

## DUE PROCESS IN INTERNATIONAL MASS CLAIMS

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### Abstract

Mass claims proceedings, in which whole groups of claimants are treated more or less collectively, aim at an efficient settlement in circumstances where individual proceedings would be too cumbersome, too time consuming and/or too expensive. Standards of due process applicable to individual justice cannot apply directly to mass claims proceedings. However, such proceedings have to respect due process, albeit in a slightly different form, in order to be perceived as fair, credible and legitimate. This paper examines how some recent mass claim bodies involved with the restoration of property rights after war have elaborated their own standards of due process.

Mass claims proceedings, in which whole groups of claimants are treated more or less collectively, aim at an efficient settlement in circumstances where individual proceedings would be too cumbersome, too time consuming and/or too expensive. They are different from traditional court proceedings, where each party submits briefs and oral arguments, which are examined by the tribunal in order to render its decision. Consequently, the

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standards of due process applicable to individual justice cannot apply directly to mass claims handling. However, mass claims proceedings also have to respect due process – albeit in a slightly different form – in order to be perceived as fair, credible and legitimate.

This paper examines how some recent international mass claims bodies have elaborated their own standards of due process. The scope of the analysis is limited in two ways. Firstly, only mass claims processes established in the last twenty years will be discussed. Secondly, only those restoring property rights after war will be analysed. This paper starts with a brief description of the different mass claims processes that are within the present focus (section 1). It then will discuss how mass claims proceedings, although they surely deviate from the traditional judicial proceedings, still respect the basic tenets of due process (section. 2).

## **1 Recent Mass Property Claims Proceedings**

Recently, several mass claims proceedings have settled property claims after war in an efficient way. The following bodies will be discussed: the United Nations Compensation Commission (UNCC), the Bosnian Commission for Real Property Claims (CRPC), the Claims Resolution Tribunal for Dormant Accounts (CRT), the Housing and Property Claims Commission in Kosovo (HPCC), the German Forced Labour Compensation Programme (GFLCP) and the International Commission on Holocaust Era Insurance Claims (ICHIEC).

### **1.1 The United Nations Compensation Commission (UNCC)**

The UNCC had to settle claims for damage, including damage to property, caused by Iraq's 1990 invasion of Kuwait. It is not only the oldest but also the largest mass claims process which will be discussed. Because of the Iraqi invasion, hundreds of thousands of *Gastarbeiter* had to return to their respective countries, leaving their assets in Iraq or Kuwait. Moreover, many buildings were destroyed and/or looted, and many businesses disrupted. The UNCC collected over 2.6 million claims from individuals, corporations, governments and international organisations. For reasons of efficiency, the claims were divided into different categories, each with specific evidentiary thresholds, different processing techniques and specific standards for compensation. Category A and B claims, which concerned individuals who had to leave Iraq or Kuwait and individuals who suffered personal injury or death respectively, both led to fixed amounts compensation. The vast majority of claims submitted to the UNCC, 1,703,396 in all, were Category C property claims for loss of personal property, loss of bank accounts, stocks

and other securities, loss of income, loss of real property and individual business losses of up to 100,000 US dollars.<sup>130</sup> Category D claims covered the same kinds of property claims for damages above 100,000 US dollars. Further, Category E claims came from corporations, other private legal entities and public sector enterprises and concerned construction or other contract losses, losses from the non-payment for goods or services, losses relating to the destruction or seizure of business assets, loss of profits and oil sector losses.<sup>131</sup> Finally, Category F claims were for loss of and damage to government property. As of June 2007, the UNCC had resolved nearly all its claims.

## 1.2 The Commission for Real Property Claims (CRPC)

The Commission for Real Property Claims (CRPC) in Bosnia was created by Annex 7 of the Dayton Peace Agreement<sup>132</sup> to restore the property rights of more than 2 million people – more than half of the country's pre-war population – who fled their homes in the war that raged in Bosnia between 1992 and 1995. In some areas, more than half of the dwellings were destroyed or at least substantially damaged. Consequently, many displaced persons were forced to stay in shelters or with relatives. Moreover, many other houses, vacated because of ethnical cleansing among others, were illegally occupied.

The CRPC collected 240,223 claims from refugees and displaced persons, relating to 319,220 real properties. When the CRPC's mandate ended in December 2003, just eight years after being founded, the Commission had confirmed property titles in 312,332 decisions. Assuming that each property had four inhabitants on average, the CRPC served more than one million people.

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<sup>130</sup> This included a consolidated claim filed by the Central Bank of the Government of Egypt on behalf of 915,527 of its nationals with approximately 1,240,000 claims. This figure also covered 31,868 individual claims from *bedouns* for a fixed amount of US dollars 2,500 each, submitted to the Commission by the government of the State of Kuwait in accordance with the special programme established by the Governing Council at its fifty-second session in June 2004.

See in general <http://www2.unog.ch/uncc/> (visited June 2007).

<sup>131</sup> For processing purposes, the claims were further divided into four sub-categories. See N. Wühler, 'The United Nations Compensation Commission: A New Contribution to the Process of International Claims Resolution', (1999) 2(2) *Journal of International Economic Law* 249, at 255-256.

<sup>132</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina was initialled in Dayton on 21 November 1995 and signed in Paris on 14 December 1995, (1996) 35 *International Legal Materials* 75.

### 1.3 Claims Resolution Tribunal for Dormant Accounts (CRT)

The Claims Resolution Tribunal for Dormant Accounts (CRT) was established in 1997 to decide who was entitled to the balance of accounts opened by non-Swiss nationals or residents but which had remained inactive since 9 May 1945, often because its holders had perished in the Holocaust.<sup>133</sup> In the first stage, the CRT decided the fate of 2,308 bank accounts.<sup>134</sup> For the vast majority of these accounts, however, a claim was submitted by more than one person. With an average of four different claimants for each account, the docket of the CRT quickly grew to a total of 9,918. All these claims were settled within 3.5 years and some 65 million Swiss francs were distributed to the claimants. In 2001, the CRT entered a second phase when Judge Korman, of the District Court for the Eastern District of New York, settled the consolidated class actions lawsuits related to dormant Swiss bank accounts opened before and during the Second World War.<sup>135</sup> Judge Korman initially decided to rely on the experience and the structure of the CRT to decide on 33,496 new claims from Nazi victims or their heirs.<sup>136</sup> In this second phase, the CRT had to distribute a total amount of 800 million US dollars and had rendered 2,362 awards as of June 2007.<sup>137</sup>

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<sup>133</sup> Article 1 of the Board of Trustees of the Independent Claims Resolution Foundation, Rules of Procedure for the Claims Resolution Process, adopted on 15 October 1997, available at [http://www.crt-ii.org/\\_crt-i/frame.html](http://www.crt-ii.org/_crt-i/frame.html) (visited June 2007). Pursuant to art. 1, the CRT also decided claims to accounts dormant since 9 May 1945 and held by a Swiss intermediary for a victim of Nazi persecution. Moreover, the term account is interpreted broadly to include "all kinds of accounts, including, without limitation, current, savings and securities accounts, passbooks, safety deposit boxes, and any other form of dormant bank liability, including, without limitation, bank cheques, bonds and bank-issued medium-term notes (*Kassenobligationen*)" (art. 1).

<sup>134</sup> This first stage was commonly known as the CRT-I.

<sup>135</sup> Settlement Agreement in the U.S. District Court for the Eastern District of New York, Chief Judge E. R. Korman presiding, *In re Holocaust Victim Assets Litigation (Swiss Banks)*, 4 November 2002, CV-96-4849, available at [http://www.swissbankclaims.com/PDFs\\_Eng/exhibit1toPlanofAllocation.pdf](http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf) (visited June 2007).

In fact, in this second phase, commonly known as CRT-II, the proceedings were more of an administrative nature rather than akin to arbitration. See R. P. Alford, 'The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks', in S. A. Riesenfeld 'Symposium 2001: Fifty Years in the Making: World War II Reparation and Restitution Claims', (2002) 20(1) *Berkeley Journal of International Law* 250, at 264-267.

<sup>136</sup> See [http://www.crt-ii.org/index\\_en.phtml](http://www.crt-ii.org/index_en.phtml) (visited June 2007).

<sup>137</sup> Data available at [http://www.crt-ii.org/\\_awards/index.phtml](http://www.crt-ii.org/_awards/index.phtml) (visited June 2007).

#### **1.4 Housing and Property Claims Commission (HPCC)**

The Housing and Property Claims Commission (HPCC) in Kosovo was established in 1999 by the United Nations Interim Administration Mission in Kosovo (UNMIK). It had exclusive jurisdiction to receive and decide three categories of residential property claims: (1) claims for compensation from owners or other rights holders who had to give up their property after 23 March 1989 because of their Albanian origin; (2) claims for informal but freely agreed property transactions concluded after 23 March 1989, carried out due to the growing discrimination against Kosovars of Albanian origin; and (3) claims for return of property from refugees and displaced persons who lost possession of their properties as a result of the 1999 war in Kosovo.<sup>138</sup>

Initially, a caseload of over 60,000 claims was expected. Ultimately, only 29,160 properties were claimed, the vast majority by refugees and displaced persons.<sup>139</sup> All of them but one had been resolved as of June 2007.<sup>140</sup>

#### **1.5 The German Forced Labour Compensation Programme (GFLCP)**

The GFLCP was created in 2000 to allocate some 200 million German marks to the more than eight million people (POWs excluded) who were forced by the Nazis to work in factories and camps in Germany, Austria and occupied Europe.<sup>141</sup> Within 5 years, approximately 35,200 property claims were received and resolved, of which around 30 per cent (approximately 10,600) were decided positively.

#### **1.6 The International Commission on Holocaust Era Insurance Claims (ICHEIC)**

The ICHEIC was founded in 2000 to address the payment of life insurance policies issued to Holocaust victims that remained undisbursed. Strictly speaking, the ICHEIC was not a mass claims settlement body, as it did not evaluate the claims. However, it did initiate and monitor the reimbursement process, examining the insurance companies' files for unpaid insurance policies of Holocaust victims and publishing a list of some 500,000 policy

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<sup>138</sup> UNMIK Regulation No. 1999/23, Section 1.2.

<sup>139</sup> See A. Dodson and V. Heiskanen, 'Housing and Property Restitution in Kosovo', in S. Leckie (ed.), *Returning Home: Housing and Property Restitution Rights of Refugees and Displaced Persons* (Transnational publishers, Ardsley, NY, 2003), 236.

<sup>140</sup> Updated statistics are available at <http://www.hpdkosovo.org/> (visited June 2007).

<sup>141</sup> See <http://www.compensation-for-forced-labour.org/> (visited June 2007).

holders. Moreover, it investigated the status of insurance policies for which claims had been filed with the ICHEIC. It established procedures and rules to handle claims and to evaluate compensation.<sup>142</sup> It received claims and transmitted them to the insurance company or affiliated organisations that had issued the policy, to be reviewed in accordance with the ICHEIC claims processing and valuation guidelines.<sup>143</sup> If the claim did not specify the insurance company – which happened in two-thirds of the claims – the ICHEIC investigated the matter further to find out which insurance company had in effect issued the policy. It finally verified whether all the decisions were made in accordance with ICHEIC guidelines.

As of June 2007, the ICHEIC had received 91,558 claims, for which more than 48,000 offers were made by the participating insurance companies or associations.<sup>144</sup>

## 2 Due Process in Mass Claims Proceedings

It belongs to the quintessence of legal proceedings to respect due process. Without due process the administration of justice cannot be perceived as fair and credible. It is not clear though what is exactly covered by the very broad and vague notion of ‘due process’.

This paper takes as a starting point article 6(1) of the European Convention on Human Rights (ECvHR), which contains the basics of due process, at least for traditional court proceedings on the European scene:

In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial [...] to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interest of justice.

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<sup>142</sup> the ICHEIC ‘Memorandum of Understanding’, 25 August 1998, at para. 5 (available at [http://www.icheic.org/pdf/ICHEIC\\_MOU.PDF](http://www.icheic.org/pdf/ICHEIC_MOU.PDF) (visited June 2007)).

<sup>143</sup> When claims did not name a company, the ICHEIC sent them to all relevant companies, i.e. those who did business in the country listed by the claimant as the one where the policy was likely to have been issued, who would then search “for any matches between their records and the electronic information submitted.” (*Holocaust Era Insurance Claims, Processing Guide*, First Edition – June 22, 2003’, 35, (available at [http://www.icheic.org/pdf/ICHEIC\\_CPG.pdf](http://www.icheic.org/pdf/ICHEIC_CPG.pdf) (visited June 2007)).

<sup>144</sup> Updated claims and decision statistics available at <http://www.icheic.org> (visited June 2007).

These requirements have been elaborated by case law of the European Court of Human Rights (ECHR).

In this part of the paper, article 6 ECvHR is used as a guideline for academic analysis to examine to what extent the mass claims proceedings mentioned in section 1 comply with the due process requirements relevant for court proceedings, as set out in article 6. It does not address the question of whether, and if so to what extent, mass claims bodies fall within the ambit of article 6 ECvHR and the scrutiny of the ECHR.

Mass claims resolution programmes are certainly not the primary addressees of article 6 ECvHR, as are judicial courts in the traditional sense. But their administrative nature or process is not in itself a decisive feature that warrants their falling outside the scope of article 6. As the ECHR stated “[t]he character [...] of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) [is] [...] of little consequence”.<sup>145</sup> Equally irrelevant is the fact that the respondent is sometimes a public authority (e.g. UNCC) or that the claim does not have a civil or commercial nature, but often involves administrative or international law.<sup>146</sup> Indeed, proceedings concerning “civil rights and obligations” covered by article 6(1) ECvHR have come to encompass many areas which are frequently regarded by national systems as part of public or administrative law. On the other hand, when claimants and respondents agree to the jurisdiction of a private body to solve their claims, like in the CRT, the proceedings are akin to arbitration and can therefore, to a certain extent, be subjected to the ECvHR requirements of due process.<sup>147</sup>

In short, the reference to article 6 ECvHR is only meant as a litmus test for mass claims proceedings, as the convention has its own criteria for determining what enters within its ambit. For instance, some mass claims

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<sup>145</sup> European Court of Human Rights, *Ringeisen v. Austria*, series A, N° 13 (1979-80) 1 EHRR 455.

<sup>146</sup> See European Court of Human Rights, *Ringeisen v. Austria*, Series A, No. 13 (1979-80) 1 EHRR 455. Thus expropriation of property by public authorities are covered by the ECHR due process provision: see i.a. *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, Series A, No. 52 (1983) 5 EHRR 35, *Boden v. Sweden*, Judgment of 27 October 1987, Series A, No. 125 (1988) 10 EHRR 36, *Zanatta v. France*, Judgment of 28 March 2000.

<sup>147</sup> See, European Commission of Human Rights, *Nordström, Janzon, Lehtinen v. the Netherlands*, 27 November 1996, No. 28101/95. According to this decision, to be valid an arbitration agreement (qualified as a waiver of Article 6 (1)) must not be signed under duress (Eur. Court HR, *Deweert v. Belgium*, 27 Feb. 1980, Series 1 no. 35, p.25-26, para. 49) and the domestic legislative framework must allow for some measure of control of the arbitration by the courts (Eur. Com. HR, *KR v. Switzerland*, 4 March 1987, No. 10881/84, Dec. 4.3.87, D.R. 51, p.83).

bodies, such as the CRT, may fall within the scope the ECvHR because of their nature and location, while it is clearly not applicable to the UNCC.

In any case, even if – as a matter of principle – the standards of article 6 ECvHR apply to mass claims proceedings, specific circumstances may lead to some flexibility. Indeed, article 15 ECvHR allows a signatory state to derogate from provisions such as article 6 in emergency situations “threatening the life of the nation [...] to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”. The ECHR has therefore accepted that other ECvHR provisions may be derogated from in “an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed”.<sup>148</sup> Far from asserting that any necessity to process hundreds of claims inevitably threatens the life of a nation, the impossibility to decide 320,000 property claims in Bosnia within a reasonable period surely would have had a disruptive effect. So, it is in this spirit of flexibility that the due process requirements, confirmed by article 6(1) of the ECvHR, should be approached in mass claims proceedings for the restoration of property rights after war.

Due process requirements are not an aim in themselves. They are the necessary path to just and fair settlements. Mass claims proceedings are often the best form of justice possible in a given situation. As will be shown below, they respect the requirements of due process, albeit in a different way than state courts do in individual adjudication. The following aspects will be discussed below: (1) access to claims proceedings, (2) exclusivity, (3) the conduct of the proceedings, (4) the impartiality of the adjudicators, (5) the timeliness of the decisions, (6) their fairness, (7) their finality, and (8) their implementation.

## 2.1 Access to claims proceedings

Under article 6(1), due process clearly requires access to court. This access must not only exist in theory, but also in effect. For mass claims processes, access to claims proceedings is in many respects a different issue than it is for courts, but it is surely not a less substantial issue; quite the contrary.

Firstly, regarding the geographical situation, access to court does not exclude that a claimant may have to conduct proceedings in a far-away country. He or she will usually sue in the state where the respondent is established to ensure the enforcement of the decision. Courts closer by may

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<sup>148</sup> See European Court of Human Rights, *Lawless v. Ireland*, Judgment of 1 July 1961, Series A, No. 1-3, (1979-80) 1 EHRR § 28.



indeed not be allowed to assume jurisdiction and/or their judgments may not be enforceable.

While individual court cases may be heard by different judges, mass claims processes must necessarily be centralised and handled by a sole body. But claimants can come from all over the world. For instance, the relatives of dormant account holders who claimed before the CRT came from over 70 different countries, and the Bosnian refugees who submitted claims to the CRPC were spread over the Balkans and Western Europe. Nevertheless, all claimants could very easily access the resolution process. For the CRT, they could submit their claims either at the CRT offices in Zurich or through the many Ernst & Young offices around the world, and could communicate with CRT personnel in more than 15 languages. Likewise, the CRPC had regional claims registration offices across Bosnia-Herzegovina, Serbia, Montenegro and Croatia, as well as in several countries in Western Europe where significant numbers of Bosnian refugees could be found, such as Germany, the Netherlands, Norway, Denmark and Sweden. Moreover, CRPC mobile teams collected claims in remote areas of Bosnia. Similarly, the HPCC established claims collection offices in some regions of Kosovo and Serbia. Regarding the UNCC, claimants simply submitted their claims to their own government, which then filed them in a consolidated form with the UNCC.<sup>149</sup> Finally, GFLCP claims were registered through the network of IOM field offices.<sup>150</sup>

Secondly, information accessibility is important, since access to justice requires that potential claimants are well-informed about their rights and available remedies. National courts do not give such information, nor is it their role. By contrast, many mass claims bodies pro-actively inform the public at large of the legal protection they grant. They often use the Internet and websites to post the requirements to claim, the application forms and any other useful information. They also inform the public of their decisions

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<sup>149</sup> Stateless persons, i.a. many Palestinians, could submit their claim through an international body such as UNDP, UNRWA and UNHCR.

<sup>150</sup> The decentralisation of claims registration was motivated by “the need to be close to the claimants in a phase of the claims processing cycle when many claimants would undoubtedly require some form of assistance or guidance. It was also hoped that lowering the barrier for claimants to seek information and help from IOM, would lead to a higher quality of claims and a more efficient and cheaper claims verification process later on.” It was made possible by the “use of Internet-based technology, which allows for the simultaneous registration of claims by the IOM filed offices in a central claims database kept at the IOM headquarters in Geneva.” (P. Van der Auweraert, ‘The Practicalities of Forced Labor Compensation. The Work of the International Organisation for Migration as One of the Partner Organisations under the German Foundation Law’, in P. Zumbansen (ed.) *NS-Forced Labor: Remembrance and Responsibility: Legal and Historical Observations* (Baden-Baden, Nomos, 2002), 309)

through their websites. Their administrator can sometimes be contacted via email by claimants who need further information about their particular case. Furthermore, the websites often contain 'Questions & Answers' or 'Frequently Asked Questions' sections, as well as general news releases and links to other relevant institutions.

In countries where information technologies are less reliable, such as Bosnia and Kosovo, traditional means of communication remain important. The CRPC and the HPCC, for instance, disseminated information through a network of local and mobile offices. Moreover, potential claimants could obtain information by telephone, for instance via a toll-free number, where they could speak to interlocutors fluent in their mother tongue. In Bosnia, the CRPC also made announcements via radio and TV networks, in local newspapers and with posters displayed in public buildings. Information can also be relayed by intermediaries such as states and other organisations. For instance, associations particularly well-connected with the targeted audience may help disseminate relevant information, as did Jewish associations in order to reach potential Holocaust claimants. Likewise, the ICHEIC made available on its website information packages to increase awareness of its work. Finally, international entities, such as the Property Law Implementation Plan in Bosnia or the UNMIK in Kosovo, were instrumental in informing the claimants of the CRPC and the HPCC respectively.

Thirdly, effective access to court requires that the weaker party is assisted by professional counsel, if necessary at public expense. For instance, if a poor litigant wishes to bring court proceedings which are meritorious but too complex to pursue without professional legal assistance, the state must provide legal aid "if this is indispensable for an effective access to court".<sup>151</sup> In other words, for the courtroom to be effectively open, the litigant must sometimes be seconded by a pro bono lawyer to help him or her through the normal procedural machinery.

Mass claims facilities, however, go even further by offering proceedings entirely free of cost, in which information and expertise is not provided by a legal counsel but by the institution itself. Mass claims institutions will go at length to staff their offices, especially their secretariat, with appropriate and competent personnel. Moreover, as will be discussed below, the institution itself often helps claimants in gathering evidence and/or in presenting their claim, which is more adequate than legal aid.

Fourthly, before the national courts, access to courts does not exonerate claimants from time bars, since they are not thought to violate due

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<sup>151</sup> European Court of Human Rights, *Airey v. Ireland*, Judgment 9 October 1979, Series A, No. 32 (1979-80) 3 EHRR 592, § 26.

process.<sup>152</sup> The events of the Second World War, which were the object of many mass claims processes initiated in the 1990s, were at that time legally time-barred. However, the general feeling was that fairness dictated granting some relief to Holocaust victims or their heirs for what happened some 50 years ago. Holocaust-related mass claims processes such as the CRT, the ICHEIC and the GFLCP consequently set aside the time bar, thereby increasing the claimants' access to adjudication.

Finally, in spite of formal access to justice for claimants, national courts still dismiss claims when they cannot prove their case. In time of war, however, much evidence is lost or impossible to retrieve (for example when a territory changes sovereignty). As a consequence, many mass claims proceedings lowered their evidentiary standards, as will be discussed below, which ultimately improved the victims' effective access to justice.

### 2.3 Exclusivity

Due process, in the traditional sense, requires full access to the judiciary. But to what extent do mass claims proceedings comply with that requirement? No general answer can be given. There are several scenarios.

Some mass claims processes have no ambition to be exclusive. In Bosnia, claimants could submit property claims before the CRPC, national courts or administrations. The CRPC was only a very attractive alternative. Likewise, the UNCC had no exclusive jurisdiction but would simply not pay compensation when the loss was covered by proceedings in national courts or other fora. As a consequence, full access to the judiciary remained intact.

However, the claimant can make a mass claims process exclusive by agreeing not to submit a claim elsewhere. For instance, prior to the processing of their claim by the CRT, claimants had to sign a formal 'Claim Resolution Agreement', waiving their right to file their case before another jurisdiction. Similarly, plaintiffs may have to effectively waive their right to pursue their claim elsewhere, in order to actually receive compensation, as in the GFLCP. Likewise, the ICHEIC required the claimant who accepted compensation to sign a form releasing the insurance company from any future liability.

Exclusivity may sometimes be agreed by the initiators of the programme and included in the founding documents, say a peace

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<sup>152</sup> For the Court of Human Rights time-bars do not go against due process in court proceedings as long as they pursue "the legitimate aim of ensuring legal certainty and finality while still allowing litigants some opportunity to come to court" (*Stubbing and others v. United Kingdom* (Apps. 22083/93 and 22095/93), Judgment of 24 September 1996, (1997) 23 EHRR 213).

agreement.<sup>153</sup> The exclusive jurisdiction could also follow from a binding decision of an international institution. For instance, when the UNMIK created the HPCC in Kosovo, it specified that:

As an exception to the jurisdiction of local courts, the Commission shall have exclusive jurisdiction to settle the [...] claims [...]. Nevertheless, the Commission may refer specific separate parts of such claims to the local courts or administrative organs, if the adjudication of those separate parts does not [infringe on the Commission's exclusive jurisdiction].<sup>154</sup>

When European insurance companies, the US insurance regulatory authorities and the Jewish and survivors organisations created the ICHEIC, they wanted it to be an exclusive remedy.<sup>155</sup> The U.S. government tried to impose this exclusivity through executive agreements. Unfortunately, since individual victims were not a party in these agreements, they were not bound by them and could therefore seek compensation elsewhere.<sup>156</sup> The U.S. State Department had to file 'Statements of Interest' before the courts in order to have the individual claims dismissed, which was usually granted, although refused by some of them.<sup>157</sup>

This paper will not venture on the question of whether an imposed exclusivity would be against due process. In fact, mass claims processes should be so appealing that claimants consistently prefer them to courts. In this regard, they do, indeed, have a few trumps. As will be discussed in detail below, they are impartial and unbiased, which cannot always be said of national courts. Their decisions are implemented while enforcement of court judgments often remains problematic; and they help claimants to substantiate their claims, which courts do not do. Moreover, mass claims settlement programmes are usually less costly than court proceedings, since they are free of charge for the claimants and do not require the assistance of a lawyer. In this respect, the secretariat of mass claims bodies typically

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<sup>153</sup> For instance, the Algiers Agreement that created the Eritrea Ethiopia Claims Commission indicated that the Commission was "the sole forum for adjudicating claims" (article 5(8)).

<sup>154</sup> UNMIK Regulation No. 1999/23, Section 2.5. The HPCC could thus submit specific technical issues, such as inheritance and family law, to domestic courts.

<sup>155</sup> The ICHEIC 'Memorandum of Understanding', above n. 142 at para. 6.

<sup>156</sup> M. J. Bazylar, 'Nuremberg in America: Litigating the Holocaust in United States Courts', (2000-2001) 34 *University of Richmond Law Review* 203.

<sup>157</sup> Even then, some courts decided not to grant the motion for voluntary dismissal filed by the plaintiffs in order to have the case dropped and the settlement programmes set up. See for instance, US Court of Appeals (2<sup>nd</sup> Circuit), 17 May 2001, *In re Austrian and German Holocaust Litigation*.

serves as a dedicated contact to provide the claimants with relevant information, guidance and forms, as well as to help them file their claims. The secretariat also stays available to the claimants during the whole resolution process to answer any further questions, in particular about the status of their claim. Furthermore, decisions are frequently reached more quickly, which is certainly attractive for Holocaust survivors and war victims in need of a home or some compensation to make a fresh start. Finally, the presumptions and relaxed standards of evidence that mass claims processes apply are often crucial for claimants who cannot meet the strict standard required for court proceedings because the evidence was lost, destroyed or confiscated in the war.

## 2.4 Conduct of Proceedings

Obviously, proceedings should be fair. In civil courts, that implies procedural equality, meaning that both parties should be treated equally. A party should have a reasonable opportunity to present their case – including evidence – under conditions that do not place them at a substantial disadvantage vis-à-vis the other side.<sup>158</sup> Due process entails the right to have an adversarial trial whereby both parties have “the opportunity to know and comment on the observations filed or evidence adduced by the other party”.<sup>159</sup> Consequently, claimant and defendant should be able to effectively participate in the proceedings if they wish to do so.

Where due process in traditional judicial proceedings applies equally to both sides, mass claims procedural rules usually favour claimants somewhat. For instance, the Dayton Peace Agreement was the very basis of the right for every refugee or displaced person to return to his or her pre-war property.<sup>160</sup> Before the UNCC, claimants did not have to prove Iraq’s liability for all damages resulting from its invasion of Kuwait, since that had already been established by the UN Security Council.<sup>161</sup>

On a procedural level, overall standards were relaxed to take into account the claimants’ weak position. For instance, the proceedings before the CRT were conducted “in an informal manner and under relaxed procedural rules that [were] convenient for the claimants and [took] into

<sup>158</sup> European Court of Human Rights, *Dombo Beheer BV v. Netherlands*, Judgment of 27 October 1993, Series A, No. 274-A; (1994) 18 EHRR 213, § 33.

<sup>159</sup> European Court of Human Rights, *Ruiz-Mateos v. Spain*, Judgment of 23 June 1993, Series A, No. 262; (1993) 16 EHRR 505, § 63.

<sup>160</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina was initialled in Dayton on 21 November 1995 and signed in Paris on 14 December 1995, (1996) 35 *International Legal Materials* 75, at 138.

<sup>161</sup> UN Security Council Resolution 687, S/RES/687 (1991), 3 April 1991, (1991) 30 *International Legal Materials* 847, at § 16.

account their age, language and residence”.<sup>162</sup> Furthermore, claimants could usually not meet the strict evidence requirements existing in a courtroom. Obviously, war refugees seldom took their property titles with them when they fled and records were often destroyed or confiscated. Therefore, to give claimants effective access to justice, claims proceedings very often relaxed their evidentiary standards or relied on presumptions. For instance, the ICHEIC clearly acknowledged the difficult balance between “the passage of time and the practical difficulties of the survivors, their beneficiaries and heirs in locating relevant documents, [and] providing protection to the insurance companies against unfounded claims.”<sup>163</sup> As a result, the ICHEIC decided that once the contractual relationship had been proven, the burden of proof shifted to the insurance company.<sup>164</sup> Similarly, the UNCC lowered its standards of proof for Category A (including displacement) and B claims (including personal injury). The CRT also applied rather relaxed standards in its assessment of claims.<sup>165</sup> Finally, the HPCC’s rules of evidence were “flexible and aimed at doing justice rather than at unnecessary formality.”<sup>166</sup>

An essential aspect of fair proceedings is that parties must have ‘their day in court’ to present their case. A day in court for each claimant would, however, render a mass claims programme too lengthy and costly, and thus inefficient. Nevertheless, even without formal hearings, in mass claims processes claimants are given the possibility to ‘tell their story’, usually at greater length than in a traditional judicial process. They may present any information in writing that they consider relevant, even if it does not reach the threshold of ‘evidence’ in a normal judicial setting. They also may correspond and communicate at length with the staff of the settlement body. In this way, plaintiffs can feel that they are participating in the procedure, even without a formal ‘day in court’.

In any event, mass claims proceedings are rarely adversarial. The CRPC, for instance, did not allow oral evidence or public hearings: neither the current occupant of the claimed property nor the local authorities were invited

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<sup>162</sup> CRT, Rules of Procedure, art. 17 (i).

<sup>163</sup> The ICHEIC ‘Memorandum of Understanding’, above n. 142 at § 5.

<sup>164</sup> The relaxed standards of proof and the approach to the burden of proof described above also apply to claims for policies that cannot be attributed to a particular company or that were issued by companies no longer in existence.

<sup>165</sup> CRT, Rules of Procedure, art. 15.

Article 22 defines the applicable standard of proof: “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 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.”

<sup>166</sup> A. Dodson and V. Heiskanen, above n. 139 at 235.

to participate in the proceedings. In the UNCC, oral hearings were held for large claims and only in exceptional cases. Similarly, proceedings before the CRT were largely based on documents only, with oral hearings when necessary.<sup>167</sup> On the other hand, the HPCC gave notice of the claims to the current occupant and other parties with a legal interest in the claimed property, who were then invited to participate in the procedures.<sup>168</sup> However, given the security risks and limited freedom of movement for minorities, the HPCC did not conduct public hearings or receive oral evidence, unless there was a specific need.<sup>169</sup> Claimant and respondent therefore very often merely submitted evidence and arguments in writing.

In fact, many mass claims resolution facilities do not wait for the parties' arguments and investigate the case directly through either the adjudicators or the secretariat. The UNCC's proceedings, for instance, were inquisitorial rather than adversarial. Indeed, the commissioners were responsible for establishing the facts and evaluating the claims by seeking the information and documentation required.<sup>170</sup> So doing, the UNCC developed particularly sophisticated techniques to collect the necessary information and relied thereby on computer support and statistics. In Bosnia-Herzegovina, the CRPC was able to recover and reconstruct most of the computerised land-register data, which was used as a verification database in the resolution of claims. It also used the 1991 census database, in which the main place of residence of all citizens was recorded, and through local courts and administrative bodies obtained additional sources of evidence on property rights. The CRPC relied on its free access to all these records to determine property titles where claimants could no longer obtain that information from the local administration, in some cases for ethnical reasons. Its staff could thus check each individual claim against all available records. In Kosovo, the HPCC also used computer databases, programmes and other electronic techniques to expedite its decision-making. In the ICHEIC insurance companies searched their records regardless of whether a claim was supported by evidence and, where appropriate, consulted external archives to find evidence of the existence of an insurance policy. Finally, the GFLCP claims were entered into a central database by a professional data entry company before a number of checks were conducted to determine whether the claimant was at least *prima facie* eligible for compensation.<sup>171</sup> The

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<sup>167</sup> CRT, Rules of Procedure, art. 17 (iv).

Pursuant to art. 17 (ii) and (iii), the Tribunal could conduct its own factual and legal inquiries and it could order the parties to submit any relevant evidence in their possession or under their control.

<sup>168</sup> UNMIK Regulation No. 2000/60, Section 9.

<sup>169</sup> UNMIK Regulation No. 2000/60, Section 19.1 and 19.2.

<sup>170</sup> Wühler, above n. 131 at 267.

<sup>171</sup> Van der Auweraert, above n. 150 at 310.

subsequent processing and verification of claims involved various types of data matching and archival research.<sup>172</sup>

## 2.5 Impartiality of adjudicators

Article 6 (1) of the ECHR requires “an independent and impartial tribunal”, which has both an objective and a subjective element.<sup>173</sup> The objective element depends, among other things, on who appoints the adjudicators, while the subjective element concerns the personal conviction of the respective adjudicators.

Firstly: Who appoints the adjudicators? The independence of state court judges is fostered by the fact that they are appointed by the state. That certainly helps to guarantee their independence from the parties who occasionally appear before them. In mass claims resolution facilities, adjudicators can also be appointed by a neutral body. Even if some are appointed by the parties involved in the claims or have the same nationality as the claimants, the panels they are on or the decision making process still guarantees independence. In the UNCC, for instance, the 59 commissioners came from 40 different countries (none from Iraq or Kuwait) and decided the claims in panels of three. Although some commissioners may occasionally have had to decide claims from a claimant of their own nationality, the presence of the other two commissioners, the scrutiny of the UNCC Secretariat and the approval by the Governing Council of every decision, were effective structural safeguards of the independence of the resolution process. In the CRPC, three of the nine commissioners were not from Bosnia-Herzegovina and had been appointed by the President of the European Court of Human Rights. The six others, however, were appointed by the Croat, Bosnian and Serb parts of Bosnia-Herzegovina. Moreover, decisions were made by consensus, which guaranteed independence.<sup>174</sup> In Kosovo, HPCC decisions were made by a panel consisting of two

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<sup>172</sup> Id. at 311.

<sup>173</sup> F. G. Jacobs, R. White, C. Ovey, *The European Convention on Human Rights*, (Oxford, Oxford University Press, 2006), 4<sup>th</sup> Ed., at 181.

<sup>174</sup> The mixed international and local composition of the CRPC has important advantages. The presence of international commissioners is a guarantee for impartial and fair claims adjudication in accordance with international standards. The involvement of local adjudicators ensures full conformity with local legal standards and systems and helps to achieve a proper integration of the final decisions into the domestic legal order. The dialogue between commissioners from varied legal backgrounds has certainly informed the decision-making process. See H. Van Houtte, ‘Mass Property Claim Resolution in a Post-War Society: The Commission for Real Property Claims in Bosnia and Herzegovina’, (1999) 48 *International and Comparative Law Quarterly* 625, at 628.



international and one local commissioner, all of whom had been appointed by the Special Representative of the Secretary-General.<sup>175</sup> For the Property Claims Commission of the GFLCP, the German Federal Ministry of Finance and the U.S. Department of State each appointed one member, who together chose a Swiss chair.<sup>176</sup>

State judges are often appointed for life, which also enhances their independence. Mass claims processes, on the other hand, are by nature intended to exist only temporarily. Appointments are therefore not made for life but only for the duration of the process and the adjudicator's independence cannot be undermined by the constraints of seeking re-appointment.<sup>177</sup>

Secondly, the subjective element is related to the personal independence and impartiality of the adjudicator. The UNCC had strict rules on impartiality and its commissioners had to confirm that they would act impartially and in their personal capacity. Moreover, they were not allowed to have financial interests in any of the claims submitted to their panel, nor were they allowed to represent or advise any party or claimant concerning the claims process during their service as commissioner or in the following two years. All commissioners were under obligation to disclose any prior, current or newly arisen relationship with governments, corporations or individuals, or any other circumstances that were likely to give rise to justifiable doubts as to their impartiality or independence with respect to their tasks. Finally, prior to taking up their duties, commissioners had to solemnly declare that they would perform their duties "honourably, faithfully, independently, impartially and conscientiously".<sup>178</sup> In the CRPC as well, commissioners had to be independent and impartial. Even the commissioners appointed by the ethnic groups in Bosnia-Herzegovina were not permitted to represent or defend the interests of the people from 'their' group.<sup>179</sup> Likewise, for each case the CRT arbitrators had to disclose any circumstances which could cast a doubt on their independence and impartiality and had to withdraw if so requested by a party.

Impartiality and independence is also important for the secretariat, which assisted the adjudicators extensively in the resolution of the claims. In

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<sup>175</sup> Regulation No. 1999/23, Section 2.2.

<sup>176</sup> Section 9, § 6 of the Law on the Creation of the Foundation 'Remembrance, Responsibility and Future'.

<sup>177</sup> At the UNCC, appointments were made for a specific panel which would operate for three years and then be automatically dissolved. In principle no re-appointments to other panels was envisaged.

<sup>178</sup> Art. 27 of the UNCC Governing Council, Decision No. 10: Provisional Rules for Claims Procedure, S/AC.26/1992/10, 26 June 1992, (1992) 31 *International Legal Materials* 1053.

<sup>179</sup> See Dayton Peace Agreement, Annex 7, art. IX.2.

this regard, the UNCC secretariat was internationally staffed and impartial. In the CRPC, multi-ethnic teams of local lawyers were supervised by international staff members as they performed their support tasks, which included screening computerised claims, checking them against the available records and preparing decision proposals. In the HPCC, the secretariat staff reflected the ethnic composition of Kosovo (with the Serbs as a minority) and worked under the supervision of the international staff to guarantee impartiality. In any case, the use of standards for decision and computer-assisted resolution methods did not leave much room for hidden biases.

Finally, when adjudicators and staff have to operate in areas affected by mass claims, such as the CRPC did in Bosnia-Herzegovina, the HPCC in Kosovo or the CRT in Switzerland, immunities to protect them from unduly interference may be an additional feature to guarantee their independence and impartiality. These immunities can be provided in constitutive texts<sup>180</sup> or in subsequent decisions.<sup>181</sup> Immunity from jurisdiction should be minimised to allow personnel acting in their personal capacity, such as commissioners or members of the policy-setting body but also secretariat staff, to perform their tasks with independence and impartiality. Immunity from legal process for acts and decisions made in the performance of official duties was granted to the CRT, the UNCC, the CRPC and the HPCC.

## **2.6 Reasonable time of proceedings**

Due process requires that decisions be rendered within a reasonable period of time. In situations prone to mass claims settlement, the issue is not so much whether an individual claim is settled within a reasonable time but whether the totality of the claims is solved in a timely fashion. For instance, an individual Bosnian or Egyptian could probably have obtained a decision on his lost property from a state court within a reasonable period. However, if 320,000 Bosnians or some 2 million former workers in Iraq or Kuwait, had had to go to State courts, it would have taken decades before the final decisions were reached. Although individual court proceedings may lead to a decision within a reasonable time for a happy few, from a more general vantage point they do not provide overall expedient decision-making. Thanks to the specific techniques and procedures used, the CRPC rendered its 320,000 decisions within 8 years and the UNCC settled more than 2.6 million worker claims within 15 years. Mass claims processes thus serve due process better than state court proceedings.

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<sup>180</sup> Dayton Peace Agreement, Annex 7, art. IX.3 and art. 5(18) of the Algiers Agreement.

<sup>181</sup> Art. 26 of the UNCC 'Provisional Rules for Claims Procedure' and art. 17(6) of the UNMIK Regulation No. 2000/60.

As a result, an attractive feature of mass claims processes is the expediency of their decision-making, since these proceedings are inherently geared to settle disputes within the shortest time possible. When they can, they even speed up their proceedings. For instance, the CRT allowed a 'fast-track' procedure with a sole arbitrator through which claims had to be decided within 30 days. Similarly, accounts with a balance of less than 100 Swiss francs were solved with an expedited procedure.<sup>182</sup> In the UNCC, small individual claims were processed with priority<sup>183</sup> and Category A, B and C claims were handled through an expedited procedure with relaxed standards of proof. Before the HPCC, uncontested refugee claims were also decided in a fast-track summary procedure.<sup>184</sup> Finally, in order to expedite decisions, claims with similar factual or legal issues were often processed together (for instance in the GFLCP<sup>185</sup>) and standard patterns of decision-making were established, based upon the evidence submitted (in the CRPC among others).

### 2.7 Fairness of decision

One of the main criticisms of mass claims processes is that they are often unable to tailor their remedy to the individual case, thus granting compensation that does not reflect the actual damage suffered. In the CRT, for instance, banks were willing to pay ten times the reported account value in full and final settlement of claims for accounts with a balance of less than 100 Swiss francs.<sup>186</sup> Such compensation did not reflect the actual interest but was an expedient way of taking into account inflation and interests without requiring extensive arguments and calculations. Ultimately, the use of fixed-amount compensation or expedited valuation methods was the price paid for quick decision-making and the fact that claimants were often unable to document their losses. Nevertheless, some resolution facilities applied full valuation techniques. For instance, although the UNCC used fixed tiers of

<sup>182</sup> Final Report on the Work of the Claims Resolution Tribunal for Dormant Accounts in Switzerland (CRT-I), p.20.

<sup>183</sup> UNCC Governing Council, Decision No. 1: Criteria for Expedited Processing of Urgent Claims, S/AC.26/1991/1, 2 August 1991, 30 *International Legal Materials* 1712, at §§ 1 and 8. According to Wühler above n. 131 ('A New Contribution, at 261), this priority marks a sharp contrast with other claims resolution processes, where the emphasis had traditionally been on claims by governments and corporations.

<sup>184</sup> UNMIK Regulation No. 2000/60, Section 23.

<sup>185</sup> The procedures are set out in the IOM Property Claims Commission, Supplemental Principles and Rules of Procedure (5 June 2001), Section 20.1 (available at [http://www.compensation-for-forced-labour.org/english\\_home.html](http://www.compensation-for-forced-labour.org/english_home.html) (visited June 2007)).

<sup>186</sup> The small amount settlement procedure was used only in non-victim cases. See the CRT, Final Report, p.21.

compensation for Category A and B claims, it went to great length to evaluate the actual damage in the claims presented by companies and states.

## 2.8 Finality of decision

Due process does not require the possibility of appeal against a decision. However, the possibility of review, whereby errors can be corrected, may enhance the acceptability of a decision. At first glance, appeals are incompatible with mass claims processes, as they delay the final decision. Nevertheless, many mass claims processes allowed for review of their decisions. For instance, although CRPC decisions were final and binding and could not be reviewed by any domestic court<sup>187</sup>, they could be subject to internal reconsideration whenever a party submitted new evidence or facts that had not yet been considered by the commission.<sup>188</sup> In the GFLCP, an Appeals Body decided on appeals on the basis of written information and evidence available. The ICHEIC's Appeals Tribunal or Appeals Panel consisted of independent and impartial arbitrators and could review

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<sup>187</sup> Dayton Peace Agreement, Annex 7, art. XII(7). Annex 7 does not grant the CRPC any enforcement or implementation powers. Instead, it imposes the responsibility for the implementation of CRPC decisions upon the domestic organs (Dayton Peace Agreement, Annex 7, art. VIII). Unfortunately, Annex 7 does not specify a particular implementation procedure, and in the first few years after the war, local authorities were often unwilling or unable to take the necessary steps to bring decision holders into possession of their property. See M. Garlick, 'Protection for Property Rights: A Partial Solution? The Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) in Bosnia and Herzegovina', (2000) 19 *Refugee Survey Quarterly* 68, at 78.

Eventually, the High Representative imposed specific laws in each entity, setting out the concrete steps that local authorities are expected to take when a claimant requests enforcement of a CRPC decision. See the Law on Implementation of the Decisions of the Commission for Real Property Claims of Displaced Persons and Refugees, Republika Srpska, Federation of B-H, 27 October 1999, (available at [http://www.law.kuleuven.ac.be/ipr/eng/CRPC\\_Bosnia/CRPC/new/en/html/laws/entitylaws.htm](http://www.law.kuleuven.ac.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/html/laws/entitylaws.htm) (visited June 2007)).

Once the implementation laws entered into force, the respect for CRPC decisions started growing, even in areas where obstruction of property rights was prominent until recently. See, M. Cox & M. Garlick, 'Musical Chairs: Property Repossession and Return Strategies in Bosnia and Herzegovina', in S. Leckie (ed.), above n. 139 at 65.

<sup>188</sup> CRPC, Book of Regulations on the Conditions and Decision Making Procedure for Claims for Return of Real Property of Refugees and Displaced Persons, 8 October 2002, Art. 76, (available at [http://www.law.kuleuven.ac.be/ipr/eng/CRPC\\_Bosnia/CRPC/new/en/html/laws/lawbookofregulations.htm](http://www.law.kuleuven.ac.be/ipr/eng/CRPC_Bosnia/CRPC/new/en/html/laws/lawbookofregulations.htm) (visited June 2007)).

decisions issued by the participating insurance companies or associations. These appeal proceedings were conducted on a document-only basis, unless an oral hearing was requested by one of the parties or ordered by the arbitrator.<sup>189</sup> Approximately 2,200 appeals for insurance claims were received.<sup>190</sup>

## 2.9 Implementation

Due process implies that the decision is implemented effectively. The enforcement of court decisions with regard to property claims after a war may very often be obstructed for practical or legal reasons. For instance, when a state is recognised guilty or liable by a judgment, it may rely on immunity of enforcement, which is recognised by the European Court of Human Right as a rightful obstacle to enforcement.<sup>191</sup>

Many mass claims processes, however, usually provide for the implementation of their decision. In Kosovo, the HPCC itself implemented its decisions by issuing an order for the eviction of the then current occupants of a property that was to be repossessed by a claimant. All the HPCC's decisions have thus been implemented.

Mass claims instances may also pay out themselves the compensation they awarded from a designated fund. This was the case for the UNCC,<sup>192</sup> the CRT in its second phase<sup>193</sup> and the GFLCP.<sup>194</sup> For

<sup>189</sup> ICHEIC, Appeals Tribunal Rules of Procedure, art. 11.3 (available at [http://www.icheic.org/pdf/ICHEIC\\_Appeals.pdf](http://www.icheic.org/pdf/ICHEIC_Appeals.pdf) (visited June 2007)).

<sup>190</sup> This figure encompasses appeals on company offers and declines. For a breakdown by category, see the updated on claims and decision statistics available at <http://www.icheic.org> (visited June 2007).

<sup>191</sup> See amongst many examples: *Horsnby v. Greece* (App. 18357/91), Judgment of 19 March 1997; (1997) 24 EHRR 250; *Burdov v. Russia*, (App. 5949/00), Judgment of 7 May 2002, (2004) 38 EHRR 639; *Jasuniene v. Lithuania*, (App. 41510/98), Judgment of 6 March 2003; *Shmalko v. Ukraine*, (App. 60750/00), Judgment of 20 July 2004; and *Popov v. Moldova* (App. 74153/01), Judgment of 18 January 2005.

<sup>192</sup> UN Security Council Resolution 687, S/RES/687 (1991), 3 April 1991, (1991) 30 *International Legal Materials* 847, at para 18.

<sup>193</sup> Section 5 of the CRT Settlement Agreement (26 January 1999):

”Settling Defendants shall pay Installments 2 [i.e. US\$ 333 million], 3 [i.e. US\$ 333 million], and 4 [i.e. US\$ 334 million] to a separate fund (Settlement Fund) that Settling Plaintiffs shall establish following the Court’s issuance of Preliminary Approval. [...]”

<sup>194</sup> Section 9 of ‘the Law on the Creation of a Foundation “Remembrance, Responsibility and Future”’ (available at [http://www.compensation-for-forced-labour.org/english\\_home.html](http://www.compensation-for-forced-labour.org/english_home.html) (visited June 2007)):

“(4) The sum of one billion deutschmarks of the Foundation’s monies is intended for payments to persons who suffered property loss. This amount is divided into the following maximum amounts: [...]”

insurance claims, each company established its own fund to pay for its own claims, but the ICHEIC also administered a Humanitarian Fund to provide relief to claimants who held an insurance policy that could not be attributed to a particular insurance company or who held insurance issued by companies no longer in existence.

Even when mass claims bodies do not implement their decisions themselves, they may nevertheless be instrumental in their enforcement. For instance, in its first stage, the CRT did not pay out the money itself but requested the banks to do so.<sup>195</sup> Moreover, it provided the claimants with practical information, such as telephone numbers and contacts at the relevant banks, and followed up when payment was in arrears.<sup>196</sup> Finally, it sent the claimant a certified copy of the award which could then be enforced in a Swiss court.<sup>197</sup> Likewise, the CRPC had no power to implement its decisions on property rights. Implementation rested squarely with the domestic authorities, which had ample room for obstruction.<sup>198</sup> However, in 1999, the High Representative imposed a ‘Law on the Implementation of CRPC Decisions’, which took care of implementation problems with local authorities. Moreover, any obstructive officials were dismissed by the High Representative, thus allowing the implementation of nearly all CRPC decisions.

### 3 Conclusion

Although mass claims settlement programmes cannot implement due process requirements in the way state courts do, their proceedings closely follow the same lines. Indeed, both domestic courts and mass claims resolution facilities aim at providing justice to the victims by safeguarding their access

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See also Section 6 of ‘the Law on the Creation of a Foundation “Remembrance, Responsibility and Future”’: “The Board of Directors shall direct the day-to-day business of the Foundation and shall implement the decisions of the Board of Trustees. It is responsible for distributing the resources of the Foundation to the partner organisations and for the management of the “Remembrance and Future” fund. It oversees the purposeful and prudent expenditure of the Foundation’s funds, in particular adherence by the partner organisations to the provisions of this Law and the guidelines established by the Board of Trustees for the use of its funds.”

<sup>195</sup> CRT, Final Report, 58.

<sup>196</sup> CRT, Final Report, 58.

<sup>197</sup> H. M. Holtzmann and E. Kristjánsdóttir (eds.), *International Mass Claims Processes: Legal and Practical Perspectives* (Oxford, Oxford University Press, 2007), 137.

<sup>198</sup> Commission for Real Property Claims of Displaced Persons and Refugees (CRPC) – End of Mandate Report (1996-2003), 23.

to impartial adjudicators, the proper, expedient and fair conduct of proceedings, and by allowing final decisions to be rendered and implemented. Nevertheless, while traditional courts focus on the individualised handling of their docket, mass claims processes have in mind the resolution of claims in a global fashion. Moreover, international mass-claims resolution bodies must take into account specific constraints. The main one is linked to evidentiary difficulties, since public documentation may have been destroyed during a conflict or individuals may have fled without property-related documents. There is also a particular sense of urgency to see the claims resolved quickly for claimants who have lost everything during the conflict or who are aged (Holocaust survivors, for instance). Finally, a conflict can affect the properties of individuals spread all over the world. Therefore, mass claims processes must accommodate the demands of both claimants and defendants as best as possible, by tailoring their procedures to the specific circumstances. Ultimately, due process is only a way of delivering justice that will be considered fair, credible and legitimate. In this regard, mass claims programmes cannot afford to sacrifice basic procedural safeguards, but must adapt them so as to provide efficient and 'rough' justice for the victims, especially after war.