

6. HOLOCAUST RESTITUTION LITIGATION IN THE UNITED STATES AND OTHER CLAIMS FOR HISTORICAL WRONGS – AN UPDATE

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I. INTRODUCTION

In the 2002 edition of the ACLU Report, the authors of this update summarized the lawsuits filed in the United States seeking financial restitution from European and American corporations for their Holocaust-era financial activities. To date, over \$8 billion has been pledged as a result of the Holocaust-era litigation, with elderly Holocaust survivors beginning to receive payments in the latter half of 2001. Since 1996, when the first Holocaust-era lawsuit was filed, other historical claims have arisen which have adopted the Holocaust restitution movement as a model. All are a direct result of the successes achieved in the Holocaust restitution arena.

II. HOLOCAUST RESTITUTION LITIGATION IN THE UNITED STATES

A. CASES AGAINST EUROPEAN BANKS

1. Swiss banks litigation

The modern era of Holocaust asset litigation began in 1996- 1997 with the filing of three class action lawsuits against the Swiss banks in federal district court in Brooklyn, New York. *In re Holocaust Victim Assets Litigation*, Case No. CV-96-4849 (E.D.N.Y 1996.)

In August, 1998, the banks settled the class actions for \$1.25 billion. The settlement was finalized in July 2000, with the largest proportion -- \$800 million -- being allocated to pay Holocaust survivors or heirs with claims to long dormant bank accounts deposited with the Swiss banks prior to, or during, World War II. The remaining \$425 million was designated for both Jewish and non-Jewish slave laborers, Jewish refugees turned away at the Swiss border, and needy survivors worldwide. Payouts, however, have been slower than expected. By August 2003, five years after the settlement, approximately \$125 million had been distributed out of the \$800 million allocated for the dormant account claims. It now appears likely that funds allocated for dormant accounts will not be fully distributed, and Judge Edward Korman, the federal judge presiding over the settlement, will have to decide how to allocate the undistributed funds. This has led to some controversy. Some believe the funds should go only to actual Holocaust survivors to help take care of their needs in old age (apparently regardless of whether those survivors had any connection to the Swiss banks), while others believe the funds should be invested in Jewish cultural projects and for Holocaust education.

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Current information on the Swiss banks settlement is available at www.swissbankclaims.com.

2. German and Austrian banks litigation

German and Austrian banks maintained close business relationships with the Nazis, and profited handsomely from such dealings. Beginning in 1998, several class action lawsuits were filed against German and Austrian banks, charging them with profiteering from the looting of gold and personal property of Jews.

In March 1999, the lawsuits were consolidated as *In re Austrian and German Bank Holocaust Litigation* in the Southern District of New York before Judge Shirley Wohl Kram. Case No. 98 Civ. 3938 (S.D.N.Y. 1999). That same month, Bank Austria and its recently-purchased subsidiary, Creditanstalt, settled the lawsuits against them for \$40 million.¹ As of June 2001, no moneys had yet been distributed from the settlement. No new information is available as of this writing. The current status of the Austrian banks settlement is available at www.austrianbankclaims.com.

Litigation against the German banks continued. However, the “rough justice” settlement reached with the German government and industry in December 1999, and finalized in July 2000, (*see* discussion below) also included the settlement of the claims made against the German banks.

3. French banks litigation

After the Nazis conquered France, French banks began to confiscate the accounts of their Jewish depositors in a process known as “Aryanization” of the accounts.

In late 1997 and early 1998, two class actions were filed against a half dozen French banks in federal court in New York. In July 1999, Barclays settled for \$3.6 million. The other banks declined to settle, and filed

motions to dismiss. The motions were denied, Memorandum and Order, dated Aug. 31, 2000, *Bodner v. Banque Paribas*, Case No. 97 CV 7433 (E.D.N.Y. 1997), and, as a result, a settlement was achieved early in 2001 during the last days of the Clinton Administration.

The banks agreed to establish two funds to compensate claimants for assets seized by the French banks during the occupation. One fund, with no limits, will pay claimants who have documentation or some other substantiated proof of wartime assets held in French banks. The second fund, capped at \$22.5 million, will compensate claimants with less proof, known as “soft claims,” who will present their case to a commission. Each of the claims approved by the commission will be paid at least \$1500.

As of summer 2003, over 6000 claims have been made for seized wartime accounts, of which almost half have been recommended for payment. Approximately 60% of the \$22.5 million has been paid out.

Current information on the French banks settlement is available at www.civs.gouv.fr.

B. CASES AGAINST EUROPEAN INSURANCE COMPANIES

In the time before the two world wars, insurance policies and annuities were popular investment vehicles in Europe. Jews in pre-war Europe often purchased insurance, and an insurance policy was known as a “poor man’s Swiss bank account.”

In 1997, a class action suit was filed in the Southern District of New York against twenty-five European insurance carriers (many of which were later dismissed due to the German settlement, discussed below) on behalf of all those with claims to unpaid Holocaust- era insurance policies. Shortly thereafter, the National Association of Insurance Commissioners, composed of the insurance

regulators in all fifty states, created a working group on Holocaust and insurance issues.

Prodded by the commissioners from California, New York and Florida, which have the largest concentration of Holocaust survivors in the United States, five of the European insurers formed (and funded) the International Commission on Holocaust Era Insurance Claims, commonly known as ICHEIC, headed by former U.S. Secretary of State Lawrence Eagleburger.²

ICHEIC was intended to be a non-adversarial alternative to the American litigation brought against the insurance companies, and correspondingly, the class action suit seemed to have stalled after its creation. In February 2000, after numerous delays, ICHEIC announced that it would begin a two-year claim process to locate and pay unpaid Holocaust-era insurance policies.

Unfortunately, ICHEIC's performance has been mixed. By 2003, ICHEIC had run up approximately \$40 million in expenses, with actual payments to Holocaust survivors or heirs for unpaid Holocaust-era insurance policies being roughly the same amount. Many claimants who submitted claims to the European insurers participating in ICHEIC also had their claims rejected, or the amounts by the European insurers to settle the claims were unreasonably small.

On the litigation front, the various Holocaust-era insurance lawsuits were consolidated before federal judge Michael Mukasey in Manhattan. Following the consolidation, the insurers moved to dismiss on the theory of *forum non conveniens*. In September 2002, Judge Mukasey wrote a lengthy decision denying the dismissal and making it clear that ICHEIC, at least from a judicial standpoint, is an utterly "inadequate forum" for the resolution of these policies. *In Re: Assicurazioni Generali SpA Holocaust Insurance Litigation*, MDL 1374, M21-89 (E. Dist N.Y. Sept, 25, 2002)(available at 2002 WL 31133027). It looks as if these seemingly

stalled suits are about to become very active again, after an almost three-year hiatus.

In the meantime, several states had also passed statutes requiring the European insurance companies operating in their states to disclose names of their prewar policyholders to inform potential claimants of potential rights to payment upon a prewar policy. The statutes of both Florida and California were challenged by the insurers on several due process grounds, and were struck down at the trial court level. The Eleventh Circuit Court of Appeals affirmed the trial court's decision nullifying the Florida statute. The Ninth Circuit, on the other hand, found the California disclosure statute constitutional. The U.S. Supreme Court granted certiorari. In June 2003, in a 5-4 decision, the Supreme Court decided in *American Ins. Ass'n v. Garamendi* that the California statute was an unconstitutional infringement on the federal government's exclusive power to conduct foreign affairs. *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 71 U.S.L.W. 4524 (2003).

American Ins. Ass'n became the first Holocaust restitution case to be decided by the U.S. Supreme Court. In the constitutional law arena, the decision also significantly expands the foreign policy preemption power of the federal government since the majority decision, written by Justice Souter, found that the California statute must fall even though no specific federal law, executive agreement or treaty exists which conflicts with the California statute.

As of summer 2003, the consolidated litigation before Judge Mukasey continues, while, on a parallel track, ICHEIC is processing prewar insurance claims through a non-litigation claims process. The current status of the ICHEIC claims settlement process is available at www.icheic.org.

C. CASES STEMMING FROM NAZI SLAVE LABOR AND LOOTED PROPERTY

Between eight and ten million people were forced to work as laborers in factories and camps in Germany, Austria, and throughout occupied Europe during World War II. Approximately 1.25 million of these laborers – now elderly – are alive today.

1. German Slave Labor Litigation

The reparations program to Jewish victims of Nazi persecution promulgated by West Germany specifically excluded payment for slave labor. Eventually, close to forty separate lawsuits were filed in various courts throughout the United States against numerous German companies which used slave labor during World War II.

On September 13, 1999, five of the lawsuits were held to be precluded by treaties entered into by Germany and the Allied powers after the war, and thus were dismissed. The dismissals were appealed, but eventually became moot when German government and industry, in December 1999, entered into a settlement with the plaintiffs’ lawyers and representatives of Jewish organizations to resolve all slave labor and related claims for DM 10 billion (approximately \$4.8 billion). The Clinton Administration acted as an interlocutor in the negotiations leading to the settlement. In return for the payment of the DM 10 billion, Germany and its industry obtained “legal peace”; henceforth, no case could be successfully brought in an American court against any German entity or the German government for World War II-related claims. If a lawsuit is brought, the federal executive is obliged, under a final agreement entered into between President Clinton and German Chancellor Schroeder in July 2000, to file a

“Statement of Interest” in the case urging dismissal of the suit.

Under the contemplated scheme for distribution, those forced by the Nazis to work to death – former Jewish slave laborers who are still alive, and numbering approximately 240,000 – are entitled to receive approximately \$7,500. Former forced laborers – primarily non-Jews, estimated to number today approximately 1 million – are awarded \$2,500 each.

Keeping in mind that the primary intent of the Fund was to compensate former slaves, DM 8.1 billion was allocated for this purpose. DM 1 billion was allocated for property losses, which included (1) payments to persons who suffered property losses at the hands of the Nazis but who, for technical reasons, could not collect under existing German indemnification programs and (2) payments for unpaid Holocaust insurance policies issued by German insurance companies. The remainder was set aside for various social and humanitarian projects to help needy survivors and for Holocaust education.

Tibor (“Ted”) Deutch, a Holocaust survivor now living in California, rejected the settlement and brought suit arguing that he should be able to pursue his action against his wartime German master rather than accept the \$7500 settlement. In January 2003, the Ninth Circuit upheld the federal district court’s dismissal of his suit, finding that the German Fund established through the settlement remains the exclusive means by which relief could be granted to still-living victims of Germany’s wartime slave labor and related policies. *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003).

Current information about the status of German Fund’s settlement process is available at www.claimsconf.org for Jewish claimants and at www.compensation-for-forced-labour.org for non-Jewish claimants.

2. Austrian Slave Labor Litigation

Following the German precedent, the Austrian government and Austrian industry likewise agreed to compensate its former slave laborers and other victims of its wartime policies. Earlier, Austria had agreed to compensate former slaves and forced laborers, setting aside approximately \$410 million, and to supplement those payments with an additional \$112 million for pension payments to Jewish victims who fled Austria as children. Under a preliminary agreement reached in October 2000, Austria also pledged a total package of \$500 million to settle claims for Holocaust-era property seizures of various types.

In February 2001, a month after the final Austrian deal was put together, a suit was filed in federal court in Los Angeles by some of the looted property claimants against Austria seeking to void the deal. This case, *Whiteman v. Austria*, was transferred to federal court in Manhattan and dismissed on the ground of sovereign immunity. The district court held that the Foreign Sovereign Immunities Act of 1976 (“FSIA”) barred the claims against Austria. In August 2003, however, the Second Circuit reversed the dismissal, holding that the FSIA could not be applied retroactively. It remanded the case (together with a similar case against Poland – *see infra*) back to the federal trial court for a factual determination of the whether U.S. State Department’s position vis-à-vis Austria’s sovereign immunity as of the time the claims first became ripe (*i.e.*, in the immediate aftermath of the war) would bar these claims. *Garb v. Republic of Poland*, 2003 WL 2189843 (2nd Cir. 2003). Austria, like Germany before it, is presently withholding payments on this portion of the settlement because of this pending litigation.

For the slave labor claims, all lawsuits against Austrian firms were dismissed by the class action lawyers, and so payments to the laborers first went out in mid-2002. Over

10,000 former slaves have already received their one-time payout of \$7,000.

3. French Railroad Death Transport Litigation

In 2000, a suit was filed against the French national railroad, Societe Nationale des Chemins de fer Francais (“SCNF”), for its role in transporting Jews in cattle-cars from both occupied and unoccupied France to death camps in Germany and Eastern Europe. The case was dismissed by the federal judge in Brooklyn on the ground that SNCF is owned by the French government and therefore immune from suit under the FSIA. In June 2003, however, the Second Circuit overturned that decision, finding that because the actions of SNCF predated the 1976 statute, the FSIA cannot be applied retroactively. *Abrams v. Societe Nationale des Chemins de fer Francais*, 332 F.3d 173 (2nd Cir. 2003). Rather, the appellate court remanded the case to the federal trial court to determine whether the plaintiffs in the case “could have legitimately expected to have their claims adjudicated in the United States prior to the FSIA’s enactment.” *Id.* at 186. The *Abrams* decision, in turn, led another panel of the Second Circuit to likewise remand the sovereign immunity dismissals of the Holocaust real property lawsuits against Austria and Poland (*see supra* discussion of *Whiteman v. Austria*).

D. **CASES REGARDING ARTWORKS LOOTED BY THE NAZIS**

Between 1933 and 1945, the Germans stole from both museums and private collections throughout Europe approximately 600,000 artworks. After the war, the art was disseminated worldwide, with much of it coming to the United States through the world’s largest art market in New York.

Looted art, unlike other areas of Holocaust restitution litigation, has necessarily been approached on an *ad hoc*, case-by-case basis, rather than through class action litigation. And even though American legal rules involving stolen art may appear to be clear (“no one, not even a good faith purchaser can obtain good title to stolen property”), the actual litigation of Holocaust art claims is, on the whole, complex, time-consuming and expensive.

Between 1998 and 2000, a number of Holocaust looted art cases were settled short of trial, with the current possessor of the disputed object either returning the object to the heirs of the original Jewish owner or some agreement being worked out where the parties agreed to sell the object and share the proceeds.

The most notorious Holocaust looted art case, however, still remains unresolved. The dispute involves a painting entitled *Portrait of Wally* (“Wally”) by the Austrian modernist painter Egon Schiele. The painting was on loan from Austria to New York’s Museum of Modern Art (MoMA) when, in December 1997, it was seized by New York State criminal authorities on the ground that the painting was stolen property, originally looted by the Nazis from a Jewish collector. In September 1999, the New York Court of Appeals, the highest court in New York State, held that painting cannot be seized and must be returned to Austria. *People v. The Museum of Modern Art*, 93 N.Y.2d 729 (1999)

Within hours of the New York court decision, the U.S. Attorney for Manhattan obtained an emergency warrant allowing the United States Customs Service in New York to seize *Wally*, on the ground that the painting was stolen property knowingly imported into the United States in violation of the U.S. National Stolen Property Act. 18 U.S.C. Section 2314 (2000). In April 2002, federal judge Michael Mukasey upheld the customs seizure, and denied defendants’ motion to dismiss. *Portrait of Wally*, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. 2002). Austria will now be forced to go to trial to determine which competing

claimant is the rightful owner *Wally*. Once decided, the painting, now in storage with the U.S. Customs Service, will be turned over to its proper owner.

Austria is also a party to another infamous Holocaust looted art lawsuit. The lawsuit involves six paintings of Austrian painter Gustav Klimt, and are claimed by the niece of the prewar Jewish owner of the paintings. Austria asserts that the paintings do not constitute Nazi looted art but lawfully came in its possession through provisions of a will executed by the Jewish owner prior to the war.

In August 2000, Maria Altmann, the elderly niece of the prewar owner, filed suit in federal court in Los Angeles seeking return of the paintings. Austria claimed sovereign immunity. Under the FSIA, a foreign state is not immune from suit in an action concerning (1) property taken in violation of international law, (2) where that property is owned or operated by an agency or instrumentality of the foreign state, and (3) that agency or instrumentality is engaged in commercial activity in the United States. FSIA, 28 U.S.C. Sec. 1605(a)(3) (known as the “takings in violation of international law” exception). The federal trial judge found that the factual allegations made by Altmann met all three requirements of the exception.

On appeal, the Ninth Circuit, both in a panel decision and in an *en banc* hearing, affirmed. *Altmann v. Republic of Austria*, 317 F.2d 954, amended 327 F.3d 1246 (9th Cir. 2003). Austria, with the support of the U.S. government, is now seeking to have the U.S. Supreme Court hear the case.

The latest art case involves a Picasso work titled *Femme en blanc* and estimated to be worth approximately \$10 million. Thomas Bennisson, heir of the original owners and a law student at Boalt Hall, filed suit last year in California state court in Los Angeles seeking recover the painting which had hung on his grandmother’s wall in Berlin home before the war. In June 2003, the California state trial

court dismissed the case on jurisdictional grounds, holding that it should be filed in Chicago, where Marilyn Alsdorf, the current owner who bought the painting in 1975 for \$357,000 from a New York art dealer, resides.

E. EASTERN EUROPEAN RESTITUTION PROGRAMS AND U.S. LITIGATION

Jews in Eastern Europe during World War II were not only murdered and but also had their property stolen. The theft included personal possessions, land, houses, and businesses. A few of the more well-to-do also lost valuable artworks.

After the war, the real estate and artworks were either nationalized by the new Communist regimes or fell into the private hands of the local non-Jewish population. After the fall of the Berlin Wall and the advent of privatization in Eastern Europe, the nationalized real estate began to revert to private hands. The new owners, however, were not the prewar Jewish survivors or their heirs, but rather the emerging capitalists of post-Communist Eastern Europe. Concomitant with the push for restitution of lost Holocaust-era personal property, described above, came also the call to likewise reconstitute the lost Holocaust-era real property, valuable artworks and other cultural objects to the Jewish families who owned such properties before the war. Many of the Jewish families however, no longer reside in Eastern Europe, with family members emigrating in the last half-century to the United States, Israel, Western Europe and other parts of the world.

The various former Eastern-bloc countries grudgingly came to accept that they need to examine the issue of restitution of lost Jewish property. The process, however, has been slow and uneven. For example, Slovakia amended its postwar compensation laws allowing even those survivors who live abroad to receive partial compensation for lost real

estate. In contrast, the Czech Republic seems more recalcitrant. The Czech legislature has now extended the deadline for claims on Nazi-looted artwork amid accusations that whenever these claims are filed, the government responds by declaring the artwork a national treasure that cannot be removed from the country. Romania's government also has been less than responsive to claims for artwork or property restoration: 188,000 claims have so far gone unanswered.

Among the worst records on restitution is Poland – particularly appalling since nearly half of all Jews murdered by the Nazis were from that country, and their losses are estimated in excess of \$10 billion. Poland was lambasted by the U.S. Congress in July 2002 for its lack of progress. There are currently no Polish legislative provisions for the return of Nazi-looted property, and no claim has yet succeeded in a Polish court.

A case filed in a U.S. federal court in Brooklyn by Jewish survivors from Poland now living in the United States seeks return of lost Jewish prewar properties. The case, *Garb v. Poland*, was initially dismissed by Judge Edward Korman (who also handled the Swiss banks case and is supervising its settlement), on the ground that Poland possesses sovereign immunity to the lawsuit. In August 2003, the Second Circuit reversed, along with a similar decision in a case against Austria (discussed *supra*). *Garb v. Republic of Poland*, 2003 WL 2189843 (2nd Cir. 2003). Following the lead of the Second Circuit panel deciding the suit against the French railroad SCNF for its wartime activities (*see supra* discussion of *Abrams v. SCNF*), the *Garb* panel remanded the case back to Judge Korman to determine whether Poland would have enjoyed sovereign immunity in the immediate postwar years when the property was nationalized.

Earlier, however, the Seventh Circuit dismissed a similar suit brought against Poland by another set of Jewish survivors from Poland. The Seventh Circuit, like Judge Korman, solely looked to the FSIA to decide the case, without

considering whether Poland would have enjoyed immunity when it nationalized the property after the war and prior to the enactment of the FSIA. *Haven v. Polska*, 215 F.3d 727 (7th Cir. 2000).

The conflicting federal *Garb* and *Haven* decisions, seemingly creating a split in the circuits, may result in another U.S. Supreme Court case being issued dealing with Holocaust restitution.

1. The Presidential Commission on Holocaust Assets in the United States and the Hungarian “Gold Train” Litigation

One recent development in the Holocaust restitution arena has been an examination of the activities of both the United States government and American industry during and after the war.³ While the United States has been the prime mover behind the Holocaust restitution settlements, forcing European governments and European industry, to confront its wartime past, it has not applied the same kind of scrutiny towards its own behavior. American corporations, both before and after the entry of the United States into the war, did business in Nazi Germany and Nazi-occupied Europe. The U.S. government also has been implicated in some tainted postwar actions.

In June 1998, Congress established the Presidential Commission on Holocaust Assets in the United States (“PCHA”). The PCHA’s mandate, however, was limited. It would investigate the fate of Holocaust victims’ assets which came into the possession of the U.S. government after the war. The Commission, however, was not charged with locating and returning any assets. Its job was only to write history, and not to redress wrongs. Moreover, the wartime dealings of American companies in Nazi Europe were not examined by the PCHA.

Unfortunately, the PCHA never even fully completed its historical task. Its final report, issued in December 2000, failed to answer many outstanding issues specifically assigned to it.⁴ Foremost among them was determining how much Nazi-looted art made its way to the United States, the largest art market in the world. The PCHA also failed to meet one of its primary goals: to assemble a database of Holocaust-era assets still present in the United States.

One of its findings, however, led to a new kind of lawsuit: litigation against the United States government seeking Holocaust restitution. In October 1999, the PCHA issued a preliminary report on the so-called Hungarian Gold Train.⁵ The report told the story of a forty-two wagon freight train loaded with goods stolen by the Germans and their Hungarian allies from the Jews of Hungary. The Hungarians attempted to send the goods to Nazi Germany in advance of the Soviet Army’s impending entry into Hungary. En route, the train was captured by the U.S. Army and its assets were transferred to a storage facility in American-occupied Austria. Thereafter, the goods were parcelled out between refugee organizations, the postwar Austrian government and the U.S. Army. Some U.S. military personnel also requisitioned goods from the train for their personal use. None of the train’s loot was ever returned to its individual owners, the Hungarian Jewish community or to the postwar Hungarian government.

Based upon the findings of the PCHA study, survivors from Hungary and heirs of victims filed suit against the United States. The complaint alleged three causes of action: 1) an unconstitutional taking under the Fifth Amendment; 2) breach of implied contract of bailment; and 3) violation of international law. The U.S. government moved to dismiss the suit, claiming lack of jurisdiction, failure to state a claim, and that the claims were time-barred. On August 28, 2002, federal judge Patricia Seitz of the Southern District of Florida issued

her initial ruling. Although the judge dismissed the Fifth Amendment claim on the ground that the plaintiffs were not American citizens (at least not at the time of the event), she refused to dismiss the rest of the lawsuit. In a significant victory for the plaintiffs, Judge Seitz held that the other two causes of action were not time-barred. Applying the principle of equitable tolling to plaintiffs' claims -- based upon allegedly wrongful acts dating back more than fifty years -- she held that plaintiffs should be able to proceed with them because the U.S. government, until the issuance of the PCHA "Gold Train" report, had kept the plaintiffs ignorant of vital information necessary to pursue their claims "without any fault or lack of diligence on their part."⁶ *Rosner v. United States*, 231 F. Supp.2d 1202, 1208-09 (S.D. Fla. 2002). She also found that the U.S. was not immune from the lawsuit and that the political question doctrine did not bar these claims.

Having survived a motion to dismiss, plaintiffs were now granted the right to conduct jurisdictional discovery, and Judge Seitz gave plaintiffs' lawyers access to all records in the custody of the Archivist of the United States pertaining to the Hungarian gold train saga. As of summer 2003, the litigation continues.

III. THE LEGACY OF HOLOCAUST RESTITUTION LITIGATION: OTHER LAWSUITS FOR HISTORICAL WRONGS

A. WORLD WAR II-ERA CLAIMS AGAINST JAPANESE COMPANIES

The suits for Holocaust restitution led to claims being filed against Japanese corporations for their use of captured soldiers and civilians as slaves during World War II. Aging victims of Japan's wartime activities began filing their lawsuits in American courts only after seeing

the successes achieved by their counterparts in the Holocaust litigation.

Approximately 25,000 American prisoners of war were shipped to Japan and Japanese-occupied Asia to work for private Japanese companies. Additionally, the Japanese captured tens of thousands of British, Canadian, Australian and New Zealander soldiers, who also toiled as slave laborers for Japanese industry, along with local Chinese, Korean, Vietnamese and Philippine civilians. These companies are now some of the largest corporate concerns in the world: Mitsubishi, Mitsui, Nippon Steel, Kawasaki Heavy Industries, and at least forty other Japanese corporations.⁷

The first World War II Pacific Theatre restitution lawsuit was filed in July 1999, by former POW Ralph Levenberg against Nippon Sharyo Ltd. and its U.S. subsidiary. *Levenberg v. Nippon Sharyo Ltd*, Case No. C-99-1554 (N.D. Cal., filed July 16, 1999).

Eventually, victims of Japanese slave labor filed over two-dozen lawsuits against numerous Japanese corporations that had employed slave labor during the war.

On September 21, 2000, federal judge Vaughn Walker of the Northern District Court of California dismissed the lawsuits filed by American, British, Australian and New Zealand POWs. *In re World War II Era Japanese Forced Labor Litigation*, 114 F.Supp.2d 939 (N.D. Cal. 2000). The court held that the United States, in the 1951 Peace Treaty with Japan, waived, on behalf of itself and its nationals, all claims arising out of actions taken by Japan and its nationals (including private Japanese corporations) during the war. In September 2001, Judge Walker also dismissed the claims of Chinese, Filipino and Korean civilian internees as time-barred.

In January 2003, the Ninth Circuit affirmed. In a consolidated appeal also involving the German slave labor litigation, the unanimous panel, in an opinion by Judge Stephen Reinhardt, found that a California

statute specifically allowing suits in California courts by former slave laborers of Nazi Germany and its wartime allies, was unconstitutional.⁸ Just as a former German wartime slave could no longer pursue his claims against his German master after establishment of the U.S.-government sponsored German slave labor settlement (see discussion *supra* of the *Deutsch* claim), so a former slave of Japan's wartime industry no longer could pursue his claims after the 1951 Peace Treaty with Japan.

Critical to the court's ruling was the appearance of the United States government in the litigation.⁹ In a Statement of Interest filed with the court, the United States asserted that the 1951 Peace Treaty barred all such claims. The position taken by the U.S. government in the Japanese litigation differed significantly from the position it took in the Holocaust restitution litigation. In the Holocaust slave labor litigation, for example, the U.S. government only advised courts that negotiations to compensate the former slave laborers of the German companies were under way. For the Japanese slave labor claims, however, the U.S. government not only sided with the Japanese companies, but, to date, has failed to press Japan and its private industry to recognize the same type of claims that it forced Germany and its private industry to resolve.

Former sex slaves of the Japanese military during, and prior to, World War II, from China, Taiwan, South Korea and the Philippines (euphemistically known as "comfort women") sued Japan in federal district court in Washington D.C. seeking compensation for their forced sexual slavery and for torture. The district court dismissed the suit, and the D.C. Court of Appeals, in June 2003, affirmed.¹⁰ The appellate court held that even though the trade of prostitution may amount to a commercial activity, exempt from sovereign immunity under the FSIA, the complained of acts took place before enactment of the federal law. The court also decided that the FSIA was not retroactively applicable. Last, the court

declined to apply the doctrine of *jus cogens* to make the activities of Japan fall under the implied waiver exception of the FSIA.

As of summer 2003, it appears that the restitution movement against the Japanese companies (and Japan) is not achieving the same favorable results as those achieved in the restitution movement launched against the European companies (and European governments) for their wartime activities.

B. OTHER WORLD WAR II CLAIMS

Attempts to emulate the American Holocaust restitution litigation model in courts of European nations have not been successful.

Survivors of the massacre of a Greek village that had attempted to resist Nazi occupation brought a lawsuit in Germany seeking compensation. In June 2003, this claim was dismissed from Germany's highest criminal court on the grounds that Germany had already paid sufficient compensation to Greece.¹¹ An 82 year-old French Holocaust survivor sued SCNF, the French national railroad, for the railroad's involvement in the deportation of his parents to the death camps, where they perished. The suit was modeled on the American SCNF litigation discussed above. However, unlike in the American lawsuit, the plaintiff sought a symbolic payment of one euro. In May 2003, the French court dismissed the lawsuit.

The last lawsuit, filed in a Swiss court in Geneva by a group of Roma, commonly known as Gypsies, charged IBM with complicity in the genocide of the European gypsies during World War II. The claims stem from allegations made against IBM in a 2001 book, *IBM and the Holocaust*, by journalist Edwin Black, claiming that IBM had supplied the machinery used by the Nazis to count and track European victim groups for extermination. In February 2003, plaintiffs won an initial victory when the Swiss trial judge declined to dismiss the lawsuit, In May 2003, however, the

judge dismissed the lawsuit for lack of jurisdiction.

**C. INSURANCE CLAIMS
ARISING OUT OF THE
ARMENIAN GENOCIDE**

During the Turkish Ottoman Empire, Armenians and other minorities purchased insurance policies from European and American insurance companies that had marketed their policies in the region. Many of the Armenian purchasers perished in the Armenian genocide during and after World War I. Their relatives, some of whom survived the genocide as young children but are now quite elderly, sought payment from the insurers, claiming that payments was never made.

A lawsuit filed on these insurance claims, *Marootian v. New York Life Ins. Co.*, Case No. 99-12073 (C.D. Cal. 1999, filed Jan. 17, 2000), was brought by twelve elderly Armenians, all but one of whom resides in the United States, against the American insurance giant New York Life Insurance Company. New York Life offered to settle the case \$15 million. While the media initially reported that the case settled for that amount, plaintiffs ultimately rejected New York Life's offer as being insufficient. Failing to settle, New York Life attempted to have the case dismissed on various procedural grounds. In December 2001, federal judge Christina Snyder in Los Angeles denied New York Life's dismissal motion. In June 2002, the case entered the discovery stage. As of summer 2003, the case has not yet gone to trial.

**D. THE CALL FOR AFRICAN-
AMERICAN
REPARATIONS**

One of the most interesting consequences of the Holocaust restitution litigation has been to give fresh impetus to the call for payments to African-Americans by the

U.S. government for slavery which ended with the Civil War. African-American reparation proponents specifically point to the payments now being made for WWII-wrongs as precedent for their cause.

The first lawsuit was filed in March 2002, against Aetna and two other name-brand corporations, Fleet Boston Financial Corp. and CSX Corp. (the largest railroad on the East Coast), claiming they profited from African-American slave labor. The suit sought unspecified damages, but the plaintiffs' attorneys declared that they would be asking for \$1.4 trillion, the figure alleged to represent the current value of unpaid African-American slave labor and interest.

The next month, a second lawsuit was filed, adding as defendants New York Life, investment firm Brown Brothers Harriman & Co, and railroad Norfolk Southern Corporation. The reparation lawsuits seek to create a "Fund for the African-American People," which can be used to ensure the existence of a vital African-American community in the future.

By the end of 2002, a total of nine actions were filed throughout the United States seeking reparations on behalf of descendants of African-American slaves. At that point, the cases were centralized and consolidated by the Judicial Panel on Multidistrict Litigation as *In re African-American Slave Descendants Litigation*, and assigned to federal judge Charles R. Norgle Sr. in the Northern District of Illinois.

In re African-American Slave Descendants' Litigation, 231 F. Supp.2^d 1357 (Jud. Pan. Mult. Lit. 2002).

As of summer 2003, the litigation is still in the pleading stage.

E. REPARATIONS FOR DOING BUSINESS IN APARTHEID SOUTH AFRICA

Victims of apartheid in South Africa are now seeking compensation in American courts from Swiss, German and American companies who did business in South Africa during the apartheid years and directly benefited from the apartheid system. A group of South African lawyers, working together with the lawyers involved in Holocaust restitution litigation, filed a series of federal class actions beginning in summer 2002.

Named as defendants are some of the same defendants sued in the Holocaust restitution arena: Switzerland’s UBS and Credit Suisse; Germany’s Deutsche Bank, Dresdner Bank and Commerz Banks, along with American corporate giants Citibank and IBM.

In December 2002, the cases were centralized and consolidated by the Judicial Panel on Multidistrict Litigation as *In re South African Apartheid Litigation*, and assigned to federal judge Richard C. Casey in the Southern District in New York. *In re South African Apartheid Litigation*, 238 F. Supp.2nd 1379 (Jud. Pan. Mult. Lit. 2002).

In May 2003, the U.S. Department of Justice filed a brief opposing the litigation. In July 2003, the South African government also came out against these suits, filing an affidavit in the case stating that “[p]ermitting this litigation to go forward will, in the Government’s view, discourage much needed foreign investment in South Africa and thus delay achievement of our central goals.”¹²

As of summer 2003, no significant rulings have been issued in the case.

IV. Conclusion

At the beginning of 2001, as the Clinton Administration was winding up its second term, it appeared that the Holocaust restitution

movement had reached its peak and would soon conclude. The Bush Administration chose not to replace Stuart Eizenstat, President Clinton’s Special Representative for Holocaust restitution issues. Eizenstat, Clinton’s Holocaust restitution czar, had been closely involved in many of the settlements described above. The State Department continued to maintain an office on Holocaust restitution, but the high level of involvement and interest in Holocaust restitution by the Executive during the Clinton years has become significantly reduced during the Bush presidency. It appeared also that the various Holocaust restitution lawsuits were winding down, and new lawsuits filed had not achieved the success enjoyed by the earlier cases.

By summer 2003, however, the pendulum began to swing back, as various suits earlier had been dismissed were reversed on appeal. As of this writing, with many of the survivors’ cases still ongoing, the Holocaust restitution movement appears to be regaining some of its earlier momentum. Congress is also resuming its interest in the claims, holding new hearings and introducing new bills to assist aging Holocaust survivors achieve some measure of justice during their lifetime. The support for political relief also appears to be bipartisan. For example, both Republican and Democratic legislators, have introduced bills in the Senate and House to reverse the effect of the Supreme Court’s *American Ins. Ass’n.* decision. It appears that the final chapter of the Holocaust restitution movement is still to be written.

Endnotes

¹ For a more detailed discussion of the Austrian banks litigation and settlement, see Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. Richmond L. Rev. 1, 239-42 (2000).

2. In addition to the participating insurance companies and the insurance commissioners of the three states, the World Jewish Congress, the Claims Conference, and the World Jewish Restitution Organization (all related NGOs), as well as the State of Israel, have a seat on the ICHEIC board.

³ A fuller discussion of this topic can be found in Michael J. Bazylar & Amber L. Fitzgerald, *Trading With the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 Brooklyn J. Int'l L. 683 (2003).

⁴ The PCHA final report and other documents of the commission can be found on its website, www.pcha.gov.

⁵ Presidential Commission on Holocaust Assets, *Progress Report on: The Mystery of the Hungarian "Gold Train,"* (available at <http://www.pcha.gov/goldtrainfinaltoconvert.html>) .

⁶ It is not altogether clear that the PCHA "Gold Train" Report accurately describes the culpability of the American military. After its issuance, an Israeli historian wrote a book questioning many of the findings of the PCHA report. See Ronald W. Zweig, *The Gold Train: The Destruction of the Jews and the Looting of Hungary* (2002).

⁷ The U.S. government-created Nazi War Crimes and Japanese Imperial Government Records Interagency Working Group ("IWG") is now searching through U.S. archives to ferret out, among other matters, information detailing the wartime activities of Japanese companies. See www.nara.gov/iwg, detailing the work of the IWG.

⁸ *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003). A California state intermediate appellate court, also examining one of the wartime slave labor cases against Japanese industry, ruled at about the same time that the California statute was a proper exercise of state law. See *Taiheiyo Cement Corp. v. Superior Court*, 105 Cal. App.4th 398 (2003). However, on April 30, 2003, the California Supreme Court set aside the opinion and granted review of the case. *Taiheiyo Cement Corp. v. Superior Court*, 133

Cal. Rptr.2d 147, 66 P.3d 1231 (2003).

⁹ The United States appeared in response to a request by the court that the U.S. government express its views on whether federal or state law should cover the POWs' claims. The United States, in response, not only answered this question - stating that federal law should govern - but also opined that article 14(b) of the 1951 Peace Treaty precluded the claims. 114 F. Supp. 2nd at 939, 948.

¹⁰ *Joo v. Japan*, 332 F.3d 679 (2d Cir. 2003). Plaintiffs' attorneys in the litigation were Cohen, Milstein, Hausfeld & Toll, one of the firms extensively involved in the Holocaust restitution litigation. Many of the lawyers working in the Holocaust restitution arena - including Edward Fagan, Michael Hausfeld, Robert Swift, and Melvyn Weiss - later went on to file suits in the Japanese wartime litigation. Fagan and Hausfeld also represent separate sets of plaintiffs in the South African apartheid and African-American reparations litigation discussed below.

¹¹ Ben Aris, "Ben Aris in Berlin," *The Guardian* (June 27, 2003).

¹² "South Africa Opposes Apartheid Class Action," *The (London) Times*, July 30, 2003.