

## **The *Duty to Repair* in Practice: The Hundred Years History of a Legal Concept**

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International norms – both social and legal - are usually the byproduct of historical ruptures during which new generations of norms entrepreneurs benefit from windows of opportunities to force global structural changes. For instance, it is widely noticed that the two world wars in the twentieth century have led to massive global normative changes in financial regulation. One can only cite the sudden rise of states' recognition of a duty to provide for the social security of their citizens – a move that is often associated with the rise of Keynesianism (Hall 1989) –, or a *duty to repair* war-lead destructions. Most often, in the last century, the addition of new duties on the side of states has been framed in the language of hard-gained rights by citizens who suffered catastrophic destruction from the Great War to the end of the Cold War. By focusing on the emergence and evolution of such a new norm as the state's *duty to repair*, we wish to trace the origins of major shifts in international norms and citizens' rights throughout the twentieth century.

Still along with the focus adopted by the other contributors to this volume we want to move our historical focus from the level of norms as ideas to the level of norms as instruments. We therefore wish to focus on the contractual instruments invented, negotiated and generated in practice by the states and transnational actors, which worked to establish the general recognition of a *duty to repair* in the last hundred years. Indeed, as in the case of other international and transnational negotiations developed between state actors, private companies and groupings of citizens, the concept of a duty to repair found its practical expression in a form of contractual knowledge, e.g. a negotiated convention which defines a set of rules that fixes not only the price and temporality necessary for the full payment of an amount commensurate with the tort suffered by the aggrieved parties, but also, a mechanism for litigation of potential disputes about the extent of each party's rights and duties in case of contractual default.

By focusing on the varied set of practical instruments that were invented to turn this new normative ideal –e.g. the duty to repair – into practice, we move away from two conventional literatures: the first one, in financial history, which ignores the question of reparations; and the second one, in political history, which treats the question of reparations as a pure element of state politics. Indeed, it is remarkable that financial historians have largely focused on the creation of multilateral trade and financial institutions in the twentieth century, such as those that ensured the expansion of free trade and the preservation of the gold standard in the interwar period, or those Bretton Woods institutions after World War II (Flandreau, Holtfrerich and James 2003), but that they have overlooked the normative, legal and practical implications associated with the implementation of the state's recognition of a duty to repair. In fact, the way financial historians relegated the reparations issue to the dustbin of financial history has been comforted by a common assumption found among socio-political historians, for whom reparations belong to the realm of alliance politics (Maier 2003) and that of the legalization of warfare practices. Reparations are also more than processes of identity-

formation as it has been very well documented by historians (Torpey 2006:43),<sup>1</sup> For most reparations scholars, the practical implementation of a duty to repair has had little influence on the way the globalization of finance has been managed throughout the century – and vice versa. The underlying assumption behind such a division of labor between financial historians, political historians and sociologists is that postwar reparation treaties and agreements offer compensation to very specific classes of populations who have suffered extraordinary harm, rather than that they participate in the construction of new instruments of macro-economic governance whose rules concern everyone.

Our paper seeks to challenge this division of labor, as well as the vision of the duty to repair that it carries with it. We argue that the conception of such a duty to repair that states, experts and societies have put forward after major wars in the twentieth century were deeply embedded in new the transformations of financial capitalism both at the institutional and intellectual level. First, we illustrate this intricate articulation with the case of the reparations that were imposed upon Germany after the Great War: as we will show, the multilateral institutions created to implement and re-negotiate the sovereign debt transfers between Germany and its former enemies played an essential role along side the stabilization plans proposed by interwar experts (economists, lawyers, socio-legal scholars as well as politicians) in order to help European economies move from protectionism to a globalized open economy. Second, we show that, in the case of the Swiss restitutions debate in the wider context of reparations politics that started after the end of the Cold War, the global integration of banking practices played an essential role in explaining the success of restitutions claimants. Although both cases exemplify very different logics of reparations settlements, they both illustrate the deep association between financial logics of (reparations) debt swaps and the globalization of financial activities.

Even if attentive to such broad processes, our article also pays attention to the historical specificity of each case, and the particular philosophical understanding of key legal notions like that of “collective responsibility” which justified the payment of reparations; the historically specific association between the financial mechanisms and instruments set up to transfer reparations money; and the broader institutional context of regulation of financial flows.<sup>2</sup> Indeed, when we look closer at various reparations as well restitutions contracts – the two being sometimes hard to disentangle –,<sup>3</sup> we realize that these have been articulated around very different notions and understandings of responsibility: whether direct or indirect, or associated with guilt or not, the notion of “collective responsibility” has garnered very different meanings, and that the articulation between morality and legality in reparations agreements has changed quite a lot over the twentieth century.

Thus, in addition to orienting the historiographical debate about reparations toward a more transnational understanding of history, as well as toward a deeper attention

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<sup>1</sup> In the sense that, through reparations, nations seek to restore a sense of pride after great trauma (Torpey 2006)

<sup>2</sup> On collective responsibility, see notably Feinberg (1968), French (1974), May (1992). In the context of reparations for historical injustice, see Colonomos (2008, 159-186).

<sup>3</sup> Indeed, the money that Swiss banks were asked to retribute and that were deposited by their clients who perished in the Holocaust, a financial agreement was reached on the basis of a lump sum to be distributed among the beneficiaries of these accounts.

to the articulation of reparations claims with the evolution of financial capitalism, we also show that reparations debates offer particular good sites of investigation for historical sociologists who have an interest in exploring the moral claims made about financial practices.<sup>4</sup> Indeed, reparations debates deploy very different concepts of morality and legality associated with justifications for the payment of reparations – and very different understandings of torts, like individual guilt, individual and collective responsibility –, and they also greatly vary with regard to the associations that participants to these debates draw between legal principles and financial instruments – in particular, which types of sanctions shall be applied in case of contractual defaults.

We hereby describe which legal and moral versions of a duty to repair we find in various reparations contracts, and whether we can say that such socially constructed conceptions of morality distinguished reparations settlements from other types of financial settlements in each of the two eras under investigation: post WWI negotiations and the 1990s Holocaust Era Assets scandal. We show that in post-WWI reparations, the notion of collective responsibility was defined in contradistinction to the notion of guilt, especially in the legal doctrines of French “solidarist” politicians, diplomats and legal experts who invented, negotiated and re-deployed new financial instruments of national accounting which were used to assess the amount of reparations that Germany had to pay to the Allies. Their actuarial conception of responsibility associated reparations with a collective mechanism of insurance against the future risk of war, and the manifestation of a collective responsibility toward the victims of a war, as well as it participated in the creation of a host of other instruments of macro-economic governance that later came institutionalized into national and international financial institutions – such as national account systems. In contrast, the restitutions claimants in the case of the Holocaust Era Assets tightly associated notions of collective responsibility and collective guilt, which they deployed in public relations campaigns aimed at labeling and shaming categories of profiteers on the world scene. These claims contributed greatly to a reflection on corporate responsibility in the context of a debate on the transnational regulation of multinationals’ behavior in wartime as well as peacetime, whose terms grafted themselves later on further debates about tax evaders, sanctions-busters and other profiteers who proliferate on the dark side of global capitalism.

Hence, both cases show that even though the intellectual history of the *duty to repair* may be read in continuous terms – from the Great War to the Second World War to the Holocaust Assets Scandals – when seen from purely normative and intellectual perspectives, the practical implementation of the duty to repair has had each time a very specific history, which had more to do with the contemporary development of instruments of financial governance in each period than with prior experimentation in the field of reparations.

### **The Reparations Settlement After the Great War: A Laboratory for Macro-Economic Global Governance**

#### *The Duty to Repair and the Concept of Collective Responsibility in Legal Thought*

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<sup>4</sup> On this very extensive literature, see Abend 2014.

Since the early days of the Versailles Treaty, by which the Allies made peace with Germany in 1919, the extent of the responsibility of Germany in the destruction of the war on non-German soil has been hotly debated, both by contemporaries and by political historians. At the time it was discussed, many German legal scholars and politicians indicted the treaty as they claimed that it explicitly assumed Germany's (collective) responsibility in the destructions (and the individual guilt of its leaders) – a claim that they adamantly rejected. They talked of the “war guilt clause,” (by which they referred to the “responsibility” clause, or article 231) unilaterally imposed on Germany (Schmitt, Carl. 2003[1950]: 266) in which they saw a bounty that the Allies unfairly asked from the defeated nation.<sup>5</sup> In particular, they hated that the Treaty should establish a Commission of Reparations, to determine the extent to which Germany could “make complete reparation for all such loss and damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency”<sup>6</sup> (art. 232), and that the Allies based their financial claim on “the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies” (art. 231). Up to this day, political historians and sociologists have also seen in the reparations planned by the Versailles Treaty an “unambiguous form of ‘victor’s justice’, which were resented accordingly” (Torpey 2003:4) by the Germans, and which were dictated by the populist sentiments agitating the British and French politicians and their public opinions.

Not all scholars, however, agree with this view of the reparations settlement as too punitive, and too one-sided in its assignment of responsibility and guilt. In contrast to long-held interpretations of these financial provisions, Sally Marks (1978, 2013) argues persuasively that the financial obligations that the Allies asked Germany to recognize were not as extravagant as the Germans claimed they were, and that they were actually quite commensurate both with what the Germans could pay and also with what they needed to pay for European recovery. Here, along with Mallard (2011), we argue that the reparations philosophy, which was translated into action by the *Reparations Commission*, did not involve the German admission of guilt, but instead, the recognition of some collective responsibility among European nations in repairing the war damages caused to Allied populations. The *duty to repair* that Germany as well as the Allies (like France) recognized was established not on the prior existence of a convention – or a pact, which warring parties would have signed prior to entering into the war – but on the commonly held assumption – at least since the times when Bodin and Grotius re-discovered Roman principles of contractual law and applied them to the realm of international politics (Bernardini 2007) – that a duty such as the duty to repair originates from the acknowledgement of a tort made to one aggrieved party.

In fact, this legal understanding of the states’ duty to repair and the idea that each warring nation would be responsible vis-à-vis its civilian population was first turned into law at the national level in France. In October 1915, the French Parliament enacted a law that proclaimed “the equality of all Frenchmen and the solidarity of nations in supporting the costs of war,” and “the right to a complete reparation” for the “damages caused in

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<sup>5</sup> For instance, France had to pay such an indemnity to fund German colonial adventures after France lost the 1870 war to Germany.

<sup>6</sup> And in general all damage as defined in Annex 1 of the Versailles Treaty.

France to the movable properties and real estate property, by acts of warfare” (Gide 1932:22). Charles Gide, a lawyer by training, and a professor of political economy in the faculty of law at Montpellier and then Paris who promoted the “economic program of solidarists” before he represented France in the Reparations Commission since its creation in 1919, applauded this French law because it expressed a form of “national solidarity, which had never before been expressed in such an affirmative way by France” – after previous wars, like in 1870, “it was said that the victims of the war might be compensated for their loss, but nothing was done, and nobody had raised to the possibility of complete reparation.”

When the war ended, it was not a surprise if those Frenchmen who had lobbied in favor of the recognition of their state’s *duty to repair* favored the establishment of multilateral rather than purely national organizations to ensure the financial sustainability of the reconstruction efforts that aimed at reducing socio-economic inequalities between the European populations who had suffered from the war and those did not. For instance, Léon Bourgeois had become the first President of the League of Nations in 1919 after a long-lasting effort in favor of obligatory arbitration of interstate conflicts in the Hague conferences, an activity for which he received the Nobel Peace Prize in 1920 (Blais 2007:237). For him, the establishment of the Reparations Commission complemented the efforts to manage world affairs on a multilateral basis and it prolonged the national recognition of a right for civilians to be insured against the risk of war. Quite characteristically, Léon Bourgeois, the rapporteur on the Versailles Treaty to the French Parliament, and a lawyer by training, an essayist and the founder of the “Radical Socialist” Party, believed that with the reparations provisions, the Allies did not ask “any indemnity from Germany in compensation for the military expenses and the exceptional civilian expenses which the state of war required them to pay” (Bourgeois 1919:82).<sup>7</sup> Bourgeois evaluated that such indemnities would have amounted for France to 143 billion francs, and France only asked Germany to pay to compensate the French population for damages directly caused by bombardments (85 billions) and pensions to war invalids and widows (60 billion).<sup>8</sup> For Bourgeois and other supporters of Versailles, the reparations simply aimed at diminishing the socio-economic inequalities that the war had created between European citizens: indeed, most of the citizens of Germany, the South of France and Italy for instance, did not suffer from the war as much as the French citizens in the North, who had lived where the trenches had been built.<sup>9</sup> Thus, states and inter-state cooperation mechanisms, should be erected to distribute more evenly the loss of private citizens due to the risk of war, according to a logic of collective responsibility and collective insurance (rather than because of a specifically German demonstration of immorality during the conduct of war).<sup>10</sup>

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<sup>7</sup> The exception is Belgium, which required that Germany paid her inter-allied war debts, which helped Belgium pay for ammunitions.

<sup>8</sup> Even though President Wilson initially opposed the inclusion of pensions, they were eventually introduced in the bill after British lobbying (Trachtenberg 1979: 45).

<sup>9</sup> Therefore, the reparations promoters imposed that Germany’s taxation should be indexed on the highest taxed population in Europe (Bourgeois 1919: 92).

<sup>10</sup> For instance, to justify the reparations provisions, the leader of the French socialist party, Léon Blum told his fellow European socialists in 1923 that the reparations were the first pan-European re-distribution policies that took seriously for the first time the existence of a collective mechanism against the risk of war. (Blum 1972:273). [1923].

Thus, we take the analysis of reparations architecture away from the political debates about the alleged German “guilt” that both promoters and critics of the Versailles treaty read in the text, and place the analysis of the treaty back in its proper context: the interwar creation of a body of international law concepts (such as collective responsibility, duty to repair, collective insurance). In many ways, the attention placed on this notion of guilt is a reconstruction that does not translate the real motivations of the authors of the reparations provisions. Most economists, diplomats and lawyers who negotiated the Reparations settlement shared the opinion that Germany did not believe that the payment of reparations should be tied to the admission of such “metaphysical guilt.” The negotiation process of the Versailles Treaty was such that the 16 articles (articles 231-247, and all the annexes), which spelled out the reparations claims, were distinguished from those that concerned the individual responsibility of the Kaiser himself. When read closely, these sixteen reparations articles suggested that the responsibility laid on the side of “Germany and her allies,” but that at the same time, Germany and her allies could not be held responsible for all the destruction of the war, but for the majority of it, and that the responsibility of the victors should also not be evaded. Indeed, if the Allies planned that Germany would “make a special issue of bearer bonds” (art. 232) to restore the properties of civilians, it also said that the final amount as well as the schedule of payments of these reparations, depended on the recommendation of the Reparations Commission (art. 233),<sup>11</sup> which shall “give to the German Government a just opportunity to be heard,” and which shall compute a fair price for the loss of property incurred by the Allied civilian populations during the conduct of the war. Quite characteristically, the word “guilt” did not appear in the article 231, which established instead the “responsibility” of Germany in the destruction of the property during the war: the lawyers and diplomats who dealt with financial questions carefully avoided to base claims of reparations on admission of “guilt” of one individual (the Kaiser), representing one people (Germany), whose (aggressive) intentions during the war they would have needed to assess.

In doing so, these diplomats departed from the opinion of the legal scholars who participated in *Commission on the Responsibilities of the Authors of War and the Enforcement of Penalties* (hereafter, Commission on Responsibilities), and who (like Ferdinand Larnaude, the very influential French expert in that Commission) came to the conclusion that Germany was fully responsible for the war (de Lapradelle 1918:20), and recommended the prosecution of the German Emperor for the violation of “international morality and the sanctity of treaties” – a demand that was included in article 227 of the Treaty. The story of the aborted attempt to trial the Kaiser finds its proper context in national politics, international alliance politics, and transnational efforts to criminalize certain warfare practices (Mallard and Holthoefer forthcoming). It was in such demands to charge the Kaiser with war crimes that the German public saw an attribution of a moral, or as Martti Koskeniemi (2001:292) argues, a “metaphysical guilt,” mostly understood in moral terms – e.g. moral obligations (to respect human life) that were assumed to be widely shared among humanity’s civilized nations. But the reparations articles were based on a different philosophy of international law, one, much more classical, which sought to derive states’ duties either from explicit contractual (or conventional) commitments, or from the reported wrongdoing of citizens’ private rights.

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<sup>11</sup> The Reparations Commission could change the deadline of payment (art. 234).

The reparations provisions of the Versailles Treaty thus did not make any claim that reparations should be paid because of a collective guilt of the German people in occasioning the war – or, in the sense of Karl Jaspers, in the sense of a passive guilt, one which expressed the fact that some Germans did not intentionally or directly provoke some harm to Allied civilians, but that they still benefitted from a system that was based on the production of such harm.

In fact, the philosophical outlook of the reparations “contract” – as we may call these 16 provisions of the Versailles Treaty – was deeply prospective rather than retrospective: by paying reparations, the Germans did not expiate for a collective crime, but made sure that Europe would not fall again in the cycle of financial disorder and chaos that would lead to a new war. For the French members of the Reparations Commission in particular, reparations would then express a renewed sense of trans-national social “solidary,” a key concept for the *solidarist* intellectuals active in the work of the Reparations Commission, like Léon Bourgeois, Charles Gide, but also Durkheim’s nephew, Marcel Mauss and his friend Léon Blum (Mallard 2011). In fact, such a philosophy of financial responsibility was not only asked from Germany by the Allies: In fact, the Versailles Treaty also asked that the new countries that included territories formerly under German control accept to repay the debts that Germany had contracted when it administered these territories (art. 255).<sup>12</sup> In the Versailles Treaty, past German financial obligations were thus transmitted to the new states which now controlled these territories whose infrastructure had benefitted from German administration and financing: they were neither unilaterally cancelled, nor placed to the debit of the new Weimar Republic.<sup>13</sup> Other treaties, like the Treaties of Saint-Germain and Trianon, which liquidated the war assets and territories of the defunct Austro-Hungarian empire, followed the same logic: they also urged the new states to endorse past debts of the Empire.

Thus, the reparations scheme was not an exceptional bilateral measure placed upon Germany’s finances, but it illustrated the broad philosophy of financial responsibility that the architects of peace asked all European nations to observe.<sup>14</sup> This reference to the successor states’ “responsibility” or Germany’s responsibility to honor past debts and new reparations debts therefore meant both a recognition of a new status (with statehood came the responsibility to honor one’s debt), and an injunction to act “responsibly.” In Alexander Sack’s systematization of the philosophical principles behind the Versailles Treaty and other contemporary treaties, debt contracts between nations could be re-structured only in extreme circumstances. In the Versailles Treaty, the implicit use of the doctrine of “odious” debt that the Sack later tried to systematize, was extremely rare: the only example that Sack (1927:159) finds is the example of Poland (a new state created out of the association of territories formerly under either German or Russian authority and control), which was relieved from a small part of the previously German debt (an amount to be fixed by the Reparations Commission) that the Germans

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<sup>12</sup> As Germany lost about 13 per cent of its territory.

<sup>13</sup> As Alexander Sack writes, to impose all war debts onto the newly created (and diminished) Austria and Hungary, would have de facto meant the cancellation of all these debts, as the two states would have defaulted (Sack, 1927:177).

<sup>14</sup> The burden of proving that debt contracts or reparations obligations were odious was quite high, much higher than present-day calls for the cancellation of the debt of Third World nations, as expressed by the Jubilee network of legal activists (Gulati and Ludington 2008).

had created to fund their occupation and colonization of Polish lands (art. 254). The experts sitting in the Reparations Commission thus saw in the peace settlement with Germany (and Austro-Hungary) the illustration of how one could apply the legal concept of collective responsibility into international law: each state was asked to act responsibly in order to maintain the collective order and to accept some redistribution to equalize the burden of war debts among nations. For Charles Gide (1932), to repudiate debts in a unilateral way – as the Bolsheviks had done – would have been typically a crime against the principle of reciprocity, or inter-dependence.

*Crafting New Instruments of Macro-Economic Governance in the Reparations  
“Laboratory”*

Now, we would like to move one step further and argue that as the reparations provisions were turned into a set of instruments of financial transfer, they were seen as one of the most – if not the most – essential mechanisms of macro-economic regulation: in fact, that they were conceived as a multilateral instrument of financial stabilization at a time of opening markets and European-wide investments in reconstruction efforts. This is why we claim that reparations provisions fully participated in the establishment of a common legal architecture governing financial flows, and that they were assumed to play that role for a long period of time – in the same way the International Monetary Fund played the role of ensuring currency stabilization from World War II to the dismantlement of the Bretton Woods system that occurred with the end of convertibility dollar-gold. Here, we thus analyze how the Reparations Commission worked to design new instruments in the same way as Bruno Latour (1987) when he analyzes how “laboratories” work to create new instruments in isolation from society, so as to later colonize their social environment with the spread of these instruments – and the re-articulation of social relations that such a spread engenders.

The legal understanding of “collective responsibility” that was taken up by the members of the Reparations Commission meant that the extent to which Germany should be asked to pay reparations would be determined by economists according to their own instruments rather than either by theologians or historians. Indeed, the compensation that Germany had to pay for the civilian destructions did neither depend on the value given to a human life by various theological doctrines, or on the history of Germany’s wrong deeds during the war, but rather, on the financial consequences that Germany’s reparation debt would have on the national budgets of Germany, France, Belgian and other Allied nations, and on the overall macro-economic equilibrium of Europe’s finances. This is why economists were brought to the center of such debates: the international experts who gathered during the first Conference, held in Brussels in December 1920 to determine the amount of the reparations, included Irving Fisher from New York, Charles Gide from Paris, Arthur Cecil Pigou from Cambridge, and their work consisted in trying “to fix a rational reparations policy based on a reasonable estimate of the credit and debit of each warring party to devalue depreciated moneys in proportion of that estimate; and in the meantime, to find enough international capital in order [for central banks] to let enough gold circulate to restore the gold-standard” (Maus 1997 [1922]:481).

In that sense, the “reparations contract” was assessed according to instruments of macro-economic governance – such as national account systems – that were used by

international experts in macro-economic stabilization, just like any other new sovereign debt contract that was under discussion at the time. Charles Gide and the other experts inferred the reparations from the overall credit and debit of each nation after the Great War,<sup>15</sup> as reparations were meant to fairly balance the price of the war among the warring parties so that European solidarity could be reconstituted on sustainable grounds. Therefore, they looked for an overall estimate of all the wartime debts contracted to domestic and international actors. As Charles Gide noted, “[a]mong the damages resulting from the war, we have the debts that each warring party has contracted (which weigh to a greater extent on the victors than on the vanquished)” (Gide and Oualid 1931:3). For example, the experts determined at the Brussels Conference “that France owes 219 billion pre-war francs in loans,” mostly borrowed on French capital, and to a small extent (about a sixth, or 38 billion), on foreign (British and American) creditors. Seeing the extent of the wound the war brought to France, it then made sense that Germany would help France shoulder its debt by paying reparations. The experts calculated that Germany would need to pay annual payments of three billion gold marks each year for 42 years. After these calculations were made, it appeared that each nation could not reevaluate the extent to which it would pay back its debts on a unilateral basis, but that the “reparations contract” would play the role of a macro-economic system of debt cancellation and redistribution, not unlike those put in place after a sovereign country defaulted on its obligation – here, it was *as if* France defaulted *ex ante* on its obligation to pay the costs of reconstruction, and if it asked Germany to help share that burden.

The Reparations Commissions thus became the official institutional conduit where the harmonization of national accounts were made in Europe as well as where negotiations of sovereign default in a globalizing world economy were conducted across the Atlantic. It was the place where new macro-economic instruments of measurement were developed to assess the health of each national economy in a context of transatlantic interdependency: the discussions focused on the consequences of Germany’s default on other European economies, but also on the role that the United States should play in the prevention of global financial crises.<sup>16</sup> Keynes, who participated in the Brussels Conference of 1920, was the first to make the linkage between European (reparation) debts and inter-Allied debts (that involved the U.S.) since the end of the war: for him, the reparations that the Allies asked Germany to pay were too high, and he had proposed that the Americans should cancel the inter-allied debts that France (and to a lesser extent the U.K., Belgium and Italy) owed them,<sup>17</sup> as the reparations to be paid by Germany to France could then be scaled back to a reasonable level (Carabelli, Anna and Mario Cedrini. 2010:317). Unfortunately, the Americans ignored Keynes’s call for debt forgiveness in 1920 and 1922, and the U.S. bankers and the U.S. government warned

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<sup>15</sup> Gide was also commissioned by the Carnegie Endowment of International Peace to participate in the collaborative study of the costs of the Great War, charged with independently assessing a “reasonable estimate of the credit and debit of each warring party” (Gide and Oualid 1931).

<sup>16</sup> The sovereign obligations contracted by new Central European states were administered under the auspices of the League of Nations.

<sup>17</sup> As Marc Trachtenberg (1979: 29) shows, like Keynes, during the Peace treaty negotiations, the French Minister of Commerce has hoped to reapportion inter-allied debts and to maintain Allied control of raw materials (coal), a position that he shared with his young advisor, Jean Monnet, who then created the European Coal and Steel Community after WW II.

various times the French representatives on the Reparations Commission that they may agree to lower the inter-allied debts in the future, but that “if French leaders were to wait for this before their own revision of reparation, they shall wait in vain” (cited in Maier 1988: 289). Indeed, the US did not want to be the first ones to devalue the worth of their loan to the French, and they insisted that the French had to adopt a stabilization plan first, “a legal change in the value of the money, . . . a euphemism” for the re-evaluation of the reparation debt, as Gide wrote (Gide and Oualid 1931:3). The economists in the Reparations Commission thus tried to find a scheme by which every country (France included, and not just Germany) should be encouraged to pay its debt, even if scaled back to a realistic level (like half or a third of its pre-war value), with real money, rather than just pay the interests of the debt with fake money artificially created by the printing press, which the German government started to manipulate in 1920 and 1921.

In the next section, however, we show how the ambiguity over the question of responsibility (and its relation to the notion of “guilt,” which existed at least in the mind of the German public) resurfaced as the instruments of financial stabilization were re-interpreted “in the wild” – e.g. outside the laboratory of the Reparations Commission – and how such ambiguity affected the German, French, and British attitudes toward sovereign default.

#### *Experimenting with New Financial Instruments in the Wild: The Sanctions Debate*

The notion that economists and financial experts could settle disputes about war reparations in what sociologists would call a “laboratory-like” (Latour 1987) setting was not of the liking of the right-wing legal commentators and politicians from both France and Germany. The right-wing politicians in both France and Germany blocked the working of the Reparations Commissions: when the time came to pay the 1921 annuity, Germany did not have enough foreign currency to pay reparations with French and Belgium francs and British pounds. As a result, Germany had to sell marks (rather than exported goods) to buy foreign moneys, and the speculation against the mark led to further depreciation (Maier 1988:244).<sup>18</sup> The French government then agreed to re-assess the amount of reparations once more, but it asked that its own creditors, the British and the American banks (especially J.P. Morgan, which floated loans to the British and the French for almost half a billion dollars in 1915 and 1916) first cancel part of the French debts.<sup>19</sup> J.P. Morgan refused: instead, he agreed to float a loan to Germany so that it could avoid a default for 1922, and proposed that, in exchange, France write off some of the amount of reparations.<sup>20</sup> But the new French government of Raymond Poincaré opposed the stabilization plan proposed by Gide as his government refused to lower the reparations that France asked Germany to pay (in exchange of a promise of reduced inter-

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<sup>18</sup> To bypass the German problem of buying foreign currencies, the French government agreed to be paid in kind (in coal), or in cession of shares of the industrial coal conglomerates upon which France’s steel industries depended. But German industrialists, aided by the British opposed the creation of large Franco-German cartels in the coal sector.

<sup>19</sup> Already in 1918, Gide had written that at some point, inter-allied debts needed to be cancelled; or that, if their total was re-negotiated, a lesser amount could be reimbursed for instance by the creation of a pan-European loan, “un grand emprunt international solidaire” (cited in Pénin 1997:185).

<sup>20</sup> Maier 1988, op. cit., p. 287.

allied war debts). As a result, the Reparations Commission found Germany in default of its coal payments in January 1923.

From becoming a site from where new macro-economic theories were debated, with the politicization of the debate about the notion of collective responsibilities and the origins of the German default on its reparations obligations, the Reparations Commission tried to move to become the authority in charge of deciding when a “credit event” (a default in modern parlance) occurred. Still, it failed to impose its authority on this issue: the Reparations commission had not been granted by the Versailles Treaty the authority to establish the penalties and sanctions against the defaulter, and to establish an order of priority among the creditors whose interests were harmed by the default. After Germany defaulted on its reparation debt, France unilaterally claimed authority to decide on sanctions, and the government of Raymond Poincaré immediately sent French troops to occupy the Ruhr in retaliation to the default. The French rightwing politicians expressed highly principled moral calls for Germany to pay whatever formidable sum the French would ask, as they insisted that German reparations were a sanction that only Germany had to pay because of its collective guilt, and that a failure to do so meant that Germany needed to be occupied again. To this extent, they gave fuel the interpretation of the reparations provision crafted by right-wing legal scholars in Germany, like Carl Schmitt (2003:268), who encouraged the German government not to pay reparations (as they refused the notion that Germans shared some metaphysical guilt associated with the Great War, from which the Allies were exempted), to default on the payment of reparations, and to refuse the necessary stabilization of the mark – and of the franc. Indeed, the French occupation of the richest Western German regions confirmed the German interpretation of reparations as indemnities, and responsibility as guilt: as Marcel Mauss (1997 [1924]:580) noticed, the militarization of the French response to German default meant that the reparations paid by Germany “went to the bailiff [the French occupying armies] rather than to the victim,” i.e. the Belgian and French families whose properties were destroyed.

The Ruhr crisis finally gave the experts of the Reparations Commission the opportunity to test “in the wild” the validity of the new instruments that they had designed in their “laboratory-like” setting, when they compared national accounts and deducted the amount of debt transfers that needed to be effectuated to ensure the stability of the European area. After the German default, followed by the French sanction in the form of the occupation of the Ruhr, the experts initially failed to impose their views. But the failure of the French sanctions policy helped the experts impose their stabilization plans on France (and Germany). After the U.S. and British bankers started buying some francs to help France redress its parity,<sup>21</sup> putting an end to the depreciation of the franc, Raymond Poincaré moved toward the acceptance of the stabilization plan drawn by a committee of experts (known as the “Dawes Plan,” written under the Chairmanship of the U.S. vice-president Charles Dawes), to review Germany’s capacity to pay reparations and France’s capacity to pay inter-allied debts. Putting an end to the Ruhr crisis, the three

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<sup>21</sup> The occupation of the Ruhr in retaliation to the German default not only drew the two countries further apart, but it also exported the financial crisis in Germany to France: indeed, after the German government finally stabilized the mark by creating a devalued new money – the Rentenmark – in November 1923, the franc suffered in January 1924, as “the Germans who were full of francs [which was used by the French occupying armies], now sell [the francs]” (Mauss 1997 [1924]:580).

main points of the Dawes plan of August 1924 were: the end of the French occupation, the immediate payment of 1 billion marks and the Allied supervision of the Reichsbank (Maier 1988, op. cit., p. 418).

Finally, the authority of economists and the usefulness of their instruments to assess the level at which reparations should be established (and the resulting level at which the franc should be priced against the gold) was recognized by the French government. As Léon Blum (1972 [1924]) wrote in April 1924, at last “the experts, disavowing the policy of Poincaré, declared themselves in favor of a moratorium” along the lines that the experts of the Reparations Commission advocated: “during the first years, limited contribution of the Germans to the Allied reparations effort by payments in kind” until the Germans could accumulate enough money to start paying back. As Mauss (1997 [1924]:680) wrote, Poincaré “was forced to change his general policy, and to adopt the principle of increased taxation [on income and profits], reaching budgetary equilibrium, paying back debts rather than inflating the printed money.” France had to accept the notion that Germany did not have to pay reparations because of a metaphysical guilt, but that reparation debts should be reassessed with an eye for their consequences on Europe’s financial equilibrium. Of course, this demonstration had repercussions on national elections, as ultimately, the solidarists’ efforts were rewarded when the “Cartel des gauches” won the election in May 1924, with Blum’s SFIO as the first party in the new parliamentary majority. But here, we emphasized the significance that the specific notion of collective responsibility espoused by the Reparations Commission had for global efforts of currency stabilization; from the adoption of the Dawes plan to the end of the 1920s, economists in the Reparations Commission continued to serve as the conduit for negotiations of sovereign debt restructuring (Schuker 1988).

Of course, the geo-political and financial context in both Europe and the United States was such that the authority of the experts and their instruments was short-lived, in the sense that the mechanisms of macro-economic governance proposed in 1924 did not survive the Great Depression and the rise to power of the National Socialist Party in 1933. By then, Germany then defaulted on both reparations and foreign debts.<sup>22</sup> This decision contrasted with most of the successor states of Eastern European, which had been “hesitant to interrupt service [of the debt] on the grounds that much of their debt had been arranged under League of Nations auspices” (Eichengreen and Portes 1987:29). The German default showed to Germany’s creditors that it rejected the whole system of macro-economic governance that had been based upon the work of the Reparations Commission and the legal philosophy behind the Reparations contract: the German state did not see itself responsible for the fate of non-German populations in the postwar era, and Hitler claimed that the new Reich had a higher responsibility (beyond that recognized by treaties) to defend and protect the interests of all Germans, wherever they might be situated (especially in new states with large population of German-speaking minorities), thus ignoring the sanctity of territorial boundaries drawn by the postwar treaties. Thus, the system of sovereign debt negotiation, which continued to be heavily politicized, as the interpretation of the reparations provisions included the Versailles Treaty had not stabilized around one common notion of “responsibility,” collapsed. When the latter

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<sup>22</sup> This leads Stephen Schuker (1988) to claim that the Weimar Republic paid almost no reparations at all, since it had largely paid the interest on its reparations debts with U.S. loans.

collapsed, it was not a coincidence if the interesting discussion of a collective responsibility in the postwar context was thrown like the baby with the water's bath.

### **Responsibility and Guilt in the 1990s Holocaust Claims for Reparations**

After WWII, debates about the legal concept of collective responsibility that justified reparations claims made by various civilian populations (especially European Jews, who were the most severely touched victims of the conflict) resurfaced. Immediately after WWII, West Germany agreed to pay reparations to the state of Israel,<sup>23</sup> to the Jewish victims in the diaspora; and to Jews of these nations of twelve Western European states -- most of the NATO countries as well as Switzerland, Austria and Sweden (Colonomos and Armstrong 2006: 406). These reparations were inspired by the consequentialist logic of responsibility not unlike that defended by the solidarists in the interwar period. Indeed, the reparations were paid to states with which the new Germany felt a community of destiny, and therefore, a responsibility to share financial burdens in times of hardship and reconstruction: The Germans' reparations policy carefully maintained the boundary between the West (the United States, Western Europe and Israel), and Eastern Europe states, which Germany refused to include into this web of inter-state contracts. If the West German taxpayers' acceptance of an extensive program of reparations could be seen as an implicit "acceptance of its collective responsibility," (Colonomos and Armstrong 2006: 412) Chancellor Adenauer consistently refused to explicitly acknowledge a "collective responsibility" – in the sense meant by Karl Jaspers of a collective even if passive "guilt" – for the Holocaust. It is plausible that Chancellor Adenauer's reluctance to acknowledge collective responsibility for the crime might have been motivated by the interwar confusion that reigned over whether collective responsibility meant retrospective shame and guilt or prospective responsibility.

In this section, we show how this paradigm was completely overhauled by the expression of new claims for restitutions in the post-Cold War context, when the fall of the Berlin Wall liberated new claims for reparations of the atrocities committed during WWII. During the Cold War a number of voices had been raised in denunciation of the limits of the reparations paid by Germany to specific communities, or by French Vichy government or neutral (but somewhat collaborating) Switzerland, but such calls went entirely unheeded, as the security dimension of East-West relations and the friend/enemy division prevented communal demands from crossing national barriers. It would have been unthinkable for American lawyers to endanger trade or good relations between the United States and Switzerland, Germany or France.<sup>24</sup> But for some victims of the Holocaust and mostly for the descendants of those who were assassinated by the Nazis, the books were not closed with the first wave of the 1950s reparations agreements. Many victims appealed for justice and called for new financial compensation schemes to be set up. Among those involved were Jews demanding that Swiss banks, European insurance

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<sup>23</sup> The 1952 Luxembourg Agreement had the effect that most capital intensive investment in the steel and energy sectors in Israel originally came from Germany and that when the program was officially terminated in 1965, Germany had become Israel's third trading partner, although diplomatic relationships were not yet established between the two countries (Colonomos and Armstrong 2006: 409).

<sup>24</sup> This chapter focuses on the Swiss case. However, other claims for reparations and restitutions were addressed at French companies such as, for example, the French railroad company. German companies that benefitted from slave and forced labor were also targeted by activists and lawyers.

companies and German industry restore their goods to them and pay them compensation.<sup>25</sup>

*The Global Call for a Tribunal of History: The Case of the Holocaust Era Assets Scandal*

Here, we show that the restitutions claims expressed after the end of the Cold War manifested a change in the social fabric of restitutions claims. From the interwar to the Cold War, reparations claims had remained largely produced in the conclaves of inter-state negotiations, in a setting protected by the closed of European chancelleries, in which economic and financial experts could argue about numbers without being subjected to the scrutiny of the public eye. In contrast, after 1989, new claims were directly voiced in the public sphere, in the form of public accusations of responsibility (in the sense of complicity) against the states and corporate actors that had supposedly benefitted from the Holocaust. The calls for restitutions expressed in the post-Cold War era were initiated by individuals and groups (in the context of class actions lawsuits) external to the state who demanded either from governmental bureaucracies or from large private companies that past injustices committed against them should be fully brought to light. Here, again, to understand how reparations claims operated, and the role they played in the establishment of larger schemes of global governance, it is important to pay attention to the transnational roots behind the proliferation of restitutions claims that originated from North America in the 1990s, in a context where access to US currencies on the New York financial scene had been increasingly important since the 1980s. Indeed, it would be a mistake to reduce this story to a purely bilateral fight between a US Jewish community represented by US diplomats, and Swiss nationals represented by the Swiss Federal government. In this story, most of the claims started directly in the public sphere, and used some of the instruments of public relations first crafted by human rights NGOs, which operated to mobilize global public opinion.

Among the transnational actors that operated in these very public transatlantic arm-wrestles, the most important one was undoubtedly the World Jewish Congress. This organization had already been involved in negotiations with Germany and, as early as 1944, pronounced itself in favour of an economic settlement made within an international system of justice. However, the World Jewish Congress was not the most active movement in the Hague negotiations that gathered representatives from Israel and the FRG in 1952 and when discussions about payments to Israel were discussed. During the Cold War, it devoted its energies to assisting Jews in the Soviet Union. The organization changed character in the 1980s when the Canadian magnate Edgar Bronfman took over its leadership and attempted to give its activities greater public visibility. Shortly after his appointment, the industrialist launched an international campaign against the nefarious figure of Kurt Waldheim. In the exposure of the UN Secretary General's Nazi past, we see three characteristics that were present in the scandal of the Swiss banks and the European companies: public harm done to the reputation of an organization by the exposure of shameful behaviour; revelation of an unknown aspect of the Second World War; and the establishment of a campaign that is global in its scope, resources and consequences. With this first success behind it, the World Jewish Congress now had

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<sup>25</sup> Other communities that were victims of the Second World War also received compensation, most notably the Slavic populations.

resolutely global ambitions, which it sought to accomplish by using the same kind of public relations instruments – e.g., unearthed archives about a shameful past, accusatory op-eds, effective lobbying of transnational organizations.

The reparations and restitutions demanded by Jewish groups revealed a clash of *ethos*, reflecting a sharp contrast between past Cold War defenders of Westphalian secret state diplomacy, and non-state actors who operated transnationally and very publicly in the context of global financial capitalism. The new leaders of the World Jewish Congress and the lawyers condemned the disdainful behaviour of many of the Swiss – and, subsequently, French – dignitaries who took the view that money was not the best way to assuage the pain of memory and that the burden of these reparations could not be imposed on them.<sup>26</sup> The pugnacity of the former clashed with the defensiveness of the latter – and their ‘art of not paying their debts’<sup>27</sup> – and the variety of resources they used to publicly prove their point: at the beginning of the scandal of the Swiss banks and the unclaimed accounts, the lawyers and the World Jewish Congress employed researchers whom were sent in the archives of banks. They wanted to prove the existence in the archives of accounts that had been opened in Switzerland by Jews who had perished in the camps. Working for the law firm of Cohen, Milstein, Hausfeld and Toll, Miriam Kleiman was one of the first to exhume from the Washington archives a list of names of account holders that was compromising for the Swiss bankers. That list had a spectacular impact in the media, even though the descendants of the persons listed were unable to obtain restitution of the monies deposited by their relatives.<sup>28</sup> Both the claimants’ lawyers and the companies accused – the banks, insurers and industrial companies – drew on the services of historians and archivists who worked as “genealogists” to get to the bottom of a potentially ignominious past (Drinan 2001).

Still, faced with the denial showed by Swiss bankers in the responsibility of the Holocaust, lawyers had difficulties convincing themselves that they could win a fight against such powerful (and foreign) institutions. Like other non-governmental organizations which resorted to the exercise of ‘naming and shaming’ in the human rights campaigns of the 1980s against abuses of dictators in Latin America (Risse and Sikkink 1999), law firms that defended those who wanted to have access to the dormant accounts in Swiss banks wanted to imprint the mark of shame on their targets.<sup>29</sup> The very first act of the World Jewish Congress and the lawyers who took this case was to attack the European companies, asserting that they had grown rich out of the war. The persons harmed by this illegal, immoral conduct had to be compensated for this “unjust enrichment.”<sup>30</sup> In the name of principles inspired by a philosophy of property and

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<sup>26</sup> At the end of WWII, both in Israel and in the diaspora, many Jewish voices were critical of those who accepted tainted ‘blood money’. The victims felt shame at the idea of making a request to their former persecutors. For instance, Menahem Begin opposed the West German reparations paid to Jews by the 1952 Luxembourg Agreement precisely for the reason that, for them, the German debt could not be paid off, and they preferred instead to quarantine Germany (Colonomos and Armstrong 2006: 397). More than forty years later, this shameful restraint was no longer so widely shared.

<sup>27</sup> This is one of the possible interpretations of Don Juan’s behaviour and aristocratic attitude when he is confronted with his creditors (Kofman 1991).

<sup>28</sup> The various Swiss establishments imposed very strict rules; death certificates were required.

<sup>29</sup> The denunciation of a particular case must always be articulated to general and universal conditions of injustice (Garfinkel 1956).

<sup>30</sup> One finds this notion in American law; it also corresponds to an Aristotelian conception of property –see Aristotle (1988: 5-7). In French, the notion of “biens mal acquis” covers some of the same ground.

restitution, the Swiss banks were obliged to make a reasonable offer. The tactic assumes a division of roles between the denouncer and the accused. The denouncer attacks the accused, employing blackmail by threat of defamation and a boycott of the companies that are said to have denied their misdeeds. He awaits the accused's offer. If it turns out to be small, the accused is suspected of dishonesty or avarice and ill-will.

This tactic, however, completely changed the rules of the game: the notion of responsibility that restitutions claimants implicitly assumed was very different from that assumed in the interwar period. When proffering these kinds of accusations, restitutions claimants did not ask former enemies to accept to share the burden of responsibility, whatever their level of guilt and association in the crime, but based on a comprehensive assessment of the capabilities of everybody. Rather, they assigned guilt and direct complicity in a crime onto a suspect, based on newly released evidence, like a prosecutor accusing a suspect of a crime, although an old one. In so doing, these transnational organizations departed from the role of neutral observers that the Reparations Commission experts had tried to play in their "laboratory-like setting," when they strictly limited their role to assessing the financial capabilities of each party to the war to pay reconstruction costs. Lawyers and activists besieged bankers, insurers, industrialists and states in the attempt to lay bare the shameful dimension of their history.

This quest to have nations and their companies confess is a singular event of enormous scope: it is one of the essential vehicles of the expansion of transitional justice and the repentance model. The accusers-lawyers wanted to induce these financial establishments to carry out an introspective self-examination, which were buttressed by institutional assessments, as for example in Switzerland where was convened the Bergier Commission in Geneva, was set up to examine Switzerland's role and its responsibility in the war. In this commission, historians accepted to frame the responsibility of the Swiss in the context of debates about collective guilt (in the Jasperian sense of "moral taint"). Indeed, as the Bergier report clearly indicated, anti-semitism was widespread in Switzerland during the war, and it played a role the way Swiss neutrality was practiced during the war.<sup>31</sup> It must be underlined that this initiative, a country that investigates its past and, as such, make some amendments to the national official narrative, is not isolated. In the context of claims for reparations, France was also forced into revisiting parts of its past (notably the behavior of its corporate agents such as for example the national railroad company, the SNCF).<sup>32</sup>

To the extent that the historical episodes to which they referred had already been the subject of legal, political and, also, economic agreements, the victims were not asking that a wrong committed in the immediate past be repaired – as in the earlier Reparations Debate –, but they were re-opening old cases that had long seemed closed because of a lack of access to archives. But after the fall of the Berlin Wall, lawyers hoped to benefit from the release of a massive number of documents archived in Moscow on the Nazi crimes. The campaign against the Swiss banks involved two aspects of their wartime activities that are often confused with one another. The World Jewish Congress set out to

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<sup>31</sup> *Final Report of the Independent Commission of Experts Switzerland – Second World War*, p. 122-24.

<sup>32</sup> A country official narrative indeed also includes an account of large corporate agents. To this extent, the role of several German industries was also scrutinized and revisited. In another setting, in the context of debates about post-sionism, a critique of national official narrative was also to be found in countries such as Israel.

look for evidence of the existence of unclaimed accounts in Switzerland's banks and claimed to have made such a discovery in late 1995 – although they were not able to make a total estimate of all the accounts that still had balances in Swiss coffers without the depositors' descendants being able to claim them. They were also trying to establish a relation of causality between the banking activities of Switzerland and the sustainability of the Third Reich during the war. The official historical narrative of Switzerland was, until the mid-1990s, that Switzerland was forced to accept the Nazis' requests because, had it failed to do so, the country would have been invaded. Such deterministic view was challenged in the Eizenstadt's US official report that activists – Jewish organizations such as the World Jewish Congress and their lawyers – referred to: after 1943, according to this report and based on evidence found in the correspondence of some Swiss leaders of the time, Swiss statesmen were aware that Germany would have not invaded their country had they failed to accept their requests, since German troops were stuck in their fighting on the Eastern front.

In this climate of suspicion, historians were even given a new role. Indeed, Eizenstadt, finally, argued that Switzerland helped prolong the war (State Department 1997). Inspired by historical work, activists and claimants were able to force an approach akin to virtual or counterfactual history (Tetlock and Belkin 1996), which identifies the alternatives that a bank, company or industry faced when they rubbed shoulders with a dictatorial power such as the Nazis, making the assumption that several possible options did exist. Indeed, historians were hired by lawyers to establish evidence of the responsibility of a particular entity, to evaluate a decision-making process in a group, company or bank, by reconstituting its various sequences. Their findings reconstructed the historical trajectory, and it led them to asking such questions as whether one modification in the sequence underlying a particular set of decisions would have led to different outcomes. The aim of this counter-factual operation is to provide an explanation of history, here by asking the question: *What would have happened if* the Swiss banks had not contributed to financing the Nazi war economy, *if* German industrialists had not worked actively alongside Hitler? If the Swiss had refrained from all trade with the Germans, the war would perhaps have been shorter; this can be said, therefore, to prove a causality that rationally establishes Swiss responsibility. This reasoning was not used in a legal setting and had no legal role as such. However, it was widely appealing socially and publicly for those who wanted states and companies to “pay” for their misdeeds.

This type of counterfactual history fed into a process of denunciation and renewed suspicion: by proving that things could have been otherwise – that the Swiss banks made a decision that commits them directly, that Switzerland adopted a very specific policy towards refugees, that German industrialists could have not used the forced labour of prisoners – these ‘new historians’ and their followers hinted at a moral offence of substantial magnitude deriving from a collective decision. Historians tried to show that the decisions of Swiss profiteers had the effect of reinforcing or extending the harm suffered by a group that suffered an injustice for which the profiteers were not directly responsible. This moral accusation had a particular voice in a context where the “guilt of nations” (Barkan, 2001), i.e. the collective guilt of state entities that, however, could also include corporate agents of those nations - became a focal point of attention in the US.<sup>33</sup>

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<sup>33</sup> The success of Daniel Goldhagen's (1996) book on Germany – followed by one on the Catholic Church – is a clear symptom of such a widespread moral attitude.

Paradoxically, in comparison with the interwar period, when the debate placed at the center the victims of the war (those populations of Northern France and Belgium whose houses were destroyed), here, the victims were less central in the debate, as the focus was placed on understanding the degree of intentionality, and the degree of complicity, demonstrated by those who benefitted from an unequal and oppressive politico-economic system. In this case, reparations and restitutions claimants started by assuming that there existed a collective responsibility in the sense of a collective guilt (French 1974; Barry 1981), and they soon overcame the obstacles raised by the fact that it is logically impossible for a collective to feel guilt, by individualizing the instances of guilt in their search for historical evidence of direct implications in a crime. Then, guilt became the verdict of a Tribunal of History (Fletcher 2002).

*From Public Campaign to Legal Action: The US Extra-Territorial Competence in the Context of Financial Globalization*

The Swiss were the first to experience the cost of a useless, expensive denial, at a time when the global integration of banking activities made Swiss banks vulnerable to foreign attacks.<sup>34</sup> In 1995, Swiss bankers felt they were able to resist the demands formulated by Edgar Bronfman. Over the next two years, they countered the Jewish demands with a massive denial, which prompted the lawyers and leaders of the World Jewish Congress to display an ever more aggressive attitude. Several American lawyers delivered an ultimatum to the bankers, threatening to restrict their activities in New York or California; this threat turned out to be decisive in concluding an agreement. In a context of globalization and interdependence between economies and financial centres, European companies were threatened as a consequence of their interests in the U.S. Both in the industrial and financial sectors, many mergers and acquisitions had taken place in the 1980s and '90s, as a result of which links between the European and American economies were strengthened. A very large number of British and American shareholders now had holdings in Swiss companies, which did not want to risk losing their clients and shareholders.

Furthermore, from 1996 to 1998 the World Jewish Congress and a number of American lawyers exerted pressure on Switzerland by bringing a series of class actions in the American courts. The World Jewish Congress also explored the possibility of laying the matter before the American Congress in order to attack Switzerland with economic sanctions: this possibility was the focus of discussions with Republican senator Al D'Amato, who initiated the embargoes on Libya and Iran in 1996, but a measure of this kind targeted against Switzerland was never adopted, and the plan was quickly abandoned. Instead, the World Jewish Congress and the lawyers opted for the application of legal pressure, the main protagonists in this being the courts and the various bodies charged with regulating commercial activity at the local level. In so doing, they took their lead from the kinds of pressure that had been exerted on the oil and textile multinationals

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<sup>34</sup> Because of Germany's role in the war, the sensitivity of opinion in that country about the Shoah, and the demonstration of force by American lawyers and the World Jewish Congress, German industrial companies accepted the principle of compensation more easily and quickly. The more astute entrepreneurs went along with the campaign, participating in the disclosure of a shameful past: a number of German business leaders adopted this line of conduct.

over human rights issues. They also seized the option offered by the Alien Tort Claims Act, an old law of 1789, which gives the possibility for any citizen of any nation to sue before a U.S. court any non-American entity for a crime committed outside the US against the “law of nations” – originally, it was meant to be used against acts of piracy.<sup>35</sup> In that sense, the accusations proffered by the World Jewish Congress and their attacks ‘*tout azimuts*’ before U.S. courts, characterized by their strongly adversarial culture, moved the notion of Swiss responsibility closer to the notion of a Swiss guilt, of either direct crime, or complicity in the crime.

The World Jewish Congress and those who filed class action lawsuits against Swiss banks used courts as a public arena in order to pressure corporate agents. Faced with the pressure of legal action, the final settlement came out of negotiations between the banks, the WJC and the American Under-secretary Eizenstat. As the banks accepted to pay 1.25 billion dollars, this sum not only covered an estimate of the amount of money in dormant accounts, but also served to compensate those persons who attempted to find refuge in Switzerland and who had been denied admission and some persons who have been forced into slave labor. Therefore, by agreeing to settle, Swiss banks implicitly accepted some responsibility in harming some of the victims of World War Two. It is the reflection of a form of collective responsibility and agency on part of these corporations.

In many ways, the paradigm that emerged from the restitutions claims campaign, which was characterized by the mobilization of courts (or the threat to go to court), the adoption of an accusatory position, the equation between responsibility and guilt (either direct or indirect), the use of counterfactual history to prove one’s point, has had far reaching consequences beyond the restitutions debate. There was a new development in this mirror-play between past and present when the NGO Jubilee 2000, which argues for the cancellation of the debt of the countries of the South,<sup>36</sup> formed an alliance with the American lawyers who brought the cases against the Swiss banks and German industry, and also with South African activists. The studies carried out as part of the Jubilee 2000 campaign picked up the thread of virtual economic history, attempting to show that the activities of the Swiss and German banks that did business with the Apartheid regime extended the life of that political system.<sup>37</sup> Actions were brought in the American courts to demand that Swiss and German banks (soon to be followed by French and American ones) give an account of the business they may have done with the South African Apartheid regime. The legal actions taken by this triumvirate coincided with the Durban Conference; taking their lead from the actions formulated around the Second World War, their frame of reference was slavery and the domination suffered by black people. Slavery, ancient and modern, and also genocide were all brought into the question.<sup>38</sup> This

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<sup>35</sup> During the last decade, several groups tried to use the same legal instruments, including some who suffered from Apartheid in South Africa, or African Americans who have begun the battle for compensation for slavery in the United States (Torpey 2006 :149).

<sup>36</sup> Particularly by calling for cancellation of the debt.

<sup>37</sup> <http://journal.probeinternational.org/2003/07/30/southern-africa-calls-reparations-apartheid/>

<sup>38</sup> The question of slavery re-surfaced both in the United States and internationally. In 2000 a class action was brought in America against the Aetna insurance company with which the bodies of slaves had been insured, as freight, when, in the nineteenth century, they were transported by rail from city to city in the north-eastern United States. The action against Aetna was the first in a series of lawsuits against many companies that had guilty links with the slave trade in their pasts. Five companies are directly concerned by these trials: Aetna, New York Life, AIG, J. P. Morgan Chase and First Boston Principal Group.

Möbius strip of references lent the accusation substantial weight. These actions echoed the campaigns against multinationals that violated human rights law, such actions being based on the exposure of transgressions of UN embargo rules. Most recently, US judicial authorities have claimed jurisdiction on cases of violations of US embargoes (not UN ones) by European banks –and particularly, Geneva-based branches, as Geneva is the main hub of the oil trade and financing – based on the fact that transactions were priced in US dollars. For instance, like Federal and New York (NY) state prosecutors imposed high penalties against France’s biggest bank BNP-Paribas, which recently fined 8.9 billion dollars in a NY criminal court case, which involved oil deals with Sudan and Iran (Ayad 2014).

More generally, the category of “profiteer” has been found in many exposés of international wrongdoing. The same paradigmatic features as found in the restitutions public relations campaign also characterize some of the main actions taken by various governments and publics in response to the financial crisis that followed the times of relative prosperity of the 1990s. Many of the actions undertaken by various governments in reaction to the financial practice – the U.S. in particular –, have aimed at finding the guilty parties and at bringing them to prosecution rather than at changing the institutional (global and domestic) architecture of inter-state sovereign debt negotiations, which could help equalize the burden of the crisis for most citizens and nations. Rather than trying to set up a new inter-state negotiating forum, as the solidarists had vainly tried to do in the interwar period, most of the actions for instance directed against the Swiss tax laws, aim at finding and punishing the individuals and corporations that have practiced tax evasion (in the case of the companies located in Switzerland), or those corporations or individuals who practiced insider trading (in the case of hedge funds like SAC Capital and its founder Steve Cohen); or those banks and individuals in specific banks (like Fabrice Tourré of Goldman Sachs) which traded against the interests of their clients, by encouraging them to buy toxic products which they put back on the market ; of those mortgage companies (like Wells Fargo) accused of predatory lending practices, which are the objects of class actions against them. Here again, responsibility in the financial crisis meant the admission of guilt in practices that have lead to escalate or aggravate the effects of the crisis, and from which the accused have benefitted. Thus, again, the notion of “unjust enrichment” is central in this paradigm, which states have adopted to respond to the unjust increase of inequalities. The relative ease with which the G20 summit of September 2013 has adopted measures which criminalize tax evasion<sup>39</sup> by which they will force Swiss banks to open their accounts to the investigative campaigns of starved-cash states only prolongs the successes achieved by lawyers who pursued the Holocaust Era Assets in the prior period of relative prosperity.

There are, however, some problems associated with the fixation on the guilt of profiteers manifest in the paradigm of restitutions. The exclusive focus on “unjust enrichment” can be deplored as it goes hand in hand with the absence of any reflection that does not associate responsibility with guilt, *duty to repair* with the punishment of individuals with evil (collective or individual) intentions. The risk is that restitutions demands (or financial compensations to assuage the burden of the victims of a financial crisis) would always have to demonstrate the existence of a minimal intention to harm, without which no compensation could be obtained. As the latter is always hard to prove,

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<sup>39</sup> <http://www.g20.org/news/20130828/782201775.html>

especially fifty years after the fact in the case of the holocaust era assets, the hegemony of this paradigm of collective responsibility risks to condemn victims to an elusive quest for a just order. In other cases, the profiteer can always claim that he has derived advantage from a situation for which he is not directly responsible, even if he admits that he was not unaware that there was great injustice in the situation. Unlike the accomplice, the profiteer can claim that he was not a perpetrator of the great crime; he did not participate in it; his is a case of vicarious responsibility, which makes calls for justice harder to receive. And in the meantime, the focus has moved from that of understanding the wrongs done to the victims, or by the flawed architecture of a system of economic exchange, to the degree of intentionality demonstrated by some profiteers in an unjust system.

## Conclusion

Over a hundred years of reparations claims, we see a radical move this article has tried to account for. In a context of growing financial integration, the claimants' direct access to US courts claiming extra-territorial jurisdiction – a process of joint judicialization and re-nationalization of international negotiations – has had major effects on the political and legal understandings of the *duty to repair*. Indeed, the evolving practice of reparations cases has facilitated a move from a negotiated settlement within the limits of an inter-statist “laboratory-like” forum – in which experts design new computational instruments to justify the amount of financial transfers – to new forms of non-state and transnational public relations campaigns, in which the reliance on US courts serves to threaten non-cooperative parties. The adoption of new instruments coming from the field of human rights in the form of public campaigns aimed at “labeling and shaming” –with its extensive use of investigative (both archive-based and counter-factual) history – and the heavy reliance on threats to go to courts has been at the heart of the process of moralization of international affairs (Colonomos, 2008). Whereas the socio-legal scholarship often offers a positive view of such a process of judicialization (Moravcsik 2000; Chorev 2009), as the process of going beyond inter-state mechanisms of cooperation and giving direct access to courts to individuals is often seen as a positive step toward the acquisition and protection of new rights, we come up with a more balanced perspective on this process by which claimants have upheld states and companies to recognize a *duty to repair*. The choice of instruments used in such a process of “moralization” (accusatory defamation campaigns, threats to use criminal courts to extort financial profits, etc.) have also reduced the scope of cases in which a duty to repair could be exercised. Indeed, the “moralization” of public campaign means that guilt became prevalent over mere responsibility, and that far from bringing closure, the last debates have generated spirals of suspicions. True, these aggressive campaigns have also relied on the unveiling of historical evidence and therefore have contributed to historical knowledge, however, they have also spurred a “competition between victims” (Chaumont, 1997), which is very characteristic of the 1990s and that has prolonged itself beyond in Western democracies.

Our focus on the level of instruments associated with the *duty to repair* also highlights the growing significance of the United States in the governance of financial flows and legal adjudication. From the interwar period, when the US largely refused its

responsibilities in the governance of capitalism, which suffered as a result, the post-Cold War has seen the joint erosion of the norm of sovereign equality and the rising hegemony of the US legal system. This is particularly striking in the Holocaust Era Assets episode, during which Switzerland has been constrained in its banking policy and has had to elaborate a new official history of its involvement in World War Two. But this decline of small states' sovereign autonomy should not be read as the consequence of the rising power of US diplomacy abroad. In fact, US diplomats were caught off guard by the World Jewish Congress action against the Swiss banks, and in the aftermath of the crisis with Switzerland, further claims against German companies that used forced and slave labor during WWII started jeopardizing US foreign policy objectives in Europe. The joint processes of Americanization and judicialization of reparations dispute settlements was therefore not only turned against foreign diplomats but also against the classical agents of US hegemony: the State Department. Thus, reparations are one of the most paradigmatic cases of the broader shift from a Cold War vision of international politics where states are the sole players of international politics reduced to the rationalist game of the pursuit of national interest to a more complex vision of global politics where norms, instruments and concepts are constraining both state and non-state actors. Judicialization is a market based process whose epicenter is American society and that is spurred by communitarian politics in an era of accrued fluidity of ideas, identity and investments at the global level.

Twenty years later, the lesson seems to have been learnt by the US Federal government, whose foreign policy is increasingly performed, not by the State Department, but by the Treasury Department and the judiciary authorities in charge of exerting pressures on foreign banks so that they comply with a host of new global governance rules and policies put in place by the US Treasury. As said, the recent case against BNP-Paribas, which led to a record settlement, may be exemplary of the new instruments by which the US seeks to regulate global capitalism. In many ways, this chapter has thus described at the level of the instruments what other contributors to this volume (Dezalay and Garth 2002) have called the “dollarization” of the world economy.

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