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## **Book Reviews**

### **Title**

Michael Bazyler's Holocaust Justice

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Michael Bazylar's account of the recent Holocaust restitution campaign tells a fascinating story of Nazi victims' legal battle for justice in American courts. It indeed represents an amazing example of how concerted efforts of lawyers, human rights advocates, non-governmental organizations, the media, and authorities succeeded in compelling some of the world's most powerful corporations to face up to the consequences of their past wrongdoing. The author not only presents an instructive analysis of legal aspects of this campaign but also places the striving for belated reparation in a bigger picture of human rights advocacy. The true heroes of his narrative are the United States' justice system, which provides for a number of unique legal instruments, and the group of lawyers who were willing to take the risk of filing suits in an area without major precedents. Michael Bazylar interprets the successful resolution of Holocaust restitution claims as a landmark in establishing accountability for past wrongdoing and extending universal jurisdiction to the corporate realm.

In my comment, I would like to concentrate on this assessment and raise the question about the historical significance of the most recent reparation campaign for amending past injustice in general. I will therefore focus on some of its historical circumstances, ask how it affected our understanding of moral and political obligations associated with the Nazi past and what implications its successful resolution has for future human rights campaigns.

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In the first chapter of his book, Michael Bazylar convincingly argues that the endorsement of universal jurisdiction by the American justice system was the most important condition for the settlement of the restitution claims. Universal jurisdiction allows victims of human rights violations to file suits in U.S. courts, even if their charges concern events and individuals with no direct relation to this country. It was first recognized in a court decision of

1980 and has since been discussed widely in human rights literature.<sup>1</sup> Universal jurisdiction thus would have permitted Holocaust survivors to file suits since the early 1980s.

Nonetheless, more than a decade passed before lawyers and victims organizations actually made use of this opportunity.

In the literature, a number of reasons are cited to explain such a delay in justice for Nazi victims. A frequently mentioned argument refers to European reluctance to tackle mythical memories that obscured cooperation with the Third Reich and complicity in Nazi crimes. The unavoidable backlashes of the recent restitution campaign indeed tend to confirm this interpretation: All over Europe, considerable portions of the public reacted to accusations of neglecting Holocaust victims rights with reluctance and invigorated patriotic representations of the wartime era that emphasize national suffering and resistance. In some countries, particularly in Switzerland, public responses also unveiled a shocking extent of previously covert anti-Semitism. The orchestration of the campaign furthermore entrenched many Europeans in their wariness of American legal and political culture. In the short run, the feeling of being lectured and patronized bred defiance to a re-assessment of historical interpretations and even strengthened the national-conservative Right in countries where the restitution issue challenged notions of collective memory and national identity.

But these ramifications point at aspects of a more complex history of dealing with Nazi legacies in Europe. All European countries indeed embarked on the construction of myths regarding their behavior in the Nazi era. But as research shows, such collective memories are far less unambiguous and encompassing as generally assumed. Rather, there are different representations of the past competing for the moral authority of accurate interpretation, and the meaning of prevailing and officially endorsed images often is erratic and contingent on political needs of the day. Moreover, representations of the wartime era have long been an issue of public controversies in most European countries. As a general

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<sup>1</sup> See for example Anne-Marie Burley, "The Alien Tort Statute and the Judiciary Act of 1889: A Badge of Honor" *The American Journal of International Law* 83/3 (1989): 461-493.

trend, this dates back to the late 1960s and early 1970s when canonized images of the past first came under fire. The meanwhile legendary Vichy syndrome in France was triggered in the early 1970s by films and publications that exposed French involvement in the Holocaust under Maréchal Pétain's collaborationist regime.<sup>2</sup> Since then, the public obsession with the memory of Vichy has loomed large. Criminal trials and scandals over the checkered past of prominent politicians or unresolved restitution issues repeatedly sparked controversies in the 1980s and 1990s. Even in Switzerland—which is generally considered most entrenched in mythical memories—the Nazi era has been an issue of contention since the early 1970s. The anti-Semitic nature of the wartime refugee policy, for instance, was first disclosed in the 1950s. The larger public later learned about it through popular publications and films. Research of the 1970s and 1980s also exposed political accommodation and economic collaboration with the Third Reich as well as the financial services rendered to the Nazis during the war, including the infamous gold transactions.<sup>3</sup>

Hence the problem is not so much that Europeans refused to face up to their past. On the contrary, they even might have been too preoccupied with the deconstruction of wartime memories, though in a narcissistic way. The bigger problem rather lies with the fact that such grappling with the Nazi era was determined by national parameters and framed through the binary terms of resistance and collaboration. This, for instance, obscured the more complex political and economic interdependencies that surpassed territorial borders; it also excluded questions about the responsibility towards Nazi victims.

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<sup>2</sup> See the classic Henry Rousso, *Le syndrome Vichy* (Paris: Editions de Seuil, 1987), also: Richard J. Golsan, *Vichy's Afterlife. History and Counterhistory in Postwar France* (Lincoln: University of Nebraska Press, 2000).

<sup>3</sup> Independent Commission of Experts, *Switzerland, National Socialism and the Second World War* (Zurich: Pendo, 2002), see also its previous report in refugee policy: *Switzerland and Refugees in the Nazi Era* (Berne: EDMZ, 1999)

That postwar reparations to Nazi victims have remained a largely unfinished business has a number of historical reasons. First, the Allies failed to agree on common standards that would have set a powerful precedent in international law, comparable to the legal legacy of the Nuremberg trials where concerted efforts of the victorious powers succeeded in establishing principles of international accountability for state crime perpetrators. Second, with the beginning of the cold war, Allied priorities rapidly shifted. The economic recovery and political integration of West Germany dominated the western agenda. In the shadow of anticommunism, countries could easily evade their international obligations—as it happened in the case of Switzerland or Portugal. Even the U.S. government, traditionally the strongest supporter of reparations for individual survivors, was willing to sacrifice victims rights to other political goals. The London Debt agreement of 1953, which basically ruled the repayment of German debts in order to re-establish the Federal Republic’s international credit, turned out to be one of the most decisive documents of international reparation politics.<sup>4</sup> It deferred all German obligations arising from the wartime era to future peace negotiations. This also included the compensation of slave labor and allowed German courts to dismiss survivors’ claims against German corporations—an issue that only reached its resolution in 2000 with the German foundation “Remembrance, Responsibility, Future”.

During the cold war, reparation politics were largely paralyzed because of this patchy legal framework. The demise of the Soviet empire was therefore crucial for making an international restitution campaign possible. Wartime memories no longer served as a political metaphor with regard to perceived Soviet threats. The fall of communism hence freed political discourses from the cold war’s ideological grip. In addition, the undoing of

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<sup>4</sup> See, for example, U.S. Depart. of State, *U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II* (Washington, D.C., 1997), U.S. Dept. of State, *U.S. and Allied Wartime and Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury* (Washington, D.C., 1998), Ulrich Herbert, “Zwangsarbeiter im ‘Dritten Reich’ und das Problem der Entschädigung,” in *Die politische Ökonomie des Holocaust. Zur wirtschaftlichen Logik von Verfolgung und „Wiedergutmachung“* (Munich: R. Oldenbourg Verlag, 2001), 220-224.

collectivization in Eastern Europe uncovered many problems that dated back to the Nazi expropriation of the Jews and triggered activity on the part of Jewish organizations. Finally, human rights advocacy, including reparation politics, came to replace the traditional emphasis on redistribution and social justice in the liberal agenda.

Globalization produced new conditions for international investment in the 1990s. Multinational corporations rushed to claim their share on the booming U.S. market, particularly in the second half of the decade when stock prices were soaring at an unprecedented speed. Strong competition fostered mergers that often required approval of national regulators. This made European corporations susceptible to any kind of political pressure in the United States.

The conjuncture of these factors opened a window of opportunity for survivors and their lawyers to take on the corporate world. In order to protect their position on the international market, many large corporations were willing to concede to political pressure and strike settlements rather than suffer damage to their reputation. They realized that Nazi legacies had become an issue fraught with high emotions in the western public. I therefore consider the amazing success of the Holocaust restitution movement largely determined by this unique constellation in the late 1990s. This leads us to the questions about its significance for today's interpretations of liabilities arising from the Nazi legacies and for future human rights advocacy.

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As Michael Bazylar shows, the result of the Holocaust related litigation often failed to meet the victims' expectation of a proper accounting, and it is highly ambiguous with regard to the assumption of responsibility by states and corporations. Very generally speaking, it produced two different patterns. On the one hand, we have the German case where the

government was involved in negotiations over the compensation claims of former slave laborers against German corporations. Litigation led to a settlement that was officially recognized by the German and the U.S. governments and included, for German business, a guarantee of legal peace in the United States. In concrete terms, this means a closure for German companies that no longer have to fear Nazi era litigation in American courts. The settlement also implied that taxpayers picked up most of the tab because the more or less voluntary contributions to the slave labor settlement of German businesses fell far behind the expectations.

The Swiss settlement, on the other hand, represents a quite different pattern. The lump-sum payment of \$1.25 billion by the two major private banks not only covered the liabilities of other economic sectors but it also relieved the state of its obligations. The Swiss government avoided taking part in the negotiations, and instead provided for a broad historical examination of business practices, financial activities, and humanitarian policies in the Nazi era to be accomplished by an independent commission of international scholars.

Unsurprisingly, these patterns reflect general tendencies of dealing with Holocaust legacies in both countries. In the early 1950s, the West German government had principally assumed legal responsibility for the Nazi crimes. But it limited reparations to a small circle of Nazi victims. Over the years, legislation made a number of previously excluded victim categories eligible for compensation payments. Yet such improvements were regularly accompanied by the proclamation of a final closure in reparation politics. Moreover, legislation transformed private claims into matters of public law, and such official assumption of responsibility shielded German companies from litigation.<sup>5</sup> From this perspective, the slave labor settlement represents continuity, rather than a change in the German tradition of

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<sup>5</sup> For a general overview on German reparation politics see Hans Günther Hockerts, "Wiedergutmachung in Deutschland 1945-2000. Eine historische Bilanz," *Vierteljahresschrift für Zeitgeschichte* 49, no.2 (2001): 167-214, Christian Pross, *Paying for the Past. The Struggle over Reparations for Surviving Victims of the Nazi Terror* (Baltimore: The Johns Hopkins University Press, 1998).

handling Nazi legacies: As in previous cases, private business did not have to embrace its liabilities but could rely on the government's resolution of the problem.

In the case of Switzerland, the bank settlement conversely permitted the state to evade legal responsibility. A recent Supreme Court decision has exposed this in an exemplary way. At the height of the dormant accounts' crisis, a Jewish Auschwitz survivor demanded reparation from the Swiss government for having been denied asylum in the fall of 1943. What made his case particularly shocking was the fact that the Swiss border police handed him over to the Germans and revealed his Jewish identity. In the eyes of the plaintiff, this represented a clear case of complicity in genocide and hence established state responsibility. The court decision, however, dismissed the complaint and argued that the Swiss bank settlement had already covered questions of state responsibility that arose from wartime refugee policy.

This formula was in line with Switzerland's political and legal dealing with Nazi legacies. The official refusal to assume state responsibility has a long tradition and lies at the core of unresolved restitution issues. During and after the Nazi era, the federal government avoided the regulation of business practices, turned a blind eye on illicit activities of private companies, and quickly discarded international obligations in reparation politics when Allied pressure diminished with the beginning of the cold war. To a large extent, this is a consequence of structural determinants, predominantly the federal government's weakness and subsequent exposure to the lobbying of the powerful banking industry and other sectors of Switzerland's largely export oriented economy.<sup>6</sup> And it has the result that the country's foreign policy is mostly run by vested interests. The government's absence in the settlement negotiations mirrors this political constellation, but also indicates the political establishment's reluctance to challenge the strong position of multinational corporations.

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<sup>6</sup> Independent Commission of Experts, *Switzerland, National Socialism and the Second World War* (Zurich: Pendo, 2002).



If we were to draw conclusions from these patterns of establishing accountability, the outcome of the Holocaust restitution campaign remains rather disappointing, even as it has forced European societies to face up to legacies of the Nazi era again. But its resolution has barely contributed to a new understanding of either corporate accountability or state responsibility. For a number of reasons, therefore, it remains questionable whether the success of the Holocaust related litigation can qualify as a precedent for future human rights advocacy. First, the recent campaign is embedded in a fairly long history of Holocaust related reparation politics and mainly addressed issues that had not been tackled over the decades since the end of the Second World War. Second, the circumstances of its emergence in the 1990s were quite unique and consisted in a conjuncture of various factors, such as the changing global order, the attractiveness of U.S. markets for multinational corporations, and the shifting meaning of the Holocaust which sensitized the public in particular for the suffering of Nazi victims. Third, the recent Holocaust restitution campaign owed part of its success to the unrelenting efforts of U.S. government officials. The current administration's endeavors, however, point in a different direction. Its call for tort reform favors big corporations and tends to curb the rights of victims in class action suits. Its stance on international law indicates a general backlash in human rights enforcement. The justice department is also trying to impose restrictions on the courts' endorsement of universal jurisdiction in various human rights cases.<sup>7</sup> These trends undermine the unique features of the U.S. justice system and pose serious challenges to human rights advocacy. They unfortunately make the success of Holocaust related litigation appear more of an exception than an example and, for the future, raise the question of what alternative routes can be found to hold governments and multinational corporations accountable for their human rights records.

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<sup>7</sup> See, for example, Adam Liptak, "U.S. Courts' Role in Foreign Feuds Comes Under Fire," *The New York Times* (National Edition), August 3, 2003; Adam Liptak, "Short in the Arm for Tort Overhaul," *The New York Times* (National Edition), November 17, 2002.

