# HEIRS

## I. INTRODUCTION

Each of the five classes, as set forth in the Settlement Agreement, includes not only the actual victim of Nazi persecution, but also his or her heirs.[1] The term "heirs" is not defined in the Settlement Agreement. Because the Settlement Agreement expressly states that it "shall be construed and governed by the laws of the State of New York,"[2] the Special Master has looked to New York law for an applicable definition of "heirs."

The Estates, Powers, and Trusts Law of New York ("EPTL"), by way of a maze of statutes, broadly defines heirs as those who would inherit from the deceased under the state's intestacy laws, unless a will or trust provides otherwise. Under these statutes, an heir is the closest surviving relative of the deceased with the cut-off at one's second cousins. Section 2-1.1 of the EPTL, entitled "Heirs at law and next of kin defined," states that "[w]henever used in a statute or instrument, unless a contrary intention is expressed therein, the term 'heirs,' 'heirs at law,' 'next of kin' or any term of like import means the distributees, as defined in 1-2.5." Section 1-2.5 provides that "[a] distributee is a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution." Section 4-1.1, entitled "Descent and distribution of a decedent's estate," sets forth a list of eligible distributees in order of priority starting with the decedent's children and ending with the "[g]reat-grandchildren of grandparents."

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1 *See* Settlement Agreement, Section 8.2(a)-(e).

2 *Id.*, Section 16.3.

Under New York law, then, depending on which relatives have survived the decedent, a determination of one's heirs might require careful scrutiny of a very long and remote line of succession. Such a process would be especially burdensome and costly if undertaken in connection with the distribution of the Settlement Fund in this action, as it has been over fifty years since many of the victim class members died, and New York law determines one's legal heirs as those closest relatives **surviving at the time of the decedent's death, not at the time of distribution**.[3] Accordingly, determining the legal heirs of a Nazi victim who died during World War II would require an assessment of that victim's closest relatives living at the time of his/her death and, if those relatives have since died, a determination of those relatives' relatives would be required, and so on. Such a process (i.e., determining heirs of heirs of heirs) could result in relatives far more remote than second cousins being eligible to recover on behalf of the original deceased Nazi victim.[4]

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[3] *See e.g.*, United States v. Comparato, 850 F. Supp. 153, 157 (E.D.N.Y. 1993), ), aff'd, 22 F.3d 455 (2d Cir.), cert. denied, 513 U.S. 986 (1994) ("[a] statutory distributee acquires 'a vested interest in the decedent's net estate' on the date of the person's death, not on the date of distribution or determination of the estate's proceeds") (quoting Estate of Smith, 114 Misc. 2d 346, 349, 451 N.Y.S.2d 546, 548-49 (Surr. Ct. Queens Co. 1982)); Estate of Smith, 118 Misc. 2d 165, 168, 460 N.Y.S.2d 441, 444 (Surr. Ct. Bronx Co. 1983) ("[f]or purposes of intestate succession, the only persons generally deemed to be distributees of a decedent are those who qualify as such on the date of decedent's death").

[4] Of course, it also would be necessary to determine whether the particular Nazi victim left a will and, if so, whether the beneficiary or beneficiaries designated therein are still alive. If no beneficiaries are living, it may then be necessary to trace the beneficiaries' beneficiaries (assuming that they, in turn, left wills) or, alternatively, determine their legal heirs under applicable intestacy laws. To complicate matters further, where a Nazi victim and his/her closest relatives all perished during the War, it would be necessary to attempt to assess (to the extent such information was available) the order in which the family members died, to determine the appropriate line of succession. *See e.g.*, Estate of Whitaker, 120 Misc. 2d 1021, 466 N.Y.S.2d 947 (Surr. Ct. Rensselaer Co. 1983) (in proceeding to establish order of deaths of father and daughter so that distribution of assets of their estates could be made, proof submitted by petitioner was sufficient to show that daughter predeceased father); In re Bausch's Estate, 100 Misc. 2d 817, 420 N.Y.S.2d 181 (Surr. Ct. Rensselaer Co. 1979) (certificates of county coroner opining that husband died at 7:55 a.m. and wife died at 8:00 a.m. admitted to prove that husband predeceased wife in proceeding for distribution of

*(footnote continued on next page)*

The Special Master also has considered, under New York law, the questions of who is eligible to assert causes of action belonging to the decedent and who then recovers the proceeds from any successful lawsuits initiated. While it is only the "personal representative" of the decedent who can bring these causes of action for personal injuries or property losses,[5] any resulting recovery accrues to the decedent's estate and is then distributed as stipulated above via the statute of descent and distribution (provided there is no will which expressly disposes of any such potential recoveries).[6] Thus, under any analysis, extremely distant relatives of the deceased could potentially claim class member status pursuant to New York law.

An inquiry into the laws of other countries reveals similarly broad definitions of "heirs." Israel, for example, permits succession to the deceased's grandparents and their issue, presumably encompassing cousins of any degree.[7] Germany contemplates distributions to more remote ancestors than even the great-grandparents of the deceased and their descendants.[8] Similarly, under Talmudic law, there is no cutoff point at all for determining heirs – a search is made for the closest relatives of the deceased until an heir is found.[9]

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assets of their estates); *see also* Annex E ("Holocaust Compensation"), at Section IV(A)(8) (discussing Norwegian program to compensate Jewish Nazi victims for property losses, in which "the order of inheritance was established on the basis of assumptions of who had died first in a family that entered the gas chamber together") (quotation omitted).

5 *See* EPTL, §11-3.2(b).

6 *See* United States v. Comparato, 850 F. Supp. 153 (E.D.N.Y. 1993), aff'd, 22 F.3d 455 (2d Cir.), *cert. denied*, 513 U.S. 986 (1994) (parents entitled to recovery awarded in medical malpractice action instituted on behalf of deceased child as statutory distributees of child's intestate estate).

7 *See* Israel Law & Business Guide, IV (b), at 356.

8 *See* Charles I. Kapralik, Reclaiming the Nazi Loot: The History of the Work of the Jewish Trust Corporation for Germany, Vol. II (London: The Corporation 1962-1971) ("[t]he German law of inheritance excludes no blood relation, however remote, from succeeding to a person's estate"), at 28.

9 *See* Letter from Rabbi Donny Bresser of Beth Din of America to Rabbi Israel Miller, dated May 28, 1999 (a copy of which is on file with the Special Master).

As noted above, it has been over fifty years since many of the victim class members in this action have died. Undoubtedly, there are millions of heirs who could potentially claim class member status. The Notice Plan of the class action, for example, in what it terms a "mid-range estimate," concludes that there are over 2 million heirs qualifying as class members for a total of 2,863,000 class members – **using a definition of heirs limited to children of deceased Nazi victims**.[10] Based on current estimates of the worldwide Jewish population as between 12.9 and 13.5 million people,[11] the Special Master estimates that, using a legal definition of heirs which potentially extends to second cousins or beyond, there are likely to be several million heirs of Jewish Holocaust survivors alone.

As emphasized throughout this Proposal, the Special Master is presented with a limited Settlement Fund and a seemingly limitless number of deserving claimants. A primary task, in accordance with his obligations under United States class action law, is to structure a distribution program that minimizes administrative costs and affords meaningful compensation that tangibly benefits at least some class members. The Special Master has sought to avoid a plan which makes millions of symbolic *de minimis* payments to all those who could potentially

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[10] *See* Notice Plan, at 6 and Ex. 1.

[11] *See* Annex C ("Demographics of 'Victim or Target' Groups"), at Section I(A).

claim membership in the classes. As Judge Weinstein found in In re Agent Orange Product Liability Litigation, 611 F. Supp. 1396, 1431 (E.D.N.Y. 1985), aff'd in part, rev'd in part on other grounds, 818 F.2d 145 (2d Cir. 1987), cert. denied, 487 U.S. 1234 (1988), "[d]istribution of thousands of small individual payments would trivialize the beneficial impact of the settlement fund on the needs of the class." Not only would direct payments to a broadly defined class of heirs require such costly eligibility determinations as to substantially deplete the fund, but the number of eligible claimants would reach such large proportions as to make it virtually impossible to meaningfully impact the lives of any individual class member. The Special Master does not deem equitable a plan which would, as a practical matter, award a token payment of "$1.98" each to millions of potential claimants.

Faced with these concerns, the Special Master has reviewed the treatment of heirs under various compensation programs, focusing specifically on those programs which distributed funds among groups of persecutees or victims of some type of personal injury such as torture or suffering. Most of these programs have confined their compensation to the original victim or, if deceased, sometimes to a very narrow class of relatives, such as spouses and children. In contrast, programs aimed at returning specific items of identifiable property, or compensating individuals for the wrongful taking thereof, typically include a broad category of heirs as eligible claimants.[12] The various programs examined by the Special Master are discussed below.

[12] As discussed below and elsewhere in the Proposal, the Special Master has adopted a similar approach.

# II. PROGRAMS REGARDING COMPENSATION FOR PERSONAL INJURY

## A. U.S. Programs

### 1. The Princz Agreement

As a result of a lawsuit against the Federal Republic of Germany by Hugo Princz, a Jewish-American captured by the Nazis during World War II and imprisoned in a concentration camp,[13] Germany reached an agreement with the United States on September 19, 1995 to compensate certain United States citizen survivors of Nazi persecution in two separate stages.[14] The first stage involved a payment of $2.1 million to Princz and ten other American survivors of Nazi concentration camps who had not previously received compensation from Germany. The second stage created a settlement class of similarly situated potential claimants whose identities were not yet known.

> Article 2 of the Princz Agreement set forth the payment terms:
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> 1. For the prompt settlement of known cases of compensation claims covered by Article 1, the Government of the Federal Republic of Germany shall pay to the Government of the United States of America three million Deutsche Mark[s] [approximately $2.1 million] within 30 days of the entry into force of this Agreement.
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> 2. For any possible further cases not known at the present moment, both Governments intend to negotiate two years after the entry into force of this Agreement, an additional lump sum payment based on the same criteria as set forth in Article 1 and derived on the same basis as the amount under paragraph 1.[15]

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[13] *See* Princz v. Federal Republic of Germany, 813 F. Supp. 22 (D.D.C. 1992), rev'd, 26 F.3d 1166 (D.C. Cir. 1994).

[14] Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution, 35 I.L.M. 193 (1996) (hereinafter, the "Princz Agreement").

[15] Princz Agreement, Article 2.

Article 1 of the Princz Agreement defined the eligible claimants as follows:

> This Agreement shall settle compensation claims by certain United States nationals who suffered loss of liberty or damage to body or health as a result of National Socialist measures of persecution conducted directly against them. This Agreement shall cover only the claims of persons who, at the time of their persecution, were already nationals of the United States of America and who have to date received no compensation from the Federal Republic of Germany. This Agreement shall, inter alia, not cover persons who were subjected to forced labor alone while not being detained in a concentration camp as victims of National Socialist measures of persecution.[16]

The United States Congress passed legislation in early 1996 authorizing the Foreign Claims Settlement Commission (the "FCSC")[17] to establish a program to adjudicate claims under the second stage of the Princz Agreement.[18] In August 1997, the FCSC issued the Final Decision on Scope of Holocaust Survivors Claims Program.[19] In it, the FCSC examined the language of the Princz agreement: "The reported intent of that language is to **limit compensation to only living Holocaust survivors (i.e., to exclude compensation for heirs, beneficiaries and estates of deceased survivors of the Holocaust**). The Commission has

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[16] *Id.* Art. 1. The United States Department of Justice later expanded the eligibility criteria to include those interned under "comparable conditions" to a concentration camp. *See* Holocaust Survivor Claims, 61 Fed. Reg. 30,638 (1996).

[17] The FCSC is "a quasi-judicial, independent agency within the Department of Justice which adjudicates claims of U.S. nationals against foreign governments, either under specific jurisdiction conferred by Congress or pursuant to international claims settlement agreements…. The FCSC was established in 1954 (reorganization Plan No. 1 (5 U.S.C. App.)), when it assumed the functions of two predecessor agencies: the War Claims Commission and the International Claims Commission. The FCSC and its predecessor agencies have successfully completed 43 claims programs to resolve claims against various countries…." "Foreign Claims Settlement Commission" Home Page *available at* http://www.usdoj.gov/fcsc/index.html (visited 8/22/00).

[18] *See id.*

[19] Final Decision on Scope of Holocaust Survivors Claims Program (hereinafter, "FCSC Final Decision"), 1997 FCSC Yearbook, Decision No. ALB-249, Exhibit II, Decision No. HS-II.

interpreted that language to mean that the Holocaust survivor must have been **living as of September 19, 1995** – the effective date of the U.S.-German agreement."[20]

The FCSC also expanded the lists of camps used to determine whether a particular institution constituted a concentration camp: "[W]hile Germany reportedly referred to ITS [the list compiled by the International Tracing Service of the International Red Cross] in the 1995 negotiations in determining whether or not a particular institution constituted a concentration camp, the Commission has not limited itself to the ITS list."[21] Instead, the FCSC included camps listed in the German government's roster of concentration camps and subcamps, known as BGB1, which Germany developed for use in another compensation program.[22]

Finally, the FCSC decided that, "since the claims compensated in 1995 included several cases involving types of confinement other than in concentration camps and sub-camps--other cases involving those same types of confinement should be compensable under the Holocaust Survivors Claims Program."[23] Thus, those ultimately eligible for compensation included any United States citizens, **living as of September 19, 1995**, who were held in concentration camps or subcamps recognized as such by the ITS or listed in the BGB1. Also included were those subjected to forced labor while on forced marches, and those held in ghettos or camps in Transnistria (the types of confinement compensated as part of the settlement of the Princz lawsuit).[24] **There was no decision to compensate any heirs of the eligible victims**.[25]

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[20] *Id.* at 31.

[21] *Id.* at 32.

[22] *Id.* at 32; *see also* Annex E ("Holocaust Compensation"), at Section IIC (discussing German Indemnification Law (BEG)).

[23] FCSC Final Decision, at 33.

[24] *Id.* at 44-45. *See also* Michael Sniffen, *U.S. Panel: More than 200 Americans May Get Holocaust*

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In March 1998, the FCSC sent 235 verified claims under the Princz Agreement to the State Department.[26] On the basis of these claims, the State Department then concluded a settlement with the German government in January 1999. The terms of the settlement were kept confidential pending approval of the settlement by the German Parliament. Parliamentary approval was secured in early June 1999 and, on June 7, 1999, the German government paid a total of DM 34.5 million [approximately $18.5 million] to the United States Treasury Department to compensate the stage two claimants.[27]

### 2. Civil Liberties Act of 1988

On August 10, 1988, Congress enacted the Civil Liberties Act of 1988 ("CLA") to provide compensation to certain Japanese American citizens and permanent resident aliens (and their American or permanent resident alien spouses or parents) who were evacuated, relocated, and interned by the United States government during World War II.[28] The following individuals were eligible to receive a payment of $20,000 each[29] under the CLA:

> (2) …any individual of Japanese ancestry, or the spouse or a parent of an individual of Japanese ancestry, **who is living on the date of the enactment of this Act** [August 10, 1988] and who, during the evacuation,

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*Reparations*, Associated Press, Washington Dateline, June 17, 1997; Sumathi Reddy, *Prisoners of Memories*, The Providence Journal-Bulletin, Sept. 28, 1997, at 1C (News).

[25] *See* Mary Corey, *The Holocaust's American Victims*, The Baltimore Sun, Feb. 20, 1997, at 2A (noting that heirs were not eligible to apply for compensation under the Princz Agreement).

[26] *See* George Gedda, *U.S. Holocaust Victims Compensated*, Associated Press Online, June 21, 1999 (hereinafter, "Gedda") (quoting a report by USA Today); "News at a Glance," Jewish Telegraphic Agency, Inc. *at* http://www.jta.org/ (last updated June 21, 1999). *See also* Marilyn Henry, *U.S. Citizens Win Right to Holocaust Reparations*, The Jerusalem Post, Jan. 17, 1999, at 3 (News) (noting that "some 230 American citizens held in Nazi concentration camps have been approved for reparations from Germany and will share up to $25 million").

[27] *See* 1998 FCSC Ann. Rep., *available at* http://www.usdoj.gov/fcsc/annrep99.htm; *see also* Gedda.

[28] Civil Liberties Act of 1988, 50 U.S.C.A. app. §§ 1989-1989b-9 (1990).

[29] 50 U.S.C.A. § 1989b-4(a)(1).

> relocation and internment period [beginning on December 7, 1941 and ending on June 30, 1946] –
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> (A) was a United States citizen or permanent resident alien; and
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> (B)(i) was confined, held in custody, relocated, or otherwise deprived of liberty or property as a result of …. [Executive orders, laws, proclamations, directives or other actions by or on behalf of the United States]. … respecting the evacuation, relocation, or internment of individuals solely on the basis of Japanese ancestry; or
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> (ii) was enrolled on the records of the United States Government during the period beginning on December, 1941 and ending on June 30, 1946 as being in a prohibited military zone….[30]

Payments were made to eligible claimants in order of birth date, with the oldest claimants paid first.[31] If an eligible claimant (alive on the date of enactment of the CLA) was deceased at the time of payment, payment then could be made **to a limited number of heirs – surviving spouses, children, or parents**, in that order of preference.[32] If there were no

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[30] 50 U.S.C.A. app., § 1989b-7(2) (emphasis added). Individuals who, "during the period beginning on December 7, 1941 and ending on September 2, 1945, relocated to a country while the United States was at war with that country" were not eligible for payment under the CLA. 50 U.S.C.A. app., § 1989b-7(2), *as amended by* Pub. L. 102-371 § 3, 106 Stat. 1167 (1992).

[31] *Id.*, § 1989b-4(b).

[32] *Id.*, § 1989b-4(a)(8).

surviving spouses, children or parents of the deceased eligible claimant, then the amount of the payment remained in the Civil Liberties Public Education Fund, established under the CLA to "sponsor research and public educational activities, and to publish and distribute the hearings, findings, and recommendations of the Commission [on Wartime Relocation and Internment of Civilians], so that the events surrounding the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry will be remembered, and so that the causes and circumstances of this and similar events may be illuminated and understood…."[33]

Persons of Japanese ancestry who were deported from Latin American countries and placed in United States internment camps – who were not United States citizens or permanent resident aliens – were not deemed eligible for payment under the CLA. In April 1997, a class action lawsuit was filed in the United States Court of Claims on behalf of such persons.[34] The lawsuit was settled on June 10, 1998 when the United States agreed to pay $5,000 to each class member (including only those former internees **living at the time of payment)** or his/her eligible heirs.[35] The class of heirs eligible under the Settlement Agreement was limited to those who would have been statutorily eligible heirs under the CLA: only spouses, children, or parents of deceased internees living as of August 10, 1988, the date of the enactment of the CLA.[36]

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[33] *Id.*, § 1989b-5(b)(1).

[34] *See* Mochizuki v. United States, No. 97-294C (Cl. Ct. 1997).

[35] After a number of motions and a fairness hearing before Chief Judge Smith, an "Opinion and Order" was drafted on January 25, 1999, granting final approval of the settlement. *See* Mochizuki v. United States, 43 Fed. Cl. 97, 1999 U.S. Claims, LEXIS 31 (Cl. Ct. 1999).

[36] *See* Settlement Agreement, dated as of June 10, 1998, Mochizuki v. United States, No. 97-294C (a copy of which is on file with the Special Master), ¶¶ 4, 13.

### 3. War Claims Act (WWII, Korea, Vietnam)

In addition to its program to administer claims pursuant to the Princz Agreement, noted above, the FCSC has administered other programs affording compensation to individuals for torture, suffering, and deprivation at the hands of a foreign government. Specifically, the FCSC has handled, among others, claims pursuant to the War Claims Act[37] for former civilian internees and United States prisoners of war during World War II, and the Korean and Vietnam wars. Section 2004 of the War Claims Act provided payment to civilian American citizens (not in the military office) who were captured or who went into hiding to avoid capture or internment by the Japanese forces during World War II, or by any hostile forces during the Korean and Vietnam wars. Payments were made out of the War Claims Fund and the statute explicitly designated who was entitled to detention benefits if the actual civilian internee had died. The statute relating to World War II internees stated:

> The detention benefits allowed under subsection (b) of this section shall be allowed to the persons entitled thereto, or, in the event of his death, only to the following persons:
>
> (1) Widow or husband if there is no child or children of the deceased;
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> (2) Widow or husband and child or children of the deceased, one-half to the widow or husband and the other half to the child or children in equal shares;
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> (3) Child or children of the deceased (in equal shares) if there is no widow or husband; and

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[37] The War Claims Act was enacted in 1948 to "decide compensation claims for property damage arising out of World War II." *See* Jessica Heslop and Joel Roberto, *Property Rights in the Unified Germany: A Constitutional, Comparative, and International Legal Analysis*, 11 B.U. Int'l L. J. 243, 289 n.258 (1993). The Act was amended several times to address claims arising out of wars waged after its enactment.

(4) Parents (in equal shares) if there is no husband, or child.[38]

The statutes providing benefits to heirs of those internees victimized during the Korean and Vietnam wars were precisely the same, except that parents of the deceased were not eligible claimants.[39]

Section 2005 of the War Claims Act authorized the FCSC to award benefits to prisoners of war during World War II, and the Korean and Vietnam wars. A prisoner had a viable claim if the enemy government breached certain terms of the Geneva Convention, including those related to forced labor, inhuman treatment, or the provision of adequate quantities and quality of food. Once again, the statutes restricted the eligibility of those heirs entitled to payments. In cases of the death of the actual prisoner of war, only spouses, children, and parents could receive payments.[40]

## B. German Programs[41]

### 1. *Bundesentschädigungsgesetz* ("BEG")

The Federal Republic of Germany enacted its first Holocaust Indemnification statute in 1953, revising it in 1956 and again in 1963. The statutes were collectively referred to

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[38] 50 U.S.C.A. app. § 2004(d). Section 2004(f) provided additional separate benefits to those American civilians captured by the Japanese during World War II (or who went into hiding to avoid capture) who suffered injury, disability or death as a result. Subsection 7 of this section expressly restricted disability and death payments to the actual victim or his widow and children. Subsection 5 specifically noted that the **benefits do not, "upon [the] death of the person so entitled, survive for the benefit of his estate or any other person."** § 2004(f)(5) (emphasis added).

[39] *See* 50 U.S.C.A. app. §§ 2004(g)(4), 2004(h)(4).

[40] *See id.*, §§ 2005(d)(4), 2005(e)(4), 2005(f)(4).

[41] The German Indemnification Statutes and Funds designed to compensate victims of Nazi persecution are discussed at length in Annex E ("Holocaust Compensation"). The discussion presented here focuses specifically on these programs' treatment of heirs.

as the "BEG" and provided compensation to certain defined Nazi persecutees.[42] The BEG contemplated payments to heirs of persecutees – but only under very limited conditions and to a narrowly defined class of relatives.

Surviving wives and children were eligible to make "loss of life" claims as survivors of those persecutees killed as a result of Nazi persecution, and to receive compensation in the form of a monthly annuity. Payments terminated upon remarriage of the wife or, in the case of a child, at age seventeen.[43] The deceased persecutee's **dependent** husband, parent, grandparent or orphaned grandchild also were potentially eligible claimants under the BEG, **if such person could establish that he or she was deprived of support from the deceased**.[44] These payments were terminable upon the achievement of reasonable self-support.[45]

The BEG also provided payments to heirs of those eligible victims who filed claims but died before those claims could be adjudicated. Awards for non-property and non-tax losses generally were restricted to "heirs in the immediate family."[46]

### 2. The Hardship Fund

The Federal Republic of Germany established the Hardship Fund in 1980 to compensate needy Nazi victims who had "suffered severe health damages" as a result of Nazi persecution but who had not obtained any prior compensation because they had not met time

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42 *See* Annex E ("Holocaust Compensation"), at Section II(C).

43 *See id.*

44 Additional relatives "in the ascending line for the period of indigence" could also assert claims for loss of life if they could establish that the persecutee was maintaining them at the beginning of the persecution or would be maintaining them if he or she were still alive. BEG, § 17.

45 *Id.*

46 *See* Raul Hilberg, The Destruction of the European Jews (New York: Holmes & Meier 1985), at 1174-75.

deadlines or residency requirements.[47] Section 6 of the Hardship Fund Guidelines explicitly states that "**[h]eirs of persecuted persons are not entitled to compensation**" (emphasis added).

### 3. Article 2 Fund

After its reunification, Germany established the Article 2 fund in 1992. This program provided pensions to needy Nazi persecutees, as defined under paragraph 1 of the BEG, who still had received minimal or no compensation. **Heirs were generally excluded from the fund's distributions**. The Guidelines to the Fund stated: "There is no legal claim to the payments provided according to this agreement. They are of a highly personal nature and are not transferable nor inheritable. However, bridging payments [payments that would have been made to a Nazi victim who died between the period January 1, 1993 through July 31, 1995] can be paid to surviving spouses or children."[48]

### 4. Remembrance, Responsibility and Future Fund

Finally, as discussed elsewhere in this Proposal,[49] on July 17, 2000, the Federal Republic of Germany enacted legislation entitled "Remembrance, Responsibility and Future." The legislation establishes a fund of approximately $5.2 billion to compensate those persons who performed slave or forced labor under the Nazi Regime, or who have claims to property looted by the Nazis. Under the German legislation, **heirs of deceased Nazi victims generally are not**

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[47] *See Section 1 of Guidelines to Hardship Fund,* published in Germany's Federal Register (Oct. 14, 1980) (hereinafter, "Hardship Fund Guidelines"); *see also* Annex E ("Holocaust Compensation"), at Section IID.

[48] *See* Annex E ("Holocaust Compensation"), at Section II(E).

[49] *See* Sections II and III(C); *see also* Annex E ("Holocaust Compensation").

**entitled to receive compensation for their ancestors' slave or forced labor, but are entitled to recover for property claims**.[50]

### C. Other Programs

Other nations, like the United States and Germany, have restricted compensation for torture or suffering to survivors of persecution or to a narrow class of heirs. In 1995, for example, the Austrian Parliament established the National Fund of the Republic of Austria for the Victims of National Socialism. The fund is to assist **surviving** Jewish Austrian victims of the Nazis who have received little or no prior assistance. The only very limited instance in which an award may be distributed to an heir is where the original victim/applicant submitted all relevant information and was approved for payment, but died before the payment was made. The statute does not otherwise specify eligible heirs.[51]

Norway enacted a program in 1999 to compensate those who suffered from "anti-Jewish measures" in Norway during World War II. If the original victim is deceased, only spouses and "direct" heirs are eligible for payment.[52] Similarly, while a general welfare law passed by France in 1946 to compensate war victims suffering from disability contemplated payments to heirs, only parents, children, and spouses were deemed eligible.[53]

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[50] *Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung und Zukunft"* [Law on the Creation of a Foundation "Remembrance, Responsibility and Future"], 17.7.2000, §9 (3), (4).

[51] *See The National Fund of the Republic of Austria for the Victims of National Socialism* (*available at*: http://www.nationalfonds.parlament.gv.at/descr2f.htm (visited Aug. 22, 2000)); *see also* Annex E ("Holocaust Compensation"), at Section IV(A)(1).

[52] *See Compensation to Persons Who Suffered from Anti-Jewish Measures in Norway During World War II* (*available at* http://odin.dep.no/jd/engelsk/publ/veiledninger/012005-990018/index-dok000-b-n-a.html (visited 8/21/00)); *see also* Annex E ("Holocaust Compensation"), at Section IV (A)(8).

[53] *See* Annex E ("Holocaust Compensation"), at Section IV(A)(4). These programs comport with the definition of victims in a United Nations report regarding restitution and compensation for human rights violations, which quotes paragraphs 1 and 2 from the Declaration of Basic Principles of Justice

*(footnote continued on next page)*

## III. PROGRAMS REGARDING COMPENSATION FOR IDENTIFIABLE PROPERTY LOSS

Historical precedent suggests a different treatment with respect to the restitution of specific and identifiable property. In some sense, prior to wrongful plunder and seizure, heirs already possessed a type of future ownership interest in these identifiable properties via the victim's will or the intestacy laws. Restitution programs appear to recognize that heirs, perhaps even very distant ones, would have inherited these property interests.

### A. U.S. Programs

After World War II, several countries sought, through the passage of legislation and the signing of treaties, to return properties that had been seized during the War to their rightful owners. In 1946, for example, the United States amended the Trading with the Enemy Act[54] to release certain property it had seized during World War II belonging to citizens of enemy countries who could establish that they were "deprived of life or substantially deprived of liberty pursuant to any law, decree, or regulation of such nation discriminating against political, racial, or religious groups" by that enemy country.[55] The amendment returned property seized during World War II to the rightful victim owners. The statute also provided for the return of such property to the heirs of the deceased owner, and it defined "heirs" broadly as the original

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for Victims of Crime and Abuse of Power: "Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights…. [T]he term victim also includes, **where appropriate, the immediate family or dependents of the direct victim**…." Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, ¶ 15, United Nations Economic and Social Council E/CN, 4/Sub. 2/1993/8, July 2, 1993 (emphasis added).

[54] The Trading with the Enemy Act was first enacted in 1917 and provided for "the seizure and sequestration through executive channels of property believed to be enemy owned." McGrath v. Manufacturers Trust Co., 338 U.S. 241, 246 n.7, 70 S. Ct. 4, 7 n.7 (1999).

[55] 50 U.S.C.A. app. § 32(a)(2)(C) (1990).

owner's "legal representative … or successor in interest by inheritance, devise, bequest, or operation of law."[56] Thus, consideration was to be given to the owner's will and the estate laws such that distant relatives may have been entitled to distributions.

The FCSC, too, has administered a number of programs aimed at compensation for the nationalization, expropriation or other uncompensated taking of the property interests of United States nationals by foreign governments.[57] In these instances of specific identifiable property losses, where the claimant is under a legal disability or deceased, some of the operative payment statutes specifically contemplate eventual distributions (via one's legal representative/executor) to those individuals who would inherit under applicable estate laws. These statutes provide, however, that the estate laws need not be followed where the payment is not over $1000 and there is no qualified executor or administrator. For instance, in the claims program concerning the nationalization or taking of U.S. nationals' property in Czechoslovakia, the statute states:

> If any person to whom any payment is to be made pursuant to this [title 22 UCSC §§ 1642 et seq.] is deceased or is under a legal disability, payment shall be made to his legal representative, except that if any payment to be made is not over $1,000 and there is no qualified executor or administrator, payment may be made to the person or persons found by the Comptroller General to be entitled thereto, without the necessity of compliance with the requirements of law with respect to the administration of estates.[58]

The language quoted above appears virtually verbatim in the statute dealing with claims under the Yugoslav Claims Agreement of 1948 or any claims agreement concluded on or after

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[56] *Id.*, § 32(a)(1).

[57] *See e.g.*, 22 U.S.C.A. § 1642(l)(d) (1990); 22 U.S.C.A. § 1623(a) (1990).

[58] 22 U.S.C.A. § 1642(l)(d) (1990).

March 10, 1954 between the U.S. government and a foreign government "providing for the settlement and discharge of claims of the Government of the United States and of nationals of the United States against a foreign government, arising out of the nationalization or other taking of property, by the agreement of the United States to accept from that government a sum in en bloc settlement thereof."[59]

### B. German Programs

The Federal Republic of Germany enacted the Federal Restitution Law (BRUEG) in 1957 to compensate Nazi victims for their identifiable property losses. The heirs of deceased property owners could seek restitution.[60] The statute did not restrict or limit the classes of eligible heirs but, rather, contemplated a broad definition of heirs in accordance with German estate laws – "restitutory claims" were those "due to persons entitled to restitution or to their **successors in right**."[61]

### C. Other Programs

In 1999, Great Britain adopted a payment program to provide compensation to victims of Nazi persecution whose property in the country was confiscated by the British government during World War II under "trading with the enemy" legislation and not yet returned or compensated. Eligible heirs are defined broadly, as those "who probably would have owned

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[59] *Id.*, § 1623(a).

[60] *See* Annex E ("Holocaust Compensation"), at Section III(B).

[61] BRUEG, ¶ 2, translated in Nehemiah Robinson, Federal Law on the Discharge of the Restitutory Monetary Obligations of the German Reich and Assimilated Legal Entities, Institute of Jewish Affairs, World Jewish Congress, July 1957 (emphasis added). In 1990, the German Restitution and Property Law was passed to restore property illegally seized by the Nazis located in the former German Democratic Republic to the rightful owners and heirs. Certain heirs (including those named in a victim's will) are eligible under this law. *See* Annex E ("Holocaust Compensation"), at Section

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the property or had an interest in it had it not been confiscated."[62] A property restitution law enacted by Greece in 1949 similarly "called upon all heirs who could lay legitimate claims on abandoned Jewish property and who possessed the requisite documentation" to come forward and claim the property.[63]

## IV. HEIRLESS PROPERTY PROGRAMS

### A. 1954 Amendment to the Trading With the Enemy Act

As noted above, the 1946 amendment to the Trading With the Enemy Act returned certain property the United States seized during World War II to the rightful owners or heirs of those owners.[64] With respect to "heirless property" (property belonging to persons who died and left no heirs), Congress amended the Trading With the Enemy Act in 1954 by adding Section 32(h). This amendment authorized the President to distribute the value of such heirless property, up to $3 million, to specific organizations designated by him, which would then distribute such funds for the rehabilitation and resettlement of **surviving persecutees in need** in the United States. In passing this legislation, Congress made certain choices as to who should receive the proceeds of a limited pool of assets among a group of persecutees. Congress ultimately decided to make the funds available, via distribution by successor organizations,[65] only to surviving persecutees in need in the United States. **No relatives or heirs of persecutees**

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III(B).

62 Annex E ("Holocaust Compensation"), at Section IV(A)(10).

63 *Id.*; *see generally id.* at Section IV(A) (discussing other countries' property restitution programs).

64 50 U.S.C.A. app. § 32(a) (1990).

65 Successor organizations were designated as successors in interest to heirless and unclaimed property of Nazi victims and were, among other things, directed to use the proceeds from the sale of such property to pursue the rehabilitation and resettlement of surviving victims. *See* Annex E ("Holocaust Compensation"), at Section VI(B).

**were deemed eligible.** The legislative history, reported in House Report No. 2451 (July 22, 1954), noted that certain restrictions on eligibility were required because of the limited nature of the fund and the existence of needy surviving persecutees. The report stated:

> [T]he property turned over to successor organizations shall be used for rehabilitation and settlement of persecutees 'on the basis of need'. . .[T]he expenditure with respect to rehabilitation and settlement of persons must be made in the United States.… In view of the limited amount of property available and the demonstrated existence of needy surviving persecutees in the United States, the committee felt that this would be a reasonable limitation to be placed on the transfer of heirless property in the United States.[66]

The legislative history of the 1954 amendment to the Trading With the Enemy Act reflects that Congress looked to other compensation programs disbursing heirless assets to determine how its program should be administered. For instance, the history cites an agreement known as the Five Power Agreement of June 14, 1946,[67] which provided that heirless assets found in neutral countries would be used for the rehabilitation and resettlement of Nazi persecutees, specifically, refugees, those wishing to emigrate, and victims of concentration camps.[68] That agreement made no mention whatsoever of families, relatives, or heirs.

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[66] H.R. Rep. No. 2451, 83d Cong., 2d Sess., at 5 (1954) (amending Sections 32 and 33 of the Trading with the Enemy Act).

[67] *Id.* at 3, App. B. (Excerpting Annex II: Agreement on a Plan for Allocation of a Reparation Share to Non-Repatriable Victims of German Action, from the Five Power Agreement of June 1946).

[68] *See* H.R. Rep. No. 2451, 83d Cong., 2d Sess., at App. B (1954). Ninety percent of these assets were to be used to assist Jewish Nazi persecutees, reflecting "the overwhelming preponderance of Jews among the broad categories of political, racial, or religious persecutees of the Nazis who were unable to claim the assistance of any Government receiving reparation from Germany;" the remaining ten percent were to be used to assist non-Jewish Nazi persecutees. Seymour J. Rubin and Abba P. Schwartz, *Refugees and Reparations*, Symposium on War Claims, Duke J. of Law & Contemp. Prob. (Summer 1951), *reprinted in* The Eizenstat Report and Related Issues Concerning United States and Allied Efforts to Restore Gold and Other Assets Looted by Nazis During World War II: Hearing

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The legislative history also cites the Allied treaties of peace with the satellite countries, specifically with Romania and Hungary, in which the heirless assets of persecuted persons were again to be used for the rehabilitation and resettlement of surviving persecutees only.[69] Similarly, after World War II, the United States, British, and French governments appointed specific successor organizations to take title to heirless property found in their respective military zones of Germany. The organizations were to use the proceeds from this property to assist, once again, surviving victims of Nazi persecution.[70]

The history of the 1954 amendment to the Trading With the Enemy Act was summarized in the Holocaust Victims Redress Act ("HVRA"), signed into law by President Clinton on February 12, 1998 and discussed below. The HVRA noted that:

> In the aftermath of the war, the Congress recognized that some of the victims of the Holocaust whose assets were among those seized or frozen during the war might not have any legal heirs, and legislation was enacted to authorize the transfer of up to $3,000,000 of such assets to organizations dedicated to providing relief and rehabilitation for survivors of the Holocaust.[71]

However, the overwhelming difficulty of determining whether certain property had a rightful owner and whether that owner had a legal heir – both of which were required to deem an asset "heirless" – soon became clear. In 1962, Congress decided to forego such an impossible process, and instead to make a single settlement payment of $500,000 to the Jewish

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Before the House Committee on Banking and Fin. Servs., 105th Cong., 1st Sess. (June 25, 1997) (hereinafter, "June 1997 House Hearing"), at 274. The Five Power Agreement also is discussed briefly at Section III(B) of the Special Master's Proposal.

69 *See* H.R. Rep. No. 2451, 83d Cong., 2d Sess., at App. C (1954).

70 *See* Annex E ("Holocaust Compensation"), at Section VII(B); *see also* Special Master's Proposal, at Section III(B).

71 Holocaust Victims Redress Act (hereinafter, "HVRA"), Pub. L. No. 105-158 (S 1564), 112 Stat. 15 (1998), § 101(a)(3).

Restitution Successor Organization (the "JRSO") to satisfy its statutory obligation of distributing heirless assets to charitable organizations.[72] In his 1997 report, Assistant Secretary of State Stuart E. Eizenstat charted the history of this lump-sum payment, specifically the conclusion reached that attempting to determine "heirless" assets was not a useful endeavor. He related Seymour J. Rubin's proposal in 1958 to simply distribute $1 million to the JRSO:

> Seymour J. Rubin (who had been on the State Department negotiating team in the late 1940s, but since then had as an attorney represented persecutee interests) appeared before the House Committee on Interstate and Foreign Commerce to testify in favor of H.R. 7830 and for providing $1 million. He emphasized in his testimony the difficult burden of producing sufficient proof, due to the circumstances of the Holocaust, to meet the statutory requirements.[73]

Assistant Secretary Eizenstat also quoted a letter, dated July 28, 1961, to U.S. Representative Peter Mack from Monroe Goldwater, President of the JRSO, who supported the lump sum payment of $500,000 as an expedient alternative to a case-by-case determination of heirless assets: "'[T]he processing of individual claims, case by case, is an impossible task. There still remain thousands of claims, many of them small in amount. A number of claims involve complicated facts, and hearings on them would consume more time of the Government and the JRSO than the amounts involved would warrant.'"[74] The HVRA, in its text, sets forth this history of the $500,000 substitute payment made in 1962:

> Although the Congress and the Administration authorized the transfer of such amount [$3,000,000] to the relief organizations referred to in

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[72] *See* Annex E ("Holocaust Compensation").

[73] U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II – Preliminary Study (May 7, 1997), coordinated by then-Under Secretary of Commerce for International Trade Stuart E. Eizenstat and prepared by William Z. Slany, Department of State Historian (hereinafter, the "Eizenstat Report"), at 197; *see also* June 1997 House Hearing, at 269 (testimony of Seymour J. Rubin).

[74] Eizenstat Report, at 198.

> paragraph (3), **the enormous administrative difficulties and cost involved in proving legal ownership of such assets, directly or beneficially, by victims of the Holocaust, and proving the existence or absence of heirs of such victims, led the Congress in 1962 to agree to a lump-sum settlement** and to provide $500,000 for the Jewish Restitution Successor Organization of New York, such sum amounting to 1/6th of the authorized maximum level of "heirless" assets to be transferred.[75]

Thus, the enormous administrative burdens and costs associated with resolving heirship entitlements resulted in the alternative decision, by the United States Congress, to forego such a rigorous process, and instead provide a single settlement payment to a charitable organization to assist **needy survivors**.[76]

### B. Holocaust Victims Redress Act ("HVRA")

As noted above, President Clinton signed the Holocaust Victims Redress Act into law on February 12, 1998.[77] The specific terms of Title I of the Act authorized a payment of $25 million by the United States, over three years, "for distribution to organizations as may be specified in any agreement concluded pursuant to section 102."[78]

As also noted above, the text of the HVRA cited the enormous administrative difficulties and costs involved in ascertaining heirless assets as the reason why Congress decided

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[75] HVRA, § 101(a)(4) (emphasis added). As discussed *infra*, the United States later authorized an additional $25 million payment in lieu of the remaining $2.5 million payment previously authorized, but not disbursed.

[76] As noted *supra*, following World War II, successor organizations also were appointed by the Allies to claim heirless property in the military zones of Germany. Of course, these organizations were then presented with the same administrative obstacles of resolving massive heirship entitlement questions as were created under the Trading with the Enemy Act. Indeed, an agreement was reached in the 1950s in which Germany agreed to pay the successor organizations a bulk settlement in lieu of a case-by-case adjudication of individual restitution claims. *See* Annex E ("Holocaust Compensation"), at Section III(B) (discussing bulk settlement leading to creation of BRUEG statute).

[77] Holocaust Victims Redress Act, Pub.L. 105-158 (S 1564), 112 Stat. 15 (1998).

in 1962 to make a lump-sum payment of $500,000 to the JRSO. The statute went on to confirm the present difficulties in determining heirless assets if attempting current restitution: "**While a precisely accurate accounting of 'heirless assets' may be impossible**, good conscience warrants the recognition that the victims of the Holocaust have a compelling moral claim to the unrestituted portion of assets referred to in paragraph (3) [$2,500,000]."[79] The $25 million authorized by the HVRA represented the present value of the remaining $2.5 million.[80]

To avoid the administrative burdens and costs associated with resolving heirship entitlements, Congress decided, as it had in 1962, to authorize the distribution of the money (in this case, $25 million) to organizations that would assist only needy survivors. It was later agreed that the United States would deposit this money into the International Nazi Persecutee Relief Fund (the "Fund") which was launched at the December, 1997 London Conference on Nazi Gold and maintained at the Federal Reserve Bank of New York. The Fund was created for willing donor countries to provide relief to **survivors of Nazi persecution** who had received little or no compensation. It was not contemplated that the Fund would assist heirs of Nazi victims. The Fund permitted the donor country to decide who would spend the donation and how such money would be spent.[81] On September 29, 1998, the United States deposited $4 million into the Fund as the first installment of its three-year $25 million pledge.[82]

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78 *Id.*, § 103(a).

79 *Id.*, § 101(a)(6) (emphasis added).

80 *Id.*, § 101(b)(2). In defining its purpose, the statute states, in relevant part: "To authorize the appropriation of an amount which is at least equal to the present value of the difference between the amount which was authorized to be transferred to successor organizations to compensate for assets in the United States of heirless victims of the Holocaust and the amount actually paid in 1962 to the Jewish Restitution Successor Organization of New York for that purpose."

81 *See* 1999 WL 14067583, *Relief for Holocaust Survivors in E. Europe, former Soviet Union*, Press Statement of United States Department of State, Mar. 31, 1999 (hereinafter, "State Department Press

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The Department of State then solicited proposals from various charitable organizations to administer this $4 million. In its solicitations, the State Department made clear that the United States intended that "its contribution be put to use in providing relief and assistance to the most needy survivors of the Holocaust, and related programs. For the purposes of this initial tranche, our priority objective is that the $4 million be dedicated to income support to the neediest double victims (i.e., victims of both Nazism and Communism) in Central and Eastern Europe."[83] On March 31, 1999, the State Department announced that the United States would be allocating the $4 million to the Claims Conference, to be spent on a newly created "Holocaust Victims Emergency Needs Assistance Program" for victims of Nazi persecution who reside in Eastern Europe and the former Soviet Union. The main thrust of the program would be to bring food, medicine and clothing to **needy survivors** through local aid networks, including the "*Hesed*" program.[84] No heirs would be compensated.

## V. CONCLUSION

Guided by the programs described above, as well as the mandates of United States class action case law to minimize administrative costs and maximize the meaningful benefits to members of the settlement classes, the Special Master has had to make certain difficult decisions. As discussed more fully in Section III of the Proposal, the Special Master recommends that:

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Release"); *see also* Marilyn Henry, *Half of Nazi Victims Aid Funds Not Yet Distributed*, The Jerusalem Post Internet Edition, June 5, 2000 *available at* http://www.jpost.com/Editions/2000/06/04/Jewish World/Jewish World.7753.html.

82 *See* 1998 Annual Report of the Conference on Jewish Material Claims Against Germany, Inc. (the "Claims Conference"), at 25.

83 *Id.*

84 *See* State Department Press Release; *see also* Special Master's Proposal, at Section III(B) (citing 1998 and 1999 Claims Conference Annual Reports).

(i) with respect to the Deposited Assets Class, the heirs of eligible claimants to Swiss bank accounts, as defined in the proposed rules of the Claims Resolution Tribunal (annexed as Exhibit 5 to the Proposal), be entitled to recover; and (ii) with respect to the remaining four classes, the first tranche of direct payments from the Settlement Fund be limited primarily to Holocaust survivors themselves.[85] As further discussed in Section III of the Proposal, as an additional benefit to both survivors and heirs who are members of all of the settlement classes, the Special Master proposes a grant of $10 million from the Settlement Fund to establish and support the Victim List Foundation**.** The objective of this Foundation will be to compile and make widely accessible – for research and remembrance – the names of all of the Victims or Targets of Nazi Persecution, both those who survived and those who perished. If, after determination of the "Stage 1" payments (including payment of fees and administrative expenses relating thereto), there are assets remaining in the Settlement Fund, it may then be possible to make additional distributions to survivors and, perhaps, needy surviving spouses and children of survivors. At that time, it also may be possible to allocate a portion of the remaining Settlement Fund to some of the proposed cultural, memorial or educational projects that have been submitted to the Special Master.

The Special Master believes that this treatment of heirs is both legally and morally appropriate. As explained elsewhere in this Proposal, the heirs of a person who placed specific, identifiable funds in a Swiss bank account and was murdered or has died before those funds were returned should be able to lay claim to those family funds. The other four settlement

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[85] As more fully described in Section III(C) of the Proposal, if a member of Slave Labor Class I and II, or the Refugee Class, alive as of February 15, 1999, has died since that date, certain of his/her heirs may be eligible to receive benefits under this settlement. As further described in Section III(C), the first tranche of direct payments from the Settlement Fund designated for members of the Looted

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classes, unlike the Deposited Assets Class, do not seek the return of still-identifiable property; their claims are of a more personal and less tangible nature. Although the Special Master recognizes that heirs of Nazi victims themselves have suffered greatly for the crimes inflicted upon their relatives, and that communal institutions also have sustained tremendous losses, he is constrained by the limited nature of the Settlement Fund to afford first priority to survivors of Nazi persecution. By limiting the "Stage 1" direct payments primarily to survivors, the Special Master hopes to ensure that the lives of eligible survivors are benefited meaningfully by this settlement.

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Assets Class is limited to the neediest members of this class.