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## The Washington Accord Fifty Years Later: Neutrality, Morality, and International Law

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# THE WASHINGTON ACCORD FIFTY YEARS LATER: NEUTRALITY, MORALITY, AND INTERNATIONAL LAW<sup>1</sup>

SEYMOUR J. RUBIN<sup>\*</sup>

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## INTRODUCTION

More than fifty years ago, in 1946, the victorious World War II Allies, represented by the United States, the United Kingdom, and France, came together in Washington to meet with the Swiss Government. This was to be the first of a series of meetings with the states that had remained neutral in the war. These talks dealt with several issues:

- *reparation* for the great losses suffered as a consequence of aggression and occupation;

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1. This article first appeared in *Translex (Transnational Law Exchange)*, Oct. 1998, at 11 and Dec. 1998 (forthcoming), carried in two installments. The first installment covered background information on the Washington Accord, its implementation and reevaluation. The second installment will cover recent events and concluding remarks. See <<http://www.transnationalpubs.com>>.

- *restitution* of the enormous amount of property looted by the Nazis, including not only war booty, but also properties extracted, in various ways, from persecuted persons, mainly but by no means exclusively Jews; and
- *security*, by elimination of the threat of a postwar Nazi resurgence supported by German external assets or influence.

The third of these objectives—security—now seems anomalous. The sea tide of history has converted Germany to ally from dreaded enemy capable—as the post-Versailles era had proved—of a new rise from the ashes of defeat. External assets had powered that rise, as well as facilitating espionage, sabotage, and propaganda. The lessons of the Sudetenland and of Austrian Anschluss were fresh in mind. Elimination of German external assets could be taken for granted in Allied nations, but the neutrals—Switzerland most of all—were a problem. These then were the *raison d'être* and essential components of the positions taken and demands made by the Allies in the discussions with the neutrals.

Contrary to common belief (and the arguments of the neutrals), the issues had less to do with the international law of neutrality than with Allied status as the successor government in Germany, and with commonly accepted norms of ownership and of the right to recover stolen—that is looted—property, particularly from one who takes in bad faith.

## I. THE PARIS REPARATIONS AGREEMENT— JANUARY 1946

In Washington, the United States, the United Kingdom, and France spoke on behalf of all the Allied nations, other than the USSR (for which other reparations arrangements had been agreed at Potsdam). Their claims were based on a series of international agreements—Yalta, Potsdam, and Paris.

In early 1945 at Yalta, Roosevelt, Churchill and Stalin had come together to decide on postwar policies—and to divide responsibility for what had been the German world. There, it was agreed that a special meeting to deal with reparations policy would be convened in Moscow, in the spring of 1945. That session was postponed as a result of the April 1945 death of Roosevelt, and eventually convened

only in July. By that date the Potsdam Summit was imminent, and the Soviets had decided that the matter of reparations was so intimately connected to major allocations of power, that it should be put off to the upcoming Potsdam Conference—to be held at the level of Heads of Government, not the mere Ambassadors who had been designated for the Moscow session.

At Potsdam, where the East-West division which was to dominate world politics for generations was established, the reparations programs for the USSR and for the West were separated. Essentially, the USSR was given a free hand to extract reparations from that part of Europe which it dominated—the Soviet-occupied Eastern Zones of Germany and Austria, and the Balkan satellite nations, together with a share in Berlin (which lay within the Soviet Zone). The three Western powers were to deal with reparations from their occupation zones. Additionally, the Western powers would, on behalf of the Allies, take title to and responsibility for all German external assets in the neutral nations.

The Allied Control Commission (ACC) in Germany—USSR, UK, France and the United States—considered itself to be both *de facto* and *de jure* government of Germany. It considered, in accord with the Potsdam agreement, that it had a legal right, for reparation or security purposes, to German external assets. Exercising these rights, the Allied Control Commission enacted its Law No. 5. That law, which was similar to many state enactments taking control of foreign exchange, became the foundation of the Allied claim to German private external assets in the neutral countries. (Parenthetically, it was also the foundation of the Soviet claim in the area assigned to it at Potsdam. Not surprisingly, there was no audible protest from the Balkans).

Before its enactment there was, however, considerable debate among the Allies as to the wisdom of Law No. 5. This debate was mainly between the British and the American sides. The British raised two points.

The first was the legality, under international law, of a taking by any government of the *private* foreign holdings of its nationals. Moreover, the ACC was not a normal government, but an occupying power exercising government authority by virtue of military victory.

The second British doubt was based on the anticipated neutral resistance to any *legal* claim which might be equated to expropriation of private property. The UK thought there was a better chance of attaining the Allied objectives of control, liquidation, and transfer of proceeds to the reparation account by negotiation. Law No. 5, it was argued, would give rise to resistance on the ground that it violated international law. This contention might be avoided by a more diplomatic and less legalistic approach.

The American response was that control over German external assets could hardly be obtained in the absence of some legal assertion of Allied rights, and that a law was the normal and probably indispensable method of making claim to title. Moreover, the Americans reminded their Allies that ample precedent existed for taking control of privately held foreign exchange. The British, indeed, had themselves required their nationals to turn dollar holdings over to the British Treasury during the war, in order to finance essential purchases—especially prior to lend-lease. Many nations imposed constraints on the foreign exchange holdings of their nationals. Nor was this practice regarded as confiscatory and/or violative of international law. Just as the British had compensated their nationals in sterling, so it was contemplated that German nationals would be compensated in German currency.

The British arguments were not without plausibility. Indeed, the neutrals later uniformly contested the international legal effectiveness of Law No. 5 and the Allied claim to German external assets (including on occasion *public* as well as *private* assets) on much the same grounds. Nevertheless, the American thesis prevailed, was incorporated in ACC Law No. 5, and became the legal foundation of the subsequent Allied-neutral negotiations. Continuing doubts, however, may have led the British and French negotiators to be more attracted to compromise in those negotiations than were the Americans.

Enactment of Allied Control Commission Law No. 5 was followed by the Paris Reparations Conference of January 1946. The Paris Agreement allocated shares of reparations from Germany. First, it affirmed the right of each Ally to retain German assets within its own territory. It then established shares in anticipated reparation payments. It made explicit provisions to deal with the troublesome issue

of the "Restitution of Monetary Gold." It set up an administrative body, the Inter-Allied Reparations Agency, to be located in Brussels. The Agreement was opened for signature in Paris on January 14, 1946 and entered into force ten days later.<sup>2</sup> The Paris Reparations Agreement was and remains fundamental to both reparations and restitution policy.

First, the Allied claim to German assets in the neutral countries for reparation purposes rests on the chain of title running from Potsdam to Allied Control Council Law No. 5 to implementation under the Paris Reparation Agreement. This was the very heart of the Allied-neutral negotiations.

Second, after its primary function of allocation, the Agreement took action on the claims and the needs of victims of Nazi persecution. First, it allocated all nonmonetary gold found in Germany to their relief and resettlement. Then, it established a fund, (\$25 million, a not inconsiderable sum at the time) to be provided out of reparations, for relief and assistance to non-repatriable victims of Nazi persecution. The Agreement provides (Part I, Article 8): "A share of reparation consisting of all the non-monetary gold . . . found in Germany and in addition a sum not exceeding 25 million dollars shall be allocated for the rehabilitation and resettlement of non-repatriable victims of German action."<sup>3</sup> Governments of neutral countries were also to be "requested to make available for this purpose . . . assets in such countries of victims of Nazi action who have since died and left no heirs." Assistance under this plan was to be "restricted to true victims of Nazi persecution and to their immediate families." Subparagraph D.(iii) provided such aid to "nationals of previously occupied countries who were victims of German concentration camps or of concentration camps established by regimes under Nazi influence

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2. The following eighteen countries signed on January 14, 1946: Albania, Australia, Belgium, Canada, Czechoslovakia, Denmark, Egypt, France, Greece, India, Luxembourg, Netherlands, New Zealand, Norway, South Africa, United Kingdom, United States and Yugoslavia. See Agreement on Reparation from Germany, Establishment of Inter-Allied Reparation Agency, and Restitution of Monetary Gold, Jan. 14, 1946, 555 U.N.T.S. 69 [hereinafter Paris Agreement].

3. Nonmonetary gold included not only rings, bracelets, and dental inlays, but other essentially unidentifiable objects of value such as gold coins without numismatic value, silver plate, *objets d'art* and the like.

but not including persons who had been confined only in prisoner of war camps.”

The Paris Reparations Agreement thus provided for:

- (a) restitution on a sharing basis of monetary gold;
- (b) allocation of all nonmonetary gold to surviving persecutees;
- (c) a special \$25 million fund (out of German external assets in neutral countries) for former persecutees<sup>4</sup>; and
- (d) organizational structures.

The Allied representatives were instructed to take possession of German external assets in neutral countries (such assets in Allied nations were to be taken by the Allied nations themselves). They were directed to “request” that neutrals turn over “heirless assets” or their proceeds to the persecutees, for relief and resettlement.

## II. THE WASHINGTON ACCORD

The Allies, France, the United Kingdom, and the United States, attempted to carry out the aims of the Paris Reparations Agreement—reparation, restitution, and some, limited, indemnification—in the series of negotiations with Switzerland, Sweden, Spain, Portugal, and Turkey, which began with Switzerland in the spring of 1946. The Swiss negotiations, which are central to the still raging controversy, were confrontational, lasted for months, and terminated in an exchange of letters that brought satisfaction to neither side. The Swedish negotiations that followed, though facing many of the same legal controversies, were brief and resulted in an exchange of letters which satisfied both sides. The Spanish and Portuguese negotiations, begun in late 1946, dragged on for years with some small results. Little came of the talks with the Turks, which expired without result after a series of inconclusive embassy-level exchanges. The Swiss, as expected, emphasized their traditional neutrality, which, as they pointed out, had permitted trade useful to the Allies as well as to the Germans. Indeed, the Swiss Central Bank had purchased more gold from the Allies than it had from the Germans. (Not surprising, since the Allies did not have loot as their only source.) Moreover, Swiss

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4. In today's values, this would be about \$250 million.

neutrality had enabled them to act as the protective power on behalf of Allied states in enemy countries, performing such useful and helpful tasks as facilitating exchange of diplomats and allowing an important Swiss institution, the International Committee of the Red Cross, to try to ensure compliance with the provisions of the Hague Conventions regarding treatment of civilians and prisoners of war.

They strongly denied (as did the other neutrals) that ACC Law No. 5 could affect title to German assets external to Germany or give the Allies use of them or their proceeds for reparation purposes. If such assets were to respond to any claims, those would be the claims of the country in which the assets were located or of its citizens. They pointed out that Germany had incurred large commercial debts to Switzerland, *i.e.* Swiss citizens, during the war, and that the clearing arrangements required that German assets in Switzerland be applied to satisfaction of this deficit.

The Allies made what seemed to their negotiators to be a telling rebuttal. They pointed out that the German debt to the Swiss reflected sales of goods and services including munitions, which had importantly assisted the German war effort, and that there hardly seemed to be an equity in favor of such debts.

One aspect of the claim to title based on ACC Law No. 5 brought a measure of irony into the discussions. How were "German assets" to be defined? It was easily stated by the Allies that the term would include only property of Germans resident in Germany, excluding those German nationals who for whatever reason (normal emigration as well as escape from persecution) lived as permanent residents outside of Germany.<sup>5</sup> But persecutees had lived—and many died—in Germany. It was questioned whether the external assets of such "German nationals" were excluded. That point was rebuffed by the Allies, who pointed out that a major class of persecutees—Jews—had in fact been deprived of German citizenship under Hitler. The point was quickly taken, and the principle of restitution of the property of persecutees accepted.

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5. The question never came up, so far as can be told, of what would happen to the assets in Germany of a Nazi who had fled. It was assumed, without discussion, that the assets of such a person would not be exempted.

There was some, fortunately very brief, discussion about how much proof of persecution was required in order for a claimant to be accepted. The matter was dropped as soon as it was raised and as far as is known was not an issue during implementation of the Washington Accord.

Finally, with the not entirely enthusiastic assent of its Allies, the American delegation pressed the matter of "heirless" claims—the assets, mostly but not exclusively of persons who had placed their holdings in Swiss banks or other places of safekeeping, and who had perished, leaving no known heirs. It was clear that substantial assets, especially bank accounts, of this nature existed. These accounts, the Allies insisted, should be accounted for, mobilized, and be used for the relief and resettlement of survivors or their successors.

The stern Swiss rejection was based on the asserted impossibility of such a flagrant violation of banking secrecy. It was argued that this demand, not related to claims for compensation to Allied states, should not be allowed to jeopardize the entirety of the hard-won prospective Agreement. The Swiss pointed out that agreement, admittedly not completely satisfactory, had been reached on the major Allied objectives of:

- (a) liquidation of German external assets;
- (b) with Allied supervision (an unprecedented intrusion into Swiss sovereignty);
- (c) reparations (50% of proceeds of German assets);
- (d) and restitution of looted gold (that is 250 million Swiss francs, or about \$59 million).

In these circumstances, they stated, to concede on a violation of the very foundation of Swiss banks reliability—the principle of secrecy and confidentiality—and for a dubious cause—the claim of refugee organizations of entitlement to the bank accounts of unknown persons—was too much. No concession would be made. The stubborn Americans insisted. A last minute impasse loomed.

At that moment, the Swiss deputy (Rappard) suggested to his American counterpart (Rubin) that the Americans could achieve their objective without compelling the Swiss to violate their principles. A letter would be signed assuring the Allies that the Swiss would give "sympathetic consideration" to the requested census and disposition

of the heirless assets. "Sympathetic consideration," the distinguished Swiss jurist assured, was the polite diplomatic equivalent to commitment. On that basis, with a handshake, the matter was settled, and formal letters of agreement were prepared. The Allied delegations agreed that the American Proclaimed List of Certain Blocked Nationals and the British Statutory List would be withdrawn, and Swiss assets would be unfrozen.<sup>6</sup> The Washington Accord was confirmed by an exchange of letters dated May 25, 1946.<sup>7</sup>

### III. IMPLEMENTATION

The Washington Accord of 1946 has been subjected to much re-examination in recent years, almost all of it strongly critical. The Swiss now find fault with their own conduct, mainly in relation to the assistance which they gave to the Germans, even in the last days of the war, when a German defeat was imminent and certain and a German military threat to Switzerland implausible. There are reasons for dissatisfaction with the results embodied in the Washington Accord.

To list a few:

- The Allies, under the Accord, were to receive for the reparations fund *only 50%* of the German assets in Switzerland.
- That amount was to be collected by a Swiss agency, though the small Allied Missions in Switzerland were given a not very detailed right of supervision (which, as even then predicted, turned out not to be effective).
- The other 50% was to repay Swiss creditors for the supplies and services that they had furnished to the Germans, right up to the day of the final surrender, supplies that had undoubtedly delayed the day of surrender, with each hour of delay taking its toll of Allied lives.

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6. The so-called blacklists contained the names of entities and individuals with whom any transactions were forbidden and whose properties in the United States and the United Kingdom had been frozen.

7. The Accord entered into force on June 27, 1946. See Accord on the Liquidation of German Property in Switzerland, May 25, 1946, 13 U.S.T. 118 [hereinafter Washington Accord]; see also Agreement Concerning German Property in Switzerland, Aug. 28, 1952, 13 U.S.T. 1131 (entered into force Mar. 19, 1953).

- It was known to the Allies—and known by the Swiss that the Allies knew—that a vastly larger quantity of gold had passed through Swiss banks than the amount for which settlement was made, and, in view both of the knowledge shared by central bankers and the several public warnings issued by the Allies, there could not be a credible claim of ignorance of source or of good faith in Swiss acceptance of looted gold.
- Finally, the Swiss would not even make a firm commitment to take a census of the holdings of those who had perished in concentration camps—the “heirless assets” now involved in the current audit into “dormant accounts.”

And, as critics correctly point out, the Allies had just triumphed in the war, and had control of almost everything an economy would need from vital supplies to transport to communications.

Therefore, why concede or compromise? The popular answer is “the cold war.” That is, the Allies were concerned about the Soviet threat to the West, and felt the need for Swiss cooperation.

There is little doubt that the Swiss were counted on for the rebuilding of war-ravaged Europe. In particular, the British felt the need for financial assistance from the Swiss, both in reconstruction and in financial and monetary stabilization. But in early 1946, with war over for barely a year, there was no widespread fear of the Soviets, except among a relative few. Moreover, there was no feeling that, of all nations, the Swiss would favor cooperation with the USSR over their financial, economic, and cultural link to the West. In any case, in the numerous consultations of the United States delegation with cabinet level American officials during and particularly toward the close of the negotiations, the “cold war” rationale for being easy on the Swiss was not mentioned, so far as recollection goes.

Much attention has been focused on a letter sent by Senator Harley Kilgore, then Chairman of the Senate War Mobilization Committee, to Acting Secretary of State Clayton, in which Kilgore objected to the signing of the Accord. That letter, unfortunately or not, was sent *after* the letters of agreement had been exchanged. A conference had been held in the Senator’s home on May 6 (prior to conclusion of negotiations) in which Kilgore expressed to the chief and deputy chief of the American delegation his belief that the deal, while far from perfect, was a good one, and that the delegation should not risk

all by holding out for “a few millions more.” He noted with strong approval that the “security” objective of eliminating German control of external assets had been achieved.

Could more have been obtained by economic pressure on the Swiss? Perhaps, but the Swiss position made that very doubtful. In any case, the Allies, especially the British and the French, urgently desired a return to “normalcy.” In the postwar period of 1946, sanctions were next to impossible. The principal threat to the Swiss was the possible continuation of the Proclaimed List. But the United States had long before agreed with the British, who were adamant on the subject, that the United States and British blacklists would be abolished by *June 30, 1946*.<sup>8</sup> The American business community was opposed to any continuation let alone expansion of the list. Nor was there sentiment in the Treasury Department—the strongest Administration hard-line agency—for such a tactic, especially against British opposition and concern for rebuilding of the world economy. Indeed, a contemporaneous memorandum of conversation with then Secretary of Treasury Vinson makes clear that Treasury staff had advised Vinson of the impracticability of continuation of the Proclaimed List.<sup>9</sup>

In the judgment of this writer, the Washington Accord, admittedly far from perfect, was not only the best achievable at the time, but meritorious. Its major flaw—attributable in large part to the prevalent belief in Swiss integrity in adhering to agreements—was in its failure to provide more effective monitoring and supervision of implementation.

#### IV. REEVALUATION

Recent events compel a reevaluation of the Washington Accord. Whether it be the fiftieth anniversary of World War II, or more substantive causes, including the re-thinking of traditional concepts of neutrality and their place in international law and foreign relations, a

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8. The Swiss were apparently unaware of this.

9. Actually, an American interdepartmental policy committee, meeting in March 1946, was faced with the problem of persuading the reluctant British to permit a brief extension—to June 30 only—of the previously agreed termination date of May 8—one year after the end of the war in Europe.

veritable barrage of inquiry has descended on both the neutrals and the postwar settlements with them. Blame has been shared among the neutrals for their conduct in relation to Nazi atrocities and the unsuitable postwar restitution and reparation arrangements. The Swiss-Allied Washington Accord of 1946 plays a leading role in the discussion.

Despite the acknowledged faults and inadequacies of the settlement, much blame can be laid not to the Accord itself but to its flawed implementation by Swiss banks and some officials. Although the Accord may be regarded (then and now) as giving too little to Allied and refugee claims, it was greeted with hostility in Swiss banking and Parliamentary circles. Negotiators pointed out to the Swiss Foreign Office, in apparent apology, that they had yielded—so far as they did so—only because of the political necessities as seen by their Foreign Office. (In other contexts, as is the way with negotiators generally, they boasted of how little they had yielded.) The Accord was submitted for ratification to Parliament. Both Houses approved it only after vigorous debate, and with substantial opposition. In these circumstances, implementation was reluctant at best. Obstacles were everywhere. Surveys and censuses were impossible or, if performed, faulty. Implementation became more a matter of creating than removing obstacles.

The Swiss were not hard pressed by the small Allied delegations in Berne. Even if the terms of the Accord itself were influenced little if at all by cold war concerns, the Allies had little heart to press the Swiss on the Accord in the midst of the more important struggle against the Evil Empire.

In reevaluating the Washington Accord, obstacles to full and fair implementation should be discussed. A major—perhaps the major aspect of the Accord, since it was central to both security and reparations, was the commitment to identify, liquidate, and distribute the proceeds of German holdings in Switzerland. Endless questions were raised by the Swiss on the issue of the rate of exchange that was to be used. A full and complete census of German-owned properties was argued to be next to impossible, and in fact seems never to have been done—despite the vaunted record-keeping skills of the Swiss (and Germans). When the weary and out-flanked Allied delegations arrived in a state of frustration in 1952—*six years after signing the*

*Accord*—they agreed to a bulk settlement into the reparations account of an amount generally conceded to be grossly inadequate.

The lack of importance attached by the Allies to Swiss failure to take a complete count of German assets, and other measures, ranging from bureaucratic delays to what seems to have been complicity in cloaking, impeded or frustrated the implementation of the reparation aspects of the Washington Accord. By the time, these issues arose for Allied-Swiss discussion, Allied economic policy toward Germany had come full circle. After adoption of the Marshall Plan, the West, especially the Americans, were feverishly engaged in rebuilding, not eliminating, German economic and industrial power. Morgenthau had been rejected in favor of Marshall; Adenauer was a treasured ally; and fear of German resurgence was a dim memory. America was pouring resources into Germany in amounts that dwarfed possible reparation payments based on German external assets.

From the financial and economic standpoint, accounting for and obtaining the proceeds of German external holdings in Switzerland was thus a somewhat anomalous exercise to which little diplomatic pressure was applied—an attitude that fit well with Swiss reluctance. Perhaps even more important, the *security* issue had almost disappeared, except for the continuing search for a few war criminals. German scientists were eagerly sought out, not to bar them but to encourage their admission to the West—and to keep their technical skill from the Soviets.

The reparation problems of the Washington Accord were long ago consigned to the ash heap of historical unconcern. Not so, however, with what were at one time issues of little governmental interest—restitution and refugee relief.

Implicit in the concepts of restitution and relief are the claims of individuals. But individuals, at least prior to the United Nations and its declarations and covenants, had few if any direct rights under international law. The traditional international law *mantra* is that only States, not individuals, are “subjects” of international law. Another *mantra* affirms the sovereignty of each State, while conceding to each its right to protect its own nationals from unjust treatment within another State’s sovereign territory. States of course have a legitimate and obvious interest in their own citizens, which they often

assert. But the interest is traditionally limited to persons who were its own nationals at the time of the asserted injury. And the individual may often feel his grievance more deeply than does his government.

The Washington Accord did deal with one restitution issue explicitly—that is, looted gold. The Allies had issued declarations warning all parties that *all* gold used by the Germans, after the early 1940s, had to have been looted. As noted above, the Swiss asserted good faith acceptance of gold from Germany, pointed out the role of gold in transnational monetary transactions, and argued (the point seemed irrelevant to Allied negotiators but was nevertheless pressed) that they had accepted more gold from the Allies than from the Germans. A settlement—resented by the Swiss, known to be inadequate by the Allies—was reluctantly reached.

That settlement has become a focus of demands for revision of the Accord—both because of the inadequacy of the amount, and because of the fact that included in the monetary gold to be restituted to central banks through the Tripartite Gold Commission, there was a considerable amount of re-smelted “victims gold.” The Paris Reparation Agreement provided, under Part I, Article 8, that nonmonetary gold found in Germany should be delivered to the Inter-Governmental Committee on Refugees. The Tripartite Gold Commission was established to receive the monetary gold, with central banks as the recipient claimants.<sup>10</sup> The recovered monetary gold has never been sufficient to cover the central bank claims. However, in light of the possibility that “victims gold” was part of the gold originally recovered by the Commission, an American proposal has been put forward that would pledge undispersed amounts to a relief fund for victims.

Important though it is, gold has not been the principal troubling issue in the present acrimonious revival of the Washington Accord. What has seized attention and aroused threats of boycotts and sanctions (which have evoked charges of coercion and extortion) has been the handling of restitution.

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10. The Commission was established under Part III of the Paris Agreement, under which the three Allies (France, the United Kingdom, and the United States) were charged with recovering the monetary gold looted by Germany and placing it in a “pool.” Claims and subsequent distribution to claimant countries were adjudicated and executed through the Tripartite Commission.

It was so self-evident, or so we assumed in 1946, that property would be restored to its proper owners that almost no reference was made to the subject in Washington Accord. The only aspect which was raised as an issue was whether the assets in Switzerland of Jews or other persecuted persons who were German nationals would be subject to reparation claims—like other “German” property. That this would be done was so manifestly ridiculous and immoral that the suggestion—raised because of the possibility that many “ordinary” Germans would claim persecutee status—was instantly discarded.

Claimants, it was somewhat naively assumed, would present themselves and obtain their deposits or monies which came to them by inheritance. Forced transfers would not be recognized. The process would effect restitution—to the owners, or to their heirs. As to heirless assets, the property of those whose entire families had been wiped out, the promised “sympathetic consideration” would result in a careful accounting and allocation of proceeds to organizations that would devote them to the relief and rehabilitation of Holocaust survivors. These expectations were badly mistaken.

Taking a census was resisted on the ground of inviolability of banking secrecy. Banking secrecy, of course, had been “violated” by the commitment of the Accord to find and liquidate German assets, with the proceeds to be divided between Allies and Swiss. This point had small effect. Despite their scruples, in the course of the years following the Accord, the Swiss banks did make three separate estimates of heirless assets—each succeeding one being slightly higher than the last, but all considerably less than the estimates of others.

In any case, the defense of the sanctity of banking secrecy lost all credibility when the Swiss, working out a clearing arrangement with the Polish Government, agreed to locate and credit to the Polish balance the heirless deposits of the many Polish Jews who had died without heirs. This agreement, reached in secrecy, caused a furor when it became known, and was of course inconsistent with the position presented to the Allied delegations and to the appeals of the Jewish relief organizations, which made many approaches to the Swiss government and banks.

Worse, claimants who did appear faced obstacles in recovering assets. Many claimants were children of deceased depositors. The circumstances of the war and the Holocaust made the proofs demanded

by bankers difficult to produce. The need for secrecy in placing money abroad made documentation understandably scarce. What existed had often been lost or destroyed. Parents on their way to death chambers had whispered information to children being smuggled out of concentration camps. Yet bankers refused to conduct searches of their records to assist claimants, demanded bank books that had long since been lost. Even demanded certificates from Bergen Belsen and Auswitz.

That these difficulties need not have existed is clear. For example, similar situations—that is, claimants with proofs faulty by normal standards—were taking place elsewhere. Many persons sought their own or their parents' deposits in American banks. So far as can be told, American—and other—banks responded by searching records and tracing fragmentary documents.

In summary, the Washington Accord, admittedly deficient in several respects, was frustrated by:

- its failure to obtain monetary gold equal to that transferred to or through Switzerland to the Nazis;
- failure to account for the “victims gold” included in monetary gold;
- faulty accounting for and liquidation of German assets in Switzerland;
- lack of cooperation in identifying and restoring assets of persecuted persons;
- and indifference if not hostility to the heirless property claims.

Of this list, only one—the monetary gold settlement—can be attributed to the terms of the Accord. The others—which have led to the current denunciations of Swiss performance and to many unfair accusations and rethinking of concepts of neutrality—are almost entirely defects of performance, not of text.

## V. RECENT EVENTS

Out of the fire-storm of criticism that has engulfed the Swiss banks and former Swiss actions (importantly denying sanctuary to many refugees and suggesting that the Germans stamp passports of

Jews so as to make them easily identifiable) has come a number of remedial measures.

First and foremost, have been the actions taken by both private and public institutions in Switzerland. In agreement with the World Jewish Congress and other organizations, the Swiss banks are financing a major (and expensive) project, under the direction of an international commission headed by former United States Federal Reserve chairman Paul Volcker, the avowed (and likely to be attained) aim of which is to identify any heirless assets in Switzerland. The banks have stated that they will fully comply with the Volcker findings.

The Swiss have themselves constituted a commission of inquiry, the Berger Commission, which has already issued a preliminary report confirming that the amount of gold that passed into or through Swiss banks substantially exceeded the figures of the Washington Accord.

A special fund has been created from Swiss (mainly banking) entities, now amounting to almost \$200 million.

Class action law suits against several major Swiss banks and the Swiss National Bank have apparently been settled by a payment in two tranches of \$1.2 billion. The law suits, based originally on heirless asset claims, were later expanded to include such items as alleged responsibility of the banks for slave labor used by German companies to which the banks had made loans. The settlement seems to this observer to be a good one for the claimants. Heirless assets (which in any case are to be identified by Volcker) are bound to be much less than the amounts claimed. Major depositors in Switzerland were from the German Jewish community, which had the most warning and could transfer holdings elsewhere; many "dormant accounts" were in fact small, forgotten accounts placed in Switzerland for reasons of tax evasion or refuge from foreign exchange regulations not related to the Holocaust.

Finally, so far as Swiss actions are concerned, a proposal for creation of a multi-billion dollar Solidarity Fund is to be put to a Swiss referendum. This would be a general humanitarian fund for relief in many parts of the world, but would include Holocaust victims. The creation of this fund, as of the time of writing, is doubtful, largely because of the deep resentment felt in Switzerland at the boycott threats directed by American state authorities at Swiss banks.

The Swiss "looted gold" and related issues have also led to inquiry and responses in other countries—the former neutrals most of all, but Allied nations as well. Sweden, whose own "Washington Agreement" followed shortly after the Swiss exchange, has conducted its own reexamination. The accord with Sweden featured much the same legal positions, but no acrimony against the Allied positions, and a forthcoming attitude toward the merits of restitution and reparation. Basically, the Swedes undertook to restore looted gold and make funds available in amounts roughly equivalent to the value of German assets in Sweden. Their one condition was that these actions (except as to gold) be viewed a voluntary contribution. Performance was almost immediate.

Nevertheless, Sweden and others have been reappraising the situation, and will likely add to what remained of the monetary gold under the control of the Tripartite Gold Commission. Other neutrals with whom negotiations were held in the 1940s and after—Spain, Portugal, and Turkey—may take modest remedial steps, with Spain, which received a substantial amount of gold in payment for the essential metallurgical product, wolfram, being the more likely.

The dissection of the Washington Accord by the United States Congress and Executive Branch, and nongovernmental organizations has also resulted in review of Washington's own performance. On the moral (as distinct from material) side, we have been reminded of Washington's refusal to admit the desperate refugees on the German ship, *St. Louis*, when they were within sight of Florida—an episode that has been compared with Switzerland's barring of refugees from occupied France. It should be noted, however, that Switzerland did admit many more refugees, in proportion to its population, than *any* other nation. This is in contrast to a United States that not only denied entry to the desperate *St. Louis* refugees, but systematically failed to fill even the limited immigration quota that was available. The episode not only demonstrates the wrongness of generalizations about national traits of character, which have unfairly denigrated "the Swiss," but is also notable for the conduct of the German captain of the *St. Louis*—who insisted that his crew treat its Jewish passengers with respect and courtesy and who kept his ship at sea for days while waiting for some nation to provide refuge.

On the material (*and* moral) side, it resulted in a revival of the dormant effort to obtain the proceeds of heirless assets *in the United States* for relief of survivors. Despite some legislative movement in the early 1950s, only a minuscule amount (approximately \$500,000) was turned over to the refugees—the remainder being deposited as German holdings, in the War Claims Fund. This injustice has now been remedied, by a generous legislative allocation. The United States example has also been followed by Norway and Great Britain.

Other consequences have followed. Argentina, a neutral until the final days of the war, has launched a large and international inquiry into the extent of Nazi activities in that country, which will cover not only the flight of Nazi funds, indirect as well as possible direct receipt of gold, but also entry of war criminals.

These events have led to an extensive multi- and international exploration, not merely of the Swiss-Allied experience, but of fundamental concepts regarding neutrality, law, morality, and the conduct of many nations. There can be no doubt that in both the postwar settlements and their implementation (or lack thereof) measures of restitution and material recompense were inadequate.

The revitalization of Holocaust claims against the neutrals should not overshadow the subject of the major claims against those *directly* involved—Germany and Austria—where much has been done. It was there, and in the countries occupied by Nazi forces, that the atrocities, as well as the vast majority of looting, took place. With those states, claims negotiations were conducted under the aegis of the worldwide Conference on Jewish *Material* (emphasis added) Claims against Germany (and its sister Austria counterpart).

Jewish claimant organizations have never, of course, considered that *any* financial amount could recompense the human suffering inflicted during the Holocaust period. Indeed, the inception of negotiations in the early 1950s in respect of materials claims were opposed by some on the ground that such payments were immoral and desecrated the memory of the victims. (In Israel, which received substantial German funds in recognition of the financial costs of receiving and rehabilitating refugees, the 1953 agreement with the Germans was almost rejected on moral grounds.) But negotiations since the early 1950s with Germany and Austria, and with Axis satellite states, have resulted in extensive recompense for material damage—for loss

of property, for loss of pensions, and to some extent for lost careers. These types of direct claims continue to be pressed, reunification having expanded the possibilities with respect to Germany. Slave labor claims are being directed against former users of slave labor, like I.G. Farben, and there have been claims for confiscated insurance in Germany, Austria, and Italy.

Central to claims and defense has been the international law governing neutrality. From the beginning of the 1946 talks, the Swiss emphasized their long standing neutrality—agreed to by the European powers in the Treaty of Westphalia, confirmed in the 1815 Congress of Vienna. Much editorial and other comment have devolved on the rights of neutrals with both sides in a conflict, with some pointing to a “positive” aspect of neutrality, that is, the ability of a neutral state to act as a protecting power, attempting to enforce the humanitarian purposes of the Hague Conventions and protecting both civilians and prisoners of war. And there has been discussion of whether concepts of neutrality are not outmoded in a contest between good and evil, as between the Nazis and those fighting to preserve human rights.

The latter point of course assumes that there is an evident and accepted standard by which a choice can readily be made. Choice would seem to have been easy in the circumstances of World War II. The same could not confidently be said of choices in the many European wars of succession of the seventeenth or eighteenth centuries, nor even of World War I, the war “to end all wars.” Invocation of the help of the Lord is customarily made with equal fervor and possibly conviction of merit on both sides of a conflict. Divine assistance is especially asked on both sides of religious wars, particularly if what seems to outsiders to be a minor point of doctrine separates the combatants. Jerusalem is felt by many of the devout to be a holy city, or at least to contain sacred places; but to which faith divine right bestows it is not a decision an atheist (or a Buddhist) may see as fore-ordained.

The chief of the Swiss delegation to the 1946 Washington negotiations made, during the talks, a speculative but certainly provocative reference to the possible argument by Hitler that his cause was the better, as being a good faith attempt to achieve the benefits of a unified Europe. Less provocatively, many influential Swiss bankers

felt that banking transactions with Germany were within their clear rights as neutrals, if not indeed their duty as custodians of international monetary stability. On the other hand, the majority of Swiss sympathized with the Allies and did much to help refugees.

Swiss neutrality and the transactions with the Germans that it permitted, have been feverishly denounced by many. Alan Hevesi, Comptroller of the City of New York, said "it is a matter of morality" in rejecting a proffer in settlement of the Swiss banks; doubling the offer, under threat of boycott, eliminated the asserted immorality. But certainly, in a broad sense, he was right. The measures being taken at present do owe much to a sense of morality—not only in connection with neutrality, but in relation to the moral aspects of human conduct by anyone, neutral or otherwise.

In point of fact, the fulcrum of the Swiss-Allied negotiations of 1946 and of what has followed had little to do with neutrality. They had much to do with the universal doctrine of law that stolen property is to be returned. Gold that has been looted, when a defense of taking in good faith is not available, is by any societal standard of law to be restored. That is true whether it be gold bars with Belgian identification on them or bracelets and rings. That, plus the right of a government, against compensation, to regulate the use of the foreign assets of its nationals, was and remains the underpinning of the Washington Accord. Neutrality, though at the epicenter of discussion, is a side issue.

It is for this reason that many of the current measures are moving forward under international impetus. They have to do with a great injustice that goes beyond a careful accounting of what has been lost. That is why the actions taken by the Swiss—whether the funds being created or the class action settlement—are not limited to amounts in dormant accounts or other countable assets. Certainly this is the case for the Solidarity Fund. These are measures that may in part be based on the point made during the negotiations, that the Swiss had benefited and Swiss democratic values had been preserved by Allied sacrifices, not merely of money but of blood in the struggle against Hitler. Perhaps more, they testify to a welcome Swiss humanitarianism.

Equally, neutrality obviously has little to do with the steps being taken in many countries to reexamine their own history. At least fifteen states—including the United States—have set up commissions

of inquiry. The Allies are being asked, and many are consenting, to put the monetary gold remaining under control of the Tripartite Commission into relief efforts. The United States has appropriated some \$25 million for the same purposes, in recognition that some heirless deposits in the United States went into the War Claims Fund. Britain and Norway have both made contributions to a relief fund. Argentina instituted a year ago an intensive internationally supervised investigation into the Nazi role in Argentina, which has already produced extensive reports—some of which dispel the more romantic tales of Nazi submarines and Hitler's escape.

## CONCLUSION

The inquiry that began with revisiting the 1946 Washington Accord has thus led to a wide, multinational inquiry—not only on restitution and reparation, but also on issues of morality and neutrality. It has broadened far beyond the neutrals. It has produced measures of restitution, rectification and new contribution from neutrals and from Allies. It has, as it expanded to review the course of events, demonstrated that considerations of self-interest affected the conduct of all—frequently in distressing ways. The most virtuous sometimes strayed. Many have repented—and brought at least material benefits to the victims. And the inquiry goes on—though the “closure” that all have sought seems, at least for the beleaguered Swiss, to be at hand.

This episode may result in higher and better standards of human conduct. One hopes so. For neutrals, and particularly for those who abstain from judgment as well as from action, it may give pause to recall that Dante places in the unpleasant vestibule of Hell those fallen angels whose sin was to abstain from choosing sides and refusing to make a choice.