
Transnational Holocaust Litigation

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Abstract

International adjudication of the Holocaust has played a defining role in the development of international criminal law. Its legacy has recently been challenged by the Holocaust restitution actions brought before American courts in the 1990s. Settled for unprecedented amounts, the litigation has been sharply criticized by legal scholars and historians, who raise doubts as to the justice achieved for victims, and criticize the representation of the Holocaust in the actions. This article assesses the contribution of civil proceedings to conceptions of justice in international law. First, contrary to the critics, it argues that the civil class action provides an appropriate legal tool to deal with the liability of bureaucratic institutions for participation in gross human rights violations. Secondly, this article argues that the restitution actions altered the relationship between law and the history of the Holocaust as shaped under the paradigm of criminal law. Precisely because it was structured as a civil action and was settled, the litigation made a substantial contribution to historical research on the relationship between the state, corporations, and civil society in the carrying out of mass crimes. Thus, in opposition to the prevailing view that criminal law is the privileged form of law for dealing with atrocity, this article uncovers the valuable contribution of this new model of litigation to international law.

1 Introduction

The law's treatment of the Holocaust has been a topic of continuing discussion between historians and lawyers. Until recently, the discussion centred on

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criminal law, following such highly-publicized trials as the Nuremberg, Eichmann, and Frankfurt Auschwitz trials. In recent years, however, researchers' attention has been drawn to a different manifestation of the Holocaust in the courts: the restitution actions brought before American federal courts in the 1990s.¹ Beginning in 1996 with claims filed against Swiss banks on behalf of Holocaust survivors for the restitution of monies held in bank accounts since the war, the litigation expanded to include claims against banks in other countries, as well as claims for life insurance plans and for compensation for slave and forced labour from German and other private corporations.

These actions were ultimately settled for unprecedented amounts, without, however, the defendants formally assuming any legal responsibility. This transnational Holocaust litigation (hereinafter, 'THL') has been sharply criticized by legal scholars and historians, who raise doubts as to the measure of justice achieved for Holocaust victims, and criticize the representation of the Holocaust in the actions. Thus, for legal historian Michael Marrus,² THL not only failed to contribute to historical understanding, it also distanced us from the insights of historical research and distorted the historical picture of the involvement of private corporations in the Holocaust. The present article re-examines the question of the justice achieved for the parties in THL, as well as the relationship between law and the historical understanding of the Holocaust as reconfigured by these actions. In doing so, this article's main concern is not to deflect criticism of THL. Rather, my objective is to provide tools to understand and evaluate the jurisprudence of this litigation.

This article interprets the turn to civil law and procedures as a solution to a persistent legal lacuna: how to hold corporations accountable for involvement in atrocity. Until THL, corporations had been largely immune from liability for their complicity in the Nazi crimes.³ Criminal law has proven unable to address corporate liability

¹ This was not the first time private law was used in connection with the Holocaust. The governments of Germany and Israel agreed to the establishment of a large reparations programme in the 1950s for Jewish victims of Nazi persecution: R.W. Zweig, *German Reparations and the Jewish World* (1987). In addition, there were various libel trials concerning Holocaust denial (see L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (2001)) and a few attempts to sue Germany and private corporations in restitution for looted property and forced labour: Allen, 'The Limits of Lex Americana: The Holocaust Restitution Litigation as a Cul-de-Sac of International Human-Rights Law', 17 *Widener L. Rev.* (2011) 1. The reparations programme, however, was administrative in nature, and the attempts to use private law were sporadic and mostly unsuccessful. The restitution litigation of the 1990s therefore represents the first significant instance of the use of civil litigation and private law doctrines in relation to the Holocaust.

² M.R. Marrus, *Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s* (2009).

³ Until the 1990s, private corporations and their managers were rarely held liable for their involvement in the Holocaust. Even when they were criminally prosecuted, courts have been reluctant to convict defendants in the absence of unquestionable criminal intent. For example, in the post-war trials in Germany of the members of the board of I.G. Farben, most defendants were acquitted of charges relating to the use of slave labour due to lack of clear evidence of knowledge and direct engagement of the defendants. For further discussion see Zuppi, 'Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert', 66 *Louisiana L. Rev.* (2005–2006) 495, and B. Ferencz, *Less Than Slaves, Jewish Forced Labor and the Quest for Compensation* (2002), at 34–67.

for involvement in atrocity.⁴ In order to show that THL fills this lacuna, the article provides two mapping devices to understand and evaluate THL: first, a normative map that interprets THL in light of two distinct models, the model of the international criminal law of atrocity and the structural reform model.⁵ By exploring the similarities between these models and THL we can evaluate what kind of process THL is and whether it is desirable or not. Secondly, the article points to the ramifications of this new mechanism by mapping how it alters the relationship between law and the historical understanding of the Holocaust as shaped under the paradigm of criminal law.

My principal argument is that the class civil action offers a new and original way of dealing with dilemmas which arose in Holocaust trials in the past, at two levels: justice to the parties and justice to history. Indeed, the class action provides ways for the law to deal with the liability of bureaucratic institutions in connection with the Holocaust, due to such factors as the group structure of the claim and the change in the role of the court. With respect to the question of justice to history, I argue that the restitution actions made a substantial contribution to a field which had been mostly obscured by criminal law – the relationship between the state, corporations, and civil society in the carrying out of mass crimes. While the international criminal law of atrocity has focused on the individual perpetrator, the class actions shifted attention to the organization, and specifically to the complicity of private corporations in the plunder of victims of the Third Reich. In this respect, the restitution actions brought the law closer to contemporary historical research, which is developing tools to examine this relationship in order to assess the responsibility of bystanders or ‘enablers’ for the crimes of the Holocaust.

⁴ See Bush, ‘The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said’, 109 *Columbia L Rev* (2009) 1094. As Bush emphasizes (at 1098), no corporation has ever been charged with or convicted of an international war crime or similar offence, and only individuals were charged in the first trials at Nuremberg and Tokyo as well as in the four subsequent trials at Nuremberg that focused on managers, directors, and owners of giant German enterprises such as Krupp, Flick, and I.G. Farben. See also Lustig, ‘The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann’s Concept of Behemoth at the Industrialist Trials at Nuremberg’, 43 *NYU J Int’l L & Politics* (2011) 965. However, even the two devices of criminalizing whole organizations and relying on criminal conspiracy have fallen into disfavour since Nuremberg: see A. Cassese, *International Criminal Law* (2008), at 33–34 and 227. The preference for individual liability has not changed with the establishment of the ICC, as the Rome charter did not include corporations as permissible subjects of jurisdiction and rejected the doctrine of criminal conspiracy, thereby undermining the ability of criminal law to cope with the organized aspects of atrocity. See Saland, ‘International Criminal Law Principles’, in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), at 189, 198–199. Instead, the ICC’s jurisdiction includes crimes similar to conspiracy like joint enterprise and aiding and abetting, as well as liability for ‘contributing to a common purpose’ as a surrogate for conspiracy. See Rome Statute of the ICC Art. 25(3), 17 July 1998, 2187 UNTS 90, at 105 (extending ICC jurisdiction to a person who ‘contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose’). As a consequence of these developments ‘the law concerning both corporations and conspiracies is in knots’ (Bush, *supra*, at 1101).

⁵ For elaboration see Fiss, ‘The Supreme Court, 1978 Term – Foreword: The Forms of Justice’, 93 *Harvard L Rev* (1979) 1.

Section 2 provides a brief overview of THL and of the principal critique levelled against it. Section 3 argues that the criticism can be explained by the hegemony of the criminal paradigm over the legal imagination with respect to the Holocaust. It develops an alternative and more positive evaluation of the ability of civil litigation to deal with certain aspects of the Holocaust. I argue that THL actually reflects developments in international criminal law from the past two decades which were intended to pierce the shield of state sovereignty. I further argue that THL was intended to achieve a similar goal of removing the immunity of private corporations, which had avoided accountability for the use of slave and forced labour, robbery, and plunder during the Holocaust.⁶ In both cases, the breakthrough imposition of legal liability is based on three central developments: overcoming the obstacles of territorial jurisdiction and of statutes of limitation, and the change in the standing of the victim. I then show how THL also reflects aspects of the structural reform model of litigation, in particular the use of the class action procedure, enabling the law to hold large organizations accountable.

Thereafter, I focus on the main difference between THL and the two models: the fact that the actions were settled. One of the central criticisms against THL was that none of the actions resulted in a principled court decision, and thus the law apparently failed to accomplish its central task: justice, that is, the reasoned determination of legal liability. We appear to be facing a paradox: the criminal law's failure to deal with bureaucratic responsibility for the Holocaust and, in particular, that of private corporations led to the adoption of the tools of private law. The American class action provided a way to unite defendants and numerous anonymous plaintiffs and to put unprecedented pressure on the corporations to cooperate with the plaintiffs' representatives. However, civil litigation is irremediably linked to settlement as a dispute-resolution mechanism, and settlement, by definition, undermines the attempt to determine legal and historical responsibility, as it allows the defendant to pay without the issue of liability being determined. Thus, it could appear as though the defendants emerged victorious – the question of the corporations' involvement in the Holocaust remains concealed from the law.

The third section of the article concludes by examining the compatibility of settlement with the objectives of international criminal law as well as with the objectives of the class action for violations of human rights. I argue that the case of THL shows us that settlement can constitute an important way to defeat corporate immunity.

⁶ A similar claim was made by Prof. Burt Neuborne who served as counsel to the plaintiffs in much of the THL: 'I felt the litigation was necessary to close a hole in international jurisprudence.' He explains that international criminal law developed doctrines and institutions to deal with 'the monster who establishes and operates death camps'. However, 'there has been no parallel discussion about how to deal with the person who manufactures and sells the poison gas or the barbed wire for use in the death camps, knowing that the profit-making activity aids and abets in the commission of a crime against humanity'. Neuborne therefore advocates recognizing 'a general principle of international law that causes the profits of genocide or crimes against humanity to be held in constructive trust for the victims': Neuborne, 'Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts', 80 *Washington U LQ* (2002) 795, at 829.

The culmination of the actions in settlement also raises doubts about their ability to do 'justice to history'. Section 4 evaluates THL from the perspective of law and history. I argue that the scathing criticism voiced by historians also derives in part from the attempt to understand THL in light of the criminal law paradigm. I argue that the civil litigation paradigm employed by THL alters the relationship between law and history, and encourages the creation of non-hegemonic historical narratives about corporate responsibility. Notwithstanding the absence of any court decision determining the degree of their liability, following the actions, many German companies established internal historical committees charged with examining their involvement in the Holocaust. Because of the separation between civil and criminal law, the link between genocide and money had been obscured for decades. The hybridity of THL, a private law mechanism with public aspects, allows the financial story behind the Holocaust to be told, revealing that human rights violations are also about money.

Thus, while civil litigation has not replaced criminal prosecutions for involvement in the Holocaust, THL represents a paradigm shift in the sense that civil litigation has become a more relevant and influential track. It is my contention that THL created a new idiom of responsibility for business involvement in the crimes of the Holocaust, possibly offering a model to be applied to other human rights violations by corporate actors. The exact contours of this new model are discussed in a forthcoming article.⁷ The purpose of this article is conceptually to frame the meanings of THL and consider its ramifications.

2 Holocaust Litigation at a Crossroads: Between Criminal and Civil Law

A Holocaust Restitution Litigation: An Overview

Restitution claims made their debut in American courts in the mid 1990s.⁸ A campaign headed by the World Jewish Congress garnered considerable political support and spurred the US Senate Banking Committee to hold hearings on dormant accounts of Holocaust victims in Swiss banks in 1996.⁹ The Clinton administration provided tailwind by treating Holocaust restitution as a subject for federal policy and action. The US State Department became deeply involved, as Under Secretary of Commerce Stuart Eizenstat was appointed to lead a governmental inquiry into Holocaust reparations.¹⁰

⁷ Bilsky, Citron, and Davidson, 'The Swiss and German Holocaust Litigation—Two Roads for Transnational Structural Reform', manuscript on file with the author.

⁸ Sporadic claims have been recorded prior to this date: see M.J. Bazyler and R.P. Alford (eds), *Holocaust Restitution: Perspectives on the Litigation and its Legacy* (2006), at p. xiii.

⁹ Slany, 'The State Department, Nazi Gold, and the Search for Holocaust Assets', in *ibid.*, at 30, 31. Marrus traced the campaign to reports accusing Swiss banks of mishandling Holocaust-era accounts and mistreating victims' descendants, which were circulated in the international media from 1995. See Marrus, *supra* note 2, at 11–15.

¹⁰ See Slany, *supra* note 9, at 32–41.

Swiss banks were the first target of mass class actions filed in US federal courts on behalf of Holocaust survivors. Soon to follow were claims for life insurance plans and demands for compensation for slave and forced labour.¹¹ Litigation also expanded to include banks in other countries and other private corporations.¹² All actions were initiated by private lawyers representing groups of victims.¹³ In 1998, Swiss banks were the first to settle, for an unprecedented US\$1,250 million.¹⁴ Shortly thereafter, a series of claims against German corporations led to the establishment of a US\$5,000 million fund to which the German government and corporations contributed in equal shares, and to the signing of an Executive Agreement between the governments of Germany and the United States.¹⁵

None of THL was ultimately resolved on the merits. After a process of negotiation in the shadow of the actions,¹⁶ the settlements reached between the parties to litigation avoided any clear ruling on the legal responsibility of the private corporations. Indeed, wishing to avoid reputation damage and the monetary costs of ongoing litigation, corporations preferred to settle without formally assuming any legal responsibility.¹⁷ The legal pressure, however, did yield some historical findings. Swiss banks agreed to a comprehensive audit, and German corporations established historical committees and opened their archives to historians whom they appointed to investigate their involvement in the Holocaust.¹⁸ In addition, during the stage of distribution, Holocaust survivors and their family members completed questionnaires in which they described

¹¹ For a survey of the quest for compensation by slave and forced labourers from the German government and companies after World War II, see Goschler, 'German Compensation to Jewish Nazi Victims after 1945', in P. Hayes and J.M. Diefendorf (eds), *Lessons and Legacies VI: New Currents in Holocaust Research* (2004), at 373.

¹² Marrus, *supra* note 2, at 4.

¹³ *Ibid.*, at 17–20, and Sebok, 'Two Concepts of Injustice in Restitution for Slavery', 84 *Boston U L Rev* (2004) 1405, at 1407–1408.

¹⁴ See Marrus, *supra* note 2, at 10–25. For a detailed exposition of the settlement mechanism see Domes, 'Compensation for Survivors of Slave and Forced Labor: The Swiss Bank Settlement and the German Foundation Provide Options for Recovery for Holocaust Victims', 14 *Transnat'l Lawyer* (2001) 171, at 175–192.

¹⁵ Under-Secretary Eizenstat played a pivotal role in the shaping of this agreement. See *ibid.* For an overview of the litigation campaign until 2006 see Bazylar and Alford, *supra* note 8.

¹⁶ Eizenstat describes the judges' active involvement in pushing the parties to negotiate and settle: see S.E. Eizenstat, *Imperfect Justice, Looted Assets, Slave Labor, and the Unfinished Business of World War II* (2003), at 165–185.

¹⁷ Marrus quotes legal counsel who voiced his clients' concerns over public relations damage, and concludes that 'the defendants simply calculated that it was cheaper to settle than to continue': Marrus, *supra* note 2, at 32. See also Korman, 'Rewriting the Holocaust History of the Swiss Banks: A Growing Scandal', in Bazylar and Alford (eds), *supra* note 8, at 115.

¹⁸ In 1996, in the wake of the restitution campaign, the Swiss Bankers' Association formed a committee of accountants to audit their records and determine the extent of dormant accounts belonging to Holocaust victims. Later that year, the Swiss government appointed a committee composed of nine historians to assess the role of Switzerland in World War II. The commission was headed by Swiss historian Jean-François Bergier. Both committees published extensive reports. See E. Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (2001), at 88–111. For the final report published in 2002 by the Bergier Committee see 'Final Report of the Independent Commission of Experts, Switzerland – Second World War', at 276–277, available at: www.uek.ch.

their losses.¹⁹ Though the courts did not make any pronouncement of liability, they were actively involved in the negotiation process as well as in the implementation of the Swiss bank settlement, issuing numerous rulings as to the proper categorization of claims and allocation of funds.²⁰

B On the Legal Theory and Doctrine

From the perspective of ordinary legal conduct, Holocaust restitutions claims had to overcome considerable formal barriers, as the claims (a) were filed over 50 years after the facts, and (b) were often instigated by descendants of victims who had either perished during the Holocaust or passed away in the intervening years. The emergence of claims within US federal courts, distanced in time and space from European soil, added a third material difficulty, as the claimants initiated proceedings (c) far outside the jurisdictions in which the acts were committed, and in which the corporate defendants were incorporated. Nevertheless, in addition to the favourable political environment, a number of characteristics of the American legal system allowed a better forecast for THL than would have been the case in any European jurisdiction.

First, US law grants federal courts 'original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.²¹ This provision, known as the Alien Tort Statute (ATS), was redeemed from near oblivion in 1980 in the landmark case of *Filártiga v. Peña-Irala*.²² It soon became a platform for an increasing number of claims in which US federal courts were asked to assert universal jurisdiction over human rights violations.²³ Although the courts responded to such claims somewhat haphazardly at first, and became increasingly cautious in extending their powers extraterritorially,²⁴ the expansion of jurisdiction should not be underestimated. The application of universal jurisdiction under the ATS should be read together with parallel developments in international criminal law that has seen increasing claims for universal jurisdiction by domestic courts.²⁵ This development in American jurisprudence provides that universal jurisdiction is not confined to the sphere of criminal law.²⁶

¹⁹ Neuborne, *supra* note 6, at 827–828.

²⁰ For a detailed outline of the courts' involvement in the Swiss banks' settlement see www.swissbank-claims.com/Chronology.aspx (last accessed 29 April 2012).

²¹ 28 USC § 1350. See G.P. Fletcher, *Tort Liability for Human Rights Abuses* (2008).

²² 630 F.2d 876 (2d Cir. 1980).

²³ For a general account see 'Developments in the Law – International Criminal Law', 114 *Harvard L Rev* (2001) 2025.

²⁴ See *Sosa v. Alvarez-Machain*, 542 US 692 (2004). Indeed, many have commented on the mounting difficulties in succeeding in ATS claims, particularly after the *Sosa* ruling. See Pell, 'Historical Reparation Claims: The Defense Perspective', in Bazylar and Alford (eds.), *supra* note 8, at 331, 335–340.

²⁵ Butler, 'The Growing Support for Universal Jurisdiction in National Legislation', in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes* (2004), at 67.

²⁶ Since the end of the 1990s, federal courts have allowed ATS lawsuits to be brought against corporations, however with very limited success: see Stephens, 'Judicial Deference and the Unreasonable Views of the Bush Administration', 33 *Brooklyn J Int'l L* (2008) 773, at 815–816. Corporate liability under the ATS has become increasingly uncertain with the decision in *Kiobel v. Royal Dutch Petroleum* (210 US App (2d Cir. 2010), 17 Sept. 2010). At the time of writing, the US Supreme Court had agreed to hear the case in the first half of 2012: Docket 10-1491, Cert. granted 17 Nov. 2011.

THL claims were crafted in various forms in order to assert the jurisdiction of US courts over the claims. In some instances, American citizens were named as claimants.²⁷ In others, claimants invoked the ATS in support of their choice of forum.²⁸ In comparison with other ATS-based claims, Holocaust era claims have specific characteristics, particularly due to their historical character.²⁹ It seems, however, that the renewed use of the ATS played some background role in generally enhancing the receptivity of courts to claims based on grave human rights violations that occur outside their territorial jurisdiction.³⁰

Second, and more important for understanding the turn to American courts, is the availability of class actions in the American legal system, generally unrecognized by civil law jurisdictions. Class actions circumvent the need for individuated claims, and are structured in a way that aggregates interests and incentivizes lawyers to devote the necessary time and effort and take on powerful opponents. Furthermore, class actions provide more efficient leverages for acquiring evidence, and can focus on evidences of pattern and practice rather than on a concrete linkage between every claimant-victim and defendant.³¹

To this legal mechanism one should add the use of the unjust enrichment doctrine that is not restricted to the relationship between the tortfeasor and the injured. By invoking claims of unjust enrichment, restitution claims can be directed not only towards the principal wrongdoers, but also their second-hand accomplices, such as banks that did business with the perpetrators, and this by the victims' successors. The unjust enrichment cause of action, together with the fact that the defendants were corporations with continuing legal personality, also helped to overcome the 50 years that had passed since the Holocaust. Apart from the removal of some external barriers that had previously shielded German industry from restitution claims,³² in targeting corporations and financial institutions with unjust enrichment claims, the focus shifts from *past* injustice to the *present* wrongful holding of ill-gotten gains. This shift, although heavily criticized by some commentators,³³ can help to overcome statutes of limitation that set time limits for civil actions.

²⁷ Neuborne, *supra* note 6, particularly nn. 29–31.

²⁸ For a list of Holocaust era cases claiming jurisdiction under the ATS see Stephens, *supra* note 26, at 815–816.

²⁹ *Ibid.*, at 813 ('[t]he nine cases against corporations stemming from World War II are treated as a separate category because the issues they raise are so distinct').

³⁰ Ratner and Becker, 'The Legacy of Holocaust Class Action Suits: Have They Broken Ground for Other Cases of Historical Wrongs?', in Bazylar and Alford (eds.), *supra* note 8, at 345, 347.

³¹ Swift, 'Holocaust Litigation and Human Rights Jurisprudence', in *ibid.*, at 50, 52.

³² After the reunification of Germany, the German Constitutional Court ruled in the *Krakauer* case that German companies cannot be further protected by the London Debt Agreement of 1953 (according to which claims against German industry are suspended until the signing of a final peace treaty): Neuborne, 'A Tale of Two Cities: Administrating the Holocaust Settlements in Brooklyn and Berlin', in Bazylar and Alford (eds.), *supra* note 8, at 60, 75–76.

³³ See, e.g., the staunch critique by Sebok in 'Reparations, Unjust Enrichment, and the Importance of Knowing the Difference Between the Two', 58 *NYU Annual Survey of Am L* (2003) 651. In defence of restitution-based claims see H. Dagan, *The Law and Ethics of Restitution* (2004), at 254–259.

C Criticism

THL did not proceed unchallenged. Some observers, particularly those unaccustomed to American class-action practice,³⁴ criticized the negotiation process prodded by courts and the monetary settlements that followed as undermining the rule of law.³⁵ Another concern, which is longstanding in the context of reparations for Holocaust victims, was that monetary settlements, particularly when reached after a process of negotiation, would reproduce a stigmatic imagery of Jews.³⁶ These general concerns seem to be connected to the shift of paradigm from criminal to civil law.

A more detailed criticism that relates to the unique characteristics of THL was raised by Holocaust historian Michael Marrus.³⁷ First, he argues that the very concept of unjust enrichment fails to deliver justice, because many corporations were not actually enriched as a consequence of their activity during the Holocaust.³⁸ Secondly, and more fundamentally, the focus on monetary gains shifts attention away from the gravest crime committed during World War II – mass murder – to theft. This focus amounts to a distortion of history, leading Marrus to claim that '[the law] gets the history wrong'.³⁹

Let us examine these lines of criticism in more detail. Marrus' criticism of the inability of the doctrine of unjust enrichment to capture corporate wrongdoing during the Holocaust is justified with respect to some but not all grounds of restitution invoked by the plaintiffs. Indeed, for only one type of claim ('wrongful enrichment') does the law of restitution require that the wealth of the defendant actually be increased.⁴⁰ Claims

³⁴ Marrus, *supra* note 2, at 25.

³⁵ *Ibid.*, at 28–29; Baumgartner, 'Human Rights and Civil Litigation in United States Courts: The Holocaust Era Cases', 80 *Washington U LQ* (2002) 835, at 841, and Baumgartner, 'Class Actions and Group Litigation in Switzerland', 27 *Northwestern J Int'l L & Business* (2006–2007) 301, at 316. See also Goschler, *supra* note 11, at 401. Even proponents of reparations mechanisms were found to distance themselves from the aggressive litigation style of the lawyers involved.

³⁶ It is not surprising that Marrus quotes the director of the Anti-Defamation League as being concerned that it would appear that Jews died because of their money: Marrus, *supra* note 2, at 86. This fear clearly resonates with the image of the aggressive Jewish lawyer negotiating for settlement: *ibid.*, at 28–30.

³⁷ *Ibid.*

³⁸ Evidently, the corporations against which the actions were filed were not chosen according to their relative fault in using forced and slave labour, but rather for their financial standing and their international activity. Going after the 'deep pocket' was considered, in this respect, an arbitrary choice: *ibid.*, at 90.

³⁹ *Ibid.*, at 103.

⁴⁰ Michael Thad Allen distinguishes between three types of restitution claims which are often conflated: *quantum meruit* (restitution of unpaid wages), unjust enrichment, and wrongful enrichment. Claims of unjust enrichment are claims for the restitution of mistaken payments. The remedy is the fair-market value of the benefit conferred. Wrongful enrichment, in contrast, arises out of a wrong, not a mistake. In this case, the law expresses disapproval by allowing the plaintiff to recover profits deriving from the labour if they are higher than the fair value of the benefit. Of these three categories of restitution claims, only claims for wrongful enrichment in which the plaintiff sues for a portion of profits imply actual enrichment by the defendant. The restitution actions were grounded in *quantum meruit* and wrongful enrichment. While claims for *quantum meruit* for slave labour were credible, they are inadequate in Allen's view because they would result in small amounts of damages to each plaintiff. This view does not account for the fact that the aggregation of tens of thousands of small claims can constitute a substantial burden on defendants and therefore serve to hold them accountable for human rights violations: Allen, *supra* note 1.

for restitution of unpaid wages, unpaid bank accounts, and interest accrued thereon need not meet any such requirement. Thus, the critique relating to the absence of profits is justified only with respect to a portion of the restitution claims.

There is certainly no correlation between the severity and extent of human rights violations and financial benefits accrued from those violations.⁴¹ Reparations, for these critics, should be about oppression and human rights violations, not about returning property wrongfully taken.⁴² To the extent that Holocaust restitution claims are meant to be about more than just money, the structure of the unjust enrichment doctrine (focusing on disgorgement of profits rather than compensation for losses) seems to misguide these claims altogether.⁴³

However, one may argue that the restitution claims' focus on the payment of money does not necessarily trivialize and commodify the Holocaust by reducing it to grievances about property.⁴⁴ Monetary recovery, especially if it includes a disgorgement of profits, can vindicate the plaintiffs' inalienable right to control their labour and life by providing a material and not merely expressive response (such as an apology) to human rights violations.⁴⁵ As legal scholar Hanoch Dagan writes, '[r]estitution provides a credibility check to human rights law'.⁴⁶

A more troubling criticism is voiced against the focus on monetary gains, which is inherently tilted towards claims that proceed from lesser crimes, such as embezzlement

⁴¹ Marrus, *supra* note 2, at 91, 101–103.

⁴² Marrus quotes to this effect Anthony Sebok, who has argued in the context of reparations claims for Holocaust victims and descendent of slaves in America that '[t]he shape and structure of unjust enrichment can be used to turn back and sap the moral language of the reparations movement': Sebok, *supra* note 33, at 657. See also 'Symposium: The Jurisprudence of Slavery Reparations', 84 *Boston U L Rev* (2004).

⁴³ See, e.g., Hayes, writing that:

'Now that incomplete compensation has been obtained from many complicit corporations. I hope we can stop distorting the historical realities. One of which is that few enterprises, German or otherwise, grew rich from the Holocaust. There are exceptions, but the general pattern is of criminal deeds and marginal, mostly fleeting gains. Perhaps if we talk less in the future about disgorgement of largely fictitious profits on extreme human suffering, we can talk more about finding a way for domestic and international courts to assess appropriate recompense for what really mattered: heartbreakingly huge and irreparable losses': Hayes, 'Corporate Profits and the Holocaust: A Dissent from the Monetary Argument', in Bazylar and Alford (eds.), *supra* note 8, at 197, 203. Marrus refers in this respect to the work of Götz Aly, who speaks of 'Larceny as a state principle' in Nazi Germany: see G. Aly, *Hitler's Beneficiaries: Plunder, Racial War, and the Nazi Welfare State* (trans. Jefferson Chase, 2007), at 197; Marrus, *supra* note 2, at 87–88.

⁴⁴ See the criticism of Sebok, *supra* note 13, at 1405.

⁴⁵ Dagan, 'Restitution and Slavery: on Incomplete Commodification, Intergenerational Justice, and Legal Transitions', 84 *Boston U L Rev* (2004) 1139, at 1139.

⁴⁶ Dagan explains that the rationale behind unjust enrichment is not only property-based: the law of restitution is concerned with protecting the autonomy of individuals, who can decide for whom and for what salary they are willing to work: *ibid.*, at 1143–1152. The view that THL reduces the Holocaust to grievances about property is further discredited by the fact that plaintiffs are constructed primarily as victims seeking compensation rather than as pure property holders. This construction is evidenced in the principles employed to distribute the settlements, according to 'rough justice' rather than precisely quantified right: see Elzenstat, *supra* note 16, at 353; Marrus, *supra* note 2, at 102; and Neuborne, *supra* note 32, at 72.

and even the use of forced labour, displacing the focus from the much graver crimes of mass murdering millions of people and the complete erasure of communities and cultures. This leads Marrus to ask whether the attention to robbery might not 'cast murder into the shade'.⁴⁷ To this one may reply that the more atrocious aspects of the Holocaust had already been the subject of legal treatment in criminal trials since Nuremberg. Dealing with 'lesser' crimes does not erase these previous efforts. Furthermore, criminal law, because of its individualistic bias, has failed to address corporate complicity in the Holocaust. It was only through tort and property claims that the law has been able to address business involvement in the Holocaust.

With respect to the distortion of history, Marrus argues that the disproportionate emphasis on a few successful international corporations and the framing of claims under particular doctrines that help to bring them to court led to the misapprehension of contentious historical matters, such as the complicity of bystanders and the immediate causes of the Holocaust.⁴⁸ According to this view, by focusing on the role of the private corporation, the restitution actions ignore and diminish the role of the state.⁴⁹ In addition, they focus on private corporations to the exclusion of the public sector and the agricultural sector, which had both used forced and slave labour to a high degree.

Finally, Marrus turns his criticism to the monetary settlements. While in the past criminal courts produced judgments on the merit, even if distorting the historical understanding, they at least were about 'justice'. The restitution actions did not even produce this result, as they all ended with monetary settlements. Thus an uneasy feeling was created, that 'it was all about money'.⁵⁰

3 Restitution Actions under the Transnational Paradigm

I believe that much of the criticism voiced against THL is due to a mistaken conception of the nature of these actions and their relation to the international criminal law of atrocity. Two unarticulated assumptions seem to inform the negative evaluation of THL. First, it is assumed that criminal law provides the proper and privileged legal

⁴⁷ Marrus, *supra* note 2, at 87.

⁴⁸ *Ibid.*, at 103–107. The efforts of European corporations to enter the American market turned them into preferred defendants, without due regard to their relative culpability. This led to the exclusion of public corporations, dissolved SS-owned corporations, and other small manufacturers, farmers, and households, despite their vast use of slave labour during World War II.

⁴⁹ *Ibid.*, at 103. It is important to note that there is an ongoing historical debate about how to divide the responsibility between state and private corporations for the use of forced labour. For the view that the Nazi state left little autonomy to private enterprises see Hayes, 'Corporate Freedom of Action in Nazi Germany', 45 *Bulletin of the German Historical Institute* (2009) 29 and 51. For the contrary view see Buchheim and Scherner, 'Corporate Freedom of Action in Nazi Germany: A Response to Peter Hayes', 45 *Bulletin of the German Historical Institute* (2009) 43.

⁵⁰ See also Adler and Zumbansen, 'The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich', 39 *Harvard J Legislation* (2002) 1, at 60–61 (arguing that the settlement lacked moral content and that court decisions on at least some of the claims may have been preferable to vindicate victims' suffering and establish defendants' culpability).

idiom to address the atrocities. Labelling such acts as torts or ‘unjust enrichment’ and seeking redress through private actions provokes the concern that the events are trivialized. A second assumption relates to the nature of the litigation as falling squarely under the rubric of private dispute resolution as distinct from the protection and promotion of public values. Below I turn to examining critically these assumptions in light of the American legacy of civil rights cases that dismantled legal segregation across the United States. My argument proceeds in a few stages. First, I identify parallel legal developments in the international criminal law of atrocity and the American civil class action for human rights violations. Secondly, I argue that these structural similarities reflect a common concern underlying both bodies of law – a systematic attempt to overcome structural sources of impunity from liability for human rights violations. Historically, the two paths crossed early on, in the 1947 attempt of the NAACP to begin an action against the US government for allegedly committing genocide against blacks in violation of the Genocide Convention.⁵¹ The failure of the international venue later led to the rise of American domestic public law litigation as the main instrument of social reform during the 1970s.⁵² These two bodies of law had developed separately, until the mid-1990s. Indeed, the two bodies of law seem to have taken a very different approach to the bureaucratic aspects of human rights violations. While the international law of atrocity developed tools to pierce the shield of state sovereignty in order to attribute legal responsibility to identifiable individuals, the American structural reform litigation focused on reforming bureaucratic organizations involved in gross human rights violations by abandoning the focus on individual guilt. We should understand the Holocaust restitution actions as an innovative attempt to bring these parallel bodies of law together in order to make European corporations answerable for their complicity in gross human rights violations during the Holocaust.⁵³ I argue that in doing so THL created a hybrid legal form capable of dealing with a persisting lacuna in the jurisprudence of the Holocaust.

A The International Criminal Law of Atrocity

Law’s continued encounter with state-organized crimes since the end of World War II has brought about radical legal transformations. These changes have matured into a corpus of international criminal law dealing with the most heinous crimes, which Lawrence Douglas has called the ‘jurisprudence of atrocity’,⁵⁴ and which I refer to here as the international criminal law of atrocity.

⁵¹ Koh, ‘Transnational Public Law Litigation’, 100 *Yale LJ* (1991) 2347, at 2360.

⁵² For an analysis of the changing understanding of the social goals of civil litigation see Chayes, ‘The Role of the Judge in Public Law Litigation’, 89 *Harvard L Rev* (1976) 1281, and Fiss, *supra* note 5.

⁵³ For an analysis of the larger trend of relying on the ATS to enforce international criminal law norms through civil litigation in American courts see Stephens, ‘Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations’, 27 *Yale J Int’l L* (2002) 1. Note, however, that Stephens does not refer in her analysis of this trend to the Holocaust restitution class actions.

⁵⁴ Douglas, on file with author (herein after ‘Manuscript’), and Douglas, ‘Shattering Nuremberg, Toward a Jurisprudence of Atrocity’, *Harvard Int’l Rev*, 21 Nov. 2007, available at: <http://hir.harvard.edu/shattering-nuremberg> (last accessed 29 April 2012).

We should not view the changes of recent decades in international criminal law sporadically, as isolated reforms meant to overcome certain legal obstacles, but rather as amounting to a paradigm shift in our understanding of the substance and processes of criminal law.⁵⁵ 'Perhaps the clearest way in which the contact with atrocity has changed law', Douglas explains, 'is by puncturing the shield of sovereignty. Today we accept without argument the idea that state actors responsible for atrocities should have to answer for their conduct in courts of criminal law.'⁵⁶ However, for this to happen, the law had to change its basic assumptions. Traditional criminal law views criminal behaviour as a deviant act harmful to community norms and interests. In this model, the culprit characteristically is an individual, and the state intervenes as the accuser and the agent for enforcing and defending violated norms of community order. The jurisprudence of atrocity begins with the opposite assumption. Here the state is no longer the locus of legality, but rather it is the source of illegality.⁵⁷ Hence, the shield of state sovereignty has to be pierced. Other innovations resulting from this conceptual shift include the establishment of individual accountability of government officials, and the recognition of new crimes such as crimes against humanity and genocide.

For these 'supranational crimes' to take effect, the legal world had to change dramatically. The new crimes (crimes against humanity and genocide) explode the spatio-temporal limitations on prosecution, as they are not governed by prescriptive periods⁵⁸ and can be tried under universal jurisdiction by domestic courts.⁵⁹ Indeed, these changes were needed in the absence of an international judiciary, in order to enable domestic courts to enforce international norms. This in turn has resulted in a radical transformation of criminal procedure, from being concerned mainly with the rights of the accused, to a sustained attempt to facilitate prosecution by protecting the rights of victims.⁶⁰ This victim-centred jurisprudence can make sense only if we understand that these trials revolve around state officials who promote state policies and not with deviant individuals who had to be protected against the centralized coercive powers of the state.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ See H. Arendt, *Eichmann in Jerusalem* (1977), at 262 ('[t]he fundamental problems posed by crimes of this kind . . . [is] that they were, and could only be, committed under a criminal law and by a criminal state.')

⁵⁸ With the Convention on the Non-Applicability of Statutory Limitations GA Res. 2391(XXIII), 26 Nov. 1968, the international legal community agreed that supranational crimes such as crimes against humanity and genocide should be controlled by no prescriptive period: Douglas, *supra* note 54.

⁵⁹ The first recognition of a principle of 'universal jurisdiction' (that is, jurisdiction conferred exclusively by the nature of the crime) was articulated in the *Eichmann* trial: *Attorney General of the Government of Israel v. Eichmann*, 36 ILR 5 (Dist. Ct. Jerusalem 1961), *aff'd*, 36 ILR 277 (Israel 1962). For further elaboration see Bilsky, 'The Eichmann Trial and the Legacy of Jurisdiction', in S. Benhabib, R.T. Tsao, and P. Verovsek (eds), *Politics in Dark Times: Encounters with Hannah Arendt* (2010), at 198.

⁶⁰ 'They include everything from a protection of the interest that victims have in telling their stories in court, to a relaxation of the norms that conventionally protect the defendant's rights of confrontation, to a recognition of the right of civil intervenors to represent victims groups in the trial process, to the creation of novel devices, such as the victims trust fund, formally incorporated in the statute of the ICC': Douglas, Manuscript, *supra* note 54, at 9.

In light of the profound transformations of the legal landscape, many authors call to recognize a revision of the goals of criminal trials, replacing traditional objectives such as correction, retribution, and deterrence with expressive, didactic purposes such as clarifying the historical truth and building collective memory.⁶¹ It is important to note that modern criminal law had tried to minimize its expressive role, as this had put it in dangerous proximity with 'show trials' and the risk of betraying justice for politics. This was precisely Arendt's criticism of the Israeli prosecution of Eichmann. However, by identifying the unique characteristics and goals of the jurisprudence of atrocity, a new justification for the expressive role of the trial has emerged.

Notwithstanding this shift, there remains a persistent incongruity in the jurisprudence of atrocity between the commitment to individual responsibility and upholding the expressive goals as the main rationale for the trial.⁶² The most convincing argument for the continued insistence on establishing individual liability, notwithstanding the major changes in the legal landscape, can only be explained as stemming from the choice of criminal law as legal tool. Individual responsibility is the heart of criminal liability, based on a strong notion of the autonomy of the individual, which justifies the severe sanction of taking liberty.⁶³ However, it is this very demand that has undermined the ability of criminal law to address the collective aspects and the bureaucratic organization of the crimes.⁶⁴ Jurists have long struggled with this difficulty, and I suggest that only by turning to private law during the 1990s did they find a way to address the involvement of bureaucratic organizations in the crimes of the Holocaust.⁶⁵

⁶¹ Ibid. L. Bilsky, *Transformative Justice: Israeli Identity on Trial* (2004); M. Osiel, *Mass Atrocity, Collective Memory and the Law* (1997); J. Shklar, *Legalism: Law, Morals, and Political Trials* (1964); Koskeniemi, 'Between Impunity and Show Trials', 6 *Max Planck Yrbk UN L* (2002) 1; and Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', 43 *Stanford J Int'l L* (2007) 39.

⁶² Bilsky, 'Judging Bureaucracy', in M. Goldoni and Christopher McCorkindale (eds), *Hannah Arendt and the Law* (2012).

⁶³ For a statement reflecting reverence for the principle of individual culpability by international criminal law see, e.g., *Prosecutor v. Tadic*, Case No. IT-1-A, Appeals Judgment 186 (15 July 1999), in which the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated that: '[t]he basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*).'

⁶⁴ For an early assessment of the law's limitation in relation to bureaucratic organization see Arendt, *supra* note 57, and Arendt, 'Auschwitz on Trial', in J. Kohn (ed.), *Responsibility and Judgment* (2003), at 227. For a recent evaluation of the difficulty see Fletcher, 'The Storrs Lecture: Liberals and Romantics at War: The Problem of Collective Guilt', 111 *Yale LJ* (2002) 1499.

⁶⁵ An alternative route would be to extend criminal liability to corporations under international law. For arguments to this effect see Clapham, 'Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups', 6 *J Int'l Criminal Justice* (2008) 899, and Kremnitzer, 'A Possible Case for Imposing Criminal Liability on Corporations in International Criminal Law', 8 *J Int'l Criminal Justice* (2010) 909. Criminal liability of corporations is well established in common-law jurisdictions, but has recently spread to some civil-law jurisdictions as well: see Weigend, 'Societas delinquere non potest? A German Perspective', 6 *J Int'l Criminal Justice* (2008) 927. However, as I argue in 'Judging Bureaucracy', *supra* note 62, in order for corporate criminal liability to provide an adequate legal response to bureaucratic involvement in atrocity, criminal law's focus on a subjective intent traceable to an individual would have to be abandoned.

B From Criminal to Civil Litigation

As indicated in section 2, since the revival of the ATS in 1980, US courts have gradually agreed to adjudicate atrocity through civil litigation. Most of the literature on international criminal law ignores this development, presumably because of its civil character. Nonetheless, in recent years a number of scholars have argued that ATS litigation should be seen as the American version, or 'translation' of the principle of accountability for human rights abuses in international law, due to the general American preference for civil remedies and features of the American civil justice system which makes civil litigation attractive to plaintiffs.⁶⁶ These authors suggest viewing ATS litigation as part of the development identified by Harold Koh as 'transnational law', characterized by the 'coupling of a substantive notion of individual and state responsibility – with a familiar process – adjudication – and a normative goal – the promotion of universal norms of international conduct'.⁶⁷ This allows domestic courts (both civil and criminal) to act as agents in the enforcement of international norms.

THL had to overcome formidable limitations of time and place. In the United States, the ATS, by granting jurisdiction to federal courts for violations of human rights wherever committed, creates a universal jurisdiction in the civil sphere. Though the Holocaust restitution actions were not all legally grounded in the ATS, the ATS precedents provided support for the legitimacy of civil litigation for human rights violations which occurred abroad,⁶⁸ based on the same rationale of removal of immunity from liability under international law. However, unlike ATS litigation, in the restitution actions, the international law aspect of the civil litigation was perhaps more difficult for observers to identify, given that the domestic law doctrines of restitution and tort law were invoked.⁶⁹ This, together with the fact that the defendant corporations had entered or were attempting to enter the US market (thus obviating the need expressly to rely on universal jurisdiction) may have contributed to obscuring the recognition that the Holocaust restitution litigation forms an integral part of transnational litigation. However, in my view, only this realization can explain the US courts' willingness to serve as forum for this type of litigation, as well as the actions' wide public reception, notwithstanding the weakness of the legal claims and the fact that the defendants were European companies sued for acts committed in Europe.⁷⁰

⁶⁶ See Stephens, *supra* note 53, and Fletcher, *supra* note 21.

⁶⁷ Koh, *supra* note 51, at 2372, cited in Stephens, *supra* note 53, at 36.

⁶⁸ See M.J. Bazyler, *Holocaust Justice, The Battle for Restitution in America's Courts* (2003), at 56, for the view that '[b]y the time the Swiss Bank cases were filed, American judges were familiar with the suits being presented to them involving acts committed on foreign soil against foreign defendants. Moreover, they were amenable to finding that U.S. Courts had jurisdiction over such suits when the acts consisted of gross violations of human rights law committed by foreign defendants who were present in the United States.' See also Vagts and Murray, 'Litigating the Nazi Labor Claims: The Path Not Taken', 43 *Harvard Int'l LJ* (2002) 503, at 514.

⁶⁹ *Ibid.*, at 513.

⁷⁰ Indeed, several scholars have noted the weak legal standing of these actions, and expressed doubts as to their serving as precedents for future litigation, precisely for this reason. See, e.g., Neuborne, *supra* note 32, at 74. See also Dubinsky, 'Justice for the Collective: the Limits of the Human Rights Class Action', 102 *Michigan L Rev* (2004) 1152 (arguing that the Holocaust restitution actions' potential to serve as a model of reparation for collective injustice is very limited).

As noted, time limitations were also a substantial obstacle, as the facts had occurred 50 years before the claims were filed. As indicated in section 2, the fact that the defendants were corporations and the focus on restitution claims created the legal bridge in time that allowed the litigation to unfold. Nonetheless, the defendants' lawyers argued that the claims were time-barred.⁷¹ In some of the cases in which judicial determinations were made prior to settlement, the courts held that exceptions to the statutes of limitations applied.⁷² However, in the majority of cases, the time defence was defeated by the settlement of the cases, which helped to avoid the legal determination of this question on the merits.⁷³ Indeed, Michael Bazylar argues that early settlement created a sort of precedent: following the settlement of the claims against the Swiss banks for events originating in the 1930s and 1940s, other actions filed against other corporate defendants were settled.⁷⁴ In my view, had the restitution litigation been viewed by the parties as 'ordinary' civil litigation, the defendants would have felt more confident that they could avoid liability by relying on the statutes of limitations, and therefore would have been less inclined to settle. Thus, only by understanding the restitution litigation in light of the removal of temporal limitations in international criminal law can we find a satisfactory explanation for the US courts' willingness to open their doors to this litigation, find exceptions to the statutes of limitation, and for the defendants seriously to entertain the claims.

Along with the removal of obstacles of place and time, a third parallel between the jurisprudence of atrocity and the Holocaust restitution actions can be found in the improved standing of the victims. As seen above, international criminal law has moved from a focus on the rights of the defendant to a recognition of the rights of the victim. American civil litigation can be seen as providing comparable support for victims as plaintiffs in class actions. There had been attempts in the past to file civil claims for unjust enrichment and tort liability in European courts against firms for their involvement in the Holocaust.⁷⁵ However, these claims were rare and had mostly failed because of the structural problems of civil litigation in Europe. Individual Holocaust survivors claiming relatively small amounts of money would have to face giant corporations benefiting from excellent legal representation and

⁷¹ Bazylar, *supra* note 68, at 27.

⁷² See *Bodner v. Banque Paribas*, 114 F Supp. 2d 117 (EDNY 2000), an ATS suit by descendants of Holocaust victims against a number of French banks for complicity in the expropriation of the victims' funds deposited in the defendant banks during the 1930s and 1940s. The court denied a motion to dismiss on grounds, *inter alia*, of the claims being time-barred by holding that the circumstances of the case (violations of international law) were compelling enough to warrant application of the 'continuing violation exception' to the statute of limitations.

⁷³ On the statute of limitations see Vagts and Murray, *supra* note 68, at 514–517.

⁷⁴ *Supra* note 68, at 54.

⁷⁵ Benjamin Ferencz describes how German compensation legislation failed to address inmates' labour for private firms, and the few private actions brought against the largest industrial firms resulted in paltry settlements. Likewise, requests by Holocaust survivors and their heirs for access to pre-war bank accounts were often denied for failure to meet the banks' documentary requirements, in particular the requirement to produce death certificates: see *supra* note 3. See Eizenstat, *supra* note 16, at 79 and Marrus *supra* note 2, at 11.

other advantages of size. In such a configuration, the claimants did not stand a chance. In this sense, the general recognition of universal jurisdiction, which, as we have seen above, took the form, in the United States, of ATS litigation, was particularly significant for the restitution claimants, as it supported granting them access to US courts. Only in US courts could they rely on the powerful device developed since the 1970s to deal with violations of human rights by large bureaucratic organizations – the class action.

Class actions allow courts to aggregate the claims of large groups of persons and resolve their common disputes in a single proceeding, thereby levelling the playing field between plaintiffs and defendants and allowing even those individuals with small or weak claims to obtain legal redress. Instructive in this respect is the decision in *Bodner v. Banque Paribas*⁷⁶ rejecting a call for dismissal, on *forum non conveniens* grounds, of an ATS suit by descendants of Holocaust victims against a number of French banks for complicity in the expropriation of the victims' funds deposited in the defendant banks during the 1930s and 1940s. The court declared that since the defendants had not established that an equivalent class action mechanism exists under French law that could provide the plaintiffs with similar or appropriate redress, they had failed to show an adequate alternate forum. While class actions are not a standard feature of the transnational litigation brought before US courts under the ATS,⁷⁷ they are certainly unique to the American civil justice system.⁷⁸ In my view, the class action is a crucial feature that enabled American law to deal with accountability of large bureaucracies for human rights violations.

Thus, just as international criminal law overcame the immunity of individual state officials for atrocities, THL abolished the *de facto* immunity of private corporations for the use of slave and forced labour, robbery, and plunder during the Holocaust, in both cases by overcoming the obstacles of time, place, and the weak position of victims in the legal arena.

⁷⁶ *Supra* note 72.

⁷⁷ In their book *International Human Rights Litigation in U.S. Courts* (2008), B. Stephens *et al.* mention the few international human rights cases in which courts certified the class. They recognize the class action's potential for providing redress to large groups of victims and promoting the broader goals of human rights litigation (at 239). However, they also point out the disadvantages of the added legal and logistical complexities, the problems of representation, and the loss of the individual story, the human face to what may otherwise have seemed too remote to attract public attention (at 239–241). See also Bazylar, *supra* note 68, at pp. xii–xiii. On the emergence of hybrid human rights mass tort litigation that merges international law with American class action procedures see Boyd, 'Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level', 1999 *Brigham Young U L Rev* (1999) 1139; Perl, 'Note, Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations', 88 *Georgetown LJ* (2000) 773; and Van Schaack, 'Unfulfilled Promise: The Human Rights Class Action', *U Chicago Legal Forum* (2003) 279.

⁷⁸ Some jurisdictions have adopted limited mechanisms allowing certain organizations to represent large groups of plaintiffs. However, the American variant remains unique. See Rowe Jr., 'Debates Over Group Litigation in Comparative Perspectives: What Can We Learn from Each Other', 11 *Duke J Comp & Int'l L* (2001) 157.

C The Structural Reform Model for Human Rights Violations

In this section I argue that THL should also be read in light of the structural reform model of litigation.⁷⁹ This model abandons the focus on individual liability to tackle the ways that large bureaucratic organizations determine social conditions. By understanding the Holocaust restitution claims as part of the structural reform model – a form of litigation tailored to address the difficulties of prosecuting large bureaucratic organizations – one can see how the restitution actions finally allowed the law to begin addressing the involvement of private bureaucratic organizations in the Holocaust.⁸⁰ Thus, I argue that while the restitution claims could not have taken place without the conceptual changes that were developed in the field of international criminal law (such as the recognition of universal jurisdiction and overcoming time limitations), it is the structural reform model of civil class actions that allowed the restitution actions to shift attention from the individual (human) perpetrator to the organization, and to the unresolved issue of the complicity of private corporations in facilitating systematic and gross violations of human rights during the Holocaust.⁸¹

In his canonical article, ‘The Forms of Justice’,⁸² Fiss turns the attention of legal academia to human rights class actions brought before US courts during the 1960s and 1970s. These actions should be understood as amounting to a shift of paradigm for adjudication, which Fiss calls the structural reform model. Under this model, a fundamental change takes place in relation to party constitution, the role of the judge, and the nature of the remedy sought in court. Fiss attributes the law’s need for the new juridical tool of the class action to the bureaucratic structure of modern human rights violations. He writes:

Structural reform is premised on the notion that the quality of our social life is affected in important ways by the operation of large-scale organizations, not just by individuals acting either beyond or within these organizations. It is also premised on the belief that our constitutional values cannot be fully secured without effectuating basic changes in the structures of these organizations.⁸³

The problem arises out of the lack of legal tools adequately to address human rights violations by bureaucratic organizations, both state and private. The failure of the law stems from the application of individualistic tools of dispute resolution to deal with the conduct of bureaucratic organizations.

Indeed, one of the most important innovations of the structural reform theory involves the issue of individual liability. The ability of the structural reform model

⁷⁹ Koh has suggested viewing *Filártiga* as the *Brown v. Board of Education* of transnational law litigation: *supra* note 51, at 2366. See also Stephens, *supra* note 53. No such landmark case has yet been identified in the realm of corporate liability for complicity in human rights violations. See Bush, *supra* note 4, at 1099.

⁸⁰ See *supra* nn. 3–4.

⁸¹ While lawyers attempted to find the legal tools to deal with corporate complicity in the Holocaust, historians developed their own theoretical tools to address the issue. See G.D. Feldman and W. Seibel (eds), *Networks of Nazi Persecution: Bureaucracy, Business and the Organization of the Holocaust* (2005).

⁸² Fiss, *supra* note 5.

⁸³ *Ibid.*, at 2. For an earlier analysis of the failure of law to develop adequate tools to respond to the unique character of bureaucratic organizations see C.D. Stone, *Where the Law Ends: The Social Control of Corporate Behavior* (1975).

to overcome the law's systemic failure in relation to the bureaucratic organization is dependent upon its willingness to abandon a cornerstone of civil litigation – the principle of individual liability. It is here that we can see why the Holocaust restitution actions can be read as fitting the structural reform model – because of the model's capacity to turn attention away from the individual manager to address the responsibility of the organization. Here we also see an important way in which the civil road diverges from the criminal road of Holocaust trials, precisely by removing the obstacle of proving individual liability.⁸⁴

The structural reform model aims to change the grammar of civil litigation so as to equip the law with sufficient tools to encounter these organizations. As explained by Fiss, the *role of the judge* is no longer limited to private dispute resolution but is rather to 'give concrete meaning and application to our constitutional values'.⁸⁵ We identified a similar development in the jurisprudence of atrocity with the growing recognition of the didactic role of trials. In order to facilitate this broader role for private litigation in relation to the articulation of public norms, the class action introduces a change in the party structure by shifting *from the individual to the group*.⁸⁶ As indicated above, by creating a class out of individual plaintiffs, the class action levels the legal playing field and puts victims of human rights violation in the centre of the litigation. Here again, this development is comparable to developments in international criminal law, which increasingly protects rights of victims in criminal trials.⁸⁷ More fundamentally, the structural reform action changes our understanding of the proper *remedy*. Instead of identifying a past wrong to be compensated for, the action aims to reform an ongoing violation by way of injunction. Fiss stresses that the goal of the structural remedy is not to compensate for a violation, but rather to remove the threat posed by an organization to the constitutional values. With this new remedy in mind, we witness a fundamental change in the role of the judge in the Anglo-American adversarial legal system. Instead of the judge as umpire, detached and passive, the judge in the structural reform actions is involved and proactive. The judge, in other words, becomes himself a bureaucratic judge, one who manages the reform and monitors its implementation.⁸⁸

⁸⁴ See *supra* nn. 3–4.

⁸⁵ *Supra* note 5, at 9.

⁸⁶ The dispute resolution model strictly honours the rights of each affected individual to participate in the process, and thus stresses the importance of the individual. This, however, leaves the individual without institutional support. The structural reform model reconstructs the party structure of an action, making it less individualistic and more group oriented: I.P. Stotzky (ed. with commentary), *Law as Justice: The Moral Imperative of Owen Fiss's Scholarship* (2009), at 111.

⁸⁷ With respect to the victim's standing in the criminal trial, one should distinguish giving the victims a 'voice' from granting them control of the proceedings: see G.P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (1995). International criminal law principally strengthened the former. In contrast, the class action may be seen as strengthening the latter, as victims and their counsel (not the state or an international body) initiate and litigate the claim. However, the literature on class actions has revealed agency problems (see, e.g., Coffee Jr., 'Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation', 100 *Columbia L Rev* (2000) 370), which various mechanisms used by the courts seek to resolve. These problems were reflected in the restitution actions, which were criticized for enriching the lawyers at the expense of victims. See Bazylar, *supra* note 68, at 92–95.

⁸⁸ See Resnik, 'Managerial Judges', 96 *Harvard L Rev* (1982–1983) 374. See also P.H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (1983), at 147–181.

THL fits well the model of structural reform action, as it possesses the following characteristics: (1) bureaucratic defendants (large banks, insurance companies, and business firms) allegedly responsible for human rights violations;⁸⁹ (2) the related absence of focus on individual responsibility;⁹⁰ (3) a large group of survivors-plaintiffs aggregating in class actions; and (4) managerial, proactive courts.⁹¹

However, THL differed in one fundamental way from the structural reform model – the remedy sought was not injunction aimed at reforming the corporations but rather monetary compensation.⁹² In fact, injunction would have made no sense 50 years after the event. Furthermore, settlement seems to stand in tension, if not direct contradiction, with the basic rationale of both the international criminal law of atrocity (stressing the expressive function of the trials), and the human rights class actions (viewing the structural reform of the organization as their main goal).⁹³ I therefore believe that the preference for monetary settlement presents the most important challenge to explaining the contribution of the Holocaust restitution actions to the two bodies of legal scholarship discussed so far.

⁸⁹ The three large Swiss banks sued were Crédit Suisse, the Union Bank of Switzerland (UBS), and the Swiss Bank Corporation: Marrus, *supra* note 2, at 12. The defendants in the slave and forced labour actions included such large companies as Siemens, Daimler Benz, Volkswagen, Degussa, Hugo Boss, Bayer, Hoechs, as well as Ford and its German subsidiary: *ibid.*, at 20. Finally, the insurance claims were brought against giant insurers such as Allianz and Generali: *ibid.*, at 22.

⁹⁰ The absence of focus on individual liability derives from the fact that the defendants were legal entities (as opposed to individuals), coupled with the primary focus of the claims on issues of property law (as discussed above, unjust enrichment does not require proof of wrongful intent on the part of any individual within the defendant organizations).

⁹¹ The court's managerial activism is exemplified in particular by Judge Korman of the Brooklyn Federal Court in the Swiss banks litigation who, among other things, initiated the consolidation of the three initial claims, urged the plaintiffs to appoint Burt Neuborne as special counsel to the plaintiffs (Bazylar, *supra* note 68, at 11), is credited with being the architect of the settlement (*ibid.*, at 27), and with overseeing the process of distribution (*ibid.*, at 38–44). As can be appreciated from the above list, these judicial actions are more administrative than adjudicative.

⁹² In this aspect they were closer to ATS litigation, in which compensation is always the sought remedy. However, besides the restitution of bank accounts which operated according to a very individualized procedure, the compensation paid in THL did not reflect the calculation of the salary of a specific employee, or even a specific company's profits. Rather, the claims were aimed at entire industries, and related to the general, gross amounts which the companies had failed to transfer to the victims in what has been termed by Eizenstat 'rough justice' (*supra* note 16, at 137 and 353). Thus, besides the bank accounts, the process of distribution was not guided by the principle of making the plaintiff whole, but by principles of distributive justice and relative need (see *supra* note 46). For a description of the distribution of the settlement against the Swiss banks see www.swissbankclaims.com/ (last accessed 29 April 2012).

⁹³ Fiss, one of the promoters of the structural reform actions, argues emphatically that there is no room for settlement in this sort of action, since settlement undermines their central objective: the promotion and interpretation of constitutional norms: Fiss, 'Against Settlement', 93 *Yale LJ* (1983) 1073. According to Fiss, settlements frequently achieve peace but not justice, due to factors such as the coercion of consent, the failure of the process to aspire to free itself from distributional inequalities, the lack of a basis for continued judicial involvement in the restructuring of bureaucratic organizations, and the failure of courts authoritatively to interpret the constitutional values.

D Against Settlement?

The emphasis on settlement paradigmatic of the dispute-resolution function of adjudication appears to send us back to the more limited objective of private litigation, and thereby to undermine the rationales of both structural reform litigation and the international criminal law of atrocity. Fiss vehemently rejects settlement as a tool for the structural reform action as it undermines the judge's role of interpreting and promoting constitutional values.⁹⁴ In contrast, the main expectation from the courts in THL was to facilitate monetary settlement. Moreover, the multi-party negotiations supported by the relevant governments have been interpreted as constituting the 'real' process.⁹⁵ Do these departures from the structural reform paradigm and the expressive aims of the jurisprudence of atrocity justify the sharp criticism pointed at the restitution claims? Can THL be justified despite its rejection of the 'expressive role' of the court? I wish to argue that, while in absolute terms questions can be raised as to the justice achieved in the restitution actions, the transnational character of the claims and the time elapsed since the facts of the cases occurred, as well as the fact that the defendants were corporations, actually make settlement more appropriate than adjudication to address the bureaucratic aspects of the Holocaust.

First, the questionable legitimacy of the American courts in judging the Holocaust makes it preferable to avoid substantive law decisions emanating from those courts. Secondly, it seems obvious that so many years after the acts, and in a completely different political regime, there would be no sense in reforming the structure of the defendant corporations. Indeed, given the formidable legal obstacles standing in the way of the restitution claims, it seems that the settlements allowed a more substantive justice to be achieved.⁹⁶ Moreover, I advance the claim that the monetary remedies obtained by the plaintiffs were actually well suited to the bureaucratic dynamic. Indeed, while the unprecedented sums paid in settlement made particularly salient the goal of reparation, the actions did bring about a certain reform of the corporate culture of the defendants. As noted above, the defendant Swiss banks agreed to extensive audits and German corporations established historical committees and opened their archives to historians. These activities are certainly focused on the past, but they represent a significant shift in the European understanding of the stance of the corporation in the face of human rights abuses. Moreover, some claims against European banks also

⁹⁴ *Ibid.*

⁹⁵ Eizenstat, *supra* note 16, describes the intense diplomatic engagement, and at 340 writes that '[t]he lawsuits were simply a vehicle for a titanic political struggle'.

⁹⁶ For a recent criticism of Fiss' principled stand against settlement see Issacharoff and Klonoff, 'The Public Value of Settlement', 78 *Fordham L Rev* (2009) 1177, arguing that settlement may be more just than a verdict after trial, given factors relating to the legal system. Indeed, Vagts and Murray favour the settlement of the claims against German corporations for precisely such reasons ('[s]ettlement of the cases was an enormous relief to overburdened American judges and provided the prospect of prompt, if modest, relief to rapidly aging claimants who might not have lived to see their claims litigated to a conclusion'. They oppose the trial road, writing that '[e]ven if some plaintiffs had achieved some victories . . . large numbers of equally grievously injured individuals would have been excluded from sharing the benefits': *supra* note 68, at 504.)

involved accusations of modern-day cover-up of wartime robberies.⁹⁷ These claims, the high amounts demanded and paid, and the public relations damage caused led defendants to realize that history has to be dealt with and that the operation of companies can no longer be guided by profits alone.

Furthermore, it can be argued that monetary payments are an appropriate sanction for bureaucratic misconduct. The imposition of financial sanctions is a fitting way to make corporations internalize responsibility, by ‘speaking the language’ that firms understand. The important point is that through THL corporate immunity for complicity in the Holocaust was removed.

In a broader sense, money is also a fitting remedy for addressing bureaucratic responsibility, whether corporate or governmental, because of its liquidity. Bureaucratic crimes involve complicity between various bodies and are characterized by a multiplicity of actors. The imposition of a monetary, liquid sanction allows for the sharing of the burden of liability.⁹⁸ Thus, in Germany, the state contributed 50 per cent of the German companies’ monetary settlement, while German corporations that were not sued were encouraged to contribute to the foundation voluntarily.⁹⁹ Likewise, in 1997 Switzerland’s central bank, together with the defendant banks and a pool of Swiss companies, contributed to the Humanitarian Fund for the Victims of the Holocaust, a fund separate from the fund that ultimately established by settlement.¹⁰⁰ This sharing of liability among bureaucracies reduces the arbitrariness in the choice of defendants for which the claims were criticized. The inter-bureaucracy cooperation and spreading of the financial burden of legal liability reflect the collaboration and sharing of responsibility in the carrying out of the Holocaust. This collaboration was made possible by the monetary character of the remedy, but also by the fact that there was no judgment expressly assigning legal responsibility to the specific defendants in the cases. Thus, settlement provided the conditions of an appropriate response to bureaucratic wrongdoing.

And yet, despite the compensation achieved through settlement, do we not fall into the bureaucratic ‘trap’ by using monetary settlements that abstract and almost eradicate personal fault and blame? Were these proceedings successful in piercing the veil of the organizations, or were they addressing the organizations as such, asserting their abstract overall responsibility without offering us a theory that penetrates the organizational charts of these companies? The law’s difficulty in addressing corporate liability is twofold. First, what is the allocation of responsibility between corporations and the state? To what extent does coercion reduce the corporation’s liability? Secondly, how is responsibility allocated within the corporation? What is the human story behind the abstract bureaucratic liability? Formally speaking, the THL did not

⁹⁷ Marrus, *supra* note 62, at 19.

⁹⁸ Compare to Osiel advocating the imposition of collective civil sanctions, the justness of which is purportedly secured by allowing officers to redistribute the sanction internally so that it is levied in accordance with individual guilt: Osiel, ‘The Banality of Good: Aligning Incentives against Mass Atrocity’, 105 *Columbia L Rev* (2005) 1751, at 1842–1859.

⁹⁹ Eizenstat, *supra* note 16, at 243–260.

¹⁰⁰ *Ibid.*, at 98–99.

provide a satisfactory answer to either of those questions. The German state's contribution to the slave labour settlement fund does not reflect a precise understanding of the complex relationship between state and corporations under the Third Reich. Furthermore, though it contributed to the Humanitarian Fund, the Swiss government adamantly refused to contribute to the settlement and insisted that it was not a party in any way to the THL.¹⁰¹ If THL provided only a rough answer to the question of the relationship between state and corporations, it completely failed to pierce the bureaucratic veil, in the sense of illuminating the dynamic of liability inside the corporation.

It seems that this failure legally to pierce the bureaucratic veil is inevitable. One of the important insights of the structural reform model is that in order to reach bureaucracies, the search for individual liability must be abandoned. However, I would like to suggest that the veil of the organization was pierced by THL outside the legal process, in the organizational history that was produced as a result of the litigation. Historians commissioned by the defendants as a result of the litigation explored the internal dynamics of the corporations, focusing on individual managers and their responsibility for the corporation's acts.¹⁰² Furthermore, as I argue below, it is the very lack of legal decision that laid the ground for the production of these new historical narratives.

4 The Civil Action and Historical Research

The discussion of settlement in the previous section reveals that even as THL reflects elements of both the international criminal law of atrocity and the structural reform model, neither body of law, nor the combination of the two, is a sufficient theoretical prism through which to understand the litigation. In a forthcoming article I elaborate on the contours of the new model which THL has created, and which could be used in litigation unrelated to the Holocaust: a model of transnational structural reform in which courts take on a more facilitative than imperial role in order to deal with areas, such as corporate liability, in which there is yet no international consensus. In this section I now turn to examine one ramification of this new model: the changed role of the court as regards the construction of historical narratives.

Various elements of the American civil action, namely pre-trial discovery, the class action, settlement, and private law's lack of focus on individual intent, made an invaluable contribution to historical research, but in a manner very different from that of criminal law. Whereas criminal law aims to produce a uniform and hegemonic narrative pronounced in the official judgment of the court, the restitution actions seem to forego any attempt to form a 'story'. We have seen that the settlement is the source of historians' critique of the restitution actions.¹⁰³ In my view, this is a misunderstanding, the root of which is the attempt to find the story in the wrong place. The historical story of the Holocaust as it emerges from the restitution litigation is not to

¹⁰¹ Bazylar, *supra* note 68, at 50.

¹⁰² See, e.g., J. Steinberg, *The Deutsche Bank and Its Gold Transactions During the Second World War* (1999) (discussing the personal responsibility of directors of the bank).

¹⁰³ See *supra* note 50 and accompanying text.

be found in the judgment of the court as is customary in criminal trials. The litigation does not shed light on an already known historical narrative about the involvement of the business sector in the Holocaust, but rather plays an active part in facilitating the creation of new narratives.

As part of his criticism of the restitution actions, Marrus pointed out that American civil procedure encourages plaintiffs in restitution cases to distort history in order to plead a strong complaint. However, when understood as a mechanism that forces a process of disclosure of evidence upon giant corporations whose documents had been beyond the reach of the individual survivor for six decades, it can be understood as a distortion perhaps necessary to trigger research. A significant example is the establishment of the Bergier Historical Committee in Switzerland¹⁰⁴ in direct response to the filing of the first action in October 1996.¹⁰⁵ A complex financial investigation of the type conducted by the Bergier Committee requires extensive expertise, time, and financial resources which individual plaintiffs (victims of the Third Reich) lack. The class actions and the pressure they create on defendants also made it possible for the lawyers as well as the judges and mediators acting on behalf of national governments to press defendants to cooperate in disclosing documents and more importantly investigate their own past.¹⁰⁶ For example, in the Swiss Bank litigation, Judge Korman pressured the banks into agreeing to publish information regarding additional dormant accounts.¹⁰⁷

The clarification of history begun with the filing of the actions also continued after the settlement was reached. Indeed, at that point, the entitlements of individual survivors and their families had to be ascertained.¹⁰⁸ Thus, following the settlement of the actions against the Swiss banks, questionnaires were sent to approximately one million survivors and their families, seeking to allow potential class members to express support or opposition to the settlement, as well as to gather information to assist the court in designing a fair scheme of allocation of the settlement funds.¹⁰⁹ In the view of Burt Neuborne, a central reason to bring the cases was ‘to speak to history – to build a

¹⁰⁴ See *supra* note 18.

¹⁰⁵ Eizenstat, *supra* note 16, at 87–88.

¹⁰⁶ Burt Neuborne remarks about the Swiss Banks litigation that ‘[t]he historical data uncovered by the Volcker Committee, the Bergier Committee, and the CRT II process have forever changed the way Switzerland can view its World War II experience’. He also attributes historical importance to the factual material developed in connection with the German slave labour litigation, and the data assembled in connection with allocation. They all ‘forced the recognition of the massive evil at the heart of the Nazi industrial complex’: Neuborne, *supra* note 6, at 830. Historian Gerald Feldman notes that German business closed its archives to independent scholars until the 1990s and the litigation played a major factor in convincing businesses to change their policy, open their archives, and begin a serious and self-critical examination of their involvement with the Third Reich: Feldman, ‘The Historian and Holocaust Restitution: Personal Experiences and Reflections’, 23 *Berkeley J Int’l L* (2005) 347.

¹⁰⁷ Bazzyler, *supra* note 68, at 39–40.

¹⁰⁸ Two special masters were appointed by the court to operate the Claims Resolution Tribunal II in Zurich to distribute the Swiss Banks settlement: see Neuborne, *supra* note 6, at 801.

¹⁰⁹ *Ibid.*, at 795, 827, 828, and 830. Writing in response to the criticism levelled at the questionnaires, Neuborne writes that ‘approximately 580,000 questionnaires were returned, demonstrating overwhelming support for the settlement. Only 300 persons elected to opt out of the class’: *supra* note 6, at 827–828, n.116.

historical record that could never be denied'.¹¹⁰ Thus, in parallel to the opening of the defendants' archives, the actions produced a large and immensely valuable repository of oral history consisting of testimonies by survivors.

Settlement also laid the ground for the production of new historical narratives. Indeed, the lack of adjudication transferred the question of the defendants' responsibility from the legal to the moral level, and encouraged German defendant corporations (and additional corporations) to establish historical committees, open their archives, hire historians to do research and publish their findings, all at a substantial cost.¹¹¹ It is important to remember that these archives were private and would not have been opened if not for the actions, and that the costs involved in researching their contents might be beyond those of individual historians.¹¹² Thus, the absence of a legal determination of liability that avoided the articulation of an official historical narrative laid the ground for the production of narratives produced by a variety of bodies – the parties to the litigation, and historians sponsored by national governments and private corporations.¹¹³

However, the most significant contribution to the historical narrative of the shift of legal paradigms is the fact that at the centre of the litigation stood the story of corporations' involvement and contribution to the Third Reich. Notwithstanding the absence of a principled court decision, the restitution actions brought to the forefront of academic and public attention the question of the responsibility and involvement of 'bystanders' or 'enablers',¹¹⁴ specifically that of business corporations, in the regime of the Third Reich. Furthermore, earlier attempts criminally to prosecute German

¹¹⁰ *Ibid.*, at 830.

¹¹¹ Feldman, *supra* note 106.

¹¹² In this sense the restitution actions constitute another example of the ways in which trials can mobilize resources to collect research material. Indeed, following the Nuremberg, Eichmann, and other criminal trials, historians relied greatly on material exposed in those trials to alter the historical narrative, as, e.g., regarding 'ordinary soldiers': see C.R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (1998).

¹¹³ The restitution actions appear to have created a new model of historical research. Indeed, the formation of historical committees composed of historians from various countries, hired by institutions (governmental or corporate) to investigate their sponsor's involvement in the Holocaust has been reproduced in other contexts, such as in the case of the international committee of historians hired by the German Foreign Ministry in 2005 to investigate the Foreign Ministry's role in the Holocaust: see Friedmann and Wiegrefe, 'Historians Deliver Damning Verdict: Study Highlights German Foreign Ministry's Role in Holocaust', *Der Spiegel*, 25 Oct. 2010.

¹¹⁴ U. Herbert, *Hitler's Foreign Workers: Enforced Foreign Labor in German Under the Third Reich* (trans. W. Templer, 1997); C.R. Browning, *Nazi Policy, Jewish Workers, German Killers* (2000). It has been argued that, ironically, at the time lawyers have increasingly been willing to assign culpability to companies committing human rights violations, historians of big business under the Nazis have turned away from judgmental history, preferring the professional standards of history to those of law. See Bush, *supra* note 4, at n. 32. For this kind of non-judgmental history, Bush refers to P. Hayes, *Industry and Ideology: IG Farben in the Nazi Era* (1987); H. James, *The Deutsche Bank and the Nazi Economic War Against the Jews: The Expropriation of Jewish-Owned Property* (2001); Steinberg, *supra* note 102; S.J. Wiesen, *West German Industry and the Challenge of the Nazi Past, 1945–1955* (2001). I believe, however, that the lawyers themselves have turned away from the criminal law paradigm to civil law and to settlement, which brings the two fields closer together.

industrialists and corporations in trials following Nuremberg encountered significant difficulties due to the criminal law's narrow definition of the intent required to establish liability, which involves independent initiative and choice, and not mere contribution to the commission of the crime.¹¹⁵ In her analysis of the Eichmann trial, Arendt pointed to the difficulties of the traditional criminal trial in dealing with the responsibility of state officials because of the gap between the bureaucratic setting of the crimes of the Holocaust and the classic conception of criminal liability based on individual guilt. In this context, Arendt formulated the expression 'banality of evil'. The attempt to impose criminal liability on individual officers in private corporations encountered additional difficulties as they were further removed from the crimes. To their indirect involvement must be added the obstacle created by classic corporate theory, according to which the sole legitimate motive for corporate actors is the realization of corporate profits.¹¹⁶ In this context, how are corporate entities to behave when their employees have been conscripted into the army and the entire civilian labour market is based to some extent on slave and forced labour? What should insurance companies and banks do when numerous business opportunities present themselves as a result of the persecution of Jewish citizens by the state? And what is the responsibility of corporations that just 'do business' with a criminal regime? It is very difficult for the criminal law to deal with questions such as these, and not only because of the 'banal' motives behind such behaviour, but principally because they do not concern exceptional cases but rather entire industries and sectors of the economy.¹¹⁷ The first legal attempt to examine corporate and business involvement in international crimes led to the subsequent trials at Nuremberg of industrialists, with very limited success.¹¹⁸ Further attempts to deal with the reversal between the general case and the exception in connection with the system of concentration camps, as in the case of the Auschwitz-Frankfurt trials, clearly failed, as the law ended up focusing on the individual deviant and sadistic perpetrators, and was unable to derive liability from the simple fact of serving as an employee in a concentration camp. In contrast, the shift to the civil paradigm induced by THL not only created tools to deal with giant corporate entities, but also allowed the law to release itself from the strictures of criminal law to move from the individual to the responsibility of the bureaucratic entity as such.¹¹⁹ The new focus led to a

¹¹⁵ See *supra* note 3.

¹¹⁶ Schuck, *supra* note 88.

¹¹⁷ Burchard, 'Ancillary and Neutral Business Contribution to "Corporate-Political Core Crimes"', 8 *J Int'l Criminal Justice* (2010) 919.

¹¹⁸ These are the 'economic cases' including the *Flick* case (*USA v. Friedrich Flick et al.*, 6 Trials of War Criminals before Nuremberg Military Tribunals under Control Council Law No. 10 (TWC), Washington: US Government Printing Office, 1952); the *IG Farben* Case (*USA v. Krauch et al.*, 8 TWC, Washington: US Government Printing Office, 1952); the *Krupp* case (*USA v. Alfred Krupp et al.*, 9 TWC, Washington: US Government Printing Office, 1950). See *supra* note 3.

¹¹⁹ Sturman, 'Germany's Reexamination of Its Past through the Lens of the Holocaust Litigation', in Bazylar and Alford (eds), *supra* note 8, at 215, 216; '[t]he class action brought to the fore that the participation or, at least, the acquiescence of "ordinary" Germans . . . was an integral element of the operation of the Third Reich . . . successor generation inheritance was derived at least in part from profits accrued through the use of slave labor and Aryanization'.

proliferation of historical research on the subject internationally,¹²⁰ and made public the new historians' debate about the role of business in the Holocaust.¹²¹

5 Conclusion

Kafka, in his short story, 'Before the Law', captures the dilemma which appears also to be present in the Holocaust restitution litigation. A person who wants to reach the law waits his entire life before the law's gates. As he nears his death, ill and feeble, he asks the gatekeeper why he has not seen anyone else come to the law. The gatekeeper answers that the gate at which he has been waiting was assigned to him only, but is now being closed. One can think in the same manner of the ongoing attempt to bring the Holocaust before the law since the end of World War II. After six decades, it seems that the legal key, in the form of the American class action, has been found to deal with mass bureaucratic human rights violations by European corporations which until then had been immune from responsibility for their acts. When American courts open their doors to Holocaust survivors and other victims of the Third Reich, old and feeble, the settlement signed by the lawyers seems to close the gates of law again, leaving us without a principled court decision. This seems to be the prevailing view among the critics of the Holocaust restitution litigation. In this article, I have attempted to offer an alternative reading of the restitution litigation and to point to the new possibilities it provides. Instead of a 'lesson', the law offers a process which creates incentives to those directly involved in the litigation, as well as increasingly large sections of civil society, to respond and take responsibility in relation to the victims' claims.

¹²⁰ Goschler, 'Die Enteignung der Juden und die Europäisierung des Holocaust', in H. Berghoff, J. Kocka, and D. Ziegler (eds), *Wirtschaft im Zeitalter der Extreme. Beiträge zur Unternehmensgeschichte Deutschlands und Österreichs* (2010), at 337 (in German); D. Diner and G. Wunberg (eds), *Restitution and Memory, Material Restoration in Europe* (2007).

¹²¹ See *supra* note 114.

