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In Re Holocaust Victms' Assets Litigation: Do the U.S. Courts Have Jurisdiction Over the Lawsuits Filed by Holocaust Survivors Against the Swiss Banks?

Stephanie A. Bilenker

COMMENTS

IN RE HOLOCAUST VICTIMS' ASSETS LITIGATION: DO THE U.S. COURTS HAVE JURISDICTION OVER THE LAWSUITS FILED BY HOLOCAUST SURVIVORS AGAINST THE SWISS BANKS?

I. INTRODUCTION

Jacob Friedman remembers making seven different trips from Romania to Switzerland between 1937 and 1938 to deposit his father's money into various bank accounts at three Swiss banks. The trips he took were extremely risky because, at the time, it was illegal for Romanian citizens to hold foreign accounts. Jacob Friedman's parents perished in Auschwitz in 1944. In the early 1970s, Jacob Friedman sent an acquaintance to Zurich to inquire about the money in his father's accounts. Bank officials at the Union Bank of Switzerland and the Swiss Bank Corporation told the envoy that they could not identify the Friedman accounts without an account number. In 1996, Senate Banking Chairman Alfonse D'Amato and Jacob Friedman's son, Robert, made similar inquiries on Jacob Friedman's behalf at the Union Bank of Switzerland and the Swiss Bank Corporation, yet received the same reply.

This story is representative of that of thousands of Holocaust survivors and their heirs who are the rightful owners of Swiss bank accounts yet have not been able to retrieve their money because they do not have sufficient documentation. In many cases, family members do not even know in which bank their relatives or a representative for their families deposited their assets. In response to Swiss authorities' unwillingness to return assets, thousands of Holocaust survivors, through two class action suits, have turned to the U.S. courts for relief.

In October 1996, two lawsuits were filed in U.S. District Court for the Eastern District of New York on behalf of all Holocaust survivors who have been unable to retrieve their families' assets in Swiss bank ac-

counts.[1] In one suit, Friedman, along with four other named plaintiffs, is suing Union Bank of Switzerland, Swiss Bank Corporation and Credit Suisse, for an amount to be determined at trial. The Friedman complaint alleges that Swiss banks have withheld Jewish assets deposited prior to and during World War II, laundered Nazi regime money, accepted looted or cloaked assets stolen by the Nazis, accepted profits from Nazi Regime forced slave laborers and participated in a conspiracy to conceal and prevent the recovery of these assets.[2] In the second suit, Holocaust survivor Gizella Weisshaus and three other named plaintiffs, also suing for an amount to be determined at trial, are alleging that the defendant banks concealed and converted assets deposited in accounts prior to 1946 and profited from the looting of personal property by the Nazi Regime between 1933 and 1945.[3] Both complaints ask the defendant banks to disclose all looted assets and accounts that existed between 1933 and 1946 and have been dormant since 1946. Friedman's complaint also asks for a disgorgement of all profits from slave labor held by the Swiss banks, alleging that German companies, such as IG Farben, Krupp and Volkswagen, used concentration camp workers as slave laborers and deposited the slave labor profits into Swiss bank accounts.[4]

A third lawsuit was filed in January 1997 by the World Council of Orthodox Jewish Communities, Inc. against the same three banks.[5] This class consists mainly of Satmar Hasidic Jews who believe that the Orthodox were not sufficiently represented in the other two class actions.[6] All three suits were consolidated for discovery purposes.[7]

The threat of litigation has forced the Swiss to respond to the allegations outside the courtroom. On February 5, 1997, Union Bank of Switzerland, Swiss Bank Corporation and Credit Suisse announced that

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1. Friedman v. Union Bank of Switzerland, No. 96-5161 (E.D.N.Y. filed Oct. 21, 1996) (Friedman complaint); Weisshaus v. Union Bank of Switzerland No. 96-4849 (E.D.N.Y. amended complaint filed Jan. 24, 1997) (Weisshaus complaint).

2. *Friedman*, No. 96-5161, at 1. *Friedman* originally named the Swiss Bankers Association as a non-Defendant, co-conspirator. *Friedman*, No. 96-5161, at 19. *See also infra* note 32.

3. *Weisshaus*, No. 96-4849, at 1. *Weisshaus* named the Swiss Bankers Association as a Defendant. *Weisshaus*, No. 96-4849, at 5.

4. *Friedman*, No. 96-5161, at 49-57.

5. *See Jewish Group Files Class Action Naming Swiss Banks*, REUTERS FIN. SERVICE, Jan. 31, 1997, *available in* LEXIS, World Library, CURNWS File.

6. *See Haredi Group Issues Summons to WJRO over Holocaust Assets*, JERUSALEM POST, Apr. 13, 1997, at 12.

7. Weisshaus v. Union Bank of Switzerland, No. 96-5161 (E.D.N.Y. amended complaint filed July 30, 1997) (consolidated with CV-96-4849 and CV 97-461; all three complaints pending under Master Docket No. CV-96-4849) (consolidated complaint).

they planned to open an account containing $68.9 million as a fund for Holocaust survivors.[8] The Swiss government plans to match the contribution of the banks and other Swiss businesses and organizations that have already contributed more than 50 million francs. In response to harsh international criticism surrounding Switzerland's wartime role, the Swiss government proposed, on March 6, 1997, the creation in two years' time of a humanitarian fund containing $4.7 billion.[9] And on July 23, 1997, Switzerland's major banks published a list of 1756 names of owners of dormant World War II-era accounts, a number of which belonged to Holocaust victims.[10] The list appeared in various international newspapers and was posted on the Internet.[11] A second list of 14,445 account holders, including accounts opened by Swiss citizens on behalf of people who wanted to conceal their identities, was published on October 29, 1997.[12]

Inside the courtroom, the banks filed several motions to dismiss the class action litigation in May 1997, primarily arguing that the discovery process would impede the efforts of a commission, headed by former Federal Reserve Chairman Paul Volcker, which is currently investigating the disposition of these World War II-era accounts.[13] The banks argued that the suit would deter Swiss bankers from releasing relevant documents.[14] Some sources speculate that the banks published the list of account holders a few days before the motion to dismiss hearing in the two lawsuits to divert attention away from the suits.[15]

Judge Edward R. Korman heard oral arguments on the banks' motion to dismiss on July 31, 1997. He had not yet issued a ruling when this Comment went to press. Judge Korman's questions and remarks during the hearing, however, indicated that he would allow parts of the suit to proceed. Given that the motion is still pending, the reader hopefully

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8. *See* Margaret Studer, *Swiss Plan Additional $4.7 Billion Fund In Response to Criticism of Its War Role*, WALL ST. J., Mar. 6, 1997, at A10.

9. *Id.*

10. *See* Alan Cowell, *Swiss Bank Reports Finding $11 Million More in Unclaimed Accounts from Wartime*, N.Y. TIMES, July 24, 1997, at A10.

11. *Id.*

12. *See* John M. Goshko, *'Will Money Make Up for Suffering?'; Swiss List of WWII Accounts Opens Doors to Hope, Uncertainty*, WASH. POST, July 26, 1997, at A1; *See also* Greg Steinmetz, *Skepticism Greets Swiss Banks' Release of Further Lists of Dormant Accounts*, WALL ST. J., Oct. 30, 1997, at A18. Advocates for Holocaust survivors criticize the lists because the banks witheld information on 63,000 accounts each containing less than $70. *Id.* According to these adovocates, even small accounts could provide information crucial to the investigation. *Id.*

13. *See* David Rohde, *Judge Weighs Fate of Suit Filed By Jews Against Swiss*, N.Y. TIMES, Aug. 1, 1997, at A5.

14. *Id.*

15. Cowell, *supra* note 10.

will gain from this Comment an understanding of the initial difficulties both sides face in addressing certain procedural issues—issues that need to be resolved before the merits of the case are considered.

This Comment will focus on the class action lawsuits while they are still in the preliminary stages of litigation. It will address whether plaintiffs can clear some procedural hurdles such as various Federal Rule of Civil Procedure 12(b) motions[16] to dismiss and certain affirmative defenses pursuant to Federal Rule of Civil Procedure 8(c)[17] in order to get to a jury. Part II will provide background information as to what has happened in Switzerland with these claims since the war and what Switzerland is doing now to appease claimants and preserve its image. Part III of this Comment will discuss the foreseeable problems with subject matter jurisdiction under § 1331 and § 1350 and predict whether plaintiffs can overcome a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Part IV will address the two affirmative defenses of political question doctrine and statute of limitations—both of which have appeared in similar kinds of lawsuits. Finally, this Comment will conclude that although it is difficult to predict how a court will respond to these allegations, whether plaintiffs win the lawsuits might not matter. Getting the attention of the Swiss banks and forcing Switzerland to reexamine its past is long overdue. The negative publicity of a lawsuit can only help put the issue of what happened to the deposits to rest once and for all.

II. BACKGROUND

Before relaying the controversial facts, it is important to ask why these issues are emerging now. There are three explanations for the recent interest. First, the fall of communism in Eastern Europe triggered a reexamination of the Holocaust because people who were silenced for many years are now filing reimbursement claims for assets and lost prop-

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16. Rule 12(b)(1)-(6) motions are all possible responses to a complaint. These motions are: 1) lack of jurisdiction over the subject matter, 2) lack of jurisdiction over the person, 3) improper venue, 4) insufficiency of process, 5) insufficiency of service of process, 6) failure to state a claim upon which relief can be granted, and 7) failure to join a party under Rule 19. FED. R. CIV. P. 12.

17. Rule 8(c) lists other possible responses to a complaint and allows a defendant to set forth certain affirmative defenses. The rule lists "accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." FED. R. CIV. P. 8(c).

erty with East Germany.[18] Moscow and Berlin, among other former communist cities, have opened up archives, providing historians with new information about the war.[19] Second, thousands of documents have been declassified recently at the National Archives, the Treasury Department and the State Department.[20] Third, the 50th Anniversary of the end of the war has caught the attention of historians and journalists. Among these writers are those who wish to reexamine Switzerland's relationship with the Nazi regime.

Switzerland is known throughout the world for its bank secrecy. In 1934, secrecy laws were enacted to provide the French and Germans with a tax haven.[21] To protect foreign investors from a threatened tax on Swiss capital, Swiss banks began offering depositors confidential numbered accounts.[22] Initially, these laws did end up protecting some Jewish deposits from the Nazis. Eventually, however, Swiss bankers used these laws to promote "a smoke screen of secrecy" and to refuse returning assets to Holocaust survivors after the war.[23]

Swiss behavior toward Jews before the war is consistent with this theory. In 1933, the Swiss passed a new law denying asylum to Jews "fleeing from the Nazis as religious rather than "political figures.' "[24] To enforce this new law, the Swiss convinced the Germans to stamp Jewish passports with a "J" because identifying the Jews among the Germans seeking entry into Switzerland was too difficult.[25] Most obvious was the agreement with Nazi Germany to turn back Jewish refugees at the border in 1938. In total, there were at least 30,000 Jews who were turned away only to face their deaths at the hands of the Gestapo.[26] During the war, this overt and covert anti-Semitic behavior in Switzerland was masked by the ongoing need to protect the Swiss identity from the impact of foreign immigration.

Almost twenty years after the war, the Swiss parliament finally agreed to set a ten-year period (1962-72) for Swiss banks to track down the owners of dormant accounts believed to have belonged to Jewish

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18. *See* Nomi Morris, *Nazis, Gold—and Justice*, MACLEAN'S, Nov. 11, 1996, at 35.

19. *Id.*

20. *See* Michael Hirsch, *Secret Bankers for the Nazis: A Search for Missing Accounts of Holocaust Victims Lifts the Lid on a Wartime Partnership*, NEWSWEEK, June 24, 1996, at 50.

21. *Id.*

22. *See* TOM BOWER, NAZI GOLD 42-43 (1997).

23. *Id.*

24. *Id.* at 21.

25. *Id.* at 22-23.

26. *Id.* at 57.

Holocaust victims.[27] The Swiss processed 7,000 claims by 1974,[28] but only 961 of these were identified with total deposits of nine and a half million Swiss francs.[29] The Friedman complaint correctly states that, under this 1962 law, there was no outside supervision and, "the Swiss banks had ultimate decision-making power to control their audit."[30] As a result, "[I]n concert, [the banks] deliberately failed to affirmatively abide by their obligations to identify [the] depositors . . . and return such monies."[31] Clearly, the 1962 search was not complete since many Holocaust survivors who had pre-war accounts failed to receive any money. Moreover, a more recent search by the Swiss Banking Association (SBA),[32] in the spring of 1996, uncovered $32 million in 775 dormant pre-war accounts, held by non-Swiss clients who are both Jewish and non-Jewish.[33] An active participant in the controversy, Edgar Bronfman, Sr., President of the World Jewish Congress (WJC), called the $32 million estimate "a bribe," and believes that the Swiss really have billions of dollars in wartime assets.[34] After all, the SBA did not consider non-cash assets such as jewelry and gold bars or deposits in insurance or trust companies in arriving at the $32 million figure.[35]

Under pressure from various Jewish organizations, in May 1996, the SBA and several representatives of Jewish organizations jointly set up the Volcker Commission to look into the claims made by Holocaust survivors. Paul Volcker hired several Swiss accounting firms to investigate Swiss bank accounts; the commission has been granted unprecedented access.[36] The Volcker Commission will focus on searching and returning

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27. Friedman v. Union Bank of Switzerland, No. 96-5161, at 60 (E.D.N.Y. filed Oct. 21, 1996).

28. *See* Morris, *supra* note 18.

29. *See* Stephanie Cooke, *Digging Up the Past*, EUROMONEY, Aug. 1996, at 50.

30. *Friedman*, No. 96-5161, at 60.

31. *Id.*

32. In the consolidated complaint, Plaintiffs name the SBA as a Defendant. Weisshaus v. Union Bank of Switzerland, No. 96-5161 (E.D.N.Y. amended complaint filed July 30, 1997), at 8. The SBA is "an unincorporated association established in Switzerland whose purpose is to promote the interests of Swiss banking globally." Weisshaus v. Union Bank of Switzerland No. 96-4849, at 5 (E.D.N.Y. amended complaint filed Jan. 24, 1997). The SBA has filed a motion to dismiss for insufficient service and lack of personal jurisdiction. *Defendant's Motion to Dismiss* (filed May 15, 1997). *See infra* note 66. While the SBA does do some business in the United States, its contacts are not as pronounced as the other three Defendant banks. *See Friedman*, No. 96-5161, at 17-20.

33. *See* Bruce W. Nelan, *The Goods of Evil*, TIME, Oct. 28, 1996, at 54.

34. *See* Jeffrey Goldberg, *Stolen Assets*, NEW YORK, Apr. 29, 1996, at 18-19.

35. *See* Morris, *supra* note 18.

36. *Called to account*, ECONOMIST, Nov. 2, 1996, at 5.

assets in the individual accounts of Holocaust survivors.[37]

The Swiss banks appointed their own investigator to examine the claims of Holocaust survivors regarding the dormant accounts in Switzerland's banks.[38] Known as the Swiss ombudsman, investigator Hanspeter Hani charges claimants a $250 search fee and, according to Jewish leaders, demands unreasonable documentation in order to trace dormant accounts.[39] In November 1996, Hani announced that he found only 11,000 Swiss francs belonging to Holocaust victims or their heirs.[40] Eight months later, he identified an additional 10 million Swiss francs in dormant Swiss bank accounts of Holocaust victims.[41]

In addition, an independent panel approved by the Swiss Parliament in December 1996 plans to conduct a thorough examination of Switzerland's wartime financial history. The panel has been given up to five years to complete its work. It will look into Switzerland's relationship with the Nazis, focusing on illegal profits, gold and currency transactions.[42] The nine-member panel includes an Israeli and the director of the Holocaust Museum in Washington.[43]

Another active participant, Senator Alfonse D'Amato of New York, conducted high-profile Senate committee hearings in April 1996, discovering that Switzerland and Poland made a Cold War deal to compensate Swiss citizens for the Polish land that the communist regime nationalized using money from Jewish dormant accounts.[44] After hedging, the Swiss did finally admit to transferring money secretly to Poland. Swiss historian Peter Hug accuses the Swiss of striking secret deals with other former communist Eastern European countries as well.[45]

Much of Senator D'Amato's ammunition comes from Treasury Department records of Operation Safehaven, a postwar U.S. government intelligence operation with the aim of locating and tracking down Nazi assets that were moved into neutral countries like Switzerland. These

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37. *See* Nelan, *supra* note 33.

38. *See* Charisse Jones, *Survivor Leads Fight For Lost Holocaust Money*, N.Y TIMES, Nov. 12, 1996, at B1.

39. *See* Dean Foust et al., *More Evidence of Hidden Holocaust Cash*, BUS.WK., May 6, 1996, at 38.

40. *See* Norma Cohen, *Swiss Bankers Find Further Dormant Funds*, FIN. TIMES (London), July 9, 1997, at 2.

41. *Id.*

42. *See* Nelan, *supra* note 33.

43. *See* Marcus Kabel, *Swiss President Calls Holocaust Claims "Blackmail,"* REUTERS FIN. SERVICE, Dec. 31, 1996, *available in* LEXIS, News Library, CURNWS File.

44. *See* Morris, *supra* note 18.

45. *See* Jones, *supra* note 38.

records suggest that Swiss banks have not disclosed all of their Nazi gold holdings.[46] The Swiss did pay out $250 million in gold after the war, but these records suggest that wartime figures were much higher.[47] For example, documents reveal that the Nazis shipped over $6 billion pounds of assets into Switzerland between 1938 and 1945.[48] Essentially, documents show that the Swiss helped the Nazis hoard looted wealth toward the end of the war, and suggest that the Swiss misled the U.S. government about how much Nazi gold they had in 1945. In fact, one document contains a list of 182 accounts held in a single bank which, in today's dollars, would be worth $29 million.[49] Even though the documents support the view that the Swiss have more money than they are ready to admit, the disposition of these accounts is unclear.

The difficulty in identifying these accounts arises from the fact that many Jews opened numbered accounts without names. Others used intermediaries to make the deposits for them in order to protect themselves because it was illegal to deposit money into foreign banks. It is possible that many intermediaries were dishonest and withdrew the money for themselves at the end of the war. Thus, tracing money paid in by third parties may be impossible. Also, it is difficult to trace funds deposited in banks that have merged or closed, and deposits that have been moved to banks in other countries.[50] Other skeptics question the Volcker Commission's ability to arrive at exact numbers of funds looted by the Nazis.

Tension between Swiss and Jewish leaders remains high. After D'Amato and Bronfman proposed creating a $191 million fund as a gesture of "good faith" toward elderly Jews pending the outcome of investigations, and just before Jean-Pascal Delamuraz stepped down from Switzerland's one-year rotating presidency to become economic minister, Delamuraz rejected the proposal as "blackmail" and as an admission of

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46. *See* Foust et al., *supra* note 39, at 38.

47. *Id.*

48. *See* Daniel Jeffreys, *Nazi Gold Trail Turns Fiction Into Fact*, INDEP. (London), Sept. 8, 1996, at 13.

49. *See* Goldberg, *supra* note 34, at 19.

50. *See* Cooke, *supra* note 29. The Friedman complaint alleges that the Swiss banks transferred looted assets into concealed accounts in the State of New York through an agency that the SBC set up in August 1939. The complaint goes on to state that three years later, Treasury officials began to examine the Swiss agency's funds and records. "The Treasury Department noted that the Swiss banks had intentionally and repeatedly violated U.S. law by its deliberate cloaking of funds and concealment of transactions from U.S. authorities. . . . The presence of Swiss bank agencies in the U.S. led U.S. officials and others to fear the influence of Nazi money hidden in Swiss banks branches in the U.S." Friedman v. Union Bank of Switzerland, No. 96-5161, at 42 (E.D.N.Y. filed Oct. 21, 1996).

guilt.[51] His remark angered Jewish leaders who threatened to support boycotts and class action lawsuits against the SBA. While the banks have since agreed to set up the fund, they argue that they are not certain how much of the money in these accounts actually belongs to Jews.

The WJC claims that Switzerland still has $3 billion to $7 billion of in Jewish accounts.[52] It produced a list of names, home cities and deposits totaling $13.5 million belonging to 500 account holders who deposited their money right before the war.[53] The list comes from Swiss Bank Corporation's New York City office, and represents only a small portion of what the Swiss banks held because it only includes funds that were transferred to New York City in 1941.[54] Credit Suisse and Swiss-America Corp.'s New York offices have similar records.[55] Lists such as the WJC list were originally handed over to the United States in 1941 because after the war started, the U.S. government froze the American accounts of people living in Nazi territory to prevent the Nazis from appropriating them.[56] Of course, it must be determined whether these accounts were rightfully claimed after the war.

In response to the negative press, the banks are considering taking a number of actions. Their possible actions include the following: 1) return money with interest to the rightful owners where bank officials can find a match, 2) provide compensation where they cannot find any money, and/or 3) provide a lump sum to Jewish organizations or charities to satisfy the remaining claimants.[57] Should Holocaust victims accept a lump sum of compensation from Swiss banks now without a full-blown investigation? Or, should the full truth be known and survivors wait until after the investigation is complete? Most Holocaust survivors are now in their seventies and eighties; they do not have a lot of time on their hands and may want to enjoy whatever compensation they can get immediately.[58] Another point to consider is that the amount of money that the Swiss government, banks and companies are contemplating distributing to claimants is much less than what Jewish leaders estimate the banks to really have. Some plaintiffs will deem the offer insufficient and proceed to litigate the claims with the hope of achieving justice through the judicial system. In order for their claims to get to a jury, plaintiffs need to show,

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51. *See* Kabel, *supra* note 43.
52. *See* Nelan, *supra* note 33.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *See* Morris, *supra* note 18.
58. *See* Jeffreys, *supra* note 48.

inter alia, that the court has subject matter jurisdiction over the causes of action.

III. SURVIVING A RULE 12(B)(1) MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The causes of action in *Weisshaus* and *Friedman* are mostly based in contract and fraud.[59] Plaintiffs from both suits rest subject matter jurisdiction over defendants on diversity under 28 U.S.C. § 1332(a), which states that the district courts "shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between . . . citizens of a state and citizens or subjects of a foreign state."[60] Both lawsuits state that the amount in controversy exceeds $50,000;[61] however, they reserve naming an exact figure until trial. While section 1332(a) grants the federal court power to hear a claim, it does not create a cause of action for plaintiffs. Plaintiffs must go on to present enough evidence in order to survive a motion for summary judgment.[62]

Friedman rests jurisdiction for additional claims of international human rights and treaty violations on section 1331,[63] the federal question statute, and 28 U.S.C. § 1350, the Alien Tort Claims Act.[64] While this

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59. This Comment is limited to an analysis of preliminary issues in the Weisshaus and Friedman complaints. The Weisshaus complaint lists the following five counts: 1) breach of contract, 2) accounting, 3) breach of fiduciary duty, 4) conversion and 5) conspiracy. Weisshaus v. Union Bank of Switzerland, No. 96-4849, at 12-17 (E.D.N.Y. amended complaint filed Jan. 24, 1997). The Friedman complaint lists the following twelve counts: 1) conspiracy to violate and/or complicity in violations of international law, 2) breach of fiduciary duty, 3) breach of special duty, 4) breach of contract, 5) conversion, 6) unjust enrichment, 7) negligence, 8) violations of Swiss Federal Banking Law, 9) violations of Swiss Federal Code of Obligations, 10) conspiracy, 11) fraud, and 12) fraudulent concealment. Friedman v. Union Bank of Switzerland, No. 96-4849, at 84-105 (E.D.N.Y. filed Oct. 21, 1996).

60. 28 U.S.C. § 1332(a) (West 1997). It is interesting to note that plaintiffs do not name the Swiss government as a party. As a result, plaintiffs avoid dealing with the complex Foreign Sovereign Immunity Act.

61. While the current minimum is $75,000, at the time of the filing of *Weisshaus* and *Friedman*, the amount in controversy under 28 U.S.C. § 1332(a) only had to exceed $50,000.

62. *See* FED. R. CIV. P. 56(c).

63. 28 U.S.C. § 1331 (West 1997).

64. The Friedman complaint alleges that the Swiss banks committed international human rights violations, thus presenting a federal question, in addition to various banking violations and tortious activity. Friedman v. Union Bank of Switzerland, No. 96-5161, at 84-105 (E.D.N.Y. filed Oct. 21, 1996). The Weisshaus complaint, on the other hand, alleges banking violations and rests jurisdiction solely on 28 U.S.C. § 1332. Weisshaus v.

move may not be necessary, plaintiffs' counsel seems to be presenting alternative theories in order to cover all ground. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[65] While the Friedman complaint alleges that the causes of action for violations of international treaties and customary international law present a federal question pursuant to section 1331,[66] it remains unclear whether the claims for violations of international law independently support "arising under" federal question jurisdiction. Section 1350 states that "[t]he district courts shall have 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." This statute may create a cause of action for plaintiffs if the court follows recent Second Circuit opinions; it does grant the District Court jurisdiction to hear the claims. Defendant banks have responded to these alleged human rights and treaty violations under §§ 1331 and 1350 by filing, *inter alia*, a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction.[67]

Union Bank of Switzerland, No. 96-4849, at 12-18 (E.D.N.Y. amended complaint filed Jan. 24, 1997).

In *Friedman*, diversity is present because U.S. citizens are suing foreign entities. *Friedman*, No. 96-5161, at 2-6. The foreign plaintiffs cannot sue the banks under this statute because § 1332 does not cover wholly alien-oriented suits. *See* 28 U.S.C. § 1332 (West 1997). The non-citizen plaintiffs in *Friedman* are suing under 28 U.S.C. § 1350 (the Alien Tort Claims Act) (West 1997). *Friedman*, No. 96-5161, at 5. *See infra* text accompanying notes 128-54.

In *Weisshaus*, the plaintiffs claim that the district court has supplemental jurisdiction over non-citizens' claims. *Weisshaus*, No. 96-4849, at 2. In addition to resting its non-federal law claims on §1332, the plaintiffs in *Friedman* allege that the district court has supplemental jurisdiction over plaintiffs' non-federal law claims pursuant to 28 U.S.C. § 1367. *Friedman*, No. 96-5161, at 4. This jurisdiction relies on whether the claims "derive from a common nucleus of operative fact." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). In making this determination, a court also considers judicial economy and fairness to the litigants. *Id.* at 726.

This Comment will not address the potential difficulties in asserting supplemental jurisdiction. However, it is worth mentioning that in federal question cases, district courts have supplemental jurisdiction over claims that form part of the same case or controversy, while in diversity cases, it is up to the court whether to accept supplemental jurisdiction over a claim. The use of the supplemental jurisdiction statute in *Weisshaus* is less common.

65. 28 U.S.C. § 1331.

66. *See* Friedman v. Union Bank of Switzerland, No. 96-5161, at 4-5 (E.D.N.Y. filed Oct. 21, 1996).

67. *Defendant's Motion to Dismiss* (filed May 15, 1997). On May 15, 1997, the Swiss banks filed more than 1,000 pages in motions in response to the lawsuits. In short, the 11 motions are as follows: 1) motion to dismiss for lack of subject matter jurisdiction,

Perhaps the Friedman complaint attempts to use § 1331 as an additional basis of jurisdiction for its federal law claims in case defendant banks succeed in destroying diversity jurisdiction. This procedural safeguard is interesting to examine in detail as it raises complex international law issues which other plaintiffs have raised in earlier cases. First, this section of the paper will examine what federal courts have said regarding jurisdiction over alleged treaty violations and alleged international law violations. Second, it will survey claims by non-citizens under the Alien Tort Claims Act.

A. *Violations of U.S. Treaties*

A U.S. treaty is a contract with another nation which becomes a law of the United States under the U.S. Constitution.[68] The issue here becomes whether private citizens may sue another entity for alleged treaty violations. Unless a treaty is self-executing, it does not "confer upon citizens rights which they may enforce in the courts."[69] Three important cases hold that plaintiffs cannot base a private right of action under a U.S. treaty that is not self-executing.

In *Dreyfus v. Von Finck*,[70] a Swiss citizen brought suit in the Southern District of New York against German citizens and residents for the

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2) motion to dismiss on the basis of forum non conveniens, 3) motion to dismiss on absention grounds, 4) motion to dismiss international law claims in *Friedman* and *World Council* for failure to state a claim, 5) partial motion to dismiss common law and Swiss law claims for failure to state a claim, 6) partial motion to dismiss for lack of standing to sue, 7) motion to dismiss the claims of looted assets and slave labor assets for failure to join necessary parties, 8) Defendant SBA's motion to dismiss *Weisshaus* for insufficient service and lack of personal jurisdiction, 9) motion to strike or require Plaintiffs to make more definite numerous averments in the complaints, 10) motion to strike punitive damages, and 11) motion in the alternative to stay all proceedings in these cases. Telephone interview with Miriam A. Kleiman, Senior Researcher, Cohen, Milstien, Hausfeld & Toll, P.L.L.C. (Oct. 13, 1997).

68. "[A]ll treaties made . . . under the authority of the United States, shall be the supreme law of the land." U.S. CONST. art. VI, cl. 2.

69. Diggs v. Dent, 14 I.L.M. 797, 804 (1975). In *Diggs*, plaintiffs asked the court to declare that defendant Dent's dealings with the South African government, through the importation of seal skins from South African-occupied Namibia, violate the United Nations Charter. *Id.* at 797. The U.S. District Court for the District of Columbia held that the provisions of the United Nations Charter were not self-executing and thus plaintiffs could not assert any individual legal rights in court. *Id.* at 804. For a discussion on how the self-executing/non-self-executing distinction emerged, see Natale V. DiNatale, *Recent Development: Chaos in the Aftermath of the Panama Invasion—Constitutional Law Implications of an Action for Damages Arising From a Treaty Violation: Industria Panificadora, S.A. v. United States*, 8 EMORY INT'L L. REV. 399, 402-04 (Spring 1994).

70. 534 F.2d 24 (2d Cir. 1976).

wrongful confiscation of property in Nazi Germany in 1938.[71] The plaintiff, a Jew and former resident of Germany, was forced to emigrate to Switzerland and sell to defendants his interest in a banking firm at a price that was $1.5 million below its actual value.[72] After the war, the parties came to a settlement agreement; however, defendants allegedly never reimbursed plaintiff.[73] In 1951, defendants did pay plaintiff 490,000 German marks pursuant to a second settlement agreement.[74] Plaintiff then sued defendant for the original taking of his property and for defendant's alleged repudiation of the first settlement agreement.[75] He alleged federal jurisdiction in part under 28 U.S.C. § 1331, claiming that the defendant violated various treaties to which the United States was a party. The plaintiff relied on the Hague Convention,[76] the Kellogg-Briand Peace Pact,[77] the Versailles Treaty,[78] and the Four Power Occupation Agreement.[79]

The court held "that none of these [treaties] dealt with the expropriation by Germans of the property of German citizens, and none conferred any private rights with regard to such property that were enforceable in American courts."[80] Essentially, there was no private right of recovery under any of the treaties for defendants' allegedly tortious conduct. The court stated that treaties rarely contain provisions that confer private rights upon citizens of one of the contracting parties.[81] More specifically, "Rarely is the relationship between a private claim and a general treaty sufficiently direct so that it may be said to 'arise under' the treaty as required by art. III, § 2, cl. 1 of the Constitution."[82]

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71. *Id.*

72. *Id.* at 26.

73. *Id.*

74. *Id.*

75. *Id.*

76. Convention between the United States and other Powers respecting the laws and customs of war on land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter Hague Convention] (attempted to impose standards of conduct for belligerent nations).

77. Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy, Aug. 27, 1928, 46 Stat. 2343.

78. Treaty of Peace between the United States and Germany, Aug. 25, 1921, U.S.-Germany, 42 Stat. 1939 (provided a reparations and war crimes compact following WWI).

79. Agreement on Control Machinery in Germany, May 1, 1945, 5 U.S.T. 2062 (provided for the joint occupation and control of Germany by the conquering nations during the period of surrender).

80. *Dreyfus*, 534 F.2d at 30.

81. *Id.* at 29.

82. *Id.* at 29-30 (quoting 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3563 (1975)).

Cases since *Dreyfus* distinguish between self-executing and non-self-executing treaties. A self-executing treaty is one which does not require another piece of legislation to set it into motion. An individual may enforce such a treaty because the treaty expressly or impliedly provides a private right of action.[83] In *Handel v. Artukovic*,[84] the court listed four factors in determining if a treaty is self-executing, thus establishing affirmative obligations without the need for implementing legislation: "(1) the purposes of the treaty and the objectives of its creators, (2) the existence of domestic procedures and institutions appropriate for direct implementation, (3) the availability and feasibility of alternative enforcement methods and (4) the immediate and long-range social consequences of self- or non-self-execution."[85] The plaintiffs in *Handel* brought a class action suit against defendant for his alleged involvement in deprivations of life and property of Jews in former Yugoslavia during World War II.[86] Plaintiffs relied on two treaties: the Geneva Convention[87] and the Hague Convention.[88] The court held that the signatory countries of the Geneva Convention specifically provided for implementation through municipal law and thus did not intend for the treaty to be self-executing.[89] As for the Hague Convention, although there is no provision for implementation through municipal law, the court held that it was not a source of rights enforceable by a litigant in a domestic court,[90] for various policy reasons outlined in *Tel-Oren v. Libyan Arab Republic*.[91]

In *Tel-Oren*, survivors and representatives of people killed in a terrorist attack on a bus in Israel unsuccessfully sued the Libyan Arab Republic, the Palestine Liberation Organization and various other terrorist organizations for damages arising from tortious acts in violation of treaties and customary international law.[92] The U.S. District Court of Appeals for the District of Columbia unanimously affirmed the dismissal of the alleged violations, but wrote three different opinions. Judge Bork's concurrence addressed treaty violations in detail.

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83. *Id.* at 30.

84. 601 F. Supp. 1421 (C.D. Cal. 1985).

85. *Id.* at 1425 (quoting People of Saipan v. Department of Interior, 502 F.2d 90, 97 (9th Cir. 1974)).

86. *Id.* at 1424.

87. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316.

88. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

89. *Handel*, 601 F. Supp. at 1425.

90. *Id.*

91. 726 F.2d 775, 810 (D.C.Cir. 1984) (Bork, J., concurring).

92. *Id.* at 774 (Edwards, J., concurring).

The Plaintiffs alleged that defendants violated thirteen treaties.[93] Bork stated that only the first five alleged treaties were binding on the United States and therefore the remaining eight could not provide a basis for jurisdiction because Count III of the complaint alleged tortious actions in violation of the treaties of the United States.[94] Moreover, of the first five treaties to which the U.S. was a party, none provided plaintiffs with a cause of action.[95] The Geneva Convention for the Protection of Civilian Persons in Time of War, the Geneva Convention Relative to the Treatment of Prisoners of War, and the OAS Convention to Prevent and Punish Acts of Terrorism expressly call for implementing legislation.[96] The party states would have to take action through their own laws to enforce these treaties because they are not self-executing. Likewise, Articles I and II of the United Nations Charter are not self-executing because they imposes obligations on nations and do not speak in terms of individual rights.[97]

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93. *Id.* at 808-10 (Bork, J., concurring). The complaint listed the thirteen treaties as follows: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516; Articles I and 2 of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031; Convention With Respect to the Laws and Customs of War and Land, July 29, 1899, 32 Stat. 1803 and Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (Hague Conventions); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; Convention to Prevent and Punish the Acts of Terrorism Taking the Forms of Crime Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949 (Organization of American States (OAS) Convention); Protocols I and II to the Geneva Conventions of 12 August 1949, June 7, 1977 and Diplomatic Conference on Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, *reprinted in* 16 I.L.M. 1391, 1442 (1977); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, F.A.Res. 2625, 25 U.N.GAOR Supp. (No. 28) at 121, U.N.Doc. A/8028 (1970); Universal Declaration of Human Rights, G.A.Res. 217, U.N. 3 GAOR, U.N.Doc. 1/777 (1948); International Covenant on Civil and Political Rights, Annex to G.A.Res. 2200, 21 U.N.GAOR Supp. (No. 16) at 52, U.N.Doc. A/6316 (1966); Basic Principles for the Protection of Civilian Populations in Armed Conflicts, G.A.Res. 2675, 25 U.N.GAOR Supp. (No. 28) at 76, U.N. Doc. A/8028 (1970); Convention on the Prevention and Punishment of the Crime and Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Declaration of the Rights of the Child, G.A.Res. 1386, 14 U.N.GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959); and American Convention on Human Rights, Nov. 22, 1969, O.A.S. Official Records OEA./Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, *reprinted in* 9 I.L.M. 101 (1970).

94. *Tel-Oren*, 726 F.2d at 809.

95. *Id.*

96. *Id.*

97. *Id.*; *see also* Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976).

Bork noted that the fifth treaty listed in the *Tel-Oren* complaint, the Hague Convention, similarly does not afford individuals a private right of action.[98] Bork reasoned that although the Hague Convention contains no language calling for implementing legislation, it "[has] never been regarded as law private parties could enforce."[99] His main concern was that giving individuals who thought their rights under the Hague Convention were violated a private right of action would open the floodgates. As the *Handel* court put it: "Recognition of a private remedy under the Convention would create insurmountable problems for the legal system that attempted it; would potentially interfere with foreign relations; and would pose serious problems of fairness in enforcement."[100] Hence, there are no cases holding that the Hague Convention provided a private right to sue.[101]

Applying the analysis from these earlier cases to *Friedman*, it seems unlikely that a court will look favorably upon plaintiffs alleged treaty violations under § 1331—the major obstacle being that private individuals do not have a private right to sue under an alleged treaty violation unless the treaty is self-executing. The Friedman complaint alleges, in much detail, that the Swiss banks, in conspiring with the Nazis, actively assisted the war objectives of the Nazi regime.[102] The complaint states that by conspiring with the Nazis in order to profit from the Nazi regime's act of looting and enforcing slave labor, the Swiss banks violated numerous international treaties, customary international laws and fundamental human rights laws prohibiting genocide, war crimes, crimes against humanity, crimes against peace, slavery, slave and forced labor and slave trade.[103] Whether these allegations are sufficient to withstand a motion to dismiss remains to be seen.

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98. *Tel-Oren*, 726 F.2d at 810.

99. *Id.*

100. Handel v. Artukovic, 601 F. Supp. 1421, 1425 (C.D.Cal. 1985).

101. *Tel-Oren*, 726 F.2d at 810 (Bork, J., concurring).

102. *Friedman*, No. 96-5161, at 86.

103. *Id.* The complaint lists the following treaties and agreements without citations: the Genocide Convention, the United Nations Charter, the Universal Declaration of Human Rights, the Geneva Convention of 1929, the supplemental Geneva Convention on the Treatment of Non-Combatants During War Time, the Nurenberg Principles, the Slavery Convention of 1926, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, the International Labor Conventions and Recommendations, the Covenant on Economic, Social and Cultural Rights, the Covenant on Civil and Political Rights, and the Hague Convention of 1907. *Id.* Seven of these agreements were used and unfavorably ruled upon in *Dreyfus v. Von Finck*, *Handel v. Artukovic* and *Tel-Oren v. Libyan Arab Republic.*

If a court finds that at least one of the treaties listed in the Friedman complaint to be self-executing, the next step is actually proving that the defendant banks' committed the violations. The banks' roles in these alleged treaty violations is one step removed from the Nazi regime's. The issue then becomes whether a court will find that indirectly aiding and abetting the Nazis to commit war crimes by storing looted assets in their coffers violates a treaty to which the U.S. is a party. A court will probably not make this determination as treaties do not usually provide private individuals with a right to sue.

B. *Violations of Customary International Law*

Unlike treaties, which establish both obligations and the extent to which they shall be enforceable, the law of nations enables each state to make an independent judgment as to the extent and method of enforcing internationally recognized norms.[104] Courts have split as to whether violations of international law (or the law of nations) confer a private right of action.

One view is that international law does not provide a civil action to each member of the community. In addition to finding that violations of four different treaties did not create a private right of action, the court in *Handel v. Artukovic* also ruled that plaintiffs could not infer a right of action from the law of nations, either.[105] The court stated that "while international law may provide the substantive rule of law in a given situation, the enforcement of international law is left to the individual states."[106] According to the *Handel* court, the state reserves the power to enforce international laws. The practical reason for giving states exclusive power is so that there is some sort of consensus on what international law includes.[107]

Likewise, the court in *Dreyfus v. Von Finck* dismissed the notion that that the seizure of individual property and defendants' allegedly wrongful repudiation of the 1948 settlement agreement were torts which violated the law of nations.[108] In dicta, the court stated that the law of nations dealt primarily with the relationship among nations rather than among individuals.[109] Like a general treaty, the law of nations was held

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104. *Tel-Oren*, 726 F.2d at 778 n.2 (stating that "a treaty and the law of nations are entirely different animals.") (Edwards, J., concurring).

105. 601 F. Supp. 1421 (C.D.Cal. 1985).

106. *Id.* at 1427.

107. *Id.*

108. Dreyfus v. Von Finck, 534 F.2d 24, 30 (2d Cir. 1976).

109. *Id.* at 30-31.

not to be self-executing so as to vest a plaintiff with individual legal rights.

Other courts have permitted suits based on alleged violations of the law of nations to proceed. In *Forti v. Suarez-Mason*,[110] the court held that Argentine citizens alleging violations of international law by a former Argentine general through torture, murder and prolonged detention had adequately pleaded federal question jurisdiction.[111] Relying on the standard that the Ninth Circuit used in *Republic of Philippines v. Marcos*[112] that the claim must arise under the Constitution or laws of the United States and must not be unsubstantial or frivolous, the *Forti* court held that it could entertain plaintiffs' international law claims pursuant to § 1331 and deny defendant's motion to dismiss.[113]

In *Kadic v. Karadzic*,[114] the court refused to go that far. Plaintiffs in *Kadic* sued the self-proclaimed President of the unrecognized Bosnian-Serb republic, alleging that he engaged in genocide, war crimes and other instances of violence such as murder, torture and degrading treatment.[115] Plaintiffs argued that § 1331 provided an independent basis for subject matter jurisdiction over all claims alleging violations of international law and relied on the settled proposition that federal common law incorporates international law.[116] The *Kadic* court chose not to address the issue because both the Alien Tort Claims Act[117] and the Torture Prevention Victim Act[118] supplied plaintiffs with a remedy for their allegations. The court did note that while *Tel-Oren* held that the law of nations generally does not create private causes of action, some district courts, such as *Forti*, have upheld § 1331 jurisdiction for international law violations. The Second Circuit in both *Kadic* and in another case—*Filartiga v. Peña-Irala*[119]—refrained from ruling definitively on whether any cause of action based in international law violations could rely on § 1331 jurisdiction for the sole reason that plaintiffs had other statutes on which to base their claims.

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110. 672 F. Supp. 1531 (N.D.Cal. 1987), *reh'g granted*, 694 F. Supp. 707 (N.D.Cal. 1988).

111. *Forti*, 672 F. Supp. at 1543.

112. 818 F.2d 1473 (9th Cir. 1987).

113. *Forti*, 672 F. Supp. at 1544.

114. 70 F.3d 232 (2d Cir. 1995).

115. *Id.*

116. *Kadic*, 70 F.3d at 246.

117. 28 U.S.C. § 1350 (West 1997).

118. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

119. 630 F.2d 876 (2d Cir. 1980). *See infra* text accompanying notes 129-32.

Thus, in the words of the recent *Xuncax v. Gramajo*[120] decision, the question of whether claims for violations of international law might independently support "arising under" federal question jurisdiction through § 1331 remains unresolved.[121] According to *Xuncax*, in the absence of legislation providing a private right of action of the kind found in the Alien Tort Claims Act discussed *infra*, federal courts should not imply a private right of action from § 1331.[122]

It is well-settled that federal common law has incorporated principles of customary international law.[123] Many courts, however, have held that because international law is not a source of a private right of action, a plaintiff's claims for human rights violations cannot ordinarily "arise under" federal common law.[124] Thus, § 1331 cannot support jurisdiction over such claims.[125] If, in our case, a court rules that it does have subject matter jurisdiction pursuant to either §§ 1331 or 1332, in order to impose liability, it would have to find first, that the banks looted and cloaked Jewish assets, and second, that the banks' activities aided and abetted the Nazis to commit human rights violations.[126]

While the court will probably dismiss the counts alleging treaty violations, it is difficult to predict whether it will allow the claims alleging international law violations to proceed. If the court decides to stretch the holdings in *Filartiga* and *Kadic* by allowing United States citizens to bring claims for international human rights violations under 28 U.S.C. § 1331, it will create new law for the Second Circuit. If it dismisses the allegations concerning human rights violations, the court may still permit the violations based in contract law to continue at this point, as long as plaintiffs' claims survive other challenges such as lack of diversity, fail-

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120. 886 F. Supp. 162 (D.Mass. 1995) (holding that defendant was liable for expatriate Guatemalan citizens' injuries suffered at the hands of Guatemalan military forces).

121. *Id.* at 193.

122. *Id.* at 194.

123. *Id.* at 193.

124. *Id.* at 194.

125. *See, e.g.*, Princz v. Federal Republic of Germany, 26 F.3d 1166, 1175 (D.C.Cir. 1994); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779 n.4 (D.C.Cir. 1984) (Edwards, J., concurring), *aff'g* 517 F. Supp. 542 (D.D.C. 1981); Dreyfus v. Von Finck, 534 F.2d 24, 28 (2d Cir. 1976); Handel v. Artukovic, 601 F. Supp. 1421, 1426 (C.D.Cal. 1985); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 702, 703 (1987). Section 702 states that "A *state* violates international law if. . . it practices, encourages or condones genocide, slavery or slave trade, the murder or causing the disappearance of individuals, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, or a consistent pattern of gross violations of internationally recognized human rights." *Id.* (emphasis added)

126. There are numerous difficulties with actually proving the merits of the claims—a discussion for another paper.

ure to state a claim or lack of standing to sue.[127]

C. *Noncitizen Plaintiffs Rest Jurisdiction on § 1350: The Alien Tort Claims Act*

In the Judiciary Act of 1789, Congress provided for federal jurisdiction over suits by aliens involving principles of international law. While there is a lack of consensus among the judicial circuits that have interpreted § 1350,[128] most are agree that the Alien Tort Claims Act grants federal courts jurisdiction to decide whether noncitizens can maintain a private cause of action. Unlike § 1331 which requires that an action "arise under" the laws or a treaty of the United States, § 1350 only mandates a "violation of the law of nations" in order to confer original jurisdiction on district courts.

The seminal case discussing the Alien Tort Claims Act is *Filartiga v. Peña-Irala*.[129] Dolly Filartiga and her father sued the former Inspector General of the police in Asuncion, Paraguay for the wrongful death of their son, alleging that defendant had kidnaped and tortured him to death in Paraguay.[130] The question before the *Filartiga* court was whether the conduct alleged in fact violated the law of nations. In pleading their case, the Filartigas produced numerous affidavits of international legal scholars who stated unanimously that torture was a recognized violation of the law of nations. Plaintiffs did not allege U.S. treaty violations, but relied on treaties and international agreements as evidence of "an emerging norm of customary international law rather than independent sources of law."[131] The court held that there was subject matter jurisdiction over their claims because deliberate torture violated universally accepted norms of the international law of human rights—numerous international agreements condemn and almost all nations renounce the practice of torture.[132]

Thus, defendant's alleged violation must be a "well-established, universally recognized [norm] of international law" for federal jurisdiction to exist under the Alien Tort Claims Act.[133] Before a generally recognized wrong becomes an international law violation within the meaning

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127. *See supra* note 67.

128. Section § 1350 states: "The district courts shall have 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."

129. 630 F.2d 876 (2d Cir. 1980).

130. *Id.* at 878.

131. *Id.* at 880 n.7.

132. *Id.* at 880.

133. *Id.* at 888.

of the statute, the nations of the world must demonstrate that the violation is of mutual, and not merely several, concern, by means of express international accords.[134] For example, in *Jafari v. Islamic Republic of Iran*,[135] §1350 did not confer jurisdiction over the Iranian nationals' suit because Iran did not violate any U.S. treaties and "the law of nations" did not prohibit a government from expropriating its own citizens' property. Similarly, *Dreyfus v. Von Finck*[136] held that the Nazi seizure of the plaintiff's interest in a banking firm did not violate the law of nations and therefore could not create an action under §1350.[137]

Courts since *Filartiga* have held that § 1350 provides both a private cause of action and a federal forum for aliens who seek remedies for violations related to torture, genocide and other war crimes.[138] In *Paul v. Avril*,[139] six Haitian nationals sued the former head of the Haitian military for alleged torture, cruel inhuman or degrading treatment, arbitrary detention and other violations of customary international law.[140] The court held that the plain language of § 1350, especially the words "committed in violation," strongly suggest that a well-pled tort would be sufficient to provide a jurisdictional basis and a private right of action.[141]

In *Estate of Ferdinand Marcos, Human Rights Litigation*,[142] the Ninth Circuit joined the Second Circuit in concluding that the Alien Tort Claims Act creates a cause of action for violations of specific, universal and obligatory international human rights standards.[143] The numerous lawsuits filed by Philippinos against former Philippine President Ferdinand Marcos allege damages resulting from torture, summary execution and other human rights abuses. The Ninth Circuit was willing to imply a cause of action under § 1350.

Following *Filartiga* and *In re Marcos*, the Second Circuit in *Kadic* held that the leader of the Bosnian-Serb forces could be held accountable for acts of genocide, war crimes and crimes against humanity under § 1350 regardless if he was acting under color of state law or as a pri-

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134. *Id.*

135. 539 F. Supp. 209 (N.D.Ill. 1982).

136. 534 F.2d 24 (2d Cir. 1976).

137. *Id.* at 30-31. *See also* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) ("We cannot subscribe to plaintiffs' view that the Eighth Commandment 'Thou shalt not steal' is part of the law of nations.").

138. *See* In re Estate of Ferdinand Marcos, Human Rights Litigation, 25 F.3d 1467, 1473 (9th Cir. 1994); Kadic v. Karadzic, 70 F.3d 232, 238 (2d Cir. 1995).

139. 812 F. Supp. 207 (S.D.Fla. 1993).

140. *Id.*

141. *Id.* at 212.

142. 25 F.3d 1467 (9th Cir. 1994).

143. *See id.* at 1475.

vate individual.[144] The *Kadic* court opined that § 1350 provides both jurisdiction and a private cause of action. Similarly, the Eleventh Circuit held that it had subject matter jurisdiction and plaintiffs could maintain their cause of action under § 1350 over a suit brought by former prisoners in Ethiopia against an official of the former Ethiopian government charging him with torturing them and committing other cruel acts.[145] And a district court in Manhattan ruled that plaintiffs, who were representing relatives who died at the hands of defendant, a former political leader in Rwanda involved in torturing and killing thousands of Tutsis and moderate members of the Hutu majority, could maintain a cause of action under § 1350.[146]

These cases indicate an emerging trend to allow civil suits under § 1350 to proceed in federal district court for injustice that occurs abroad. Compared to § 1331, it seems that it is easier to obtain jurisdiction under § 1350 when alleging a violation of international law. However, *Kadic*, relying on *Filartiga*, opines that the Alien Tort Claims Act requires a more searching review of the merits to establish jurisdiction than is required under the more flexible "arising under" language of § 1331. According to *Kadic*, there is no subject-matter jurisdiction under § 1350 unless "the complaint adequately pleads a violation of the law of nations (or treaty of the United States)."[147] Nevertheless, according to most courts, § 1350 and its "committed in violation" language, yields both a jurisdictional grant and a private right to sue for torts that violate international law.

The District of Columbia Circuit does not follow the trend to interpret § 1350 broadly. The three judges who wrote separate concurrences in *Tel-Oren* read § 1350 slightly differently. Judge Edwards endorsed the Second Circuit's opinion in *Filartiga* that § 1350 provides individuals with a right to sue.[148] He construed the statement that § 1350 did not grant "new rights to aliens, but simply opened the federal courts for adjudication of the rights already recognized by international law"[149] to mean that "aliens granted substantive rights under international law may assert them under § 1350."[150] Judge Bork, on the other hand, stated that

144. *See* Kadic v. Karadzic, 70 F.3d 232, 239 (2d Cir 1995).

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

146. Mushikiwabo v. Barayagwiza, No. 94 CIV. 3627, 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996).

147. *Kadic*, 70 F.3d at 238.

148. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 780 n.5 (D.C.Cir. 1984) (Edwards, J., concurring).

149. Filartiga v. Peña-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

150. *Tel-Oren*, 726 F.2d at 780 n.5 (Edwards, J., concurring).

§ 1350 does not grant individuals an explicit cause of action. Bork's reasons for denying jurisdiction included that there was no evidence that Congress intended § 1350 to authorize private causes of action and reading the statute any other way would open the floodgates—a result inconsistent with the constitutional limits on the role of federal courts.[151] He maintained that a plaintiff bringing suit under § 1350 must show that the international law or U.S. treaty upon which plaintiff relies provides a right to sue independent of § 1350's language. Judge Robb maintained that the other two Judges' "exhaustive" reviews of jurisdiction under § 1350 was unnecessary because the political question doctrine controlled and thus the case was nonjusticiable.[152]

In the instant case, the court will most likely follow the emerging trend as evidenced in the decisions in *Kadic*, *Marcos*, *Paul*, *Abebe-Jira* and *Mushikiwabo* and find that non-citizen plaintiffs have a right to sue in a federal forum for alleged torts committed by defendant Swiss banks. Plaintiffs Sonabend and Boruchowicz, British and Canadian citizens, respectively, may be able to pursue their claims in federal court given the trend to construe § 1350 broadly.[153] Despite the *Tel-Oren* opinion, federal courts in New York have found subject matter jurisdiction over claims by both Tutsi and Bosnian victims of human rights violations.[154]

IV. Surviving Possible Affirmative Defenses Under Rule 8(c)

Other possible responses to plaintiff's allegations include such affirmative defenses as accord and satisfaction, payment, release and res judicata pursuant to Rule 8(c). This section addresses two 8(c) affirmative defenses that appear in similar kinds of litigation—the political question doctrine and statute of limitations—and predicts how the court would respond to them in the lawsuits against the Swiss banks.

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151. *Id.* at 812 (Bork, J., concurring).

152. *Id.* at 823 (Robb, J., concurring). *See infra* text accompanying notes 155-62.

153. It is ironic that under the current state of the law, aliens, but not U.S. citizens, may bring a suit for human rights violations in U.S. courts. Plaintiffs argue that at the time of the Holocaust, they were aliens to the United States. Nonetheless, if the court holds that U.S. citizens may not invoke § 1331, "these Holocaust survivors will have lost their rights to seek civil remedies in federal courts against state or private actors." *Plaintiffs' Post-Hearing Memorandum in Opposition to Defendants' Motion to Dismiss* (filed Aug. 29, 1997), at 17.

154. *See* Mushikiwabo v. Barayagwiza, No. 94 CIV. 3627, 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996); Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

A. *The Political Question Doctrine*

In their motion for abstention, the banks argue, *inter alia*, that the issues plaintiffs raise are foreign policy questions not properly subject to judicial determination. In other words, courts should not deal with issues constitutionally committed to other branches of government.[155] While this doctrine prevents the judicial branch from deciding issues committed to the legislative or executive branches, the Supreme Court maintained that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[156]

In *Kadic*, the Second Circuit recognized that judicial action in the case against the Serbian despot Radovan Karadzic might create a detrimental effect on political relations. However, the court maintained that not every case "implicat[ing] sensitive matters of diplomacy" is nonjusticiable, and judges should not invoke the political question doctrine "to avoid difficult and somewhat sensitive decisions in the context of human rights."[157] The *Kadic* court, relying on *Filartiga*, stated that international law provides judicially manageable standards for adjudicating suits under § 1350 and therefore the political question doctrine does not apply.[158] The court believed there was no danger of interference with important governmental interests as defendant claimed. Furthermore, the court had written the Attorney General, asking whether the United States wished to comment on the proceedings. The State Department replied that the political question doctrine did not apply to these facts.[159] Based on these findings, the *Kadic* court held that the case against defendant could proceed.

In contrast, Justice Robb's concurrence in *Tel Oren v. Libyan Arab Republic*[160] reasoned that because the lawsuit involved a terrorist attack, judicial interference in the area of foreign relations would enter the Congressional and the Executive's domain.[161] Justice Robb maintained that other branches of the national government were better equipped to deal with terrorism. Therefore, by allowing plaintiffs in this case their day in

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155. *See* Russell J. Weintraub, *Establishing Incredible Events by Credible Evidence: Civil Suits for Atrocities that Violate International Law*, 62 BROOK. L. REV. 753 (1996).

156. Baker v. Carr, 369 U.S. 186, 211 (1962).

157. Kadic v. Karadzic, 70 F.3d 232, 249 (2d Cir. 1995).

158. *Id.*

159. *Id.* at 250. *See also* Klinghoffer v. Achille Lauro, 739 F. Supp. 854, 860 (S.D.N.Y. 1990) (doctrine did not apply because plaintiffs' claims were in tort); Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (doctrine did not apply because action was a tort); Paul v. Avril, 812 F. Supp. 207, 212 (S.D.Fla. 1993) (doctrine is devoid of merit because case presents clearly justiciable issues).

160. 726 F.2d 774 (D.C.Cir. 1984).

161. *Id.* at 825.

court, every alleged victim of violence around the world could mount similar claims.[162]

The Swiss banks have argued that these lawsuits should not be allowed to proceed, because they will impede the Volcker Commission's investigation into the disposition of the wartime accounts. They also asserted that Judge Korman should abstain from handling the case and allow the executive branch to resolve these issues. An attorney for the plaintiffs duly noted that the suits involve private individuals suing private companies. As a result, government action should not have an impact on the proceedings. Another argument in support of mallowing this litigation to proceed is that dspite the work of independent committees and auditors, and the banks and despite the humanitarian funds that have been set up to compensate Jewish survivors and their heirs by the Swiss banking industry and the government, no money has changed hands. Moreover, the offers, totaling close to a combined $5 billion, falls $15 billion short of what Jewish organizations and leaders think Holocaust survivors and their heirs rightfully deserve. At any rate, in light of the Second Circuit's opinion in *Kadic*, the court is not likely to adopt the position that the political question doctrine precludes the court from adjudicating these claims.

B. *Statute of Limitations*

In their motions, which were filed on May 15, 1997, the defendants did not directly broach the issue of the expired statute of limitations. They did, howver, refer to it in general terms and argued it would be a future point of contention. Plaintiffs in both *Weisshaus* and *Friedman* claim that because defendant banks acted to conceal the existence of deposited, looted, and cloaked assets, they should be estopped from seeking the protections the applicable statute of limitations.[163]

Equitable tolling principles apply in cases where a defendant's wrongful conduct, or extraordinary circumstances outside the plaintiff's control prevent a plaintiff from asserting a claim timely.[164] In *Forti v.*

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162. *Id.* at 826.

163. Friedman v. Union Bank of Switzerland, No. 96-5161, at 104 (E.D.N.Y. filed Oct. 21, 1996); Weisshaus v. Union Bank of Switzerland, No. 96-4849, at 8-9 (E.D.N.Y. amended complaint filed Jan. 24, 1997). The Weisshaus complaint states: "No statute of limitations has begun to run on the causes of action herein since plaintiffs and the plaintiff class have remained in ignorance of vital information, without any fault or want of diligence or due care on their part, essential to pursue their claims." *Weisshaus*, No. 96-4849, at 8-9.

164. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1549 (N.D.Cal. 1987), *reh'g granted*, 694 F. Supp. 707 (N.D.Cal. 1988).

Suarez-Mason,[165] Argentine citizens brought suit in a U.S. court against a former Argentine general under the Alien Tort Claims Act.[166] The plaintiffs alleged that under the general's authority, military personnel had tortured and detained them and murdered their family members.[167] The Argentine citizens sought relief for their injuries approximately ten years after the alleged activity occurred.[168] The court first held that the statute of limitations of the forum state for personal injury actions should be applied to claims under the Alien Tort Claims Act. The court also acknowledged that under California law, personal injury actions must be brought within one year of the incident.[169] They went on to assert that in order to demonstrate that their claims are not barred, plaintiffs must "allege facts sufficient to show a disputed question of fact as to timeliness."[170] The court found that the plaintiffs presented enough evidence indicating that they may have been denied access to the Argentine courts, thus raising an issue of fact as to whether the limitations period was tolled.[171] Plaintiffs argued that the courts retained their powers to adjudicate civil claims against military officers only in theory, while in reality, no relief was or could be granted by the Argentine courts during the military's "reign of terror."[172] According to the court, it was not necessary for plaintiffs to "plead specific factual detail not ascertainable without discovery" to demonstrate that their claims were not time-barred.[173] The court also found that the equitable tolling doctrine applied during the time the defendant was in hiding, thereby applying the "fraudulent concealment" doctrine to situations where a defendant flees and conceals himself in order to avoid being sued.[174]

Similarly, in *Hilao v. Estate of Marcos*,[175] the Ninth Circuit ruled that any action against the estate of former Philippine President Ferdi-

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165. *Forti*, 672 F. Supp. 1531.

166. *Forti*, 672 F. Supp. at 1536-38.

167. *Id.*

168. *Id.* at 1549.

169. *Id.*

170. *Id.*

171. *Id.* at 1550.

172. Forti v. Suarez-Mason, 672 F. Supp. 1531, 1550 (N.D. Cal. 1987), *reh'g granted*, 694 F. Supp. 707 (N.D. Cal. 1988)

173. *Id.* at 1549.

174. *Id. But see* Handel v. Artukovic, 601 F. Supp. 1421, 1431 (C.D.Cal. 1985). "Criminal prosecutions of crimes against humanity should be and are subject to a statute of no limitations; but civil actions cannot be subjected to this rule under American law." *Id.*

175. 103 F.3d 767 (9th Cir. 1996).

nand Marcos had tolled during his presidency.[176] The court found that the testimony offered by plaintiffs demonstrated extraordinary conditions. One witness testified that Marcos had gotten the legislature to pass a constitutional amendment granting him immunity from suit during tenure.[177] Another witness testified that many victims of torture did not report the abuse they suffered out of fear of reprisals.[178]

Accordingly, the court could apply the "fraudulent concealment" doctrine to the banks' situation if it finds evidence that the banks in fact concealed essential information from plaintiffs regarding the status of their accounts and the deposits of looted assets. The Weisshaus complaint includes a particular story about a plaintiff's encounter with defendant Credit Suisse. After the war, class member Estelle Sapir, acting on information that her father shared with her before he died in a concentration camp, contacted Credit Suisse and requested the return of all money in her father's accounts. Credit Suisse acknowledged the existence of her father's accounts, yet refused to return the money unless she could produce her father's death certificate.[179] Obviously, Sapir did not have and could never obtain her father's death certificate. It seems that the Swiss banks were purposefully demanding unreasonable documentation from Sapir in order to deny her any money. Interestingly, *Weisshaus* uses this story as evidence of the banks' active concealment of information from class members. According to plaintiffs, by continually denying the existence of the Sapir account, and hardly making an effort to locate it, the banks consciously acted to hide the whereabouts of Plaintiffs' assets.

Problems with the statute of limitations doctrine are evident—plaintiffs are suing the banks because of transactions that occurred over fifty years ago.[180] However, the doctrine may not apply if plaintiffs argue that the conspiracy to deny them their deposits is ongoing. Moreover, new information crucial to the litigation has recently surfaced at the National Archives. Reexamining Switzerland's role during the war is more timely now than immediately after the war given the newly released documents

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176. *Id.* at 773.

177. *Id.*

178. *Id.*

179. Weisshaus v. Union Bank of Switzerland, No. 96-4849, at 4 (E.D.N.Y. amended complaint filed Jan. 24, 1997).

180. In addition to applying the "fraudulent concealment" doctrine, the Friedman complaint alleges that defendant banks are estopped from raising the statute of limitations defense because the "activities in concealing their common scheme and purpose to deny, block and obstruct access to and knowledge of these assets" are ongoing. Furthermore, defendant banks are estopped from raising the statute of limitations as a defense by operation of the doctrine of unclean hands. Friedman v. Union Bank of Switzerland, No. 96-5161, at 104-05 (E.D.N.Y. filed Oct. 21, 1996).

and the current investigations into Switzerland's past. If it is not too late to uncover the truth through these special investigatory committees, it should not be too late for claimants to achieve justice through the courts.

V. CONCLUSION

It is difficult to predict exactly how Judge Korman will rule on these lawsuits. Analyzing how courts have dealt with similar claims in the past is a helpful exercise. Based on prior courts' reasoning, it seems that the court will not entertain the Friedman suit's federal question claims of treaty violations under § 1331 but might entertain claims of international human rights violations under § 1331. The court is even more likely to recognize that the allegations under § 1350 provide noncitizen plaintiffs with a private right to sue. Then, however, the problem becomes proving that the Swiss banks actually violated international law by prolonging the Nazi Regime's reign of terror by hiding looted and cloaked assets.

Diversity jurisdiction remains for plaintiffs from both suits who are U.S. citizens. A court may determine that diversity jurisdiction supports all counts (most of which are based in contract and fraud) in the complaints. And New York courts do have personal jurisdiction over defendant banks because the bank branches conduct a substantial business in New York. However, other obstacles preventing plaintiffs from getting to a jury include two discussed in this paper—the political question doctrine and an expired statute of limitations—and many more that are not—such as problems with class certification, failure to plead with sufficient particularity, and proof.

Even if plaintiffs do not succeed in court, it might not matter. These lawsuits impose added pressure on the Swiss banks to act favorably in light of their questionable conduct during World War II. In fact, the suits have forced a reexamination of Switzerland's dealings with the Nazis. They have exposed the Swiss' unfriendly postwar treatment of Holocaust survivors and their heirs by instigating negative publicity. Plaintiffs certainly will not regain all of what they lost during the war, but they will receive some compensation from the Swiss banks. Whatever the Swiss banks and Swiss government decide, the result could not arrive soon enough.

Stephanie A. Bilenker