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Proof

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> …unspeakable crimes have been committed in the name of the German people, calling for moral and material indemnity… The Federal Government are prepared, jointly with representatives of Jewry and the State of Israel…to bring about a solution of the material indemnity problem, thus easing the way to the spiritual settlement of infinite suffering.
> Konrad Adenauer, speech to the Bundestag, 27 September 1951[2]

Abstract
This essay looks at the historical background of compensation payments, then considers the impact of World War II on reparations programs, the intellectual criteria for compensation developed by international bodies during the second half of the 20th century, and examples of state-level compensation after 1975 to individuals who were harmed by state actions. It concludes by considering the documents required to prove identity and prove the harm that gives rise to the right to compensation.

Keywords: Compensation; Reparation; Claims; United Nations; Inter-American Court of Human Rights; Albania; Argentina; Brazil; Bulgaria; Canada; Chile; Republic of the Marshall Islands; United States.

Prueba

Resumen
Este ensayo examina los antecedentes históricos de los pagos de compensación, y así mismo toma en consideración el impacto de la Segunda Guerra Mundial en los programas de reparación, los criterios intelectuales de compensación desarrollados por los organismos internacionales durante la segunda mitad del siglo XX y presenta ejemplos de compensación a nivel estatal después de 1975 a individuos que fueron perjudicados por acciones del Estado. Concluye considerando los documentos requeridos para probar la identidad y acreditar el daño que da lugar al derecho a una compensación.

Palabras clave: Compensación; Reparación; Reclamaciones; Naciones Unidas; Corte Interamericana de Derechos Humanos; Albania; Argentina; Brasil; Bulgaria; Canadá; Chile; República de las Islas Marshall; Estados Unidos.

Property taken from Colombia's FARC guerrillas will be used to pay

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[2] "History," The Conference on Jewish Material Claims against Germany. http://www.claimscon.org/about/history/

reparations to FARC victims[3]. More than 5000 Kenyans who were tortured and abused during the Mau Mau uprising in the 1950s under British colonial rule received settlement payments[4]. The residents of Guam want compensation for the damages suffered during World War II[5]. Caribbean countries want reparations from their former European colonial masters[6]. And even after the argument over whether to pay is settled, large questions remain: What are the criteria for payment? Who is within the group that will receive compensation? How will someone prove that he or she is within that circle? If the person who was within the circle is dead, will heirs be compensated? If so, how will they prove heirship? To answer all these questions and more, compensation decision bodies and claimants alike rely on records.

Money cannot replace love, friendship, dignity, self-respect. Money cannot replace cemeteries obliterated, lands vaporized in a nuclear blast, or family photographs turned to ashes. But in the wake of great and terrible events, money CAN do some things: it can provide funds for living, buy prostheses, pay medical bills, support schooling and rebuild housing. Perhaps most of all, money paid to persons who suffered acknowledges that harm was done. It moves personal knowledge of what happened into public acknowledgement of the damage.

Compensation is one of the central elements of transitional justice systems. Some compensation is communal: building schools, constructing clinics, repairing or installing water systems. Some of it is commemorative: erecting monuments, holding ceremonies, adopting national or local holidays. And some is individual: regaining houses, getting support payments.

In his study of reparations, Roy L. Brooks identified five factors as prerequisites for a "meritorious redress claim": "(1) a human injustice must have been committed; (2) it must be well-documented; (3) the victims must be identifiable as a distinct group; (4) the current members of the group must continue to suffer harm; and (5) such harm must be causally connected to a past injustice." [7] The second of these factors is an archival issue.

This essay will look briefly at the historical background of compensation payments, then consider the impact of World War II, the intellectual criteria for compensation developed by international bodies during the second half of the 20th century, and state-level compensation after 1975 to individuals who were harmed by state actions. Finally it will consider the documents that serve as proof for the harm that gives rise to the right to compensation. It will not consider forms of individual compensation other than monetary, of which there are many: restoration of citizenship

[3] "Lista de bienes de las Farc va a Fiscalía, JEP y fondo para víctimas," *El Tiempo,* 17 August 2017. http://www.eltiempo.com/politica/proceso-de-paz/a-quienes-beneficia-entrega-de-bienes-de-las-farc-120680

[4] The United Kingdom agreed to pay damages to 5,228 Kenyans for torture and abuse during the Mau Mau uprisings in the 1950s. "UK to Compensate Kenya's Mau Mau Torture Victims," *The Guardian,* 6 June 2013. http://www.guardian.co.uk/world/2013/jun/06/uk-compensate-kenya-mau-mau-torture

[5] "Guam World War II War Claims: A Legislative History." http://www.guampedia.com/guam-world-war-ii-war-claims-legislative-history/

[6] Stephen Castle, "Caribbean Nations to Seek Reparations, Putting Price on Damage of Slavery," *New York Times*, 20 October 2013.

[7] Roy L. Brooks, "Introduction," in Roy L. Brooks, ed., *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice.* New York: New York University Press, 1999, p. 7.

and civil rights, return of property (real or personal) or payment for property, and social services. Each of these is an important element of a comprehensive program to compensate for harm done, but they have different evidentiary needs than those for monetary compensation paid for harm to the person.

Part 1: Background

Historically, two lines of compensation cases developed. In one line, states paid compensation for war damage as a state-to-state transfer of resources. Reparations were part of the world's protocols for post-war settlements; defeated powers made compensation in cash or kind. The 1907 Hague Convention Respecting the Laws and Customs of War on Land said, in Article 3, "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[8]

How the receiving state went about using that compensation was entirely a matter of state decision. If the state had demanded compensation for damages done to private property, the state receiving compensation might for example, pay the farmer whose land and crops were ravaged during a battle—but it was no sure thing. Some states undertook to indemnify their citizens themselves, as the United States did after the Civil War when Southern citizens who were Union loyalists during the Civil War were compensated by the Federal government. Such compensation was for damage that could be assessed in monetary terms: buildings, land, sometimes for quantities of goods such as a merchant's stock. It was not for human pain and suffering.

A landmark case setting out the legal philosophy for compensation was decided after World War I by the Permanent Court of International Justice. The case involved a nitrate factory formerly in Germany that was now within the new boundaries of Poland and had been taken over by the Polish government. Germany sued for compensation and won. The court ruled that:

> 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 arbitral 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 for 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 due for an act contrary to international law.[9]

The "essential principle" defined by the Court has been used ever since in international compensation cases. The decision, however, limited compensation to the commission of an act contrary to international law, not domestic.

[8] Convention Respecting the Laws and Customs of War on Land (Hague IV 1907). http://www.lawofwar.org/hague_iv.htm

[9] Permanent Court of International Justice, *Factory at Chorzów* (Merits), Judgment of 13 September 1928, p. 47. www.icj-cij.org/pcij/series-a.php?p1=9&p2=1

The second line of compensation cases comes from individual litigation, not state-to-state settlements. For millennia people had turned to courts to recover, say, a missing sheep and, if it could not be returned, to be paid the value of it. Over time, courts also began to award compensation to people who were disabled by the action (or lack of it) of others. This often became a mathematical question, with compensation based on the length of time the person was injured and the loss of income that resulted. Wrongful death lawsuits also arose, as survivors sought to recover the monies that the deceased would have earned had he lived. Compensation for "pain and suffering" also developed, first as a component of disability claims and later with claims for the harm caused to a person by the death of a loved one. Finally, primarily in countries with a legal system based on English common law, after World War II courts began imposing punitive damages for harm, awarding large monetary settlements when the court found that the defendant's conduct was egregious and a heavy fine would help deter the offender from committing similar offenses in the future.

These cases for disability or wrongful death or pain and suffering involved private parties, either an individual suing another person or an individual suing a corporate entity, usually a business or manufacturer. The idea of that an individual could recover monetary damages from the government was not part of most lawyer's mental fabric before World War II. This stems, at least in part, from the doctrine of sovereign immunity, dating from the Middle Ages in Europe, which almost universally protected governments and their officials from being sued without their consent. A sovereign could, of course, magnanimously decide to award a form of compensation to one of his or her subjects and courts occasionally would entertain a limited suit against an official. But a right to sue to obtain recompense for harm caused by a government's policy or practice or by the act of a government official did not exist.

Part 2: The Impact of World War II

At the end of the war in Europe, the leaders of the USSR, the United States and the United Kingdom conferred at Potsdam, outside Berlin. They issued a protocol on August 1, 1945, that formed the basis for the peace agreements with the European powers defeated in the war. Reparations issues were a contentious part of the discussions, and the three conferees finally agreed that the USSR would take reparations from the German zone it occupied, while the United States, the United Kingdom and "other countries entitled to reparations" would take reparations from the western zone, and all parties would take reparations from further unspecified "appropriate German external assets." [10]

These were purely state-to-state reparations. The decisive break with the intertwined traditions of state-to-state repayment and sovereign immunity from private

[10] Article 3, Protocol of the Proceedings of the Berlin Conference, August 1, 1945. https://history.state.gov/historicaldocuments/frus1945Berlinv02/d1383, Only Article 13 mentioned documents needed to support compensation, oddly on oil equipment in Rumania: the parties "agreed to set up two bilateral commissions of experts, one to be composed of United Kingdom and Soviet Members and one to be composed of United States and Soviet Members, to investigate the facts and examine the documents, as a basis for the settlement of questions arising from the removal of oil equipment in Rumania."

suits for damages by governments came with the post-World War II West German reparations to Jews. As Ariel Colonomos and Andrea Armstrong explained:

> [T]he West German reparations program contained several new innovations: First, the reparations addressed both the Holocaust . . beginning with the rise of Nazism in the 1930s, and the war against other countries; all preceding reparations had addressed the damages caused by war, exclusively. Second, they were negotiated by representatives of two countries, West Germany and Israel, which did not exist at the time the atrocities or the war took place. Third, these reparations compensated two categories of people: individual victims of the Holocaust, including citizens of the State paying reparations; and citizens of a new country, Israel. Fourth, also unprecedented, the negotiations included both representatives of states and nongovernmental organizations, such as international Jewish associations. Last, in contrast to the reparations following World War I, West Germany established this policy because Adenauer was convinced of its political necessity and of its just and moral character, and not necessarily because the FRG [Federal Republic of Germany] was held legally responsible.[11]

The first West German agreement on a Jewish reparations program was signed in 1952, but it had been preceded by a number of important steps. In 1947 the Allies required Germany to return goods that had been "aryanized," but they did not require compensation for the taking. Laws of compensation were promulgated in the British, French and U.S. Zones of Occupation in 1949, which then became part of the Allied/German treaty ending the Western occupation in 1952. At that time, the Western Allies requested the German government to enact a law on reparations, which included two points important to the future mechanism of reparations: the law was to have "a procedural and evidentiary arrangement for restitution that takes account of the difficulties of proof resulting from persecution—loss of documents, disappearance of witnesses" and "appropriation of funds to satisfy restitution claims."[12]

On September 10, 1952, West Germany signed a compensation agreement with the new Government of Israel and the new Conference on Jewish Material Claims against Germany, a group created by 23 major Jewish national and international organizations to represent Jewish survivors outside Israel. Known as the Luxembourg Agreement, it stipulated that West Germany would pay 3 billion Deutsche Marks to the new state of Israel (Protocol I) and 450 million to the Claims Conference (Protocol II). Officially the money was all provided to Israel, which in turn paid the specified amount to the Claims Conference. The Claims Conference was to distribute the funds to individuals "according to the urgency of their needs." [13]

Next the Federal Supplementary Law of 1953 established a basis for individual claims against the state if claimants could prove they had been targeted by "officially approved measures." [14] Additional laws followed, including the key Federal Restitution Law of 1965 that established eight "fact situations indicating harm" that

[11] Ariel Colonomos and Andrea Armstrong, "German Reparations to the Jews after World War II: A Turning Point in the History of Reparations," in Pablo de Grieiff, ed., *The Handbook of Reparations* (Oxford: Oxford University Press, 2006), p. 391.
[12] Christian Pross, *Paying for the Past.* Baltimore, Maryland: The Johns Hopkins University Press, 1998, p. 21.
[13] Angelika Timm, *Jewish Claims against East Germany: Moral Obligations and Pragmatic Policy.* Budapest, Hungary: Central European University Press, 1997, pp. 85-87.
[14] Pross, op. cit., p. 39.

would make the person harmed eligible for compensation: (1) harm to life, (2) harm to body and health, (3) harm to freedom, (4) harm to possessions, (5) harm to property, (6) harm through payment of special taxes, fines, and costs, (7) harm to career advancement, and (8) harm to "economic advancement."[15] A sample of the application form used to establish a claim of "harm to body or health" is (in English translation) eight pages long, with such detailed questions as "Persecutee's average total income (not turnover!) from agriculture and forestry, small business, self-employed and non-self-employed work in the last three years prior to the beginning of the persecution that led to health damage" (underscore and exclamation mark in the original). No wonder the medical director of the Berlin, Germany, Center for the Treatment of Torture Victims said the details of the regulations were "impossible for laypeople to untangle and even something of a hieroglyphic for lawyers."[16] But the sequence of laws was, quite simply, a legal revolution on the right to individual compensation by a state for actions of a state.

Part 3: The International Setting

In December 1948 the United Nations adopted the Universal Declaration of Human Rights. The drafters, all scarred by the experience of the Second World War, wanted to protect individuals and their rights, particularly those rights that were abused repeatedly during the war. The Declaration included, as Article 8, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law," and as Article 17 (2), "No one shall be arbitrarily deprived of his property."[17] Although referring exclusively to decisions by courts, a generous interpretation of Article 8 supported the right of compensation for the abysmal violations of human rights by the Nazi regime, whether or not specifically adjudicated. Article 8 also seemed to open the possibility of reparation for violations that did not relate to property, but it provided only remedies as provided by the government of the country in which the person was living. There was no apparent international recourse for harm that had not (a) occurred during a war, whether international or internal, regular or irregular, and was not (b) related to property whose financial cost could be assessed.[18]

Next, United Nations delegates began debating the elements to be included in the covenants that would provide a legal framework for the Declaration. Some delegates proposed including a procedure for individuals to submit petitions to any agency that might be created under the Covenant, but opposition quickly arose, including from delegates representing the three nations that met at Potsdam. No right to petition was included.[19] This eliminated the possibility that an individual harmed

[15] Pross, op. cit., p. 50.
[16] Pross, op. cit., p. 51; claim forms pages 197-207.
[17] United Nations, *Universal Declaration of Human Rights,* 10 December 1948. http://www.un.org/en/universal-declaration-human-rights/index.html
[18] The day after the Declaration was adopted, the General Assembly passed a resolution on Palestine, which in paragraph 11 said "that compensation should be paid for the property of those [refugees] choosing not to return and for loss of or damage to property which, under principles of international law or in equity, should be made good by the Governments or authorities responsible." A/RES/194 (III), 11 December 1948. https://unispal.un.org/DPA/DPR/unispal.nsf/0/C758572B78D1CD0085256BCF0077E51A
[19] Mary Ann Glendon. *The World Made New: Eleanor Roosevelt and the Universal Declaration of*

by a state could look to United Nations bodies for help. The final language in Article 2 of the International Covenant on Civil and Political Rights said merely that each State Party must "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."[20] This cracked the wall of sovereign immunity, but for all practical purposes, the impact of this language on international law was weak. Besides, the Covenant, although opened for ratification by states in December 1966, did not gain enough support to go into force until March 1976, showing the tepid support for its contents.

Starting in 1955 and every five years thereafter the United Nations held a "Crime Congress," an international assembly looking at standards for crime prevention and criminal justice.[21] In 1985 the Congress and the UN General Assembly adopted a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. It spoke to victims of crime and abuses of state power; importantly, it included "abuse of economic and political power." It obliged states to provide remedies for criminal violations by their employees and officials; it said that if a government is no longer in existence, the successor state must provide restitution and compensation. And in the case of "substantial harm to the environment," it required the offender (identity unspecified in the document) to "as far as possible" restore the environment, reconstruct the infrastructure destroyed, replace community facilities and reimburse "the expenses of relocation, whenever such harm results in the dislocation of a community." The preamble called upon states to "promote disclosure of relevant information to expose official and corporate conduct to public scrutiny," an early signal of the problem of access to information that would bedevil courts of the 21st century. The language of the Declaration was directed solely at Member States and, as usual with UN documents, included no enforcement mechanism. Still, it is another landmark in the movement toward individual compensation.[22]

But it wasn't enough. In 1989, as great political changes in Latin American and Eastern Europe were climaxing, the United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, asked Dutch jurist Theo van Boven to undertake a study "concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms."[23] Van Boven filed a preliminary report in 1990 and a final report in 1993. Action on the report was slow. Van Boven and M. Cherif Bassiouni, a jurist who was a key proponent of an international criminal court, together revised van Boven's draft, and the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law finally was adopted by the UN General Assembly in December 2005, sixteen years after van Boven began his work.[24]

Human Rights New York: Random House, 2001, p. 195.

[20] United Nations, *International Covenant on Civil and Political Rights*, 1966. http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

[21] United Nations, "United Nations Congresses on Crime Prevention and Criminal Justice 1955–2015: 60 years of achievement," 2015. http://www.un.org/en/events/crimecongress2015/pdf/60_years_booklet_EN.pdf

[22] *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, United Nations General Assembly, A/RES/40/34, 29 November 1985.

[23] UN Doc. E/CN.4/Sub.2/1990/10 (26 July 1990).

[24] United Nations General Assembly resolution 60/147, *Basic Principles and Guidelines on the Right to*

The Right to Remedy principles provide a broad categorization of reparations measures: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. It says compensation "should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law," such as lost opportunities, loss of earnings and "moral damage."[25] The inclusion "moral" as well as monetary damage greatly widened the scope for compensation. States are responsible for providing reparation, which "should be proportional to the gravity of the violations and the harm suffered." However, in "cases where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim."[26] Echoing the provisions of the Set of Principles for the protection and the promotion of human rights through action to combat impunity that the Human Rights Council accepted in 1997,[27] the Right to Remedy principles state that "victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations."[28] This appears to oblige nonstate actors, including commercial entities, to provide reparation for harm, but whether they are also obliged to provide information is not clear from the text. And although the document once again links compensation only to violations of international law, by this time international law had taken on a new strength.

Between the time van Boven began drafting and the 2005 adoption of the Right to Remedy principles, several important advances had been made. The International Criminal Tribunals for the former Yugoslavia (1993) and for Rwanda (1994) and the International Criminal Court (ICC) had been established,[29] and the statute of the ICC required the Court to develop "principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation." Further, in 2004 the United Nations Human Rights Committee adopted a "General Comment" on The Nature of the General Legal Obligation Imposed on States Parties to the International Covenant on Civil and Political Rights. It focused on Article 2 of the Covenant, restating obligations and cautioning states to ensure that "individuals are protected by

a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, 16 December 2005. http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_ph_e.pdf

[25] Ibid., paragraph 20.

[26] Ibid., paragraph 20.

[27] In an influential 1997 report to the United Nations Commission on Human Rights on the question of impunity of perpetrators of human rights violations, the distinguished legal scholar Louis Joinet proposed five principles on the "preservation of and access to archives bearing witness to violations." Professor Diane Orentlicher updated the principles in 2005. *The Administration of Justice and the Human Rights of Detainees: Question of the impunity of perpetrators of human rights violations (civil and political).Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*, United Nations Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1997/20/Rev.1, 1997-10-02; rev. by Diane Orentlicher, E/CN.4/2005/102 and E/CN.4/2005/102/Add.1, 8 February 2005. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement

[28] Ibid., paragraph 24.

[29] The International Criminal Court began operating in 2002, following the ratification of the Rome Statue of 1998 by 60 state parties.

the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities."[30]

With the intellectual framework for reparations to individuals fully developed and the international court system in pace, the rationale and a means for compensation for human injustice were in place.

In addition to these United Nations initiatives, regional bodies also began developing guidance and case law on the right to reparations during the second half of the 20th century.[31] The Inter-American system was particularly active.

The *American Declaration of the Rights and Duties* of Man was adopted by an International Conference of American States in Bogota in 1948. Then in 1959 the Organization of American States (OAS), as the international group now was named, established the Inter-American Commission on Human Rights "to promote the observance and protection of human rights." The Commission was strengthened in 1969 when the OAS adopted the American Convention on Human Rights, which in Article 44 said, "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."[32] This opened the door to individual complaints. Through the Commission, then, aggrieved individuals had a route to international adjudication of complaints against the state, although not complaints against non-state entities unless they could be linked to the state.

The same 1969 Convention established the Inter-American Court of Human Rights, which finally came into being on July 18, 1978, when the eleventh OAS member State ratified the document.[33] Both state parties and the Commission may refer cases to the Court, but the Court can only decide a case if it involves one of the twenty states that has accepted the Court's jurisdiction.[34] This does provide individuals

[30] UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, paragraph 8. http://www.refworld.org/docid/478b26ae2.html

[31] The European Court of Human Rights was established in 1953 and reformed in 1998, having been relatively quiet during the Cold War when Europe was divided. A state, group or individual (who need not be a citizen of one of the state parties) can submit a complaint; however, the jurisdiction was limited to claims that a state violated the European Convention on Human Rights, excluding the possibility of claiming against a non-state actor. The African Court of Human Rights came into force in 2004; Asia does not yet have a similar court.

[32] However, Article 10 specified, rather confusingly, "Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice." This appeared to limit the scope of compensation to those improperly convicted. American Convention on Human Rights, 22 November 1969.
http://www.cidh.oas.org/Basicos/English/Basic3.American%20Convention.htm

[33] Inter-American Court of Human Rights, "Court History."
http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh

[34] The twenty states are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay. Previously, Trinidad and Tobago and Venezuela had both accepted the Court's jurisdiction, but withdrew from that jurisdiction when they denounced the American Convention, in 1998 and 2012, respectively. Ibid.

with a two-step path to adjudication: first to the Commission and then from the Commission to the Court.

In an important case in 1989, the Inter-American Court ruled on compensation for the forced disappearance in Honduras of Angel Manfredo Velasquez Rodriguez. At the initial stage of the case before the Commission, the commissioners decided that the family deserved compensation from Honduras, including paying monetary compensation for income lost and making "an exhaustive investigation of the circumstances of the disappearance of Manfredo Velasquez and [bringing] charges against anyone responsible for the disappearance." The family appealed to the Court for moral compensation as well as monetary damages. The Court agreed and added compensation for moral damages to the amount calculated as the loss of earnings that Manfredo Velasquez would have provided to his family had he lived. The Court ruled, "[T]he obligation to indemnify is not derived from internal law, but from violation of the American Convention. It is the result of an international obligation."[35]

Part 4: National efforts

While these significant international advances were being made in thinking about rights and compensation for wrongs, nations in the last quarter of the 20th century were grappling with the aftermath of mass violations of human rights and attempting to find means of redress. The national investigations were spurred in Latin America by the end of military dictatorships, in Eastern Europe by the demise of the communist governments, and in North America by social movements demanding acknowledgement that historic wrongs had been committed. These governments set about establishing the parameters for persons to be compensated and what proof the persons had to offer. The German example at the end of World War II was important to them, but often viewed as sui generis. Instead, national governments passed laws on compensation that were tailored to their national situations. Here are examples of the laws and regulations on compensation that were established by states, three each from Latin America, Eastern Europe, and North America.

Latin America: *Argentina*

Argentina had a particularly long and complex program of compensation.[36] After the restoration of democratic government, Argentina in 1986 passed Law 23.466 providing pensions for relatives of disappeared persons. It covered spouses and persons "living in consensual union for at least five (5) years immediately preceding

Velasquez Rodriquez, Inter-American Court of Human Rights, Judgment on Compensatory Damages, Judgment of July 21, 1989, Series C No. 7, in Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume III Laws, Rulings, and Reports.* Washington, DC: United States Institute of Peace, 1995, pp, 739-747. All citations from Kritz use the English translations therein provided.

[35] Velasquez Rodriquez, Inter-American Court of Human Rights, Judgment on Compensatory Damages, Judgment of July 21, 1989, Series C No. 7, in Neil J. Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Volume III Laws, Rulings, and Reports.* Washington, DC: United States Institute of Peace, 1995, pp, 739-747. All citations from Kritz use the English translations therein provided.

[36] De Greiff, op. cit. Argentina, pp. 702-731. All citations from De Greiff use the English translations therein provided.

the disappearance," disabled parents and siblings, and minor children of the disappeared. The disappearance must have taken place before December 10, 1983, and the claimant had to show that he or she had filed a complaint about the disappearance "with a judicial authority with jurisdiction, the former National Commission on the Disappearance of Persons, or the Office of the Undersecretary for Human Rights of the Ministry of the Interior." The payments were based on "the minimum amount awarded by the pension system for ordinary retirement to workers in the employ of another," but a separate amount was to be provided to disabled persons. Applications were filed with the Ministry of Health and Social Action.

The next year National Decree 1.228/87 was issued, regulating the application of Law 23.466 for pensions for minors whose parents had been disappeared. Its Article 1 specified that claimants had to submit an application form and the complaint that had been filed about the disappearance, and the "family relationships" of minors to the disappeared "shall be shown exclusively by the pertinent certificates or by judicial declaration" which were also to be submitted. If the facts of the original complaint were unclear, the applicant could submit the testimony of "two or more persons," and if the original complaint "cannot be provided by the applicant, the Secretariat of Human Development and Family shall collect it at its own initiative from the agencies mentioned."[37] The proof that the parents had lived in "consensual union" could be demonstrated "by any clear and convincing evidence showing that the persons in question were living together at the same address."[38]

Next came Argentine Indemnification Law 24.043 of 1991,[39] titled "Benefits granted to persons placed under the control of the National Executive Branch during the State of Siege," covering persons who had been "placed at the disposition of the National Executive Authority prior to December 19, 1983" (Article 1) and civilians "having been deprived of liberty by acts of military tribunals, regardless of whether a guilty verdict was reached in the military jurisdiction" (Article 2). Applications were to be filed with the Ministry of the Interior to "verify compliance with the formal requirements" and confirm the duration of the prison term (Article 3).[40]

In 1994 Argentina returned once more to compensation for forced disappearances, passing Law 24.321 in May 1994 and Law 24.411 in December 1994. The implementing regulations in 1995 (National Decree 403/95) included a long list of requirements to prove a forced disappearance, the death of a person, and the existence of "consensual unions."[41]

All this became too much for the claimants (and, perhaps, also the government) to handle. Consequently, in 1997, the government issued Decree 205/97 "making the evidence required for receiving benefits more flexible." Now the evidence that would be accepted was:

> (a) Copy of the filing of the writ of habeas corpus or of the court's judgment on said writ.

[37] Ibid.
[38] Ibid.
[39] Argentina had issued National Decree 70/91 on the topic in January 1991, which was then codified by the November 1991 Law 24.043.
[40] De Grief, op. cit. Argentina, pp. 702-731
[41] Ibid.

(b) Reports or certifications issued by a competent authority. . . .

(c) Documents in judicial and administrative files.

(d) Documents at the Inter-American Commission on Human Rights of the

Organization of American States and the Inter-American Court of Human Rights.

In addition, the Ministry of Interior, which had authority to make the payments, would consider documents from "national and international human rights organizations, press articles and consistent bibliographic material." When the payment was for "grievous injuries," the applicant had to provide "at least one" of:

(a) Clinical records of the place of detention.

(b) Copy of the judicial judgment that considered the detentions shown.

(c) Medical or clinical records with the date corresponding to the period covered by the benefit, issued by an official health institution.

(d) If necessary, a medical consultation . .

In all cases "the documents should be submitted with certification by the issuing authority."

Finally, in 2004 the government passed a law of compensation for "persons who were born during the deprivation of liberty of their mother or who, being minors, were detained under any circumstance in relation to either parent" who was detained or disappeared. To apply, a person had to present a birth certificate "and show, by any type of evidence" that the mother was "detained and/or disappeared for political reasons" and if born outside "prisons and/or captivity," the person had to provide "any type of evidence that they stayed in these places" and the detention and/or disappearance of the parent. The application was to be filed with the Ministry of Justice, "which shall in very summary form verify compliance with the requirements." The compensation was a one-time payment plus a monthly remuneration. If the person was one of the children whose "identity was changed," additional payments were authorized.[42]

By legislating repeatedly on the disappeared, Argentina's compensation program became exceedingly complex. The volume of records produced during its extended claims period must be enormous.

Latin America: *Brazil*

In 1995 Brazil passed Law 9,140 recognizing "as deceased those persons who have disappeared because of participation, or accusation of participation, in political activities in the period from September 2, 1961, to August 15, 1979."[43] Appendix I of the law listed the people recognized as deceased "for legal purposes." "The spouse, male or female companion, descendant, ancestor, or relative to the fourth degree of the persons named on the list . . who have proven this relationship, may petition the

[42] Ibid.
[43] De Greiff, op. cit., Brazil, pp. 760-763.

official of the civil registry . . to obtain a death certificate; this petition must be presented" when making a claim (Article 3). A Special Commission on the disappeared was created; one of its duties was to "issue opinions on the petitions regarding compensation by the spouse, the companion," descendants, ancestors, and "relatives to the fourth degree removed," all of whom could petition the Special Commission for validation. Article 7 says merely that such a petition "shall be accompanied with the information and documents that verify the assertion," and the Commission was empowered to request "documents from any public agency" as well as to ask the Ministry of Foreign Relations "to obtain information from foreign governments and organizations" (Article 9). The compensation was a single payment based on the life expectancy of the person who disappeared (Article 11).[44]

In 2002 Law 10,559 established a Commission on Amnesty to provide compensation for acts of "exclusively political persecution."[45] It changed the final date for acts committed against the person to October 5, 1988, the date the new constitution was adopted, and two types of compensation were provided, one the lump-sum payment and another a monthly compensation. Article 6(1) said the compensation to be paid would be "established according to the evidence provided by the applicant, information from official bodies, as well as from foundations, public or private companies, or joint enterprises under state control, orders, trade unions or professional councils." In a set of "frequently asked questions" posted on the website of the Ministry of Justice, the Commission, which still exists, said to apply for compensation a person must submit an "initial petition narrating the facts in detail, emphasizing the situations of political persecution and the damages caused by this situation" and also:

> "a) Identity Card (RG);
>
> "b) C.P.F;
>
> "c) Marriage Certificate, if married;
>
> "d) Birth certificate of the child (ren);
>
> "e) Proof of Residence;
>
> "f) Certificate of Reservation, if he is or has been military;
>
> "g) Proof of Bank Account;
>
> "h) Power of Attorney, if the application is filed by Attorney;
>
> "i) Electoral Title;

[44] The Commission did not receive full cooperation from the military to provide access to their archives, leaving the burden of proof with the relatives of deceased victims. Further, where official archives that were available told one story, later proven to be false, "cases in which no documents supported the alternative version received no compensation." Ignacio Cano and Patricia Galvao Ferreira, "Reparations Program in Brazil," in De Greiff, op. cit., Brazil, p. 119.

[45] Lei No. 10.559/2002, de 22 de Novembro de 2002. http://www.justica.gov.br/seus-direitos/anistia/

> "j) In case of death of the Amnesty, present the Certificate of Death;
>
> "k) Medical Report, if you are a carrier of any chronic disease;
>
> "l) Work Portfolio and/or Proof of Employment Bond, if applicable;
>
> "m) School History, if applicable;
>
> "n) Proof of Exile, if applicable; and
>
> "o) Other document (s) if necessary. Ex .: National Archives Certificate, State Public Archives Certificate, Employee Company Certificate (s), Witness Statement, Newspaper and Magazine Articles."

If the person who was subjected to persecution is deceased, the "dependents/successors" should submit a single joint petition for compensation.[46]

Latin America: *Chile*

Chile established a National Corporation for Reparation and Reconciliation in 1992, with a specific duty "to promote the reparation of moral damages" (Article 2). It was able to shortcut the decision on who would receive reparations by using the work of Chile's truth commission: "a monthly pension is hereby established for the benefit of relatives of the victims of human rights violations or political violence, who are named in the Second Volume" of the truth commission report (Article 17). The monthly pension was to be a flat fee (Article 19); the beneficiaries were to be "the surviving spouse, the mother of the principal or his father if she has predeceased; the mother of the natural children of the principal or their father when the principal is their mother, and children under the age of 25, or disabled children regardless of age." The Health Service was to determine the child's disability (Article 20). Although this law neatly solved the "who is a victim" question, it left open the problem of proving who were relatives of the victim as well as the proof of medical condition.[47]

A second official truth commission in 2004-5, called the "Valech Commission" after its chair, Bishop Sergio Valech, developed a greatly expanded list of persons who had survived torture or politically-motivated detention by state agents between 1973-1990. Once again, persons who were on the Commission list as victims were given reparations.[48] Although "the pensions accruing to one and to the other situation were and are widely different, consisting of approximately US$666 per month for Rettig.

Europe: *Albania*

Albania in 1993 passed a Law on Former Victims of Persecution. Persons in five categories were eligible for compensation:

(a) Persons who have lost their lives or are mentally ill because of persecution;

[46] The Commission received 75,000 petitions. Thanks to Vitor Fonseca for the references.
[47] Kritz, op. cit., Chile, pp. 685-695.
[48] As Cath Collins points out, "The pensions accruing to one and to the other situation were and are widely different, consisting of approximately US$666 per month for Rettig [first commission] families and US$217 for individuals named by Valech." Cath Collins, "Truth-Justice-Reparations Interaction Effects in Transitional Justice Practice: The Case of the 'Valech Commission' in Chile," *Journal of Latin American Studies,* August 2016, pp. 1-28, quotation fn. 65.

(b) Persons sentenced to imprisonment or who survived as outlaws within the country because of persecution;

(c) Persons sentenced to internment or deportation because of persecution; Albanians with foreign citizenship, now Albanian citizens, who have lived in concentration camps especially built for them;

(d) Persons who have lost civil rights, village kulaks, declassed persons, and those who have suffered privations of various kinds because of persecution;

(e) Persons who, although fulfilling the conditions for inclusion in one of the above categories, do not gain the right to this status.

For each of these five, the law then specified the "documents recognized for the right of this status" (Article 16). For example, for category (a), the claimant had to submit a "certificate from the Commission of the Ministry of Public Order and the Justice Ministry in cases in which a person had been killed or has died as a result of persecution" and a "legal and medical report from the time when the persecuted person lost the power of judgement because of persecution and a current legal and medical report showing that this situation is still true today or continued until the date of death, if the persecuted person is no longer alive. The degree of incapacity at which a person acquires rights under Paragraph (a) will be determined by a commission specially created for this purpose by the Ministry of Health."

The claim documents were to be "collected by the presidiums of the associations of former political prisoners and victims of persecution and the associations of former victims of political and economic persecution in neighborhoods, villages, and towns in cooperation with State inspectors for victims of political persecution in the districts, who will send them to the Committee for Former Victims of Political Persecution. This committee will collate them and submit them" to the state commission that would decide on eligibility for compensation (Article 17). The law warned that persons acquiring the status of victim "with documents legally proved to have been falsified, besides returning the sum they have unjustly obtained, will also be subject to criminal prosecution" (Article 19). With these strict criteria, one wonders how many people actually received compensation.[49]

Europe: *Bulgaria*

Bulgaria in 1991 passed the Law on Political and Civil Rehabilitation of Oppressed Persons. It established eight categories of persons eligible for "property and non-property damages" that occurred between 12 September 1944 and 10 November 1989 (Article 1). The successful claimants were to receive a lump sum payment, with "the amount and procedures of payment of compensation . . determined by the Council of Ministers." "Appropriate written evidence" of unlawful oppression was to be submitted to the Council, and "if said written evidence is missing as a result of circumstances under previous regulations, its establishment shall be carried out by central and regional commission under procedures and in a composition determined by the Council of Ministers" (Article 4). The length of time persons were in forced "labor service" or were "interned, deported or resettled" was to be calculated, but without specifying what documents would be used in the calculation (Article 7). Heirs "of

[49] Kritz, op. cit, Albania, pp. 661-666.

persons who died, committed suicide or disappeared in connection with forced changes of name shall receive a survivor's pension until such time as there is lawful basis for its termination" (Article 8). This was followed by a set of extensive regulations on amnesty for crimes and for restoration of confiscated property.[50]

Europe: *Russia*

A Russian law of 1991, amended in 1992, aimed "to rehabilitate all victims of political repressions on the territory of the RSFSR since 25 October 1917." Article 15 said that individuals "subjected to repressive measures in the form of deprivation of freedom and rehabilitated" will be "paid, on the basis of a certificate of rehabilitation, a monetary compensation of 180 rubles for each month of their incarceration, but no more than R25,000 out of funds from the republic budget." The compensation was to be paid within three years, and "no compensation is paid to heirs except in cases when the compensation was assigned but the rehabilitated individual did not receive it." Persons "who were repressed outside the borders of the Russian Federation but who permanently reside in its territory" can be compensated "on the basis of documentation concerning rehabilitation and time spent in prison which was issued in the States/former USSR Union republics or by State organs of the former USSR." Article 6 specified that applications could be submitted by "repression victims" or "by any other individuals or public organizations;" the applications were to be "submitted at the location of the organ or official who adopted the decision to apply the repression," which was either the "internal affairs organs" or the "procuracy organs." Article 7 required the internal affairs organs, after receiving an application, to "establish the facts" and issue a "certificate of rehabilitation." Further, "in the absence of documentary evidence of the fact of the application of repressive measures can be established judicially on the basis of testimony." Refusal by "internal affairs organs" to issue a certificate could be appealed to the courts.[51] Submitting claims at the office of the repressor surely must have deterred some claimants.

North America: *Canada*

Compensation for the abuse endured by generations of First Nations children in Canadian residential schools took years and major litigation to resolve. In the 1870s Canada began to establish boarding schools to which aboriginal children were forcibly removed, with the goal of assimilating the children into European-Canadian life. Over 130 residential schools were established across Canada, and they endured until the last quarter of the 20th century. Most of the schools were operated on the government's behalf by churches. The Indian Residential Schools Settlement Agreement of 2007 was a comprehensive resolution between for former students, the churches, the Assembly of First Nations and other Aboriginal organizations, and the Government of Canada for the acknowledged harms..

The Settlement Agreement included five different elements to address the legacy of the Indian Residential Schools. One was a lump-sum Common Experience Payment to each former student who had resided at a recognized Indian Residential School(s) and was alive on 30 May 2005.[52] The parties worked together to establish the roster of

[50] Krtiz, op. cit., Bulgaria, pp. 672-684.
[51] Kritz, op. cit., Russia, pp. 797-807.
[52] The five elements were a Common Experience Payment (CEP) for all eligible former students of Indian Residential Schools; an Independent Assessment Process (IAP) for claims of sexual or serious

persons who were compensated; the government and the churches both researched records and provided evidence for the claims, supplemented by documentation provided by former students and First Nations organizations.

North America: *United States*

In February 1942, two months after the December 1941 attack on Pearl Harbor, Hawaii, by the Japanese military, President Franklin Roosevelt issued Executive Order 9066, ordering the relocation of about 117,000 persons of Japanese ancestry, both citizens and non-citizens residents, from parts of California, Oregon, Washington, Arizona, Alaska and Hawaii, that were designated as military areas. The persons removed were housed in ten internment camps, the last of which closed in 1946. In 1988, after years of lobbying work by Japanese-Americans and the report of a Congressional commission on the wartime relocation, the government agreed to pay reparations to the relocated persons.

The Federal attorney general was directed to "identify and locate, without requiring any application for payment and using records already in the possession of the United States Government, each eligible individual." An eligible individual was anyone "of Japanese ancestry who is living on the date of the enactment of this Act and who, during the evacuation, relocation, and interment period (A) was a United States citizen or a permanent resident alien; and (B)(i) was confined, held in custody, relocated, or otherwise deprived of liberty or property" as a result of the wartime Executive orders and proclamations or who was recorded by the government as "being in a prohibited military zone" between December 7, 1941, and June 30, 1946. In addition, anyone could "notify the Attorney General that such individual is an eligible individual." Each eligible person was paid $20,000. [53]

Using records of the wartime camps held by the U.S. National Archives and a university as well as records compiled by Japanese-American organizations, the Justice Department contacted persons identified as eligible, asked them to verify their identity with a document showing a date of birth and, if the person had changed his or her name (such as a woman changing to a married surname), documentation of the name change. For persons who were "statutory heirs" of a person who was eligible but died between the enactment of the law and the date of payment, documentation was required of the deceased individual's identity, death, and a document showing evidence of relationship (marriage certificate for a deceased spouse, documentation of birth if a child, or evidence of guardianship) to each "eligible individual."[54]

physical abuse; measures to support healing such as the Indian Residential Schools Resolution Health Support Program and an endowment to the Aboriginal Healing Foundation; commemorative activities; and the establishment of a Truth and Reconciliation Commission. The IAP was also an individual claims process that used an evidentiary procedure separate from the CEP.

[53] Public Law 100-383, 102 Stat. 903, "An act to implement recommendations of the Commission on Wartime Relocation and Internment of Civilians," 10 August 1988, https://www.gpo.gov/fdsys/pkg/STATUTE-102/pdf/STATUTE-102-Pg903.pdf. The Act also made restitution to Aleut residents of the Pribilof Islands and the Aleutian Islands that were destroyed during World War II. In addition, to settle a civil lawsuit brought by four Japanese Latin Americans, the government also paid $5,000 to 145 Japanese Latin Americans who were deported from their homes in Latin America during World War II and held in internment camps in the U.S.

[54] "Declarations of Eligibility by Persons Identified by the Office of Redress Administration and Requests for Documentation," 28 Code of Federal Regulations, Chapter 1, Part 74, Subpart E, Appendix A. https://www.gpo.gov/fdsys/pkg/CFR-2011-title28-vol2/xml/CFR-2011-title28-vol2-part74-appA.xml

North America: *United States and the Republic of the Marshall Islands*

Also in the 1980s, the United States relinquished its Trust Territory of the Pacific Islands. Part of the territory became the Republic of the Marshall Islands (RMI): the location where the United States between 1946 and 1958 exploded 67 test atomic bombs. As part of the separation, the United States agreed to pay $150 million to the new nation to be used "for the just and adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which have not yet been compensated in or which in the future may arise" resulting from the damage caused by the tests.[55] The RMI government decided that any person who was living (including in utero) in the Marshall Islands at any time after June 30, 1946, or who was the biological child of a mother who was physically present (including in utero) in the Marshall Islands could claim, on the assumption that everyone had some degree of exposure.

The Tribunal established a list of medical conditions that—if the person had the condition—could be presumed to be caused by the nuclear testing and no further proof was needed. The claimant had to prove that he or she had the medical condition, however. If the person suffered from a condition that was not on the "presumed" list, the person had to show both that he or she suffered from the condition and that the condition was a result of the testing program. A Nuclear Claims Tribunal was established, which developed a claims form and sent staff members to many of the islands to help claimants prepare the claims. A 1989 statement of the rules of practice and procedure said, "[T]he Tribunal shall not be bound by the legal rules of evidence. . . . the Tribunal will receive any evidence that is of a type commonly relied upon by reasonably prudent people in the conduct of their affairs" (Section 1000). It allowed people to submit copies of documents or "excerpts," saying that the "unavailability of an original shall not, in and of itself, make a copy inadmissible." The Tribunal also wanted a "certificate that it is a true and correct copy of the original," but noted that that requirement would be observed "whenever possible" (Section 1002). [56]

Part 5. Role of records

Looking at the variety of compensation schemes briefly described above, it is evident that a successful claim always requires at least two types of proof: identity and harm. And for those proofs records are needed.

Establishing identity

The claimant needs to show that he or she falls within the parameters of the group of victims to be indemnified. This begins with establishing identity. This may be the identity of the person who was the victim; it may be the spouse, the child, the parent; it may be a person acting on behalf of one of these persons. The proof needed is different in each case. It is easier for the state to assume the initial responsibility for identifying the persons within the group than to require documentation from the

[55] Compact of Free Association between the Government of the United States and the Government of the Republic of the Marshall Islands, Section 177 (b), 25 June 1983.
[56] Nuclear Claims Tribunal, "Regulations governing Practice and Procedure," n.d., ca. 1989. Copy in author's possession.

claimants. Some states, like Chile, have done this through a truth commission or, like Canada and the United States, through the government's own research. However, other states have placed the burden on the individuals, sometimes to a degree that makes it difficult for a victim to submit a successful claim.

Identity: *Victim.* States hold birth records and death records, records of identification cards issued which likely include a photograph, voter rolls, and records of tax payments. Some national governments have records of driver's license issuance, which may contain birth date and a photograph; social security or other identifications for pension benefits also may contain basic data on the individual. Police files on the person may have information on birth date and residence, photograph and fingerprints, perhaps results of a DNA test, and, if the person used an alias, may provide the link of alias to birth identity. If the person ever had a passport or visa, these would include birth date and a photograph, and even documents for temporary official exit from and entry to the country may include birth date and address and perhaps a photograph. Court records may show that the court determined the identity of victims, as the International Criminal Court's Trust Fund for victims did in the case of 297 victims of crimes committed by former Congolese militia leader German Katanga.[57]

Beyond government records, employers have personnel records that likely contain information on birth date, residence and length of employment and may have a photograph (of course, if the person was ever employed by the government, the government would have these records also). Banks and credit institutions may have identification of account holders, as will insurance companies for policy holders; labor unions, membership rolls; faith-based institutions, records of affiliation. Media sources may have photographs or identification information, particularly if the person was prominent or notorious. Schools, especially primary schools, may have records showing birth date of the child, names of parents, and residence. If the compensation is in the wake of the work of a truth commission, a list of names may have been part of the records created by the commission.

DNA is increasingly important for determining identity. Governments have banks of DNA records taken from the population, either as a comprehensive program or as part of police or emergency or hospital cases. DNA may also help an illiterate person prove he is indeed who he says he is. Courts have generally held DNA identification as conclusive.

Private correspondence, social media postings, cell phone records, and personal photos all may be used to accumulate a picture of the person that would buttress claims of identity, if not be dispositive alone.

Some persons never had a birth certificate or similar document;[58] others had

[57] International Justice Monitor, "The Trial of German Katanga & Mathier Ngudjolo Chui: Trust Fund Unveils Reparations Plan for Katanga Victims," September 5, 2017. https://www.ijmonitor.org/2017/09/trust-fund-unveils-reparations-plan-for-katanga-victims/

[58] Writing in 2014, the World Bank and the World Health Organization said, "In the past 10 years, there has been an overall increase in global birth registration rates of children under five from 58 percent to 65 percent. However, more than 100 developing countries still do not have functioning systems that can support efficient registration of births and other life events like marriages and death." In 2015 they began a "Global Civil Registration and Vital Statistics Scaling Up Investment Plan," with a goal of having "universal civil registration of births, deaths, marriages, and other vital events, including reporting cause of death, and access to legal proof of registration for all individuals by 2030."

these items but they were lost in flight or destroyed when a village was burned. Stateless persons and refugees may have only documents issued by an international organization, if they have any at all. In the absence of any evidence, as when the Kosovar refugees fled into Macedonia in 1999, having been stripped of all their documents and with no access to the records in the Serbian government, the UN High Commissioner for Refugees resorted to having two persons testify that this is who the person is and then issuing a refugee identification card. This situation would be true as well for persons who lived in communities whose existence was not recognized and the persons were not given national identity cards, such as the Rohingya within Myanmar.

Identity: *Spouse*. Showing kinship is a multi-step process: first the person harmed needs to be identified (as above) and then the identity of the claimant and the relationship to the person harmed must be verified. For a spouse, the state may have a marriage record or the faith institution that performed the marriage may have documentation. Again pension records with an employer may show the spouse of the employee, as may insurance records or hospital records indicating next of kin or names on a joint bank account. Titles to property, such as a house, or a rental agreement or a mortgage or an insurance policy may have the name of both spouses. And if one spouse had a will, it might be held by a notary or by the lawyer who drew it up, listing the names of the heirs including the spouse. If the couple had a child, a birth record or a hospital record may exist but it may not include the names of both parents (in Afghanistan, for instance, the mother's name is not listed) or one name might be an alias.[59]

If the marriage is a common law arrangement, as accepted for compensation by Chile's "living in consensual union for at least five (5) years immediately preceding the disappearance," it might be proved by police records, if one of the couple was under surveillance, or if the couple was formally renting housing, by the lease. However, if the couple was living in a squat or similar informal residence, there is unlikely to be a record of residence.

Changes of name are also an issue with spousal identity. When a woman changes her last name to include that of her husband, a government may record the transaction as, perhaps, may the faith-based organization that conducted the marriage. Two other name changes create more difficulty. First, if after the birth of a child a woman is known simply as "X, mother of Y," a formula used in a number of cultures, that will not narrow the name to a single person without other information. Second, people in clandestine groups may take an alias, either a consistent nom de guerre or one that changes depending on the circumstance. In these cases, police records or military intelligence records may track the identity through the name changes and perhaps link the spouses.

Identity: *Child or parent.* If a claim by a child or parent is allowed under the law, many of the same records used for the spouse can be used here. Children can be identified from birth records, hospital and clinic records, school records, faith-based documents such as baptism records, perhaps insurance records, perhaps a will, perhaps

http://www.worldbank.org/en/topic/health/publication/global-civil-registration-vital-statistics-scaling-up-investment

[59] Bahaar Joya, "Where is my name? Afghan women fight for their own identity," Thomson Reuters Foundation, 27 July 2017. http://news.trust.org/item/20170727230424-vl88t/

refugee records where the birth indicated another ration of supplies. Personal documents can be useful, from videos and photographs of the family to email and social media chats.

When eligibility is extended beyond the immediate family, as it is in Brazil's "to the fourth degree removed" discussed above, it becomes essential to understand the number of persons who might claim eligibility. If the compensation is to be extended to, for example, spouse and minor children of a deceased man who had four wives and each wife had four children, twenty claimants would need identity verification.

The DNA records that exist in government or medical databanks or in banks of DNA extracted from recovered remains and held by forensic archaeologists can be matched with the DNA of a living person claiming to be a child or parent. It can also be used if the immediate relatives are deceased. Chile gave the DNA samples from persons whose family lost a member to a forced disappearance to the archives of the International Committee of the Red Cross, in the hope one day of being able to identify remains. Lebanon is undertaking a similar program.[60] DNA may also be the only option to identify children who were found orphaned during a conflict and who were too young or too traumatized to remember the names of their parents or children forcibly removed from birth parents and adopted by others.

Identity: *Representative.* To prevent fraud, it is essential to prove that a person is authorized to act for another who is entitled to claim. The same is true if a social organization is claiming on behalf of an individual.

The identity of the representative is intertwined with questions of authority. After proving the identity of the person harmed, the guardian will need to demonstrate that he or she is authorized to act on behalf of the person. In the decree regulating pensions in Argentina for minors whose parents have disappeared, Article 1 said, "For the specific case of minors and other situations in which this benefit is to be collected through a representative, the nature of this representation must be shown by clear and convincing evidence."[61] If the individual is illiterate or disabled, the guardian should have another person witness the document that authorizes the guardian to act on his or her behalf. That could be a notary or, in a refugee situation, an official of the organization managing the refugee facility, either of whom may keep a record of the transaction.

Establishing harm

Dead, disabled in any way, persecuted, imprisoned or exiled: all these are harms that some political systems have compensated. Each requires a different kind of proof.

Harm: *Dead.* As several of the national examples quoted above show, death certificates normally must be obtained from the state. And while agreeing to record a missing person as dead is controversial in some situations, such as when families are reluctant to give up hope that the person did not perish, it is often a rigid requirement

[60] International Committee of the Red Cross, "Chile: ICRC stores DNA in search for missing persons," 21 January 2015 https://www.icrc.org/en/document/chile-icrc-stores-dna-search-missing-persons; "ICRC collects DNA to identify Lebanon's civil war dead," *AFP*, July 2016 https://www.yahoo.com/news/icrc-collects-dna-identify-lebanons-civil-war-dead-173910965.html

[61] De Grief, op. cit., Argentina National Decree 1.228/87, Article 1(b).

for compensation.

If a death certificate is not available, the records of hospitals, including police and military hospitals, and records of morgues and cemeteries can help verify the dead. In cases of death in police or military custody, unit records may contain evidence; in the infamous cases of persons pushed to their death from airplanes, military flight records may provide supporting evidence. Death in the custody of paramilitary groups may have little official documentation (unless, of course, the death was video recorded and posted on social media for propaganda purposes). In those cases the testimony of witnesses will be the only available evidence.

Harm: *Medical condition.* Documenting the harm that resulted in a compensable medical condition may be difficult or at least complicated to prove. For example, part of the form to be completed by persons making claims under the German Restitution Law of 1965 for harm to body or health asks:

> "What ailments do you ascribe to persecution measures?" (Exact information on appearance of bodily harm and disruptions it caused to working ability.)
>
> "In your view, what special measures of persecution or what persecution-induced circumstances caused the harm?" (Provide the time period and precise description of events, indicating evidence.)
>
> "When did the ailments first appear?" Ailment, time period
>
> "How did the bodily harm become evidence?"
>
> "Are you under a doctor's treatment because of the bodily harm, or were you treated in a hospital (including infirmary or prison hospital)?" From-, treated by whom or where (address), ailment, type of treatment
>
> "What insurance carrier were you a member of?" Prior to persecution, in; during persecution, in: "What insurance carrier are you currently a member of, in?"
>
> "Have you been evaluated or cared for by a health office, another official office, or at the behest of a social insurance carrier? In what time period? Where? For what reason?"
>
> "When, where and because of what illness did you undergo medical treatment or therapy at the expense of health insurance carriers, insurance carriers, agencies, or at your own expense?"
>
> "What illnesses do you suffer from, or what bodily injuries or health damage exists that you do not attribute to persecution?" Description of illness, bodily injury or health damage, Starting when, Address of doctor or hospital where treated, Address of insurance carrier.

These questions, many of them nearly impossible for a person not traumatized to answer, were followed by questions on the personal and economic situation of the persecute, the spouse and the parents, including the requirement to "attach evidence (proof of income, tax return, etc.)."[62]

[62] Pross, op. cit., pp. 197-207.

Proof of harm resulting in a debilitating medical condition normally resides in medical records. In the best cases, claimants can obtain copies from the medical facility itself, often with a certificate of authenticity attached. But obtaining patient records is not easy. In war zones, hospitals, ostensibly protected under the provisions of The Hague conventions on the law of war, now are often subjected to bombing, fire, and destruction, taking records blazing with them, whether stored in paper, on x-ray film, or in computers. In the case of the Marshall Islands claimants, many of them were treated in hospitals in other countries: in Hawaii, in Manilla, in medical centers in the continental United States. Others were treated in Majuro, the capital, but the old hospital was razed and records were destroyed. And some people were treated in U.S. military or other secure government facilities who controlled the treatment records as sensitive if not classified; after much back-and-forth between the Tribunal and the government facilities, the Tribunal doctors were allowed to obtain the crucial documents.

Also, there are locations where no medical facility existed and people were treated informally, if at all. Sometimes refugee and humanitarian organizations were able to reach these people and to some degree document their suffering; those records would be available if kept by the organizations.

Medical records are also complicated as proof because medical practice, terms and diagnostic criteria have changed over the years. A diagnosis of a prisoner by a medical officer employed by a military hospital forty years ago would not only need to be evaluated for bias (the patient was a prisoner) but also for the changes in categorization of, especially, mental conditions.

A further complication is that non-medical persons who sit on bodies making the compensation decisions find medical records difficult to interpret. The Nuclear Claims Tribunal had a medical officer review the records and make a report to the commissioners, rather than try to understand the medical terms, abbreviations and conclusions in the records.

Harm: *Prison, disappearance and exile.* The records of prison, disappearance and exile are, as with death, largely in the archives of the government. Arrest records are with the police; abduction records sit in archives of military and police units, even if the information is said to have come from paramilitaries in league with the government. The duration of imprisonment may be documented through lists of persons held each day at a facility and records of feeding. Records of prison hospitals also provide dates when the individual was known to have been in custody.

Non-state actors may keep no records of persons captured and held, but it is also possible that there are internal records of prisoners. For example, ISIS sold women and children as slaves, and the records of those transactions have been found in their computers and in postings to electronic services.[63]

[63] The *New York Times* published a long report on the enslavement and systematic rape of captive Yazidi women and girls by Islamic State fighters. The Islamic State "has developed a detailed bureaucracy of sex slavery, including sales contracts notarized by the ISIS-run Islamic courts." Women who managed to escape said that "their status as a slave [was] registered in a contract. When their owner would sell them to another buyer, a new contract would be drafted, like transferring a property deed." At least one woman was set free and given a "Certificate of Emancipation" signed by an Islamic State judge. Some of the captive Yazidi women "were bought by wholesalers, who photographed and gave them numbers

Records of trials, however hasty, and the resulting sentences are found in archives of civil and military courts. Some non-state bodies like ISIS also have used a form of trials, some of which are documented.

If the state is unable or unwilling to provide evidence of its actions, civil society groups and independent media may have documented disappearances and may have copies of judicial proceedings that were given to them by family members. In some cases, too, such as the Honduras case discussed above, an international judicial body may have records that provide evidence. And, of course, families of the imprisoned and missing will often have personal items showing their concern, such as emails among family and friends asking anxiously if they know where the person is.

A particularly cruel provision in some state laws is to require the claimant in a case of disappearance to provide a copy of the filing of the writ of habeas corpus. Families of the disappeared in some countries, such as Chile, did indeed file petitions with courts seeking the release of the missing person. But once again this shifts the burden of proof to the family of the person and creates guilt if no petition was made and thus no documentation exists.

Exile is documented by both the state expelling the person through a judicial proceeding and the state providing refuge. Court, border control and transportation records could be useful; diplomatic records might have the arrangement with the country to which the person was deported. Families also are likely to have documents, including social media, showing the existence of the person in exile.

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As demonstrated above, many sources exist to establish an identity and prove harm and thereby support the demand for compensation. The state awarding the compensation, whether by a law or decree or through action of the courts, often possesses the information that can verify the claim. Adjudication of the documents before a claims body must have procedural fairness and should also be sensitive both to traditional forms of adjudication and to the emerging international legal consensus on appropriate methods to validate the links between the victim, the violation of the law, the harm that resulted, and the nature of the compensation (direct monetary loss and moral damage) that can be claimed.

Often the critical documentation problem is the unwillingness of the state to open the relevant records. Classification of records as secret and the exemption of military and police forces from government records laws (including freedom of information acts) severely hampers the fact-finding required in compensation cases. In the face of intransigent officials denying that records exist, and unless courts are willing to force the police and military to completely divulge their records, claimants will go through the excruciating process of assembling documents from other sources, including by taking sworn testimonies, in order to obtain compensation.

to advertise them to potential buyers." Rukmini Callimachi, "ISIS Enshrines a Theology of Rape," *New York Times,* 13 August 2015. http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html?mkt_tok=3RkMMJWWfF9wsRonv6vKdO%2FhmjTEU5z17u0kUKCg38431UFwdcjKPmjr1YIHRMFqI%2BSLDwEYGJlv6SgFSLHMMa12z7gLXxI%3D&_r=0

As a claims commission begins its work, the body needs to be sensitive to the requirements that proof places on archivists. For example, here is what the Government of Canada did to verify that former students resided at a recognized Indian Residential School:

1. A computer search is an automatic search of over two million documents which produces clear answers in about 40 per cent of cases.

2. If the computer search does not give a clear answer, a researcher must manually search through documents for each school named in the application in order to confirm eligibility.

3. If a manual search does not produce a clear result, the [authorities] will try to contact the applicant to find out more about their residential school experience. If the applicant can provide information, their answers will be compared with what is known about the school and life there to support the application.[64]

While the government did this search, other archivists researched the records of the churches who ran the schools. Claude Roberto, an archivist in Alberta, Canada, wrote of the research done by church archivists for the truth commission that was part of the settlement package:

> The Canadian government and religious organizations involved... signed an agreement to support the activities of the [truth] Commission and make their records available to it. This agreement put archivists in an unprecedented and stressful situation requiring them to identify and make records available to the Commission. The agreement was written by lawyers of the commission, without consultation with archivists. Consequently the extent of the records to be reviewed and the amount of work to be done by archivists were largely underestimated.
>
> Religious archivists photocopied records to protect their integrity and to prevent theft and tampering. They made information available and remained impartial in a climate of hostility and conflicting interests as well as cuts in institutional funding. Transparency was essential in institutions serving donors, including clergy members, and users such as the Commission. However archivists face ethical issues when requirements from Canon law conflicted with transparency. Archival standards and practices suddenly changed: the need to provide access became by far more important than other archival responsibilities and protection of privacy and intellectual property rights.[65]

Conclusion

The second half of the 20th century saw governments compensating other

[64] Indigenous and Northern Affairs Canada, Indian Residential Schools, Common Experience Payments https://www.aadnc-aandc.gc.ca/eng/1100100015594/1100100015595

[65] Claude Roberto. "Indian Residential Schools Truth and Reconciliation Commission of Canada: Accountability, Transparency and Access to Information." https://www.ica.org/en/claude-roberto

governments for the specific purpose of indemnifying their citizens: Germany began the practice, and it has continued into the 21st century. In 2014, for example, France transferred $60 million on the United States to compensate persons now living in the United States who were transported to World War II concentration camps on French trains.[66]

Sovereign immunity has eroded, with individuals suing governments for harm. Governments, in response, have agreed to settlements that acknowledge harm and provide monetary and sometimes moral indemnity. And some governments, particularly after a change in regime, have voluntarily developed compensation plans for categories of people harmed, such as families of the disappeared or persons unjustly incarcerated.[67]

Governments are also being sued by individuals from another state who have been harmed by the actions of that state. For example, the Mothers of Srebrenica sued the government of the Netherlands for lack of protection by the Dutch peacekeepers in Srebrenica of their husbands and sons who were killed.

Individuals are also bringing abuse claims against governments to regional human rights commissions, especially the Inter-American and the European commissions, and through them to the respective Courts of Human Rights. Individuals can petition the United Nations High Commissioner for Human Rights to launch an investigation into an abuse, and the Commission can recommend that International Criminal Court bring charges.

Today international corporations are often sued for human rights damages—to health, to environment, to community. Obtaining the documents for proof in these cases is difficult, whether the corporation is state-owned or private. Claimants find themselves facing corporations with closed corporate archives. In extractive industries or industries that manufacture products that harm health (and know the products are harmful), compensation cases arise from litigation brought by private individuals against the firm in national courts. While in some instances the persons harmed have, for example, personal medical records that document harm to health, the records of the firm are usually obtained through a laborious, expensive process of legal discovery. In a few instances, leaks from within the corporation or accidental document disclosures have played roles in the compensation cases. But until there is a more regulated means of obtaining relevant corporate documents in cases of violations of international humanitarian law or international human rights law, these claimants will not have a regular, assured document disclosure path to follow, nor will they have a clear path to adjudication in an international tribunal.

Be it in governments or nongovernmental bodies or corporations, considerable effort is required to locate and make available the records that document harm. It is a burden that the institutions of state and private sector should shoulder. The preamble to

[66] Agreement between the United States of America and France, Claims and Dispute Resolution, Treaties and Other International Acts Series 15-1101, 8 December 2014. https://www.state.gov/documents/organization/251005.pdf

[67] "Netherlands Found Partially Liable for Srebrenica Deaths," BIRN, 27 June 2017. http://www.balkaninsight.com/en/article/srebrenica-netherlands-peacekeepers-verdict-06-27-2017?utm_source=Balkan+Transitional+Justice+Daily+Newsletter+-+NEW&utm_campaign=186f3c69a3-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_a1d9e93e97-186f3c69a3-319755321

the Basic Principles on the Roles of Archivists and Records Managers in Support of Human Rights, a 2016 official working paper of the International Council on Archives, says that "adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to archival services provided by independent archival professionals." Material and moral indemnity for grievous harm is essential. Only when that is paid can victims and victimizers, in Konrad Adenauer's words, begin "easing the way to the spiritual settlement of infinite suffering."

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