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FROM PARIS TO LONDON: THE LEGAL HISTORY OF EUROPEAN REPARATION CLAIMS 1946-1953

Richard M. Buxbaum*[1]

I Introduction: The Early History and Why It Matters

The umbrella concept of Reparations, including its compensatory as well as restitutionary aspects, regretfully remains as salient today as it was in the 20th century. A fresh look at its history in that century, and how that history shapes today's discourses, is warranted. It is warranted in particular because the major focus in recent decades has been on the claims of individual victims of various atrocities and injustices, generalized as the development of international human rights law by treaty, statute and judicial decision. One consequence of this development is that the historical primacy of the state both as agent for its subjects and as the principally if not solely responsible actor is ever more contested.

How did this shift from state responsibility and state agency over the past half-century or more occur? Considering the apparent primacy of the state in this context as World War II came to an end, is there already in the war and early postwar period a partial explanation of these later developments? These formulations imply that failures in the inter-state reparations processes of that era played a role in the rise of these alternative processes. Whether that suggestion can be demonstrated in satisfying detail is another matter; but the attempt justifies the following discussion.

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* Jackson H. Ralston Professor of International Law emeritus, School of Law, University of California at Berkeley. My thanks to a number of research assistants, in particular Lisa Pfitzner, Sonya Hymer, Niilana Mutama, and Rachel Anderson; my thanks also to David Caron and the late Gerald Feldman for critical reading of the manuscript and good advice. Even more than in the usual case it should be emphasized that errors of fact and interpretation are my own.

Some disclaimers and disclosures: These are my personal views; they do not derive from and should not be attributed to the Property Commission of the German Foundation for Remembrance, Responsibility, and the Future, of which I was the US member, to its staff, or to the appointing authority (US Department of State). For personal reasons I have been interested in the issues discussed herein, and had some peripheral engagement with them, for many years. More recently I was a consultant to counsel representing some of the defendants in the US litigation that was settled by the US-Germany agreement leading to the creation of the mentioned Foundation: United States-Germany Agreement concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, reprinted in 39 I.L.M. 1298 (2000) and Gesetz zur Errichtung einer Stiftung (Erinnerung, Verantwortung und Zukunft), August 2, 2000, in 2000 BGBl. I at 1263. I also prepared a pro-bono brief as amicus curiae in the litigation mentioned in n. 77 below.

This legal-historical survey at the same time suggests another line of inquiry; namely, into the fate of efforts of the Allied Powers occupied by Germany during the war to obtain reparations. It is another thesis of this paper that the failure of these first-stage collective efforts had a significant role in a shift towards bilateral treaties that could compensate in part for that failure. This may well be a separate strand with fewer connections to the questions concerning the rise of the individual subject's own agency; but as the early postwar history is common to both of these later developments, that strand is also an element of this narrative.

The discussion begins with the first coordinated effort of France, the United Kingdom and the United States to search for a multilateral process for the division of the reparations that the four major powers had agreed to immediately upon the end of the war, as soon as the Soviet Union's unilateral approach to reparation was accepted as a fait accompli. That division was memorialized in the Potsdam Agreement of August 1945, in which the Soviet Union, the UK and the US, with the later reluctant acquiescence of France, in essence left reparations to their respective spheres of influence.[2] The agreement did allocate to the Soviet Union 25% of whatever productive (industrial) assets the Western Powers might choose to claim as reparations, but left the remaining 75% for allocation among all Western Allies.

Part II discusses that allocation episode. Part III focuses on the slow erosion of early hopes among those Allies who had been under German occupation for a meaningful transfer of monetary and physical assets under the reparations arrangements that evolved.[3] Part IV turns to a major, and in a sense separate component of the early reparations efforts; namely, the search for monetary gold seized by the German occupation regimes and to a large

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[2] The best sources of the Potsdam Protocol of August 2, 1945 are the Protocol of the Proceedings of the Berlin Conference in 1945:II FRUS 1478ff and the same as reprinted in Senate Committee on Foreign Relations, "A Decade of American Foreign Policy: Basic Documents, 1941-49" (Washington, Government Printing Office, 1950). See its review from this reparations context in Buxbaum, "A Legal History of International Reparations," 23 Berk. J. Int'l L. 314 (2005) [hereinafter "Legal History"].

[3] As will become clear below, the Soviet Union, while partly and temporarily occupied, had its own means to satisfy this demand. France, while later also an Occupation Power, had considerably less power in this regard. The exclusion of the formerly occupied countries later in the Soviet sphere of influence from this later bilateral treaty regime also needs to be noted. In short, the statement in the text, and its suggestion of a connection between early collective failure and later bilateral treaty recoupment processes principally applies to the smaller Western European Allies.

extent used by Germany to pay for transactions with the wartime Neutrals, in particular Switzerland. Part V briefly introduces the subject of the gold and other valuables taken from or left by individual victims of the Third Reich regime. Part VI concludes.

II The Early Reparations Negotiations

The Paris Agreement on Reparations of January 14, 1946[4] among the Western Allies (which at that time still included Albania, Czechoslovakia, and Yugoslavia) essentially provided for this division of anticipated German reparations, but left their absolute size and nature to later determination. In essence, only France, the UK and the US had the authority to make those determinations; in addition, the timing and rate of distribution to the other, formerly occupied Allies also rested with them.[5] As these decisions crawled through time, the emerging Cold War and the resultant international and domestic political considerations important to these three Powers led to a substantial reduction of hopes and expectations to obtain a decent level of these resources. But that reality still was largely in the unknown future as the process of implementation of the Agreement began.

The Paris Conference understandably focused on the nature of the resources that might be claimed from Germany and its wartime partners by these Allied states. That non-state persons and institutions might also lay claim to these resources was relevant only in a subsidiary or derivative sense. Organizations representing Jewish survivors and the larger aggregation of displaced persons were the objects of consideration in this resource-allocation process, but only in a limited way were they subjects or agents participating in, let alone shaping these decisions.[6]

Three separate reparation tracks were established by the Paris Agreement, characterized by the nature of the resources that were under discussion as suitable for reparation purposes. Each of those tracks is important from the perspective of this paper, for the first hints of conflict between state and

[4] The Agreement on Reparation from Germany, on the Establishment of Inter-Allied Reparation Agency and Restitution of Monetary Gold, January 14, 1946, 61 Stat. (3) 3191. It was implemented as to the support of the victims of the Nazi regime by the Agreement on a plan for allocation of a reparation share to nonrepatriable victims of German action of June 14, 1946, TIAS 1594.

[5] See Buxbaum, "Legal History", supra n. 2 at 332ff.

[6] This is discussed more fully in Buxbaum, "Legal History", supra n. 2 at 335ff.

individual claimants arise by reason of the nature of these resources. Physical assets found in the Western Zones of Germany would be subject to return to any signatory country which could provide evidence that it or its subjects had had a significant financial interest in either the particular asset or a group of fungible similar assets. These returned assets, or their monetary value if liquidated, would be charged against that country's percentage allocation of tangible assets granted under the agreement.[7] This, in short, was the restitutionary component of the reparations arrangement.

The allocation of two types of assets not originally taken by German occupation forces and thus not subject to the restitution concept comprised the second track. The defined category ("B") was industrial (i.e., productive capital) equipment to be taken from Germany, as well as German merchant ships and inland water transport. This category was under the decision-making authority of the Inter-Allied Reparation Agency (IARA) created by Part III of the Agreement, an Agency that itself was in turn subject to the actual asset-removal determinations of the Allied Control Council. The undefined category ("A") consisted of all other physical and financial assets. In addition to assets located in the German territory, this also included what were generally known as German external assets – those located in neutral countries as well as in the signatory Allied countries.[8] The first $25,000,000 of the German external assets found in neutral countries were to be paid first to a fund for the support of the Displaced Persons community, many of them in essence stateless victims of Nazism.

Category A also included such dwindling and eventually illusory assets as deliveries of industrial production to be made to the West from the Soviet Zone. It also tangentially included the prickly issue of German POW labor. The United Kingdom at one point argued that the value of forced labor by German prisoners of war held after the termination of hostilities also should

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[7] Part I, Article 4(C)(i) of the Agreement:

> "Any item or related group of items in which a claimant country has a substantial prewar financial interest shall be allocated to that country if it so desires…."

[8] Part I, Article 6. The disposition of these external assets, however, differed depending on whether located in neutral or Allied countries. Privately owned German assets in Allied countries had been frozen at the beginning of the war, and were now vested – i.e., confiscated – there. They were made subject to a species of self-help reparations, to be treated as credits under the Paris Agreement's distribution arrangements. Assets in neutral countries were to be subject to later arrangements with those countries, as discussed below, including a first charge in favor of relief and rehabilitation of displaced persons.

be included as a debit against the benefiting country's allocation of assets received on this track. This argument focused primarily on France, which claimed the right to require this service and exercised it until 1947.[9] Not surprisingly, a bitter and sensitive political battle erupted over this proposal. The United States finally sided with France in rejecting this category, though under the condition that the repatriation of these POWs be hastened and that they not be required to do dangerous service such as mine clearing.[10]

The third track had to do with monetary gold looted by or wrongfully removed from the occupied countries to Germany during the war. It is more fully discussed below.

Finally, some reparations, but only to specific victim-states, were to be paid by the other Axis members and the co-belligerent Finland. This was done pursuant to the Peace Treaties, treaties the Paris Agreement itself anticipated, that were negotiated among all Allies and then put before these Axis states at the Paris Conference of Ministers of July-August 1946. Bulgaria, Finland, Hungary, Italy and Romania had little choice and little negotiation room, and signed them in February of 1947.[11] Austria, which came into the enjoyment of victim status for reasons not immediately obvious then or now, is another story. Its Treaty of Peace was signed in 1955 when its quasi-occupation status by East and West ended; it did not

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[9] For an account of the retention of German POWs in France and the relatively late date of their release, see Kurt W. Böhme, Die deutschen Kriegsgefangenen in französischer Hand (Munich 1971), in particular the review of repatriation categories and dates at 127ff. This work, Volume XIII of Zur Geschichte der Deutschen Kriegsgefangenen des Zweiten Weltkrieges (Erich Maschke, ed., Munich 1971), relies in turn for much of its data on a French analysis prepared in 1948 by the Direction Générale des Prisonniers de Guerre de l'Axe [Rapport Buisson], which apparently was only available in mimeographed format and was not preserved. Much of its substance may be found in Jean Hurault, "Les camps de Prisonniers de guerre allemands en Bretagne (1944 à 1946)" (2004), available at http://bastas.pagesperso-orange.fr/pga/camps-francais/list-camps-bret.htm, a reference Professor Vivian Grosswald Curran kindly provided me.

[10] See Memorandum of Understanding on Repatriation and Liberation of Prisoners of War, March 13, 1947, TIAS 2405 (1947) (memorializing an understanding reached concerning especially the terms of release of those German POWs captured by American forces and turned over to the French).

[11] Treaty of Peace with Bulgaria, Feb. 10, 1947, 61 Stat. (2) 1915, 41 U.N.T.S. 21; Treaty of Peace with Hungary, , Feb. 10, 1947, 61 Stat. (2) 2065, 41 U.N.T.S. 135; Treaty of Peace with Italy, Feb. 10, 1947, 61 Stat. (2) 1945, 49 U.N.T.S. 3; Treaty of Peace with Romania, Feb. 10, 1947, 61 Stat. (2) 1757, 42 U.N.T.S. 3. The Treaty of Peace with Finland, 48 U.N.T.S. 203 (228) was not signed by the United States, since the two countries had not been at war with each other despite Finland's role as a co-belligerent of Germany. The background to that state of affairs is an interesting but separate story. For a useful review thereof see R. Michael Berry, American Foreign Policy and the Finnish Exception (Helsinki 1987).

require Austria to make general reparation payments (as distinguished from restitution of identifiable property found there after the war).[12]

From January 1946 to mid-1949, three collection efforts based on the Paris arrangement (and the separate arrangements with the Neutrals, especially Switzerland) take center stage. There is the implementation of the smaller Allies' share of reparations expected by those of them that had been occupied but had no occupation zone of their own.[13] There is the search for German monetary gold[14] looted by German occupation forces, to be shared by all Allies under the monetary-pool arrangement.[15] There is the effort to procure German private-sector assets located in neutral countries[16] and, for different disposition,[17] in the Allied countries. As a separate element, though indirectly relevant to both efforts, there is the implementation of the promise to fund the support of the redefined Displaced Persons communities by means of assets that, as categories, coincided with those being sought by these Allies.

These various collection efforts are the subject of this article. The review of their fruits is an important prelude to the temporally concurrent other two stages of the postwar story – the expansion of reparations, restitution, and compensation claims to encompass private claimants; and the resolution of prewar debt claims and postwar state occupation-cost claims as these collection efforts impacted on private claimants and on their conflicted relations with interstate claims and claimants. The review of those stages,

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[12] For a review of Austrian compensation of its own persecuted subjects, including the recent legislation enacted in consequence of US-Austrian negotiations, see Eric Rosand, "Confronting the Nazi Past at the End of the 20th Century: The Austrian Model," 20 Berkeley J. Int'l L. 202 (2002).

[13] "Allies" unless otherwise specified identifies only the "Western Allies" of the Paris Reparations Agreement, whether the assets at issue are physical or financial, German or external.

[14] See the definition of this category, infra Part IV.

[15] The related search for non-monetary gold and similar valuables (including both confiscated items and those harvested from the corpses of the murdered victims) is discussed infra Part V. The disposition of German private-sector assets, whether located in Allied countries and frozen there by wartime legislation, or frozen in neutral countries under similar wartime legislation, and then sought for turnover after the war through separate agreements of these Neutrals with the Allies, is a separate issue though it overlaps to some degree with the searches called for by the Paris Agreement; see infra Part IV.

[16] Of course, the search for looted monetary gold also implicated the Neutrals, principally Switzerland; see the discussion infra Part IV.

[17] Basically, though not exclusively, in partial reimbursement of those countries' war-waging costs.

however, is beyond the scope of the present article; it requires separate treatment.

III Failing Hopes and Expectations of the Formerly Occupied Allied Countries

The first narrative can be sketched briefly. It reveals the diminishing hopes for any significant implementation of the smaller Western Allies' shares of reparations. It is reflected in the increasingly despondent annual reports of the IARA, the institutional arm of the Paris Agreement's signatories. The IARA, as already mentioned,[18] was dependent upon the decisions of the three Western Occupation Powers – nominally made within the framework of the Four-Power Allied Control Council -- for deliveries of both industrial equipment and industrial output from their Zones. Those decisions were based on factors among which the reparations allocation was only one, and one less and less dominant. Largely responsible for the creeping failure of this mechanism to achieve meaningful reparations were the emerging Cold War; the increasingly successful campaign of German industry and labor union leaders against the program; a US Congress that, especially after 1948, was unsympathetic if not hostile towards the subtle distinctions between supporting German reconstruction with Marshall Plan funds and dismantling excess German (military-) industrial capacity; and the simple evaporation of resolve.[19]

In short, by 1951, when these states were summoned back to the negotiation table for the reorganization and rescheduling of the various components of prewar and postwar German debts, the best they could do, as described more

[18] Supra Part II.

[19] Important elements within the US Republican Party had pressed the argument for the sanctity of private property, even of subjects of the Axis, from 1945 on, but with the advent of the Cold War and the imminent return of German sovereignty, the Truman Administration also moved in this direction. The critical turning point was the Foreign Assistance Act of 1948, P.L. 472, 80th Cong. 1st Sess., pursuant to which the Industrial Advisory Committee under George Humphrey reviewed the Western Zonal Commanders' list of German enterprises slated for reparations transfer, in order to determine which ones would best be left in place to aid European economic recovery. See "Humphrey Report," 1949:III FRUS 569-572.

These policies, despite the Cold War blanket, were nonetheless controversial, especially given the pre-war involvement of some of the American industrialists with their Third Reich counterparts. For a taste of this lingering bitterness, specifically in the context of the Humphrey Report, see "Our Reparations Experts," Extension of Remarks of Hon. George G. Sadowski [Dem. Mich.], App. Cong. Rec. A509 (Feb. 2, 1949).

fully below, was to avoid the formal extinguishment of their theoretically still outstanding claims.

The Treaties of Peace that the four Occupation Powers forced Bulgaria, Finland,[20] Hungary, Italy, and Romania to sign and ratify in 1947 also called for and in the end actually resulted in some payments in cash and kind by these states to their respective victim-beneficiary states as was prescribed in the Paris Agreement. Those reparations, however, also were far below the level these Allied states had had reason to expect, or at least to hope for, when they left the table in Paris with the January 1946 Agreement. They were to be credited against allocations that Agreement set forth but were not a substitute for these. Indeed, their principal beneficiary was the Soviet Union, understandable in the case of the peace treaties with the Eastern Axis states and Finland.[21] The other beneficiaries were Czechoslovakia, Greece, and Yugoslavia, but the amounts, as stated, were minor.

The small size of these transfers is the principal reason why the original expectation that adherence to the Paris Agreement implied a waiver of further claims by its signatories against Germany[22] could not be maintained. Whether taken alone or in conjunction with the occasional transfer of some German physical assets from within Germany, they could not be counted on to satisfy the implicit understanding on the basis of which the obligation of exclusivity had been imposed on these Allies by the three Western Occupation Powers at Paris. In private-law terms, the synallagmatic structure of the contract simply was not achieved in the implementation of that Agreement. In addition, it was by no means clear that the Paris Agreement by its terms did express a waiver. Article 2B of the Agreement had specified that it was "without prejudice to…the right which each signatory government may have with respect to the final settlement of German reparations."[23] More specifically, even as to the waiver language of Article 2A, it was noted as early as 1953 that "in certain authoritative

[20] In the case of Finland, only three since the United States had not been at war with Finland.

[21] The amounts are tabulated in the Report of the War Claims Commission, "War Claims Arising Out Of World War II," 83d Cong. 1st Sess., House Doc. No. 67 (Washington 1953) at 33 ["War Claims Report"]. Bulgaria, the only Axis member already by then in the Soviet orbit, was spared any obligation to the Soviet Union, and charged only with minor reparations payable to Greece and Yugoslavia. Treaty of Peace with Bulgaria, Feb. 10, 1947, art. 21, ¶ 1, 61 Stat. (2) 1915, 41 U.N.T.S. 21.

[22] And – a separate argument – of the claims of those signatories' subjects against Germany.

[23] See supra Part II.

quarters it is believed that in this section of the agreement the signatory powers merely settled claims among themselves with respect to German assets….”[24]

The same result obtained in essence as to the mentioned 1947 Peace Treaties with the other Axis countries and Finland, but less in regard to state claims than to the individual claims of persecuted subjects of those states. Those treaties included a complex series of waivers of claims of these Axis members or cobelligerents against Germany.[25] In essence, these waiver provisions purported to waive, for the state and its nationals, all claims against Germany and its nationals outstanding at war’s end other than pre-war contract claims.[26] The “state waiver” is understandable given the fact that these countries had been members of or co-belligerents with the Axis. They had maintained their own governmental structures, admittedly under greater or lesser degrees of German overlordship; their wartime economic relationships with Germany were at least nominally those of equals; their and their subjects’ economic losses were not going to receive the ascription of coercion from which the occupied countries benefited after the war.

The Hungarian, Italian, and Romanian waivers, however, also had an additional cast that bears on the issue of persecution, though a cast that differs in each specific national case. Had they been taken literally, these waivers would have collided with the fact that in Hungary and Romania, and to a considerable degree even in Italy, substantial populations of persecuted subjects existed. They would have been without their states’ political support when arguing for compensation from Germany of the type that the racial, religious, and political victims of German and Allied nationality would begin to receive as the early postwar chaos settled into something resembling stability.

Some of this reality is already reflected in these peace treaties. Thus, so far as property restitution was concerned, the Hungarian and Romanian treaties specifically required restitution (or compensation) to their own victims of

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[24] “War Claims Report,” supra n.20 at 49, n. 49.

[25] See supra n. 10.

[26] The effect of these provisions is exhaustively but not conclusively reviewed in Eberhard Menzel, “Die Forderungsverzichtsklauseln Gegenüber Deutschland In Den Friedensverträgen Von 1947” (mimeo., Hamburg 1955).

persecution, albeit only by these states, not by Germany.[27] While a fuller discussion of this whole issue is beyond the scope of this discussion (as is the problem that Poland, through its agent the Soviet Union, also purported to waive all claims against Germany), a brief look at the wartime history of persecution is necessary in order to put that aspect of these peace treaties in context. That differentiated history, plus the fact that the peace treaties were signed in 1947, before the question of compensation for persecution was on any state's agenda, [28] explain the limited nature but also the limited effect of this effort at resolving wartime claims.

The clearest situation is that of wartime Hungary.[29] The anti-semitic measures of its government already were a feature of the 1930s, and their sharper bite after the war began, while to some degree reflecting German political pressure, were on a continuum with that earlier time. But imprisonment, deportation and extermination were not a part of that repression. Those tragedies were visited on Hungarian Jewry only after the fall of the national regime and the takeover of its functions by the German occupation forces. It is thus understandable that the Hungarian peace treaty would not face that question of compensation.

Romania presented yet a different situation, and the limitation to property restitution in its treaty was less justified.[30] Roughly coinciding with the beginning of the war, its government permitted a genocidal assault on

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[27] Articles 27 of the Hungarian and 25 of the Romanian Treaty respectively. These provisions covered seizures by the authorities of these two states, since only in the case of Hungary could there have been a German seizure of victim's properties and then only after the fall of the Horthy regime spring 1944. That the German government influenced the anti-Semitic persecution measures of those national regimes is another matter and becomes important in the implementation of post-1949 German legislation providing compensation to victims of persecution. This, too, is a matter beyond the scope of the present discussion.

[28] Indeed, in the cited five-power Paris Agreement of June 1946, supra **n.** , this was specifically excluded:

> "A. It is the unanimous and considered opinion of the Five Powers that in light of Paragraph H of Article 8 of the Paris Agreement on Reparation, the assets becoming available should be used not for the compensation of individual victims but for the rehabilitation and resettlement of persons in eligible classes…."

[29] See generally to the following Randolph Braham, The Politics of Genocide: The Holocaust in Hungary (New York: 1994), esp. at 880ff, 915ff, 971ff, 1031.

[30] In addition to the classic overview of both countries' experiences in 2 Raul Hilberg, The Destruction of the European Jews 853ff [Hungary], 808ff [Romania] (3d ed., New Haven 2003, see The Destruction of Romanian and Ukrainian Jews During the Antonescu Era (Randolph Braham, ed., Boulder 1997) and the Review Essay by Livezeanu, "The Romanian Holocaust: Family Quarrels," in 16 East European Politics and Societies 934 (2003).

Romanian Jewry, resulting in the death of approximately 250,000 citizens or over one-third of this population. Once that bloodlust had been slaked, the regime was satisfied with eliminating Jews from its economy and society, but did not and unlike Hungary was not forced to relinquish the remaining Jewish population to the Nazi exterminators. In this case, paradoxically, the German government would not be and after the war indeed was not charged with a compensation duty. The fact that 1947 was too early for compensation to be on the agenda thus had no bearing on the nature of Romania's waiver of its and its subjects' claims against Germany.

Italy's was an intermediate position.[31] The fascist prewar and early wartime legislation did contain the prevalent anti-semitic economic and social elements. In addition, even before the fall of its regime in 1943 and the takeover of the northern regions by the Germans, some deportations with their fatal consequences did occur. On the whole, however, the Italian wartime regime did not fall either into the Romanian frenzy nor make the handover of any substantial part of the Jewish population to the Germans a considered policy. Indeed, so long as its military forces were in control of those areas of Greece, France, and Albania under its temporary occupation, their Jewish subjects were actively protected against German demands for their delivery. Most Italian Jews who were deported to the German concentration and extermination camps were seized after the fall of Mussolini. Under these circumstances, the arguable waiver of claims of and for its persecuted subjects can only be explained by the date of the peace treaty.

The absence of a property-restitution requirement of the Hungarian and Romanian sort, however, needs other justification. That justification may lie in the facts (i.e., that little such confiscation took place), or in the possibility that Italy was treated with more consideration for political reasons, reasons that may well have included the early date of its surrender and switch to the Allied side. Bulgaria's is a different story, since the Holocaust did not rage there; therefore, the absence of restitution provisions is not surprising.

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[31] Again, see 2 Hilberg, id. at 703ff.

For the purposes of the present discussion, of course, the lesson of this review is that the seeds of a challenge to the historical distinction between state and private subjects of public international law were sown.

With this overview completed, the mooted question of the exclusive nature of the Paris Reparations Agreement can be put into perspective. The ultimate beneficiary of the contingent commitment to treat the Paris allocation formula as the exclusive means, and limit, of reparations would have been the Federal Republic of Germany, but it did not come into existence until 1949.[32] The immediate beneficiaries were the three Western Occupation Powers, especially the United States, which wished to avoid the competition of "excessive" reparations claims of their former Allies. Major claims of that sort would have clashed with these Powers' own expectation of repayment by the Germans of the increasingly significant occupation expenses incurred by them, in particular of the burden of keeping the German population fed and sheltered during the first three postwar years.

To recapitulate: The Potsdam Agreement allocated to the Soviet Union 25% of those West German industrial assets the four Occupying Powers might claim as reparations. The remaining 75% was available for allocation among all Western Allies pursuant to the percentage scheme agreed to at Paris – but the important point was that the absolute amount of that theoretical asset was within the discretion of the Allied Control Council to determine. Given the de facto acceptance of Soviet and Western spheres of influences, the Western Occupation Powers had the say in that matter. With the increasing influence of the Cold War and the increasing drumbeat of respect for private property heard in the UK and the US,[33] those Powers kept reducing the overall amount until, with the Petersberg Protocol of November 1949[34] they settled on an amount that was only a fraction of what the other Allies had expected when they concluded the Paris negotiations.

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[32] The technical legal question of whether the Federal Republic after 1949 could claim the benefit of this 1946 commitment exercised the minds of German legal scholars from that date on. For early, and late, treatments of this issue see, respectively, Hans Baade, "Die Behandlung des deutschen Privatvermögens in den Vereinigten Staaten nach dem ersten und zweiten Weltkrieg," in Der Schutz des Privaten Eigentums Im Ausland -- FS Janssen (Fritz Kränzlin & H. Müller, eds., Heidelberg 1958), 11; and Albrecht Randelzhofer & Oliver Dörr, Entschädigung für Zwangsarbeit? (Berlin 1994). Indeed, the issue played a role in the US litigation that in turn was a major factor in bringing about the creation of the German Foundation described in n. * supra.

[33] This is a point worth emphasizing; see the references supra n. 18.

[34] The Protocol is summarized in Department of State Press Release No. 919, November 24, 1949.

For the next five years, but only for the next five years, neither the 1946 Paris Agreement nor the 1947 peace treaties generated significant conflicts between state and private claimants to German and Axis assets. Conflicts among the Allied states continued over the issue of property characterization; i.e., over the broad versus narrow characterization of specifically restitutable property, but these were largely resolved by side-bar bilateral agreements.[35] Allied nationals who had suffered specific war damage[36] – ranging from prisoners of war and civilian detainees to firms losing business opportunities because of the war – even benefited, though only to a small extent, from war-claims legislation enacted by their respective governments. The less the recovery the greater the occasion for domestic disputes between these states and their subjects, but that did not give rise at that time to direct competing claims by these subjects against the former Axis states. On the contrary, as illustrated by the US example, such conflicts as arose were largely those between German and other Axis private parties challenging the freezing and vesting of their property under the US Trading With The Enemy Act[37] on various grounds, both direct due-process challenges to the takings as such and procedural challenges to their limited right to contest the enemy characterization.[38]

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[35] These agreements either concerned conflicting claims to physical property held by the Allied Occupation Powers in Germany, or claims concerning frozen assets, typically financial assets such as shares, held under conflicting wartime freezing or vesting orders. See in particular the multilateral Agreement relating to the resolution of conflicting claims to German enemy assets of December 5, 1947, TIAS 2230; but bilateral implementing arrangements also were needed. An example is the sub-ministerial Executive Agreement (literally, "Understanding") between the US and Norway, "Conflicting Claims to Enemy Property," TIAS 2980, June 21, 1952, relating to assets frozen under both Norwegian and US wartime legislation because of the presumed enemy status of their beneficial owners.

[36] As distinguished from victims of persecution.

[37] 40 Stat. 411, as amended, codified as 50 App. U.S.C. 1 et seq.

[38] The summary nature of US authorities' treatment of German owners' postwar claims for property return is clear from the leading cases. Standing to allege the absence of "enemy status," a necessary prerequisite to challenging a confiscation, was granted at the pleading level: Clark v. Uebersee Finanz-Korporation v. McGrath, 343 U.S. 205 (1952) (the Opel case); Clark v. Uebersee Finanz –Korporation, 332 U.S. 480 (1947). At the substantive level, however, "[t]here [was] no constitutional prohibition against confiscation of enemy properties," United States v. Chemical Foundation, Inc., 272 U.S. 1, 11 (1926). In consequence, the denial of procedural rights to German nationals to appeal detrimental agency determinations was upheld in Schilling v. Rogers, 363 U.S. 666 (1962).

IV The Swiss Case: Private Property and Looted Gold

The next issue is that of the effort to identify and collect those German public and private assets held in neutral countries, assets that were to be used both in partial satisfaction of the reparations claims of the Western Allies and to stock the proposed fund of $25,000,000 for the support of the Displaced Person population. The 1997/1998 US State Department studies of those efforts, while necessarily hurried and incomplete, provide sufficient information to permit reference to them in lieu of full discussion here.[39] Since the primus inter pares of neutral countries was Switzerland, however, a country with a recent history of restitution obligations that are directly related to the themes of this study, [40] an evaluation of the results of the efforts involving Switzerland, limited to the larger thematic focus of this paper, is appropriate at this point even if based largely on secondary sources.[41]

The Swiss role during World War II, and therefore the possible justification of any possible claims of the Allies against Switzerland, had two aspects that were relevant to the reparations issues. Gold stocks of occupied Allied countries looted by German occupation forces were sold by the Third Reich to Swiss banks, in the main to obtain the Swiss currency that in turn was a critical factor in German purchases of essential war materiel from a number of other neutral countries. In the second place, German individuals and companies owned Swiss properties and financial assets; and also hid financial assets through the use of Swiss nominees, including assets evidencing ownership of ostensibly non-German firms in a variety of Allied

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[39] The two central studies are U.S. and Allied Efforts To Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II (State Dep't Pub. 10468, Washington 1997 ["USDS-I"], and U.S. and Allied Wartime and Postwar Relations and Negotiations With Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury (State Dep't Pub. 10557, Washington 1998) ["USDS-II"].

[40] The class action against the Swiss banks for their treatment of Holocaust-era bank accounts (In re Holocaust Victim Assets, 105 F.Supp.2d 139 (E.D.N.Y. 2000) and its sequels are described and evaluated in Roger Alford, "The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks," 20 Berk. J. Int'l L. 250 (2002).

[41] Particularly useful in this connection are Linus von Castelmur, Schweizerisch-Alliierte Finanzbeziehungen im Übergang vom Zweiten Weltkrieg zum Kalten Krieg (2d ed. Zürich 1997), and the principal report and associated studies of the Bergier Commission, created by the Swiss Government to provide a contemporary review of this history. These items are cited below as appropriate.

and neutral countries. Early in the war the Allies, cognizant of these possibilities, had frozen Swiss assets in their own countries[42] and had warned Swiss authorities about these two types of transactions. Later in the course of the war, in January of 1943 and again in February of 1944, they had formally announced their intention to undo any illegitimate transactions of either type.[43] The Paris Reparations Agreement called for the identification, seizure, and return of looted gold, both monetary and (if identifiable) private gold, and its transfer either to its original owners or into a pool for proportional reallocation to the eligible Allied countries.[44] Since Swiss wartime transactions in German gold accounted for over three-quarters of all German gold transactions,[45] and since these gold holdings were thought at the time to be a principal and certainly an early component of reparations, the post-Paris interest of all Western Allies in this aspect of the planned approaches to Switzerland and other Neutrals, especially as to the monetary gold, was intense.

The interest in German private-sector financial assets (including in those nominally held by Swiss subjects) came to some degree from the same reparations focus, though the Swiss portion of German overseas assets was less prominent. The major Allied Powers' interest in them, at least in the

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[42] In the US this was a general program, designed in part to protect the US-located assets of occupied countries and their subjects from German seizure and in part (after US entry into the war) to hinder German war efforts. See In lieu of other primary statutory, regulatory, and judicial citations to the earlier wartime period, see Martin Domke, The Control of Alien Property 174f (New York 1943; Supp. 1947). It is worth noting that at the start of this program even the property of victims of the German Reich, if themselves German subjects, were caught in this program; the release of these assets proceeded only over time and on a case-by-case basis.

[43] See Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control, January 5, 1943, generally called "Inter-Allied Declaration Against Acts of Dispossession," 1943:I FRUS 443f (declaring the Allied intention to recover and restore all German property seizures) and the Declaration on Gold Purchases, February 22, 1944, generally called "Allied Gold Declaration," 1944:II FRUS 213f (putting neutral countries on inquiry notice concerning the source of their purchased German gold). For a brief review of their origin and scope, see USDS-I, supra n. 38, at 6f, 9f. Their texts are analyzed and their deficiencies criticized in Jacob Robinson, "Transfer of Property in Enemy Occupied Territory," 39 Am.J.Int'l Law 216 (1945).

[44] In the case of state (not private) claims, gold was considered fungible and thus appropriately pooled and distributed to all Western Allies pursuant to the Paris Reparations Agreement formula, without regard for the possibility that bar and ingot markings might prove otherwise as to their original provenance. See the fuller discussion of this sensitive issue infra Part V.

[45] See, from two different starting points, Unabhängige Expertenkommission Schweiz – Zweiter Weltkrieg, Die Schweiz und die Goldtransaktionen im Zweiten Weltkrieg (Zürich 2002); and Johannes Bähr, Der Goldhandel der Dresdner Bank im Zweiten Weltkrieg (n.p. [Cologne], n.d. [1999]). See also Jonathan Steinberg, The Deutsche Bank and Its Gold Transactions During the Second World War (Munich 1999).

immediate postwar years, in large part was based, or asserted to be based, on the fear of a German resurgence and the concomitant need for control over productive resources capable of fueling that resurgence.[46] While understandable during the war, this concern also seemed legitimate and serious at least during the first postwar year, and remained a strategic point of some though diminishing importance in the Swiss negotiations next described.[47] Soon, however, this concern took a back seat to the straightforward desire to capture those assets for additional reparation purposes – and thereby suffered the same loss of legitimacy suffered by all efforts to seize the private property of former enemy subjects.

Moral pressure to participate in the costs of European reconstruction,[48] combined with the Swiss interest to regain its subjects' war-frozen properties in Allied hands, led Switzerland to agree to negotiate with the Allies over implementation of the Paris Agreement. Those first negotiations began in the spring of 1946 and culminated in the Washington Accord of that summer. They were bitter and did not bode well for the future, when the difficult process of implementation of the Accord would have to be faced. The effort to procure the return of or compensation for monetary gold looted from occupied nations' central banks was hindered by Swiss efforts to challenge the claim that the Swiss National Bank had known or at least had inquiry notice of the provenance of that gold when it accepted it from the Third Reich.[49] The issue of seizure of privately owned German external

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[46] This was the reason for the so-called "Safehaven Program" that the US urged its other Allies, especially the UK, to launch. A quotation from the first internal review by the US Department of State in 1944 [the "Klaus Report"], as cited in USDS-I, dsupra n. 38, at 16f, succinctly describes the issue:

> "In its most important aspects [Safehaven] is to prevent the use of neutral countries as bases for maintaining the assets, skills and research necessary for the conversion of Germany to a war basis at an appropriate future date."

[47] Id. at 20ff.

[48] This issue of "moral pressure" was the subject of considerable debate within the US Administration at the end of the war. The World War II Neutrals consistently rejected any legal argument that German property, in particular private property, could be claimed by the victors. After debates within US circles and between them and British circles, a proposal by Seymour Rubin (then a Treasury Department delegate and for decades, until his death in 2002, a major figure in these postwar events) that the claim was more appropriately put in moral terms, was generally accepted among the Western Allies and at least in principle by the Neutrals.

[49] Whether the Swiss banks, especially the Swiss National Bank (that in time became the only authorized purchaser) knew the gold was looted became an issue during the Allies' postwar negotiation with the Swiss for the return of gold; see von Castelmur, supra n. 40 at 61ff. The Swiss Independent Committee of Experts ("Bergier Commission") now has published an exhaustive monograph on this matter that is devastating in its criticism of the Swiss National Bank leadership and its claim of good faith; see Die

assets in Switzerland was complicated by the Swiss instrumental use of property rights to challenge the Allied claim to the private property of German nationals, including that of German corporations and other legal entities.[50]

This external-asset situation was nominally resolved when the three Allied negotiators accepted the requirement that either the Swiss or a future German government would compensate the prior owners. This was, predictably, of little value as neither the compensation formula nor the all-important Swiss-German exchange rate formula was resolved by the Accord. The Swiss element of this duty to compensate private owners of these properties was partially resolved with the agreement to split the proceeds of the Swiss sale of Swiss-controlled German assets between Switzerland and the Allies. The monetary-gold issue was resolved by a compromise as to the amount of gold Switzerland would be obliged to provide to the gold pool in satisfaction of Allied claims. Neither that transfer, made almost immediately, nor the later, much-delayed and much-contested transfer[51] of the proceeds of the Swiss-held external German assets, however, provided the other signatories to the Paris Convention with nearly the amount they had originally expected from these two sources.

Under those circumstances, which were foreseeable in 1946, it is not surprising that the question of preclusion of further claims against Switzerland by those Allies could not be settled by the first Washington Accord. So far as the monetary-gold transfer issue was concerned, the Allied signatories did give the equivalent of an accord and satisfaction, waiving on behalf of themselves and of all signatories of the Paris Reparations Agreement any further claims to gold obtained by Switzerland from Germany during the war.[52] There was less to this than meets the eye, however. In a separate letter the French delegate asserted that this waiver would not apply to monetary gold seized by the Germans, transferred to and held by the Swiss as depositaries, and then sold by the Germans to other

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Schweiz und die Goldtransaktionen im Zweiten Weltkrieg (UEK, ed., Zürich 2002), passim and in its summary at 311ff.

[50] Of course, this itself was only a part of the larger debate over the legitimacy of Allied claims to privately owned German assets, even within Germany. See the discussion infra at 19f.

[51] "Eventual" because, as discussed immediately below, the first Accord of 1946 could not be implemented.

[52] Accord and Annex, Article II (2), 13(1) TIAS 1118 (1946).

parties.[53] The waiver also did not prevent the Dutch government from raising a claim against the Swiss shortly thereafter on the basis of newly discovered evidence concerning the transfer of Dutch monetary gold reserves to Switzerland, though the Swiss rejected the demand to reopen the question of their negotiated payment.[54] And, of course, the waiver was subject to the general argument, often and again recently made, that it did not preclude individual claims for identifiable non-monetary gold, an issue to be discussed in more detail later since it is more relevant to the "conflicting private-public claims" issue that is the basis of this narrative.[55]

As for the registration, liquidation, and distribution of the proceeds of the sale of the private German external assets in Switzerland, and putting aside the debate over its legitimacy,[56] the circumstances of that process did not permit any concept of exclusivity and preclusion to be raised explicitly. The equivalent of a waiver, however, was programmed into the procedure that was adopted: The official Swiss Federal Accounting Office (*Verrechnungsstelle*) was charged with the duty of registering those assets, and was subject to consultation with and oversight by a Mixed Commission on which the Allies were represented. Swiss domestic legislation then took care of the problem of any later-discovered but previously unregistered assets in a way satisfactory to the Allies.[57] The notorious Interhandel

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[53] Letter No. 14, appended to the Accord, cited after von Castelmur, supra n. 40, at 94. These letters are not reproduced in the source cited supra n. 38; von Castelmur cites to the Swiss Federal Archive (Bundesarchiv Bern, 2801, 1968/84, 32). The reference is to the notorious problem of the Belgian monetary gold, which Belgium had transferred to France on the eve of occupation,. Moved then to Senegal as a precautionary measure, it was then nonetheless seized by the Germans, possibly with the collaboration of French Vichy officials – see Smith, "Questions Concerning the Looted Nazi Gold Controversy," 20 Cardozo L. Rev. 483, 485f (1998) --, surreptitiously airlifted to Germany and then transferred to Switzerland for deposit. According to von Castelmur, id. at 94, n. 328, the Swiss delegation implicitly accepted this reservation, at least to the degree of giving the French an accounting of that deposit, a step they had rejected during the negotiations when the issue was their good faith and lack of actual knowledge of the source of that deposit.

The Belgian gold transfer had its own postwar sequel in litigation between Belgium and France over the allocation of gold from the gold pool marshaled for distribution by the Tripartite Commission; see the discussion Part V infra.

[54] Von Castelmur, supra n. 40, at 118.

[55] Part V infra.

[56] See infra n. 69 and accompanying text.

[57] A brief description is given by von Castelmur, supra n. 40 at 158ff. A doctoral dissertation by a member of the *Verrechnungsstelle* is the best source for a full description of the registration and liquidation process, the values claimed, the amounts received on liquidation, and – especially interesting – the proportions

situation does not fall within this context: it involves securities evidencing ownership of US-situated corporate assets, securities held by a Swiss firm (Interhandel) that the US claimed was a front for IG Farben, a German holding company. It has long deserved a separate investigation, one that now has been provided by a Swiss historian.[58]

It can be argued that the issues left unsettled by the 1946 negotiations, which became the barrier to implementation of the Accord, were only surface manifestations of an important underlying disagreement about the sanctity of private property, even enemy property, a disagreement which the illusory agreement to compensate its former owners could not mask.[59] From the outset not only Swiss but German, British, and even US commentators protested the US position on the seizure of privately owned (including corporate) enemy assets. In Switzerland itself that position from the beginning was characterized as the unprincipled exercise of the victors' power.[60] This is not surprising.[61] The United States had had experience

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represented by corporate assets (and financial assets) and individual assets such as bank accounts respectively: Hans W. Leuzinger, Die deutschen Vermögenswerte in der Schweiz und ihre statistische Erfassung (Winterthur 1960).

[58] Mario Koenig, Interhandel (Zürich 2001), one of the studies commissioned by the Bergier Commission.

[59] It has been suggested that underlying this concern with property rights was the importance to the Swiss financial sector, and thus to the government, of the inviolability of the Swiss finance sector as a haven for foreign deposits. In one sense, that sector's insistence on this inviolability is understandable and unsurprising. How far that sector influenced the government, which had to balance its need to restore Switzerland in the postwar Allied-dominated world against its domestic economic interests is a topic for inquiry by historians and political scientists.

[60] The clearest and typically critical expression of this basis of the Allied action at the time is that of a famous UK practitioner-academic, himself a German émigré: F. A. Mann, German Property in Switzerland, 23 British YB Int'l L 354 (1946), at 356f:

> "The Allies…claimed title in their capacity as sovereigns in Germany. They stood in the shoes of a German Government. [I]t is essential to see this clearly and to eliminate any confusion which may arise from…[this] peculiar position….
>
> "There cannot be any doubt that German municipal legislation confiscating German property in Switzerland would have been held by Swiss courts to be opposed to Swiss public order and would, consequently, not have been recognized [citing, interestingly enough, United States v. Pink, 315 U.S. 203 (1942)]."

Incidentally but not trivially, Mann's view reveals the difference the US act of state doctrine makes in this analysis; see its slightly later expression in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) in the much stronger case of the expropriation not of one's own nationals' but of aliens' property.

[61] One anomaly, however, deserves brief mention. The Swiss government itself in effect confiscated the equivalent of the increase in gold value created at the time of its 1936 devaluation of the Swiss franc by the

with the young Soviet Union's and with the Mexican appropriations of US investments within recent memory, and was at this very time facing expropriation activities by the Socialist states of Central and Eastern Europe. The legitimate distinction between expropriation of aliens' interests and the confiscation of one's own subjects' interests[62] was not, in the context of the Allies' role as the state authority in the defeated Germany, one that could withstand much pressure, and that quite apart from the looming Cold War.[63]

Three separate issues were involved in this complex and contentious debate. The first concerned the legal status of the Allies' exercise of lawmaking power in Germany. On the whole, while some doubts were expressed on this matter even by one or two neutral powers faced with Allied pressure to cooperate[64] (not to mention the objections of most German commentators[65]), these doubts could not withstand the facts on the ground. The second concerned the intended scope of the various Allied laws and

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expedient of declaring that monetary gain a "profit", which could be recaptured at least from the Swiss National Bank under domestic legislation if not even from private holders of gold. See Engeli, Die Beteiligung der Schweizerischen Nationalbank an den nach Washingtoner Abkommen zu bezahlenden 250 Millionen, 43 SJZ 149 (1947). In fact, as this title suggests, the last remnant of that "profit" was used by the Swiss government to complete its obligation to turn over the monetary gold called for in the Accord.

[62] A nuanced review of the subject-alien distinction in the specific context of private enemy property is found in Christian Dominicé, La Notion du Caractère ennemi des biens privées dans la guerre sur terre (Geneva 1961).

[63] See already Edwin M Borchard, The Diplomatic Protection of Citizens Abroad (New York 1927). From among the legion of German and Swiss publications on this subject of the confiscation of the private property of the enemy, see in particular the contemporaneous writings of Gerhard Graf, Die Liquidation der Deutschen Vermögenswerte in der Schweiz (Stuttgart 1949), Karl G. Seeliger, Das ausländische Privateigentum in der Schweiz (Munich 1949), and Rudolf Moser, Das Washingtoner Abkommen in schweizerischer und deutscher Beleuchtung, in Staat und Wirtschaft – FS Nawiasky 109 (Zürich 1950).

On the related and at the time practically important problem of the effect of the 1946 Washington Accord on private-law transactions involving the German assets marshaled in Switzerland, see Walther Hug, Sperre und Liquidation Deutscher Vermögenswerte und ihre Wirkungen auf die privaten Rechtsverhältnisse, in FS Nawiasky, at 261. Interestingly, given the federal nature of the Swiss Confederation, this problem is a matter of the federal division of legislative competence in Swiss public law between the federal government and the cantons; see generally Fritz Fleiner and Z. Giacometti, Schweizerisches Bundesstaatsrecht Sec. 79 (810ff) (Zürich 1949) – a problem not unknown to the US treatment of the conflict between treaty law and states' rights.

[64] The pro forma Swiss objection based on this ground is described in von Castelmur, supra n. 40, at 120. A brief review of other neutrals' positions on this issue is provided by Böhmer, "Grenzen der Auswirkung des besatzungsrechtlichen Beschlagnahmerechts in Deutschland auf deutsches Auslandsvermögen," in FS Janssen , supra n. 31 at 42f.

[65] Id. at 43.

proclamations.[66] In part this was a matter of statutory construction – of whether seizure of German assets included financial assets representing ownership of foreign properties.[67] In part it reflected an early and illusory expectation of the Allies that they could satisfy much of their reparation claims from the state- and state agency-owned assets as well as from those held by a class of complicit individuals that were yet to be defined.[68] The third, however, was the central difficulty: Would other states, especially the neutrals, recognize confiscatory decrees that would have effect in their countries, either indirectly through the confiscation of German financial assets evidencing ownership of property there, or directly through the registration of new titles?[69]

These matters hampered negotiations with the neutrals, and in the end led to illusory compromises on these matters. So far as Switzerland is concerned, since the Washington Accord contained the promise of compensation for these liquidations and distributions,[70] the larger issues of principle were

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[66] Specifically, based on Proclamation No. 2 of the Four-Power Control Council and the subsequent Council Law No. 5 of October 31, 1945, in Official Gazette of the Control Council for Germany No. 1 (October 29, 1945) 8 and same, No. 2 (November 30, 1945) 27, both in turn based on the Allied Powers June 5 "Declaration Regarding…the Assumption of Supreme Authority with Respect to Germany…" Its Preamble stated:

> "The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The assumption, for the purposes stated above, of the said authority and powers does not affect the annexation of Germany."

The most accessible source for the Declaration is http://avalon.law.yale.edu/wwii/ger01.asp.

[67] These issues are discussed in Böhmer, supra n. 63.

[68] See Paris Reparations Agreement, supra n. 4.

[69] The position of the signatories of the 1946 Paris Reparations Agreement on this point was complicated by the debatable nature of Part I, Article 6A, which could be interpreted to bar each from returning privately owned German assets found in its territory to the former owners. Whether this was a provisional measure to aid the IARA in its work or a final disposition was subject to debate. Compare Henry de Vries, "The International Responsibility of the United States for Vested German Assets," 51 Am.J.Int'l L. 1 (1957) with Ulrich Scheuner, "Zur Auslegung des Interalliierten Reparationsabkommen vom 14.1.1946," in FS Janssen, supra n. 31, at 135.

[70] Payment, n.b., not by the United States, but by the new Federal Republic of Germany. This itself had a two-stage sequel: two 1952 treaties between Switzerland and Germany and Switzerland and France/UK/US respectively [for the former, see 1953 II BGBl 15; for the latter, 175 UNTS 69 (1952)]. These treaties intended to regulate the respective payments by Germany and German property claimants (of Swiss-located property) that would honor the kited check issued by the Washington Accord. Not surprisingly,

quickly subsumed within the smaller issues of the modalities of that payment.[71] These were themselves sufficiently contentious, however, especially in the context of the eroding US and UK support for Draconian confiscation measures, that the Accord could not be honored. Only with a return to the negotiation table and the conclusion of the far less stringent second Washington Accord of 1952 did this episode in the Allies' relationship with the European Neutrals come to a whimper of a conclusion.[72]

V Monetary Gold

This story, as mentioned, is only a part, though a large part, of the general situation representing the third element of the post-Paris Treaty situation: the recapture and reallocation of monetary gold among those of the Allies occupied during the war.[73] As briefly mentioned earlier, the Agreement created a Tripartite Commission for Monetary Gold to implement these obligations. It was formally constituted in September of 1946 and,

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constitutional litigation then ensued in the Federal Republic between those claimants and the German government over the obligation imposed by German law on the claimants to participate on an equalization-of-burdens basis in the payments to Switzerland. To this see Buxbaum, "Equalization of burdens," in II FS Erik Jayme (Munich 2004) 1051, at 1055f.

[71] The following is based to a considerable extent on von Castelmur, supra n. 40, at140ff.

[72]Agreement concerning German property in Switzerland, August 28, 1952, 175 UNTS 69, TIAS 5069. The domestic US analogue to these issues – the liquidation and distribution of German corporate assets and individual ownership interests – is related to the foregoing only in the sense that those recoupments substituted for US reparations claims in the international context; i.e., in the context of the Paris Agreement. This is the story of the Alien Property Custodian Office; see the full discussion in Domke, supra n. 41.

[73] Non-monetary gold was composed of two parts. The first was individual victims' gold, ranging from gold objects confiscated from Jews after forced registration in Germany and occupied countries to the gold extracted from the teeth of the exterminated victims of the gas chambers. These items fell into the category of assets to be pooled under the Paris Agreement's Part I Article 8 procedure, supra Part II. The second was all other privately owned gold, ranging from numismatic items to industrial-use gold. The controversies surrounding its appropriate (definitional) separation from monetary gold were significant at the time; see infra n. 76 and accompanying text.

While victims'gold comprised a minuscule proportion of all gold (Unabhängige Expertenkommission Schweiz – Zweiter Weltkrieg, Die Schweiz und die Goldtransaktionen im Zweiten Weltkrieg (Zürich 2002), at 69ff provides the most detailed current account of these categories, not only of the part shipped to Switzerland), the circumstances of its creation understandably have been in the forefront of public attention during this past decade. It is to the credit of the Western Allies that it was the subject of equally intense concern during the first, pre-1949 period of asset recovery.

amazingly, decommissioned only late in 2000 after finishing its distributions in 1996. So far as the actual recovery of this gold is concerned, it depended largely on the Allied negotiations with the Neutrals, such as the already described marathon with the Swiss.[74] Of course not all of this gold was recoverable, but contemporaneous sources then, and historians now, estimate that roughly 60% of all monetary gold looted by the German occupiers was recovered. This aspect of the early effort to implement Part III of the Paris Agreement has been reviewed by a number of national agencies since the issue resurfaced as a part of the focus on these events in the 1990s.[75] Since it is not the purpose of this presentation to detail the specific outcome of these efforts but to place them in the context of the evolution of the international-law norms of reparation from purely intergovernmental to wider ranges of international relations, reference to the more comprehensive of those studies will suffice here.[76] Only two specific elements of this search for gold deserve brief separate mention: conflicting private and governmental claims to gold, based on the contested broad characterization by the Tripartite Commission of "monetary gold;" and survivors' and conflicting organizational claims to victims' gold.

One major element of ongoing dispute, and one occupying both the Commission and the courts, was the claim of private parties that gold ostensibly held as part of a nation's monetary reserves in fact belonged to them and had only been stored with Central Bank or Finance authorities or, in the more blatant cases, merely registered with these authorities. Exemplary of this issue is a case well known in the 1950s, the Dollfus-Mieg litigation,[77] although the matter has arisen occasionally even in recent

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[74] In fact, its single largest "haul" was the gold discovered by US troops in Thuringia at the end of the war, the so-called Merkers cache that then was stored and inventoried in Frankfurt. See the description of these events in Arthur L. Smith, Jr., Hitler's Gold: The Story of the Nazi War Loot 158ff (New York: Berg 1989); and the earlier review in Elizabeth B. White, "The Disposition of SS-looted Gold During and After World War II", 14 Am.J.Int'l L. 213 (1955). The story now has been extensively revisited in USDS-II, supra n. 38, at xxxi-ii, 149ff.

[75] See the discussion of these efforts in U.S. and Allied Wartime and Postwar Relations and Negotiations With Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury (USDS Publication 10557, Washington 1998).

[76] Again from the Bergier Commission brief; see Unabhängige Expertenkommission, Die Schweiz und die Goldtransaktionen im zweiten Weltkrieg (Zürich 2002).

[77] Dollfus Mieg et Compagnie S.A. v. Bank of England, 1 All E.L.R. 572 (H.L. 1952). The plaintiff-company's claim to its identifiable gold bars, that had been stored in France, seized by German authorities, found in the Merkers cache, and transferred to the Bank of England as bailee/custodian for the Tripartite

times.[78] Much of this type of dispute came about because the Commission decided in 1947 that any gold with markings that evidenced possession by a central bank was "monetary gold" rather than privately originating gold.[79] With this definition it avoided possibly legitimate restitution claims of private parties, in order to maximize the amount of gold available for state reparations under the allocation formula of the Paris Agreement. For understandable reasons, none of the involved governments had a motive to challenge this approach. Their own disputes were over claims that identifiable monetary gold should be returned as part of a privileged restitution program rather than shared as part of an allocation of reparations; any action that increased the size of this "gold pot" was welcome.[80]

The other major intergovernmental issue was a byproduct of the Cold War. Albania and Czechoslovakia of course had been part of the Western camp at the time of the Paris Reparations Agreement, and were entitled to their allocative share.[81] Because the United States had unresolved claims against each for the expropriation of its subjects' property during the postwar Socialist regime period, it used its position on the Tripartite Commission to prevent disbursement of those shares until agreement was reached on those

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Commission, was rejected on the jurisdictional ground that the foreign sovereign immunity of the US and France, as members of the Commission, also extended to the Bank as bailee.

[78] See, e.g., Chytil v. Powell, 15 Fed.Appx. 315 (9th Cir. 2001), which, though this is not clear from the decision, concerned plaintiff's claim to gold bars seized during the German occupation of Czechoslovakia, in turn found by US military authorities and shipped to the US, and then returned to Czechoslovakia at the time of the 1981 mutual claims settlement. A final round played out in the work of the Property Commission under the German Foundation for Remembrance, Responsibility, and the Future, supra. n.*; some of the claims filed with it asserted the seizure of gold of this sort by German occupation forces.

[79] See its questionnaire of June 1947 to claimant states requesting claim details, in which the Commission defined monetary gold as "all gold…carried as part of the claimant country's monetary reserve." According to Foreign & Commonwealth Office, "History Notes [No. 11]" (1996), this consciously avoided the reality that much gold nominally held by a central bank had been held for the account of private parties. That conclusion is well-supported by original archival records (on file with author).

[80] This was the issue in the Franco-Belgian dispute; here, too, the earlier characterization of the entire reparations process as a type of bankruptcy administration, with its analogies of secured and unsecured, priority and non-priority claims, is apparent. See Smith, supra n. 73, at 158.

[81] Albania first had to prevail against the claim of Italy to the former's monetary gold, which always had been held in Italy because of the unsettled climate in post-World War I Albania, and which had originally been built up under circumstances allowing Italy to argue that it was not a state-owned reserve. This issue was resolved in Albania's favor in an arbitration fact-finding proceeding invoked by the Tripartite Commission under its procedural rules; see Arbitral Advice of Sole Arbitrator G. Sauser-Hall, February 20, 1953, in 20 ILR 441 (1953). By then, of course, Albania was the fortress-outpost of the Soviet sphere of influence; hence the standoff of four decades before the "Advice" was honored.

matters. That did not occur until 1981 in the case of Czechoslovakia, and until 1995 in the case of Albania.[82] As a result, the Commission did not lay down its mandate and obtain its discharge until then.

VI Victims' Gold

The issue of victims' gold, as mentioned, has been in the forefront of recent studies and will not be separately reviewed here. The one aspect of that tragic situation important in the context of this narrative of the early period of reparations is the internecine dispute between survivors who claimed a kind of first priority over any non-monetary gold found by occupation authorities and held by them and by the Tripartite Commission on the one hand,[83] and the Jewish organizations which were entitled, under the Paris Agreement, to claim heirless assets on the other. That is a dispute that has continued, with various eruptions, to the present day in a variety of venues and over a great variety of property issues.[84] It was handled in this gold context by means of a relatively generous definition of identifiable – and thus specifically restitutable – gold items; though the actual details of these cases have not been satisfactorily explored to this day.

VII Conclusion

The brief review of the gold situation in Part V of this article, with which this segment of the legal story concludes, illustrates more generally the nature of the reparations processes that took place under the umbrella of

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[82] Smith, supra n. 73, at 158. The U.S.-Albanian Claims Settlement Agreement of April 18, 1995 made US consent to this transfer contingent upon Albanian payment of $2,000,000 to distribute to US subjects holding certified claims from the Foreign Claims Settlement Commission for assets expropriated by the prior Albanian regime during the Cold War. The Agreement also requires Albania to afford national treatment under any domestic Albanian restitution or compensation laws to US nationals who had suffered expropriation while still Albanian subjects.

[83] Recall that the fund for stateless persons was to be generated in part from German assets liquidated in neutral countries, and in part from this non-monetary gold that was expected to be found only in Germany; see supra Part I.

[84] For an early example, see Revici v. Conference of Jewish Material Claims AgainstGermany, 11 Misc. 2d 354, 174 N.Y.S.2d 825 (1958); for a more recent one, Wolf v. Federal Republic of Germany and The Conference on Jewish Material Claims Against Germany, Inc., 95 F.3d 536 (7th Cir. 1996).

international agreements during the first half-decade after the German surrender.[85] The formerly occupied Allied governments[86] searched and scrabbled for identifiable and restitutable assets[87] while pursuing their ever more frustrated hopes and claims of participation in the reparations allocations of German and other Axis public and private property -- frustrated in increasing degree by the policies of the United States. The individual victims' gold and other valuables became the subject of contentious claims among survivors and heirs, local associations of Jewish community remnants, and globally focused Jewish organizations dedicated to the revival and support of Israel's and the Diaspora's communities.

The next chapter in the history of interstate reparations by Germany, and in the intersection of private with state claims, is beyond the scope of this article. It began in 1950, when the major Allies' claims to reimbursement of their postwar expenditures, and the perceived need to resolve prewar Germany's public debts to its lenders, led to the London Debt Agreement of 1953.[88] That Agreement set the stage for the next era of interstate reparations, one that lasted until the unification of Germany in 1990. It will be the subject of a separate study.

Reverting to the question posed at the outset of this discussion, one very preliminary conclusion now can be provided. The frustrations born of these decades-long struggles, frustrations felt intensely if differently both by the formerly occupied Allies and by the individual and organizational victims, had to lead to major changes in the claims discourses of the postwar eras. At a relatively early stage – 1960-1965 – the mentioned Allies reluctantly moved towards settling with the Federal Republic of Germany by means of the bilateral reparations treaties permitted by the London Debt Agreement.

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[85] The parallel but separate issue of property restitution under pre-1949 Allied Occupation legislation, which focused, as the equivalent of German legislation, on the property claims of persecuted German subjects, is another topic. I hope to review it in a forthcoming paper before then reviewing the convergence of these two strands in later decades.

[86] And, standing marginally under their governments' umbrellas, some private parties.

[87] A particularly good example is that of the Government of the Netherlands seeking to increase its allocative share of the gold pool by claiming full restitution (or equivalent compensation), under the Italian Peace Treaty, of ingots looted by German occupation forces and transferred to Italy as a result of wartime transactions with Germany and Sweden respectively. The claim was rejected, and the Netherlands limited to its share of the pool, in Case Concerning Gold Looted from the Netherlands, Decision of the Italy-Netherlands Conciliation Commission of August 17, 1963, in 44 ILR 448 (1972).

[88] See Buxbaum, "The London Debt Agreement and Its Consequences", in Balancing of Interests – Liber Amicorum Peter Hay (Frankfurt am Main: 2005) 55.

But the resources generated through these processes were insufficient to alleviate the victims' and survivors' plight, or meet their states' claims. Their disappointed expectations became a significant element in maintaining the long struggle to create legally binding rights of individuals against states under the mantle of international human rights. And their states' claims, equally thwarted in this first round, led, in this case more directly, to somewhat larger reparations sums through the negotiation of bilateral agreements with Germany over the next 15 years.[89]

[89] Twelve such treaties were negotiated between 1959 and 1964 between the Federal Republic of Germany and both Allied powers and Neutrals -- (in chronological order) Luxembourg, Norway, Greece, Denmark, the Netherlands, France, Belgium, Italy, Switzerland, Austria, the UK and Sweden.