

"Holocaust Compensation"
From the vantage of Jewish Law and Morality

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The questions concerning compensation for the Holocaust atrocities--specifically the enormous monetary damage suffered by the victims, survivors, and Jewish community as a whole--are of historic significance not only practically but morally. In elaborating an approach to them, I have in mind the moral self-confidence of us on the Jewish side rather than an attempt to persuade the governments on the other side. I will endeavor to formulate a specific *Jewish* view in order to develop what I hope will be an authentic Jewish response to the issues before us, one based upon the classics of the Jewish tradition. In other words, I will let the sources speak for themselves, even if such conclusions will not meet with unanimous approval, and even if I will have hoped for different results.

Some caveats: comparisons to historic approaches and situations described and prescribed in classical texts often lend themselves to overstating similarities and undervaluing differences. Moreover, we cannot always expect the halakhic sources to be applied directly and without some attempt at interpretation to unprecedented situations. In such cases, we must read out (not into) the halakhic sources the basic principles and values that motivated the detailed laws which the tradition bequeathed to us. However, if handled sensitively and honestly, such extrapolations have much to teach us, and we ignore them at our own peril. I will try to exercise such sensitivity. If I fail, it will not be because of want of trying.

There are two major issues that I will deal with--the responsibility of governments that seized Jewish property during the Holocaust, and priorities for the proper distribution of the recovered funds to the victims and their survivors. I shall do so on the basis of Biblical teachings and, more particularly, on the basis of Halakha, i.e., the Oral Law which explicated and supplements the Written Law or Scripture.

The Jewish tradition distinguishes between law (דיני אדם) and ethics or morality (דיני שמים). Law is enforceable by human courts; morality is a matter of one's conscience. However, there are times when history makes great demands on the moral conscience of nations and institutions--demands that impose mandatory action upon us, even transcending the law itself. Whether or not this is applicable in our contemporary issues remains to be seen.

Let us pose the major question: *Are successor governments and institutions responsible to compensate victims of the Holocaust?*

The story of Elijah and Ahab (I Kings 21) is well known: Ahab, sovereign of the northern Kingdom of Israel, lusts after the property of Nabot, his immediate neighbor, and he offers a generous price to buy it from him. The latter refuses, because it is his ancestral estate. Ahab falls into depression and his wife, Jezebel, takes over, promising her childish husband that *she* will obtain the estate for him. She cooks up a phony trial, where Nabot is falsely accused of blasphemy and treason and is executed--whereby Ahab seizes Nabot's lands. Incensed at this outrageous royal injustice, the prophet Elijah confronts the king and utters the immortal challenge: "כֹּה אָמַר ה' הֲרָצַחְתָּ וְגַם יָרַשְׁתָּ" "Have you murdered and also inherited?" It is morally indefensible to allow the criminal to enjoy the fruits of

his crime at the expense of his victims. Elijah was not concerned with any possible criticism that a man of God should not stoop to attend to mere pecuniary matters, that a prophet should be involved only in not-for-profit issues. Money and property are an area where humans can act either justly or unjustly and it is the responsibility of men and women of rectitude and probity to support justice and condemn injustice. And to refrain from protesting is itself perfidious.¹

This prophetic challenge is not only an expression of an intuitive sense of right and wrong, but receives formal expression as law, Halakha. Thus, the Torah teaches that if one stole he must return the object to its rightful owner: (ויקרא) והשיב את הגזלה אשר גזל (ה' כא-כג). The Halakha is succinctly summarized by Maimonides:² the thief is required to return the very item he stole; even if he had built a stolen beam into a entire building, he must destroy the building in order to return the beam. However, to make it possible for repentant thieves to make restitution without being subject to inordinate and unsustainable expenses and thus discouraged from compensating their victims, the Sages of the Talmud ordained a תקנת השבין, "decree for the penitent," allowing the thief to return only the *value* of the asset, such value determined as of the time of the crime.

The application to our case is self-evident. Countries which officially and actively collaborated with the Nazis have no right to inherit the estates of the Jewish victims. Killers are not entitled to keep the property of their victims. To refuse to compensate the victims and their heirs is to compound murder with the vilest form of moral hypocrisy. הרצחת וגם ירשת? Legally and morally, these countries, from both a Biblical and Talmudic perspective, must return what was stolen from their hapless victims: "והשיב את הגזלה אשר גזל"

It would be a mistake, however, to limit this culpability to governments which officially endorsed anti-Semitic depredations. Even those states which passively condoned the murder of Jews, which did not protest the murder and despoliation of millions of Jews, are guilty of transgressing the Biblical admonition of (ויקרא יט-טז) לא תעמוד על דם רעך. Nations as well as individuals are enjoined to defend the defenseless, to succor the victims, to prevent bloodshed -- certainly within their own borders.

The Halakha declares it mandatory--a *mitzvah*--to prevent the pursuer (*rodef*) from achieving his nefarious goals. The bystander who fails to lift a finger to save the intended victim from the pursuer may not be formally penalized, because the violation of a

¹ Interestingly, not only the concept but even the very phrase--*Ha-ratzahta ve'gam yarashta* -- "Have you murdered and also inherited?" -- is echoed throughout the ages as a categorical rejection of the retention of ill-begotten gains. See Midrash (*Pirkei de'Rabbi Eliezer*, Horev 21) which reads back the almost identical dialogue into the Biblical narrative of Cain and Abel. And much later, one of the most prolific decisors of the 14th-15th century, Rabbi Simeon ben Tzemah Duran of Majorca and Algiers (1361-1444) invokes the immortal words of Elijah in ruling on behalf of a woman abused by her husband in a divorce case (*Shut Tashbatz*, II 8). This prophetic utterance is suffused with a sense of moral rectitude and revulsion at an obvious injustice. Its power has not diminished with time.

² *Hil. Gezeilah* 1:5, 2:2.

commandment which does not entail a positive act is not subject to judicial punishment.³ But, as Maimonides rules, *אע"פ שאין לוקין על לאוין אלו מפני שאין בהן מעשה חמורים הם שכל המאבד נפש אחת מישראל כאילו אבד כל העולם כולו וכל המקיים נפש אחת מישראל כאילו קיים כל העולם כולו* (הל' רוצח פ"א הט"ז). The absence of formal punishment does not imply the absence of culpability and calumny. The bystander who turned a blind eye and deaf ear to the cry of the innocent victim is a rogue, a moral leper. Most certainly he--or it, the state--cannot escape the burden of opprobrium. Cold-hearted officials, diplomats, politicians stood by and watched while our Jewish world was destroyed in Europe. Elijah would proclaim with equal eloquence, in such a case, *"הרצחת וגם ירשת"*. It is a second degree case of what might be called, "aggravated Ahabism."

At this point, I must digress from the argument here presented to express my unhappiness and even dismay at the way this correct and rightful demand that the victims and their families be compensated. We have acted in a manner that allows the media, perhaps abetted by a degree of unconscious anti-Jewish stereotypes and even propaganda by those responsible to pay, to paint all of us as money-grubbing Jews whose only interest is in shekels. The infighting in the survivor groups, the hullabaloo about extravagant lawyers' fees, the concentration on the pecuniary aspects of the case against the successor governments—all this does not add to the glory or dignity of our people. Perhaps some or maybe most of this is inevitable, but it is deplorable and unfortunate that there was no talk of the moral dimensions, the non-financial responsibilities of the murderers and their heirs. I know this is not particularly germane to this discussion, but our Sages warned us a long time ago that, *כל מקום שיש חלול השם אין חולקין כבוד לרב* (מס' ברכות דף יט ע"ב).

Finally, there is a third category of states that have come into possession of Jewish property even though no crimes were committed within their own borders. This includes neutral countries as well as those Allies of World War II that never succumbed to Nazism--indeed, opposed it--and that, like USA or Great Britain, had no history of Quislings or Petains attaining formal political power. There is no fundamental blot on their records, at least insofar as our theme is concerned. Yet confiscated Jewish property--gold, diamonds, real estate, art--has somehow found its way into their treasuries. Having committed no crime, the Elijah charge is not relevant to them. Nevertheless, they are receivers of stolen goods, and the Talmudic tradition considers this a serious infraction. If the owner had not despaired of retrieving his property, Biblical law requires the purchaser to return the object to its original owner without compensation, and it is up to the purchaser to sue the thief to recover his loss. However, the Sages enacted a special decree (*תקנת השוק*--an "open market rule") to protect the new owner who acquired the stolen object in good faith, lest all commerce be inhibited by fear that one is innocently acquiring stolen goods.⁴ This Rabbinic decree protects the innocent receiver of the stolen items by having the goods returned to the owner, and it is the owner who must then go to the trouble of instituting a suit against the thief. But this relief is not available, according to many authorities, in the case of a "notorious" thief,

³ Rambam, *Hil. Rotzeiah* 1:15.

⁴ *Bava Kamma* 115a.

Whether this principle of returning such property for use by the public is law (דיני אדם) and hence actionable in a court of law, or morality (דיני שמים), is explored by a contemporary halakhic scholar.¹² For us, it makes little difference, for there is no question of summoning independent nations to appear before a Bet Din sitting in Israel or France or the U.S. We are armed only with the force of morality and conscience--and leave the final resolution to the Almighty: the "laws of Heaven."

In principle, then, the countries that plundered Jewish property, whose owners were, for the most part, murdered, are morally bound to make restitution to the victims or their heirs, if such can be found, or to "the community" for צרכי רבים, the use of the public. This latter term, as we have seen, is seemingly narrowly defined as "wells, ditches, and caves," in the expectation that the victims or their heirs will benefit from such public works as part of the community.

We are then presented with two problems: first, what if there is very little likelihood that the victims or their families are present in the countries or communities in which the crimes were committed; and second, must the restitution be limited to public works such as wells, ditches, and caves?

There are commonsensical answers to both questions in halakhic literature. R. Abraham Isaac Kook, the first Chief rabbi of what was then Palestine, discusses the first question in one of his halakhic tomes.¹³ The public utilities which are to be the beneficiaries of the returned objects which were plundered must be located in an area where it is likely that the victims or their heirs will be in a position to benefit from them. Hence, if the Jews of the area are scattered and very few of the inhabitants remain in the original sites, the payment must be directed to those areas to which most or many of the surviving victims have repaired after the crimes were committed.

More serious and urgent is the following dilemma: what of the millions of victims who were wiped out with no heirs or family? True, the Talmud¹⁴ maintains that *every* Jew has relatives. When the Torah (Numbers 5:8) speaks of the return of wrongfully obtained property to one who is deceased "and had no kinsman," the Talmud asks, in a tone of surprise, "וכי יש לך אדם בישראל שאין לו גואל" (סנהדרין ס"ח ע"ב). The Talmud is so sure of this that it goes on to identify the heir-less Israelite in the Biblical passage as a proselyte who dies; such a one is regarded as without relatives because the previous biological relations are no longer valid, given the proposition that "a proselyte is like a newborn child."¹⁵ But otherwise every Jew is considered as having left heirs, even if it means tracing him back to the Patriarch Jacob as the common ancestor.¹⁶

¹² R. Yaakov Yeshaya Blau, *Pit'hei Hoshen*, 4:18, n.3.

¹³ *Shut Orah Mishpat*, *Hoshen Mishpat* 18.

¹⁴ *Sanhedrin* 68b.

¹⁵ *Yevamot* 48b.

¹⁶ Rashi to *Bava Kamma* 109a, s.v. *Ve'khi yesh*.

for then the presumption is that the buyer should have suspected the seller to have stolen the item.⁵

We now turn to the next serious question: *the proper distribution of whatever funds are made available to Jews for plundered property:*

In Jewish law, if the victims or their immediate heirs can identify their property, there is no question that it is they to whom the stolen property or its value must be returned. The principle is evident throughout the halakhic literature,⁶ and every effort must be made to locate the owners.⁷ Hence, such assets as art, businesses, homes, other real estate, etc., must be returned to the rightful owners or, if that would cause significant financial or social displacement, their value must be returned. But what if there is no reasonable likelihood that relatives can be identified --such as in our case where one third of our people was exterminated and it is now half a century after the Holocaust?

Here we come to an important distinction in the sources. Thus, the following statement by the Tosefta, one of the most significant legal treatises of the early years of the Common Era:

One who steals from the public must return it to the public. Stealing from the many is more grave than stealing from an individual, for if one steals from an individual he has the opportunity to propitiate him and return the stolen item, but one who steals from the many cannot propitiate his victims and return to them what he has taken from them⁸

The Babylonian Talmud⁹ cites this source and then amplifies the principle and teaches that those who habitually steal from the general public (such as in the case of shepherds who are wont to graze their sheep in fields that belong to others, tax collectors, and revenue farmers) should restore the stolen articles to the victims if they recognize them, but if they do not--such as stealing public property or from any large number of people--they should offer the money for צרכי רבים, public utilities. This is defined by R. Hisda as "wells, ditches, and caves": תשובתן הרועים והגבאים והמוכסים, קשה מפני שגזלו את הרבים ואין יודעים למי יחזרו, לפיכך יעשו בו צרכי רבים, כגון בורות שיחין ומערות (ש"ע חו"מ סי' שסו סעיף ב) This ruling, incorporated in the standard Code of Jewish Law,¹⁰ is based on the notion that at least some of the anonymous victims will probably benefit from their loss as members of the larger public.¹¹

⁵ On this subject in general, see Rema to *Shulhan Arukh Hoshen Mishpat* 356, 360, *et passim*, and *Arokh ha-Shulhan* ad loc.

⁶ Meiri, *Hibbur ha-Teshuvah* 1:11; *Shulhan Arukh ha-Rav, Hoshen Mishpat*, 366:2.

⁷ *Shut Radvaz* III 504.

⁸ Tosefta (ed. Lieberman) *Bava Kamma* chapter 10.

⁹ *Bava Kamma* 94b.

¹⁰ *Shulhan Arukh Hoshen Mishpat*, 366:2.

¹¹ See *Arokh ha-Shulhan*, *ibid*.

This Talmudic teaching presents us with a baffling problem. If we are to assert that every Jew must be considered to have left a relative, no matter how distant, then what of the Holocaust where entire communities--one third of our people---were wiped off the face of the planet?

Our case is so rare, so unimaginable to previous generations for whom the principle of the ubiquity of Jewish kinsmen was self-evident, that we are indeed in a position to say that in our days, tragically, history has confounded the assumption of the Talmud: vast numbers of Jews did indeed die without heirs. Or, we may put it in another way: accepting the Talmudic principle as valid even for such incredible circumstances, the result is that *all* Jews, wherever they were during World War II and wherever they reside now, must be considered relatives. We are all of us survivors or relatives of survivors. If indeed all Jews can be traced to common ancestors, and are therefore related to each other, the practical effect of the remoteness of such relationships is that the claims for restitution must be made on behalf of the Jewish people as a whole. We are all *mishpacha*. It is the Jewish *people*, not individual Jewish *persons*, who have the major claim on the property taken from the Holocaust victims.

The survivors and their families have just claims to receive compensation for what was violently taken from *them*. But they have no greater claim on the property of the millions of martyrs who left no identifiable heirs. The people as such do have such creditable claim.

The second question as to the nature of the public utilities--the צרכי רבים--is resolved in favor of a broader definition. The "wells, ditches, and caves" are only *illustrations* of public needs, and are not meant to be confining. R. Isaiah Halevi Horowitz (16th-17th century Prague) maintained that the term comprehends as well such things as donating the funds for purchasing books for a communal library, such as a the synagogue and the like--since they will be used by the public.¹⁷ A great contemporary authority, the late R. Moshe Feinstein, o.b.m., holds that the funds may not be used for ordinary צדקה, such as supporting individuals who are needy--presumably because this does not qualify as צרכי רבים --but they may be used for such things as the building and repair of communal baths because they serve the public at large.

For our purpose we must focus on the theft or destruction of public property, namely, communal institutions such and synagogues, kindergartens, schools for older children and adults, Jewish clubs, etc. Certainly, if enough Jews remain in a city where such institutions once flourished, these institutions should be rebuilt with the funds made available by the authorities. But what of the hundreds or thousands of towns and villages which are now all but *Judenrein*? What of the cities where once magnificent structures were erected at enormous cost to the local Jews and philanthropists, and have then been converted into engineering schools or office buildings or government institutions--or stables? What of communities now composed largely of Jews who fled from faraway places, where the probability of indirect benefit to the original owners does not apply?

¹⁷ As cited in R. Israel Meir Kagan's *Ahavat Hesed*.

The very vastness of the pillage and the considerable revenue from such restitution--if indeed it ever becomes available--challenges us to exercise our most creative moral imagination.

It is only right that we consider the original, underlying purpose of such public institutions as a guide to the proper disposition of the funds. Almost all of these buildings were dedicated, one way or another, to the perpetuation of Judaism or Jewish life, mostly via education and research. That is exactly what such funds should be used for: the perpetuation of Judaism or Jewish life via Jewish education on all levels from kindergarten to high scholarship, from traditional yeshivot to Yiddishist circles, from Zionist camps to YIVO activities..

We are all in danger of a precipitous and calamitous decline of the numbers of Jews in the world--especially in the Diaspora but in Israel as well. We are all well acquainted with the sorry statistics. Education is not a guarantee, it is not a nostrum for all ills. But--as Churchill said of democracy, that it is a terrible form of government but the others are far worse--education alone is inadequate but all the other proposed solutions are infinitely less effective. If we fail to take advantage of these funds for education--to perpetuate the lives of the vanished communities and not only to commemorate their deaths; and to prevent as many young Jews as we can from tumbling into the abyss of demographic implosion and spiritual rootlessness--we will be guilty of a monumental historical error, one which will be beyond the ability of any conferences, studies, or gimmicks to cure. We are honor bound use the funds of these public institutions honorably, aspiring to the same ultimate goals as they once did. We must use them to resurrect and renew Jewish life, to empower Jewish children with knowledge of their past and promise for their future, and make a creative, vibrant, flourishing Jewish community our posthumous gift to our *kedoshim*--a living memorial to their lives and aspirations, not merely commissioning silent sculptures as testaments to their annihilation.

This is not an easy task, because we will be pressured to put the bulk of our recovered resources into memorials of all kinds. Certainly, memorials must be established, and some of those already done are magnificent. But now the times call for living memorials, testaments to life, the lives and loves of the martyrs. For if there will be no Jews, two or three generations from now, to summon the memory of the קדושים, who will remember them? Are we to build only for non-Jews? Are not living, breathing, proud, committed Jews a greater and more enduring memorial to the generations that perished in the Holocaust?

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We are now in a position to *summarize our findings* which, although this study has by no means been exhaustive or comprehensive, should give us an inkling of a Jewish perspective on the question of restitution for the victims of the Holocaust.

1. It is morally repugnant to have been complicit to murder--whether directly or indirectly--and to retain the ill begotten gains. To hold on to such fruits of crime is morally outrageous. For good moral reasons, we should not be shy about pressing such claims.
2. Jewish law requires stolen goods to be returned to their lawful owners. The victims must be compensated. This holds true for countries that actively suppressed Jewish life, those that condoned the oppression, and even the nations that neither supported nor condoned violence against our people, but still came into possession of objects stolen from us. They are all honor bound to make restitution.
3. The victims or their heirs--if such are identifiable--have first claim on the returned goods or their value, provided it was their personal property that was plundered.
4. Where such identification is impossible, the restitution must be made to לכל ישראל, to the Jewish "public" or community. Because the Holocaust caused massive displacement of the survivors, hardly any Jewish community can lay claim to special treatment. East Europeans have relocated to other countries in Eastern Europe--as well as to Western Europe, to Israel, to America, as well to South America and other countries; and the same is true for West European survivors. Because we are operating on the principle that there are victims or their heirs who exist but who cannot be identified, the restitution should be apportioned approximately according to the number of Jews--all of whom are in this sense survivors--in different geographical locations. The rule of thumb should be that restitution follows population. And we must recall that today probably half the Jews of the world are found in Israel.
5. Granted that the Jewish people are the beneficiaries of all property not reserved for the survivors and their heirs--in other words, they are the רבים, the "many" or "public" whose צורכים or "needs" must be supported. Is there any restriction as to the disposition of these funds for the common weal of the Jewish people?

The only restriction that I mentioned is that the money should not go for ordinary צדקה or, for that matter, any one class of people or projects in which all other Jews cannot participate. Now, while this ruling is completely consistent with the Talmudic example of "wells, ditches, and caves"--items from which all may benefit--we must still ask if providing for ailing or impoverished *survivors* violates this principle, or upholds it.

6. Finally, we treated as a separate matter the question of compensation for Jewish communal institutions that were destroyed. I suggested that the funds be used to perpetuate the very purpose that inspired their founding, especially Jewish schools, as the *real* and most enduring tributes to the martyrs--the development of Jewish minds and hearts and personalities, not just mute monuments. Jewish education--of all kinds

and on all levels--is that which can revive and re-empower the engines of Jewish creativity as we enter the seventh decade of the eighth century of the sixth millenium.

What is demanded of us at this critical time is wisdom and courage and mutual respect and the avoidance of bitter polemics. Above all, both history and destiny summon us to exercise our wisdom. For, as Scripture teaches us, כי הוא חכמתכם ובינתכם לעיני העמים, "this--the Torah--is (the source of) your wisdom and understanding in the sight of the peoples (of the world)...who shall say, 'Surely this great nation is a wise and understanding people'" (Deut. 4:6).

May we prove worthy of that encomium.