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The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks

By
Roger P. Alford*

It is a privilege to be able to participate in the Stefan A. Riesenfeld symposium on “Fifty Years in the Making: World War II Reparation and Restitution Claims.” The participants gathered for this symposium at Boalt Hall provide a wonderful collection of voices from government, the bar and the academy on a host of difficult issues concerning Holocaust claims.

The discussion regarding Holocaust reparation claims has focused primarily on the theoretical and policy implications of these claims or on specific lawsuits that have been filed against foreign corporations. However, this paper will focus on issues related to the the implementation of settlements for these claims. For example, once an agreement has been reached between the parties, how is this agreement implemented? What are the legal difficulties that arise? Just as Norbert Wühler and Karen Heilig have provided insights into the implementation process for German slave labor claims,¹ this paper will focus on Swiss banks, and in particular the measures taken by the Independent Committee of Eminent Persons (“Volcker Commission”) established to resolve claims to Holocaust-era Swiss bank accounts.²

Section I of this paper will provide a brief historical analysis of Holocaust claims against Swiss banks to address the fundamental question of why this process did not occur earlier.³ Section II will introduce procedures utilized by

* Associate Professor of Law, Pepperdine University School of Law. The author served as Senior Legal Advisor at the Claims Resolution Tribunal for Dormant Accounts in Switzerland from 1999-2000. All opinions expressed are solely those of the author. Grateful acknowledgement is given to Jennifer Joseph and Monet Nelson for research assistance. This work was supported by a Pepperdine Summer Research Grant.

1. Norbert Wühler, Director, Claims Processing German Forced Labor Compensation Programme, Address at the Stephan A. Riesenfeld Symposium (Mar. 8-9, 2001); Karen Heilig, Counsel, Claims Conference on Jewish Material Claims Against Germany, Address at the Stephan A. Riesenfeld Symposium (Mar. 8-9, 2001).

2. INDEPENDENT COMMITTEE OF EMINENT PERSONS, REPORT ON DORMANT ACCOUNTS OF VICTIMS OF NAZI PERSECUTION IN SWISS BANKS, (Dec. 6, 1999) [hereinafter VOLCKER REPORT], available at http://www.icep-iaep.org/final_report/ICEP_Report_english.pdf; see also *In re Holocaust Victim Assets*, 105 F.Supp.2d 139 (E.D.N.Y. 2000) (There were a number of claims against Swiss banks that did not concern dormant accounts. The class action lawsuit filed against Swiss banks included five categories: dormant account claims, looted asset claims, slave labor claims, insurance claims, and refugee claims.).

3. See *infra* pp. 251-59.

the Claims Resolution Tribunal for resolving claims to accounts published in 1997 and in 2001.⁴ Section III will focus on some of the most difficult legal issues that have arisen in resolving Holocaust claims against Swiss banks.⁵ This discussion includes the definition of what constitutes a Holocaust account,⁶ issues concerning the applicable law,⁷ and difficulties with the burden of proof.⁸ This paper will conclude with thoughts on reparations and the moral accounting that is achieved through Holocaust restitution and reparation claims.⁹

I.

A HISTORY OF OBFUSCATION AND NEGLECT

One of the most common questions asked about the Holocaust litigation against Swiss banks is “Why now?” Why, after fifty years, are we only now acknowledging past injustices committed by Swiss banks against Holocaust victims for failing to turn over assets to their heirs? It is an important question, and the answer is complex.

The impetus for progress made in the 1990s is well documented.¹⁰ However, the reason so little was done for fifty years is less obvious and deserves mention. In my view, it relates directly to the obfuscation by the Swiss banks and inattention of the Swiss government. One can examine the historical surveys conducted by the Swiss of their Holocaust assets and the actual stories

4. See *infra* pp. 259-67.

5. See *infra* pp. 267-77.

6. See *infra* pp. 271-78.

7. See *infra* pp. 269-71.

8. See *infra* pp. 267-68.

9. See *infra* pp. 277-81.

10. While there were a number of elements that were critical in the movement, its origins can be attributed to Israel Singer and Edgar Bronfman of the World Jewish Congress. Johanna McGeary, *Echoes of the Holocaust*, TIME, Feb. 24, 1997, at 36. Reportedly Israel Singer became fascinated with the issue of Nazi gold smuggled out of the Third Reich based on a novel he read by Paul Erdman called *The Swiss Account*, as well as a Richard Immerman biography of John Foster Dulles that alluded to a U.S. war-time intelligence effort to trace Nazi looted assets code-named Project Safehaven. *Id.*; see also WILLIAM Z. SLANY, U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II, Preliminary Study Coordinated by Stuart E. Eizenstat (May 1997) [hereinafter SLANY REPORT], available at <http://www.state.gov/www/regions/eur/ngprpt.pdf>. In 1995, Singer received authorization from Edgar Bronfman, president of the World Jewish Congress, to begin investigating recently declassified U.S. reports on Project Safehaven. McGeary, *supra*. This eventually led to meetings with Swiss bankers regarding Holocaust-era bank accounts. *Id.* On September 12, 1995, Bronfman and Singer met in Berne, Switzerland with the Swiss Bankers Association requesting an independent audit of Swiss banks. *Id.* Swiss banks allegedly refused to offer Singer or Bronfman a seat. *Id.* Following unsuccessful negotiations and the Swiss publication of the 1995 self-audit in early 1996, Bronfman met with then-Senator Alfonse D'Amato and President Clinton to request action. *Id.* Sen. D'Amato agreed to hold congressional hearings on the matter. *Id.*; *Deposits By World War II Jews in Swiss Banks: Hearing of the Senate Banking, Housing and Urban Affairs Committee*, (Apr. 23, 1996) [hereinafter *Congressional Testimony*]. These hearings led to the establishment of the Volcker Commission. VOLCKER REPORT, *supra* note 2. In addition, under the leadership of Stuart Eizenstat, the Clinton Administration took active steps to investigate U.S. archives for the trail of Nazi assets. McGeary, *supra*. From these hearings and these U.S. archive investigations, the modern era of Holocaust litigation was born. See generally, Michael J. Bazylar, *Nuremberg in America: Litigating the Holocaust in the United States Courts*, 34 U. RICH. L. REV. 1 (2000) (explains the general history of recent Holocaust litigation).

that have been established regarding their treatment of Holocaust survivors and their heirs. The inevitable impression is that Swiss banks and the Swiss government did far less than what was feasible to resolve this issue. The heirs of Holocaust victims have attempted for decades to secure information regarding the assets located in Swiss banks. However, the full extent of Holocaust-era bank accounts was unknown, and unknowable, until Swiss banks provided this information in the mid-1990s.

A. *Surveys of Holocaust Accounts*

One of the most unusual aspects about Holocaust claims against Swiss banks was that information regarding the scope and extent of Holocaust accounts was wholly within the control of the Swiss banks. Given the Swiss banks' prerogative and obligation to maintain bank secrecy, a conflict of interest existed regarding the publication of account information. Swiss banks and the Swiss government were the only entities that could provide the requisite information to claimants concerning the number and value of Holocaust accounts. Unfortunately, when memories were fresh and documentation still available, Swiss banks were not forthright and straightforward in their dealings with Holocaust victim accounts, and the Swiss federal government took halting and inadequate steps to force the banks to audit their books and establish an appropriate claims procedure. As a result, for decades claimants had no mechanism to prove that tens of thousands of accounts held by victims of the Holocaust existed and remained unclaimed.

Swiss banks conducted two early audits shortly after the Second World War that proved less than illuminating.¹¹ The first audit occurred in 1947, when the Swiss Bankers Association ("SBA") requested its members to identify so-called "heirless assets" in order to identify assets that belonged to victims of Nazi violence.¹² This survey originated from Switzerland's participation in the Washington Agreement of 1946, obligating Switzerland to assist Allies in identifying heirless assets.¹³ The Swiss banks reported an unknown number of accounts with a total value of 482,000 Swiss Francs.¹⁴ The second audit came in 1956 when various Jewish organizations were pressuring the Swiss Parliament to pass legislation requiring Swiss banks to report on the Holocaust-era dormant accounts.¹⁵ Because Jewish organizations could only find legislative support if the value of the dormant accounts exceeded four million Swiss Francs, Swiss banks undermined the legislation by reviewing their records and reporting only 86 accounts with assets totaling 862,000 Swiss Francs.¹⁶ The SBA sent a letter to its board members on June 7, 1956 stating that "[a] meager result from the survey will doubtless contribute to the resolution of this matter in our favor."¹⁷

11. VOLCKER REPORT, *supra* note 2, at 87-90.

12. *Id.* at 89.

13. *Id.*

14. *Id.* at 88-89.

15. *Id.* at 90.

16. *Id.*

17. *Id.* (alteration in original).

Subsequently, the SBA sent a letter to the Swiss President stating that the problem “by no means [had] the significance which the other side is constantly attempting to ascribe to it.”¹⁸

In the course of the 1960s, Switzerland was confronted with a second wave of diplomatic démarches concerning unclaimed assets of Holocaust victims.¹⁹ In 1962, the Swiss Parliament passed a law requiring banks and other financial institutions to report on the assets in Switzerland of foreign or stateless persons subject to racial, religious or political persecution.²⁰ The Swiss banks strictly construed the terms of the federal law to require only reports on persons who “died a violent death or were missing because of the reasons for persecution as specified in the law.”²¹ As a result, the Swiss banks reported only 739 accounts with 6.2 million Swiss Francs in assets.²² Nonetheless, the Federal Decree created a sensation, with claimants around the world seeking information on unclaimed assets. In 1963, the Swiss Consulate General in New York, Hans Wilhelm Gasser, reported that he anticipated “tens of thousands of claims” in New York alone.²³

The 1962 Federal Decree led to the establishment of a Claims Registry Office within the Swiss federal government.²⁴ Prior to the enactment of the Claims Registry Office, the Swiss federal government had always referred claimants to the Swiss Bankers Association. Following the establishment of the Registry Office, the Swiss Bankers Association referred all matters to the federal government, indicating that the SBA would no longer conduct a search for assets.²⁵ Over thirty years passed before there was another major self-audit of Holocaust-era dormant accounts.²⁶ As counsel for the Volcker Commission put it:

It is now well recognized, both outside Switzerland and in Switzerland, that a miserable job was done [in administering the 1962 law]. In the end, some 10,000 claims were made, and only 1,000 claims were recognized. . . . No serious attempt was made to compel the financial intermediaries, including the banks, to turn over all accounts. No one checked how banks complied with the law. Consequently,

18. *Id.* (alteration in original).

19. See Peter Hug and Marc Perrenoud, *Assets in Switzerland of Victims of Nazism and the Compensation Agreements with East Bloc Countries*, (hereinafter Hug-Perrenoud Report), available at http://www.switzerland.taskforce.ch/W/W3/W3a/a1_ei.htm.

20. VOLCKER REPORT, *supra* note 2, at 91. The relevant text of the Federal Decree provided that:

Assets of any type located in Switzerland whose last known owners are foreign nationals or stateless persons about whom no reliable information has been received since 9 May 1945 and who are known or presumed to have fallen victim of racial, religious or political persecution, shall within six months . . . be registered with an authority to be determined by the Federal Council of Minister with notification of all changes to the assets that have taken place since the disappearance of their owner or his or her absences without information as to his or her whereabouts.

Id. (quoting Swiss Parliament Federal Decree of Dec. 20, 1962).

21. *Id.* at 91-92.

22. *Id.* at 92.

23. Hug-Perrenoud Report, *supra* note 19.

24. VOLCKER REPORT, *supra* note 2, at 91.

25. Hug-Perrenoud Report, *supra* note 19.

26. VOLCKER REPORT, *supra* note 2, at 92-93.

there remained this terrible question that justice had not been done, that all of these assets had not been turned over to the Swiss Government, and that they remained in the banks. This issue continued to plague the Swiss.²⁷

Under pressure from Jewish organizations, the Swiss banks again conducted a survey of their accounts in 1995 to quell speculation that the 1962 survey was incomplete or inaccurate.²⁸ Edgar Bronfman, President of the World Jewish Congress, reported that he met with the SBA in 1995 to secure a commitment from the Swiss Bankers Association for an impartial audit of the Holocaust assets held by Swiss banks.²⁹ Instead, the Swiss banks conducted yet another self-audit, reporting that they had discovered 775 foreign dormant accounts with assets totaling 38.7 million Swiss Francs.³⁰ According to the SBA, the purpose of the 1995 survey was to establish that the 1962 survey "was done in a thorough fashion and to show that speculations which [said] that huge amounts were held back [was] at most a rumor . . . so that these partly unfounded press speculations [could] be refuted through a coordinated public affairs campaign."³¹ This approach backfired. At congressional hearings in April 1996, Edgar Bronfman testified that the results of this "unilateral" survey "defy credibility," representing another attempt of Swiss banks to say "trust us, we looked into our records and our own vaults and that's all we could find."³² In Bronfman's view, what was "urgently needed" was "a transparent mechanism to conduct a verifiable audit of all Nazi-era assets, those deposited by Jews and those assets stolen from the Jews by the Nazis and also deposited in Switzerland and their disposition so that all the parties involved can be satisfied Justice has been served."³³ Only through such a "full, fair and impartial audit can we uncover the truth" and "restore the reputation of the Swiss banking community that has been called into question by so many."³⁴

In the face of tremendous public pressure for an independent audit, the Swiss banks relented.³⁵ In May 1996, the Swiss Bankers Association and the

27. Michael Bradfield, *The Role of the Independent Committee of Eminent Persons*, 14 AM. U. INT'L L. REV. 231, 232 (1998). Even the Swiss banks now acknowledge that the 1962 survey was seriously lacking. See *id.* See also Roger Witten, *Switzerland's Response to the Claims of Holocaust Victims: A Mid-Term Report*, 20 CARDOZO L. REV. 527 (1998). Roger Witten, counsel for the Swiss Bankers Association, has described the 1962 survey as "certainly unsuccessful." *Id.* at 532. He attributes much of the blame to the Swiss government, not the Swiss banks. *Id.*

28. VOLCKER REPORT, *supra* note 2, at 92.

29. Congressional Testimony, *supra* note 10 (testimony of Edgar M. Bronfman, President, World Jewish Congress and World Jewish Restitution Organization).

30. VOLCKER REPORT, *supra* note 2, at 93.

31. *Id.* (quoting SBA Board Minutes).

32. Congressional Testimony, *supra* note 10 (statement of Edgar M. Bronfman, President, World Jewish Congress and World Jewish Restitution Organization available at 1996 WL 10162515, 4).

33. *Id.* at 11.

34. *Id.*

35. *Id.* at 27.

Given questions raised concerning the amount of funds identified in response to the SBA directive and the likelihood that not all of these funds will be claimed under the process that is being overseen by the Ombudsman, the SBA recently has announced several further steps to resolve issues concerning the identification and ultimate disposition of unclaimed funds. These steps are responsive to requests and concerns

World Jewish Congress established the Volcker Commission with the authority to appoint an independent auditing company.³⁶ From its inception this independent auditing company was accompanied by assurances from the Swiss Bankers Association that the auditors would have “unfettered access to all relevant files in banking institutions regarding dormant accounts and other assets . . . deposited before, during and immediately after the Second World War.”³⁷ Under the supervision of the Volcker Commission, the Swiss banks agreed to immediately conduct another self-audit to identify all foreign accounts opened prior to May 1945 and dormant thereafter.³⁸ Having the accounts identified would allow the independent auditors to conduct a more thorough survey. The result of the 1997 self-audit was the revelation of 5,570 foreign accounts with assets totaling 74.5 million Swiss Francs.³⁹ The Claims Resolution Tribunal was established on June 25, 1997 to resolve claims to the accounts published in July and October 1997.⁴⁰

Finally, the result of the independent audit conducted by the Volcker Commission was announced in December 1999. This report was the result of a three-year investigation that included an independent audit of banking practices of 254 Swiss banks from the Second World War to the present.⁴¹ The Volcker Commission reported, in addition to the 5,570 accounts discovered from the 1997 self audit, an additional 53,886 accounts with a probable or possible relationship to victims of Nazi persecution.⁴² The Volcker Commission divided these claims in four categories. Of the newly discovered accounts, 10,471 had a close connection to the Holocaust in that they were open, dormant and matched the names of known Holocaust victims (category 1 accounts) or had other characteristics suggesting that there may be a probable or possible relationship be-

expressed by the World Jewish Congress and other interested persons, including you, Mr. Chairman [D'Amato]. First, an independent commission of distinguished individuals whose experience and integrity are well-known is being established . . . The independent commission will be authorized to retain an internationally recognized independent accounting firm and other experts, as necessary, to assist it. The accounting firm retained by the commission will review the methodology for identifying funds and property held by Swiss banks that may have belonged to Holocaust victims and, upon approval of the methodology, the independent commission, with the help of the accounting firm and the bank supervisors, will verify that the banks have properly implemented the methodology. After it completes its work, the commission will prepare a final report on the assets held by Swiss banks that belonged to Holocaust victims. The commission will operate in a sensitive, open and professional manner, and will obtain and disclose the truth about this complicated matter.

Id. (testimony of Hans J. Baer, Chairman, Julius Baer Bank, and Member, Swiss Bankers Association Executive Board available at 1996 WL 10162494, 9-10).

36. *Memorandum of Understanding Between The World Jewish Restitution Organization and the World Jewish Congress and The Swiss Banker Association*, reprinted in VOLCKER REPORT, *supra* note 2, at Appendix A, A-1.

37. *Id.*

38. VOLCKER REPORT, *supra* note 2, at 93.

39. *Id.* at 88, 93-95.

40. *Id.* at 115.

41. *Id.* at 57.

42. *Id.* at 10, n.33, 71.

tween the account holder(s) and Nazi persecution (category 2 accounts).⁴³ The Volcker Commission has reported that the accounts in categories 1 and 2 contained assets with an estimated value of 31.5 million Swiss Francs. However, it is difficult to put a valuation on these accounts because many of them lack fiscal information.⁴⁴ The Volcker Commission estimates that the value of category 1 and 2 accounts in 1945 would have been between 271 and 411 million Swiss Francs.⁴⁵ Category 3 accounts, totaling 30,692 closed accounts, had insufficient information to place a valuation upon them.⁴⁶ Category 4, consisting of 12,723 accounts, had the weakest Holocaust nexus and contained assets with an estimated value of 4.2 million Swiss Francs.⁴⁷

In sum, until the 1990s, Swiss banks were largely uncooperative in efforts to locate assets of victims of Nazi Persecution. In 1962, Swiss banks reported that they held approximately 750 Holocaust accounts valued at over 6 million Swiss Francs.⁴⁸ A generation later, as a result of the 1997 self-audit and the 1999 independent audit, the Volcker Commission reported that Swiss banks held almost 60,000 accounts with a possible Holocaust connection, and that the total *current* value of the approximately 26,000 bank accounts within the Tribunal's jurisdiction exceeded 100 million Swiss Francs.⁴⁹ Put differently, prior to the 1990s, Swiss banks reported only one percent of the actual number of Holocaust accounts held.

SUMMARY OF AUDITS OF HOLOCAUST ACCOUNTS⁵⁰

	1947	1956	1962	1995	1997 ⁵¹	1999 ⁵²
Number of Accounts	Unknown	86	739	775	5,570	53,886
Value (SFr. 000's)	482	862	6,219	38,700	74,386	35,744

Because what constitutes a "Holocaust account" depends on how that term is defined, there will never be a precise number of Holocaust accounts. A narrow definition will yield one result, while a broad definition will yield a dramatically different result. Nonetheless, the information obtained from the independent audit reveals that the early surveys were woefully inadequate. As the Volcker Commission concluded:

43. *Id.* at 10-11.

44. *Id.* at 72.

45. *Id.* at 72.

46. *Id.* at 75.

47. *Id.* at 71-75.

48. *See supra* notes 19-27 and accompanying text.

49. *See supra* notes 35-47 and accompanying text.

50. VOLCKER REPORT, *supra* note 2, at 71-75, 88.

51. *Id.* at 88. This includes only accounts where the domicile is known to be foreign. *Id.* It does not include 74,496 accounts totaling 12.8 million Swiss Francs for accounts of persons of Swiss or unknown nationality. *Id.*

52. *Id.* at 71, 75. The values include only the 35.7 million Swiss Francs estimated book value of new accounts discovered from the independent audit. *Id.* Over 30,000 accounts were closed for which no valuations were available. *Id.*

[O]n two opportunities that clearly could have been used to address this problem in a straightforward and forthright way in 1956 and 1962, when memories were fresh and much more documentation was then still available, banks either used these occasions to deliberately minimize the problem in an attempt to avoid the threat of legislation (1956), or responded inadequately or not at all to a law that was too narrowly drawn and very poorly enforced (1962).⁵³

B. *Swiss Banks' Treatment of Holocaust Accounts*

Statistics should not overshadow the moral and human implications of Swiss resistance to Holocaust-era claims. Throughout the postwar period there is evidence that the Swiss were, to use Ambassador Eizenstat's phrase, "obdurate negotiators, using legalistic positions to defend their every interest, regardless of the moral issues also at stake."⁵⁴ These actions had very real human consequences.

A famous case of Swiss resistance to a Holocaust survivor's attempts to recover assets is the story of Estelle Sapir. Estelle Sapir's father's last wish before falling victim to the Holocaust was that Estelle recover the assets in his Swiss bank account for the benefit of their family.⁵⁵ After the war, Estelle endured twenty trips to Credit Suisse from 1946 to 1957, each time being turned away empty handed.⁵⁶ In 1998, Credit Suisse admitted that it "found a card under the name of J. Sapir that appeared to confirm that he held an account without an indication of how much the account may have once contained."⁵⁷ Credit Suisse settled with Estelle Sapir for approximately \$500,000.⁵⁸

Another case involved a Russian Jew, who in 1930 opened a Swiss bank account with instructions that the bank invest in fixed-income securities.⁵⁹ The bank ignored the instructions, invested in equities and by 1962 the account contained a value of over one million Swiss Francs.⁶⁰ Given the account holder's instructions, the bank "creamed off" the returns on the investment, transferring the 488,600 Swiss Francs to its own account and recreated the value in the original account to reflect what it would have received had it been invested in fixed-income securities.⁶¹ This was described by internal bank memorandum as the

53. *Id.* at 81. The plaintiffs were even more critical, stating:

[O]f the vast sums that . . . flowed into Swiss banks in the years before the Holocaust, only a pittance has ever been acknowledged. The vast bulk of the assets have simply disappeared into the Swiss banking system, constituting the single most egregious example of unjust enrichment in banking history.

Bazyler, *supra* note 10, at 36.

54. Stuart Eizenstat, *U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II, Preliminary Study*, (May 1997), at vii available at <http://www.state.gov/www/regions/eur/ngprpt.pdf>.

55. Elaine Woo, *Estelle Sapir; First Holocaust Survivor to Recover Wartime Claim from Swiss Bank*, L.A. TIMES, Apr. 16, 1999, at A26.

56. *Id.*

57. David Sanger, *Crack in the Vault: Swiss Bank Yields to a Nazi Victim's Daughter*, N.Y. TIMES, May 5, 1998, at A27.

58. *Id.*

59. VOLCKER REPORT, *supra* note 2, at 83.

60. *Id.*

61. *Id.*

“usual way . . . to accumulate reserves.”⁶² When the account holder’s heirs inquired about the account, they were told that it was never published in the 1962 survey because the Holocaust victim had died of natural causes.⁶³

In some cases, bank documents establish that significant fees were charged for maintaining or closing accounts.⁶⁴ While the Volcker Commission has estimated that normal bank fees for fifty years should total approximately 665 Swiss Francs,⁶⁵ in *Case 2012*, a bank charged 6,212 Swiss Francs in fees, leaving only 9.60 Swiss Francs in the account.⁶⁶ In other cases, if the account was previously closed because of excessive bank fees, the banks informed inquiring claimants that there was no such open account at the time the claim was made, without revealing that an account had existed and was now closed because of bank fees.⁶⁷ The Volcker Commission found over 1,300 accounts closed due to bank fees.⁶⁸ In one case, the fee for closing the account was 4,761.70 Swiss Francs, depleting the balance of the account.⁶⁹ Bank closings also occurred to avoid claims from being submitted thereon. One bank closed accounts totaling 77,000 Swiss Francs in October 1962, just prior to the passage of the 1962 Federal Decree to avoid registering them with the federal government.⁷⁰

Swiss banks engaged in dozens of other questionable activities. Such activities included collecting fees and charges owed for the use of safe deposit boxes by opening the boxes and selling the jewelry and other valuables to cover prior unpaid and future rental charges.⁷¹ In some cases jewelry was sold to pay for “unpaid” rental costs for a number of years into the future. In other instances, Swiss banks deliberately narrowed their scope of inquiry to protect the assets in an account. For example, if a victim’s account was held in Basel and years later an heir sought information at the Zurich branch about the existence of the account, the bank would review the records, discover that the account was held in the Basel branch, and inform the heir that there was no account at this branch held by a person with that name.⁷² Occasionally, an account holder held two or more accounts with a bank, a current account and a securities account. The bank would reveal the existence of one of the accounts and pay this out to the account

62. *Id.*

63. *Id.* at 84.

64. *Id.* at 84-86.

65. Board of Trustees Independent Claims Resolution Foundation, *Rules on Interest, Charges and Fees, for Arbitral Decisions of the Claims Resolution Tribunal*, Schedule A, [hereinafter CRT I Rules on Interest] available at http://www.crt.ch/rules_interest.html.

66. Consolidated Docket No:2012/0498/MJ, available at http://www.crt.ch/decision_en/2012.html (The depletion of this account reflects significant additional fees for hold mail and numbered accounts.).

67. VOLCKER REPORT, *supra* note 2, at 83.

68. *Id.* at 85.

69. *Id.* at 84.

70. *Id.*

71. *Id.* at 85. While the banks may have had a contractual right to do this, it reflects a moral insensitivity to the Holocaust victims. As the Volcker Report noted, “in order to preserve the assets, the bank could have transferred the contents of these safes into a general safe when it became apparent that the account was inactive.” *Id.*

72. *Id.* at 82-83.

holder's heirs, but not reveal the existence of the other account.⁷³ Dormant accounts were also often ripe for embezzlement because no account holder would notice erratic behavior in an account. In 1990, one account at a large private bank contained a value of 65,850 Swiss Francs, but by the end of 1994 it held only 557 Swiss Francs.⁷⁴ The account was reported in 1997 as still having a balance of only 557 Swiss Francs.⁷⁵

In the first half-century after the end of the Holocaust, Swiss banks resisted the efforts of claimants to regain access to their accounts. As the Volcker Commission summarized, there was:

[C]onfirmed evidence of questionable and deceitful actions by some individual banks . . . , including withholding of information from Holocaust victims or their heirs . . . , inappropriate closing of accounts, failure to keep adequate records, . . . and a general lack of diligence—even active resistance⁷⁶—in response to earlier private and official inquiries about dormant accounts.

II.

THE CLAIMS RESOLUTION TRIBUNAL

The Volcker Commission was originally independent and separate from the New York class action litigation. The Volcker Commission was established based on an agreement between various Jewish organizations and Swiss banks with a mandate to:

[P]rovide the basis for restitution of monies owed to victims of Nazi persecution or their heirs who entrusted funds to Swiss banks for safekeeping before and during World War II, to make as full an accounting as feasible of the custody of these funds by Swiss banks, and to satisfy the historic need for a moral accounting for present and future generations of critical events surrounding World War II.⁷⁷

In furtherance of that goal, on June 25, 1997 the Volcker Commission announced the establishment of a comprehensive claims resolution process that included the creation of an independent and objective international claims resolution tribunal known as the Claims Resolution Tribunal for Dormant Accounts in Switzerland (“CRT” or “Tribunal”).⁷⁸ The Tribunal was intended to be an international arbitration tribunal established by private parties with the imprimatur of the Swiss government to resolve claims to Holocaust-era dormant Swiss bank accounts.⁷⁹ After the class action litigation was filed against the Swiss banks in New York, Paul Volcker wrote in opposition to the litigation, stating that it would cripple the resolution process being conducted by the Volcker Commission.⁸⁰

73. *See id.*

74. *Id.* at 84.

75. *Id.*

76. *Id.* at 13.

77. Press Release, ICEP Status Report From The Independent Committee of Eminent Persons (September 17, 1998) (*reprinted in* VOLCKER REPORT, *supra* note 2 app. D, at A14).

78. Joint Press Release, ICEP (June 25, 1997) (*reprinted in* VOLCKER REPORT, *supra* note 2 Appendix D, at A19).

79. *Id.*

80. Bazylar, *supra* note 10, at 283, n. 169.

The independence between the Tribunal and the New York class action suit changed in 1998. As part of the \$1.25 billion global settlement between the Swiss banks and New York class action claimants, the parties agreed that the Tribunal in Switzerland should continue to function, and any awards rendered by this Tribunal that had a Holocaust connection would be honored by reducing the remaining amount owed by the Swiss banks to the New York class action claimants.⁸¹ Thus, in a rare if not unique occurrence in international arbitration, an international tribunal was essentially folded into a domestic court litigation proceeding by consent of the parties. Judge Korman, responsible for the class action litigation in New York, approved this approach in August 2000, reserving \$800 million of the \$1.25 billion for payment of awards rendered by the Claims Resolution Tribunal.⁸²

The Claims Resolution Tribunal has had two distinct phases in its adjudicative process. During the first three years of its existence, the Tribunal resolved claims to accounts published by the Swiss Bankers Association in 1997 under the original procedure ("CRT I").⁸³ Beginning in February 2001, the Tribunal launched a second procedure under a new set of rules for resolving claims to the 21,000 newly published accounts derived from the independent audit conducted under the auspices of the Volcker Commission ("CRT II").⁸⁴

A. CRT I Procedure

Chairman Dr. Hans Michael Reimer described the procedure established for resolution of claims to accounts published in 1997 as an exceptional, even unique procedure in international arbitration.⁸⁵ The Claims Resolution Tribunal is a mass arbitration tribunal that resolves claims in "a judicial case-by-case manner rather than through an administrative procedure using predetermined criteria (as with certain types of claims before the United Nations Compensation Commission)."⁸⁶ As originally established, its jurisdiction was over accounts opened by non-Swiss nationals or residents that had been dormant since May 9, 1945, which were subsequently made public by the Swiss Bankers Association in 1997.⁸⁷

81. *In Re Holocaust Victim Assets*, 105 F. Supp. 2d 139 (E.D.N.Y., 2000), Class Action Settlement Agreement, art. 4.2 available at http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf ("Settling Defendants shall pay Matched Assets, together with interest and fees . . . to rightful claimants as and when determined by the ICEP or the Claims Resolution Tribunal. *Such payments of Matched Assets shall be deemed to be included in, and part of, the Settlement Amount and shall in no event cause the Settlement Amount to be increased.*") (emphasis added).

82. Press Release, ICEP Claims Process Underway in \$1.25 Billion Swiss Bank Settlement, (Apr. 17, 2001) available at http://www.swissbankclaims.com/pdfs_eng/pressreleasefinal.pdf.

83. See *infra* Part II(A) and accompanying notes.

84. See *infra* Part II(B) and accompanying notes.

85. Roger P. Alford & Peter H.F. Bekker, *International Courts and Tribunals*, 33 INT'L LAW. 537, 548 (1999).

86. *Id.*

87. *Id.*

The Tribunal received almost 10,000 claims to the 5,570 accounts published in 1997.⁸⁸ The Tribunal had three distinct procedures for resolving these original claims.⁸⁹ The “initial screening” procedure was a process designed to protect the banks’ obligation of confidentiality to account holders. This process established whether a claimant had submitted any information on his or her entitlement to the assets in the dormant account or whether it was otherwise apparent that he or she was not entitled to the account.⁹⁰ For example, many claimants would submit information based solely on the similarity of surnames, believing that this was sufficient information to secure the assets in the account.⁹¹ Others provided relevant information about the relative they believed to be an account holder, which invalidated their claims. This included information which clearly established a mismatch, such as the wrong gender, the wrong birth or death date, or the wrong names of parents, siblings or spouse.⁹² The Tribunal was able to maintain confidentiality of bank information while preventing unmeritorious claimants from securing access to bank documents by reviewing the bank documents in conjunction with the information submitted by the claimants. Approximately ninety percent of claims submitted to the Tribunal for initial screening did not go forward to arbitration because they did not pass the initial screening threshold.⁹³

If the bank or the Tribunal determined that the claimant should receive the information contained in the bank documents, the claims were subsequently submitted for consideration under either a “fast track procedure” or an “ordinary procedure.”⁹⁴ The “fast track” procedure was applied when a bank believed that the claimants were entitled to the assets in the account and requested the Tribunal to render an award or confirm a settlement agreement reached between the banks and the claimants.⁹⁵ Subject to confirmation that the request conformed with the claims resolution process, the Tribunal generally granted such requests.⁹⁶ Of particular concern to the Tribunal was a finding that there were no other possible heirs that could be adversely affected by an award to a claimant and that there was no information before the Tribunal that might render its plausibility suspect.

88. See Final Report (Sept. 30, 2001), available at <http://www.crt.ch/statistics.html>.

89. Rules of Procedure for the Claims Resolution Process, art. 10, (Oct. 15, 1997) [hereinafter CRT I Rules] (reprinted in VOLCKER REPORT, *supra* note 2, at A-31), available at http://www.crt.ch/rules_procedure.html.

90. *Id.* Article 10 of the Tribunal’s Rules provides that: “The Sole Arbitrator shall order that the name of the bank and the amount held in the dormant account be disclosed to the claimant, unless he or she determines in the initial screening that (i.) the claimant has not submitted any information on his or her entitlement to the dormant account, or (ii.) if it is apparent that the claimant is not entitled to the dormant account, in which case the Sole Arbitrator shall not accept the claim for further processing and shall not disclose to the claimant the name of the bank or the amount held in the dormant account.” *Id.*

91. Docket No: 6212/0898/LH, available at http://www.crt.ch/decision_en/6212.html.

92. Docket No: 3288/0498/NW/MJ, available at http://www.crt.ch/decision_en/3288.html.

93. Roger P. Alford, Peter H.F. Bekker, & Mark B. Rees, *International Courts and Tribunals*, 34 INT’L LAW. 651, 666 (2000).

94. *Id.*

95. *Id.*; see also, *supra* note 89, at arts. 11-13.

96. CRT I Rules, *supra* note 89, at arts. 11-13.

Case 7827 illustrates a typical fast track claim. Seven heirs of an account holder submitted claims seeking the assets held by the bank.⁹⁷ The bank reported that the account consisted of a safe deposit box containing 114 gold coins.⁹⁸ The claimants all agreed that they were the closest surviving relatives, and that the claims should be distributed based on their degree of relationship from the account holder.⁹⁹ The claimants and the bank requested that one claimant receive one-fourth of the assets in the account, three claimants receive one-sixth of the assets in the account, and three claimants receive one-twelfth of the assets in the account.¹⁰⁰ Based on this information, the Tribunal found that the settlement agreement between the claimants and the bank was consistent with the claims resolution process, and awarded one claimant twenty-seven gold coins, three claimants nineteen gold coins each, and the remaining three claimants ten gold coins each.¹⁰¹

Where the Tribunal was of the view that the claim should not be resolved by fast track, it referred the matter to ordinary procedure.¹⁰² For example, in *Case 5427*, the bank requested that a claim submitted by the nephew of the account holder be resolved by the Tribunal in the fast track procedure.¹⁰³ After reviewing the nephew's claim together with a claim submitted by the purported son of the account holder, the Tribunal denied the fast track request and referred both claims for resolution in the ordinary procedure.¹⁰⁴

All claims not resolved by the fast track procedure were resolved by the ordinary procedure.¹⁰⁵ This process involved a full review of the claims and all available evidence in an expedited procedure.¹⁰⁶ Recognizing the difficulty of establishing a claim given the destruction of documents and the passage of time, the burden of proof required is that it is "plausible in light of all the circumstances" that the claimant is entitled to the claimed account.¹⁰⁷ Because these claims presented the most difficult and interesting legal issues, they were re-

97. Docket No: 7827/1198/RO, available at http://www.crt.ch/decision_en/7827.html.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. CRT I Rules, *supra* note 89, at art. 13 ("A claim submitted to the fast track procedure shall be referred to a Claims Panel for decision in the ordinary procedure if the Sole Arbitrator . . . determines that (a.) the entitlement of the claimant cannot be verified by simple inquiries in accordance with art. 12 (i); (b.) the determination of the amount due to the claimant requires detailed and complicated calculations or inquiries; or (c.) a full review by a Claims Panel is appropriate for other reasons.").

103. Consolidated Docket No: 5427/0798/SR/KD/RO, available at http://www.crt.ch/decision_en/5427.html.

104. *Id.*; see also Docket No: 6088/0898/NI, available at http://www.crt.ch/decision_en/6088.html.

105. CRT I Rules, *supra* note 89, at art. 14.

106. *Id.*

107. *Id.* at art. 22 ("The claimant must show that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the dormant account. The Sole Arbitrators or the Claims Panels shall assess all information submitted by the parties or otherwise available to them. They shall at all times bear in mind the difficulties of proving a claim after the destruction of the Second World War and the Holocaust and the long time that has lapsed since the opening of these dormant accounts.").

solved by a panel of three arbitrators under procedures not unlike traditional international arbitration.

The arbitration panels confronted many challenging questions of law and fact. Frequently there were concerns that the claimants who had submitted claims were not the sole or closest heirs of the account holder.¹⁰⁸ Uncertainties arose where the claimant clearly had a relative with the same name as the account holder, but it was uncertain whether this person was in fact the account holder. In some cases, two competing claimants identified two distinct individuals with the same name as the account holder.¹⁰⁹ Numerous accounts were jointly held by two or more account holders, with one set of claimants related to one account holder and the other claimants related to the other account holder. Depending on which account holder survived the other and the terms of the contract with the bank, the assets generally would be distributed to only one set of claimants.¹¹⁰ On rare occasions a company held the account, and questions arose as to whether the assets in the account should be awarded to the successor entity or to the heirs of the original shareholders of the company.¹¹¹ In some cases, there was so little information contained in the bank documents that it was difficult for the Tribunal to determine if the claimant had a plausible claim of entitlement to the account. Given the general obligation of the banks to maintain account opening information, this frequently led to an award of the assets in the account to the claimant.¹¹²

Finally, if the Tribunal determined that the claimant was entitled to the assets in the account, it would render a partial award ordering the bank to distribute these assets to the claimant.¹¹³ The Tribunal would then determine whether the claimant was entitled to additional compensation reflecting unpaid interest on the account and reimbursement of bank fees.¹¹⁴ The claimant would receive the adjustment provided the account holder was determined to be a victim or target of Nazi persecution.¹¹⁵

Calculating the adjustment is complex, but essentially requires four major steps. The Tribunal's Rules on Interest, Charges and Fees stipulated that in calculating the adjustment, the Tribunal must: (1) determine the earliest known book value of the account; (2) back out estimated fees charged on the account from that date to determine the estimated value of the account in 1944; (3) for interest-bearing accounts, adjust this amount by a discount factor to reflect interest on the account from 1944 to the earliest known book value date; and (4) then

108. Consolidated Docket No: 5628/0798/SW/GD/PJ, available at http://www.crt.ch/decision_en/5628.html.

109. Consolidated Docket No: 2321/0498/JF/GD, available at http://www.crt.ch/decision_en/2321.html.

110. Consolidated Docket No: 5563/0798/RO, available at http://www.crt.ch/decision_en/5563.html.

111. Consolidated Docket No: 2012/0498/MJ, *supra* note 66, available at http://www.crt.ch/decision_en/2012.html.

112. Docket No: 6172/0898/NW/PJ, available at http://www.crt.ch/decision_en/6172.html.

113. CRT I Rules, *supra* note 89, at arts. 31-33.

114. *See id.* at art. 12.

115. *Id.* at art. 15.

apply a factor of 10 (more for managed accounts) from that amount to adjust for compound investment return from 1944 to the end of 1999.¹¹⁶ For example, if an account holder with a non-interest bearing current account having 1,000 Swiss Francs in 1986 was found to be a victim of Nazi persecution, the Tribunal would back out fees of 665 Swiss Francs (representing the amount of charges normally assessed on current accounts from 1944 to 1986), and then apply a factor of ten to 1,665 Swiss Francs, thus awarding the claimant a total of approximately 16,650 Swiss Francs. If the account was an interest-bearing savings or custody account, the Tribunal would apply Schedule B and discount 1,665 Swiss Francs by 2.99 (the discount factor that reflects appreciation from 1944 to 1986) to arrive at an original account value of 556.86 Swiss Francs, and then apply a factor of ten to this amount, awarding the claimant a total of approximately 5,568.60 Swiss Francs.

Most awards have been rendered for claims to accounts held by persons who were not identified as victims or targets of Nazi persecution. According to a Final Report of the Claims Resolution Tribunal published on September 30, 2001, the Tribunal had rendered 49 million Swiss Francs in awards to claimants to “non-Victim” accounts, while only 16 million Swiss Francs had been awarded to claimants of Victim accounts.¹¹⁷

B. *CRT II Procedure*

Beginning in February 2001, the Tribunal launched phase two of its procedure. In many respects CRT II is quite similar to the original procedure. Although utilizing a new set of rules, the Tribunal will continue to conduct a case-by-case analysis of each claim to determine if the claimant is plausibly entitled to the assets in the account.¹¹⁸ The burden of proof will continue to be the same: each claimant must demonstrate that it is plausible in light of all the circumstances that he or she is entitled to the claimed account.¹¹⁹ The Tribunal also will continue to make an initial determination of whether the claimant has provided any information as to the plausibility of the claim or whether it is otherwise apparent that the claimant is not entitled.¹²⁰ This is done in terms of “admissibility” of a claim rather than “initial screening,” but for practical purposes there is little difference. Under the former procedure the claimant was not invited to submit their claim to arbitration if they did not pass the initial screen-

116. CRT I Rules on Interest, *supra* note 65.

117. Final Report, *supra* note 88.

118. Rules Governing the Claims Resolution Process, [hereinafter CRT II Rules] available at http://www.crt-ii.org/_pdf/governing_rules_en.pdf.

119. *Id.* at art. 22.

120. *Id.* at art. 23(2) (“A claim to the Tribunal is inadmissible if (a) the Claimant has provided not plausible information indicating that the person he or she believes to be the Account Owner was a Victim, or (b) the claim is based essentially on a statement that the Claimant or his or her relative and the Account Owner have the same or similar last name, or (c) the Claimant has provided no relevant information and/or documentation regarding his or her relationship to the Account Owner, or (d) the Claimant has not asserted a relationship to the Account Owner that would justify an Award to the Account, or (e) it is apparent that the person the Claimant believes to be the Account Owner and the actual Account Owner are not the same person.”).

ing threshold; under the latter procedure the claim will be deemed inadmissible if it does not pass the relevant criteria. Finally, fifteen of the seventeen arbitrators and Secretariat that resolved claims under the first procedure will resolve claims under the new procedure. This will insure that qualified attorneys and staff members trained in resolving claims under the old procedure will be utilized for the new procedure.

However, there are several noticeable differences between the original and subsequent procedures. Most important, the CRT II procedure will be under the supervision of a federal district court judge in New York, whereas the first procedure was an international arbitration process conducted under the supervision of the Volcker Commission.¹²¹ Continuity of supervision will be maintained, however, because the federal district court judge appointed Paul Volcker and Michael Bradfield, respectively chairman and counsel of the Volcker Commission, as Special Masters under the new procedure.¹²²

Another significant difference is that only claims to accounts held by victims or targets of Nazi persecution will be admissible.¹²³ Article 15 of the CRT II Rules provides that the Tribunal “shall have jurisdiction to resolve claims to Accounts of Victims open or opened in Swiss banks during the Relevant Period and to certify to the Court for payment the value of Accounts.”¹²⁴ This is a salutary development. In CRT I, the Holocaust connection had a remedial nexus. The only relevance that the Holocaust had to claims was that a Holocaust connection could be subject to the interest and fee adjustment.¹²⁵ As a result, the Tribunal and its Secretariat spent a tremendous amount of time and energy resolving claims to dormant accounts that had no Holocaust connection.¹²⁶ By making the Holocaust connection a jurisdictional requirement, the Tribunal can be confident that it will not waste valuable resources resolving claims that have no business before the Tribunal.

Finally, the nature of the proceeding is different from the original procedure. The first procedure was an international arbitration pursuant to an agreement between the parties. The procedure established under CRT II is arguably not arbitration, because the procedure is not established pursuant to an arbitration agreement between claimants and defendants and the arbitral tribunal is not empowered to determine the total liability of the defendants and the amount of damages owed by the defendants. Rather, it takes the form of a court-sponsored alternative dispute resolution process in which both banks and claimants agree to a set of procedures for resolution of claims and have certain rights and obliga-

121. See *supra* Part II and accompanying notes.

122. *In re Holocaust Victims Assets Litigation, Referral to Special Masters For Claims Resolution Process for Deposited Assets*, (E.D.N.Y. 2000) (No. CV 96-4849), available at http://www.specialmasters.org/_press_releases/96cv4849ref12800.pdf.

123. CRT II Rules, *supra* note 118, at art. 15.

124. *Id.*

125. See *supra* Part II(A) and accompanying notes.

126. According to the Secretary General of the Tribunal, Alexander Jolles, seventy-nine percent of the accounts subject to the CRT I process were not Holocaust accounts. See Adam Sage and Roger Boyes, *Swiss Holocaust Cash Revealed to be Myth*, LONDON TIMES, Oct. 13, 2001.

tions.¹²⁷ The Tribunal has expressed the view that banks are not parties to the proceedings,¹²⁸ but this is only partially correct. In the settlement agreement between Swiss banks and the plaintiffs, the banks agreed to a procedure for resolution of these claims under the supervision of the federal district court judge. The Settlement Agreement provided for the Claims Resolution Tribunal to carry out the claims resolution process to distribute the Settlement Fund, and the banks committed to “good faith cooperation with the implementation of the settlement.”¹²⁹ In appointing the Special Masters, the court vested powers in these individuals to implement the claims resolution process in recognition that the Settlement Agreement supports the resolution of claims by the Claims Resolution Tribunal. Moreover, in the CRT II Rules, the banks are vested with certain rights and obligations, including the obligation to provide the Tribunal with access to bank documents and information, and the right to appeal certain decisions of the Tribunal to the New York federal district court.¹³⁰

The Tribunal has made numerous changes to its procedures to expedite the process. One important change is with respect to the distribution of assets among the claimants. In distributing assets, the Tribunal eliminated the concept of applicable law and resolves claims with a view of achieving the “result that is most fair and equitable under the circumstances.”¹³¹ While this suggests that the Tribunal shall render decisions *ex aequo et bono*, in reality, the Tribunal has dictated the methodology for distribution of the assets. According to the CRT II Rules, the Tribunal will award assets in the account only to persons who have submitted claims. “[A]s a general rule” the rights of individuals to an account

127. See Memorandum and Order, *In re Holocaust victims assets Litigation* (E.D.N.Y. 2000) (No. CV 96-4849), available at http://www.swissbankclaims.com/PDFs_Eng/96cv4849mo12800.pdf (“The . . . Claims Resolution Tribunal (“CRT”) will administer the Deposited Assets Class claims process on behalf of the Court. . . . I have decided to appoint CRT Special Masters [Paul Volcker and Michael Bradfield] to closely supervise the day-to-day supervision of the CRT and to regularly monitor its activities.”).

128. CRT II Rules, *supra* note 118, Introduction (“In this process, banks will not be parties to the proceedings but are cooperating by assisting in making certain information available for the claims resolution process.”).

129. Referral to Special Masters For Claims Resolution Process for Deposited Assets, *In re Holocaust victims assets Litigation* (E.D.N.Y. 2000), available at http://www.specialmasters.org/_press_releases/96cv4849ref12800.pdf.

130. CRT II Rules, *supra* note 118, at arts. 5-6. Not surprisingly, the essential obligation of the banks is to provide the Tribunal with access, albeit limited, to bank account information. For example, Article 5 provides that the banks must maintain a database and keep this information in secure facilities and at the disposal of the Tribunal. *Id.* The banks also must put the account database on a secure network that is available to the Tribunal. *Id.* The banks are also required to permit on-site inspection by Tribunal personnel of information not contained in the account databases. *Id.* Finally, Article 6 provides that for any information not made available under Articles 1-5, the Tribunal may seek the “voluntarily” assistance of the banks. *Id.* In terms of rights, the fundamental question of whether a claim matches information contained in a Swiss bank account is subject to a number of limitations. The relevant bank must be informed if the Tribunal initiates Article 26 matching and the bank may “appeal” a matching decision of the Tribunal to the Special Masters and the federal district court. *Id.* at art. 27. In submitting a claim for resolution, the claimant agrees that the claim “shall be adjudicated by the Claims Resolution Tribunal according to its Rules of Procedure” including a provision on bank immunity. Claim Form Instruction Sheet, available at http://www.crt-ii.org/_pdf/claim_instr_ro_en.pdf; see also CRT II Rules, *supra* note 118, at art. 50.

131. CRT II Rules, *supra* note 118, at art. 33.

who have not submitted claims will “not be considered.”¹³² Assuming claimants have correctly identified the account holder as their relative, the assets shall be divided only among those members of the family who submitted claims, with the order of priority being that of the account holder’s (1) spouse, (2) children, (3) grandchildren, (4) siblings and their descendants, and (5) grandparents and their descendants.¹³³

III.

SALIENT LEGAL ISSUES

There are a number of difficult legal issues that have arisen in resolving claims to Holocaust accounts. This section will focus on a few of the most problematic issues: the burden of proof, applicable law, and defining what constitutes a Holocaust account.

A. *Burden of Proof*

Perhaps the most difficult task of the Tribunal is determining whether a claimant has satisfied the burden of proof that he or she is entitled to the assets in the account. The burden of proof standard that is utilized by the Tribunal is quite unusual. Under Article 22 of the CRT I Rules, a claimant must show that it is plausible in light of all the circumstances that he or she is entitled, in whole or in part, to the dormant account.¹³⁴ The standard reflects the difficulty claimants face in establishing their claims due to the destruction of documents during and after the Second World War as well as the passage of over forty years when memories fade. Nonetheless, plausibility is an extremely difficult standard to apply. A few illustrations underscore this point.

In one case, an account holder was a Hungarian national who died in Auschwitz in 1945.¹³⁵ Two claimants came forward to procure the assets in the account.¹³⁶ One provided significant documentary support to clearly establish that he was the nephew of the account holder.¹³⁷ The other claimant alleged that he was the son of the account holder and had been separated from his family at the beginning of the war due to a serious head injury.¹³⁸ The only evidence he had to support his story was circumstantial.¹³⁹ He provided a statement by two witnesses who recalled a small boy in a foster home with a head injury who purportedly was Jewish and from Vespem, Hungary, the account holder’s home-town.¹⁴⁰ He also provided another witness who testified that she recalled that the account holder’s smallest child suffered a serious head injury in July

132. *Id.* at art. 30.

133. *Id.* at art. 29.

134. CRT I Rules, *supra* note 89, at art. 22.

135. Consolidated Docket No. 5427/0798/SR/KD/RO, available at http://www.crt.ch/decision_en/5427.html.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

1944.¹⁴¹ This claimant also provided physical evidence indicating that he had suffered a serious injury in the past. Additionally, he established that he was circumcised and, therefore, allegedly Jewish.¹⁴² Despite requests from the Tribunal, the claimant provided no documentary evidence, such as a birth certificate, in support of his claim.¹⁴³ Over the vigorous objections from the nephew, the Tribunal applied Article 22 and concluded that it is at least plausible that the claimant was the son of the account holder.¹⁴⁴ It further found that because a son has a better claim of entitlement to the assets in the account, the nephew should not receive any of the assets.¹⁴⁵

The plausibility standard can also have the unusual result of double payments to two competing sets of claimants. One element of the Article 22 plausibility analysis requires a finding that “no reasonable basis exists to conclude that . . . other persons may have an identical or better claim to the dormant account.”¹⁴⁶ In several cases, the Tribunal has been faced with scant bank records regarding the account holder. In many cases, the only information about the account holder that the claimant can produce is a signature and an address. Additionally, multiple claimants may come forward establishing that they have a relative with that name from that town, but who are clearly different persons. In cases where the relative of either claimant could plausibly be the account holder, the Tribunal has determined that the claims are not identical, but are equally plausible.¹⁴⁷ Therefore, the Tribunal has awarded the full amount in the account to both claimants.

In the CRT II Rules, the Tribunal has maintained the plausibility standard, but has clarified the result when dealing with competing claimants. According to Article 28 of the CRT II Rules, “[w]hen a number of related Claimants have established a plausible relationship to the Account Owner, the Tribunal will make an Award in favor of the Claimant who has established the closest relationship to the Account Owner.”¹⁴⁸ In addition, Article 32 provides:

In cases where the identity of the Account Owner cannot be precisely determined due to the limited information contained in the bank documents, and where several unrelated Claimants have established a plausible relationship to a person with the same name as the Account Owner, the Award will provide for a pro rata share of the full amount in the Account to each Claimant or group of Claimants who would otherwise be entitled under these Rules.¹⁴⁹

Although these rules provide helpful clarifications on the approach to be taken by the Tribunal in applying the plausibility standard, they do not alleviate the underlying difficulty of denying one strong claim of a distant relative be-

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. CRT I Rules, *supra* note 89.

147. Thomas Buergenthal, *Arbitrating Entitlement to Dormant Bank Accounts*, 15 FOREIGN INVESTMENT L. J. 301, 313 (2000).

148. CRT II Rules, *supra* note 118, at art. 28.

149. *Id.* at art. 32.

cause another dubious and yet plausible claim of a closer “relative” has been submitted.

B. *Applicable Law*

Another critical problem for the Tribunal concerns the applicable law. Pursuant to Article 16 of the CRT I Rules, the Tribunal is required to “apply the law with which the matter in dispute has the closest connection in deciding matters concerning the relationship between the published account holder . . . and the claimant.”¹⁵⁰ In several cases the Tribunal has faced difficulty in applying this standard.

Assume that an account holder, his spouse, and their children all were deported to a concentration camp in Poland and subsequently murdered. The nieces and nephews of the account holder claim the account, as do the nieces and nephews of the spouse of the account holder. All of these relatives are now scattered throughout Europe and the Americas. The question arises as to who is entitled to receive the assets in the account: the heirs of the account holder, the heirs of the account holder’s spouse, or some combination. The result may depend on who survived whom, or in the absence of such information, on the application of a *commorientes* presumption that there were no survivors of the common calamity. According to traditional rules, if the spouse survived the account holder, then their relatives should receive the assets in the account. But if one presumes that neither spouse survived the other, the account holder’s relatives should receive the assets in the account. In an attempt to resolve such a case, the Tribunal would first look to the facts to determine if there is any indication of survivorship, and in the absence thereof, it would then determine the applicable law and look to it to ascertain whether it adopts a *commorientes* presumption of no survivorship.¹⁵¹

Even assuming the choice of law is clear, one must also consider the temporal application of that law. For example, assume that a claimant submits a claim regarding the account of a national asserting that he or she is the heir of an illegitimate son of the account holder. While it may be clear that the law of the national applies, it is not clear whether one should apply the law of that country as it existed in 1945 or the law of that country as it exists today. Application of the old law would result in a finding that the heir of an illegitimate child has no inheritance rights. In contrast, modern law eliminates that distinction and would grant the claimant the assets in the account. Moreover, if one applies the old law, this may violate the public policy of Switzerland, and be subject to an enforcement challenge under the New York Convention.¹⁵² As Judge Burgerthal has put it:

150. CRT I Rules, *supra* note 89, at art. 16.

151. *Id.*; see also http://www.crt.ch/decision_en/5628.html.

152. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), June 10, 1958, art. V(2)(b), 21 U.S.T. 2517, 2519, 330 U.N.T.S. 38 (permitting a court to refuse recognition and enforcement where “the recognition or enforcement of the award would be contrary to the public policy of that country”).

Public policy considerations or laws which may in the past have discriminated against women or persons born out of wedlock . . . or which did not recognize common law marriages or had special rules applicable to adoptions, may also have been substantially modified or modernized. Some of the old laws may today also conflict with the provisions of applicable human rights treaties. . . . It is thus readily apparent that the formalistic application of the law in force at the time of the account holder's death could produce results difficult to square with the demands of a claims resolution process that is defined to do justice in a world far removed from that of the account holder.¹⁵³

The applicable law questions of CRT I were eliminated in the CRT II procedures, but unfortunately these procedures have created new problems. As noted above, under the new procedure the results are pre-ordained based on the methodology set forth in Article 29 of the CRT II Rules.¹⁵⁴ Under the new approach, preference is always given to the relative who submitted a claim, whether or not there are other living family members with a closer connection to the account holder.¹⁵⁵ This has the advantage of simplifying the distribution of assets in the account among relatives of the account holder, but creates undesirable results. First, no matter how strong the relationship to the account holder, if a relative does not submit a claim to the account, then more distant relatives will receive the assets in the account. Accordingly, it is to be expected that elderly, infirmed, unsophisticated and minority-language relatives who are less likely to submit claims will therefore be excluded from the process. Second, if a claimant is related to the surviving spouse of the account holder who has since deceased, that person has no claim to the account despite the fact that under most legal systems they would have a strong claim of inheritance. Third, the CRT II Rules presume the existence of general principles of inheritance law that are common to all nations.¹⁵⁶ Ignoring notions of applicable law, the Tribunal bases its determination on one set of inheritance principles to the exclusion of others. For example, in many Latin American countries preference is given to the children and parents of the deceased over surviving spouses.¹⁵⁷ The Tribunal's approach also ignores the relevance of any mandatory reserve requirements in the inheritance laws of various countries. These laws are designed to protect spouses and children from being excluded from a decedent's estate. Finally, the approach is problematic if the account holder left a Last Will and Testament. If the account holder has a Will that gives all of their assets to one family member who has not submitted a claim, the Tribunal will ignore the wishes of the account holder to disinherit other family members, and will award the assets to those family members who have submitted claims.

This approach may be justified as an expeditious mechanism to resolve a mass claims conundrum. But viable alternatives exist. The Claim Form and CRT II Rules could impose an obligation on claimants to distribute assets re-

153. Buergenthal, *supra* note 147, at 317.

154. CRT II Rules, *supra* note 118, at art. 29.

155. *Id.*

156. *Id.*

157. See, e.g., Consolidated Docket No. 5563/0798/RO, available at http://www.crt.ch/decision_en/5563.html.

ceived from the Tribunal to other relatives with a closer connection to the account holder. The Tribunal could apply a presumption that the applicable law is the country of the account holder's last known address. The Tribunal is well acquainted with the inheritance laws of the major countries, and could apply the appropriate law to determine the distribution of the account assets. Finally, the Tribunal could have given itself more discretion by simply adopting a provision authorizing it to resolve claims *ex aequo et bono* without the strictures of Article 29. However, none of these alternatives have been adopted.

C. Defining a "Holocaust Account"

If the purpose of the Claims Resolution Tribunal is to "provide for simple justice for those victims (and their heirs) with unsatisfied claims on accounts in Swiss Banks"¹⁵⁸ one of the key questions for the Zurich Tribunal is what constitutes a Holocaust account, or more accurately, precisely who is a victim of Nazi persecution? Under the Tribunal's Rules, a victim of Nazi persecution is defined as any person who was persecuted or targeted for persecution by the Nazi regime because he or she was, or was believed to be, Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped.¹⁵⁹

While this definition is useful and appropriate for the vast majority of cases, it has difficulties. The definition is arguably both under-inclusive and over-inclusive. One may view the definition as over-inclusive in that it includes within its ambit all persons who were within a targeted group, or believed to be within a targeted group, and yet evaded all forms of persecution. Despite the fact that they were unsuccessfully *targeted* for persecution, they are deemed a "victim of Nazi persecution." Such an over-inclusive definition may well be understandable given that such individuals likely were victimized from a well-founded fear of persecution, regardless of the fact that such persecution never materialized. More troubling is that the definition also is under-inclusive in that it excludes entire categories of individuals that were victimized by the Holocaust, including prisoners of war, political dissidents, and ethnic Slavs. The Tribunal has heard cases in which account holders were political dissidents who were murdered because of their opposition to the Nazi regime. Yet, under the Tribunal's under-inclusive definition, the Tribunal informs claimants to these accounts that the account holder was not a "victim of Nazi persecution." Undoubtedly many of these claimants find the news impossible to accept, when told their relative was not a "victim" of the Holocaust.

158. VOLCKER REPORT, *supra* note 2, at 2.

159. See CRT I Rules on Interest, *supra* note 65, at art. 2(I) (defining a victim of Nazi persecution to be "[a]ny individual, corporation, partnership, sole proprietorship, unincorporated association, community, congregation, group, organization, or other entity persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped"); see also CRT II Rules, *supra* note 118, at art. 52(27) (defining a Victim or Target of Nazi Persecution as "any person or entity persecuted or targeted for persecuted by the Nazi regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped").

The definition's under-inclusive and over-inclusive shortcomings have real implications. Under CRT I, a successful claimant of an account holder that was not a "victim of Nazi persecution" received only the assets currently in the account.¹⁶⁰ By contrast, a successful claimant who is the heir of a Holocaust victim received the assets in the account, plus reimbursement for fifty years of bank fees and payment of unpaid interest based on a special adjustment factor.¹⁶¹ The impact is even starker under CRT II procedure. Only an account holder who is a "Victim or Target of Nazi persecution" as defined above is subject to the Tribunal's jurisdiction.¹⁶² Accounts held by victims of the Holocaust that do not fall within the Tribunal's definition will not be adjudicated by the Tribunal at all.

Strictly applying these definitions can have seemingly unjust results. Imagine then, that you have two watchmakers who live in Nazi-occupied Holland. Prior to the war both watchmakers made occasional trips to Switzerland to purchase Swiss watches and as a result each had a Swiss bank account that had a balance in 1945 of 1,000 Swiss Francs. One family, whom we will call the Ten Boom family, live in Haarlem and are devout Catholics. They are active in the underground movement to smuggle Jews out of harm's way. The Germans discover this smuggling activity, expropriate the watchmaker's shop, murder the elderly watchmaker and his spouse on the spot, and send the rest of the family to a concentration camp. Only the youngest daughter survives the war. The other watchmaker and his family, whom we will call the Van Loos family, live in Amsterdam and are quiet but devout Jehovah's Witnesses. Living in fear of discovery, they do nothing to help the Jews or other persons seeking shelter from persecution. Try as they might, the Nazis never discover the true religious beliefs of this watchmaker and his family. The entire Van Loos family survives the war without incident. Fifty years later, the heirs of each watchmaker pursue claims before the Tribunal and seek the assets located in the respective Swiss bank accounts. The last known value of each account in 1986 was 335 Swiss Francs.

160. In some cases in which the account holder was not a victim or target of Nazi persecution but the account was an interest-bearing account or had been collectivized into a collective account, the Tribunal asked the banks to complete a Financial Information Checklist stating when interest was last paid on the account and to calculate how much interest was owed. For interest-bearing accounts, this was done to reflect the contractual obligation of banks to pay interest on these accounts and to be consistent with the assurances given to claimants that if the account was interest bearing, they would receive the appropriate interest that has accrued during the dormancy of the account. Interest was paid to claimants for collective accounts to reflect the benefit of the bank using these funds as if they were savings accounts. These claimants received adjustments for unpaid interest, but did not enjoy the significant benefits of victim claimants, who have fees backed out and a multiplying factor applied to the original account balance.

161. See CRT I Rules on Interest, *supra* note 65, at 4(a) ("The CVAF [Current Value Adjustment Factor] and FA [Fee Adjustment] shall apply to accounts of victims of Nazi persecution open or opened in the Relevant Period as provided in these Rules.").

162. See *supra* note 159 and accompanying text; see also CRT II Rules, *supra* note 118, at art. 15 (providing that "[t]he Claims Resolution Tribunal shall have jurisdiction to resolve claims to Accounts of Victims open or opened in Swiss banks during the Relevant Period.").

Under the CRT I Rules, the Ten Boom daughter will receive 335 Swiss Francs. If she inquires, she will be told that she could have received much more if only her father had been a victim of Nazi persecution. By contrast, the Van Loos family will be told that Mr. Van Loos was a victim of Nazi persecution because he was a Jehovah's Witness who was targeted by the Nazis. Therefore, his heirs are entitled to receive approximately 10,000 Swiss Francs.¹⁶³ Under the CRT II Rules, the Van Loos family would again received approximately 10,000 Swiss Francs, while the Ten Boom daughter would have her claim deemed inadmissible because it does not related to a Holocaust account. Clearly, the result is incongruous.

Although the above example is only a heuristic device, there are in fact many cases in which persecuted political dissidents or prisoners of war are not deemed victims while other less harmed account holders are deemed to be victims because they fell within a targeted category. There is no published information about the precise number of account holders who were persecuted by the Nazis but fell outside the Victim definition, nor of account holders who fell within the definition but suffered no actual persecution. However, the estimated number is not insignificant. At least to some degree, the moral credibility of the Tribunal is undermined by resolving cases in a manner insensitive to the true nature of the life experiences of the account holders.

There are a few cases that are available to the public. As briefly mentioned above, one of the most important is *Claim 2012*, in which the Tribunal addressed claims to a bank account held by a Jewish-owned company that was expropriated by Nazi-collaborators in Bucharest, Romania.¹⁶⁴ The bank reported that in 1998 the assets in the account totaled 9.60 Swiss Francs, but that in 1945 the assets totaled 6,212.00 Swiss Francs.¹⁶⁵ One of the claimants, Claimant 3, alleged that he and his sister were the sole heirs of the original founders and owners of the company.¹⁶⁶ This claimant provided evidence that his father and uncle were dismissed from the company by the Romanian government for being Jewish in 1940, the company and its assets were unlawfully and forcefully taken over in return for only a paltry sum.¹⁶⁷ Among the documents provided was a list published in a Romanian newspaper containing names of Jews fired by the Romanian government from their respective companies.¹⁶⁸ Included therein was the name of this claimant's father and uncle as persons fired from the company.¹⁶⁹ The Tribunal concluded that:

Based on the information provided by Claimant 3, which was not refuted by any of the other Claimants, and based on the fact that as of September 1940, a fascist

163. This is calculated based on an account balance in 1986 of 335 Swiss Francs, plus the backing out of fees from 1945 to 1986 of 665 Swiss Francs, and then applying a multiplying factor of 10 to the estimated original account balance of 1,000 Swiss Francs. See *supra* note 116 and accompanying text.

164. See *supra* notes 66 & 111 and accompanying text.

165. See *supra* note 66.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

government, made up of Iron Guard members, army officers and Nazi elements, was set up in Romania, the Claims Panel finds it plausible that the assets of the company, including those deposited in the Account, were looted from the M. family.¹⁷⁰

Accordingly, the Tribunal found that Claimant 3 had a valid claim to the assets in the account and that "compensation for special interest and bank fees previously deducted will be added on the basis of [the Rules on Interest]."¹⁷¹ The effect of this holding is that Claimant 3 and his sister will receive approximately 62,000 Swiss Francs, representing ten times the balance in the account as of 1945, notwithstanding that in 1998 the bank account had only 9.60 Swiss Francs.

Contrast this with other company accounts held in Swiss banks in which the original shareholders were not Jewish or among the other Victim classifications. The Tribunal has held that to the extent an account was held by a Nazi-expropriated company whose shareholders were not Jewish (or one of the other specified victim categories), then the successful claimants are entitled only to the assets in the account as of the date of the award.

However, the Tribunal is not responsible for this incongruity. It is subject to the rules established by the Volcker Commission, which expressly state that in deciding matters relating to interest, fees and charges, the Sole Arbitrators and Claims Panels shall apply the Rules on Interest promulgated by the Volcker Commission.¹⁷² In drafting the definition, the Volcker Commission relied on the identical definition set forth in the Settlement Agreement reached in the New York class action litigation.¹⁷³ Yet such wholesale reliance on the definition in the Settlement Agreement is problematic for several reasons.

The Volcker Commission and the Claims Resolution Tribunal were established prior to the signing of the class action Settlement Agreement. The Volcker Commission's principal purpose was to conduct an investigation and establish a claims resolution process for dormant accounts of victims of Nazi persecution that were deposited in Swiss banks before and during World War II.¹⁷⁴ The Volcker Commission understood that "the persecution of minorities by the Nazis and others . . . made it likely that many of the victims sought to move their assets to safety in neutral or Allied countries."¹⁷⁵ The Volcker Commission originally utilized a liberal definition of "Victim of Nazi Persecution,"

170. *Id.*

171. *Id.*

172. CRT I Rules, *supra* note 89, at art. 16 ("In deciding matters relating to interest, fees and charges, the Sole Arbitrators and Claims Panels shall apply the Interest Guidelines recommended by an international panel and as adopted by the Board of Trustees of the Claims Resolution Foundation.").

173. Class Action Settlement Agreement, *supra* note 81, at art. 1 (states that a "Victim or Target of Nazi Persecution" is defined as "any individual, corporation, partnership, sole proprietorship, unincorporated association, community, congregation, group, organization, or other entity persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped.").

174. See *supra* Part I(A) and accompanying notes.

175. Memorandum of Understanding, *supra* note 36.

recognizing that “in the past, this term has been narrowly construed so as to act as a barrier to a complete and just evaluation of the scope of the dormant account issue.”¹⁷⁶ Accordingly, the Volcker Commission concluded that the “[t]he term is to be construed broadly to cover all persons fairly within this concept.”¹⁷⁷ Unfortunately, this inclusive definition was later abandoned in favor of the definition utilized in the Settlement Agreement.¹⁷⁸

In the context of the Settlement Agreement, the justification for this unusual definition is understandable. Faced with the prospect of dividing \$1.25 billion in assets among millions of Holocaust victims, the parties sought a compromise between two extremes. To quote Professor Burt Neuborne, in the settlement negotiations:

[W]e had to walk a line between everyone harmed by the Nazis—which is virtually all of Europe—or only the Jews Both extremes were unacceptable. The first would have so diluted the recovery it would have rendered the whole suit meaningless. The second would have made it unfairly parochial.¹⁷⁹

However, the same justification does not apply to litigation before the Claims Resolution Tribunal. With litigation before the Tribunal, the heirs of a Holocaust victim are to be placed in the position they would be in if the assets were paid out in 1945 (i.e., reimburse all bank fees charged after 1945) and then that money was invested (i.e., compounded investment returns since 1945). The only question is whether or not the assets in a particular account should be subject to such a calculation depending on whether the account holder was, in the Tribunal’s determination, a Holocaust victim.

The Settlement Agreement reached between the Swiss banks and Holocaust claimants anticipated that the Claims Resolution Tribunal would utilize a broader definition of a Holocaust victim in rendering awards, than that of the class action, and that any such award would be set off from the \$1.25 billion settlement amount. Article 4.1 of the Settlement Agreement stipulates that the Swiss banks shall pay:

Matched Assets, *together with interest and fees* as determined pursuant to guidelines established by the ICRF [Independent Claims Resolution Foundation], to rightful claimants as and when determined by . . . the Claims Resolution Tribunal. Such payments of Matched Assets shall be deemed to be included in, and part of, the Settlement Amount¹⁸⁰

The Settlement Agreement further defines “Matched Assets” as “Deposited Assets,”¹⁸¹ which in turn is defined as:

(1) any and all Assets actually or allegedly deposited by the beneficial owner, fiduciary, or other individual or organization with any custodian, including, with-

176. Auditor Reporting Requirements, Dec. 1998, available at http://www.icep-iaep.org/final_report/ICEP_Report_Appendices_A-W.pdf; reprinted in VOLCKER REPORT, *supra* note 2, at app. N, A-79, A-81.

177. *Id.*

178. See *supra* note 159.

179. Henry Weinstein, *Holocaust Survivors, Swiss Banks OK Settlement*, L.A. TIMES, Jan. 23, 1999, at A3 (quoting Professor Burt Neuborne).

180. Class Action Settlement Agreement, *supra* note 81, at art. 4.2 (emphasis added).

181. *Id.* at art. 1 (“Matched Assets means Deposited Assets that the ICEP or the Claims Resolution Tribunal determines belong, and should be paid to, particular claimants.”).

out limitation, a bank . . . in any kind of account . . . prior to May 9, 1945, that belonged to a Victim or Target of Nazi Persecution . . . ; and/or (2) any and all Assets that the ICEP or the Claims Resolution Tribunal determines should be paid to a particular claimant or to the Settlement Fund because the Asset definitely or possibly belonged to *an individual . . . actually persecuted by the Nazi Regime or targeted for persecution by the Nazi Regime for any reason*. A determination by . . . the Claims Resolution Tribunal to award a special adjustment for interest or fees to a particular claimant pursuant to the guidelines . . . on Interest and Fees . . . shall be deemed to establish that the claimant was persecuted or targeted for persecution within the meaning of subsection (2) of this definition.¹⁸²

Thus, to the extent the Rules on Interest and Fees promulgated by the Volcker Commission in 1999 had followed the Settlement Agreement role anticipated for the Tribunal, the Claims Resolution Tribunal would have been authorized, on a case-by-case basis, to determine if an individual account holder was actually persecuted or targeted for persecution by the Nazi Regime *for any reason*. If so, the successful claimant to such an account would have received the amount in the account together with unpaid interest and reimbursement of bank fees.

Finally, the claimants who brought claims before the Claims Resolution Tribunal submitted their claims believing that the Tribunal was responsible for resolving all Holocaust claims to dormant accounts published by the Swiss banks in 1997. They signed an arbitration agreement submitting to the jurisdiction of the CRT and agreeing to abide by its rules of procedure,¹⁸³ including Article 16, which stipulates stipulating that “[i]n deciding matters relating to interest, fees and charges, the Sole Arbitrators and Claims Panels shall apply the Interest Guidelines.”¹⁸⁴ Only years later were these guidelines published, and for the first time were claimants informed of the Volcker Commission’s definition. The claimants are therefore bound by this *ex poste* definition by virtue of the arbitration agreement, with little recourse to challenge the procedure.

If the definition used by the Tribunal as mandated by the Volcker Commission is so problematic, why did they resort to it? Quite simply, the Volcker Commission’s approach reflected a difficult balance between the need for efficiency and the desire for fairness. The Holocaust claims process necessarily is performing an act of rough justice. After the Settlement Agreement was reached, it was natural for the parties who established the Tribunal to streamline the process (particularly the CRT II process), and have the Tribunal’s approach (including its definitions) parallel the approach used in the New York class action litigation.¹⁸⁵ Quite obviously the time involved in establishing a clear Hol-

182. *Id.* (emphasis added).

183. *See, e.g.*, Partial Award in Consolidated Docket No: 5427/0798/SR/KD/RO (Oct. 14, 1999), available at http://www.crt.ch/decision_en/5427.html (“The Bank and each of the Claimants (together, “the Parties”) have signed a Claims Resolution Agreement, thereby agreeing that this claim will be resolved by the Tribunal in accordance with the Rules.”).

184. CRT I Rules, *supra* note 89, at art. 16.

185. *See* Press Release, Special Master Files Proposed Plan of Allocation and Distribution of Settlement Proceeds in the Swiss Bank Ligation (Sept. 12, 2000), available at http://www.icep-iaep.org/final_report/slideshow.pdf. As the Volcker Commission recently stated, “The Committee recommends that any person with a valid claim to a dormant account of a victim . . . should be

ocaust connection on a case-by-case basis could result in a serious delay in the process and therefore a denial of justice for many. This, after all, is a mass claims procedure involving thousands of elderly claimants. The first stage involved over 5,500 account holders, with almost 9,500 claimants.¹⁸⁶ Although it was anticipated that it could be done in a matter of months, over four years to resolve these claims.¹⁸⁷ The second procedure involves 21,000 account holders and, if the previous pattern continues, will have over 25,000 claimants.¹⁸⁸ It is likely that the claims will be far greater in number, as the Court submitted information about the CRT II process to over 560,000 individuals.¹⁸⁹ With the average age of Holocaust survivors estimated to be eighty-one years old,¹⁹⁰ judicial efficiency must be recognized as a key element of procedural fairness.

Many factors must be balanced in considering how the Tribunal's resources can be most effectively used. Is it a legitimate use of Tribunal resources to require targeted persons to establish that they were in fact persecuted? Is it a legitimate use of Tribunal resources to dramatically expand the number of published accounts beyond 30,000 and undertake a case-by-case review of each claim to establish whether, for example, every Czech, Pole, or Hungarian account holder was in fact persecuted by the Nazis? In short, expanding the universe of Holocaust accounts and claimants too broadly would cripple the Tribunal's resources, seriously delaying the process and ultimately resulting in the denial of justice to hundreds of elderly Holocaust survivors and their heirs. In this context, achieving exactly the right result for certain claimants would mean getting no result for hundreds of other claimants. As a result, the Tribunal has placed a significant premium on speed and efficiency.

IV.

REPARATIONS AND A MORAL ACCOUNTING

The modern era of Holocaust investigation and litigation began out of a concern for reparation, not restitution.¹⁹¹ The movement aimed more for a

provided facilities for submitting such a claim. Claims already submitted to ICEP, new claims submitted to the Claims Resolution Tribunal . . . , claims filed with the Class Action Settlement, and claims from the New York Holocaust Claims Processing Office should be matched against the centralized database of accounts and resolved, as appropriate, by the CRT." *Id.*

186. See Final Report, *supra* note 88.

187. Joint Press Release, *supra* note 78 ("The international claims resolution panels will be required to decide claims, with interest or other appropriate adjustments related to fees or other charges, within 6 months after the end of the period for the submission of claims.")

188. See The Claims Resolution Tribunal for Dormant Accounts in Switzerland, *reprinted in* VOLCKER REPORT, *supra* note 2, at 119 ("The Tribunal received 9,776 claims to approximately half of the 5,570 accounts published in July and October 1997. . . ."); see also Claims Resolution Tribunal homepage at <http://www.crt-ii.org/>.

189. Press Release, ICEP, Special Master Files Proposed Plan of Allocation and Distribution of Settlement Proceeds in the Swiss Banks Litigation (Sept. 12, 2000), available at <http://www.swissbankclaims.com/media/pdfs/PressRelease091200.pdf>.

190. Bazylar, *supra* note 10, at 8 and n. 11.

191. Restitution is defined as the "act of restoring; restoration; restoration of anything to its rightful owner; the act of making good or giving equivalent for any loss, damage or injury;" BLACK'S LAW DICTIONARY 1180 (5th ed. 1979). See also Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1279-80 (1989). Restitution originally meant to restore

moral accounting than a financial one.¹⁹² The Volcker Committee has described the process as satisfying a “historic need for a moral accounting for present and future generations of critical events surrounding World War II.”¹⁹³ Paul Volcker himself stated:

The Holocaust represents a terrible moral issue that should never be repeated. . . . There may never be a real sense of closure with respect to the horrors of the Holocaust. After fifty years, the generation with first-hand knowledge of the Holocaust is passing on, and there is clearly a need for some kind of final moral and financial accounting of what took place.¹⁹⁴

What moral impact then, does the Holocaust reparations process have on the parties?

Undoubtedly, the moral accounting impacts Swiss banks. Indeed, it has affected all of Switzerland. The Swiss are rethinking their role during and immediately after the Second World War. As Swiss Ambassador Thomas Borer stated,

Frankly, the debate surrounding Switzerland’s role during and after World War II caught us by surprise. . . . [F]or most of the war years, my country was surrounded on all sides by the Axis powers and under constant threat of being invaded by its powerful and merciless neighbors. For our own survival . . . we had to deal with them to some extent. That said, we Swiss have no desire to white-wash our history. We are determined to reexamine in depth our actions during the Nazi era and its aftermath, for we strongly believe that a country that cannot cope with its past will have difficulties in mastering its future.¹⁹⁵

For Swiss banks, there is an undeniable sense of frustration that their image has been tarnished. The indelible impression is that the banks “made it extremely difficult for surviving family members of Nazi victims to successfully file claims to secure bank . . . assets” and that “[t]his overall pattern of apparent Swiss bankers’ indifference to the needs of the victims of the Holocaust and their heirs persisted until the current international pressures came to bear.”¹⁹⁶ Swiss bankers ignored the moral implications of their actions, and at least some Swiss bankers now recognize as much. Jacques Rossier, managing partner of the oldest private bank in Geneva, has argued that the crisis of 1995 happened because:

something lost or taken away, and “continues to include remedies that restore to plaintiff the specific thing he lost or that undo disrupted transactions and restore both parties to their original positions in kind.” *Id.* Reparation is “the act of making amends for a wrong. Compensation for an injury or wrong, especially] for wartime damages or breach of an international obligation.” BLACK’S LAW DICTIONARY (7th ed. 1999).

192. Alfonse D’Amato, *Justice, Dignity and Restitution of Holocaust Victims’ Assets*, 20 CARDOZO L. REV. 427, 431 (1998). Sen. Alfonse D’Amato relates that when Edgar Bronfman first came to him in December 1995 he remarked, “Alfonse, this is not a question of settling for \$31.5 million. This is not a question of settling for \$150 million or \$250 million. This is a question of getting an accounting and getting justice.” *Id.*

193. Press Release, *supra* note 77.

194. Paul Volcker, *Dormant Accounts in Swiss Banks: The Independent Committee of Eminent Persons*, 20 CARDOZO L. REV. 513, 513 (1998).

195. Statement by Ambassador Thomas G. Borer (Dec. 8, 1997), available at http://www.switzerland.taskforce.ch/G/G2/G2b/971208_e.htm.

196. Stuart Eizenstat Report, *supra* note 54, at viii.

[T]he Swiss Bankers Association, dominated by the two big banks [UBS and Credit Suisse], had neglected the issue of World War II dormant accounts for decades. They had legal, political and administrative reasons for doing so, but they failed to understand the moral aspects of the issue. Moreover, they did not see the political and diplomatic crisis coming in 1995. Faced with the insistent demands of American Jewish and Israeli Organizations, they persisted for too long in their defensive attitude, brushing aside moral concerns.¹⁹⁷

For decades the *modus operandi* of many Swiss banks was denial and obfuscation, and one must say candidly that even now it is unclear whether the Swiss Bankers Association fully accepts this part of their past. Despite the Volcker Report's conclusion that there was "widespread lack of diligence in searching for victims' accounts" and that some Swiss banks engaged in a number of "questionable and deceitful actions,"¹⁹⁸ the chairman of the Swiss Bankers Association stated in response to the release of the Volcker Report that "with the exception of a few isolated cases . . . the banks' conduct during the period in question was correct."¹⁹⁹ Moreover, the reluctant conclusion one draws from the past fifty years is that Swiss banks would never have taken the steps they did had it not been for pressure from abroad, particularly from the World Jewish Congress and the United States.

To give credit where it is due, it must be recognized that once forced to act, the Swiss acted forcefully. The Swiss are said to get up early but wake up late.²⁰⁰ Since they have awoken to the reality of what needs to be done, the Swiss have taken the matter extremely seriously. Swiss banks have invested a tremendous amount of time, effort and money to try to redress some of their past wrongs, as is reflected in the \$1.25 billion settlement agreement, and the independent audit by the Volcker Commission that cost the Swiss banks over 310 million Swiss Francs, or approximately \$185 million U.S.²⁰¹ The Swiss banks have correctly described the Volcker audit as "probably the biggest banking audit ever undertaken,"²⁰² with over 650 forensic accountants searching the records of 254 banks in Switzerland spanning a period of more than 60 years.²⁰³ As Ambassador Eizenstat remarked, "Switzerland continues to take the lead among the wartime neutral nations in the commitment it has made to provide justice in concrete ways. It is important to recognize amidst all the criticism and

197. Jacques Rossier, Managing Partner of Darier Hentsch & Cie, Speech at the American Swiss Forum, "Switzerland, Gold and the Banks, Analysis of a Crisis," (May 26, 1999), available at <http://www.americanswiss.org/Rossier9.htm>.

198. VOLCKER REPORT, *supra* note 2, at 13.

199. Dr. Georg F. Krayner, Chairman of the Swiss Bankers Association, Speech in Zurich, Switzerland upon presentation of Volcker Report (Dec. 6, 1999), available at http://www.swissbanking.org/e/Pages/press/14_speech_krayner_e.html.

200. Rossier, *supra* note 197, available at <http://www.americanswiss.org/Rossier11.htm>.

201. VOLCKER REPORT, *supra* note 2, at 55. Regarding the degree of cooperation by the Swiss banks to this audit, the Volcker Report stated that "[o]verall the cooperation of Swiss banks with a detailed, intrusive, and very costly investigation has been adequate to allow the investigation to reach its goal of finding as much of the truth about the accounts of victims of Nazi persecution as can now be determined after the passage of more than 50 years." *Id.*

202. Press Release, Swiss Bankers Association, "Did You Know" (Dec. 12, 1999), available at http://www.swissbanking.org/e/Pages/press/11_did_know_e.html.

203. See <http://www.jewishsf.com/bk991210/iswissbanks.shtml>.

controversy, the breadth and depth of the Swiss effort.”²⁰⁴ He went on to note that “[w]e should be applauding Switzerland’s actions and encouraging its continued progress. Condemning the Swiss can only discourage them from moving on with the truly remarkable steps they have taken.”²⁰⁵ To their credit, the Swiss banks understand that public trust is a critical element of their success, and that they must address the problem correctly or tarnish their reputation.²⁰⁶ The Swiss recognized that their integrity and trustworthiness were in jeopardy, and they have taken long overdue steps. As for the claimants, their stories are not available to the public. However, when they become available, their claims will provide an important link in the ongoing historical effort of remembrance. The written and oral record paints a picture of unspeakable pain and suffering experienced by these Holocaust victims and their families which was only compounded by their inability to retrieve their assets after the Holocaust ended. The safe haven of Swiss banks was all too safe. “Indeed, *so* secure were [these accounts]—and so wrapped in the secrecy that is the selling point of the Swiss banking system—that in the years following the war they became for all practical purposes another windfall for Swiss bankers on top of the one offered by Nazi gold.”²⁰⁷ For this the Holocaust victims and their families are rightfully bitter.

My personal experience with Holocaust claims confirms that the claimants first and foremost are concerned about a moral accounting. They are not concerned about money. They want recognition that a wrong was done. If possible, they want an apology.²⁰⁸ There have been numerous occasions in which the Tribunal has provided bank documents to claimants indicating how little is in the bank account, yet they chose to continue on in the process. If these claimants were concerned about money, they would abandon their claim upon discov-

204. Delegation Statements, available at <http://www.state.gov/www/regions/eur/holocaust/heac3.pdf> (Switzerland Delegation quoted Stuart Eizenstat from the Washington Conference May 1998, at 353).

205. Stuart Eizenstat, Address to the United Jewish Appeal National Young Leadership Conference (March 23, 1998), available at http://www.state.gov/www/policy_remarks/1998/980323_eizenstat_ngold.html.

206. Dr. Georg Kraye, Chairman of the Swiss Bankers Association, Speech to H.R. Committee on Banking and Financial Services, available at 1996 WL 13104434 (December 11, 1996) (“[T]he paramount goal of this process would be to establish truth, and, to be successful, it would have to embody principles of justice, trust and transparency.”).

207. Gabriel Schoenfeld, *Holocaust Reparations: A Growing Scandal*, Magazine Commentary (2000), available at http://search.britannica.com/magazine/print?content_id=183711.

208. Dr. Georg F. Kraye, *supra* note 199. To his credit, Dr. Georg F. Kraye, Chairman of the Swiss Bankers Association, has formally apologized. *Id.* “Whereas the age and attitude of 1956 and 1962 are more a matter for the committee of historians to address, I myself was in my present office in 1995 and will readily admit that, like other representatives of the Swiss banks, my knowledge about the subject was completely insufficient. It was insufficient for dealing with this problem as a whole, and it was inadequate in the face of the immense suffering endured by all the victims of the Second World War. I should like to apologize for all the disappointments and hurt feelings this inadequacy may have caused.” *Id.* See also Rossier, *supra* note 197, at 9 & 12. Other Swiss bankers have gone further. *Id.* “We deserved what happened first and foremost because we had treated the whole issue of Holocaust-related assets too lightly, and that is unforgivable. . . . I am sorry that the Swiss Bankers Association did not look actively and systematically immediately after the war for heirs of Holocaust victims.” *Id.*

ering how little was at stake. Yet again and again, they choose to continue. They write that they are pursuing their claim in the memory of their mother, or their grandfather, or their uncle who perished in the Holocaust. They realize how much is at stake.

Pursuing a claim before the Claims Resolution Tribunal can be physically and emotionally challenging. The Tribunal requires these claimants to provide information and documentation, if possible, to establish the validity of their claims. Although this procedure is necessary and legally sound, it can be taxing for claimants. The Tribunal has the difficult duty to request parties to relive the most painful parts of their past, and divulge details of their lives that have gone unmentioned for decades. As Judge Hadassa Ben-Itto, a former Israeli Supreme Court Justice and Tribunal arbitrator put it:

The claims process is about people, about faceless, not nameless but still anonymous account holders and their survivors, who have waited close to sixty years for this process which is meant to right a historical wrong. Unfortunately, we cannot boast that we are capable of doing full justice. What justice is there when people receive what is rightfully theirs fifty or sixty years too late? Some of them have known suffering and poverty and are now too old to enjoy this belated wind-fall. In effect we have thousands of people around the world who . . . are required to fill out forms which seem too complicated, even though an attempt has been made to make them as clear as possible. These claimants are asked to rummage in old cabinets, seek ancient documents, they are going through emotion upheaval, rekindling painful, sometimes unbearable memories, examining old letters and photographs, writing to authorities in other countries whose language they no longer speak, asking for old certificates from archives which sometimes no longer exist. This is the picture we arbitrators at the CRT face, this is what emerges from the individual files, as we are striving to discover the people behind the documents, the families behind the family tree. I saw one family tree, with scores of names, where the claimant a woman, wrote in matter-of-fact language that she had marked in red the names of all family members who had perished in the Holocaust. There were only three names not marked in red on that family tree."²⁰⁹

Speaking personally, it is a strange and remarkable experience for a lawyer working at an international tribunal to receive phone calls from claimants across the globe who weep when they discuss their family background. But it happens at the Claims Resolution Tribunal. Claimants write that in retelling their story, in pursuing their claim, there is a cleansing. Although the past can never be erased, the Claims Resolution Tribunal, even with its shortcomings, provides a measure of healing and justice for the victims of the Holocaust and their heirs.

209. Judge Hadassa Ben-Itto, Remarks to the Panel on Jurisdiction of the CRT and Different Types of Procedures, Claims Resolution Process on Dormant Accounts in Switzerland, *available at* http://www.swissbankclaims.com/PDFs_Eng/VolumeIPlan.pdf. at 102-03.