Reports

Klaus Barbie – The Butcher of Lyons

That OSI personnel would help prepare a report on Klaus Barbie – or anyone else – was not readily foreseeable when OSI was founded. OSI's mission was framed in terms of its litigative purpose: to secure the denaturalization and deportation of persons in the United States who assisted the Nazis in persecuting civilians between 1933 and 1945.[1] Such a mandate did not necessarily include writing reports about U.S. post-war activity. Moreover, since Barbie was not in the United States, there was no obvious reason for OSI to focus on him.

Klaus Barbie, a German by birth, joined the SS and served the Nazi cause in Vichy France. Between 1942 and 1944, he served in the intelligence branch of the German security apparatus and headed the Gestapo in Lyons. His rank at war's end was captain. During his tenure in Lyons, thousands of Jews and resistance fighters were tortured by the Gestapo and sent to concentration camps. Most died. Because of his alleged role in many of these atrocities, Barbie became known as "the butcher of Lyons."

At the war's end, France submitted a statement of charges against Barbie to the United Nations War Crimes Commission.[2] Among the alleged crimes were "murder and massacres, systematic terrorism, and execution of hostages." He was sentenced to death *in absentia* by a French postwar military tribunal.[3]

In 1963, the French government learned that Barbie was living in Bolivia under the name Klaus Altmann.[4] It did not seek his removal until nine years later, when Beate Klarsfeld, a Nazi hunter living in France, uncovered the information and made it public. In 1972, and again in 1975, Bolivia's military government – with which Barbie had close ties – refused France's

request for extradition on the ground that there was no extradition treaty between the two countries.[5] After civilians regained control of the Bolivian government in 1982, France filed a new indictment against Barbie, charging him with "crimes against humanity," and again requested his return. Although there was still no extradition treaty, the new administration devised an alternative method to oust him. He was charged with making a fraudulent loan to the Bolivian government and expelled to French Guyana. When his plane landed, the French, who had been forewarned, arrested him and flew him to France. He arrived in Lyons on February 6, 1983.

News of his expulsion unleashed a flood of information. A former American intelligence officer asserted that the U.S. had protected Barbie and paid him $1,700 a month for intelligence information after the war.[6] Newspapers reported that while the Americans were harboring Barbie in Germany, they turned down French requests to locate him.[7] A Canadian, claiming to know Barbie from Bolivia, recalled Barbie's telling him that he had come to the United States several times during the 1960s and 1970s.[8] Many in the media called for a governmental investigation to determine what relationship, if any, the U.S. had with Barbie. The Justice Department, the State Department, the CIA, and Defense Department were all suggested as appropriate agencies to pursue the allegations.[9] In a well-publicized letter, the Chairman of the House Judiciary Committee wrote to Attorney General William French Smith, suggesting that OSI:

> could play a unique and valuable role in any investigation conducted by the Executive Branch. Given the expertise of OSI's staff, and the fact that attorneys and investigators there have the necessary security clearances, it would seem that the office would be ideally suited to coordinate such an inquiry. More importantly, OSI, with no direct ties to the intelligence community and no vested interest in any predetermined outcome, is sufficiently detached to assure that its findings would be viewed as complete and honest.

> . . . While the primary function of OSI must remain the prosecution of denaturalization and deportation actions involving suspected Nazi war criminals in this country, the case of Klaus Barbie is potentially too important a part of the historical record to be left unattended.[10]

Some within the Department feared that taking on the task might lead to an inundation of similar assignments. The Department might be asked to conduct inquiries on all sorts of prior government conduct.[11] The Attorney General decided against investigating the Barbie matter on the grounds that no prosecution was likely to result (the statute of limitations on any crimes having long since passed), and that historical inquiry was not the work of the Justice Department in any event.[12] William Clark, the national security advisor, urged the Attorney General to reconsider.[13] Outside groups also pressed to have the matter investigated,[14] and nine members of Congress appealed to President Reagan to authorize an investigation.[15]

As this pressure was mounting, OSI Director Allan Ryan received a call from an ABC News reporter who had gone to Bolivia to pursue the story.[16] He told Ryan he had documents showing that Barbie had worked for U.S. intelligence and that the United States had helped him escape to Bolivia. The story would air on that evening's news. Ryan relayed this information to the Attorney General's office; within hours the Attorney General authorized the Department to conduct an inquiry.

Ryan had indicated his intention to leave government service before the Barbie issue arose. He was, however, intensely interested in the Barbie controversy. Therefore, he was very amenable when AAG Jensen asked him to lead the Barbie investigation. He was named AAG Jensen's Special Assistant for the duration of the project. Ryan selected two investigators, one historian, and one attorney, all from OSI, to work with him full time.[17] The report was

completed five months later.

It revealed not only that the Army used Barbie as an informant after the war,[18] but that it had ignored several requests by the French for extradition, had misled the State Department (which then passed on this misinformation to the French) as to Barbie's whereabouts, and had used the services of a shady intermediary to help Barbie escape to Bolivia in 1951 under the name Klaus Altmann.[19] Once he was there, the U.S. no longer protected or used him. He obtained Bolivian citizenship and twice made business trips to the United States under his new name;[20] the visits were not connected to any agency or activity of the U.S. government.

The 218 page report (with over 600 pages of attachments) was detailed and pointed.[21] It recounted the enormous pressure on the Army to develop "sources" during the early Cold War period, and concluded that from 1947 – when Barbie first began working with the United States – until 1949, the U.S. did not know that he was accused of involvement in wartime atrocities. (The report suggests that this information was available, but not readily so.) By 1949, however, the allegations were inescapable, as Nazi victims and former Resistance fighters were publicly claiming that Barbie had used torture as an interrogation technique.

Ryan concluded that the Army officials who continued to use and protect Barbie, even after they had reason to suspect he was a war criminal, did so for two reasons: (1) surrender of Barbie would "embarrass" the U.S. by revealing it had worked with a former Gestapo official, and (2) it would risk compromising procedures, sources and information. The latter concern was based on the fact that Barbie had recruited informants from within the German Communist Party as well as right-wing groups. At the time, the U. S. believed that French intelligence had been penetrated by Communists. Therefore, if Barbie were turned over to the French, the Communists

might learn about U.S. sources. This not only could compromise U.S. operations, but also might jeopardize the lives of the informants.[22]

The report was non-judgmental about the initial decision to work with Barbie.

> . . . I cannot conclude that those who made the decision to employ and rely on Klaus Barbie ought now to be vilified for the decision. Any one of us, had we been there, might have made the opposite decision. But one must recognize that those who did in fact have to make a decision made a defensible one, even if it was not the only defensible one. No one to whom I spoke in this investigation was insensitive to the horrors perpetrated by Nazi Germany, nor entirely comfortable with the irony of using a Gestapo officer in the service of the United States. They were, on the whole, conscientious and patriotic men faced with a difficult assignment. Under the circumstances, I believe that their choice to enlist Barbie's assistance was neither cynical nor corrupt.

Once the United States had reason to believe that Barbie was involved in war crimes, however, Ryan opined that there was no longer any moral or legal underpinning to the Army's actions. By lying to the State Department about Barbie, and then helping spirit him out of the country, Army personnel precluded the U.S. from making a fully informed decision about whether to honor France's request for extradition. According to Ryan, the Army's actions amounted to a criminal obstruction of justice. The question then became how to deal with – and prevent future occurrences of – such conduct.

Prosecution was not an option, since the five year statute of limitations on obstruction of justice had run. The obstruction had occurred in 1950 when Army officers – knowing that the State Department was considering an extradition request from France – falsely told the State Department that Barbie's whereabouts were unknown.

Ryan held out no hope that legislative or regulatory reforms would be effective.

> [G]iven the almost infinite variety of circumstances that an intelligence agency encounters in the course of its operations, it would be exceedingly difficult to

> define a class of eligible informants based on their background or status. And any such line-drawing would require the comparison of . . . two fundamentally dissimilar considerations . . . : the need for information of strategic importance versus the repugnance of dealing with criminals, or former enemies, or brutal thugs, or officials of evil institutions. Even if there were a consensus on whom we ought not to deal with, any workable definition would be so broad as to be useless to those who must apply it, or so narrow that it would be of little practical significance.

He was optimistic, however, that during the thirty years since the United States had ended its relationship with Barbie, there had developed a greater sense of accountability on the part of the various intelligence agencies.[23] The report ended on an upbeat note, hopeful that persons faced with similar issues in the future would not assume that anything was permissible, including obstruction of justice, simply because it falls under the cloak of intelligence.

These findings and conclusions – that the United States had worked with a Nazi Gestapo leader and that Army officers had obstructed justice on his behalf – would alone have been sufficiently shocking to make headlines, as had the allegations leading to the report. However, Ryan went further. In a letter accompanying the report, and addressed to the Attorney General, Ryan urged that the United States publicly apologize to France.

> It is true that the obstruction of efforts to apprehend and extradite Barbie were not condoned in any official sense by the United States Government. But neither can this episode be considered as merely the unfortunate action of renegade officers. They were acting within the scope of their official duties. Their actions were taken not for personal gain, or to shield them personally from liability or discipline, but to protect what they believed to be the interests of the United States Army and the United States Government. Under these circumstances, whatever may be their personal culpability, the United States Government cannot disclaim responsibility for their actions. Whether Barbie is guilty or innocent of the crimes with which he is charged will be decided by a French court. But whatever the verdict, his appointment with justice is long overdue. It is a principle of democracy and the rule of law that justice delayed is justice denied. If we are to be faithful to that principle – and we should be faithful to it – we cannot pretend that it applies only within our borders and nowhere else. We have delayed justice in

Lyons.

> I therefore believe it appropriate, and I so recommend, that the United States Government express to the Government of France its regret for its responsibility in delaying the due process of law in the case of Klaus Barbie. We should also pledge to cooperate in any appropriate manner in the further investigation of the crimes for which Barbie will be tried in France.
>
> This is a matter of decency and of honorable conduct. It should be, I believe, the final chapter by the United States in this case.

This recommendation had originally been in the report itself. However, after receiving an advance copy of the document, the State Department expressed some reservations.[24] In order to accommodate their concerns – and yet not back down on the need for an apology – Ryan proposed excising the recommendation from the report and instead making it a separate memorandum to the Attorney General. The State Department could then present the final report to the French, along with a formal note of apology which the State Department prepared. The Justice Department would withhold public release of the report and the memorandum until after the apology had been made.[25] DAAG Richard helped negotiate these accommodations with the State Department.[26]

On August 12, 1983, the State Department presented the full report to the French chargé d'affaires in Washington, along with a note expressing the United States' "deep regrets over the actions taken in Germany . . . to conceal Barbie." Five days later, the cover letter, report and apology were made public. The story received enormous attention. It was page one in *The New York Times*, which printed Ryan's cover letter in its entirety, large excerpts from the report, and a statement by Ryan as its "quotation of the day." The Justice Department held a news conference and the presidential press secretary announced delivery of the note to the French.[27] Ryan was a

guest on two of the three major network morning news shows as well as on public television's *MacNeil/Lehrer News Hour*.

Although there was much praise for his scholarship, there was some debate over his conclusions. Conservative newspaper columnist Patrick Buchanan, who had no sympathy for Barbie, thought an apology unwarranted.

> Ironic, is it not? The U.S., which gave thousands of its sons freeing France from the grip of Adolf Hitler, finds itself apologizing to the French nation, many of whose citizens actively collaborated with Hitler.[28]

Liz Holtzman questioned Ryan's belief that the Americans working with Barbie prior to 1949 did not know of his true wartime activities: "[F]or me to accept that conclusion, I would have to believe either that these people were very unintelligent or that they wore the narrowest of blinders."[29] Some Jewish leaders shared her skepticism.[30] Other public figures did as well. Flora Lewis, foreign affairs columnist for *The New York Times*, found the report "unconvincing" in its conclusion that the obstruction of justice was limited to only about a dozen officers; she suspected others higher up in the administration were involved.[31] Her suspicions got some support from Eugene Kolb, an Army colonel who had supervised the Barbie matter in the early years. He opined that Ryan's inability to establish culpability higher up the chain might be due to the fact that decisions at the higher levels were often made during phonecalls, leaving no paper trail.[32]

For the most part, however, reaction to the report and the apology was positive. *The Washington Post* found the "candor and balance" of the report "a credit to the Justice Department and particularly to its principal author, Allan A. Ryan, Jr."[33] *Time* magazine called the report "remarkable."[34] *The New York Times* noted "[h]ow rare it is for a proud and powerful nation to

admit shabby behavior." It described the report as one which "serves history and invites us to learn from it."[35] Newspapers in both France and Germany praised the work, with one German paper extolling the United States' "powerful and impressive capacity for democratic self-purging."[36] And the GAO, which later investigated the Barbie matter for Congress, fully endorsed Ryan's report.[37]

The decision to prepare the report had a significant impact on OSI. Strictly speaking, the report was not an OSI project; Ryan was no longer OSI Director when he prepared the document, though he relied on OSI staff exclusively to assist him. Nonetheless, Ryan had been chosen because of his OSI connection and the credibility he had helped establish for the office. He further enhanced that credibility by producing a document of unassailable scholarship and by directly taking on the issue of the government's moral and legal posture *vis à vis* Nazis in the post war period.

When the next Nazi-era investigation needed to be conducted, there was no issue about whether the Department of Justice should be involved or which office should prepare the document. OSI was the natural and noncontroversial choice to do the investigations and to write reports on Robert Verbelen, Kurt Waldheim, and Josef Mengele, each discussed elsewhere in this report.[38] The quality of the Barbie and subsequent reports helped establish OSI as an essential resource for persons dealing with World War II issues.

As one result of that development, the Attorney General designated the OSI Director to represent the Justice Department on the Interagency Working Group (IWG), created to implement the Nazi War Crimes Disclosure Act of 1998 and the Japanese Imperial Government Disclosure Act of 2000. The IWG is charged with locating, identifying, inventorying,

recommending for declassification and making available all classified Nazi war criminal records, subject to certain specified restrictions. The restrictions include records related to or supporting any active or inactive investigation, inquiry, or prosecution by OSI and any records solely in the possession, custody or control of the office.[39]

The Barbie report has thus had the unforeseeable effect of subtly expanding OSI's recognized mandate. After the report was issued, it became a given that the mandate went beyond prosecutions and covered matters beyond U.S. borders.

As for Barbie, in 1987, after an eight-week trial in France, he was convicted of crimes against humanity and sentenced to life in prison.[40] He died four years later.

1. Department of Justice Order No. 851-79, Sept. 4, 1979.

2. *See* p. 324, n. 7 re the role of the UNWCC.

3. Under French law the conviction lapsed after twenty years. "Exorcising Old Ghosts," *Time*, Feb. 21, 1983.

4. "France Had Data on Barbie in '63, Document Shows," by Paul Webster, *The Washington Post*, Feb. 16, 1983.

5. *Latin American Newsletters, Ltd.*, Mar. 9, 1973; *Latin American Newsletters, Ltd.*, Jan. 3, 1975.

In 1976, the Bolivian Ambassador to France was murdered. His alleged role in attempting to stop the French government from seeking Barbie's extradition was given by the terrorists as one reason for the assassination. "Envoy of Bolivia is Slain in Paris, " by Andreas Freund, *The New York Times*, May 12, 1976.

Apart from the French request, Peru sought to extradite Barbie on charges of currency fraud and smuggling. He was in Bolivian custody for almost 8 months before the Peruvian request was denied. "War Crimes Suspect Released by Bolivia," *The New York Times*, Oct. 30, 1973.

6. "Ex-Gestapo Official in Lyons is Linked to U.S. Intelligence," by Ralph Blumenthal, *The New York Times*, Feb. 8, 1983. "Canadian Says Barbie Boasted of Visiting U.S.," by Ralph Blumenthal, *The New York Times*, Feb. 28, 1983.

The Department of Justice report ultimately issued on Barbie casts serious doubt on the $1700 figure. It concludes it much more likely that Barbie was paid about $100 per month in food, cigarettes, ration cards and German currency.

7. "Klaus Barbie's American Connection" (editorial), *The Washington Post*, Mar. 1, 1983.

8. "Canadian Says Barbie Boasted of Visiting U.S.," *supra*, n. 6.

9. "Obligation to History," *The New York Times* (editorial), Mar. 3, 1983.

10. Feb. 24, 1983 letter to Attorney General Smith from Peter Rodino, Chairman of the House Committee on the Judiciary. For reports of the letter, *see e.g.*, "U.S. is Reported to Have Evidence That Barbie Visited in '69 and '70," by Ralph Blumenthal, *The New York Times*, Mar. 8, 1983; "Rodino Asks Probe of U.S. Aid to Seized Nazi," by Robert Cohen, *The Newark Star-Ledger*, Mar. 9, 1983.

11. Jan. 12, 2002 recollection of DAAG Richard.

12. Mar. 3, 1983 letter to Chairman Rodino from Attorney General Smith. *See also*, "U.S. is Reported to Have Evidence that Barbie Visited in '69 and '70," *supra*, n.10.

Martin Mendelsohn shared this view. He believed a congressional committee or specially

designated commission should investigate the "sordid mess," leaving OSI to focus on finding and expelling Nazi war criminals. "Nazi Hunting for Nothing," by Martin Mendelsohn, *The San Jose Mercury News*, June 12, 1983. At the time he wrote the article, Mendelsohn served as legal counsel to the Simon Wiesenthal Center in Los Angeles; it is unclear whether he was speaking for the organization.

13. "U.S. Plans an Inquiry on Barbie," by Ralph Blumenthal, *The New York Times*, Mar. 15, 1983. The file containing Clark's request (#182-1359) was destroyed by the National Archives in due course (Jan. 1999) before this report was written.

14. "Justice to Probe Whether U.S. Protected Nazi," by Mary Thornton, *The Washington Post*, Mar. 15, 1983.

15. "U.S. is Reported to have Evidence that Barbie Visited in '69 and '70," *supra*, n. 10.

16. Recorded interview with Ryan, Dec. 13, 2002. All statements in this chapter concerning Ryan's positions come from this interview.

17. Neal Sher was named Acting Director of OSI while Ryan worked on the project.

18. During the period covered by the Barbie episode, intelligence work in Europe was handled by the CIC. Although the National Security Act of 1947 created the CIA, it was several years before the agency was fully operational.

19. The Army used an underground railroad of sorts, which had been established by others to evacuate defectors or informants who had come to Austria from the Soviet zone or Soviet bloc countries. The escape route, known as the "rat line," ran from Austria to Italy. There, for an exorbitant fee, a Croatian priest helped Nazis obtain passports from the International Red Cross and visas from various South American countries. One Army document described the priest as "a Fascist, war criminal, etc." Ryan came across no other instance in which the United States used the rat line.

20. Barbie traveled to the U.S. in 1969 and 1970, before OSI was formed. It was of course also before OSI entered tens of thousands of names to the Watchlist. *See* p. 297. In any event, a Watchlist posting of the name "Barbie" would have been useless since he traveled under the name Altmann.

21. The report and supporting exhibits can be found at http://www.usdoj.gov/criminal/publicdocs/11-1prior/11-1prior.htm (last visited Sept. 2005).

The great majority of documents reviewed for the report had been classified when executed and remained classified during the intervening years. The agencies involved, particularly the U.S. Army, declassified extensive amounts of material so that it could be included in the report's appendix. The declassifications were done in full consultation with Ryan. In the report's introduction Ryan expressed confidence that the material still classified did not in any way detract from the completeness of the report.

22. Statement of Eugene Kolb, who supervised and directed the Americans working with Barbie, on *The MacNeil/Lehrer News Hour*, Aug. 16, 1983.

23. The 1976 Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities of the United States Senate, 94th Congress, 2nd Session (generally referred to as "the Church Report"), had detailed abuses in counterintelligence by the FBI and CIA. This increased public awareness of the issues and led to new guidelines for domestic intelligence agencies.

24. The Department of Justice records do not contain the letter sent by the Secretary of State. However, extrapolating from an extant draft letter for the Secretary of State's signature, which was given to Ryan and attached by him to a memo to AAG Jensen, State was not opposed to the concept of an apology, but believed that it should not be included in the published report. They also wanted assurance that the French would receive a copy of the report before it was made public. Aug. 3, 1983 memo to AAG Jensen from Ryan re "Draft State Department letter re Klaus Barbie."

25. Aug. 7, 1983 memo to AAG Jensen from Ryan re "Klaus Barbie – State Department Options."

26. Dec. 13, 2002 recorded telephone interview with Ryan.

27. "U.S. Says Army Shielded Barbie; Offers its 'Regrets' to the French," by Stuart Taylor, Jr., Aug. 17, 1983. Press Secretary Larry Speakes said "there was no interagency conspiracy to conceal Barbie from the French."

28. "Successors of Klaus Barbie," by Patrick Buchanan, *The New York Post*, Aug. 18, 1983.

29. "What Job Specifications Call for a War Criminal?" by Stuart Taylor, Jr., *The New York Times*, Aug. 21, 1983. Holtzman was no longer in Congress when the report was issued. She was serving as the District Attorney in Brooklyn, New York.

30. *See* statements of Julius Berman, Chairman of the Conference of Presidents of Major American Jewish Organizations, *The MacNeil/Lehrer News Hour*, Aug. 16, 1983.

31. "Barbie's American Connection," by Flora Lewis, *The New York Times*, Aug. 25, 1983.

32. *The MacNeil/Lehrer News Hour*, Aug. 16, 1983.

33. "The Barbie Case" (editorial), *The Washington Post*, Aug. 18, 1983.

34. "Delaying Justice for 33 Years: How 'the Butcher of Lyons' Got Secret U.S. Help and Protection," by Maureen Dowd, *Time* magazine, Aug. 29, 1983.

35. "Shame, Pride and Klaus Barbie" (editorial), *The New York Times*, Aug. 18, 1983.

36. The *Stuttgarter Zeitung*, as quoted in "Uneasy Europeans Praise U.S. 'Mea Culpa' in Klaus Barbie Case," by William Drozdiak, *The Washington Post*, Aug. 19, 1983.

37. *Nazis and Axis Collaborators Were Used to Further U.S. Anti-Communist Objectives in Europe – Some Emigrated to the United States*, (GAO/GGD - 85 - 66, June 28, 1985), pp. 21-22.

38. *See* pp. 310-329, 385-405.

39. OSI has interpreted the restriction narrowly and has waived it entirely in many cases.

40. France had abolished the death penalty in 1981.

Robert Verbelen – Another Barbie?

The Verbelen assignment came on the heels of the Barbie report and in many ways was a natural outgrowth of the earlier document. The Barbie report shocked the public with news that U.S. intelligence services had worked with a known Nazi collaborator after the war. Verbelen raised the question of whether the Barbie case was unique.

During World War II, Robert Jan Verbelen commanded an SS security corps which terrorized the Belgian populace in retaliation for activities conducted by the Belgian underground. Acts of reprisal included the arbitrary arrest, beating, torture, imprisonment, deportation, and murder of innocent civilians. In 1947, a Belgian military court convicted Verbelen *in absentia* and sentenced him to death. At the time of this conviction, he was living in Austria and working under a pseudonym for the CIC.

In 1983, the ADL filed a Freedom of Information Act (FOIA) request for documents about Verbelen. The responsive material established that Verbelen had worked for the CIC from 1947 to 1956, although the redacted documents suggested that CIC had been unaware of his true identity.

The ADL likened the matter to the Barbie revelations and petitioned the Attorney General to institute a "comprehensive examination" of working relationships between Nazi collaborators and U.S. intelligence services.[1] AAG Trott asked OSI to conduct a preliminary inquiry into the allegations "as expeditiously as possible."[2] This initial inquiry quickly confirmed the broad outlines of Verbelen's work for the United States – he ran a network providing intelligence and counterintelligence information – but it also raised a host of additional questions. Among them were when the Army had first learned Verbelen's true identity, whether there were other known

Nazi collaborators working for CIC, and whether the Army had protected him. After meeting with Director Sher and the historian working on the report, AAG Trott authorized OSI to expand its inquiry in order to resolve these issues.[3]

In June 1985, before OSI completed its investigation, the GAO issued a report dealing with some of the same matters. The GAO report had been commissioned by the House Judiciary Committee. Its purpose was to determine, in part, whether federal agencies helped Nazi war criminals and collaborators emigrate to the United States and/or conceal their backgrounds once they were admitted. The GAO concluded that U.S. intelligence agencies knowingly employed alleged Nazis and Axis collaborators who could provide information about Communist agents in western Europe.[4] The report stated that 12 such cooperators had emigrated to the United States, four with U.S. assistance. The report did not name the twelve, although the GAO provided the names to OSI.[5]

OSI completed its own report in October 1986. Due to the amount of classified material cited, it took another year and a half before the report was cleared for release by the State Department, the CIA and the Army.[6] The June 1988 document concluded that the Army had been ignorant of Verbelen's true identity and full history until 1956, although it did know from the outset that he had been an SS officer and was trying to avoid arrest for his wartime activities. CIC severed ties to Verbelen for reasons independent of his past;[7] there was no evidence that the United States attempted to prevent his being brought to justice.

On the broader question of whether the U.S. systematically used known Nazi collaborators as intelligence sources, the answer was an emphatic yes.

For the CIC, its mission of protecting American security apparently

> justified the use of persons who were morally repugnant. A . . . CIC directive explained that, while it was preferable to use informants whose ideals were similar to those of the United States, this did not preclude "use of an informant of the 'stab-your-neighbor' type if it seems that there is definite value to be obtained thereby. It is realized that all types of characters must be used in order to obtain adequate coverage." Nearly all the former CIC agents interviewed in the course of this investigation acknowledged that membership in the SS or participation in questionable war-time activities did not disqualify a person from use as a CIC informant. Indeed, Verbelen's first CIC control agent maintained that it was advantageous to use such persons, not only because of their knowledge and experience, but also because their dependence upon the United States for protection ensured their reliability.[8]

OSI cited 13 unnamed individuals with Nazi backgrounds who had been used by the CIC in Austria, noting that in some instances the CIC protected the men from arrest.[9] The list was intended to be illustrative but not exhaustive.[10]

The report did not have the impact of other OSI special projects. Perhaps this is because its most astonishing conclusion – that there had been a pattern of reliance upon Nazi collaborators – had been foretold by the GAO two years earlier. The matter had received wide media coverage at that time.[11] Moreover, Verbelen – unlike Mengele, Barbie and Waldheim – was not a household name. Therefore, news of his connection to U.S. intelligence services did not generate front page coverage or public outrage.

At the time the report was issued, Verbelen was living in Austria, writing espionage novels and working as a speaker and publicist for neo-Nazi organizations. He died in 1991; according to newspaper accounts, his funeral was attended by a muster of approximately 100 former SS troops and neo-Nazis.[12]

1. Dec. 16, 1983 letter to Attorney General Smith from Justin Finger, Director, ADL National Civil Rights Division.

2. Dec. 27, 1983 memo from AAG Trott to DAAG Richard and Director Sher; Dec. 27, 1983 memo from AAG Trott to Attorney General Smith.

3. Sept. 8, 2003 interview with OSI Chief Historian Elizabeth White, who worked on the Verbelen report; Mar. 30, 1984 memo to file from Sher re "Authorization to Conduct Full Investigation."

4. *Nazis and Axis Collaborators Were Used to Further U.S. Anti-Communist Objectives in Europe – Some Immigrated to the United States* (GAO/GGD - 85-66, June 28, 1985).

5. June 5, 1985 letter to Director Sher from GAO evaluator John R. Tipton. One of the twelve had already been prosecuted by OSI and another was under investigation. Two others were dead. OSI opened investigations on the remaining eight. For various reasons, none of these investigations led to prosecutions. Some of the subjects died before the investigation was complete; in other cases, there was insufficient evidence to take to court.

6. Ultimately, the Army declassified all CIC files pertaining to Verbelen. The CIA was more problematic. The agency was concerned that release of some of the documents referenced in the report might compromise liaison relationships or cover assignments. In the end, as noted on p. 365, the Justice Department forewent publishing an appendix of supporting material because the CIA mandated redactions were so extensive.

7. They were concerned that at least one foreign intelligence agency knew about his work with CIC and they felt that his intelligence gathering capabilities were no longer of value.

8. *See* http://www.usdoj.gov/criminal/publicdocs/11-1prior/11-1prior.htm (last visited Sept. 2005).

9. The Justice Department took the additional precaution of not revealing the names of the countries associated with these individuals when doing so might help a reader ascertain the informant's identity.

10. May 26, 1988 memo from John Keeney, Acting AAG for the Criminal Division to Mark Levin, Chief of Staff to the Attorney General, re "Response to Memorandum of May 11, 1988 regarding OSI's Verbelen Report."

11. *See e.g.*, "2 War Criminals had Official Help in Getting to U.S., Study Finds," by Ralph Blumenthal, *The New York Times*, June 29, 1985; "U.S. Aid in Emigration of Nazis Reported," by Don Shannon, *The Los Angeles Times*, June 29, 1985; "U.S., Nazis Traded Escape, Facts: GAO Study," AP, *The Chicago Tribune*, June 29, 1985; "U.S. Used Ex-Nazis Against Soviets, Hill Told," by George Lardner, Jr., *The Washington Post*, June 29, 1985.

12. "Robert Jan Verbelen Dies at 79," by Ralph Blumenthal, *The New York Times*, Jan. 8, 1991.

Josef Mengele – The Angel of Death

That a piece of Dr. Josef Mengele's scalp would wind up in the desk of the OSI Director is an irony that Mengele could hardly have imagined.

Josef Mengele was one of the most notorious Nazis to escape prosecution. He spent most of the war at the Auschwitz concentration camp, where he helped determine which inmates would go to the gas chambers and which, by virtue of their ability to work, could be used as forced laborers. Hundreds of thousands were sent to perish immediately. Many of those "spared" became subjects in gruesome and sadistic pseudomedical experiments, including castration, forced miscarriages and intentional exposure to fatal disease and radiation. Mengele's work at Auschwitz led many to refer to him as the Angel of Death.

Mengele's doings and whereabouts after the war were the subject of much pop culture speculation.[1] The general consensus was that he was in Paraguay, living in splendor under the protection of its dictator, General Alfredo Stroesser.[2] He was therefore not on OSI's agenda.[3]

All that changed in January 1985, when the SWC released documents obtained from the Department of Defense under the Freedom of Information Act. The material indicated that Mengele might have been arrested and released in the American occupation zone of Vienna shortly after World War II, and that he might have applied for a Canadian visa in 1962.[4] This revelation set off a spate of news stories suggesting that Mengele had been in the United States.[5]

The story was particularly poignant as it came on the eve of the fortieth anniversary of the liberation of Auschwitz. The Canadian Prime Minister immediately called for an "urgent investigation." In Washington, the State Department's Assistant Secretary of State for Human Rights and Humanitarian Affairs announced that the Administration wanted the matter examined

by OSI.[6]

The Justice Department welcomed the opportunity.[7] The Attorney General called on OSI to compile all credible evidence on Mengele's current whereabouts as well as information concerning his travel in occupied Germany, his suspected flight to South America and the reliability of reports that he had visited the United States.[8]

The proposed inquiry differed from the Barbie and Verbelen reports in one significant respect: there needed to be a worldwide hunt for Mengele. In light of this, the Department of Justice assigned the U.S. Marshals Service to work with OSI. As originally conceived, OSI would focus on the historical issues: had Mengele ever been in the U.S.? had he worked with U.S. agents? The Marshals Service would take the lead in finding him.[9] Simon Wiesenthal, the West Germans and the Israelis were also committed to finding Mengele; all parties agreed to work cooperatively.

The matter galvanized the public. Spurred on, perhaps, by millions of dollars in privately sponsored reward money,[10] citizens reported Mengele sightings as diverse as the Club Med in Bora Bora, a Chinese restaurant in Salt Lake City, and a nursing home in Massachusetts. After undergoing hypnosis, one citizen reported being tortured by a neo-Nazi group that included Mengele. A psychic offered to use her powers to help the government in its search.

Just as OSI was to begin its investigation, a Senate panel convened to hold hearings on the matter.[11] Allan Ryan was one of many speakers at a hearing filled with dramatic testimony. New York senator Alphonse D'Amato, citing CIA reports, testified that Mengele might have financed his life and travels as a fugitive in South America by trafficking in cocaine. The dean of the SWC passed on reports that Mengele was in Paraguay where he had taken up the hobby of

bee collecting. And a three-star general, Assistant Chief of Staff for Army intelligence, was strongly rebuked for not being fully informed on Mengele's post-war activity. The chair of the subcommittee opined that "[i]t is time the Army gave some priority to Josef Mengele."[12]

The Army took heed. That very day, a task force was established to assist the Department of Justice in its Mengele quest.[13] The Army agreed to supply "approximately 20 personnel" to conduct a "frame by frame" search of relevant microfilm reels.[14]

All parties presumed that Mengele was alive. Director Sher was optimistic that Mengele would be brought to justice.[15] The working assumption was that Mengele would be returned to Germany or Israel, each of which had an outstanding warrant for his arrest.[16]

Unfortunately, there were no good leads as to Mengele's whereabouts. The break came when German law enforcement officials, acting on a tip, raided the home of a long-time employee of the Mengele family business in Germany.[17] They found a series of letters apparently mailed by Mengele from Brazil between 1972 and 1978, as well as letters from a Brazilian couple who had sheltered Mengele on the outskirts of Sao Paolo. A 1979 letter from the couple reported that Mengele was dead.[18]

Sao Paulo police raided the couple's home and found writings and diaries that the couple said were Mengele's. There were also pictures of an elderly man and of Rolf Mengele – Josef's grown son now living in Germany. The couple said Mengele had drowned in 1979 and they led the authorities to his putative grave. The Brazilians exhumed the body amid much publicity; they agreed to work with foreign experts to determine whether the remains were Mengele's.[19]

These developments created two independent strands to the investigation – determining whether (1) the writings, photos and possessions found in Brazil belonged to Mengele; and (2)

whether the exhumed body was his. OSI commissioned a handwriting analyst and a paper and ink document examiner to study the Brazilian writings. Both experts had worked on OSI cases before, analyzing whether World War II documents found in the Soviet Union were genuine. For the handwriting expert, the Mengele comparison was easier to make than most because the well-educated Mengele had ingrained writing habits by the time he joined the SS. The documents in the SS file and the Brazilian writings were so similar that they looked as if they were penned within weeks of each other.[20] The paper and ink analysis confirmed that the materials used had been available in Brazil during the 1970s when the diaries were purportedly written.[21]

A team of six American forensic experts traveled to Sao Paolo to study the remains. Three of the experts were chosen by the Marshals Service; the other three were selected by the SWC.

At the time of the exhumation, the two most reliable methods for rendering a positive identification were x-ray and fingerprint comparisons. Neither seemed possible in this case. There were no known x-rays of Mengele from Germany or Brazil to compare with the corpse. Although there were fingerprints in Mengele's SS file, the corpse's skin had so decomposed that no print could be taken.[22] Nonetheless, in less than two weeks, the scientists made a preliminary assessment that the body was Mengele's. They expressed confidence "within a reasonable scientific certainty."[23]

Their confidence was based on a variety of factors, the most persuasive of which was an innovative West German photographic comparison in which pictures of the exhumed skull were matched on a video terminal to known photographs of Mengele in his SS file. The skull pictures were also compared to the photographs found in Brazil. Given 24 points of comparison, there

was overwhelming identity among the pictures. In addition, the corpse's gender, height and age at death were consistent with Mengele's. The bones in the upper jaw of the skeleton showed a gap between the front teeth which matched a known gap in Mengele's jaw; it also matched a denture found with the Brazilian belongings. German dental records showed that Mengele had fillings in his molars; so too did the teeth from the skeleton. Moreover, the fillings in the skeletal teeth were European rather than Brazilian.

The Brazilian and German governments, as well as the SWC, quickly embraced the scientists' conclusion. The U.S. Attorney General was also convinced. He announced that OSI would now focus on the historical portion of the case, determining whether Mengele had ever been in U.S. custody or had any relationship with U.S. officials.[24] Director Sher and the associate director of the U.S. Marshals service told Congress that the Department "accept[ed] the conclusion" that the exhumed body was Mengele's.[25] The Marshals' role in the investigation was ended.[26]

In fact, not everyone was fully convinced that the body was Mengele's. There were several loose ends that Israel, the U.S. Army, and some within OSI and the Department of Justice wanted resolved. Most importantly, there was no evidence of osteomyelitis in the skeletal bones despite the fact that Mengele's SS records indicated that he had suffered from the disease. In addition, there was concern that a careless exhumation might have compromised the integrity of the bone samples. Moreover, the Brazilian diaries mentioned dental x-rays, yet no one had located these films to compare with the teeth in the coffin. The diaries also documented root canal work performed by someone named Gama in the town of Sama. However, there was no such town and the only dentist named Gama who could be found had no records paralleling the

entries in the diary.[27]

These unresolved issues raised two disturbing possibilities: (1) assuming Mengele had been living in Brazil, this was an elaborate hoax to connect him to an unrelated dead body in order to end the worldwide manhunt;[28] or (2) the scientists were right, but for insufficient reasons, and the case "would plague everyone forever."[29] Although the Attorney General's pronouncement had nominally ended inquiry into the identity of the corpse, the government kept the matter under review as part of its ongoing historical investigation. Thus, four months after the identity issue was supposedly resolved, DAAG Richard and Director Sher attended a meeting in Jerusalem with Israeli and German officials to discuss the need for more medical evidence. Director Sher attended a followup meeting the next month as well.[30]

The most important breakthrough in the historical research occurred when OSI historian David Marwell reviewed a manuscript which Mengele had sent to his son.[31] Mengele described it as an "autobiographical novel." In it, the protagonist explained that he had been detained briefly by the Americans after the war. He also described how his discharge papers (issued under an alias) had later been altered to another pseudonym. Marwell assumed that Mengele was the protagonist and that none of the people mentioned in the "novel" were identified by their real names. He then extrapolated from the code used to alter the protagonist's discharge papers, in order to ascertain the true name of a Munich doctor mentioned as having been with the protagonist in an American POW camp. The extrapolation was not precise, however; several names were possible fits.

This was the pre-computer era. Marwell checked old Munich telephone directories at the Library of Congress. One of the possible names was listed in the 1950 phonebook. Marwell

then went to the National Archives and searched through a microfilm card index of medical officers who served in the German military. He found a match, and the Consulate in Germany located the doctor in a small German village. Reluctantly, he spoke with Marwell. He provided a plethora of previously unknown information about Mengele's post-war aliases and travels.[32] The military task force then located personnel files of those who could have come in contact with Mengele at the various places mentioned. The Army obtained current addresses for the men from the Veterans Administration.

OSI interviewed scores of these witnesses and learned that Mengele had been in custody in two separate POW camps immediately following the war. He had used an alias, at least initially, and U.S. forces never realized that he was a war crimes suspect. He was released in routine fashion in the chaotic conditions that existed at the time. He did not work with the U.S. authorities nor did he ever travel to Canada or the United States.[33]

With the historical inquiry largely complete, a dramatic breakthrough was made in identifying the corpse. By happenstance, the U.S. Consul General in Sao Paolo was an erstwhile oral pathologist. The dental questions therefore particularly intrigued him. In a eureka moment, he realized that the reference to Sama, where Mengele's diary said he had his root canal work done, could be an abbreviation; the Consul General guessed it was shorthand for Santo Amaro:

> There was one last hopeless place we had not looked – the yellow pages of the phone book. And there it was, Dr. Hercy Gonzago Gama Angelo in Santo Amaro. My secretary called and asked for an appointment and she was told, "yes, but Dr. Gama does only root canals."

Dr. Gama's records established that he had seen a patient using a known Mengele alias on the dates listed in Mengele's diary. Mengele's precise recording of payments also dovetailed

with the doctor's records, and the patient's address was the home of the couple who had sheltered Mengele. Although Dr. Gama had no x-rays, he mentioned that the patient had been referred by a dentist named Kasumasa Tutiya. As the Consul General recalled:

> By then I was hyperventilating. . . . Mengele had told [the couple who sheltered him] that he went to a Japanese dentist because, he said, all Japanese looked alike and so Japanese could not tell one white from another. But he never told [them] the name of the dentist.
>
> When visited, Dr. Tutiya promptly found the dental charts . . . and, disproving Dr. Mengele's thesis, he also recognized photographs of the patient.
>
> . . . I then asked him sort of casually, "You wouldn't have any x-rays, would you?" And he said "Wait a minute" and came back 30 seconds later with eight dental films. . . . When the x-rays dropped on the table, I thought I had won the lottery.[34]

Although there were no German x-rays with which to compare, the finding was key. The recent x-rays were consistent with dental information contained in Mengele's SS file and with the seven teeth found in the coffin. The dentist also confirmed that the bridges and crowns in the skull were his own work.[35] All but one of the dozens of dental appointments listed in Mengele's diary matched the dentist's records.

OSI pressured the Brazilians to obtain medical information from other doctors mentioned in Mengele's writings.[36] When they failed to do so, Marwell went to Brazil himself. Accompanied by members of the German, Brazilian and Israeli investigative teams, he found and interviewed various doctors. Everything he learned corroborated the diaries. One interview was especially pivotal as it connected the diarest with the pre-war Mengele. The diary discussed a 1972 surgical procedure. The Brazilian doctor recollected the case as one performed in his out-patient clinic; he was certain that he would not have kept the records. Nonetheless, he acceded to Marwell's request for permission to search the files.[37] Within 15 minutes the team found records

under the name of a known Mengele alias. The patient's medical history stated that he had had a hernia operation 48 years earlier. That would have been 1924. Mengele's SS file listed such an operation that very year. Marwell returned from Brazil convinced that "we have removed the basis for any reasonable doubt that Josef Mengele died in Brazil in 1979."[38]

There were, by now, plausible explanations for the osteomyelitis conundrum. Reading a German medical article from the 1920s, Marwell discovered that the term osteomyelitis in prewar Germany was broadly inclusive of various conditions, some of which would not be detectable on x-rays. In addition, a paleopathologist (expert in detecting disease in skeletal bones) examined Mengele's bones at OSI's behest. He noticed a previously undetected small circular depression on one of the bones which could have been caused by osteomyelitis as the Germans then defined it.[39]

The Israelis, however, wanted more definitive proof.[40] For them there were "emotional and political reasons" which made it difficult to close the case.[41] They prevailed upon the Justice department to defer issuing a report until DNA analysis – then a nascent technology – could be performed.[42]

At OSI's request, the Consul General in Brazil obtained a judicial order authorizing release of part of the skeletal remains for examination in the U.S. (It was this which led to a piece of Mengele's scalp being held in Director Rosenbaum's drawer before being turned over to the FBI.) Although the FBI was unable to extract a sufficient quantity to create a DNA profile,[43] the British, using new techniques, could do so. However, there was no DNA from Josef Mengele with which it could be compared. The German, Israeli and American authorities proposed getting DNA from Mengele's former wife and his son Rolf, both of whom lived in Germany.

The comparison would establish whether the son was the biological offspring of the man buried in Brazil. If so, the body was Mengele's.

Unfortunately, the son and former wife refused to provide blood samples. The Israelis suggested retrieving DNA from saliva left on glasses in a restaurant, but were advised that this would violate German privacy laws. The German prosecutor proposed an alternative plan: Mengele came from a prominent family which operated the largest factory in the small town of Günzburg. The prosecutor directed two German policemen to go to Günzburg, find the local gravedigger, and ask him to point out where Mengele's father was buried. They were to warn the gravedigger to tell no one that they had been there.

The policemen followed these directions and then waited several days. Nothing happened. The prosecutor had them return and repeat the drill with the town's retired gravedigger. They did so. Three days later a call came from Mengele's son: he and his mother would submit to DNA testing.

This was, as Marwell saw it, "a wonderful story about a guy [the German prosecutor] who understood psychology and politics and what a company town was all about." He knew that word would get to Mengele's family and that they would fear that the authorities were about to exhume their ancestors in order to do a DNA analysis. Giving blood would avoid the desecration of ancestral remains.[44]

Once the DNA comparison was made, there was no doubt that the body was Mengele's. Israel no longer objected to issuing the report and it was released in October 1992, almost eight years after it had been commissioned.

The OSI historian and attorney who had been given primary responsibility for preparing

the report had varying perspectives on the outcome. For the historian, there was satisfaction. This discrete project had overcome many hurdles and had resolved, definitively, a matter of important historical concern. The attorney was somewhat less sanguine. While he shared satisfaction in knowing that the historical issues were resolved, he had hoped that the report would lead to an expanded mandate for OSI. Had Mengele been found alive and brought to justice, the enormity of that accomplishment might have created pressure for OSI to assume an active role in searching for other prominent Nazis worldwide.[45] As it was, the focus remained on those who had come to the United States. For the most part, these were underlings.

1. Among the most popularized depictions of him were as a mad scientist in both "Boys from Brazil" (1976 book, 1978 movie) and "The Marathon Man" (1976 movie).

2. H. Cong. Res. 235, introduced in the House of Representatives in Dec. 1981, called upon Paraguay "to apprehend and extradite Josef Mengele to stand trial in the Federal Republic of Germany." (The resolution was never reported out of subcommittee.) *See also*, "Nazi Germany's 'Angel of Death' Is Still at Large," by Jack Anderson, *The Washington Post*, July 18, 1984. In November 1984, Elizabeth Holtzman, then District Attorney in Brooklyn, N.Y., French Nazi-hunter Beate Klarsfeld, Menachem Rosenshaft, Chair of the International Network of Children of the Jewish Holocaust Survivors, and Bishop Rene Valero of the Brooklyn Catholic Diocese, met with various government officials in Paraguay to urge a nationwide manhunt for Mengele. "Paraguay Pledges to Hunt Auschwitz 'Angel of Death,'" *New York Post*, Nov. 23, 1984. Simon Wiesenthal also thought Mengele was in Paraguay. "Investigators Get New Lead on Location of Mengele," by John McCaslin, *The Washington Times*, May 22, 1985.

3. Sporadic assertions that Mengele was in the United States had brought him to the government's attention, but these rumors had been quickly discounted after minimal inquiry. Thus, in 1979, the Justice Department was alerted that Mengele might be on a flight from Paraguay to Miami. He was not. Three years later, a member of the Miami Jewish community reported that someone named Mengele had checked into a hotel with an elderly man. An OSI historian, fluent in German, flew down to speak with the travelers. The young man was Mengele's nephew; the elderly gentleman was unrelated.

In Dec. 1984, Holtzman, on behalf of the group which had traveled to Paraguay two months earlier (*see* n. 2, *supra*), asked the Attorney General to send OSI personnel to Paraguay to "observe and/or participate" in a Paraguayan investigation of Mengele's whereabouts. Dec. 20, 1984 letter from District Attorney Holtzman to Attorney General Smith. As events unfolded, this request became moot.

4. "Papers Indicate Mengele May Have Been Held and Freed After War," by Ralph Blumenthal, *The New York Times*, Jan. 23, 1985.

5. *See e.g.*, "Was Mengele Ever in L.A.?" by Rabbi Yale Butler, *B'nai Brith Messenger*, Feb. 1, 1985. Similar stories had been published even earlier. *E.g.*, "Angel of Death in Westchester," by Elli Wohlgelernter, *New York Post*, May 26, 1981.

6. "U.S. May Investigate Mengele Case," by Ralph Blumenthal, *The New York Times*, Jan. 24, 1985.

7. Jan. 28, 1985 memo to the Attorney General from AAG Trott re "Nazi War Criminal Josef Mengele."

8. Feb. 6, 1985 Department of Justice press release.

9. Statement of AAG Trott before the Senate Judiciary Juvenile Justice Subctee, Mar. 19, 1985.

10. Over $3,000,000 was offered from various sources: Israel ($1,000,000), Friends of the Simon Wiesenthal Center ($1,000,000), *The Washington Times* ($1,000,000), the West German government ($300,000), Simon Wiesenthal ($50,000) and Beate Klarsfeld ($25,000). "Israel Offers $1 Million Reward for Mengele's Capture," *The New York Times*, May 8, 1985. When the SWC offered the first million in Feb. 1985, it was the highest bounty ever offered for a criminal. "Mengele: $1M bounty," by Gregory Katz, *USA Today*, Feb. 26, 1985.

11. Senator Arlen Specter, chair of the Juvenile Justice Subcommittee of the Judiciary Committee, felt that the matter was within his committee's purview since many of Mengele's victims had been children. "Senate Panel Will Conduct Hearing on Mengele," by John Kendall, *The Los Angeles Times*, Feb. 13, 1985.

12. "Senator Cites Possible Mengele Drug Link; Nazi May Have Financed Self by Selling Cocaine, D'Amato Testifies," by Robert Jackson, *The Los Angeles Times*, Feb. 20, 1985; "Army Task Force to Help Hunt Mengele," *Reuters*, *The New York Times*, Feb. 21, 1985; "Mengele Link to Drug Trafficking is Reported in C.I.A. Documents," by Ralph Blumenthal, *The New York Times*, Feb. 26, 1985.

13. Feb. 20, 1985 memorandum for Chief of Staff, U.S. Army General Counsel from Secretary of the Army, John O. Marsh, Jr. re "Search for Information Concerning Dr. Mengele."

14. Memorandum of Understanding Between the Central Security Facility and OSI, Mar. 15, 1985. During the first seven months of its existence, the Army's Task Force reviewed hundreds of reels and indexed 272,319 entries. In that pre-computer era, the work took 21,766 hours (10.4 man years). Nov. 22, 1985 letter and enclosure from Thomas Taylor, Sr. Ass't to the Dep't of the Army General Counsel, to David Marwell, OSI Historian.

OSI historians were given unprecedented access to the military files. Ultimately, this became a cause for concern to the Army. Information serendipitously discovered by one of the OSI historians was relevant to another OSI investigation. When OSI requested access to the new material, the Army feared that OSI had exploited the situation. OSI denied the accusation, explaining that it was obligated to follow up on all relevant information. Oct. 22, 1985 memorandum from Marwell to Sher re "Meeting at Ft. Meade." *See also*, Jun. 13, 1986 letter from Sher to Lt. Col. Tom Johnson at Ft. Meade.

15. "U.S. is 'Optimistic' on Nazi's Capture," by Philip Shenon, *The New York Times*, Apr. 22, 1985.

16. "Mengele Can be Seized, Justice Dept. Says," *AP*, *The New York Times*, Mar. 20, 1985; Statement of AAG Trott, *supra*, n. 9.

17. The authorities were acting, in part, on information from a university professor who had overheard the employee boasting that he had helped funnel money to Mengele.

18. The letter suggested several reasons for not announcing his death, one of which was to cause Nazi hunters to waste time and money on a fruitless search. "Mengele Trail: Clues of

Paper, Then of People," by Ralph Blumenthal, *The New York Times*, June 23, 1985.

19. "Brazil is Seen Accepting Foreign Help on Mengele," by Alan Riding, *The New York Times*, June 10, 1985.

20. Recorded interview with forensic document analyst Gideon Epstein, Dec. 6, 2000. It helped too that Mengele's diaries and SS documents were all written in German. In the more typical OSI cases, involving camp guards, the defendants were barely literate and poorly educated during the war. Their original language often had a cyrillic alphabet. Thus, comparisons have to be made between often primitive cyrillic script on military documents and more sophisticated Latin alphabet handwriting in the U.S. For further discussion of this, *see* pp. 537-538.

21. July 31, 1985 FBI Report prepared by Dr. Antonio Cantu to Howard Safir, Associate Director for Operations, U.S. Marshals Service.

22. So many people had handled the artifacts found in the Brazilian home that there were no prints identifiable as Mengele's. "Brazil is Seen Accepting Foreign Help on Mengele," by Alan Riding, *supra*, n. 19. Of course even if his prints were on the artifacts, that would not establish the identity of the corpse.

23. "Scientists Decide Brazil Skeleton is Josef Mengele," by Ralph Blumenthal, *The New York Times*, June 22, 1985.

24. Department of Justice press release, June 21, 1985.

25. "U.S. Justice Department Closes its File, Agrees Body in Brazil was that of Mengele," *AP*, *The Los Angeles Times*, Aug. 3, 1985.

26. Statement of Howard Safir, Associate Director for Operation, U.S. Marshals Service, before the Senate Subctee. on Juvenile Justice, Aug. 2, 1985.

27. July 16, 1985 memo to Sher from Philip Sunshine re "Mengele Investigation – Information on Death in Sao Paulo;" Oct. 30, 1985 Draft memo "For Discussion Purposes Only" from Sunshine to Sher re "Summary of Allegation that Mengele died on Feb. 7, 1979 in Sao Paulo, Brazil."

The paucity of corroborating medical evidence led the WJC to begin its own investigation of Mengele's death. "Jewish Group Questions Mengele Probe," by Jack Anderson and Dale Van Atta, *The Washington Post*, Jan. 29, 1986. Others also were skeptical that the body was Mengele's. *E.g.*, "Nazi-Hunter [Tuviah Friedman] Believes Mengele is Still Alive," by Dody Tsiantar, *The Washington Post*, June 15, 1985; "Why the Nazi Hunters Keep Pressing On," *U.S. News and World Report*, June 24, 1985; "Evidence is Shaky in Mengele's Death; Witnesses Conflict," by Jack Anderson, *Newsday* (Long Island), June 26, 1985; "One Piece of Mengele Puzzle Won't Fit," by Jack Anderson and Joseph Spear, *The Washington Post*, Feb. 25, 1986; "Grave Doubts," *The Daily News* (New York), June 10, 1985.

28. Oct. 30, 1985 Draft memo, *supra*, n. 27.

29. Recorded interview with former OSI historian David Marwell, July 17, 2003.

30. Mar. 6, 1986 memo to the Attorney General from AAG Trott re "Developments in the Mengele Investigation – Submission of Final Forensic Report;" Jan. 2, 1986 memo to Mengele Files from Sher re "Meeting in Jerusalem (Dec. 11-12, 1985)."

31. The son had sold it to a German publishing company, which allowed Marwell to read the manuscript at their offices in Germany.

32. Oct. 21, 1985 memo from Marwell to Mengele File re "Interview with Dr. Fritz Ulmann."

33. It is not the purpose of this chapter to detail, or even summarize, all the information ultimately included in OSI's report. Rather, this section is intended to give context to the preparation of the report. The report, with its attendant exhibits, can be accessed at http://www.usdoj.gov/criminal/publicdocs/11-1prior/11-1prior.htm (last visited, Sept. 2005).

34. "Sleuths Uncover Dental Records, Clinching Mengele Identification," by Alan Riding, *The New York Times*, Mar. 28, 1986.

35. "Dogged U.S. Dentist-Envoy Finds X-Ray of Mengele," by Richard House, *The Washington Post*, Mar. 28, 1986.

36. Dec. 27, 1985 memo from Sher to DAAG Richard re "Update on Mengele Investigation."

37. The group with Marwell included two armed Brazilian policemen. Brazil had recently emerged from a period of brutal military dictatorship. Marwell suspected that the presence of the policemen was helpful in getting the doctor's acquiescence for the search. The policemen "gave us a lot of credibility." Recorded interview, July 17, 2003.

38. May 6, 1986 memo from Marwell to file re "Trip to Brazil," Apr. 16 - 23, 1986.

39. Dec. 18, 1985 memo to file from Sunshine re "Meetings with Dr. Ortner."

40. July 13, 1987 memo to file from Sunshine re "Current Israeli Position on Mengele – Additional Investigative Action to be Taken by Israel and the United States."

41. June 8, 1989 memo to the Attorney General from AAG Dennis re "Mengele Report."

42. July 1, 1988 memo to Sher from Marwell re "Mengele;" Dec. 12, 1988 memo from Sher to DAAG Richard re "Update on Mengele."

43. May 18, 1989 memo to DAAG Richard from Sher re "Mengele – Update on DNA Testing."

44. Information about the abortive effort to get a saliva sample comes from Director Rosenbaum. His source was Hans Klein, the prosecutor handling the Mengele investigation in Germany. By the time this report was prepared, Mr. Klein was deceased.

Details about the ruse at the cemetery come from a recorded conversation with David Marwell, July 17, 2003. His source was the two policemen sent to Günzburg. (As Marwell recalled the incident, the British were able to make a determination based solely on a comparison with the son. In fact, however, both the son and ex-wife were tested. DNA Analysis Report, p. 423 of Mengele Appendix.)

The DNA analysis was done with a blood sample rather than saliva. Although saliva is simpler to obtain, blood is preferable. Saliva, composed largely of water, must be analyzed quickly. Moreover, unlike blood, it cannot be permanently preserved.

45. Interview with Phil Sunshine, July 15, 2003.

Looted Assets

Looting by the Third Reich was both prodigious and notorious; the regime plundered vanquished nations as well as individuals. Booty included gold bullion, coins, metals, paper currency, securities, jewelry, precious and semi-precious stones, books, artwork, religious objects, even dental fillings and crowns. Between 16 and 30% of all gold accumulated by the Third Reich was likely taken from individuals.[1]

The Nazis segregated gold from other assets. Most gold was smelted into bars and deposited in the Reichsbank, Germany's central bank at the time. Germany sold the majority of these gold reserves to neutral nations in order to acquire foreign currency for financing the war effort. The largest purchaser of gold from the Reichsbank was the Swiss National Bank.

At the end of the war, the Allies sought to recover, from Germany as well as from the neutral nations, assets appropriated by the Nazis. Representatives of 18 Allied nations agreed at the Paris Reparations Conference to distribute assets both to the nations whose treasuries had been plundered and to war victims.[2]

They struggled, at the Conference and thereafter, to categorize the gold and set rules for its distribution.[3] In broad terms, "monetary gold" was defined as gold bars and coins; "non-monetary" gold was all else, including jewelry and dental work from camp inmates. They agreed that monetary gold should be returned to claimant countries in proportion to their losses. Non-monetary gold was to be liquidated and given to an international relief agency for humanitarian aid to the "non-repatriables" – Jewish and other homeless victims of the war.

Although the terms "monetary" and "non-monetary" were thus based on the form rather than the origin of the gold, shorthand descriptions often referred to the two categories as

"currency" and "victim gold." This fostered the false impression that the former was inevitably pure and the latter inevitably "tainted."

France, Britain and the United States established a Tripartite Gold Commission (TGC) to oversee the distribution of monetary gold. The procedure for identifying and collecting the gold was varied. While the Allies seized the reserves in defeated Germany, they could not do the same with neutral nations; they had to negotiate with these countries to determine the amount of gold involved.

Negotiations with the Swiss were especially contentious. They ultimately agreed to contribute $58 million to the TGC. This was approximately two-thirds of the $88 million that Switzerland acknowledged purchasing from the Reichsbank.

The Swiss contribution, combined with gold relinquished by other neutral nations, gold purchased with the proceeds from liquidation of assets of German diplomatic missions, and gold bars found by allied forces in defeated Germany, gave the TGC approximately $260 million. It was all deemed monetary gold.

By 1996 (when the value of gold had increased almost tenfold), the TGC was ready to distribute the final $68 million in its coffers. That money, referred to as "residual gold," had been held back, in part to cover administrative expenses and contingencies. Before the final distributions were made, however, the matter of Nazi gold broke into the headlines.

It arose in relation to dormant Jewish bank accounts. In 1995, following the collapse of East Germany, the West gained access for the first time to records from the Stasi (East German secret police). Those records revealed the hitherto unknown fact that 13,000 Hungarian Jews had opened Swiss bank accounts in the hope of ransoming their lives from the Nazis.[4] This added

urgency to ongoing requests by the World Jewish Restitution Organization for access to dormant accounts.[5]

In response to calls by Jewish organizations, both the House and Senate banking committees held hearings. The Senate committee, aided by the WJC, serendipitously uncovered some significant and headline producing documents concerning Nazi gold. One set of documents suggested that the Truman administration had downplayed the amount of gold Switzerland purchased from the Reichsbank.[6] Although the State Department estimated that Switzerland had purchased almost $300 million worth of Nazi gold, the Secretary of State discounted the estimate when questioned by a skeptical member of Congress.[7] A second set of documents called into question the presumed purity of monetary gold. The documents suggested that the Reichsbank's wartime ingots contained gold smelted from the teeth of slaughtered Jews as well as from personal jewelry and other Jewish properties.[8]

Inclusion of victim gold into the Reichsbank reserve did not prove that "tainted" ingots had been sold to Switzerland or other neutral countries. However, it did raise the possibility that this was so. It also raised the possibility that gold transferred by the Allies from the Reichsbank reserves to the TGC was tainted. Given that some of that gold remained on deposit, Jewish organizations asked that this residual account be distributed to survivors, rather than to central banks.[9]

In part to determine whether the U.S. should support this request, President Clinton ordered a formal inter-agency effort to investigate the U.S. role in the seizure, retrieval and disposition of Nazi assets.[10] The group's mandate included an investigation into "allied and neutral nation actions during and after the war to handle Nazi assets and dormant accounts."[11]

The president asked Under Secretary of Commerce Stuart Eizenstat to oversee the project, including a report to be written by the State Department Historian.[12]

The Justice Department was one of 11 government components asked to assist in the effort.[13] OSI served as the lead DOJ representative. It reviewed material already gathered by the WJC and the Senate Banking Committee and assumed some independent investigative efforts as well. Much as in its own case investigations, OSI studied wartime documents, post-war interrogations of SS officials, and trial transcripts from Nuremberg.[14]

The material established that from August 1942 until the war's end, the SS delivered valuables taken from victims in the concentration camps and extermination centers to the Reichsbank. This plunder included victim gold. The SS deposits were listed in an account under the name of Colonel Melmer, the SS officer who delivered the assets to the bank. The Reichsbank purchased the gold bullion and coins in the SS shipments at full value and credited the SS account at the Reich Ministry of Finance with the equivalent amount in Reichsmarks. The bank sent dental gold and other small items, such as wedding rings, to the Prussian mint for resmelting into ingots; they were then incorporated into Germany's gold reserves at the bank. Larger items were sent to the Berlin Pawn Shop which arranged for the more valuable items to be sold abroad for foreign currency; the remainder were sent to Degussa, a private refinery in Frankfurt, to be smelted and then added to the Reichsbank gold stocks. Some of these stocks were so impure that, after being seized by the Allies at war's end, they were refined and resmelted before going to the TGC.

Given these facts, OSI concluded that it was most likely – though not certain – that victim gold had been included both in some wartime shipments to Switzerland and in the Allies'

postwar shipments to the TGC.[15]

Reichsbank gold was not the only victim loot purchased by the Swiss. OSI discovered documents showing that jewelry taken from Jews was routinely transferred (without resmelting or other alteration) by the Reich in diplomatic pouches to Switzerland. It was then retrieved by a German agent and traded for industrial diamonds vital to the war effort.[16]

The State Department completed a draft of its report in January 1997. It held the Swiss accountable for serving as bankers and financial brokers for the Third Reich and suggested that their role might have helped prolong the war. Moreover, it characterized Swiss postwar conduct as obstructive and asserted that their participation in postwar European rehabilitation was insignificant both materially and morally.

Although these were serious charges, the draft stated that there was *no* evidence that looted gold had made its way to Switzerland or to the TGC. It also made no mention of the fact that the Truman Administration apparently misled Congress about the amount of German gold bought by the Swiss National Bank – a fact which had already been reported in the press.[17]

Director Rosenbaum was sufficiently concerned about these two points to alert Ambassador Eizenstat on February 6, 1997 of the disagreements between OSI and the State Department historian. Rosenbaum warned that he could not "in good conscience" recommend that DOJ sign off on the report in its current form. Eizenstat encouraged him to do whatever possible to assure the accuracy of the report.[18]

The report was scheduled to be released on March 25. In late February, OSI found a "smoking gun" document proving that victim gold had been sent to Switzerland and had been incorporated into the TGC account as well.[19] The document had been prepared by the U.S.

government before it transferred gold to the TGC.[20] It therefore established that the United States knew at the time that some portion of victim gold was being used to compensate looted treasuries rather than to help war victims.

By the time OSI found this material, the report was undergoing final revisions. On March 9, some conclusions from the soon-to-be-released document were leaked to the press. As described by unnamed sources, "the records do not establish definitively that so-called nonmonetary gold from personal effects was accepted by Switzerland."[21]

OSI believed the material it had found did provide such definitive proof. Rosenbaum protested to the State Department and, at their suggestion, submitted a written summary of his concerns and proposed revisions.[22] Ambassador Eizenstat convened a meeting to discuss the issues. At that meeting it was agreed that the report should be revised to make clear that victim gold *had* been sold to Switzerland and that it had been included in some of the ingots transferred by the Allies to the TGC.[23]

While OSI welcomed those changes, it remained concerned that the report did not address what OSI saw as the Truman Administration's dissembling to Congress. Not only had Secretary Acheson lent credence to the Swiss $88 million figure, so too had the president. In a letter to Senator Harley Kilgore, the president referred to that figure as the only amount which was "fairly provable."[24] Yet experts at both the State Department and the Treasury Department then believed the true amount to be much higher. The State Department's expert estimated the figure as $414 million; Treasury's expert, relying on ledgers from the Reichsbank, estimated $289 million.[25] Rosenbaum believed that it was essential to discuss the disparity between these studied estimates and the $88 million figure given by the Swiss and supported by the

Administration. He warned that failure to do so might yet cause him to recommend that DOJ withhold support for the report.[26]

In order to address Rosenbaum's concerns, Ambassador Eizenstat postponed publication of the report.[27] The postponement extended six weeks. When the report was finally issued in May 1997, all major points of contention had been resolved.

The report held the Swiss accountable for buying tainted gold and then lying to the Allies about the amount purchased.[28] (There was no evidence, however, that Switzerland knew at the time that victim gold was a component of the Reichsbank shipments.)[29] The report also revealed U.S. shortcomings -- its knowing transmittal of some "tainted gold" to the TGC and the Truman Administration's understatement to Congress of the amount of Nazi gold the government believed had been purchased by the Swiss.[30] Proof that tainted gold had been transferred to the TGC ended the myth that all looted assets collected at war's end had been distributed to victim assistance organizations. It further corrected the historical record by disentangling the terms "monetary" and "non-monetary" from the issue of victim loot.

Ambassador Eizenstat credited OSI with "the discovery and thorough documentation" of the Nazi practice of converting victim gold into Reichsbank reserves. In addition to the historical importance of this information, he noted it as "a critical factor in . . . negotiations aimed at providing restitution and reparations to remaining victims of Nazi persecution."[31]

The report was titled a "Preliminary Study."[32] It focused largely, although not exclusively, on Switzerland. The State Department planned to prepare a separate study on the conduct of other neutral countries which had purchased Nazi gold as well as on allegations that

the Axis government of Croatia had transferred gold to the Vatican.[33] It hoped to publish this second report before a scheduled December 1997 conference in London on Nazi gold.

OSI was not involved in research for, or drafting of, the supplemental report, but it did receive a copy for comment. It recommended several changes which were ultimately incorporated into the report.

The supplemental draft noted that two private financial institutions in Germany, the Dresdner and Deutsche banks, sold gold on the Turkish free market; it cited a British report which opined that this gold had been looted from European central banks. OSI was able to document that at least some of the gold came from victims.[34]

OSI also urged revision of the draft's contention that trade with Germany amounted to support of the Third Reich. OSI noted that trade had to be placed in context, including consideration of the amount of trade these same countries were doing with the Allies.[35] OSI opined that the draft was unduly harsh on Argentina.[36] These comments were of sufficient import to cause the State Department to postpone the release date until some time after the London conference.

The conference, with participants from 41 nations, dealt with the question of residual gold. In response to the revelation in the Preliminary Study that some of that gold was tainted, several countries agreed to contribute money due them to a fund for Holocaust survivors. While not all the residual gold was so distributed, a portion of it did go to needy survivors.[37]

Coincidently, just as the conference opened, a privately-held cache of microfilmed Reichsbank records became accessible.[38] The records belonged to an Austrian concentration

camp survivor who, after the war, did extensive research on the gold trade of the Reichsbank. His private collection included a report about the Melmer account by Albert Thoms, the wartime Reichsbank Director. At Ambassador Eizenstat's request, OSI reviewed this newly-available material. Based on Thoms' figures, OSI calculated that the SS had deposited over $4.6 million dollars worth of gold into the Melmer account – much more than previously had been provable.[39]

OSI also examined the records of the private smelting firm used by the Reichsbank to transform large gold articles in the SS shipments into bullion. Although the firm had intentionally destroyed most pertinent documents, enough was extant to show that the firm was aware that the gold came from Jews.[40] Both the revised Melmer figures and the smelting company's complicity were included in the final report. Ambassador Eizenstat described the recalculation of the Melmer account as "the most dramatic" finding of the study.[41]

OSI's contribution to the report is evident in other ways as well, especially in the report's nuanced distinctions among the neutral nations. OSI's information about victim gold for sale on the Turkish free market led inexorably to the conclusion that Turkey was more involved in the marketing of victim gold than had previously been known. OSI's analysis of Argentine gold records showed that Argentina was less involved; indeed, it had purchased no Nazi gold at all. The State Department acknowledged that OSI's analysis of these Argentine documents was crucial.[42]

The Supplemental Study was released in June 1998.[43] It did not, however, end OSI's involvement on matters relating to Nazi assets. While working on the gold studies, OSI became

involved in additional asset issues.

According to a post-war agreement among the Allies, looted cultural items were to be returned to their country of origin, and, if possible, to their rightful owners. At an early (December 1996) meeting of the interagency working group on the Preliminary Study, one of the participants mentioned a 1940s memo from an Army archivist suggesting that the Library of Congress may have inappropriately acquired books looted by the Nazis. Director Rosenbaum asked an OSI historian to look into the matter.

OSI's research established that there was no basis for the allegation.[44] On the contrary, the Library had adopted and followed detailed regulations to ensure that it did not obtain or retain any books whose provenance could be ascertained. If the provenance was undeterminable and the material had national, cultural, or religious significance, the regulations called for distribution to an appropriate institution. Of the more than 3,000,000 looted books gathered by the U.S. government, two and a half million were distributed according to these guidelines. Since it was not possible to identify the owners or country of origin for the remaining half million, they were given to the Commission on European Jewish Cultural Reconstruction (JCR), an organization comprised of American Jewish religious leaders, scholars and educators. The JCR distributed them to centers of Judaism and Jewish learning throughout the U.S. and Israel. At the JCR's direction, several thousand volumes went to the Library of Congress.[45]

The second asset forfeiture issue that spun off from OSI's work on Nazi gold involved looted artwork. In February 1997, a source informed the office of previously classified documents from the Office of Strategic Services (predecessor to the CIA) listing artworks the

OSS suspected had been stolen by the Nazis. The list, compiled shortly after the war, drew upon the memories and records of theft victims as well as art dealers who sold works on behalf of the Nazis. It also referenced captured German correspondence, receipts, museum accession reports, and inventories.

Despite these extensive sources, there were limitations to the OSS listings. Titles were often imprecise, either because the work was untitled or because the true title of the work was unknown to the person providing the information to the OSS. Thus, there were a number of "Still Life," "Portrait" and "Landscape" entries. In addition, artists often created multiple works with the same title and the OSS list rarely contained distinguishing information, such as canvas dimensions. OSI pared down the list and then reviewed books, websites, and archival material (including post-war claims filed by private citizens) in an attempt to match works on its list with holdings in the U.S. and abroad. The office was particularly interested in determining whether any looted artwork was held at the National Gallery of Art. Ultimately, OSI identified four possibly looted pieces at the museum.[46] The National Gallery did additional research and determined that one of the four had indeed been taken from a Jewish family. The museum returned the painting to the owner's heirs amid much public fanfare. In announcing this decision, the museum took sole credit for determining the provenance.[47] The Department of Justice issued its own statement crediting OSI with raising the issue.[48]

Since the gold studies, OSI has periodically been called upon to share its expertise on asset issues.[49] OSI's work in this area is yet another example of how the government has broadened OSI's mandate and how the office has helped the public understand the history of Holocaust. To the extent that OSI's scholarship has helped bring about restitution, it has also

shaped that history.

1. This was the estimate of historians at a Dec. 1997 conference on Nazi gold in London. "Victim Fund Gets Pledges from U.S. and Britain," by Alan Cowell, *The New York Times*, Dec. 3, 1997.

2. The conference convened in 1946. The 18 nations were Albania, Australia, Belgium, Canada, Czechoslovakia, Denmark, Egypt, France, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, South Africa, the United Kingdom, the United States, and Yugoslavia. The U.S.S.R. had earlier waived any claim to the assets.

3. The evolving definitions are discussed in the State Department's Preliminary Study, fully cited *infra*, n. 32, at pp. 171-177, 179-81.

4. "Jews Look to Swiss to Reclaim Nazi Plunder," by Jay Bushinsky, *The Chicago Sun-Times*, Sept. 15, 1995. *See also*, "Swiss Banks Undervalue Unclaimed Holocaust Accounts," by Batsheva Tsur and Marilyn Henry, *The Jerusalem Post*, Feb. 9, 1996; "Quest for Nazis' Loot; Dispute Focuses on Role of Swiss Banks," by David Ottaway, *The Washington Post*, Dec. 8, 1996.

5. The World Jewish Restitution Organization was founded in 1993. It works for the return to the Jewish people of heirless and unclaimed properties of communities, associations, organizations and individuals; the payment of compensation where restitution is impossible; and the restitution of private property and compensation to Holocaust survivors.

6. "Quest for Nazis' Loot, Dispute Focuses on Swiss Banks," *supra*, n. 4.

7. July 31, 1946 letter from Acting Secretary of State Acheson to Congressmen Joseph Baldwin, July 3, 1946. Portions of the letter are quoted in the State Department's Preliminary Study, *infra*, n. 32, at pp. 86-87.

8. Bank's Gold Inspires Tales of Plunder," by Clyde Haberman, *The New York Times*, Sept. 27, 1996; "Heat on Geneva to Return US $5b in Nazi Gold Loot," by Neil Behrmann, *Business Times* (Singapore), Sept. 12, 1996. The documents led New York's Senator Alphonse D'Amato, chair of the Senate banking committee, to suggest that the amount of Swiss payments should now be renegotiated. "Time to Settle the Score," by Marilyn Henry, *The Jerusalem Post*, Nov. 1, 1996.

9. "U.S. to Launch 2nd Inquiry into Fate of Gold Stolen from Jews," by Marilyn Henry, *The Jerusalem Post*, Oct. 13, 1996.

10. "U.S. to Launch 2nd Inquiry into Fate of Gold Stolen from Jews,"*supra*, n. 9.

11. Oct. 30, 1996 letter from President Clinton to WJC president Edgar Bronfman.

12. At the time Eizenstat was serving as Under Secretary of Commerce for International Trade and Special Envoy of the Department of State on Property Restitution in Central and Eastern

Europe. Shortly after the report was released, he became Under Secretary of State for Economic, Business & Agricultural Affairs.

13. The 11 were: CIA, the Departments of Commerce, Defense, Justice, State and Treasury, the FBI, the Federal Reserve Board, the National Archives and Records Administration (NARA), the National Security Agency (NSA) and the U.S. Holocaust Memorial Museum.

14. Several German bank executives were charged at the war's end. As noted earlier (*see* p. 7), Walter Rockler, OSI's first Director, had been on the bank prosecution team at Nuremberg. Among the defendants he prosecuted was the vice-president of the Reichsbank.

15. Feb. 2, 1997 memo from OSI Chief of Investigative Research Elizabeth White to Director Rosenbaum re "Evidence of SS-Looted Persecutee-Origin Gold in the TGC 'Gold Pool;'" Jan. 29, 1997 e-mail from White to Rosenbaum re "Monroe/Nuremberg Testimony."

16. Industrial diamonds are used, among other things, to shape artillery shells, to facilitate the manufacture of wire, to produce anti-aircraft artillery shell fuses, to cut and test tank armor, and to machine differential gears for vehicles. "The Conversion of Looted Jewish Assets to Run the German War Machine," by Michael MacQueen, *Holocaust and Genocide Studies* (Spring 2004).

17. "Quest for Nazis' Loot, Dispute Focuses on Role of Swiss Banks," *supra*, n. 4.

18. Mar. 17, 2001 letter from Rosenbaum to State Department Historian William Slany re "March 7, 1997 Draft Interim Report on 'Nazi Assets.'"

19. The document showed that gold from the Melmer account was added to a 1943 smelting of looted Dutch guilders. Eighty-three percent of the bars resulting from this smelting were eventually traded to the Swiss National Bank. In addition, a 1944 smelting of gold bars from the Netherlands included six gold bars that the Reichsbank had received from the SS. OSI determined the numbers given the bars after being resmelted and confirmed that six bars with these same numbers were transferred by U.S. forces from Germany's captured gold reserves to the TGC.

20. The report was prepared by the Foreign Exchange Depository of the U.S. Military Government in Germany.

21. "U.S. Can't Tie Holocaust Victims' Jewels, Dental Gold to Swiss," by Laura Myers, *AP*, Mar. 9, 1997.

22. Mar. 10, 1997 letter to Amb. Eizenstat from Rosenbaum; Mar. 11, 1997 letter from Rosenbaum to State Department Historian Slany.

23. Mar. 12, 1997 e-mail from Rosenbaum to DAAG Richard re "Nazi Assets: Important Update."

24. July 3, 1946 letter from President Truman to Senator Kilgore.

25. State Department's Preliminary Study, *infra*, n. 32, at p. 66.

26. Mar. 17, 1997 letter from Rosenbaum to State Department Historian Slany.

27. Eizenstat's public statements at the time attributed the delay to the need to review recently declassified documents. "U.S. Report to Sting Swiss: New Documents to Shed Light on Neutral Countries' Links to Nazi Loot," by Eric Greenberg, *The Forward*, Mar. 28, 1997. However, he acknowledged in his memoir that OSI was the precipitating cause. *Imperfect Justice, Looted Assets, Slave Labor, and the Unfinished Business of World War II*, by Stuart Eizenstat (Public Affairs), p. 101. *See also*, Mar. 20, 1997 e-mail from Rosenbaum to OSI attorney William Kenety re "J. Barnett - Reply."

28. The report focused primarily on the Swiss purchase of gold bars; it did note, however, (pp. 170, n. 43 and 180), OSI's discovery that victim gold had been transferred by diplomatic pouch to Switzerland.

29. The Swiss insisted that they had no such knowledge. *See e.g.*, "Swiss: No Victims Gold but Admit Profiting from Nazis," *Newsday* (New York), Dec. 14, 1996; "Three Nations Agree on Freezing Gold Looted by Nazis," by David Sanger, *The New York Times*, Feb. 4, 1997.

The report presumed, however, that the Swiss did know that some portion of the gold was looted from occupied countries. (Such knowledge would have come from public knowledge about the low level of the Reichsbank's gold reserves and repeated warnings from the Allies.)

30. The report shied away from holding Secretary of State Acheson accountable for his statement that "there was no reasonable evidence that Switzerland had purchased $300,000,000 worth of gold looted by Germany." The report stated that Acheson's letter had been drafted by an underling and "presumably was not seen by Acheson." There was no basis given for this presumption. "Preliminary Study," *infra*, n. 32, at p. 87.

31. Sept. 28, 1997 letter from Amb. Eizenstat to Attorney General Reno.

32. "Preliminary Study on U.S. and Allied Efforts To Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II." The report can be accessed at www.state.gov/www/regions/eur/holocausthp.html#rpt (last visited Nov. 2005).

33. Technically, only Switzerland and Sweden were "neutral" countries during the War. Spain, Portugal, Turkey and Argentina were "non-belligerent" but not neutral. However, for the sake of simplicity, the report referred to them all as "neutrals" when mention of them was made collectively.

34. An OSI historian recalled from her research for the Preliminary Study that the Reichsbank sold Melmer account gold to the Deutsche and Dresdner banks. Apr. 1, 2004 e-mail from Chief Historian Elizabeth White to Judy Feigin re "I got it, I think." An OSS document unearthed by the SWC added further detail included in the final report. It explained that the German

government used victim gold to finance overseas operations and to influence foreign nations' diplomats. Apr. 1, 2004 e-mail from White to Feigin re "query."

35. Sept. 30, 1997 letter to Bennett Freeman, Senior Advisor to the Under Secretary of State for Economic, Business, and Agricultural Affairs, from DAAG Richard.

36. In fact, German investment in, and trade with, Argentina was dwarfed by the British interests there. Moreover, the draft wrongly suggested that Argentina could have been made to return all German assets in its territory. Since Argentina joined the Allies before war's end and signed the 1945 Act of Chapultepec, it acquired exclusive rights to German assets in its territory. (More significant than these trade figures is the fact that Argentina accepted more Jewish refugees between 1933 and 1945 than any other country in the Western hemisphere.)

OSI was especially well poised to discuss these issues since its then-Chief of Investigative Research had authored a book which covered this subject. *German Influence in the Argentine Army, 1900 to 1945* by Elizabeth White (Garland Pub.).

37. Two and a half years after the conference, only $21 million had been dispersed. The effort was hampered in part by infighting over who had the moral authority to distribute the funds. "Half of Nazi Victims Aid Funds Not Yet Distributed," by Marilyn Henry, *The Jerusalem Post*, June 4, 2000. The TGC itself was disbanded in 1998. "International Panel Closes Books on Gold Seized by Nazis in War," by Craig Whitney, *The New York Times*, Sept. 10, 1998.

38. "Microfilms Trace the Path of Nazi Gold Movements," by Eric Frey, *The Financial Times*, Dec. 2, 1997.

Reichsbank records from the Precious Metals Department had been located earlier at the National Archives. They did not include information about the Melmer account, and therefore were not especially helpful in preparing the report on Nazi gold. Nonetheless, their discovery was wonderfully serendipitous.

The records had been microfilmed by the Allies; the Reichsbank no longer had the originals. An OSI historian found a receipt at the Archives showing that a microfilm duplicate set of these records (comprising 65 reels) had been transferred in 1948 from the U.S. Army to the Treasury Department. However, the Treasury Department informed OSI that it no longer possessed the microfilm.

While reviewing Dutch bank records at the Archives (to determine the extent of Nazi looting from Dutch reserves), an OSI historian and a NARA archivist came upon an unmarked box. It contained 65 rolls of microfilm – unmarked, not on spools, and wrapped with rubberbands.

39. Dec. 27, 2001 letter to Amb. Eizenstat from Deputy Attorney General Eric Holder re "Additional Department of Justice Research on Nazi Gold." (Only weeks earlier, a Swiss commission studying the issue estimated that $2.5 million and "possibly" as much as $4 million flowed through the Melmer account. "Swiss Say Nazis Stole More Victim Gold than Believed," by Alan Cowell, *The New York Times*, Dec. 2, 1997.)

After the supplemental report was issued, another historian pointed out that OSI had

misinterpreted some of the information in the Thoms' study. While that miscalculation caused the $4.6 million figure to be higher than it should have been, the error is likely inconsequential. The Thoms' report did not reference millions of dollars worth of gold taken from Jews before they were sent to the camps. The records for this gold are incomplete and it therefore cannot be ascertained whether these additional millions were deposited in the Melmer account. However, it is likely that they were since there is sufficient documentation to establish that they were shipped to the SS for that purpose. "The Disposition of SS-Looted Victim Gold During and After World War II," by Elizabeth White, *Amer. U. Int'l L. Rev.*, vol. 14, No. 1 (1998), p. 218, n. 12.

It should be noted that the $4.6 million figure came from Thoms' study, rather than the Reichsbank records. They, like the records found at the Archives, did not have material on the Melmer account. However, Thoms had apparently referenced the now-missing Melmer records when he prepared his report.

40. Dec. 21, 2001 letter from Rosenbaum to Amb. Eizenstat.

41. "A Lingering Ledger of Grief," by Marilyn Henry, *The Jerusalem Post*, June 8, 1998.

42. Preface to the Supplemental Study, *infra*, n. 43, at p. xxviii. The Argentine gold records were given to the SWC by the Argentine government in 1996.

43. "U.S. and Allied Wartime and Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury" (Supplement to Preliminary Study on U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II.) The Supplemental Study can be found at www.state.gov/www/regions/eur/holocuasthp.html#rpt (last visited Nov. 2005).

44. The historian studied records from the Library of Congress and the U.S. military government in Germany.

45. The precise number the Library obtained is uncertain because some were sent by the Library to other institutions. In no event was the number retained by the LoC greater than 21,000.

Although the matter of looted books was not included in either governmental report, an article on the topic written by an OSI historian assures that it is now part of the public record. "Returning Jewish Cultural Property: The Handling of Books Looted by the Nazis in the American Zone of Occupation, 1945 to 1952," by Robert G. Waite, *Libraries and Culture*, Vol. 37, No. 3, Summer 2002. (OSI had proposed including the information in the Preliminary Study. Mar. 11, 1997 letter from Rosenbaum to Slany.)

46. Sept. 29, 1998 letter to Under Sec'y Eizenstat from DAAG Richard; Dec. 2, 2003 e-mail from Rosenbaum to Judy Feigin re "Re Query."

47. "National Gallery of Art to Return Painting to Heirs as a Result of Gallery Research and Web Posting," National Gallery of Art News Release, Nov. 20, 2000; "National Gallery to Return a

Family's Painting Looted by the Nazis," by Celestine Bohlen, *The New York Times*, Nov. 21, 2000; "Museum to Return Plundered Painting,"by Michael Dobbs, *The Washington Post*, Nov. 21, 2000.

48. "U.S. Told Museum in 1998 Canvas Could be Nazi Loot," by Joan Uralla, Reuters, Nov. 22, 2000; "Agency Says Museum Took Too Long to ID Nazi Loot," CNN.com-arts& style, Nov. 23, 2000, posted at 11:17 a.m. EST. *See also*, "Who Found Looted Still Life?," by Paula Amann, *Washington Jewish Week*, Nov. 30, 2000.

49. Several examples:

1. Hungarian Jews and their descendants whose personal property and valuables were loaded onto a "Hungarian Gold Train" by the pro-Nazi Hungarian government during World War II sued the U.S. government because the U.S. Army had captured the train in May 1945 and shipped its contents to Salzburg. The plaintiffs alleged that the Army and individual members thereof improperly expropriated much of the cargo. *Rosner et al., v. U.S.*, Civ. No. 01-1859 (S.D. Fl.). The lawsuit was defended by another section within the Department of Justice. OSI's assistance included participation in court-ordered mediation of the case and the preparation of a methodology to calculate payments if the case settled. Nov. 1, 2004 memo to Daniel Meron, Principal Deputy Ass't Attorney General from Rosenbaum and Elizabeth White re "Proposed Formula for Arriving at a Settlement in Rosner v. United States." The court approved a $25 million settlement in Sept. 2005.

2. OSI helped prepare the Department's response to a draft ABA resolution urging the U.S. to ratify the 1954 Hague Convention Concerning the Protection of Cultural Property in the Event of Armed Conflict. Jan. 10, 2001 memo to AAG James Robinson from Director Rosenbaum re "ABA House of Delegates Resolution Concerning the Protection of Cultural Property."

3. OSI was asked to comment on drafts of a report prepared by the Presidential Advisory Commission on Holocaust Assets in the United States. The final report was issued in Dec. 2000. It can be found at http://www.pcha.gov (last visited Nov. 2005). The report specifically acknowledged the contribution of OSI historian Robert Waite for his research on looted books and OSI attorney William Kenety for his investigation into looted art.

4. OSI's input was sought by the Department of Justice's Office of Legislative Affairs on the appropriate U.S. response to Germany's handling of Holocaust-era insurance claims. Nov. 7, 2001 e-mail from Rosenbaum to Adrien Silas re "Draft Testimony of Amb. Bindenagel."

OSI Goes International

Germany

Germany's relationship to OSI has two crucial aspects: its assistance in investigating cases and its willingness to accept into its territory persons prosecuted by OSI. In considering each of these issues, it should be remembered that for the first ten years of OSI's existence, Germany was a divided country. The German Democratic Republic (East Germany (GDR)) and the Federal Republic of Germany (West Germany (FRG)) dealt with the U.S. separately. East and West Germany reunited in 1990.

Investigative Assistance

Before they reunited, East and West Germany had separate archives. OSI's access to material from the East German archives was limited. The Office of the General Prosecutor of the GDR forwarded OSI's requests to the Stasi-controlled National Socialist Archive. That organization first made a political determination as to whether to provide assistance. If they chose to do so, the material was retrieved and then reviewed by the Stasi before it was sent to the Department of Justice.[1] OSI lacked direct access to the archives and could not gather background information unrelated to a specific subject.

Most of the World War II records were, however, in West Germany. The two facilities there most essential to OSI were the Berlin Document Center (BDC) and the Ludwigsburg Zentrale Stelle. The BDC material includes Nazi party (NSDAP) membership cards, NSDAP membership applications, disciplinary actions against NSDAP members, SS officer files, SS racial purity records (containing information on SS men who were married and those seeking permission to marry), SS enlisted men records, SA (storm trooper) files, immigration and

reimmigration files (on individuals of ethnic German origin who immigrated or re-immigrated to Germany), applications for membership in German cultural organizations, court records, and registries of physicians and teachers. Some of these files include photographs, handwriting, and fingerprints as well as wartime activities and place of operation.

Until 1994, OSI's access to the BDC was assured, since it was under U.S. control.[2] Control was then ceded to the German government. In negotiating the transfer, the State Department consulted with OSI to ensure that the Justice Department's investigative and prosecutorial interests were protected.[3] Germany agreed to microfilm all BDC documents for the U.S. National Archives and guaranteed the U.S. access, in perpetuity, to the original documents for forensic and judicial purposes.[4]

By contrast, the Ludwigsburg Zentrale Stelle is an entirely German operation. Established in 1958, it is the repository for records from war crimes trials held throughout Germany.

It was not initially clear that the Ludwigsburg material would be as readily available to OSI as was the BDC information. Mutual legal assistance agreements between the U.S. and Germany provide the U.S. access to German material for use in *criminal* prosecutions. OSI cases are *civil* matters. Nonetheless, West Germany from the outset opted to treat OSI's cases as if they were criminal, reasoning that the substance of the cases (often murder or accessory thereto) would be treated criminally in Germany.[5] This flexibility has allowed OSI the full range of assistance available in criminal proceedings, including access to criminal trial records (a source of witnesses and corroborating testimony) and compelled testimony from reluctant German witnesses. As one German Justice Ministry official acknowledged, this piece of legal

legerdemain had a weak foundation; its maintenance required both the political good will of the FRG and OSI respect for FRG criminal procedures.[6]

German good will was evident in other ways as well. In several key areas, they allowed the Department of Justice to avoid the often cumbersome and time-consuming diplomatic process for handling matters of judicial assistance. Thus, as early as 1982, the West Germans allowed U.S. Embassy personnel to contact potential witnesses directly;[7] they also sanctioned direct contact between OSI and personnel at Ludwigsburg. After a 1991 meeting with representatives from Australia, Great Britain, Canada and the United States, Germany authorized the free exchange of German sourced documents among those countries.[8]

This is not to suggest that there are not still areas of frustration. Most prominent is that requests that do go through the standard bureaucratic process (*e.g.*, pension inquiries) get caught in an administrative quagmire. Response times of over one year are not uncommon.[9] Nonetheless, the overall working relationship between the Department of Justice and Germany in Nazi prosecution cases is productive and positive.

It is also mutually beneficial. Before reunification, both East and West Germany conducted World War II investigations and trials.[10] The unified Germany continues to do so as of this writing.[11] OSI has assisted by interviewing and/or identifying witnesses of interest to the Germans,[12] sharing OSI research and records,[13] and serving subpoenas on U.S. residents needed to testify in German prosecutions.[14]

Admitting OSI Defendants into Germany

Fulfilling the mission of OSI depends, ultimately, on being able to remove from the United States those who assisted the Nazis in persecuting civilians during World War II.

However, the United States cannot unilaterally send a defendant to a designated country; that country must be a willing recipient. Very few countries are anxious to have "Nazi war criminals" in their midst. Even Germany, which has expressed contrition and claimed responsibility for its role in the war,[15] has been ambivalent about accepting OSI defendants.

The issue first surfaced in the pre-OSI era. Boleslav Maikovskis was a Latvian chief of police who, during World War II, had participated in the arrest of civilians and the burning of their dwellings. INS contacted West Germany in 1973 about seeking Maikovskis' extradition. The West Germans acknowledged that the branch of the auxiliary police to which Maikovskis belonged had been under the supervision of the German civil police; the higher police chiefs were appointed with the consent of the Germans, and these chiefs reported to, and were supervised by, the Germans. Nonetheless, they thought the significance of all this was outweighed by the fact that Maikovskis himself was immediately commanded by Latvians and paid with funds from the Latvian Police budget.[16] Moreover, they claimed constraint because Maikovskis was not a "German national," either at the time the crimes were committed or currently and because his acts were not directed against German nationals.[17] Although they could prosecute Maikovskis if he had been acting on behalf of the Reich, they concluded that he had not been. As the West Germans saw it, Latvian opposition to German occupation during the war was evidence that Latvia should be considered separate and apart from Germany.[18]

Despite this intransigence about Maikovskis, West Germany was not opposed to extradition in all cases. Around the same time that they rejected the Maikovskis request, they sought extradition of New York City housewife Hermine Braunsteiner Ryan. They distinguished her from Maikovskis because she had been a supervisor in a German concentration camp. As

such, her activities were undertaken "in the exercise of German sovereignty."[19] Once she was extradited, she was tried, convicted, and sentenced to life in prison.

When OSI was established in 1979, the Department of Justice anticipated that extradition would be an oft-used procedure which would expedite removal.[20] Germany seemed to OSI the most likely venue for extradition for two reasons. First, Germany bore moral responsibility for the war. Second, many alternative destinations were not viable options. Most of OSI's subjects performed their wartime service in the U.S.S.R. (which, until 1989, included Estonia, Latvia and Lithuania), and the United States had no extradition treaty with the Soviet Union.

In October 1980, shortly after OSI's founding, Director Ryan went to Germany to discuss the mechanics of extradition. He was quickly disabused of the idea that extradition to Germany would be the default procedure for OSI. The Germans made clear that extradition would be a rare occurrence, possible only if the defendant could be tried for murder, the only relevant crime not foreclosed by the statute of limitations. Even then, if the defendant were a non-German who had acted outside Germany's borders, it would be problematic.[21] Since most OSI subjects were Latvians, Ukrainians and Lithuanians, they would not fit within the parameters established by Germany.[22]

Simon Wiesenthal put forth a proposal which would have resolved the impasse. He suggested that subjects be divided into two categories, those who worked on behalf of sovereign countries (*e.g.*, Hungary or Romania) and those who worked for the Nazis in occupied areas. The latter group would include those from the Baltic states as well as Ukraine. Although the Germans agreed to consider the matter, and OSI was also interested, the proposal was never

adopted.[23]

The Attorney General wrote to his counterpart in West Germany urging resolution of the problem. His plea was based on ethical rather than legal grounds.

> As the highest legal officers of our respective governments, we share a solemn responsibility to see that justice is done in cases involving Nazi crimes. We recognize the extensive efforts that the Federal Republic has made to that end, and I am grateful for the cooperation that your government and your Ministry have extended to us in our recent efforts to gather evidence after so many years. Although many years have passed since the fall of the Nazi regimes, our common obligation to enforce our respective laws against those who were responsible for the crimes of that era continues.[24]

In response, the West German Minister of Justice acknowledged that war crimes should not be "left unatoned." Nonetheless, he reiterated that there was no jurisdiction to try foreign nationals for acts committed in "occupied territory" absent "exceptional circumstances."[25]

Although this was not encouraging, it did not preclude *deportation* or a voluntary departure to Germany. In either of these situations, unlike extradition, the person would not have to stand trial once he arrived in Germany.

OSI had its first opportunity to pursue one of these alternatives in October 1982, when Archbishop Trifa agreed to depart the United States under the terms of his settlement agreement. Although Trifa was not German, he had a strong nexus to the country, which gave him refuge during most of the war. Nonetheless, West Germany informed OSI that as a non-citizen, Trifa was inadmissible.[26]

Trifa was not the only well-publicized OSI defendant to whom West Germany denied admittance. It also refused to accept Bohdan Koziy and Karl Linnas, both of whom are discussed elsewhere in this report.[27] Even after acknowledging that it had "no doubt" about OSI's evidence

against Koziy (evidence which, among other things, showed him responsible for the cold-blooded murder of a four year old Jewish girl), West Germany still refused him entry. They did so on the grounds that (1) he never possessed German citizenship; (2) his crimes were committed on foreign (Ukrainian) soil; and (3) the government would be unable to establish "base motive," a prerequisite to a murder conviction under German law.[28]

Two years later, the issue of Maikovskis' departure resurfaced. After West Germany refused to seek his extradition in 1973, INS had filed a deportation action. That case was ultimately taken over by OSI, and Maikovskis was ordered deported in 1984. He designated Switzerland as his chosen country of deportation. After the Swiss notified the Justice Department that they would not accept him, the State Department asked Germany if Maikovskis could enter as a deportee. They refused permission to do so.[29]

There was a country which did want him, however – the U.S.S.R., which years ago had sentenced him to death *in absentia* for his World War II activity.[30] In 1987, OSI requested that the court modify its order to designate the U.S.S.R. as the country for deportation. Before the court ruled, Maikovskis fled to West Germany – having been given a visa to enter despite West Germany's earlier refusal to seek extradition or to accept him as a deportee. According to Maikovskis' attorney, the Germans issued the visa for "humanitarian reasons" when they learned that he might be sent to the Soviet Union.[31]

A year later – after the Soviets publicly called upon the West Germans to arrest Maikovskis, and only days before the West German Chancellor was scheduled to visit Moscow – the West Germans arrested the 84-year-old Maikovskis and placed him in custody. Although Germany had earlier refused to seek his extradition on the ground that he could not be criminally

charged, he was now brought to trial. One of the witnesses was the OSI attorney who had handled the deportation case. He testified about Maikovskis' admissions during the deportation proceedings, specifically that he had been chief of police and that he had carried out orders to arrest and imprison all villagers and to burn the village. The prosecution was suspended midway due to Maikovskis' ill health. It never resumed, and he died in Germany in 1996.

Additional tensions surfaced over emigrés who had entered the United States under the RRA. As noted earlier,[32] one of the conditions for admittance under the RRA was that the country from which one departed had to guarantee that one would be taken back if in fact the visa had been procured through fraud or misrepresentation of material facts. Germany had made a written commitment to that effect in 1954; it covered all persons embarking from their shore. Although the number of native-born Germans coming to the U.S. in the early post-war years was limited,[33] many Eastern Europeans and Ukrainians came to the U.S. from displaced persons camps in Germany.

In 1983, during discussions about Trifa, Germany advised OSI that it doubted the validity and enforceability of its 1954 agreement.[34] And indeed, the German government later contended that it could not locate an original copy of such an agreement and therefore did not feel bound by its terms. At OSI's request, the State Department twice formally requested that Germany search its files.[35] In November 2005, the German government advised that it had finally located the document.[36]

That it took over two decades to resolve this issue was frustrating for OSI. In fact, however, it did not affect large numbers of OSI defendants. OSI filed 21 cases against men who entered under the RRA. Of these, between 10 and 12 had departed from Germany. (Information

on the country of departure was not readily available in two of the cases.) Six of the men ultimately wound up in Germany, though they were not admitted pursuant to the agreement.[37] Two others went to Lithuania before deportation proceedings, and therefore before the U.S. could have demanded action under the agreement.[38] Of the four possibly remaining,[39] one died while his case was in litigation; the U.S. agreed not to seek deportation of the other three because of their ill health.

Indeed, Germany accepted many more OSI defendants than it declined. As of this writing, 23 OSI defendants have gone to Germany. One was extradited;[40] some fled in the midst of OSI proceedings;[41] others left the United States as a result of pre- or post-filing settlements with OSI;[42] some were admitted after deportation orders were entered.[43]

Six of the twenty-three were German citizens, and thus had to be admitted under German law.[44] Most of the others entered unannounced with their U.S. passports. The Germans did not know at the time of entry that they were either OSI subjects or defendants.[45] In most cases where Germany later learned of the connection, they let the matter lie. Their reaction was quite different, however, in the two cases where OSI was involved in the defendant's plan to go to Germany.

John Avdzej and Arthur Rudolph went to Germany as part of an agreement with OSI to avoid prosecution in the United States. Each renounced his U.S. citizenship shortly after arrival. Although OSI knew about the defendants' plans, Germany had not been forewarned nor had the State Department.[46] When they entered Germany, neither man acknowledged that he was doing so in order to avoid prosecution in the United States.

The Germans sent a strongly worded Diplomatic Note in protest.[47] They made clear that

they would not have admitted either man had they known the true circumstances of his departure from the United States; the admittees' lack of candor rendered their admissions unlawful.[48] Germany asked the United States to take the men back and went so far as to threaten to withhold investigative cooperation in future OSI endeavors. Indeed, the Diplomatic Note pointedly warned that Germany might end the charade of treating these cases as criminal matters so that they would be covered under the mutual assistance treaty.

> The Government of the Federal Republic of Germany also deems it necessary to point out that assistance to the OSI has been provided in accordance with the principles of judicial assistance in criminal matters. The present cases, however, lie outside the category of judicial assistance in criminal matters. They belong to the administrative process.[49]

The U.S. refused to allow the men reentry although it did, ultimately, change its policy in response to White House pressure. AAG Jensen, DAAG Richard, and Director Sher were summoned to the National Security Council on June 7, 1984 to discuss the matter. Sometime thereafter, AAG Jensen advised DAAG Richard that the program of encouraging defendants to go to Germany unannounced could not be continued absent State Department support.[50]

The State Department was not, however, in favor of OSI's policy in this regard. In December 1987, it issued a new policy: U.S. nationals who renounced their citizenship and had no other nationality or had not been accepted for permanent residence by another country could be involuntarily returned to the United States unless it was against U.S. interests to do so.[51]

In 1993, OSI agreed to provide the Germans with a list of current OSI defendants along with their date and place of birth, the status of the litigation, and a summary of the defendant's World War II service. The Germans wanted the information to help control their borders. They continued to accept some OSI defendants until well into the 1990s.[52] However, in the late 1990s,

the Germans announced that they would no longer accept any non-German OSI defendants as deportees. It is unclear what caused this change. Some at the State Department thought that pending litigation concerning Holocaust victim assets might explain Germany's intransigence.[53] Director Rosenbaum thought it more likely that the collapse of the Soviet Union was the key factor. As he saw it, the Germans were willing to accept non-German OSI defendants only in order to prevent their deportation to the Soviet Union.[54]

The problems caused by Germany's hardening position came to a head in the cases of Bronislaw Hajda, Anton Tittjung and Nikolaus Schiffer. Hajda, a Pole who served as an SS guard at various Polish camps, including the Treblinka labor camp, was denaturalized and ordered deported to Poland (his country of birth) or Germany (the country from which he embarked to the United States) in 1998. Poland refused to accept him on the ground that he had expatriated himself by his collaboration with the Nazis.

Tittjung, born in Yugoslavia (now Croatia), was a German national. As a member of the Waffen SS, he served as a guard at Mauthausen in German-annexed Austria. He lived in Austria for seven years after the war and received his entry visa there. He was denaturalized and ordered deported to Croatia in 1994. The Croatian government refused to accept him because he was neither born in that country nor a citizen thereof. The United States asked Austria to admit him, but the request was denied; Austria noted that he had never been a citizen of that country.[55]

Schiffer, a German national from Romania, served in the Waffen SS as a concentration camp guard in both Poland and Germany, and was ordered deported to Romania in 1997. That country refused to accept him on the ground that he had surrendered his Romanian citizenship when he left Romania and voluntarily joined the German armed forces.[56]

OSI urged the State Department to pressure Germany to accept all three men, warning that Congress, the media and the public would be highly critical if Germany did not.[57] Rosenbaum was particularly outraged since he felt that now, more than ever, Germany "owe[d] us big time." (They had just obtained what he felt was an agreement overly favorable to them on the issue of slave labor reparations.)[58] The State Department, however, insisted on further pursuit of diplomatic channels with Poland, Croatia and Romania before increasing pressure on Germany. State hoped that as new democracies, these countries would want to be seen as "European" and therefore would respond favorably.[59]

Romania, particularly, was importuned on several fronts. In July 2000, the U.S. Solicitor General raised the matter in a meeting in Romania with the Romanian Deputy Prime Minister and Minister of Justice. He followed up with a letter to the Minister of Justice in which he observed that "there are, in any system, unique cases that assume a significance transcending the importance of the particular facts involved. In the eyes of the United States, this is such a case." That same month, the U.S. Ambassador to Romania raised the issue with the Chief of Staff of the Romanian President. Shortly thereafter, U.S. Embassy officials met in Bucharest with officials from the Romanian Ministry of Justice and Ministry of the Interior. And in February 2001, the Attorney General of the United States raised the issue with the Romanian Minister of Foreign Affairs. These efforts bore fruit in January 2002, when Romania advised the State Department that it was willing to accept Schiffer. He went that May, at age 83.

He may be the last OSI defendant that country will accept. Shortly after his arrival, Romania adopted new legislation barring the entry of persons as to whom "there are serious reasons to consider that they have committed criminal offences or took part in committing

criminal offences against peace and humanity, war crimes or crimes against humanity."[60]

The United States continued to pressure Germany about the other two defendants. Rosenbaum met with the German Consul General and offered the Germans political cover in case they were concerned about world reaction if they failed to prosecute the men: Rosenbaum would explain publicly that the United States understood the difficulties of filing a case at this late date and was confident that the Germans would do an appropriate investigation.[61] Shortly thereafter, the State Department sent a Diplomatic Note to Germany stating that "the United States believes that Germany has a compelling moral obligation to act as the receiving country of last resort."[62] A second diplomatic message was sent in March 2002[63] and a demarche the following summer.

Germany withstood the pressure. They maintained that although they could accept non-Germans for reasons of international law, political interest or humanitarian concern, practice dictated that there be current links to Germany; typically such links were either to family or property, neither of which applied to Tittjung or Hajda.[64] Ultimately, Germany turned down the U.S. request, emphasizing that the men were not German citizens and there was no "public interest" in Germany to accept the men since there were no criminal charges or investigations pending against them. Germany did not respond to the moral imperative argument.[65]

In January 2003, the State Department proposed importuning Croatia and Poland again before applying renewed pressure on Germany. Meeting with the State Department's Director of Austria, Germany and Swiss Affairs, Rosenbaum and his Principal Deputy Susan Siegel made plain their opposition to this proposal. They deemed it futile and a waste of time.[66] The State Department insisted however, and a demarche was sent to Poland and Croatia. Both countries

rejected the U.S. proposal.

At this point, diplomatic relations between the U.S. and Germany were strained, for reasons unrelated to OSI.[67] The media was reporting that Germany was anxious to improve the situation and Rosenbaum hoped that this might work to OSI's advantage. In May 2003, he contacted the State Department's Special Ambassador on War Crimes issues. Rosenbaum opined that unless the matter were resolved soon, "a major public controversy will soon erupt, and this entire sordid history will come out."[68]

The Ambassador was supportive of the need to press the issue further with Germany. Very soon thereafter, and one day before the U.S. Secretary of State was scheduled to meet with the German Chancellor, the State Department delivered a Diplomatic Note to the Germans. This May 2003 document reviewed the history of the United States' efforts to deport Hadja and Tittjung and renewed the U.S. request that "Germany act as the receiving country of last resort for these individuals on the basis of Germany's compelling moral obligation to accept them." The U.S. added that neither Croatia nor Poland possessed "an equivalent moral obligation."[69]

Rather than offering to accept Tittjung and Hajda, Germany asked the United States to take back Dmytro Sawchuk, an OSI defendant who had fled to Germany in 1999. Having renounced his U.S. citizenship when he reached Germany, Sawchuk, born in Poland, was stateless; the Germans were neither interested in prosecuting him nor in granting him German citizenship.

The United States rejected the German request. The State Department advised that the December 1987 agreement to readmit stateless persons did not control since there was an exception if readmittance was not best for U.S. interests. Sawchuk had guarded Jews who were

forced to exhume and burn corpses. From the U.S. perspective, that made him the precise type of person for whom the exception was created. Moreover, OSI had timely alerted the German Consulate that Sawchuk might flee to Germany. They therefore should not have been taken unawares when he entered the country.[70]

As anxious as OSI was to have Germany accept OSI deportees, the office was not optimistic that any would face trial in Germany. Murder was the only relevant crime not barred by the German statute of limitations and it was almost impossible to establish the "base motive" called for in the statute. OSI had always understood base motive to mean that one would have to establish that the murder was inspired by something akin to racial hatred or that the perpetrator imposed extra suffering through extreme cruelty.[71]

In the summer of 2003, however, OSI learned that German courts had long ago upheld findings of base motive in cases of mass shootings or group death in gas chambers. According to one 1971 ruling by the German Federal Court of Justice:

> Waiting for one's own sure death, experiencing the preparations, and being herded into the gas chambers constituted additional mental torture for the victims of mass extermination.[72]

This raised the possibility, for Rosenbaum, that Germany might be persuaded to seek the extradition of Jacob Reimer, an OSI defendant who had been denaturalized in December 2002.[73] Reimer, trained as a camp guard, had been involved in ghetto clearings and a pit execution.

Before broaching the topic of extradition, however, Rosenbaum wanted to pursue the issue of OSI deportees. In October 2003, Rosenbaum met with the Political Minister of the German Embassy. Rosenbaum presented a proposal, approved by the State Department, which would obligate the United States to seek other countries for deportation, but commit Germany to

accept those with German citizenship and those who are not granted admittance elsewhere.[74] Rosenbaum also alerted the Minister that two members of Congress had recently written to the Attorney General asking about OSI's deportation problems.[75] Unless the matter were settled before a response was due, Rosenbaum warned that he would "devote [him]self to doing whatever the Justice Department will permit me to do to fan the flames of controversy."[76]

In December 2003, Germany issued a Note Verbale rejecting again both Hajda and Tittjung. The Note spoke of the lack of legal authority for their admission; again, Germany did not address the moral argument.

The issue took an unexpected turn in January 2004. An OSI defendant who had been ordered deported to Lithuania flew to Germany after all his appeals were exhausted. OSI had been working with Immigration and Customs Enforcement ((ICE) – successor to the INS) to locate the defendant and put him on a plane to Lithuania. He eluded the authorities and, with his still-valid Lithuanian citizenship, flew to Germany where he was admitted without a visa because Germany and Lithuania are both members of the European Union (EU).

As soon as OSI learned of this, it notified the State Department which passed the information on to Germany. A member of the German Embassy, grateful for the "heads up," acknowledged to Director Rosenbaum that his country had OSI's 1993 information concerning this defendant. However, the information had not been shared with airport security and so the entry was accomplished without incident.[77]

Germany's inadvertent admission of an OSI defendant did not reduce the U.S. government's determination to convince Germany to knowingly accept OSI deportees. In January 2004, Rosenbaum, with State Department approval, met with staff of the two

Congressmen who had written to the Attorney General about the deportation issue. The State Department had a separate meeting with the staff shortly thereafter. The State Department reiterated OSI's message that Germany "has steadfastly refused to address the moral argument." However, State was less critical than OSI had been of Germany's overall actions on the deportee issue over the years.[78]

In February 2004, the two Representatives wrote to the German chancellor asking him to recognize Germany's "moral responsibility" to accept Tittjung and Hajda.[79] The German response, issued by the foreign minister, acknowledged the country's "special historical responsibility." The Minister maintained, however, that the responsibility was met in large part by the payment of "comprehensive compensation" to Holocaust victims over the years. He reiterated Germany's position on deportees. It would only consider accepting people who were not – and never had been – German citizens, if there was a possibility of criminal prosecution in Germany. As he saw no such possibility for Tittjung and Hajda, they would not be admitted. Moreover:

> Admission outside of a legal assistance procedure would send the wrong signal. Since the persons in question cannot be convicted due to a lack of evidence against them, and due to the fact that on the contrary they would even have to be granted state aid, this would give the impression that Germany is providing protection and shelter to persons with a Nazi past. This would not be justifiable for both domestic and foreign policy reasons. The Federal Government sees the responsibility for admission of the persons in question as resting with the states whose citizenship they hold.[80]

In March 2004, Director Rosenbaum advised the Germans that Johann Leprich, another OSI defendant, had been ordered deported to Germany.[81] Leprich, an ethnic German born in Romania, had been a camp guard. He was denaturalized in 1987. Shortly before the ruling, he

fled the country. His attorney advised the court and OSI that he had gone to Canada.

Years later, a self-styled Canadian "Nazi hunter" began a public search for Leprich, maintaining that he had returned to the United States. Leprich was featured on a May 1997 segment of a popular U.S. television show, "America's Most Wanted." In 2003, he was found hiding in a secret compartment under the basement stairway of his wife's home in Michigan. He claimed that he had recently entered from Canada where he had no legal status. His illegal entry from Canada formed the basis for deportation.[82] He requested Germany as his destination country.

OSI, with the State Department's approval, posited a new theory under which Leprich remained a German citizen and therefore had to be accepted back into the country. As OSI read German law of the era, as an ethnic German Leprich became a German citizen when he joined the Waffen SS. While Leprich renounced his German citizenship when he became a naturalized U.S. citizen, German law allows for renunciation only if one does not become stateless as a result. OSI claimed that Leprich's renunciation was ineffective since the district court which stripped him of his citizenship did so retroactively. Since he never properly became a U.S. citizen, he would be stateless without his German citizenship.[83]

Germany rejected that analysis outright. It maintained that service in the SS did not automatically confer citizenship. Even if it had, Leprich would have lost citizenship based on lack of residence and/or acquisition of U.S. citizenship. That the U.S. retroactively stripped him of citizenship did not alter their view. Germany added another reason as well, one which applies to all OSI defendants who cannot be prosecuted criminally in Germany: Germany does not want to create the impression that it is "offering protection and shelter to persons with Nazi pasts."[84]

To eliminate that possibility, the State Department offered to issue a statement explaining that Germany had taken Leprich only to accommodate the United States. Germany did not take up the State Department offer.[85]

Both Hajda and Reimer died in the United States in 2005. That same year, a German television news magazine devoted a segment to Germany's refusal to readmit elderly Nazis ordered deported by U.S. courts.[86] A former OSI Deputy Director appeared on the program to argue for revision of the policy. In a letter sent to the program, but not read in its entirety on air, the Federal Ministry of the Interior defended the policy.

> There are no obligations under international law, nor can the Federal Republic of Germany have any interest in accepting people into our country who, although they are suspected of committing Nazi crimes, cannot be proven to have committed them. If we did so, we would be encouraging, and be responsible for, a state of affairs in which these people have been accepted by the very country where the Nazi crimes originated, the people would then be supported here by German social services and could possibly even become active in the extreme right and anti-Semitic social scene. In addition, because we are doing everything possible to encourage the growth of an active Jewish life in Germany again, we cannot hospitably accept people from the Brown circle into our country at the same time. Although we completely understand that the United States would want to send these people out of its country after revoking their citizenship, they should be deported to the countries of their former citizenship, as prescribed by international law.[87]

As of this writing, Sawchuk is still in Germany while Tittjung and Leprich remain in the United States.[88] The United States has begun discussions with the Russian government about the possibility of Russia's accepting OSI deportees whose crimes were committed in the Baltics.[89]

1. Nov. 14, 1991 memo from Peter Black, OSI Historian, to OSI attorneys, historians and investigators re: "Former Stasi Archives in the Freienwalderstrasse, Berlin-East." One instance in which the East Germans provided assistance involved the Mengele investigation. East Germany provided a needed photograph of Mengele which they had from an old drivers license. Recorded interview with former OSI Chief Investigative Historian David Marwell, July 17, 2003.

2. From July 1945 until Oct. 1953, captured Nazi party records were consolidated at the BDC under the authority of the U.S. Army for use in war crimes and denazification trials. Between Oct. 1953 and July 1994, it was under the jurisdiction of the State Department. In 1988 David Marwell, former Chief Investigative Historian at OSI, was named Director of the BDC. He remained in that position until 1994.

3. Oct. 22, 1992 letter from then Principal Deputy Director Rosenbaum to W. David Straub, Central European Affairs, U.S. State Department.

4. Oct. 18, 1993 Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany Concerning the Transfer of the Berlin Document Center to the Federal Republic of Germany, Arts. 4 and 5.

DAAG Richard testified in favor of the agreement before the House Subctee on International Security and Human Rights, Committee on Foreign Affairs, Apr. 28, 1994.

5. Not all countries have been as flexible. Contrast Germany's approach on this issue with Australia's, discussed at p. 490, and Austria's. In 1982, the Austrian Ministry of the Interior refused to allow OSI access to a Vienna District Court file on Bruno Blach, a former concentration camp guard then a defendant in deportation proceedings initiated by OSI. Austria noted that its treaty covered assistance only in criminal cases and this was "an administrative proceeding." March 22 1982 letter to OSI, from Dr. Zeyringer of the Austrian Ministry of the Interior.

6. Oct. 26, 1987 memorandum from OSI Historian Peter Black to Director Sher re "Issues for Discussion with FRG Officials."

7. Jan. 29, 1982 telegram 023845 from Secretary of State to American Embassy in Bonn.

8. June 1, 1992 letter from the German Federal Ministry of Justice to Director Sher re: Mutual Assistance in Criminal Matters here concerning: U.S. Investigations of Nazi War Criminals. Before the Germans authorized this document sharing, the countries had alerted one another to information each had received from Germany which might be useful to another country. The second country then had to request the material from Bonn. June 12, 1987 memo to OSI staff from Peter Black re: "Release of Documents and Records Obtained from the FRG Through Requests for Judicial Assistance."

9. Another area of frustration is the German government's unwillingness, possibly due to privacy concerns, to allow OSI unrestricted access to German pension information for R&D purposes. *See* July 17, 2000 memo to Rosenbaum from OSI Chief Historian Elizabeth White re:

"Examination of German Pension List in 1997; Note Verbale No. 68/97 from the German Embassy," Aug. 26, 1997.

The Germans will, however, generally respond to a request for pension information about a specific individual. Indeed, their response to a request for information on Kazys Ciurinskas led to the key document in the case, establishing in Ciurinskas' own words (on his pension application to the German government) where he had served and where the unit had been when he was wounded. It also negated his claim that he was unaware that his unit was working for the Germans. *U.S. v. Ciurinskas*, 976 F. Supp. 1167 (N.D. Ind. 1997), *aff'd*, 148 F.2d 729 (7th Cir. 1998). In 2005, however, the Germans unexpectedly refused to allow OSI access to pension records for an OSI subject. The Germans suddenly claimed that access was permissible only in criminal investigations. Apr. 28, 2005 e-mail from Rosenbaum to Donald Shermanski, Deputy Director State Dep't Office of Austrian, German and Swiss Affairs re "OSI Egner Investigation – German Denial of Access to His Pension Records."

10. American occupation forces prosecuted 1,941 alleged Nazi criminals. 1,517 were convicted, 367 were acquitted, and charges were withdrawn in 57 cases. Adalbert Rueckerl, *The Investigation of Nazi Crimes 1945-1978* (Heidelberg: C.F. Mueller, 1979), pp. 28-29. The Germans themselves have prosecuted thousands of others. 2003 SWC Annual Report, Worldwide Prosecution and Investigation of Nazi War Criminals, p. 27.

11. In Jan. 2004, Germany arrested a man accused of ordering his unit to round up and shoot 146 civilians (including 51 children) in Czechoslovakia. The condemned group allegedly was composed of partisans and those who supported them. The defendant was also charged with ordering the execution of 18 Jews, some of them children, who had been hiding. He went on trial in Sept. 2004. "Germany Arrests Alleged Nazi, 86," by Andrea Dudikova, *The Chicago Tribune*, Jan. 20, 2004. He was acquitted in Dec. 2005. "Nazi Officer Acquitted of Wartime Mass Murder," by Roger Boyes, *The Australian*, Dec. 21, 2005.

In Feb. 2004, an 88 year old female doctor was charged with murder of one mentally handicapped patient and complicity in the murder of 158 others as part of a Nazi euthanasia program. "East German Doctor Faces Trial Over Nazi Murders," by Tony Paterson, *The Sunday Telegraph* (London), Feb. 1, 2004. A former SS member, charged with killing a Dutch prisoner during the war, went on trial in Sept. 2003. The prosecution was aborted mid-trial, however, because the defendant was adjudged mentally unfit. "Court Says Ex-Nazi Unfit to Stand Trial," *AP*, Feb. 2, 2004.

Germany's investigations and prosecutions have been recognized each year by the SWC in its annual report on world-wide investigations and prosecution of Nazi war criminals. Germany is generally in the second or third tier of the six categories created by the SWC. The United States is consistently sole occupant of the top tier, reserved for countries which have taken all reasonable measures to identify the potential suspected Nazi war criminals in the country in order to maximize investigation and prosecution and have achieved notable results during the period under review. *See* the SWC reports for 2002 - 2006.

12. *E.g.*, Mar. 12, 2003 letter from OSI Chief Investigative Historian Michael MacQueen to Ludwigsburg Chief Kurt Schrimm forwarding a list of collaborators whose names came up in

recent research and who might still be in Germany; Aug. 9, 1989 letter to Reinald Walkemeyr, Ass't to the Amb., GDR, from Rosenbaum, Deputy Director OSI, notifying him of survivor witnesses in the U.S. who might have relevant information for an upcoming East German trial. OSI has even assisted by interviewing witnesses on matters somewhat outside OSI's traditional mandate. Thus, at the request of the Germans, and with the sanction of the State Department, an OSI attorney interviewed witnesses in the U.S. for a German investigation about the 1945 murder of Sudeten Germans in the Czech Republic. Mar. 18, 2003 e-mail from Rosenbaum to Stephen Markard, Assistant Director, Terrorism and Violent Crime Division, USNCB- Interpol Washington, re "WWII era war crimes - 20020303674."

13. *E.g.*, Aug. 12, 2002 letter from Rosenbaum to Schrimm inviting him to visit OSI and examine records. In 2005, as part of its investigation of John Kalymon, OSI learned the whereabouts in Germany of a citizen who had signed "bullet reports" describing the killing of Jews in Poland. OSI sent the Germans 21 relevant wartime documents and the Germans opened an investigation. Sept. 26, 2005 letter from Elizabeth White, OSI Deputy Director and Chief Historian to Criminal Chief Commissioner Manfred Haag, Ludwigsburg, Germany; Nov. 20, 2005 e-mail from White to Director Rosenbaum re "Kalymon: Message from German Prosecutor re Kerestil."

14. Aug. 9, 1989 letter to Reinald Walkemeyer, Ass't to the Amb., GDR, from Deputy Director Rosenbaum.

15. *E.g.*, Marking the 50th anniversary of Hitler's ascension to power, West German Chancellor Helmut Kohl said that his country "cannot and will not shirk [its] responsibility for the past." "A Hitler Anniversary Recalled at Reichstag," *The New York Times*, Jan. 31, 1983.

16. Oct. 26, 1973 report from German prosecutor in Landau in der Pfalz to Department of Justice, pp. 20-21 (hereafter 1973 Report).

17. A German national (volkszugehöriger) is a person "who has declared himself to be of Germany nationality, as long as this declaration is confirmed by certain characteristics such as ancestry, language, education and culture." Sec. 6 of the Federal Refugee Act of 1993 (BGB1 I, S. 829 ff.) A similar definition existed in 1973.

18. 1973 Report, *supra*, n. 16. *See also*, June 19, 1974 letter from German Consulate General to Samuel Zutty, INS Investigator; Oct. 15, 1974 report from German prosecutor to Department of Justice (hereafter 1974 Report); Sept. 24, 1975 report of District Attorney Landau to Central Office of State Judicial Administrations, Ludwigsburg.

19. 1974 Report, *supra*, n. 18 at p. 7.

20. Jan. 4, 1982 letter from Attorney General Smith to Jürgen Schmude, German Minister of Justice; Oct. 6, 2000 recorded interview with former OSI Director Ryan. Since there are fewer levels of appeal, and the burden of proof is less, extraditions are generally speedier for the United States than denaturalization trials followed by deportation hearings. *See* pp. 41-42 for a fuller

discussion of extradition.

21. A synopsis of Ryan's trip is set forth in the Jan. 4, 1982 letter from Attorney General Smith to West German Minister of Justice Schmude, *supra*, n. 20.

22. Of the 134 cases which OSI has either litigated or settled pre-filing as of this writing, only 7 involved persons born in Germany.

23. "Proposal to Speed War Crimes Cases Studied," by A. O. Sulzberger, Jr., *The New York Times*, Nov. 15, 1981.

24. Jan. 4, 1982 letter, *supra*, n. 20.

25. Feb. 12, 1982 letter to the Attorney General from the Federal Minister of Justice.

26. Jan. 28, 1983 memorandum from OSI Deputy Director Sher to DAAG Richard re "Meeting with West German Legal Official." OSI was so irate about West Germany's position that it proposed sending Trifa to the United States occupation sector of West Berlin. *See* pp. 218-219.

27. *See* pp. 271-295, 510-515.

28. Although base motive could be established if the defendant exploited the lack of suspicion or inability of the victim to put up a defense, West Germany advised that "[t]he fact that one of the victims was a four year old child in itself does not suffice to establish a determination of a cruel or underhanded killing according to . . . the Legal Code." Mar. 28, 1983 Note Verbale from German Foreign Office. (Of course, if Koziy were a deportee, Germany would not be obligated to try him in any event.) For a further discussion of base motive, *see* p. 340, n. 17.

29. Oct. 1, 1985 letter from German Embassy to Department of State.

30. Indeed, the U.S.S.R. had wanted to extradite Maikovskis, but in the absence of an extradition treaty between the United States and the U.S.S.R., the U.S. did not honor this request.

31. *JTA*, Feb. 20, 1991 reporting on testimony by Maikovskis' attorney. *See* also Maikovskis' May 10, 1996 obituary in *The Pittsburgh Post-Gazette* reporting that he had "secretly persuaded a German consul to grant him a visa."

32. *See* p. 38.

33. *See* pp. 35, 38.

34. Jan. 28, 1983 memo to DAAG Richard from Dep'ty Dir. Sher re "Meeting with West German Legal Official."

35. Notes Verbale, No. 195-C (May 24, 1995) and 1142-C (June 10, 2005).

36. Note Verbale, Ref. No. 508-516.50 (USA), Nov. 22, 2005.

37. The six were Mathias Denuel, Jakob Denzinger, Stefan Leili, Hans Lipschis, Peter Mueller and Wiatschelaw Rydlinskis. The circumstances of their entry are set forth in notes 41 and 43, *infra*.

38. The two were Kazys Gimzauskas and Aleksandras Lileikis.

39. Albert Ensin, Talivaldis Karklins, Mikelis Kirsteins and Alexander Lehmann.

40. Bruno Blach, an ethnic German from the Sudentenland (now the Czech Republic.) He was tried and acquitted in 1993 of four wartime murders.

41. Anton Bless, Jakob Denzinger, Juris Kauls, Stephan Leili, Peter Mueller, Stephan Reger, Wiatschelsaw Rydlinskis, Dmytro Sawchuk, Josef Wieland, and Chester Wojciehowski. The Germans had notified OSI that they would not accept Rydlinskis as a deportee because they did not have the "original" exchange of notes. Jan. 5, 1995 letter from German Consul General Ulf Hanel to Director Rosenbaum. However, he entered with a U.S. passport shortly after his denaturalization case was filed.

42. John Avdzej, Arthur Rudolph, Michael Schmidt.

43. Paul Bluemel, Algimantas Dailide, Mathias Denuel, Johann Hahner, Liudas Kairys, Reinhold Kulle, Hans Lipschis, Boleslavs Maikovskis, and Conrad Schellong.

In the case of Kairys, a Treblinka labor camp guard, enormous pressure was brought to bear on Germany by the U.S. government. He was ordered deported to Germany in 1987. After giving formal assurances (through a Note Verbale in 1990; *see* Dep't of State telegram 311711Z, Oct. 31, 1990) that they would issue him a residence permit, Germany later advised that they were reluctant to do so. One cause for their concern was that Kairys might become a ward of the state. OSI assured them that he was the recipient of a sufficient pension from the Crackerjack company, his long-time U.S. employer. Mar. 2, 1993 letter from Rosenbaum to German Consul General Ulf Hanel.

Germany apparently had other reasons for reconsidering their earlier commitment to accept Kairys. In Feb. 1993, a German Foreign Ministry official told officials at the U.S. Embassy in Bonn that the German government was reconsidering its decision because conditions in Eastern Europe had changed and Kairys could now be deported elsewhere. (This was an apparent reference to the collapse of the U.S.S.R. and the end of Communist rule in eastern and central Europe. Had Kairys been deported to a Communist country before the end of the Cold War, he would have faced a judicial system viewed by many as lacking in fundamentals of due process.) May 28, 1993 draft letter from OSI Chief Historian Peter Black to German Justice Ministry official Reinhard Weth (hereafter Black draft). The letter was a followup to a May 11, 1993 telephone conversation between Weth and Black in which they discussed recent problems between Germany and the United States concerning OSI defendants.

Ultimately, the State Department prevailed upon Germany to honor its earlier

commitment concerning Kairys. Apr. 7, 1993 letter to German Ambassador Immo Stabreit from Director Sher. Kairys was admitted in Apr. 1993.

44. Paul Bluemel, Mathias Denuel, Johann Hahner, Reinhold Kulle, Hans Lipschis, and Peter Mueller.

45. By agreement between the United States and the FRG, U.S. citizens in possession of a valid passport did not need a visa to enter Germany.

46. Citizenship renunciations are not valid unless accepted by the State Department. In these cases, the State Department was initially reluctant to do so. The responsible consular officers were concerned that the renunciations might not be voluntary given the impending OSI prosecutions. The State Department requested an opinion from the Justice Department on the matter. The Office of Legal Counsel (OLC) concluded that the renunciations were in fact voluntary. Sept. 27, 1984 memo from Ralph Tarr, DAAG of the OLC to Daniel McGovern, Acting Legal Advisor of the State Department. The State Department accepted the renunciations shortly thereafter.

47. May 21, 1985 Note from the Embassy of the FRG to the State Department.

48. This is the very argument OSI makes when is seeks to remove persons from the United States, *i*.e., had all the facts been known they would have been denied entry.

49. Diplomatic Note, May 21, 1985. Rudolph and Avdzej were not the only admittees about whom Germany complained. In 1993, they were angry because they believed the DOJ press release announcing Kairys' deportation portrayed Kairys as a major war criminal. They felt this put intense pressure on Germany to bring a prosecution which, under their law, they had scant hope of winning. *See* Black draft, *supra*, n. 43. They were also upset about Michael Schmidt's entering Germany in 1993. (Schmidt voluntarily agreed to leave the U.S. rather than face deportation charges.) The Germans resented that they had not been notified by the U.S. in advance of Schmidt's arrival. In fact, however, the U.S. was not privy to his plans beforehand. And in any event, the German consulate in Chicago had been notified by Schmidt's attorney of Schmidt's intentions. The consulate had apparently failed to pass the information along. *Id.*

50. Interview with DAAG Richard, Apr. 25, 2001.

51. All Diplomatic and Consular Posts (ALDAC) cable (87 State 386507), Dec. 12, 1987.

52. OSI defendants who went to Germany in the 1990s include Michael Schmidt (1990); Liudas Kairys and Johann Hahner (1993); Mathias Denuel and Wiatschelsaw Rydlinskis (1994); and Dmytro Sawchuck (1999). Kairys is discussed *supra*, n. 43.

53. Comment of James I. Gadsden, Deputy Asst. Secretary of State for European Affairs at State Department Meeting Apr. 19, 2001 re Removal of Hajda, Schiffer and Tittjung. Hajda, Schiffer and Tittjung are discussed at pp. 434-437, 440.

54. May 5, 2000 letter from Rosenbaum to Charles Cohen, Deputy Director, EUR/AGS Department of State. It is the case that those sent to the Soviet Union did face serious consequences. Fedorenko who had been deported in 1984 to the Soviet Union had been tried and executed; Linnas, deported in 1987, was awaiting trial when he died of natural causes. And, as noted at p. 430, there is reason to believe the Germans took in Maikovskis to spare him from the Soviet judicial system. However, since Germany continued to accept, albeit sometimes reluctantly, people without German citizenship years after the Soviet collapse, that explanation does not seem sufficient.

55. Aug. 24, Nov. 2, and Dec. 13, 2000 letters to Director Rosenbaum from Austrian Amb. Peter Moser.

56. The legal predicate for this position is murky. In May 1943, the Romanian Government and the German Reich entered into an agreement providing that Romanian citizens of German ethnic origin who joined the Germany Army would preserve their Romanian citizenship. (OSI relied on this when trying to persuade the Romanians to accept Schiffer.) However, in Sept. 1944, when Romania switched sides and joined the Allies, King Michael declared that all those who had served in the German Armed Forces must forego citizenship.

57. *See e.g.*, May 5, 2000 letter from Rosenbaum to Cohen, *supra*, n. 54; Aug. 27, 2001 letter from Rosenbaum to James Gadsden, Deputy Assistant Secretary of State for European Affairs.

58. In 2000, the United States and Germany approved an agreement that obligated Germany to place approximately $5 billion in a compensation fund for those who had been forced to work in Nazis concentration camps, ghettos and factories. Half the money in the fund came from the German government and half from German industry (including some American subsidiaries of German companies). Payments ranged from $2,200 to those who worked for German companies to $7,500 for those in concentration camps or ghettos that aimed at "death through work."

Although most of the beneficiaries were not in the U.S., the United States helped negotiate the agreement after American lawyers filed class action lawsuits in the United States on behalf of victims from around the world. (Negotiations were handled by then Deputy Treasury Secretary Stuart Eizenstat.) To encourage Germany in the negotiations, the U.S. pledged to do everything it could to block the lawsuits.

The class actions were dismissed in May 2001 and payouts from the fund began shortly thereafter. "Payments Begin for Laborers Forced to Work for the Nazis," by Stephanie Flanders, *The New York Times*, June 29, 2001; "Judge Clears Obstacles to Pay Slaves of the Nazis," by Jane Fritsch, *The New York Times*, May 11, 2001; "Germans Sign Agreement to Pay Forced Laborers of Nazi Era," by Edmund Andrews, *The New York Times*, July 18, 2000.

59. Apr. 19, 2001 meeting, *supra*, n. 53.

60. Government Ordinance No. 194, "Emergency Ordinance on the regime of aliens in Romania," Dec. 2002. In January 2004, the Attorney General of the United States met with the Romanian Minister of Justice and expressed concern about the new statute. The Justice Minister

indicated that decisions would be made on a "case by case" basis. Jan. 28, 2004 e-mail from Rosenbaum re "AG's Luncheon Meeting Today with Romanian Justice Minister: Postscript." (The Justice Minister, before assuming that post, had, coincidently, been an expert witness on Romanian law for OSI in its 1993 denaturalization suit against Nikolaus Schiffer.)

As of this writing, two OSI defendants, Johann Leprich and Michael Negele, were born in Romania. (Two others, Adam Friedrich and Joseph Wittje, died in the U.S. while their cases were pending.) Negele has an outstanding order of deportation to Romania (or, alternatively, Germany). Citing the new statute, the Romanian ambassador informed OSI that Negele would not be admitted. The ambassador described the legislation as an effort "to meet the standards and embrace the values of the Western democracies." June 28, 2004 letter from Romanian Ambassador Sorin Ducaru to Rosenbaum.

In Nov. 2004, an international commission chaired by Elie Wiesel and established by Romanian President Iliescu, called on the government to "accept responsibility for alleged Romanian war criminals." Report of the International Commission on the Holocaust in Romania. (An earlier draft had called on Romania to "accept war criminals expelled from other countries." This language was omitted from the final report.)

In separate meetings with Romanian President Basescu and Foreign Minister Ungureanu, Assistant Sec'y of State Maura Harty raised concern about Romania's unwillingness to accept OSI defendants. May 12, 2005 e-mail from Bob Gilchrist, Political Section Chief, U.S. Embassy Bucharest to OSI Director Rosenbaum re "Nazi Deportees - Romania." Gilchrist himself followed up in Aug. 2005 with his counterparts at the Romanian Embassy. Aug. 30, 2005 e-mail from Gilchrist to Rosenbaum re "Nazi Deportees – Romania (Negele, Leprich, Friedrich, Wittje)."

With the strong support of the State Department, scholars from the USHMM raised the issue again in meetings with Romanian political leaders in Oct. 2005. Oct. 28, 2005 e-mail to Dir. Rosenbaum from Radu Ioanid, Director of International Archival Projects at the USHMM, re "OSI/Romania."

As of this writing, the Romanian position has not changed.

61. Dec. 10, 2001 e-mail from Rosenbaum re "12/5/01 Meeting w/ German Consul General Germann."

62. Jan 31, 2002 telegram (18835) from Secretary of State.

63. U.S. Dip. Note No. 565-C, Mar. 13, 2002.

64. Mar. 17, 2002 telegram 000913 from American Embassy in Berlin to the Secretary of State; Dec. 31, 2002 e-mail from Carol Van Voorst, DOS Director of Austria, Germany and Swiss Affairs re "Germany and Readmission of Nazis Tittjung & Hajda," to Rosenbaum and responsive e-mail of Jan. 2, 2003 from Rosenbaum to Van Voorst.

65. June 24, 2002 Note Verbale from the German Foreign Office, Case No. 200-533.00 USA.

66. Rosenbaum voiced the view that Germany would accept Tittjung and Hajda only if it believed that by doing so it could save the men from a worse fate – as Germany had accepted Maikovskis when it looked as if he might be sent to the U.S.S.R. Rosenbaum proposed threatening to send the defendants to Israel where they could be locked up as enemy combatants. The State Department was unreceptive to this suggestion. Jan. 13, 2003 meeting at OSI.

67. *See e.g.*, "Germany and U.S. Tentatively Ease Chill in Relationship," by Steven Weisman, *The New York Times*, Oct. 31, 2002. The main points of contention involved Germany's opposition to U.S. policy toward Iraq and the perceived anti-American tone of Chancellor Schroeder's fall 2002 reelection campaign.

68. May 12, 2003 e-mail from Rosenbaum to Amb. Pierre Prosper re "Germany-Nazis." Rosenbaum reiterated that message to Van Voorst. May 12, 2003 e-mail re "Fwd: Re: Germany-Nazis."

69. U.S. Dip. Note No. 1078/03, May 14, 2003.

70. Cable 1981, May 23 from Emb. Berlin to U.S. State Dept; 5/31/03 e-mail from Rosenbaum to Steve Donlon, State Department re "OSI: Cable from Germany re: Sawchuk."

71. *See* p. 340, n. 17.

72. Nov. 1, 2003 e-mail from Rosenbaum re "Reimer Extradition to Germany?" in which he quotes from a German decision reported at 1 StR 110/70 (May 18, 1971). The case was cited to him by Kurt Schrimm, the Director at Ludwigsburg Zentrale Stelle.

73. *U.S. v. Reimer*, 2002 WL 32110197 (S.D.N.Y.), *aff'd*, 356 F.3d 456 (2nd Cir. 2004).

74. The text reads as follows: With respect to the Nazi-era cases handled by the Office of Special Investigations of the Department of Justice, the United States Government agrees that it will always seek initially to remove persons who have retained foreign (i.e., non-U.S.) citizenship to their country of citizenship. This includes persons who formerly held German citizenship but were naturalized by third governments after World War II and have not lost or surrendered such citizenship. Germany will have no obligation to admit such individuals, other than those who have retained German citizenship. The United States Government further agrees that it will seek initially to remove stateless individuals to: 1) the countries in which they formerly held citizenship; 2) the countries of which they were previously nationals, or if such countries do not agree to admit the individuals, 3) the countries from which they immigrated to the United States. If none of these countries agrees to admit the individual, Germany agrees that it will be the receiving country, provided that the decision of the United States Government to seek removal/departure is predicated in whole or in part on the individual's assistance or other participation in persecution while serving during World War II in a military, paramilitary, police, auxiliary police or other unit of, under the direction or control of, or sponsored by, the German Government or the NSDAP. Germany agrees that it will also continue to be the receiving country for persons who immigrated to the United States from Germany under the Refugee

Relief Act of 1953 through fraud or misrepresentation of material facts.

75. Oct. 27, 2003 letter to Attorney General Ashcroft from Rep. Tom Lantos, Ranking Member of the House International Relations Committee and Sheila Jackson Lee, Ranking Member, House Subcommittee on Immigration, Border Security and Claims.

Rosenbaum had testified before Rep. Jackson's subcommittee on July 11, 2003. The hearing concerned immigration relief under the Convention Against Torture for Serious Criminals and Human Rights Violators. The subcommittee was investigating whether, as an unintended consequence of the Convention, human rights abusers were remaining in the U.S. rather than facing deportation to their own countries. At one point Rosenbaum commented:

> I would not want the Subcommittee to be left with the impression that it is only undemocratic countries, lawless countries even, that refuse to accept these individuals, or countries with which we perhaps don't have diplomatic relations. In our cases – in the Nazi cases – some of the most prominent democracies in the world have refused to accept the return of these individuals as well.

The letter from Reps. Lantos and Lee was a followup to that comment.

76. Oct. 28, 2003 memo to File from Rosenbaum re "Meeting at German Embassy With Rolf Nikel Regarding OSI Deportees."

77. Jan. 13, 2003 e-mail from Rosenbaum re "Dailide Case: Tel. Call from German Embassy's Christian Germann."

78. Feb. 9, 2004 e-mail from Van Voorst to Rosenbaum re "Meeting with Congressional Staffers."

79. Feb. 25, 2004 letter from Congresswoman Sheila Jackson Lee and Congressman Tom Lantos to German Chancellor Gerhard Schroeder.

80. Apr. 1, 2004 letter from Federal Foreign Minister Joschka Fischer. Germany's position altered somewhat in 2005 when it advised OSI that it would not admit someone "merely because they once possessed German citizenship." Admission would be predicated solely on whether there was admissible evidence to support a criminal prosecution. Aug. 20, 2005 letter to Director Rosenbaum from Chargé d'Affaires Peter Gottwald. The letter was in response to notification from OSI about developments in the Reimer case.

81. Mar. 3, 2004 letter from Rosenbaum to German Ambassador Wolfgang Ischinger re Johann Leprich.

82. The deportation, unlike all others OSI has handled, had nothing to do with his World War II activities. Although that could have been the basis for deportation as well, OSI determined it would be much simpler to rely on Leprich's own admissions about his illegal entry from Canada.

Also unusual in the Leprich case, he was placed in custody upon his arrest in July 2003.

The basis for the detention was that he was a flight risk, as established by his leaving during the denaturalization case. He spent 40 months in custody and was released only after Romania, Hungary and Germany all declined to admit him. "US Frees Ex-Nazi Camp Guard in Michigan," *AP*, Oct. 18, 2006.

83. Mar. 19, 2004 letter to German Amb. Wolfgang Ischinger from Director Rosenbaum.

84. May 13, 2004 letter from Christian Germann, Consul General at the German Embassy in Washington, D.C. to Rosenbaum.

85. The suggestion was made by Don Shamanski, Deputy Director of AGS to German Consul General Hans Jörg Neumann, Oct. 28, 2004 as set forth in Oct. 28, 2004 memo to Leprich file from Rosenbaum re "Fascinating Meeting Today with German Consul General Neumann."

86. WDR-TV news magazine *Monitor*, June 9, 2005, segment "Nazi Crimes: How the Federal Government of Germany Hinders Investigations," reported by John Goetz and Monika Wagener.

87. June 9, 2005 letter to *Monitor* Editorial Staff from Rainer Lingenthal, Federal Ministry of the Interior.

88. The problem of having no receptive country for a deportee is not limited to OSI defendants. There are many reasons for such problems, *e.g.*, persons from war zones where there are no authorities to issue appropriate documents. *See*, "Refugees in Limbo: Ordered Out of U.S., but With Nowhere to Go," by Jodi Wilgoren, *The New York Times*, June 4, 2005. According to a report by the Inspector General of DHS, as of June 2004, removal orders against more than 133,000 aliens could not be carried out because their countries of origin have blocked their return. *The Detention and Removal of Illegal Aliens*, p. 18. The full report can be found at www.dhs.gov/interweb/assetlibrary/OIG_06-33_Apr06.pdf (last visited Nov. 2006).

89. Nov. 9, 2005 e-mail from Director Rosenbaum re "OSI Deportees, Etc. - Meeting Today with Russian Embassy's Georgiy E. Borisenko."

The Baltics

Over one third of OSI defendants come from Estonia, Latvia and Lithuania. These former "captive nations" have a complex political history which affects their perspective on World War II, and consequently their working relationship with OSI.

All three nations were under Russian domination until the end of World War I. They then attained independence, but in 1940, partly as a result of the Soviet/German Molotov-Ribbentrop Pact, the Soviets annexed the three countries. When Germany invaded the U.S.S.R. in June 1941, it overran and occupied the Baltic nations. The invading forces included small mobile killing units (Einsatzkommandos) charged with annihilating Jews and others deemed inimical to the Reich. Indigenous groups within each country assisted the Germans in carrying out their mission.[1] At war's end, the Baltic nations were once again forcibly incorporated into the Soviet Union.

The three countries saw themselves as victims of both the Nazis and the Communists. Many who assisted the Nazis claimed they were seeking to rout their former Communist oppressors, not Jews; to the extent that there was any overlap, they saw it as incidental. This defense was raised in several OSI cases, once successfully.[2]

While the Baltic nations were part of the Soviet Union, OSI had access to documents in their archives to the same extent that it had access to documents in other Soviet archives: the Soviets would receive requests from OSI and produce documents they deemed responsive.[3] Once the Baltic countries gained independence, they, like the other parts of the former Soviet Union, were generous in allowing OSI access to their archives. However, they have been reluctant to prosecute criminally those who assisted the Nazis.[4]

1. Estonia

About 75% of Estonia's Jewish community fled to the Soviet Union before the German invasion. Of the remaining 950 to 1,000, virtually all were killed by the Nazis. The Nazis also murdered hundreds of Estonian Roma (gypsies).

As a Soviet Socialist Republic, Estonia was prepared to prosecute Karl Linnas.[5] Since it gained independence, Estonia has maintained that it is anxious to find and prosecute those who assisted the Nazis in persecution. In fact, however, independent Estonia has never prosecuted anyone for aiding the Axis powers. Several Estonian collaborators have come to OSI's attention.

a. Evald Mikson

In 1993, Iceland sought OSI's assistance in investigating former Estonian national and nationalized Icelandic citizen Evald Mikson. Mikson had been head of the Estonian Political Police. That organization, at the behest of the Germans, arrested, interrogated and imprisoned persons whose racial, religious, political, ethnic and social identity was deemed dangerous or undesirable. Iceland shared with OSI a 1993 report about Mikson that it had received from the Estonian Prime Minister's office. While positing that Estonians had "no power to run the country and its society" during the Nazi era, the report nonetheless referenced 28 arrest orders that Mikson had signed. It noted also that he had interviewed an unspecified number of the arrestees. Thirteen of the 28 arrest orders listed no crime; 11 of these 13 arrestees were Jews. The report made no mention of the ultimate fate of any of those arrested and concluded that there was no basis for accusing Mikson of war crimes. Mikson died in late 1993, at which time the Icelandic investigation was closed.[6]

In 1998, the president of Estonia appointed an international commission to investigate

crimes against humanity during World War II. The Commission presented its findings in 2001.[7] It concluded that although Estonian police were formally subordinate to the Germans, they nonetheless "exercised significant independence of action in arresting and interrogating suspects, and determining and carrying out sentences." While reluctant to assign personal responsibility to most members of the Estonian police, the Commission made an exception for the Political Police, *all* of whose members it held accountable. Within this culpable group, the Commission named those *most* responsible, including Mikson, who had "signed numerous death warrants."

b. Harry Männil

Although Mikson was dead by the time the Commission issued its report, Harry Männil, one of his chief deputies, was alive and well in Venezuela.[8] In March 2001, the SWC appealed to the Estonian Prime Minister to investigate Männil,[9] and shortly thereafter the Estonian Security Police asked the United States for any documents relating to Männil's World War II activities.[10] OSI responded with a report, along with supporting documents, most of which came from the Estonian State Archives. The documents established that Männil had interrogated individuals in Political Police custody, including Jews and suspected Jews, and that the Germans had murdered at least one of the Jews interrogated.[11] After receiving the documents, the Estonian Security Police announced that there was no basis for accusing Männil of Nazi crimes and that Männil's interrogations were "a legal, procedural act" that could not be considered a crime against humanity.[12]

In June 2002, OSI's Principal Deputy Director and its Chief Historian went to Estonia to discuss, among other things, whether Estonia might seek Männil's extradition from Venezuela. This trip came in the wake of a controversial Op-Ed piece about the Holocaust written by the

U.S. Ambassador to Estonia and published in one of that country's prominent newspapers. The article suggested that membership in NATO (which the Estonians were then seeking) depended in part upon eliminating resurgent anti-Semitism. It urged the Estonians to pursue those involved with the Holocaust "with the same vigor with which the state still pursues those suspected of Soviet crimes," and recommended national commemorations and education about the atrocities committed during that era.[13] The piece created a furor in Estonia, where some viewed it as interfering with the internal affairs of a foreign country.[14]

OSI's discussions with the Estonian prosecutors were tense. Although the Estonians reluctantly acknowledged that Männil might be culpable under Estonian law,[15] they changed their position shortly after the meetings concluded. In July 2002, the government announced that it could not prosecute Männil without evidence that he had actually issued (or carried out) the execution orders.[16] The Estonians never confronted Männil with the documents sent by OSI nor interviewed potential witnesses in the United States. The investigation was officially closed in December 2005, with the Estonians announcing that the 85-year-old Männil was not guilty of crimes against humanity.[17]

A philanthropist and avid art collector, Männil was invited to Estonia in February 2006 to attend the opening of the country's new art museum. The U.S. ambassador boycotted the event because of Männil's presence.[18] As of this writing, Männil still resides in Venezuela.

c. Kalijo Arvo Lehela

Kalijo Lehela, an Estonian-born Canadian citizen, was placed on the Watchlist and barred from entering the United States in 1990. The basis for his exclusion was a handwritten and signed statement he wrote as an officer candidate for the Waffen SS. In that document, he

reported serving as a criminal police official in the German Security Police and SD (Security Service) from October 20, 1941 to July 17, 1943, after which he joined the Estonian SS.

In support of Lehela's unsuccessful effort to have his name removed from the Watchlist, the Estonian Consul General in Toronto wrote letters stating that he did not believe Lehela was a proper subject for investigation. The Consul General also certified a translation of Lehala's autobiographical statement which OSI deemed "so far from the original as to be unquestionably fraudulent."[19]

d. Michael Gorshkow

OSI filed a denaturalization lawsuit against Michael Gorshkow in May 2002. The complaint alleged that Estonian-born Gorshkow had been a Gestapo interpreter/interrogator at the headquarters of the German security police in Minsk, Poland (now Belarus). The complaint detailed Gorshkow's participation in a Nazi killing action at the Jewish ghetto in nearby Slutsk in February 1943. Some 3,000 Jewish men, women and children were shot to death at pits or burned alive when Nazi-led forces set fire to the ghetto and blocked Jews from leaving. The Nazi's advance order for the action identified Gorshkow by name as one of the men deployed to carry out the massacre; a fellow interpreter, questioned by the West German authorities in 1960, recalled Gorshkow's participation in the executions.

A month after the complaint was filed, OSI's Principal Deputy and its Chief Historian shared with the Estonians OSI's information on Gorshkow. Gorshkow fled to Estonia shortly thereafter and in July 2002, the district court entered a default judgment revoking Gorshkow's U.S. citizenship. A year later, Representative Tom Lantos asked the Estonian government for an update on their investigation of Gorshkow.[20] The Estonian reply professed commitment to the

investigation but noted that material from OSI was "great and labor consuming, which makes it difficult for us at the moment to complete the case rapidly."[21]

Given that OSI had turned over only 36 pages of written material (plus 50 post-war interviews on a CD-ROM), OSI saw this as yet another example of Estonia's "bad faith in dealing with the Nazi cases."[22] In December 2003, Estonia formally opened an investigation into Gorshkow. The Prime Minister assured Representative Lantos that he would "personally follow" the investigation.[23] Several months later, the Estonians concluded that there was insufficient basis for an indictment.[24]

2. Lithuania

Over the years, Lithuania has sent mixed messages about its commitment to prosecuting alleged war criminals. After gaining independence, Lithuania seemed committed to prosecuting those who had persecuted civilians on behalf of the Nazis. In 1991, the government established an office to investigate "crimes against humanity" committed during the Nazi and/or Soviet eras; its mandate included determining whether the country had wrongly "rehabilitated" any Nazi collaborators.[25] Lithuania also signed an agreement to assist Australia in its efforts to prosecute former Lithuanian war criminals now resident in Australia, and offered to enter into a similar pact with both Israel and the United States.[26] The following year, Lithuania adopted a statute punishing Nazis and Nazi collaborators for crimes committed against the Lithuanian people during World War II. There is no statute of limitations and punishments range from five years imprisonment to death.[27] Lithuania also negotiated a Memorandum of Understanding (MOU) with the United States, whereby each country agrees to assist the other in the investigation of alleged war criminals.

Despite these intentions, by September 1994, when OSI filed a denaturalization suit against Lithuanian-born Aleksandras Lileikas, Lithuania had not yet prosecuted any Nazi collaborators.[28] OSI saw the Lileikis prosecution as "one of the most important Nazi cases brought anywhere in the world in recent history."[29] As such, Lithuania's handling of Lileikas issues became, for OSI, the litmus test of Lithuania's commitment to prosecute those who had assisted the Nazis.

Lileikis had been chief of the Lithuanian Security Police (Saugumas) in Vilnius. On behalf of the Nazis, the Saugumas arrested Jews, suspected Jews, and those who aided, hid or did business with Jews. Tens of thousands of those incarcerated in Vilnius were marched or trucked to an excavation site at Paneriai, six miles away.

Not all those incarcerated in Vilnius were arrested there, nor were all those arrested in Vilnius rounded up by the Saugumas. Nonetheless, even with very incomplete records available, it is certain that at least several hundred of those sent to Paneriai were arrested by the Saugumas during Lileikis' tenure. Once at Paneriai, the victims were stripped of their clothing and any remaining possessions, and then shot in groups of ten at the rim of pits by a Lithuainian volunteer unit. Vilnius had been home to 60,000 Jews before the war; at war's end, only 5,000 were alive.[30]

As chief of the Saugumas in Vilnius, Lileikis was the highest ranking Lithuanian prosecuted by OSI. The case, based on documents found by an OSI historian in the Lithuanian archives, included dozens of orders signed by Lileikis. There were arrest warrants as well as orders transferring many arrestees to the German Security Police, where they were "treated according to orders," *i.e.*, murdered. The documents also showed that, during Lileikis' tenure,

the Saugumas conducted a series of sting operations, in the course of which 38 Jews, including a ten year old boy, were lured out of the ghetto with a false promise of escape. The Saugumas then arrested the victims.[31]

Lileikis did not contest that he had been chief of the Saugumas and that as such he had ordered his men to arrest thousands of Jews and turn them over to the Nazis. Rather, he maintained that this was a "ministerial and custodial" position and did not amount to the "personal advocacy or assistance of persecution" necessary to revoke his admission to the United States under the RRA.[32]

Almost immediately after the case was filed, the Lithuanian ambassador to the United States made clear that it would be "very difficult" to prosecute Lileikis in Lithuania, no matter what the documentary evidence. He suggested that Lileikis would have a viable defense if he simply claimed he did not know that those he had arrested and turned over would be killed.[33] Yet barely two weeks later, the Lithuanian premier, in Israel to sign a cultural and scientific cooperation agreement, apologized for his country's persecution of Jews during the Nazi era and indicated that Lithuania would seek Lileikis' extradition.[34] The Department of Justice forwarded copies of pertinent documents to Lithuania. U.S. officials made clear that they hoped Lithuania would request extradition even before the district court ruled on denaturalization, as an extradition request would expedite Lileikis' departure.[35]

In February 1995, shortly before the Lithuanian president was due to visit Israel, his government claimed that there was insufficient evidence to warrant an investigation of Lileikis. The World Jewish Congress expressed outrage and warned that the upcoming trip might be "a diplomatic disaster."[36] On the eve of the visit, Lithuania opened an investigation.[37]

A few months later, Lithuania again warned of pending problems. It suggested that since its 1924 extradition treaty with the United States did not cover genocide, it did not apply to Lileikis' alleged crimes.[38] Moreover, the Lithuanians indicated that the documentary evidence was insufficient; they wanted eyewitnesses.[39]

Forty-nine U.S. Congressmen urged Lithuania to reconsider its extradition analysis and to file charges against Lileikis.[40] Jewish groups argued the same.[41] Ninety-two members of the Israeli Knesset wrote to the Lithuanian president, prodding him to take action against Lileikis as well as against Kazys Gimzauskas, Lileikis' second in command, who had fled to Lithuania after OSI filed a denaturalization action against him in 1995.[42]

In May 1996, a U.S. court stripped Lileikis of his citizenship and adopted OSI's analysis of the case.

> [A]s the government nicely put it at oral argument, Lileikis is attempting to stand the classic Nuremburg defense on its head by arguing that "I was only *issuing* orders.[43]

Within days of the denaturalization, Poland (which shares a border with Lithuania and lost tens of thousands of Polish Jews at Paneriai), announced that it had opened its own criminal investigation and might seek extradition.[44] The SWC asked Israel to do the same.[45]

Lithuania made clear that Lileikis was welcome to return home and suggested that he would not be prosecuted since there were no eyewitnesses.[46] Lileikis returned voluntarily within three weeks of this news. He was 89 years old and the first OSI defendant to return to one of the new republics formed after the dissolution of the Soviet Union.

The SWC demanded that Lithuania follow through on its promise to prosecute war criminals.[47] The United States too weighed in. At the time, all the Baltic states were seeking

admission to NATO. The United States asserted that prosecution of Lileikis and other war criminals would be strong evidence of adherence to "western values," a prerequisite to joining the alliance. Vice President Al Gore made this point when meeting with the president of Lithuania's parliament in April 1997,[48] and thirty members of Congress reiterated the message in a November 1997 letter to the Lithuanian president.[49]

Finally, in 1998, Lithuania charged Lileikis with genocide.[50] It was the first Nazi war crimes prosecution in post-Soviet Eastern Europe. Trial was suspended after a day, however, due to Lileikis' health. The State Department expressed "deep disappointment" and called on Lithuania to take "whatever steps are necessary" to ensure that Lileikis and others involved in war crimes during the Nazi era were brought to justice.[51] Three months later, trial not having resumed, Director Rosenbaum and a representative from the State Department's Office of War Crimes met with the Lithuanian Ambassador. They proposed having Lileikis examined by an international panel of doctors, including one U.S. physician, with the United States covering all costs. Lithuanian prosecutors presented the proposal to the court, but it was rejected by the judge.

Lithuania's admittance into NATO was on the agenda for an April 1999 NATO summit meeting. In a meeting with the U.S. Attorney General just one month before the scheduled summit, Lithuania's Prime Minister asked for assistance in drafting a law allowing for the prosecution of war criminals *in absentia*. The Department of Justice forwarded material prepared by both OSI (concerning the standards for *in absentia* hearings) and OIA (concerning videoconferencing).

In January 2000, the State Department reiterated its call for Lithuania to prosecute Nazi

war criminals.[52] Two months later, Lithuania amended its criminal code to provide that those charged with war crimes, genocide, and crimes against humanity can participate in court proceedings via closed circuit television if they are mentally competent but physically unable to appear in court. While no punishment may be imposed unless the defendant is subsequently deemed healthy enough to withstand a jail sentence, a verdict is rendered for purposes of "historical judgment."

Lileikis' trial resumed in June 2000 and was the first case to proceed under the new statute. Thirty minutes into the hearing, Lileikis complained of difficulty in breathing and was taken to the hospital. Trial was suspended indefinitely; he died two months later, at age 93.

Although the case had not proceeded to verdict, the Lithuanian Procurator General issued a press release stating that his office had enough evidence to substantiate Lileikis' role in the commission of genocide. He promised to seek "historic justice" in other cases of war crimes and genocide.[53]

He did so in the case of Lileikis' wartime deputy, Kazys Gimzauskas. Relying largely on documents pointed out by OSI, Lithuania had originally charged Gimzauskas with genocide in 1998, shortly after Lileikis' trial was first suspended. Gimzauskas' case was repeatedly delayed and ultimately suspended due to his deteriorating mental condition. Despite the court's finding that Gimzauskas was incapacitated from Alzheimer's disease, the trial resumed via closed circuit television after Lileikis' death.[54] Gimzauskas was convicted in 2001, at age 93, with the court finding that he had handed over at least three Jews to Lithuanian killing squads. The State Department and Director Rosenbaum lavished praise on Lithuania.[55]

Gimzauskas' conviction was the first Holocaust-related conviction in any of the successor