

**SPECIAL ISSUE:
PUBLIC AUTHORITY & INTERNATIONAL INSTITUTIONS**

Thematic Studies

**International Administration of Holocaust
Compensation: The International Commission on
Holocaust Era Insurance Claims (ICHEIC)**

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A. Background

I. Contextual Considerations

The most important change in public international law over the past century has been a re-direction of its focus exclusively on states to a broadened scope of subjects including, most importantly, individual human beings. This shift in the status of individuals may be directly traced to the widely acknowledged need, in the aftermath of the Second World War, for a more adequate response to the Holocaust and other large-scale atrocities than that offered by traditional international law. Substantive concerns led to the development of human rights law.¹ Victims' demands for compensation or restitution for the material injuries caused by genocidal Nazi persecution spurred a parallel procedural revolution. The innovation lay in national and international recognition of individuals' rights to assert such claims on their own behalf against their own governments, foreign states and foreign private entities.²

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¹ See, e.g., Daniel Levy & Natan Sznajder, *The Institutionalization of Cosmopolitan Morality: the Holocaust and Human Rights*, 3 JOURNAL OF HUMAN RIGHTS 143, 143-144 (2004).

² See, e.g., Richard M. Buxbaum, *A Legal History of International Reparations*, 23 BERKELEY JOURNAL OF INTERNATIONAL LAW 314, 314-317 (2005); Thomas Buergenthal, *International Law and the Holocaust*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, 17 (Michael J. Bazylar & Roger P. Alford eds., 2006).

In relation to other procedural-institutional changes in international law which have likewise found their impetus in awareness of the horrors perpetrated by Nazi Germany during World War II, the International Commission on Holocaust Era Insurance Claims (ICHEIC) represents a unique development. This institution is distinguishable from both a traditional claims commission and an arbitral tribunal.

Classically, claims commissions have been established under bilateral, lump-sum, postwar reparations settlements to resolve demands for compensation by individuals. An example of such a commission may be found in the context of the Nazi Persecution (*Princz*) Agreement³ between the United States and Germany, which facilitated compensation of a small group of American citizens who survived Nazi concentration camps.⁴ The settlement in the *Princz* case,⁵ including its claims processing arrangement, corresponded to the traditional practice under customary international law. Pursuant to that practice, claims of individuals against a foreign state may only be espoused by the state of which they are citizens.⁶

The United Nations Compensation Commission (UNCC), which processed claims resulting from the Iraqi invasion and occupation of Kuwait in 1990, represented a similar compensation approach. However, the UNCC's establishment within a multilateral framework rendered it an atypical example of a postwar claims commission. The UNCC, moreover, constituted a subsidiary organ of the UN Security Council, was multinational in composition and processed an unprecedented number of individual damage claims.⁷ Nevertheless, the UNCC still relied on the state espousal doctrine.⁸

³ Agreement Between the Government of the Federal Republic of Germany and the Government of the United States of America Concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution, 19 Sept. 1995, 35 ILM 195 (1996).

⁴ Following a lump-sum payment of \$2.1 million by Germany to the US in 1995 for distribution to Hugo Princz and 10 other survivors, US implementing legislation entitled similarly situated persons to have their claims adjudicated by the Foreign Claims Settlement Commission, an agency within the US Dept. of Justice. Claims found by the Commission to satisfy eligibility requirements were awarded with distributions from an additional German lump-sum payment to the US in 1999 of \$18 million. See www.usdoj.gov/fcsc/holocaustclaims.htm. This Internet citation and all which follow were last accessed on 13 July 2008.

⁵ *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

⁶ See Ronald J. Bettauer, *Holocaust Claims: The Role of the United States Government in Recent Holocaust Claims Resolution*, 95 ASIL PROCEEDINGS 37-38 (2001).

⁷ See John J. Chung, *The United Nations Compensation Commission and the Balancing of Rights Between Individual Claimants and the Government of Iraq*, 10 UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS 141, 147-148 (2005); Norbert Wühler, *Institutional and Procedural Aspects of Mass Claims Settlement Systems: The United Nations Compensation Commission*, in INSTITUTIONAL AND PROCEDURAL ASPECTS OF

As indicated, ICHEIC also differs from an arbitral tribunal such as the Claims Resolution Tribunal (CRT), which made awards under the US court-supervised settlement in the *Swiss Banks Litigation*.⁹ Finally, ICHEIC was not set up – at least formally – as a public foundation, or an agency of such a foundation, to administer an out-of-court settlement under national law.¹⁰ It stood, however, in close proximity to the German Foundation “Remembrance, Responsibility and the Future,” a domestic nongovernmental institution charged with distributing a fund stocked with equal contributions by German industry and the German government. The German Foundation was meant to implement a bilateral executive agreement between the United States and Germany resolving compensation claims primarily relating to the use of slave and forced labor by German companies.¹¹

ICHEIC can be seen as a largely private or hybrid private-public and national-international form of regulatory authority. From its inception, ICHEIC advertised itself as a global mechanism for processing insurance claims against non-state-owned insurance companies and responding to related humanitarian concerns that continued to beg a response more than half a century after Germany’s military defeat and the removal of its Nazi regime. The following examination of ICHEIC – which completed its claims and appeals processing in March 2007 and officially

MASS CLAIMS SETTLEMENT SYSTEMS 17-22 (The International Bureau of the Permanent Court of Arbitration ed., 2000).

⁸ See Wühler (note 7), at 17.

⁹ See *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000), *aff’d*, 413 F.3d 183 (2d Cir. 2001) (hereinafter *Swiss Banks Litigation*). The settlement covered claims not only related to the dormant accounts of Holocaust victims in Swiss banks, but also looted assets, denials of asylum, slave labor and insurance policies. In exchange for payment of \$1.25 billion by the Swiss banks, the plaintiffs dropped all claims against the banks and the Swiss government for damages related to the Holocaust and the war. Decisions over individual claims were left to the Claims Resolution Tribunal (CRT), which operated essentially as an arm of the District Court. See Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASHINGTON U. LAW QUARTERLY 795, 801 (20002).

¹⁰ The German Foundation (see, *infra*, note 11) was such an entity. See Neuborne (note 9), at 821.

¹¹ Agreement Concerning the Foundation “Remembrance, Responsibility and the Future” of 17 July 2000, 39 ILM 1298 (2000). The German Foundation, which provided the framework for a \$5.2 billion out-of-court settlement, was established under German domestic law by the *Gesetz zur Errichtung einer Stiftung “Erinnerung, Verantwortung und Zukunft”* (EVZStiftG) (Law on the Creation of a Foundation “Remembrance, Responsibility and the Future”), 2 Aug. 2000, BGBl. I-1263, last amended by Art. 1 of the *Gesetz vom 21. Dez. 2006* (Law of 21 Dec. 2006), BGBl. I-3343. Bettauer (note 6), at 39 (the executive agreement was intended to facilitate the dismissal of multiple class action lawsuits in the US through the creation of the German Foundation, on the one hand, and the provision of a “statement of interest” by the State Department to seized courts, on the other. This mix of domestic and international aspects warrants reference to the German Foundation as a “hybrid settlement.”). See Neuborne (note 9), at 820.

closed shop in June 2007,¹² but whose humanitarian programs have ongoing significance – offers a case study of an administrative manifestation of the above-noted “epochal break”¹³ in international law’s history.

II. Moral Qualms

Does assessing ICHEIC as an administrative process bureaucratize Holocaust compensation and obscure or devalue the moral significance of the issues with which the Commission has dealt? Those with misgivings may join the numerous critics who have questioned the legitimacy of the litigation which began in the 1990s on behalf of Holocaust victims to resolve claims involving dormant bank accounts, forced labor, stolen artwork and insurance policies, as well as the path taken under the bilateral executive agreement to reach “closure” of outstanding issues through the German Foundation. The controversy is not new. A commonplace of Holocaust compensation discourse – voiced by those asserting claims as well as those confronted with them – has been that no pecuniary redress can ever restore the victims to the position in which they found themselves prior to the crime against humanity perpetrated against them. Justice is said to be unattainable in this context. Moral responsibility, it is argued, can never find closure. Thus, some have labeled Holocaust-related litigation as inappropriate and pecuniary resolution of Holocaust-era claims as degrading.¹⁴

Material disputes concerning the Holocaust undeniably also contain “extra-legal components.”¹⁵ Morals and memory are no less at stake where Holocaust victims have asserted claims for material loss.¹⁶ Consequently, emphasis may instead be

¹² See Press Release, ICHEIC Announces Successful Completion of Holocaust Era Insurance Claims Process, 20 March 2007, and the Chairman’s Cover Letter (accompanying an ICHEIC “legacy document,” cited, *infra*, at note 44), 18 June 2007, both available at: www.icheic.org.

¹³ Levy & Sznajder (note 1), at 143.

¹⁴ For references to the original postwar debate over the propriety of Holocaust compensation and its more recent manifestation, see Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARVARD JOURNAL ON LEGISLATION 1, 54-57 (2002); MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS 286-293 (2003).

¹⁵ Vivian G. Curran, *Competing Frameworks for Assessing Contemporary Holocaust-Era Claims* 25 FORDHAM INTERNATIONAL LAW JOURNAL 107 (2001) (Symposium issue).

¹⁶ See *id.*, 111-113; Adler & Zumbansen (note 14); Roman Kent, *It’s Not about the Money: A Survivor’s Perspective on the German Foundation Initiative*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, 205, 213-214 (Michael J. Bazylar & Roger P. Alford eds., 2006); Edward B. O’Donnell, Ambassador, Special Envoy for Holocaust Issues, Compensation and Restitution for Victims of the Holocaust, Remarks at the Claims Conference Board of Directors, New York City, 11 July 2006, available at: www.state.gov/p/eur/rls/rm/69488.htm; Pierre A. Karrer, *Mass Claims Proceedings in*

better placed on revealing details of the genocide which occurred and its individual impact, thereby responding to the victims' unassuaged need for "re-individualization."¹⁷ Notwithstanding this forceful argument, consideration of the property rights of those who – as victims of an unparalleled industrialized mass murder – were simultaneously robbed in what has been called "thefticide,"¹⁸ the greatest mass theft in history, seems natural and necessary.¹⁹ Their compensation, whether resulting from litigation or within the framework of an administrative process, involves recognition of "a simple, straightforward and virtually universally acknowledged basic legal right that civilized societies afford their citizens."²⁰

III. Introduction to the Subject-Matter, Regime and Interests Involved in the ICHEIC Process

1. Addressing an Ignored Dimension of the Holocaust

Under traditional international law, individuals who suffered damage during wartime have had to look to their governments to represent their interests once hostilities ended and the victorious states entered into agreements for reparations with those they defeated. This model was largely applied after World War II as well despite its inadequacy in view of the enormity of Germany's crimes. Millions of people were stateless or unwilling to return to their original countries after fleeing Nazi persecution and surviving the atrocities committed by Nazi Germany. Their interests could only be represented by the states to which they fled. In the case of Jewish survivors, that was for many the new State of Israel. Jewish non-

Practice: A Few Lessons Learned, 23 BERKELEY JOURNAL OF INTERNATIONAL LAW 463 (2005); STUART E. EIZENSTAT, IMPERFECT JUSTICE. LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II ix (foreword by Elie Wiesel, 2003).

¹⁷ See Curran (note 15), at 116-117.

¹⁸ *Id.* at 120 (quoting Deputy Treasury Secretary Stuart Eizenstat, the principal representative of the US government on Holocaust issues during the Clinton Administration).

¹⁹ For the view that claiming individual as well collective monetary compensation for Jewish victims of Nazi persecution is an understandable, natural and legitimate notion, see Siegfried Moses, *Die jüdischen Nachkriegsforderungen* (Tel Aviv 1944), reprinted in: IUS VIVENS: QUELLENTEXTE ZUR RECHTSGESCHICHTE (Wolf-Dieter Barz, Andreas Roth & Stefan C. Saar eds., 1998). The expectation that Germany would restore property it had taken or provide material reparation for the loss it caused reflects nothing less an "elementary principle of justice and human decency." NANA SAGI, GERMAN REPARATIONS, A HISTORY OF THE NEGOTIATIONS 76 (1980).

²⁰ Curran (note 15), at 120.

governmental organizations, represented by the Claims Conference,²¹ also articulated the claims of Jews outside Israel as well as the Jewish people as a whole with regard to the loss of private assets belonging to individuals who were exterminated during the Holocaust leaving no heirs. Ultimately, postwar Germany agreed to provide reparations to Israel as well as some individual compensation and humanitarian assistance to certain categories of persons who had been damaged.²² Bilateral and multilateral agreements for reparations were also entered into with Western countries and, after the reestablishment of diplomatic relations following German reunification and the end of the Cold War, with former Communist-bloc countries as well.²³ However, efforts to achieve justice for Holocaust survivors were stymied by the omission of significant classes from among those who received remedial payments.

One class widely neglected in both the international reparations agreements and domestic German restitution and compensation legislation comprised holders and beneficiaries of insurance policies purchased before the war. As in the case of dormant Swiss bank accounts from the Holocaust-era, litigation over which resulted in a settlement for \$1.25 billion in 2000,²⁴ insurance policies also involved substantial amounts of assets. Estimates of the value of life insurance policies alone extended up to \$15 billion.²⁵ Figures such as this rested on compelling evidence that insurance policies, particularly for the large Jewish population in Eastern Europe, were “the poor man's Swiss bank account.”²⁶

²¹ The Conference on Jewish Material Claims Against Germany (Claims Conference). See <http://www.claimscon.org>.

²² See Agreement between the State of Israel and the Federal Republic of Germany (Luxembourg Agreement), 10 Sept. 1952, 162 UNTS 206 and German *Wiedergutmachung* legislation (see, *infra*, note 27).

²³ For details regarding postwar Germany's financial response to Nazi persecution, see German Federal Ministry of Finance, *Compensation for National Socialist Injustice: Indemnification Provisions* (2006 edition).

²⁴ See (note 9).

²⁵ See Sidney Zabudoff, ICHEIC: *Excellent Concept but Inept Implementation*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 260, 267 (Michael J. Bazylar & Roger P. Alford eds., 2006).

²⁶ Bazylar (note 14), at 110. See also Press Release, \$16 Million Paid to Holocaust-Era Insurance Claimants from ICHEIC Humanitarian Fund, 30 March 2004, available at: <http://www.icheic.org/newsroom.html>. *But see* The International Commission on Holocaust Era Insurance Claims (ICHEIC), *Lessons Learned: A Report on Best Practices*, June 2007, 7-8 (hereinafter ICHEIC, *Lessons Learned*), available at: <http://www.icheic.org/pdf/ICHEIC%20Best%20Practices%20Paper.pdf> (maintaining that the analogy, which raised claimants' expectations, was relativized by ICHEIC's own research).

2. *Legal Interests: Material Redress vs. Immunity from Unjustified Claims*

Surviving policyholders and beneficiaries who demanded that the insurance companies fulfill their contractual obligations or compensate for damages encountered an overwhelmingly negative and often demeaning response. In addition to requiring death certificates and documented proof of ownership of a policy or entitlement to benefits, insurers also often declared that the policies had meanwhile been closed or that the claimants' injuries were only nominal in view of postwar currency devaluations. Faced with potential legal liability, insurers raised substantive arguments which ignored the special circumstances surrounding the claims. Thus, payments were frequently denied on the grounds that policies had lapsed due to nonpayment of premiums. Insurers often insisted, moreover, that policies had previously been satisfied by payments made under government directive into blocked and later confiscated bank accounts, or that the claims were extinguished by prior payments under Germany's compensation or restitution laws²⁷ or under its postwar international reparations agreements.²⁸ In many cases, insurers maintained that the policy-issuing company had ceased conducting business or was nationalized by a postwar communist regime, or that relevant records no longer existed.²⁹

When litigation began, the insurance companies also raised significant procedural defences. Insurers questioned the jurisdiction of the courts or the appropriateness of adjudicating Holocaust era insurance claims under the political question doctrine as well as the notions of *forum non-conveniens* and comity. Further, defendants argued that such claims were barred under prevailing statutes of limitations and treaties, in particular, the London External Debt Agreement³⁰ and the Two-Plus-Four Treaty.³¹ The insurers additionally denied the standing of the claimants to represent the designated class where collective suits were lodged.

²⁷ See *Bundesentschädigungsgesetz* (BEG) (Federal Compensation Law), 29 June 1956, BGBl. I-559, and the *Bundesrückerstattungsgesetz* (BRüG) (Federal Restitution Law), 19 July 1957, BGBl. I-734. See BAZYLER (note 14), 144.

²⁸ See Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARVARD INTERNATIONAL LAW JOURNAL 503, 510-528 (2002) (for analysis of what the authors consider powerful legal defences of German industry which the plaintiffs would have had to overcome for the forced labor cases dismissed in connection with the German Foundation agreement to proceed). *But see* Adler & Zumbansen (note 14) (identifying significant weaknesses in these traditional defences).

²⁹ See BAZYLER (note 14), at xvi, 117, 138; Derek Brown, *Litigating the Holocaust: A Consistent Theory in Tort for the Private Enforcement of Human Rights Violations*, 27 PEPPERDINE LAW REVIEW 553, 560 (2000).

³⁰ Agreement on German External Debts (London Debt Agreement), 27 Feb. 1953, 333 UNTS 3.

³¹ Treaty on the Final Settlement with Respect to Germany (with Agreed Minute) (Two-Plus-Four Treaty), 12 Sept. 1990, 1696 UNTS 124. In effect, the London Debt Agreement of 1953 (note 30) postponed

In the class actions brought before American courts against the insurance companies which issued the original policies or their successors – many of which had meanwhile become multinational conglomerates doing billions of dollars of business in the United States, plaintiffs nevertheless sought judicial review and financial redress. They asserted that the companies had breached their contractual obligations and were unjustly enriched by appropriating assets to which they lacked any entitlement.³² These arguments were bolstered legally and morally by the assertion of collusion. Evidence indicated that companies had in many cases willingly and profitably worked together with the Nazi regime. When indemnifying claims by making payments into blocked accounts, for example, companies had been allowed to keep a transaction fee and paid less than the policies' face value. Some companies insured facilities in concentration camps, including Auschwitz. The head of Germany's largest insurer, Allianz, for instance, was the second Minister of Economy under the Nazi regime and belonged to the inner circle of supporters of SS chief Heinrich Himmler.³³

3. Regime: Globalized Compensation of Holocaust-Era Insurance Claims

With the establishment of ICHEIC as an alternative to litigation, its founders imagined that the need for adjudicating the parties' conflicting legal positions on an issue which had previously eluded a satisfactory response could be avoided by means of a central, unified or standardized regime for compensation. ICHEIC was, thus, envisaged as a way of providing expedited redress to deserving individuals who had lacked a remedy under national and international law for many decades. As a non-judicial, regulatory mechanism,³⁴ ICHEIC represented for its advocates a pragmatic solution meant to provide already elderly Holocaust victims, and in some cases their families, with a small measure of justice rather than the recognition of legal rights.³⁵ It ultimately resulted in compensatory payments for about half of those who submitted claims, either on the basis of named or identified

consideration of the liability of German companies until the conclusion of a peace treaty with Germany, something which the Two-Plus-Four Treaty of 1990 functionally represents. See Adler & Zumbansen (note 14), at 30-37; Neuborne (note 9), at 813-816.

³² For an overview of the litigation, see Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. OF RICHMOND LAW REVIEW 1 (2000-2001).

³³ See *id.* at 114-116.

³⁴ See Holocaust Era Insurance Restitution after *AIA v. Garamendi*: Where Do We Go From Here? Hearings Before the House Committee on Government Reform, 108th Cong., 1st Sess., 54, 62 (16 Sept. 2003) (hereinafter Hearings 2003) (Statement of Lawrence S. Eagleburger, Chairman, ICHEIC).

³⁵ See, e.g., O'Donnell (note 16).

policies or on humanitarian grounds. Direct humanitarian payments to individuals resulted where evidence showed that policies had existed although an issuing company could not be further specified, the company no longer existed or had been nationalized, or the policy had been confiscated. Significant humanitarian distributions to social programs were also made from separate funds contributed by member insurance companies in recognition of “heirless” claims.

IV. Overview of the Activity of ICHEIC

1. Purpose and Legal Basis

Indisputably, Germany’s postwar international reparations agreements as well as national compensation programs developed in the 1950s and 1960s were deficient and incomplete with respect to lost or stolen assets of Holocaust victims, including those relating to insurance policies. After the Cold War and following German unification in 1990, the major obstacles to seeking compensation for claims previously relegated to the back-burner appeared to have disappeared.³⁶ Class action lawsuits filed in American courts against European insurance companies focused renewed attention on the matter during the 1990s.³⁷ Because of the claimants’ advanced age, time was of the essence, if survivors were personally to receive any redress for wrongs they had suffered.³⁸ This bolstered the demands of survivors’ groups as well as the US government for an expedited process to resolve the insurance issue. Ultimately, however, the financial threat posed by the lawsuits, the negative publicity they gave the defendant companies, as well as potential federal regulatory sanctions³⁹ provided the prime impetus for an agreement which offered the companies an alternative to costly litigation.⁴⁰

³⁶ See (note 31).

³⁷ By the end of 1998, 25 insurers had been sued. See BAZYLER (note 14), at 132. The National Association of Insurance Commissioners (NAIC), in which all state insurance regulators participate, formed a working group to examine the matter; insurance commissioners in several states held hearings at which the companies were questioned on their non-payment histories. *Id.* at 69.

³⁸ Holocaust survivors were dying at a rate of 10% per year. See Stuart E. Eizenstat, *The Unfinished Business of World War II*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 297 (Michael J. Bazylar & Roger P. Alford eds., 2006).

³⁹ See H.R. 1210, Holocaust Victims Insurance Relief Act of 2003, 108th Cong., 1st Sess. (11 Mar. 2003). See, moreover, H.R. 1905, Comprehensive Holocaust Accountability in Insurance Measure, 108th Cong., 1st Sess. (1 May 2003), recognizing the authority of states to pass laws requiring insurance companies to disclose policyholder names and the current status of Holocaust era insurance policies, and creating a federal cause of action permitting claimants to sue insurers for payment of such policies in federal court.

⁴⁰ See EIZENSTAT (note 16), at 339.

ICHEIC was intended by its founders as a mechanism for pursuing individual claims against European insurance companies which would allow both claimants and the companies to avoid protracted litigation in US courts and shield the companies from threatened governmental restrictions on their business in the United States. As such, and in view of “the national interest in maintaining amicable relationships with current European allies,” it also represented the preferred policy choice of the US government and received its clear endorsement.⁴¹

A Memorandum of Understanding (MOU) signed on August 25, 1998 by several major European insurance companies, American state insurance regulators, several international non-governmental Jewish and survivor organizations, and the State of Israel constituted ICHEIC’s legal basis.⁴² Under the MOU, the new entity was delegated a sizeable bundle of competences relating to development of a just process for collecting and facilitating the signatory companies’ processing and settling of insurance claims from the Holocaust period. ICHEIC’s authority encompassed: the formulation and implementation of procedures for filing, investigating, valuating, and resolving such claims; negotiation with European insurers to provide information about and settlement of unpaid insurance policies; promulgation of an audit program and monitoring to assure company compliance with the MOU and ICHEIC decisions; and establishment and administration of a related humanitarian fund.

2. Scope

The MOU committed member insurance companies to providing access to policyholder data, making contributions to the humanitarian fund to be administered by ICHEIC and covering the costs of ICHEIC’s investigation of claims, as well as oversight and auditing of the insurers’ compliance with the

⁴¹ See *American Insurance Association v. Garamendi*, 539 U.S. 396, 396-397, 421-423 (2003) (striking down California’s attempt to force insurance companies licensed in the state, including the subsidiaries of European companies, to reveal the names of their Holocaust-era policyholders). The Court’s holding rested primarily on its determination that the US government, through the executive agreement which led to the German Foundation and its provision for the Foundation to work with ICHEIC, had clearly formulated national foreign policy on the issue of Holocaust-era insurance claims and that the state law directly conflicted with this legitimate exercise of executive authority and was accordingly preempted. See also *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, 340 F.Supp. 2d 494, 500, 503-505 (SDNY 2004) (hereinafter *Generali II*) (dismissing multiple suits against Generali on the basis of unambiguous executive branch policy favoring resolution of claims by ICHEIC).

⁴² The MOU is available at: http://www.icheic.org/pdf/ICHEIC_MOU.PDF.

agreed claims process.⁴³ Roughly \$500 million was ultimately received by ICHEIC for compensatory payments of eligible claims and humanitarian purposes from ICHEIC member companies and from funds made available through the conclusion of side-agreements relating to parallel processes.

To identify and expeditiously resolve unpaid insurance Holocaust-era insurance claims, ICHEIC issued rules and guidelines which the participating companies were obligated to apply. ICHEIC, moreover, negotiated and concluded agreements with partner entities, seeking to ensure analogous application of its prescriptive efforts, particularly with regard to relaxed standards of proof and policy valuation.

ICHEIC also developed criteria for making humanitarian awards where claimants had only anecdotal information about the existence of a policy and could not name a specific company, and where no additional documentation could be found. Such awards were paid by ICHEIC out of a separately maintained section of the humanitarian fund.

B. Legal Analysis

I. Institutional Framework

1. Is ICHEIC “Public” and “International”?

ICHEIC was chartered as a *Verein* (private association) under Swiss law. Its principle US address was in Washington, D.C., but claims were processed at an office established in London.⁴⁴ ICHEIC thus appears to be a private, nonprofit institution representing the signatories of the MOU and subject primarily to Swiss and British law. If ICHEIC was not legally constituted as an international organization, with a headquarters in the United States, that lay in the shared intention of the signatories to impede litigation before American courts.⁴⁵ A glance behind ICHEIC’s formal veil, however, reveals the inadequacy of defining the legal personality of ICHEIC as that of a purely private, nongovernmental, domestic-law

⁴³ See Megan Hoey, *Holocaust Era Insurance Claims: Compensating the Unimaginable*, 30 AUSTRALIAN ALTERNATIVE LAW JOURNAL 134, 140 (2005).

⁴⁴ Initially outsourced, claims processing in-house came at a later stage. See ICHEIC’s “legacy document”: LAWRENCE S. EAGLEBURGER & M. DIANE KOKEN, WITH CATHERINE LILLIE, FINDING CLAIMANTS AND PAYING THEM: THE CREATION AND WORKINGS OF THE INTERNATIONAL COMMISSION ON HOLOCAUST ERA INSURANCE CLAIMS 42 (2007), available at: <http://www.icheic.org/pdf/ICHEIC%20Legacy%20Document.pdf>. ICHEIC also established a call-center in New York, whose operations were outsourced to the Claims Conference. See *id.*, 21, 42.

⁴⁵ See *id.*, 42; BAZYLER (note 14), at 136; EAGLEBURGER, KOKEN & LILLIE (note 44), at 42.

entity. ICHEIC may instead be better conceived as a hybrid public-private and national-international body with regulatory functions regarding a subject of transborder public concern.

The MOU which established ICHEIC represents a private associational agreement with a public and international dimension.⁴⁶ It was signed by and reflected the interests of national and sub-national authorities as well as nongovernmental organizations and private parties. However, ICHEIC's qualification as a hybrid private-public institution not only derives from the partially "public" source of the competences it was delegated by the MOU. ICHEIC's public component may also be seen in its socio-political purpose of expediting the non-adjudicative processing of Holocaust era insurance claims where the resolution of conflicting private interests through litigation threatened a delay offensive to basic conceptions of human rights.

In setting out the public-private, national-international institutional framework of ICHEIC, the MOU envisaged an entity whose membership would equally balance the competing interests at stake. Half of the 12 members of ICHEIC were to be designated by American state insurance regulators from the National Association of Insurance Commissioners⁴⁷ as well as the World Jewish Restitution Organization (WJRO),⁴⁸ the Conference of Jewish Material Claims Against Germany (Claims Conference), and the State of Israel. The other half were to be designated by the signatory European insurance companies.⁴⁹

Appointment of an independent Chairperson unaffiliated with any of the persons or entities otherwise represented in ICHEIC was left to the 12 regular Commission members. ICHEIC formally began with the appointment of former US Secretary of State Lawrence S. Eagleburger as its Chairman in October 1998. ICHEIC's Chairman was supported by two senior staff, consisting of a Chief Operational Officer and a Chief Financial Advisor, and a combined staff of about 20 persons in the Washington and London offices.⁵⁰ While the MOU appears to establish a

⁴⁶ See Hearings 2003 (note 34), at 11, 12 (Statement of Rep. Henry A. Waxman, Ranking Minority Member of Committee on Government Reform).

⁴⁷ See (note 37).

⁴⁸ See <http://www.jafi.org.il/education/worldwide/synagogues/part2e.html>.

⁴⁹ The signatory insurance companies were Allianz, AXA, Basler Leben, Generali, Zurich Financial Services, and Winterthur Leben. Basler Leben resigned shortly after signing the MOU.

⁵⁰ See ICHEIC Holocaust Era Insurance Claims Processing Guide 8 (1st Edition, 22 June 2003), available at: http://www.icheic.org/pdf/ICHEIC_CPG.pdf (hereinafter ICHEIC Claims Processing Guide);

relatively compact institution, the ICHEIC articles of association allowed for the formation of committees,⁵¹ which consisted of delegates of Commission members, to address particular tasks. As a result, ICHEIC meetings sometimes involved almost 100 people.⁵²

In its provision for observers, the MOU reflects the unusual “mix of negotiating partners”⁵³ which lent a multi-dimensional or hybrid character to the entity it created. Each of the two above-mentioned interest groups was to designate two alternate representatives with observer status. Five additional observers were foreseen. Of these, three were to be designated by the WJRO together with the Claims Conference and the State of Israel, one by the “European Economic Commission” and one by the US Department of State.⁵⁴ This grant of observer-status to delegates of supranational as well as national and subnational governmental authorities further manifests the semi-public and international personality of ICHEIC.

2. ICHEIC and the Trilateral Agreement

Another unusual feature of ICHEIC relates to its side-agreements or “partnerships.” Separate operating agreements were concluded on claims processing with what ICHEIC termed “partner entities.”⁵⁵ ICHEIC’s attempt to establish a global or integrated process for resolving all outstanding insurance claims and pursuing related humanitarian purposes involved agreements with MOU signatory companies,⁵⁶ agreements with governmental restitution/

⁵¹ See EAGLEBURGER, KOKEN & LILLIE (note 44), at 20. Despite the legacy document’s reference to the articles of association, they are absent from the ICHEIC website.

⁵² See *id.* at 19.

⁵³ Bettauer (note 6), at 39.

⁵⁴ Presumably, the “European Economic Commission” referred to the Commission of the European Communities. For indications of the more active role than that of a mere passive observer played by the US government in ICHEIC, see *supra*, note 41.

⁵⁵ See ICHEIC Claims Processing Guide (note 50), at 9; EAGLEBURGER, KOKEN & LILLIE (note 44), at 31-32.

⁵⁶ Agreement was entered into by ICHEIC and the WJRO with Assicurazioni Generali S.p.A. (Generali) in 2000. In 2001, the Generali Fund in Memory of the Generali Insured in East and Central Europe Who Perished in the Holocaust (Generali Trust Fund/ GTF), established in Israel, was recognized in a further agreement as the implementing organization. See ICHEIC Claims Processing Guide (note 50), 9. This arrangement ended in Nov. 2004, when the Generali Policy Information Center in Trieste, Italy, assumed claims-processing functions. See EAGLEBURGER, KOKEN & LILLIE (note 44), at 29. Agreement was concluded in 2003 with AXA, Winterthur and Zurich on the terms of claims processing and additional funds for ICHEIC. See *id.*, 30.

compensation organizations and/or insurance industry associations,⁵⁷ and an agreement with a Jewish restitution/ compensation organization.⁵⁸

The most important and elaborate of ICHEIC's side-agreements was that with the German Foundation and the German Insurance Association (GVD) (hereinafter Trilateral Agreement),⁵⁹ This instrument places ICHEIC in a peculiar light for the following reasons: it finally got the claims process off the ground after an ineffective start; it resulted in the publication of about 360,000 potential policyholder names, thereby alerting many potential claimants to their possible eligibility for receiving an award; it provided ICHEIC with the bulk of its funding;⁶⁰ and it effectively shielded the European insurers from the jurisdiction of American courts. Although the German Foundation came about through separate negotiations and entailed formal recognition of ICHEIC as an autonomous entity,⁶¹ the Trilateral Agreement for practical purposes transformed ICHEIC into a *de facto* implementing organ of the German Foundation.⁶² Accordingly, ICHEIC may be

⁵⁷ ICHEIC, the German Foundation and the German Insurance Association (*Gesamtverband der deutschen Versicherungswirtschaft*) (GDV); ICHEIC and the General Settlement Fund (Austria); ICHEIC and the Buysse Commission (Belgium); ICHEIC and the *Sjoa* Foundation (the Netherlands); ICHEIC and the Draï Commission (France). See ICHEIC Claims Processing Guide (note 50), at 10-14.

⁵⁸ While an official text is unavailable, the Humanitarian Claims Processing Agreement between ICHEIC and the Conference on Jewish Material Claims Against Germany is referred to in INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES 36 (Howard M. Holtzmann & Edda Kristjansdottir eds., 2007).

⁵⁹ Agreement Concerning Holocaust Era Insurance Claims among ICHEIC, the German Foundation and the German Insurance Association, 16 Oct. 2002, available at: <http://www.icheic.org/pdf/agreement-GFA.pdf>. The 111-page document, consisting of a main agreement and eleven annexes, served as a model for similar agreements sought with Austria and France. See ICHEIC Claims Processing Guide (note 50), at 11-12.

⁶⁰ Most of the funds available for payment of claims under the ICHEIC process came from the German Foundation's DM 10 billion (€ 5.1 million) fund, to which German insurance companies had contributed about 10%. In total, DM 550 million resulted for ICHEIC from the side-agreement among the German Foundation, the German Insurers Association and ICHEIC, of which DM 200 million was for named or matched policies, with the remaining DM 350 million for humanitarian purposes, including claims resolved under the humanitarian claims process. See *id.* at 10-11.

⁶¹ See *Satzung der Stiftung "Erinnerung, Verantwortung und Zukunft"* (Statutes for the "Remembrance, Responsibility and the Future" Foundation), available at: http://www.stiftung-evz.de/eng/foundation_remembrance_responsibility_and_future/statutes/, which lists ICHEIC among the institutional partners operating in the subject-area of the Foundation that "will assume functions assigned to them by the Foundation Act and relevant contracts. They are not organs of the Foundation, which will work together with them to fulfill the purpose of the Foundation ...," as envisaged under Section 7 of the EVZStiftG (note 11), amended 11 June 2007, Section 9.

⁶² For the German insurers, ICHEIC could indeed be considered an administrative sub-organ of the German Foundation. See Eizenstat, (note 38), 300; Kai Hennig, *The Road to Compensation of Life Insurance*

said to represent an example of hybrid public-private as well as national-international administration also when seen from this perspective.⁶³

II. Substantive Aspects

1. Mandate

Under the MOU's normative framework, ICHEIC was charged with establishing a just process to collect insurance claims from the Holocaust period⁶⁴ and to facilitate their processing by signatory companies. Signatory companies agreed to determine the claims' current status following ICHEIC guidelines, which were to be negotiated and established by consensus among the ICHEIC membership. The scope and structure of the ICHEIC claims process was extended through ICHEIC's partnerships agreements. *Inter alia*, they contributed to ICHEIC's operating funds and the funds from which claimants were paid. As part of the agreements, the partner organizations stipulated that they would process claims in a manner broadly consistent with ICHEIC rules and guidelines, and that ICHEIC would be provided with copies of all offers and denials.⁶⁵

The following six primary normative prescriptions, addressed to both ICHEIC and the member companies, constitute the claims mechanism established by the MOU or what may be considered ICHEIC's "substantive programming:"

First, ICHEIC is to "initiate and conduct an investigatory process" to assess the current status of claims filed (MOU, Section 4). For purposes of the investigatory process, ICHEIC is given authority for obtaining information about victims of the Holocaust from relevant archives such as *Yad Vashem* in Jerusalem. Beyond this, it is delegated two related functions: first, promulgating an "audit mandate" which shall outline the work of the auditing firms engaged by ICHEIC or the member companies to insure that there is reasonable review of the insurers' files; and

Policies: The Foundation Law and ICHEIC, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 251, 254 (Michael J. Bazylar & Roger P. Alford eds., 2006).

⁶³ Evidence of ICHEIC's hybrid quality may be seen in the fact that, under the executive agreement signed on 17 July 2000 (note 11), the US and Germany agreed that insurance claims against German companies that fell within the handling procedures of ICHEIC would be processed by the companies and the GDV on the basis of these procedures and additional processing rules to be accepted by ICHEIC, the German Foundation and the GDV.

⁶⁴ Holocaust-era insurance claims were defined as those relating to policies issued to Holocaust victims between 1920 and 1945. See MOU (note 42), at Section 4.

⁶⁵ For a general description, see EAGLEBURGER, KOKEN & LILLIE (note 44), 31.

second, establishing a review mechanism to assess the acceptability of previous investigatory work by the companies (MOU, Section 4 (a)).

Under the same subsection, participating insurers or insurance regulators are committed to ensuring “complete and unfettered access” to the relevant data by the auditing firms to the extent necessary for their work. This duty is further qualified by the stipulation that “[s]uch access shall be in accordance with local insurance authorities and laws.” And, as if this had not sufficed to cause paralysis, dispute seems to have been pre-programmed into the ICHEIC process under Section 4 (b) of the MOU. Here, ICHEIC appears charged with assuring potential claimants’ adequate notification of the possibility to submit claims. The provision reads: “[ICHEIC] will address the issue of a full accounting by the insurance companies and publication of the names of Holocaust victims who held unpaid insurance policies.”

Second, ICHEIC is to “establish a claims and valuation process” to resolve and pay individual claims at no cost to the claimants (MOU, Section 5). This entails promulgation of claims processing guidelines and “establishment of relaxed standards of proof that acknowledge the passage of time and the practical difficulties of the survivors, their beneficiaries and heirs in locating relevant documents, while providing protection to the insurance companies against unfounded claims.”

Third, the MOU requires that each participating company “establish its own dedicated account” for immediate payment of claims found valid and attributable to that insurer by virtue of named or matched claims (MOU, Section 7).

Fourth, the insurance companies are obligated under the MOU, Section 8, to contribute to a Special (Humanitarian) Fund which consists of two sections and respective, separately maintained accounts. These accounts allow for compensation under the “Specific Humanitarian Section” in cases where claimants are unable to attribute their policies to a particular and currently existing insurance company (Section 8 (A)(1)), or where policies were nationalized or confiscated (Section 8 (A)(2)). Under the “General Humanitarian Section” (Section 8 (B)), for which the insurers’ contributions are understood to “give due consideration to the category of ‘heirless claims,’” funds “shall be used for the benefit of needy victims of the Holocaust and for other Holocaust-related humanitarian purposes.”

Fifth, member companies are required to cover the expenses of ICHEIC and each insurer individually will bear the costs of auditing its records “and any expenses relating to the processing or investigation of claims” against itself (MOU, Section 9).

Sixth, the MOU (Section 10) requires the signatories to “work to achieve exemptions from related pending and future legislation... for those insurers that become signatories to the MOU and which fully cooperate with the process and funding of ...[ICHEIC].”

2. *Secondary Rules*

ICHEIC announced initiation of the claims process in February 2000. Despite ICHEIC’s so-called “outreach program,” which consisted of a global campaign advertising the possibility of claiming previously unpaid Holocaust-era insurance policies, very few potential policyholder names were initially revealed.⁶⁶ Yet, this was very often precisely the basis upon which individuals could decide whether to file claims when they could not name a specific company or knew nothing of a policy’s existence. Critics saw the slow process and limited release of policyholder names as evidence of the insurance companies’ bad faith in view of the advanced age of the claimants. A result was negative media attention, litigation, regulatory sanctions under US state legislation and repeated Congressional hearings.

Clearly, the program outlined in the MOU required further specification with regard to ICHEIC’s investigatory process, the auditing of insurers’ processing work and the processing of humanitarian claims, valuation of policies and standards of proof. The development of the relevant secondary rules, which became essential elements of the ICHEIC normative framework, took place only gradually and without direct public input. At least initially, ICHEIC’s committees⁶⁷ served as a forum for negotiations and facilitated the relevant compromises required for the Commission to reach the consensus necessary for adoption of such rules.⁶⁸ After negotiating impasses, however, the consensus requirement was abandoned and the insurers agreed to abide by the Chairman’s directives.⁶⁹

⁶⁶ By mid-Nov. 2000, ICHEIC’s website listed only 39,000 of the more than 519,009 names that were eventually published by the end of 2003. See Press Release, International Commission on Holocaust Era Insurance Claims announces publication of additional 20,000 Holocaust-era insurance policies, 16 Nov. 2000, available at: <http://www.icheic.org/pdf/2000-1116.pdf>; EAGLEBURGER, KOKEN & LILLIE (note 44), 37. For a response to critics, echoing insurer’s arguments against full disclosure, see Letter from Lawrence S. Eagleburger, ICHEIC Chairman, to Tom Davis, Chairman, Committee on Government Reform 1, 9, 10 (23 Oct. 2003); available at: <http://www.icheic.org/pdf/2003-1023.pdf>.

⁶⁷ See (note 51) and accompanying text.

⁶⁸ See *In re Assicurazioni Generali S.p.A. Holocaust Insurance Litigation*, 228 F. Supp.2d 348, 357 (2002) (hereinafter *Generali I*) (citing evidence of the understanding of Chairman Eagleburger and Generali regarding consensus).

⁶⁹ BAZYLER (note 14), at 158. For a critical assessment, tracing many of ICHEIC’s problems to the “inept governance” which resulted from abandonment of the committee approach to consensus-building, see Zabludoff (note 25), at 262-263.

Valuation guidelines enabling companies to calculate offers were finalized in 2002, distributed to MOU-members and posted on the ICHEIC website.⁷⁰ Guidelines for policies issued in Germany, which varied somewhat from those otherwise applicable, were included in ICHEIC's side-agreement with the German Foundation and the GDV in October 2002.⁷¹

Relaxed standards of proof⁷² were adopted by ICHEIC to ensure thorough investigation by the companies of every claim regardless of the kind of evidence submitted and serious assessment of "the strength and plausibility of non-documentary or unofficial documentary evidence."⁷³ Where the claimant could prove the existence of a policy, the burden shifted to the company to demonstrate the policy's status. It was up to insurer to show an adjustment of the policy's value or its previous payment. To substantiate an assertion that the company had already fulfilled its contractual obligations, it had to produce proof from its own records or other external documentary evidence. The rules take account of the difficulties companies faced in satisfying their burden of proof because of the destruction of documents during the war or in the normal course of business. Thus, any documentary evidence that payment was made to the insured or a beneficiary, whether from the company's own records or external sources, was acceptable. However, where the company could not show that the policy was paid or its value should otherwise have been adjusted, it was called upon to offer full payment of the sum insured using the valuation guidelines.⁷⁴

Succession guidelines also formed an important component of the ICHEIC process. They determined the ability of claimants to inherit benefits of a policy from the person originally entitled to payment upon the death of the insured or maturity. In contrast to the secondary norms already described, the succession guidelines were not separately posted on the ICHEIC website. They were, however, also part of the Trilateral Agreement and published in that context.⁷⁵

⁷⁰ ICHEIC Guide to Valuation Procedures (edition 22 Oct. 2002), available at: http://www.icheic.org/pdf/ICHEIC_VG.pdf.

⁷¹ See Trilateral Agreement (note 59), at Annex D.

⁷² See ICHEIC, Standards of Proof (15 July 1999), available at: http://www.icheic.org/pdf/ICHEIC_SP.pdf; see also Trilateral Agreement (note 59), at Annex B.

⁷³ ICHEIC Claims Processing Guide (note 50), at 20.

⁷⁴ *Id.* at 22-23.

⁷⁵ See Trilateral Agreement (note 59), at Annex C.

3. Rules Specifically Concerning ICHEIC'S Humanitarian Funds

The MOU delegates to ICHEIC administrative functions concerning the distribution of humanitarian funds. Those functions have noteworthy multilevel features.

Criteria for evaluating claims which could not be matched to a particular or existing company or policy under the ICHEIC process, but which nevertheless demonstrated plausibility, were developed under the supervision of the Senior Counselor to ICHEIC. Chairman Eagleburger appointed former US National Security Advisor Samuel R. Berger to this post. Berger also acquired responsibility for overseeing the process for handling the respective humanitarian awards provided for under MOU, Section 8 (A). The actual task of evaluating Section 8 (A)(1) claims was contracted out to the Claims Conference.⁷⁶

ICHEIC also decided on allocations from the general humanitarian fund reserved for the benefit of needy Holocaust victims worldwide.⁷⁷ Acting on behalf of ICHEIC, the Claims Conference distributed the bulk of this money to various social welfare programs.⁷⁸ Additionally, ICHEIC earmarked a portion of the fund for strengthening Jewish culture and heritage, to counteract the Nazis' efforts to achieve their obliteration, and to memorialize those who did not survive.

Decisions regarding the appropriate programs and the best approach toward allotting payments for social welfare as opposed to Holocaust-related education were made by ICHEIC *ad hoc* and drew criticism for their lack of transparency. According to Eagleburger, however, prior consultation with the "humanitarian community" as well as with US insurance regulators overcame this objection.⁷⁹ He referred in this respect to the ICHEIC Service Corps, which was run by Hillel Foundation and the University of Miami under the fiscal oversight of the Claims

⁷⁶ See Hearings 2003 (note 34), at 75-76 (Statement of Chairman Eagleburger). For detailed treatment of the humanitarian claims aspect of the ICHEIC process in the context of a comparative survey, see Holtzmann & Kristjansdottir (note 58).

⁷⁷ The ICHEIC's competence to make such allocations is recognized under the law establishing the German Foundation in Section 9 (4) nos. 3 and 5 as well as Section 9 (5), EVZStiftG (note 11).

⁷⁸ The Claims Conference (see note 21) was asked by ICHEIC to implement the distribution of the fund, which began in 2003 with allocations originally earmarked through 2011. See http://www.claimscon.org/index.asp?url=news/icheic_new_grants.

⁷⁹ ICHEIC'S proportional allocation of funds for social welfare (80%) and educational purposes (20%) was also defended as being "[i]n keeping with general practice for funds reclaimed from Holocaust-related assets..." EAGLEBURGER, KOKEN & LILLIE (note 44), at 61.

Conference.⁸⁰ Further humanitarian distributions have gone to programs administrated by other private institutions or governmental agencies.⁸¹

III. Procedural Aspects

1. ICHEIC's Procedural Functions

Claims processing was regulated under guidelines promulgated by ICHEIC. A copy of these guidelines, dated 22 June, 2003 and designated as a "first edition," was posted on the ICHEIC website.⁸² As described in the guidelines, ICHEIC assumed responsibility for sending claims it received to the appropriate companies/entities for further processing. ICHEIC did not seek, in the first instance, to evaluate such policies. In contrast to the process established under the CRT regime for resolving insurance claims related to the Swiss banks settlement, ICHEIC was not an arbitral tribunal. It was, however, committed to ensuring that: (1) claims that named an insurance company were sent to and reviewed by that company; (2) claims that did not name a company were checked by those MOU-member companies (or companies associated with programs covered by ICHEIC side-agreements) which sold policies in the country where the claimant lived; and (3) offers or denials on claims were determined in accordance with ICHEIC guidelines.⁸³

In other words, in addition to determining the framework of claims processing by developing the secondary norms previously discussed, ICHEIC played a direct three-fold administrative role in the overall claims process: it facilitated the transfer of claims to the companies for their evaluation and decisionmaking, tracked the progress of the companies' handling of claims, and verified resulting decisions against ICHEIC guidelines. The process itself fell into the three following stages in cases where claimants managed to identify a particular company: 1) filing and assignment to appropriate company or companies/partner organization or entity

⁸⁰ See Hearings 2003 (note 34), at 76 (Statement of Chairman Eagleburger). The ICHEIC Service Corps Program encouraged voluntary social assistance to Nazi victims by students. See ICHEIC, Humanitarian Fund, <http://www.icheic.org/fund.html>.

⁸¹ Initiative to Bring Jewish Cultural Literacy to Youth in the Former Soviet Union (developed and run by the Jewish Agency for Israel) and the ICHEIC Program for Holocaust Education in Europe (established and administered by the *Yad Vashem* International School for Holocaust Studies).

⁸² ICHEIC Claims Processing Guide (note 50).

⁸³ See *id.* at 14.

(under the relevant ICHEIC side-agreements); 2) company evaluation and determination; and 3) appeals.⁸⁴

2. Role of the Companies in Claims Processing

In the second stage of the process, the company/ partner entity was required to search its records to determine the existence of claimed policies. Evidence of prior compensation or restitution was also sought at this stage. Under the Trilateral Agreement, a significant multilevel aspect of the ICHEIC claims process may be seen in this connection: the GDV together with the *Bundeszentalkartei* (BZK) (Federal Filing Agency) were namely charged with making an initial check for previous governmental compensation or restitution covering claims before the named company was required to proceed with its own search. According to the ICHEIC guidelines, policies that had previously been subject to decisions under the German Federal Compensation Law⁸⁵ were ineligible for compensation under the ICHEIC claims process.⁸⁶ For companies covered by the Trilateral Agreement, a positive result on this check therefore generally meant no further obligation by the company to investigate or evaluate a claim.

Following the BZK check, the companies evaluated claims for which there had been no previous compensation. They were bound to do so taking into account all information provided by the claimant, data discovered by the insurer during investigation of its records, and any supporting data submitted by ICHEIC as a result of its own search of additional archives. Final assessments by the insurers required application of the relaxed standards of proof and the valuation guidelines previously mentioned. Copies of the companies' determination to offer an award or deny a claim were sent simultaneously to the claimant and ICHEIC.

3. Claims Matching by ICHEIC

ICHEIC played a unique role during the second stage of claims processing by independently attempting to match claims with policyholder names. The massive investigatory work which this necessitated was the result of a fundamental compromise. Rather than release all policyholder names for the relevant period, companies agreed to make their archives available to ICHEIC or auditors operating

⁸⁴ Appeals are otherwise considered along with monitoring in the context of oversight, rather than under ICHEIC's procedural aspects, in Part B V.

⁸⁵ See (note 27).

⁸⁶ See ICHEIC Claims Processing Guide (note 50), at 19; Trilateral Agreement (note 59), at Section 2 (1)(C).

within the ICHEIC process. To ensure payment where justified despite many claimants' inability to name a particular company, ICHEIC did the following two kinds of archival searches: 1) it compared names of policyholders submitted to ICHEIC by claimants with those provided by the insurance companies; and 2) it compared claimants names with a further database containing the companies' lists of names plus names obtained from public or governmental archives.⁸⁷ Resulting matches were communicated to the claimants and the appropriate companies.

An unpublished manual entitled "ICHEIC Protocols and Procedures for Matched Claims" provided secondary rules formalizing the procedural standards to be applied in these cases.⁸⁸ The primary normative basis for ICHEIC's research, Section 4 of the MOU, broadly provides that ICHEIC "shall initiate and conduct an investigatory process to determine the current status of ... insurance policies issued to Holocaust victims... [and] assess the remaining unpaid ... policies" of this nature. Section 4 continues with a delegation of competence relevant to archival work: "[R]easonable review will be made of the participating companies' files, in conjunction with information concerning Holocaust victims from Yad Vashem and the United States Holocaust Memorial Museum and other relevant sources of data."

Cases of "unnamed claims," where claimants were unable to identify an insurance company, were handled somewhat differently. These claims were transferred by ICHEIC (or the GDV in the case of the Trilateral Agreement) to all relevant companies.⁸⁹ The result of the companies' search for evidence of a policy was communicated to ICHEIC,⁹⁰ whereupon it in turn notified the claimants. When matches were found, the companies processed the claims following the rules for named claims. In the event companies' investigations failed to locate a policy, the claimants were informed of their possible eligibility for a humanitarian payment under MOU, Section 8 (A)(1), the processing of which has already been mentioned.⁹¹

⁸⁷ See Hearings 2003 (note 34), at 73-75. In the relevant cases, claims were matched under the Trilateral Agreement against the list of Holocaust-era insurance policies compiled by the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BAFin) (German Federal Agency for the Supervision of Financial Services). See ICHEIC Claims Processing Guide (note 50), 37.

⁸⁸ See *id.*

⁸⁹ See *id.* at 35.

⁹⁰ Under the Trilateral Agreement (note 59), Annex A, Section 24, companies reported their findings to the GDV, which in turn communicated this information to ICHEIC.

⁹¹ See Part B II 3.

IV. Central Regulatory Instrument: Claims Decision and Award Letters

While award or denial decisions contractually affected the financial relations of private actors, this is only one of the competing frameworks for understanding their significance.⁹² From a legal perspective, final decision letters from the insurance company in cases of named or matched claims may be seen as a central regulatory instrument in the ICHEIC claims process. Doing so recognizes their particularly public regulatory significance for both the company and the external addressee, *i.e.* the individual claimant.

Decision letters provided an assessment of claims based on ICHEIC procedural guidelines, relaxed standards of proof, succession rules and valuation guidelines. They were thus directly based on secondary norms related to the MOU or to ICHEIC's side-agreements. The decision letters included reference to this legal basis, for example where particular valuation rules were mentioned on the enclosed valuation sheet. However, no particular form was prescribed for this instrument.

A positive decision letter did not directly confer on the claimants any legal rights. Rather, it communicated a private contractual offer of payment to its addressees, who could accept or ignore this as they saw fit. While the decision letter included reasons for the company's determination and documents relevant to the claim, this had no binding effect. This instrument did not represent an acknowledgement of legal liability by the deciding company. Contractual rights arose only upon acceptance of the award, which required consent to its conditions,⁹³ including the waiver of any and all rights and benefits which the claimant might then have "or ever had, up to the date of ... [the] release, relating to, or in any way connected with ... the policy or any claims related to it..."⁹⁴

The multilevel reporting requirements surrounding decision letters indicate public regulatory dimensions of the claims process. Seen as the functional equivalent of a lower level of public regulatory authority, the companies bore certain reporting duties *vis-à-vis* claimants and the "higher levels" represented by ICHEIC, the German Foundation and the GDV. Specifically, companies had to include the following items together with their determination regarding a claimant's entitlement to a claimed policy: all documents relevant to the claim and the

⁹² See Curran (note 15).

⁹³ These included, *e.g.*, the claimant's agreement to share the payment with other entitled persons who make a claim or seek compensation with regard to the policy in question. See Trilateral Agreement (note 59), Annex F, Consent and Waiver, Section (e).

⁹⁴ *Id.* at Section (a).

company's decision; notice of the possibility of appeal within a specified timeframe; an appeal form; and a copy of the Appeals Guidelines.⁹⁵ At the same time, ICHEIC's claims processing procedure called for companies to communicate the outcome of their claims assessments to the higher administrative levels in the form of a copy of the decision letter and accompanying documentation.⁹⁶

The ICHEIC's award offer under the humanitarian process with respect to plausible but unmatched claims, or claims against companies no longer in existence,⁹⁷ was of course no less central to ICHEIC's mandate than the companies' decision letters. Most of what has been said about decision letters also applies to the award letters. However, the latter reveal even more distinct international public regulatory contours, since they issued directly from ICHEIC, as did the respective humanitarian payments, rather than from a particular insurer.

Evidence of the public regulatory character of ICHEIC decision and award letters can be further derived from the fact that they may eventually be susceptible to public scrutiny and thereby also serve a memorializing function. Section 10 of the Trilateral Agreement provides for archiving data relating to ICHEIC claims. It obliges ICHEIC to retain or offer to the German Foundation "records generated during the processing of the claims and the appeals process" after the conclusion of the claims process.⁹⁸

V. Oversight of the Claims Process

1. Monitoring

a) Audits

The ICHEIC regime provided for audits of claims processing and decision-making by both its own member companies and other organizations in Section 4 (a) of the

⁹⁵ ICHEIC Claims Processing Guide (note 50), at 33-34.

⁹⁶ These "higher levels" were the ICHEIC and, in the case of German companies covered by the Trilateral Agreement, the German Foundation. *See id.*

⁹⁷ *See* MOU (note 42), at Section 8 (A)(1).

⁹⁸ *See* Trilateral Agreement (note 59); *see also* ICHEIC, Concluding Meeting of the International Commission on Holocaust Era Insurance Claims, Washington D.C., March 20, 2007, 21, available at: <http://www.icheic.org/pdf/Meeting%20Presentation%203-20-07.pdf> (hereinafter ICHEIC, Concluding Meeting) (indicating that the US Holocaust Memorial Museum would continue to store key documents, research data and claims files following ICHEIC's closure).

MOU. Subsequently developed “Audit Standards” set the template for evaluation of the insurers' performance.

Under the standards, the companies were audited in a first stage with respect to their efforts to find, collect, safeguard and make accessible the records necessary for establishing claims. Auditing in this regard was carried out by internationally recognized accounting firms appointed by the insurers themselves. A second stage of auditing focused on evaluation of the companies' process for receiving claims and searching records for matches, as well as for issuing decision letters with the proper notifications and relevant supporting documents. Peer review of the actual handling of claims and use of ICHEIC standards and procedures subject to the initial audit was carried out at this second stage largely on the basis of selective sampling by a firm appointed by ICHEIC. Auditing reports were submitted to a special ICHEIC committee: the Audit Mandate Support Group.

Because of ICHEIC's fractured regime, the auditing process varied depending on the company or partner organization and the audit-category concerned. Thus, in the case of the Generali Trust Fund, ICHEIC commissioned an auditing firm to examine claims handling procedures and processing. On the other hand, audits of German non-MOU insurers, ten of which were selected by mutual consent, were carried out by the *Bundesanstalt für Finanzdienstleistungsaufsicht* (Federal Financial Supervisory Authority/ BaFin) with the participation of ICHEIC observers.⁹⁹ The BaFin audits covered the companies' compliance with the terms of the Trilateral Agreement, which incorporated claims handling requirements similar – but not identical – to ICHEIC's Audit Standards. To audit the processing by the Claims Conference of humanitarian claims under Section 8 (A) of the MOU, ICHEIC commissioned yet another international auditing firm.

The role played by audits in the ICHEIC process may be overstated. Audit reports only became publicly available on the ICHEIC website after ICHEIC claims processing was substantially completed. For audits carried out by BaFin in connection with the Trilateral Agreement, a possibility existed for appeal by dissatisfied ICHEIC observers to the Appeals Panel.¹⁰⁰ The Panel, in turn, had authority to direct a company to make payments where necessary,¹⁰¹ but its decision was confidential and not appealable in a court of law.¹⁰²

⁹⁹ Trilateral Agreement (note 59), at Annex I.

¹⁰⁰ *Id.* at Annex I, Sections 11-23.

¹⁰¹ *Id.* at Section 21.

¹⁰² *Id.* at Section 22.

b) Decision Verification System

Oversight was augmented by an internal system developed to check whether companies were making decisions in keeping with the relevant guidelines. The Decision Verification System aimed in particular at ensuring the companies' consideration of all pertinent evidence and their comprehensive responses to the claimants. For this purpose, the ICHEIC Claims Team in London was charged with reviewing all named-company claims concerning the MOU-companies, the GTF and the companies covered by the Trilateral Agreement.¹⁰³ The verification system extended on a "rolling basis" to all decisions made since the beginning of the ICHEIC claims process. Moreover, the Claims Team also conducted verification focusing specifically on denials of well-documented claims.¹⁰⁴

The ICHEIC Claims Team could raise questions with companies, track their responses and make follow-up inquiries. But the Decision Verification System threatened recalcitrant companies only with the application of "pressure" to "ensur[e] the continued effectiveness of the claims team as a means of receiving prompt responses on the issues about which they inquire."¹⁰⁵ Results of ICHEIC's verification efforts were never published. During a substantial portion of ICHEIC's existence, critics have accordingly questioned whether the London office served as anything more than a "post-office" for transmittal of claims to the companies.¹⁰⁶

c) ICHEIC Monitoring Group

Annex K of the Trilateral Agreement provided for an *ad hoc* monitoring group. Originally convened in 2002, the Monitoring Group consisted of a chairman and representatives appointed by the MOU-companies, the US regulators and the Jewish groups/ the State of Israel. According to paragraph 4 of Annex K, the Monitoring Group would, "from time to time," be charged at the behest of Chairman Eagleburger or its own chairman, "with reviewing and verifying that all members of ICHEIC are complying with ICHEIC rules, procedures and decisions,

¹⁰³ See ICHEIC Decision Verification System, available at: http://www.icheic.org/pdf/ICHEIC_VP.pdf.

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

¹⁰⁶ See Zabludoff (note 25), at 262. See Hearings 2003 (note 34), 140, 143 (Statement of Daniel Kadden). See also *Generali I* (note 68), at 356-357 (describing ICHEIC as "entirely a creature of the six founding insurance companies" and "the company store"). With respect to ICHEIC's outsourcing of core functions, see, *supra*, note 44 and, implicitly self-critical, ICHEIC, Lessons Learned (note 26) 14.

including decisions of the Chairman, and are doing so as effectively and efficiently as possible." Otherwise, the Monitoring Group could commence review, as set out in paragraph 5, based on "information of a pattern of noncompliance by a company or companies" or "a concern relating to the consistency or effectiveness of claims processing," as identified by members of ICHEIC, the Appeals Panel or the audit process.¹⁰⁷ In 2003, the Monitoring Group was asked to evaluate the claims verification process. Any assessment it may have made remained unpublished.¹⁰⁸

d) External Monitoring

More meaningful monitoring took place outside ICHEIC itself. Formal oversight by means of periodic governmental reporting occurred at the national level in Germany and the United States. In addition, informal oversight in the United States resulted from congressional hearings and, at the state level, in the form of reports published by state regulatory authorities.

The German federal government was statutorily required to report semi-annually to the Bundestag on the status of distributions and cooperation with partner organizations of the German Foundation.¹⁰⁹ American federal law similarly obligated the Secretary of State to report to appropriate congressional committees on the status of the German Foundation Agreement, including those aspects of it involving ICHEIC.¹¹⁰ In both cases, however, the dependency on information provided by ICHEIC limited the efficacy of governmental reporting.¹¹¹

¹⁰⁷ Trilateral Agreement (note 59), at Annex K, Section 5.

¹⁰⁸ The Monitoring Group's ineffectiveness was also criticized in congressional testimony by Daniel Kadden. See Hearings 2003 (note 34), at 140, 143.

¹⁰⁹ See *Beschluss des Deutschen Bundestages vom 28. Juni 2001* (Decision of the German Bundestag of 28 June 2001) (*Bundestagsdrucksache 14/6465*); with regard to ICHEIC, see, e.g., *Fünfter Bericht der Bundesregierung über den Stand der Auszahlungen und die Zusammenarbeit der Stiftung "Erinnerung, Verantwortung und Zukunft" mit den Partnerorganisationen*, *Bundestagsdrucksache 15/5936* (21 July 2005) (Fifth Report of the German Government on the Status of Distributions and the Cooperation of the Foundation "Remembrance, Responsibility and Future" with Partner Organizations).

¹¹⁰ See Pub. L. 107-288, Section 704, Foreign Relations Authorization Act of 2003.

¹¹¹ The limitations for effective oversight are manifest in the State Department's open acknowledgment that it "was unable to obtain such information on the ICHEIC claims process as required by Section 704 (a)(3)-(7)" and its referral in this connection to publicly available statistics on the ICHEIC website. See US Dept. of State, Bureau of European and Eurasian Affairs, Report to Congress: German Foundation "Remembrance, Responsibility, and the Future," March 2006, available at: www.state.gov/p/eur/rls/rpt/64401.htm. But see Review of the Repatriation of Holocaust Art Assets in the United States, Hearing before the Subcommittee on Domestic and International Monetary Policy, Trade and Technology, 109th Cong., 16, Appendix 1, Best Practices in Holocaust Era Claims Restitution, NY State Banking Dept. Research Paper (27 July 2006) (Testimony of Catherine A. Lillie, Director,

Reports by the New York Banking Department provide one example of monitoring at the state level in the United States. The Banking Department was statutorily required to explain the status of work done by its Holocaust Claims Processing Office (HCPO) *inter alia* with regard to insurance claims.¹¹² In this case, the connection between the entities was particularly close, since the director of the HCPO represented US regulators on the ICHEIC Monitoring Group after September 2003.¹¹³

Perhaps the most effective oversight of ICHEIC came in the form of the congressional hearings which took place before the Committee on Government Reform of the US House of Representatives.¹¹⁴ Notwithstanding federal legislators' lack of formal authority over ICHEIC, the House Committee drew national public attention to problems of accountability in the ICHEIC process. An example of the impact of the hearings may be seen in connection with that held on September 24, 2002, concerning proposed legislation to induce European insurance companies to release policyholder information and otherwise cooperate with ICHEIC.¹¹⁵ It seems to be no coincidence that the Trilateral Agreement, which brought the non-MOU German companies into the ICHEIC system, was signed shortly thereafter, on October 16, 2002.

To be sure, the Supreme Court's 2003 decision in *Garamendi*,¹¹⁶ striking down similar state disclosure legislation, removed enormous pressure on the insurers. Undeterred, however, the Committee on Government Reform held further hearings that year to discuss future congressional strategy with respect to federal legislation

Holocaust Claims Processing Office, NY State Banking Dept.), available at: <http://www.claims.state.ny.us/sp060727.pdf>, qualifying as a "best practice" ICHEIC's provision to US insurance regulators of a monthly report on the status of claims filed by US residents or by a US regulatory agency on their behalf.

¹¹² See NY Consolidated Laws Service, Banking Law, Art. II, Section 37-a (2007).

¹¹³ Holocaust Claims Processing Report, Report to the Governor and the Legislature, 15 January 2007, 10 (New York State Banking Dept. ed., 2007).

¹¹⁴ For comprehensive links to the testimony presented, see the website of Rep. Henry A. Waxman, www.henrywaxman.house.gov, as well as that of the Committee on Oversight and Government Reform, <http://oversight.house.gov/>.

¹¹⁵ See Hearing on H.R. 2693, The Holocaust Victims Insurance Relief Act of 2001, Before the Subcommittee on Governmental Efficiency, Financial Management and Intergovernmental Relations, Committee on Government Reform, 107th Cong., 2nd Sess. (24 Sept. 2002).

¹¹⁶ *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003).

which would allow ICHEIC to achieve its purpose.¹¹⁷ Renewed calls for congressional action conspicuously preceded a court-approved settlement of the last major class action involving Holocaust-era insurance claims in February 2007.¹¹⁸

2. Appeals

ICHEIC provided claimants a cost-free means of contesting decisions on named company claims or matched, unnamed company claims in the case of negative claim assessments.¹¹⁹ However, ICHEIC's composite features complicated oversight of the claims process with respect to appeals. Two independent review-bodies heard appeals during the third stage of the ICHEIC claims process. The ICHEIC Appeals Tribunal considered appeals on decisions from all member companies and on German MOU-company decisions dated before October 16, 2002. The Tribunal operated in accordance with specially provided Rules of Procedure¹²⁰ and Expert Determination Rules.¹²¹ The Tribunal was comprised of a President, a Vice President and independent Arbitrators. It was deemed to have its seat in London.

Under ICHEIC's side-agreement with the German Foundation and the GDV, another body -the Appeals Panel - considered appeals on decisions from German insurance companies, including MOU-member companies, dated on or after October 16, 2002. The Appeals Panel was deemed to be located in Geneva, Switzerland. This adjudicative body consisted of three members, one of whom was appointed as Chairman. Its determinations on appeals petitions were governed by the Appeals Guidelines found in Annex E to the Trilateral Agreement.

¹¹⁷ See H.R. 1210 (note 39), and H.R. 1905, Comprehensive Holocaust Accountability in Insurance Measure, 108th Cong., 1st Sess. (1 May 2003) (introduced in the House), recognizing the power of the states to place conditions on insurance companies operating within their territory.

¹¹⁸ See Joseph B. Treaster, Settlement Approved in Holocaust Victims' Suit Against Italian Insurer, N.Y. TIMES, 28 Feb. 2007, Section C, 3; *In re Assicurazioni Generali S.p.A. Holocaust Ins.*, Slip Copy, 2007 WL 601846, S.D.N.Y., 27 Feb. 2007 (hereinafter *Generali Settlement*).

¹¹⁹ There was no right to appeal concerning unnamed and unmatched claims or the humanitarian awards of ICHEIC. See ICHEIC Claims Processing Guide (note 50), at 35.

¹²⁰ ICHEIC Appeals Tribunal Rules of Procedure, available at: http://www.icheic.org/pdf/ICHEIC_Appeals.pdf. The ICHEIC Appeals Process is detailed in the ICHEIC Claims Processing Guide (note 50), 38-45.

¹²¹ See *id.* at 43.

Various ICHEIC claims were ineligible for consideration under ICHEIC's own appeals processes and fell instead within the divergent parallel processes of ICHEIC's partners.¹²²

C. Assessment

I. Principles

Substantive principles central to the ICHEIC process included the application to claims processing of relaxed standards of proof taking account of genocide, wartime conditions and the passage of time, as well as valuation guidelines making allowance for currency changes, interest and prior compensation/ restitution assessments. Salient procedural principles included the provision to claimants, without charge, of assistance with claims filing and evaluation, including research in appropriate archives, the application of processing guidelines that required insurers to communicate all essential facts and documents, and possibility for appeal.

Analogous core principles have been applied in other mass claims processes.¹²³ The truly significant and distinctive feature of ICHEIC, however, was its attempt to administrate a universal nonadversarial process to resolve Holocaust-related claims by private parties against private entities. This development represents a departure from the traditional approach of international law, under which damage claims by individuals following an armed conflict fell within the general scope of war damages and were subsumed in and dependent on reparations agreements between States.¹²⁴ For those who insist that this tradition maintains its currency, additional payments made in response to private claims relating to World War II were the result of moral pressure and constitute charitable distributions rather than legal or quasi-legal redress.¹²⁵ A powerful argument insists, however, that there is

¹²² See *id.* at 44-45 (with regard to the Sjoa Foundation, the GTF and the Buysse Commission).

¹²³ With respect to the UNCC, for example, see Chung (note 7).

¹²⁴ For unwavering support by prominent German academics for this traditional approach, see, e.g., Karl Doehring, *Reparationen für Kriegsschäden*, in *JAHRHUNDERTSCHULD – JAHRHUNDERTSÜHNE: REPARATIONEN, WIEDERGUTMACHUNG, ENTSCHÄDIGUNG FÜR NATIONALSOZIALISTISCHES KRIEGS- UND VERFOLGUNGSUNRECHT*, 41 (Karl Doehring, Bernd J. Fehn & Hans G. Hockerts eds., 2001); Christian Tomuschat, *Ein umfassendes Wiedergutmachungsprogramm für Opfer schwerer Menschenrechtsverletzungen*, 80 *DIE FRIEDENS-WARTE/ JOURNAL OF INTERNATIONAL PEACE AND ORGANIZATION* 160-167 (2005) (with an English summary, 12).

¹²⁵ See Doehring (note 124), at 41; Rudolf Dolzer, *The Settlement of War-Related Claims: Does International Law Recognize a Victim's Private Right of Action? Lessons after 1945*, 20 *BERKELEY JOURNAL OF INTERNATIONAL LAW* 296-341, 335 (2002), Their depiction comes disconcertingly close to that which

an evolving consensus favoring the principle that victims of gross violations of human rights are entitled to reparations. The remedies provided by monitoring bodies under human rights treaties, as well as a recent UN General Assembly resolution which adopted rules on reparations for gross violations of human rights law and serious violations of international humanitarian law,¹²⁶ indeed point to an “emerging right of victims to reparation.”¹²⁷ With its focus on easing formal requirements in order to allow for compensation of individuals who were victims of Nazi genocide, the ICHEIC process reflects and contributes to this growing trend.¹²⁸

As a regulatory alternative to litigation meant to avoid the adjudication of legal rights, the ICHEIC process paradoxically provided “compensation” to those who could establish a plausible claim and who had not previously received redress even where a company could not be identified, the company no longer existed, the company was nationalized, or the policy was confiscated or paid into a blocked and subsequently plundered account. Under Section 6 of the MOU, claims awards are expressly labeled “compensatory.” In the above-mentioned situations where the

refers to representatives of the “Jewish-American establishment” and class action lawyers as being engaged in an enterprise to “shakedown” or “extort” payments in the name of Holocaust victims for their own personal, political and financial motives. See NORMAN FINKELSTEIN, *THE HOLOCAUST INDUSTRY: REFLECTIONS ON THE EXPLOITATION OF JEWISH SUFFERING* (2001). The failure of such critics to appreciate “the essential moral value that formed the heart of these processes” or the legitimacy of the American approach to mass injury cases is noted, e.g., by Melvyn I. Weiss, *A Litigator's Postscript to the Swiss Banks and Holocaust Litigation Settlements: How Justice Was Served*, in *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* 103, 109-111 (Michael J. Bazylar & Roger P. Alford eds., 2006) and EIZENSTAT (note 16), at 345.

¹²⁶ UN GA Res. 60/147 of 16 Dec. 2005.

¹²⁷ Manfred Nowak, *The Right of Victims of Gross Human Rights Violations to Reparations*, in *RENDERING JUSTICE TO THE VULNERABLE. LIBER AMICORUM IN HONOUR OF THEO VAN BOVEN* 203, 223 (Fons Coomans et al. ed., 2000) (referring to Special Rapporteur van Boven's first draft of Principles and Guidelines on a Right to Reparation for Victims of (Gross) Violations of Human Rights and International Humanitarian Law, UN Doc. E/CN.4/1997/104). *But see* Christian Tomuschat, *Dafur – Compensation for the Victims*, 3 *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE* 579, 587 (2005) (denying the existence of individual compensation claims under customary international law); Albrecht Randelzhofer, *The Legal Position of the Individual under Present International Law*, in *STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS* 231, 242 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999), (denying that any fundamental change has occurred with respect to the reparation of individuals under international law).

¹²⁸ See EIZENSTAT (note 16), at 353 (offering cautious recognition of such a trend: “Although I would like to think my teams and I helped write a new page in creating civil liability for the violation of human rights, we provided scant legal precedent” which, however, “does not diminish the legal and diplomatic implications of what we accomplished.”).

formalities of a legal claim may have been absent, claims were thus redressed as if legal rights were at stake.

II. Multilevel or Composite Aspects

To speak of “upper” and “lower” levels of regulatory authority in the ICHEIC process may sound artificial. The insurance company members of ICHEIC independently assessed claims, despite their commitment to follow certain standards and procedures. The MOU recognizes as much. Section 5 states: “The initial responsibility for resolving claims rests with the individual insurance companies....” Hierarchical regulatory features might be seen where the member companies implemented the Chairman’s “memoranda,” if these instruments are understood rather as directives.¹²⁹ However, the companies were never formally integrated into a hierarchical regime. The ICHEIC process has been seen as significantly flawed as a consequence. Its member companies fought bitterly for and were largely able to maintain their autonomy. The primary example of this was their successful prevention of a more wide-scale publication of potential policyholder names than the approximately 519,000 which ultimately appeared on the ICHEIC website. How many names were supplied to ICHEIC on condition that they remain confidential is unknown, but some 8 million policyholder names from the Holocaust period were said to exist in company records.¹³⁰ This flew in the face of the MOU mandate, under Section 4 (b), for ICHEIC to “address the issue of a full accounting by the insurance companies and publication of the names of Holocaust victims who held insurance policies.”

The ICHEIC process also reveals a horizontal dimension in ICHEIC's side-agreements. Attention has previously been directed toward the most important of these – the Trilateral Agreement – but related parallel processes also handled insurance claims in Austria,¹³¹ Belgium,¹³² France,¹³³ and the Netherlands,¹³⁴ as

¹²⁹ See, e.g., ICHEIC Memorandum: Laws of General Application, 4 Feb. 2004 (detailing – in a noticeably directive-like communication – laws relating to currency conversion which are to be taken into account in the processing of ICHEIC claims). The legal nature of the Chairman’s memoranda apparently evolved during ICHEIC’s existence. See, *supra*, note 69 and accompanying text; ICHEIC, Lessons Learned (note 26), 4.

¹³⁰ See Hearings 2003 (note 34), 33, 36 (Statement of Ambassador Randolph M. Bell, Special Envoy for Holocaust Issues, US Dept. of State) (referring to the total number of names registered in the companies’ files from 1920 through 1945). See Hennig (note 62), at 255 (indicating that the German insurance companies themselves had compiled a database – monitored by the German Federal Financial Supervisory Authority – which contained 8.5 million names.

¹³¹ See Agreement Between the International Commission on Holocaust Era Insurance Claims and the General Settlement Fund of the Republic of Austria, 8 Dec. 2003, available at: [http://www.icheic.org/pdf/agreement-RAGSF%20\(eng\).pdf](http://www.icheic.org/pdf/agreement-RAGSF%20(eng).pdf).

well as with respect to Generali.¹³⁵ Moreover, a group of three MOU-companies signed their own separate agreement with ICHEIC.¹³⁶ The communication of claims information between the parties was agreed to in ICHEIC's side-agreements and processing by ICHEIC's partners took place according to rules similar to ICHEIC's. But there were significant variations. Thus, the level of funding, valuation standards and filing deadlines differed, as did the regulation of appeals, auditing and publication of potential policyholder names. The resulting lack of consistency, *i.e.*, fragmentation, in Holocaust-era claims processing provoked critics to call the ICHEIC system "Balkanized."¹³⁷

Fragmentation on the horizontal plane also resulted from decisions of the arbitral mechanism established under the court-approved settlement in the *Swiss Banks Litigation*. While predominantly concerned with claims to dormant Swiss bank accounts, the Claims Resolution Tribunal (CRT) also assessed Holocaust-era insurance claims against a number of Swiss companies and some of their affiliates. Filing deadlines and other rules applicable to the CRT system differed from those of ICHEIC.¹³⁸

¹³² See Operating Agreement between ICHEIC and *La Commission Pour le Dedommagement des Membres de la Communauté Juive de Belgique* (Buysse Commission), 14 July 2003, available at: <http://www.icheic.org/pdf/agreement-buysse.pdf>.

¹³³ With respect to the *Commission pour l'indemnisation des victimes de spoliations intervenues du fait des législations antisémites en vigueur pendant l'Occupation* (CIVS) (Commission for the Compensation of Victims of Spoliation under the anti-Semitic Legislation in force during the Occupation), see <http://www.civs.gouv.fr/>. Formal signed agreements did not result, however, in the cases of France and the Netherlands, although member companies of the Dutch Insurance Association joined the ICHEIC.

¹³⁴ With respect to the *Sjoo* Foundation, see <http://www.stichting-sjoo.nl/>.

¹³⁵ See the Generali Implementation Agreement, 16 Nov. 2000, and the Generali Implementing Organization Agreement, 30 April 2001, respectively available at: <http://www.icheic.org/pdf/agreement-general.pdf> and <http://www.icheic.org/pdf/agreement-gtf.pdf>.

¹³⁶ See AWZ-Settlement Agreement, 11 July 2003, available at: <http://www.icheic.org/pdf/agreement-awz.pdf> (concluded among AXA, Winterthur Life Insurance Company, Zurich Life Insurance Company, the WJRO and ICHEIC).

¹³⁷ Hearings 2003 (note 34), at 140, 144 (Statement of Daniel Kadden).

¹³⁸ CRT also provided for relaxed standards of proof in its Rules Governing the Claims Resolution Process (as Amended), available at: http://www.crt-ii.org/_pdf/governing_rules_en.pdf. Its rules on valuation referred to ICHEIC's valuation guidelines, see Section 4.2, Amendment to No. 2 Settlement Agreement, 9 Aug. 2000, available at: http://www.swissbankclaims.com/pdfs_Eng/Amendment2.pdf.

Whether the CRT was able to do a better job resolving Holocaust-era property claims is open to question. In contrast to ICHEIC, however, it handled only a relatively small number of insurance claims.¹³⁹ Certainly, a more limited disclosure of the names of potential claimants occurred in the context of the *Swiss Banks Litigation*. Notwithstanding the four million bank accounts opened between 1933 and 1945, and the recommendation of Paul Volcker, chairman of the Independent Committee of Eminent Persons which supervised a \$200 million audit to identify dormant accounts, to publish 36,000 names, the banks ultimately revealed the names of only 23,700 account owners and 400 holders of a power-of-attorney.¹⁴⁰

III. Legitimacy

Whether the ICHEIC process can be judged as having adequately addressed the interests of those affected is questionable at best. This assessment rests on consideration of the following factors: representation of the claimants, their ability to affect the outcome, the transparency of the process, the alternative of having the issue judicially resolved, the duration of the process, its costs, the amount of funding made available for distribution to claimants, and disclosure of policyholders' names.

The fact that government officials as well as representatives of important Jewish nongovernmental organizations and the State of Israel belonged to or participated in ICHEIC does not necessarily offset an important objection raised by survivors. Some insisted that they gave no authorization for negotiation in their name and would have preferred to have had their day in court.¹⁴¹ Arguably, class action lawyers, such as those who played a vital role in negotiations leading to the Swiss bank settlement and the German Foundation Agreement, more effectively represented the insurance claimants than the ICHEIC members who unilaterally assumed this function.¹⁴² A persistent criticism has been that ICHEIC members

¹³⁹ See Swiss Banks Settlement Fund Distribution Statistics as of November 15, 2007, *Holocaust Victim Assets Litigation*, CV 96-4849, available at http://www.swissbankclaims.com/Documents_New/11_15_st.pdf (indicating 88 approved and 391 "no match" decisions) (hereinafter Distribution Statistics).

¹⁴⁰ See Eizenstat (note 38), at 302; Deposited Assets Class, *Holocaust Victim Assets Litigation*, CV-96-4849, <http://www.swissbankclaims.com/DepositedAssets.aspx>.

¹⁴¹ See, e.g., Si Frumkin, *Why Won't Those SOB's Give Me My Money? A Survivor's Perspective*, in *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* 92, 95 (Michael J. Bazylar & Roger P. Alford eds., 2006).

¹⁴² Positive assessment of the role of the class action lawyers, not unexpectedly, comes from those who acted as such. See, e.g., Robert A. Swift, *Holocaust Litigation and Human Rights Jurisprudence*, in

were, in any event, not representative enough, inasmuch as “[t]he interests of the victims were represented by ‘non-survivor organizations.’”¹⁴³ Furthermore, no possibility existed for survivors to help shape the ICHEIC process by commenting on the various secondary rules or side-agreements adopted.¹⁴⁴ Provision for such input was, by way of contrast, an important feature of the Swiss banks settlement. Judicial approval of this settlement in fact rested to a significant degree on the opportunity of the class-action plaintiffs and interested parties to have the court consider their views on the allocation plan proposed by a court-appointed Special Master.

With respect to the information required for meaningful input, the litigation approach offered a model of transparency. Summaries of the proposed plan for allocation and distribution of settlement funds were mailed to the almost 600,000 persons who returned “Initial Questionnaires” concerning a draft settlement. Moreover, copies of the Special Master’s two-volume, 900-page report were available cost-free upon request as well as posted in the Internet prior to the public hearing held by the District Court in November 2000.¹⁴⁵

This kind of transparency was largely absent from the ICHEIC process. Not surprisingly, critics explained the discord within ICHEIC and its lack of public support, most pronounced in ICHEIC’s early stages,¹⁴⁶ by pointing to Chairman

HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 50, 53 (Michael J. Bazylar & Roger P. Alford eds., 2006); Weiss (note 125), at 103.

¹⁴³ See Jolie Bell, *Maybe Not the Best Solution, But a Solution: The German Foundation Agreement*, 6 CARDOZO JOURNAL OF CONFLICT RESOLUTION 107, 151 (2004). A result may have been a disproportionate allocation of humanitarian funds for educational and remembrance purposes rather than for health care and social services for elderly and financially needy survivors (20% and 80%, respectively), a problem meanwhile acknowledged, for example, by Stuart Eizenstat. See Eizenstat (note 38), at 303; see also David A. Lash & Mitchell A. Kamin, *Poor Justice: Holocaust Restitution and Forgotten, Indigent Survivors*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 315 (Michael J. Bazylar & Roger P. Alford eds., 2006); Thane Rosenbaum, *Losing Count*, N.Y. TIMES, 14 June 2007, Section A, 31.

¹⁴⁴ See Bell (note 143), at 151-152 (criticizing also this aspect of the Trilateral Agreement). See also Zabudoff (note 25), at 265 (noting that even a proposal to appoint an ombudsman to receive complaints from claimants on the handling of claims bore no fruit).

¹⁴⁵ See Chronology: *In re Holocaust Victim Assets Litigation*, <http://www.swissbankclaims.com/Chronology.aspx> (June 11, 1999: Initial Questionnaire; September 11, 2000: Statement From Burt Neuborne, Lead Settlement Class Counsel).

¹⁴⁶ See EIZENSTAT (note 16), at 267.

Eagleburger's "secret diplomacy" and purported reliance on advice from selectively consulted ICHEIC members and staff.¹⁴⁷

Assessment of the ICHEIC's output legitimacy calls for comparison with its alternatives. It is unclear whether the ICHEIC process was superior to what might have resulted from litigation.¹⁴⁸ A judicial determination would necessarily have had to rest on complex procedural and substantive legal doctrines often difficult to square with the singular situation in which Holocaust survivors found themselves. This posed serious risks for the claimants, as demonstrated by the refusal of the District Court in the Generali litigation to retain jurisdiction following the Supreme Court's articulation of separation of powers and federalism concerns in *Garamendi*.¹⁴⁹ However, the persistence of class action lawyers and legislators induced Generali to settle even after the District Court's dismissal.¹⁵⁰

Under the Swiss banks settlement, payment of the claimants does not appear to have taken longer than the nine-year ICHEIC process. More than six years after the banks settled, over \$500 million of the \$1.35 billion settlement fund was still unpaid.¹⁵¹ Insurance awards continued to be ordered by the CRT through October

¹⁴⁷ See Zabludoff (note 25), at 263. With regard to ICHEIC's secrecy, see also BAZYLER (note 14), at 155-156; Hearings 2003 (note 34), at 140, 144 (Statement of Daniel Kadden); *id.* at 11, 12 (Statement of Rep. Henry A. Waxman).

¹⁴⁸ For observers more favorably disposed toward the litigation approach, see Adler & Zumbansen (note 14); Bell (note 143), at 154; Burt Neuborne, *A Tale of Two Cities: Administering the Holocaust Settlements in Brooklyn and Berlin*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 60, 77 (Michael J. Bazylar & Roger P. Alford eds., 2006). See also EIZENSTAT (note 16), at 342 (acknowledging the essential role of the lawsuits for the diplomacy which led to the settlements); Dinah Shelton, *Reparations for Historical Injustices*, 50 NETHERLANDS INTERNATIONAL LAW REVIEW 289, 303 (2003) (underscoring the value of lawsuits, even where they do not lead to favorable court judgments, in focusing attention on the legitimacy of the asserted claims). For Swiss and German criticism of the Holocaust litigation in American courts, see, e.g., Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases*, 80 WASHINGTON UNIVERSITY LAW QUARTERLY 853 (2002); Burkhard Heß, *Entschädigung für NS-Zwangsarbeit vor US-amerikanischen und deutschen Zivilgerichten*, 44 AKTIENGESELLSCHAFT 145, 154 (1999).

¹⁴⁹ See *Generali II* (note 41), at 357 (dismissing multiple claims against Generali in light of *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003)). For a resumé of the *Generali* litigation and negative assessment of ICHEIC in this regard, see Lawrence Kill & Linda Gerstel, *Holocaust-Era Insurance Claims: Legislative, Judicial and Executive Remedies*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 239, 248 (Michael J. Bazylar & Roger P. Alford eds., 2006)

¹⁵⁰ See Treaster (note 118) (reporting that Generali agreed to add \$35 million more to what it already paid to resolve claims on Holocaust-era policies). See also *Generali Settlement* (note 118), at 2.

¹⁵¹ See EIZENSTAT (note 38), at 301.

2006 – seven years into the settlement.¹⁵² Despite his unwavering support for ICHEIC, Eizenstat acknowledged, its “slow and costly start.”¹⁵³ The time-lag between conclusion of the settlement and initial distributions in the Swiss banks case was 2 ½ years.¹⁵⁴ In the case of ICHEIC, only \$7 million worth of claims had been paid, while administrative expenditures had run up to \$90 million, by July 2002, four years after its inception.¹⁵⁵ After six years, 61% of all the eligible 80,000 claims still awaited processing and only 5.5% (approximately 4500) had received offers.¹⁵⁶

As intended, the ICHEIC process spared claimants legal costs which would have arisen in connection with class actions. But a comparison of approaches hardly disfavors litigation in this respect. For the many dozens of lawyers who participated, it was estimated that legal fees would come to just over 1% of the roughly \$8 billion recovered as a result of all the negotiations to resolve outstanding Holocaust-era claims.¹⁵⁷ ICHEIC, in contrast, ran up administrative costs amounting to almost 20% of the \$550 million placed at its disposal.¹⁵⁸

Serious questions remain regarding the adequacy of ICHEIC’s funding. According to a prominent expert on economic issues pertaining to Holocaust-era claims, the amount which ICHEIC was expected to distribute by way of redress of recognized claims and for humanitarian purposes represented only 3% of the value (in 2003) of

¹⁵² See Distribution Statistics (note 139). Under the Swiss banks settlement, \$50 million was allocated for payment of Holocaust-era Swiss insurance claims. By Nov. 2007, eighty-eight claimants had been awarded a total of \$1,023,480 by the CRT. See *id.*

¹⁵³ EIZENSTAT (note 38), at 300.

¹⁵⁴ See Neuborne (note 148), at 68.

¹⁵⁵ See EIZENSTAT (note 38), at 300.

¹⁵⁶ See Kill & Gerstel (note 149), at 242. See also Zabudoff (note 25), at 260 (criticizing ICHEIC’s nine-year duration as a failure to meet its mandate). Further comparison may be made with the German Foundation regime under which payments ended in June 2007. This was more than 8 years after announcement by the German government and German companies of their intention to create the Foundation. See http://www.stiftung-evz.de/eng/foundation_remembrance_responsibility_and_future/press_contact_newsletters/press_archive/year_2007/press_release_04_2007_2007_06_11/.

¹⁵⁷ See EIZENSTAT (note 16), at 345 (indicating that this is “a pittance” compared to contingency fees commonly awarded in successful mass injury tort litigation, which can range from 15% to 30% of the total award); see also Neuborne (note 9), at 804. Litigation, however, continued over this issue. See *In re Holocaust Victim Assets Litigation*, Slip Copy, 2007 WL 805768 (E.D.N.Y. 2007) (containing a report to the District Court on Neuborne’s fee as the Lead Settlement Counsel involved in the allocation of German Foundation funds and recommending an amount significantly below that proposed by Neuborne).

¹⁵⁸ See EIZENSTAT (note 38), at 300; ICHEIC, Concluding Meeting (note 98).

Holocaust-era insurance policies which were unpaid at the time ICHEIC was founded in 1998.¹⁵⁹ Moreover, the estimated total value of these policies – some \$15 billion – excluded claims relating to non-life insurance policies, *e.g.* casualty insurance.¹⁶⁰ Under the ICHEIC process, attention focused exclusively on life insurance.¹⁶¹ Valuation of policies under this process also failed to consider several relevant factors bearing on the true value of the claims at issue, thereby further throwing the adequacy of offers made by the insurance companies into question. Arguably, policyholders were entitled to stock issued or dividends paid out by their insurance companies over a sixty-year period.¹⁶² In agreeing to relinquish their claims for contractual damages under the ICHEIC process, claimants also gave up potential common law and statutory remedies which allow recovery of extra-contractual damages as well as punitive damages.¹⁶³

In comparison with the disclosure of account-holders which occurred under the court-supervised Swiss banks settlement,¹⁶⁴ a more significant number of policyholder names were published within the framework of the ICHEIC process – something due in no small measure to ICHEIC's own extensive archival research.¹⁶⁵ Notably, the names posted on ICHEIC's website overwhelmingly belonged to possible holders of policies purchased from German insurers – a result of the Trilateral Agreement. Only a small portion of these, however, were revealed by the companies themselves.¹⁶⁶ In the end, both German and other insurers, whether MOU-members or not, successfully avoided full disclosure regardless of which approach they faced.¹⁶⁷

¹⁵⁹ See Zabludoff (note 25), at 260, 267.

¹⁶⁰ *Id.* at 260. See Joseph B. Treaster, Deal Struck on Claims of Nazi Era, N.Y. TIMES, 31 Jan. 2007, Section C, 1 (referring to an estimate by Sidney Zabludoff of \$18 billion at 2007 rates). While many owners held casualty insurance, they received no indemnities from their insurers following the devastation of Jewish property during the "Kristallnacht" pogrom of Nov. 1938, which entailed total losses of \$270 million (estimated at 2003 rates). See BAZYLER (note 14), at 114.

¹⁶¹ See Zabludoff (note 25), at 260, 267.

¹⁶² See Bell (note 143), at 147-148.

¹⁶³ See *id.* at 149.

¹⁶⁴ See (note 140) and accompanying text.

¹⁶⁵ The CRT, however, did publish a list of 37 names of Holocaust-era insurance policyholders in 2005. See http://www.crt-ii.org/_insurance/faqs_in.phtml.

¹⁶⁶ See Kill & Gerstel (note 149), at 242; see also BAZYLER (note 14), at 146-153.

¹⁶⁷ For criticism that the disclosure of some 350,000 policyholder names under the Trilateral Agreement was "not even close to a disgorgement," see Bell (note 143), at 150.

IV. Concluding Critique

Did ICHEIC exercise too much international regulatory authority concerning Holocaust-era compensation issues or too little? Could the underlying insurance claims have been better resolved through an international apparatus for processing mass claims similar to the UNCC?¹⁶⁸ Transnational compensation claims are often dealt with by regulatory mechanisms whose institutional role has long been recognized under public international law. At its core, the UNCC was such a mechanism.¹⁶⁹ If the mass of individual claims arising from the Iraqi invasion of Kuwait in 1991 could be resolved on this basis,¹⁷⁰ was a different regulatory approach appropriate to deal with those consequences of the Holocaust at issue in the ICHEIC context?

Intended essentially as an administrative process under the direction of the Security Council,¹⁷¹ the UNCC might be more specifically described as an international administrative dispute-settlement mechanism with some judicial functions.¹⁷²

¹⁶⁸ See Roland Bank, *New Programs for Payments to Victims of National Socialist Injustice*, 44 GERMAN YEARBOOK OF INTERNATIONAL LAW 307, 352 (2001) (submitting, with regard to the Swiss banks settlement, the German Foundation and the Austrian funds for reconciliation and compensation, that “a multinational solution would have been preferable”). Without specifically naming the UNCC as a precedent, Bank, mentions the possibility that the UN could create an international compensation mechanism for “situations involving responsibilities of States and/or companies from different States” for massive violations of human rights. *Id.*, 352.

¹⁶⁹ See (notes 7 and 8).

¹⁷⁰ According to the UNCC, more than 2.6 million claims of individuals, corporations, and governments, were submitted by nearly 100 governments, as well as international organizations, where individuals were unable to have claims submitted by governments. Approximately \$368 billion in compensation was sought. See <http://www2.unog.ch/uncc/theclaims.htm>. Determinations on the merits of some 2.5 million eligible claims of individuals which were deemed more urgent were made from 1991 to 1996, with payment of awards for these categories of claims completed in 2000. See David D. Caron & Brian Morris, *The UN Compensation Commission: Practical Justice, not Retribution*, 13 EUROPEAN JOURNAL OF INTERNATIONAL LAW 183, 187-188 (2002) (asserting that “[this] first phase of the UNCC’s work is one of the most significant and underreported success stories of the United Nations”). In comparison, the German Foundation paid out about € 4.37 billion to 1.66 million former forced and slave laborers between 2000 and 2007. See http://www.stiftung-evz.de/eng/foundation_remembrance_responsibility_and_future/press_contact_newsletters/press_archive/year_2007/press_release_04_2007_2007_06_11/. Under the ICHEIC process, 48,000 claimants were awarded \$306.24 million by the time it ended in March 2007.

¹⁷¹ See Danio Campanelli, *The United Nations Compensation Commission (UNCC): Reflections on Its Judicial Character*, 4 THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 107, 112 (2005).

¹⁷² See *id.* at 139.

However, the UNCC's authority did not cover claims concerning Iraq's own citizens. The various categories of claims which it had authority to resolve, including those of individuals, could only be submitted by governments.¹⁷³ Claims were considered to be directed against Iraq, and the funds for awards came from economic sanctions imposed on Iraq by the Security Council.¹⁷⁴ These features alone indicate that the UNCC regime rested upon a recognition of State responsibility for injuries to foreigners under the traditional international law doctrine of diplomatic protection.¹⁷⁵ Ultimately, therefore, the legal framework of the UNCC mirrored that of traditional inter-State adjudication.¹⁷⁶

A major factor contributing to the relatively successful UNCC approach was its simple factual context.¹⁷⁷ Iraq could be and was held liable for its invasion of Kuwait and the resulting damage. Moreover, control of Iraq's oil exports by the Security Council facilitated the creation of a compensation fund of unprecedented proportions. ICHEIC was different. No opportunity existed for establishing a postwar reparations claims commission under traditional principles of international law in the case of Holocaust-era insurance claims. These claims involved private contractual rights and the obligations of private business entities. Compensation depended upon contributions to a settlement fund by such entities. For the most part, funding for ICHEIC came from the German Foundation. The alternative which Germany and the companies belonging to the German Foundation initiative would have preferred, namely a treaty or executive agreement with the United States explicitly extinguishing private claims in favor of a lump-sum arrangement to be implemented by the German Foundation,¹⁷⁸ never

¹⁷³ For an overview and analysis of the claims categories, processing modalities and institutional aspects of the UNCC, see Norbert Wühler, *United Nations Compensation Commission*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW*, VOL. IV, 1068 (R. Bernhardt ed., 2000); See DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* (2005, 2nd ed.) 404-412.

¹⁷⁴ See Caron & Morris (note 170), at 196-197 (denying that, because of the diversion of oil revenues for funding of awards made by the UNCC and the relation between the UNCC and the oil-for-food program imposed on Iraq by the Security Council, the UNCC constituted a disguised sanctions device).

¹⁷⁵ For an exposition of the classical regime concerning reparations, see SHELTON (note 173), at 50-103.

¹⁷⁶ See Heidy Rombouts, Pietro Sardaro & Stef Vandeginste, *The Right to Reparation for Victims of Gross and Systematic Violations of Human Rights*, in *OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC VIOLATIONS OF HUMAN RIGHTS VIOLATIONS* 418 (K. De Feyter, S. Parmentier, M. Bossuyt & P. Lemmens eds., 2005) (erroneously placing ICHEIC in the same category); Norbert Wühler, *The United Nations Compensation Commission*, in *STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS* 228 (Albrecht Randelzhofer & Christian Tomuschat eds., 1999).

¹⁷⁷ See Tomuschat (note 127), at 589.

¹⁷⁸ See EIZENSTAT (note 16), at 269.

materialized. The United States steadfastly rejected such an approach,¹⁷⁹ which led the parties to adopt an unusual alternative: an agreement by the US government to support defendants in Holocaust claims litigation before American courts by submitting a "Statement of Interest" referring to the German Foundation (including its provisions on ICHEIC) as the appropriate mechanism for resolving Holocaust-era claims.

As a regulatory remedy with a mixed national and international structure providing "rough justice" rather than the more individualized redress normally available through a judicial process,¹⁸⁰ ICHEIC had serious flaws, as enumerated above particularly in Part C, II and III. Consequently, litigation continued.¹⁸¹

A deeper explanation for the continuing legal challenge may be found in a widespread dissatisfaction with ICHEIC on a moral level. Was the ICHEIC process anything more than a fig-leaf which permitted the insurance companies to continue business as usual and the governments of the United States and Germany to dispose of an uncomfortable diplomatic problem, as some critics suggest?¹⁸² In essence, ICHEIC was an administrative arm of the German Foundation.¹⁸³ By acceding to the Trilateral Agreement, the ICHEIC in effect allowed Allianz, the largest German insurance company¹⁸⁴ and one of ICHEIC's key founding members, to play by another set of rules.¹⁸⁵ Among other things, Allianz could thereby

¹⁷⁹ The US government "would not [agree to] take a formal legal position barring U.S. citizens from their own courts." *Id.*

¹⁸⁰ See EIZENSTAT (note 16), at 353.

¹⁸¹ See Joseph B. Treaster, *Appeals Court Extends Time for Suit on Holocaust Insurance Payments*, N.Y. TIMES, 3 Oct. 2007, Section C, 4 (referring to the *Generali Settlement*). See also, Treaster (notes 118 and 150); *In re Assicurazioni Generali S.p.A. Holocaust Ins.*, Slip Copy, 2007 WL 3129894 (S.D.N.Y., 26 Oct. 2007).

¹⁸² See Bell (note 143), at 144 (noting that the German Foundation Agreement has been seen as providing a neat diplomatic way of removing an irritant to US-German relations). The objection that the *Generali Settlement* (note 118) initially approved by a lower Federal court in Feb. 2007 amounted to a "cover up" by failing to require full disclosure of policyholders' names, see Rosenbaum, *Losing Count* (note 143), could be lodged with respect to ICHEIC as well. Rosenbaum notes elsewhere the absence of "a true and complete accounting" in the Holocaust compensation cases, and that the "pillaging enterprises, in most cases, purchased the silence of history for a few pennies on the dollar, thereby exploiting the unfortunate conspiracy of time." See THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE: WHY OUR LEGAL SYSTEM FAILS TO DO WHAT'S RIGHT* 76 (2006).

¹⁸³ See (note 62) and accompanying text.

¹⁸⁴ Allianz AG of Germany, the second largest insurance company in the world and owner of over 30 American subsidiaries, was said to have collected \$6.2 billion in premiums in the US in 1996. See BAZYLER (note 14), at 112.

¹⁸⁵ See (note 63).

contribute exclusively to the German Foundation and ignore its prior commitment to provide separate funding to ICHEIC specifically to compensate insurance claims.¹⁸⁶ To this extent, ICHEIC might be termed an elaborate shell game.¹⁸⁷

Viewed more positively, the ICHEIC process may have achieved a measure of re-individualization and, perhaps, satisfaction at least for those who did receive some compensation. Payments, at least symbolically, represented acknowledgment of the claimants' injury and slightly dented the insurers' pocketbooks. Irrespective of the pecuniary outcome, moreover, the ICHEIC process established a record which testifies to the economic dimensions of the Holocaust. The documentation relating to claims, thus, contributes toward establishing historical truth and memorializing the victims. ICHEIC's archival research and publication of policyholder names had a similar effect, as did the portion of the ICHEIC humanitarian fund earmarked for educational and remembrance purposes.¹⁸⁸

Unsurprisingly, debate over ICHEIC's achievement eludes simple resolution. ICHEIC abounds in paradoxes: it sought compensation for the non-compensable and individualized redress for a collective injury; it was a private entity and a form of international administration, and it was an autonomous regime and an appendage of a domestic administrative program. Where questions prevail over answers, as in so many matters concerning the Holocaust, additional consideration appears justified.

¹⁸⁶ See EIZENSTAT (note 16), at 268; Kent (note 16), at 211.

¹⁸⁷ As in a shell game, observers are likely to be distracted by appearances, losing track of the primary object of their interest. Understanding the true nature of ICHEIC requires one to "follow the money." Most of ICHEIC's funding came from the German Foundation. Half of the \$5 billion fund administered by the German Foundation was contributed by the German government, while the other half came from German industry. German industry received an approximate 40% tax deduction on its contribution. In other words, German taxpayers rather than German corporations footed about two-thirds of the bill - an additional reason for describing ICHEIC as a semi-public entity. See BAZYLER (note 14), at 88, 100; Deborah Sturman, *Germany's Reexamination of Its Past through the Lens of the Holocaust Litigation*, in HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 215, 223 (Michael J. Bazylar & Roger P. Alford eds., 2006).

¹⁸⁸ *But see* ROSENBAUM (note 182), at 77 (identifying the central flaw in the various Holocaust compensation arrangements as a failure to provide the "moral remedy of having the story of atrocity [and pillaging] told and the historical truth revealed").