there is authorization directly from Congress.<sup>138</sup> This defense theory does not have wide acceptance in judicial circles.<sup>139</sup>

In recent years, federal courts have been allowing Section 1350 to provide a direct cause of action for alien plaintiffs against foreign defendants.<sup>140</sup> Courts have been more willing to provide plaintiffs with jurisdiction under § 1350 than § 1331 when there is an accusation of a violation of international law.<sup>141</sup> Furthermore, courts seem to have come to a consensus that § 1350 provides both a jurisdictional grant and a private cause of action if the plaintiffs meet all of the statute's requirements.<sup>142</sup> It appears from the material presented by the plaintiffs that they have met the statutorily imposed requirements and that a claim brought under § 1350 would likely survive a summary judgment motion and provide a federal forum in which to present their case.

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136. See *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995)

137. See *Iwanowa supra* note 86, at 23.

138. See *id.*

139. See Anthony D'Amato, *What Does Tel-Oren Tell Lawyers? Judge Bork's Concept of the Law of Nations is Seriously Mistaken*, 79 AM. J. INT'L. LAW 92 (1985). In *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774., Judge Robert Bork made the argument that the defendant are putting forward and it was summarily dismissed by the two other judges who heard the case. Furthermore, Bork's contention about the executing nature of the Alien Tort Claims Act has yet to be adopted by any court in the country. *Id.*

140. See *Bilenker supra* note 110, at 4.

141. See *id.* at 8.

142. See *id.*

#### IV. Conclusion

In the weeks and months immediately following the filing of these lawsuits against the titans of German industry, intense media scrutiny was focused on the war time actions of these companies. It was unlikely that any of these suits would ever make to trial — the cost in real dollars and negative publicity would much too high for any of these companies not to settle. The idea that the new Volkswagen Beetle might have to compete for media attention with protesting Holocaust survivors was not something shareholders or corporate executives would allow to happen. To this end, in September 1998, Volkswagen announced that it would establish a \$12 million fund to pay reparations to former slave laborers.<sup>143</sup>

The Volkswagen domino was just the first to fall; soon after companies that had pledged that they would never settle, lined up at the bargaining table. The parties of all of the slave labor lawsuits agreed to a \$5 billion settlement.<sup>144</sup> The money, which will come from both private industry and the German government, will be distributed to 1.2 million survivors, with each survivor receiving between \$2,500 and \$7,500 each.<sup>145</sup>

Although the cases that are referred to throughout this comment have settled, the analysis of the cases still rings true. To this day, attorneys and Holocaust victims continue to file lawsuits against war-time abusers and the principles outlined above must continue to be satisfied for a claimant to make it to the trial stage.

The possible number of Holocaust related law suits will decline over the next several years as more suits are filed and as more of the plaintiff classes passes away. It is unlikely, however, that any of the claims brought forth in the next few years will actually result in a trial as the stakes are just too high for any defendant. Even though a plaintiff in Holocaust-era lawsuit must pass through a gauntlet of challenges in order to make it to the trial stage, no company can take a chance that they will lose. The jury award could be incredibly damaging and the negative publicity would no doubt have a unflattering effect on the company's bottom line.

*Stuart M. Kreindler*

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143. See Peters *supra* note 100.

144. See William Drozdiak, *Payments Set for Ex-slaves of Nazi Regime; Germany to Pay Aged Survivors*, WASH. POST, Mar. 24, 2000, at A13.

145. See *id.*