



**Yod**

Revue des études hébraïques et juives

21 | 2018

Histoires transgénérationnelles

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postcommuniste et le triomphe généralisé du néo-libéralisme dans les  
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גל הפיצויים השני, מדיניות ההפרטה בעידן הפוסט-קומוניסטי וניצחון  
הנאו-ליבראליזם בשנות ה-90

Regula Ludi

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**Electronic version**

URL: <http://journals.openedition.org/yod/2597>

DOI: 10.4000/yod.2597

ISSN: 2261-0200

**Publisher**

INALCO

**Electronic reference**

Regula Ludi, « Second-Wave Holocaust Restitution, Post-Communist Privatization, and the Global Triumph of Neoliberalism in the 1990s », *Yod* [Online], 21 | 2018, Online since 29 March 2018, connection on 15 November 2019. URL : <http://journals.openedition.org/yod/2597> ; DOI : 10.4000/yod.2597

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This text was automatically generated on 15 November 2019.



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# Second-Wave Holocaust Restitution, Post-Communist Privatization, and the Global Triumph of Neoliberalism in the 1990s

*La deuxième vague de restitutions, la politique de privatisation de l'ère postcommuniste et le triomphe généralisé du néo-libéralisme dans les années 1990*

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## Regula Ludi

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- 1 Like no previous decade, the 1990s were under the grip of an obsession with Nazi-era legacies. Grievances of Holocaust survivors, aimed at European governments and corporations, resurged in huge numbers and with unprecedented vehemence. The calls for restitution and reparations troubled diplomats and politicians on both sides of the Atlantic. Arousing public preoccupation with the Third Reich's policies of genocide, plunder, and exploitation, the restitution campaign profoundly changed our understanding of Nazi mass murder. A new Holocaust awareness left its distinctive mark on Europe's evolving culture of memory. It framed the notion of international obligations that arose after the collapse of the bipolar world order and undergirded the period's enthusiasm for lofty humanitarian rhetoric. "Holocaust restitution," Michael Marrus states, "carried with it a distinct flavor of human rights."<sup>1</sup>
- 2 When Holocaust restitution claims first resurfaced in 1995, however, they took almost everybody by surprise. Following an international settlement of World War II liabilities in the early 1950s, governments, the public, and, in particular, those non-state actors which were the main targets of survivors' accusations considered the issue closed. But, within months of the first new claims, calls for restitution and reparations had become ubiquitous as the number of grievances ballooned. Survivors' complaints rapidly

expanded in scope and dimension to encompass corporations and financial institutions, churches, museums, and other public bodies in formerly belligerent and neutral countries. The 'Holocaust-era restitution campaign,' as the array of differing claims was soon to be called, rapidly gained momentum. It resonated with the media and impacted on international relations once claimants started filing class-action suits in American courts. Almost as surprising as the sudden emergence of these complaints was their resolution. By the end of the century, most of the grievances had resulted in negotiated settlements that provided considerable funds to be allocated as small compensation payments to millions of Nazi victims and their descendants all over the globe.<sup>2</sup>

- 3 Given the subject's previous absence from public debate and international diplomacy, its recurrence in the 1990s is puzzling and demands explanation. The willingness of those who were targeted by the campaign to settle with the plaintiffs does too. After a brief period of denial and resistance, the accused corporations yielded and agreed to guarantee fairly large lump-sum payments to plaintiffs. In so doing, they accepted responsibility for their past behavior-this, at least, was the general impression. Moreover, in most countries debate over restitution went hand in hand with an extensive historical examination of Nazi-era robbery and looting. Through this scrutiny, a more complex and troubling picture of the entanglements of European societies with Nazi policies emerged. Research revealed, for example, the involvement of private business in the exploitation of slave labor and showed that large sectors of national economies, even in unoccupied and neutral countries, benefited from the spoliation of Jews and the cloaking of Nazi flight capital. It exposed the lucrative transactions conducted among financial institutions, trustees, lawyers, and other private brokers and Nazi businesses. In general, a much higher degree of complicity in the expropriation of Jews was revealed than had previously been acknowledged.
- 4 While the campaign sharpened our understanding of the scope of Nazi plunder and its postwar repercussions, its proponents stressed the paradigmatically moral character of survivors' calls for redress. The Clinton administration's Special Envoy on Property Restitution in Central and Eastern Europe, Stuart E. Eizenstat, for instance, depicted his mission as a "crusade" that "laid the groundwork for resolving future disputes arising from man's inhumanity to man, proving that it is possible to bring justice, even imperfect justice, to an unjust world."<sup>3</sup> The term 'crusade,' and the religious imagery it conjures up, testifies to the moral significance that was ascribed to the campaign. Besides alleviating survivors' material needs, which was clearly vital for impoverished claimants and those living in Eastern Europe and Russia, belated compensation payments apparently carried political significance as the vestige of international morality.
- 5 Contemporary observers accordingly invested these events with moral significance. They would serve as a "model for obtaining justice for historical wrongs," Michael J. Bazyler, a legal scholar specializing in transnational human-rights advocacy, prophesied. Praising the role that the American court system played in enabling transnational litigation, he added, "One of the enduring legacies of the Holocaust restitution movement is the precedent it has set for addressing other injustices of the past."<sup>4</sup> Sociologists and historians likewise took Holocaust restitution as indicative of broader transformations. Signifying "the increasing importance of morality and the growing democratization of political life," restitution campaigns should be understood as the harbinger of a cosmopolitan value system that would rely on negotiated justice, Elazar Barkan suggested.<sup>5</sup> For many observers, Holocaust restitution thus represented "a template for a

new era of financial relief and recognition of victims of crimes against humanity.” Some authors even predicted that the campaign would produce lasting changes in corporate behavior by providing a “new idiom of responsibility” that would encourage transnational corporations to comply with universal moral standards in order to avoid future human-rights litigation and its attendant risks to reputation.<sup>6</sup> Sociologists interpreted these events as the catalyst of a profound transformation in the articulation of justice claims. Its gist was a shift from the forward-looking ambition to realize a more egalitarian society to a new concern for past injustices, John Torpey, for example, argued.<sup>7</sup> Indeed, the restitution campaign became “part of a much greater phenomenon, involving truth commissions, international criminal trials and claims to justice for historic wrongs.”<sup>8</sup> Likewise it impacted the new field of knowledge production that had been unfolding under the umbrella of transitional justice since the late 1980s and helped shape the evolving international vernacular for dealing with the past.<sup>9</sup> As a result, reparations were integrated into the increasingly conventionalized toolkit that transnational experts offered to societies facing the challenges of past political violence.

- 6 However, few of the high expectations associated with the Holocaust-era restitution campaign have been realized. Instead, international sensitivities have changed dramatically in the wake of 9/11. With the global war on terror and, in more recent years, the financial crisis dominating the international agenda, concerns about the legacies of systematic violence and gross human-rights violations have rapidly faded. And, subsequent human-rights litigation modeled on Holocaust restitution has not been successful. Rather, most of the claims that have since been filed in American courts have stalled for technical reasons. They did so even before a recent U.S. Supreme Court decision limited applicability of the Alien Tort Claims Act, the eighteenth-century legislation excavated in 1980 to provide a legal basis for litigation involving extraterritorial acts and foreign plaintiffs or defendants. Commentators worry that this decision, which slams the door on foreign victims of human-rights violations seeking redress in U.S. courts, might halt the trend towards universal jurisdiction.<sup>10</sup>
- 7 Not only have these developments lowered idealistic expectations, they also invite critical revision of the history of Holocaust-era restitution. The dominant narrative describes the restitution campaign’s success as a realization of justice idealistically motivated by cultural developments, such as a new awareness of human rights and remembrance of the Holocaust. In fact, that narrative often resembles a parable about the triumph of good over evil in which the victims are restored, the culprits converted, and the public enlightened thanks to its cathartic soul-searching. But has not the desired outcome, the advent of a golden age of human rights and justice, perhaps given rise to skewed representations of these events that obfuscate important aspects of the story? On a closer reading, the dominant narrative raises fundamental methodological questions and even hints at larger problems in the theory and philosophy of history.
- 8 At the same time, the imagery applied by the Holocaust-era restitution campaign, its talk of “unfinished Holocaust business” and a “final accounting,” contrasts sharply with the impression of a new idealism prevailing in the struggle for justice. The metaphors used in the dominant narrative to characterize the restitution campaign and explain its moral significance are often borrowed from business and finance. They refer to a delayed accounting of past abuse and the payment of an outstanding debt.<sup>11</sup> Stuart E. Eizenstat, for instance, titled the concluding chapter of his 2003 autobiographical report on Holocaust-era restitution “A Final Accounting for World War II.”<sup>12</sup> What makes such

imagery attractive? What relationship among past injustice, its reparation, and bookkeeping does it suggest?

- 9 As a simple observation, the financial vocabulary pervading the discussion of restitution indicated deep ties between money and justice, ties that were further emphasized by the monetization in the 1990s of a wide range of claims including many that did not concern material losses. Polemics soon appeared. Elie Wiesel, horrified by the idea of calibrating “the greatest tragedy in Jewish history in terms of money,” saw a fundamental dilemma couched within the question: “how does one measure human suffering in terms of material reward?”<sup>13</sup> Vitriolic denunciations of restitution litigation as a “reparations business,” a “growing scandal,” and the “Holocaust industry” targeted the campaign’s weak spot, *viz.*, the discrepancy between the huge amounts of money involved and its advocates’, in particular class-action lawyers’, insistence on the humanitarian sentiments driving their efforts. The controversy reflected a widespread discomfort with this mixture of money, morality, and memory politics. And, the juxtaposition, or even conflation, of moral and financial language did not help to defang the criticism.<sup>14</sup>
- 10 Commentators also worried that public exhibitions of victims’ suffering staged by their attorneys for their emotional impact and haggling over the prize of settlements would trivialize unforgivable wrongs. “[M]oney becomes the sorry center of the whole restitution business,” complained Michael Ignatieff in 2000. And, he was certainly not the only one to express unease about the demand for justice being framed in financial terms. <sup>15</sup>Such remarks disparagingly implied that money, as the medium of restitution, was its message. Yet, this was an equation to which some of the campaign’s protagonists had no problem subscribing. “I think there is a certain symbolic quality,” Stuart E. Eizenstat asserted, “that only money can convey to repair the injustices.”<sup>16</sup>
- 11 So, instead of rejecting the equation of money and justice as an aberration of the moral tenets involved, it may be more useful for our understanding of second-wave Holocaust restitution to consider the monetization of claims as an essential precondition for their resonating as powerfully as they did. This would situate restitution in the context of larger economic changes rather than to conceive of it purely as an issue of “righting past wrongs,” a problem exclusively concerning law and morality. After all, it is only in fairy tales that justice prevails simply because it ought to. In reality, claims for justice are successful by virtue of their association with powerful interests. And, nowhere, not even in Israel, did Holocaust survivors—or any other group of Nazi victims for that matter—constitute an important voice or a constituency in control of the instruments of power. Hence, in order to understand the sudden emergence and largely successful settlement of restitution claims, one has to look for other reasons.
- 12 It is my contention, in brief, that Holocaust-era restitution was so successful not despite the commodification of claims but precisely because those claims were about money, for in expressing the demands of justice and morality in the vernacular of ownership they thereby employed the imagery of the then dominating economic discourse. To support my assertion, I offer an alternative reading of the history of the 1990s restitution movement by taking into consideration the circumstances under which the call for reversing expropriation first emerged as an international issue. That draws attention to the fall of Communism and the subsequent transition in Central and Eastern Europe in which property restitution was an integral part of the reform packages aimed at the creation of market economies, packages originating in the neoliberal philosophy of deregulation and privatization. Marking a break in the history of the regulation of

capitalism, these policies were first tested in Chile after the military coup of General Augusto Pinochet and became the main feature of the neoconservative revolution in the West that Margaret Thatcher and Ronald Reagan spearheaded in the 1980s. By the end of that decade, “market fundamentalism” had conquered mainstream economic discourse; Chicago-school economists flocked to the sanctuaries of power and influence and, vested with the authority of international financial institutions, offered their advice to post-Communist governments.<sup>17</sup>

- 13 Those transformations in global capitalism, which included the deregulation of financial markets, a global surge in privatization, profound changes in labor relations, and a shift of power to investors and shareholders, set the stage for the advent of restitution as a claim for international justice. The circumstances under which the demand to right past wrongs first surfaced left their distinct imprint on the meaning of restitution, both the envisaged instruments and practices as well as the interpretation of the underlying wrongs and their present significance. Therefore, in order to understand what Holocaust restitution in the 1990s was all about, we need to consider its origins in the post-Communist transition. Before addressing that history, however, I will briefly summarize the dominant narrative of the Holocaust-era restitution campaign. In the following sections, I will then sketch out the history of post-Communist privatization in Central and Eastern Europe in order to show that claims for the return of private property were part of economic reforms long before they were again associated with Nazi crimes. As a result of those events, new ideas of ownership, which interlocked with justice and human rights in an entirely novel manner, emerged and prepared the ground for second-wave Holocaust restitution.

## A Triumph of Justice: The Romantic Narrative of Holocaust-Era Restitution

- 14 It all began in the spring of 1995, the familiar narrative goes, when a series of reports accusing Swiss banks of appropriating the savings of Holocaust victims appeared in the Israeli press. For decades, the stories claimed, bankers in Switzerland had refused survivors access to the accounts of deceased family members and failed to comply with international restitution obligations regarding heirless Jewish property.<sup>18</sup> In Switzerland, very little was known about that history and, except for a handful of specialists, everybody responded with amazement, if not irritation, to the allegations.<sup>19</sup> Jewish organizations, spearheaded by the World Jewish Congress under Edgar Bronfman’s energetic and confrontational leadership, were quick to adopt the survivors’ cause. The political climate appeared favorable for the claimants. The attacks on Swiss banks coincided with the fiftieth anniversary of the end of World War II, a time of solemn remembrance, official demonstration of sympathy with the victims, and heightened public interest in Nazi-era history. The campaign gained traction politically in April 1996 as Republican Senator Alfonse D’Amato, the head of the U.S. Senate Banking Committee, who was running for re-election in the state of New York, staged public hearings at which individual survivors and representatives of the Swiss banking industry testified. In linking the legacy of the Holocaust to Wall Street and questions of financial regulation, the hearings transformed the campaign’s claims into a problem of American domestic politics.<sup>20</sup>

- 15 This gave survivors and Jewish organizations the opportunity for which they had long waited. In the fall of 1996, they filed class-action suits against Swiss banks in American courts, probing the new weapons of transnational jurisdiction that were being forged since the early 1980s. Almost instantly, governments, parliaments, diplomats, courts, and, of course, the media were involved, in one way or another, with the campaign. “Within a short time, restitution became a global issue,” Michael Marrus observed.<sup>21</sup> Holocaust-era legacies became the subject of international conferences, congressional hearings, behind-the-scenes negotiations, and public debate. Nevertheless, the chances of court decisions in favor of the claimants were modest. No precedent existed for this type of litigation, and the plaintiffs faced enormous legal obstacles including statutes of limitation and issues of territorial jurisdiction.<sup>22</sup> But, the campaign’s protagonists were not easily discouraged by the faint prospects for favorable court rulings. Realizing that the reputations of the accused Swiss banks were particularly vulnerable at a time when they aspired to expand their operations in the booming American market and, so, depended on American regulators’ approval of a planned mega-merger, restitution advocates aimed for their adversaries’ Achilles heel. They issued boycott threats accompanied by a concerted press campaign. And their strategy worked. The call for sanctions resonated with the American public. It also found the support of chief financial officers and pension-fund managers who threatened to disinvest if the banks failed to heed the survivors’ complaints.<sup>23</sup>
- 16 In August 1998, following two years of public criticism and behind-the-scenes negotiations, the accused banks gave in. Litigation ended in an out-of-court settlement in which the banks offered the plaintiffs a global compensation payment of \$1.25 billion, a sum unprecedented in human-rights litigation.<sup>24</sup> This lump-sum payment covered claims resulting from unreturned assets (heirless and “dormant” accounts) plus a wide range of injuries for which the banks did not bear legal responsibility. This latter category included, for instance, the exploitation of slave labor by Swiss companies in Nazi-controlled areas and the expulsion of refugees at the Swiss border for which government agencies were accountable. The fact that the banks took the sins of others onto themselves reveals how little, in their perception, the case was about responsibility for past wrongs. Instead, for the banks it was simply a matter of realizing that gaining unhindered access to global markets was, at times, a demanding ambition that had a price tag attached. And, indeed, their financial concessions paid off. Compliance paved the way for expanding their banking activity in the U.S. market, and handsome profits in the following years showed that restitution had been a good investment.<sup>25</sup>
- 17 For the survivors, the Swiss case was only the beginning. Stimulated by its example, other groups of previously neglected Nazi victims voiced their grievances and filed claims in American courts. The restitution campaign “mushroomed into transnational public law litigation on a grand scale,” one author marveled in 2004.<sup>26</sup> The class-action suit against the Swiss banks served as the model for the Holocaust related action that followed among which were those of former forced and slave laborers demanding unpaid salaries from transnational corporations. Survivors and heirs of deceased Holocaust victims also filed complaints against insurance companies and art collectors in which they demanded the return of confiscated insurance policies and looted pieces of art, jewelry, and other valuables. In most of these cases, the legal argument innovatively replaced the concept of (individual) guilt with a notion of liability resulting from a corporation’s “aiding and abetting” state crimes. Moreover, charging corporations with unjust enrichment shifted

the focus “from past injustice to the present wrongful holding of ill-gotten gains,” Leora Bilsky explained.<sup>27</sup>

- 18 By the end of the century, most of the lawsuits had resulted in negotiated settlements, that is, political rather than legal resolutions. In exchange for considerable lump-sum payments, the claimants withdrew their suits and, as urged by governments and accused corporations, agreed to desist from further legal action (“legal peace”). In the case of German forced labor compensation, the overall sum amounted to € 4.4 billion and provided benefits to a total of 1.66 million survivors. Most settlements, furthermore, were preceded by difficult multilateral negotiations involving government officials and various non-state agents and often brokered by eminent personalities in American public life who also coordinated and monitored the allocation of money.<sup>28</sup> In the slave and forced labor case, for instance, German government officials, the plaintiffs’ attorneys, members of Jewish organizations, delegates of the Central and Eastern European countries from which most of the forced laborers had come, and, finally, representatives of German corporations participated in the 2000 agreement establishing the foundation “Remembrance, Responsibility and Future.” Instead of delegating the implementation to reparations bureaucracies notorious for their red tape, this settlement mandated that private associations and humanitarian agencies in recipient countries allocate the funds.<sup>29</sup>
- 19 The restitution campaign did not only benefit a large number of previously neglected victims. It sprouted a new industry of NGOs acting as victims’ advocates and lawyers specializing in human-rights litigation. And, by intersecting and partly coalescing with changes in the culture of memory, it informed the emergence of past injustice as a new category of political discourse. Moreover, it consolidated the Holocaust’s new significance in Western self-reflection, a development that had been propelled by previous political controversy and cultural events, such as “Schindler’s List,” Steven Spielberg’s award-winning film of 1992. In drawing large audiences worldwide, Spielberg’s movie popularized the American representation of the Jewish genocide, a narrative organized around the categories of good and evil, and confronted the European public with its inclination to universalize the moral lessons of the Holocaust. As a result of these developments, survivors acquired a “heightened public profile” and an aura that “elicits honor, respect, fascination, and no small degree of awe,” as students of Holocaust memory observed.<sup>30</sup>
- 20 In the literature, therefore, second-wave Holocaust restitution is often understood to be a consequence of those shifts in the culture of memory. The first calls for restitution did indeed coincide with manifestations of the Holocaust’s changed meaning in European societies. In 1995, official events to commemorate the fiftieth anniversary of the end of World War II quite unprecedentedly included acknowledgments of moral responsibility for the extermination of Jews. In France, for instance, President Jacques Chirac acknowledged, for the first time, French complicity in the implementation of the “final solution.”<sup>31</sup> Similarly, on the occasion of an official commemoration of the end of World War II, Kaspar Villiger expressed the Swiss government’s regret over his country’s restrictive wartime asylum policy and the harm it caused Jewish refugees. In Germany, where controversy about the place of the Third Reich in national history had repeatedly flared up in the 1980s, a travelling exhibition about the Wehrmacht’s crimes opened in 1995. Revealing ordinary soldiers’ participation in massacres of Jews and other civilians, the exhibition sparked intensely emotional responses. Fanning the flames of



those controversies, in 1996, the political scientist Daniel J. Goldhagen confronted the public with his contention that anti-Semitism was deeply ingrained in German culture and had been the driving force for those who had participated in mass-shootings and operated the extermination machinery. According to the historian Wulf Kansteiner, these events had transnational repercussions and heralded the transformation of Europe's "divisive memory of Nazi aggression and occupation into a shared, self-critical memory of an era of European human-rights abuses that unites former victims, perpetrators, and bystanders."<sup>32</sup>

- 21 Research in the late 1990s, often carried out by historical commissions appointed in response to the accusations of the Holocaust-era restitution campaign, and the subsequent grappling with the past in most European societies underscored that trend and tremendously increased the relevance of Nazi-era history. They spurred transnational initiatives that placed the Holocaust at the center of a debate about European identity and values. Efforts to institutionalize Holocaust memory, which culminated in the Stockholm conference of January 2000, resulted in the establishment of the Task Force for International Cooperation on Holocaust Education, Remembrance, and Research (ITF) (later renamed the International Holocaust Remembrance Alliance (IHRA)), an intergovernmental body for coordinating state and civil-society activities for promoting public awareness of the suffering caused by Nazi crimes.<sup>33</sup> This concurrence of Holocaust remembrance and the restitution campaign has given rise to the presumption of "the obvious, indeed, organic interconnection between the restitution of private-property rights and the evocation of past memories."<sup>34</sup> Property restitution was, as a result, increasingly equated with recognition of victimhood and associated with features considered essential to personhood such as individual identity and social agency. However, the extent to which restitution was itself the result of "recovered memory," as Dan Diner claimed, remains to be determined. In fact, the relationship between memory and restitution is more complicated and, in any case, there is no direct causal chain from Holocaust memory to appreciation of the significance of ownership for victims' identities. Therefore, the question of why property has become so central to remembrance, identity, and recognition remains unanswered. Exploring the more recent history of property restitution and, specifically, its origins in the context of the post-Communist transition will provide some clarification.

## A Different Genealogy: Post-Communist Privatization in Central and Eastern Europe

- 22 In reality, second-wave Holocaust restitution did not begin with the claims against Swiss banks. Its origins date back to the early 1990s and programs implemented after the fall of Communism in Central and Eastern Europe. Despite the objections of former dissidents, the desirability of a "market economy anchored to the fundamental right of private property" seemed "almost self-evident" in 1989.<sup>35</sup> Most of the countries in the region were heavily in debt and in desperate need of help from Western governments, the World Bank, and the International Monetary Fund (IMF). The transition, therefore, largely followed the prescriptions laid down in the "Washington Consensus," a reform program for eliminating structural problems in debt-ridden countries of Latin America initially devised in 1988/89 by American policy advisers and experts in the Bretton Woods institutions. The program centered on deregulation, financial liberalization, fiscal

discipline, and privatization as the key strategies for economic revitalization. In the early 1990s, the “entire package of policy recommendations was ‘offered’ to Central and Eastern Europe as well,” the economic historian Ivan T. Berend summarized.<sup>36</sup> And, the region’s new leaders eagerly embraced it. A profound change in ownership structures—the privatization of state-owned retail businesses, farmland, housing, banks, and industrial plants—“was widely considered one of the keystones of the entire transition process.”<sup>37</sup> Reformers believed that a rapid transition from state planning to private enterprise was the only way to end the region’s deep structural crisis and stimulate economic growth. International financial institutions bolstered this judgment. In its 1996 Development Report, the World Bank declared that “fully specified property rights reward effort and good judgment, thereby assisting economic growth and wealth creation.”<sup>38</sup>

- 23 With its neoliberal thrust, the post-Communist transition seemed to bring to completion a development that had started in the late 1970s. At that time, supply-side economics and public-choice theory, which promised to remedy the world’s economic problems, offered what proponents claimed was a viable alternative to the discontents of Keynesian regulation with its inability to overcome the unprecedented combination of inflation and stagnation (stagflation) characteristic of the 1970s’ recession. Their insistence on downsizing public administration and curtailing state regulation endeared neoliberals to conservatives disgruntled by growing public expenditures and high taxation. As a program for economic policy, neoliberalism made its first sweeping breakthrough in the 1980s following Margaret Thatcher’s electoral victory in Great Britain in 1979 and Ronald Reagan’s taking office in the United States in 1981. The long-term impact was enormous. International financial institutions and governments opened their doors to the expertise offered by the mushrooming neoliberal think-tank industry and policy advisers trained in Chicago-school economics.<sup>39</sup> Invigorated by the economic failure of state regulation in the Communist bloc, “market romantics” in the 1990s spread their message with an “evangelical approach.”<sup>40</sup> Deregulation and privatization became mainstream policy; even the UN General Assembly—normally not known for particularly capitalist-friendly attitudes—issued one declaration after another endorsing private ownership and economic liberalization.<sup>41</sup> Neoliberalism, masquerading “as a radically populist philosophy,” succeeded in establishing “what is widely perceived nowadays as ‘simple common sense’ in the realm of politics.”<sup>42</sup>
- 24 Yet, privatization, as post-Communist policy planners and reformers imagined it, was far more than an instrument to stimulate growth and spur recovery. Considered the foundation of the self-regulating market, private ownership, they believed, would serve as the ultimate guarantor of individual agency and freedom “not only for those who own property, but scarcely less for those who do not,” as F. A. Hayek had explained in 1944. To neoliberal authors, any kind of state tampering with private property was anathema, seen as a step on “the road to serfdom” because, ultimately, it would suffocate competition and thus prevent the free interplay of market forces from organizing society in a manner that guaranteed individual freedom.<sup>43</sup> Holding out the prospect of a radical break with the paralyzing restrictions and dire realities under Communist rule, such ideas proved attractive to a younger generation of economists and politicians in Central and Eastern Europe. Donald Tusk, declared in 1989, “We want to move towards a Poland where... property rights are guaranteed and where liberty stems from private property.”<sup>44</sup>

- 25 Reformers, therefore, did not tire of stressing the relationship between private ownership and political transformation. They expected privatization to “create a nascent middle class that has a stake in the creation and maintenance of an effective system of property rights and the pursuit of economic policies that would enable the private sector to flourish.”<sup>45</sup> It would “counteract any concentration of power in the political system and contribute to social stability,” the World Bank expounded.<sup>46</sup> The assumption that the widespread distribution of property rights would create a large constituency in support of radical reform also led to the equating of private ownership with democracy, a line of thought which drew on Margaret Thatcher’s vision of “popular capitalism” resulting, in her words, from “a crusade to enfranchise the many in the economic life of the nation.”<sup>47</sup>
- 26 Hence, there is broad consensus in the literature that privatization was not dictated by economic requirements alone but was to a large extent driven by ideology and political considerations. “The most fundamental goal of privatization was political... The dominant political aim of the reformers was to break up hegemonic state power and make private ownership the foundation of freedom and democracy,” explained the economist Anders Ålsund, a policy advisor with solid neoliberal credentials.<sup>48</sup> Property reforms, accordingly, topped the agendas of post-Communist governments in the early 1990s. As an “interrelated international phenomenon,” they enjoyed enthusiastic support from leading Western economists, such as Jeffrey Sachs, Lawrence Summers, and David Lipton, who acted as policy advisers to post-Communist governments and produced a new body of knowledge that was quickly spread through the activity of transnational experts pushing for particularly radical change. Western governments offered additional incentives by funding privatization programs. The European Union spent more to advance private ownership than on any other area of aid to institutional and economic reforms in post-Communist countries apart from infrastructure.<sup>49</sup> As a result, Central and Eastern Europe became a huge laboratory with economic experts “using the region as a testing ground to investigate the validity of classic propositions.” At the same time, reform efforts engendered “cognitive harmonization” among their main proponents, including the Bretton Woods institutions and the EU, about the free market’s superior problem-solving capacity.<sup>50</sup>
- 27 Mainly in Poland and Czechoslovakia, the new leaders opted for early and brutal “shock treatment,” the so-called ‘Big Bang approach,’ in the belief “that a painful but fast operation was the best way to cope with the towering problems of regime change.”<sup>51</sup> The rush to deregulate and privatize paid off. It earned reformers international approval. The World Bank rewarded Poland with generous debt relief, and Czech voucher privatization, fervently defended by Václav Klaus, the finance minister in the country’s first post-Communist government, was soon emulated elsewhere as the road to success. This “pet idea of liberal economists,” which the University of Chicago economist Milton Friedman claimed as his own, consisted in the distribution to all citizens of vouchers for buying shares in state-owned companies.<sup>52</sup> Politically, it was meant to kill two birds with one stone. On the one hand, it appeared to be the most effective way to separate the former *nomenklatura* from the instruments of power. On the other hand, by transforming ordinary citizens into stakeholders, mass privatization was supposed to stimulate entrepreneurial thinking among the public and increase popular approval of the free market. In the belief that the market would provide infallible mechanisms for organizing and regulating the polity, mass privatization followed a scheme that would eventually turn the relationship between the state and the market on its head, as

Michel Foucault predicted in his analysis of neoliberal philosophy. No longer would the state control the market, but, on the contrary, it would be subjected to market forces and the limits they would impose on public policy. At the same time, political power would receive its legitimacy from citizens' economic activity; in other words, through their participation in the market as consumers and producers, individuals would automatically affirm the institutional framework.<sup>53</sup> With individuals enfranchised by their shares in once public enterprises, citizenship would become a form of ownership, and citizen-stakeholders would constitute the new polity. By generating conditions of competition, ownership would, according to these assumptions, be the engine of political change.

- 28 In reality, the results of privatization were not quite as constructive as its advocates had predicted. Instead of radically redistributing ownership, voucher privatization led to the concentration of shares in investment funds owned by banks most of which were still in state hands. And, it largely benefited those who were in a position to exploit the period's legal uncertainty. In breeding corruption, mass privatization undermined public confidence in the new system and in countries like Russia and the Ukraine allowed a group of oligarchs to enrich themselves by gaining control of key sectors of the economy and, at times, exert considerable political influence.<sup>54</sup>
- 29 Still, the structural impact of privatization was dramatic. By the mid-2000s, the private-sector contribution to GDP in post-Communist countries often reached the levels of West-European economies. Within less than a decade, this proportion had risen from between five and ten percent to 70 percent, even 80 percent in some places. Whether there was any direct relationship between privatization and growth, however, remains controversial in the literature.<sup>55</sup> Less so are the social costs. In the 1990s, formerly Communist societies were hit by huge increases in unemployment, rising poverty rates, and a widening gap between rich and poor. In the first three years after the fall of the Berlin Wall, East Germany suffered the loss of five million jobs, and thousands of businesses were liquidated. In countries which privatized enormous amounts of agricultural land, such as Bulgaria, productivity temporarily dropped by almost 50 percent. The huge demand for capital made post-Communist economies ever more dependent on foreign investment, and ownership relations clearly shifted in favor of foreign capital. In Hungary, for instance, more than 80 percent of investment is from abroad and, by the end of the last decade, roughly half of all employees were working for foreign-owned companies.<sup>56</sup> In sum, property reforms radically transformed societies and produced their integration into global markets with breath-taking speed.

## Restitution and the New Language of Ownership and Human Rights in the 1990s

- 30 The resurgence of restitution claims cannot be separated from the larger process of property reform. From the very beginning, privatization in Central and Eastern Europe was confronted with demands for re-privatization, that is, the return of property that had been confiscated under Communist rule. Strong lobbies called for the restoration of previous ownership to reverse the collectivization of farmland, businesses, and housing. Citizens eager to roll back the clock and forget their own compliance with the old system wished to return to the conditions that existed in the interwar period, when the countries of Central and Eastern Europe had first enjoyed national sovereignty. The desire for

re-privatization was so rampant that observers talked about “restitution frenzy in newly emerging market economies.”<sup>57</sup> Therefore, hardly any transitional government (apart from Russia and nations in the eastern parts of the former Soviet Union) dared to ignore the call for property restitution, objections over anticipated new injustices and delays in economic reforms notwithstanding.<sup>58</sup> At an early stage of transition, post-Communist governments enacted special legislation defining who was entitled to restitution and simplifying procedures for obtaining it. The most extensive programs were implemented in Bulgaria, the Czech Republic, and the Baltic states; Hungary, by contrast, opted for compensation payments instead of restitution in kind. Only Poland, where conflicting demands were deeply mired in political struggles and antagonistic agendas prevented any of the more than a dozen bills from being signed into law, failed to pass special legislation.<sup>59</sup>

- 31 According to the literature, governments adopted restitution programs partly for pragmatic reasons. Restoration of previous ownership facilitated privatization by catering to powerful pressure groups and creating “a constituency supportive of capital reforms.”<sup>60</sup> Restitution was also considered a clean method of de-collectivization because it helped prevent undesirable insider privatization by managers, who were normally members of the former *nomenklatura*. Moreover, clarification of legal entitlement in cases of conflicting property claims was essential to winning investors’ confidence. Therefore, restitution was meant to contribute to the establishment of the firm property rights that were considered a prerequisite for economic growth.<sup>61</sup> In addition to such pragmatic reasons, restitution also enjoyed widespread public support as a form of justice. Returning collectivized property to those from whom it had been confiscated was meant to vindicate the victims of political persecution under Communist rule. Any privatization program that did not acknowledge that Communist governments had expropriated property not only to nationalize the economy but also as a political weapon to enforce conformity and eliminate the bourgeoisie would have lacked legitimacy and public approval in the transitional period’s climate of vehement anti-Communism. And, finally, restoring private ownership was thought of “as an aid to social regeneration” because it illustrated the sort of property regime reformers wanted to establish.<sup>62</sup> In sum, almost all transitional governments viewed “the principle of restitution as fundamental to their programs of denationalization and as a means of granting compensation for what is now viewed as ‘illegal’ communist expropriation, the Bulgarian legal scholar Mariana Karadjova summarized.”<sup>63</sup>
- 32 At the same time, the call for restitution raised huge difficulties requiring political solutions. Who should be entitled to restitution? What types of confiscation should be redressed? And, in the case of conflicting ownership, which claimants should have priority? In a region of Europe which had experienced violent disruptions and political repression long before the Communists came to power, such questions were particularly thorny. Fascist regimes, Nazi occupation authorities, and postwar governments had all confiscated private property to harass and expel minorities and opponents. The war’s territorial changes and enormous destruction further complicated matters. Before being collectivized under Communist rule, an item could easily have been taken from a political opponent or member of a minority during World War II and later given to a resettled refugee. Who, then, was its legitimate owner? Who was entitled to claim redress for having been wronged?<sup>64</sup>

- 33 The new governments eliminated some of these problems by limiting claims to property that was confiscated during the period of Communist rule. Legislation typically also restricted eligibility to resident nationals excluding those, like expelled minorities and dissidents, who had been harmed in the past but had emigrated and lost their citizenship during the Communist era. In this way, governments used restitution to promote loyalty and political solidarity among their current citizens. Evidently, the restoration of ownership was meant to convey a message about shared suffering under Communism and to further the construction of new cultural identities. The following examples from Czechoslovakia and Hungary illustrate the implications of such laws. In Czechoslovakia, the new authorities adopted an extensive restitution program in 1990/91 despite the risk that it would decelerate privatization. At the same time, legislation restricted entitlements to the period of Communist rule beginning in 1948 and imposed citizenship and residence requirements.<sup>65</sup> Hungary introduced similar cut-off dates, but its legislation was less strict about citizenship and residency. In both countries, the intention was to exclude ethnic Germans and other minorities who had been expelled at the end of World War II from the right to claim redress. But, these laws also closed the door to victims of anti-Semitic expropriation. In Hungary, this was a particularly sensitive issue. Long before the Nazi occupation in the spring of 1944, Hungarian Jews had suffered legal and economic discrimination under Admiral Miklós Horthy's authoritarian regime. Moreover, Hungary was bound by the 1947 peace treaty to comply with international obligations to return Jewish property including communal and heirless assets. Previous regimes had largely ignored those obligations.<sup>66</sup>
- 34 As they affected claimants abroad, national restitution practices attracted external attention and international criticism including protests from international Jewish organizations and complaints from German diplomats over the exclusion of German expellees. The ensuing controversy over conflicting entitlements was a minefield of antagonistic claims and associated memories. In the eyes of foreign observers, re-privatization emerged as the yardstick for gauging post-Communist governments' success at grappling with their history, for restitution arrangements seemed to indicate whether the new elites were at all sincere in their desire to acknowledge unpleasant aspects of national history and, beyond that, whether they would respect the values of equality, diversity, and tolerance in their dealing with past abuse. Not only because of the claims' connection to the Holocaust but also because of the region's long history of domestic anti-Semitism, observers came to see Jewish claims as the test case. For all these reasons, ownership increasingly connoted memory, recognition, and the transnational validity of rights give the large numbers of Jewish absentee claimants.
- 35 Parallel events reinforced those connotations and, in setting new parameters for addressing the unresolved legacy of the past, forged closer links between post-Communist re-privatization and restitution demands stemming from the Nazi era. The end of the Cold War paved the way for the formal ending of World War II that had been prevented in the 1940s by the intensifying conflict between the superpowers. In lieu of a peace treaty, the two Germanys and the former occupation powers—Great Britain, France, the United States, and the Soviet Union—concluded the Two Plus Four Agreement in 1990. This treaty prepared the ground for German unification and provided the legal foundation for addressing Nazi-era claims, which West Germany had refused to settle during the Cold War, on the basis of the division of Europe and international agreements of the early 1950s.<sup>67</sup> In the 1990s, however, that position was no longer tenable, and,

consequently, the Federal Republic had to offer global compensation payments to Eastern European states plus Russia, Ukraine, and Belarus. Though designed as reparations for victims of the Nazis, the German government also utilized the transferred funds to encourage reconciliation and as incentives for market liberalization in the region.<sup>68</sup> German reparations reinforced the connection between righting past wrongs and creating favorable conditions for capitalist economies.

- 36 Finally, the fall of the Berlin Wall created fresh opportunities for Jewish organizations to reassert unsuccessful claims against the GDR. After abandoning plans for special restitution legislation in the late 1940s, East Germany in subsequent years persistently refused to return Jewish assets. The restoration of private property contradicted party doctrine, and official propaganda, with an unmistakably anti-Semitic edge, reviled former property owners as capitalist exploiters. Until 1990, the GDR denied any responsibility for the crimes of the Third Reich, and it did not consider Jewish victims of the Nazis as deserving special attention. Inevitably, with the collapse of Communism East Germany faced an avalanche of claims whose settlement would strain its already tense financial situation. Moreover, spontaneous privatizations in the early transition period frequently bypassed Jewish claims, outcomes that alarmed Jewish organizations and seemed to bode ill for the future of Holocaust survivors in unified Germany. Repeatedly reminding the German and American governments of outstanding restitution claims, the Claims Conference and the World Jewish Congress hoped to secure a binding statement from top-level authorities in either country. During preparatory talks on monetary union, however, East and West German negotiators did not come to a conclusive agreement: the East Germans favored global compensation payments for settling Jewish claims while the Kohl administration insisted on giving restitution precedence over compensation. The West German position eventually prevailed, and restitution guarantees were included in an appendix to the 1990 Unification Treaty. Ensuing legislation gave priority to Nazi-era confiscations, and subsequent practice in hearing Jewish claims followed the principle that “restitution of looted property appeared to be the best guarantee for the damage to be repaired.”<sup>69</sup> In prioritizing restitution in kind, the Kohl administration both satisfied Jewish demands and exhibited its commitment to private ownership and the sanctity of property rights. Unified Germany, swayed by the “belief in the central role that private property should play in the fabric of society,” thus set an example for the region.<sup>70</sup>
- 37 Different developments reinforcing each other—heightened concerns about how post-Communist countries were implementing re-privatization and treating Jewish claims and a new awareness of the legacy of the Holocaust attendant on German unification—brought growing international scrutiny to restitution practices in Central and Eastern Europe. When gauged by the German model, there were serious shortcomings. In the eyes of foreign observers, inconsistencies in national restitution laws raised questions about the new establishments’ commitment to protecting private ownership.<sup>71</sup> Transitional governments were not entirely insensitive to such concerns. Restoration of ownership, after all, signified progress in becoming a “normal society,” and popular opinion in many transitional countries equated such “normality” with the West’s way of organizing legal institutions and society in general.<sup>72</sup> Similarly, post-Communist governments were sensitive to pressure from abroad because they depended on foreign loans and investment. The desire to adhere to Western standards for the rule of law motivated revisions in restitution practice, which were mainly in favor of Jewish claims. In Hungary, for instance, new provisions in 1991 extended the cut-off date

to 1 May 1939 to include anti-Semitic expropriations under Admiral Horthy's rule. In the Czech Republic, for another example, amended legislation in 1994 and 2000 recognized the claims of Jewish citizens whose goods had been confiscated between 1939 and 1945 and settled the conflict over Jewish community assets, respectively.<sup>73</sup>

- 38 To defend Jewish interests in Central and Eastern Europe, advocates for Holocaust survivors founded a new agency, the World Jewish Restitution Organization (WJRO), which became an international player in the "new world order" of the 1990s and could increasingly count on American support. Its interventions with post-Communist authorities were instrumental in raising Holocaust awareness in the region. It also drew on the pattern of cooperation with U.S. government agencies that advocates for Jewish rights had established in previous years. In the 1980s, American diplomats tended to make commercial negotiations with countries of the Eastern Bloc dependent on compliance with the human-rights principles of the Helsinki Accords, such as the protection of minorities and facilitating Jewish emigration to Israel. In the 1990s, U.S. government agencies were even more willing to heed Jewish demands in their relations with the former Communist countries and support the activity of the WJRO.<sup>74</sup> As a result, the U.S. State Department demonstrated a growing inclination to connect restitution and human-rights policy and make Jewish property claims the touchstone of post-Communist societies' commitment to Western legal culture.
- 39 A key event in globalizing restitution and connecting it to unresolved Holocaust-era issues was the meeting in November 1994 between leaders of the World Jewish Congress and the senior U.S. diplomat Richard Holbrooke. One of its results was the appointment in January 1995 of Stuart Eizenstat as the U.S. Special Envoy on Property Restitution in Central and Eastern Europe. In May of that year, Eizenstat toured the region on a fact-finding mission and communicated his government's strong interest in property restitution to leaders of post-Communist countries—this was shortly before the wave of Holocaust-restitution claims in Western Europe and the United States. At about the same time, a letter from members of Congress, indicating their growing interest in the issue, requested the Secretary of State to support "appropriate legislation providing for the prompt restitution and/or compensation of property and assets seized by the former Nazi and/or Communist regimes" in that region and framed the problem of restitution as an American concern.<sup>75</sup>
- 40 U.S. authorities, of course, had no legal competence to intervene in sovereign countries' domestic matters, but they had the means, as the only remaining superpower, to persuade post-Communist governments to comply with their wishes. Mounting American interest in the issue and the U.S. government's readiness to consider the treatment of Jewish property as a touchstone of new democracies' progress on the road to normalization prepared the ground for the massive resurgence of claims and survivors' class-action litigation in the second half of the 1990s. Moreover, the American approach was informed by a new theory of restitution that emphasized symbolic aspects and, in particular, the relationship between private property and memory and the idea that restitution practices expressed a society's general attitudes *vis-à-vis* the institution of private ownership. "Property restitution," Stuart Eizenstat explained in a 1999 congressional hearing, "is an integral part of the economic and political reform now underway in central and eastern Europe. It reflects, and contributes to, the development of democratic and pluralistic institutions. By establishing new legal protections for



private and other non-state ownership, property restitution helps establish a sound basis for a market economy.”<sup>76</sup>

- 41 Eizenstat’s remark, which wedded capitalism and human rights into a seemingly natural union, became the guiding principle of Western restitution diplomacy. By restoring property rights without any kind of discrimination, post-Communist states could exhibit their readiness “to act in their political and economic interests.” There were EU and NATO memberships as rewards for good performance. “At this exciting time in history, a time when former communist nations are yearning to belong more fully to the West, ...we have an opportunity to help these countries achieve their full potential. As states in Central and Eastern Europe undertake the reforms they must complete in order to qualify for NATO and EU membership, they are examining the issue of property restitution and are looking to the United States for guidance. The United States Government has continually and specifically stressed to them that uniform, fair and complete restitution is a prerequisite both to adequate establishment of the rule of law and to the safeguarding of religious and minority rights and freedoms. We have stressed that, in joining the Euro-Atlantic mainstream and applying for membership in multilateral organizations, these countries are seeking to join a community of values,” Randolph Bell, the State Department’s Special Envoy for Holocaust Issues, outlined in a 2002 hearing before the U.S. Helsinki Commission.<sup>77</sup>
- 42 In sum, restitution metamorphosed, within a decade, from an instrument for facilitating privatization after the fall of Communism and promoting feelings of national solidarity in post-Communist societies into the touchstone of political decency, the international benchmark of a society’s respect for human rights and freedom as exemplified by their willingness to protect private property. Given this new meaning, restitution testified to changing ownership practices and, at the same time, reinforced a trend that recent scholarship has described as “propertization.”<sup>78</sup>

## Paradoxes of Ownership Practices under Neoliberal Hegemony

- 43 “A successful property restitution program is an indicator of the effectiveness of the rule of law in a democratic country. Non-discriminatory, effective property laws are also of crucial importance to a healthy market economy,” proclaimed the U.S. State Department’s website on Holocaust issues 2013.<sup>79</sup> Informed by the post-Communist transition and the Holocaust-era restitution campaign of the 1990s, ownership protection has crystallized into the epitome of human rights and the chief indicator of the stability of an economy’s institutional organization. This is a message that can be found, with little variation since the late 1990s, in countless declarations issued by multinational organizations and Western governments. Restitution is the practice for which ownership provides the theory. And yet, the tendency to associate, even identify, human rights with ownership is neither revolutionary nor particularly new but the legacy of more than three centuries of Western theorizing. As the supposed essence of individual agency and most fundamental precondition of liberty, it has echoed the tradition of “possessive individualism” since the days of John Locke and his assumption about the foundation of private property in the pre-contractual, natural state of human existence.<sup>80</sup> So, where is the novelty in the late-twentieth century’s preoccupation with private property? And,

what explains the growing practical and symbolic significance of ownership, which recent restitution campaigns have drawn on and fueled at the same time?

- 44 In the past three decades, possessive individualism has undergone substantial transformation under the impact of neoliberal regulation. The institution, and the legal protection, of private property, including the unrestricted employment, control, and ability to dispose of one's assets, has gained unprecedented importance. Since the 1980s, growing global recognition of private ownership, and the social relations it encapsulates, has galvanized the institution and increasingly vested it with self-evidence—sanctified by countless declarations of international organizations and reified by privatization efforts that created new social facts.<sup>81</sup> The international confirmation of private property as a universal institution was concurrent with its geographical spread and its expansion to encompass a growing number of collective goods such as cultural knowledge and intellectual production; genetic material and parts of the human body; and water, air, and other natural resources. Bolstered by trade agreements, a new institutional framework, and general trends in economic globalization, new international practices have turned goods previously inaccessible to private ownership into commodities. As a result, propertization has transformed virtually every social relation into a form of ownership and, concomitantly, exposed it to competitive market forces. The restitution campaigns of the 1990s, in other words, “took place within the framework of an affirmative and universalistic discourse on ownership,” which, according to the historian Hannes Siegrist, has invigorated, systematized, and politically entrenched the notion of private property.<sup>82</sup>
- 45 While post-Communist privatization has contributed to establishing private property, restitution, in associating property rights with justice and healing, has given the practice of ownership moral justification. It has provided a specific, moral vocabulary of justice, personhood, and freedom and informed a discourse that has raised the symbolic and cultural significance of private ownership by linking its denial to the memory of state crimes aimed at the destruction of the person and her identity. This discourse has boosted the emotional investment in the return of confiscated property and the (partial) restoration of the social relations believed to have been embodied in previous ownership structures. In Poland, for instance, a recent study shows how restitution claims emphasizing the connection between private property, especially real estate, and tradition have turned the institution into “a stronghold of the culturally defined nation.” This was exemplified by the fact that the Catholic Church, which embodied national survival during periods in which the Polish nation had ceased to exist as a sovereign state, was one of the main beneficiaries of re-privatization. Similarly, in the past two decades, the language of dispossession and ownership has become central to the configuration of destruction, loss, and mourning in cultural representations of the Holocaust.<sup>83</sup>
- 46 Yet, those developments, though invigorating the institution of private property by giving it new cultural meaning, do not necessarily harmonize with the principles of market fundamentalism intrinsic to neoliberal ownership practices. Rather, deregulation and the dismantling of controls on capital since the 1980s have enormously accelerated capital flows. With the support of Western governments, the Bretton Woods institutions have urged debtor nations all over the globe to liberalize financial markets, open their economies to foreign investment, and, thereby, provide incentives for mobilizing capital including land ownership.<sup>84</sup> In the service of profit maximization, property is commoditized while capital becomes increasingly volatile, moving in and out of countries with growing speed, and, thus, a factor of destabilization to which financial crises since

the 1990s have given impressive testimony.<sup>85</sup> Such a functionalist understanding of property and its uprooting impact on societies, however, undermines the significance of ownership for social belonging and individual identity.

- 47 Second-wave Holocaust restitution cannot be isolated from those broader trends and their paradoxical impact. The resurgence of claims and their successful resolutions, while strengthened by the growing importance of private property, also testify to the above-mentioned ambiguities. On the one hand, the insistence on the return of communal property in Central and Eastern Europe was a precondition for Jewish revival in the regions and, as such, emphasized the links among ownership, identity, and belonging. The individual claims pressed by Holocaust survivors and their descendants, on the other hand, contributed to the mobilizing of property. Opposition to eligibility restrictions, such as citizenship and residence requirements, was meant to eliminate discrimination against Jewish claimants most of whom had emigrated in previous decades. Criticism of restrictions imposed on absentee claimants also targeted provisions which impeded the transnational exercise of property rights and proved to be an obstacle to the mobility of capital. This latter implication was crucial for the region's integration into global markets and facilitated foreign investment in Central and Eastern European countries. And in associating Jewish property with remembrance and the new cultural meaning of the Holocaust, restitution eventually proved instrumental in transforming ownership into what is considered to be the very essence of universal human rights. In so doing, it contributed to the conflation of capitalism and human rights—"free market and democracy"—in the concept of ownership. Given this conflated meaning, the Holocaust restitution campaign can be understood as part of the project "to reframe the expansion of capitalist social relations as a force of emancipation and empowerment," a process whose outcome is unpredictable and obviously difficult to equate with the triumph of even imperfect justice.<sup>86</sup>

## Concluding remarks

- 48 It has been my aim in this article to show that Holocaust-era restitution did not originate in the sudden changes in mentalities or sentiment that promoted the recognition of past wrongs of states and private agents but was part of a larger process involving major transformations in global capitalism and property regimes. Restitution, fashioned as re-privatization, surfaced in the early 1990s in connection with the post-Communist de-collectivization that was included in the neoliberal reform package adopted by transitional societies in Central and Eastern Europe. By the end of that decade, however, it had attained a much wider significance as a token of justice, memory, and identity because international scrutiny of national restitution practices had turned the restoration of property rights into an indicator of post-Communist societies' willingness to deal with their past and their commitment to human rights. As a "travelling concept" that coupled private property with novel ideas of historical justice on its road from east to west and west to east, restitution gradually changed from a method of advancing privatization and creating new polities to a carrier of the memory of past wrongs.<sup>87</sup> By virtue of its association with remembrance and historical justice, private property correspondingly metamorphosed from a device for expediting the transition to capitalism to the core principle of the global value system. This was a seminal shift preparing the ground for the resurgence of Holocaust-era restitution in Western Europe

and the United States and the new sympathy survivors' claims found with the political establishment and a portion of the public. By endorsing restitution while pushing for deregulation and privatization domestically and abroad, political leaders could pose as champions of justice without contradicting their neoliberal commitments. On the contrary, in the political climate of the 1990s, their support for the Holocaust survivors' cause ennobled the crusade for the expansion of private ownership. As the main beneficiaries of changes in global capitalism—privatization, new international investment opportunities, deregulation of financial markets, and the increasing transnational mobility of capital—multinational corporations, the primary targets of Holocaust restitution claims in the 1990s, had a genuine interest in supporting those trends by accepting novel concepts of accountability and participating in the period's propertization frenzy by paying their entry into globalizing markets.

- 49 This is the broader context that has to be considered if one is to understand the wider implications of second-wave Holocaust restitution beyond its moral significance for the victims and the achievement of belated justice. It is a context in which property claims were the most promising way to insert a call for justice into a hegemonic discourse organized around neoliberal assumptions about ownership as the foundation of human agency. The resurgence of Holocaust-era restitution claims in the 1990s partly relied on this new notion of ownership; partly it propelled the identification of ownership with human rights in general and of expropriation, in turn, with the negation and destruction of the person. Second-wave Holocaust restitution, therefore, was a paradigm for how justice claims could be articulated under the condition of neoliberal hegemony. Ownership provided a moral language that enabled survivors to express feelings of injustice, loss, and suffering in a new way that resonated with global leaders and economic players. This new situation allowed the project of righting past wrong to spread widely. Yet, it also included the travesty of reducing the responsibility for genocide to the settlement of property claims. And, all of this occurred against the backdrop of the obvious dilemma afflicting current ownership practice, viz., the tension between its being constitutive of personhood while serving as a highly depersonalized vehicle of capital mobility.
- 50 I am indebted to Frank Haldemann and Greg Sax for their invaluable comments and suggestions on earlier versions of this essay. My gratitude also goes to the organizers of the Conference "Corporate Liability for Human Rights Violations" at Tel Aviv University, December 2012, and the 2013 Summer Research Workshop "The Politics of Repair: Restitution and Reparations in the Wake of the Holocaust" at the United States Holocaust Memorial Museum's Center for Advanced Holocaust Studies for providing a forum to discuss the ideas expressed in this article with colleagues and specialists of restitution history.

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 NOTES

1. Michael R. MARRUS, *Some Measure of Justice. The Holocaust Era Restitution Campaign of the 1990s* (Madison: The University of Wisconsin Press, 2009), 81.
2. Most of the available literature originates from authors who were directly involved in events. For a rare exception see the comprehensive and critical survey by Holocaust historian Michael Marrus, *ibid.*
3. Stuart E. EIZENSTAT, *Imperfect Justice. Looted Assets, Slave Labor, and the Unfinished Business of World War II* (New York: Public Affairs, 2003), blurb.
4. Michael J. BAZYLER, *Holocaust Justice. The Battle for Restitution in America's Courts* (New York: New York University Press, 2003), blurb, 307.
5. Elazar B ARKAN, *The Guilt of Nations. Restitution and Negotiating Historical Injustices* (Baltimore and London: The Johns Hopkins University Press, 2001), 308.
6. BAZYLER, *Holocaust Justice. The Battle for Restitution in America's Courts*, 307, 30. Leora B ILSKY, "Transnational Holocaust Litigation," *The European Journal of International Law* 23, no. 2 (2012): 353.
7. John TORPEY, "Making Whole What Has Been Smashed': Reflections on Reparations," *Journal of Modern History* 73, no. 2 (2001). Among the first to observe such a shift associated with the new rhetoric of memory and victimhood was Charles S. MAIER, "A Surfeit of Memory? Reflections on History, Melancholy and Denial," *History & Memory* 5, no. 2 (1993).
8. MARRUS, *Some Measure of Justice. The Holocaust Era Restitution Campaign of the 1990s*, XII.
9. On the emergence of transitional justice theory, see Paige ARTHUR, "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly* 31 (2009). For a critical assessment, see Christine BELL, "Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'," *The International Journal of Transitional Justice* 3 (2009).
10. On the 2013 Supreme Court decision in *Kiobel v. Royal Dutch Petroleum CO. (Shell)*, see David P. STEWART and Ingrid WUERH, "Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute," *The American Journal of International Law* 107, no. 3 (2013).
11. See, for instance, many contributions in Michael J. BAZYLER and Roger P. ALFORD, eds., *Holocaust Restitution. Perspectives on the Litigation and Its Legacy* (New York and London: New York University Press, 2006).
12. EIZENSTAT, *Imperfect Justice. Looted Assets, Slave Labor, and the Unfinished Business of World War II*.
13. Forward by Elie WIESEL in *ibid.*, IX.
14. Norman G. FINKELSTEIN, *The Holocaust Industry. Reflections on the Exploitation of Jewish Suffering* (London: Verso, 2000). Though Finkelstein's polemic largely reflected an intra-Jewish controversy about the role of Jewish organizations in allocating

compensation funds, it particularly resonated with opponents of restitution claims and right wing circles in Europe.

15. Cited after MARRUS, *Some Measure of Justice. The Holocaust Era Restitution Campaign of the 1990s*, 8.

16. EIZENSTAT in his response to Jewish critics in 2001, quoted after BAZYLER, *Holocaust Justice. The Battle for Restitution in America's Courts*, 294.

17. Ivan T. BEREND, *Europe Since 1980* (Cambridge: Cambridge University Press, 2010), 98f., 197f. From a Marxist perspective, see David HARVEY, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005). With a special focus on Eastern Europe also Philipp THER, *Europe since 1989: A History* (Princeton: Princeton University Press, 2016).

18. ICE, ed. *Switzerland, National Socialism and the Second World War. Final Report* (Zurich: Pendo, 2002). On the Swiss case also Thomas MAISSEN, *Verweigerter Erinnerung. Nachrichtenlose Vermögen und Schweizer Weltkriegsdebatte 1989-2004* (Zurich: Verlag Neue Zürcher Zeitung, 2005). With special focus on the role of the Clinton administration and U.S. government agencies, see Jan SURMANN, *Shoah-Erinnerung und Restitution: Die US-Geschichtspolitik am Ende des 20. Jahrhunderts* (Stuttgart: Franz Steiner Verlag, 2012).

19. A 1993 survey by historian Jacques PICARD appeared in 1996 under the title "Switzerland and the Assets of the Missing Victims of the Nazis" (published by Bank Julius Bär, Zurich). In 1996, the government mandated two historians to examine accusations raised in the media, for the results, see Peter HUG, "Unclaimed Assets of Nazi Victims in Switzerland," in *Switzerland and the Second World War*, ed. Georg Kreis (London: Frank Cass, 2000). On the context Regula LUDI, "Waging War on Wartime Memory: Recent Swiss Debates on the Legacies of the Holocaust and the Nazi Era," *Jewish Social Studies* 10, no. 2 (2004).

20. Claimants filed several suits that were later united in one single action. BAZYLER and ALFORD, eds., *Holocaust Restitution. Perspectives on the Litigation and Its Legacy*, 3. Also EIZENSTAT, *Imperfect Justice. Looted Assets, Slave Labor, and the Unfinished Business of World War II*, 67f.

21. MARRUS, *Some Measure of Justice. The Holocaust Era Restitution Campaign of the 1990s*, 12. On legal developments, Robert A. SWIFT, "Holocaust Litigation and Human Rights Jurisprudence," in *Holocaust Restitution. Perspectives on the Litigation and its Legacy*, ed. Michael J. BAZYLER and Roger P. ALFORD (New York & London: New York University Press, 2006).

22. BILSKY, "Transnational Holocaust Litigation."

23. MARRUS, *Some Measure of Justice. The Holocaust Era Restitution Campaign of the 1990s*, 81-84. Rickman mentions that up to 800 American public finance officers were ready to participate in sanctions. Gregg J. RICKMAN, *Conquest and Redemption. A History of Jewish Assets from the Holocaust* (New Brunswick & London: Transaction Publishers, 2007), 217.

24. MARRUS, *Some Measure of Justice. The Holocaust Era Restitution Campaign of the 1990s*, 4.

25. On the recent history of the Swiss banking industry, see Malik MAZBOURI, Sébastien GUEX, and Rodrigo LOPEZ, "Finanzplatz Schweiz," in *Wirtschaftsgeschichte der Schweiz im 20. Jahrhundert*, ed. Patrick HALBEISEN, Margrit MÜLLER, and Béatrice VEYRASSAT (Basel: Schwabe Verlag, 2012), 499-510.

26. Paul R. DUBINSKY, "Justice for the Collective: The Limits of the Human Rights Class Action," *Michigan Law Review* 102, no. 6 (2004).
27. BILSKY, "Transnational Holocaust Litigation," 360. Critically on the unjust enrichment charge see also MARRUS, *Some Measure of Justice. The Holocaust Era Restitution Campaign of the 1990s*, 91-103.
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66. For an overview, with a special focus on Jewish claims, see POGANY, *Righting Wrongs in Eastern Europe*. Catherine HOREL, *La restitution des biens juifs et le renouveau juif en Europe centrale. Hongrie, Slovaquie, République Tchèque* (Frankfurt am Main: Peter Lang Verlag, 2002).
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83. SKĄPSKA, "Paying for Past Injustices and Creating New Ones: On Property Rights in Poland as an Element of the Unfinished Transformation," 269. See, particularly, the contributions in Dan DINER and Gotthard WUNBERG, eds., *Restitution and Memory. Material Restoration in Europe* (New York: Berghahn, 2007).
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## ABSTRACTS

This article argues that the emergence in the 1990s of a second wave of Holocaust-era restitution claims was not the result of a shift in mentalities leading to the sudden recognition of past wrongs or the surge of repressed memories but rather part of a larger process involving major transformations in global capitalism and property regimes. Restitution, fashioned as re-privatization, surfaced in the early 1990s in connection with post-Communist de-collectivization and was included in neoliberal reform packages adopted by transitional societies in Central and Eastern Europe. By the end of that decade, restitution attained a much wider significance as a token of justice, memory, and identity. International scrutiny of restitution mechanisms implemented by post-Communist states turned the restoration of property rights into an indicator of these societies' commitment to human rights and their willingness to address the legacies of their totalitarian past. As a "travelling concept" linking private property with novel ideas of historical justice on its road from east to west and west to east, restitution gradually changed from a method of advancing privatization and creating new polities to a carrier of the memory of past wrongs. In this entirely new meaning, restitution became the heart of Holocaust survivors' fin-de-siècle call for justice and recognition.

Cet article tend à montrer que l'émergence, dans les années 1990, d'une deuxième vague de demandes de restitutions de la part de victimes de la Shoah n'était pas le résultat d'un changement de mentalités qui aurait conduit à la reconnaissance soudaine des fautes du passé ou au retour de souvenirs refoulés, mais qu'elle s'est inscrite dans un processus plus vaste impliquant des transformations majeures dans le capitalisme mondial et le statut de la propriété privée. Cette politique de restitution, conçue comme une nouvelle privatisation, a vu le jour au cours de cette période dans le cadre de la décollectivisation postcommuniste et a été partie intégrante des programmes de réforme néolibérale adoptés par les sociétés en transition d'Europe centrale et orientale. À la fin de cette décennie, elle a revêtu une signification beaucoup plus large en tant que geste symbolique de justice, de mémoire et d'identité. Sous le regard attentif porté au plan international sur les mécanismes de restitution mis en œuvre par les États postcommunistes, la restauration des droits de propriété est devenue un indicateur de l'engagement de ces sociétés dans le domaine des droits de l'homme et de leur volonté d'assumer l'héritage de leur passé totalitaire. En tant que « concept itinérant » liant la propriété privée à des idées neuves de justice historique sur sa route d'est en ouest et d'ouest en est, la restitution a évolué progressivement : d'abord moyen de promotion de la privatisation et de la mise en place de politiques nouvelles, elle est devenue porteuse de la mémoire des fautes du passé. Dans ce sens, la restitution est en cette fin de siècle au cœur de la demande des survivants de la Shoah pour la justice et la reconnaissance.

תקציר: המאמר מנסה להוכיח כי הגל החדש של תביעות הפיצויים מצד קורבנות השואה בשנות ה-90 של המאה הקודמת אינו פועל יוצא של מנטאליות חדשה כתוצאה מהתעוררותם של זיכרונות מודחקים או מהכרה בשגיאות העבר. הוא מהווה חלק מתהליך רחב יותר של שינויים בתפישת הקפיטליזם העולמי והרכוש הפרטי. מדיניות הפיצויים בתקופה זו היא תוצאה של הפרטה חדשה במסגרת הדה-קולקטיביזם בתקופה הפוסט-קומוניסטית וחלק מרפורמה נאו-ליברלית בחברות המשתנות במזרח אירופה ובמרכזה. בסיומו של עשור שנים זה היא קיבלה משמעות רחבה של מחווה סמלית לצדק, לזיכרון ולזהות. תוך תשומת לב ניכרת לתכנית הפיצויים הבין-לאומית, הפכה החזרת זכויות הרכוש במדינות הפוסט-קומוניסטיות לציון של מחויבותן של אלו לזכויות האדם ולרצונן ליישם את שירשו מן העבר הטוטליטארי. מדיניות הפיצויים, כמושג מובילי הקושר את הרכוש הפרטי לתפישת הצדק ההיסטורי על התוואי שבין מזרח למערב ולהיפך, השתנתה באופן הדרגתי: מאמצעי לקידום ההפרטה וליישום דרכים חדשות, היא הפכה למגלמת זכרון של שגיאות העבר. במובן זה תביעות הפיצויים של ניצולי השואה בסוף המאה הקודמת הן בקשה לצדק ולהכרה.

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