THE REFUGEE CLASS

I. INTRODUCTION

Under the Settlement Agreement, the Refugee Class is defined as

> Victims or Targets of Nazi Persecution who sought entry into Switzerland in whole or in part to avoid Nazi persecution and who actually or allegedly either were denied entry into Switzerland or, after gaining entry, were deported, detained, abused, or otherwise mistreated, and the individuals' heirs, executors, administrators, and assigns, and who have or at any time have asserted, assert, or may in the future seek to assert Claims against any Releasee for relief of any kind whatsoever relating to or arising in any way from such actual or alleged denial of entry, deportation, detention, abuse, or other mistreatment. (Settlement Agreement ¶ 8.2(e)).

In the months following the execution of the Settlement Agreement, there have been a number of developments which shed new light upon the status of refugees in Switzerland and upon the current ability to locate and compensate members of the Refugee Class. These developments are (a) the release of the "Bergier Refugee Report," a study sponsored by the Swiss government of that nation's World War II-era policies toward refugees (*see below*); (b) awards in Swiss courts to at least three refugees who were expelled from Switzerland; and (c) extensive communications between the Special Master and the Swiss Federal Archives, which have resulted in the release of lists of thousands of refugees for the Court's use as part of the claims administration process.

Each of these developments, bearing directly on the Special Master's recommendations for the Refugee Class, is described below.

II. REFUGEES IN SWITZERLAND

A. Background

It has been said of Switzerland, "[t]raditionally considered a country of haven to the persecuted,"[1] that "[n]o European country had a longer tradition of receiving persecuted refugees."[2] Its "tradition of receiving outcasts continued through the nineteenth century, when Zurich, Geneva, Basel, and other Swiss cities usually harbored hundreds of colorful exiles from abroad …. Over 15 percent of Swiss inhabitants were aliens in 1914, and although this dropped to 8.7 percent in 1930, Switzerland had the highest proportion of outsiders of all European countries except Luxembourg at that time. Foreigners in major cities, such as Geneva or Basel, numbered as high as 40 percent of their populations."[3]

Despite concerns about the impact of the foreigners upon the nation's economy and culture, Switzerland remained generally hospitable to refugees even during the first years following Hitler's rise to power. The nation "admitted large numbers of refugees from Germany in 1933, allowing them to reside temporarily in Switzerland pending reimmigration elsewhere. For about five years, this remained the essence of Swiss policy: the Confederation was seen as a place of transit through which refugees might pass on their way to more permanent sanctuaries."[4]

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[1] Shaul Ferrero, *Switzerland and the Refugees Fleeing Nazism: Documents on the German Jews Turned Back at the Basel Border in 1938-1939*, Yad Vashem Studies XXVII (1999) (hereinafter, "Ferrero"), at 203.

[2] Michael R. Marrus, The Unwanted: European Refugees in the Twentieth Century (New York: Oxford University Press 1985) (hereinafter, "Marrus"), at 154.

[3] *Id.* at 155.

[4] *Id.*

However, as the situation in Germany worsened, "Switzerland was confronted by an unprecedented and particularly grave problem which seriously called this humanitarian tradition into question."[5] The nation's reaction to that problem has been the subject of considerable scrutiny, culminating in a scholarly inquiry, the Bergier Refugee Report, undertaken at the behest of the Swiss Confederation itself.

B. The Bergier Refugee Report

On December 13, 1996, the Swiss parliament passed a decree establishing an Independent Commission of Experts, which, on December 19, 1996, received a mandate from the Swiss Federal Council to "examine the period prior to, during, and immediately after the Second World War."[6] The Independent Commission of Experts, known as the Bergier Commission, after its Chairman, Professor Jean-Francois Bergier, was composed of ten members of diverse nationality, all of them historians, including the recognized Holocaust scholars Sybil Milton and Saul Friedlander. Other members of the Commission included Wladyslaw Bartoszewski, Harold James, Joseph Voyame, Georg Kreis, Jacques Picard, Jakob Tanner and Linus von Castelmur.

In May, 1998, the Bergier Commission presented its first report, a preliminary assessment of "Switzerland and Gold Transactions in the Second World War."[7] On

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[5] Ferrero, at 203.

[6] *See* Independent Commission of Experts Switzerland – Second World War, Switzerland and Refugees in the Nazi Era (Bern 1999) (hereinafter, the "Bergier Refugee Report"), at 9.

[7] *See* Independent Commission of Experts Switzerland – Second World War, Switzerland and Gold Transactions in the Second World War, Interim Report (Bern 1998).

December 10, 1999, three years after its creation, the Bergier Commission presented a second report, addressing Switzerland's refugee policy before and during the war years. The 343-page report discusses the following topics, among others: "current knowledge about Swiss refugee policies"; "the flight, expulsion, and acceptance of refugees, as well as the living conditions of those admitted into Switzerland"; "financial and property law aspects" of refugee policy; and "the humanitarian policies of the Swiss government."[8]

The Report deals primarily with Jewish refugees. The Bergier Commission has announced that it "will take up the topic of Switzerland's policy towards Gypsies (Roma and Sinti) persecuted by the Nazi regime at a later point in time."[9]

Given the Commission's recent scholarly assessment of Swiss refugee policy, it is appropriate to incorporate as part of the Special Master's Proposal for the Refugee Class the analysis and conclusions of the Bergier Commission. The Commission's salient conclusions, and related findings by others who have studied Swiss refugee policy, are summarized below.

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[8] Bergier Refugee Report, at 9. The Bergier Commission notes that the "complex nature of the material did not permit a systematic comparison of Swiss refugee policies with the policies of other countries," *id.*

[9] *Id.* at 10, n.5.

1. Overview of Bergier Commission Conclusions

The Bergier Refugee Report, commissioned and funded by Switzerland itself, condemns that nation's policy toward refugees during the Nazi era,[10] while at the same time pointing out that Switzerland was far from alone in its reluctance to open its doors to refugees.[11]

The Bergier Commission is particularly critical of two crucial determinations reached by Switzerland in 1938 (a year marked by the Austrian *Anschluss* in March and the *Kristallnacht* pogrom in November) and 1942 (the year following the German invasion of the Soviet Union, the *Einsatzgruppen* round-ups and shootings, and the first wave of mass deportations to the death camps). The two key Swiss decisions were, respectively, its successful pressuring of Germany to mark the passports of Jewish persons with a "J" stamp (1938); and the sealing of the Swiss borders (August 1942).[12]

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[10] *See e.g.*, Michael Shields, *Historians' report blasts Swiss WW2 refugee policy*, Reuters, Dec. 10, 1999; Elif Kaban, *FOCUS – Swiss renew apology for WWII refugee policy*, Reuters, Dec. 10, 1999.

[11] *See e.g.*, Bergier Refugee Report, at 40 (describing the failed Evian Conference of July 1938, which had been called to create a "permanent agency that would be responsible for facilitating the emigration of refugees from Austria and Germany," an "initiative" which "inspired high hopes in Jewish circles" but which, "did not, unfortunately, lead to anything much, as most of the thirty-two governments represented were more interested in getting rid of their refugees than in coming to an agreement about their respective capacity for accepting more"); *Id.* at 76 ("… in Czechoslovakia, Poland, and Hungary, the authorities restricted the admission of refugees. In Italy, as in Sweden, Belgium, and France, the number of obstacles was growing. In July 1938, the Evian Conference's failure demonstrates these countries' intense reluctance to do anything for the victims of the Nazis, whose discriminatory measures were multiplying"). Seymour J. Rubin, Deputy Chief of the American delegation that negotiated the Washington Accord of 1946, likewise has observed "that Switzerland did admit many more refugees, in proportion to its population, than any other nation. This is in contrast to a United States that not only denied entry to the desperate St. Louis refugees, but systematically failed to fill even the limited immigration quota that was available." Seymour J. Rubin, *Neutrality, Morality, and the Holocaust: The Washington Accord Fifty Years Later*, 14 Amer. Univ. Int'l. Law Rev. 61, 78 (1998).

[12] *See infra*.

The Bergier Commission has assessed these two events as follows:

> What would have happened if Switzerland had not pushed for marking the passports of German Jews with the "J"-stamp in the summer of 1938? What would it have meant if Switzerland had not closed its borders for "racially" persecuted refugees in August 1942?
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> The introduction of the "J"-stamp in 1938 made it more difficult for Jews living in the Third Reich to emigrate. Without Swiss pressure, the passports would not have been stamped until later, perhaps not at all. This would have made it less difficult for refugees to find a country willing to accept them. For many, Switzerland would not have been the goal of their flight. Without the "J"-stamp, however, many victims of National Socialism would have been able to escape persecution through Switzerland or another country.
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> In 1942, the situation was completely different. Jews had been forbidden to leave the Nazi areas of occupation since 1941 and many thousands of Jewish men, women, and children were being systematically killed daily. For persecuted people, the journey to the Swiss border was already fraught with great danger. When they reached the Swiss border, Switzerland was their last hope. By creating additional barriers for them to overcome, Swiss officials helped the Nazi regime achieve its goals, whether intentionally or not.
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> There is no indication that opening the border might have provoked an invasion by the Axis, or caused insurmountable economic difficulties. Nevertheless, Switzerland declined to help people in mortal danger. A more humane policy might have saved thousands of refugees from being killed by the Nazis and their accomplices.[13]

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[13] Bergier Refugee Report, at 270-71. *See also* Marrus, at 157 ("As a result of this Swiss agreement with Germany and the stamping of Jewish passports, other countries now had the technical means to discriminate against Jews seeking to leave the Reich – even when the Jews attempted to hide their status as refugees").

Following the release of the Bergier Refugee Report, then-Swiss president Ruth Dreifuss "reiterated the government's apologies to victims, acknowledging that Switzerland's asylum policy at the time was 'marred by errors, omissions and compromises.'"[14]

2. Sources of Bergier Refugee Report

The Bergier Commission examined a variety of primary and secondary sources, but was hindered by the absence of other crucial sources either lost or destroyed since the War.

a. Primary Sources

The Commission analyzed "files relevant to refugee policies" opened in recent years by the Swiss Federal Archives, "including the personal files of all refugees granted asylum . . . . Even though the sources in the Federal Archives generally reflect the views of the government, records of the Swiss Central Office for Refugee Relief (SZF) and the Swiss Jewish Association for Refugee Relief (VSJF), deposited in the Archives for Contemporary History of the Federal Institute of Technology (ETH) Zurich present a somewhat differentiated picture. Other primary sources include the archives of other relief organizations, oral history, written statements, and personal papers."[15]

However, the Commission also stressed that "[s]ome files … no longer exist, in particular those containing information about the expulsion of refugees."[16] Further, "[a]mong

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[14] *Switzerland and the Holocaust Assets*, Timeline, 10.12.99, *available at* www.giussani.com/holocaust-assets/updates/timeline.html (visited Mar. 23, 2000).

[15] Bergier Refugee Report, at 17-18.

[16] *Id.* at 18.

the most important records lost or partially lost are the register of refugees expelled by the Federal Police Division, the records of the territorial commands (except for Territorial divisions 1 and 4, the State Archives of the cantons Geneva and Tessin), and the records of the Federal Central Office for Refugee Homes and Camps."[17]

Other significant files have been destroyed, including those of the "Swiss Federal Police for Foreigners," from which data regarding visa applications could have been derived.[18] As to visas, then, "[t]he general practice can only be reconstructed fragmentarily using the few remaining files from Swiss legations and consulates. The relevant files are missing from the foreign missions in Germany. The only still existing files are for the Swiss Legation in Paris and in Vichy."[19]

Similarly, "there are no official reports that document the fate of [expelled] refugees after Switzerland turned them away. For Swiss officials, a 'case' existed only up to the border; what happened after that was outside their field of vision."[20] Thus, the Commission relied upon documents such as letters "found in files pertaining to other matters," or which

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[17] *Id.* at 18, n.40; *see also id.* at 129, n.171 ("Police files on expulsions no longer exist, nor do source materials relevant to refugee policy of many territorial commands and of the police section of the Security and Special Services Division of the military"). With respect to treatment of refugees permitted to remain in Switzerland, "[i]n contrast to the camp system, research about private housing of refugees has been absent because of decentralized sources." *Id.* at 163, n.391. As of December, 1999, the date of publication of its report, the Bergier Commission had been informed that the "Federal Archives are creating a database that is supposed to contain all available information on refugees known to have been expelled." *Id.* at 129, n.172. The Special Master's communications with the Swiss Federal Archives concerning refugee databases are described below.

[18] *Id.* at 108, n.45.

[19] *Id; see also id.* at 263.

[20] *Id.* at 128.

happened to have been sent to attorneys, relief organizations, or the press; however, such "often hastily scribbled reports by refugees" exist "only by chance."[21]

Lastly, the "number of people who did not try to enter Switzerland either following the rejection of their application for a visa by a Swiss consular office, or in the wake of information about restrictive Swiss policy, is uncertain. Thus, the exact number of people Switzerland could have saved from deportation and murder remains unknown."[22]

b. Secondary Sources

The Bergier Commission relied upon the following additional sources:

- "Documents on German Foreign Policy," a 1953 publication which "revealed that in 1938 Switzerland had participated in stamping the passports of German Jews with a "J";[23]

- *Flüchtlingspolitik*, a report commissioned by the Swiss Federal Council in 1954 and published by legal expert Carl Ludwig in 1957, which "is still regarded today as indispensable for understanding Swiss refugee policies"; comprehensively examined the prevailing legal parameters and named Federal Councillor [Edouard] von Steiger and Heinrich Rothmund, head of the Police Division in the EJPD [Swiss Department of Justice and Police] as primarily responsible"; and which offered as "explanations" for the "restrictive refugee policies" the "'inundation by foreigners' … and the 'strained job market'";[24]

- *Das Boot ist voll…Die Schweiz und die Flüchtlinge 1933-1945* (The Boat is Full), (Zurich: Stuttgart, Fretz & Wasmuth 1967) a book authored by journalist Alfred A. Hasler which "presented to a broad audience the horrifying consequences of expelling and turning back refugees";[25] and

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[21] *Id.; see also id.* at 128, n.165.

[22] *Id.* at 263.

[23] *Id.* at 16.

[24] *Id.*

[25] *Id.*

- Various "well-researched studies" conducted under the auspices of Swiss universities, including analyses of the operation and division of responsibilities among various governmental departments, Swiss policies toward Jews, refugee internment camps, and "Swiss knowledge about Nazi mass murder policies from 1941 to 1943."[26]

3. Statistical Conclusions

Based upon the available primary and secondary sources, the Bergier Commission reached the following conclusions regarding the relevant statistical data:

- "The limitations of statistics must be considered. There are hardly any reliable figures available for the years 1933 to 1939";[27]

- "[O]nly those refugees granted asylum were registered individually, enabling us today to compile various figures; however, very little is known about the refugees denied asylum";[28]

- "There is proof that about 24,500 refugees were turned away at the border between January 1940 and May 1945. The actual figure is probably somewhat higher, but a more exact calculation is not possible because of a lack of sources";[29]

- "The exact number of refugees denied asylum at the Swiss border after 1933 can never be reconstructed . . . . Important sources were destroyed in the postwar period. Many expulsions before the fall of 1942 were not even registered. The most verifiable exact figure is that a total of 24,398 refugees can be proven to have been expelled during the war years. Between the spring of 1938 and November 1944, the Police for Foreigners also rejected 14,500 of a total of 24,100 entry applications by refugees";[30]

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[26] *Id.* at 17.

[27] *Id.* at 20.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 129. Guido Koller of the Swiss Federal Archives, with whom the Special Master has had numerous communications and who has provided considerable assistance in analyzing and assembling relevant data, explains these statistics in further detail in his work, *Life and Death Decisions: The Administrative Practice of Swiss Refugee Policy during the Second World War*

(*footnote continued on next page*)

("*Entscheidungen über Leben und Tod: Die behördliche Praxis in der schweizerischen Flüchtlingspolitik während des Zweiten Weltkrieges*"), in Die Schweiz und die Flüchtlinge, 1933-1945 (Haupt 1996) (hereinafter, "Koller") (translation obtained by Special Master). Koller explains that the previously accepted assessment, propounded in the 1950s by Carl Ludwig, was that approximately 10,000 refugees were "rejected," a number that "was adopted in most publications on the refugee policy until today," although "[m]ost authors also agree with Ludwig on the point that a much higher number of persecuted, due to the defensiveness of the Swiss, did not even attempt to flee to Switzerland." Koller, at 91. However, Koller's more recent analysis of the existing archival materials led both Koller and ultimately the Bergier Commission – which relied upon his work, among others (*see e.g.*, Bergier Refugee Report, Chapter 1 and *passim*) – to conclude that "the number of rejections Carl Ludwig cited must … be revised." Koller, at 92. As Koller explains, Ludwig's analysis of rejections had been

> …[B]ased on a statistic that was compiled by the police department (PA) in the end of 1945, which was based upon the *Card Index according to Date of Entry* [internal citation omitted]. This card index recorded only those rejected refugees who on the basis of border guard reports and the rejection lists of the territorial commands (TK) *were known by name*. In the case of rejections immediately on the spot of the border crossing, the border authorities often only passed on anonymous reports. These were statistically recorded by the police department (PA). In their inventories of files, they can still in part be found. It is therefore possible to correct the rejections which are recorded in the card catalogue on the basis of the anonymous information of the border authorities. In such a manner, one obtains a more exact quotation of the *actual registered* rejections during the war.

Koller, at 92 (emphasis in original). Accordingly, Koller concludes that approximately 24,000 refugees – not always registered by name – were expelled from Switzerland or turned away at the border.

As for the Bergier Refugee Report's conclusion that approximately "14,500 of a total of 24,100 entry applications" were rejected (Bergier Refugee Report, at 129), Koller explains that the "entry applications" were the result of Switzerland's "introduction of [a] general visa requirement on September 5, 1939," so that "those seeking protection would have been referred to the way to petition for entry" (Koller, at 97); however, the specific "identities of the rejected male and female applicants can only be documented in a very few cases, as the majority of corresponding personal dossiers of the Foreign Police were destroyed." *Id.* at n.234.

Koller criticizes the destruction of refugee files. "Contemporary witnesses cite registrar specific, and especially the lack of space as motives. Yet the police department (PA) knew that historically relevant files were to be saved, and, in general, the destruction of files was not to be undertaken without first consulting the federal archivist. However, during the time period in question, the federal archive was often never consulted. In addition, the capacities of the federal archives were not sufficient to personally inspect inventories. It can not be excluded from the outset that the motive for destruction of the files was to obliterate incriminating evidence. In the connection to the debate about the Ludwig Report, it is hardly imaginable that the significance of the rejection files was not recognized." *Id.* at 100.

- With the closing of the Swiss borders in the summer of 1942 (*see above* and *infra*), "the number of expulsions rose steeply beginning in August 1942 and remained high until the fall of 1943; more than 5,000 rejections of asylum-seeking refugees are documented in writing during this period alone, out of more than 24,000 documented rejections for the entire wartime period";[31]

- For those granted asylum, "[o]f the 51,100 refugees accepted during the war, 14,000 came from Italy; 10,400 from France; 8,000 from Poland; 3,250 from the Soviet Union; and 2,600 from Germany . . . . Among them were 19,495 Jews and 1,809 individuals who were persecuted because of their Jewish ancestry";[32]

- "From September 1 to December 31, 1942, 7,372 refugees were admitted; the statistics on rejection (incomplete) indicate at least 1,628 rejections for the same time period. In the period covering January 1 through August 31, 1943, 4,833 refugees were accepted while 3,331 were (according to official documentation) rejected";[33] and

- "In November 1944 nearly 12,000 refugees were housed in reception and quarantine camps."[34]

4. General Refugee Policy Motivations

The Bergier Commission concluded that during the World War II period, one key factor motivating refugee policy was the nation's long-held view that Switzerland was a sanctuary for persecuted people. "Conjured up in an almost ritualistic fashion, it remained a moral reference point that permeated the behavior of the Swiss, thereby complicating the task of the authorities" who sought to enforce restrictive refugee provisions:

> The asylum tradition of our country is so firmly anchored that not only the Swiss citizen, but every office that must deal with an individual refugee case, is inclined to accept

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[31] Bergier Refugee Report, at 263.

[32] *Id.* at 24 and 263; *see also id.* at 24 - Table 2: "Nationality and religion of civilian refugees."

[33] *Id.* at 146, n.273.

[34] *Id.* at 156, n.337.

> the person despite reservations and can only decide on ejection if particular reasons are present.[35]

At the same time, however, the Swiss were confronted by a worldwide economic collapse "provoking massive unemployment," which "furnished additional arguments to those who wanted to prevent the arrival of refugees into Switzerland."[36] This "paralysis" by the "sense of the country's weakness" affected the Swiss leadership, which "saw foreigners as posing the gravest threat to the entire society. Federal Councillor Edouard von Steiger, head of the country's Ministry of Justice and Police, popularized an image of the Swiss Confederation that was widely accepted – 'a lifeboat in a great sea disaster, with only very limited space and even more limited provisions.'"[37]

The Bergier Refugee Report also attributes the restrictive Swiss policies at least in part to "a form of anti-Semitism, as well as to hostility towards Gypsies."[38] Chief of Police Heinrich Rothmund wrote in November, 1938:

> Under no circumstances can we allow emigrants to enter the Swiss job market in any way. Our unemployed, among whom can be found numerous Swiss who have returned from living abroad,

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35 *Id.* at 45., n.48, quoting Report of Nov. 23, 1941 from Rothmund to von Steiger.

36 *Id.* at 48.

37 Marrus, at 252, 253.

38 Bergier Refugee Report, at 45-6. One scholar likewise has concluded that "Switzerland, like other industrialized countries at the time, was suffering from high unemployment and already had a considerable foreign population. It immediately adopted a series of measures in order to stem the flow of unfortunate people heading for its borders. In no time at all, perceived national interests, nourished by xenophobic and antisemitic prejudices, would prevail over the humanitarian mission that Switzerland had taken upon itself, as one of the moral justifications for its neutrality." Ferrero, at 203.

> would resist this and they would be right in doing so. The result would be an anti-Semitism that is unworthy of our country.[39]

In a speech before parliament, Rothmund responded to criticism of his already restrictive policies with an explicit denunciation of the "Eastern Jews":

> As you will see, we are not such horrible monsters after all! But that we do not let anyone walk all over us, and especially not Eastern Jews, who, as is well known, try and try again to do just that, because they think a straight line is crooked, here our position is probably in complete agreement with our Swiss people.[40]

There was a "split in attitude towards Jews," according to the Bergier Commission, which "translated into an intransigence towards requests from refugees while, at the same time, attempting to involve certain refugee aid organizations in legitimizing the measures adopted."[41] The Bergier Commission also concluded that there was a further split in attitude "depending on whether persons or property were involved," so that, ironically, the

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[39] Bergier Refugee Report, at 48 (quoting Nov. 18, 1938 letter from Rothmund to Erwin Schachtler de Wegelin & Co.).

[40] *Id.* at 47, quoting Jan. 15, 1938 letter from Rothmund to States Councillor Ernst Lopfe-Benz; *see also id.* at 54 (citing letter of Swiss Army Supreme Commander Guisan, who contended in a report to the Federal Council that "the emigrants" represent "[a]nother category of internal enemies" and that it "can be seen in Dutch and English reports that a great many Jewish emigrants who were granted asylum are developing into a not-insignificant source of danger"); *Id.* at 132-33 (describing similar prejudice against "Gypsies," citing 1936 remark of a "high-ranking customs official" that "'beggars, vagabonds, Gypsies, etc.' are 'to be expelled immediately at the border'").

[41] *Id.* at 47; *see also id.* at 50 ("[I]n business circles, reactions towards refugees were split between sorrow and fear. Among industrialists the fear of competition took precedence over other considerations, but exceptions were advocated in particular cases; it was not rare for the authorities to be confronted with individual requests that were supported by the highest ranking Swiss economic leaders").

"influx of European capital took place with practically no obstacles, whereas the border was often hermetically sealed against persons in search of asylum."[42]

5. The "J"-Stamp

According to the Bergier Commission, the decision to stamp Jewish passports with the letter "J" evolved as follows:

- "During 1938, the Swiss authorities were quickly and regularly informed of new discriminatory measures" against Jews in Germany;[43]

- "Starting in the first weeks of 1938, we find in Swiss [emigration] documents the routine use of the terms 'Aryan' (*Arier*) and 'non-Aryan' (*Nichtarier*). Faced with the implementation of the Nazi program, the Swiss authorities were attempting to adjust their reactions according to criteria of expediency";[44]

- During the summer of 1938, following the annexation of Austria, the "number of illegal entries into Switzerland quickly climbed," and on August 19, 1938, "the Federal Council passed a decree containing severe orders: the reinforcement of border controls, the closing of the border to all Austrian passport holders who did not have a Swiss entry visa, and the turning back of all who had tried to enter illicitly. A circular on September 7, 1938 clarified these instructions: refugees without visas were to be turned back, especially those 'who are Jewish or probably Jewish' and their passports were to be marked 'turned back'";[45]

- Switzerland considered it important to find "a durable solution to drastically reduce and strictly control the influx of Jewish refugees from the Reich,"[46] ultimately resulting in an August 22, 1938 communication from the Swiss Legation in Bern to the German Foreign Office proposing that there be some delineation on German passports as to whether the person was an "'Aryan' …

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[42] *Id.* at 53.

[43] *Id.* at 74.

[44] *Id.* at 75.

[45] *Id.* at 76.

[46] *Id.*

> whose return to Germany is prohibited, as well as for 'non-Aryans.'"[47] Thus, on September 29, 1938, although "without enthusiasm" because of the anticipated detrimental impact upon Swiss Jews in Germany, "Rothmund negotiated the German-Swiss Protocol" which established that "[o]nly those Jews whose passports met" two criteria – that they bore the "J"-stamp as well as an authorization to enter Switzerland – "would be allowed to cross the Swiss border."[48]

On the issue of the "J"-stamp, the Bergier Commission concluded that

> If the documents do not allow us to be absolutely certain about who – Germans or Swiss – proposed a distinctive "J"-stamp marking for Jews in German passports, they do clearly show that the initiative and energy that ended up leading to the discriminatory marking came from the Swiss side. It was Switzerland that was looking for a way of identifying and controlling a specific population: German and Austrian Jews, whose persecution marked them out for emigration and whom Nazi policies pushed to leave the *Reich*.[49]

6. <u>The 1942 Closing of the Swiss Border</u>

In the years following the introduction of the "J"-stamp, information regarding Nazi atrocities "circulated quite rapidly and made it to Switzerland through several channels."[50] Among the communications received by Swiss representatives were (1) "damning reports on the

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[47] *Id.* at 78.

[48] *Id.* at 81.

[49] *Id.* at 82. As to who must bear responsibility for this decision, "[i]t is too easy to denounce only Rothmund"; instead, "[i]t is more equitable to speak of a general climate in which the different participants in the negotiations were steeped." *Id.* at 83 (citation omitted). During the 1930s, in addition to Jews, others also were considered "'undesirable'" – "including Roma and Sinti and refugees who were not recognized anywhere" (*i.e.*, "stateless" persons) – and who often "were sent back and forth across the same border from one country to another, two or three times within 24 hours." *Id.* at 135.

[50] *Id.* at 85.

deportations" and, by late 1941, "quite precise indications on the systematic killings" submitted by Swiss diplomats, particularly in Cologne, Rome and Bucharest; (2) reports by Swiss servicemen who had questioned refugees; (3) communications within the Swiss business and humanitarian communities; (4) oral and written reports by those engaged in refugee assistance; and (5) media reports.[51]

Until mid-1942, refugees sometimes were able to circumvent the restrictive Swiss emigration policies, often with the tacit or direct assistance of the cantons. Although the Federal Council had issued an October 17, 1939 decree requiring expulsion of refugees who illegally entered Switzerland, "these measures were rarely applied by the cantons;" to the contrary, "for humanitarian reasons and for reasons of foreign or domestic policy, those who had entered the country illegally were most often interned in Switzerland."[52] However, during the summer of 1942, and notwithstanding the reports of Nazi crimes that were making their way back to Switzerland, on August 13, 1942, Rothmund's Police Division issued its most restrictive directive to date: "'Those who only took flight because of their race, Jews, for example, should not be considered political refugees.' They were therefore to be turned back but be given one chance: the first time, they would not be placed into the hands of military or police officers

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[51] *Id.* at 85-87. *See also* Marrus, at 256 (" After the war, some Swiss officials claimed that if they had only known the realities of the Final Solution, they might have acted otherwise. But there can be little doubt that, even without a full grasp of the details, every literate Swiss knew that the Jews faced a terrible, mortal threat under Nazi occupation").

[52] Bergier Refugee Report, at 90.

monitoring the other side of the border. But any repeat offenders would be handed over, with all the risks that such entailed."[53]

Although "the August 1942 decisions aroused a good deal of criticism" within Switzerland,[54] the "expulsion of refugees who had already spent several days in Switzerland and believed themselves to be safe aroused great public indignation,"[55] and "precise information had

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[53] *Id.* (quoting Police Division circular of Aug. 13, 1942 (citation omitted)).

[54] *Id.* at 92. One of the leading figures who acted in opposition to the restrictive policies was Paul Grueninger, lieutenant in the St. Gallen canton, who actively and repeatedly facilitated the illegal entry of refugees into Switzerland, particularly Jewish refugees. Grueninger was removed from his position in 1939 and, in 1940, and sentenced for dereliction of duty. In 1971, St. Gallen declared Grueninger's behavior "morally correct"; in the same year, Grueninger was honored by Yad Vashem as one of the "Righteous Among the Nations." *Id.* Appendix 2, at 298. Other protesters included National Councillors such as Paul Graber and Albert Oeri (who "[d]isput[ed] von Steiger's famous declaration" by asserting that "[o]ur lifeboat is not yet overflowing; it is not even full"). *Id.* at 95. Those objecting to the official measures "were often from cantons located on the border and thus confronted with this human tragedy," *id.* at 96. Specifically, "Basel, Bern, and Ticino were accommodating, whereas Zurich and Vaud [were] very reluctant" to accept refugees. *Id.* at 111 n.65; *see also id.* at 125 (Basel-Stadt "was known for its generous refugee policy in 1938," in part because the head of its Police Division "repeatedly failed to follow the expulsion orders issued by the Federal Police for Foreigners"; however, the "majority of cantonal governments in 1938 followed the Federal Council's restrictive policies").

[55] *Id.* at 139.

reached Switzerland about the summer 1942 massive police roundups of foreign Jews in France, the federal authorities began putting mechanisms into place to hermetically seal the Franco-Swiss border," where many of the refugees attempted entry.[56]

Among these restrictions, there was "one loophole" which "classified some individuals as 'hardship cases' – children under the age of 16 or 18, families with small children, and pregnant women."[57]

The overall policy, however, remained restrictive. "Even in September 1943, while noting the difference between *'Vernichtungslager'* (extermination camps) and *'Internierungslager'* (internment camps), Rothmund did not fundamentally modify his position: over the following days, he minimized the risks run by the Jews flocking to the border after the German invasion of Northern Italy."[58] Indeed, there was "an increased stringency in practical application [of the 1942 directives] with the result that by fall of 1943, several thousand refugees had been turned away. This transpired without giving rise to public protests as had been the case in 1942 when the border was closed."[59] One scholar has observed of Rothmund that "[r]elentlessly, he walled himself off from the desperate calls for help, the accounts of massacre, and strong humanitarian instincts of his own countrymen. . . . Rigid, blinkered, and utterly convinced of his own rectitude, Rothmund saw the helpless Jews as a great source of danger."[60]

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[56] *Id.* at 94.

[57] *Id.* at 122.

[58] *Id.* at 98-99.

[59] *Id.* at 146.

[60] Marrus, at 257.

According to the Bergier Commission and other scholars, moreover, Nazi retribution against Swiss acceptance of refugees was unlikely, and cannot explain the increasingly restrictive directives of the early 1940s.[61]

It was not only the restrictive policy but also the manner in which the orders were carried out that proved disastrous for Jewish refugees. Although forbidden by Rothmund, refugees had been and, in 1942 and 1943 "continued to be put across the border into occupied France in such a way that they were bound to fall into the hands of the Germans, as witnesses reported."[62] The "military police carried out their own refugee policies. Delivering endangered persons to the Germans went far beyond what federal regulations mandated."[63] Other refugees were first "[s]ystematically robbed, beaten, and abused" before they were "sent back across the border in such a way that their expulsion was identical to being delivered to the enemy. In most cases, the expulsion was arbitrary and against the law. Many victims of these brutalities were arrested by the German or the French police and deported to German killing centers."[64]

By May 13, 1944, however, even Rothmund had become "'convinced that the news of Jewish extermination by the Gestapo was consistent with reality.' In July 1944, with his

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[61] Bergier Refugee Report, at 35, 271. *See also* Marrus, at 256 (Switzerland did not face "direct Nazi pressure to refuse refugees or to send back specific fugitives who did find asylum in the Swiss Confederation"; although "the Axis military presence was a grave menace, and the Nazi press vociferously attacked Bern for harboring Jews," Germany and Italy "seem to have been largely indifferent to Swiss action on behalf of refugees, and their wishes can hardly be said to have played a direct role in the policy of restriction").

[62] Bergier Refugee Report, at 141; *see also* Marrus, at 158 ("Swiss police tracked down fugitives within the country and occasionally deposited them forcibly on the German side of the frontier").

[63] Bergier Refugee Report, at 141.

[64] *Id.* at 144.

convictions confirmed after a visit to the Schaffhausen border, the Chief of the Police Division published new directives which replaced those of December 1942 and which admitted that Jews were in mortal danger."[65]

For many thousands of refugees, however, the change in policy came far too late.

7. Refugee Conditions Within Switzerland

For those refugees who managed to gain successful entry into Switzerland, conditions often were difficult. The Bergier Refugee Report criticizes the internment of refugees in "camps and mass shelters," which "gave refugees little opportunity to meet personal needs or develop individual capabilities . . . . 'They were not allowed to find the peace they so needed within their own four walls in order to gather fresh strength; they were forced to live for years in camps and institutions with strangers, people with whom they had no connection.'"[66] In particular, the Commission criticizes the treatment of refugee families, which were "torn apart, children sent to foster parents, women sent to homes, and men to work camps," a practice that

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[65] *Id.* at 98-99 (citations omitted); *see also id.* at 130 (the July 1944 "directives ensured acceptance to all who sought refuge and who 'are truly in danger of losing life and limb'") (citations omitted).

[66] *Id.* at 154. "The civilian managed operations included work camps for male refugees and homes set up in the spring of 1942 under ZLA [Central Directorate for Work Camps] supervision for women and the elderly. The ZLA developed into a large enterprise during the war. At the end of 1944, its head, Otto Zaugg, ruled over nearly 12,000 refugees, and employed up to 900 persons at any one time in the general administration, the management of camps and homes, and the training and medical care of refugees. The ZLA operated 96 camps and homes in 1944. Between 100 and 200 hundred people generally lived in these mass shelters; in some homes, over 500 people of diverse origins lived together." *Id.* at 155. The Bergier Refugee Report further notes that in reception camps in Geneva, among other places, "the refugees lived behind barbed-wire fences," and were prohibited from interaction with the Swiss population. *Id.* at 157.

continued through the end of 1943.[67] The Bergier Refugee Report does make clear, however, that many former refugees have "rejected sweeping judgements [sic] of the camp system."[68]

Refugees were subject to a mandatory work requirement, with the work chosen by refugee camp authorities. With limited exceptions, refugees were forbidden from practicing their former employment.[69] While "[m]any were happy to be occupied and to escape the humiliating existence of a petitioner," others "did not have the strength needed for [the construction and agricultural work often required], since the majority of the refugees came from academia and the liberal professions, business, and specialized trades."[70] However, as the Bergier Refugee Report further observes, the work requirement was not limited only to refugees. In fact, "Swiss citizens, both men and women, were required to perform labor service beginning in May 1940. Tens of thousands of them did such work during the war . . . ."[71]

As to the "financial and asset aspects of Swiss refugee policy," areas which, according to the Bergier Refugee Report, "have not received any attention until now,"[72] the

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67 *Id.* at 160.

68 *Id.* at 154, n.325. As noted in the Special Master's Proposal (at Section III(E)) , many of those who found refuge in Switzerland have expressed their gratitude to that nation. *See* Ken Newman, Swiss Wartime Work Camps: A Collection of Eyewitness Testimonies 1940-1945 (Zurich: NZZ Verlag 1999).

69 Bergier Refugee Report, at 164-66. This restriction on work was not new. From 1933 through 1938, Switzerland admitted "large numbers of refugees from Germany"; however, "the refugees were forbidden to exercise any lucrative activity. Deeply preoccupied with unemployment in the first half of the 1930s, Swiss officials scrutinized new arrivals rigorously to ensure they did not compete in commerce or the labor market." Marrus, at 155.

70 Bergier Refugee Report, at 165.

71 *Id.* at 165, n.402.

72 *Id.* at 175.

"greatest financial burden was borne by the Jewish community in Switzerland, which consisted of about 18,000 people."[73] The total costs to the Jewish community - the Swiss Jewish Association for Refugee Relief (the "VSJF") - were high. Expenses for the years 1933-1950 amounted to SFr 60,716,000, of which the American Jewish Joint Distribution Committee (the "JDC") contributed 55.2%, or SFr 33,548,000.[74]

Following the United States' 1941 decision to block Swiss assets, "receiving financial support from the United States became more difficult due to measures taken by both sides," and in May 1942, "the Swiss National Bank (SNB) excluded the [JDC] from financial transfers to Switzerland and did not allow them to resume until the end of 1943. . . . It is noticeable that during the same period in which persecution was becoming more intense in France, and the Swiss authorities were rejecting thousands of refugees, Switzerland was also making it more difficult for refugees and the relief organizations that helped them, to receive currency transfers."[75]

Eventually, however, "[a]s the number of refugees attempting to enter Switzerland increased in the summer of 1942, and the cantons refused to share in the costs, and

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[73] *Id.* at 195. The Bergier Refugee Report concludes that "the authorities used [cost] as an instrument to implement a restrictive refugee policy. Their priority was to impede those 'who could not be assimilated,' *i.e.*, Jewish refugees, from settling permanently in Switzerland." *Id.* at 204.

[74] *Id.* at 196. *See also* Yehuda Bauer, American Jewry and the Holocaust: The American Jewish Joint Distribution Committee, 1939-1945 (Detroit: Wayne State Univ. Press 1981), at 232-34 (discussing the important role played by Saly Mayer, who, as president of the SIG (*Schweizerischer Israelitischer Gemeindebund*) and then as JDC representative, "occupied a central place in the care of Jewish refugees in Switzerland" and who, "[i]n order to do his work successfully, … had to keep up his contacts with Heinrich Rothmund").

[75] Bergier Refugee Report, at 267.

as the funds of the relief organizations were exhausted, the federal government significantly increased its financial involvement."[76]

At the same time that the Jewish community was asked to bear the refugees' expenses, the refugees themselves were placed in a position in which they were unable to contribute to their own welfare even from pre-existing assets. By decree of March 12, 1943, the Federal Council "placed all refugee assets under the control of the Confederation. Currency and valuables were to be taken from refugees and placed under trusteeship administration. This decree retroactively created a legal basis for a practice that had long been adopted in the reception camps. Thus, refugees could no longer manage their own assets without approval by police authorities."[77]

The "trusteeship" for these assets was assumed by the Swiss Volksbank, which, the Bergier Commission notes, "made every effort to maintain the accounts correctly."[78] Through its Bern headquarters, the Volksbank "notified its branches to accept currency and valuables from refugees, issue a receipt, and then transfer them to the main office in Bern."[79]

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[76] *Id.* at 268.

[77] *Id.* at 214-15. At the same time, a "so-called 'solidarity tax,' a special tax for wealthy emigrants," was imposed. *Id.* at 268. The tax was "meant as a contribution by the refugees to the costs of their maintenance," but was "based on arguments that had little relevance to the situation of the refugees," whose "economic existence had been destroyed, who were forbidden to work, and whose residence in Switzerland was only approved for a few months. Moreover, this special tax was legally doubtful" in certain cases. *Id.*

[78] *Id.* at 268. "Councillor Edouard von Steiger insisted on the [Volksbank's] duty to exercise scrupulous care in dealing with these assets, using the antisemitic stereotype that Jews were 'especially sensitive' in financial matters." *Id.* However, the trusteeship was not without problems – such as the 1943 discovery "that the place of residence had not been reported on more than half of the refugees' accounts." *Id.* at 217.

[79] *Id.* at 215.

The "amounts of cash that the refugees brought with them into Switzerland were relatively small," with an average balance for pre-September 1943 accounts of 230 francs.[80] Nevertheless, "[t]owards the end of the war, many refugees left Switzerland without demanding the return of their assets from the EJPD [Federal Department of Justice and Police]. In each instance, the EJPD instructed the Volksbank to close the accounts and to transfer the amounts to the Federal Treasury and Accounting Office."[81]

Subsequently, with the "decree of March 7, 1947, the Federal Council rescinded the management of refugee property. Of the 1,650 accounts that still existed at the [Volksbank] on March 1, 1947, 1,000 accounts with small deposits were dormant and/or heirless. These accounts were liquidated and the total sum deposited into the 'deposit account for internees' at the Swiss Treasury and Accounting Office."[82] Refugees still in Switzerland in 1947 had their accounts returned to them "in principle after the deduction of their internment costs."[83]

The Bergier Commission determined that what it characterized as an "assault on refugees' property rights was fundamentally not against the law" primarily because the assets were to be returned; "[h]owever, the confiscation of valuables prior to the issuance of the Federal Law of March 12, 1943, the continuation of accounts after 1947, and deductions from former refugees' wages, raise a number of legal questions. . . . It seems that an additional motive can be

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80 *Id.* at 216.

81 *Id.* at 222.

82 *Id.* at 223-24.

83 *Id.* at 224.

added to the reasons explicitly given by the authorities for their actions: The refugees were to remain under complete control and be legally incapacitated."[84]

III. RECENT JUDICIAL AND POLITICAL DECISIONS ON REFUGEES

In addition to the conclusions reached by the Bergier Commission, the Special Master also has taken into account recent Swiss judicial and political responses to certain refugee claims brought in that nation's courts.

One such Swiss lawsuit was brought by one of the named class representatives in this action, Charles Sonabend. In this United States litigation, Mr. Sonabend asserted "looted assets" claims arising from valuables that he contends never were returned to him, or to his sister, Sabine Sonabend, after the Sonabend family was expelled from Switzerland in an unsuccessful effort to obtain asylum. Mr. Sonabend did not assert "refugee" claims against Switzerland in this lawsuit, nor, as discussed elsewhere in the Special Master's Proposal, has any other named plaintiff.[85]

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[84] *Id.* at 226.

[85] The absence of a refugee claim may be due at least in part to the questionable legal validity of such a claim under United States law, which provides certain protections to foreign states which avoid or minimize the extent to which their sovereign acts may be subject to scrutiny in United States courts. *See, e.g.*, Declaration of Burt Neuborne, Esq., Nov. 5, 1999, at page 5, n.6 (discussing possible sovereign immunity defenses to certain of plaintiffs' claims); *see also* Michael J. Bazyler, "Nuremberg in America: Litigating the Holocaust in United States Courts," 34 Univ. of Richmond L. Rev. 1, 21 n.44 (2000) ("The judicially-created Act of State doctrine 'allows U.S. Courts to abstain from deciding a case involving an international transaction on the grounds that one of the actors in the transaction is a foreign state.'") (citation omitted).

However, in support of his "looted assets" claims, Mr. Sonabend recounted the tragic events which led to the loss not only of his family's assets, but also of his parents. Mr. Sonabend alleged, among other things, that:

- in the summer of 1942, as the Nazis were rounding up Belgian Jews, his father, a well-known importer of Swiss watches, made arrangements for the family to flee to Switzerland;

- after the Sonabend family reached Switzerland on August 14, 1942, and declared themselves to Swiss police the next day, the police "interrogated Simon Sonabend, as documented by a 1942 police dossier recovered recently"; the police described in their report "two suitcases, one containing currency and given to a Swiss family and the other, also containing currency, left with the police to be given to a different family";

- despite intervention on the family's behalf by "[t]hree prominent Swiss watch manufacturers, and a member of the Swiss parliament, who knew Simon Sonabend" and "tried to prevent the family from being deported by stating that the Sonabends would not be a burden on the Swiss economy," on August 17, 1942, the family "was deported by Swiss police who deposited Simon Sonabend, his wife, and two children [Charles and Sabine] at the French border in the night without a map"; and

- the family was "immediately captured by Nazi Regime soldiers" and imprisoned in France, and the "parents were put on a train to Drancy and then transported to Auschwitz where they were executed on August 24, 1942."[86]

In their lawsuit brought in Switzerland, the Sonabends' legal claims were premised upon their expulsion from Switzerland, having been brought as a "state liability claim for the atrocities suffered by the family that was deported …"[87] The Sonabends sought

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[86] *See* Sonabend et al. v. Union Bank of Switzerland et al., No. 96-5161, at ¶ ¶ 11-14, one of four complaints consolidated as part of this action, In re Holocaust Victim Assets Litig. (Master Docket No. CV-96-4849). *See also* Bergier Refugee Report, at 128 n.169 ("The Jewish Sonabend family was turned back into occupied France from the Jura region on August 17, 1942 and was caught by a German patrol. The parents were deported to Auschwitz and murdered there; the children, Charles and Sabine, survived their persecution").

[87] Fifteenth Annual Whittier International Law Symposium, 20 Whittier L. Rev. 91, 139 (Mar. 1, 1998)

(*footnote continued on next page*)

compensation of "about $70,000, the highest amount one may be awarded for the loss of two parents."[88]

The "Swiss government, consisting of seven ministers, denied the state liability claim because, as it claimed, the statute of limitations had expired."[89] The Sonabends then appealed to the Swiss Supreme Court, contending, among other things, that a Swiss court has the authority to determine "whether a law is valid," a novel argument in Switzerland because "[u]nlike United States courts, the Swiss courts cannot determine whether a law is constitutional…"[90]

In January, 2000, meanwhile, the Swiss Federal Tribunal rendered a decision on a lawsuit that had been brought against Switzerland by another expelled refugee, Joseph Spring.[91] The outcome of the Spring case appears to have had some impact upon the Sonabends' claims:

> In the January decision, the Federal Tribunal rejected a complaint by an Auschwitz survivor that the Swiss government should be held responsible for handing him over to the Nazis, but awarded him 100,000 francs (dlrs 61,000) in damages anyway. The court ruled that Swiss authorities at the time did nothing illegal in arresting Joseph Spring [,] then 16 [,] as he tried to enter the country from France. It upheld the government's view that the border guards' action did not amount to complicity to genocide, as claimed by Spring's lawyers. But the judges decided that the 73-

(statement by Marc R. Richter, counsel for the Sonabends in the Swiss action).

88 20 Whittier L. Rev., at 139-40.

89 *Id.* at 140.

90 *Id.* at 139, 140.

91 *See, e.g.*, Bergier Refugee Report, at 129 n.170 ("Joseph Spring and his two cousins were turned over to the Germans by the Swiss border guards at the La Cure border checkpoint on November 18, 1943. The three Jewish teenagers were deported to Auschwitz; Joseph Spring was the only one to survive").

> year-old should be awarded the money [,] the amount he had filed for on ethical grounds and to cover his costs.[92]

Following the Swiss court's ruling that Spring's refugee claims were legally invalid, but that on "ethical grounds," he nevertheless should be paid over $60,000, the Swiss Confederation offered to settle the Sonabends' claims. According to the Associated Press, on May 23, 2000:

> The Swiss government apologized to a Jewish brother and sister … for having expelled them with their parents during the Holocaust, and agreed to pay them $118,000 in an out-of-court settlement. Charles Sonabend, whose parents later perished at the Auschwitz death camp in Poland, said the meeting with Finance Minister Kaspar Villiger and Interior Minister Ruth Dreifuss was comforting …. The $118,000, which the Finance Ministry will pay to Charles and Sabine Sonabend, is an out-of-court settlement to cover costs incurred during their legal battle.[93]

The Sonabend settlement has been described in the press as a "first-of-its-kind," as "Bern has never before voluntarily agreed to make payments to make up for the country's wartime deportations of thousands of Jews who were seeking to flee Nazi troops."[94]

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92 *Swiss Minister Invites Jewish Refugees for Meeting*, AP Worldstream, Apr. 10, 2000. *See also* Bazyler, at 15 n.20 ("In January 2000, Switzerland's highest court dismissed a lawsuit filed by a Holocaust survivor who, during World War II, was handed over by Swiss border guards to the Nazis and then deported to Auschwitz …. Plaintiff Joseph Spring, 73, survived the ordeal but his two cousins, also expelled by Switzerland, perished in the gas chambers …. The court, in a 3-2 decision, nevertheless, awarded plaintiff $63,000, the damages he requested, on ethical grounds") (citing Clare Nullis, *Swiss Court Rejects Holocaust Suit*, AP Online, Jan. 21, 2000).

93 Alexander G. Higgins, *Swiss Make Holocaust Apology*, Associated Press, May 23, 2000. *See also* Clare Nullis, "Swiss Settle With Jewish Siblings," Associated Press, May 19, 2000 ("The ministry said it will pay Charles and Sabine Sonabend in an out-of-court settlement to cover their costs from a legal battle with the government. Ministry officials stopped short of calling the payment 'compensation,' apparently fearing that might encourage claims from other Holocaust survivors").

94 Elizabeth Olson, *Swiss Apologize To 2 Jews Denied Wartime Refuge*, International Herald Tribune, May 24, 2000. The Sonabend settlement was the "first-of-its-kind," *Id.* because Spring had

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Although the Spring and Sonabend decisions must be regarded on their own merits, and the outcome of any future refugee claims brought in Switzerland is unclear, the Swiss courts and government evidently have deemed certain refugee claims worthy of compensation for moral, if not necessarily legal, reasons.[95]

IV. SPECIAL MASTER' S INQUIRIES CONCERNING REFUGEE DATA

The last factor affecting the Special Master's recommendations for the Refugee Class is the current availability of hard data – or the lack thereof – and the willingness of the Swiss government to provide the Court with the data that does exist. The Special Master has assessed the existing data, investigated the status of certain cantonal records, and significantly, has had extensive communications with representatives of the Swiss Federal Archives, resulting in the release of certain refugee lists.

A. Existing data

The Special Master approached his investigation into the current status of refugee data bearing in mind the following information concerning the number of refugees who may have been denied entry into, expelled from, or detained, mistreated or abused in Switzerland (*see* Settlement Agreement, Section 8.2(e)):

- The Bergier Refugee Report states that refugee records are incomplete for the years 1933 to 1939, and that "[m]any expulsions before the fall of 1942 were not even registered";[96]

recovered damages from the Swiss courts, not the Swiss Confederation.

95 The Canton of Basel also has settled with at least one refugee, Eli Carmel, as described below.

96 Bergier Refugee Report, at 20 ("There are hardly any reliable figures available for the years 1933 to 1939"); *Id.* at 129.

- The Bergier Refugee Report indicates that approximately 50,000 refugees were admitted into Switzerland, of whom approximately 20,000 were Jewish or identified as Jewish, and that a list of these individuals still exists;[97] and

- The Bergier Refugee Report further states that approximately 24,500 refugees were expelled from Switzerland, while 14,500 individuals were denied entry (both of which statistics, as explained by Guido Koller in his 1996 work, are based upon analysis of existing individual refugee files, as well as police and other reports which do not contain refugee names).[98]

B. Communications with Swiss Federal Archives

The Special Master has had extensive communications with representatives of the Swiss Federal Archives, Prof. Dr. Christoph Graf, the Federal Archivist, and Mr. Guido Koller. As noted previously, Koller's research into the status of refugee archives, published in a 1996 volume analyzing Swiss refugee policy, was incorporated into the Bergier Commission's 1999 report and makes clear that while many records remain, many others were long ago destroyed.

In attempting to provide further information concerning the refugee files that do still exist, in a memorandum transmitted to the Special Master dated March 22, 2000, the Swiss Federal Archives advised that it "is trying to establish a list of names of refugees turned back at the Swiss border between 1939-45 with the help of the cantonal archives" (emphasis added); that it "will be possible to collect a small part of the names only"; and that "[a]t the moment, this list contains about 2'500 names," of which "one third have been registered as Jewish."[99]

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[97] *Id.* at 20.

[98] *Id.* at 20; *see also* Koller, at 92 and n.234.

[99] *See* Letter of Dr. Prof. Graf to Special Master, Mar. 22, 2000, and attachments (on file with the Special Master).

By letter dated May 16, 2000, the Swiss Federal Archives advised the Special Master that of the cantons, only Geneva is likely to have a "substantially complete set of data concerning refugees turned back at the border," and that the Swiss Federal Archives had contacted the State Archivist of Geneva to transmit the Special Master's request for this data.[100] As discussed below, the Geneva archives thereafter provided the requested information.

Ticino's refugee policy was the subject of further research, including a work by an Italian scholar, Renata Broggini. Broggini's book names some 300 persons who apparently were turned away from Switzerland and thus appears to suggest that in Ticino, hard data exists or once existed concerning these particular individuals.[101]

Refugee archives also apparently are available in several other cantons, some of which are or are expected to be under analysis by Yad Vashem researchers. These include archives from the cantons of Basel-Stadt (Basel-City),[102] St. Gall[103] and Schaffhausen.[104] Yad Vashem is "continuing its search in other cantons, particularly in French-speaking

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[100] The Court noted this response in its decision approving the settlement: "I acknowledge the good faith cooperation of the SFA [Swiss Federal Archives] in compiling this list. Unfortunately, however, SFA officials have informed the Special Master that it 'will be possible to collect a small part of the names only,' and that, '[a]t the moment, this list contains about 2,500' names. This is woefully inadequate. Nevertheless, the SFA further informed the Special Master that it 'is trying to establish a list of names of refugees ... with the help of the cantonal archives,' and that, of the cantons, only Geneva is likely to have a 'substantially complete set of data concerning refugees turned back at the border.' To that end, the SFA has contacted the Geneva archives for assistance in compiling this information." In re Holocaust Victim Assets Litig., 96 Civ. 4849 (ERK)(MDG), slip op. (E.D.N.Y. July 26, 2000, corrected Aug. 2, 2000), at 38.

[101] Renata Broggini, *La Frontiera Della Speranza Gli ebrei dall'italia verso la Svizzera 1943-1945* (Milan: Mondadori 1995), at 514.

[102] Ferrero, at 205.

[103] *Id.* at 206.

[104] *Id.* at 207.

Switzerland."[105] Basel archives analyzed by Yad Vashem researchers were located in a specific file, "*Emigranten die von der Grenzpolizei zuruckgewiesen wurden*" ("Emigrants Who Were Turned Back by the Border Police"). This file

> consists of forms, carefully filled out by the border police officers, containing the personal details of the refugees who were turned back, generally when they arrived from Germany by train at Basel train stations …. The most interesting part of these forms is under the heading "Observations" (*Bermerkungen*), at the bottom of the page. This provides details and insights regarding the circumstances of the rejections at the border. These observations show in particular the extent to which Swiss officials based themselves on the racial definition of a Jew as laid down by the Nuremberg Laws. They also reflect the refugees' attempts to escape being turned back and the activities of border smugglers or accomplices, duly kept under surveillance by the Swiss police.[106]

In response to further inquiries from the Court and the Special Master, by letter dated June 29, 2000, the Swiss Federal Archives advised Judge Korman that the Swiss Federal Council "has authorized the Swiss Federal Archives to transmit to the Court the requested data, under the condition that Swiss federal legislation on data protection is respected."[107] Thereafter,

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[105] *Id.*

[106] *Id.* at 207-08. It has been reported that in September 1997, "as Basel was celebrating the centenary of Zionism, the canton apologized to Eli Carmel, a survivor of Sachsenhausen now living in Israel, and paid him SFr 50,000 in compensation for turning him over to the Nazis in 1939." *See* Marilyn Henry, *Victims of Omission*, The Jerusalem Post Internet Edition, July 28, 1999, *available at* www.jpost.com/Features/Article (visited July 28, 1999), at 3. *See also* Bergier Refugee Report, at 128, n.168 ("Elie Carmel, a German Jew by birth, was sent back to Germany by the Basel police in October 1939 and was arrested there. He survived incarceration in Sachsenhausen concentration camp"). As described below, the State Archives of the Canton Basel-City recently provided the Court with data which may be from the same file described in the Yad Vashem research report. In a letter to the Special Master, the file was referred to as "Emigrants who were turned away by the border police, 1938-1939." *See infra*.

[107] Letter of Prof. Dr. Christoph Graf to Judge Korman, June 29, 2000. In a letter dated June 21, 2000, following several communications between the Special Master and the Swiss Federal Archives

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by letter dated July 14, 2000, the Swiss Federal Archives advised the Special Master that it was "hereby sending … the requested data on 51'417 refugees admitted into Switzerland during World War II" and that "[d]ue to technical problems, we won't be in a position to send you the data on refugees *not* admitted into Switzerland, until a later date." (Emphasis in original).[108]

On July 26, 2000, Judge Korman gave final approval to the Settlement Agreement, but noted a number of potential problems in implementing a plan of allocation and distribution. With respect to the names of possible members of the Refugee Class, the Court observed:

> If it proves impossible to assemble the information needed because Swiss entities (including cantonal entities) refuse to provide information that they have in their possession that is needed for the fair administration of the Refugee Class, I will consider an

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concerning Swiss legislation protecting data from disclosure, the Court stated: "With my authorization, Special Master Gribetz has already assured you by letter dated April 12, 2000 that the Court is sensitive to Swiss privacy concerns, and that anyone whose name appears on any of the refugee databases you provide will be given a reasonable opportunity to be excluded from publication. I will direct that when notice is provided to the settlement classes of the Special Master's Proposed Plan of Allocation and Distribution of the settlement fund, that notice will instruct potential members of the Refugee Class as to the procedure by which they may exclude their names from publication." Letter from Hon. Edward R. Korman to Prof. Dr. Christoph Graf, June 21, 2000.

[108] Letter of Andreas Kellerhals of the Swiss Federal Archives to Special Master, July 14, 2000. The letter explained that the list of 51,417 refugees "contains the names of civilian refugees who entered Switzerland between 1936 and 1945 *and* who were legally interned by federal authorities in World War II. These refugees were normally sent to labor camps (men), homes (women, old), Swiss families (children) or schools (youth, students). A few thousand civilian refugees who received a cantonal legal status are *not* included on the list. These refugees were not forced into a residence as the civilian internees usually were. A complete set of data on refugees does not exist in most cantons." *Id.* (emphasis in original). The letter also stated that approximately 21,200 of the people appearing on the list were Jewish, and provided a breakdown of the refugees' respective nationalities. The letter further advised that although the list "*mainly* contains the names of victims of Nazi persecution," it is "essential to acknowledge the possibility that the list may also contain the names of *perpetrators* since many tried to evade capture by the Allies at the end of World War II. Switzerland refused to admit war criminals. However, in spite of strict controls lesser-known perpetrators may have entered Switzerland undetected." *Id.* (emphasis in original).

> application for modification of the enforceability of releases with respect to those entities.[109]

On July 27, 2000, the Special Master received another letter from the Swiss Federal Archives, advising that the archives was "hereby sending [the Special Master] the requested data on refugees not admitted into or expelled from Switzerland during World War II."[110]

The letter from the Swiss Federal Archives is quoted below virtually in its entirety:

> "The data consists of three lists, which have been compiled according to the potential legal status of refugees *as civilian internees* in Switzerland in World War II.
>
> 1. The database *refugees-turned-back-us-dc* contains data on 1'715 civilian refugees turned back at the Swiss border or expelled from Switzerland between March 14, 1938 and May 09, 1945 and collected by the Swiss Federal Archives from various federal and cantonal record groups.
>
> 2. The "Liste de refugies ayant ete refoules contre leur gre" contains data on 2'159 civilian refugees turned back at the border to Geneva between 1939 and 1945. It has been established and transferred to us by the State Archives of the Canton of Geneva. However, research on the pertinent records is still underway. It is possible that further data on refugees turned back, will be found and forwarded to you.
>
> 3. The list called "Namen von zurückgewiesenen judischen Flüchtlingen aus den Bestanden des Staatsarchive Schaffhausen" contains data on 99 civilian refugees turned back at the border to the Canton of Schaffhausen shortly before and during World War II. The list has been established and

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[109] In re Holocaust Victim Assets Litig., at 38.

[110] Letter of Guido Koller, Swiss Federal Archives, to Special Master, July 27, 2000.

transferred to us by the State Archives of the Canton of Schaffhausen.

It is important to note that:

1. A complete set of data on refugees not admitted into or expelled from Switzerland exists neither in the federal government archives nor in the state archives.

2. The lists handed over to you *mainly* concerns the names of victims of Nazi persecution. That is, *first* of all Jewish refugees, *second*, Polish, Italian, French or other persons who managed to escape from a slave labor situation and *third*, other persons affected by the Nazi occupation of various European countries and the War. However, it is essential to acknowledge the possibility that the list may also contain the names of *perpetrators* and Nazi collaborators since many tried to evade capture by the Allies at the end of World War II. Switzerland refused to admit war criminals.

3. A refugee can be mentioned on more than one list."[111]

By letter dated August 9, 2000, the State Archives of the Canton Basel-City advised the Special Master that since 1995, it "has worked with Yad Vashem" and "has made possible the evaluation of relevant files from the Archives," and that beginning in January, 1996, it "again began comprehensive investigations into the sources which could refer to the rejection of Jewish refugees."[112] As a result of this research, the State Archives of the Canton Basel-City has collected data "regarding *circa* 60 persons who were turned away (in: PD-REG 3, Nr. 31200 'Emigrants who were turned away by the border police,' 1938 [-1939])."[113]

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[111] *Id.* (emphasis in original).

[112] Letter of Dr. Josef Zwicker, State Archivist, to Special Master, Aug. 9, 2000, at 1. The letter further stated that in "1996, the State Archives played a deciding role in clearing up the circumstances under which Hans Weinberg (Eli Carmel) was turned over to the authorities of Nazi Germany by the Basler Police in October 1939"and "also participated in the negotiations of the Basel City authorities, which led to a certain compensation in 1997," *Id.* at 2.

[113] *Id.* (brackets and parentheses in original).

The various databases and lists described above, together containing the names of 4,033 persons turned back at the Swiss border or expelled from Switzerland, are now in the Court's possession.[114]

V. CONCLUSION

The conclusions reached by the Bergier Commission and other scholars, the recent Swiss decisions awarding significant sums to certain expelled refugees, the existence of significant – if incomplete – personal data regarding refugees, particularly those expelled from Switzerland,[115] and the comparatively limited number of surviving refugees, persuade the Special Master to recommend an individualized claims process for the Refugee Class. Additionally, because those who found refuge in Switzerland and thereby survived the Holocaust in comparative safety obviously fared far better than those who were denied entry or expelled from Switzerland, it is further recommended that claimants alleging "mistreatment" or "abuse" receive only nominal and largely symbolic compensation from this limited settlement fund. More significant (although still essentially symbolic) payments should be allocated to the class members whom Switzerland turned away. The proposed distribution mechanism is discussed in detail in the Special Master's Proposal.

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[114] Based upon the dates of birth shown in the lists, it is clear that a great many of these individuals are no longer alive.

[115] In light of the data that now has been provided to the Court, and with the promise of the further assistance of the Swiss Federal Archives in the event that additional information becomes available concerning refugees who were expelled from or denied entry into Switzerland, the Special Master believes that a fair claims process can commence, subject to any determinations the Court may make in the future concerning the releasees' compliance with their obligation to act in good faith. *See* In re Holocaust Victim Assets Litig., at 31-32, 38, 41, 43-46.