Roger P. Alford

War Reparations, the Holocaust, and the ICC

I would like to focus my discussion on the International Criminal Court in the context of war reparations generally, both past, present, and future. I should begin by emphasizing that while international law is exceptionally good at dealing with certain issues relating to international wrongs, but it is exceptionally bad at dealing with others. International law can deal with revolutions, catastrophes, and lesser evils we euphemistically call acts of God. But when the fury of hell is unleashed on earth, international law quakes. The great irony of war is that the more catastrophic and widespread its destructive consequences, the less likely that those caught in its path will ever be repaid for their injury.

I. Revolutions Are Easy for International Law

We should begin with a minor thesis: revolutions are easy. International law is now well positioned to respond to revolutions. Mechanisms for enforcing international rights have been established and international law itself has blossomed through a network of bilateral investment treaties and judicial decisions protecting foreign investment. Now we know the drill when a revolution occurs: immediately freeze the country’s assets, invoke investment treaties, waive sovereign immunity for acts of expropriation, establish a dispute resolution mechanism, and honor that mechanism’s awards through frozen assets, lump-sum settlements, or assets chased under the New York Convention. We can credibly state, as international courts like the Iran-United States Claims Tribunal regularly do, that in the aftermath of a revolution, foreign investors whose property has been expropriated must receive prompt, adequate, and effective compensation representing the full value of their losses.

II. Wars Are Hard for International Law

But what about wars? Wars are hard because the suffering is so great and reparations so onerous that often there is no mutuality of interest between the victorious governments and their own constituent victims. Wars force victorious States to make hard choices between looking backward to repair the harm caused to constituent victims and looking forward to a relationship with a potential strong and strategic ally. Just as “the conduct of [w]ar, in its great features, is ... policy itself,” so too it often appears that war reparation schemes have almost everything to do with international relations, and very little to do with international law. The victorious States must choose to either (1) wholly embrace the past harms of the victims and ignore a future with the vanquished, or (2) wholly embrace a future with the vanquished and ignore the painful past of the victims, or (3) strike a balance of both that will satisfy neither the victims nor the vanquished. To turn an old maxim on its head, failure to address war reparations properly may result in a bad peace after a good war.

(1) Embrace the Victims at the Expense of the Vanquished. An example of the first approach is the Treaty of Versailles. Article 232 of the Treaty of Versailles required Germany to “make compensation for all damage done to the civilian population of the Allied Powers ... and to their property ... and in general all damage.” Shortly thereafter, John Maynard Keynes wrote that reparations are “preach[ed] ... in the name of Justice,” but such justice is not so simple “[i]n the great events of man’s history, in the unwinding of the complex fates of nations.” He famously predicted that the reparations scheme established at Versailles would reduce Germany “to servitude for a generation ..., degrad[e] the lives of millions of human beings, and ... depriv[e] a whole nation of happiness.”

1 Carl von Clausewitz, 3 On War 130 (Routledge 7 kegan Paul 1962).
2 John Maynard Keynes, The Economic Consequences of the Peace 225 (Harcourt, Brace & Howe 1920).
Adolf Hitler built his early career railing against the Treaty. In *Mein Kampf*, “the shameless and monstrous word ‘reparations’ was able to make itself at home in Germany.” In speeches attacking the “inhuman cruelty” of the Treaty of Versailles, Hitler wrote that he was “struck by the glances of [thousands of] hostile eyes” and the “surging mass full of the holiest indignation and boundless wrath.” He said that he repeated this theme “dozens of times ... until ... a certain clear and unified conception became current among the people from among whom the [Nazi] movement gathered its first members.” Many historians of course have argued that the seeds of discontent were sown at Versailles and bore devastating fruit in the Second World War.

(2) Embracing the Vanquished at the Expense of the Victims. If the Treaty of Versailles illustrates the problems of the first approach, the Peace Treaty with Japan illustrates the problems of the second approach, which embraces the vanquished at the expense of the victims.

Following the Second World War, the United States and Japan signed a peace-treaty, the purpose of which the United States asserts was to limit the exposure of Japan only to those amounts claimed by the Allied Powers and to preclude the rights of victims of the war to claim directly against Japan and her nationals. In furtherance of this treaty, the United States waived its claim to war reparations. This policy and subsequent nurturing of the US-Japan relationship has transformed Japan from one of our greatest enemies into one of our strongest allies.

But the soft underbelly of this policy is that it was undertaken at the expense of United States constituent victims. Under United States legislation, each prisoner of war was authorized to receive $1.50 for each day he was held as a prisoner-of-war and was subjected to forced labor and inhuman treatment. The unspoken deficiency in the policy toward Japan has festered for fifty years and now US prisoners of war and other victims are attempting to challenge the wisdom of that policy employed at their expense. Had Japan taken the courageous approach of Germany and provided compensation when it later had the ability to pay, matters would have been different. But Japan has hidden behind the legal protections of the peace treaties, and victims of the war in the Pacific remain bitter at the burdens they have been forced to bear in the name of a strong alliance with Japan.

(3) Embrace Both But Satisfy Neither. An example of the third approach, one that embraces both the vanquished and the victims but satisfied neither, can be found with the United Nations Compensation Commission. Despite the noble efforts of the United Nations, many Gulf War victims remain unsatisfied with the results because the UNCC has awarded only partial compensation to individual victims and has disingenuously denied compensation to many meritorious corporate and government claims. Under the UNCC regime, individual claimants are denied full recovery for the extent of their injuries, with the UNCC providing a fixed fee of $2,500 for serious personal injury and $10,000 per family in the event of death, and in some cases more if the claimant can provide adequate proof. Fixing the amount of loss to such a relatively low amount will ensure that the families of the victims will not feel that the full extent of their injuries has been compensated. Likewise, corporate and government claimants are often denied compensation based on strained interpretations of what constitutes evidence of a direct loss or an offsetting gain.

But the UNCC approach was likewise unsatisfactory to the vanquished Iraq. Presumably these measures were undertaken not only in recognition of the limited resources of Iraq, but also to limit the overall exposure of Iraq to Gulf War reparation claims. Today of course the new government in Iraq faces a major problem as it seeks forgiveness of its debt obligations. Unlike the Peace Treaty between Japan and the United States, which provided a measure of certainty to Japan regarding its long-term exposure to war reparations, the Gulf War approach offers no such security for Iraq. The UNCC is supplemental to other avenues of compensation, permitting claimants to pursue any other avenue that may be available to them, including contractual arbitration clauses and litigation in foreign courts. To put another way, Iraq secure no legal peace in the UNCC compensation scheme.

One wonders in analyzing these different models where international law is in this picture. Are these choices in any way circumscribed by general principles of international law? Does international law require some balance of interests between the victims and the vanquished?

One also wonders where international law was in the Holocaust restitution movement. Was it yet another example of international relations devoid of international law? Of course as you all know, there were a variety of Holocaust reparation claims involving numerous countries – Germany, France, Switzerland, Austria, Japan – and a range of subjects, ranging from art, slave labor, bank accounts, and insurance policies.

III. War Reparations and the Holocaust

If one analyzes the Holocaust restitution movement, as I have in great depth, one finds parallels with these historic choices regarding war reparations.

(1) Embracing the Victims: The Case Against Switzerland. The initial wave of litigation involving the Holocaust was focused on Switzerland. A number of steps were taken that established a predominant emphasis on victim compensation without significant regard to the foreign policy implications of future relations with the Swiss government. First, there were the congressional hearings in 1996 led by Alfonse D’Amato, followed by Clinton Administration investigations of U.S. archives for the trail of Nazi assets.

This led to a four-fold strategy against the Swiss banks, in which local officials in New York threatened sanctions against the banks, state regulators threatened to refuse approval of a proposed merger between the two largest Swiss banks, fractured Jewish interests initiated major public relations campaign against the Swiss banks, and scores of class action lawyers threatened billions of dollars in lawsuits. As the Swiss banks’ top lawyer put in our forthcoming book, these groups “focused on what pressures they might bring to bear on the banks here, they generally gave scant attention to, and lacked a sufficient understanding of, the Swiss domestic pressures that constrained the banks’ conduct.”

Moreover, the Swiss Government took a hands-off approach and passing the responsibility to the banks, viewing it as their problem, and generally avoiding any significant involvement in brokering an acceptable global solution to the problem. The U.S. was left to mediate a private settlement between American lawyers and the Swiss banks.

In the end, the banks settled the dispute with a $1.25 billion settlement under the supervision of a district court judge in New York. The broad consensus was that the settlement was extraordinarily favorable to the victims. The goal of the Swiss settlement is to make individual account holders completely whole. That is, if a Holocaust victim is entitled to an account, he or she is entitled to the full value of the account, backing out over forty years of interest payments and adding from 1945 over forty years of compound interest that would have accrued. The Swiss settlement illustrates an example in which private party litigation seeks to achieve full compensation for claimants, reflecting an unrelentingly focused on victims concerns, not foreign relations implications.

(2) Embracing the Vanquished: The Case Against Japan. When Holocaust litigation turned to Japan, and more specifically Japanese corporations, the focus was radically different. Japan had the law on their side, and Japanese corporations invoked the Peace Treaty to argue that the claims of Holocaust victims should be dismissed. The United States Government intervened on the side of the Japanese, submitting statements of interest. The Japanese government refused to succumb to the various pressures and refused to consider any settlement. Indeed, when I was asked to consult on these Japanese POW cases, I read the briefs, examined the treaty provisions, considered the political calculus of the Japanese, and politely declined the invitation. It was just too obvious the victims were getting nowhere in this...
litigation. And of course, in the end the Japanese were victorious in the courts. The continued perception in the United States, however, is that Japan has failed to live up to its responsibility for grave human rights violations during the Second World War, and that unlike Germany, it has ignored its moral, if not legal, burdens as a civilized, developed country that is more than capable of redressing its past transgressions.

(3) Embracing Both: The Case Against Germany. Germany was radically different. It exemplifies an approach to Holocaust restitution that embraced both victim and government concerns. While Germany had paid significant reparations in the immediate aftermath of the War, these reparations expressly excluded slave labor. This left it vulnerable to Holocaust restitution litigation in the 1990s. Germany and in particular German corporations were faced with an onslaught of private lawsuits in the wake of the successful Swiss settlement. In 1998 German corporations appealed to the German government to intervene and treat it as a national problem. Recognized the foreign policy implications, the German government was quick to intervene. The remarkable thing was that after the Germans won a handful of initial lawsuits filed against them, they then resolved to broker a settlement with the victims. Through the intervention of German and U.S. negotiators, the Germans established a German Foundation in which $5 billion were paid to distribute to Holocaust victim slave laborers. The negotiations addressed not simply slave labor, but also certain other outstanding issues. It is also combined public and private compensations schemes in a joint effort between German corporate and government interests. And it included the plaintiff lawyers in the bilateral government negotiations.

The result is a balance of victim and state concerns. It does not attempt to offer full compensation. Each slave laborer in a concentration camp is to receive around $7,000 dollars, while slave laborers in less severe conditions are to receive around $2,500 dollars. This is a far cry from what one survivor who contributed to our book argued he was entitled, which was around $70,000 for his slave labor. In exchange for this, the Germans secured a commitment of legal peace from future litigation. This peace not only meant the lawyers dropping all of the outstanding cases, but also a binding commitment from the United States to intervene to request dismissal of any future litigation. Thus, the victims' and the governments' interests were both satisfied.

IV. Three Models for War Reparations

So with the Holocaust, we again see different examples of reparation schemes that highlight different concerns. Which raises the much broader question of the future of war reparations. Whither war reparations? I would suggest that there are at least three models for the future of war reparations.

(1) The Human Rights Litigation Model. The first is private human rights litigation model. This approach will focus on victim interests and diminish the role or importance of foreign relations concerns. This is the approach currently being taken with September 11th litigation in the Multi-District Litigation in New York. These plaintiffs are seeking billions, if not trillions of dollars in compensation from defendant countries including Iran, Iraq, and Saudi-Arabia. The plaintiffs involved in that litigation care very little about foreign relations concerns, except to the extent it will undermine their case. A degree of foreign relations concerns are built into the system, as with foreign sovereign immunity defenses, but generally this approach will emphasize victim compensation. One should expect that with the success of the Holocaust litigation, future war reparations will be litigated in U.S. courts as human rights litigation.

(2) Classic Interstate Negotiation Model. A second approach is focused on interstate negotiations using a classic state responsibility model. Under this approach, a state can broker with another state to resolve claims at an interstate level, without predominant regard to the interests of their constituent victims. This approach will focus on questions such as (i) the establishment of principles for determining appropriate compensation for acts of war; (ii) the relevance of the vanquished country's present or future ability to pay; and (iii) the responsibility of states for war-like conduct undertaken by
non-state actors. As you all know, the German Foundation slave labour scheme in many ways fits this model.

(3) Victim Compensation Fund. A third model is focused on both state interests and victim compensation through the establishment of compensation funds using resources other than the unlawful nations’ assets. One modern example of this is the twin effort of the United States to compensate the victims of September 11 out of a special Compensation Fund funded by U.S. taxpayers, while at the same time spending billions to rebuild Afghanistan, which of course was the country most culpable for the September 11 attacks. Another modern example is the International Criminal Court. Two key provisions address victim compensation. Article 75 provides that the Court may require a “convicted person” to make “appropriate reparations to ... victims including restitution, compensation, and rehabilitation.” In addition, Article 79 provides a trust fund and states that the assembly of state parties may establish a trust fund “for the benefit of victims of crimes ... and of the families of such victims” and “may order money and other property collected through fines or forfeiture to be transferred ... to the Trust Fund.” A significant portion of this trust fund will be paid by member states, corporations and other philanthropic organizations.\(^5\) It should be noted, however, that the ICC does not contemplate a scheme of state responsibility for reparations to the victims. It is either the individual perpetrators of war crimes or humanitarian aid through the Trust Fund that will seek a measure of compensation. This approach will mean that victims will rarely if ever secure full compensation. But it will also mean that States will not be saddled with crippling war reparation obligations in the aftermath of unlawful conduct. This third model has been described by Desmond Tutu, who serves on the Board of Directors of the Victim Trust Fund, as “perhaps the most innovative aspect of an innovative institution...” recognizing that a “judicial process concentrating only on perpetrators has not usually been able to make the crucial contribution to reconciliation and peace.”\(^6\) The great advantage of this model is that by sourcing the funds from both through fines and forfeiture imposed on the wrongdoer, as well as voluntary contributions from public and private sources, the victims receive a measure of compensation and the future relationship with the vanquished is not compromised. This third model is innovative because it frees states to avoid the hard choice of choosing between the victims and the victimizing state.

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Auch im Umgang mit dem Holocaust lassen sich alle drei Modelle finden. Während die Vereinbarung mit der Schweiz die Opfer bevorzugte, wurde eine Opferbeteiligung beim Friedensvertrag mit Japan ausgeschlossen. Im Falle Deutschlands wurde ein Mittelweg beschritten, was sich vor allem an der symbolischen Entschädigung von Zwangsarbeitern durch die Errichtung der Stiftung „Erinnerung, Verantwortung, Zukunft“ zeigt.

Aus diesen Erfahrungen lassen sich drei grundsätzliche Wege zum Kriegsoperausgleich feststellen. Der Weg zur Entschädigung über die so genannten Human Rights Litigation hilft den Opfern am meisten, der Weg über einen bilateralen Friedensvertrag kann zum Ausschluss der Individualansprüche führen und die Lösung durch die Errichtung eines Opferfonds, wie nun auch im ICC Statut vorgesehen, versucht einen Kompromiss zwischen den Opferinteressen und den staatlichen Interessen zu ermöglichen.