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A Process-Oriented Approach to Corporate Liability for Human Rights Violations

Leora Bilsky and Natalie R Davidson*

Abstract

This article shifts attention from the search for a norm of corporate liability for human rights abuses to an exploration of the process(es) through which corporate liability could be imposed. Elaborating on Nancy Fraser's theory of 'abnormal justice', we argue that only by giving serious attention to process can we begin to address the democratic deficit that characterises the current globalisation era and is particularly manifest in struggles to hold multinational corporations accountable. We further provide a conceptual matrix within which to develop processual models of transnational civil corporate liability. This conceptual analysis is grounded in a study of the Holocaust restitution litigation of the 1990s, in which Swiss banks and German corporations were sued in US courts on grounds of tort, restitution and international law for their involvement in the Nazi crimes. We closely analyse and compare the Swiss and German cases in order to gain insights about the procedural tools at our disposal to hold multinational corporations accountable for human rights violations. Moreover, these cases provide concrete sites in which to explore the jurisprudential continuities and transformations experienced by law in the move from the domestic to the transnational context.

INTRODUCTION

International legal scholars have been preoccupied with the question of whether multinational corporations (MNCs) can be held liable for human rights violations under the Alien Tort Statute (ATS).[1] This statute had been interpreted since 1980 to allow alien

* Leora Bilsky is a Full Professor and Natalie Davidson is a PhD candidate, both at the Buchmann Faculty of Law, Tel Aviv University. We thank the participants at the conference on 'Corporate Liability for Human Rights Violations' held at Tel Aviv University in December 2012, as well as the anonymous reviewer for their helpful comments. We also thank Neli Frost for research assistance and Shani Shisha for technical assistance. This article forms part of a book-length project on Holocaust restitution litigation undertaken by Leora Bilsky, with the support of the David Berg Institute for Law and History, the Minerva Center for Human Rights and the Cegla Center for the Interdisciplinary Research of the Law, all at Tel Aviv University, as well as the Israel Science Foundation. All websites accessed June 2013.

1 28 USC § 1350, which grants federal courts 'original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States'.

victims of human rights abuses, wherever committed, to sue perpetrators in US federal courts.[2] The debate surrounding corporate liability under the ATS gained momentum around the case of *Kiobel v Royal Dutch Petroleum*.[3] Because ATS claims must be grounded in norms of international law,[4] scholars turned to the Nuremberg industrialist trials, debating whether they provide a precedent for corporate liability under international law.[5]

The US Supreme Court eventually held in *Kiobel* that the ATS should be construed not to apply to violations of international law that occur outside US territory.[6] At the time of publication of this article, the impact of that decision on transnational human rights litigation against corporations remains unclear. While some see in *Kiobel* the end of an era,[7] others predict that other avenues for such litigation will be found, for example in state courts.[8] We do not adopt a position on this question. Rather, faced with the pressing issue of corporate accountability for human rights violations, this article calls to invert the order in which questions have been asked, by moving from the search for a norm to an exploration of the transnational process(es) through which corporate liability could be imposed.

2 The ATS was redeemed from near oblivion in 1980 in the landmark case of *Filártiga v Peña-Irala*, 630 F 2d 876 (2d Cir 1980).

3 *Kiobel v Royal Dutch Petroleum Co et al*, 569 US ___ (2013) US LEXIS 3159 (US Apr 17, 2013). The plaintiffs in *Kiobel* alleged that the defendant corporations aided the Nigerian government in suppressing their resistance to oil exploration by allowing corporate property to be used as a staging ground for attacks and by providing food and compensation to Nigerian soldiers.

4 Beth Stephens, 'Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' (2002) 27 *Yale Journal of International Law* 1, 8.

5 By 'Nuremberg industrialists trials' we are referring to the trials of individual German industrialists and bankers that followed the trials of the highest-ranking Nazis by the International Military Tribunal at Nuremberg. See Doreen Lustig, 'The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann's Concept of Behemoth at the Industrialist Trials' (2011) 43 *NYU Journal of International Law & Politics* 965; Kim Priemel, 'Tales of Totalitarianism: Conflicting Narratives in the Industrialist Cases at Nuremberg' in Kim Priemel and Alexa Stiller (eds), *Reassessing the Nuremberg Military Tribunals* (Berghahn Books, 2012). These trials appear to be the closest attempt in international law to hold corporations—or at least corporate officers—liable for violations of international law. Thus, amici briefs filed by historians and legal scholars in *Kiobel* debated whether Nuremberg provides a precedent for corporate liability. See Brief for the Nuremberg Historians and International Lawyers as Amicus Curiae, *Kiobel v Royal Dutch Petroleum Co et al*, 621 F 3d 11 (2011); Brief for the Nuremberg Scholars Omer Bartov et al as Amicus Curiae, *Kiobel v Royal Dutch Petroleum Co et al*, 621 F 3d 11 (2011). The terms of that debate implied that criminal and civil litigation are merely different procedural tools through which international law norms are enforced.

6 *Kiobel* (n 3).

7 Julian Ku and John Yoo, 'The Supreme Court Unanimously Rejects Universal Jurisdiction', Forbes.com (21 April 2013), www.forbes.com/sites/realspin/2013/04/21/the-supreme-court-unanimously-rejects-universal-jurisdiction.

8 Donald Earl Childress III, 'The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation' (2012) 100 Georgetown Law Journal 709; Roger Alford, 'Kiobel Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation', Opinio Juris (17 April 2013), http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation.

We assume that corporations should be held liable in some manner for participation in atrocity. The precise extent of their liability, and its apportionment with actors outside the corporation and within it, are difficult questions which must be addressed, but we defer these questions for the moment and focus on process, for we believe that process will help define and design liability.[9] More importantly, we argue that only by giving serious attention to process can we begin to address the democratic deficit that characterises the current globalisation era and is particularly manifest in struggles to hold MNCs accountable.[10] The value of adopting the lens of process becomes clearer once we place the question of MNC liability for human rights abuses in the context of transnational struggles for justice. Political theorist Nancy Fraser has characterised these struggles as situations of 'abnormal justice'.[11] Contrary to situations of 'normal justice' in which 'the contestants share underlying presuppositions about what an intelligible justice claim looks like',[12] in situations of abnormal justice there is no agreement about the very rules of the game.[13]

The debate surrounding the liability of MNCs for human rights violations is a striking instance of 'abnormal' justice, as there is currently no consensus as to the proper forum, the standards by which to judge claims, or the constituencies whose interests are to be taken into consideration when resolving claims.[14] Yet in these situations, familiar

9 It is also necessary to devote more attention to possibilities for regulating MNC conduct *ex ante*, including by altering the structural conditions that enable MNC participation in human rights violations. Within the scope of this article, however, these broader questions cannot be explored.

10 The expression 'democratic deficit' refers to the mismatch between domestic democratic processes tailored to the nation-state on the one hand, and the transnational sources of power and causes and consequences of injustice on the other. As a result of this mismatch, the persons most affected by a policy are often unable to participate in the policy-making.

11 Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalized World* (Cambridge University Press, 2009) 48–75. For an application of Fraser's theory of abnormal justice to transnational labour disputes in the European Union and the World Trade Organization, see Judy Fudge and Guy Mundlak, 'Justice in a Globalizing World: Resolving Conflicts Involving Workers Rights Beyond the Nation State' (manuscript on file with authors).

12 Fraser (n 11) 48.

13 'No sooner do first-order disputes arise than they become overlain with meta-disputes over constitutive assumptions, concerning who counts and what is at stake. Not only substantive questions, but also the grammar of justice itself is up for grabs.' *Ibid*, 50.

14 Even when courts are favourable to ATS lawsuits against corporations, the abnormal character of the legal struggle is apparent. Thus, in the ATS case of *Flomo v Firestone Natural Rubber Co*, 643 F 3d 1013 (7th Cir 2011), Liberian plaintiffs alleged that Firestone's use of child labour in hazardous conditions on its rubber plantation in Liberia violated international law. It was not claimed that Firestone had directly employed children; rather, by setting high production quotas, it had encouraged children of employees to assist their parents. While Posner J held that corporations could in principle be held liable for violations of international law under the ATS, he did not find any violation of customary international law in the facts presented before him. Besides his interpretation of international sources as lacking a sufficiently precise prohibition of this form of child labour, Posner J stated that 'the biggest objection to [the] lawsuit' was that '[w]e … don't know the situation of Liberian children who don't live on the Firestone plantation. Conceivably, because the fathers of the children on the plantation are well paid by Liberian standards, even the children who help their fathers with the work are, on balance, better off than the average Liberian child, and would be worse off if their fathers, unable to fill their daily quotas, lost their jobs or had to pay

theories of justice are unhelpful, as they are premised on a shared grammar, and therefore focus mostly on first-order questions, such as what constitutes a just distribution of wealth.[15] They do not suggest how to proceed when there is no democratic institutional structure through which to resolve questions regarding the how, what, and who of justice-seeking.[16]

Elaborating on Fraser's theory, we argue that it sheds light on the importance of shifting attention to process when addressing MNC liability. Furthermore, we show that this theory can provide a conceptual matrix within which to develop processual models of transnational civil corporate liability for human rights violations.

At the centre of our inquiry stands the transnational Holocaust litigation (THL) of the 1990s, in which Swiss banks and German corporations were sued in US courts on grounds of tort, restitution and international law in connection with their involvement in the Nazi crimes. We argue that THL represents the transnational situation of abnormal justice *par excellence*, and as such constitutes a rich experiment for reflecting on and developing transnational modes of MNC accountability. These class action claims filed on behalf of Holocaust survivors and former forced labourers were settled for unprecedented amounts. Having failed to produce a legal judgment, THL is usually ignored by legal scholars. However, in our view, it is precisely the settlement of these lawsuits that allowed lawyers, politicians, giant corporations, civil society organisations and individual victims to come together to design deliberative forums and establish innovative mechanisms to resolve decades-old disputes, all the while enhancing historical knowledge.

We use the theory of abnormal justice to critically assess the extent of THL's success in dealing with the democratic deficit in struggles for the accountability of giant corporations. Indeed, shifting our attention to process means that instead of examining cases

adult helpers, thus reducing the family's income.' These comments pose the difficult question of what labour standards are applicable in developing nations: those of the forum, the employer's jurisdiction of incorporation, international law, or the country in which the labour is performed? The debate over the choice of standards reflects conflicting assumptions, even *within* the perspective of children's welfare, as to whether this sort of child labour is better framed as an issue of human rights or economic development (the 'what' of justice), and whether the court's decision should purport to clarify labour standards for Liberian children, children in developing nations, or children worldwide (the 'who' of justice). These uncertainties are compounded by the weak legitimacy of US courts' involvement in human rights violations committed abroad (the 'how' of justice). Indeed, though the judge held that corporations could in principle be sued under the ATS, he had to limit the ATS's applicability to the most egregious abuses in order for that body of law to retain legitimacy.

15 Fraser (n 11) 51.

16 From this perspective, lawyers' and scholars' search for a clear and precise norm of corporate liability in the debate surrounding *Kiobel* can be conceptualised as a focus on a first-order question (are corporations liable when implicated in state repression?), masking the profound disagreements about the very rules of the game present in these cases—disagreements which tend to eventually rise to the surface. Thus, whereas *Kiobel* was initially framed around the question of corporate liability, the Supreme Court ordered reargument to include the question of the ATS's extraterritorial reach, and it is the question of US courts' universal jurisdiction, or the 'how' of these disputes, that stood at the centre of the Supreme Court decision. *Kiobel* (n 3).

for the norms they produced or failed to produce, we should focus on the kind of settlement designed in each case, and develop theories enabling us to assess different types of process. THL offers a unique opportunity for analysis, as the Swiss and German cases developed two distinct paths within class action procedure to address similar problems of transnational corporate accountability. Following Fraser, we compare these two paths along the following parameters: the decision-making procedure employed ('how'), the definition of the parties ('who'), and the type of justice provided ('what').

Our analysis proceeds as follows. Part I presents the theoretical framework of the article. It argues that transnational justice is best characterised as abnormal, and as such requires a shift to process and away from norms. Part II presents THL as an instance of abnormal justice in which the parties relied on the US class action while transforming it into a transnational forum. We present the Swiss and German cases and point to a key difference between them in terms of process. Both cases proceeded as settlement negotiations in the shadow of lawsuits. However, in the Swiss case the negotiations and settlement distribution procedure were supervised by the court and followed formal procedures. In contrast, the German negotiations were removed from the courts and managed by diplomats in an informal process, and the settlement distribution was administered by a German foundation without substantial third-party supervision. We argue that this key difference between a judicial track and a diplomatic-bureaucratic track has important ramifications for the participatory character of the forum created.

The next three parts compare the Swiss and German cases in light of each of the nodes of 'abnormality' identified by Fraser. We begin with the 'how'. Part III finds that while a formal judicial track has advantages in terms of *democracy*, a diplomatic-bureaucratic track may be more *efficient*. Part IV turns to the 'who' of justice. It shows that while the more formal Swiss case provided more participatory methods of defining who counts as a *victim*, the informality of the German case encouraged the state and non-defendant corporations to share liability with the formal defendants, allowing the definition of *perpetrator* to be broadened. Finally, Part V compares the 'what' of justice promoted in the two models. While the central role of the court in the Swiss case led to the adoption of a predominantly *individual and corrective* justice, the diplomatic-bureaucratic track of the German case furthered *collective, distributive and commemorative* justice. Thus, by turning to process, we see that THL's most important jurisprudential contribution resides not in norms produced but in the innovative ways in which the peculiar North American institution of the class action was harnessed to create a transnational forum in which groups of victims could demand accountability from giant private corporations. In this sense, this article seeks to contribute to a larger body of scholarship that abandons a narrow understanding of democracy as electoral processes, and sees the legal process not in opposition to politics but as a central arena in which to encourage the democratic values of transparency, participation and accountability in a transnational setting.[17]

17 See nn 52–53 and accompanying text below.

I. THE THEORY OF ABNORMAL JUSTICE

A. The Diagnosis: Democratic Deficit

Globalisation has often been described as creating a crisis for law.[18] The mismatch between our political institutions, which remain primarily state-based, and the new transnational legal order poses serious questions of democratic participation and legitimacy. To the familiar limitations of domestic democratic processes, such as the muting of minority voices and capture by special interest groups, is now added the fact that policy-making at the global level erodes national sovereignty without offering significant venues for participation by civil society.[19] Moreover, the growing dependence on foreign capital has significantly increased the domestic political leverage enjoyed by private foreign corporations,[20] who are not, in counterpart, accountable to the citizenry. In this context, 'partitioning political space along territorial lines'[21] insulates 'extra- and non-territorial powers' such as MNCs, financial markets, investment regimes and the global media from justice.[22]

It should therefore come as no surprise that contemporary justice-claiming seeks to expand traditional legal categories, for example by overcoming national-territorial limitations on jurisdiction and standing. Nancy Fraser has elaborated a theoretical framework to conceptualise this phenomenon more precisely. She characterises disputes in the current era of globalisation as situations of 'abnormal justice',[23] in which there is no agreement about the rules of justice-seeking. 'No sooner do first-order disputes arise than they become overlain with meta-disputes over constitutive assumptions, concerning who counts and what is at stake. Not only substantive questions, but also the grammar of justice itself is up for grabs.'[24]

There is no agreement over the 'what' of justice, as cultural claims for recognition and political claims for representation now compete with distributive justice for the position of legitimate subject of claims.[25] Furthermore, even among those who agree that the status quo is unjust, there is disagreement as to how to describe it: 'Where one party perceives distributive injustice, another sees status hierarchy, and still another

18 Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism' in Gunther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff, 2012).

19 Eyal Benvenisti, 'Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders' (2013) 107 *American Journal of International Law* 295.

20 *Ibid*.

21 Fraser (n 11) 23.

22 *Ibid*.

23 *Ibid*, 48–75.

24 *Ibid*, 50.

25 *Ibid*, 53.

political domination.'[26] Neither is there is any agreement over whose interest deserves consideration, as local-communalist, transnational-regional, and global-cosmopolitan views of the 'who' of justice challenge the established Westphalian frame.[27] Finally, there is no agreement over the 'how' of justice: what institution and decision-making procedure should be used to resolve questions of what and who. Democratic expectations challenge the prerogatives of states and elites to decide, as evidenced by civil society protests against international organisations.[28] Thus, the field of contestation has expanded, and in doing so has led to a contestation of the very 'grammar' of justice.

Fraser does not deny that there is contestation and dissent in times of so-called 'normal justice'. However, based on Thomas Kuhn's understanding of normal science, she argues that one can talk about normal justice where public dissent and disobedience are contained such that the discourse is not de-structured.[29] These nuances notwithstanding, the theory of abnormal justice assumes in our view too sharp a dichotomy between law's functioning in the current globalisation era and in the past situation of so-called 'normal' justice confined to the frame of the nation-state. As Peer Zumbansen has pointed out, 'the alleged crisis of law and legal regulation, whether depicted as a loss of state sovereignty or as a problem of lacking (democratic, political) accountability and legitimacy in the global context, has to be understood as a particular amplification of a problem with law that has long been in the coming'.[30] From this perspective, what is new about our argument that a transnational class action can help address the global democratic deficit? It has been argued that through the class action, the US civil rights struggle of the 1960s not only voiced new claims for equality, but also sought to reimagine the very grammar of civil litigation, which was transformed from a mechanism of private dispute resolution into an arena for elaborating public values.[31] We recognise that there is much continuity in law's functioning in the domestic and transnational settings. Thus, our use of the expression 'abnormal justice' in this article implies less a rupture with a sociologically accurate practice of 'normal justice' in the domestic context, than a depar-

26 *Ibid*.

27 *Ibid*, 56.

28 *Ibid*, 55–56.

29 *Ibid*, 48.

30 Zumbansen (n 18) 71 (reminding us that anxieties about the nature of law and the accuracy of traditional jurisprudential boundaries pre-date the current era of globalisation, having grown over the course of the 20th century, from the attack on legal formalism through the emergence of legal pluralism, Critical Legal Studies and the Law and Society movement, which blurred the boundaries between public and private, relativised the power of state law, and pointed to the normative effect of non-binding rules).

31 Owen Fiss, 'The Supreme Court, 1978 Term—Foreword: The Forms of Justice' (1979) 93 *Harvard Law Review* 1, 17 (arguing that the structural reform lawsuit dramatically changes the party constitution, role of judge and nature of remedies away from the 'dispute resolution model' in order to adapt the law to the bureaucratic structure of modern human rights violations). For an analysis of THL in light of debates regarding structural reform litigation in order to develop a more robust theory of transnational corporate liability, see Leora Bilsky, Rodger Citron and Natalie R Davidson, 'From *Kiobel* back to Structural Reform: the Hidden Legacy of Holocaust Restitution Litigation' (manuscript, on file with authors).

ture from 'normal justice' as a theoretical paradigm focused on the elaboration of clear norms.

At the same time, the theory of abnormal justice is useful for pointing to a heightened democratic deficit in the transnational era. In the US domestic context, the class action is perceived as competing with the legislative process, and hence must be legitimised in comparison with more representative alternatives.[32] In the transnational setting, the arguments against corporate liability under the ATS are often cast by conservatives in similar terms of an infringement of politics by law, the taking of jurisdiction being portrayed as interference with US foreign policy.[33] Similarly, from the left side of the political spectrum, commentators saw the use of the class action in THL as a form of US imperialism,[34] and the litigation's settlement as a reflection of the triumph of power over law.[35] The theory of abnormal justice suggests that the domestic/transnational analogy is imperfect, because, in contrast with the domestic context, transnationally we do not have even minimally functioning democratic institutions to provide an alternative to the class action. In THL, there were no relevant international institutions, and Swiss and German domestic law had proven themselves incapable of addressing the victims' claims for over 60 years.[36] By drawing attention to the nuances of process, Fraser encourages us to forsake the dichotomy of law vs politics as well as simplistic accusations of imperialism, and try to understand whether a legal mechanism can in fact be tailored to fulfil democratic values. This does not mean that the turn to US courts is always legitimate, or that the US class action provides the best participatory mechanism to deal with the democratic deficit, as our analysis in the subsequent Parts will reveal serious problems within THL. Rather, our point is to substantially reformulate the questions being asked about MNC accountability.

32 For critiques of the class action for infringing on separation of powers and federalism, see John Choon Yoo, 'Who Measures the Chancellor's Foot? The Inherent Remedial Authority of Federal Courts' (1996) 84 *California Law Review* 1121, 1123–4; Alfred M Mamlet, 'Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits' (1984) 33 *Emory Law Journal* 685.

33 See eg Carolyn A D'Amore, 'Sosa v Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?' (2006) 39 *Akron Law Review* 593.

34 Michael Robert Marrus, *Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s* (University of Wisconsin Press 2009) 25; Ugo Mattei and Jeffrey Lena, 'US Jurisdiction over Conflicts Arising outside of the United States: Some Hegemonic Implications' (2001) 24 *Hastings International & Comparative Law Review* 381, 395 (arguing that '[t]he class action is the intellectual-ideological device that permits US hegemony to obtain the consent of hegemonized communities by offering and promoting an alternative to political struggle').

35 See eg Samuel P Baumgartner, 'Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases' (2002) 80 *Washington University Law Quarterly* 835, 841; Samuel P Baumgartner, 'Class Actions and Group Litigation in Switzerland' (2007) 27 *Northwestern Journal of International Law & Business* 301, 316.

36 See n 96 and accompanying text below.

B. The Sketch of a Solution

Having brought to light expansions in the field of contestation, Fraser points out that contestation itself cannot overcome injustice.[37] She therefore attempts to outline the contours of a transnational justice system that would be self-reflexive and open to further expansion, and yet have the institutionalised capacity for decision-making. Thus, her theory not only usefully maps disagreements about process by distinguishing between the who, what and how of justice, but also uses these three 'nodes' to begin to sketch the contours of real-world solutions. However, as a political theorist, Fraser provides only the broad theoretical framework, leaving the specific institutional mechanisms to be developed by others. This article takes up the task and elaborates on the theory of abnormal justice as applied to MNC accountability through the case of THL.[38]

Fraser argues that resolving the democratic deficit manifest in disputes concerning the 'how' of justice requires abjuring the presumption that states and private elites should determine the grammar of justice, with greater weight instead being given to opinions voiced in civil society. However, she recognises that civil society is not a representative forum and cannot produce binding decisions. Dialogue with civil society must therefore be complemented with a formal institutional track with democratic institutions, representative structures and fair procedures, as well as the capacity to make decisions.[39] But in the absence of elections, how does one evaluate the democratic character of transnational litigation? This is where Fraser leaves off, and we turn to a number of legal scholars who have argued that we should consider due process guarantees as substitutes for the democratic values of individual participation, transparency and accountability.[40] In Part III we therefore assess THL's democratic character in light of these due process parameters.

But who is it that should participate? Fraser rejects overly expansive notions of standing such as those based on membership in humanity, for failing to distinguish between morally relevant relationships. She adopts instead what she calls the 'all-subjected principle', according to which 'all those who are subject to a given governance structure have moral standing as subjects of justice in relation to it'.[41] This principle focuses exclusively

37 Fraser (n 11) 57.

38 Our use of the theory of abnormal justice does not imply that all types of contemporary transnational disputes are underlain with profound disagreements as to the rules of the game. MNC liability for involvement in state atrocity, however, is a question gravely lacking both normative and procedural consensus, and the shift to process is therefore appropriate for this issue.

39 Fraser (n 11) 69.

40 Armin von Bogdandy, 'The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations' (2012) 23 *European Journal of International Law* 315; Judith Resnik, 'Fairness in Numbers: A Comment on *AT&T v Conception*, *Wal-Mart v Dukes*, and *Turner v Rogers*' (2012) 125 *Harvard Law Review* 78, 88 (arguing that in procedural matters the democratic values of equality, dignity and sovereignty over one's fate are embodied in principles of due process such as adequate representation, public proceedings and fair procedures).

41 Fraser (n 11) 65. Subjection to a governance structure is to be broadly construed, and includes subjection 'to the coercive power of non-state and trans-state forms of governmentality'. *Ibid*.

on claimants, leaving aside the important question of the scope of responsibility, which we explore in Part IV. Moreover, even if we adopt her solution, such that all those who were 'subject to the coercive power'[42] of the defendant corporations should have standing, the question remains whether, in addition to the aggregate interests of the victims (the 'subjected'), some broader public interest should be pursued. If THL, for instance, is a form of public litigation standing in for democratic processes, what is the *relevant public*? To whom does this lawsuit belong? There is no straightforward answer to this question with respect to the Holocaust, for which it can alternatively be argued that the relevant community is that of the victims, the concerned states, or a broader cosmopolitan interest.[43] Below, we therefore assess the Swiss and German cases for the extent to which they gave not only victims but also other publics what Fraser calls 'a fair hearing'.[44]

As to the 'what' of justice, Fraser urges us to allow all types of claims, provided that they reflect 'parity of participation' as an overarching normative principle. That is, claims may be formulated if they seek to dismantle obstacles to participation on a par with others, whether these obstacles be economic, cultural or political.[45] She does not, however, offer a solution to the problem she identified of differing interpretations even among those who see the status quo as unjust. This was apparent in THL, where conflicts arose as to whether the payments made in distribution of the settlement funds should promote a more corrective or distributive justice. Part V elaborates on the implications of different processual arrangements for the 'what' of justice. In this sense, THL offers an opportunity not only to identify concrete applications of Fraser's theory, but also to explore additional areas of disagreement and possible responses.

C. Abnormal Justice in Broader Jurisprudential Context

But what is new about adopting the lens of process when addressing transnational corporate liability for human rights violations? Harold Koh has famously developed the concept of 'transnational legal process', and insists that inquiries into legal process have a long pedigree in international legal scholarship.[46] For Koh, '[t]ransnational legal process describes the theory and practice of how public and private actors—nation-states, international organisations, multinational enterprises, non-governmental organisations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalise rules of transnational

42 *Ibid*, 65.

43 Daniel Levy and Natan Sznaider, *The Holocaust and Memory in the Global Age* (Temple University Press, 2006).

44 Fraser (n 11) 61.

45 *Ibid*, 60.

46 See Harold Hongju Koh, 'Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181; Harold Hongju Koh, *Transnational Litigation in United States Courts* (Foundation Press, 2008) 24.

law'.[47] The concept of transnational legal process urges us to look at court decisions not as 'final stops, only way stations'[48] in a complex process of norm internalisation by states.[49]

However, as the above quotes suggest, the familiar concepts of transnational legal process and transnational public law litigation are still captive of a form of legalism,[50] as they remain geared toward the elaboration and internalisation of norms of international law. It is simply the means to reach those norms—a complex political process—which has been broadened beyond court decisions and made more flexible. Thus, Koh's discussion of MNC liability under the ATS is symptomatic of the current focus on international norms. Like other advocates of corporate liability under the ATS, Koh portrays the question of the nature of the defendant as one of mere procedure, distinct from and auxiliary to the norm of international law prohibiting human rights violations.[51] Fully shifting attention away from first-order norms to process as suggested by the theory of abnormal justice allows us to move not only beyond the already discredited dichotomies of public law vs private law and international law vs domestic law, as urged by Koh, but also beyond the still dominant dichotomies of norm vs settlement and substance vs procedure, and tackle directly difficult and crucial questions of efficiency, democracy, representation and responsibility.

In this sense, this article contributes to scholarship on global administrative law, which attempts to address the global democratic deficit by turning to due process values such as transparency, participation, accountability and review in the decision-making of international organisations.[52] However, most of that writing is confined to European Union or international organisations.[53] There has been no attempt to investigate ATS litigation and transnational class actions as part of this attempt at democratisation

47 Koh, 'Transnational Legal Process' (n 46) 183–4.

48 *Ibid*, 199.

49 'Through a complex process of rational self-interest and norm internalization—at times spurred by transnational litigation—international legal norms seep into, are internalized, and become entrenched in domestic legal and political processes.' *Ibid*, 199.

50 As defined by Judith Shklar, legalism is 'the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.' Judith N Shklar, *Legalism: Law, Morals, and Political Trials* (*Harvard University Press*, 1964) 1. Legalism relies on a strict separation between law and politics.

51 Koh, *Transnational Litigation in United States Courts* (n 46) 46.

52 Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2004) 68 *Law and Contemporary Problems* 15.

53 See Fudge and Mundlak (n 11); Joanne Scott and Susan Sturm, 'Courts as Catalysts: Re-thinking the Judicial Role in New Governance' (2006) 13 *Columbia Journal of European Law* 565 (arguing that in addition to traditional roles of rule elaboration and enforcement, courts have a limited but crucial role as catalysts in new governance, which in the context of the EU includes prompting institutions to provide full and fair participation and fostering transparency and accountability); Bogdandy (n 40) 321 (arguing that a close reading of Arts 9–12 of the EU Treaty reveals an attempt to develop democracy in the EU, by abandoning the concept of holistic democracy, based on elections, and developing a concept of individualistic democracy, based on equal citizenship, transparency, participation and deliberation).

through process,[54] presumably because these mechanisms are seen as peculiar US institutions, but also because their scholarly discussion has centred on the question of norms. In the next parts we provide a new reading of THL as offering an exciting experiment in developing a deliberative forum by relying on and adapting the US class action.

II. THE SWISS AND GERMAN CASES: TWO WAYS OF ADDRESSING ABNORMAL JUSTICE STRUGGLES

This section presents the Swiss and German cases and argues that they represent situations of abnormal justice. In both cases, the claims were filed in US federal courts, initiated by private lawyers representing groups of victims from around the world, against European corporations for acts which occurred on European soil during World War II. In both, the large settlements reached between the parties to litigation avoided any clear ruling on the legal responsibility of the private corporations, but yielded historical findings through the work of out-of-court historical commissions. One of us has elaborated on the jurisprudential transformations that this new mode of transnational litigation entails, including the privatisation of human rights struggles and the judge's retreat from the didactic functions of norm elaboration and historical record setting in favour of a facilitative role.[55] In what follows we delve more deeply into the process adopted in THL, and differentiate between a formal track that relied on the federal rules of class actions procedure, and an informal track that removed the negotiations and settlement distribution from the US courts in favour of diplomacy and the establishment of a German foundation. In keeping with our focus on process, our methodology is not only to examine court rulings in the Swiss and German cases, but also to explore these cases as legal-historical events. We therefore studied legal documents pertaining to the cases, first-hand accounts of the cases by participants,[56] and studies of THL by lawyers and historians.[57]

54 One of us further explores the relationship between ATS litigation and democratisation by reading ATS litigation in light of the transitional justice paradigm. Natalie R Davidson, *Representations of Political Violence in the Shadow of Alien Tort Statute Litigation: Revisiting Filártiga v Peña-Irala* (manuscript on file with authors).

55 Leora Bilsky, 'Transnational Holocaust Litigation' (2012) 23 *European Journal of International Law* 349; Leora Bilsky, 'The Judge and the Historian: Transnational Holocaust Litigation as a New Model' (2012) 24 *History & Memory* 117.

56 Burt Neuborne, 'Transnational Holocaust-Related Litigation in United States Courts: The Swiss Bank and German Slave Labor Cases' (manuscript on file with authors); Burt Neuborne, 'Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts' (2002) 80 *Washington University Law Quarterly* 795; Stuart E Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (Public Affairs, 2003). See also the collection of essays by various participants in THL in Michael J Bazyler and Roger P Alford (eds), *Holocaust Restitution: Perspectives on the Litigation and its Legacy* (NYU Press, 2006).

57 Marrus (n 34); Michael J Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (NYU Press, 2003); Libby Adler and Peer Zumbansen, 'The Forgetfulness of Noblesse: A Critique of the German

A. The Swiss Case

In 1934, Swiss bankers pressed the Swiss parliament to enact legislation that criminalised revealing information about a Swiss bank account to any third party. This policy was intended to encourage those persecuted by the Nazi regime to transfer their money to a safe haven. Massive sums poured into Swiss banks from Jews and other targets of Nazi repression.[58] However, after the war, banking secrecy was used against the survivors and their descendants to justify withholding information about accounts. Against the growing pressures of descendants of Holocaust victims, now dispersed around the world, to provide information about 'dormant accounts', Swiss banks coordinated their legal response in order to systematically deflect enquiries.[59] The banks also urged the Swiss government to refrain from enacting laws that would have forced them to reveal the accounts.[60] Without such disclosure laws, 'the claims of surviving Holocaust victims were usually rejected under the pretext of banking secrecy'.[61] Switzerland was not subject to much scrutiny for its wartime activities, as it played the important role of financier to the West during the Cold War.[62]

In the 1990s, however, a campaign headed by the World Jewish Congress garnered considerable political support.[63] The US State Department became deeply involved, as Clinton's Under Secretary of Commerce Stuart Eizenstat was appointed to lead a governmental inquiry into Holocaust reparations.[64] Three large Swiss banks, representing

Foundation Law Compensating Slave and Forced Laborers of the Third Reich' (2002) 39 *Harvard Journal on Legislation* 1; Leonard Orland, *A Final Accounting: Holocaust Survivors and Swiss Banks* (Carolina Academic Press, 2010). We are, of course, comparing significantly different disputes. Most importantly, the state in Germany was the principal perpetrator in the Nazi crimes, while the Swiss state had been at most an enabler. As a result, the cases operated against the background of different collective memories in Switzerland and Germany. Germany had long accepted responsibility for the Nazi crimes, whereas Switzerland had portrayed itself as neutral. The Swiss and German governments were therefore inclined to play very different roles in each case. However, these differences are precisely why the case-study method is appropriate: by understanding the context in which each case developed, we can pinpoint the role played by legal form.

58 International Commission of Experts (ICE), *Switzerland, National Socialism and the Second World War* (Pendo Verlag, 2002) 255–61 (Bergier Report); Orland (n 57) 21.

59 Bergier Report (n 58) 446.

60 Bazyler (n 57) 47.

61 Bergier Report (n 58) 455. Additional aspects of Swiss law, such as the absence of an escheat law requiring unclaimed accounts to be transferred to the state, combined with regulations authorising the destruction of account records after 10 years, provided economic incentives for Swiss banks to hide the existence of accounts. In addition, the Swiss banks were keen to avoid any close examination of the large transfers of money made from Jewish accounts to the Reichsbank, as access to such information would surely have led to liability. See *In re Holocaust Victim Assets Litigation*, 319 F Supp 2d 301 (EDNY 2004).

62 Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 37.

63 William Z Slany, 'The State Department, Nazi Gold, and the Search for Holocaust Assets' in Bazyler and Alford (n 56) 31. Marrus traced the campaign to reports accusing Swiss banks of mishandling Holocaust-era accounts and mistreating victims' descendants, which were circulated in the international media from 1995. See Marrus (n 34) 11–15.

64 See Slany (n 63) 32–41.

over 75 per cent of the Swiss wartime banking sector,[65] were the target of four class actions filed in US federal courts on behalf of Holocaust survivors, under Rule 23(b)(3) of the Federal Rules of Civil Procedure.[66] The claims had two principal grounds. First, the claims grounded in customary international law under the ATS (where the named plaintiff was an alien) alleged that the Swiss banks had aided and abetted genocide and crimes against humanity by providing ordinary banking services to the Nazis.[67] However, in the absence of clear precedents for the imposition of customary international law on private corporations, the plaintiffs' lawyers felt that it was important to ground the claims in other areas of law.[68] Thus, the plaintiffs invoked, second, the common law of restitution to seek both the return of unjustly taken property and the disgorgement of unjust profits. The main obstacle faced by the claimants was the lack of information, compounded by the banks' use of banking secrecy to consistently deflect claims.[69]

Thus, the broad and liberal rules of discovery offered by American courts were a main source of attraction for plaintiffs. The transnational aspects of the litigation mitigated this procedural advantage as Judge Korman, who was in charge of the Swiss banks case, refused to formally order discovery to allow the plaintiffs' accounting experts to inspect the banks' records, fearing that such an order would force Swiss banks to commit a criminal act in their country.[70] An intermediate solution was found, as under court pressure the Swiss banks agreed to an audit by an independent group called the International Committee of Eminent Persons, headed by Paul Volcker, to search for unpaid Holocaust-era accounts.[71] In a conservative estimate, the Volcker Committee discovered

65 Neuborne, 'Transnational Holocaust-Related Litigation' (n 56); Neuborne, 'Preliminary Reflections' (n 56).

66 See *In re Holocaust Victim Assets Litigation*, 105 F Supp 2d 139, 143 (EDNY 2000).

67 *In re: Holocaust Victim Assets—Memorandum of Law Submitted by Plaintiffs in Response to Expert Submissions Filed by Legal Academic Retained by Defendants* CV-96-4849 (NY 1997), http://swissbankclaims.com/Documents/6-16-97.pdf.

68 'No one had yet imposed customary international law on a corporation … And, I was worried about the extraterritorial reach of the [ATS]. So, I concentrated on developing an additional claim that didn't rest on emerging ideas of international law.' Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 41.

69 Most of the claimants knew that their family had opened an account in Switzerland, but did not know the name of the bank, let alone the account number and other identification details. Furthermore, heirs of accounts holders in possession of information about a specific account were countered with requests for official death certificates, which could of course not be provided for loved ones killed in a concentration camp or in mass shootings. For example, the father of Estelle Sapir, lead plaintiff in the litigation against Swiss banks, was a wealthy Polish banker who had deposited money with Credit Suisse. Before being deported to his death in Majdanek concentration camp, he told his daughter about his bank account, and she promised him she would recover the funds. After the war, Credit Suisse refused to even search for the account, asking to see her father's death certificate. Her documentation, including photographs of him on a train with Jews bound for Majdanek, and Nazi records of his transport there, were not deemed sufficient by the Bank. Bazyler (n 57) 15–16.

70 ibid 39. Instead, Korman pressured the defendants to reveal some information, by chastising the banks for failing to publish their lists of dormant accounts, and by refusing to validate the settlement as fair according to the law until access to information required for a fair claims procedure was secured.

71 The Volcker Committee, though independent, was subject to much pressure from the Swiss banks. For a description of the compromises it had to make in order to produce findings that were susceptible of being complied with, see *In re Holocaust Victims Assets Litigation* (n 61) 323–6. However, it avoided a long process of discovery that could have taken years, and it transferred the cost of this very expensive audit to the banks.

35,000 relevant accounts.[72] In the meantime, the parties settled in 1998, for an unprecedented US$1.25 billion.[73] The settlement agreement created five classes of claims to be compensated by the settlement fund: bank account owners; individuals who had performed slave labour for German companies with assets in Switzerland; individuals who had performed slave labour for Swiss companies; owners of looted assets disposed of through Switzerland; and refugees excluded from or abused in Switzerland.[74]

Furthermore, in 1996, in direct response to the restitution campaign, the Swiss parliament had commissioned distinguished historians from various countries (Switzerland, US, Israel, Poland) headed by historian Jean-Francois Bergier to research property spoliation in Switzerland during World War II. The Bergier Commission reported a concerted wartime policy on the part of Swiss banks to comply with German requests for transfers from Jewish accounts even when this was contrary to their customers' interest and to the law. It also found that after the war, the Swiss banks had deliberately failed to return assets deposited with them by victims of the Holocaust, and engaged in systematic destruction of documents related to Holocaust-era accounts. The findings of both the Volcker Committee and the Bergier Commission formed the basis of legal presumptions adopted in the rules for distribution of the settlement administered by the court.

B. The German Case

Shortly following the settlement of the Swiss case, the same team of lawyers filed class actions against German corporations for the use of forced and slave labour during the war. Over 60 lawsuits were filed in various federal courts throughout the United States. As in the Swiss case, the plaintiffs invoked mass wrongdoing. By 1944, at least 80 per cent of the Nazi industrial labour force was involuntary. However, contrary to the Swiss case, where the facts were unknown, having been hidden by the banks for decades, here the use of forced and slave labour had been well documented by the Nazis.[75] The obstacle was the law—in particular the meta-rules regarding statutes of limitations and the jurisdiction of US courts. As part of the effort in the 1950s to rebuild Germany in order to counter the Soviet block, the 1953 London Debt Agreement establishing normal economic relations with the US, Great Britain, France and the Soviet Union set up a freeze on individual claims for compensation against Germany until final settlement of the

72 The Volcker Committee, in its published findings from December 6, 1999, had identified nearly 54,000 accounts that it believed 'possibly' or 'probably' belonged to victims of Nazi persecution. 'The conservative estimate of 54,000 relevant accounts was met with surprise and disfavor by the SBA and the SFBC. They turned to the Volcker Committee's auditors and asked them to further 'scrub' the accounts the auditors identified. After two rounds of 'scrubbing' the auditors decided that out of the 54,000 accounts previously identified, there were only 21,000 accounts that 'probably' belong to Nazi victims and 15,000 accounts that 'possibly' belonged to Nazi victims.' *In re Holocaust Victims Assets Litigation* (n 61) 324.

73 See Marrus (n 34) 10-25.

74 Each class, except the class of individuals who had performed slave labor for Swiss companies, was limited to five victim groups (Jews, Jehovah's Witnesses, the disabled, homosexuals and Sinti-Roma). *In re Holocaust Victim Assets Litigation* (n 66) 143.

75 Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 53.

problem of reparations. This was interpreted by German courts as postponing plaintiffs' claims against German companies until conclusion of a final peace treaty.[76] No such treaty was ever signed, postponing individual compensation litigation indefinitely, until the German Federal Constitutional Court held in 1996 that a 1991 treaty regularising Germany's border with Poland should be treated as the *de facto* peace treaty lifting the ban imposed by the London Debt Agreement.[77] Emboldened by the discovery of this decision, the lawyers filed the class actions against German corporations that had used slave labour.

In order to negotiate, the giants of German industry organised a group of 12 corporations (which grew to 17), headed by the CEO of Daimler/Chrysler as chief negotiator.[78] Under-Secretary of State Stuart Eizenstat organised the negotiations in Washington DC, which involved eight interested countries (Germany, US, Israel, Poland, Russia, the Ukraine, Czech Republic and Belarus), two NGOs, representatives of German industry and the main American lawyers in the class action.[79] From the outset, the German corporations and German state insisted on a political solution, to avoid an American court procedure.[80] Furthermore, they demanded 'legal peace' and the German administration of the settlement. Otto Graff Lambsdorff, representative of the German government in the negotiations, explains that 'a class action settlement was … excluded for a number of reasons: (1) the example of the Swiss bank settlement, where money began to flow only three years after the agreement, had been hardly edifying; (2) such a settlement presupposed at least the possibility of an existing legal claim, a notion excluded by Germany for a number of reasons under international and national law—the statute of limitations being one of them; (3) a class action settlement would have put the whole Foundation, largely financed by German taxpayers' money, under the supervision of an American judge—a notion incompatible with any idea of German sovereignty'.[81] In the absence of settlement approved by a US court,[82] legal closure was to be obtained by an Executive

76 Adler and Zumbansen (n 57) 34.

77 Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 55.

78 Neuborne, 'Preliminary Reflections' (n 56) 819-820.

79 ibid. In the meantime, the judges in two cases filed in a Newark federal court ruled that the claims were time-barred, as six years had passed between the signing of the 1991 Treaty which had lifted the ban on individual claims and the filing of the lawsuits, when the statute of limitations under German law was two years. They further ruled that the 1991 treaty had extinguished international law claims by not providing explicitly for reparations. *Burger-Fischer v Degussa* 65 F 2d 248 (DNJ 1999); *Iwanowa v Ford Motor Co* 65 F Supp 2d 424 (DNJ 1999).

80 Eizenstat (n 56) 210-217. Genz, the CFO of Daimler/Chrysler, chief negotiator of the GEFI, hired Witten, who had represented the banks in the Swiss settlement, and approached Eizenstat. Gentz offered a political deal—the creation of a German charitable foundation funded by German corporate contributions that would pay compensation to WW II slave and forced laborers, in return for Congressional legislation or a Presidential Executive Order terminating the burgeoning litigation. Instead, Eizenstat, who was working with the lawyers in seeking to mediate the Swiss cases, offered to organize negotiations.

81 Otto G Lambsdorff, 'The Negotiations on Compensation for Nazi Forced Laborers' in Bazyler and Alford (n 56) 176–7.

82 In class actions, finality for the defendants is provided through the doctrine of preclusion, which prevents class members from filing claims covered by the settlement. Tobias B Wolff, 'Preclusion in Class Action Litigation' (2005) 105 *Columbia Law Review* 717, 765.

Agreement between Germany and the United States, committing the United States to file a Statement of Interest seeking dismissal in any future Holocaust-related litigation against German industry.

In July 2000, the Berlin Accords were signed by representatives of German industry, the plaintiffs and the eight interested nations, providing for an end to the class action litigation in return for a commitment by German industry and the German government to place DM 10 billion for distribution to victims under a pre-negotiated formula into a German Foundation, 'Remembrance, Responsibility and the Future', created by the Bundestag and governed by a Board of Trustees representing the victims, interested governments and the German companies. Eighty per cent of the Foundation's assets were set aside to compensate labourers. The remaining 20 per cent went to property claimants, to fund a separate programme compensating insurance claims, and to create the Future Fund, a charitable Foundation in memory of deceased victims.[83] The labour funds were divided between slave labourers, a category which represented those who worked under atrocious conditions (mostly Jewish but also homosexual and Sinti-Roma victims) and forced labourers, who worked under slightly less brutal conditions for no or extremely low wages (mostly Slav victims).[84] Thus, while the federal court in Brooklyn devised elaborate rules and procedures for the distribution of the Swiss banks settlement and supervised the individual claims and award process, in the German case the entire distribution process was administered by German civil servants in a foundation set up by German legislation for this purpose.

As in the Swiss case, none of the lawsuits was ultimately resolved on the merits, and the German corporations never assumed legal responsibility, insisting throughout the process that they bore only moral responsibility.[85] However, here too the legal pressure yielded important historical findings.[86] While some companies had begun investigating their Nazi past prior to the 1990s, THL is seen by many historians as the main engine leading German and European businesses to self-investigate their wartime history.[87] Some of the largest German corporations opened their archives, hired prestigious historians to do research and publish their findings, all at a substantial cost. This led to a

83 Neuborne, 'Preliminary Reflections' (n 56) 822.

84 Jewish victims comprised most slave laborers, and the forced labourer category was composed mostly of Slavs. Compensation of slave labourers was double that of forced labourers, but represented only 25% of the funds because of the higher mortality rate of slave labourers. The Slav labour funds were themselves subdivided among the citizens of five participating Eastern European countries (Belarus, Russia, the Ukraine, Poland, the Czech Republic). Adler and Zumbansen (n 57) 2, 14.

85 Bazyler (n 57) 83.

86 See Bilsky, 'The Judge and the Historian' (n 55).

87 Historian Gerald Feldman—who was commissioned by Allianz to investigate its Nazi past—explains that '[i]t was inconceivable that German corporations prior to the 1990s would have gone around looking for, let alone publicly announcing the kinds of documents I mentioned in connection with the Deutsche Bank, let alone ask people like myself … what other awful things we could find.' Gerald D Feldman, 'Holocaust Assets and German Business History: Beginning or End?' (2002) 25 *German Studies Review* 23, 26. See also Harold James, *The Deutsche Bank and the Nazi Economic War against the Jews* (Cambridge University Press, 2001) 4 (arguing that one of the most important factors in the new interest in company history was the class action lawsuits brought before US courts).

boom of research on business and economic history in Germany and Europe during the 1930s and 1940s.[88]

C. THL as Abnormal Justice

We see THL as an instance of abnormal justice rife with disagreement about the three parameters of justice-seeking, as well as a rich site in which to examine attempts to resolve these disagreements. However, in order to see the litigation's contribution, it may be helpful to set aside two arguments which downplay THL's innovative aspects. The first expresses disappointment with settlement, and sees in THL yet another illustration of Marc Galanter's warning that corporations settle to avoid creating precedents detrimental to them.[89] For this reason, discussions of corporate liability seldom include THL, which is seen as lacking precedential value.[90] Such an emphasis on corporate power assumes incorrectly that norms are the principal product of litigation.[91] The second, more complex argument, sees in the litigation continuity in the way the state handles Holocaust-related claims. By taking the lead in the settlement negotiations, establishing a foundation through German legislation to distribute the settlement, and obtaining legal closure through an Executive Agreement with the United States, the German state pursued its legacy of assuming principal responsibility for the Nazi crimes, transforming private claims into public law claims, and proclaiming final closure in reparation politics.[92] Settlement and the adoption of a discourse of historic as opposed to legal responsibility have also been seen as reflecting the German corporations' legacy of denial of responsibility.[93] Similarly, THL reflects continuity for Switzerland, as the state's distancing itself from the settlement allowed it to evade responsibility.[94]

88 Feldman (n 87) 25; James (n 87) 1–6.

89 Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 97. For the view that corporations settled precisely in order to avoid liability, see Adler and Zumbansen (n 57).

90 Morris Ratner and Caryn Becker, 'The Legacy of Holocaust Class Action Suits: Have They Broken Ground for Other Cases of Historical Wrongs?' in Bazyler and Alford (n 56) 345. See also Paul R Dubinsky, 'Justice for the Collective: the Limits of the Human Rights Class Action' (2004) 102 *Michigan Law Review* 1152 (arguing that the potential of the Holocaust restitution lawsuits to serve as a model of reparation for collective injustice is very limited). The failure to recognise THL as a legal model is based on a number of misconceptions, first and foremost the belief in a sharp dichotomy between law and politics. See Michael Thad Allen, 'The Limits of Lex Americana: The Holocaust Restitution Litigation as a Cul-de-Sac of International Human Rights Law' (2011) 17 *Widener Law Review* 1. In contrast, this article offers a legal analysis of THL which moves beyond the formalist division between politics and law. We view politics as inextricably linked to law, and argue that the fact that THL was part of a political campaign should not blind us to its jurisprudential innovations.

91 For elaboration on the normativity of settlement, see Leora Bilsky and Talia Fisher, 'Rethinking Settlement' (2013) *Theoretical Inquiries in Law* (forthcoming).

92 Regula Ludi, 'Michael Bazyler's Holocaust Justice' (University of California, 2003), www.escholarship.org/uc/item/3n95c0tw.

93 Adler and Zumbansen (n 57).

94 Ludi (n 92).

These narratives of continuity, though accurate, reveal only part of the story. They ignore the special place given to victim voices for the first time in reparation politics, and this thanks to the class action that levelled the playing field between victims and giant corporations. They also obscure the German corporations' active participation in the settlement negotiations, their contribution to a large portion of the settlement, and their establishment of internal historical commissions. These important departures from prior reparation practices become visible once we shift attention from norm-enunciation to process.

In what sense, then, does THL represent abnormal justice? We see that the central problem of THL was a democratic deficit in Fraser's sense of a mismatch between the territorial boundaries of domestic politics and the transnational and non-territorial character of actual power. Until the 1990s, private corporations and their managers were rarely held criminally liable for their involvement in the Holocaust.[95] For decades, victims' demands for the return of bank accounts and compensation for forced and slave labour had been denied by the corporations.[96] The national governments of Germany and Switzerland had submitted to pressure from business in their respective countries

95 No corporation has ever been charged with or convicted for an international war crime or similar offence, and only individuals were charged in the first trials at Nuremberg and Tokyo as well as in the Industrialist trials. See Jonathan A Bush, 'The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said' (2009) 109 *Columbia Law Review* 1094, 1098. Neither have German courts held corporations accountable under German law for participation in Nazi crimes. For a review of court decisions denying redress to former slave labourers, see Adler and Zumbansen (n 57) 30–40. Even when they were criminally prosecuted, courts have been reluctant to convict defendants in the absence of unquestionable criminal intent. For example, in the post-war trials in Germany of the members of the board of IG Farben, most defendants were acquitted of charges relating to the use of slave labour due to lack of clear evidence of knowledge and direct engagement of the defendants. For further discussion see Alberto Z Zuppi, 'Slave Labor in Nuremberg's IG Farben Case: The Lonely Voice of Paul M Hebert' (2006) 66 *Louisiana Law Review* 495; Benjamin Ferencz and Telford Taylor, *Less than Slaves: Jewish Forced Labor and the Quest for Compensation* (Indiana University Press, 2002) 34–67. Similarly, the trial of the head of the Dresdner Bank at Nuremberg demonstrates the difficulty criminal law has addressing secondary participation in atrocity for 'profit' reasons. In that case, '[t]he tribunal refused to hold Rasche—the head of the Dresdner Bank—responsible for helping implement the slave-labor program by making loans to SS enterprises, even though it believed that he knew the enterprises were using slaves and that he had authority and discretion concerning the loans'. According to the tribunal, '[t]he real question, is [whether] it is a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law…A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit which the bank realizes from the transaction, out of which it must deduct its business cost, and from which it hopes to realize net profit.' See Ministries trial, XIV TWC 622, cited in Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford University Press, 2011) 288.

96 Benjamin Ferencz describes how German compensation legislation failed to address inmates' labour for private firms, and the few private lawsuits brought against the largest industrial firms resulted in paltry settlements. Likewise, requests by Holocaust survivors and their heirs for access to pre-war bank accounts were often denied for failure to meet the banks' documentary requirements, in particular the requirement to produce death certificates. See Eizenstat (n 56) 79; Marrus (n 34) 11.

to protect them from legal liability,[97] and Western concerns with countering the Soviet bloc shielded Swiss and German corporations from scrutiny. The group of victims, for its part, was so geographically dispersed as to be lacking the political power to change the law.[98] In addition to these legislative and political obstacles, the turn to domestic courts was futile due to the structural limitations of civil litigation in Europe. Individual Holocaust survivors claiming relatively small amounts of money would have to face off with giant corporations benefiting from excellent legal representation and other advantages of size. In the absence of international institutions able to remedy the failings of domestic institutions, THL created a forum by combining the ATS, which provided universal civil jurisdiction for gross human rights violations, and the American class action, which levels the playing field by enabling aggregate litigation.[99]

In the ensuing encounter between corporations, victims, lawyers, diplomats and civil society organisations, all three parameters of abnormal justice were deeply disputed. As to the how, US courts' receptiveness to the litigation and the use of American class action procedure were perceived both in Switzerland and Germany as affronts to those nations' sovereignty.[100] Neither was there any consensus that these historic claims could properly form the subject of a legal dispute—the what of justice—in particular with respect to German corporations, which claimed until the end that they bore moral, not legal responsibility for their wartime use of slave and forced labour, invoking their lack of freedom under Nazi rule. In addition, the definition of the relevant parties—the who—was fluid and subject to much disagreement. While the Swiss government repeat-

97 See n 61 above for a discussion of the Swiss legislation favourable to Swiss banks. With respect to Germany, the 1953 London Debt Agreement froze individual claims for compensation against private German defendants until a peace treaty with Germany formally ending WWII was signed, and this in part following pressure from German business. Feldman (n 87) 23–34, 25.

98 In Germany, courts regularly dismissed individual lawsuits by former slave and forced labourers, by holding that existing compensation legislation precluded such lawuits, even where plaintiffs failed to meet the eligibility criteria of the compensation laws. Adler and Zumbansen (n 57) 33–34. In the 1950s, Germany established a broad reparations programme, including the restitution of looted property and compensation to victims of Nazis. However, this scheme had important lacunae: 'First, the plan was unable to provide any relief for property in East Germany. Second, it ignored victims residing in communist Eastern Europe. Third, it made no provision for compensation to victims harmed by German companies, as opposed to the Nazi government. Until the fall of communism, nothing much could be done about property and victims in East Germany, Eastern Europe, and the former Soviet Union. But, in the early 1950s, many slave and forced laborers who were victims of German corporate complicity in Nazi war crimes were demanding immediate compensation in West German courts.' Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 53. See generally Iris Nachum, 'Reconstructing Life after the Holocaust: The Lastenausgleichsgesetz and the Jewish Struggle for Compensation' [2013] *Leo Baeck Institute Year Book* 1.

99 On the emergence of hybrid human rights mass tort litigation that merges international law with American class action procedure see Kathryn L Boyd, 'Collective Rights Adjudication in US Courts: Enforcing Human Rights at the Corporate Level' (1999) 1999 *Brigham Young University Law Review* 1139; Margaret G Perl, 'Note: Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations' (2000) 88 *Georgetown Law Journal* 773; Beth Van Schaack, 'Unfulfilled Promise: The Human Rights Class Action' (2003) 2003 *University of Chicago Law Forum* 279.

100 Ludi (n 92).

edly refused the US government's requests that it participate in the negotiations,[101] the German government took the lead in the negotiations and then distribution of the settlement. In addition, defendant lawyers confronted, on the claimant side, not only plaintiff lawyers but also Jewish organisations and, in the German case, states representing former forced labourers. Yet in this highly unorthodox setting, abounding in disagreements over the very rules by which the claims could be brought and settled, THL resulted in a clear outcome—the agreement to pay huge sums of money in settlement—that was actually accepted and enforced by the parties.

Universal civil jurisdiction and class action procedure both reflect American legal culture's preference for civil litigation over criminal law and administrative regulation in addressing mass wrongdoing. Is the use of such an American legal mechanism legitimate with respect to a dispute concerning European corporations and many non-American victims? Here we see how domestic legal institutions are transformed when used in a transnational context. As in US domestic civil rights litigation, the class action provided a powerful tool enabling victims to address large bureaucracies where they would have been powerless on an individual level.[102] However, the procedure was adapted to the transnational context. Discovery was not ordered in the Swiss case, but used as a background threat to pressure Swiss banks to disclose information. Similarly, the German case was taken out of the hands of US courts so as not to offend German sovereignty. As the remainder of the article will show, in both the Swiss and German cases, settlement created a process flexible enough to allow the parties themselves to participate in designing the procedure. In this way, the peculiar cultural institution of the class action was able to serve as a transnational forum, leading the parties to accept its outcome as their own.

D. Two Tracks for Abnormal Justice

One may at first glance have the impression that the difference between the processes in the Swiss and German cases is simply one of degree. In comparison with everyday domestic and even transnational litigation,[103] both cases involved much diplomacy.[104]

101 Roger M Witten, 'How Swiss Banks and German Companies Came to Terms with the Wrenching Legacies of the Holocaust and World War 2: A Defense Perspective' in Bazyler and Alford (n 56) 88–89.

102 Bilsky, 'Transnational Holocaust Litigation' (n 55).

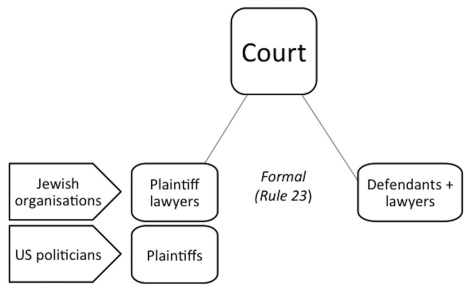
103 According to Koh's classic definition, the uniqueness of transnational public law litigation lies in the merging of elements of classical domestic private law litigation and classical international litigation involving nation-states. As a result, this type of litigation involves both private and public parties. Koh, *Transnational Litigation* (n 46) 24. However, Koh's model envisions the elaboration of universal norms of international law, and therefore gives a central role to the court decision. In THL, in contrast, there was no court decision elaborating a precise norm of international law, but settlement, making the process appear even more political than other transnational litigation.

104 This is also true of the Swiss case. In 1996, the Swiss government appointed a special envoy on Holocaust-era restitution issues, and Stuart Eizenstat engaged in 'shuttle diplomacy' between plaintiff lawyers and

This article shows, however, that the choice between a court-centred and diplomatic-bureaucratic track has significant ramifications.

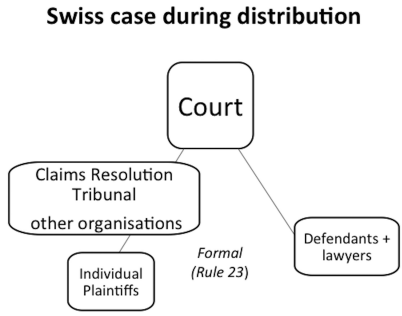
In order to understand these ramifications, it is helpful to emphasise the different party structures of each case. One can roughly divide each case into two general stages: a first stage of claim-making and negotiating culminating in a settlement agreement, and a second stage of post-settlement distribution. In the Swiss case, the party structure was identical in both stages, consisting of a grossly *triangular structure among plaintiffs, defendants and court*. In the first stage, the plaintiffs (supported outside the court by Jewish organisations and American politicians) claimed, negotiated and signed the settlement agreement with the defendants, under the supervision of the court. In the second stage, the victims filed claims before the distribution bodies set up by the court, such as the Claims Resolution Tribunal set up in Zurich by the court to adjudicate bank account claims, the defendants being basically removed from the picture once they had provided the global settlement amount, but occasionally challenging distribution decisions.[105] Thus, in both stages there was a third party (the court) supervising the process. This party structure can be represented visually as follows:

Swiss case up to settlement

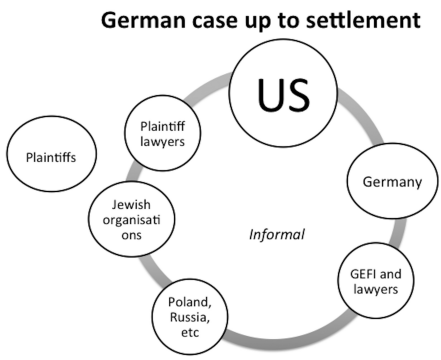


banks in order to press for settlement. It was only when negotiations reached a standstill that Neuborne urged Korman to host negotiations with parties directly, and thus Eizenstat was 'ousted' from the process. See Bazyler (n 57) 33.

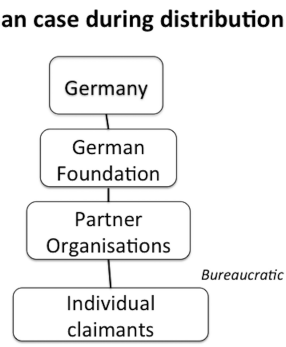
105 For instance, in order to adjudicate the post-settlement individual claims to Swiss bank accounts, the court had designed legal presumptions based on the findings of the Bergier Commission that the banks had systematically destroyed documents relating to Jewish Nazi-era accounts. One such presumption was that the account owner or heirs did not receive the proceeds of the account since 'the Account Owners, the Beneficial Owners, and/or their heirs would not have been able to obtain information about the Account after the Second World War from the Swiss bank due to the Swiss banks' practice of [destroying records or] withholding or misstating account information in their responses to inquiries by Account Owners and heirs because of the banks' concerns regarding double liability'. Claims Resolution Tribunal, 'Rules Governing the Claims Resolution Process' (as amended), Art 28(h) www.crt-ii.org/_pdf/governing_rules_en.pdf (hereinafter 'CRT Rules'). The banks challenged these presumptions, insisting that they had never engaged in any substantial misconduct, even though, at the distribution stage, the presumptions did not affect their overall financial liability which had been set by the settlement agreement. *In re Holocaust Victim Assets Litigation* (n 61) 30.



In the German case, in contrast, the pre-settlement and distribution stages were structured in sharply contrasting ways. The pre-settlement stage can be conceptualised in a roughly triangular manner, as Jewish organisations, states with large populations of former forced labourers, and plaintiff lawyers on the claimant side, sat across from defendant lawyers, the industry representatives and the German state on the defendant side at the negotiations table, under the supervision of American diplomats, here the apex of the triangle. In the distribution stage, however, the victims filed claims before the organisations with whom the Foundation had contracted for this purpose, with almost no outside supervision.[106] This party structure can be represented visually as follows:



106 A plaintiff lawyer serves as one of two members of the Foundation's 27-member Board of Trustees appointed by the United States; while that lawyer is to represent the interests of victims, an American diplomat represents the interests of the United States. See 2 August 2000 Law on the Creation of the Foundation 'Remembrance, Responsibility and Future' (*Gesetz zur Errichtung einer Stiftung 'Erinnerung, Verantwortung, Zukunft'*), BGBI I S 1263, sec 5, www.stiftung-evz.de/eng/the-foundation/law.html (hereinafter 'Foundation Law').



In the Swiss case, because the body at the apex of the triangle was a court, the procedures employed in both the pre-settlement and the post-settlement stages—namely, the procedures under Rule 23(b)(3) of the Federal Rules of Civil Procedure—were formal; that is, they followed precise rules, were subject to requirements of transparency, and were appealable. In the German case the American diplomats played a role similar to that played by the court in the Swiss case, mediating the dispute, pushing the parties to settle, and attempting to ensure that the settlement amount reached a reasonable minimum.[107] However in this first stage of the German case the settlement negotiations did not have to follow formal processes, such as the holding of a public hearing on the fairness of the settlement agreement. Characterising the federal rules of class action procedure as formal might sound surprising: in the US domestic context, the reduced role of individual participation in class action procedures has been criticised for being too informal, in comparison with individualised litigation procedures.[108] However, in the transnational context of MNC liability for human rights violations where there are no relevant institutions and procedures, and non-legal measures are the default position, class action procedures become the more formal alternative. How do these structural and procedural differences between the Swiss and German cases affect the grammar of justice?

107 Neuborne describes how Eizenstat refused to consider the bilateral agreement between Germany and the US until the plaintiff lawyers agreed that the settlement amount was fair. For Neuborne, this was a law-like tactic, taking into account the victims' rights. Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 82.

108 Owen M Fiss, *The Law as it Could Be* (NYU Press, 2003) 105–21 (discussing the tension between the struggle for civil rights through class actions on the one hand and individual participation in litigation on grounds of due process on the other).

III. HOW: DECISION-MAKING PROCEDURES: DEMOCRACY VERSUS EFFICIENCY?

Using the comparison of the Swiss and German cases, this part develops a framework for assessing the 'how' of transnational justice-seeking against corporations. We have seen that in her attempt to solve disagreements over the 'how' of justice, Fraser suggests combining democracy and efficiency in procedure. Following legal scholars grappling with the democratic deficit in international institutions, we suggest using the due process criteria of transparency, participation, accountability and representation to examine the democratic character of each track,[109] and this with respect to both victims and other constituencies.

A. Democracy

To what extent did the process in the Swiss and German cases promote democratic values? We begin with the Swiss case and then move on to the German case. As mentioned, the Swiss case was filed as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure, which grants putative class members the right to opt out of the class, leaving them free to pursue their individual claims separately. As a result, the victims in the Swiss case benefited from the procedural safeguards accorded such class actions. *Transparency* was provided through a massive worldwide outreach programme, in compliance with the federal rules that require that notice of the terms of the settlement be given to each class member. The notices informed potential class members of the settlement's terms, explained how to deliver written comments to Judge Korman, encouraged interested persons to submit written comments on the settlement, and invited class members to a hearing in Judge Korman's courtroom to discuss the settlement's fairness and adequacy. Transparency was also furthered in the settlement distribution mechanism devised in the Swiss case. The bulk of the Swiss case—relating to the bank accounts—was resolved through a formal procedure, the Claims Resolution Tribunal (CRT) sitting in Zurich under the direct supervision of the Brooklyn court. Designed by Special Master Judah Gribetz, the CRT individually adjudicated the claim of each survivor or heir, with relaxed rules of evidence and rebuttable presumptions to account for the massive document destruction the Swiss banks had engaged in, as established by the Bergier Report.[110] The CRT operated according to highly detailed, publicly available rules designed by the court's Special Master, including guidance on how to evaluate claims.[111]

The formal class action procedures also provided a number of avenues for *participation* in the Swiss case. This is not surprising, given that the notion of due process,

109 See n 40 above.
110 Orland (n 57) 70–71.
111 CRT Rules (n 105).

comprising a right to a hearing and other participatory procedures, is highly developed in the legal context.[112] Even if the class nature of the litigation reduces the due process guarantees traditionally provided to individuals,[113] it is much more participatory than a purely bureaucratic or diplomatic process. Along with the notices, over a million questionnaires were sent to potential claimants. 573,000 questionnaires were returned, demonstrating a high level of support for the settlement. Furthermore, the Special Master appointed by the court to design a plan for the distribution of the settlement invited the public to submit suggestions for the allocation of the settlement, and received hundreds of suggestions from individual survivors, as well as from Jewish and victim organisations.[114] Moreover, the 'fairness hearings' allowed victims and others to express their opinions.[115] At the fairness hearing held in Brooklyn, many individuals as well as organisations spoke, either directly or through lawyers. The transcript of the fairness hearing held in Brooklyn reveals a formal proceeding that provides room for dialogue. The court asked questions, requested clarifications from speakers, and sometimes asked whether anyone in the courtroom wanted to respond. Comments included concerns that the settlement amount was too low, and worries about the bureaucratic procedure involved in filing a claim. Some of the objections raised led to substantial amendments to the settlement agreement.[116] In addition, it seems that the insistence of some victims that the money be returned to their owners and not used for charity[117] convinced Judge

112 For a comparison of the Swiss and German cases in terms of due process for victims, see Morris A Ratner, 'The Settlement of Nazi-Era Litigation through the Executive and Judicial Branches' (2002) 20 *Berkeley Journal of International Law* 212. Discussing references from national courts to the European Court of Justice, Fudge and Mundlak have also found that formal legal processes provide openings for the participation of individuals. Fudge and Mundlak (n 8).

113 Fiss (n 108); Resnik (n 40) 141: 'classes reduce personal participation yet enable individuals who would not otherwise be able to pursue rights to do so.'

114 These can be read at the Holocaust Victim Assets Litigation (Swiss Banks), 'Archives' (2004), www.swissbankclaims.com/Archives.aspx.

115 Two fairness hearings were held, one in the Brooklyn Federal court, and one in Jerusalem. Neuborne, 'Preliminary Reflections' (n 56) 810.

116 The four main objections were: (1) that the settlement amount was too low; (2) that as drafted, the settlement agreement might have inadvertently blocked future efforts to track artwork to Swiss hiding places; (3) that no provision existed in the settlement for unpaid Swiss insurance claims; and (4) that it would be difficult if not impossible to resolve bank account claims when bank secrecy forbade public identification of the account. While the first objection was not considered realistic, the three other objections led to renegotiations and amendments. Thus, under pressure from Korman not to approve the settlement, both sides agreed on an amendment exempting from preclusion efforts to recover specific works of art, an insurance provision governing unpaid WW II-era Swiss life insurance policies, and an information access mechanism, including the internet publication of 21,000 (eventually increased to 24,000) high probability accounts, the creation of a database reflecting the records of the 36,000 accounts identified as 'probable' or 'possible' Holocaust accounts by the Volcker auditors, access to the 36,000 account database by the CRT in Switzerland, and a promise of good faith assistance in providing additional information needed to resolve particular claims. Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 62–65. For a detailed discussion of the ways in which victims influenced the settlement agreement, see Ratner (n 112) 219–21.

117 Alice Fisher said: 'I will give my own charity and I really ask that it's not a contribution. It's not a fund. I don't want funds and I don't want contributions from banks. They don't have to go collect the money for

Korman that a corrective, individualised approach to justice should be adhered to as far as possible (see Part V for further discussion). In addition to participation in the hearings, many class members wrote their views to the court by letter and email.[118] Finally, *accountability* was furthered through the highly detailed, publicly available rules of the CRT, whose award decisions were subject to appeal.[119]

Nevertheless, the problems of *representation* typical of class actions appear to have been exacerbated in the court's attempt to manage these mass claims efficiently. In comparison with criminal trials and administrative reparation programmes, the class action lawsuit may be seen as strengthening active participation by the victims, as victims' counsel (not the state or an international body) initiates and litigates the claim. However, in comparison with ordinary civil litigation, class actions pose serious representation problems in that the same lawyers are asked to represent masses of victims with potentially conflicting claims, and the lawyers' economic incentives are not necessarily aligned with those of the victims.[120] Furthermore, because of the largely fictive nature of class actions, often initiated by lawyers who themselves look for victims to serve as named plaintiffs, the victim-clients in the class actually have very little control over the lawyers.[121] These problems were reflected in both the Swiss and the German cases, which were criticised for enriching the lawyers at the expense of victims.[122] Moreover, in order to transcend the adversarial process and make the case manageable notwithstanding the number of potential claimants and the different categories of victim, counsel for the plaintiffs in

us. They should give us back our money that we put in our for our life's safekeeping.' *In re Holocaust Victim Assets—Transcript of Civil Cause for Fairness Hearing* CV-96-4849, 122 (NY 1999), www.swissbankclaims.com/Documents/DOC_14_fairnesshearingtranscript.pdf. There seems to have been concern in particular about funds going to religious groups. Ernest Lobet stated: 'No money, I feel, should be given to any organization, be it religious or otherwise … Who is going to decide, among all these different clans, who should be entitled, what constitutes education, what is in the best interests of our children? I do not believe that really can be done. Therefore, I personally believe that none of the organizations should benefit by it. There are those that believe that religious education should be paramount. I do not believe that. There are those that believe that institutions and synagogues and museums should be established and helped. I do not believe that. There are those that believe that religion plays an all-important role, but it does not for me, your Honor. And I do not want to be blasphemous, but as far as I'm concerned, I did not see the Almighty stand at the ramp in Auschwitz when the selections were made.' *Ibid*, 148.

118 Orland (n 57) 50. This is not to imply that there were no recriminations from victims over the settlement. See eg Marrus (n 34) 3–4.

119 CRT Rules (n 105) art 30.

120 Because lawyers in compensation-seeking class actions are typically remunerated according to the contingency fee system, whereby they are awarded a percentage of the court award or settlement, their interest lies in reaching a sufficiently high settlement where the victims might prefer a judgment on the merits.

121 For a discussion of the representation problems created by class actions, see Owen M Fiss, 'The Political Theory of the Class Action' (1996) 53 *Washington & Lee Law Review* 21; John C Coffee, Jr, 'Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation' (2000) 100 *Columbia Law Review* 370, 418–25; Samuel Issacharoff, 'Preclusion, Due Process, and the Right to Opt Out of Class Action' (2002) 77 *Notre Dame Law Review* 1057.

122 See Bazyler (n 57) 92–95.

the Swiss case devised procedural innovations which further reduced victims' control of the case, such as a 'pre-commitment strategy' whereby potential claimants were asked to decide whether to join or opt out of the litigation once the global settlement amount had been approved, but before the precise allocation method was devised.[123] Thus, the ability of individual victims to challenge certain aspects of the litigation through their own lawyers was restricted, all victims having to be represented by the same plaintiff lawyers on these specific issues.

Yet one should bear in mind that direct participation of every single victim is not a plausible condition to set for mass litigation, or any other decision-making process involving large numbers of people. Burt Neuborne argues that as with direct democracy in a legislative or executive context, 'it is impossible to sustain the common law ideal of universal direct participation in the judicial process, with lawyers functioning as one-to-one interpreters and guides for every individual member of the population … [W]e have no choice but to evolve representative legal institutions that allow us to assert that everyone with a need or desire to participate is metaphorically (if not physically) present in the courts of justice.'[124] The procedures discussed above appear to be promising steps in that direction, as they established clear and transparent procedures and allowed victims to bypass the representative track in favour of direct participation in the process: at the fairness hearing, individual victims, as well as other members of the public, could (and did) express an opinion contrary to the Lead Settlement Counsel, and the pre-commitment strategy gave them the opportunity to opt out of the settlement altogether and not be bound by its terms.

The procedure in the German case did not provide similar openings for individuals to participate directly.[125] In Part II, following our understanding of THL as a form of public litigation standing in for democratic processes, we raised the question of the relevant public in THL. This question is made more difficult to answer by the fact that, as in many class actions, the gathering of plaintiff-victims into a group was done ad hoc by lawyers, for the purposes of the litigation, in contrast to organisations or organic groups whose existence is independent of class actions.[126] In fact, the wishes of Jewish commu-

123 'The notices [to potential claimants] included a description of the techniques we planned to use in dividing up the pie among the five classes and offered prospective class members an opportunity to pull out of the litigation in order to pursue their own lawsuit against the banks. We made it clear that those class members who did not use the escape hatch would be bound by the results of the allocation procedure.' Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 45.

124 *Ibid*, 10–11. Alexandra Lahav also suggests 're-envision[ing] the tort trial as a democratic enterprise rather than only an individual's day in court. This argument draws an analogy to the theory of deliberative democracy, which values participation as a means of encouraging public deliberation and believes that contentious issues are best addressed through deliberative processes.' Alexandra D Lahav, 'Bellwether Trials' (2008) 76 *George Washington Law Review* 576, 577.

125 The pool of potential claimants in that case was much wider, with over a million potential claimants, and conducting participatory procedures would perhaps have proved prohibitively time-consuming and costly.

126 See Stephen C Yeazell, *From Medieval Group Litigation to the Modern Class Action* (Yale University Press, 1987).

nity organisations were often at odds with those expressed by individual victims, who insisted that the settlement be allocated to the victims themselves.[127] The informality of the German case seems at first glance to overcome this difficulty, as it allowed Jewish organisations to take the lead in the negotiations alongside the representatives of the victims. In this manner, the German process gave a stronger voice to the interests of the community of Jewish victims, which may be better represented by Jewish organisations established for the long term than by individual victims.[128] Yet the voice given to these community interests cannot be a substitute for the voice of the victims themselves, for which there was very little room in the German case.

Furthermore, non-Jewish voices were absent or ill-represented at the negotiations, and when they were present they complained of their unequal bargaining power. Thus, no representatives of homosexual or disabled workers were present at the negotiations.[129] An American lawyer joined discussions to represent the interests of the Roma, but no one signed the agreement on their behalf.[130] Representatives from five Central and Eastern European countries present at the negotiations complained that the US had pressured them to accept the terms of the settlement agreement despite their sense that the compensation amounts were too low.[131] The lack of adequate representation is even more troubling in light of the fact that potential class members did not have the opportunity to opt out of the arrangement as in the Swiss case,[132] and the Foundation Law enacted by the German Bundestag in fulfilment of the settlement agreement purports to bar recovery pursued in any other forum.[133]

127 See n 116 and accompanying text above. The commemorative and educational projects funded by the German settlement were criticised by many who thought the settlement money should go only to individual Holocaust survivors. Bazyler (n 57) 275–85. Allocation to educational projects was seen by some as reproducing the flaws of the reparations programmes, providing 'a means for organized Jewish groups to create a "slush fund" to perpetuate their existence and for academics and others, applying for financial support from the groups controlling the flow of the funds, as parasites taking money that rightfully belongs to the surviving victims.' *Ibid*, 279.

128 For a discussion of Jewish organisations' representation of Jewish interests with respect to German reparations, see Ronald W Zweig, *German Reparations and the Jewish World: A History of the Claims Conference* (Westview Press, 1987).

129 Adler and Zumbansen (n 57) 22.

130 *Ibid*, 23.

131 *Ibid*, 26.

132 Adler and Zumbansen, *ibid*, surmise that following the US Supreme Court's decision in *Fireboard*, which limited the possibility of certifying a mandatory class under 23(b)(1)(B) (that is, a class without the ability to opt out) where the limitation on available funds derives from an agreement between the parties, as opposed to a limited trust fund or specific asset, it is difficult to imagine that a court would have certified the class action against German corporations as mandatory. Thus, as in the Swiss case, there would probably have been an opt-out option had the German case remained managed by the courts.

133 *Ibid*, 26. Adler and Zumbansen emphasise that preclusion of alternate fora reproduces the previous scheme in German law, whereby courts consistently held that the Federal Compensation law of 1956 blocked avenues for individual compensation, even where individual claims were not covered by the law. In addition, Adler and Zumbansen claim that individuals who performed forced labour in ecclesiastical institutions, private households or the agricultural sector have no claim under the Foundation Law, but the law purports to preclude future lawsuits brought by them in another forum.

The German settlement distribution also lacked the transparency and accountability of the CRT process. The German settlement, together with the portions of the Swiss settlement allocated to former slave labourers, were distributed by seven organisations outside Germany. These organisations processed the claims and distributed the funds according to the eligibility standards set by the Foundation Law, which provides little guidance and contains no standards to govern appeals, other than stating that 'partner organizations are to create appeals organs that are independent and subject to no outside instruction'.[134] This has led commentators to view the partner organisations as unaccountable.[135] Not only did the informality of the distribution process fail to create a democratic process through transparency, deliberation, and appeals; the absence of a third party supervising the formulation of the distribution rules, such as the court had done in the Swiss case, granted Germany exclusive power over important distribution decisions, to the exclusion of other voices. Thus, the lengthy dispute that led to the dispute between German and Italy before the International Court of Justice was the result of Germany's unilateral decision to exclude Italian military internees from the settlement.[136]

The situation described above reflects the danger of reproducing inequalities inherent in market mechanisms such as settlement. Jewish organisations had more power in the US relative to other groups, and were therefore given more voice in the negotiations. The comparison of the German and Swiss cases therefore suggests that it is crucial that a third party institution relatively immune to political pressures, such as a court, have the power to grant weaker voices access to the deliberations. Yet one of the reasons for the removal of the German case from the court was the parties' wish for expediency in light of the delays experienced in the Swiss case. We therefore appear to have a classic trade-off between democracy and efficiency.

B. Efficiency

One of the reasons German companies and the German state excluded a class action settlement was expediency. This consideration was also important to the plaintiffs' lawyers, given the plaintiffs' advanced age.[137] The length of the Swiss process furthermore induced the parties in the German case to draft the settlement agreement in a way that provided for the distribution mechanism instead of leaving it to a court.[138] As a result, German payments were made at almost the same time as Swiss payments, even though

134 Foundation Law (n 106) art 19.

135 Adler and Zumbansen (n 57) 26–28.

136 *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening)* (Judgment) General List No 143 [2012] ICJ 1.

137 Bazyler (n 57) 100 also sees the lack of court procedure as a timesaver.

138 According to Eizenstat (n 56) 262, the parties learned from the Swiss case that it was a mistake to leave it up to the court to allocate the funds as distribution was delayed.

the campaign against the German companies had started a year and a half after the Swiss litigation.

This is not to imply that the diplomatic-bureaucratic process followed in the German case was highly efficient. Because in the German case the settlement process was removed from court, there were difficulties making it binding on the courts before which the lawsuits had been filed, leading to delays.[139] By integrating the courts into the settlement process, the Swiss case avoided these problems. Furthermore, Bazyler sees a flaw in the diplomatic structure of the German case—the lack of a neutral arbiter to resolve disputes in the stage of distribution. Government administrations change, and the lead diplomats in charge of the negotiations—Eizenstat and Lambsdorff—were no longer in place a few months after the settlement had been reached. As a result, the settlement almost fell apart after it was signed and while money was being distributed because '[w]ithout a Judge Korman … there was no arbiter to keep the parties in line'.[140] Numerous contentious issues arose regarding how to distribute the funds, leading to lawsuits.[141] Nevertheless, we can venture that, given the magnitude of the German case, involving over a million potential claimants, a court-led procedure would have been less efficient in that case.

IV. WHO: DEFINITION OF PARTIES

The theory of abnormal justice suggests that any process aimed at resolving struggles for abnormal justice needs to be reflexive and open to the fact that first-order questions have been wrongly limited in scope. In this Part we go beyond Fraser's claimant-centred frame and compare the Swiss and German cases in terms of reflexivity in the definition of the relevant participants, including perpetrators. We argue that while the Federal Rules of Civil Procedure followed in the Swiss case provided fairer methods of defining who counts as a *victim*, the informality of the diplomatic negotiations in the German case enabled the formal defendants to share liability with other bodies, such as the state and non-defendant corporations, allowing the definition of *perpetrator* to be broadened.

139 The parties to the settlement fought a tough battle against Judge Kram of the Second Circuit, who obstinately refused to dismiss the cases against German and Austrian banks before her until compelled to do so by an appellate court. Bazyler (n 57) 86–88.

140 *Ibid*, 96.

141 Bazyler blames the German companies for threatening the stability of the settlement, first by demanding that they receive credit for any money claimants had previously received from Germany, and later by disputing the amount of interest that had accrued on the settlement money between settlement date and actual distribution. *Ibid*, 96–97. The German companies further argued that money contributed by the general public in Germany should reduce the German industry's DM 5 billion obligation. Moreover, three German banks (Deutsche Bank, Commerzbank and Dresdner Bank) were accused of financial dishonesty when transferring funds to victims while converting into local currency. These and other disputes led Neuborne to suit against the German companies to enforce the settlement agreement.

A. Who Counts as a Victim?

Both cases exhibited flexibility in defining who counts as a legitimate claimant, creating opportunities for hitherto denigrated victims to claim justice. In a class action, the list of plaintiffs is necessarily open-ended.[142] However, in THL, it was not just the identity of the specific individuals who would be listed as plaintiffs that was flexible. The very category of claimants covered by the settlement was altered over the life of the cases. In the Swiss case, the settlement was broadened to additional categories of victims who had nothing to do with the initial bank-related claims: persons who had performed slave labour for German companies holding Swiss assets; persons who had performed slave labour for Swiss companies; owners of looted assets fenced through Switzerland; and refugees excluded from or abused in Switzerland. This broadening of the victim definition had been requested by the Swiss banks, which in addition to extinguishing the lawsuits against themselves sought to extinguish wartime claims against other Swiss companies and the state.[143] In addition, each of these categories of claimant was opened to victim groups beyond Jews, namely the four other victim groups mentioned in the Nuremberg race laws—Jehovah's Witnesses, the disabled, homosexuals and the Sinti-Roma.[144] Other victims of Nazi oppression, however, such as Slavs, communists and Catholics, were not included in the settlement agreement.[145] In the German case, claims against German banks were included in the settlement at the request of the plaintiffs who had filed those claims. Claims against German insurance companies were also included at the request of the German negotiators.[146]

The fact that inclusion in the settlement can be requested by either victim or defendant is indicative of the fact that inclusion can be advantageous to the victims, in that it signifies that one's claim is recognised, but also detrimental, in that it binds the victim

142 Lawyers usually initiate a lawsuit with a named plaintiff, and only after judgment or settlement are potential class members notified of the existence and terms of the judgment or settlement and offered an opportunity to join or opt out.

143 The Bergier Report also explored these categories of victims. See Bergier Report (n 58) 105–76 (discussing Swiss policy toward refugees); 177–368 (discussing the relations of Swiss banks, insurance companies, industry and services with Nazi Germany, the use of forced labour in Swiss subsidiaries, and looting).

144 An informal advisory group of Jewish leaders had urged plaintiff counsel to expand the settlement to include all victims singled out by the Nazis in the Nuremberg race laws, not just Jews. Bazyler (n 57) 34–35.

145 Neuborne describes the dilemmas of inclusion as follows: 'As a concession to the Swiss, who wanted to end all Holocaust era litigation against all Swiss entities, we opened one class—the Swiss slave labor class—to everyone, on the assumption that the total number of slave and forced laborers working for Swiss companies would be relatively small. That turned out to be the case … Excluding Slav victims from the settlement may have made economic sense, but it was divisive and morally troubling. Although the courts eventually upheld the exclusion of Slavs from the Swiss bank settlement classes, I believed then, and believe now, that exclusion raised serious moral issues. … I made a mental note to try to make sure that the evolving German slave labor cases did not ignore Slav victims. In the end, Slav forced laborers received a very substantial slice of the $5.2 billion German slave labor settlement, but virtually nothing in the Swiss case.' Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 57.

146 Bazyler (n 57) 97–98.

to the terms of the settlement and precludes future claims. Thus, from the perspective of victims, excluding certain groups is defensible, to the extent that this does not preclude them from filing their own lawsuits, as in the Swiss case. In the German case, however, some groups, though excluded, have their claims precluded by the Foundation law.[147] This is not to imply that the due process guarantees of a judicial track provide a completely satisfactory solution. In practice, the excluded groups are not likely to file a new class action, which requires expending huge resources.[148] However, the due process guarantees of a formal court proceeding at least leave an opening for future lawsuits.

From a broader public interest perspective, inclusion of additional categories of victims is also a double-edged sword. On the one hand, the inclusion of Jews denied refuge in Switzerland in the Swiss banks settlement can be viewed as providing public recognition of Switzerland's failure to assist Jews during the war. On the other hand, the inclusion of a new category of claimants during settlement negotiations and not as the result of a claim filed by victims in that category may have the effect of silencing public discussion of a particular chapter of history before that chapter has been fully opened. It may also be read to imply that the formal defendants bear full responsibility for wrongdoing, to the exclusion of the state and other participants. It is therefore essential that the legal process be designed so as to incentivise the production of out-of-court historical narratives, for example through historical commissions as in both the Swiss and the German cases,[149] and that the 'who' be enlarged to include important bearers of responsibility beyond the defendants, as we discuss immediately below.

B. Sharing Liability

Transnational litigation tends to target corporations, as under current interpretations of international law sovereign states enjoy immunity from civil litigation for the commission of atrocities.[150] While it is precisely this process of transnational aggregate civil

147 This was pointed out by Adler and Zumbansen (n 57) 26. The Foundation Law grants the partner organisations discretion to provide compensation to forced labourers in agriculture, while the Law purports to preclude their lawsuits. Section 11(1) of the Law provides that 'partner organizations may also award compensation from the funds provided to them pursuant to Section 9, Paragraph 2 to those victims of National Socialist crimes who are not members of one of the groups mentioned in Sentence 1, Numbers 1 and 2, particularly forced laborers in agriculture'. Section 16(1) provides that '[p]ayments from public funds, including social security, and from German business enterprises for injustice suffered under National Socialism as defined in Section 11 may be claimed only under the terms of this Law. Any further claims in connection with National Socialist injustices are excluded.'

148 Neuborne claims to have offered to turn over legal research to lawyers representing Slav victims in order to help them bring their own lawsuit, but that their lawyers were not prepared to make the effort. See Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 57.

149 For further elaboration on how settlements can serve as catalysts of historical research, see Bilsky, 'The Judge and the Historian' (n 55).

150 Beth Stephens, *International Human Rights Litigation in US Courts* (Martinus Nijhoff, 2nd edn 2008) 89–94.

litigation that allowed THL to address the responsibility of business for human rights violations where criminal law had persistently failed,[151] the litigation might lead to an exclusive focus on corporate liability, leaving an important bearer of responsibility—the state—out of the picture. Furthermore, the targeting of corporations with deep pockets and operations in the US could lead to a distorted emphasis on a few large corporations, when during the war large sections of the economy contributed to the war effort and employed involuntary labour. The question therefore arises as to whether transnational litigation, which is controlled by private parties and yet aims to reach finality for claims with important normative value, can reach all the relevant wrongdoers, through an apportionment of liability between the formal defendants and both the state and non-defendant corporations. One of the defences raised by corporate officers at the Nuremberg industrialist trials was necessity, as they argued that the Nazi state did not leave them any choice but to commit crimes. For criminal law, which is grounded in individual intent, this is a legitimate defence. In private law, in contrast, responsibility can be apportioned among wrongdoers.[152] However, settlement prevented THL from addressing the precise apportionment of liability between the state, the defendant corporations and the rest of industry and finance.[153] Yet turning to process, we believe that the Swiss and German cases have important implications for the apportionment of responsibility.

Contrary to regular lawsuits, including most class actions, where the defendant's identity is defined from the beginning,[154] the settlement in both the Swiss and the German cases opened the possibility for both non-defendant corporations and the state to join the process. This happened in the German case, where the state contributed 50 per cent of the German companies' monetary settlement,[155] with DM 5 billion contributions from both the German government (acting on behalf of German governmental entities that had used slave labor) and German industry. Furthermore, the German government encouraged German companies that were not defendants, as well as the general public, to contribute, in light of the fact that more than 20,000 companies had used slave labour

151 See n 94 above.

152 For a discussion of collective liability in tort law doctrines, see Ariel Porat and Alex Stein, *Tort Liability under Uncertainty* (Oxford University Press, 2001). This suggests that we should be more open to transnational human rights litigation being based on norms of domestic private law, as opposed to international criminal law.

153 Even without settlement, there appear to be two legal obstacles to the apportionment of liability among state and corporations. Sovereign immunity creates a procedural obstacle, and liability is difficult to apportion for substantive reasons in situations in which the relationship between state and corporations during the war, and in particular the measure of freedom enjoyed by business in a totalitarian state, is the subject of historiographical disputes. See eg Christoph Buchheim and Jonas Scherner, 'Corporate Freedom of Action in Nazi Germany: A Response to Peter Hayes' (2009) 45 *Bulletin of the German Historical Institute* 43.

154 Subject of course to joinders in the course of litigation. While in most class actions the plaintiffs are the class, defendant class actions are also possible. See Robert R Simpson and Craig Lyle Perra, 'Defendant Class Actions' (2000) 32 *Connecticut Law Review* 1319.

155 Eizenstat (n 56) 243–60.

during the war.[156] Over 6,500 German companies contributed.[157] In theory, the Swiss case could also have been interpreted to require the involvement of the Swiss government and broader sections of industry in the settlement. The litigation was felt to be directed against Switzerland itself.[158] As a result, the Swiss government took a few initial steps towards resolution of the claims.[159] In particular, the Bergier Commission was given the mandate to assess the relationship of Switzerland, and not just of the defendant banks, to National Socialism. Yet in contrast to the German case, the Swiss government refused to participate in the negotiations and did not contribute to the settlement, insisting that the settlement was a matter between the parties to the legal proceedings.

In fact, in terms of sharing responsibility with non-defendants, the Swiss and German cases achieved exactly opposite results. While after tax deductions to German industry, German taxpayers actually bore 70 per cent of the cost of the Foundation,[160] it was the Swiss defendants who took upon themselves the liability of the state and other Swiss companies for wrongs without any link whatsoever to the banking industry, by agreeing to have the settlement cover the claims of individuals denied refuge in Switzerland during the war, and claims related to slave labour performed for Swiss companies.[161] Furthermore, a lawsuit filed against the Swiss government-owned bank, the Swiss National Bank (SNB), for providing credits and engaging in other transactions with the Nazis, was dropped as part of the settlement, even though the SNB refused to contribute any funds to the settlement, its director insisting that the SNB was not a party to the dispute.[162] Thus, instead of the Swiss government and industry contributing to the

156 Bazyler (n 57) 88–89. In light of German companies' initial reluctance to contribute, the German government offered tax deductions for contribution. According to Bazyler, companies were finally shamed into contributing by a campaign organised by the government and the defendant companies. As there were still fewer contributors than originally thought, the contribution rate of the founding members was raised. Bazyler (n 57) 353–4.

157 Stiftung: Erinnerung, Verantwortung, Zukunft, 'Facts and Figures on Funding Activities' (*Stiftung*, 31 December 2012), www.stiftung-evz.de/eng/the-foundation/facts-and-figures.html.

158 The Swiss government first opposed the litigation, calling it blackmail. Bazyler (n 57)4–5. The Bergier Report also notes that in Switzerland the entire country felt attacked. Bergier Report (n 58) 494.

159 In 1996, Switzerland appointed Thomas Borer as special envoy on Holocaust-era restitution issues, and in 1997 created the Swiss Fund for Needy Victims of the Holocaust to aid destitute Holocaust victims worldwide, as a gesture of goodwill (and for Bazyler, in an attempt to halt the litigation). $180 million, of which the Swiss banks contributed $70 million, was managed by the Swiss government initially, and then management was turned over to Jewish groups. 300,000 survivors received a few hundred dollars each. Bazyler (n 57) 5–6.

160 Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 89.

161 The settlement provided for a fifth settlement class to compensate refugees who had been denied entry into Switzerland as they fled Nazi persecution. The settlement also included Slave Labor II Claims representing persons who worked for Swiss companies, such as Nestle, which were alleged to have directly owned or controlled factories in Germany or Nazi-occupied Europe and used slave labour. This class does not relate to Swiss banks, but to other companies. The objective in creating these classes 'was to extinguish all World War II-related claims against Switzerland and its industries through this settlement'. Bazyler (n 57) 36.

162 *Ibid*, 49. Before the settlement was reached, Eizenstat had approached the SNB's president and asked him to contribute, saying it was 'unfair to the big three commercial banks to carry all the burden'. Eizenstat (n 56) 138.

monetary settlement, it was the banks that settled, out of their own pockets, claims made against the state and other industry.[163] Indirectly, this solution was useful to the Swiss banks, as it allowed them to settle while appeasing public opinion in Switzerland.[164]

The Swiss denial of responsibility was facilitated by the existence of formal legal proceedings, which, the Swiss implied, created the boundaries of participation. Immediately after the settlement, the Swiss government issued a statement in which it both distanced itself from the result and took pains to confirm that it would not be contributing any funds to the settlement:

> The Federal Council noted today that a settlement was finalized … between CS [Credit Suisse] Group, UBS AG, and the American plaintiffs. It hopes that this settlement calms the tense situation of recent months and promotes good economic relations. The precise content of the settlement is not yet known. The Federal Council has always stressed that negotiating such a settlement is a matter for the parties affected. Accordingly, it did not take part in these negotiations. For this reason, no obligation ensues for the Swiss Confederation from the settlement.[165]

We are not claiming that the choice of a diplomatic or court-centred path to settlement is a predictor of how wide the net of liability will be cast. For historical and political reasons,[166] Switzerland, unlike Germany, was not ready to accept even moral responsibility.[167] Nevertheless, a formal court track makes it easier for non-parties to deny responsibility. Switzerland consistently relied on the fact that it was not a formal party to the class action to refuse to take part in the negotiations and contribute to the settlement. Conversely, in the German case, it was precisely because German taxpayer money was at stake that proceedings in an American court were perceived to constitute an infringement of sovereignty.[168] The possibility of establishing a broader sphere of liabil-

163 The Refugee and Slave Labor II classes were created through the settlement agreement, and the settlement amount must therefore have been reached taking them into account. Therefore it was clearly not in the banks' direct financial interest to include them and pay for them; rather it was in the Swiss government's and other industries' interest to reach finality for these classes.

164 Plaintiff attorney Mel Weiss is credited with having first offered to have the settlement cover the Swiss National Bank's obligations as well as other claims against the Swiss government and Swiss companies, in exchange for the defendant banks' raising the amount of settlement. John Authers and Richard Wolffe, *The Victim's Fortune: Inside the Epic Battle over the Debts of the Holocaust* (Harper Perennial, 2002) 98. According to Authers and Wolffe, the defence lawyers saw an opportunity to raise the settlement amount without angering Swiss public opinion: 'Witten realized that he could "buy peace for the nation," which would be much easier to sell to a skeptical Swiss public.' *Ibid*.

165 Declaration of the Swiss Federal Council (1998), cited in Bazyler (n 57) 50.

166 Eizenstat describes the Swiss government's stubborn unwillingness to participate in negotiations in any way, as right wing leader Christoph Blocher derived political profit from the controversy. Eizenstat (n 56) 163.

167 The German state had already acknowledged its responsibility through the reparations programme, and the litigation did not require shattering a myth of neutrality or absence of responsibility as in the Swiss case.

168 See n 81 above and accompanying text.

ity therefore seems inextricably linked to the choice of an informal-diplomatic or formal court procedure. This in turn may have profound ramifications for historical understanding and moral responsibility. A legal process which restrains a broadened notion of responsibility may limit our historical understanding. It is true that the Bergier Report, triggered by the lawsuits, dealt extensively with the role of Switzerland during World War II, not just the banks, and shattered Switzerland's image of neutrality. However, this shattering continues to be contested in Switzerland, where the state forcefully insisted that it should remain extraneous to the dispute, willing at most to create a small humanitarian fund (the term 'humanitarian' implying no obligation).[169] In the German case, in contrast, the state's responsibility was internalised through the legislation of the Foundation Law—a sovereign act of the German state, exemplifying the dialogue between the foreign and domestic spheres characteristic of transnational public law litigation. Though this internalisation of responsibility was far from adequate, as our discussion above of the Foundation Law's limitations suggests, it is arguably preferable to a complete denial of responsibility on the part of the state as in the Swiss case.

As discussed in Part III, because in the German litigation the settlement process was removed from the courts, there were difficulties making it binding on courts. There we saw the advantages of a formal court process in terms of enforcement. Yet enforcement can be more successful in a less formal process because parties internalise responsibility more willingly—perhaps the German case led to better internalisation of responsibility by German defendants, as well as corporations and the state beyond the formal parties to litigation, notwithstanding many corporations' insistence that they were not legally responsible.

VI. WHAT SORT OF JUSTICE?

Fraser points to the lack of consensus in the current era of abnormal justice as to what kind of claim is appropriate. In THL, various parties involved in the cases expressed differing views as to the type of justice that should be furthered by the settlements—many victims expressing a strong preference for corrective justice in the form of individualised restitution, while organisations often encouraged distributive and commemorative payments. In this Part we explore the types of justice furthered in each track. As will be recalled, each of the Swiss and German settlements created various categories of claims,

169 In addition, according to one author, the Holocaust litigation resulted in an outburst of antisemitism in Switzerland, the litigation having lifted the taboo against uttering anti-Semitic remarks in public. Regula Ludi, 'Waging War on Wartime Memory: Recent Swiss Debates on the Legacies of the Holocaust and the Nazi Era' (2004) 10 *Jewish Social Studies* 116, 121 (cited in Orland (n 57) 35). The findings of the Bergier Commission were also attacked by some quarters in Switzerland: *ibid*. According to Ludi, '[t]he debates on the Nazi era have … produced a political polarization and contributed to strengthening and uniting a national-conservative opposition in Switzerland': *ibid*, 141 (cited in Orland (n 57) 36).

each category with its own rules of eligibility and procedure for application.[170] While the central role of the court in the Swiss case led to the adoption of a predominantly *individual and corrective model* of justice, the diplomatic-bureaucratic track of the German case furthered *collective, distributive and commemorative* justice.

The bulk of the Swiss case—relating to the bank accounts—was resolved through the individualised procedure of the CRT, which adjudicated the claim of each survivor or heir. Judge Korman had insisted on an individualised process, reproducing many attributes of the legal process, even when plaintiff lawyers had suggested that due to a lack of adequate bank records, the funds should be divided among claimants through a standard payment of $3,000 to each.[171] In a 'traditional' class action, the rules of procedure are already altered in order to deal with the context of mass violations. It is sufficient to show evidence of pattern and practice rather than a concrete linkage between every claimant-victim and defendant.[172] The CRT procedure represents an attempt to re-inject individualised justice into class action procedure, with a distinct award for each claimant based on the specific circumstances of that claimant's case, while taking into account the mass nature of the claims and the historical background against which the wrongs were committed, specifically the widespread destruction of information by the banks. Thus, the CRT used a computerised system which matched claims with the 36,000 bank accounts uncovered by the Volcker Report. When the system found a match, the CRT staff investigated it to verify that the owner had been correctly identified. When there was doubt as to the amount in the account, it was resolved through rebuttable presumptions designed to account for the fact that the Swiss banks had engaged in mass destruction of relevant transactional bank records, relying on statistical averages developed by the Volcker auditors.[173] Furthermore, the CRT Rules presumed that if a Swiss bank account was closed during the Nazi era without a record of who actually received the money, it was fair to presume that the account had not been paid to its true owner.[174]

In the Swiss case, more 'rough justice' measures were only adopted where it was deemed that corrective justice could not be achieved for practical and moral reasons. Thus, individualised but 'rough justice' was furthered in the payments relating to slave

170 See nn 74, 84 and accompanying text above.

171 Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 64.

172 Robert A Swift, 'Holocaust Litigation and Human Rights Jurisprudence' in Bazyler and Alford (n 56) 52. Statistics are also commonly used in class actions to calculate damages. Lahav (n 124).

173 CRT Rules (n 105) art 29.

174 CRT Rules (n 105) art 28(h) provides that the CRT is to presume that the account owner or heirs did not receive the proceeds of the account since 'the Account Owners, the Beneficial Owners, and/or their heirs would not have been able to obtain information about the Account after the Second World War from the Swiss bank due to the Swiss banks' practice of [destroying records or] withholding or misstating account information in their responses to inquiries by Account Owners and heirs because of the banks' concerns regarding double liability'.

labour claims in both the Swiss[175] and the German[176] cases and to Swiss refugee claims.[177] The process can be deemed to be individualised in that an individual must make a claim and justify that he is a class member. However, the amount awarded is standard—hence the use of the term 'rough' justice.[178] Furthermore, distributive considerations appear to have motivated the parties' agreement to allocate 75 per cent of the German settlement funds to forced labourers from Eastern Europe, whose suffering had never before been recognised.[179] The fact that only survivors (as opposed to heirs) received compensation from the German slave labour classes[180] also makes the payment more distributive than

175 The Swiss settlement created two classes of slave labour claims. First, a class of victims of slave labour in German companies that transacted profits through Swiss entities. Because Special Master Gribetz found that most companies that used slave labour had accounts in Swiss banks, all persons 'who performed slave labor for private entities, entities owned or controlled by the state or Nazi authorities, or by the concentration camp and ghetto authorities, were deemed members of Slave Labor Class I. This Court-adopted presumption helped to streamline the distribution process by enabling the Court to utilize the same administrative agents, the Claims Conference and the IOM, and adhere closely to the procedures that had been adopted under the German Foundation's Slave and Forced Labor program. The Distribution Plan originally provided for payments of $1,000 each (subsequently increased to $1,450) to surviving slave laborers, or to their heirs if the former slave laborer died on or after February 16, 1999.' Holocaust Victim Assets Litigation (Swiss Banks), 'Slave Labor Class I' (2006), www.swissbankclaims.com/SlaveLaborI.aspx. Second, a class of victims of slave labour for Swiss companies. The Distribution Plan originally provided for payments of $1,000 (subsequently increased to $1,450) to former slave labourers. Holocaust Victim Assets Litigation (Swiss Banks), 'Slave Labor Class II' (2006), www.swissbankclaims.com/SlaveLaborII.aspx.

176 Each surviving slave labourer received $7,500, supplemented by $1,450 from the Swiss bank settlement. Neuborne, 'Preliminary Reflections' (n 56) 800. Each surviving forced labourer received $3,000. Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 94.

177 'Under the terms of the Settlement Agreement, the Refugee Class consists of those individuals who were denied entry into or expelled from Switzerland, or admitted into Switzerland but abused or mistreated. … Class members who indicated a possible refugee claim on their Initial Questionnaire were sent refugee program applications either by the Claims Conference or the IOM. As with the other classes, applications also were made available over the Internet and at Holocaust survivor help centers around the world. The claims process was supervised directly by Special Master Gribetz and Deputy Special Master Reig, and all final determinations were made by the Court. Each claim recommended for approval was submitted to the Court with often extensive documentation and/or a detailed narrative, and each claim was summarized in a report filed with the Court and docketed for public review. Surviving refugees (or the heirs of refugees who died on or after February 16, 1999) originally were to receive $2,500 if they were denied entry into or expelled from Switzerland, while those admitted but mistreated were to receive $500. Those payments subsequently were increased, respectively, to $3,625 and $725.' Holocaust Victim Assets Litigation (Swiss Banks), 'Refugee Class' (2006), www.swissbankclaims.com/RefugeeClass.aspx.

178 The parties themselves used this term. Eizenstat (n 56) 137–8.

179 According to Neuborne, 'Transnational Holocaust-Related Litigation' (n 56), '[t]he negotiators decided to award surviving slave laborers (mostly Jews) DM 15,000 each, more than twice as much as surviving forced laborers (mostly Slav) to reflect the relative severity of their labor conditions. In the end, approximately 75% of the labor funds went to Slav forced laborers, who had never received any compensation for their suffering under the Nazis.'

180 It was thought that including heirs of deceased labourers would bring the numbers to something astronomical, and it would be difficult to find them. 'Compensation' for deceased victims was conceptualised as provided through the Future Fund, established as a memorial to them. Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 88.

corrective. This individualised but rough justice is common to both the Swiss and German cases. In fact, the court in the Swiss case decided to use the same administrative agents as were employed to distribute the German fund, and adhered closely to the procedures that had been adopted under the German Foundation's Slave and Forced Labor programme. However, this procedure was adopted in the Swiss case as a second best.[181]

Indeed, in the Swiss case, it was only in the looted assets class that a primarily distributive justice approach was adopted, after it proved impossible to discover whether particular looted items had been disposed of in Switzerland. Thus, payments were made to the poorest members of the class. However, even in this case, the court refused to opt for commemorative justice. Community advocates for homosexuals and the disabled noted that few of these victims were qualifying for this class, because the disabled had low survival rates and homosexuals were reluctant to talk about the past. They therefore argued that commemorative payments should be made instead, but Judge Korman refused. Similarly, when there was a surplus of $200 million in undistributed funds and none of the parties could agree on how to distribute it to poor survivors, Korman allocated everything to the bank account owners. He adopted the view throughout the administration of the settlement that the funds were the property of individual victims 'and not of the collective victim communities'.[182]

In contrast, the participants in the German track did not shy away from commemorative justice. EUR 358 million of the German settlement was set aside as Foundation capital in order to finance international projects promoting human rights, historical research, and support for the victims of National Socialism.[183] The Foundation provides support to hundreds of research and educational projects concerning forced labour and human rights violations during the Nazi era as well as in contemporary times, and German-Jewish history, amongst other things.[184]

It appears that the predominantly corrective and individualised character of the Swiss bank settlement was a result of the court's involvement. This can probably be explained by the conditioning of lawyers—the court sought to create a claims process as close as possible to the legal process with which it was familiar. Furthermore, a recurrent request by victims at the fairness hearings was that funds go to their owners, and not to

181 In his proposal for distribution, Gribetz explains that he recommends a standard amount in those categories of claims in order to avoid 'the bureaucratic and emotional morass' experienced by survivors who filed claims with settling companies in Germany after the war, as had been described by Benjamin Ferencz in *Less than Slaves*. Gribetz cites Ferencz, as well as Neuborne who urges a standard amount given that the victims are old, to avoid delay and bureaucratic complications, but mostly to avoid having the elderly survivors fight with one another over the funds, which everyone agrees are inadequate anyway. *In re: Holocaust Victim Assets—Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds* CV-96-4849 (NY 2000), www.swissbankclaims.com/Documents_New/VolumeIPlan.pdf.

182 Neuborne, 'Transnational Holocaust-Related Litigation' (n 56) 70.

183 Stiftung: Erinnerung, Verantwortung, Zukunft, 'Origins of the Foundation EVZ' (*Stiftung*, 2012), www.stiftung-evz.de/eng/the-foundation/history.html.

184 *Ibid*.

commemorative or educational projects.[185] However, even this most individualised type of justice is a mix of individuated and collective justice, as the presumptions are collective, but the individual has to make a claim based on his personal circumstances. THL therefore suggests the implications of a judicial or diplomatic-bureaucratic track for the types of justice promoted, but also reveals a broad spectrum of types of justice, where the boundaries between individual and collective justice, and corrective and distributive justice are not always clear.

CONCLUSION: THL AND TRANSNATIONAL LEGAL THEORY

More broadly, the Swiss and German cases show that the 'what' of justice can no longer neatly be categorised as legal, political, moral or historical. The combination of legal procedures and diplomacy in both cases challenges an already highly contested distinction between law and politics. The defendants' insistence that they bore only moral responsibility is belied by the unprecedented settlement amounts paid. Moreover, the litigation triggered an explosion of historical research, undertaken by historical commissions commissioned by the corporations themselves, as well as national governments in Europe. In turn, the findings of these commissions were relied upon in the legal process, forming the basis of legal presumptions and helping the court design distribution mechanisms for settlement in the Swiss case, and helping the parties assess the extent of liability in the German case. In this new constellation in which boundaries between fields are increasingly blurred, the search for clear legal norms may prove self-defeating, obscuring the ways in which domestic court procedures can be harnessed to hold MNCs accountable, as well as the important trade-offs involved in choosing one type of process over another.

What are the larger jurisprudential implications of our analysis? 'Transnational law' has been alternatively understood as a post-national historical situation;[186] a new legal field, which, breaking down the distinctions between international and domestic law, 'regulates actions or events that transcend national frontiers';[187] and a new methodological approach which uses globalisation as an opportunity to critically assess the foundational assumptions of legal theory.[188] The case of THL allows us to shed light on each of these meanings of 'transnational law' and to observe transformations in the

185 See n 117 above and accompanying text. In the 1950s, the Claims Conference allocated substantial amounts of the reparations paid by Germany for Jewish victims of the Holocaust to commemorative projects, triggering strong criticism from some survivor communities. Zweig (n 128) 158–9. It seems that the fairness hearing in the Swiss case provided the victims with a stronger voice than the bureaucratic processes of either the 1950s or the German restitution case of the 1990s.

186 Jürgen Habermas, *The Postnational Constellation: Political Essays*, Max Pensky ed and trans (MIT Press, 2001).

187 Philip C Jessup, *Transnational Law* (Yale University Press, 1956) 2; Koh, 'Transnational Legal Process' (n 46); Koh, *Transnational Litigation* (n 46) .

188 Zumbansen (n 18).

concept of the transnational. The first wave of writing about THL was produced by participants in the litigation, such as lawyers, diplomats and historians.[189] These works described the litigation, emphasising its relation with global processes such as the end of the Cold War and the rise of neo-liberalism. The second, more critical wave, centred on the normative and historical questions raised by the litigation, asking whether THL could serve as a precedent for future litigation[190] and what contribution the litigation made to international legal norms,[191] as well as to historical representations of the Holocaust.[192] These questions were asked within the disciplinary frameworks of law and history in an attempt to understand whether THL represented a new model for each of these fields.

This article attempted to inaugurate a third wave of scholarship about THL, in which THL is envisioned less as a legal field than as a tool of reflexivity about law's ability to provide new channels of participation in a transnational world. By shifting attention from norms to process, this paper reframed corporate liability for human rights violations as an issue of participation, and offered a broader jurisprudential perspective on THL and transnational law. The question before us is not whether THL is a precedent or a new model, but how familiar questions of democracy, legitimacy and efficiency resurface in the globalisation era, and how legal mechanisms are transformed when used transnationally.

Hannah Arendt, in her preface to *Between Past and Future*, points to the crisis created by the loss of tradition in the modern age. '[I]t began to dawn upon modern man that he had come to live in a world in which his mind and his tradition of thought were not even capable of asking adequate, meaningful questions, let alone of giving answers to its own perplexities.'[193] She turns to a parable by Kafka for a metaphor for the conditions of thought in the modern age:

> The scene is a battleground on which the forces of the past and the future clash with each other; between them we find the man whom Kafka calls 'he,' who, if he wants to stand his ground at all, must give battle to both forces … Only because man is inserted into time and only to the extent that he stands his ground does the flow of indifferent time break up into tenses.[194]

Kafka meant the insertion of man to break up 'the unidirectional flow of time'.[195] Arendt goes a step further and adds 'a spatial dimension where thinking could exert itself with-

189 Neuborne, 'Preliminary Reflections' (n 56); Eizenstat (n 56); Gerald Feldman, 'The Historian and Holocaust Restitution: Personal Experiences and Reflections' (2005) 23 *Berkeley Journal of International Law* 347.

190 See n 90 above.

191 Bazyler and Alford (n 56).

192 Marrus (n 34) .

193 Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought* (Penguin, 1977) 9.

194 *Ibid*, 10–11.

195 *Ibid*, 11.

out being forced to jump out of human time altogether', a 'diagonal force, whose origin is known, whose direction is determined by past and future, but whose eventual end lies in infinity … the perfect metaphor for the activity of thought'.[196] This gap between past and future is not, for Arendt, a modern phenomenon. What is new is the loss of tradition which in the past had helped most individuals bridge the gap: 'When the thread of tradition finally broke, the gap between past and future ceased to be a condition peculiar only to the activity of thought and restricted as an experience to those few who made thinking their primary business. It became a tangible reality and perplexity for all; that is, it became a fact of political relevance.'[197]

If the crisis of tradition experienced in modern times is destabilising, it is also, for Arendt, an opportunity for society at large, and not just philosophers, to rethink fundamental questions, such as what is authority? What is freedom? In this spirit, our article attempts to mark the transnational situation and the perplexities it raises as a new crisis creating the conditions for a reconsideration of our basic assumptions about law and its relationship to politics.

196 *Ibid*, 11–12.
197 *Ibid*, 14.