Judicial Redress for Historical Crimes: Procedure

GEOFFREY C. HAZARD, JR.*

Introduction
In logical and formal legal terms, the concept of compensation for victims of historical crimes through civil legal proceedings is perfectly coherent and can be implemented in many legal systems with limited technical difficulties.

Claims for compensation can be formulated in pleadings on the basis of substantive legal theorems recognized in virtually all modern legal systems. Problems of evidence can be accommodated by relaxation of the restrictions on “hearsay” evidence. Various procedural mechanisms exist in all modern legal systems by which claims of multiple claimants can be joined together in one action or by consolidation of separate proceedings. Adjustments in other procedural rules that formally are only minor ones would accommodate the claims. Hence, arguments questioning the legitimacy of claims for compensation for historical crimes cannot be intelligently addressed in terms of conventional legal analysis of judicial procedures. Instead, different terms of reference are required.

Substantive Bases of Claims
A first requirement of a procedurally valid claim is that it rest on a substantive legal basis recognized under applicable law. Virtually all wrongs within the category of “historic crimes” are also civil wrongs, that is, a basis for compensatory judicial relief. The most horrendous historical crime was, of course, the Holocaust, in which millions of European Jews were exterminated by the Nazis. There have been many other mass killings of innocent people, before and since, and other crimes against persons such as systematic torture, rape and subjugation. Other historic crimes include theft of property such as bank accounts and of artistic and cultural objects.

From a procedural perspective, there is no serious difficulty in framing claims for compensation for these wrongs in substantive legal categories that are recognized in all modern domestic legal systems. In common law systems these are “torts”; under civil law they are civil delicts or simply wrongs. The forms of

* Trustee Professor of Law, University of Pennsylvania.

1 A synthesis of modern civil procedure concepts is being developed in the American Law Institute/Unidroit project for Principles of Transnational Civil Procedure. See ALI/ UNIDROIT Principles and Rules of Transnational Civil Procedure, Preliminary Draft No. 3 (November 6, 2002).
misconduct – homicide, assault, theft – therefore can be readily translated into formally proper civil claims.

Hence, there is no serious objection that the substantive legal basis of these claims is being invented ex post facto. Most if not all of these claims nominally would have been enforceable at the time when the acts occurred. The failure of enforcement was not because of legal inadequacy of judicial remedies or substantive bases of liability. Instead, it was because government regimes prevailing at the time either asserted that the conduct was lawfully justified (essentially an affirmative defense of national necessity), or that the conduct was legitimate in some political sense, or the regimes ignored the offenses and protected the offenders. That is why the crimes are “historic.” By the same token, that is why there is generally no issue of “ex post facto” invention of the legal basis of the claims.

Place of Trial (Venue in Common Law Terminology)
A second procedural problem is that of competence or subject-matter jurisdiction of a forum. In the pursuit of civil redress of historic crimes, there are some difficulties in identifying a legitimate legal theatre in which the facts can be established and legal rules administered.

The proper place of trial under generally accepted principles of procedure for redress of civil wrongs is the residence of the defendant. Concerning some historic crimes, the potential defendants still reside where the offenses occurred, and hence would be subject to jurisdiction in those locations. In other instances, some sort of international assistance would be required. The principle and practice of criminal extradition has long been recognized under principles of international law. The facts of the Pinochet case are illustrative. International judicial assistance in claims against a civil defendant in a location outside the forum are similarly well established.

Here again, the procedural problem is not technical but extra-legal and political. The question concerns the willingness of one judicial system to provide assistance to a foreign proceeding where claims for historic crimes have been asserted. The wrongdoer may reside or, in the case of a corporate defendant, have its headquarters, in a place where the judiciary is connected historically (and sometimes personally) to the original events. Courts in that location accordingly may be reluctant or recalcitrant in responding to requests for assistance.

If traditional procedural principles were applied, the result could be the recusal of a regime’s entire judiciary. That possibility is unrealistic. However, the continuing relationships between the past and present can be manifested in hesitant or ineffective judicial assistance in prosecution of historic crimes in the place where they were committed.