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Policy Implications of World War II Reparations and Restitution as Applied to the Former Yugoslavia

By
Mark S. Ellis & Elizabeth Hutton*

I.
INTRODUCTION

Reparation is not just about money, it is not even mostly about money; in fact, money is not even one percent of what reparation is about. Reparation is mostly about making repairs; self-made repairs, on ourselves.[1]

The focus on reparation and restitution claims is related to a fundamental shift in international law toward the plight of victims during conflicts. In the first half of the 20th Century, state sovereignty went unchallenged, and states were reluctant to give credence to the notion of victims' rights. As victims fought to restore their dignity, the typical state responses were disinterest and neglect.[2] World War II changed this. The international community witnessed a holocaust and vowed "never again." Citing this as a period of unprecedented human rights atrocities, victims and their representatives demanded justice.

The war crimes of World War II were unprecedented in their scope, their systematic nature, and their visibility to the international community. They were so horrific that they prompted the creation of a new term, "violations of international humanitarian law." As a result, the Nuremberg and Far East trials following World War II were legal landmarks in holding government officials accountable for atrocities. Nuremberg was the first major exception to state impunity for war crimes. The idea that victims of human rights violations are entitled to seek action against the responsible individuals or nation state is now

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1. Brandon Hamber, *Repairing the Irreparable: Dealing with Double-binds of Making Reparations for Crimes of the Past*, (Centre for the Study of Violence and Reconciliation, Johannesburg, South Africa), 1998, 1 (citing Professor Chinweizu, "Reparations and a New Global Order: A Comparative Overview," Paper presented at the First Pan-American Conference on Reparations, Abuja, Nigeria (April 29, 1993)).

2. JOHN BORNEMAN, SETTLING ACCOUNTS: VIOLENCE, JUSTICE, AND ACCOUNTABILITY IN POSTSOCIALIST EUROPE 117 (1997).

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set forth in numerous international human rights treaties and conventions.[3] These include the Universal Declaration of Human Rights,[4] the International Covenant on Civil and Political Rights,[5] the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,[6] and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[7] By establishing this set of universal principles, the international community moved to legitimize interference by the "world community" in the "domestic affairs" of the state.[8] The protection of victims' rights would no longer be the sole domain of the sovereign state. The international community was becoming more vigilant in addressing the rights of victims.

In the decades following World War II, state conflicts have increased, and atrocities against innocent civilians continue to be committed.[9] Genocide, crimes against humanity, war crimes, extra-judicial executions, torture and arbitrary arrest have become all too familiar. But international sensitivities and sensibilities to these events have continued to develop as well.

One aspect of the heightened recognition of victims' rights is the current focus by the international community on victims' claims against the state for reparations and restitution. In the absence of comprehensive legislation regarding restitution and reparation claims, the judgment of the Permanent Court of International Justice in the Chorzow Factory case provides a useful description of the ideology governing this concept. In that case, the court stated:

> The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbiter tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages of loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation for an act contrary to international law.[10]

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3. VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1-11 (1995).

4. Universal Declaration of Human Rights, G.A. Res. 217A (111), U.N. GAOR, 3rd Sess., arts. 8,10, at 71, U.N. Doc. A/810 (1948).

5. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1996), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

6. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (1984), *opened for signature* Feb. 4, 1985, 23 I.L.M. 1027, 24 I.L.M. 368.

7. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/34 (Dec. 11, 1985).

8. *See generally* M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 584 (1996).

9. M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROBS., 9 (Fall 1996), n.2 (citing Erik Hobsbawm, THE AGE OF EXTREMES: A HISTORY OF THE WORLD, 1914-1991 (1995)).

10. LOVELL FERNANDEZ, *Possibilities and Limitations of Reparation for the Victims of Human Rights Violation in South Africa, in* CONFRONTING PAST INJUSTICES: APPROACHES TO AMNESTY, PUNISHMENT, REPARATION AND RESTITUTION IN SOUTH AFRICA AND GERMANY 65, 67 (1996) (citing

In essence, *restitution* attempts to re-establish the conditions existing prior to the human rights violation, and as such, encompasses *inter alia* the restoration of citizenship, employment, and liberty. It also refers to the return of confiscated or stolen goods.[11] *Reparation* is due to victims in instances where damage, including physical damage, emotional suffering, and the loss of opportunities and earning power, may be ascertained in economic terms. The term refers to material compensation for an un-returnable loss, such as the loss of human life.[12] *Rehabilitation* covers the various forms of care and service that may be required by victims, such as medical and legal care, in addition to "measures to restore the dignity and reputation" of individual victims.[13] Together, these concepts encompass a means by which perpetrators can begin to amend past injustices against individuals and groups.[14] They outline a process rather than a specific solution.

There is much debate among international legal experts about whether: 1) restitution and reparations can achieve reconciliation without some forum for accountability, and 2) recognition of victims' suffering can be separated from perpetrators' acknowledgement of the injustices they committed. Even token reparations may constitute symbolic recognition of an injustice committed and can prove powerful in the reconciliation process.[15] However, it is difficult to imagine restitution and reparations without accountability. Alone, it is unlikely that they can offer satisfaction to either the victims or the world community. A state must demonstrate that it accepts moral responsibility for its past. Restitution and reparation must, at a minimum, be integrated with the distinct concepts of acknowledgement and accountability. Restitution and reparations can be seen as cultural concepts encompassing a "mosaic of recognition," undertaken with the ultimate goal of reconciliation, which must incorporate acknowledgement and accountability.[16]

The admission of wrongdoing and acceptance of responsibility by the perpetrators for injustices committed is absolutely essential to reconciliation. Without such admission and acknowledgement, the injustice, no matter how long ago it occurred, will fester and ultimately prevent reconciliation. Historical injus-

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Concerning the Factory at Chorzów (Merits) (F.R.G. v. Pol.), 1928 P.C.I.J. (Ser. A) No. 17, at 47 (Sept. 13)).The Chorzow Factory case involved Polish expropriation of German owned industrial property outside of Poland. The vote was 10-3 with one dissenting opinion. The case established a certain basis for restitution, which remained in place until the 1970s. In its decision, the PCIJ set forth two standards: for takings or other acts which are illegal under international law, the "payment of a sum corresponding to the value which a restitution in kind would bear;" whereas for other takings which are not illegal, "the value of the undertaking at the moment of dispossession, plus interest to the day of payment."

11. ELAZAR BARKAN, THE GUILT OF NATIONS xix (2000).

12. *Id.*

13. FERNANDEZ, *supra* note 10, at 68 (citing UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, SUBCOMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES; STUDY CONCERNING THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, at 57, U.N. Doc. E/CN.4/Sub. 2/1993/8 (1993)).

14. BARKAN, *supra* note 11.

15. *See generally id.*

16. *Id.* at xix.

tices are continuous injustices if they are not purged; they will lead to cycles of retributive violence. By voluntarily admitting wrongdoing for past injustices, a state creates an environment in which citizens are forced to evaluate their own role vis-à-vis the atrocities committed. In turn, such an admission stimulates public discussion and debate; it often directly and forcefully contradicts citizens' perceptions of their country's history. It also helps the state purge its own guilt and create a new national identity through atonement.[17]

Existing restitution claims made by World War II victims and their representatives clearly demonstrate the fact that while some restitution cases have provided the groundwork for further reconciliation between victims and perpetrators, other attempts at gaining compensation have only succeeded in fostering new animosity.[18] Germany and Japan represent the two extremes of this spectrum. This article will contrast and compare both models for lessons that may be applicable to the issue of reconciliation in the former Yugoslavia.

II.
Germany and Japan

Germany's post-war response to the Jewish community was an important step in the re-building of the German Federal Republic.[19] It also set the bar for the payment of reparations. In 1952, Germany began compensating not its victors, but its victims. By the year 2030, it is estimated that Germany will have paid over $70 billion in the form of reparations to the state of Israel and indemnification to Holocaust survivors.[20] Total current payment of claims have far outstripped those made initially, in terms of both monetary value and acknowledgement of responsibility.[21]

17. *Id.* at 29.
18. *Id.* at xxiii-xxviii.
19. *Id.* at 8.
20. Hamber, *supra* note 1, at 5.
21. Motivation for participating in reparation programs, however, is not based solely on an appreciation of moral responsibility. For instance, the German Industry Foundation Initiative was created in February 1999 to provide assistance to surviving Nazi-era slave and forced laborers. Germany's government and industry agreed to each contribute DM 5 billion (equivalent to US$ 2.28 billion) to fund the foundation. German companies had been reluctant to make donations, as the United States could provide no water-tight guarantee against further claims (as was evidenced in a March 2001 New York district court ruling that refused to throw-out a class action brought against German banks). However, in the past few months, the dismissals of important cases pending against German companies in the United States (including the consolidated class action suits against industrial companies, against insurance companies, and against banks) have been essential in establishing a satisfactory "legal peace" prompting German companies to finally pledge their contributions. Of particular interest was the dismissal by the United States Second Circuit of the Gutmann case (the last class action suit against German banks) on May 17, 2001. As a direct result, on May 30, 2001, the German Bundestag confirmed the existence of a sufficient measure of legal security for German companies in the US. This resolution not only allows the German fund to finally begin making payments to the estimated one million former forced laborers, but also served to alleviate the concerns of German industry regarding the possibility of new claims in the future. It has been suggested that this security, rather than an appreciation of moral responsibility, was the necessary and sufficient condition for Germany industry contribution to the compensation fund. *The Cheque Isn't in the Post*, The Economist, March 15, 2001 at 49. *See also* German Economy Foundation Initiative Steering Committee *at* http://www.stiftungsinitiative.de/eindex.html (last visited Sept. 4, 2001); *see*

Even more striking is the degree to which the collective process of commemorating the Holocaust has become an entrenched feature of both Israeli and German identity. The claims paid to survivors are secondary to what has been a remarkable process of openly acknowledging German responsibility for crimes committed during the Holocaust. Despite continued tension on both national and individual levels, it is fair to say that restitution negotiations between Germany and the various governmental and non-governmental representatives of Holocaust survivors have succeeded in as much as they have enabled a dialogue between perpetrators and victims. Less than fifty years ago, the idea of such a dialogue would have been unthinkable.

One product of this dialogue is a version of the past acceptable to most people, Germans and Jews alike. While there may be disagreement over particular details of the past and about the way in which it informs the present and the future, there is general agreement that the Holocaust represented a deliberate attempt by German authorities to exterminate the Jewish community and, as such, was a crime against humanity for which there can never be complete compensation. In January 2001, a record number of Germans watched a television documentary on the Holocaust;[22] years ago such an event would have been unlikely at best. Germany's acceptance of past criminal acts—at both state and popular levels—is a sign of maturity and growth for the German nation.[23]

The unerring commitment to memory demonstrated by both perpetrators and victims effectively refutes the simplistic arguments that a nation's development requires that past injustices be consigned to history. German and Israeli behaviors indicate a shared belief that incorporating a narrative of the past into present-day life is a key component of national identity. The tremendous debate and struggle that such an effort entails suggests that successful reconciliation begins with self-accountability.

Japan, on the other hand, has adopted a very different attitude about its role in World War II, a mentality that has seriously compromised its ability to reconcile with the victims of its wartime aggression. Perhaps the most significant illustration of this fact is the status of restitution claims brought against the Japanese government on behalf of the *ianfu,* the military comfort women coerced into a government-organized system of sexual slavery during the war.[24]

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also The Conference on Jewish Material Claims against Germany *at* http://www.claimscon.org (last visited Sept. 4, 2001).

22. Allan Hall, *Germany Turns the Relics of its Nazi Past Over to Tourism,* SUNDAY TELEGRAPH, February 11, 2001, at 40.

23. *Id.*

24. In the closing months of World War II, American forces in Asia and the Pacific noted the existence of female survivors or some evidence of female occupation within or in close proximity to fallen Japanese holdings, even those on the frontline. Translators and survivors explained that these were the "comfort women" of the Imperial Forces, women whose responsibilities included the sexual, as well as domestic and medical, needs of the troops. Although a percentage of these women were Japanese, the vast majority were Koreans, with some Filipino, Taiwanese, Malay, Indonesian, and Chinese women, and a small number of European women from POW camps. GEORGE HICKS, THE COMFORT WOMEN 159 (1995); DAVID ANDREW SCHMIDT. IANFU – THE COMFORT WOMEN OF THE JAPANESE IMPERIAL ARMY OF THE PACIFIC WAR 12 (2000); Barkan, *supra* note 11, at xix.

In the post-war period, it was widely known that large numbers of women had provided sexual services to Japanese troops, and the term "comfort women" was integrated into popular narratives about World War II.[25] To an observer unfamiliar with the details of the *ianfu* cases, the far-reaching consequences and malignant implications of this familiar term may therefore seem surprising. The existence of the "comfort system" was a hidden feature of the war in Asia, and in this sense reflects a Japanese tendency to normalize events of the war and deny their current relevance.

For over fifty years, the Japanese government has denied any official role in the routine rape and enslavement of Asian and European women, a position reinforced by the relative invisibility of *ianfu* as a victim group. Increased activism concerning the issue of comfort women during the 1990s hit an impasse as the Japanese government remained staunchly opposed to any formal statement of accountability and continued to deny major aspects of the historical narrative as pieced together by scholars and survivors. When Kim Hak Sun, a Korean *ianfu*, filed a lawsuit against the Japanese government in 1991, the government's responses to the trial ranged from indignation to shock to apathy.[26] Japan has not altered its position.[27]

International reactions to the comfort system also tended to normalize wartime extremes. Allied authorities treated *ianfu* as professional sex workers rather than war victims, a stance often rationalized by Cold War considerations. The need to enlist a strengthened Japan as a pro-Western ally outweighed the need to investigate evidence of sexual slavery.[28] Meanwhile, Asian governments showed little interest in championing the issue, especially given the region's growing dependence on the Japanese economy.[29] Normalization treaties between Japan and its neighbors completely side-stepped the issue of restitution for wartime victims in the interest of encouraging Japanese aid and investment.[30]

The problem in Japan is not about possible compensation for victims; it is about Japan's unwillingness to truly acknowledge the injustices committed. In 1992, the Voluntary Service Corps Problem Restitution Council, an organization

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25. *See generally* HICKS, *supra* note 24; SCHMIDT, *supra* note 24.

26. *See generally* HICKS, *supra* note 24.

27. Hence, in late March 2001 the High Court overturned a 1998 ruling from a district court that ordered the government to pay compensation to three South Korean women. The Japanese government relies on these and other judicial pronouncements to question the legitimacy of reparation claims. As such, the Japanese government continues to contend that post-war international and bilateral treaties settled all wartime claims, the statute of limitations on such claims has expired, and international labor rules do not require compensation for sexual slavery. *Japan Court Rules Against 'Comfort Women'*, CNN, March 29, 2001, *at* http://europe.cnn.com/2001/WORLD/asiapcf/east/03/29/japan.comfort.women/index.html.

28. Postwar documents recently declassified in the United States indicate the degree to which Allied powers were aware of Japanese government involvement in the comfort system and point to Allied complicity in the failure to investigate and prosecute its establishment as a war crime. SCHMIDT, *supra* note 24, at 19.

29. HICKS, *supra* note 24, at 196.

30. BARKAN, *supra* note 11, at 51-52.

working on behalf of the Korean *ianfu*, set forth a proposed restitution agreement that included the following components:

1. That the Japanese government admit the forced draft of Korean women as comfort women;
2. That a public apology be made for this;
3. That all barbarities be fully disclosed;
4. That a memorial be raised for the victims;
5. That the survivors or their bereaved families be compensated;
6. That these facts be continuously related in historical education so that such misdeeds are not repeated.[31]

The fact that the demand for compensation is vague and is not the first priority for *ianfu* indicates the relative unimportance of material restitution in light of more intangible demands. The most important message is that the greatest injustice is Japan's continued failure to acknowledge and respond appropriately to these war crimes.[32] Without this acknowledgement, compensation is worth little.

Equally important is the fact that Japanese narratives of the war do not provide a context within which the *ianfu* experience can be acknowledged. Japanese discussion of the tremendous human suffering during and after the war years is framed by the images of Hiroshima and Nagasaki as symbols of ultimate victimization. This narrative places Japan in the role of victim rather than perpetrator and characterizes Japanese society as peace-loving and non-militant.

Representatives and advocates for the comfort women have presented an historical narrative very different from the "normalized" version of wartime events offered by Japan and accepted by the world community.[33] What emerges from government archives and personal testimony of survivors and perpetrators is a portrait of the "large scale, officially-organized system of rape by Japanese Imperial Forces."[34] Historian George Hicks writes, "The comfort system con-

31. HICKS, *supra* note 24, at 145.

32. While the initial position of the Japanese government was denial of any official involvement, the emergence of recent legal action has prompted a shift towards some limited acknowledgement. Japan continues, however, to deny any *legal* responsibility. Frustrated by the lack of engagement of these issues on the part of the government, survivors and non-governmental organisations from across Asia established the Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery (convened in Tokyo from December 8-12, 2000). In the interest of justice for the "comfort women" the Tribunal was called upon to determine the responsibility of various high-ranking officials of the Japanese government and military, including Emperor Hirohito for sexual slavery and rape as crimes against humanity. The People's Tribunal issued its findings it the final Judgment on March 8, 2001 (International Women's Day). *See* http://www1.jca.apc.org/vaww-net-japan/ (lasted visited Aug. 23, 2001). *See also* Phyllis Hwang, *Oblige Japan to Pay Reparations to Former "Comfort Women"*, INTERNATIONAL HERALD TRIBUNE, December 13, 2000, at 8; *Discomfited Japan*, THE ECONOMIST, December 16, 2000, at 21.

33. *But see* recent statements issued from the All-China Lawyers Association, the All-China Women's Federation and the China Foundation for Human Rights Development (all government-supported groups) supporting court action. Five Chinese women from central China filed a lawsuit in Tokyo in 1995 demanding an apology and compensation from Japan for suffering caused by their sexual servitude during the war. The Tokyo District Court ruled against them. *"Sex Slaves" Win Support Against Japan*, CNN, June 20, 2001, *at* http://www.cnn.com/2001/WORLD/asiapcf/east/06/20/china.sex.slave/index.html (last visited Aug. 23, 2001).

34. HICKS, *supra* note 24, at xi.

sisted of the legalised military rape of subject women on a scale—and over a period of time—previously unknown in history."[35]

The fact that restitution for comfort women has become fraught with accusations of Japanese guilt is due to a complex interplay between national agendas, female activism, investigative scholarship, and individual testimony. A cause that merited minimal attention and elicited no real debate for most of the twentieth century has emerged in the past ten years as the symbolic focal point for new and urgent restitution claims against Japan. The success of these immediate claims depends on the willingness of the Japanese government and the Japanese people to reconsider a "closed" issue in full recognition of what this may entail for representatives of the comfort women, for other victims of Japanese aggression, and for Japanese nationalism. What is required of Japan is an "admission of guilt and demonstration of sincere contrition on behalf of the government with the support of the Diet *and* the Imperial family."[36] Given the modest amount of the proposed financial compensation to *ianfu*, continued Japanese resistance to restitution should be understood as a response to its more symbolic and intangible content, rather than its material dimensions.[37]

III.
YUGOSLAVIA

For the former Yugoslavia, restitution and reparations will be of secondary importance for achieving reconciliation among the region's diverse peoples. Acknowledgement and accountability will be indispensable and fundamental to the reconciliation process, and it will be Serbia—and Croatia to a lesser extent—that will determine whether or not this goal will be achieved.

The legacy of World War II is evident in the ways in which the narratives of wartime experiences continue to inform national ideologies, most importantly among the Serbian population. Although it would be inaccurate to portray the disintegration of Yugoslavia as an inevitable result of the failure to deal with the injustices that swept the region during World War II, it is unlikely that these wartime experiences could have been invoked with the same degree of intensity had there been any substantive attempt towards reconciliation.

During World War II, the Ustashe Nazi puppet state in Croatia vowed to kill, deport, or convert Croatian Serbs to Catholicism. Particularly ingrained in Serbian narratives of wartime victimization is the murder of thousands of Serbian children at the Jasenovac concentration camp, children who would have been the contemporaries of Radovan Karadžić and Slobodan Milošević. It is no

35. *Id.* at xv.

36. SCHMIDT, *supra* note 24, at 5.

37. In 1996, the amount proposed by the Asian Women's Fund, a private fund founded to commemorate the 50th anniversary of the end of the war and supported politically by the Japanese government, was two million yen, the equivalent of U.S. $19,000. It is significant to note that most surviving *ianfu* have rejected the amount as an insult while only a relative few have accepted the offer. Most survivors and their representatives resented the fact that while the money came with a letter of apology from Prime Minister Tomiichi Murayama, the letter did not acknowledge responsibility of either the Japanese government or army. *See* BARKAN, *supra* note 11, at 46-64.

coincidence that Omarska, a concentration camp for Bosnian Muslims operational during the early 1990s, and infamous for reports of rape, torture, and mass murder, is located close to Jasenovac. Commenting on the atrocities committed at Omarska, one high-ranking Serbian official noted, "Write about the 11,000 Serb children killed in the Kozara Mountains in World War II. Perhaps you will have a deeper understanding of why this happened in 1992."[38] Clearly, from a Serb perspective, restitution and reparations for World War II victims have been insufficient to the degree that victim narratives continue to legitimate military aggression and violations of human rights. Serbian hostility, stemming from World War II, is exacerbated by international actions of the past decade, because Serbia still sees itself as a victim and sees these actions as continued attempts to victimize it.[39]

In order to comprehend the difficulties faced by the former Yugoslavia in achieving reconciliation among its diverse peoples, it is necessary to understand the enormity of the atrocities committed during the Yugoslav wars. During the Kosovo conflict alone, the international community witnessed some of the most extensive human rights violations since the end of World War II. Forced displacements, killings, rape, sexual assault, arbitrary detention, pillaging of civilian property, use of "human shields," violations of medical neutrality, torture, and cruel and inhuman treatment were all acts documented between March 2 and June 10, 1999.[40] Approximately 86,300 refugees were displaced from Kosovo during this period, representing over 90% of the estimated Kosovar Albanian population.[41] Summary and arbitrary killings were widespread, executed primarily by Serb forces against Kosovar Albanians.[42] The total number of Kosovar Albanians killed exceeded 10,500.[43] Serb forces frequently used rape and sexual assault as instruments of intimidation.[44] The violations of medical neutrality included the expulsion of Kosovar Albanian medical personnel from hospitals, denial of health care services to Kosovar Albanian patients, and the wholesale destruction of approximately 100 hospitals, clinics and pharmacies by Serbian forces.[45]

The International Criminal Tribunal for the Former Yugoslavia (hereinafter "ICTY") was not established by powerful victor nations, but by an international body that represents virtually all of the world's countries. It is founded on a more advanced body of international law than existed during the Nuremburg and

38. *See* Tina Rosenburg, *Defending the Indefensible*, THE NEW YORK TIMES MAGAZINE, Apr. 19, 1998, at 46.

39. *Id.*

40. These findings were documented in a definitive study conducted by the American Bar Associations' Central and East European Law Initiative (CEELI) and the Science and Human Rights Program of the American Association for the Advancement of Science (AAAS). ABA/CEELI, POLITICAL KILLINGS IN KOSOVA/KOSOVO (2000), *available at* http://hrdata.aaas.org/kosovo/pk/toc.html (last visited Aug. 4, 2001).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* Rape as a war crime was introduced in a case before the ICTR. *See* Prosecutor v Jean Paul Akayesu, ICTR 96-4-I (1998).

45. ABA/CEELI, *supra* note 40.

Far East Trials. The ICTY was established by a Security Council Resolution pursuant to its powers under Chapter VII of the UN Charter "to maintain or restore international peace and security."[46] Its enabling statute grants jurisdiction in four areas of substantive law which focus on *individual accountability* for (1) grave breaches of the 1949 Geneva convention, (2) violations of the laws or customs of war, (3) genocide, and (4) crimes against humanity.[47]

In the former Yugoslavia, there has been no real official effort to focus on restitution and reparations for victims of the Bosnian and Kosovo conflicts. The ICTY was not intended to deal with victim compensation and it is not authorized to award victim compensation.[48] However, its focus on accountability for individual acts does not relieve the state from its obligation to provide compensation. Under Rule 106 of the Rules of Procedure and Evidence, the ICTY transmits to the competent authorities of a state its findings that the accused caused injury to the victim. The victim (or his/her representative) may bring an action in the national court or other competent body to obtain compensation.

This approach provides a way for victims to obtain compensation by relying on the ICTY's standing authority under the UN Security Council. The ICTY's statute authorizes the Trial Court to order the return of stolen property or proceeds from the sale of such property to the victim. In establishing the ICTY, the UN Security Council felt that people who were forced to leave their property behind as a result of ethnic cleansing should retain property ownership.[49] The ICTY's rules also allow the Trial Court to hold a special hearing to determine the matter of restitution of property or its proceeds.[50] The ICTY's authority extends over such property or its proceeds even to third parties not otherwise connected with the crime.[51] It is ultimately, however, the national courts that will have jurisdiction over such claims. The ICTY is simply not set up to resolve property claims.[52]

The new states of the former Yugoslavia have not themselves rectified past injustices by prosecuting wrongdoers, nor have they made efforts to restore the dignity of the victims. Accountability for the former Yugoslavia has been structured solely through the ICTY. However, Yugoslav federal and national leaders continue to contest the authority of the ICTY, so it is not apparent whether its judgments will offer a starting point for restitution of victims, let alone reconciliation. Under Milošević's regime, Yugoslavia simply refused to co-operate with the ICTY.[53] Even Milošević's successor, Vojislav Koštunica, has refused to assist in apprehending perpetrators indicted by the ICTY.[54] The current govern-

46. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at 1, U.N. Doc. S/INF/49 (1993).

47. Rosenberg, *supra* note 38.

48. *See generally* SCHARF, *supra* note 3.

49. *See* S.C. Res. 779, U.N. SCOR, 47th Year, Res. & Dec. 1992, at 34, U.N. Doc. S/INF/48 (1992).

50. ICTY R. P. & EVID. 105.

51. *Id.*

52. SCHARF, *supra* note 3, at 258.

53. THE ECONOMIST, *supra* note 21, at 49.

54. *Id.*

ment has failed to adopt domestic legislation to allow the surrender of fugitives indicted by the ICTY.[55] The perception among Serbs is that the ICTY itself is another example of persecution of Serbia. Public opinion in Serbia regarding the ICTY and its ability to deliver justice reflects the belief that it is part of a witch hunt—charging the Serbian leadership on false grounds and conducted by the international community in order to weaken the Serbian state. The more time that elapses between human rights atrocities and public acceptance of perpetrator accountability, the more such events become normalized in the collective memory as inevitable, justifiable, or unremarkable.[56]

As the primary perpetrator of the conflicts in the former Yugoslavia, Serbia must show a willingness to recognize and acknowledge the atrocities committed, particularly in Bosnia and Kosovo. It must abandon its attempts to "normalize" war crimes as an unremarkable by-product of war, accept responsibility, and atone for the acts committed in these two regions of the former Yugoslavia. Only by purging the ethnic nationalism formulated by the Milošević regime—and the violence that brought so much suffering to the region—can Serbia be reintegrated into the international community.

This task will not be easy, because Serbia has been isolated from the international community for the past ten years and still sees itself as a victim mistreated by the world community. Today, most Serbs are not concerned about whether individuals who committed crimes in Bosnia and Kosovo are held accountable.[57] This is a sure sign of Serbia's continued self-perception as victim. The majority of Serbs continue to see themselves as part of a group persecuted by an unsympathetic international community. Groups that regard the narrative of victimization as the constitutive factor of collective identity demand security and sympathy, and use these demands as the basis for a relative standard of morality. This is the case in Serbia. There has been minimal recognition of victims and very little prosecution of wrongdoers in the former Yugoslavia.[58] There has been little or no justice, while accountability has been shifted from the state to outside forces.[59]

In the final analysis, Serbia's willingness to approach the negotiating table and acknowledge its own accountability will be the most essential component of restitution. It is certainly a step that the Japanese government has thus far been reluctant to take, and a step for which Yugoslav authorities demonstrate minimal enthusiasm. And while the recent cooperation between Yugoslav authorities and the international community signals important differences between the current administration and that of Milošević, it proceeds from a utilitarian recogni-

55. See statement by Prosecutor Carla Del Ponte, January 30, 2001. *See* Press Release, Office of the Prosecutor of the ICTY, Statement by Prosecutor, Carla Del Ponte, on the Occasion of her Visit to Belgrade (Jan. 30, 2001) *at* http://www.pict-pcti.org/news/archive/months%202001/january/ICTY.01.30.ponte.html.

56. *See* Maggie O'Kane, *Hunting Radovan*, THE GUARDIAN, Feb. 24, 2001.

57. Discussions between author and colleagues in Belgrade during numerous visits to Yugoslavia during and after the Bosnian and Kosovo wars.

58. BORNEMAN, *supra* note 2.

59. *Id.* at 105.

tion of the need for change rather than a desire to confront past injustice, both recent and historical. There has been a preference for "getting on with things," rebuilding the economy and re-establishing relations with the European community.

As in Japan, Yugoslav leaders have argued too often that restitution for and criminal prosecution of war crimes is too time-consuming, too expensive, and too explosive. From their standpoint, the most viable path to reconciliation has appeared to be the speedy normalization of the present situation. However, World War II restitution and reparation claims demonstrate that "forgetting" past injustice in the interest of a normalized present is a politically expedient act that fails to acknowledge individual human responses to suffering. There is an enduring need among victims for recognition and accountability, and this need transcends the legal and pecuniary language in which their demands are articulated.[60]

Accountability is not compatible with the impulse to rationalize or normalize past actions, and, therefore, it cannot occur in a political climate based on competing narratives of victimization. Serbian self-perceptions of victimhood must be modified in order to enable an admission of responsibility in the statements of its leaders, in its prosecution of war criminals, in its compensation to war victims and in its narratives about the conflict.

Recently, there have been some signs that Serbia is beginning to modify its long-standing position of ignoring the issue of accountability. The surrender of Slobodan Milošević by Serbian authorities to the ICTY was the most significant manifestation of this policy shift. It was a major step in starting the reconciliation process, but it was not without peril, as it caused a split within the Yugoslav government. The party of Yugoslav President Vojislav Koštunica, who declared the forced extradition of Milošević illegal, left the main parliamentary group. In contrast, the Serbian Prime Minister Zoran Djindjić ignored the Yugoslav Constitutional Court and moved forward to arrest and extradite Milošević to The Hague.[61] Despite this split, a shift in policy that seems to embrace accountability has still emerged. With Milošević no longer part of the Yugoslav political landscape, key Yugoslav reformists are calling for an open debate within Yugoslavia about the atrocities committed by Serbs in Bosnia and Kosovo, and accountability for those responsible.[62]

In one of the most significant developments in Yugoslavia's current transition, the Serbian government is now supporting a major program to prepare the Yugoslav judiciary to hold domestic war crime trials. The program is premised on the need to hold individuals accountable for atrocities committed in order to begin the process of reconciliation. In doing so, the current Serbian authorities

60. *See, for example*, BRANDON HAMBER, ed., PAST IMPERFECT: DEALING WITH THE PAST IN NORTHERN IRELAND AND SOCIETIES IN TRANSITION (1998).

61. *See Extradition Sparks Belgrade Turmoil*, BBC NEWS, June 29, 2001.

62. One of the leading proponents of this new emphasis is Nataša Kandić, of the Humanitarian Law Center in Belgrade.

are following the "German way" in agreeing that successful reconciliation begins with self-accountability.

During the past ten years, events in the Balkans have served as a vivid and horrifying illustration of the limits to coexistence when minimum guarantees of group security do not exist. In the Yugoslavia of the early 1990s, this minimum clearly had not been met. It remains to be seen whether Yugoslavia's current leaders will see comprehensive restitution, based on acknowledgement and accountability, as the minimum requirement for future coexistence, however lengthy and expensive such a path might be.