in a certain manner. In giving judgment they also stand to be judged by their equals,[42] and by the rest of the professional legal community. As the ICC begins deliberating its first cases, it should not be forgotten that international law ultimately resides in states, and not in international organizations.

THE LIBERAL-REPUBLICAN QUANDARY IN ISRAEL, EUROPE, AND THE UNITED STATES
EARLY MODERN THOUGHT MEETS CURRENT AFFAIRS
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42 As President Barak noted in HCJ 769/02 Public Comm. against Torture in Israel v. Gov't of Israel (Nevo, 14 December 2006)—which dealt with the legality of the application of force by general-security-service investigators—when the court sits to judge it is also being judged. For analysis see Amnon Reichman, "When We Sit to Judge," *supra* note 24; Eyal Benvenisti, "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts," *102 Am. J. Int'l L.* 241 (2008).

Republican and Liberal Values in Coping With the Memory of World War II: The Swiss Holocaust Assets in a Transnational Perspective

THOMAS MAISSEN

The restitution of Holocaust-related assets was a major issue in the 1990s. Rather surprisingly, at least for the Swiss themselves, Switzerland became the most prominent target in the respective debates. To compare the reactions in the involved countries—besides Switzerland, especially the United States, Israel and the members of the EU—is not only necessary in order to explain the relevant conflicts of the outgoing twentieth century but also conflicts among befriended democratic states. It can also help us understand diverging approaches and inhibitions among some important actors of globalization in the years to come. Such differences can be explained, at least partially, with the role that republican and liberal traditions play in these countries and their national memories. The assumption is that political languages of the pre-nation-state era can help us understand which specific lessons different nation-states drew from World War II and the Holocaust. Since the end of the Cold War, these lessons have affected and go on to affect their position to globalization and a possible new world order.

To explain this argument, the Swiss case will first be discussed both with (1) a characterization of the relevant problem areas stemming from World War II and (2) a summary of the debates in the 1990s, followed by (3) a description of how the payment of reparations has evolved to date and a discussion of the respective problems. The different national patterns of reaction and their foundation in collective memory are analyzed (4) and then confronted (5) using "republicanism" and "liberalism" as ideal typical political languages.[1]

1 I have described the whole issue at length in *Verweigerte Erinnerung. Nachrichtenlose Vermögen und die Schweizer Weltkriegsdebatte 1989-2004* (Zürich: NZZ, 2005) and will not refer to that book for details of the account. I will quote the relevant literature, however, where I discuss interpretations. It is limited, if some scholarly standard is applied, as most publications in Switzerland, Israel and the US were quite partisan. The relevant contributions in English are: John

1. The Legacy of the Nazi Era

Dormant accounts, Nazi gold, loot, and the policy towards refugees are different problem areas that all raise questions about the Swiss role during the National Socialist rule in Germany. Switzerland, where two thirds of the population speak German, was immediately affected by Hitler's seizure of power. The Nazi ideology did not appeal to the Swiss who had only one Nazi in their national parliament, and for just one term (1935-9). Unlike Austria, the neutral Swiss were not traumatized by World War I: even though the country was hit by the lasting depression, unemployment remained relatively low (about 5 percent) compared to other countries and especially Germany; Nazi centralism contradicted Swiss federalism with its large autonomy for cantons and communes; dictatorship and Führerprinzip were incompatible with the Swiss democratic parliamentarian system that was the only one on the continent, besides the Swedish, to last throughout the Nazi era; racist references to "blood and soil" made no sense in a country where four different languages (German, French, Italian, Romansh) were not only spoken but also official languages; national identity depended on a shared historical past, not on a social Darwinistic "master race." Such deeply rooted differences manifested in a clear opposition of the Swiss and their public sphere, including almost all newspapers, against Nazism. In the spiritual defense (Geistige Landesverteidigung), organized by the minister of the interior, this position became an official policy.

Switzerland, however, was far from autarkic. The economy of the small but already wealthy country depended on exports, and Germany was a major trade partner. Compared to the present, the Swiss banking-system was still largely national, but the convertible Swiss franc and the accessible banks already attracted an international clientele. Anti-Semi-

Authers, Richard Wolffe, *The Victim's Fortune: Inside the Epic Battle over the Debts of the Holocaust* (New York: HarperCollins, 2002); Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Court* (New York, London: NYU Press, 2003); *Holocaust Restitution: Perspectives on the Litigation and Its Legacy* (New York, London: NYU Press, 2006), ed. Michael J. Bazyler and Roger P. Alford; Regula Ludi, "Why Switzerland? Remarks on a Neutral's Role in the Nazi Program of Robbery and Allied Postwar Restitution Policy," in *Robbery and Restitution: the Conflict over Jewish Property in Europe*, ed. Martin Dean, Constantin Goschler and Philipp Ther (New York, Oxford: Berghahn, 2007), 182–210; Leonard Orland, *A Final Accounting: Holocaust Survivors and Swiss Banks* (Durham: Carolina Academic Press, 2010). Literature on restitution issues in general has become vast; for broad perspectives see e.g. Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: Norton, 2000); *Restitution and Memory: Material Restoration in Europe*, ed. Dan Diner, Gotthart Wunberg (Oxford: Berghahn Books, 2007).

tism, not least among civil servants, was widespread in a country where barely one half percent of the population was Jewish. Anti-Semitism often accompanied the anti-Communism that had become an integrative glue after the failed general strike in 1918. While Nazism remained limited to splinter parties, many exponents of the bourgeois elite, and also members of government and army, admired Mussolini and his Fascist equals in Spain, Portugal or Austria. The Fascist model of a corporative state had influential sympathizers. Authoritarian thoughts and practices were manifest also in the federal government.

After the fall of France, from July 1940 onwards, Switzerland was surrounded by the Axis powers but for a short borderline with Vichy France, which became occupied as well in November 1942. Hence the Swiss had to cope with German hegemony during the war and did so quite well. While general mobilization in 1939-1940 was directed against the Third Reich and a considerable number of Swiss troops remained at the borders throughout the war, Swiss economy produced largely for the surrounding Axis. Strategic material, including anti-aircraft-weapons, was not a small part of these exports. Against the duties of a neutral state, the federal government subsidized this production through considerable credits—with the double aim to maintain jobs and to propitiate the Germans who easily could block Swiss imports and exports. Invulnerable transit for trains passing through the neutral Alps favored the Axis as well—and so did many decisions, from censorship to blackout, the government adopted to appease the Reich.

Most of these facts were not unknown at that time. A well-known joke described the Swiss ambivalence this way: six days a week, we work for the Germans and then spend the *seventh* day saying prayers for the Allied victory.[2] The issues that seemed to appear from nowhere in the 1990s had their origin in this uncomfortable situation in the years 1939-45 which the Swiss, however, had managed to turn into too many comparative advantages. There were essentially four:

Nazi gold refers to the gold that the German Reichsbank sold the Swiss National Bank and—to a lesser extent—the commercial banks between 1940 and 1945. The Germans received Swiss francs in exchange for which they needed to purchase raw materials in other non-belligerent countries, such as Portugal. Of the German gold, worth about 1.9 billion

2 Quoted as a "standard joke" in Max Frisch, *Dienstbüchlein* (Frankfurt a. M.: Suhrkamp, 1974), 102.

francs (U.S. $444 million at the exchange rate of 1945), which was purchased by Swiss institutions, a considerable portion had been looted, mostly from the Belgian and Dutch central banks. Confiscated property of individuals was in the booty, too, and a small part of this gold (worth CHF. 0.58 million) even came from concentration camps. Nobody in Switzerland seems to have known about its dreadful origin, while the Swiss National Bank's leading representatives must have known about the monetary gold's looting at latest in 1942. The allied were not sure about that, however, when they summoned the Swiss to Washington in the spring of 1946 to account for controversial financial transactions in favor of the Reich. By signing the "Washington Agreement," Switzerland agreed to pay CHF. 250 million in gold to those national banks which had suffered losses. Claims of private individuals were not taken into consideration.

Loot was a rather vague issue, as it was and is very difficult to determine which private assets German institutions or individuals stole during the War and then deposited in other countries. It is clear, however, that some Nazis had bank safes in Switzerland, and stolen jewelry and works of art were sold by Swiss fences.

Refugee-policy was already debated to some extent during the War, and later in an official, though quite critical report in 1956, which provoked further research, reports and movies. During the War, Switzerland hosted about 28,000 Jewish refugees. At the same time, about 25,000 refugees, mostly Jews, were denied the entry into Switzerland. The number is debated, but those who were sent back to the territory controlled by the Germans faced death in the concentration camps.

Dormant accounts or *heirless assets* describe a problem that only developed after the war. By its end, accounts of unknown value belonging to Nazi victims, especially to Jews, had accumulated in Switzerland. The banks resisted several initiatives to search for the original owners. Their interpretation of the Swiss bank secrecy law implied that a bank could give information only to people authorized by the account holder and that the bank never had to get into contact with its foreign clients. When the law was stipulated in 1934, this was considered a protective measure for foreigners who had to fear draconian punishment, especially in Nazi Germany, for having violated their own country's law prohibiting transactions in foreign currencies or tax evasion. After the War, however, such a policy worked to the disadvantage of survivors

who searched for assets that had belonged to their murdered relatives but could not produce a death certificate or authorization. For obvious reasons, this was often impossible for survivors who in addition knew little about the accounts and could not even identify the right bank. There was no institutional help in such cases, and banks often proved to be far from helpful, denying the possible heirs the specific treatment they needed and deserved in respect for the historical circumstances. Although the banks did not appropriate their clients' money but left it dormant, it could be reduced to nil through fees throughout the years. There are also documented cases of criminal bank clerks who plundered accounts whose owners never claimed their assets. Only in 1962, a Swiss Federal Decree ordered that all accounts of Jewish origin and dormant since 1945 were to be declared as such. The procedure was implemented carelessly: until 1974, the banks declared only the sum of roughly 10 million Swiss francs, of which only between 1.5 and 4 million francs were paid to relatives of Nazi victims, part of the remainder to humanitarian associations.

2. The Controversies of the 1990s

In the 1970s, the matter of the heirless assets seemed definitely settled to the few who knew anything about it; and so were in the 1990s the domestic debates about the Swiss wartime past that the new left had initiated after 1968. But soon after the celebrations for the fiftieth anniversary of the War's end in 1995, Switzerland's history became a major international issue for the first time ever. Several newspapers printed articles with titles such as "Secret Legacies" (*Wall Street Journal*, June 22, 1995) or "Give Us Our Money Back!" (*Jerusalem Report*, June 29, 1995). Members of the Swiss parliament reacted suggesting legislation on the matter, and the Swiss Bankers' Association, so reluctant earlier, finally established a central information service for dormant accounts to assist claimants in their search. The Bankers' Association wanted to deal with the matter on a strictly national level, with just the community of Swiss Jews as its partner. But the World Jewish Congress (WJC) and the Jewish Agency (JA) had agreed to investigate the case. In September 1995, their representatives Edgar Bronfman, Israel Singer and Avraham Burg met with some exponents of the Swiss Bankers Association and insisted to be part of further investigations. "Trust, but verify," was his

motto, Bronfman declared. But outside verification would have meant a breach into Swiss bank secrecy. Therefore the bankers only proposed an information service working under their own control. When the WJC realized that this was the Swiss approach, it mobilized political backing. U.S. Senator Alfonse D'Amato held several hearings before the Senate Banking Committee that he chaired, the first one in April of 1996. Ten days later the Swiss agreed to sign a "memorandum of understanding" that established a Commission chaired by Paul Volcker, the former chairman of the US Federal Reserve. The Volcker Commission mandated the leading international auditing companies to check whether and how many heirless assets stemming from World War II still were dormant in Switzerland. The auditors got unrestricted access to relevant information on accounts opened in Swiss banks before, during and immediately after the War.

The dynamics did not stop there, however. In fall 1996, British and later American original sources were quoted in the press in order to show the discrepancy between the looted gold acquired by the Swiss National Bank and the sum actually paid in the Washington agreement in 1946. While the heirless assets had been an issue of private companies, the banks, the National Bank was a public institution, and its wartime politics, often justified with the convertibility of the neutral nation's currency, had been part of the overall strategy to keep the country out of the conflict. Although reluctantly, Swiss politics now came into the game. The federal parliament tried to counter growing international criticism by adopting a decree providing for a historical and legal investigation into the matter. The expert commission was chaired by the Swiss historian Jean-François Bergier; the holocaust survivors Saul Friedländer and Władysław Bartoszewski were among its 9 members, and the research would last 5 years, leading to about 30 sub-studies and an encompassing final report in early 2002.[3]

As all the relevant issues, including loot and also refugee policies, were intensely covered by international media, the WJC lost its monopoly in criticizing the Swiss, and with it control of the case. The WJC aimed at an institutional solution, essentially with the Jewish organizations themselves. In this perspective, the Swiss case was hijacked when American lawyers opened a new front in October 1996 and launched plaintiff class actions for the restitution to groups of discriminated individuals; and not to institutions. Ed Fagan, an outsider with more media savvy than legal expertise, preceded the heavyweights Mel Weiss and Mike Hausfeld in filing lawsuits against Credit Suisse and UBS for having withheld access to information from potential heirs.

3 For further information see http://www.uek.ch/en/index.htm, containing also the *Final Report of the Independent Commission of Experts Switzerland—Second World War* (2002), hereafter Bergier Report.

Three scandals in Switzerland marked the decisive escalation in January 1997. The outgoing president of the Swiss government, Jean-Pascal Delamuraz, had to apologize after he had characterized Jewish pressure as "ransom and blackmailing" to undermine the Swiss banking place. This crisis was barely settled when Christoph Meili, the employee of a security company, noticed that documents which, in part, concerned transactions with Germany in the 1930s (but not Jewish accounts) were to be destroyed at UBS. Although this violated the mentioned federal decree for historical and legal investigation, UBS fired Meili for acting against bank secrecy. As if this were not enough, the Swiss Ambassador to the United States, Carlo Jagmetti, resigned in late January after one of his internal reports was leaked to the press wherein he warned about being at war with adversaries that could not be trusted.

The three major Swiss banks, the National bank and some companies of the export industry reacted to the escalation by establishing a humanitarian "Special Fund for Holocaust Victims" that eventually distributed about $200 million; the Israeli politicians Josef Burg and Avraham Hirschson belonged to the executive board. Soon after, in March 1997, the President of the Confederation launched the idea of a 7-billion-franc "Swiss Foundation for Solidarity" with the objective to provide relief for people in need. The Foundation met with fierce political opposition among conservatives who vilified it as surrender to blackmail; after a negative referendum, the Foundation eventually was not established.

While conservative rejection gained strength in the Swiss public sphere, new opponents came forward in the United States, in addition to D'Amato's hearings and the class actions. The representatives, treasuries and comptrollers of several U.S. states gradually joined in the growing movement for boycotts. The Clinton administration opposed such interventions into what it considered its prerogative in foreign relations. But the federal government had its own way to push the Swiss towards

compromise. Under Secretary of Commerce Stuart Eizenstat was in charge of the issue and published a report that described the post-war negotiations on German assets and looted gold. In his foreword, Eizenstat criticized the Swiss for having been the principal bankers for the Nazis, thereby prolonging World War II: "In the unique circumstances of World War II, neutrality collided with morality: too often being neutral provided a pretext for avoiding moral considerations."[4] The Swiss were shocked that a member of the government of a friendly nation would so harshly criticize neutrality that had formed the core element of Swiss foreign policy for centuries.

The increasing boycott movement threatened the Swiss banks which were very vulnerable because they were expanding heavily on the American market after acquiring U.S. investment banks, such as First Boston, bought by Credit Suisse in 1990, or Dillon Read, bought by the future UBS in 1997. So a long negotiation process started between the banks, the plaintiff lawyers and the WJC, with Stuart Eizenstat mediating. When, in the summer of 1998, a real boycott of transactions with Swiss banks seemed imminent, Swiss politicians envisaged more or less radical countermeasures; even the boycott of American and Jewish products was proposed by a small rightwing party. On August 12, 1998, however, a global settlement was reached: Credit Suisse and UBS assented to pay $1.25 billion for an extra-judicial agreement prepared by Judge Edward Korman in Brooklyn. This sum covered possible heirless assets that would be discovered through the auditing organized by the Volcker Commission, but compensated also for possible claims against the Swiss Confederation, the National Bank, other banks and other Swiss branches, except the insurance companies which were part of another class action.[5] The boycott movement immediately stopped. While representatives of the Swiss business world welcomed the agreement, many other Swiss complained that blackmailing had proved successful.

4 Stuart E. Eizenstat, foreword to William Z. Slany, *U.S. and Allied Efforts To Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II* (Department of State, Washington, 1997), v; http://www.ess.uwe.ac.uk/documents/asetindx.htm.

5 For these litigations see http://www.icheic.org/, containing also the 2007 final report; see also Orland, *Final Accounting*, 95-98.

3. Problematic Compensation, 1998-2010

The global settlement was a political end to the international debate, but it was not one to the judicial issue itself. Judge Korman held a fairness hearing in late 1999, finalized the Settlement Agreement of July 26, 2000 and adopted an institution to implement the Agreement, the Claims Resolution Tribunal II (CRT II) in Zurich and New York. Thus he succeeded in combining his task with the extraordinary audits that the Volcker Commission had organized in roughly 60 Swiss banks. For a remuneration of about $500 million, some 650 international auditors checked 4.1 million accounts of all kinds (hence mostly domestic and unproblematic) for which some documentation still could be traced. The number of 4.1 million was surprisingly high given a record retention of only ten years, but it was opposed to an estimated 6.8 million accounts that may have existed in the Nazi era. Information was missing for an estimated 2.7 million accounts. Out of the 4.1 million examined accounts, the Volcker Commission, in its final report dated December 6, 1999, considered 54,000 as "probably" or "possibly" belonging to Holocaust victims. Among them, there were only few obvious cases. Thus, 417 accounts had been paid out to Nazi institutions after the original owner had ordered to do so, probably under pressure; still, the orders that they had sent to the banks were legally corrected, and fulfilling it may have saved lives of Jews who were captured and blackmailed by Nazi henchmen. The Volcker Commission stated that there were some proven cases of cheating but no systematic looting or destruction of documents by the banks. The category of the "possible" accounts referred mostly to people in countries that were or came under Nazi control between 1933 and 1945 and were "closed unknown to whom," which means that there was just no proof left about who eventually got the asset. The Volcker Commission's approach to auditing was a decisive reversal of the onus of proof: until then, the Swiss banks had considered an account to be Holocaust related only if there was positive evidence that the former owner had perished in the Shoah. Now every account whose final destiny was unclear became a possible victim's account.[6]

For Judge Korman, who had to allocate the settlement money, the work had just begun in the summer of 1998. About 580,000 claimants

6 ICEP (Independent Committee of Eminent Persons), *Report on Dormant Accounts of Victims of Nazi Persecution in Swiss Banks* (Bern: Stämpfli, 1999).

filled out his "Initial Questionnaires" to explain their claim. This data was checked to decide whether the claimants fit one of the following classes, each of which got a share of the settlement money awarded according to the provisions of Korman's Settlement Agreement and the Distribution Plan presented by special masters Judah Gribetz and Shari Reig in September 2000.[7]

1. Deposited Assets (bank accounts and other assets deposited in Swiss financial institutions): $800 million. For Judge Korman, the property rights of account holders and the banks' neglecting their duties as a fiduciary were the substance of the litigation. He reserved two thirds of the settlement in order to offer legitimate heirs individual compensations corresponding to the account's original value. The findings of the Volcker Commission provided the basis for the attribution. In contrast, the members of the four other classes received lump sums. Such a procedure is typical for class actions. It was limited to individuals who had suffered personally from Nazi crimes where a relation to Switzerland was possible. They received a legal title that—unlike the claims to assets—could not be bequeathed.
2. Slave Labor Class I (individuals who may have performed slave labor for German and other companies which transacted their profits through Swiss entities). A total of $200 million was put aside, from which $1000 per capita was paid out together with the money from the German settlement on slave labor that was concluded independently in the summer of 2000 and consisted of 10 billion Deutsche marks.
3. Slave Labor Class II (individuals who may have performed slave labor for affiliates of Swiss companies): the few documented cases got $1000 as well.
4. Looted Assets (individuals whose assets were looted and transacted through Switzerland or Swiss entities during the Nazi era). As it was completely impossible to identify members of this class, $100 million, subsequently increased to $205 million, were designated as a cy-près remedy for humanitarian assistance programs.
5. Refugees: $2500 was granted to individuals denied entry into or expelled from Switzerland; $500 if they were admitted into Switzerland, but abused or mistreated.

7 Judah Gribetz, Shari Reig, *Plan of Allocation and Distribution of Settlement Proceeds* (New York: 2000), http://www.nyed.uscourts.gov/pub/rulings/cv/1996/96cv4849-erk-smplan.pdf; for their considerations see also their "Epilogue," in Orland, *Final Accounting*, 135-151, where the plan is reprinted to a large extent (293-364), and their article "The Swiss Bank Holocaust Settlement," in *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in Making*, ed. Carla Ferstman, Mariana Goetz, Alan Stephens (Leiden and Boston: Martinus Nijhoff, 2009), 115-142.

These later sums seem ridiculous, as the members of the refugee class had arguably suffered most and most directly from Swiss malpractice. But as mentioned, Korman and Gribetz considered only the assets as actionable in a class action. By earmarking $800 million for the Deposited Assets' class, Korman followed the estimations of Volcker's final report but built himself a trap. It proved absolutely impossible to find enough legitimate heirs for such a considerable total sum. Swiss bankers maintained that the interpretation of the "probable or possible" victim's account had not been serious and largely overestimated their number. The bankers' opponents in the class action, and eventually also Judge Korman, countered that in the decades since the war, the banks had destroyed the evidence that would have been necessary to find the legitimate heirs and that, after having achieved their goal—impunity—in the global settlement, the banks no longer contributed to providing further data that could facilitate its distribution. As a matter of fact, the Swiss banks very consciously left the distribution process to the Judge and the CRT II. They had paid a large sum for the external auditors who had already checked their files for Holocaust related cases, and they wanted to avoid further breaches into bank secrecy; but they wanted to avoid the blame from victim groups that remained unsatisfied in the distribution process.

Under these circumstances, with little additional information from the Swiss banks, the criteria of proof for heirs of deposited assets were increasingly reduced. Simultaneously, the distributors increased both the average values of accounts in 1945—which served as starting point for cy-près calculations—and the interest-rates since the War, which was labeled "adjustment of deposited assets class presumptive values." In other classes as well, the payments were "adjusted," which means increased, because there were less entitled persons than anticipated. With such measures, the Settlement Fund Distribution Statistics from March 31, 2012 show that $716.2 million has been approved for distribution to some 18,000 members of the Deposited Assets Class; $205 million

for distribution to over 230,000 members of the Looted Assets Class; over $287.2 million for distribution to over 197,000 members of Slave Labor Class I; $826,500 for distribution to 570 members of Slave Labor Class II; over $11.5 million for distribution to over 4,150 members of the Refugee Class, for a total of over $1.228 billion distributed to over 450,000 claimants. The distribution had been concluded in all classes for some years already except for Deposited assets: in the summer of 2007, only $452.5 million had been distributed in that class ($967.2 million in total). This means that the distribution within the lump-sum classes could be done relatively easily, while the deposited assets took much more time and could not and cannot be resolved by identifying eligible persons, unless the criteria for selection are widened.[8]

If one looks at the list of certified awards as last updated on March 31, 2012, fourteen years after the settlement and ten years after the Settlement Agreement, one will also see that not all the approved cases are really assigned cases yet. In the Deposited Assets class, there is a big gap to the numbers just given: for 2,916 certified awards, $497.4 million has been paid out so far.[9] The distribution proceeds at a slow and arguably decelerating pace. This is not surprising if one considers that the well-documented cases were settled first. The CRT II spends its time checking the probability that present-day claimants are related to persons who lived in the 1930s in European countries and of whom the Swiss lists sometimes just mention the last name. Korman and the CRT are confronted with the Sisyphean labor of establishing legally solid solutions where the lack of documentation makes this impossible.

Criticism was unavoidable in such a situation where interest groups could also hope that there would be considerable unclaimed residual funds. Their allocation was contested for some time (as were the lawyer's fees). While Jewish institutions proposed to organize research or education programs, Judge Korman earmarked these funds for humanitarian aid, such as food relief and health care, to the neediest survivors. In spite of this, the essential beneficiaries of the restitution process were not the many old, needy survivors but, regardless of their wealth, the relatively few and happy who could assert a kinship to individuals

8 The relevant information of the court in Brooklyn are to be found here: http://www.swissbankclaims.com/ (accessed August 8, 2012).

9 http://www.crt-ii.org/_awards/index.phtm (accessed August 8, 2012); this homepage contains the relevant information of the *Claims Resolution Tribunal II*, including the individual awards.

named on the banks' lists. This was unavoidable as far as the class actions had been about property rights. In the Deposited Assets class, claims were rewarded not as a moral recompense for misbehavior of the banks or the Swiss in general but as a liability of the banks as fiduciaries towards individuals. But such well documented claims (in a legal sense) were far from attaining the earmarked sum.

The explanation for this fact depends on how one interprets the lacking documents of a period 70 years ago. The Swiss banks maintained that there never had been many well documented cases. As the plaintiff lawyers, Judge Korman took another stand. Document destruction, even though legal after ten years according to Swiss law, became for him the "most contentious subject": if a party destroyed relevant evidence, the law assumed that this would have been harmful to the destroyer.[10] Thus the onus of proof was reversed so that a former account in a Swiss bank became a possible victim's account if the contrary was not positively evident. Therefore, the Swiss banking system of the Nazi era (and thereafter) had to be criminalized as a whole and transformed into a conspiracy built up to rob European Jews and then to cover the tracks. Such a plot cannot be excluded, but it is quite improbable and not supported by existing documentation and the research of the Bergier and the Volcker Commissions although they did not spare the banks from criticism for misbehavior, criminal acts and stonewalling against clients. As mentioned above, there are several other aspects of historical and moral guilt that Swiss agents can be blamed for, and this would be enough for recompensing Holocaust survivors on a humanitarian basis. But Korman and the CRT felt that they had to develop a historical argument against the Swiss banks and Switzerland in order to legitimize payments for deposited assets to claimants with a feeble documentation. In spite of this, the blanket assumptions of many CRT-awards are not convincing.[11] There are good reasons to distinguish between the

10 Edward R. Korman, "Rewriting the Holocaust History of the Swiss Banks. A Growing Scandal," in: *Holocaust Restitution. Perspectives on the Litigation and Its Legacy* (New York, London: NYU Press, 2006), ed. Michael J. Bazyler and Roger P. Alford, 115-134, 127-129.

11 See http://www.crt-ii.org/_awards/index.phtm. Maissen, *Verweigerte Erinnerung*, 578-581, discusses some awards. The problem is also manifest where Orland, *Final Accounting*, 51-55, quotes several claimants at the 1999 fairness hearing to suggest Swiss responsibility. They say a lot about their sufferings during the Holocaust, but little about Switzerland; out of 9 quoted declarations, only 4 mention Switzerland at all but only vaguely in the following way: "Germans were coming in every single day to collect the treasures. I'm sure, that I don't know but I'm sure

historian's and the judge's task and why the latter should not be held responsible for establishing historical truth in order to adjudicate individual cases.[12]

4. National Memories and Political Sensitivities

Neither discussing the problems of the distribution process nor alluding to a certain self-righteousness of some American protagonists fighting for the good cause is to be misunderstood as apologetic. The Swiss banks deserved the punishment of the global settlement because they had not resolved the problem of victims' assets when they should have done so, immediately after the War. On the contrary, the banks stonewalled possible claimants and purposely obstructed political initiatives to face the problem in the 1950s.[13] Nevertheless, one might wonder in hindsight, after a distribution process that has lasted for well over a decade and still is unfinished, whether Judge Korman chose and maybe, for legal reasons, had to choose a wrong way for a fair solution instead of going for rough justice. Ironically, it would be a similarly wrong way as those the Swiss banks and the Swiss government had tried. Neither an unprecedented auditing mandate nor a commission of scholarly experts nor a Claims Resolution Tribunal could resolve the problems at stake by precision in the legal sense of clear property rights or in the scientific sense of historic evidence. Too many documents are missing, if they ever existed; and it is arbitrary to make the missing evidence into a case in favor of or against the banks.

Instead of hypothesizing about the years of the War and immediately after, it may be more rewarding to understand the conflict about the Swiss bank case as a phenomenon of the 1990s. After all, against the expectations of some proponents and in spite of their success, the Holocaust litigations have not lead to extended human rights jurisdiction; class actions have not received a similar momentum in the case of South Africa, for example. One can draw three conclusions:

1. The litigations and what belonged to them had their time: the Clinton administration and the pre-9/11 search for a new world order.
2. They were limited to one highly emotional historical crime, the Holocaust, which was politically relevant not only on the level of a particular nation but for international relations as a whole.
3. After all, the issues at hand were not litigable. The Swiss banks case was the only one to eventually be resolved in court and not through an international—which means political—agreement, a solution that federal trial judges usually preferred. The reason is that the Swiss solution that government strongly opposed participating in what it considered to be a private-law litigation and abandoned the banks in their search for a solution although it turned out, as a global settlement, to include the government. But even this legal settlement, mediated and executed by a judge, was not preceded by court ruling. Legally, the banks probably would have won the case for lack of enough clear evidence; but fighting Holocaust survivors in court would have been a PR disaster, and a disclosure obligation would have caused an unsupportable dilemma between following an American judge and obeying Swiss bank secrecy that prohibits exactly such actions.

At its core, the conflict was neither about historical truth nor about individual rights. It was about collective memory: the collective memory of Jews in Israel and in the Diaspora, of the Americans, of the Swiss, and of the Europeans. Characterizing these collectivities and some changes that their identity underwent is unavoidably a rough but hopefully helpful enterprise.

To start with the Jewish world, it had lost its European roots. The World Jewish Congress had been founded in 1936 in Geneva, where it kept its headquarters for decades. Nahum Goldmann lived there as well and eventually became a Swiss citizen. Chaim Weizmann studied and taught in Switzerland, and Joseph Burg spent his annual holidays in Zurich reading the *Neue Zürcher Zeitung*. His son Avraham Burg had lost that adherence to old Europe when he became one of the protagonists of

that some of the money was deposited within the Swiss banks or someplace else..."

12 Edward R. Korman, "Rewriting the Holocaust History of the Swiss Banks. A Growing Scandal," 117, states that "the accountants were not seeking historical truth," obviously claiming this for himself. For the problematic judicialization of historical deeds see both in general and with reference to the Swiss case Stefan Schürer, *Die Verfassung im Zeichen historischer Gerechtigkeit: Schweizer Vergangenheitsbewältigung zwischen Wiedergutmachung und Politik mit der Geschichte* (Zürich: Chronos, 2009).

13 For clear evidence on this matter, see Bergier Report, 445-6, following Barbara Bonhage, Hanspeter Lussy, and Marc Perrenoud, *Nachrichtenlose Vermögen bei Schweizer Banken: Depots, Konten und Safes von Opfern des nationalsozialistischen Regimes und Restitutionsprobleme in der Nachkriegszeit (Veröffentlichungen der UEK*, vol. 15) (Zürich: Chronos, 2001), 474; also 242-9, 337-8, 260-1.

the Swiss bank case. In a fictive dialogue with Theodor Herzl at the centennial Zionist Congress, Burg Jr. declared: "Europe betrayed us. And six million brothers and sisters of ours, children and elderly people. ... And we shall never have enough tears to cry for the loss of the Jewish people. But we learnt our lesson."[14] The lesson was the Israeli "never again," discussed by Diana Pinto in the next chapter of this volume. When the Swiss ambassador Jagmetti gave the mentioned appraisal that Switzerland had to fight a war against an unreliable adversary, Avraham Burg responded: "A new Jew has arisen, and he does no longer lose a war."[15]

For this new generation of Jews, equally self-confident in the United States and in Israel, the Shoah was no longer a concealed trauma but a legacy towards the past and a tie for a future that united Israel and the Diaspora, all Jews albeit their secular, religious or national differences. It is significant that in the 1990s, the restitution process was brought forward not by the Israeli government but by Jewish organizations mainly of the Diaspora; however, when Israel's interest grew, it shifted, in 1999, from a fiscal matter handled by the minister of Finance to an identitarian issue under the minister of Diaspora affairs.[16] While earlier, one had focused on general damage done to the Jewish people represented by Israel, it now was about individual restitution according to property rights. This shift originated in the fall of the Berlin Wall, insofar as the German principle "restitution before compensation" was not only established in the former GDR but also in Eastern Europe; and not only for property socialized during Communism but also for property once arianized during Nazism. As a result, Jewish organizations and individuals searching through archives rediscovered not only legal titles but also many kinds of historical documents of a past that had been destroyed forever. Hitler, however, would ultimately not triumph, according to Emil Fackenheim's famous dictum, if the murdered were duly remembered.

When memory, stolen property and genocide thus came together as issues of the 1990s, this meant also that the Holocaust was no longer seen as an exclusively German crime. The lost apartments, synagogues,

14 Avraham Burg, *Speech at the Centennial Zionist Congress*, Basel August 31, 1997, http://www.jajz-ed.org.il/actual/burgb.html (accessed March 12, 2003).

15 *Neue Luzerner Zeitung*, January 28, 1997.

16 For Israel's position see Arie Zuckerman, "The Holocaust Restitution Enterprise. An Israeli Perspective," in *Holocaust Restitution. Perspectives on the Litigation and Its Legacy* (New York, London: NYU Press, 2006), ed. Michael J. Bazyler and Roger P. Alford, 321-330.

paintings, assets had ended up in the hands of all kind of Europeans who had profited from the killing of their former neighbors. One can quote Israel Singer, secretary general of the WJC from 1981 to 2007: "In fact, the organized theft of Jewish property was an intentional and major byproduct of murder during the war. There were no 'good guys' but for a few exceptions in Bulgaria and Denmark where Jews were saved in an organized effort." This is again a kind of reversed onus probandi: Europeans were guilty for letting the Shoah happen, unless they proved the contrary. They were not used to that particular accounting. When remembering the War, until 1989 every European nation had cherished its heroes and a variant of a résistance narrative. Now, heroes no longer had to comply with national pride but with universal values: defending not their country but human rights, namely the innocent and helpless victims. Most Europeans had betrayed them, to repeat Avraham Burg's quote. Even the many who had fought the Nazis had seldom done so to help the Jewish minority.

Israel Singer's opposition of good guys and bad guys does not only reflect the Jewish experience but also the American rhetoric where Manichean confrontations go back to the religious language of the Pilgrim Fathers. Manicheism could also become part of the self-conscious identities that religious and ethnic minorities developed as a consequence of the civil rights movement, often referring to their own experience as victims of discrimination. Within this general phenomenon, the Holocaust did not remain a particularistic Jewish point of reference but was increasingly interpreted in a universalistic sense from the 1970s onwards.[17] Steven Spielberg's movie *Schindler's List* is particularly illustrative because its hero is a German and even a member of the NSDAP. The message is not only universalistic but individualistic: if human dignity is at stake, every single one of us is asked to make the right choices, regardless of his origin; and even a German Nazi can do the right thing. In the same year of 1993, when *Schindler's List* was released, the U.S. Holocaust Memorial Museum was inaugurated. Located among the central monuments of Washington D.C., it recalled a historical event in which Americans actually had not been involved, neither as heroes nor as vic-

17 For this topic in general, see: Peter Novick, *The Holocaust in American Life* (New York: Mariner 2000); Daniel Levy, Natan Sznaider, *Erinnerung im globalen Zeitalter: Der Holocaust (Edition Zweite Moderne)* (Frankfurt a. Main: Suhrkamp, 2001).

tims. The Shoah no longer belonged only to the Jewish memory, it had become the Holocaust: a universalized, a globalized point of reference. When inaugurating the new museum in 1993, Nobel prize laureate Elie Wiesel prompted that President Clinton should intervene in Bosnia. The lesson of Auschwitz eventually legitimized the allied intervention in Kosovo: Clinton himself declared in March 1999 that the Holocaust could have been avoided, if someone had intervened early enough.[18]

One must not forget that the Clinton presidency was marked by pre-9/11 optimism: maybe not an end of history but a new world order seemed ahead. An overarching coalition had defeated Saddam after the invasion of Kuwait. From South Africa to Italy, the rotten regimes of the Cold War had collapsed. Oslo and Madrid spread hope into a lasting peace process in the Near East. The United States as the only hegemonic power was coining these processes with their typical mixture of self-interest and idealism. One of their major instruments was economic boycott. Between 1993 and 1996 alone, the United States used sanctions in 61 cases against 35 countries—more often than during the whole Cold War, when boycotts would have driven the opponent into the Soviet camp. Clinton's administration did not only boycott them, but forced other countries to do so as well. In 1996, the Helms-Burton Act obliged companies that were doing business in the United States not to invest in Cuba. The Under Secretary of Commerce who had to teach this lesson to the unwilling Canadians and Europeans was Stuart Eizenstat, soon after to become the decisive figure of the government in the Swiss bank's affair. Another mentioned protagonist, Senator Alfonse D'Amato, put through the D'Amato-Kennedy Act that forbade investments in Iran and Libya in the same year of 1996.

Jurisdictional imperialism was another tool in establishing a new world order or, depending on the perspective, imposing American rules to a globalised world. The Alien Tort Claims Act (28 U.S.C § 1350), dated from 1789, allowed non US-citizens to file a suit with a federal court against violation of international law. The act was barely used until 1980 when, in Filartiga vs. Pena-Irala, an American court claimed to be the forum conveniens for a "hostis humani generis," an enemy of mankind. In the 1992 Torture Victim Protection Act, the Congress adopted the same principle as a federal law.

18 Levy/Sznaider, *Erinnerung*, 2001, 173-205.

Class actions, a legal instrument hardly known in Europe, became a weapon for ethnic groups that went to American courts to fight for recompense after having suffered historical injustice. European companies, which in a time of globalization developed a growing interest in the American market, had to realize that there were sometimes good reasons for them to become the target of class actions, too. As for the Swiss banks, they had prospered in a neutral country not least due to the two World Wars. After the end of the Cold War, the relative importance of the financial center decreased in the new and fast growing global markets of the 1990s. The big Swiss commercial banks reacted by buying investment banks in the English-speaking world: Credit Suisse acquired First Boston in 1990, the future UBS bought S. G. Warburg in 1995 and Dillon Read in 1997. In 1989, Credit Suisse gained only 18% of its benefit abroad, while in 1997 it was already over 50%. As a consequence and under soft pressure from the United States, the Swiss had to adopt American rules against insider dealing or money laundering as well as legislation on product liability or on corporate governance. Globalized markets necessitated global rules, and the Americans were ready to impose their standards if they offered access to their lucrative market.

What turned out to be much more difficult for the Swiss bankers was the requirement of the 1990s: renouncing the national myth of their fathers. As every national history, the Swiss cultivated a narrative of exceptionalism, the "Sonderfall," a unique case of peaceful democratic continuity amidst incessantly war-waging states in the rest of Europe. Since the sixteenth century, there had been neither war nor occupation, with the exception of the Napoleonic era; internal and external boundaries have barely changed. Compared to European history in the nineteenth and twentieth centuries, Swiss history looked like an unquestionable success story bringing together a people with four different languages and with two large confessions in internal harmony, protected from the outside due to armed neutrality. World War II became the climax of this historical narrative: regardless of internal differences, the Swiss had mobilized and were ready to defend their independence against Nazi Germany that, however, never attacked.

After the war, many Swiss interpreted the survival of their independence as a merit of their own military readiness: if Hitler had not attacked Switzerland, it was not for economic reasons, but because he

did not dare fight the brave Swiss army in the Alps. The generation that served in the army during those years of siege not only cultivated such narratives but constituted also the Swiss elites until 1990. For them, World War II was the formative experience of their youth as well as the climax of the Swiss success story. For all other Europeans on the continent, Sweden apart, and for most of the world, the wartime included humiliation, moments of defeat, guilt and collaboration. Only the Swiss could cherish their kind of résistance myth that embraced the whole nation: they did not have to pass the true test about who would make concessions to the occupying Nazis and who would not. In the fall of 1989, alone in the world, Switzerland celebrated the memory of the outbreak of the war with national festivities, officially to honor the generation which then had guarded the borderlines—unofficially, to fight against a popular referendum that intended to abolish the army that met with a surprising approval of one third of the voters in the optimistic November of 1989, after the fall of the Berlin Wall. In May 1995, the same federal government that had organized the 1989 celebration originally did not plan at all to commemorate the fiftieth anniversary of the War's end and eventually did so only after intervention of some parliamentarians.

One of those federal councilors was Jean Pascal Delamuraz, mentioned above for complaining about ransom of the Swiss. In the same interview, Delamuraz added the rhetorical question whether one should believe that Auschwitz was located in Switzerland. With his colleagues in government, he shared the conviction that the Swiss had no reason to feel ashamed. If somebody dared to accuse them of misdeeds, he or she must be an extortionist. When one dealt with problematic topics, especially the undeniable repulse of Jewish refugees, this was not interpreted as proper misbehavior that might root, for example, in Swiss traditions of anti-Semitism. Swiss refugee policy was considered to have been merely a reaction, even though an awkward one, to the evil incarnated exclusively in Germany. Nazi racism was just one aspect of many within an ideology that was despised because it threatened Switzerland's existence and not because it was exterminatory to the Jews. The Swiss interpretation of the War never focused on the Holocaust. It was integrated into the tradition of armed neutrality among neighboring great powers that fought another fatal war among each other as they had already done for centuries.

The self-image of a nation that had successfully passed another his-

torical test was diametrically opposed to the Jewish perception of the War as a joint venture of the European goyim to rob and exterminate the Jews. Those who did not actively oppose such a genocidal program favored it—this was the essence of Singer's appraisal of the "good guys" and of the Eizenstat report's introduction. Elie Wiesel formulated it categorically: "When human dignity is at stake, neutrality is a sin, not a virtue; ... neutrality, which used to be, at one time, a high ideal or ideal of nations is wrong. Reject it! You must side with the victim, even if you both lose."[19] More concretely, Israel Singer declared: "Swiss 'neutrality' in the face of evil was a crime."[20] Therefore the WJC demanded an official Swiss apology for which it even suggested a concrete document to the banks in the summer of 1998:

> We, like yourself, are concerned with both moral and material restitution. Our discussions and negotiations of the past months, also aimed to resolve the issue of recognition of moral obligations for any wrong doing by the Big Swiss Banking institutions and their former managements. For these actions we have publicly apologized in our determination to undo past wrongs and to respond with proper deeds.[21]

The Swiss bankers were prepared to pay some additional millions rather than to sign such a text. Out of economic pragmatism and with the American market in mind, they agreed to pay roughly $2.5 billion for all kinds of investigations plus the global settlement. What they could not do was sign a letter of excuse for the misdeeds of their grandfathers and fathers, whom they had seen as national heroes. And much less so could the Swiss politicians who, as everywhere, worried about re-election. There was no official participation of the state in the global settlement; and the mentioned "Swiss Foundation for Solidarity" failed. A majority of the Swiss people opposed most fiercely what it considered humiliating the honor of their ancestors who had been ready to fight the Nazis.

19 David Johnston and Elie Wiesel, "The Raoul Wallenberg Forum on Human Rights," in *Nuremberg Forty Years Later: The Struggle Against Injustice In Our Time* (Irwin Cotler, ed. Montreal: Mcgill Queens University Press, 1995), 20.

20 Israel Singer, "Auschwitz is Europe's challenge," *Financial Times* (January 26, 2005).

21 Israel Singer, Draft of a letter on behalf of Rainer Gut (Credit Suisse), July 14, 1998.

The way the Americans dealt with national apologies was completely different.[22] President Clinton declared at a gala dinner of the WJC in 2000:

> In forcing the world to face up to an ugly past, we help shape a more honorable future. I am honored to have been part of this endeavor, and I have tried to learn its lesson. Within our country, I have been to Native American reservations and acknowledged that the treaties we signed were neither fair nor honorably kept in many cases. I went to Africa ... and acknowledged the responsibility of the United States in buying people into slavery. This is a hard business, struggling to find our core of humanity.[23]

This is not the place to discuss whether public apologies are always profound and sincere; they obviously can be thoughtless and cheap. But they symbolize that two former antagonists share values; and they demonstrate to the greater public a commitment to joint responsibilities.[24] That is what people need if they want to make business in a globalised world with partners whom they do not know yet. It creates trust.

That is one reason why the Americans tried to teach the Swiss to face the past the way they thought it should be done. The Holocaust became the universal metaphor for the "never agains" of liberal democracies respecting human rights and capitalist economies respecting property rights. They all made their public apologies: the French president Jacques Chirac in 1995, the Ukrainians as well as the Lithuanians, Hungary, the Netherlands and Britain, the Scandinavians and, in 2000, the Pope himself. Israel Singer commented on this movement:

> Those "I am sorry's" are worth more than all the money

22 For public apologies as part of a restitution process see Barkan, *Guilt of Nations*, 2000.

23 Remarks by the President during Bronfman Gala, September 11, 2000, http://clinton6.nara.gov/2000/09/2000-09-11-remarks-by-the-president-at-bronfman-gala.html (accessed February 24, 2011).

24 For these issues see Elazar Barkan and Alexander Karn, ed. *Taking Wrongs Seriously: Apologies and Reconciliation* (Stanford: Stanford University Press, 2006).

> that is being given back because they're educational. And those are what we are seeking. It's not just throwing money on the table. It's not this effort that we're participating in with regard to heirless property that merely restitutes, but it also makes whole the people whose lives were destroyed, who were butchered, and whose children were left without parents and without homesteads.[25]

Singer's high moral ground has proven shaky since. But similar thoughts contributed to a vast process, the building of new and supranational collective memory of Europe. At the end of January 2000, a huge international Holocaust conference in Stockholm recalled the liberation of Auschwitz. The German minister Michael Naumann finished his speech declaring: "In the remembrance of the Holocaust we must find the right answer for politics and society of future history." The second article of the conference's final declaration postulated a collective memory of "the selfless sacrifices of those who defied the Nazis, and sometimes gave their own lives to protect or rescue the Holocausts victims." With obvious reference to ex-Yugoslavia, Article 3 declared that the international community shared a solemn responsibility to fight evils like genocide, ethnic cleansing, racism, anti-Semitism and xenophobia.[26]

It was exactly the same Holocaust conference in Stockholm where the EU-representatives decided to boycott Austria if Jörg Haider's FPÖ would join the governmental coalition—a right-wing party that had its very specific ideas about the wartime. Austria's government program reacted to the strong isolation and declared in its preamble: "The uniqueness and singularity of crimes of the Holocaust are an exhortation to permanent alertness against all forms of dictatorship and totalitarianism."[27] Of all politicians, Haider was arguably the first, al-

25 House of Representatives, Committee on International Relations, Hearing on Heirless Property Issues of the Holocaust, August 8, 1998 (51–646 CC), http://commdocs.house.gov/committees/intlrel/hfa51646.000/hfa51646_0.HTM (accessed February 3, 2011).

26 For the texts see http://www.dccam.org/Projects/Affinity/SIF/DATA/2000/page877.html (accessed February 24, 2011); for the interpretation also Levy, Sznaider, *Erinnerung*, 2001, 210-216.

27 "Declaration of Responsibility for Austria. Future at the center of Europe," quoted in *Central Europe Review*, 2, 5 (February 7, 2000); http://www.ce-review.org/00/5/austrianews5.html (accessed February 14, 2011).

though under pressure, to make the Holocaust a point of reference for a government program. Thus the Austrians proved, formally, that they belonged to a new, supra-national Europe that had learnt its lessons. What these European countries should have in common, was not an external enemy (such as Turkey, Russia or the United States), the way it had been constitutive for nation building since the nineteenth century. Nor could it be national history the way generations had learnt it to become good and committed citizens of their country. Almost the only historical experience the Europeans had in common was their shared internal guilt after persecuting the Jews all over the continent; in World War II but also many times before. This common experience should lead to a high consciousness and responsibility when dealing with minorities within a European union where all nations became minorities.

With this background, the fellow Europeans—although skeptical about US economic and legal imperialism—did not understand nor support Switzerland during the heirless assets' crisis. The Swiss did not follow the EU-logic of a shared responsibility for a continent traumatized in wars and genocides; and they will not do so for some time. The Swiss know that Auschwitz did not take place in Switzerland; and they believe it never could. They think that the nation state and its neutrality are and remain the best way to cope with a world of states that remain in the state of nature. And they think that one can separate the economic integration of the world's fourth biggest net-investor (in absolute numbers) from a supra-national political participation in establishing the political rules and responsibilities for these economic exchanges.

5. Republican Traditions Challenged By Liberal Universalism

Switzerland's reticence against supra-national cooperation differs from the program of the EU but not necessarily from the United States and Israeli policy. Both states stay away from the International Criminal Court (while Switzerland has signed the treaty). Israel's isolation in the U.N. is mitigated only by the barely conditional support of the veto power of the United States. As for Switzerland, it joined the U.N. only in 2002, after a referendum had passed narrowly. One reason behind these positions is the self-image of a chosen people, albeit of a different kind: in the case of Israel, it originates in Jahveh's covenant with the Jews; in the U.S., it refers to the Protestant dissent building a city set upon a hill

and later became part of a civic religion that has transcended the single denominations; in bi-confessional Switzerland, where Protestants and Catholics have fought several rancorous civil wars from the sixteenth to the nineteenth century, it is a secularized conviction that History itself (rather than the Almighty) has decided to spare a virtuous people its rigor if only it remains united.

In the twentieth century, the universal mission for democracy became a driving force in American foreign politics. But the state of Israel also feels a particular responsibility for its potential citizens living all over the world, in the Diaspora. In contrast, the Swiss remain focused on the commonwealth of a tiny nation in its territory and face the rest of the world with neutrality. In a republican sense, they favor positive or political liberty as the privilege of a restricted community of citizens governing itself in direct democracy, with a weak judiciary—elsewhere, the backbone of negative or civil liberty in the liberal tradition granting equal rights to a vast body of inhabitants. Unlike its counterparts in the United States, Israel and many European countries, the Federal Supreme Court of Switzerland cannot declare federal laws unconstitutional, and even if it believes them to be so, it has to apply them. In a direct democracy, the sovereign nation has the last say about the law. Especially the conservative nationalists stick to a democratic absolutism according to the slogan: "The will of the people is always right." Therefore the political process driven by voting citizens is deemed to be much more important than the forensic process based on rights of legal persons. It is barely imaginable that two cantons would oppose each other in court on an issue like the ownership of Ellis Island that the US Supreme Court had to resolve in favor of New Jersey vs. New York. The process that led to the constitution of the new Swiss canton Jura in 1978 was a series of referenda on all levels, communal, regional, cantonal and national. The identity of Jura is rooted in the French language and the Catholic faith, two traditional elements of Switzerland. A sense of exclusiveness inhibits additional plurality in an already multi-faceted country. The emancipation of the Jews was achieved only late, in 1866, under pressure from foreign powers, among them the United States and especially France; and just recently, in 2009, a national referendum that interdicts the building of minarets won by a majority of 57.5%.

In the republican tradition, social conformity of full citizens with their particular privileges and duties and subordination of non-citizens

are seen as prerequisites for a stable state within a precise territory. The citizen, in this interpretation, is of Christian imprint and male (which explains the late introduction of women's suffrage in 1971); he is the bread-earning head of the household and a soldier in the militia army, another reason for the inflated memory of the soldiers in service during the War. With his pairs, and without claiming to be an ethnos given by nature, this citizen forms a demos of privileged rulers. Contrasting with such a republican conception of the political realm, the economic sphere, in a liberal tradition, is very little regulated by the state, as became clear in the Holocaust assets' crisis; for example, there does not exist an escheat law that would define what happens with heirless assets.

Not all of these mentioned particularities of Switzerland are unknown to the nations that were its opponents in the 1990s. However, it is the case for the limited role that liberal universal values grounded in the title of human rights and a Supreme Court guaranteeing overriding legal principles receive in Switzerland's republican politics. In the last three decades, the fate of Europe's Jews, the slaughter and robbery of a transnational minority, has become paradigmatic for the need to protect human rights and property rights beyond national territories. The lessons may differ, but the Holocaust has become a major legitimizing experience for the mentioned collectivities. Although fortunately spared by the War, the Swiss will have to learn the lesson that the combatant nations already, painfully, did.

Europe and Israel Today: Can Their Incompatible "Never Again(s)" Be Reconciled?

Diana Pinto

In the post-war order, the decline contemplated by early modern philosophers with respect to classical times became a reality, with Europe no longer at the center of the Western world. World War II and the Holocaust recomposed the horizon, both in the immediate post-war period and a second time in the 1990's under the double impact of the fall of the Berlin Wall and the revival of public discourse on the Holocaust (and World War II) through their extensive commemorations. In both cases, the careful sedimentation of political thought going back to the previous centuries—when the difference among full fledged monarchies, constitutional monarchies and republics counted—was abandoned. Pedigrees in political philosophy after the war mattered less than the democratic lessons that had to be learned in order to avoid the horrors of totalitarian dictatorship. The result was the blending of political thought into a democratic purée. New more immediate references to a post-war 'never again' with respect to the Nazi (and later Soviet) totalitarian horror increasingly took center stage especially after 1989. And to add to the purée, the Hebraists of early modern political thought with their Biblical references now gave way to real life "Hebrews" in the both old and new land of Israel. As a consequence, the democratic thought that emerged concretely from World War II and the Holocaust developed in two poles: a European (in this context the American reflections remained European since they were mainly the intellectual product of émigrés) and an Israeli, both the legitimate heirs to the political reflections which emerged from the Nazi horror.

In the following paper, I spell out the theoretical differences that separate the European and the Israeli and Jewish "never again(s)." I do this as an intellectual historian with a European Jewish identity, who has witnessed firsthand the growing divide between the European "never again(s)" and the Israeli/Jewish "never again (to us)."

The scenarios are well known. Europeans (and some Israelis as well)