A Retrospective Evaluation of Less than Slaves

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14 November 2001

A Glance Back

The Universal Declaration of Human Rights makes plain that if there is to be freedom and justice and peace in the world there must be "recognition of the inherent dignity and inalienable rights of all members of the human family." The story told in this book asks the moral question: what does one human being owe to another who is in his power? It records the arguments made when victims confront their oppressors and demand justice. In his Foreword to the 1979 edition, Telford Taylor, my former Chief at the war crimes trials at Nuremberg and later my law partner, predicted: "I believe that in time, Germans will regret that their industrial leaders did not write a post war record of generosity, instead of the cold and niggardly one revealed in this book."

All of us who became engaged in seeking compensation for victims of Nazi persecution half a century ago were well aware of the inadequacy of the results achieved. The restitution of heirless and unclaimed Jewish property began in 1948 when the defeated Third Reich law in ruins. "Displaced Persons" camps in Germany were swarming with destitute concentration camp survivors who needed help immediately. Germany's primary focus was on feeding and housing its own citizens. The communist regime imposed on East Germany by its Soviet occupiers was not interested in restitution.

In 1951, the restoration of German sovereignty was being considered by the occupying powers. The dismembered country was virtually bankrupt and dependent on foreign aid. US High Commissioner John J. McCloy impressed on West German Chancellor Konrad Adenauer that compensating Hitler's victims would encourage re-acceptance of Germany in the family of nations. When the new State of Israel formed a coalition with leading Jewish organizations, known as the "Claims Conference," to negotiate the terms of reparation, militant Jewish extremists threatened those who, in their view, would betray Jewish honor by offering or accepting "blood money" from the nation that had

planned to exterminate all Jews.

After long, difficult and dangerous negotiations in The Hague, an agreement was finally reached in 1952 for payments to Israel, the Claim Conference and to survivors of Nazi atrocities who could qualify with the strict terms of the indemnification law. West German representatives constantly stressed their government's limited capacity to pay. The German indemnification program was unprecedented. Never before had any people subjected to such persecution been compensated for the suffering. That many justified claims would fall between the cracks was unavoidable and inevitable. What was most important was that significant payments would be made and that a legal foundation stone would be laid for the redress of injury to innocent victims of persecution.

The West German indemnification law was expanded in 1956, 1957, 1964 and again in 1965 to cover recognized shortcomings in earlier laws. Modest reparation grants also went to western European governments to compensate some of their nationals. To cope with some of the neediest cases, the Claims Conference persisted in obtaining limited hardship funds for distributions subject to German audit. Refusal of West Germany to consider claims coming from any communist country meant that many survivors who had suffered most under German occupation in conquered territories received nothing.

The earliest compensation legislation provided just over a dollar a day for detention in concentration camps, but no payment was considered for unpaid wages or unjust enrichment while inmates were assigned to work for private firms. Government negotiators brushed such claims aside as a relatively minor obligation that could be dealt with by the companies themselves. The failure to "slave laborers" soon gave rise to lawsuits against a few of the big industrial firms whose abuses had been revealed in the Nuremberg trials. Details of those negotiations between 1954 and 1969, and the paltry settlements, are recorded herein. The choice was to "take it or leave it." Despite intensive litigation on many test cases, Germany's highest court held that all such claims, being in the nature of reparations, could only be considered as part of a peace treaty with a united Germany. The German legal door on forced labor claims was thus closed and has remained closed ever since. The moral issues of industrial culpability

and accountability were left unresolved by the courts.

Litigating in the United States on Behalf of Slave Laborers

My deep involvement on behalf of reparation to victims of persecution that began in 1948, ended by 1992. Before my employment by the major Jewish organizations to direct the programs for restitution and compensation, I had been a war crimes investigator during World War II and had collected evidence of the atrocities in many Nazi concentration camps. I returned to Germany after the war and became the Chief Prosecutor at the Nuremberg trial against the SS Einsatzgruppen that had murdered more than a million innocent men, women and children. I recognized that bringing criminal to justice and rehabilitating their victims were both vital objectives that had to be vigorously pursued. But I also came to realize that it was even more important to prevent the repetition of such barbarities. When Germany was unified at the end of 1990, and announced plans to extend its restitution laws to include former East German states, I felt I could be more productive if I resigned my various posts and redirected my energies toward the creation of an international criminal court that might deter future crimes against humanity. I have therefore not been involved in any way in recent activities or lawsuits related to claims on behalf of slave laborers.

Beginning around 1995, a flood of litigation was unleashed in US courts on behalf of victims of persecution. Little consideration seemed to be given to the prior Claims Conference efforts and achievements. Well-known German corporations were accused of abusing slave laborers and profiting at the expense of the American plaintiffs. Swiss banks and European insurance companies were accused of misappropriating Jewish assets. Art galleries were accused of acquiring stolen treasures. American corporations that had plants in Germany were sued for allegedly deriving profits during the Nazi era. Asian women, who had been victims of organized rapes by Japanese soldiers, and whose justified claims had never been recognized by Japan, demanded compensation. What generated the sudden torrent of new demands for redress is speculative but some possible influences may be noted.

Following the horrors of World War II, the world community, led by the

United Nations and non-governmental organizations, cried out for the universal protection of human rights. There gradually emerged a body of international humanitarian law that that American courts began to recognize. The sovereign immunity of foreign states could no longer be relied on to protect those who kidnapped, tortured, plundered or violated basic human rights. Furthermore, the West German "economic miracle" had enabled large German firms to expand into the United States, thereby making them vulnerable to US legal processes and pressures. The popularity of "class actions", the unpredictability of American jurors and their generosity in levying punitive damages against those with "deep pockets" may also have encouraged renewed demands. A new generation, unencumbered by past atrocities for which they were not guilty, might be more amenable to humanitarian payments that did not imply a personal legal or moral culpability. Alert American lawyers, attracted by the drama of morally uplifting causes, were not slow in discovering susceptible targets of opportunity.

In the fall of 1996, a class action lawsuit was filed in New York against three of Switzerland's largest and most respected banks. The World Jewish Congress led the public outcry, accusing the banks of having unjustly enriched themselves in trades with German companies and refusing to disgorge dormant accounts worth many billions of dollars that belonged to murdered Jews. The denunciations were hailed by Nazi survivors, backed by American politicians and a public eager to demonstrate continued sympathy for the oppressed. The Swiss Humanitarian Fund of some $200 million would be distributed promptly to a wide assortment of needy survivors of Nazi persecution worldwide who would be sent between $500 and $1400 as a gesture of Swiss good will.

In courts of law it must normally be shown that there is a direct causal connection between wrongful acts of the defendant and the injury suffered by the plaintiff. The alleged damages must be measurable and proved. To meet these challenges fifty years after the injury is nearly impossible. In the court of public opinion, however, different standards apply. The Swiss banks and government were overwhelmed by the barrage of unfavorable publicity. It was made clear that licenses to do business in the United States could be revoked and thereby induce losses far greater than the cost of any settlement. The threat of devastating sanctions were hazards that every businessman could

understand. The Swiss banks, fiercely denying any culpability, reached for an out-of-court settlement. In August 1998, the banks agreed to pay $1.25 billion on condition that all sanctions would be lifted and there would be complete releases from all Holocaust-related demands against Switzerland, its nationals and it companies.

Creative lawyering and imagination, couple with a desire by all parties to resolve the disputes, made the accord possible. Details were hammered out in later negotiations. It was recognized that the procedures for auditing dormant accounts of all Swiss banks, locating potential claimants and adjudicating hundreds of thousands of claims would be complex, costly and time-consuming. It was anticipated, however, that even after lawyers fees, administrative costs and all account owners were paid, a sizeable residue might still remain and be available for slave laborers and other Nazi victims. Existing charities were named to distribute the anticipated residue to Jews and non-Jews alike who would not have to prove any specific connection with Switzerland. The residual payments, including up to $1000 for former concentration camp laborers, could be seen as voluntary humanitarian contributions to Nazi victims who had suffered during World War II. On July 26, 2000, the plan was approved by the Chief Judge of the US District Court as “fair, reasonable and adequate.”

The Swiss settlement animated additional lawsuits against German corporations that appealed to their government to rescue them from the thundering threat to their American business interests. The defendants, echoing denials similar to those of an earlier generation, rejected the accusation against them, insisting that what they did during the war years was normal and legal; hence they owed nothing. Besides, the German Government had already paid significant sums. Bitter debates hinged around such issues as the amounts to be allocated, the classes of beneficiaries, who was to make the distribution and what airtight guarantees could be given that all Holocaust-related claims would be forever barred. As in the Swiss case, condemnation by plaintiffs that the defendants were matched by defendants’ retorts that they were being subjected to blackmail and extortion. Despite bitter recriminations, another deal was struck.

On July 17, 2000 it was finally agreed that a German “Foundation for

Remembrance, Responsibility and the Future", endowed with approximately $5 billion (DM 10 billion), half of which would be contributed by German industry, would dispose of all lawsuits and claims once and for all. The Foundation began to make grants to several Eastern European governments in 2001 to compensate Nazi-victim's who had previously been excluded. The Claims Conference received sums for distribution to Jewish survivors worldwide. The combined amount that each surviving concentration camp laborer might get from the Swiss and German funds might reach $8,500. The non-concentration camp laborers could not get more than about $3,500. It would take several more years before the hundreds of thousands of pending claims could all be processed. The Claims Conference was able to report proudly in its 50-year commemorative booklet in July 2001, that since its founding it had negotiated German government compensation payments totaling well over $50 billion that had benefited more than 500,000 survivors of persecution, Jews and non-Jews alike, in 67 countries. It was an unprecedented accomplishment.

Lessons for the Future

Camp inmates seldom knew or cared which particular company or agency was the beneficiary of their toll, sweat and tears. Every concentration camp inmate was a slave laborer. Jews in particular were less than slaves since they were all marked for extermination; for those unable to work, the next stop was the gas chamber or the crematorium. Non-Jewish forced laborers who were not inmates of concentration camps were also non-victims of inhumane treatment and persecution. The German term for the varied restitution programs, Wiedergutmachung, literally means "making good again". But it was a "Mission Impossible" since the harms sought to be remedied can never be made good again. No one can possibly gauge or pay for the pain of seeing loved ones murdered or the constant fear of being beaten or killed or the hunger and misery that was the daily bread or all camp inmates. The attempt to heal such injuries, and their resultant hidden traumas, within rigid and precise parameters was doomed to failure. The crimes against humanity committed by the Nazi regime and its accomplices were so enormous that they can never be redressed in a manner that will be seen as fair by either the perpetrators or their victims.

Deep-seated hatreds and animosities cannot be banished by decree and compassion cannot be coerced. Imposing liability on those who are not responsible for the harm provokes resentment. Yet, for the sake of our own humanity and to help assuage some of the rage and hatreds which may linger like a festering wound, an effort must be made to seek public recognition that wrongs have been done. Lawful means must be found to offer psychological and economic relief to persons of all nationalities or persuasion who have been innocent victims of massive human abuse.

Since Less Than Slaves was published, thousands of women have been raped in war-torn Yugoslavia and hundreds of thousands of innocent humans have been butchered in civil strife in Rwanda and elsewhere. These crimes were foreseeable and might have been prevented if the general public cared enough about the suffering of others or if political leaders of powerful nations had the courage to intervene. Outrageous crimes against humanity continue to be committed in the name of religion, self-determination and social justice, forgetting that just goals can only be sought by just means and that justice requires punishment of the guilty and not the innocent. Surely there is need for clearer laws, court and effective enforcement to protect a universal right of all human beings to live in peace and dignity.

Tolerance, respect and consideration for other cannot be taught easily or quickly. It is to the gradual development of the rule of law that one must look for the future protection of humankind. The temporary criminal courts set up by the Security Council of the United Nations to try some of those responsible for the atrocities in Yugoslavia and Rwanda in 1991 and 1994 point the way to further progress. Another step forward would be the creation of the permanent international criminal court now being formed at the United Nations. In addition to holding perpetrators of genocide and crimes against humanity criminally responsible, the statute for the court took another stop forward by stipulating that victims of such atrocities are entitled to "restitution, compensation and rehabilitation"—as a matter of legal right under international law.

Unfortunately, the United States, seeking a free hand to engage in

what it regards as “humanitarian military interventions,” has not yet ratified the treaty creating the court. Conservative leaders still cling to outmoded notions of national sovereignty and fail to remember the lessons of Nuremberg that war-making itself is “the supreme international crime” and law must apply equally to everyone. Despite such obstacles and hesitations, evolutionary process that recognizes the individual as the true sovereign is gradually taking place. Patience and determination are essential for further progress.

Only by creating effective global institutions found on principles of equity and universally accepted legal norms can we curb the violence and inhumanity that still scars the global landscape. Here we have recorded cases of indifference and denial of responsibility for human suffering. But we have also noted a new willingness to compromise and to find imaginative solutions in the elusive search for justice. This book ended with Cain’s question “Am I my brother’s keeper?” In our shrinking and interdependent world, is it not time to ask: “Are we not all out brothers, and sisters, keepers”? As Sir Martin Gilbert concluded in his 1979 New York Times review, “This is a book to ponder.”