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Introduction

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Introduction

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Abstract

The purpose of this special issue of the Fordham International Law Journal and the underlying Symposium that was held on November 1, 2001 at Fordham Law School is to examine the moral dimensions of the question of restitution in the aftermath of atrocity. This special edition will specifically explore questions regarding restitution for victims of the Holocaust nearly sixty years after the liberation of the concentration camps of Europe.

INTRODUCTION

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The impulse and objective behind this special issue of the *Fordham International Law Journal*—and the underlying Symposium that was held on November 1, 2001 at Fordham Law School—is to examine the moral dimensions of an important legal event, one that also had broad political and diplomatic implications.

All too often the legal and political spheres of society are guardians only to a bureaucratically efficient, bottom line. They seek to achieve correct results, but solely within the parameters of legal rules and political agendas. What remains is the false closure of a final judgment. Some legal and political remedies are applied under the assumption that people can live with them. But sometimes they can't. Sometimes those who look to the legal system require more, and deserve more.

The law should commit itself to understanding what draws people to the courthouse in the first place, what is missing emotionally from legal decisions, and what moral consequences are ignored in order to achieve arguably correct legal outcomes.

The question of restitution in the aftermath of atrocity—or in the case of this Symposium and accompanying articles, nearly sixty years after the liberation of the concentration camps of Europe—is a perfect example of where moral imperatives need to be reconciled with legal and political initiatives. In reviving discussions about dormant bank accounts and looted Jewish assets, Stuart Eizenstat, Carl McCall, leaders of Jewish institutions and governmental agencies, and a number of distinguished class action lawyers—essentially, many of the people who are participating in this Symposium and writing articles for this issue of the *Fordham International Law Journal*—provided a fresh opportunity to think broadly about what restitution means from a moral perspective.

These complex restitution efforts, undertaken on behalf of

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Holocaust survivors and Jewish institutions, also raise questions about the strategies that were employed to achieve restitution, and the remedies that were deemed satisfactory given the fact that the underlying crime of genocide was committed sixty years ago. The nature of these more recent restitution initiatives, which involves the recovery and reallocation of stolen property, looted assets, and compensation for slave labor, as well as the creation of humanitarian funds, presents an entirely different moral basis for restitution than the original crime of mass murder that first gave rise to these discussions decades ago.

The first question to ask is: Can there ever really be restitution? In the aftermath of genocide, there is no authentic way to make victims whole again. After such unspeakable losses, how is it possible to speak in terms of reparations? Reparations, after all, assumes the possibilities of repair, which is impossible when lives were so violently taken away. For millions of people in the twentieth century, their future was canceled and so many children became instant orphans. A painting, a house, perhaps can one day be returned to its true owner. But a murdered father and all those children can never enjoy such a reunion. Nor is it possible to achieve closure, because these are wounds that are unhealable, and the losses are irreplaceable. Finding remedies for mass murder is ultimately an end game with no possibility for justice and final judgment. Every resolution is ultimately inadequate; the victims can never walk away satisfied.

So what is it that we mean when we speak of restitution, which in itself is also a deficient word, but perhaps it is one that is more emotionally neutral than the word reparations? The fact is: while we can't truly compensate for the magnitude of these crimes, morally speaking, we must do something to try, even if we know that in the end, morally speaking, we are also destined to fail. Restitution, even if insufficient and lacking, is not just for the victims, but for the perpetrators, and the silent witnesses, as well. Survivors of atrocity must be assured that the memory of what had happened to them is not forgotten, that there is no statute of limitations on inhumanity, and even in the case of looted assets and stolen bank accounts, self-interest, bad faith, and greed are punishable, and those unjustly enriched will be held legally accountable. This is the correct moral result even if it presents legal and political challenges.

Restitution is also important as a way to force perpetrators

to confront the enormity of their crimes and the repugnance of their deeds. And it also places moral pressure on those who were not directly guilty, but yet are still responsible for what was done on their soil. And of course, the rest of humanity benefits from restitution because it reminds bystanders of the moral duty to act otherwise, and compels each of us to reject the poison of complacency, indifference, and neglect.

But if memory is important, we also find that the legal system, and governmental diplomacy, tends to define restitution solely in terms of money. Memory and money—they seem to go hand in hand in the restitution business. But there is nothing wrong with money. Indeed, even money has a moral component. Governments, banks, and insurance companies shouldn't profit from their ill-gotten gains, and when money is what was illegally taken, money is what should be morally returned. The correct moral outcome is to divest those of the spoils of genocide, even if the proceeds can't be returned to their original owners because they are dead.

But moral justice and restitution can also be achieved by non-monetary remedies. Often what victims want, and what moral justice demands, is the opportunity to have their stories told, their losses counted, their pain acknowledged, as often as is emotionally required. Moreover, similar to the South African Truth and Reconciliation Commission, it is equally important for the moral health of nations that perpetrators admit to what they had done. And in the case of these recent Holocaust restitution initiatives, where decades have passed, it is morally necessary that nations inherit responsibility for the crimes and misdeeds of their fathers and grandfathers.

Moral justice requires acknowledgment as much as it does money, because money will always be inadequate, but there can be no value placed on truth. In an open atmosphere where grievances are expressed and crimes acknowledged, there are the possibilities for true expressions of shame, guilt, and apologies, and perhaps even forgiveness and reconciliation.

The aftermath of Auschwitz has taught us that human rights must be framed in human, and moral terms. But what it means to be human, and moral, includes as much of a respect for dignity as it does for property. Monetary remedies are creations of legal justice. But when the quality of the underlying crime is so

vast and unspeakable, moral justice must transcend the conventional remedy and address fundamental questions of human fulfillment and spiritual dignity. What, morally, do casualties of mass death require, deserve and want as compensation? Money is good, and appropriate, but what else can and should be done?

Yet dignity is that most abstract of human imperatives. How can courts quantify it if it cannot be seen, measured or even validated? Dignity can be taken away, but how can it be returned? Sometimes the elevation and acknowledgment of someone's story is precisely what the victim wants, but the law often loses sight of its obligation to provide forums not solely for achieving some measure of rough justice, but also for the more refined healing power, and simple eloquence, that comes from truth.

Ordinary law, dealing with the mundane transactional matters of life, can satisfy itself with remedies that focus on compensating the individual for lost wages, property and injuries to the body. But human rights and genocide demand human and moral satisfaction. The burdens are high for those who are charged with dispensing justice in such extreme cases of outright deprivation and mass murder. In all cases it requires a far more complex and expansive vision of what a legal and moral remedy should be, even if hopelessly inadequate because the nature of the crimes is, by definition, beyond redress.

For these reasons, restitution can and should include the rebuilding of communities, the search for historical truth, and punishment by way of either legal trials or condemnation from the court of public opinion. Such remedies can also provide moral justice because they look beyond the injury to the body and contemplate the full magnitude of human and communal loss.

Yet, class actions, given their prominence in the Holocaust restitution arena, have a way of depriving claimants of an opportunity to preserve their individual claims and to participate meaningfully in the process. There is a tragic irony in reducing victims of concentration camps—many of whom possess limbs still tattooed with identifying, self-annihilating numbers—to a broad class of similarly numbered litigants, their individual stories silenced, their participation in the outcome hijacked by the time-saving efficiencies of the civil court system.

And allocating some of the proceeds of restitution for gen-

eral humanitarian purposes rather than to Holocaust survivors directly, along with the question of what to do with property that was acquired in good faith but once belonged to a victim of genocide, presents its own set of moral dilemmas. Also, morally, who should speak for the victims of genocide? And are there ever innocent bystanders when it comes to mass death and its aftermath?

Of course, that's why we are engaged in these discussions—to think about the difficult moral issues that gives rise to restitution, and the moral justice that we expect from restitution. In the end we know how important morality is in these circumstances. After all, we are compelled to apply legal rules and invoke the full force of governmental pressure all because of the moral decline of what was the Holocaust.

