**Statement of Thane Rosenbaum***
**Before the Senate Foreign Relations Committee**
**Subcommittee on International Operations and Organizations,**
**Democracy and Human Rights**
**May 6, 2008**

Mr. Chairman, and the Senators on this Committee, let me begin by thanking you for inviting me to testify here today in connection with the Senate's consideration of H.R. 1746, the Holocaust Insurance Accountability Act. My name is Thane Rosenbaum. I am a law professor specializing in the area of human rights and moral justice. Over the years I have written a great number of books, articles, and essays that concerned Holocaust-related themes and issues. I have been quoted in various national news media stories on matters involving Holocaust restitution. I have been a Yom HaShoah (Holocaust Memorial Day) speaker at synagogues, churches, universities, and public memorials in cities all across America. In fact, last week I was simultaneously writing this statement while preparing to deliver a Yom HaShoah address.

Finally, I am the only child of two Holocaust survivors, both concentration camp victims, neither of whom are alive today. I have made no claims for restitution relief on behalf of my parents. I am here today at your invitation and without any tangible benefit to myself. Indeed, I am here only because when it comes to the Holocaust, this Committee, this chamber of Congress, is the appropriate place to be.

Let me begin by stating that what you do here today is vitally important on so many grounds, most especially, for reasons of humanity and morality. Given my emotional, familial and professional involvement in all things related to the Holocaust, I want to thank and commend you for convening this hearing. To my mind, there is great potential that your efforts here today will lead to righting a historic wrong and vindicating the rights of those who were the principal victims of the Nazi genocide.

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The voice of the Holocaust survivor has, tragically, and for far too long, been silenced throughout these restitution initiatives. And, in making this assessment, I am including here the measures taken against Swiss Banks, German industries for their use of slave labor and the confiscation of gold bullion and artwork, and now the matter of European insurance companies and their unconscionable denial of claims and $17 billion in unjust enrichment, which forms the centerpiece of this Committee's hearings for today.

Along the way, however, throughout each of these restitution efforts, the Holocaust survivor has been repeatedly stripped of his rights, separated from his property, and deprived of his dignity. No one ever bothered to stop and ask Holocaust survivors what they wanted. There was so little curiosity as to whether Holocaust survivors even had an opinion about how to best redress the crimes committed against them. And there has been great neglect from those who were purportedly entrusted to guard their interests. Finally, and perhaps most insultingly of all, Holocaust survivors have been readily dismissed and deemed too insignificant to speak for themselves. Self-appointed surrogates stepped in as custodians and proxies and immediately regarded the survivors as too unsophisticated to define their own interests and dictate the terms of how to proceed against those who had harmed them—six decades after their improbable survival.

So few people can claim to have endured what they survived, and yet so many presume to speak for them, and speak so casually about what they should accept as restitution for the nightmares they experienced firsthand. Rare has been the case where Holocaust survivors meaningfully participated in the negotiations that have presumably addressed their losses, their property, and their family history.

It is, in fact, grossly ironic that Holocaust survivors have been so infantilized during the last days of their lives. Those who survived the Nazi death camps as indefatigable teenagers have, in their old age, been reduced to voiceless reminders of fraud and neglect. After the recent various disclosures of wartime thefts of the Nazis and the complicity and self-dealing of other European nations and corporations, the objective should have been to find ways to empower Holocaust survivors to reclaim their property and discover the truths of how they were so cruelly defrauded and deceived. Instead, the very opposite outcome occurred. The failure of ICHEIC is but one example of how these well-meaning restitution initiatives only served to further marginalize and degrade Holocaust survivors during their greatest hour of need and during the final hours of their lives.

What you do here today is a most righteous task. You have the power to enable a depleted community of Holocaust survivors, many of whom are living in poverty, to restore their rights, their dignity, and, most especially, their voice.

Restitution is primarily about righting a historic wrong. It is about providing relief to those who have been subjected to the most unimaginable forms of human suffering. And it is relief in the broadest sense—relief that actually makes victims feel relieved. Restitution is not only about the recovery of assets and the receipt of monetary compensation. That is too simplified an understanding of restitution—the language and mindset of lawyers rather than the wishes of moral men and woman. At its deepest most

profound core, restitution demands the public acknowledgment of loss and the public reckoning that is achieved only by learning the truth. This is what historical justice means: The duty that is owed to victims, and the duty that is owed to history, can only be achieved when the truth is discovered, internalized, and preserved.

The legislation before you serves this broad moral purpose. First and foremost, H.R. 1746 restores the survivor his voice and decision-making authority. It allows victims to finally receive their day in court and opportunity to testify to their losses—both personal and financial—in their own words and with their own appointed representatives. This legislation would also enable survivors to confront those who have harmed and defrauded them, and to do so in the most human terms possible—not as faceless entities folded into a vast, anonymous government bureaucracy, but as principals seeking to vindicate their rights in American courtrooms.

Furthermore, H.R. 1746 would require European insurers to publish the names of all Holocaust-era insurance policies. For various and apparent self-condemning reasons, they have been reluctant to do so. This legislation would finally compel full disclosure as to these insurers' postwar misdeeds, and it would result in the necessary truth-seeking that has been entirely absent from these proceedings for well over a decade. By finally acknowledging the names of, and being held accountable for their conduct toward, their customers, European insurance companies will invariably be forced to disclose how, and by how much, they benefitted from the murder of those whose lives they were contractually entrusted and obligated to insure.

In addition to achieving the historical justice that comes with truth, the threat of private lawsuits would empower Holocaust survivors to negotiate on their own terms, without surrogate institutions that otherwise seek to aggregate, standardize, and depersonalize claims. Institutions don't take things personally; individuals do. Restitution relief always requires some form of personal engagement—sometimes minimal, sometimes symbolic, but always personal. Given the enormity of their loss and the grotesque moral failure that gave rise to that loss, Holocaust survivors must retain substantively meaningful self-determination over their family histories. Anything less is neither moral nor consistent with the objectives of restitution. Private lawsuits permit such personal engagement; courtrooms, after all, are places where individual losses are counted and damages are assessed.

Under ICHEIC, however, which had the ostensible purpose of maximizing efficiencies and reducing costs, each survivor became simply a number that needed to be processed in order to establish that <u>something</u> was done, regardless of whether that something amounted to anything meaningful or just. In the vast majority of cases, such processing resulted in the alarmingly swift denials of casually disposable claims. ICHEIC was all too focused on maintaining global friendships and generating goodwill for future negotiations that may, ultimately, have nothing to do with the Holocaust at all. The legal and moral claims of the individual Holocaust survivor, however, ended up being the collateral damage of these perceived international commitments.

There can be no restitution if the victim does not ultimately and actually feel restituted. This is precisely why so many of these restitution initiatives, and especially

ICHEIC, despite all good intentions, have failed so miserably on moral grounds. The fundamental imperative to measure success only by looking at the score sheet of actual victims went completed ignored. No one asked Holocaust survivors how they felt about the tactics deployed on their behalf, or whether they were satisfied, or what they actually wanted. There are many possible remedies in addition to the face value of an insurance policy. Many survivors wanted to know the truth of their family histories—who purchased the policy, when and where? Other victims merely wanted to assist other Holocaust survivors in need. Instead, government leaders, Jewish institutions, and class action lawyers blithely went about their business as if they had the moral authority to speak for survivors and determine their level of satisfaction—or ignore their wishes altogether.

Yet, what is undeniably true is that in order for restitution to have meaning—both in a strict moral and legal sense—it must offer a pathway to the relief of human misery and resentment. If restitution doesn't actually produce relief and dissipate resentment, then it may be many things, but it is decidedly not restitution. It is a halfhearted legal resolution that resolves nothing, a mere symbolic gesture, or, as my friend Stuart Eizenstat repeatedly proclaims, it is a measure of rough justice, a way to achieve some legal peace.

But the entire concept of legal peace is such a curious idea, one that is purely legal and not at all moral. Peace for whom? Governments? Corporations? Lawyers, diplomats, and government negotiators who wish to rest much easier, or, more peacefully, at night? Something is terribly twisted here. After all, doesn't our duty to achieve peace and secure restful nights remain only with the survivor? And do we not have an equal duty to the memory of the dead? Isn't that what is meant by "rest in peace"? Why should the legal peace offered to nations supersede the moral peace owed to actual victims?

Notions of rough justice and legal peace only appease the interests of governments, corporations, and morally lazy judges; they do not restitute and restore victims. These proclaimed remedies are, by definition, perfunctory—placebos that carry no moral weight or currency with the victims for whom these self-congratulatory measures were intended to benefit. In the end, short of bringing about relief, the futility and frustration of these restitution efforts have given rise to an unrelievedly mechanized process that has only added insult to injury.

In the case of ICHEIC, its legacy, unfortunately, will be remembered for this familiar pattern of institutional callousness and neglect. European insurance companies stole premiums (or shared them with Nazi and Axis authorities), refused to pay on policies and failed to fully disclose the names of their Jewish customers, even though they were quite aware of the existence and special vulnerability of this particular class of insureds. Indeed, they marketed life insurance policies specifically to Jews, knowing full well that everything about European Jewry was soon to become irreparably short-lived. And then, after profiting from the premiums, they handed over their Jewish files and records to the Nazis without regard to this breach of fiduciary and contractual duty. Despite this level of duplicity and deceit, with a guilty party that was, stunningly, this guilty, ICHEIC, a public entity created to achieve justice, failed to achieve justice or to

give victims any sense that it was capable of advancing their interests and fighting their cause.

The recovery of 3% of the $17 billion in unpaid Holocaust-era insurance policies hardly amounts to even rough justice. This is particularly true given the amount of poverty in the Holocaust survivor community and the astonishing wartime and postwar theft of the European insurance industry, whose entities are now counted among the largest corporations in the world. The relative benefit derived from these ill-gotten gains, in which a mass shakedown of insurance policies would help these insurers grow to become financial behemoths, compared with the suffering of so many in the Holocaust survivor community, is a laughably poor demonstration of "rough justice." Moreover, ICHEIC authorized the use of funds to promote Holocaust education over the needs of destitute Holocaust survivors; and the majority of claimants received $1,000 humanitarian payments in lieu of the proceeds of their policies, which has far more in common with a consolation prize than any true sense of justice, even of the "rough" variety.

Mr. Eizenstat speaks with a certain degree of conviction as if ICHEIC was a success, as if all of its advertised benefits upon creation were actually realized, as if the Holocaust survivor community should be grateful for the relaxed standards of proof that ultimately resulted in tens of thousands of claims NOT being paid. We are reminded that the great benefit of ICHEIC is that Holocaust survivors were spared attorney's fees; through the beneficence of ICHEIC, Holocaust victims were shielded from having to engage in costly and protracted litigation in order to vindicate their rights, the very thing that H.R. 1746 would unleash.

But in not having to hire a lawyer, what did Holocaust survivors receive in return? The overwhelming majority was treated with the indignity of having their claims rejected, making a mockery of the presumed liberal evidentiary standards under which their claims were supposed to have been evaluated. ICHEIC stood in the shoes of the insurance companies, and, ultimately, echoed the same defenses that were uttered decades ago: Show us a death certificate or get lost. The token $1,000 humanitarian payments trivialized their actual losses and exonerated European insurers for now, and for history. What insurance company wouldn't sell life insurance policies if it knew that the lives that were being insured were so dispensable and worthless that six decades later, with the premiums long invested and with no dividends to pay out, the contract could be discharged with a mere check for $1,000?

The point, all along, should have been to disgorge the insurers of their wartime booty and disclose the truth of their postwar deceit. Instead, ICHEIC administrators flew first class and initially spent more money on administrative expenses than in the payment of actual claims. The overall consequence of ICHEIC has produced not only the widespread feeling of justice denied and a windfall preserved for the European insurance industry, but also a renewed sense of resentment among the Holocaust survivor community—this time compounded and directed not only against their former insurers, but also America's deeply flawed ICHEIC experiment.

And that's precisely why this is a job for the Legislative Branch. Indeed, it should have always fallen to Congress to establish the rights of those who had been defrauded in this sordid arena of international commerce, and to establish the jurisdiction of federal courts in the service of redressing these crimes.

The powers of the Executive Branch to conduct foreign policy surely cannot be expanded to allow the suppression of facts in the hands of foreign corporations that collaborated with the Nazis and defrauded its customers. Whether there is a compelling foreign policy interest here or not, the Executive Branch simply cannot preempt and cancel the rights of citizens to avail themselves of American courtrooms. Unless Congress acts decisively in this matter, the forfeiture of these legal rights is exactly what will have happened. The legal and moral authority of the Holocaust survivor to seek justice in his or her lifetime, surely under these circumstances, should supersede all other considerations of a political, as well as foreign policy, nature.

As Mr. Eizenstat is here today to reaffirm, the Executive Branch always operates under a different set of priorities. Surely the State Department would prefer that European insurers look upon the American government favorably for having spared them from lawsuits in the United States for crimes committed over 60 years ago. But absent a formalized agreement that would have purported to deprive Holocaust victims of a private right of action, of which there is none, nor, constitutionally speaking, could there ever be one, all that remains is the presumption that the insurers are somehow entitled to full immunity—a position the government never agreed to when the German Foundation was negotiated, and, never could have agreed to.

To deprive Holocaust survivors of their day in court constitutes a twisted manipulation of realpolitik, the privileging of vague notions of international diplomacy over the moral duties that are fundamentally owed to victims of genocide. (The irony, of course, is that the State Department's obsession with realpolitik resulted in the abandonment of the Jews during World War II. Now, over 60 years later, similar concepts of global "diplomacy" are being reintroduced with respect to the vindication of the rights of these very same victims.)

In order to have negotiated a payment of $5 billion from the German Foundation as compensation for slave labor ($3 billion of which was set aside for non-Jews; $1 billion for Jews; and another $1 billion for other compensatory purposes), Mr. Eizenstat maintains that it was necessary to limit the future rights of Holocaust survivors to sue insurance companies for claims arising out of their policies. Under what moral criteria is it appropriate for one group of victims, who had once purchased insurance contracts that entitled them to legal relief in any country in the world in which the insurer did business, to forfeit those rights as an inducement for the German Foundation to make restitution for slave labor—an obligation they should have undertaken years earlier and without regard to whether Jews owned insurance policies that were never honored? Did anyone consult Holocaust survivors to see whether they were willing to waive their legal rights under their insurance contracts in order to ease the negotiations on behalf of an entirely different category of Nazi victims?

Moreover, in every sense of the word, Holocaust survivors stand as a separate category of Nazi victim. Their position is unique because the Nazis deemed them so; indeed, the Final Solution was conceived entirely for them. Slave laborers were surely victims of war, but they were decidedly not, by definition, selected for extermination and destined for the murderous flames of the Holocaust. While non-Jewish slave laborers surely deserve restitution, why should the insurance policies of those who stood fixedly atop the hierarchy of Nazi suffering be leveraged in order to bring German industries to the negotiating table to pay restitution to others? The $5 billion restitution payment for slave labor is worthy and impressive, but it devalues the nature of victimhood and the relative experiences of suffering by calling it a Holocaust settlement, and it should have no bearing on whether Jewish policyholders of life insurance can bring lawsuits against the companies that had defrauded them.

Imagine if Mr. Eizenstat were testifying here today and took a similar position with respect to the victims of Hurricane Katrina. What if he told us that the casualties of a natural disaster could not avail themselves of Louisiana courtrooms in their pursuit of legal remedies against corporations that failed to honor their property insurance contracts? And what if the reason behind this forfeiture of rights was some foreign policy objective that necessitated the negotiating away of these legal remedies—rights otherwise guaranteed by contract and enforceable under American law—all for the purposes of achieving some other benefit for another party that had never before weathered a hurricane? What would this Committee say if we were to invalidate those insurance contracts, and for these professed reasons?

Let's look at a different type of injury and even a different class of victim—for instance, the makers of dangerous substances and defective products; and, more specifically, unwitting consumers who were damaged by say, tobacco smoke or faulty seatbelts. Should the competing considerations and nuances of foreign policy—with all that give and take and winks and nods—stand in the way of smokers and car accident victims to seek redress, under either tort and contract law, against those who may have harmed them? Would this body stand for that?

Yet, today, in this hearing, we are faced with the legacy of the Holocaust. Holocaust survivors—as would be the case with the survivors of any genocide—have always been understood to be deserving of special treatment and protection. They were not, in any ordinary sense, the consumers of defective products. On the contrary, there was nothing voluntary about the nature of their victimhood. They couldn't simply have chosen to stop smoking or promise never again to step inside a car. They were the victims not of consumption, but rather human barbarism. For this reason, they stand in a privileged position in the eyes of the world, largely because they are eyewitnesses to the very thing that humanity is all-too-afraid to look at—the reflection of unimaginable evil. Holocaust survivors are the custodians of this forbidden knowledge, and therefore the range of responsibility that is owed to them is greater than any courtesy that might otherwise be exchanged in the course of international diplomacy.

Realpolitik has no place in the world of atrocity. In this instance, and with respect to this legislation, the burden to do what is right is higher, because the burden that

Holocaust survivors endured was greater. This Committee, this chamber of Congress, has, with H.R. 1746, an opportunity to grant Holocaust survivors the return of their rights and the restoration of their dignity, both of which have been withheld from them—throughout these restitution proceedings—for far too long. And in empowering Holocaust survivors and exposing European insurers to the imperatives of truth, this Committee will also serve as a moral voice that the United States offers no protection to those who profit from the suffering of others and who take advantage of the spoils of man's darkest hour.

Thank you.

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OP-ED CONTRIBUTOR

# Losing Count

By THANE ROSENBAUM

THE Holocaust has always been marked by numbers. There was the numbering of arms in death camps and the staggering death toll where the words six million became both a body count and a synonym for an unspeakable crime. After the Holocaust, Germany performed the necessary long division in paying token reparations to survivors. More recently, Swiss banks and European insurance companies have concealed bank account and policy numbers belonging to dead Jews.

Only with the Holocaust have dehumanization and death been as much a moral mystery as a tragic game of arithmetic. And the numbers continue, although now largely in reverse.

After 60 years, Holocaust survivors are inching toward extinction. According to Ira Sheskin, director of the Jewish Demography Project at the University of Miami, fewer than 900,000 remain, residing primarily in the United States, Israel and the former Soviet Union. Most are in their 80s and 90s. Unless immediate measures are taken, many of those who survived the Nazi evil will soon die without a proper measure of dignity.

According to Dr. Sheskin's data, more than 87,000 American Holocaust survivors — roughly half the American total — qualify as poor, meaning they have annual incomes below $15,000. The United Jewish Communities, the umbrella organization of the American Jewish Federations, determined that 25 percent of the American survivors live at or below the official federal poverty line. (The poverty figure in New York City is even higher.) Many are without sufficient food, shelter, heat, health care, medicine, dentures, eyeglasses, even hearing aids.

Conditions worldwide are similar. It's a sad twist that the teenagers who mastered the art of survival so long ago have been forced, in their old age, to call on their survival instincts once again.

It doesn't have to be this way. Although the various global financial settlements represent only a small fraction of the Jewish property that was plundered during the Holocaust, they still amount to billions of dollars. Which raises questions: Why aren't the funds being used to care for Holocaust survivors in whose name and for whose benefit these restitution initiatives were undertaken? Why weren't survivors permitted to speak for themselves in the very negotiations that led to the recovery and distribution of their stolen assets?

Take the Swiss bank settlement, for instance. A federal judge in Brooklyn distributed 75 percent of the looted assets to survivors in the former Soviet Union, leaving only 4 percent for destitute survivors in the United States, even though roughly 20 percent of the world's Holocaust survivors live in America. Assets that had been stolen by the Swiss were once again diverted, this time by the charitable inclinations of a judge who, ignoring the voices of survivors, severed the connection between the victims of the theft and the proceeds of

the recovery.

On the matter of insurance, a federal judge in Manhattan recently approved a settlement in which fewer than 5 percent of the life insurance policies that had been sold to Jews would be restituted, allowing the Italian insurer, Generali, to escape with more than $2 billion in unjust enrichment. By not requiring Generali to disclose the names of policyholders, the settlement amounts to a cover-up. Tens of thousands of Holocaust survivors are being kept from the truth and will likely be foreclosed from bringing individual claims against the corporation that defrauded them.

The Jewish Claims Conference, an organization established in the 1950s to recover and distribute Jewish property, has assets under its care estimated at $1.3 billion to $3 billion, which includes a vast inventory of cash, real estate and artwork. Despite the urgency of human suffering, the conference insists that it cannot respond to the unmet needs of Holocaust survivors.

Meanwhile, it spent about $32 million last year on programs dedicated to "research, documentation and education." Some of those millions went to a program that paid $700,000 to a "consultant" — a friend of the organization's president — who, in an interview with The Jewish Week, couldn't recall what he had been asked to consult on. While the conference supports many worthy projects, it is controlled not by survivors but by surrogates, and operates with limited oversight and financial accountability.

The Holocaust, so large an atrocity, has a way of overshadowing everything, including its survivors. In focusing on the past in order to prevent history from repeating itself, we have forgotten those who are the direct casualties of this crime. Amid all the Holocaust hoopla the survivors have become secondary.

This neglect is widespread. Even the United States Holocaust Memorial Museum has regarded itself as primarily a home for historians and a monument to history, but not as an institution that places survivors first. Yet without their anguished presence the museum would not exist.

One demonstration of its inattentiveness involves the imminent transfer to the museum of electronic copies of Germany's Bad Arolsen archives, which hold 50 million documents pertaining to the fate of more than 17.5 million victims. Unfortunately, the museum has failed to commit to making the archives accessible on the Internet so that they can be accessed as easily by Holocaust survivors as by visiting scholars.

So what can be done to honor those who survived but who seem to have been forgotten?

First, all traceable assets held by the claims conference and the negotiated settlements with Swiss bankers and European insurance companies must be returned to their owners, with the remainder used for survivor needs.

Second, Congress should pass the proposed Holocaust Insurance Accountability bill, which would require insurers to publish the names of policyholders and allow survivors to resolve claims on fair and truthful terms.

Third, all Holocaust documentation, like the Bad Arolsen archives and the recently disclosed Austrian war records, must be made readily accessible. Survivors and their families must have easy access so family

histories can be recovered and property claims verified. These archives cannot be just the province of scholars.

Finally, if both the World Jewish Congress and the claims conference fail to achieve transparency in their operations, then Congress or law enforcement should publicly account for the funds that have been controlled by institutions that survivors never elected and did not authorize.

Surviving the Holocaust, which was against all odds, is still a numbers game. The percentages are always against the survivors. Nearly murdered, shamefully defrauded and with the clock ticking, they wait for justice, accountability and, most of all, respect.

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