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Litigating Genocide of the Past

HERBERT R. REGINBOGIN*

Who are you?

A number.

Your name?

Gone. Blown away. Into the sky. Look up there. The sky is black, black with names.¹

-by Nobel Prize laureate Elie Wiesel

This article discusses the ethical, philosophical, and moral issues of litigating historic mass violations of human rights. Should there be a limit to attempts to redress historically wrongful acts? How far back in time should we go? Should the courtroom door ever be closed? If so, who decides when it is closed for good?

In addition to crimes of genocide, a sense of moral and ethical duty accompanies the litigation of past crimes against humanity and war crimes. These cases encompass a utopian vision of seeking justice through restitution. For example, through his tenacious pursuit of justice, Simon Wiesenthal demanded that the European nations bring Nazi criminals to trial after World War II.² In a world

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1. ELIE WIESEL, *ONE GENERATION AFTER 30* (Lily Edelman & Elie Wiesel trans., Schocken Books 1982) (1970).

2. Michael Berenbaum, *The Uniqueness and Universality of the Holocaust, in HOLOCAUST: RELIGIOUS AND PHILOSOPHICAL IMPLICATIONS* 82, 83 (John K. Roth &

that would prefer to forget, Wiesenthal hounded both criminals and States to remember and reaffirm the meaning of justice.³

As Elazar Barkan wrote in *The Guilt of Nations*, "the new global trend of restitution for historical injustices" through the collapse of the Soviet Empire marks "a new globalism" and "embodies the increasing importance of morality and the growing democratization of political life."⁴ Consequently, German reparation for the Holocaust has become "a precedent and a model for future restitution cases."⁵ Indeed, "[i]n a post-Cold War world we tend to pay increased attention to moral responsibility, but we do it out of choice, not necessity."⁶ Prior to the Cold War, however, "realpolitik, the belief that realism rather than ideology or ethics should drive politics, was the stronghold of international diplomacy."⁷ According to Henry Kissinger:

[A]ny universal system [such as universal jurisdiction] should contain procedures not only to punish the wicked but also to constrain the righteous. It must not allow legal principles to be used as weapons to settle political scores. Questions such as these must be answered: What legal norms are being applied? What are the rules of evidence? What safeguards exist for the defendant? And how will prosecutions affect other fundamental foreign policy objectives and interests?⁸

Elazar Barkan observes, "[t]he demand that nations act morally and acknowledge their own gross historical injustices is a novel phenomenon."⁹ Furthermore, Barkan suggests that "Cold War conflicts . . . constrained the case for repairing the crimes of slavery, colonialism, apartheid, and humanitarian violations, and that claims to redress these wrongs have been considerably strengthened with the end of the bipolar political confrontation."¹⁰

Michael Berenbaum eds., 1989).

3. *Id.*

4. ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 308 (2000).

5. *Id.* at 15.

6. *Id.* at xi.

7. *Id.* at xvi.

8. Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, *FOREIGN AFF.*, July-Aug. 2001, at 86, 88.

9. BARKAN, *supra* note 4, at xvi.

10. MICHAEL R. MARRUS, *OFFICIAL APOLOGIES AND THE QUEST FOR HISTORICAL JUSTICE*, Munk Ctr. for Int'l Studies Occasional Paper No. 111, 21 (2006), available at

Together with the rejection of “utopian politics of all sorts,”¹¹ the collapse of Communism produced a “faltering of all political communities with public collective aspirations,” as Charles Maier puts it.¹² With the retreat from totalitarianism, American domestic politics and international diplomacy has shifted to the rectification of past wrongs.¹³

The ethical, moral, philosophical, and legal ramifications of litigating distant and historic mass violations of human rights against specific ethnic or cultural groups was born from the aftermath of World War II.¹⁴ The pain and trauma of the injustices suffered by victims and their families paints a narrative that “has become a central feature of the human rights discourse and practice in recent years.”¹⁵

In America’s seeming service to a “higher calling,” many are stunningly oblivious to the genocidal nature of humans. This is evidenced by the billions of people slaughtered by man’s own hand in name of a “higher calling.” Today, litigating human rights crimes of the past is a conscious effort to bring closure for historic injustices. Among the political elites and concerned individuals of the international community, the universal human rights movement has developed into a transformative culture, using diplomacy and international organizations to rectify grave violations of the past.¹⁶

In the mid to late 1990s, which became known as the Holocaust Restitution Era, an international groundswell of popular theories emerged in the United States.¹⁷ A distinct flavor

http://webapp.mcis.utoronto.ca/resources/mcis_controversies/2006_cgps3_marrus_official_apologies.pdf [hereinafter MARRUS, OFFICIAL APOLOGIES].

11. *Id.*

12. Charles S. Maier, *A Surfeit of Memory? Reflections on History, Melancholy and Denial*, 5 HISTORY & MEMORY 136, 148 (1993).

13. See MARRUS, OFFICIAL APOLOGIES, *supra* note 10, at 22..

14. See generally THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945 (Herbert R. Reginbogin & Christoph J. M. Safferling eds., 2006).

15. John Torpey, *Paying for the Past?: The Movement for Reparations for African-Americans*, 3 J. HUM. RTS. 171, 171 (2004).

16. See MARRUS, OFFICIAL APOLOGIES, *supra* note 10, at 22-26.

17. Herbert R. Reginbogin, *Towards a Watershed in U.S. Global Policy: From Neo-conservatism to Neo-rationalism*, IN DEPTH (Cyprus Center for European and International Affairs, Nicosia, Cyprus), Dec. 2008, available at <http://www.rcenter.intercol.edu/Newsletter/In%20Depth/volume%205%20issue%206/article06.htm>.

of human rights permeated this era, “a theme that was a rhetorical accompaniment of American foreign policy during the Clinton Administration.”¹⁸ In addition to the Clinton White House, “[j]ournalists, politicians[,] and scholars demanded that neutral European states of World War II acknowledge their wartime pasts.”¹⁹ America, however, was engaging in a double standard regarding its own wartime past.²⁰ While Switzerland was pilloried as the major offender, the United States was spared the same criticism despite its own “dreary efforts to organize restitution for [its] shortcomings during the Holocaust era.”²¹

Regardless of the hypocrisy related to seeking a measured justice for only some perpetrators of injustices of the past, the drive to hold all accountable persists.²² Drawing upon the UN International Law Commission’s 2001 articles on reparations, the victims of historic atrocities and their families hope to seek, through written or oral testimonies, reparations in the form of restitution, compensation, and satisfaction.²³

In seeking justice through litigation, a critical evaluation of historical records and victims’ recollections is required. Such an evaluation will avoid inaccurate submissions or oversimplified comparisons. Additionally, it helps contextualize both when the events took place and the span of time that has elapsed since the events occurred. Such litigation aims to present the untold suffering and injustice of “those who have endured and suffered great injustice, [who] often have a powerful sense that what they experienced must not be forgotten, but must be cultivated both as a monument to those who did not survive and as a warning to future generations.”²⁴ The precursor for such legal endeavors is

18. *Id.*

19. *Id.*

20. *Id.* (citing Michael J. Bazylar & Amber L. Fitzgerald, *Trading with the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOK. J. INT’L L. 683, 686 (2004)).

21. *Id.*

22. See generally MARRUS, OFFICIAL APOLOGIES, *supra* note 10 (detailing the attempts by many groups to force governments around the world to recognize their past wrongdoing).

23. *Id.* at 22.

24. See, e.g., MICHAEL R. MARRUS, SOME MEASURE OF JUSTICE: THE HOLOCAUST RESTITUTION CAMPAIGN OF THE 1990S 4 (2009) [hereinafter MARRUS, SOME MEASURE OF JUSTICE] (discussing the “wave of Holocaust-era restitution” in the late 1990s).

grounded upon the gravity of wrongdoing and injustice epitomized by the Holocaust.

Hundreds of lawyers battled during the Holocaust Restitution Era of the 1990s in various courts of different countries about offenses committed during the Holocaust.²⁵ In American courts, plaintiff's lawyers seeking belated justice for Holocaust victims struggled to craft menacing legal threats and fierce accusations about an incomprehensible catastrophe that had occurred more than half a century earlier.²⁶ And so, as Michael Marrus points out, "the Swiss enlisted historical interpretation, just as did their opponents, in a great class action struggle that unfolded in the United States."²⁷

In the late 1990s American courts called upon others to account for their actions during WWII, all while history and law were being ripped apart in the name of justice. Framing the restitution of lost Holocaust era assets in terms of lost bank accounts, gold, art, and property²⁸ distorted the murder of European Jews, ultimately rendering the Holocaust banal.²⁹ The story of the greatest tragedy in Jewish history was not being completely and critically told in the courtroom. Different approaches were needed to teach the lessons of the Holocaust and the six million murdered Jews³⁰ to new generations. One such approach was the comparative analysis of neutral countries during World War II.³¹

The long-established principles of non-intervention and non-interference in the internal affairs of a sovereign State were also challenged in the 1990s.³² Culminating with the 1999 NATO bombing of the Federal Republic of Yugoslavia, the Clinton

25. *Id.* at 242.

26. *Id.* at 13.

27. *Id.*

28. *See, e.g., id.* (discussing claims related to gold, art, and property which had disappeared into Swiss bank vaults).

29. *See id.* at 6-7 (discussing the view that lawsuits for money diminished the message of the Holocaust).

30. RAUL HILBERG, *THE DESTRUCTION OF THE EUROPEAN JEWS 1301-21* (3d ed., Yale Univ. Press 2003) (1961).

31. *See generally* HERBERT R. REGINBOGIN, *FACES OF NEUTRALITY* (Working Group Lived History ed., Ulrike Seeberger & Jane Britten trans., Transaction Pub. 2009) (2006) (discussing the comparative analysis of neutral countries during World War II).

32. *See* Jules Lobel & Michael Ratner, *Humanitarian Military Intervention*, FOREIGN POLICY IN FOCUS (Interhemispheric Res. Ctr./Inst. for Policy Studies), Jan. 2000.

administration enacted a policy of forcible humanitarian intervention.³³ Based on international law, which authorized initiatives designed to maintain international peace and security, this new Clinton policy was intended to protect the rights of the Kosovo Albanians in the absence of explicit authorization by the UN Security Council.³⁴ Although the UN Charter does not allow military interventions in other sovereign nations without approval of the Security Council, NATO's violation was in accordance with the mandate of the Genocide Convention of 1948 to prevent genocide.³⁵ Indeed, NATO's actions saved international law from being strangled by its own formalities. Had only this been done to German Nazis before the beginning of World War II and the Final Solution, millions would surely have survived.

The Holocaust Restitution Era of the 1990s triggered a wave of what appeared to be an admirable reach of ethical, legal, and political action perpetuated by the humanitarian interventionism of the Clinton administration, both in U.S. courts and abroad.³⁶ Nevertheless, international views on American foreign policy were mixed. On one hand, many perceived the 1999 humanitarian intervention into Serbia as warranted. On the other hand, Holocaust Restitution Era defendants and their publics resented the idea that U.S. courts could call others to account for their role during World War II in the form of a *lex americana* or even judicial imperialism by using political and economic power to exercise its influence. "Imagine how we would feel," asks Joseph G. Finnerty, a lawyer for the defendants in a class action suit, "if courts in another part of the world decided they had jurisdiction over alleged actions by America, in America, against other Americans. We would be affronted, and rightly so."³⁷

Some scholars argue that military intervention into another sovereign nation for the sake of justice is adverse to the emergence of international rule of law.³⁸ These scholars challenge the legality

33. *Id.*

34. *See id.*

35. Convention on the Prevention and Punishment of the Crime of Genocide, arts. 1-8, Dec. 9, 1948, 78 U.N.T.S. 277.

36. *See* MARRUS, SOME MEASURE OF JUSTICE, *supra* note 25, at 4.

37. Adam Liptak, *Class-Action Firms Extend Reach to Global Rights Cases*, N.Y. TIMES, June 3, 2007, <http://query.nytimes.com/gst/fullpage.html?res=9501E3DD1030F930A35755C0A9619C8B63>.

38. Lobel & Ratner, *supra* note 32.

of America's interventions into Kosovo, Iraq, and Afghanistan.³⁹ Following this perspective, international ethics may give way to spurious justification for what is legally inadmissible, which opens the door for opportunists. For example, the Bush Doctrine could be considered a hegemonic intervention of Iraq.

Ironically, many Americans who urged that the *lex americana* of the 1990s be applied now live in a new millennium where America lays claims to hegemony and abandons its commitment to upholding the rule of law in its fight on the Global War on Terror. Was the *lex americana* an exercise in the measure of justice, or a symptom of judicial imperialism? Was the Holocaust Restitution Era a prelude to the humanitarian intervention under the Clinton administration, or an opportunistic policy of hegemonic intervention under the Bush administration?

The Holocaust Restitution Era cases have become the precedent in pursuing justice of distant and historical mass violations of human rights. But, in retrospect, have they also driven our nation into a self-righteous war with Iraq? Can they drive us to a point where, at time of war, voices are silenced or modulated and citizens detained without charge or suspension of habeas corpus? One is reminded of the Latin maxim, *inter arma silent leges*: In time of war, the laws are silent.

Although each case is unique, there are a number of events that could arguably be considered genocide: slavery in the United States, the referred to Armenian Genocide of 1915, Japanese internment and civilian maltreatment during the Second World War, and the alleged genocidal practices perpetrated against Australian Aborigines and Native Americans.⁴⁰

Litigating historical crimes—often in the distant past—was usually considered out of reach of criminal proceedings or other conventional modes of dispute resolution until the Holocaust Restitution Era.⁴¹ With the influx of Holocaust restitution claims,

39. *Id.*

40. See, e.g., S. Res. 316, 111th Cong. (2009) (Senate's affirmation of the Armenian Genocide Resolution); Stuart E. Eizenstat, Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II, Address at Vanderbilt University's Holocaust Lecture Series "Justice, Redress, and Restitution" (Oct. 9, 2003), in 37 VAN. J. TRANSNAT'L L., 333, 349-50 (2004) (speaker questioned whether others contend that American slavery was genocide).

41. See MICHAEL BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS xi-xii (2003) [hereinafter BAZYLER, HOLOCAUST JUSTICE].

many U.S. courts found creative ways to adjudicate cases, including exercising universal jurisdiction pursuant to the Alien Tort Claims Act, engaging in theories of unjust enrichment, or drawing upon precedents based on statutes of limitation and sovereign immunity.⁴² The success of these claims has bolstered the fight to hold present day human rights abusers, both individuals and corporations, responsible for their misdeeds. Moreover, the litigation of such past injustices puts mankind on trial. Such litigation produces vivid narratives that civilized people truly embrace. These narratives provoke moral, ethical, and philosophical questions. Does the current status of domestic and international law seek to achieve a utopian recognition of human rights, democracy, and peaceful coexistence regardless of race, religion, or gender? Or does it foster imperialism and cultivate a crusade-like self-righteousness for the most powerful countries?

While Americans support a policy in which victims and their heirs may seek justice in U.S. courtrooms against European defendants,⁴³ according to Cold War Era theorist Samuel Huntington, much of the world views the United States as a "rogue superpower . . . intrusive, interventionist, exploitative, unilateralist, hegemonic, [and] hypocritical."⁴⁴ This is the crossroad between paying homage to the victims and indulging in a self-righteous opportunism coupled with political expediency. As the eminent legal Holocaust scholar Michael Ignatieff underscores, "[t]hose who should use the word 'genocide' never let it slip their mouths, [while] those who do use the word 'genocide' banalize it into a validation of every kind of victimhood."⁴⁵ This leads to an oversimplified comparison of historical injustices, which can create misleading conclusions:

Thus slavery is called genocide, when—whatever else it was—it was a system to exploit the living rather than to exterminate them. . . . Genocide has no meaning unless the crime can be

42. See, e.g., Michael Bazylar, *Litigating the Holocaust*, 33 U. RICH. L. REV. 601, 605-08 (1999).

43. See Michael Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 12-13 (2002) [hereinafter Bazylar, *Holocaust Restitution Movement*].

44. Robert Kagan, *The September 12 Paradigm: America, the World, and George W. Bush*, FOREIGN AFF., Sept.-Oct. 2008, at 25.

45. Michael Ignatieff, *Lemkin's Word: The Danger of a World Without Enemies*, THE NEW REPUBLIC, Feb. 2001, <http://www.tnr.com/article/politics/lemkins-word>.

connected to a clear intention to exterminate a human group in whole or in part. . . . Calling every abuse or crime a genocide makes it steadily more difficult to . . . [discern] when a genuine genocide is taking place.⁴⁶

Yet, something more than rhetorical exaggeration for public effect or political expediency is at stake here.⁴⁷ At stake is America's cultural and public policy commitment to seeking justice in accordance with the Constitution of the United States. Is this commitment imbued with the spirit of neo-Kantian values for international law that respects other countries' sovereignty? Is it committed to universal ideals of human rights and democracy as the common goal of all people, with far-reaching endeavors to make international organizations more effective in preventing corruption and genocide and alleviating poverty in the world? Will this "change" towards strengthening a cosmopolitan world by empowering people and humanity lead to greater respect for multilateral diplomacy and an obligation to abide by the rules of international law? Will the litigation of the distant past be a catalyst for cosmopolitan public policy development in a future in which the United States of America will become a member of, and thereby recognize, the International Criminal Court? Is the Holocaust restitution campaign of the 1990s applicable to other historic wrongs, and will the symbolism of the Holocaust, of genocidal attacks on entire populations, similarly become a model for a new wave of justice-seeking today?

International law has incorporated reparation and restitution to individuals as part of the transformative legacy of WWII because of the Holocaust Restitution Era of the 1990s.⁴⁸ Comparative case law involving restitution for slavery and for the victims of the Armenian massacres of 1915 involves an even greater span of time than that of the Holocaust, and therefore poses special difficulties tracing chronology and identifying legitimate claimants.⁴⁹ In many cases, claims extend beyond individuals. Indeed, a persistent theme during the Holocaust Restitution Era, which is often argued in other contexts, is that claims should be extended to an entire people, as if restorative

46. *Id.*

47. *Id.*

48. See Bazyler, *Holocaust Restitution Movement*, *supra* note 43, at 11.

49. See *id.* at 36-38.

justice is consonant with collective or group reparations for victims. Currently, several cases involving human rights violations of the distant past are waiting to be litigated. According to Professor Michael Bazylar, these cases "are claiming inspiration for the American litigation model represented by the Holocaust restitution movement."⁵⁰

Litigating mass violations of human rights of the distant past presents difficult questions. Should there be a limit to attempts to redress historically wrongful acts or the manner in which redress is sought? How far back in time should we go? Should the courtroom door ever be closed? If so, who decides when it is going to be closed for good?

There is no doubt that if we all go back in time, we can find ancestors that were oppressed and victimized, observes Tyler Cowen.⁵¹ "We may award compensation for the effects of wrongs done as many as ten or twenty generations ago, . . . but what of wrongs done a hundred generations ago? Or five hundred or a thousand?"⁵² The problem is that at some point, the wrongs become so ancient "as to overstretch any reasonable capacity for their rectification."⁵³ Indeed, attempts to rectify the past can appear as a demonstration of inadequacy, such as President Bill Clinton expressing regret in 1998 for American participation in slave trade.⁵⁴ How meaningful is it for the twenty-first century generation to hear leaders expressing remorse for actions taken in a distant past, such as the treatment of Australian aborigines in the eighteenth century? Professor Daniel Szechi suggests a more mature approach: "Learning to live with the sins of our forebears is more important than grand public acts of contrition."⁵⁵ Contrarily, "[t]reaties [between nations] are *transgenerational* promises," observes Professor Janna Thompson.⁵⁶ Nations undertake to keep these commitments in the future and "since agreements persist from one generation to another . . . so too do

50. BAZYLAR, HOLOCAUST JUSTICE, *supra* note 41, at 328-30.

51. Tyler Cowen, *How Far Back Should We Go?: Why Restitution Should be Small, in RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY* 17, 17 (Jon Elster ed., 2006).

52. MARRUS, OFFICIAL APOLOGIES, *supra* note 10, at 32.

53. *Id.*

54. Alfred L. Brophy, *Reparations Pro & Con* 13 (2006).

55. MARRUS, OFFICIAL APOLOGIES, *supra* note 10, at 29.

56. *Id.*

reparative entitlements and obligations.”⁵⁷

With respect to deeds of the past, the responsibilities belong to organizations capable of maintaining and honoring transgenerational commitments, such as governments, churches, corporations, and the like.⁵⁸ Consequently, obligations, as well as rights, persist across generations.⁵⁹ Indeed, as Professor Jeremy Waldron observes, “[o]ur moral understanding of the past is often a way of bringing to imaginative life the full implications of principle to which we are in theory committed.”⁶⁰

Discussing whether the courtroom door should ever close, Waldron notes that “not every claim for restitution or reparative justice presents a compelling case.”⁶¹ Some claims “‘fade’ with the passage of time. Legal systems accept this as an inescapable reality.”⁶² Waldron continues, “[i]n the law of property we recognize doctrines of prescription and adverse possession. In criminal procedure and in torts we think it important to have statutes of limitations.”⁶³ In other words, “certain wrongs are simply not worth correcting.”⁶⁴

The judiciary must determine whether the collective nature of restorative justice is consonant with collective or group reparations for victims. The victims of mass atrocities cannot be made whole by compensation alone. Realistically, not all cases of the distant past can be put on trial, and sufficient individual payments are not feasible. Even if there were billions of dollars to disburse, the sheer scale of international crimes would likely dwarf monetary resources. As a result, the court should typically complement the

57. *Id.*

58. *Id.* at 29-30.

59. *Id.* at 30.

60. *Id.*

61. *Id.* at 32 (quoting Jeremy Waldron, *Historic Injustice: Its Remembrance and Supersession*, in JUSTICE, ETHICS AND NEW ZEALAND SOCIETY 139, 155 (Graham Oddie & Roy W. Perrett eds., 1992)).

62. *Id.* (quoting Jeremy Waldron, *Historic Injustice: Its Remembrance and Supersession*, in JUSTICE, ETHICS AND NEW ZEALAND SOCIETY 139, 155 (Graham Oddie & Roy W. Perrett eds., 1992)).

63. *Id.* (quoting Jeremy Waldron, *Historic Injustice: Its Remembrance and Supersession*, in JUSTICE, ETHICS AND NEW ZEALAND SOCIETY 139, 155 (Graham Oddie & Roy W. Perrett eds., 1992)).

64. *Id.* (quoting Jeremy Waldron, *Historic Injustice: Its Remembrance and Supersession*, in JUSTICE, ETHICS AND NEW ZEALAND SOCIETY 139, 155 (Graham Oddie & Roy W. Perrett eds., 1992)).

retributive justice achieved through the prosecution of the worst offenders with restorative justice measures in the form of collective reparations. The court should consider favoring collective awards to a broader class of victims to further the goal of restorative justice in the name of the victims and their heirs. If the court manages the expectations of these large numbers of potential victims and the allocation of scarce resources through collective reparations, it would give different groups a voice in seeking justice and thus contribute to the healing of victims and society.

By empowering the people to seek truth and justice in the rectification of past wrongs, the retreat from utopian visions will reverse. American national politics, economic pragmatism, and international diplomacy will once again enter into an era where new visions for the future will reign. Seeking international peace and security in conformity with the principles of justice by protecting humans from deprivation and mistreatment will also contribute to a strong, robust economy again. This will be the watershed from Globalization to an Era of Cosmopolitanism.