

# When Litigation and Proposed Legislation Frame Memories of the Holocaust: An Historical Perspective on SNCF and the Historical Narratives Used in the Proposed United States Holocaust Rail Justice Act

Owen C. Pell

## Introduction

Between 2009 and 2011, a series of bills were proposed in the United States House of Representatives and Senate aimed at allowing private US lawsuits to proceed against SNCF for its role in transporting Jews from France to Nazi German concentration and death camps during the Holocaust. Collectively, this legislation was known as the Holocaust Rail Justice Act. The HRJA was premised on so-called legislative “Findings” relating to SNCF’s alleged conduct during and after World War II. Although the HRJA was not enacted, the Findings are important because they highlight the tensions that can arise with respect to history and assessments of responsibility when historical narratives are framed for purposes of litigation or legislation.

Prior to World War II, SNCF was a company controlled and wholly operated by the French state. After France was conquered by Germany, SNCF (an agency within the Vichy government) was placed under Nazi control within the German Army’s Transportation Department. As discussed below, however, the Findings portray SNCF as an independent, for profit, corporate entity – a narrative that is at odds with the historical record. This paper traces the history of US litigation relating to the Holocaust in France, how that litigation eventually focused on SNCF, and how challenges surrounding the litigation against SNCF resulted in efforts to enact the Holocaust Rail Justice Act. Specifically, the Findings presented in the HRJA reflected three events that preceded the HRJA. *First*, from 1995-2001, private plaintiffs pursued US civil litigation seeking billions of dollars in damages from French financial institutions for collaborating with German and Vichy authorities in expropriating assets from their Jewish customers and for failing to make restitution for those expropriations after World War II. Neither the French state nor SNCF were sued in these lawsuits, in part because the plaintiffs knew that issues of foreign sovereign immunity under US law

would greatly complicate or frustrate their litigation against French banks.

*Second*, in 2001, the French Holocaust litigation was settled through an agreement between the United States and France that provided for a fund of almost \$500 million and was intended to provide (i) “full disgorgement” by French banks (including La Poste, a French government agency) with respect to bank assets seized from Jews in France during World War II; and (ii) compensation for *other* assets seized from Jews by French government entities during World War II. Given the nature of the litigation claims being settled (i.e., claims against banks), the US-France settlement did not address the pain and suffering experienced by those deported from France during the Holocaust, including those who were deported from France by train. Although these personal injury claims were eligible for compensation from a separate €10 billion settlement fund established under an agreement between the United States and Germany, the US-German settlement did not address France’s responsibility in the deportation of Jews from France.

*Third*, separate civil litigation against the French state and SNCF had been dismissed by US courts under the US Foreign Sovereign Immunities Act (28 USC. §§ 1602-1611), and lawsuits in France against SNCF also had failed to advance. Hence, the HRJA was designed to address perceived gaps in the various Holocaust settlements with respect to victims of the Holocaust in France by removing the FSIA as a *jurisdictional* bar to US claims against SNCF – i.e., plaintiffs still would have had to litigate and prove their claims regarding SNCF’s alleged role in the Holocaust.

But, in attempting to clear the way for litigation against SNCF, the HRJA and its proposed Findings raised serious historical issues, including with respect to how France responded to the Holocaust over time. By the time of the HRJA, France had acknowledged the role of the Vichy French regime in the Holocaust and commissioned broad research into French Holocaust history, including with respect to assets stolen from Jews in France. As noted above, France had agreed to pay various forms of reparations for wrongs committed during the Holocaust in France but left certain claims, including with respect to the pain and suffering experienced by deportees, to Germany, as the ultimate and principal state responsible for the Holocaust. The litigation directed at SNCF was intended to ignore this broader historical context and extract *additional* reparations from France by treating SNCF as an entity “independent” from the French state that thereby bore some *separate* portion of France’s liability to Holocaust victims.

Given that litigation and/or legislative processes often play important roles in framing how societies address genocide and other mass atrocity crimes, it is important to understand how these processes can affect the way in which history is presented. The SNCF case frames important issues relating to organizational “independence” in the face of government action and direction – issues that often arise in the context of assessing corporate responsibility for genocide or other mass atrocity crimes. Understanding how litigation positions or proposed legislation have the potential to complicate efforts at historical understanding also may inform how transitional justice processes should approach corporate responsibility as part of our efforts to foster long-term genocide prevention.

## Overview and Organization

With regard to SNCF, the various HRJA bills contained Findings asserting that:

- During World War II, over 76,000 Jews and “thousands of other persons” were deported from France to German concentration or death camps like Auschwitz-Birkenau and Buchenwald on trains owned and operated by SNCF; and that thousands of other persons were transported between holding camps within France on SNCF trains, including US citizens and residents, or their relatives, and US airmen shot down over France.
- SNCF was an independent corporate entity that remained independent during World War II and operated the deportation trains for a profit, as ordinary commercial transactions; and that SNCF remained under French civilian control throughout World War II and allegedly collaborated willingly with the Nazi regime.
- Attempts had been made to sue SNCF for its role in the Holocaust. Among other things, those lawsuits alleged that:
  - SNCF provided the necessary rolling stock, scheduled the train departures, supplied the employees to operate the trains bound for concentration or holding camps, and charged an ordinary passenger fare for the deportations – calculating per person and per kilometer fees which applied to sick, elderly, pregnant women, babies, and young children forced on to the trains.
  - SNCF cleaned and disinfected the train cars after each trip, and that SNCF knew that the conditions on the deportation trains were inhumane and often fatal.
  - SNCF had not made its full records regarding the deportations available to the plaintiffs (or the public).
  - SNCF had not disgorged the money that it was paid for the deportations or otherwise compensated the deportees or their heirs for its actions during the Holocaust.
  - SNCF’s conduct with respect to the deportation trains violated principles of international law, including under the Nuremberg Charter, the rulings of the Nuremberg Tribunal, and the Hague Convention of 1907.
- Those lawsuits had been dismissed because, as an entity owned by the French government, SNCF was immune from the jurisdiction of US courts under the FSIA.
- In addition, French courts would not consider claims against SNCF with respect to these claims.

- No treaties or executive agreements between the United States and France provide reparations and/or restitution for personal injury or death relating to SNCF's transportation or deportation activities between June 22, 1940 and December 31, 1944.<sup>1</sup>

This paper will discuss why these Findings were framed as they were, contextualize the claims against SNCF within the broader context of attempts by private plaintiffs to recover Holocaust reparations from France in the United States, and consider how the Findings relate to the historical record. Specifically, this paper will review:

- The French Bank Holocaust Litigation in the US courts.
- Settlement of those cases in the 2001 US-France Executive Agreement.
- Post-settlement attempts to sue SNCF in US courts.
- Proposed legislation in US states targeting SNCF.
- Proposed HRJA legislation regarding SNCF.
- The historical issues related to SNCF, as raised by the proposed Findings in the HRJA.
- The US-France Agreement to resolve Holocaust-related issues relating to SNCF.
- Conclusions that can be drawn from the HRJA process and how we resolve tensions between legal and historical responsibility, particularly as they may relate to corporations.

## The French Bank Holocaust Litigation

In 1997, claimants representing a purported class of Holocaust survivors and their families sued, in US federal court, a group of French, British, and US banks and financial institutions (“banks”) that had done business in France during World War II. The cases were consolidated before US District Judge Sterling Johnson under the headings *Bodner v. Banque Paribas*, 97 Civ. 7433 (E.D.N.Y.) and *Benisti v. Banque Paribas*, 98 Civ. 7851 (E.D.N.Y.) (the “*French Bank Holocaust Litigation*”). In addition to the largest French banks (e.g., Crédit Lyonnais, Crédit Agricole, Société Générale, Banque Paribas, and Crédit Commercial de France), claims were asserted against Barclays Bank, J.P. Morgan & Co., and Chase Manhattan Bank. The plaintiffs alleged that the defendant-banks had acted prematurely in assisting the Vichy and German authorities in their efforts to freeze and then seize the property of Jews in France, including assets on deposit in the banks. The plaintiffs asserted that the banks had gone beyond what Vichy or German laws and regulations required, or had begun enforcing those laws or regulations prior to applicable commencement dates, and that these actions by the banks, among other things, undermined the ability of Jews in France to escape the Holocaust.<sup>2</sup> Nothing in the *French Bank Holocaust Litigation* mentioned SNCF, nor did the case seek

<sup>1</sup> See, e.g.: S. 634 and H.R. 1193, introduced 111<sup>th</sup> Cong., 2d Sess. (2010).

<sup>2</sup> See, generally: *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (summarizing complaints).

damages for the pain and suffering that deportees suffered in being transported by rail to detention or concentration/death camps or that other persons (like US airmen) suffered in being transported to Nazi camps on SNCF trains.

The theory of recovery in the *French Bank Holocaust Litigation* was designed to avoid the plaintiffs having to sue either France or Germany for the losses of French Jews in the Holocaust. As with other Holocaust-related cases then pending, the plaintiffs understood that suing foreign states in US courts was unworkable based on the FSIA and the limits it places on the jurisdiction of US courts, especially with respect to tortious behavior. Under the FSIA, a foreign state (or state-owned entity) is presumed immune from claims in US courts unless the plaintiff can establish that one of the exceptions to immunity enumerated in the FSIA applies. With regard to tortious acts, no US jurisdiction is available unless the entire tort (i.e., the act and injury) occurs in the United States.<sup>3</sup> Given that the Holocaust occurred in Europe, it was not feasible to sue Germany or Austria directly for the tortious acts of the Third Reich, or France for the tortious acts of Vichy. As such, in the *French Bank Holocaust Litigation*, plaintiffs had to allege that the defendant-banks collaborated with the Germans and Vichy French so that they could be liable for aiding the crimes committed by those states, but also that the banks acted independently so that the banks could be liable for the harms then suffered by Jews in the Holocaust. In August 2000, Judge Johnson denied the defendants' motions to dismiss the *French Bank Holocaust Litigation*.<sup>4</sup> At the same time, however, the Clinton Administration began organized efforts, under the leadership of Deputy Secretary of Treasury Stuart Eizenstat, to settle the various pending Holocaust-related litigation with respect to German companies and banks, French banks, Austrian banks, Swiss banks, and international insurance companies that had issued insurance products to European Jews. These settlements were completed in 2000 and early 2001.

## 2001 US-France Executive Agreement Settling Holocaust Litigation

On January 18, 2001, the United States and France entered into an Executive Agreement to resolve claims relating to property spoliation (i.e., the plundering or looting of property) with respect to Jews in France during the Holocaust.<sup>5</sup> An executive agreement was used so that no Senate ratification would be needed to give effect to the agreement. As an expression of the foreign affairs power of the US Executive Branch, an executive agreement is entitled to great weight from US courts, although it does not have the same preclusive weight as a ratified treaty, which is like an enacted statute.<sup>6</sup>

The US-France Executive Agreement (the "Agreement") recognized that the French state had taken responsibility for its actions with respect to the Holocaust in France. The Agreement also recognized that (i) France had enacted legislation after World War II (indeed, after the liberation of France in late 1944) providing restitution to banking customers who had suffered spoliation of their banking assets and to Jews who also had suffered property spoliation by certain entities of the French state (including La Poste, and municipalities), and providing certain other benefits for those persecuted by the Germans

<sup>3</sup> See: 28 USC. § 1605(a)(5), which limits tort claims against foreign states to money damage claims "for personal injury or death, or damage to or loss of property, occurring in the United States . . . ."

<sup>4</sup> *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000).

<sup>5</sup> US-France, T.I.A.S. No. 01-205, as amended May 30 and 31, 2002, and Feb. 21, 2006.

<sup>6</sup> See: Statement of Interest of the United States of America (Feb. 23, 2001), filed in *Bodner v. Banque Paribas*, 97 Civ. 7433 (E.D.N.Y.) and *Benisti v. Banque Paribas*, 98 Civ. 7851 (E.D.N.Y.).

or Vichy; and (ii) French archival records (and the records of French banks) confirmed that many Jewish customers had applied for and received some restitution under these French laws. The Agreement also recognized that France had established a special fund for the orphans of French Holocaust victims and a foundation to disburse funds relating to property and other assets spoliated from Jews in France during the Holocaust period.

Under the Agreement, the defendant-banks in the *French Bank Holocaust Litigation* and the French state made almost \$500 million available to the newly created French fund and foundation. The focus of the claims process was bank and other discrete assets (e.g., apartment leases, other immovable property, and home furnishings in seized residences). Funds were to be disbursed to Holocaust victims and their heirs, based on a claims process that would allow a victim's claims to be supplemented based on research done by a team of archivists who would seek records about additional property spoliation that may have been suffered by a victim or their family, including property losses attributable to La Poste (which also served as a widely-used savings bank) and other French government entities (including local governments that seized leases and homes). As stated by the Agreement, the purpose of this process was:

to accomplish full disgorgement by the French Government, the Banks, and other private and public institutions of any unjust enrichment based on assets left with such institutions and never restituted to their former owners, as well as a substantial contribution in recognition of the suffering of Holocaust victims in France.

On the basis of this Agreement, the United States agreed to seek full and final dismissal of the *French Bank Holocaust Litigation* (and any subsequent similar litigation), arguing that the Agreement represented the important foreign policy interests of the United States with respect to its longstanding relationship with France. The US also argued that the Agreement provided the best available means for providing compensation to victims of the Holocaust in France (especially when compared to the risks inherent in the pending litigation, including the risk that the claims would fail or result in judgments that could not be enforced in France or elsewhere).

Notably, the US-France Agreement did not address the pain and suffering of French Jews deported to German camps, ghettos, or killing sites during the Holocaust. The reason for this is two-fold. *First*, nothing in the *French Holocaust Bank Litigation* related to these types of claims. *Second*, it was broadly understood that those types of tort-based reparation claims were expressly covered by the July 2000 US-Germany Agreement Concerning the Foundation "Remembrance, Responsibility and the Future" (the "US-Germany Agreement"). Under the US-Germany Agreement, the United States agreed to provide Germany, as well as German banks and companies, with the same kind of legal peace provided under the US-France Agreement. In return, Germany, as part of reaffirming its ultimate and principal responsibility for the Holocaust, agreed to establish and administer a €10 billion fund, which included contributions of almost €5 billion from German banks and companies (with the remainder coming from the German state).<sup>7</sup> This fund would, among other things, pay reparations to any Holocaust survivor or their heirs for their pain and suffering with respect to deportation and slave or forced labor during the Holocaust. These reparations were made *in addition to* any other social welfare benefits or reparations that otherwise might have been paid under other German or other national reparation laws.

<sup>7</sup> See: US-Germany Agreement Concerning the Foundation "Remembrance, Responsibility and the Future" (signed July 17, 2000) (with annexes), US-Germany, T.I.A.S. No. 13104.

Even though the US-Germany Agreement was designed to resolve litigation involving German banks and companies, the actual settlement was drafted more broadly. Specifically, the governing principles established under the US-German Agreement provided that the purpose of the fund was to “make payments . . . to those who suffered as *private and public sector* forced or slave laborers and those who suffered at the hands of German companies during the National Socialist era.”<sup>8</sup> In addition, the US-Germany Agreement expressly covered deportees from other nations, allowing claims by “persons who were held in concentration camps . . . or in another place of confinement or ghetto under comparable conditions and were subject to forced labor” and by “persons who were deported from their homelands into the territory of the 1937 borders of the German Reich or to a German-occupied area, and were held in prison-like or extremely harsh living conditions . . . .”<sup>9</sup>

Thus, the class of people deported on SNCF trains were eligible for reparations under the US-Germany Agreement, and there is good reason to believe that many of these victims and their heirs applied for reparations. Interestingly, neither France nor SNCF sought to link any amounts paid under the US-France Agreement to compliment reparations to be paid under the US-Germany Agreement. Accordingly, as noted above, nothing in the US-France Agreement addressed non-property Holocaust reparation claims relating to France. This gap set the stage for the US litigation and eventual proposed US legislation relating to SNCF.

## Post-Settlement Attempts to Sue SNCF in US Courts

As the US-France Agreement was being negotiated, a new lawsuit had commenced in US courts, this time against SNCF. In *Abrams v. Société Nationale des Chemins de Fer Français*, 00-CV-5326 (E.D.N.Y.), the plaintiffs sued SNCF on behalf of all those deported from France on SNCF trains to Nazi concentration or death camps.<sup>10</sup> The plaintiffs claimed that the FSIA did not apply to the case (and that US courts therefore could exercise jurisdiction over the case) because SNCF’s actions had occurred during World War II, well before the FSIA was enacted. Ultimately, this position was rejected by the US Supreme Court, which held that the FSIA applied to a current claim brought against SNCF.<sup>11</sup>

Plaintiffs then started a new lawsuit, suing not only SNCF but also the Republic of France and its state-owned fisc, the Caisse des Dépôts et Consignations (the “CDC”). Intent on avoiding the requirements of the FSIA tort exception, the plaintiffs’ lawyers focused on another of the exceptions to sovereign immunity under the FSIA by alleging that France, the CDC, and SNCF had stolen the property of Jewish deportees and either retained that property or profits derived from that property, including through commercial

<sup>8</sup> US-Germany Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” T.I.A.S. No. 13104, at Annex A, Art. 1 (emphasis supplied).

<sup>9</sup> *Ibid.*, Art. 4.

<sup>10</sup> Indeed, the *Abrams* case commenced in late 2000, before the US-France Agreement. Hence, there was a time period when France (or SNCF) could have attempted to cover this litigation or these types of claims under the settlement it was negotiating with the United States. This did not happen.

<sup>11</sup> *Société Nationale des Chemins de Fer Français v. Abrams*, 542 US 901 (2004).

contacts with the United States.<sup>12</sup> In 2008, that lawsuit was dismissed, including on the grounds that the plaintiffs had presented no credible evidence that any of the defendants still retained any property of the plaintiffs. The claims against the French state and CDC were dismissed on the grounds of the US-France Agreement.<sup>13</sup> Thus, as of 2008-09, US litigation claims against SNCF looked to hold little prospect of success.

## Proposed Legislation in Various US States Targeting SNCF

Beginning in 2003-04, bills began to be introduced in the US Congress aimed at overturning the result in *Abrams* (and, ultimately, *Freund*). The proposed bills took two forms. Most simply attempted to block application of the FSIA to claims relating to any railway-related entity that might claim sovereign immunity with respect to claims premised on Holocaust-related deportations from France.<sup>14</sup> None of these bills advanced.

In 2009, as part of its response to the 2007-2008 Financial Crisis, the US Congress passed the American Recovery and Reinvestment Act, which contained an array of programs to further employment opportunities and economic growth. One proposal under this legislation was the High-Speed Rail Initiative, an \$8 billion initiative under the auspices of the US Department of Transportation.<sup>15</sup> Under this program, the Transportation Department ultimately designated a group of eligible high-speed rail corridors, and Congress assessed a group of companies that could be considered to bid to develop high-speed mass transit.<sup>16</sup> That list included SNCF.

In response, the plaintiffs from the unsuccessful US litigation against SNCF began lobbying for US states to prevent or hamper SNCF's ability to bid on high-speed rail contracts. In 2010, California Assembly Bill 619 would have required the disclosure of any bidder's "direct involvement" in the deportation of individuals to Nazi camps and any records of restitution efforts made on behalf of that bidder. "Direct involvement" was defined as "ownership or operation of the trains on which persons were deported to extermination camps, work camps, concentration camps, prisoner of war camps, or any similar camps during the period from January 1, 1942 through December 31, 1944." The bill cleared the California legislature before being vetoed by California Governor Arnold Schwarzenegger.<sup>17</sup> A similar bill was passed in Maryland, but

<sup>12</sup> *Freund v. Société Nationale des Chemins de Fer Français*, 06 Civ. 1637 (S.D.N.Y.). Under 28 USC. § 1605(a)(3), the FSIA allows claims against sovereigns based on claims for the taking of property in violation of international law, if that property or property relating to that property has some connection to the United States. Plaintiffs also argued that they could not sue SNCF in France because the French courts had rejected claims against SNCF based on the ultimate responsibility of the Vichy and German governments for the Holocaust in France. See: *Lipietz v. Prefect of Haute-Garonne and SNCF*, 06BX01570 (Bordeaux Admin. Ct. 2007). See also the discussion in: Michael R. Marrus, "French Railways and the Deportation of Jews in 1944," in David Bankier and Dan Michman eds., *Holocaust and Justice* (Yad Vashem, 2010).

<sup>13</sup> *Freund v. Societe Nationale des Chemins de Fer Francais*, 592 F. Supp. 540 (S.D.N.Y. 2008); affirmed, 391 F. App'x 939 (2d Cir. 2010).

<sup>14</sup> Generally, identical versions of the bills were introduced in the US House of Representatives and Senate. See, e.g.: H.R. 4237 and S. 28 (111<sup>th</sup> Cong.); H.R. 3713 and S. 3462 (110<sup>th</sup> Cong.); H.R. 474 (109<sup>th</sup> Cong.); H.R. 2954 (108<sup>th</sup> Cong.).

<sup>15</sup> See: American Recovery and Reinvestment Act of 2009, 123 Stat. 115 (2009).

<sup>16</sup> See: High-Speed Rail Stimulus Funding, Mass Transit, <https://www.masstransitmag.com/rail/article/10113731/highspeed-rail-stimulus-funding>. See also: Hearing Before the Subcommittee on Railroads, Pipelines, and Hazardous Materials of the House Committee on Transportation and Infrastructure, 2007.

<sup>17</sup> AB-619 Transportation projects: high-speed rail, Sec. 2 (Cal. 2010).



then was preempted by the US-France settlement as to SNCF, discussed below.<sup>18</sup>

What these early bills had in common was requiring disclosure by SNCF about its activities in France during the Holocaust, and its approach to reparations or restitution. The laws did not prevent SNCF from otherwise bidding, nor did the state laws open SNCF up to US lawsuits relating to their activities during World War II. Rather, these bills were aimed at drawing negative attention to SNCF, and at raising the risk that inadequate disclosure either could be used as an independent basis for liability or for disqualifying any SNCF high-speed rail bid. Ultimately, a similar type of bill was proposed in the US House of Representatives.<sup>19</sup>

But, as time progressed, the focus of the proposed legislation relating to SNCF switched back to opening the way for US litigation. The focus of the victims' lawyers was on replicating the success of the *French Bank Holocaust Litigation* and this required the threat of US litigation. Reopening US courts to claims against SNCF thus became the focus of Congressional efforts in 2009-2011, which culminated in public hearings in November 2011.<sup>20</sup> All the legislation proposed at this time, however, shared a flaw that ultimately weakened the lobbying efforts for these bills.

## Proposed Federal Legislation Regarding SNCF

As noted above, the federal bills on which hearings were held in late 2011 relating to SNCF's role in the Holocaust contained specific Findings about SNCF's alleged actions during the Holocaust and the unsuccessful efforts by Holocaust survivors and their heirs to sue SNCF in the United States for its role in transporting Jews from France. Significantly, although the Findings did mention France and SNCF, the operative sections of all the Congressional bills did not limit the reach of the proposed laws to SNCF (or "French-government controlled or owned entities"). This was significant because the preamble or findings attendant to legislation generally are not binding and, absent express reference in the operative sections of legislation, also do not then limit the scope of the legislation (there was no limitation by express reference in the SNCF-related bills). Moreover, generally, US state and federal legislation cannot single out one entity for legislative sanction, as these types of legislative acts may be attacked as unconstitutional (as prohibited "bills of attainder").

Thus, the Congressional bills relating to SNCF were drafted broadly and generally – indeed, they did not restrict claims to deportees from France. But, allowing any railroad in Europe to be sued for Holocaust-related deportations implicated all European national railroads in nations ultimately controlled by

<sup>18</sup> SB 479 Transportation – Procurement for MARC Service (Md. May 19, 2011).

<sup>19</sup> See: H.R. 6347 (111<sup>th</sup> Cong.).

<sup>20</sup> The SNCF-related legislation moved in parallel with other proposed legislation that focused on another perceived shortfall in the Holocaust settlements: insurance claims relating to Holocaust victims. Insurance-related Holocaust litigation had been the subject of a settlement negotiated by Secretary Eizenstat, under which over \$300 million was distributed by the International Commission on Holocaust Era Insurance Claims ("ICHEIC"). Almost immediately, however, claimants were unhappy with the ICHEIC process, including for an alleged lack of transparency. This led to a series of proposed bills, all of which demanded more accountability from ICHEIC, absent which, Congress might demand greater regulation of insurance companies with Holocaust-related claims or allow some claims relating to Holocaust-era insurance to be reopened. See, e.g.: H.R. 890 and S. 466 (112<sup>th</sup> Cong.); H.R. 4596 and S. 4033 (111<sup>th</sup> Cong.); H.R. 1746 (110<sup>th</sup> Cong.); H.R. 743 (109<sup>th</sup> Cong.); H.R. 1210, 1905, 3129 and S. 972 (108<sup>th</sup> Cong.). The November 2011 hearings relating to SNCF were combined with hearings relating to ICHEIC issues.

Germany.<sup>21</sup> This drafting decision directly implicated at least one other approved high-speed rail bidder: Deutsche Bahn – the German national railway, which was a successor entity to the *Deutsche Reichsbahn* that transported Jews to Nazi concentration camps from around Europe. However, Deutsche Bahn had contributed to, and was expressly protected by, the €10 billion US-Germany Agreement. This drafting flaw, and the unwillingness of victims’ lawyers to embrace amendments limiting the scope of the proposed legislation to French entities, ultimately drew attention to other historical issues raised by the Findings – which created serious questions about whether these bills could, or should, proceed.

## **The Issues Raised by the Proposed Legislative Findings**

By 2011, the victims’ lawyers seeking legislation directed at SNCF had focused on a particular historical narrative. This narrative was driven by their litigation need to separate SNCF from prior settlements – and US foreign policy interests in those prior Holocaust settlements. This narrative was set forth in the Findings used in H.R. 1193 and S. 634. The historical issues created by the Findings broke down into several categories, and ultimately raised serious issues for both Congressional and Executive Branch leaders considering the bills.

### ***The Availability of Historical Data on SNCF’s Wartime Actions***

The Findings state that SNCF hid its wartime conduct prior to US lawsuits against SNCF.<sup>22</sup> This was not true. Although scholars could debate how accessible SNCF’s archives may have been – especially with regard to the records relating to demands for payment regarding the deportations – facts relating to SNCF’s wartime activities had been investigated and made public before the US-France Agreement or SNCF litigation. SNCF began a historical examination in 1992. In 1996, a 914-page two-volume report on its World War II activities was published, which included an appendix of historical documents. As of 1996, SNCF’s archives were open<sup>23</sup> and SNCF had issued an executive summary in English of its historical report (the “SNCF Summary Report”).<sup>24</sup>

### ***SNCF’s Alleged Corporate Independence***

In order to work around the US-France Agreement and the US-Germany Agreement, the victims’ lawyers lobbying for the HRJA had to create an historical narrative that SNCF operated independently. Under this approach: (i) SNCF’s conduct was “French” conduct – so as not to be fully accounted for by Germany’s settlement of Holocaust claims; *and* (ii) was not “Vichy” conduct – so as not to be fully accounted for by the settlement of French state spoliation under the US-France Agreement. Accordingly, the Findings

<sup>21</sup> This issue is beyond the scope of this paper, but could have affected national railways in the Netherlands, Belgium, Italy, Greece, Bulgaria, Austria, the Czech and Slovak Republics, Hungary, and Romania. It is unclear whether those lobbying for the HRJA were attempting to open a new chapter in Holocaust-related litigation. There were then pending deportation-related claims against Hungary’s national railway, a case that continues to this day. See: *Simon v. Republic of Hungary*, No. 17-7146 (D.C. Cir. 2018).

<sup>22</sup> It had been a hallmark of US Holocaust litigation to argue that companies which had participated in the Holocaust had hidden their actions, which also allowed plaintiffs’ lawyers to argue that normal statutes of limitation should not apply to their claims because the defendants had hidden their conduct. This had been a particularly effective argument in the Holocaust litigation against the Swiss banks.

<sup>23</sup> See: <http://www.sncfhighspeedrail.com/wwii-disclosure>.

<sup>24</sup> The report is available at [http://holocaustrailvictims.org/wp-content/uploads/2010/10/Bachelier-Report\\_Executive-Summary.pdf](http://holocaustrailvictims.org/wp-content/uploads/2010/10/Bachelier-Report_Executive-Summary.pdf).

stated that SNCF was an independent corporate entity that remained independent during World War II, operated deportation trains for profit just like any independent business, and remained under French civilian control throughout World War II so as to be collaborating freely and willingly with the Third Reich.

While there is absolutely no doubt that the Vichy regime collaborated willingly in the Holocaust and sought to aid Germany's plans to round-up and deport Jews, that is different from establishing that SNCF had the ability to act independently of Vichy, including in providing trains to deport Jews from France. Issues around this point further undermined the bills and complicated efforts to pass them.

Upon the conquest of France, SNCF expressly came under the control of the German Army and the Vichy state. Article 13 of the Franco-German Armistice Agreement required that the national railway system in Occupied France be made available to Germany.<sup>25</sup> Although SNCF owned its equipment, "all French railroad operations, routes, and inland waterways in the occupied territory [were] at the full and complete disposal of the German Head of Transportation."<sup>26</sup> This was significant, especially considering that two-thirds of SNCF's tracks were within Occupied France and not Vichy.<sup>27</sup> The German Head of Transportation in France was the *Wehrmachtverkehrsdirektion* (the German Army Transport Directorate or WVD). A German general was the commander of the railway transport department in Paris. He oversaw the *Deutsche Reichsbahn* officials who oversaw SNCF. That German general reported to a general in Germany who reported to the German Army High Command.<sup>28</sup> The German commanders of the WVD issued direct orders to SNCF making clear that SNCF and all its rail networks were to be at the "full and entire disposal of the German Transport Chief." A second general order issued by SNCF and based on those German orders stated that "all SNCF civil servants, staff and workers [were] subject to German laws of war." That general order listed obligations owed to the German authorities, including the types of rolling stock to be used for certain types of transports and the expected behavior owed by SNCF employees to the Germans. The order ended with the statement that "any member of staff who infringes the above-mentioned stipulations will leave themselves open not only to administrative sanctions but to proceedings initiated by the German authorities which could have serious consequences."<sup>29</sup>

In addition, SNCF's corporate structure was changed by German and Vichy authorities. In 1940, SNCF's Board was reduced from 33 to 12, and the Management Committee was eliminated so as to tighten Vichy control.<sup>30</sup> The WVD could, and did, replace SNCF officials at will.<sup>31</sup> Hence, the idea that SNCF was an independent corporate entity, under "civilian control" and free to do what it wanted, is not well-supported.

The historical record also shows that German authorities were willing to kill SNCF employees for attempting to resist the Germans. While there does not appear to be evidence of SNCF employees being punished for attempting to assist or save Jews, there is ample evidence to support the idea that resisting the Germans carried serious consequences. This was particularly true after November 1942

<sup>25</sup> See: *Convention d'armistice* of 22 June 1940, available at [www.mjp.univ-perp.fr](http://www.mjp.univ-perp.fr).

<sup>26</sup> SNCF Report, 4.

<sup>27</sup> Ibid.

<sup>28</sup> SNCF Report, 7-8.

<sup>29</sup> See: Wehrmacht Verkehrsdirektion, *Ordre du Jour Nos. 35 and 36* (Paris, 1940).

<sup>30</sup> SNCF Report, 7.

<sup>31</sup> Ibid., 5.

when, following the Allied invasion of North Africa, Germany occupied the remainder of France (and sped up the pace of deportations). Thereafter, Germany increasingly took SNCF employees hostage in connection with Resistance activity in France, and summarily executed SNCF employees. As Resistance activity involving SNCF employees increased, so did German reprisals against SNCF personnel.<sup>32</sup> Again, while this evidence in no way absolves SNCF from its participation in the deportation of Jews, it casts the idea of SNCF's independence, civilian control, and "collaboration" in a different light because any SNCF employee had to confront the real risk that resisting the Germans could have mortal consequences.

Any measure of corporate independence also involves a business controlling its assets and their use. The historical record shows that SNCF had little effective control over its assets. Germany expropriated and "rented" (on demand) SNCF equipment to meet German war needs – which grew dramatically as the war progressed. By late 1943, 30% of SNCF's locomotives, 52% of its freight cars, and 36% of its passenger cars had been taken for German use.<sup>33</sup> Germany's use of rolling stock from railroads across conquered Europe was part of a plan devised by Albert Speer which envisioned centralized rolling stock management coordinated for German industrial needs.<sup>34</sup> This was strong evidence that SNCF was not capable of controlling its own assets or how they were used.

### ***Did SNCF Play an Independent Role in the Deportations?***

The Findings state that SNCF provided the necessary rolling stock, scheduled the train departures, and supplied the employees to operate the trains bound for concentration or holding camps – again, consistent with the idea that SNCF was acting voluntarily, independently, and willingly. But the fact that SNCF provided equipment and personnel are, in and of themselves, proof of little, given that those actions by themselves do not prove independence from Germany or Vichy. The more serious allegation is that SNCF "scheduled" the train departures. Once again, this appears at odds with the historical record.

There does not appear to be evidence showing that SNCF initiated deportations or deportation transports. Rather, French deportations were initiated and coordinated by the Reich Security Office overseen by Adolf Eichmann. The Reich administrators dictated what types of train cars would be used and how local police authorities were to load and order the trains. The fact of this standardization not only is well-known but was a hallmark of Reich administrators like Eichmann. Orders then were passed down through the German authorities, with the WVD – which oversaw SNCF – ultimately setting the conditions and schedules for each deportation convoy.<sup>35</sup> Further evidence of SNCF's lack of independence is that early deportation trains probably used *German* rolling stock because it was a German priority to get German rolling stock moving back toward Germany or to the Eastern Front. German engines also were substituted for SNCF engines at the French frontier (the Germans generally allowed only German engineers to drive trains into German concentration camps). Finally, SNCF rolling stock used in deportations generally remained in Germany.<sup>36</sup> Thus, it is not clear on what basis the Findings state that after the deportations

<sup>32</sup> SNCF Report, 16-18, 19-21, 22-23; see also: Michael R. Marrus, "French Railways and the Deportation of Jews in 1944," in David Bankier & Dan Michman eds., *Holocaust and Justice* (Yad Vashem, 2010), 258. Almost 1,700 SNCF employees were killed by the end of 1944.

<sup>33</sup> SNCF Report, 5-6, 10, 13-14, 20.

<sup>34</sup> *Ibid.*, 14.

<sup>35</sup> *Ibid.*, 14-16.

<sup>36</sup> *Ibid.*, 15-16.

SNCF employees cleaned the trains and knew the horrors experienced on them.

What would seem more likely from the historical record is that SNCF employees cleaned trains used for internal transport of Jews to detention camps around France, which must have shown the deplorable conditions and hardships suffered by deportees, and that SNCF employees must have known how Jews were crammed into the trains under inhuman conditions.

This distinction is raised because it goes to the nature (and narrative) of SNCF's alleged collaboration. In one narrative, as pressed by the victims' lawyers, SNCF was a willing and independent actor joining with the Germans in mistreating Jews being deported – the same narrative that had worked in the *French Bank Holocaust Litigation*. In the other narrative, SNCF was being directed by the Germans, and was not resisting – including because they were aware of the consequences if resistance was offered. The latter undoubtedly carries with it responsibilities and a need for historical openness and reconciliation but is nonetheless very different from being a willing and independent participant in genocide.<sup>37</sup>

Again, none of this is intended to excuse the collaboration of the Vichy French government, of which SNCF was a major and important part. However, there is a distinct historical difference between SNCF following German orders as a government department within a conquered state, and SNCF initiating the deportation of Jews from France to assist the Germans in carrying out the Holocaust. The Findings could be read to suggest the latter, but the historical record does not appear to support that.

### ***The Idea That SNCF Profited from Jewish Deportations***

The Findings state that SNCF profited from the deportations and then failed to disgorge those profits. This relates to SNCF's alleged independent business status, willing collaboration, and failure to do justice to Holocaust victims. Also, there is the implicit claim here that the "profit" was significant, such that SNCF has furthered its business interests via the suffering of Jews during the Holocaust, and that the current appreciated value of this "profit" is a way of measuring the reparations owed (again, a narrative used in the *French Bank Holocaust Litigation*).

There are documents showing that SNCF issued invoices in 1944 for at least some of the deportation transports, that payment was sought on these invoices, and that payment continued to be sought even after France was liberated.<sup>38</sup> But the fact that payment was sought, and even that some payment may have been received (although it is unclear whether there is evidence of payment on invoices relating to deportation trains), does not necessarily support either the historical fact of Holocaust-related profit or of a profit so great that it has helped SNCF to this day.

It is axiomatic that business profit cannot be derived from one transaction. Rather, profit requires an understanding of a business' operating expenses (i.e., its costs of doing business) and its actual receipt

<sup>37</sup> The Findings also misstate international law and the Nuremberg Tribunal rulings after World War II. No companies were indicted, prosecuted, or convicted in the Nuremberg proceedings. Corporate *principals* were prosecuted, typically for use of slave and forced labor, and, in particular, for how they treated laborers once the companies had control of them.

<sup>38</sup> See, e.g.: "Letter to the Prefect of Haute-Garonne from Chief of Subdivision of Revenue Control" (Expense Accounting) (1944); "Invoice No. 45,313 (camps d'internement, centres de séjour surveillée, internes, expulsés, etc.)" (1944); "Chief of Camp Letter (J'ai l'honneur de vous retourner par le recommande et dument revêtu de ma signature, le Relevé et ler Trimestre 1944 présentes par la S.N.C.F.)."

of funds from all the different transactions in which it engages. For a business like SNCF, which delivers services day-after-day, profit is measured cumulatively, not on a transaction-by-transaction basis. Thus, even if a business knows that its standard rate allows it to be profitable, that is true *only if* that standard rate actually is achieved enough times to cover the ongoing costs of the business – including the times when the standard rate is not achieved or the times when unplanned losses or costs are incurred. To the extent profits are made, there must then be an assessment of whether profits were retained/saved and reinvested in the business. The Findings do not address these issues.

In a broad sense, it is hard to see how SNCF, as a department of the Vichy French government, profited from deportations when the Vichy French government suffered massive financial losses from the German occupation, including through reparations imposed on France by the Third Reich after France was conquered. Article 18 of the Franco-German Armistice mandated that France pay Germany for the costs of German occupation.<sup>39</sup> Those costs were set unilaterally by Germany at RM 20 million per day, which equaled FF 400 million per day at the artificial exchange rate imposed by Germany upon France (which at FF 20:1 was at least double the pre-war exchange rate).<sup>40</sup> The German reparations were so large that Vichy officials asked Germany to reduce the daily reparation, and the *daily* fine imposed by Germany was almost equal to the *annual* revenue of the French state. Moreover, with specific regard to SNCF's pricing for its services, there is no evidence that SNCF could increase its billing rates to the Germans to account for the change in exchange rates, and available evidence suggests that no adjustments would have been permitted because it was Germany's intent to make French goods and services cheaper for the Reich to purchase.<sup>41</sup> Absent a mark-up to account for the change in exchange rates, SNCF's billing rate would not have covered the discounted Francs it was receiving in payment, leaving the billing unprofitable, and increasingly unprofitable over time.

As also noted above, Germany expropriated significant portions of SNCF's equipment – sometimes agreeing after the fact to treat that equipment as “rented” but then not agreeing to the terms of the rental. Although SNCF did submit invoices for this equipment, and for SNCF services provided to the Reich, Germany never fully paid SNCF the amounts invoiced.<sup>42</sup> SNCF sustained *monthly* deficits of FF 200 million on rentals alone.<sup>43</sup> By comparison, the *total* number of SNCF rail cars used for deportations, if aggregated, equaled roughly 15% of only *one day's* rolling stock use – meaning that any alleged profits on deportations trains would have to have been enormous to overcome these other huge losses – further undermining any deportation profit claim.<sup>44</sup>

What this shows is that SNCF was not routinely paid for what it invoiced. An independent business would not do business on those terms – but SNCF did not have the ability to refuse Germany's business. Moreover, even if SNCF had been paid fully for rolling stock used in deportations (which has not been shown), it is hard to see how that amount could have covered the overall losses sustained by SNCF based

<sup>39</sup> See: *Convention d'armistice* of 22 June 1940, available at [www.mjp.univ-perp.fr](http://www.mjp.univ-perp.fr).

<sup>40</sup> See: documents located at [www.avalon.law.yale.edu](http://www.avalon.law.yale.edu).

<sup>41</sup> See, generally: Adam Tooze, *The Wages of Destruction*, 391-93 (Penguin 2008); F. Occhino, K. Oosterlinck, E.N. White, “How Occupied France Financed Its Own Exploitation in World War II,” 4-6, 9, 30 (Nat'l Bur. Eco. Research, Working Paper 12137) (Mar. 2006).

<sup>42</sup> SNCF Report, 10, 19-20.

<sup>43</sup> *Ibid.*, 19-20.

<sup>44</sup> *Ibid.*, 15-16.

on Germany's ongoing expropriation of SNCF's equipment. Accordingly, there is no real support for either the concept of profit being made on the deportations, or for the idea that retained profits have been part of SNCF to this day.

Finally, there is the allegation that SNCF looted the property of deportees, and then kept that property. This allegation, however, had been tested and has failed in two contexts. *First*, in *Freund* the US courts considered and rejected this bald allegation as unsupported by anything other than conjecture. *Second*, in any event, the detailed archival research report commissioned by the French government and carried out by the Working Party on the Spoliation of Jews in France (also known as the Matteoli Mission) spent years researching the conditions under which Holocaust-related spoliation occurred in France, evaluating the extent of the spoliation, and discovering what happened to the property and assets spoliated. In its work, the Matteoli Mission specifically included the spoliation that occurred in, or as Jews exited, French internment camps. The Matteoli Mission research showed that looting at the camps resulted in the Vichy French government – not SNCF – appropriating property from Holocaust victims.<sup>45</sup> The testimony of a deportation survivor at the November 2011 hearings did not contradict or challenge the conclusions of the Matteoli Mission.<sup>46</sup>

Thus, the historical evidence does not establish that SNCF was independent or that it necessarily profited from deporting Jews. Also, the historical record does not appear to show that SNCF was in a position to refuse to do business with the Germans – as an independent business could do. SNCF unquestionably bears the responsibility (and guilt) of the Vichy government of which it was a part – and France attempted to address that responsibility in, among other things, the US-France Agreement. But, at bottom, the responsibility of national rail systems like SNCF must lie (both legally and logically) with the governments that oversaw their operations and decided to perpetrate the Holocaust. Any corporate veil that might have existed as to entities like SNCF was pierced by the German and Vichy French governments which determined how and when SNCF's trains would be used, including within the mechanics of the Holocaust.

The narrative offered in the Findings deviated from the historical record. It turned out to be a litigation narrative – one that had already failed – which was being used to drive potential legislation that would have allowed that unsuccessful litigation to be resuscitated.

## **December 2011 US-France Agreement that resolved SNCF Holocaust-related issues**

In response to the 2011 Congressional hearings, and the prospect that US states might reject SNCF's high-speed rail contract bids over Holocaust-related issues, the French government entered into discussions with former Secretary Eizenstat, who had been asked by the US government to assist in resolving the issues raised by the Findings and the proposed legislation.

In December 2011, the United States and France reached a resolution, which ultimately was documented some years later. The new US-France Agreement on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are Not Covered by French Programs filled the gap left by the 2001 US-France Agreement. The new agreement was designed to allow Holocaust deportees (and certain

<sup>45</sup> See: Matteoli Mission Reports available at [www.civs.gouv.fr](http://www.civs.gouv.fr). Separate reports were issued in 2000 on spoliation at the main internment camps ("Les Biens Des Internes Des Camps de Drancy, Pithiviers et Beaune-la-Rolande") and at other camps in other French provinces ("La Spoliation dans les camps de province").

<sup>46</sup> See: Testimony of Leo Bretholz before the US House of Representatives Committee on Foreign Affairs (Nov. 16, 2011), 3.

other deportees) not previously eligible for benefits to receive money under French compensation and reparation programs.<sup>47</sup> Under the new agreement, which went into effect in 2015, France established a \$60 million fund to be administered and distributed by the United States, which would make payments to survivors and their families who were not entitled to make claims under existing French programs relating to the Holocaust. Survivors generally would receive approximately \$400,000 each, while spouses of survivors could receive up to \$100,000.<sup>48</sup> In return, the United States agreed to ensure “an enduring legal peace” for France with regard to Holocaust deportation claims in the United States.

This agreement, as supplemented several times since 2014, brought to an end all but one US court case against SNCF, and legislative efforts to block SNCF from federal or state business because of its role in Holocaust deportations from France.<sup>49</sup>

## Conclusions: Resolving Tensions Between Legal and Historical Responsibility

The Findings included in the text of the HRJA were driven by an historical narrative intended to support an amendment to the FSIA that would bring SNCF within the jurisdiction of US courts. This narrative sought to establish two types of separation. *First*, separating SNCF from any other Holocaust settlements, particularly those pertaining to Germany. *Second*, separating SNCF from the French (or German) state with respect to the Holocaust in France. It is important to note that the Findings do not relate to historical responsibility, especially in terms of placing SNCF’s actions within the broader context of Vichy’s active participation in the Holocaust. The Findings were designed only to support a legal theory of jurisdiction, but they end up complicating efforts to accurately frame and contextualize the facts relating to SNCF’s historical responsibility for the Holocaust.

### ***Establishing SNCF as an Entity “Independent” of France or Germany***

As discussed above, the various Holocaust litigation settlements negotiated by the United States in 2000-01 were designed to foreclose further legal disputes over Holocaust-related claims covered by those agreements. As stated repeatedly by the United States, the premise for these settlements, and the billions of dollars in reparations paid under them, was enduring “legal peace.” At the same time, however, it was clear that the US-France Agreement did not cover every action taken by France during the Holocaust. Rather, the focus of the US-France Agreement was on bank and other “hard” assets (e.g., apartment leases, other immovable property, and home furnishings in seized residences). Hence, to the narrow extent the Findings state that there were no treaties or executive agreements between the United States and France providing for “reparations and/or restitution for personal injury or death relating to SNCF’s transportation or deportation activities between June 22, 1940 and December 31, 1944,” the Findings were correct.

But the Findings also were reaching beyond France. The US-Germany Agreement was unquestionably the only Holocaust litigation settlement to address pain and suffering claims as well as claims *specifically*

<sup>47</sup> US-France, Dec. 8, 2014, T.I.A.S. No. 15-1101.

<sup>48</sup> See, e.g.: <https://www.npr.org/2019/02/07/692376994/holocaust-survivors-and-victims-families-receive-millions-in-reparations-from-fr>.

<sup>49</sup> The program is explained in detail in a report issued by the French National Senate. See: French Senate Report No. 584, Annex 13 at 19-26 (July 1, 2015), available at [www.senat.fr/rap/114-584/114-584.html](http://www.senat.fr/rap/114-584/114-584.html).



relating to deportation – no matter where in Europe a deportation occurred. Based on this, and the negotiating history of the US-Germany Agreement, there is a strong argument that this agreement represented Germany’s recognition that it bore ultimate and principal historical *and* legal responsibility for the Holocaust – including for the pain and suffering of Jews deported from anywhere within Europe.<sup>50</sup> It was imperative that those trying to sue SNCF distinguish their claims from those otherwise covered by the US-Germany Agreement so as not to see those claims in any way foreclosed. Hence, the Findings do not refer to the US-Germany Agreement, but do attempt to carve SNCF out from any other Holocaust settlement by asserting that SNCF acted independently (i.e., of France or Germany) in deporting Jews from France.

### ***SNCF as a Business vs. Governmental Entity***

The FSIA was a codification of a widely recognized doctrine under international law called the restrictive theory of sovereign immunity. This theory distinguished between a sovereign’s “public acts” (*jus imperii*) and “private acts” (*jus gestionis*). Under the restrictive theory, sovereign immunity is recognized for the former, but not the latter, which focused particularly on sovereign entities engaged in routine commercial activities. The FSIA recognized that a foreign state should have a lower expectation of immunity from the jurisdiction of other national courts (i.e., other than its own) with regard to entities that act like private businesses, and also that the risk of a lawsuit raising sensitive diplomatic or foreign policy issues should be lower where the entity sued is acting like a private business.<sup>51</sup> As observed by the US Supreme Court, when a foreign state participates in the marketplace in the manner of a private person or corporation it does not exercise powers peculiar to sovereigns.<sup>52</sup>

If the HRJA could be seen as consistent with the restrictive theory of immunity, it was much more likely to be enacted. Accordingly, the proposed legislation is careful to focus on railroads – which seem very commercial – as distinct from the foreign states that own them. Consistent with the idea that it is not objectionable to hold a state-owned entity liable for commercial activities, the Findings also portray SNCF as a business willing to deport Jews for a profit – as opposed to a French government agency following directions from the Third Reich, the German Army, or Vichy. Finally, it should be noted that to the extent a foreign state entity is not immune from jurisdiction, the FSIA provides that it “shall be liable in the same

<sup>50</sup> See generally: Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (Perseus 2003).

<sup>51</sup> Until the mid-1800s, the classical rule of international law which provided for virtually absolute sovereign immunity. But, in 1952, the United States issued the so-called Tate Letter, which announced that the United States would join the majority of other countries by adopting the restrictive theory. The FSIA was meant to codify the restrictive theory, including by providing rules by which federal courts, rather than the Executive Branch, decide whether foreign sovereigns (or their agencies and instrumentalities) may be sued in US courts. See: Letter from Jack B. Tate, Acting Legal Adviser, US Dept. of State, to Acting US Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984-985 (1952); *Permanent Mission of India to the UN v. City of New York*, 551 US 193, 199 (2007).

<sup>52</sup> *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 US 682, 698-705 (1976). Understanding that state-owned entities have expanded into the commercial sphere, the FSIA provides that the “commercial character of an activity shall be determined by reference to *the nature of the course of conduct* or particular transaction or act, *rather than by reference to its purpose.*” 28 USC. § 1603 (d) (emphasis added). Hence, under the FSIA, conducting an activity that any business could undertake is commercial, even if the purpose of the activity relates to sovereign interests.

manner and to the same extent as a private individual under like circumstances.”<sup>53</sup> Thus, under the HRJA, SNCF would have been opened to liability akin to that faced by private persons.

Interestingly, this FSIA-driven result is at odds with legal responsibility under international law, which represents the source of the alleged claims against SNCF. International law has wrestled with the nature of government entities versus private entities, and, under international law, companies have not been considered “persons” that may be held liable for crimes under international law. Indeed, a draft provision in what became the convention governing the International Criminal Court that would have extended the jurisdiction of the court to corporate entities did not garner sufficient state support – confirming that this is not yet an accepted norm under international law.<sup>54</sup> Thus, to the extent that SNCF was subject to FSIA jurisdiction, and thereby deemed to be as liable as a “private individual,” it might have faced claims in US courts premised on international law (i.e., for torts relating to the crime of genocide, war crimes, or crimes against humanity), which normally would not have applied to a private company.<sup>55</sup>

### ***Independence and Legal vs. Historical Responsibility***

Likening SNCF to a private company may have made sense from a US litigation perspective, but it raises serious historical issues because it seeks to ignore SNCF’s status as a government entity subject to German and Vichy control. Just because private companies can operate railroads for profit does not mean that a state-owned railroad operating during a war is free to operate like a typical commercial enterprise. In particular, even if legally there is no distinction between a corporate and state-owned railroad, this begs the question of historical responsibility as between a private and sovereign enterprise. With respect to SNCF’s historical responsibility in the Holocaust, taking SNCF out of its actual historical context means potentially ignoring how, as a French government entity, it may have operated very differently from any private company. In some ways this may make SNCF *more* historically responsible and, in some ways, *less*. The point is that legal perspectives may cloud an analysis of historical responsibility because legal analysis compartmentalizes facts to see whether precise elements of a crime or claim can be satisfied,

<sup>53</sup> 28 USC. § 1606. The FSIA, however, states that punitive damages may not be imposed on a foreign state, as opposed to its agencies or instrumentalities. Ibid. The FSIA also sometimes makes distinctions between foreign states and their agencies or instrumentalities, by making it easier to establish jurisdiction as to certain claims with respect to an agency or instrumentality.

<sup>54</sup> See: *Jesner v. Arab Bank, PLC*, 584 US \_\_\_, 138 S. Ct. 1386, 1399-1401 (2018) (noting also that no corporations were charged or held liable by the Nuremberg Tribunal). Although under the so-called Alien Tort Statute (28 USC. § 1350) civil damage claims premised on crimes under international law may be pursued in US federal courts, under *Jesner*, a non-US company may not be sued for crimes under international law.

<sup>55</sup> International law does allow a government entity to be designated a criminal “organization,” but this is not for purposes of punishing the organization – it is to make it easier to hold members of the organization criminally liable by making it easier to prove intent. At Nuremberg, governmental groups within the Reich were designated criminal organizations (e.g., the SS, Gestapo, SD, and General Staff), such that there was a presumption of intent with respect to crimes committed by members of those organizations. But prosecutors still had to prove facts linking individuals to a given criminal incident. Under both international and national law, claims against states generally are made against specific government agencies – often in addition to the state itself – because of the need to “locate” the wrong in a person or persons who committed the *actus reus* (i.e., the legally operative act) with *mens rea* (i.e., the required state of mind). States generally are liable for the acts of state-owned entities, which is different from the rule relating to companies, under which parent companies generally are *not* liable automatically for the wrongs of their subsidiaries. Hence, it also is anomalous to argue for the “independence” of a government entity because a claimant suing a state typically would *not* want to apply doctrines of corporate separateness that are used to *limit* how liability is spread from one corporate entity to another. Claimants generally want to sue an entity with greater financial resources, and states (like parent companies) generally have more money than state agencies or state-owned entities (like subsidiaries).

while historical analysis casts a different and broader net.

Under law, a company owes duties to its shareholders – not the public at large. Those duties include acting in the company’s best economic interests in pursuit of profit. State agencies, on the other hand, are not required to pursue a profit. They owe duties to the state – which often may operate at a deficit – and must carry out their duties even if uneconomic (unless the state has specifically dictated otherwise). Companies also are not generally legally responsible for every wrong committed by the state in which they operate, while state entities may have broader exposure to the wrongs committed by their governments. Companies also do not become accomplices of the state simply by contracting to provide a service or product.

For example, at Nuremberg, a tribunal made up of US federal judges refused to impose liability for aiding and abetting war crimes and crimes against humanity on a Dresdner bank officer (Rasche) who made a loan financing a concentration camp knowing the crimes being committed there.<sup>56</sup> The same tribunal, however, convicted the deputy to the Reichsbank president (Puhl) on the same charge because Puhl knowingly took part in disposing of gold, including gold teeth and crowns and other valuables he knew had been looted from Holocaust victims.<sup>57</sup> The distinguishing factor was that one defendant exhibited a purpose to aid and abet Nazi crimes that went beyond simple knowledge of what the Nazis were doing. Rasche’s activities in approving a loan never went beyond the routine duties of a banker. By contrast, Puhl engaged in activities beyond routine banking duties in order to assist primary criminal perpetrators in disposing of looted Holocaust gold. In contrast, from the perspective of historical responsibility, *both* Rasche and Puhl (and their institutions) bear responsibility for assisting the machinery of the Holocaust, *and* that historical responsibility is crucial to our understanding of the Holocaust and our efforts to use transitional justice processes to prevent future genocides or mass atrocity crimes. That same tension is evident with SNCF.

As shown in Part VI, above, the historical context surrounding SNCF is far more complicated than that offered by the Findings. In particular, SNCF’s independence becomes more problematic the more its railroad operations are examined in the historical context of a state-owned railroad operating in a conquered country. For example, consider the following questions:

***Was SNCF free to operate independently and to whom was it responsible?***

An independent company owes duties to its shareholders and can make day-to-day operational decisions without shareholder approval. It is not clear whether that was true for SNCF.

- Following the Fall of France, SNCF came under the express control of the German Army and the Vichy state. Although SNCF owned its equipment, all railroad operations (i.e., SNCF’s equipment and tracks) in Occupied France were “at the full and complete disposal of the German Head of Transportation.” Two-thirds of SNCF’s tracks were in Occupied France.

<sup>56</sup> See: United States v. von Weizsaecker (The Ministries Case) (1949), reprinted in 14 Trials of War Criminals Before the Nuremberg Military Tribunals, at 661-662 (William S. Hein & Co. 1997).

<sup>57</sup> Ibid., 620-622.

- After France fell, SNCF's Board was reduced from 33 to 12, and the Management Committee was eliminated so as to tighten Vichy control. The German Army Transport Directorate (WVD) could and did replace SNCF officials at will.
  - The WVD reported to German Army High Command, and the German commanders issued direct orders to SNCF.
  - German general orders made all SNCF employees subject to German control, and SNCF orders based on those German orders warned of "serious consequences" for disobeying German orders.
  - The Germans did kill SNCF employees for attempting to resist. While there does not appear to be evidence of SNCF employees being punished for attempting to assist or save Jews, there is ample evidence of SNCF employees being taken hostage and subject to summary executions, particularly after November 1942 when Germany occupied all of France (and sped up the pace of deportations).

### ***Was SNCF free to deploy its assets so as to maximize profit?***

An essential attribute of any commercial enterprise is that it controls its assets and is free to deploy those assets to maximize profits. It is not clear whether SNCF could do this. Moreover, any assessment of SNCF's alleged profit motives must take account of the value of SNCF assets appropriated by the Germans – both as to the value of the equipment itself, *plus* the lost usage value of assets that SNCF could no longer deploy at any billed rate.

- Germany expropriated and "rented" (on demand) SNCF equipment to meet German war needs. By late 1943, 30% of SNCF's locomotives, 52% of its freight cars, and 36% of its passenger cars had been taken for German use.
- When SNCF submitted invoices to the Germans for "rented" equipment and services, Germany never fully paid SNCF. SNCF sustained *monthly* deficits of FF 200 million on rentals of its equipment alone. By comparison, the *total* number of SNCF rail cars used for deportations (which would relate to revenue generated), if aggregated, would have equaled only to about 15% of *one day's* rolling stock use.
  - Documents show that SNCF issued invoices in 1944 for at least some deportation transports, and that payment was sought even after France was liberated. But even if discrete payments were sought and received, this does not demonstrate that any profits were made on deportations.
- Upon invading France, Germany reset the exchange rates by devaluing the franc by over 50%. There is no evidence that SNCF was allowed to increase its billing rates to the Germans to account for this change, but available research suggests that no adjustments would have been allowed because

it was Germany's intent to make French goods and services cheaper for Germany to purchase. Absent an increase, SNCF's billing rates would have been increasingly unprofitable over time. Nonetheless, there also is no evidence that SNCF could withhold services from the Germans on the basis of profitability.

- Vichy, of which SNCF was a part, suffered massive financial losses from the German occupation, including through enormous reparations imposed on France, which averaged almost 40% of the *annual* French GDP. These reparations more than doubled France's debt to GDP ratio as compared to pre-war levels.<sup>58</sup>

### ***Did SNCF independently initiate deportation transports?***

Generally, a commercial railroad decides when and how it will schedule its trains. With respect to Holocaust deportations, it is not clear that SNCF had this authority or control.

- It does not appear that SNCF initiated deportations or deportation transports. Rather, French deportations were initiated and coordinated by the Reich Security Office overseen by Adolf Eichmann, which also dictated what types of train cars were to be used and how local police authorities were to load and order the trains.
- To the extent SNCF rolling stock was used in deportations, it generally remained in Germany, making it unlikely that SNCF employees cleaned rolling stock used to deport Jews from France.

### ***Did SNCF engage in non-railroad activities to further the Holocaust?***

As with the *Ministries Case*, discussed above, understanding of SNCF's independence and responsibility also would involve examining whether SNCF undertook activities that went beyond normal day-to-day commercial railroad activities so as to assist the primary perpetrators (i.e., the Germans or Vichy French) in deporting Jews. It does not appear that SNCF did this.

Allegations that SNCF looted the property of deportees and then kept that property have been tested and have failed.

In US litigation against SNCF, US courts considered and rejected this allegation as unsupported by anything other than conjecture.

A detailed archival research report commissioned by the French government showed that looting at French internment camps involved the Vichy French government – not SNCF – appropriating property from Holocaust victims.

<sup>58</sup> See: supra at notes 40-41.

Based on the above, SNCF appears to have lacked key attributes of corporate personality, and it is not at all clear whether SNCF crossed the line of becoming an active aider and abettor like Puhl in the *Ministries Case*. SNCF did not control its own assets and had no ability to control or prevent German looting of its assets over time. By itself, this would be strong evidence as to who really controlled SNCF. SNCF also does not appear to have been free to make decisions that would maximize its economic performance, or profit. The historical record shows that the Germans routinely refused to pay SNCF invoices for appropriated rolling stock, and there does not appear to be evidence showing that SNCF could alter its billing rates to the Germans to make up for the ruinous exchange rates imposed by Germany – and SNCF was not in a position to refuse to do business with the Germans. Any assessment of SNCF’s alleged profits from the Holocaust must account for all these factors (and, perhaps, the overall financial losses imposed on Vichy France by German reparations).

SNCF also was not in a position to protect or fully manage its employees, who were subject to German orders and to being taken hostage or summarily executed. Placed in this context, it is not clear whether an SNCF employee who kept doing his job by billing for deportation trains and pursuing payment was “profiteering” or simply trying to stay invisible and alive. Finally, that there is no historical evidence that SNCF employees looted Holocaust victims suggests that SNCF never crossed the line of becoming a purposeful aider and abettor of German or Vichy French Holocaust crimes.

It also is worth noting that, unlike private companies, SNCF was not wholly free to ignore its past. Well before the 2001 US-France Agreement, France had taken responsibility for the role it played in the Holocaust and for the crimes of the Vichy regime. Based on France’s movement toward engaging with the historical record, SNCF also began addressing its past. As discussed above, SNCF’s wartime activities had been investigated and made public before the US-France Agreement or SNCF litigation. This was not the case with French companies generally.

Thus, were SNCF to be judged as a “private individual” – which is what the plaintiffs presumably intended in seeking to apply the FSIA to SNCF – it is not at all clear that legal responsibility would have been imposed upon SNCF or that SNCF would have been viewed as an independent corporate actor. This, in turn, highlights starkly the challenge of corporate engagement with respect to mass human rights violations.

### ***Historical Responsibility and the Holocaust Settlement Process***

Absent legal liability, companies are left to say, “there was nothing to be done.” Companies can argue that business has to go on, duties to shareholders must be met, employees must be kept working, and – depending on the industry – doing business with an evil government often is not an option, but a necessity. Indeed, once World War II began, German economic planning imposed strict quotas on many industrial sectors and mandated outputs and contract terms. SNCF was part of an essential war industry, deemed so important that it was placed under the control of the German Army. As highlighted by the *Ministries Case*, it takes a great deal more than “doing business” to make a company legally liable for the crimes of the state in which they are located.

But no matter how it is viewed, it also is true that the historical record in no way absolves SNCF from its responsibility for participating in the machinery of the Holocaust. SNCF was part of the Vichy regime, and the depth and willing participation of Vichy in the persecution of Jews in France was open and notorious. Yet, the historical record leaves open how willing or compelled SNCF’s collaboration may have been,

or how free SNCF may have been to delay or frustrate the deportation of Jews from France. It seems highly likely that SNCF employees would have understood the horrors facing Jews being deported, as SNCF employees presumably would have seen the inhumanity of deportation trains being loaded and would have cleaned trains used for internal transport of Jews among French detention camps. But again, knowing the horrors faced by Jews during the Holocaust is only one piece of the historical record, and must be balanced against facts that would appear to show that an SNCF employee might have been under greater German pressure because SNCF was an essential war industry subject to direct, daily German control and orders.

Interestingly, placing SNCF within the context of Vichy, and Vichy's policies of joining in the German persecution of Jews, casts the 2014 US-France Agreement between the United States and France in a different light and, arguably, validates the logic behind Secretary Eizenstat's approach toward Holocaust reparations. Secretary Eizenstat's working assumption was that there is no perfect justice. As the US government made clear in its papers supporting the various Holocaust settlements, legal liability was far from guaranteed in the US Holocaust litigation (consistent with the discussion above relating to SNCF). But the historical record supported a case for actual and moral responsibility, which demanded a response to address the suffering inflicted. Secretary Eizenstat framed that response in two ways. *First*, there would be reparations that worked some form of "rough justice" while also evidencing acceptance of responsibility. *Second*, there would be factual openness in the form of historical reporting and the opening of archives, which again evidences responsibility *and* reduces the risk of future denial or revisionism.

The 2014 US-France Agreement fit this approach. It filled a gap in the existing French Holocaust settlements, which had not addressed the independent pain and suffering that Vichy had visited upon the Jews of France. The 2014 US-France Agreement also addressed issues of broader "corporate" liability beyond the banking industry, something the 2001 US-France Agreement did not do. In this sense, the 2014 US-France Agreement between the United States and France builds on the precedent of the US-Germany Agreement by having the state (i.e., France) take responsibility for industry and the role industry played in the human rights crimes committed at the behest of the state. Finally, the 2014 US-France Agreement recognized the prior historical research done by SNCF and the French government, which is already a part of the public record, and which fits within the broader research already produced by the French government relating to the Holocaust in France.

Secretary Eizenstat's approach also fits squarely within transitional justice approaches endorsed by the United Nations. For example, the Holocaust settlements, including the 2014 US-France Agreement, builds on key transitional justice components:

- The Holocaust settlements build on the historical record surrounding the Holocaust, including extensive historical investigations conducted by government commissions, which then yielded voluminous public reports with respect to Germany, France, and Switzerland.
- The Holocaust settlements established a respect for the right to truth for victims, survivors, future generations, and society as a whole, as well as by opening archives, which facilitated a continuing examination of the Holocaust period.

- The Holocaust settlements delivered reparations and/or restitution which were linked to acknowledgements of historical responsibility for the wrongs committed.
- The Holocaust settlements were the product of national and societal engagement, processes that can be used to reduce the risk of recurrence.<sup>59</sup>

As opposed to the questionable historical approach of the HRJA Findings, the value of Secretary Eizenstat's approach – with respect to corporate responsibility – is that it recognized the principal and central role played by governments in the Holocaust. It is easy to say that the Holocaust could not have occurred without the participation of industry, but it also is easy to say that every member of society who did not act in the face of injustice bears equal responsibility for the crimes ultimately committed. This is not true legally, ethically, or morally. Rather, it is an incomplete approach because, as the law recognizes, not all forms of collaboration (or standing-by) are equal, or even equivalent. That is why collective guilt was rejected by Justice Robert Jackson at Nuremberg and why it does not serve the purpose of advancing long-term prevention, as it ignores historical context and the ways in which that context informs the question of responsibility.

Karl Jaspers, in a series of post-war lectures regarding Germany's responsibility for the crimes of the Third Reich, posited four categories of responsibility: criminal guilt (the commitment of overt acts), political guilt (the degree of political acquiescence in the Nazi regime), moral guilt (a matter of private judgment among one's friends), and metaphysical guilt (a universally shared responsibility of those who chose to remain alive rather than die in protest against Nazi atrocities).<sup>60</sup> It is beyond the scope of this paper (and the qualifications of the author) to work through the implications of Jaspers' responsibility model. However, Jaspers' categories ably capture the challenge of placing corporate actions into the broader context of state-driven mass atrocity violence. Among other things, Jaspers' model frames the difficult issue of how much resistance is required to lessen guilt. These types of issues come into play whenever the authority and power of the state are used to mobilize society toward mass violence. They are precisely the types of issues ignored by attempting to portray entities like SNCF as "independent" actors with unlimited free will.

There is a strong argument that SNCF's role in the Holocaust was determined when France was conquered by Germany. SNCF unquestionably bears the responsibility (and guilt) of the Vichy government of which it was a part. But, at bottom, the responsibility of national rail systems like SNCF must lie (both legally and logically) with the governments that oversaw their operations and decided to aggressively participate in the Holocaust that Germany decreed, organized, and implemented. Any corporate veil that might have existed as to entities like SNCF was pierced by the German and the Vichy French governments which determined how and when SNCF's trains would be used, including within the mechanics of the Holocaust. To the extent the HRJA Findings ignored this, they did not do justice to the historical record. As important, the Findings also did not further efforts to develop principals of historical responsibility that could help corporations better understand their responsibility to prevent genocide and mass atrocity violence *and* how large organizations can avoid becoming participants in that kind of violence.

<sup>59</sup> See, e.g.: Guidance Note of the Secretary General: United Nations Approach to Transitional Justice (March 2010), 7-9.

<sup>60</sup> See: Karl Jaspers, *The Question of German Guilt* (Fordham rev. ed. 2001).