The Politics of Reparations and Apologies:
The Differential Application of Restorative Justice
Following State Atrocity

by

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Abstract:

Today, it is nearly a given that groups seeking redress or reparation for past wrongs will receive some form of justice. Groups wronged by states often seek and receive apologies and compensation, to the point that it is now worthy of discussion when groups do not receive some form of compensation or acknowledgement. Yet how did this widespread acceptance of redress and reparation emerge?

This thesis seeks an answer to this question, while also seeking to understand why it is that different groups, having experienced similar atrocities, have received varying degrees of redress. In order to do so, this thesis examines three countries and two victimised groups within each state-sponsored atrocity. In Germany, the Nazi government perpetrated genocide upon both Jews and Roma; in the United States, Japanese Americans and Japanese Latin Americans were both interned during World War II and, in the third case study, the Japanese military systematically enslaved and raped both Korean and Dutch women within occupied territories. In each of these cases, one victimised group had more relative success in achieving redress and reparation than the other.

This thesis thus considers the key historical background to the various social movements, the development of the social movements themselves and the gradual emergence of international norms and political opportunities which have combined to encourage what is today known as the redress and reparation movement. The thesis also seeks to determine factors which explain the differential success of social movements of groups which have experienced similar atrocities.

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Thank you.

Figures

Tables

Abbreviations

AJDC	American Jewish Joint Distribution Committee
CLPEF	Civil Liberties Public Education Fund
CWRIC	Commissionon Wartime Relocation and Internment of Civilians
DOJ	Department of Justice
FRG	Federal Republic of Germany
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IMT	International Military Tribunal
JACL	Japanese American Citizens League
JRSO	Jewish Restitution Successor Organisation
NGO	Non-governmental organization
OIA	Office of Intergovernmental Affairs
POS	Political Opportunity Structure
RRM	Redress and Reparation Movement
SMO	Social Movement Organisations
TRC	South African Truth and Reconciliation Commission
UN	United Nations
WRA	War Relocation Authority

Chapter One:
Atrocity, the State, and Reparation Politics

Overview

Today, it is nearly a given that groups seeking redress or reparation for past wrongs will receive some form of justice.[1] Groups wronged by states often seek and receive apologies and compensation. It is certainly worthy of discussion when groups do not receive some form of compensation or acknowledgement. Yet how did this widespread acceptance of redress and reparation emerge? This thesis seeks an answer to this question, while also seeking to understand why it is that different groups, having experienced similar atrocities, have received varying degrees of redress. In examining this question, this thesis will consider the key historical background to the various social movements as well as the gradual emergence of international norms and political opportunities which have combined to encourage what is today known as the redress and reparation movement.

While the redress and reparation movement has known great successes, particularly when previously victimised groups achieve closure, recognition of their suffering, and/or compensation, it is perhaps better understood as a sensitive topic. Redress and reparation movements, in seeking to right a wrong, also uncover painful memories. The following quote is perhaps thus a fitting start to this thesis investigating the differential success of reparation movements:

> "Coming to terms" with our past is not a celebration of great achievements, but rather the reverse: a moral and intellectual grappling with past behavior that gives cause more for shame than for pride, ranging from great evils such as the Holocaust to lesser actions fuelled by arrogance and insensitivity.[2]

1. Introduction

It is precisely this moral and intellectual grappling with the past which defines redress and reparation movements (RRMs), and which is understood differently by each victimised group and (previously victimising) state. These RRMs, which seek to achieve 'coming to terms with the past' – or, in its German original,

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[1] This is not to say that groups always receive a wide variety of redress or reparation, however some form is typically offered.

[2] Alan Cairns, "Coming to Terms with the Past," in *Politics and the Past: On Repairing Historical Injustices*, ed. John Torpey (New York: Rowman & Littlefield Publishers, 2003), p. 63.

Vergangenheitsbewältigung – emerged in the post-World War II era. States across the globe, starting with post-war Germany, began to make amends and offer apologies for state-sponsored injustices and atrocities. Reparation politics, as John Torpey dubbed it in 2001, first began with the Federal Republic of Germany's (West Germany or FRG) creation of restitution and reparation programmes for those Holocaust victims specified in the 1952 *Reparations Agreement between Israel and West Germany*.

With that specific beginning, the concept has now expanded to include, among others, the 1988 redress for World War II Japanese American internments, the establishment in 1995 of the South African Truth Commission, as well as legal steps such as German and Austrian laws which ban the denial of the Holocaust and United States Public Law 103-150 (1993), which apologised to Native Hawaiians for the overthrow of their native government. This thesis will draw from RRMs which have their foundation in World War II - the German genocides, the United States internments and Japan's comfort women system. Through examining these movements, I will explore each case study's relative success or failure and argue that there are overarching trends which can explain the success and failure of RRMs more generally.

1.1 Atrocity and Injustice

Michael Humphrey argues that state-sponsored atrocities are generally, by their very nature, political. Atrocities are shaped by political considerations and ideals, a state's history, societal norms, and contemporary economic and political status. Within the framework of current international law, atrocities challenge the foundation of modern political life, absolute sovereignty, and have led to the current debates on limitations of sovereignty found in arguments regarding 'conditional sovereignty' and humanitarian intervention.[3]

The central component of a state-sponsored atrocity is that the state enforces upon a segment of its population a violent and structured injustice, as recognised in the Rome Statute of the International Criminal Court, which entered into force in 2002. Such atrocities then leave the survivors feeling that they do not have the same rights, protection or opportunities as others.[4] The state, according to Humphrey, has indicated which segments of the populace are to be included and to be excluded from society, often by legalised injustice. Indeed, my examination of the cases in Germany, the United States, and Japan demonstrate a clear and evolving legislative exclusion of the

[3] Michael Humphrey, *Politics of Atrocity and Reconciliation: From Terror to Trauma* (London: Routledge, 2002), pp. 1 - 3.
[4] Ibid. p. x.

groups discussed. The state, through policy and action, insinuates whose life has value and whose can be infringed upon. The state has the ultimate say in power, violence and life, and as Humphrey points out, it is the state that ultimately challenges society: who dares to protect those whom the state has identified as victims.[5] My research examines the process of those survivors regaining some measure of *ex post facto*[6] justice.

State-sponsored atrocity and injustice go beyond legitimate state-controlled legal, judicial and political mechanisms that are established to contain society. The majority of these acts are illegal according to international law codified in 1945 for crimes against humanity and 1948 for genocide. Nonetheless, at times, these actions have been given a veneer of legality. I would argue, however, that states generally recognise that their actions are not only violating international law, but are also breaking international societal norms[7] of accepted behaviour. As Martha Finnemore and Kathryn Sikkink state, norm-breaking behaviour can be recognised because it generates disapproval or stigma.[8] Thus, when states break a commonly held norm, they have a tendency to hide these actions from international society, or extensively justify these actions as legal under their sovereign right. The very fact that these actions are cloaked from common sight, or require extensive justification, suggests that the leaders of the states know that these actions will be perceived to be wrong, thus implying that their actions violate an existing or emerging norm, i.e., a generally understood concept of right and wrong within international society.[9] The question emerges, then, as to when, precisely, the norm defining such behaviour emerged. I will argue here that this norm emerged in the post-war era (1945/1948), and became institutionalised with the Rome Statute of 2002.[10] This thesis discusses genocide, and two specific crimes against humanity, namely internment (deportation/imprisonment) and rape/sexual slavery.

Genocide, according to Article 6 of the Rome Statute, includes mass murder, forced sterilisation and the 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction' but only when committed with the

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[5] Ibid. pp. 4-5.

[6] Latin: "from something done afterward" An *ex post facto* law is one that retroactively changes the legal consequences of acts committed or the legal status of facts and relationships that existed prior to the enactment of the law. Most democratic criminal justice systems prohibit *ex post facto* laws.

[7] Following general usage, norms are standards of appropriate behaviour for actors with a given identity. Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4 (1998): 887-917, p. 891.

[8] Ibid. p. 892.

[9] Ibid.

[10] For other definitions of atrocity see Steven R. Ratner, Jason S. Abrams, and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* 3rd ed. (Oxford: Oxford University Press 2009); Humphrey, *Politics of Atrocity and Reconciliation*; and Claudia Card, *The Atrocity Paradigm: A Theory of Evil* (Oxford: Oxford University Press, 2002).

'intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'[11] Article 7 specifies crimes against humanity which include various acts such as murder, enslavement, torture, deportation and rape. The key aspect of this definition is that the act is 'widespread or systematic' and directed towards a civilian population.[12] It is important to note that I will not be applying these legal concepts *ex post facto,* but will rather be using the definition to spell out which actions violate existing norms in society today. These actions are what international society deems to be acts of such grave injustice that they cannot go unremarked and require an international criminal court to prosecute.

These acts, as grievous as they are, do not occur in a vacuum. They most often occur as the end result of an orchestrated process that conditions a collective to believe that the murder, rape, or imprisonment of another collective is acceptable because the targeted collective is, at the extreme end of the spectrum, 'sub-human,'[13] or inferior in some way. Whether such a group is defined by ethnic, religious or cultural criteria is, in many ways, irrelevant: the existence of such a group is socially constructed. As such, its positioning within society is not necessarily a fixed point, but changes as governments, regimes and societal norms adapt. This thesis will trace some of the key evolutions in the cases discussed here.

1.2 Definitions

Some definitions used in reparation politics will help to clarify the research at hand. 'Reparation politics' itself is key, but so are 'apologies,' 'restitution,' and 'restorative justice.' While many of these are terms that have entered into everyday usage, they do have specific meanings within the reparation politics context. 'Reparation politics', as coined by John Torpey, is the broad field within which actors, primarily states, attempt to address past wrongs. It includes a spectrum of redress and reparation acts, including transitional justice, apologies, restitution, and various other forms of restorative justice.[14] This thesis builds on the reparation politics field, drawing on political opportunity structure to explain why some groups have been more successful in reparation politics than others. In order to complete this argument, a framework measuring relative success is developed in Chapter Four.

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[11] United Nations, *Rome Statute of the International Criminal Court*, A/CONF.183/9, 2002, p. 3.
[12] Ibid. pp. 3-5.
[13] For an overview of how this process occurs and its utilisation to promote genocide and crimes against humanity see Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (Cambridge: Cambridge University Press, 1989).
[14] See John Torpey, *Making Whole What Has Been Smashed: On Reparations Politics* (Cambridge: Harvard University Press, 2006) for one of the seminal texts on reparation politics.

Apologies are one crucial element within reparation politics. Elazar Barkan defines an apology as 'an admission of wrongdoing, recognition of its effects, and in some cases, an acceptance of responsibility for those effects and an obligation to its victims.'[15] As will be discussed later, one key part of this definition is the phrase 'in some cases, an acceptance of responsibility.' The question of responsibility has, on many occasions, delayed or led to an outright refusal to issue an apology, because the current government does not feel that it is legally responsible for actions of a previous era or regime, refuses to accept responsibility for the event, or denies the event occurred. An apology is construed as constituting some measure of responsibility.

Restitution, one of the acts of redress that Germany initiated in response to Allied demands during post-war occupation, refers to the return of actual belongings which were confiscated, seized or stolen, such as land, art or ancestral remains.[16] Although 'reparation politics' is, as noted above, the broader term for the field of study, 'reparation' itself is utilised as a narrower definition. 'Reparation' refers to some form of material recompense for that which could not be returned, such as human life, a flourishing culture, strong economy and cultural identity.[17] Finally, compensation refers to payment for damages or loss that can be quantified and returned, such as loss of wages and property.[18] In theory, compensation will make the injured person whole. It is thus distinguished from 'reparation,' which acknowledges the irreversibility of some actions.

Restorative justice is, again, a broader term. While it was used initially within the criminal justice field, it is now a term that some redress and reparation movement scholars are beginning to appropriate.[19] Within this thesis, restorative justice will be understood as any state-supported action that attempts to redress historical atrocities and injustices.[20]

Social movements are groups 'acting with some degree of organisation and continuity outside of institutional or organisational channels for the purpose of

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[15] Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: W.W. Norton & Company, 2000), p. xix.

[16] Ibid.

[17] Ibid.

[18] Compensation is to make a payment to; to recompense; to repay; Black's Law Dictionary, 8th ed., s.v. 'compensation.'

[19] Both the definition within the criminal justice field and the utilisation of the term by redress and reparation scholars will be discussed within Chapter Three.

[20] This definition of restorative justice builds upon the definition that is beginning to emerge within redress and reparation movement literature, but has not yet solidified. This definition thus reflects my own personal use of the term.

challenging or defending extant authority.'[21] I have coined the term 'redress and reparation movements' (RRMs) to describe social movements that focus on obtaining some form of restorative justice.[22] Social movements and RRMs will be discussed in this introduction while restorative justice will be discussed in Chapter Three.

1.3 Evolution and Success of Redress and Reparation Movements

The trend of 'coming to terms with the past' is characterised by, first, the continuing emergence of redress and reparation movements as well as, second, the increasing success that these social movements have achieved. For a successful RRM, the state must first acknowledge that it has committed, or allowed representatives of the state to commit, atrocities or injustices towards a particular group. Second, states must take positive action in response to demands made by these social movements, which it does not always do. These movements, made up primarily of the victimised group and allied or interested parties, may have one or more redress demands – they may ask for apologies, reparations, restitution, compensation, judicial recognition, criminal justice and/or memorials, etc. Despite the increasing prevalence of such movements, there remains a significant discrepancy in their success. In states that have more than one group previously victimised in the same atrocity, and a corresponding number of RRMs, the form and degree of restorative justice received by each group can vary greatly.

It is precisely these cases of differing treatment that leads to the question that this thesis seeks to answer: why is it that similarly affected groups often achieve differential applications of restorative justice? Drawing on and building on the initial frameworks established by John Torpey, this thesis examines not only the redress and reparation movements, which are increasing in number and in profile, but asks which factors influence the politics of granting recognition. The thesis is structured in two parts: it first investigates case studies to determine what factors lead to differing degrees of success and failure and, second, from those case studies, extrapolates more generalisable findings. When the state is responsible for atrocities or injustices inflicted upon two or more groups, where they are both subjected to the same treatment (e.g. both groups are subjected to genocide, internment, or rape) why are these groups treated differently after the fact? Why does one group receive differing amounts of

[21] David A. Snow, Sarah A. Soule, and Hanspeter Kriesi. "Mapping the Terrain," in The Blackwell Companion to Social Movements, eds. David A. Snow, Sarah A. Soule and Hanspeter Kriesi (Oxford: Blackwell Publishing, 2007).

[22] Redress and reparation movement (RRM) is a term I propose to categorise the social movements which address this issues.

compensation, restitution, reparation or redress than another, and why are the two groups subjected to different requirements and regulations? How do normative expectations of international society and of the victimised group impact the results? Is restorative justice based solely on a case-by-case basis, or are there factors that significantly increase the probability of success or failure? Can these factors be seen as predictive for reparation politics more broadly?

This thesis examines three countries and two victimised groups within each state-sponsored atrocity in order to make two arguments. In Germany, the Nazi government perpetrated genocide upon both Jews and Roma;[23] in the United States, Japanese Americans and Japanese Latin Americans were both interned during World War II and, in the third case study, the Japanese military systematically enslaved and raped both Korean and Dutch women within occupied territories.

Using these cases within reparation politics and drawing on restorative justice principles and social mobilisation theory, most particularly political opportunity structure, I argue that the differential application of restorative justice can be explained by a two-fold argument: first, a normative trend has emerged and become relatively institutionalised within international society. This trend has in turn, facilitated the emergence of various redress and reparation movements due to increasing normative expectations, both domestically and internationally, that states will engage in reparation politics with previously victimised groups. Second, taking that trend into account, the thesis has argued that there are both domestic and international factors that have led to the differential achievement of success and/or failure of the RRMs examined. These three factors are: the presence or absence of influential allies, whether domestic or international; the openness of the political system; and the inclusion of surviving victims within the membership of a strong political community.

2. Methodology

[23] Many terms have been used to refer to the Roma – historically they have been called 'Gypsies'; however, in the post World War II era, Gypsy is seen to be a derogatory term. Today, international society tends to use Roma (plural for man) to describe the group. Within Germany, however, the two largest clans targeted for genocide were the Roma and Sinti. Other scholars thus refer to the group as Romani. 'Roma,' however, remains the term in most common usage. For the purpose of this paper Roma will refer to the group ethnicity and Romani as an adjective. See Peter Vermeersch, *The Romani Movement: Minority Politics & Ethnic Mobilization in Contemporary Central Europe* (New York: Berghahn, 2007), pp. 10-11 for further discussion on terminology.

This thesis engages in a comparative study of differential success of RRMs. It examines cases of atrocities in which two different groups were involved, each experiencing similar treatment during the atrocity. The dual level of comparison within this thesis holds different factors constant on each of the two levels. This thesis is thus able to draw conclusions about both domestic as well as international factors which play a role in affecting the success of RRMs. The examination of the case studies was carried out on the basis of an analysis of both primary and secondary texts.

The selection of cases was made based on several criteria: first, clearly, case studies had to draw on a state-sponsored atrocity or injustice. The state, or an agent of the state, working with the state's implicit or explicit consent, must have been directly involved in the atrocity or injustice. An agent of the state is a domestic actor which operates in an official capacity as a duly authorised operative representing the state. Actions are considered to be approved by the state unless there is direct and immediate action taken to refute that actor's legitimacy.

Second, as redress and reparation movements and subsequent norms both emerged and strengthened in the post-World War II era, the cases are thus drawn from this era. Specifically, all cases are drawn from World War II, with RRMs emerging in the post-war era. Atrocity and injustice are, of course, not new concepts with accounts of genocide, rapes and other atrocities occurring from within the Peloponnesian War to modern-day Darfur. What is new, however, is the international reaction to these atrocities, the societal demands for restorative justice, and states' willingness to address these claims.

The atrocities in each case are well documented and supported by historical evidence. The fact that these events did occur is a given. It is from the starting point of the event, and subsequent demands for redress and reparation by a social movement, that this thesis begins, seeking also to determine what factors may play a role in the success of future RRMs. Given that the German case started the post-war redress and reparations movement, Germany was an obvious choice for this thesis. Within the German case, two RRMs, that of Jewish survivors and the less well-known Roma movement, were selected. Two cases of non-genocidal atrocities were also selected: the United States' internment of its Japanese American citizens, along with the internment of Japanese permanent residents and Latin Americans of Japanese origin. These two groups also have experienced differential success in their quest for redress and reparations. Finally, this thesis examines the case of the comfort women of World War II, looking at the sexual enslavement by Japan of two groups of women: Korean

women and the lesser-known case of Dutch women. Women from six different countries were kidnapped. They currently have formed one RRM, however, here, too, a clear difference in success between two nationalities can be seen, although neither nationality has yet been successful in obtaining adequate redress and reparations. These three case studies thus represent three different countries and three different types of atrocity. Each of the six groups involved attempted to obtain some form of restorative justice; success has varied. It is this variation that this thesis aims to explain.

3. Theoretical Framework

This thesis draws upon the norm life cycle (Finnemore and Sikkink) and political opportunity structure in order to make a two-fold argument: first, that a redress and reparation norm has emerged in the post-World War II era on the international level, which has in turn increased both the numbers of states engaging in reparation politics as well as increasing the expectations of victimised communities. Secondly, even within an era of increased openness vis-a-vis RRMs, differential success of victimised groups remains. This thesis thus argues that there are certain factors, within the framework of political opportunity structure, which can explain that different success.

3.1 Norm Dynamics and Political Change

The norm life cycle, as developed by Finnemore and Sikkink,[24] explains the institutionalisation of norms on the world stage. Martha Finnemore has argued, first, that states' interests are socially constructed and that, second, these interests can and do shift over time as norms evolve:

> [s]tates are embedded in dense networks of transnational and international social relations that shape their perceptions of the world and their role in that world. States are *socialized* to want certain things by the international society in which they and the people in them live.[25]

Finnemore here referred to states' interests as including power, security, and wealth, but at the same time she notes that this does not define what kind of power, what kind of wealth, whose security, or how to obtain any of the above. As noted above, she

[24] See Finnemore and Sikkink, "International Norm Dynamics and Political Change" for the development of the norm life cycle.
[25] Martha Finnemore, *National Interests in International Society* (New York: Cornell University Press, 1996), p. 2.

argues that, in order to understand how a state decides upon its own interests, one must first understand that these interests are socially constructed: 'State interests are defined in the context of internationally held norms and understandings about what is good and appropriate'[26] The values found within international society change over time and alongside it, the understanding of the international system changes.[27]

Such transitions in international society and norms governing society underlie many aspects of this thesis. Concepts such as race, ethnicity, gender, and related social norms such as racism and sexism have changed substantially, as discussed in Chapter Eight. Norms about racial superiority and gender inequality are powerful and have governed both international thinking and various domestic societies throughout history. The atrocities discussed in this research project occurred in the 20th century. However, the legislation, political rights, and processes governing the state and the conception of people and individuals within Germany, the United States and Japan, as subsequent chapters will argue, were informed by racial norms of the previous century. In the Japanese case, the additional level of gender norms plays a key role as well.

We can argue that the norms of the 21st century, particularly with respect to redress and reparation, have their roots in the post World War II era. While violence, atrocity and injustice have not been conquered, an expectation of state redress for such violence has emerged. Codifications of racial and gender equality have occurred internationally in the post-World War II era. This shift in racial and gender equality norms has been accompanied by a shift in atrocity and redress norms. This normative shift has been reflected in two ways: one, a codification of international criminal law[28] establishing legal concepts of genocide and crimes against humanity, and two, a prescriptive element in which states which have committed atrocities against a population are now expected to engage in reparation politics. Even for atrocities committed in the late 20th century, such as apartheid in South Africa and genocide in Cambodia, there is now no question of these atrocities not being addressed – in South Africa through the Truth and Reconciliation Commission (1995-1998) and in Cambodia through the Extraordinary Chambers in the Courts of Cambodia (2006-ongoing, as of 2011).[29]

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[26] Ibid.

[27] Ibid.

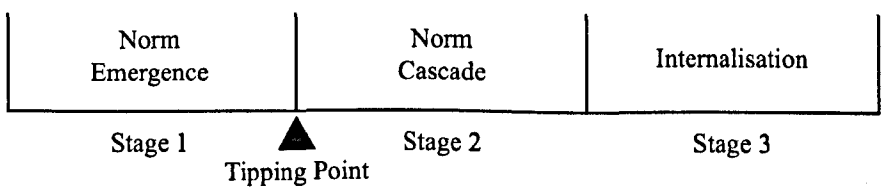
[28] The horror of the German genocides created enough international impact that it codified international criminal law and impacted international humanitarian law, human rights laws, and the creation of refugee laws. Various bodies of law are addressed throughout this thesis; however, definitions are also included in the glossary as needed.

[29] The chamber conducted a joint hearing on 11 January 2011 and is currently still in operation.

While it is clear that even the widespread proliferation of a norm at the international level does not guarantee that every country adheres to the same standards of behaviour, it is useful to examine this variation from a theoretical perspective. Finnemore and Sikkink argue that one way to understand the proliferation of a norm is through the norm life cycle and that this norm life cycle can be understood as being a three-part process. First, norm entrepreneurs, i.e., specialists who campaign to change particular norms, emerge. These individuals can appear within the domestic or international level and are able to convince states (or their representatives) to accept changed norms.[30] Thus, norm emergence is categorised by individuals and/or organisations attempting to convince a critical mass of states to embrace new norms. It is important to note that within the German redress and reparation movements, the initial norm entrepreneurs were not trying to convince the international community to change the norms for the entire international system, but simply to establish a redress and reparation norm for Holocaust survivors. Once the precedent had been established, however, future norm entrepreneurs were able to build upon this framework.

Finnemore and Sikkink continue by saying that, once enough states or leaders have accepted the new norms, a 'tipping point' occurs, which represents a transition into the period Finnemore and Sikkink have dubbed norm cascade. This tipping point is the point at which there is no turning back – other states are, in essence, pressured into accepting the changed norm. The norm cascade continues as more and more countries begin to adopt the norms – without domestic pressures. This can be seen currently with the adoption of United Nations (UN) resolutions on reparations, the increase in trials and tribunals, and the large number of apologies which emerged in the last decade. Regarding redress and reparation, however, the international community is still operating in the norm cascade stage, and has not yet reached the final stage of the norm life cycle. The third and final stage in the norm life cycle is that of 'internalisation,' when the norm is no longer seen as new, but has become so widely accepted that few diverge from it. Finnemore and Sikkink illustrate this process as follows:[31]

Figure 1.1: Norm Life Cycle



[30] Robert C. Ellickson, "The Evolution of Social Norms: A Perspective from the Legal Academy," in *Social Norms*, eds. Michael Hechter and Karl-Dieter Opp (New York: Russell Sage Foundation, 2001), p. 44.
[31] Finnemore and Sikkink, "International Norm Dynamics," p. 896.

It must be noted that different norms have different strengths and carry varying degrees of commitment by actors – some norms are adhered to strictly while others are ignored when convenient. Norm commitment can also vary according to region – commitment can be international, national or even subnational.[32] This thesis will draw on Finnemore and Sikkink's concept of the norm life cycle to make the argument that redress and reparation norms have emerged on the international level. I will demonstrate, using Finnemore and Sikkink's argument, that during the 1990s, the proliferation of redress and reparation movements created a norm cascade so that we are now at the verge of an internalisation point in which there seems to be a widespread expectation of redress and reparation, both on the international level and among previously victimised groups.

3.2 Political Opportunity

While the norm life cycle helps to explain one part of success and failure within reparation politics, it does not, however, explain the entire picture. Successful and failed attempts require further analysis in order to clarify what distinguishes the one from the other. In order to explain this differential degree of success and failure at the domestic level, I turn to the political opportunity structure. Sidney Tarrow defines political opportunity structure as 'consistent – but not necessarily formal or permanent dimensions of the political environment that provide incentives for people to undertake collective action by affecting their expectations for success or failure.'[33] Tarrow emphasises formal structures such as state institutions, but also conflict and alliance structures which provide resources and oppose constraints external to the group.[34] Tarrow identifies four elements of opportunity that have primary importance within the political opportunity structure (POS): the openness of the political system, shifting alignments, the availability of influential allies, and the cleavages within elites.[35] This thesis will argue that within the political opportunity structure, two such factors emerge which strongly influence success or failure of a redress and reparation movement: the opening of access to power and the presence – or absence – of elite allies.

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[32] Jeffrey W. Legro, "Which Norms Matter? Revisiting the "Failure" of Internationalism," *International Organization* 51, no. 1 (1997): 31-63, p. 32.
[33] Sidney Tarrow, *Power in Movement: Social Movements, Collective Action and Politics* (Cambridge: Cambridge University Press, 1994), p. 85.
[34] Sidney Tarrow, "States and Opportunities: The Political Structuring of Social Movements," in *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Culture Framings*, eds. Doug McAdam, John D. McCarthy and Mayer N. Zald (Cambridge: Cambridge University Press, 1996), p. 54.
[35] Ibid.

The political opportunity structure within the redress and reparation movements discussed, have both domestic and international aspects that will be addressed during this thesis. For example, the alliance structures within a redress and reparation movement are found on multiple levels within international and domestic society. Alliance structures include not only formal state actors, but also international inter-governmental organisations such as the United Nations, which has conducted reports on the ideas of reparations, redress, and various case studies such as the Japanese Latin American internments and the Japanese sexual enslavement of women during World War II. Transnational nongovernmental groups who engage in lobbying international agencies and engage in transnational activism involving differing elements of international society also fall into this category. Early examples include Jewish agencies within the United States, the British Mandate of Palestine, and Switzerland which requested various Allied countries to intercede on their behalf for war reparations; more recent examples include groups associated with former comfort women lobbying for reparations by presenting their cases to the United Nations, United States, and Canadian governments. This contrasts with the Japanese American RRM, where the alliance structures were inherently domestic. Although some of the national opportunity structures within various states are more 'open' then others, it does not necessarily follow that the elite allies within the state are neutral in regard to the different social actors attempting to gain redress from the government.[36] As will be discussed, the German elite allies favoured the Jewish RRM over the Romani RRM, and within the United States, citizens were favoured over non-citizens.

4. Redress and Reparation Movements

Before discussing why some groups succeed while others fail in obtaining various elements of restorative justice, one must consider the question of how the victimised communities engage with the state. How does the state become convinced that redress or apologies are necessary? Although there is, as I argue, currently a norm cascade which pressures states to negotiate with victims of past atrocities, this norm has not yet become instinctual or internalised within international society. In order then to take advantage of this norm cascade, groups must mobilise and advocate for redress

[36] Ibid. p. 51.

and reparation. Thus this next section will examine social movements, mobilisation, and the emergence of redress and reparation movements.

4.1 Social Movements and Social Movement Organisations

As Tarrow discussed and as others have noted, the political opportunity structure includes not only state institutions but also conflict and alliance structures. One of these structures that is vital to understanding redress and reparation movement is the formation of social movement organisations which lobby the state regarding redress and reparations. Social movements encompass a broad array of organisations, and can best be categorised by drawing on Paul Wilkinson's three-point definition:

1. Social movements are deliberate collective endeavours that promote change in any direction and by any means.
2. Social movements have - at the very least - a minimal degree of organisation, either on an informal or formal level.
3. The social movement must be based on a voluntary normative commitment which includes member participation.[37]

Social movements are distinct from social movement organisations (SMOs),[38] although the two are often conflated. When discussing social movements, it is common to refer to organisational goals and results as being identical to the goals and results of the overarching social movement, especially when the movement is dominated by one or two large organisations. The organisations, however, represent individual groups with their own leadership and support structure, whereas the overall social movement represents formal organisations, informal and grassroots organisations, and the individuals who support the movement's goals, but are not affiliated with any group. This distinction is further elaborated below.

The difference between social movement and social movement organisations is important in terms of success. The two are interrelated, but not absolutely co-dependent as multiple SMOs can have different or even conflicted goals. I have identified three possible options: an organisation can achieve its goals while the movement can still fail; an organisation can fail, but the movement itself can still be successful, and both can succeed or fail. Social movement organisations are easier to examine as they are represented by formal, structured organisations with clear objectives and

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[37] Paul Wilkinson, *Social Movement* (London: The Macmillan Press, 1971), p. 27.
[38] John D. McCarthy, and Mayer N. Zald, "Resource Mobilization and Social Movements: A Partial Theory," *The American Journal of Sociology* 82, no. 6 (1977), pp. 1217-1218.

starting/concluding dates, whereas social movements are more nebulous because informal groups and individuals are analysed in addition to formal organisations.

There are primarily two ways to examine social movements, and thus redress and reparation movements, which are a subset of the social movement: on the basis of the individual SMO and/or on the basis of the overarching social movement. This distinction can be illustrated with the Japanese American redress and reparation movement relating to the World War II internment of Japanese Americans within the United States. Each SMO had individual goals. These goals varied in what they wished to achieve, however, each organisation attempted to contribute to the overarching goal of obtaining recognition and some form of reparations for the internments. It is now commonly accepted that the goal of the Japanese American RRM was for each survivor to receive an apology and a check for $20,000. This was not the goal of every organisation within the social movement; however, the Japanese American Citizens League (JACL), who took the lead in the redress and reparation movement achieved this goal.[39] The successful passage of the Civil Liberties Act of 1988, which outlined what reparations would be given to the Japanese American internees and gave a governmental apology, contributed to the overarching social movement goal of achieving recognition and symbolic reparations for the internment of Japanese Americans during World War II.

The social movement, however, was composed of more than this single organisation. One important component of the Japanese American social movement success was achieved by an informal group led by attorney Dale Minami and historian Peter Irons. This group utilised the rare procedure of *coram nobis*[40] to reopen Supreme Court cases which had previously found the internments of Japanese Americans during World War II to be constitutionally justifiable. The JACL, a formal organisation and the Minami court case both contributed to the success of the social movement.[41] The reparation money, as will be discussed later, was financially significant neither to the movement nor to the affected social group and in many cases was not a material need. Individuals who were interned during World War II, however, were, in 1988, offered an apology and $20,000 as symbolic reparations for what they lost. This satisfied the goal of the JACL. Many of the survivors, upon receiving the check and apology, spoke

[39] This JACL will be discussed further in Chapter Six.

[40] The writ of *coram nobis* (Latin for 'error before us') allows one to reopen a criminal court case after the sentence has been served on the basis that there was a fundamental error and/or manifest injustice in the original conviction.

[41] Ricardo René Laremont, "Jewish and Japanese American Reparations: Political Lessons for the Africana Community," *Journal of Asian American Studies* 2001, no. 3 (2001), pp. 243-248.

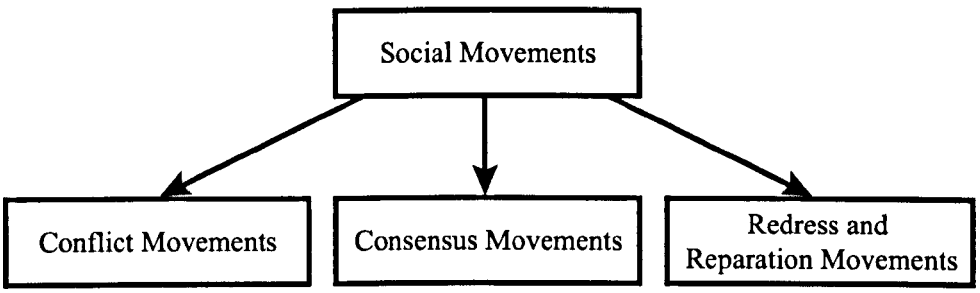
of intense emotions, some crying and others admitting that they had carried guilt throughout the years feeling somehow, that they had done something wrong. The apology freed them of this assumption of guilt and reaffirmed that they were the victims of an injustice. The apology, the publication of an accurate history from the Commission on Wartime Relocation and Internment of Civilians (CWRIC), and the issuance of reparations was seen to be an official, and sufficient, response to the Japanese American redress and reparation movement's demands. The response brought psychological relief to the victimised community and helped close a traumatic chapter of their lives. It enabled honest dialogue and helped the victimised community reconcile with the offending state. In general, the redress and reparation movement ceased its mobilisation, although, remembrance activities and activities to educate the current generations continue.

4.2 Social Movement Categorisations

This section establishes an independent framework within which a subset of social movements, the redress and reparation movement, can be understood. It provides a typology of social movements which will discuss conflict and consensus movements, both sub-categories of social movements, and then furthers the typology by establishing a third category: redress and reparation movements. McCarthy and Wolfson, in 'Consensus Movements, Conflict Movements, and the Cooptation of Civic and State Infrastructures,' (1992) proposed the delineation of social movements into two separate categories: conflict and consensus movements. The emerging trend of redress and reparation movements however, suggests that a third type must be added. Thus, I propose a modified model – which includes three different types of social movements in addition to the conflict and consensus movements illustrated by McCarthy and Wolfson. Building on their model, I propose a third category: the redress and reparation movement. Figure 1.2 shows the subdivision of social movements into the three categories proposed here:[42]

[42] See John D. McCarthy and Mark Wolfson, "Consensus Movements, Conflict Movements, and the Cooptation of Civic and State Infrastructures," in *Frontiers in Social Movement Theory*, eds. Aldon D. Morris and Carol McClurg Mueller (New Haven: Yale University Press, 1992). McCarthy and Wolfson first proposed the delineation of conflict and consensus movements. As I will show, I have expanded upon this typology to include redress and reparation movements.

Figure 1.2: Social Movement Subcategories



Adapted from McCarthy and Wolfson (1992)

Conflict Movements

Conflict movements are social movements which are: one, supported by minorities and/or a small segment of the population; two, confront fundamental and organised opposition in an effort to bring societal change; and three, are often illustrated by legislation which guarantees fundamental rights or enforces a societal standard which must be adhered to once the law has been enacted.

Within the United States, the most well-known conflict movement is the civil rights movement, but the labour and women's rights movements also fall into this category.[43] The civil rights movement began with the support of African Americans and a small group of allies that were independent of major social movement organisations. The supporters of this movement comprised only a small segment of the United States population. The majority, i.e. Caucasian, population was generally, although not uniformly, opposed to the overall goals of the movement, which included school integration, desegregation of public and private spaces, reducing/eliminating the prevalence of racial discrimination, equal rights and equal treatment under the law. Proponents of the movement faced not only a lack of support, but were often subjected to harsh opposition up to and including physical violence and murder. Acts committed upon supporters ranged from local domestic incidents, including beatings and lynchings, to acts that affected the movement on a national level, such as the assassination of Martin Luther King Jr.

Many social movement organisations were created to support various goals of the movement. SMOs included organisations created for a single purpose exemplified by the United Defence League whose goal was to assist with a bus boycott in Baton Rouge, to organisations that are still active today such as the National Association for

[43] Ibid.

the Advancement of Colored People.[44] The organisations had various rates of success,[45] and overall, contributed to the success of the civil rights movement.[46]

The civil rights movement also illustrates the type of societal change that conflict movements seek. One of the first significant achievements was the Supreme Court's ruling in *Brown v. Board of Education of Topeka* (1954), which found that the segregation of 'white' and 'black' children in public schools had a detrimental effect upon black children, and therefore, ruled that the 'separate but equal' legal doctrine from *Plessy v. Ferguson* (1896) was unconstitutional.[47] In addition to success in the judicial system, the civil rights movement achieved success in the legislative branch as well. The passage of the Civil Rights Act of 1957 attempted to safeguard voting rights, the Civil Rights Act of 1964 banned discrimination in employment practises and public accommodations, and the Civil Rights Act of 1968 banned discrimination in the sale and rental of housing.[48] Crafting a new tool for social movements, supporters utilised the concept of civil disobedience to fight segregation, implemented boycotts, sit-ins, and marches to show support for their cause. These tools created pressure to change local and state laws, and were responsible for desegregation throughout the south.[49]

The key factors which identified the civil rights movement as a conflict movement were the small segment of the populace which initially supported the movement, the high opposition to movement goals, and the goal of social change which was supported through legislation and guaranteed rights. Today, many factors seem to point to the civil rights movement as having emerged as a consensus movement due to the widespread support that equal rights now shares. Further research would be needed to determine whether this assertion is conclusive.

Consensus Movements

According to McCarthy and Wolfson, consensus movements are social movements which first, have widespread support for the stated goals of the group; second, encounter little to no organised opposition; and third, attempt to create societal

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[44] For an overview of the various organisations that comprised the civil rights movement see Aldon D. Morris, *The Origins of the Civil Rights Movement: Black Communities Organizing for Change* (New York: The Free Press, 1984).

[45] United Defense League was created to arrange a mass bus boycott and was disbanded after the members accepted a compromise that met their goal of being able to sit down on the bus.

[46] There are, however, some groups that are considered to be extremists who have failed such as those pushing for black separatism. This particular goal however, was never an overall movement objective. It does illustrate however, that a movement can succeed even if an organisation failed.

[47] *Brown et al. v. Board of Education of Topeka et al.* 347 U.S. 483 (1954).

[48] Various Civil Rights Acts can be found detailed in Morris, *The Origins of the Civil Rights Movement* and Robert Johnson Jr., *Race, Law and Public Policy: Cases and Materials on Law and Public Policy of Race* (Baltimore, MD: Black Classic Press, 1998).

[49] For various mobilising techniques see Morris, *The Origins of the Civil Rights Movement.*

change through awareness and education. Specifically, to be considered a consensus movement, the organisation or group must have the vast majority – 80 to 90 percent – of the population support within the geographical or thematically relevant populace. Consensus movements are frequently seen as localised movements such as the opposition to opening a new landfill or nuclear power plant. Perhaps the most well-known, and one of the few national-level consensus movements within the United States, is the movement against driving under the influence of alcohol.[50]

The movement against driving under the influence of alcohol on the national level consists mainly of formal organisations such as MADD (Mothers against Drunk Driving) and RID (Remove Intoxicated Drivers). These groups have widespread support and little opposition because of the nature of their goals. Traditionally, these groups have attempted to create an increase in public education and awareness of the dangers which surround drunken driving.[51]

The key factors which distinguish the movement against driving under the influence as a consensus movement is the high support, low opposition, and primary goals of education and awareness raising. The movement, however, has been gradually shifting from a consensus movement to a conflict movement as the goals of the primary organisation, MADD, have moved from awareness raising to new objectives. Lobbying for legislation which concerns the sale and drinking of alcohol, such as raising the legal drinking age, to lowering the alcohol content of drinks, creates new opposition from both companies and individuals.[52]

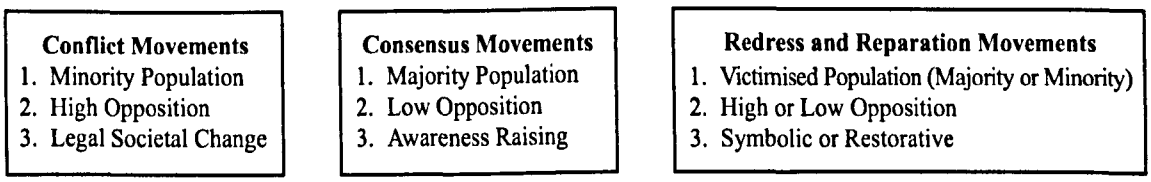
Redress and Reparation Movements

The previous two subcategories of social movements, which have also included other movements for rights of minority groups, environmental movements, and so forth, are however, only the framing for the third category. As previously stated, McCarthy and Wolfson delineated social movements into two categories – that of conflict and consensus movements. Both conflict and consensus movements have population and opposition indicators which oppose each other (conflict – high opposition, low support, and consensus –low opposition, high support). Redress and reparation movements however, are distinct from both conflict and consensus movements. They represent an entirely different type of movement which cannot be captured neatly by the previous models, yet are clearly part of the social movement

[50] McCarthy and Wolfson, "Consensus Movements," pp. 273 – 278.
[51] Ibid.
[52] Ibid.

typology. The population that supports redress and reparation movements can be either a majority or minority population. In turn, the opposition can vary depending on the type of population which has been affected and is demanding recognition. The differences can be captured and clarified if one modifies the McCarthy and Wolfson model with a third dimension - the type of change the social movement is trying to create. The creation of this third dimension, as argued here, adds to the understanding of social movements and allows us to better analyse redress and reparation movements. Thus my addition to McCarthy and Wolfson's binary sub-division of Conflict and Consensus Movements gives us a more complex typology, which can be visualised as follows:

Figure 1.3: Social Movement Indicators



Adapted from McCarthy and Wolfson (1992)

Redress and reparation movements meet the previously discussed definition of a social movement: they are deliberate collective endeavours which promote a change – that of historical recognition and acknowledgement. They may also seek other forms of restorative justice, but the important normative shift of recognition of past injustice remains central. Redress and reparation movements are organised, sometimes formally, with acknowledged leaders and structured SMOs, and sometimes informally, with multiple grassroots organisations and individual (or class-action) lawsuits. The movements are based on a normative commitment to change the collective memory and, even the reporting of history, in terms of events either included or excluded from standard historical accounts, of both the state and the victimised group.

Characteristics of Redress and Reparation Movements

The first characteristic of a redress and reparation movement, namely the support of an historically victimised population, refers to a population which has either been directly victimised or whose social group has been victimised in the past. This group, in contrast to those in both conflict and consensus movements, can refer to either a majority or a minority population within the defined territory of a movement. Redress and reparation movements' core supporters tend to be the cultural group which has been victimised by the state, or the descendants of the cultural group who had been

victimised. Japanese Americans are perhaps one of the key examples of an ethnic minority[53] within the United States which has successfully developed an associated redress and reparation movement for actions inflicted against them by the state (forcible detainment in internment camps). The redress and reparation movement was largely supported, first by those who were children and grandchildren of those interned, and later, by those who had been interned.

In contrast, the redress and reparation movement of South African Apartheid is an example of the social movement by a racial majority. South African Apartheid legislation identified four races according to the 2001 South African Census. The percentages for these groups were: 79% 'Black African', 8.9% 'Coloured', 2.5% 'Indian or Asian', 9.6% 'White.'[54] Despite the clear majority of the 'Black African' population and the clear minority of the 'White' population, South African Whites subjugated the Black South Africans creating a second class citizenship for the majority of the population. Following the end of Apartheid, various forms of restorative justice have been debated including the well-known South African Truth Commission and the less-supported quest for reparations.

These two examples contrast with the population statistics and illustrate how the victimised population can be either a majority (Black African) or a minority (Japanese American). The resulting redress and reparation movements had support from the victimised group – both the South African majority and the United States minority. This variance in population is an indicator that a third form of social movement exists.

The second characteristic - confronting fundamental, organisational, and procedural opposition in response to an historically based grievance of state-sponsored injustice or atrocity - is a multi-layered issue. As stated previously, it differs from both conflict and consensus movements in that it looks to redress actions inflicted upon the social group by the state in the past. Conflict and consensus movements, in contrast, are attempting to create a change in the current behaviour of a government or a population. This does not mean, however, that redress and reparation movements are not attempting a deliberate collective endeavour to promote change. They are attempting to create a change in historical and collective memory, in historical records, and in discriminatory legislation. This change in memory is a change in the societal perception

[53] Definitions of race and ethnicity are controversial and not definitive. For the purpose of this work, 'race' is defined as a broad category of people who fall into categories such as Caucasian, Black, Native and Asian/Pacific Islanders. Ethnicity will refer to specific groups within the racial categories: for example, Japanese American versus Chinese American or African British versus Caribbean British.
[54] "Census 2001 Digital Atlas," Statistics South Africa, http://www.statssa.gov.za/census2001/digiAtlas/index.html, accessed on 2 August 2007.

of its own history and responsibility to the past. Thus, these movements often confront fundamental, organisational, and procedural opposition. The historically based grievance mobilises a community to seek recognition for what has occurred and to correct current imbalances and collective memory, whereas conflict and consensus movements seek to redress current ongoing wrongs for a better future. For example, at the heart of the Japanese American redress and reparation movement was an attempt to obtain recognition that the internment was a wrongful act and not that the internment was constitutional, as previously ruled. They sought to confirm that there was no reason to detain the population, to reaffirm that a wrong had been committed, and that the population victimised was innocent of the charges laid at its collective feet. This affirmation of memory was a significant goal in addition to creating a legal record of the wrongs committed in order to, hopefully, prevent something like this from occurring in the future.

The third characteristic is at the centre of the redress and reparation movement – that these types of movements also have a highly symbolic goal. Whereas conflict movements are trying to create societal changes, such as equality in legislation, and consensus movements are trying to raise awareness, such as the dangers of drunk driving, redress and reparation movements are trying to create, at the very least, a political reconciliation with those who victimised them – defined as the ability to live in the same space. They are trying to obtain recognition of the crimes perpetrated upon them, the acknowledgement of past wrongs, a sincere apology, a commitment of future deterrence, and an emotional and psychological healing of the victimised population. The movements utilise a variety of strategies ranging from trials and constitutional amendments to truth commissions, reparations, and restitution in an effort to obtain a satisfactory outcome. The outcomes of these movements vary according to the cultural groups, but range from monetary reparations to non-monetary measures such as apologies and memorials.

5. Overview of Thesis

Chapter Two discusses the evolution of reparation politics, and traces the emergence of the redress and reparation norm. From the Trial of the Major War Criminals, also known as the Nuremberg Trials (21 November 1945 to 1 October 1946), through the transitional justice surge in the 1970s and 1980s, the phenomenon of

states coming to terms with the past has become more common within international society with truth commissions, reparations, and more recently, a plethora of apologies.

Chapter Three discusses the concept of restorative justice within the criminal justice system and how it can be relevant to reparation politics. Chapter Four builds on Ruti Teitel's *Transitional Justice* (2000) and proposes that restorative justice as a state response can take five forms: that of criminal justice, historical justice, reparatory justice, legislative justice, and symbolic justice.

Chapter Five will further discuss the emergence of a redress norm within international society, focusing on how norm entrepreneurs reframed the issue and worked within their respective domestic structures in an attempt to bring international pressure for a reparations programme to be established by West Germany in the immediate post-war era. West Germany provided restitution, apologies and created a precedent for engaging in reparation politics that other states and victim groups later recognised as important. Over time, other states engaged in reparation politics, creating their own redress and reparation programmes and providing apologies for various injustices and atrocities. I argue here that there is a clear link between the precedent set by Germany in terms of reparation and succeeding movements.

Chapter Six will demonstrate that the United States redress and reparation movement for Japanese Americans became the tipping point within the norm life cycle and subsequently the redress and reparation norm entered into the second stage of the norm life cycle, that of a norm cascade. Actions within reparation politics, and in particular the apology, can be utilised by states as a tool to enhance legitimacy and esteem by apologising for past actions. In some later cases, the apology has been offered without a social movement or populace requesting the statement.

Although a normative shift has emerged and a reparations norm is becoming more recognised, exemplified by the United Nations' adoption of the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* in December of 2005, I would still argue that it is not yet at the final stage of the norm life cycle, internalisation. A redress and reparation norm has been spreading throughout international society; however, it has met resistance in several countries regarding apologies, recognition and other forms of restorative justice. One such case is examined in Chapter Seven in regard to the Japanese comfort women system.

Finally, Chapter Eight will draw together the different elements of the thesis. Having examined the norm dynamics relating to the case studies, how does this translate into a normative trend within international society? If there is such a trend, how does this affect the success of some victimised groups in obtaining either legal or symbolic restorative justice, and how does it explain the failures? When examining two groups within the same country who have experienced atrocity, why are there discrepancies in the success rate? I argue in this chapter that, as more and more groups obtain success in a redress and reparation movement, the normative trend that states should recognise their former victims, apologise, and make some type of symbolic or legal redress is reinforced. The United Nations has become involved, transnational organisations lobby governments and work with nongovernmental groups, states pressure other states, and an expectation that states will engage in a dialogue with their former victims exists within international society.

Chapter Two:
Reparation Politics: An Emerging Field

The norms that have now emerged concerning the virtue of reparation politics have their roots in the early post-war era. It was not only the codification of the Genocide Convention (1948) and the creation of reparation and restitution laws for Jewish victims of the Holocaust, but also the philosophical underpinning given to the movement, particularly by Theodor Adorno, Hannah Arendt, and Karl Jaspers. They argued for the recognition of the German state's responsibility for the Holocaust as well as arguing for the importance of a coming to terms with the past, or *Vergangenheitsbewältigung*.[55] These developments contributed strongly to the emergence of a new norm within international society and were a direct reaction to the atrocities committed in Germany during World War II, and created a foundation on which reparation politics has now solidly been built.

What is unique about this foundation is that reparation politics directly counters the idiom that history is written by the victors. Reparation politics, however, is a story narrated by those who were victimised. An important segment of this field is indeed precisely the recognition and transmission of an historical narrative wherein the state acknowledges its unjust actions – leading to a history at least partially written by those who lost the battle, not those who won. In other words, we see an entirely new way of examining a nation's history and the victimisation of groups.

This chapter will discuss the development and emergence of this field, bringing together the various strands of the literature. It will then move on to examine current theories that seek to explain the proliferation and success of reparation politics.

1. Emergence of Atrocity Norms

The idea of basic human rights was set forth by the United Nations General Assembly with the 1948 adoption of the *Universal Declaration of Human Rights*; however, the granting and protection of such rights can only be enforced by the state.

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[55] For early works which argue Germanys need to come to terms with the past see: Theodor W. Adorno, "What Does Coming to Terms with the Past Mean?" trans. Timothy Bahti and Geoffrey Hartman (1959; reprint in *Bitburg in Moral Perspective*, ed. Geoffrey Hartman (Bloomington: Indiana University Press, 1986); Hannah Arendt, *The Origins of Totalitarianism*, New with added prefaces ed. (New York: Harcourt, 1997); and Karl Jaspers, *The Question of German Guilt*, trans. E. B. Ashton (1947; reprint New York: Capricorn Books, 1961).

Andrew Schaap describes this relationship between legitimacy and states' treatment of their citizens as follows:

> ... the legitimacy of the state was established by divesting sovereignty from the monarch and investing it in 'the people'. On the other hand, it was understood to depend on the state's role in securing the private freedoms of individuals through the institution of rights. Yet, despite this achievement in principle, modern states have, in fact, been responsible for the most pervasive and systematic destruction of human life in history.[56]

I argue that the state has an obligation to its citizens as defined by a social contract. This contract, distinguishable by the rights it grants its citizens, the duties it demands, and enforced by the legal codes of the individual countries varies from one sovereign nation to the next, and has evolved, and in some instances temporarily devolved, over time. It is recognised that within the domestic sphere of a state's territories, the state is the absolute holder of the rule of law. Its police force exists to apprehend those in violation of said law and judicial systems enforce these laws and punish those who violate them. Humphrey states that citizenship rights represent those rights that states grant as protection to its population. These same laws, however, have been, and, in some cases, still are manipulated to create policies of inclusion and exclusion within society. By defining who is and who is not protected, the state can exclude segments of the populace, deny full formal citizenship rights, enshrine legal discrimination, and create segments of the populace who are subjected to violence without impunity.[57]

Within the international sphere, states are expected to both protect their own citizens and refrain from violating the rights of other sovereign states' representatives and citizens. This right and obligation to protect can be seen in international law, is enshrined in the concept of absolute sovereignty and codified within international treaties and customs that have the force of international law. One such international custom is the inherent acceptance that diplomats have immunity from prosecution within the countries in which they are posted.[58] Further, this respect for the human rights of other states' citizens can be seen in the codification of international norms, as reflected by the Geneva and Hague Conventions, as listed in Table 2.1.

Prior to World War II, states were neither required nor expected to provide legal or symbolic redress. There was no historical precedent to do so, nor were there international or domestic norms which would encourage states to engage in reparation politics. The horrors of the Holocaust with its six million Jewish civilians dead,

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[56] Andrew Schaap, *Political Reconciliation* (New York City: Routledge, 2005), p. 10.
[57] Humphrey, *Politics of Atrocity and Reconciliation*, p. 7.
[58] The concept of diplomatic immunity is a longstanding practise within international customary law.

targeted solely for ideological and racial reasons, resulted in a shift in international thinking, as I argue, creating strong political will to mandate laws and to codify norms against genocide and crimes against humanity. These atrocities and the subsequent normative shift within international law and society dictated restrictions on state behaviour towards its own citizens, and this thesis argues, introduced a human rights regime within international society.

The concept of state-sponsored atrocity is not new. Tales of massacre, murder, and mayhem predate the foundation of the modern state system. One of the most well-known examples is written in the *History of the Peloponnesian War* (431 BC): the Melians were faced with the choice of paying tribute to Athens and surviving, or fighting the Athenian army and being destroyed. The Melians argued that they had the right to remain neutral in the conflict and their rights should be respected. The Athenians replied: 'the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.'[59] The Melians did not surrender and, following the Athenian attack, all adult males were put to death and all women and children were enslaved. Redress and reparations for the deaths and enslavement would, during this time period, be unthinkable. The norms of this time permitted these types of actions.

It was not until 1859 in the Battle of Solferino[60] that international norms began to emerge concerning the treatment of individuals during war. The creation of such norms can be directly attributed to Henri Dunant, who was horrified about the treatment of wounded soldiers during the battle. His campaigning and lobbying eventually resulted in the passage of the Geneva Conventions and the founding of the International Red Cross. Table 2.1 displays a brief summation of international conventions and treaties which regulate actions committed by soldiers and the state during war. The expectation of humane treatment of enemy soldiers and civilians demonstrates an evolution of norms within international society. This normative shift, however, only reflected proper treatment of soldiers and medics; it did not speak to treatment of the states' own domestic populations.

Table 2.1: Major International Conventions and Treaties Regulating Armed Conflict[61]

[59] Thucydides, *History of the Peloponnesian War*, trans. Rex Warner, rev. ed. (New York: Penguin Classics, 1954), p. 402.

[60] The 24 June 1859 Battle of Solferino was between the Austrian army and the allied French and Sardinian armies.

[61] Sources for this table include: "International Humanitarian Law – Treaties and Documents," The International Committee of the Red Cross, http://www.icrc.org/ihl.nsf/INTRO?OpenView, accessed 7

Date	International Conventions	Regulates:
1864	First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (Last Revision: 1949)	• Protects wounded and sick soldiers during ground warfare • Protects medical and religious personnel, medical units and medical transports • Recognises distinctive emblems • Recognition of the Red Cross symbol as a means of identifying persons and equipment covered by the agreement
1899	Hague Convention of 1899	• Settlement of international disputes • Laws and customs of war on land • Adaptation of maritime warfare principles from the Geneva Convention of 1864
1906	Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea	• Protects wounded, sick, and shipwrecked military personnel at sea during war.
1907	Hague Convention of 1907	• The opening of hostilities • Laws and customs of ground warfare • The rights and duties of neutral powers and persons • Bombardment by naval forces during war • Adaptation of the principles of the Geneva Convention • Certain restrictions with regard to the exercise of the right of capture in naval war • Rights and duties of neutral powers in naval war
1914 - 1918	World War I	
1928	Kellogg-Briand Pact	Multi-lateral treaty signed by the United States, Germany, and Japan among others stating that signatories: • Condemn war for the solution of international controversies • Renounce war as an instrument of national policy
1929	Third Geneva Convention (Last Revision 1949)	• Treatment of prisoners of war
1939 - 1945	World War II	
1949	Fourth Geneva Convention	• Protection of civilians persons during war
1977	Protocol I Additional to the Geneva Conventions of 12 August 1949	• Protection of victims of international armed conflicts
1977	Protocol II Additional to the Geneva Conventions of 12 August 1949	• Protection of victims of non- international armed conflict
2005	Protocol III Additional to the Geneva Conventions of 12 August 1949	• Adoption of an additional distinctive emblem

With the exception of the Kellogg-Briand Pact of 1928, the above conventions and protocols are part of the 'international humanitarian laws of war', also commonly referred to as international humanitarian law, IHL, or the laws of war. International humanitarian law is the subset of international law that deals with the rules and

September 2009; and "Kellogg-Briand Pact 1928," The Avalon Project, http://www.yale.edu/lawweb/avalon/imt/kbpact.htm, accessed 7 September 2009.

regulations seeking to limit the effects of armed conflict.[62] This body of law regulates the actions of states only during periods of war or armed conflict. It does not limit state action during time of peace, nor did it consider the states' treatment of individuals within their own territories. The only consideration that one's domestic citizens had within international law was under the League of Nations (1919-1946) and its minority treaties which stated that racial, religious, and linguistic minorities within a country would have the same political and civil rights as the majority.[63] Although the minority treaties contributed to our understanding of international law, the failure of the League of Nations, the subsequent outbreak of World War II, and the widespread injustices and atrocities directed at minority groups during the war, demonstrates that the minority treaties did not contribute decisively to the emergence of an international norm. It took the shock and horror of the Holocaust with its six million Jewish dead for the international community to mobilise, and norms concerning human rights and protections from the state to emerge.

The normative shift towards protection of individuals within conflict and the emergence of norms forbidding atrocity is illustrated within international humanitarian law by the 1949 Geneva Convention regulating the Protection of Civilians Persons in Time of War. The codification of international criminal law is illustrated by the International Military Tribunal at Nuremberg (1945-1946), or the Nuremberg Trials, and the Genocide Convention (1948). The emergence of these norms is a direct result of World War II and the Holocaust. Chapter Five will examine how the concepts of genocide and crimes against humanity emerged within international society, while Chapter Eight will discuss the norm cascade within international society and its effect on reparation politics.

2. Legal Concepts of 'Reparation'

Some aspects of redress and reparation movements did exist before World War II; however the context was quite different. As I will argue, prior to World War II reparations, state apologies, trials, and so forth were the result of international politics, and focused on the state, not the individual. This can be seen with the concept of

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[62] Henry J. Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, 3rd ed. (Oxford: Oxford University Press, 2007), p. 70.
[63] Helmer Rosting, "Protection of Minorities by the League of Nations," *The American Journal of International Law* 17, no. 4 (1923), p. 649.

reparation. Reparation had a distinct meaning within international society prior to World War II. 'Reparation' or 'compensation' was utilised exclusively in law to mean post-war fines. States on the losing side of a war were often required by treaty to make monetary payments to the victor for damages that occurred during the war.[64] In a legal context, 'reparation', often used interchangeably with compensation, can be defined as 'compensation for an injury of wrong, esp. [sic] for wartime damages or breach of an international obligation.'[65] This definition has evolved from exclusive use in international or domestic law to also being used in the field of reparation politics – with reparations being material recompense for those items which cannot be returned, such as human life, a flourishing culture, strong economy, and cultural identity.'[66]

An early codification of the principle of reparations was in the 1907 Hague Convention, which stated: '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.'[67] This convention, like the later Versailles Treaty, related only to international armed conflict and, under international law, entitled the nation-state to compensation. There was, however, not yet the concept of reparations to be paid to an individual citizen.

The evolution of the term reparations can next be seen in the Treaty of Versailles of 28 June 1919, the Peace Treaty ending World War I. The Versailles Treaty is perhaps the most well-known example of what the term 'reparation' meant prior to World War II. Ironically, it was precisely the harsh reparations demanded in the Treaty that are often credited as being one of the causal factors of World War II.

Article 231 is the infamous 'war guilt' clause of the Versailles Treaty:

> The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies.[68]

The clause thus affirms Germany's moral responsibility for the consequences of the war, but does not acknowledge a direct financial responsibility. The document is,

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[64] Torpey, *Making Whole What Has Been Smashed*, p. 8.
[65] *Black's Law Dictionary*, 8th ed., s.v. 'reparation.'
[66] Barkan, *The Guilt of Nations*, p. xix.
[67] "Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907," The International Committee of the Red Cross, http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument, accessed 7 September 2009.
[68] Bernard M. Baruch, *The Making of the Reparation and Economic Sections of the Treaty* (New York: Howard Fertig, 1920), p. 127.

rather, laying the burden of guilt upon Germany. The reparation obligations are thus laid out next in Article 232:

> The Allied and Associated Governments recognise that the resources of Germany are not adequate, after taking into account permanent diminutions of such resources which will result from other provisions of the present Treaty, to make complete reparation for all such loss and damage.
>
> The Allied and Associated Governments, however, require, and Germany undertakes, that she will make compensation for all damage done to the civilian population of the Allied and Associated Powers and to their property during the period of the belligerency...[69]

The language in the Versailles Treaty, and in particular Article 232, seems to make an initial distinction between 'reparation' and 'compensation.'

This initial distinction is however, as we would understand the terms reparation and compensation misleading, as the focus was still state-centric. The Versailles Treaty clearly refers to damage to civilian populations in Article 232; however, the concept of the individual citizen within international law was fundamentally different than our understanding today. Compensation for property and economic damage was due only to citizenry of Allied nations and was included in the peace treaty negotiations. Further, the citizen was, in essence, an extension of the state:[70] Oppenheim's treatise *International Law* in 1912 stated: '...if individuals who possess nationality are wronged abroad, it is their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such rights.'[71] Thus, reparation and compensation claims were not due to individuals who lost property or were damaged in some way. They were due to the state. Only the damages and fines that had been negotiated for during the peace treaty were thus considered, and compensation was linked only to the victimised population of the victorious state. Citizens of Central or neutral countries were not directly compensated by the losing state, nor in actuality, were individuals from the Allied countries. Reparation monies would be paid to the victorious state, and that state could distribute funds to civilians if the state so desired.

Further, according to Thomas Buergenthal, individuals prior to World War II had no independent rights under international law. They could not claim rights since they were not subject to international law. There were merely objects of international

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[69] Ibid. p. 128.

[70] Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, rev. ed. (New York: The New Press, 1999), p. xxi.

[71] quoted in Thomas Buergenthal, "International Law and the Holocaust," in *Holocaust Restitution: Perspectives on the Litigation and Its Legacy*, eds. Michael J. Bazyler and Roger P. Alford (New York: New York University Press, 2006), p. 19.

law, and the concept of the individual did not differ from a sovereign's territory or other possessions.[72] Citizens were merely possessions of a state, and thus, injury to a citizen was not deemed to be a human rights violation, but injury upon the state.[73] The process of reparation for individuals, then, would be as follows: during the peace treaty negotiations, it was agreed that Germany had to pay a set amount to France for damages, and it was then France's responsibility to determine damages to its civilians including any and all property damage claims, disability claims, and pensions. Reparations are seen in this 1919 definition as monies or territories given to the victor as compensation for damages that the losing state inflicted upon the victorious state. This definition and the process itself is distinctly different than compensation for that which cannot be returned,[74] the definition of reparations that one finds within the reparation politics field.

The concept of individuals obtaining reparation and compensation for crimes committed against their property and person did not arise until after World War II. This shift in philosophy, and emphasis on the individual, is encapsulated by the negotiations between West Germany and Israel, and culminated in the 1952 Reparations Agreement between Israel and the Federal Republic of Germany, more commonly referred to as the Luxembourg Agreement. The Reparations Agreement between Israel and the Federal Republic of Germany resulted from negotiations between West Germany, Israel, and the Claims Conference. West Germany offered both Israel and the Claims Conference reparations, and agreed to establish domestic reparation laws to compensate individuals. This agreement created a shift in the conceptual understanding of reparations, and later became the foundation that other groups would draw upon. The creation of these redress norms are further explored in Chapter Five.

3. Normative Shifts in International Law

The Versailles Treaty can also be utilised as a backdrop to describe the evolution of crimes against humanity and their treatment in international criminal law. Prior to World War II, international law addressed relations between states; the only exceptions were codified within international treaties and limited to the cases of those individuals apprehended in the act of piracy (from the 13th century) and individuals who

[72] Buergenthal, "International Law and the Holocaust," p. 19.
[73] Ibid.
[74] Barkan, *The Guilt of Nations*, p. xix.

were slavers (from the 19th century). These were, however, clearly very specific exceptions. These crimes – as discussed below – often took place within international waters and thus carried a restricted understanding of universal jurisdiction and international criminals – individuals, regardless of where they were apprehended, could be tried by the state responsible for the capture.[75] Barring this highly limited notion of international responsibility, however, the rights of individuals were a factor only when one state violated the rights of another state's citizens. Thus, when the Versailles Treaty discussed compensation of individuals, it repeatedly referred to the 'civilian population of the Allied countries.' In general, the idea that international law could dictate a state's actions *vis-à-vis* its own citizens, or that an individual within the state could be held accountable for breaches of international law, especially in regard to the same state's citizens, was, at that time, unheard of.[76]

3.1 Legal Status of Individuals Prior to 1945

As noted above, the first group of individuals to be considered criminals under international law were pirates. The concept of piracy *jure gentium* is one of the oldest international offences.[77] Since Hugo Grotius' 1631 text *On the Law of War and Peace*, pirates have been considered 'no longer a national, but hostis humani generic', or enemy of mankind, 'and as such he is justiciable by any State anywhere.'[78] The evolution of pirates as enemies of mankind and the application of universal jurisdiction has more to do with the problematic issues of how and where to prosecute piracy, rather than the concept of an international 'criminal' law.

Due to the nature of the crime and its location in international waters, pirates tended to be outside of the normal jurisdiction of the domestic courts. It was generally accepted, however, that since there was a 'common interest of all nations in protecting navigation against interference on the high seas outside the territory if any state, it was considered appropriate for the state apprehending a pirate to prosecute in its own

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[75] Robertson, *Crimes against Humanity*, pp. 223-225.

[76] The League of Nations attempted to safeguard the rights of national groups as equals under law and guarantee their right to exist as cultural, religious and linguistic entities by a series of minority treaties and by issuing a *voeu* (vow) that declared states not bound by the treaties should observe the same standards as those bound. However, the minority treaties are generally considered to have failed. Joseph B. Schechtman, "Decline of the International Protection of Minority Rights," *The Western Political Quarterly* 4, no. 1 (1951): 1-11, pp. 1-2.

[77] Ilias Bantekas and Susan Nash, *International Criminal Law*, 2nd ed. (London: Routledge, 2003), p. 95.

[78] Qtd from "In Re a Reference under the Judicial Committee Act, 1833, in Re Piracy Jure Gentium," *The American Journal of International Law* 29, no. 1 (January 1935): 140-150, pp. 141-142. *Re Piracy Jure Gentium* discusses the evolution of international law regarding piracy from the seventeenth century. See also G. Edward White, "The Marshall Court and International Law: The Piracy Cases," *The American Journal of International Law* 83, no. 4 (October 1989), p. 141.

courts.'[79] This status beginning in the 14h century meant that captured pirates were punished by various states, regardless of the individual nationality or the specific crime (murder, robbery, etc) for which they were apprehended. This application of limited universal jurisdiction shows us that although the language of the law was 'pirates as the enemy of mankind,' the laws that were enforced, and individuals were prosecuted under, were, in actuality, the domestic laws of the nation-state. Likewise, until the adoption of the 1958 Geneva Convention on the High Seas, even the definition of piracy rested within each country's own domestic laws.

The second group of individuals who were assigned this status of *hostis humani generic* and were therefore subjected to universal jurisdiction were slavers. Like international piracy law, the evolution of international anti-slavery norms resulted in a compilation of domestic laws, international treaties, and international customary laws,[80] however, the Declaration of the Powers section of the Abolition of the Slave Trade document of 8 February 1815, declared the slave trade to be 'repugnant to principles of humanity and universal morality.'[81] The 1926 Slavery Convention confirmed that there was universal jurisdiction for punishment of slavers, regardless of where they were apprehended.[82] The ban of slavery was later codified under international human rights law in Article 4 of the Universal Declaration of Human Rights.

Slavers and pirates were thus considered to be the first international criminals. They could be captured anywhere and be held on trial, regardless of their personal citizenship or the locality in which they were captured. The concept of international criminals then can roughly be found in the application of crime and punishment for slavers and pirates, yet it does not translate into what, today, is considered to be 'international criminal law.' These two categories of criminals that presaged the development of crimes against humanity were ultimately not included in the codifications of international criminal law. Piracy remained within the realm of international maritime law, whereas slavery was enveloped within international human rights law. The exception is enslavement when 'committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the

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[79] Steiner and Alston, *International Human Rights in Context*, p. 115.

[80] Customary law is understood as practises that have been carried out over long periods of time; and although they are not laws, they have the force of law.

[81] *The Parliamentary Debates from the Year 1803 to the Present Time*, vol. 32 (London: Thomas Curson Hansard, 1816), p. 200.

[82] Robertson, *Crimes against Humanity*, pp. 224-225. Revisions were made following the convention further defining slavery. This was followed by the United Nations 1956 *Supplementary Convention on the Abolition of Slavery, Slave Trade, and Institutions and Practices Similar to Slavery*.

attack,'[83] which was codified within international criminal law. Additionally, crimes under international law were still encapsulated by the normative concept of state sovereign immunity and head-of-state immunity – which meant that in practise, the heads of state, senior military commanders, and officials acting under governmental orders were representatives of the state and therefore immune from international prosecution. State sovereign immunity governed the extent to which the state, as an entity, was free from the jurisdiction of foreign courts and reflected the premise that each sovereign state was independent and equal under international law and thus could not be put on trial without its consent.[84] Head-of-state immunity historically meant that the leaders of state entities were immune for any acts committed as part of any public or private enterprise.[85]

Another concept ingrained within international law was the defence of superior orders. The concept behind this defence was that one had to obey the orders of one's military commander, regardless of the nature of the order. This was considered a necessity of war, because no commander, regardless of nationality, would want soldiers who would question his or her orders. Although the defence of 'superior orders' were still invoked in cases ranging from East German border guards to the Yugoslav genocides, it is no longer considered to be a mitigating factor allowing one to escape culpability for his or her individual actions.[86] Regardless of the military justifications of these two principles, the end result is that the defence of superior orders in conjunction with sovereign immunity meant that, with exception of individual violations of the Geneva Convention, criminal responsibility within international law was virtually non-existent.[87]

The norm of head-of-state sovereign immunity was debated at the Versailles Peace Conference. Although the debate failed to bring an indictment, Article 227 of the Versailles Treaty did state that: 'The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.'[88] The Treaty went on to describe the

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[83] United Nations, *Rome Statute of the International Criminal Court*, p. 3.
[84] Michael A. Tunks, "Diplomats or Defendants? Defining the Future of Head-Of-State Immunity," *Duke Law Journal*, Vol. 52, Issue 3, pp. 651 – 682, p. 653. As more states engaged in commercial behaviour, state sovereign immunity began to shift to a 'restricted' state sovereign immunity where commercial activity could be regulated without violating core concepts such as state independence and equality.
[85] Ibid. p. 655.
[86] Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), pp. 25-51.
[87] Ratner, Abrams, and Bischoff, *Accountability for Human Rights Atrocities in International Law*, p. 4.
[88] "The Versailles Treaty, 28 June 1919," The Avalon Project at Yale Law School, http://avalon.law.yale.edu/imt/partvii.asp, accessed 11 March 2011.

creation of a special tribunal that was constituted with five judges appointed by the Allied Powers (the four major Allied Powers were the United States of America, the French Republic, the United Kingdom, and the Union of Soviet Socialist Republics). The challenge to the existent norms of sovereign immunity failed however, as the German Emperor had not committed any crime that had previously been defined or was considered punishable by then-existing international law. The indictment against him was regarded as political and lacked legal grounds for extradition. As a result, he never went to trial, an international tribunal was never established and the former head of state resided in exile in the Netherlands until his death in 1941,[89] thus upholding sovereign immunity for the time being.[90] The challenge to the norm was significant in that it shows willingness for world leaders to consider abolishing sovereign immunity; however they lacked political will at that time to carry out the international tribunal.[91]

The actions taken after World War II, however, are extremely significant as they **successfully** challenged sovereign immunity and broadened international law to encompass state responsibility for its own citizens in addition to the citizens of other states. As noted above, it is ironic, in particular for the argument of this thesis, that the Treaty of Versailles – and the harsh reparations it imposed on Germany – is credited as a causal factor of Hitler's rise to power and the rise of Nazism. In turn, World War II and its aftermath were directly responsible for the changing paradigms found in international law and reparations. The German atrocities, examined in this thesis, are thus central to redress and reparation movements.

Indicators that the traditional defence of sovereign immunity was beginning to erode could be seen before the end of World War II. On 25 October 1941, Winston Churchill and Franklin Roosevelt responded to Nazi massacres in France by issuing a joint statement in which they stated that punishing war criminals was now considered

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[89] Robertson, *Crimes against Humanity*, p. 226.

[90] Germany opposed Allied conducted trials and proposed that Germany conduct the trials of alleged war criminals themselves. The result was the Leipzig Trials. The original list of war criminals was 20,000, which the Allies pared down to 865 to be tried. Upon negotiation, the Allies agreed to reduce the number to be prosecuted and submitted 45 names. Of these 12 military officers were brought to trial, and 6 convicted with lenient punishments. For a review of these trials see Theodor Meron, "Reflections on the Prosecution of War Crimes by International Tribunals," *The American Journal of International Law* 100, no. 3 (2006): 551-79 and George A. Finch, "Retribution for War Crimes," *The American Journal of International Law* 37, no. 1 (1943): 81-88.

[91] Although sovereign immunity was upheld after World War I, this does not imply a complete absence of trials. War crime trials were carried out in Germany following the end of the war for violations of Military Penal Codes and customary international law. One of the more infamous of these was the Leipzig trial. See Jürgen Matthäus, "The Lessons of Leipzig: Punishing German War Criminals After the First World War," in *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes*, eds. Patricia Heberer and Jürgen Matthäus (Lincoln: University of Nebraska Press, 2008).

to be a principal war aim.[92] The Moscow Agreement, signed by Roosevelt, Churchill and Stalin in October 1943, stated that they had received evidence of 'atrocities, massacres and cold-blooded mass executions' perpetrated by Nazi forces in the countries which Germany had invaded. It went on to warn that any German officers, soldiers or members of the Nazi Party who took part in the atrocities would be judged and punished at the conclusion of the war.[93] This statement presupposed that the Allies would win the war, and thus as victors would be able to enforce their standard of justice upon those nations defeated. As the war neared its end, the issue of accountability became more significant, with the Allied Powers proposing different solutions to the question of how to handle war criminals – President Truman believed that an international tribunal should be convened while Premier Stalin preferred show trials, much like his rigged show trials of the 1930s; Prime Minister Churchill, however, strongly favoured executing war criminals without trial.[94] Members of the United Kingdom's administration concurred with Churchill's opinions, citing the obvious guilt of individuals such as Heinrich Himmler. The British Foreign Office in particular argued that war crime trials might have significant procedural problems, such as the lack of precedent and warned that any trials held might breach the legal principle of *nulla poena sine lege*.[95]

Additional arguments were made by the Foreign Office warning that trials would enable the defendants to have opportunities to disseminate propaganda and to question the Allies' own war crimes.[96] Churchill's position was that a list of 50 prominent Nazis should be created and that they should be pursued, captured and, upon

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[92] "Nuremberg Trial Proceedings, Vol. 5: Thirty-Sixth Day, Thursday 17 January 1946." The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/imt/proc/01-17-46.htm, p. 412, accessed on 5 March 2007.

[93] "Joint Four-Nation Declaration, the Moscow Conference, October 1943," The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/wwii/moscow.htm, accessed on 5 March 2007. In particular, the declaration listed the countries in which the atrocities occurred: 'parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece including Crete and other islands, to Norway, Denmark, Netherlands, Belgium, Luxembourg, France and Italy.'

[94] Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001), p. 9.

[95] Latin for "no penalty without a law" refers to the legal principle that one cannot be penalised for doing something that is not prohibited by law.

[96] A severe criticism of the Nuremberg trials is the ruling against *tu quoque* evidence. (The "you also" argument.) This ruling was established so that the Allies' own war crimes could not be used as a rationale for German war crimes. Some instances of *tu quoque* are: charges that Germany violated the rearmament provisions of the Versailles Treaty. The French ignored the provision and Britain also violated the treaty. The French violated the Geneva Convention in the treatment of prisoners, the criminality of carpet bombing, forced labour and deportations that the Soviets also participated in, etc. The exception to the *tu quoque* ruling was for Admiral Chester Nimitz whose lawyer successfully argued that because the Admiral was on trial for his orders concerning the German submarine practise, the courts should allow the evidence that the Allies submarine practises were identical. See Robertson, *Crimes against Humanity*, pp. 230-232.

capture, summarily executed.[97] The United Kingdom maintained its position against war crime trials until May 1945 when they reluctantly joined the other Allies in support of an international tribunal.[98] Ironically, some of the Foreign Office's predictions were accurate; the lack of precedent within international law for the Nuremberg Trials continues to haunt its legacy. The Nuremberg Trials indeed are the most celebrated international criminal courts in history and represented a fundamental shift in international law regarding individual accountability, sovereign immunity and created a foundation for laws of genocide and crimes against humanity. This does not, however, negate the significant flaws the trial had where debate has raged on the question of *nulla poena sine lege* laws, as discussed in the preceding paragraph, in addition to the question of Allied bias and the jurisdictional issues.[99]

3.2 The International Military Tribunal

Just three months after Germany's surrender on 8 May 1945, in August 1945, the four major Allied Powers signed the *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, commonly referred to as the London Agreement. The London Agreement established the Charter of the International Military Tribunal[100] (IMT) which outlined three crimes that were considered to be violations of the post-war customary international law and therefore under the jurisdiction of the IMT. These were: Crimes Against Peace, War Crimes, and Crimes Against Humanity. Each charge defined in the IMT charter, according to Donald Bloxham, was allocated to one of the Allies whose responsibility it was to 'prove' these crimes.

The first of these charges defined in the London Agreement was:

> (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;[101]

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[97] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), pp. 151, 166-167.

[98] Howard Ball, "The Path to Nuremberg: 1944-1945," in *The Genocide Studies Reader*, eds. Samuel Totten and Paul R. Bartrop (New York: Routledge, 2009), p. 429.

[99] Ratner, Abrams and Bischoff, *Accountability for Human Rights Atrocities in International Law*, pp. 209 – 212.

[100] The International Military Tribunal (IMT) at Nuremberg is commonly referred to, and known as, the Nuremberg Trials. The Nuremberg trials were comprised of four distinct trials. It is the first trial, however, the Trial of the Major War Criminals, which has been the focus of scholastic research and debate. When Nuremberg, or the Nuremberg trials, are referenced in this thesis, it is in reference to this first trial.

[101] "Charter of the International Military Tribunal, 8 August 1945," The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm, accessed on 5 March 2007.

This charge was given to the United States to prove; however, many argue that it was not customary international law. The Americans, regardless, were strongly in favour of 'proving' a conspiracy to dominate the European continent.[102]

> The second of these charges defined in the London Agreement was:
>
> (b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;[103]

This charge was given to the British government to prove. Substantial pressure was brought upon the government to expand the definition of war crimes used. Britain, however, refused to expand this definition, arguing that it would create *ad hoc* and *ex post facto* laws.[104]

> The third of these charges defined in the London Agreement was:
>
> (c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[105]

This charge was given to the Soviets (for Crimes Against Humanity in the East) and the French (for Crimes Against Humanity in the West).[106] Regarding this debate, it must also be recognised that there was only a rudimentary understanding of Crimes Against Humanity, as evidenced by the 24 May 1915 public declaration by Great Britain, France and Russia, which stated:

> In view of these new *crimes* of Turkey *against humanity and civilization* the Allied governments announce publicly to the *Sublime Porte* that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.[107]

The resultant and rudimentary understanding of crimes against humanity and civilisation however, did not translate into the emergence of international norms against genocide or massacres, nor did it result in the emergence of a term understood as

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[102] Bloxham, *Genocide on Trial*, p. 18.
[103] "Charter of the International Military Tribunal, 8 August 1945."
[104] Bloxham, *Genocide on Trial*, p. 18.
[105] "Charter of the International Military Tribunal, 8 August 1945."
[106] Bloxham, *Genocide on Trial*, p. 18.
[107] Quoted in Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), p. 67.

customary international law. Again, international laws did not address actions inflicted by a state upon their own domestic citizens, only upon those civilians who were in occupied territories or those in combatant situations. The establishment of the IMT deemed the actions spelled out in the IMT charter to be criminal, and convicted people 'whether or not violation of the domestic law of the country where perpetrated' and the IMT responding to the Holocaust lead to the emergence of atrocity norms.[108]

The creation of the IMT signified a major paradigm shift in international law, and the framework within which a new norm of holding states and individuals accountable for atrocities, or atrocity norms, could emerge. The Nuremberg Trials signified the first international tribunal and the first time representatives of the state were charged with crimes against humanity and crimes against peace. Donald Bloxham argues that 'the idea of legal redress for state crimes was novel and contentious'[109] even among the Allies, and many debated the legality of the trials, primarily due to the accusation that the Nuremberg trials enforced laws *ex post facto*.[110] During the IMT, German defence attorneys argued that the tribunals violated the legal principle that individuals should not be tried for acts which, at the time the acts were perpetrated, were not in fact illegal. The argument centred on the issue that there was no precedent in international law that criminalised the various deeds committed by the Nazis.[111] Thus, the trials violated the principle of *nulla poena sine lege* because the London Agreement created international law rather than enforcing current international laws. Although many scholars, including myself, believe that the laws were in fact in violation of *nulla poena sine lege*, the crimes were too horrific to allow the perpetrators to go unpunished. Once these laws were introduced, however, a legal precedent was formed, thus establishing this crime within international law, and prosecutions for events occurring after 1945 were legal.

Some scholars insist, however, that the principle which the IMT was based upon did not violate the principle of *nulla poena sine lege* because although there were no explicit international laws forbidding the 'criminal' acts of the Nazis upon its own citizens, there were customary international laws that had been violated. Again, customary laws are practises that have been carried out over long periods of time and,

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[108] "Charter of the International Military Tribunal, 8 August 1945"
[109] Bloxham, *Genocide on Trial*, p. vii.
[110] Anthony Ellis, "What Should We Do with War Criminals?," in *War Crimes and Collective Wrongdoing: A Reader*, ed. Aleksandar Jokić (Oxford: Blackwell Publishers, 2001), p. 5.
[111] Jonathan Friedman, "Law and Politics in the Subsequent Nuremberg Trials, 1946-1949," in *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes*, eds. Patricia Heberer and Jürgen Matthäus (London: University of Nebraska Press, 2008), p. 81.

although they are not laws, they have the force of law. The Fourth Hague Convention (1907) is such a source – the Martens Clause states:

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[112]

This clause, it can be argued, establishes that there is law of humanity and public conscience.

Another consideration, outlined by Alan Rosenbaum, is that although the Fourth Hague Convention (1907) does not specifically prohibit the killing of hostages, the act is criminal under international laws on the basis of Grotius' commonly accepted ideas of the laws of humanity. This concept of a 'law of humanity' infers that all public institutions have legitimacy to the degree that they promote and/or conform to moral ideas and standard principles of justice. Thus, obligations respecting basic rights and justice for all overrule or limit efforts in fulfilling governmental needs.[113] These considerations illustrate the current thinking regarding international law. There were no explicit laws that forbade the killing of civilians; however there were legal statements that inferred that these acts are not to be tolerated.

The Nuremberg trials, according to Antonio Cassese, did create two new categories of international crime: crimes against peace and crimes against humanity. In doing so, the trial did apply *ex post facto* law; however these crimes, in particular, the concept of crimes against humanity, have been codified in subsequent legal documents, as discussed in the following subsection. Thus, while the IMT created international law, its subsequent codification in the international criminal court, international tribunals, and other domestic judicial systems now allow for prosecution of these crimes without the charge of *ex post facto* and illustrate a norm cascade and, with the 2002 Rome Statute, internalisation.

In addition to establishing atrocity norms within international society, the IMT also represented a paradigm shift in international society with the explicit rejection of previously accepted concepts of sovereign immunity and the superior orders defence. Article 7 of the IMT's charter states: 'The official position of defendants, whether as

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[112] "Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907," The International Committee of the Red Cross.

[113] Alan S. Rosenbaum, *Prosecuting Nazi War Criminals* (San Francisco: Westview Press, 1993), p. 30.

Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.'[114] Article 8 states: 'The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.'[115] The trial was composed of 24 high-ranking officials, and throughout the trial, the defence of acting under superior orders was discredited. This defence, much like the concept of sovereign immunity, had previously been considered to be a necessity of war; however, the horrific nature of the Holocaust permanently altered international society's perception. No longer could individuals use these concepts to excuse criminal acts. The denial of sovereign immunity and of superior orders was further eroded in the enactment of *Control Council Law Number 10* which applied to individuals, who were not considered to be major war criminals, but was, thusly, prosecuted under the IMT Charter.

3.3 Legacies of Nuremberg

The legacies of Nuremberg can be seen in the codification of international criminal law, including the 1948 Convention of the Prevention and Punishment of the Crime of Genocide, the creation of tribunals such as the 1993 International Criminal Tribunal for the former Yugoslavia (ICTY), the 1994 International Criminal Tribunal for Rwanda (ICTR) and the resulting 2002 International Criminal Court (ICC). In 1948, the United Nations passed Resolution 260, *The Prevention and Punishment of the Crime of Genocide,* which made genocide a crime under international law, envisioned the use of international tribunals to prosecute such crimes and called on the International Law Commission to examine the desirability and possibility of establishing a permanent international court of law. The Convention came into force in January of 1951; however, it was not until 1998 that the Assembly of States Parties began the formation of the International Criminal Court, and not until 1 July 2002 that the Rome Statute entered into force. The Rome Statute established the ICC as a permanent institution with jurisdictions over 'serious crimes of concern to the international community,' further specifying and defining the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.

[114] "Charter of the International Military Tribunal, 8 August 1945," section 2, article 7.
[115] Ibid. section 2, article 8.

As will be explored in Chapter Eight, part of the reason for this lengthy gap between the Genocide Convention and the Rome Statute was Cold War politics. With the international community, and in particular the (members of the) United Nations Security Council, locked into an East-West ideological conflict, neither side could gain enough support to address the question of criminalising perpetrators of bloody conflicts taking place throughout the world.[116]

Despite the caesura during the Cold War, the establishment and subsequent ratifications of the Genocide Convention (1948) does represent, to return to Finnemore and Sikkink's model, the normative tipping point, regarding an atrocity norm. Of 194 countries in the world,[117] 140 countries, i.e. 72%, have ratified the convention, including major world powers such as the United States and Russia. Atrocity norms, including recognition and definitions of genocide, have begun to internalise, which is the final stage of the norm life cycle. The creation of a permanent criminal court which legally defines crimes such as genocide, crimes against humanity, and war crimes in addition to being utilised to prosecute beyond national boundaries, as well as illustrating a commitment to the prevention of genocide which had not previously been seen on the international level.

Between the ICC's inception and 18 August 2010, 113 countries had ratified the Rome Statute, including Germany (in 2003) and Japan (in 2007).[118] The United States has not ratified this treaty, however the United States has recognised crimes against humanity and genocide via the United Nations Security Council's establishment of the ICTY and ICTR statutes. The 113 countries represent well more than half of the world's governments, including two out of three of the case studies in this thesis. Other states accused of genocide or crimes against humanity vary in their acceptance of the ICC. Rwanda (1994 genocide) has not joined the ICC, whereas the states of the former Yugoslavia (1990s genocide and ethnic cleansing), and Cambodia (1975-1979 crimes against humanity) have done so. When also taking into account Sudan's referral from the United Nations Security Council in 2005 to the ICC, one can argue, that the establishment of international criminal law in regard to crimes against humanity and

[116] For example, the Indonesian massacres (1965-1966), the Burundi genocide (1972), and the Cambodian genocide/massacres (1975-1978) are notable events occurring during the Cold War with no action taken by the United Nations, despite the genocide convention's requirement "to prevent and to punish," and other human right conventions.

[117] 192 members of the United Nations, plus two non-members: the Holy See and Palestine. There are two whose political status are under contention: Kosovo and Taiwan; these are not included under the state count as they are not yet recognised as independent.

[118] "The States Parties to the Rome Statute," International Criminal Court, http://www2.icc-cpi.int/Menus/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.htm, accessed on 8 March 2011.

genocide is institutionalised. The referral represented the first state that was not a party to the ICC came under investigation by the Court for violations of genocide and crimes against humanity.[119]

Although international conventions are not always adhered to, the ratification of conventions can be seen as an important step forward. It theoretically shows a willingness to commit to the normative behaviour, or at least by the signing of the documents tell the international community they are willing to do so. The ratification or accession of these states also demonstrates the creation and diffusion of norms against atrocity and injustice. The understanding that these types of actions are morally and legally wrong in addition to the condemnation of such actions through trials, truth commissions and recognition of responsibility through apologies will assist in the formation of a norm of redress and reparation.

4. Normative Concepts of 'Reparation'

The shift in international law, specifically the establishment of legal concepts such as crimes against humanity and genocide, the refutation of 'superior orders' and sovereign immunity defences, and the broadening of international law to include both domestic and foreign citizens is one strand of the historical narrative concerning reparation politics. Yet this strand alone cannot account for the shifting conceptual understanding of reparations. In conjunction with international law, a second strand which assists in explaining the transformation of reparations from war fines to reparation politics, is found in the political arena of West German politics and *Vergangenheitsbewältigung,* the struggle to come to terms with the past.

The implementation of redress and reparation programmes to benefit victims of the Holocaust was a culmination of laws, treaties and policies which began in 1947. The 1952 Luxembourg Agreement, however, permanently altered what 'reparation' meant. The first 'reparation' law was adopted in November 1947 and drafted by German lawyers; however, *Law Number 59 on Restitution of Property Stolen in the Course of the 'Aryanization' of the Economy* was eventually issued by the United States military government as an Allied law, not German.[120] While the law concerned what we now call restitution, or the return of stolen goods, and not reparations i.e.

[119] United Nations Press Release, *Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court.* SC/8351, 03 March 2005.
[120] Christian Pross, *Paying for the Past: The Struggle over Reparations for Surviving Victims of the Nazi Terror*, trans. Belinda Cooper (Baltimore: The John Hopkins University Press, 1998), p. 19.

monetary payments for items that cannot be returned, it is a significant step towards the changing perception of state responsibility for victimisation of a domestic populace.[121] After the formation in 1948 of Israel, the newly-established state demanded reparation payment from East and West Germany in order to enable refugees to build new lives. According to the then-current understanding of reparations, Israel would not have been eligible for monetary compensation, since it legally had not existed as an entity during World War II, and would have had no standing in the conflict. While the demand for reparations was rejected by East Germany, as discussed in Chapter Eight, the West German government voluntarily addressed the claims. In 1951, Chancellor Konrad Adenauer stated that 'unspeakable crimes were committed in the name of the German people, which created a duty of moral and material reparations'.[122] West Germany voluntarily entered into negotiations with Israel on 21 March 1952, and just six months later, on 10 September 1952 the Reparations Agreement between Israel and West Germany was signed in Luxembourg.[123]

Ariel Colonomos and Andrea Armstrong argue that the Luxembourg Agreement represented a turning point in this concept of reparations for several reasons. First, all previous reparation and reparation programmes had exclusively addressed damages that were caused by the vanquished state upon the victorious forces during the period of armed conflict. The West German programme, however, addressed not only the war against other countries, but actions which occurred during the domestic rise of Nazism in the 1930s. Second, the West German programme compensated individual victims of the atrocity, including its own domestic citizens, citizens of the newly created state of Israel, and through the inclusion of an international non-governmental organisation, citizens of other countries such as the United States and Western European countries.[124]

As previously mentioned, the Versailles Treaty dictated that Germany would pay 'reparation' to the Allied nations, and 'compensation' on behalf of individual citizens of the Allied nations. These different terms represent the historical definition of reparations. The focus was on payment from a state which lost the war to a state which won the war. The individual as victim was only considered as an extension of the

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[121] Ibid.

[122] Quoted in Ibid. p. 22.

[123] Frederick Honig, "The Reparations Agreement between Israel and the Federal Republic of Germany," *The American Journal of International Law* 48, no. 4 (Oct 1954): 564-78. pp. 564-565. Since East Germany refused to enter into negotiations, the agreement states that Israel has the right to pursue claims towards East Germany, p. 578.

[124] Ariel Colonomos and Andrea Armstrong, "German Reparations to the Jews after World War II: A Turning Point in the History of Reparations," in *The Handbook of Reparations*, ed. Pablo de Greiff (Oxford: Oxford University Press, 2006), p. 391. The emergence of non-state actors negotiating for reparations will be further explored in Chapter Four.

winning state, and as such, the only consideration was compensation for losses which a victor's citizen might have incurred, which had been negotiated for during the peace process. The new concept of reparations focused not on fines paid to the victorious state, but on the individual victims of the Holocaust, primarily Jewish citizens who were residing in West Germany and Israel. There is now a shift from an exclusive focus on the state, to the individual citizen, regardless of his/her nationality during the conflict. The conceptual shift in reparations allowed a reparation programme to compensate for not only the physical injuries, but for the loss of freedom, property, income, professional, or financial advancement if the reason for the loss or injury was due to persecution on political, social, religious, or ideological grounds.

The reparation programme, as laid out in the Luxembourg Agreement, compensated the state of Israel for the suffering by Holocaust survivors who were now Israelis. The funds were to be used in resettling the massive refugee population who had migrated from Germany and the displaced persons camps. It further obligated West Germany to enact a series of laws allowing individuals to request reparations because of 'physical and moral suffering' during the time of Nazi persecution, this was a separate issue from restitution -- the return of specific actual items confiscated, seized or stolen. While the Luxembourg Agreement obligated Germany to create reparation laws, there had been no obligation to enter into the treaty negotiations with Israel or to sign the agreement. In addition, Germany voluntarily passed further reparation laws, and it is this willingness to commit to a reparations programme that changed both the definition of reparations and launched a new concept of reparation politics. The West German reparation programme, both up to 1952 and after, in conjunction with its Jewish and Romani victims, will be explored in more depth in Chapter Five.

5. Philosophical Concepts of *Vergangenheitsbewältigung*

During the same time frame that the legal and normative definitions of reparations were changing, German philosophers and political theorists, such as Theodor Adorno, Karl Jaspers, and Hannah Arendt were struggling with the concept of German political and moral guilt, the need for German society to 'come to terms' with their collective responsibility for the atrocities committed during World War II, and the inherent moral responsibility of the German people to pay reparations. This transformation of the term 'reparation' thus launched a broader debate within literature and philosophy. John Torpey credits the emergence of this discourse to the highly

influential publication in 1946 of Karl Jaspers' text *Die Schuldfrage,* (published in English as *The Question of German Guilt* in 1947).[125] Jaspers later recalled that his text was written at the moment that the crimes of the Nazi regime were made 'apparent to the entire population.'[126]

Jaspers begins:

> Almost the entire world indicts Germany and the Germans. Our guilt is discussed in terms of outrage, horror, hatred, and scorn. Punishment and retribution are desired, not by the victors alone but also by some of the German emigrés and even by citizens of neutral countries. ... People do not like to hear of guilt, of the past; world history is not their concern. They simply do not want to suffer any more; they want to get out of this misery; to live but not to think. There is a feeling as though after such fearful suffering one had to be rewarded, as it were, or at least comforted, but not burdened with guilt on top of it. ...And yet, though aware of our helplessness in the face of extremity, we feel at moments an urgent longing for the calm truth. ... We want to see clearly whether this indictment is just or unjust, and in what sense. For it is exactly in distress that the most vital need is most strongly felt: to cleanse one's own soul and think and do right, so that in the face of nothingness we may grasp life from a new authentic origin. We Germans are indeed obliged without exception to understand clearly the question of our guilt, and to draw the conclusions. What obliges us is our human dignity.[127]

Jaspers' words are haunting. At a time in which guilt and responsibility were often ignored, Jaspers made a clear and compelling argument for German guilt. Anson Rabinbach argues that Jaspers' text was a founding narrative of the 'European German', 'of a neutral, anti-militarist and above all ethnical [sic] Germany.' [128] No single intellectual, Rabinbach contends, contributed more to the restructuring of German thought post-World War II than Jaspers.[129]

Jaspers outlined his four concepts of guilt: criminal guilt whose jurisdiction rests with the courts, political guilt, whose jurisdiction rests with the power and will of the victor; moral guilt, whose jurisdiction rests with one's conscience; and metaphysical guilt, whose jurisdiction rests with God alone.[130] The differentiation and analysis of different types of guilt offered a vantage point from which one could understand how a person might not be criminally responsible, but still, as a German, have responsibilities due to political guilt and, to differing extents, moral and metaphysical guilt for actions of the Nazi regime. Jaspers concluded his treatise with

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[125] Anson Rabinbach, *In the Shadow of Catastrophe: German Intellectuals between Apocalypse and Enlightenment* (Berkeley: University of California Press, 1997), p. 130; and Torpey, *Making Whole What Has Been Smashed,* pp. 43-45.
[126] Quoted in Rabinbach, *In the Shadow of Catastrophe*, p. 130.
[127] Jaspers, *The Question of German Guilt*, pp. 27-29.
[128] Rabinbach, *In the Shadow of Catastrophe*, p. 130.
[129] Ibid. p. 136.
[130] Jaspers, *The Question of German Guilt*, pp. 31-32.

the argument that there was a political responsibility for the German people to make reparation to victims of the Nazi regime.[131]

Although Jaspers is considered to be the primary influence concerning the emergence of the philosophical concept of reparations, other scholars eventually began to address the concern of how one should come to terms with the past. John Torpey credits Jürgen Habermas as a scholar who often reiterated the theme of the continuity of national traditions and the corresponding need to 'come to terms with the past,'[132] while Hannah Arendt, in 1950, warned:

> We can no longer simply afford to take that which was good in the past and simply call it our heritage, to discard the bad and simply think of it as a dead load which by itself time will bury in oblivion. The subterranean stream of Western history has finally come to the surface and usurped the dignity of our tradition.[133]

Throughout the 1950s and early 1960s, the movement of coming to terms with the past became well-known within Germany, leading prominent scholar Thomas Adorno to write, in 1959, that 'We will not have come to terms with the past until the causes of what happened then are no longer active. Only because these causes live on does this spell of the past remain, to this very day, unbroken.'[134] Thus, the German concept of *'Vergangenheitsbewältigung'*, or 'coming to terms with the past', emerged as a prominent discourse within Germany.

The paradigm shift in international law which led to the establishment of international criminal law, and the conceptual shift within the meaning, application and philosophical arguments for reparation(s), in conjunction with the emergence of philosophical discourses on coming to terms with the past were vital to the creation of a new intellectual field, often referred to as reparation politics. The creation of this field, however, was not instantaneous. Although there was a redress and reparation norm following World War II, reparation politics, as currently conceived, lay dormant for many decades, as nations gave primacy to Cold War politics. What did emerge in the late 1970s and 1980s, and now can be viewed as one segment of reparation politics, was the study of transitional justice.

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[131] Ibid. p. 118.

[132] John Torpey, "Introduction: Politics and the Past," in *Politics and the Past: On Repairing Historical Injustices*, ed. John Torpey (New York: Rowman & Littlefield Publishers, 2003), p. 2.

[133] Arendt, *The Origins of Totalitarianism*, p. ix.

[134] Adorno, "What Does Coming to Terms with the Past Mean?" p. 129.

6. Transitional Justice

Transitional justice, at times, also called transitology,[135] is the study of how autocratic, authoritarian or totalitarian regimes transition to more democratic regimes, and how successor governments respond to the atrocities and injustices of the previous regime.[136] Transitional justice is typified by a distinctive shift in the political order, and examines the state's attempts to redress injustices and atrocities committed by the previous regime.[137] The study of transitional justice is closely interlinked with democratisation studies -- the field which studies transitions to more democratic political regimes. Democratisation studies focus on the processes of transition while transitional justice focuses on how the actions taken by the government redress past atrocities. Transitional justice has generally been conceived as a subset of democratic transition studies.[138] The International Centre for Transitional Justice, a well-known international non-governmental organisation (NGO), clarifies the definitional aspect:

> Transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and to promote possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades.[139]

The difference then is transitional justice focuses on forms of restorative and retributive justice. Its focus is on coming to terms with the past, and not simply on the transition itself.

Transitional justice has also been defined as a subset of reparation politics by John Torpey, and is included by other prominent authors such as Roy Brooks and Jeffrey Olick in their research regarding coming to terms with the past,[140] with Olick

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[135] Jeffrey K. Olick and Brenda Coughlin, "The Politics of Regret: Analytical Frames," in *Politics and the Past: On Repairing Historical Injustices* ed. John Torpey (New York: Rowman & Littlefield Publishers, 2003), p. 42; One distinction which could be made is that transitology is the name for the study of the process of change while transitional justice is the practise itself. The difference in terms is very subtle and many scholars do not make the distinction preferring to call the study as well as the entire process transitional justice instead of transitology.

[136] Jon Elster, *Retribution and Reparation in the Transition to Democracy* (Cambridge: Cambridge University Press, 2006), p. i.

[137] Ruti G. Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000), p. 5.

[138] Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2002), p. 11.

[139] "What is Transitional Justice," International Center for Transitional Justice, http://www.ictj.org/en/tj/, accessed on 8 March 2007.

[140] See Torpey, *Making Whole What Has Been Smashed*, pp. 51-54; Roy L. Brooks, "The Age of Apology," in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustices*, ed. Roy L. Brooks (New York: New York University Press, 1999), pp. 10-11; and Olick and Coughlin, "The Politics of Regret: Analytical Frames," pp. 42-45.

identifying it as one of three distinct frames for understanding the field.[141] Having this sub-field categorised as both part of the democratic transition studies and within the field of coming to terms with the past is not a contradiction in terms. At the heart of both fields is the basic question of how to come to terms with state crime, abuse, and injustice. The difference between the two fields is generally straightforward. Democratic transition studies focus exclusively on regime change and a transition to a more democratic regime, whereas reparation politics assumes a broader stance and examines atrocities and injustices that have occurred with or without a regime change, occurred in an authoritarian or liberal regime, and consider a broader historical and temporal scope.[142] Transitional justice bridges this gap and focuses on the legal processes that the state utilises.

Priscilla Hayner credits the 1986 publication of *Transitions from Authoritarian Rule* as the major work which helped to define the field of transitional justice.[143] While the 1986 publication helped to solidify the field, the initial research and study arose as investigations of transitional justice during regime changes in Southern Europe in the 1970s, and the emergence from military dictatorships in Latin America during the 1980s. Once the study of transitional justice was established, scholars often retroactively applied the concepts to post-war Europe and other regime transitions in the 1950s and 1960s. The definitive text on transitional justice – *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (1995), edited by Neil J. Kritz and comprised three volumes of over 2,200 pages, starts its examinations with the transition from Nazism to the Federal Republic of Germany following World War II.[144] In addition, it broadens the focus to include transitions from formerly communist Eastern European regimes, and South Africa's emergence from apartheid to multiracial democracy.[145] It has also been used, albeit only by scholar Jon Elster, in conjunction with historical analyses of regime change such as Athens (411, 403 B.C.) and the French restorations (1814-1815).[146] While the study of transitional justice flourished

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[141] Olick and Coughlin, "The Politics of Regret," p. 38.
[142] Torpey, *Making Whole What Has Been Smashed*, pp. 52-53.
[143] Hayner, *Unspeakable Truths*, p. 10.
[144] Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Three vols. Vol. Two, Transitional Justice (Washington D.C: United States Institute of Peace Press, 1995).
[145] Allison Marston Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law," *California Law Review* 93, no. 75 (2005), p. 90; and Neil Kritz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* Three vols. Vol. One, Transitional Justice (Washington D.C: United States Institute of Peace Press, 1995), p. xvii.
[146] See Jon Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge: Cambridge University Press, 2004).

from 1970 on, the broader field, considered to be reparation politics, did not garner much study until after the Cold War ended, as discussed below.

6.1 Submergence of International Justice

According to legal scholar M. Cherif Bassiouni, the time period following World War II was classified by the international society remaining unaffected by the needs for international criminal justice, regardless of the fact that some 250 conflicts had occurred with a minimum of 70 million casualties. The reason why the perpetrators of these various crimes – including genocide and crimes against humanity – have benefited from impunity is because of the primacy the international society gave to Cold War politics at the expense of international justice.[147] Similarly, legal scholar Jackson Nyamuya Maogoto concurs that 'the precedent set at Nuremberg, and amplified at Tokyo, pointing to a restrained State disciplined by international law norms was to run into a storm as the world's third hegemonic struggle in the 20th century – the Cold War – commenced even before the ashes of World War II had cooled.' Further he states:

> The Cold War largely put an end to the spurt of international judicial activity inaugurated at Nuremberg and Tokyo and contributed to the preservation of a statist international order. Many States were reluctant to enthusiastically embrace any form of international penal process and displayed a great deal of ambivalence in the normal conduct of their foreign affairs. With lack of State cooperation, the blood-soaked Cold War era was characterised by impunity. The bipolar politics of the era effectively scuttled any possibility of international efforts to address numerous atrocities despite major advances in the enaction of numerous treaties covering human rights and humanitarian law. Statism was taken particularly seriously in the newly independent and fragile countries of the developing world, where even if the State acted unjustly or genocidally against its own people, the prevailing wisdom was that this was not an affair for outside powers.[148]

The codification of crimes against humanity and genocide evolved from legal documents of the Nuremberg Trials and the Genocide Convention. Although created following World War II, they then lay dormant for some time, re-emerging following the end of the Cold War with the creation of *ad hoc* international tribunals sanctioned under the United Nations, taking the form of the ICTY in 1993 and the ICTR in 1994.

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[147] M. Cheriff Bassouni, "Realpolitik," in *The Genocide Studies Reader*, eds. Samuel Totten and Paul R. Bartrop (New York: Routledge, 2009), p. 290.

[148] Jackson Nyamuya Maogoto, "The Concept of State Sovereignty and the Development of International Law," in *The Genocide Studies Reader*, eds. Samuel Totten and Paul R. Bartrop (New York: Routledge, 2009), p. 292.

Although the period of the Cold War is characterised by both a lack of intervention on the international level and by a lack of criminal responsibility or judicial prosecutions, at the same time, there was development in the area of transitional justice, as discussed in the previous subsection. These events, for the most part, disappearances of regime opponents, took place in South America, Asia, and Africa, and were followed almost universally by commissions of enquiry. A selection is listed in Table 2.2 The table however, does not include, all events within the Cold War, or events such as the Cambodian or Burundi genocides, as there were no transitional justice actions following these events:

Table 2.2: Select Transitional Justice Actions during the Cold War

Country	Atrocity	Actions	Victims	Actions
Uganda	1971 – 1974	• Forced Disappearance	Political Opponents	• 1974: *Commission of Inquiry into the Disappearance of People in Uganda since 25th January, 1971* • 1975: *Report of the Commission of Inquiry into the Disappearance of People in Uganda since the 25th January, 1971*
Bolivia	1967 – 1982	• Forced Disappearance	Political Opponents	• 1982 – 1984: Aborted Truth Commission – *National Commission of Inquiry into Disappearances* (did not complete the process) • Criminal Trials
Argentina	1975 – 1983	• Forced Disappearance • Detention • Torture	Political Opponents	• 1983 – 1984: National Commission on the Disappearance of Persons • 1984: *Never Again* (Publication of Commission Report) • 1983 – 2004: A series of reparation laws • 1984 – on: Prosecution of high ranking military officers
Uruguay	1973 – 1982	• Forced Disappearance	Political Opponents	• 1985: Investigative Commission on the Situation of Disappeared People and Its Causes. • 1985: *Final Report of the Investigative Commission on the Situation of Disappeared People and Its Causes*
Zimbabwe	1983	• Governmental repression of dissidents	Political Opponents	• 1985: Commission of Enquiry (report kept confidential)
Uganda	1962 – 1986	• Violations of Human Rights	Political Opponents	• 1986 – 1995: *Commission of Inquiry into Violations of Human Rights.* • 1994: *The Report of the Commission of Inquiry into Violation of Human Rights: Findings, Conclusions, and Recommendations.*
Nepal	1961 – 1990	• Forced Disappearance	Political Opponents	• 1990 – 1991: *Commission of Inquiry to Locate the Persons Disappeared during the Panchayet Period* • 1994: Public release of *Report of the Commission of Inquiry to Locate the Persons Disappeared during the Panchayet Period*
Chile	1973 –	• Human rights	Political	• 1990 – 1991: *National Commission on*

	1990	violations • Forced disappearance • Executions • Torture	Opponents	*Truth and Reconciliation* aka 'The Rettig Commission' • 1991: *Report of the National Commission on Truth and Reconciliation* • Reparations for families of those killed or disappeared (excluded torture)
Chad	1982 – 1990	• Violation of Human Rights	Political Opponents	• 1991 – 1992: *Commission of Inquiry on the Crimes and Misappropriates Committed by the Ex-President Habré, His Accomplices and/or Accessories* • 1992: *Report of the Commission*

A substantial portion of the transitional justice actions occurred in the 1980s and began to increase towards the end of the Cold War. Although similar events occurred in the 1960s and 1970s, it was not until the 1980s that the trend of transitional justice, i.e. addressing the injustices, of a previous regime became stronger. Likewise, it was in the late 1980s that the current conception of 'coming to terms with the past' began to re-emerge, with the Japanese American redress and reparation movement.[149] As will be argued in Chapter Six, this movement is a significant step forward for reparation politics, because this movement--which sought redress for the internments during World War II -- allowed reparation politics to transcend the limitations of transitional justice. The success of the Japanese American movement demonstrated that successful redress and reparation movements could take place, first, outside of regime change and, second, within democratic states. This shift solidified the international trend of 'coming to terms with the past,' with each subsequent movement helping to further the understanding of the field of reparation politics.

6.2 Analytical Frameworks within Transitional Justice

Transitional justice literature contributes a great deal to our understanding of the various ways that states can engage in reparation politics. In particular, Ruti Teitel's *Transitional Justice* (2000) examines the concept of legal response and justice which states utilise in times of political transformation. Teitel broadly categorises transitional justice into five distinct responses:

i. Criminal justice is characterised by criminal trials and prosecutions. The focus is on bringing perpetrators to justice and individual accountability within the judicial system. Within a transitional justice framework, the majority of trials have occurred within the domestic sphere, and not the international.

[149] This is now considered to be a redress and reparation movement, however the movement used the term redress movement.

ii. Historical justice is represented by the pursuit of historical truth and an accurate collective memory. Both trials and truth commissions are emphasised within historical justice as is the importance of open access to research in documentation and archives.

iii. Reparatory justice is exemplified by a number of diverse forms including reparations, compensation, damages, redress, restitution, rehabilitation, and so forth. Reparatory justice emphases payments and monetary commitments for damages inflicted upon the individual.

iv. Administrative justice is typified by corrections in law and political purges of former perpetrators. The administration of the state is 'cleansed' through the removal of unjust rules and regulations and individuals which supported the previous regimes actions.

v. Constitutional justice is illustrated by the creation of, or modification of, the country's constitution in order to prevent the reoccurrence of the injustice or atrocity which had been perpetrated. It enshrines, in the highest legal document, prevention of said injustice, thus refuting the previous regimes stance.

An extended discussion of this typology can be found in Chapter Four. Although transitional justice itself is significantly narrower in scope than reparation politics, it nonetheless represents an extremely important subset of reparation politics; it is the actions taken within transitional justice which bring legal clarification to the atrocities/injustices which have occurred. When the state sanctions and supports efforts gained at determining truth and culpability – such as trials and truth commissions – it creates an historical record that cannot be denied by legitimate authorities. This legal clarification is the vital underpinning and first step to the understanding of reparation politics.

6.3 Levels of Analysis

Transitional justice literature can also illustrate the level of analysis that transitional justice and reparation politics often utilise. Jon Elster proposes that transitional justice can involve a variety of actors and levels:[150]

i. An overarching international level of actors typified by supranational institutions, i.e. the institutions and organisations that have inherent 'international' structure and are composed by member states. Some of the resulting declarations of these organisations, such as: the *Convention on the*

[150] Elster, *Closing the Books*, pp. 93-99.

Prevention and Punishment of the Crime of Genocide (1948), the Rome Statute of the International Criminal Court (2002), and the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005) illustrate an international response and encouragement of a redress and reparation norm. These norms will influence the state actors and contribute to the flourishing of movements which seek apologies, redress and so forth.

ii. Actors within the domestic level which are typified by sovereign states and corporate actors (organisations which profited or benefited from the atrocity such as corporations, political parties, and churches). Redress and reparation movements focus on obtaining redress mainly from the state. There have been several lawsuits however, against cooperate entities such as insurance companies and banks.

iii. Actors at the individual level who participate in the redress movement. These actors can be very influential.

This thesis brings together the different levels of reparation politics. As will be argued, the international norms have been influenced by the supranational organisations such as the United Nations and European Union. On the domestic level, reparation claims are debated and either accepted or denied, and, finally, within social movements, there are various approaches to claims. Additionally, bringing in the analytical perspective of political opportunity structure, the role of elite allies, who can make the crucial difference between success and failure will be discussed, including the level on which they engage.[151]

7. Emergence of Modern Reparation Politics

The Nuremberg Trials, and subsequent changes in international law, established the illegality of certain crimes and proposed new legal definitions – that of genocide and crimes against humanity. The subsequent reparation programmes and emergence of philosophical arguments towards reparation within German society established the precedent of recognition and dictated reparations and apologies as appropriate forms of

[151] Although it is recognised that many social movements additionally target organisations, the primary target and offender is the state. As such it is the state which will be our focus.

response for state atrocity. This precedent was reinforced by the emergence of transitional justice and the proliferation of criminal, historical, reparatory, administrative and constitutional justices in response to regime changes. The culmination of these factors – legal, normative and philosophical – converged at the end of the Cold War to consolidate into a larger field of study, which was linked together by the idea that coming to terms with the past was an essential element of statehood.

In the late 1980s, research in 'coming to terms with the past', outside of Germany, began to move away from the exclusive realm of democratic transition literature. Various social movements[152] and subsequent literature began to explore the possibilities of redress for other victimised groups and for states which did not experience regime change. A breakthrough occurred in the 1980s with the Japanese American redress movement. The success of a movement associated with a current world power, and not a recently defeated regime, in conjunction with the success of well-known transitional justice movements, led to a worldwide increase in redress and reparation movements which called on governments to come to terms with their past. Many of these movements, such as the South African Truth and Reconciliation Commission utilised the linguistic framework of restorative justice, whereas many other movements preferred more traditional wordings of transitional justice.

Reparation politics, however, has altered the meaning of reparation to solely mean fines paid from one state to another; reparations are today often considered to be some form of material recompense for that which cannot be returned. Reparations are part of a broader redress and reparation system, the broad field in which actors, primarily states, attempt to address past wrongs. This field encompasses transitional justice, apologies, and various other forms of reparations redress, and restitution.

Reparation politics has been framed by several theories, all of which contribute to the field in various ways. I will review these theories and major scholars' work here, moving on to discuss the theoretical approach used in this thesis.

[152] The Japanese American reparations and redress movement and the Japanese comfort women reparations and redress movement substantially increased mobilisation and influence during the 1980s. Other movements became more prominent in the news and literature such as the African American, Native American, and other cases in Australia and Germany. See Roy L Brooks, ed., *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustices* (New York: New York University Press, 1999).

7.1 Theory of Redress

As a distinct field of study, reparation politics began to solidify in 1999 with Roy Brooks' publication of *When Sorry Isn't Enough*, an anthology of what Brooks called civil redress movements, including a discussion on 'The Age of Apology'. Brooks' understanding of this emergent field included a theory of redress detailing four elements which are required for successful redress:[153]

i. The demands for redress must be addressed with the legislative body rather than the judicial body.

ii. Political pressure, either public or private, must be brought upon individuals within legislature.

iii. Strong internal support from the group that has been victimised must exist, and it must be a high priority for the group.

iv. The claims must be meritorious: constitution of a meritorious claim are: '(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.'[154]

Brooks' initial contribution exemplified that the notions of 'coming to terms with the past,' which had emerged post World War II, had solidified into a field of study which warranted further research. His theory of successful redress composed of nine pages and was largely unsubstantiated. Yet it was visionary as it successfully began to draw parallels between the social movements demanding recognition and the emergence of redress within international society.[155]

7.2 Theory of Restitution

The field of reparation politics was then further expanded in 2000, with Elazar Barkan's publication of *The Guilt of Nations: Restitution and Negotiating Historical Injustices*. Barkan's approach, which Jeffrey Olick and Brenda Coughlin classify as a philosophical-jurisprudential approach to reparation politics,[156] centres on the concept of universal human rights and morality. The text continues in the vein of Karl Jaspers, arguing that states have a moral responsibility to come to terms with their past. Barkan's discourse substantially furthers the field of reparation politics by clarifying

[153] Brooks, "The Age of Apology," p. 6
[154] Ibid. p. 7.
[155] Ibid. pp. 3-11.
[156] Olick and Coughlin, "The Politics of Regret," p. 38.

terminology and proposing a new explanatory framework for reparation politics. Barkan argues that this new international trend of states of engaging in reparations and restitution is the result of an emergence of a 'neo-Enlightenment morality' [157] within international relations. This morality, he says,

> [i]s cognizant of the tension between the group and the individual and is committed to address both while refusing to privilege either. It rejects the notion of a general global moral system and recognizes instead that only voluntary local resolutions can provide tentative solutions. These agreements are reached among social movements with political identities.[158]

Barkan further explains that the demand for states to act morally in acknowledging the injustices or atrocities in which they have engaged is a novel phenomenon, and differs from past practises because of the voluntary nature of reparation politics. The actors are not states who were on opposing sides of a past war, but rather a victimised group and its oppressor, both of whom voluntarily enter into negotiations. The willingness of these governments to enter into these negotiations, to recognise the past injustice or atrocity, to apologise for the event(s), and to provide reparations and other forms of redress is not only part of this new morality, but an expectation, based more on moral considerations than political.[159] As will be discussed in Chapter Eight, I argue that although there is a strong normative element that influences the success of redress and reparation movements, the primary domestic considerations are often political, and rely heavily on elite allies within the political opportunity structure. I argue that there must be both this normative aspect in addition to the political to explain the differential level of success and failure between groups.

Barkan outlines his theory stating that this new theory of restitution provides a mechanism for international justice and proposes a process, not a solution or standard. States engage in reparation politics for various political and moral reasons, including recognition that the injustice or atrocity continues to impact those victimised, regardless of the temporal differences between the event and modern times, reflecting the awareness that even historical injustice can impact the present.[160] This theory of restitution is furthered by Janna Thompson's publication *Taking Responsibility for the Past* (2002). Thompson argues there is an historical obligation to those groups the state

[157] see Barkan, *The Guilt of Nations* for his work on the emergence of this morality framework.
[158] Ibid. p. 309.
[159] Ibid. pp. xvi, 317.
[160] Ibid. pp. xxx-xxxi, 319 – 320.

has victimised. The obligation is a trans-generational moral responsibility which is inherited by the descendants of both the victimised and perpetrators.[161]

According to the philosophical-jurisdictional approach, successful movements depend on the victims being able to mobilise sufficient political and moral leverage in order to get the perpetrators or beneficiaries of the atrocity to engage in reparation politics. Power plays a crucial role, but morality and world opinion, as decisive political instruments, are manifest in the negotiation of international treaties and conflicts.[162] Reparation politics, Barkan argues, demonstrate that 'acting morally carries tangible and intangible political and cultural benefits' and argues 'for a morality that recognizes an ensemble of rights beyond individual rights.'[163]

The philosophical arguments that the state needs to make reparations to those whom they victimise is linked to the concept of universal human rights, which were vocalised in 1948 by the United Nations in the *Universal Declaration of Human Rights.*[164] Scholars within this discourse such as Karl Jaspers, Elazar Barkan, and Janna Thompson argue this approach because they believe that it is only with gestures of reparation and apologies by those who committed or benefited from the injustices/atrocities, and formal recognition of the event(s) in question, which can restore the dignity of the victims and their descendants, and deter potential re-occurrences. The literature often speaks of the rights of man, dignity, and quite frequently utilises Judeo-Christian references to atonement and sin.[165]

The international community utilises a similar approach of universal human rights in discourse which focuses primarily on the codification of international law. Earlier in this chapter the evolution of international criminal law and the impact of the Nuremberg trials was reviewed, which included the legal concepts which were established or reinforced immediately after World War II, gave the international community a framework for accountability, and both clarified and created international norms and laws. It did not, however, give a clear international understanding of reparation politics, as the field was just beginning to solidify.

The legal framework focuses on international and domestic laws, criminal prosecutions, civil trials, and other various activities. The focus throughout the legal

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[161] Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Cambridge: Polity Press, 2002), p. xii.
[162] Barkan, *The Guilt of Nations*, pp. xxxi - xxxvii.
[163] Ibid. p. xli.
[164] Olick and Coughlin, "The Politics of Regret," p. 39.
[165] See Thompson, *Taking Responsibility for the Past*; Barkan, *The Guilt of Nation*, p. xxiii; and Brooks, "The Age of Apology," p. 8.

literature is on the concept of universal human rights and the establishment of international norms and laws regarding reparation politics. Whereas redress and reparation for victims was a novel idea following World War II, it can now be said to be a normative expectation: 'Modern international law takes as a fundamental value the condemnation and redress of certain categories of heinous conduct, such as genocide, torture, and crimes against humanity.'[166]

The codification of international laws and norms regarding reparation politics can be seen in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. This United Nations resolution was adopted by the General Assembly on 16 December 2005 after it spent fifteen years drafting the text. The resolution emphasises that principles and guidelines:

> [d]o not entail new international or domestic legal obligations but identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights law and international humanitarian law which are complementary though different as to their norms.[167]

This resolution reflects the culmination of the legal discourse within reparation politics. Similar to the philosophical discourse, the focus is on universal human rights, the emphasis, however, is on law, and not on morality:

> [i]n honouring the victims' right to benefit from remedies and reparation, the international community keeps faith with the plight of victims, survivors and future human generations and reaffirms the international legal principles of accountability, justice and the rule of law.[168]

I will argue that both the philosophical and the legal framework emerged immediately after World War II and then lay dormant during the Cold War due to the emphasis on state sovereignty during this timeframe. This philosophical-jurisdictional approach was then utilised by Barkan and Thompson in the early 2000s as an explanatory framework for the solidifying field of reparation politics.

7.3 Politics of Regret

Jeffrey Olick and Brenda Coughlin propose an alternative explanation to Barkan and Thompson's emphasis on moral responsibility. In 'The Politics of Regret:

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[166] Donald Francis Donovan and Anthea Roberts, "The Emerging Recognition of Universal Civil Jurisdiction," *The American Journal of International Law* 100, no. 1 (2006), p. 142.
[167] United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, A/RES/60/147, 2006.
[168] Ibid.

Analytical Frames' (2003), Olick and Coughlin suggest that states engaging in this so-called 'retrospective practise' are employing a 'new principle of legitimation' which they call the 'politics of regret'.[169] Identified as a 'sociohistorical approach' to reparation politics, the authors argue that reparation politics should be understood within a sociological and historical approach which focuses on culture, collectivity, and historical studies. They place these politics of regret at the 'centre of modernity.'[170]

Olick and Coughlin examine the question of collective memory and culture in conjunction with reparations and apologies. One conclusion they draw is that reparations:

> [i]s strongly based on an extrapolation of tort law and other institutions for generating consistency in commercial relations (e.g., insurance). This is one reason why Japan, whose cultural resources and identity might (and do) work against participating in the politics of regret, has made some gestures (albeit reluctantly): Reparation of past injustice maintains restitutive norms essential for contemporary forms of international commerce.[171]

They continue their argument by also examining Norbert Elias' work on increasingly dense networks of relations, which give actions a wide and unforeseeable circle of implications with Hannah Arendt's work on *Human Condition:*

> [M]en ... have known that he who acts never quite knows what he is doing, that he always becomes "guilty" of consequences he never intended or foresaw, that no matter how disastrous and unexpected the consequences of his deed he can never undo it, that the process he starts is never consummated unequivocally in one single deed or event, and that its very meaning never discloses itself to the actor but only to the backward glance of the historian. ... The possible redemption from the predicament of irreversibility – of being unable to undo what one has done though one did not, and could not, have known what he was doing – is the faculty of forgiving ... Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover.[172]

Thus, Olick and Coughlin argue, when Elias's logic of complex stylised rituals, where subtle gestures can lead to social, or real death, is combined with Arendt's philosophy, one can see how apology becomes a necessary part of a modern interaction ritual.[173] The Politics of Regret chapter thus concludes with the argument that regret is a form of historical consciousness.

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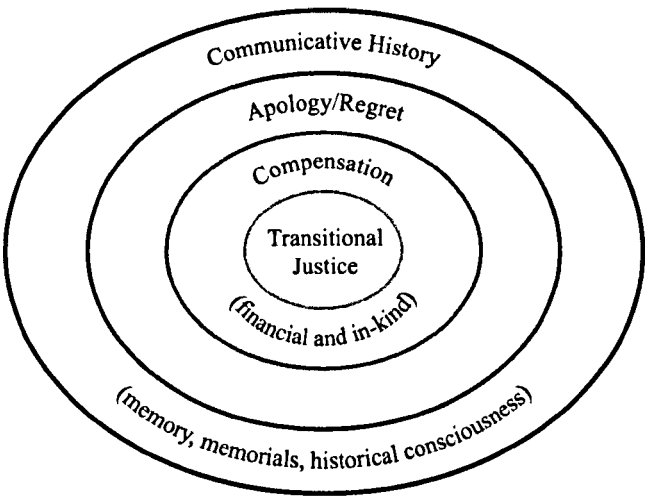
[169] Olick and Coughlin, "The Politics of Regret," p. 38.
[170] Ibid. p. 45.
[171] Ibid. p. 47.
[172] Hannah Arendt, *The Human Condition* (Chicago: The University of Chicago Press, 1958), pp. 233, 237.
[173] Olick and Coughlin, "The Politics of Regret," p. 47.

7.4 The Field of Reparation Politics

Scholars such as John Torpey and Elazar Barkan both argue that reparation politics now includes 'the entire spectrum of attempts to rectify historical injustices.'[174] Torpey proposed the following as a visual representation of how the field is arranged, I in turn, utilise this as a foundation, which my research is built on:

Figure 2.1: The Field of Reparation Politics



The field of reparation politics
Torpey, *Making Whole What Has Been Smashed*, p. 50

The representation quite accurately displays the field of reparation politics. The concept of the field as expanding rings illustrates how the different types of actions that states can take are nested one within the other. As noted above, transitional justice is usually at the heart of reparation politics, dealing with the legality of the orders and transitions from periods of time that held unjust regimes (or unjust/illegal actions committed during the regime). Efforts to come to terms with state wrongs have not, however, been restricted to new democracies. Many well-established democracies have committed grave crimes without a regime change, and this historical memory continues to be a source of grievances for the victimised group.[175] Thus, the phenomenon of 'coming to terms with the past', or reparation politics, has had to envelop a wider array of actions than those defined as transitional justice in order to grapple with atrocities such as compensation, apologies and commemorative history for actions which have occurred outside of the traditional transitional justice framework. Although this figure gives an accurate description of the field, at the same time, it would, of course, be incorrect to say that these spheres are immutable. Acts of restorative justice, the range of actions that states can take, flow back and forth between the nestled spheres. This thesis will

[174] Barkan, *The Guilt of Nation*, p. xix.
[175] Schaap, *Political Reconciliation*, p. 11.

utilise this concept of reparation politics as a field and expand upon it, utilising the framework to analyse why it is that some cultural groups are more successful at obtaining their aims and objectives from the offending state, while other groups are relatively less successful. These factors will be examined to see if any trends within reparation politics can be identified.

Reparation politics differs from previous concepts in international law and society in that both states and the injured parties **voluntarily** enter into negotiations concerning redress and reparation. Central to the idea of reparation politics is that there is an increasing international pressure or expectation that governments are expected to admit to prior unjust or discriminatory actions and engage in negotiation with their victims.[176] The result of this trend is that there is a proliferation of movements, or redress and reparation norm cascade, which seek to claim recognition, apologies, and other forms of justice.[177] These movements tend to share the outlook that the past is important for moving forward in the present, they share a common language of human rights and dignity and are built on the foundations established during the Nuremberg trials and the Jewish redress and reparation movement.[178]

The final relevant discourse within the literature, which this chapter will discuss, and the discourse to which this thesis contributes, is the literature contributing to the framework of political studies. Each of the previous frameworks has contributed to the establishment of reparation politics and brings unique and important aspects of this field.

John Torpey argues that 'Reparations politics is precisely that – a form of *politics*, of people mobilizing to frame facts in an effort to achieve or get things in the world' [Emphasis in the original].[179] Charles Maier agrees and contributes that the point of reparation politics is to enable, at the very least, a political reconciliation. When states engage in negotiations with those whom they have victimised, they are removing the victimisation from the 'sacred, the never-to-be-forgiven, into the realm of the politically negotiated.'[180] The transition is interpreted to mean that the topic goes from unspeakable and unapproachable, to one in which dialogue can occur. In theory, this allows both the oppressor and the oppressed to be able to live under some overarching

[176] Barkan, *The Guilt of Nation*, p. 317.
[177] Torpey, *Making Whole What Has Been Smashed*, p. 45.
[178] Ibid. p. 49.
[179] Ibid. p. 7.
[180] Charles S. Maier, "Overcoming the Past? Narrative and Negotiation, Remembering, and Reparation: Issues at the Interface of History and the Law," in *Politics and the Past: On Repairing Historical Injustices*, ed. John Torpey (New York: Rowman & Littlefield Publishers, 2003), p. 298.

rules of coexistence, and for both sides to consent to some degree of closure.[181] It also allows for a shared history to emerge and often a greater understanding of the truth.

John Torpey argues that the spread of reparation politics can be credited to the collapse of socialism and the nation-state in conjunction with the spread of identity politics and an increasing focus on victimisation and victim rights. I agree, as it was the emergence from the Cold War which allowed the proliferation of norms. As the redress and reparation movement grow in strength and are increasingly successful many turn to the RRM models from World War II to lobby for recognition of their own group's suffering.

7.5 Comparative Reparation Politics

Although emerging over a number of years, the field of reparation politics is now fairly well defined. However, a gap in the literature remains: little analysis has focused on what factors or trends would indicate whether one group will be more or less successful than another group in obtaining their redress and reparation goals and objectives. It is this gap which this thesis addresses. Andrew Woolford and Stefan Wolejszo's *Collecting on Moral Debts: Reparations for the Holocaust and Pořajmos* (2006) was the first, and to date only, attempt at examining the overarching factors of RRM success and failure within the field. By examining the redress and reparation movements of the Jewish and Romani movements, Woolford and Wolejszo seek to 'illustrate how organizational and institutional support structures, social and political opportunities, and discursive openings for trauma narrative articulation and resonance contributed to the success and/or failures of their reparations claims.'[182] They ultimately argue that the success of the Jewish redress and reparation movements were influenced by the creation of a successful trauma narrative which was influenced by the historical and social forces such as political, economic and cultural factors. They also contend, however, that the contemporary shifts in which reparations claims are made, means that current groups cannot simply follow the Jewish model or claim equivalency of suffering and be guaranteed success.[183] Equivalency arguments fall short as each group's experience is unique drenched in its own historical identity. Utilisation of the model, including lobbying techniques and the recruitment of allies is more likely to grant success.

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[181] Ibid. p. 298.
[182] Andrew Woolford and Stefan Wolejszo, "Collecting on Moral Debts: Reparations, the Holocaust, and the Porrajmos," *Law & Society Review* 40, no. 4 (December 2006): 871-902, p. 872.
[183] Ibid. p. 898.

This thesis takes a similar approach, additionally using social mobilisation theory to analyse and help identify patterns of success and failure, and goes further. This thesis argues that reparation politics are indeed, as Torpey states, 'a form of politics'. Proliferation of redress and reparation movements, however, have increased due to normative expectations within international and domestic society, and are dependent on the openness of the political system, the presence or absence of influential allies, and the inclusion of surviving victims within the membership of a strong political community. The focus of this research will thus link social mobilisation, a means of engaging in politics, and restorative justice principles.

Chapter Three:
Conceptual Framings of Restorative Justice

Building on the works of John Torpey and Ruti Teitel I will examine reparation politics as it contributes to political reconciliation, specifically how the various types of restorative justice affect the victimised communities. This chapter will argue that the development of various social movements within reparation politics can be best understood by the application of social mobilisation theory and the concepts of restorative justice in order to analyse the differing outcomes of movements associated with coming to terms with the past. It will proceed to outline the current concepts of restorative justice in the criminal justice field and how restorative justice principles have been utilised within reparation politics. The chapter will propose a more comprehensive definition of restorative justice within reparation politics, which will be utilised to better explain the field, as it exists today, and to better understand the various components of the field. Finally, the chapter will propose a typology of restorative justice, establish a framework in which the subsequent redress and reparation movements will be examined, and examine the question of how success and failure of these movements can be determined.

Rather than speaking of a 'successful' reparation movement, which would be misleading, I propose that it would be more productive to discuss the relative success or failure of a movement.[184] If one considers success and failure as a continuum, I argue, then certain groups have been more successful in achieving redress and reparation goals than have other groups. There are variances not only between groups in differing states but also between groups within a single state. Due to the nature of atrocity, injustice and the resulting redress and reparation movements, it would not be feasible for every affected individual to be analysed in order to determine the perception of success on an individual basis. This thesis examines the collective level, and thus, it is the general perception of the international community, the group victimised, and major social movement organisations within the redress and reparation movement which will be utilised to determine the overall 'condition' of the movement.

[184] One could argue that a case of absolute failure would be an atrocity that has completely disappeared from collective memory. This absolute, however, would, by its nature, not be known and thus cannot be utilised as a standard of comparison.

1 Restorative Justice as Criminal Justice

As noted in section 1.2, restorative justice originated in, and is used primarily within, the criminal justice field. The concept emerged in 1977 when Randy E. Barnett suggested that the current paradigm of punishment existent within the criminal justice field was inadequate and should be discarded.[185] Barnett proposed the use of a new paradigm - a system focused on restitution and not retribution: 'A restitutive theory of justice is a rights-based approach to criminal sanctions that views a crime as an offence by one individual against the rights of another calling for forced reparations by the criminal to the victim.'[186] Restitution thus would 'not change the fact that a possibly traumatic crime has occurred (just as the award of damages does not undo tortious conduct.) The aim of restitution is to make the resulting loss easier to bear for both victims and their families.'[187] The goal of this procedure would be to do justice by the victims.[188] Although the original concept of restitutive justice was not quite what is meant today by restorative justice – outlined below - it indicated a radical change in perspective and created the idea that a new, alternative paradigm was needed.[189] This concept, which arose out of dissatisfaction with the formal justice system and the desire for an alternate to a paradigm which was focused primarily on punishment, is now called restorative justice.

1.1 Restorative Justice Definitions

Restorative justice is a unique way of responding to criminal behaviour by balancing the needs of the victim, the community, and the offender. It was developed by practitioners in the criminal justice field who felt that the punitive nature of the criminal justice system encouraged repeat offenders[190] and that the criminal justice system was not a workable, efficient or fair system as long as it only took a coercive and retributive approach to crime.[191] The frustration at the traditional focus on punishment led to an exploration of alternatives which were intended to be more

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[185] Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice," *Ethics* 87, no. 4 (1977). Reprinted and accessed online via http://randybarnett.com/restitution.html on 14 March 2007.
[186] Randy E. Barnett, "The Justice of Restitution," *American Journal of Jurisprudence* 25 (1980): 117-132, p. 117.
[187] Barnett, "Restitution", p. 11.
[188] Ibid. p. 12.
[189] Gerry Johnstone, "Introduction," in *A Restorative Justice Reader: Texts, Sources, Context*, ed. Gerry Johnstone (Devon: Willan Publishing, 2003), p. 21.
[190] Barnett, "Restitution", p. 5.
[191] Charles F. Abel and Frank H. Marsh, *Punishment and Restitution: A Restitutionary Approach to Crime and the Criminal* (London: Greenwood Press, 1984), p. viii.

successful in reducing crime, satisfying victims, and rehabilitating offenders. This balance was found in programmes which focused on ensuring that all parties engaged in the crime would become actively involved in the resolution process.[192] The most well-known of these programmes is the victim-offender mediation.

The paradigm of restorative justice is not restricted to the United States, but is an international phenomenon, as evidenced by multiple United Nations, European Union, and other resolutions and declarations concerning the subject matter. The *Vienna Declaration on Crime and Justice* (2000), for example, encouraged 'the development of restorative justice policies, procedures and programmes'[193] while others, defined and encouraged the development of restorative justice programmes for local populations. A selection of these international actions follows:

Table 3.1: Codification of Restorative Justice within the International Community[194]

1996	United Nations: Working Party on Restorative Justice of the Alliance of NGOs on Crime Prevention and Criminal Justice
1997	Declaration of Leuven approved at the International Conference on Restorative Justice – the first international conference on restorative justice
1999	The European Union funded the creation of the European Forum for Victim Offender Mediation and Restorative Justice
2000	United Nations: *The Vienna Declaration on Crime and Justice*
2002	United Nations: *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*
2005	Eleventh United Nations Congress on Crime Prevention and Criminal Justice
2006	United Nations: Handbook on Restorative Justice Programmes

The United Nations *Handbook on Restorative Justice Programmes* takes a broader view than that which emerged from the predominantly domestic criminal justice perspective; stating for the UN, restorative justice encompasses all programmes which 'utilize restorative processes and seek to achieve restorative outcomes.'[195] The emergence of restorative justice on the international level also indicates that a norm has begun to emerge within international society. The UN further defines:

> [restorative processes as] any process in which the victim and the offender, and where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.[196]

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[192] Johnstone, "Introduction," p. 21.
[193] United Nations, *Vienna Declaration of Crime and Justice: Challenges of the Twenty-First Century* (Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000), p. 6.
[194] Sources include: United Nations Office on Drugs and Crime, "Handbook on Restorative Justice Programmes"; and Paul McCold, "The Recent History of Restorative Justice: Mediation, Circles, and Conferencing," in *Handbook of Restorative Justice*, eds. Dennis Sullivan and Larry Tifft (New York: Routledge, 2006).
[195] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* (Vienna: United Nations, 2006), p. 7.
[196] Ibid. p. 6.

and

> [restorative outcomes as] an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.[197]

The United Nations definitions, however, are just one of many definitions of restorative justice which have been proposed.[198] To date, there is not a consensus on a single definition. Working definitions tend to be tailored to individual institutions, states, and countries, depending on the needs of their criminal justice system. It is set in policy and practise guided by the general concepts of the field, but allowing flexibility for adaption to community needs – whether that is a local, national or international community.

John Braithwaite and Heather Strang offer a useful differentiation within the criminal justice paradigm: they argue that the restorative justice literature can be divided into two broad conceptual categories: the process-oriented approach which conceives of restorative justice as 'a process that brings together all stakeholders affected by some harm that has been done,'[199] and the value-orientated approach which seeks healing of the individual and community over punishment and, in so doing, focuses on distinguishing the traditional punitive approach to criminal justice from a restorative approach.[200]

The United Nations *Handbook on Restorative Justice Programmes* takes a process-orientated approach, emphasising 'participatory processes designed to achieve a desired outcome,'[201] and utilises the following definition:

> [a]ny process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participated together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.[202]

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[197] United Nations Economic and Social Council, *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, E/2002/INF/2/Add.2, p. 56.
[198] For other definitions of restorative justice see Tony F. Marshall, *Restorative Justice: An Overview* (London: Home Office, Information and Publications Group, Research Development and Statistics Directorate, 1999) and Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottdale, PN: Herald Press, 1990).
[199] John Braithwaite and Heather Strang, "Introduction: Restorative Justice and Civil Society," in *Restorative Justice and Civil Society*, eds. Heather Strang and John Braithwaite (Cambridge: Cambridge University Press, 2001), p. 1.
[200] Ibid.
[201] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, p. 7.
[202] Ibid.

This definition, or a similar one, is used most often by practitioners and focuses on restorative justice as a distinctive process in which victims and offenders take part in mediation sessions, can communicate directly with one another and participate in the decision-making process. This format is often contrasted to the criminal justice paradigm, in which victims and offenders are positioned as adversaries, are discouraged from communicating with each other during the trial, and decisions are made, not by those directly involved, but by third parties – law enforcement and the courts.[203]

In contrast to a process-orientated approach, many advocates focus on a value set which guides restorative justice, arguing that the traditional criminal justice process responds 'to the hurt of the crime with the hurt of punishment' whereas the restorative justice process is guided by healing.[204] While there are a variety of terms that are used to describe the values of restorative justice, the most salient points are that the value-orientated approach focuses on a set of ethical ideas on how society and individuals within society should relate to other human beings and those who break societal norms.[205] Restorative justice values within the value-laden approach are often argued to be more humane than the contrasting harshness of the criminal justice system.[206]

A third approach has appeared as illustrated by Braithwaite and Strang. They suggest that to understand restorative justice, one must consider it as both a process and a value-set.[207] This approach was further argued by Gerry Johnstone in his analysis of restorative justice literature. Johnstone emphasises that a process-oriented approach captures the meaning of restorative justice quite well; however, Johnstone argues that the concepts espoused need to be supplemented with a focus on the outcomes of restorative justice.[208] Although Johnstone, in general, was referring to the criminal justice system, I argue that restorative justice outcomes are indeed the most important part of restorative justice, particularly as applied to the case of redress and reparation. Focusing exclusively on processes denies the importance of the outcomes and allows the over-identification of restorative justice with a single set of processes, or can exclude processes that might be beneficial.[209]

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[203] Johnstone, "Introduction: Restorative Approaches to Criminal Justice," pp. 2-3.
[204] Braithwaite and Strang, "Introduction," pp. 1-2.
[205] Johnstone, "Introduction: Restorative Approaches to Criminal Justice," p. 6.
[206] See Abel and Marsh, *Punishment and Restitution*, Barnett, "The Justice of Restitution" and Braithwaite and Strang, "Introduction" for comparisons.
[207] Braithwaite and Strang, "Introduction," p. 2.
[208] Johnstone, "Introduction: Restorative Approaches to Criminal Justice," p. 3.
[209] Ibid. p. 5. This can be seen with the emphasis of victim-offender meditation. While this is often an important part of restorative justice it is not the only form which restorative justice can take, and is not applicable, or acceptable, for all offences.

1.2 Principles of Restorative Justice

The term restorative justice, in the context described previously, conjures up images of gang members cleaning up graffiti and performing acts of community service around town. While these types of actions are indeed an integral part of restorative justice, they are, however, not representative of the whole story. Restorative justice operates on the assumption that crime has its origins in social conditions and that the consequences of a crime cannot be fully resolved without the involvement of the people or communities who were affected.[210] These assumptions hold true both in a domestic context as well as on an international level. It is clear that the United Nations *Handbook on Restorative Justice Programmes* is operating on this assumption when it lists five fundamental underlying principles of restorative justice programmes:

> (a) that the response to crime should repair as much as possible the harm suffered by the victim;
> (b) that offenders should be brought to understand that their behaviour is not acceptable and that it had some real consequences for the victim and the community;
> (c) that offenders can and should accept responsibility for their action;
> (d) that victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation, and
> (e) that the community has a responsibility to contribute to this process.[211]

These principles demonstrate the balance between the needs of the victim, offender, and community that restorative justice espouses.

When applied to reparation politics, I argue that the needs of the groups – such as denunciation by the state of its earlier actions, reparations for health and financial losses, and mental health requirements such as an apology – can only be met through state actions. When the state is the offender, then the victim needs the state to take responsibility for its acts. The failure of the state to take responsibility further victimises the collective and can result in the group never reaching any stage of reconciliation and cause continuing harm to the group. This will be further explored in subsequent sections.

1.3 Restorative Justice Objectives

One key attribute of restorative justice within the domestic criminal justice field, is that the focus is not about punishment, nor is it about focusing on the past, or focusing on the individual. It is, rather, a focus on the construction of a better society

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[210] Marshall, *Restorative Justice*, p. 8.
[211] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, p. 8.

and repairing the damaged relationships between groups within that society.[212] Successful reintegration of both victims and offenders into society is therefore of particular importance.

The primary objectives of restorative justice principles in relation to the victim are, first, supporting the victims by allowing them to become actively involved in the restorative justice process and second, in repairing the relationships damaged by the crime.[213] In relation to the offender, the primary objectives are encouraging the offender to take responsibility for the crime, reducing recidivism by addressing the core issues of the crime, and facilitating the offender's reintegration into society. Finally, the primary objectives in relation to the community are to identify restorative, forward-looking outcomes, to denounce criminal behaviour and reaffirm community values, and to identify factors which lead to crime so that authorities can address core societal issues.[214] In other words, each of the three affected groups – victim, offender, and community/communities – has a specific focus and a targeted goal.

The United Nations *Handbook on Restorative Justice Programmes* offers the following example from the criminal justice system: A Canadian youth offender (age 17) was charged with robbing an immigrant cabdriver at knifepoint. Both victim and perpetrator agreed to work within a restorative justice programme and with third-party mediators. The victim did not want to meet with the offender, but did wish to convey to the youth how the robbery had affected him, including his increased fear, an increased bias against teenagers and what the consequences would have been if he had lost his immigration card. The offender wrote a letter of apology to the victim and a dialogue began, without the two ever meeting. As more information was shared, it became known that the victim had stayed home the week after the robbery due to being afraid to go back to work. He subsequently lost $800 in wages. The offender felt responsible for the lost wages and voluntarily offered to make monthly payments to the victim until the debt was paid off; he also continued to work with the restorative justice programme concerning the root causes of his behaviour and the impact it had on the victim, himself, and his family. The end result of this process was a presentation to the courts regarding the restitution and the letter of apology. The courts concurred that a satisfactory resolution had been crafted and sentenced the offender to two years' probation with strict conditions, including the fulfilment of the restitution agreement.[215]

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[212] Marshall, *Restorative Justice*, p. 8.
[213] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, pp. 9-10
[214] Ibid. pp. 10-11.
[215] Ibid. pp. 28-29.

Working within the restorative justice system allowed the victim to begin a dialogue with the offender and for an apology to be offered and accepted. He was able to ask questions and explain how the crime affected him. The cabdriver received symbolic reparation with the wages he lost being returned over a period of time and, in the end, reported that he was satisfied with the result of the case.[216] The offender was able to understand the impact of his actions beyond the immediate crime. He was able to ask for forgiveness and have his apology accepted. He was also able to obtain therapy to address the core issues of his behaviour and avoid jail, both of which resulted in an improvement in his home life and obtaining a job.[217] The community benefited by the offender's therapy and job, and from the reduced chance of the offender committing another robbery. By allowing the offender to engage in the restorative justice process, the denouncement of the behaviour was focused not on stigmatising individuals – as is often the (unintended) case in criminal justice – but on stigmatising actions.

The concept of restorative justice and these principles of reintegration and stigmatising of actions have, as will be shown below, been brought into the literature of reparation politics. In Germany, the United States, and Japan, the criminal justice system would be wholly unable to deal with state-structured injustice or atrocities: how does one prosecute an overwhelming number of perpetrators and responsible bystanders? Especially when these actions are implemented and approved by the state? Furthermore, when one delves into the issue of guilt and responsibility, as recognised by Jaspers, there are multiple levels of guilty: that of criminal, political, moral, and metaphysical. As Jaspers argues, only those individuals who are guilty of breaking the law can be held criminally liable for their actions.[218] What then do we do in response to those who may share other forms of guilt, but on the more abstract levels of political, moral or metaphysical? For this we can turn to the execution of restorative justice techniques and the renunciation of actions committed by the regime through reparations, apologies, and redress.

If the goals of restorative justice are to be achieved, such as constructing a better society, repairing the damaged relations within that society, and reintegration of both victims and offenders into society, then I argue that the state must adapt restorative justice principles in response to atrocities. These actions attempt a political

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[216] Ibid.
[217] Ibid.
[218] Jaspers, *The Question of German Guilt*, pp. 31-32, 41.

reconciliation between two collectives: the state and the victimised group, as represented by the various organisations that compose the social movement seeking redress and reparation. As we will discuss in subsequent sections, political reconciliation 'does not presuppose a prior community that must be restored between wrongdoers and wronged,'[219] but only that political reconciliation should find a way for the two groups to co-exist within a common space, which for the most part is sought, in post-conflict states.

2. Restorative Justice as Reparation Politics

As noted above, restorative justice is a fairly new paradigm within criminal justice, having emerged in its modern form in the late 1970s;[220] however, as evidenced by the increasing use of it by the United Nations, the European Union, and various countries throughout the world, it is an increasingly more common way of responding to crime. Paul McCold noted that the 2000s were the decade of international proliferation.[221] Legal scholarship within the field of reparation politics, such as Martha Minow's *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (1999), and Martha Urban Walker's 2006 'Restorative Justice and Reparations,' reflect the linkage between redress and reparation and those of restorative justice.

2.1 Transitions within Restorative Justice

The principles and concepts found within the restorative justice literature have been increasingly applied to redress and reparation movements. Restorative justice has traditionally been housed within the criminal justice field; however, as the field of reparations politics has solidified certain authors[222] have applied restorative justice concepts to elements within the redress and reparation movements, particularly in the area of truth commissions.

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[219] Schaap, *Political Reconciliation*, p. 84.

[220] Although the modern restorative justice movement emerged in the 1970s, it incorporates older means of community justice found in tribal and native villages. See Dennis Sullivan and Larry Tifft, "Introduction: The Healing Dimension of Restorative Justice," in *Handbook of Restorative Justice*, eds. Dennis Sullivan and Larry Tifft (London: Routledge, 2006), pp. 1-16.

[221] McCold, "The Recent History of Restorative Justice," p. 35.

[222] See *Truth and Reconciliation Commission of South Africa Report: Volume One*, (Cape Town: South African Truth and Reconciliation Commission, 1998); Minow, *Between Forgiveness and Vengeance;* Margaret Urban Walker, "Restorative Justice and Reparations," *Journal of Social Philosophy* 37, no. 3 (2006).

The South African Truth and Reconciliation Commission (TRC)[223] represents the first time that restorative justice was used in transitional justice. It was thus in 1998, when the TRC released its Final Report, that the conceptual shift occurred in which restorative justice ceased being restricted to the criminal justice domain and was applied to transitional justice. As the TRC noted, 'We believe ... that there is another kind of justice - a restorative justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships – with healing, harmony and reconciliation'.[224] The report makes a clear distinction between what it considers to be two distinct forms of justice: first, retributive justice characterised by trials and punishment and, second, restorative justice which focuses on 'healing' through truth-telling and reparation, and mirrors the fundamental assumptions of the restorative justice paradigm.

Likewise in 1998, Martha Minow utilised restorative justice principles to discuss elements of redress and reparation movements when she applied the concept to the Japanese American internments; she understood restorative justice to have the goal of 'seek[ing] to repair the injustice, to make up for it and to effect corrective change in the record, in relationships, and in future behaviour.'[225] While Minow's work follows the same philosophical framework established by the TRC, i.e., restorative justice as an alternative to retributive justice, I believe that criminal justice has its own place within the redress and reparation paradigm. As will be discussed in the next section, I build upon the concepts that criminal justice has its own place within the redress and reparation paradigm, and as such, restorative justice principles can be applied both to trials and to truth commissions. A defence of this position will be further explored in subsection 6.1.

Margaret Urban Walker (2006) similarly utilises the principles of restorative justice to analyse redress and reparation movements. Walker uses a restorative justice framework to argue that restorative justice is a 'more ideal' framing than 'corrective frameworks', in which she examines reparation, restitution, and redress in regard to the ongoing African-American RRM within the United States. The principles of restorative justice are essential, she contends, where injuries such as the denial of equal human

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[223] The South African Truth and Reconciliation Commission was established in 1995 by the Government of National Unity, based on the Promotion of National Unity and Reconciliation Act, No 34 of 1995 in order to investigate and form as much as possible, a completed picture of the abuses committed under the apartheid regime, focusing on the timeframe of 1960 to 1993. For more information see the Truth and Reconciliation Committee's website: http://www.doj.gov.za/trc/ or http://www.doj.gov.za/trc/report/index.htm.

[224] *Truth and Reconciliation Commission of South Africa Report: Volume One*, p. 12.

[225] Minow, *Between Vengeance and Forgiveness*, p. 91.

rights and degradation of the group have occurred.[226] This thesis utilises a somewhat similar approach in that it also applies restorative justice principles to the aftermath of state-sponsored atrocity or injustice, which have been designed to benefit or create political reconciliation with international society and/or the victimised cultural groups. However, the framework will be utilised to examine the political and normative processes which contribute to the success and failure of obtaining reparation, recognition and redress goals.

2.2 The State as Offender

I argue that the dynamic of the victim-offender-community model is altered by the application of restorative justice principles to state-sponsored injustice or atrocity. The state in this model is the offender, rather than an individual. This obviously requires an adjustment in thinking. As previously discussed, a traditional restorative justice programme requires that the victim and the offender engage in some form of dialogue. The community is considered only in an abstract way, such as friends and family engaging in the dialogue. The community objective is thus reaffirming community norms and preventing recidivism by addressing the root problem of the crime, and offering a therapeutic approach rather than a punitive one. The state, in this scenario, is involved in overseeing the restorative justice process through its various justice agencies, courts, and facilitators.

When applying restorative justice principles to reparation politics, the implications of the state or society as the offender must be considered. The state is not an independent actor whose goal it is to ensure that justice is done, but in this case is the offender, or the predecessor of the offender. In addition, the domestic community – that is, the individuals within society who contributed either as perpetrators or as bystanders to the atrocity or injustice – may include a large percentage of individuals who hold criminal, political, moral or metaphysical guilt for the injustice/atrocity.[227] For instance, Germany and the United States both drew on the legal system to legislate identity and race within society (as discussed in Chapter Five and Six), and then to enforce the marginalisation and removal of the victimised group from mainstream society. As discussed below, it would not be sufficient to exclusively utilise the criminal justice approach, as violations could occur in the criminal sense, but also involve political and moral decisions.

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[226] Walker, "Restorative Justice and Reparations," p. 379.
[227] See previous discussion on Jaspers four types of guilt.

When the legal system has been used against these individuals on a collective basis, a strictly punitive approach will not be sufficient to bring justice. Those responsible are too widely distributed throughout society. Responsibility, in this sense, could be assigned not only to legislators who authored discriminatory laws, but also to those who enforced the laws, who helped build camps, worked as guards, worked in transporting individuals, who supported the administration of the camp, who enriched themselves through buying property or possessions of those who were desperate to sell, etc. Although the state was the main perpetrator and, as such, must bear the main burden of responsibility, the community itself can often be said to have furthered the victimisation of the group by perpetrating minor offences, aiding the state in its policies, or simply as bystanders, allowing the state to do as it willed without political repercussion. The debate on the degree of guilt afforded to bystanders was, again, brought into German popular debate in 1946 with Karl Jaspers' text *The Question of German Guilt*. Although Jaspers examined the varying gradients of guilt and responsibility for German World War II atrocities, the text can be seen as a model for assessing the responsibilities of any society as a whole which allowed atrocities to be committed in their name.

In each of the case studies of this thesis, widespread legal prosecution for bystanders and minor perpetrators would have been impossible. Some actions -- such as buying property from Japanese Americans and German Jewish individuals at a fraction of its worth -- were certainly not illegal, although it could be argued that knowingly taking advantage of the victimised population is immoral. Thus when society composes a mixture of criminally guilty with those who are politically or morally guilty, I believe the answering response should also be a mixture of criminal and symbolic actions. Trials can often serve both measures as evidenced by a statement issued by the chairman of Israel's Yad Vashem Holocaust Memorial regarding the 2009 German trial of John Demjanjuk, who stands accused of being a guard at the Sobibor death camp, and thus assisting in the death of 27,900 Jews: 'Survivors are interested, even at this late stage, in a modicum of justice. While no trial can bring back those that were murdered, holding those responsible to justice has an important moral and educational role in society.'[228] While the elderly perpetrator would not likely live to serve a lengthy

[228] Nicholas Kulish, "Man Tied to Death Camp Goes on Trial in Germany," *New York Times*, 30 November 2009, http://www.nytimes.com/2009/12/01/world/europe/01trial.html, accessed on 10 March 2010.

sentence, the trial clarifies responsibility and demonstrates a commitment to bringing perpetrators to justice.

Following restorative justice principles, the state – or state agencies – must be an integral part of overseeing the restorative justice processes. The state as perpetrator created the structure in which the atrocities occurred; the state issued the Nuremberg laws (Germany), required obedience to Military Commanders' orders, including those of internment (United States), and encouraged the sexual enslavement of those they colonised (Japan). The state did not target specific individuals, but rather specifically targeted a community or group of individuals. Thus, the state, or its successor, must take part in the restorative justice process in order to bring about any measure of justice or political reconciliation.

Changing the role of the state within the restorative justice model does alter the framework some core ways, but the restorative justice model does remain relevant. In particular, if the state and, indeed, society itself are the offenders, it is even more important to apply restorative justice principles in order to bring about political reconciliation. The state as offender violates the state-citizen contract because it has not only failed to protect the individual within the group, but has rather encouraged the mistreatment and victimisation of a person – or group - by others. The traditional response to this harm would be to report these actions to an individual or institution responsible for enforcing the laws, i.e. representatives of the state; however, if the state itself is responsible for the atrocity, the situation leaves no authority to who a complainant can turn for relief. There often is no criminal or civil justice recourse to state-sponsored atrocity, especially if that atrocity or injustice was inflicted widely upon a populace. Hence, a traditional criminal justice model is simply not sufficient on its own although, as we will see, some elements of criminal justice do indeed surface in a restorative justice framework.

In order for the victim to obtain some form of justice, the state must voluntarily enter into negotiations with the victimised group; in nearly all cases, the state voluntarily enters into such negotiations as a result of pressure, whether gentle or more pointed, from a redress and reparation movement. While external factors can be utilised to pressure the state into negotiations, the very concept of sovereignty means that external actors cannot force the state into domestic actions, especially when, by the nature of state-victim relationship, the victim is in the weaker position. A voluntary restorative justice approach, thus, is often the only recourse that victimised communities may have to obtain justice, in addition to being the only available

framework within which political reconciliation can occur. If the state admits that it was wrong, the acknowledgement helps to bring closure and fosters the perception that there is less chance of the action recurring. In many cases, however, this admission of wrongdoing does not occur – and no measure of justice is achieved.

3. Restorative Justice as Political Reconciliation

As Tavuchis states, 'An apology, no matter how sincere or effective, does not and cannot *undo* what has been done,'[229] just as reparations and other forms of redress cannot undo the unjust or criminal actions of a state inflicted upon a victimised population. Yet, just because these actions cannot be undone, does not mean that the grievances should be left to fester within both the state and the community. As restorative justice within the criminal justice system is more inclusive of the community, the concepts as applied within reparation politics would ideally bring together both representatives of the state and the victimised group to negotiate a way forward.

Like an apology, redress and reparation would speak 'to an act that cannot be undone but that cannot go unnoticed without compromising the current and future relationships of the parties, the legitimacy of the violated rule, and the wider social web in which the participants are enmeshed.'[230] An accord must be reached in order to obtain a reasonable state of co-existence; as Andrew Schaap contends in his analysis of political reconciliation, 'the memory of offense continues to be a source of grievance for a section of the population and presents a legitimation crisis for the state.'[231] One goal of reparation politics then is to obtain a state of political reconciliation, i.e. to co-exist within a common state or common community, to share a common understanding of the historical events, and to come to some form of national (or international) reconciliation. This state can best be achieved by a combination of forms of restorative justice, as will be argued here.

Reconciliation has been defined broadly. Priscilla Hayner observes that reconciliation 'implies building relations today that are not haunted by the conflicts and hatreds of yesterday,'[232] where atrocities and injustices of 'yesterday' could be openly

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[229] Nicholas Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford: Stanford University Press, 1991), p. 5.
[230] Ibid. p. 13.
[231] Schaap, *Political Reconciliation*, p. 11.
[232] Hayner, *Unspeakable Truths*, p. 161.

discussed in public without bitterness. The state and the victimised group would look to the future, not to the past, and yet they would share a common understanding of the past events.[233] Andrew Schaap argues that the goal of political reconciliation is not to define a common identity with those who once victimised the group, but,

> Rather, it would be to keep available a space for politics within which they could debate and contest the terms of their political association and the significance of past events for their life in common. ... Political reconciliation presupposes only the will to live together in the mode of acting and speaking. Although antagonists may disagree radically about the significance and moral meaning of past events for their life in common, they need only acknowledge that they are talking about the same events in order to initiate political reconciliation. ... Political reconciliation cannot transcend the conflicts of the past by appealing to an ultimate end. Rather, it must be enacted in the gap between past and future, between the memory of offense and anticipation of communities.[234]

Schaap continues with the observation that political reconciliation must be both retrospective with its coming to terms with the past and prospective by bringing about social harmony.[235] Political reconciliation promises that never again will the state victimise the group and asserts that both the state and those previously victimised are now members of the same community.[236]

This thesis argues that political reconciliation is an important goal of reparation politics. This form of reconciliation focuses on the creation of a political space where members of a victimised group are now seen to be part of the political community in addition to the state reasserting itself as a legitimate actor. It does not promote a 'happy ever after' or reassert a previous relationship, but does imply recognition of historical facts and a dialogue between the various actors. Recognition by the state can allow a more accurate historical record to emerge, and potentially allow for negotiation for reparations and redress. The state-supported actions, or acts of restorative justice, that have been utilised in an attempt to redress varying historical atrocities and injustices, are identified in Chapter Four.

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[233] Ibid.
[234] Schaap, *Political Reconciliation*, pp. 82, 87.
[235] Ibid. p. 91.
[236] Ibid. p. 94.

Chapter Four:
Conceptual Understandings of Success and Failure

Redress and reparation movements attempt a wide variety of restorative justice actions in order to obtain their broadest goal, which is to symbolically repair the injustice or atrocity inflicted upon the group. Each of the three countries examined have multiple victimised groups and there is a differential level of success between two of the groups: the Jewish RRM and the Roma RRM, the Japanese American RRM and the Japanese Latin American RRM, and within the comfort women RRM, Dutch women received more reparations than other nationalities including Korean women. The theoretical framework of success and failure will be established in this chapter, whereas the redress and reparation movements for the individual case studies will be discussed in Chapters Five through Seven. Chapter Eight will discuss the implications of the success and failure of the cases and examine the trends which have emerged from these case studies in order to determine the generalisability of my findings.

1. Restorative Justice as State Response

As previously stated, the state apologises, makes reparation, and gives restitution or compensation, not because it is in its best material interest to do so or is legally required to do so by an external third party,[237] but because material or symbolic gestures are needed in order to bring about political reconciliation between the victimised cultural group and the state. Applying restorative justice principles to reparation politics is a logical step since those principles can help illustrate the goals and purpose of the state's attempt to redress historical atrocities and injustices. Thus, within the field of reparation politics, this thesis proposes utilising the definition of restorative justice as any state-supported action that attempts to redress historical atrocities and injustices.

Ruti G. Teitel outlined five forms which transitional justice can take: criminal, historical, reparatory, administrative, and constitutional.[238] This typology reflects the various forms of justice utilised to redress wrongs committed by a former regime, however, in order to apply it to the wider field of reparation politics, the categories need to be adapted to more accurately reflect restorative justice. Restorative justice can

[237] Excluding treaties or agreements into which the state voluntarily enters.
[238] See Teitel, *Transitional Justice* for an overview of each form of transitional justice.

take a multitude of forms, ranging from formal trials to truth commissions, from reparations to memorials, from restitution and apologies to inclusions in textbooks. Considering that restorative justice can take the form of any state-supported action which attempts to redress historical atrocities and injustices, the question emerges of how restorative justice, and the subsequent redress and reparation movements, are to be analysed. Teitel's typology - although effective for strictly transitional justice measures - requires broadening if one wishes to analyse reparation politics as a whole as I do.

Thus, I propose the following categorisation, loosely based on Teitel's: criminal, historical, reparatory, legislative, and symbolic, based on the type of justice being sought. My typology has two distinct changes from Teitel's transitional justice categorisations, which I believe will allow for a better understanding and analysis of restorative justice components. First, the administrative and constitutional categories are combined into one category: legislative. Administrative justice, referring to explicitly political measures, and constitutional justice, dealing with the constitution are best served by their inclusion into a legislation category which would encompass both administrative/political acts and constitutional acts that are created or enforced by legislation. Second, the additional category of 'symbolic' has been added to the typology in order to encompass those actions taken by the state which have symbolic meaning, yet are distinct from other forms of justice. The concept of apologies for past wrongs would be found in this section.

Redress and reparation movements often attempt to secure a broad range of actions from the state, such as truth commissions, trials, reparations, and official apologies. Restorative justice components are primarily in one category, however, they often will bleed over into another category due to the interlinking nature of the event. For example, a war crime trial is obviously categorised in criminal justice; however, trials can be utilised to help establish the truth of an event and thus reflect a more accurate collective memory. These five categories, criminal, historical, reparatory, legislative, and symbolic, will now be examined to see the various components contribution to the restorative justice process.

1.1 Criminal Justice

To clarify, the first category, that of criminal justice, does not refer to a punitive versus restorative framework, but is typified by the type of justice it imposes. This is the criminal justice component of a redress and reparation movement which seeks to utilise the legal system through various judicial instruments such as international

tribunals, international courts, war crime trials, and other domestic trials which focus on laws, prosecution, and punishment. While some scholars argue that the idea of utilising trials to reconcile the state and the victimised community is 'wholly inappropriate,' that the only realistic expectation one can make from criminal trials is for prevention, and that trials could in fact make reconciliation harder,[239] this thesis follows the counter claim purported by Teitel and Minow that responding to mass atrocity with legal prosecutions is not a perversion of the criminal justice system, but in actuality, embraces the rule of law itself.[240] It is the reassertion of legal principles and the denunciation of atrocities or injustices regardless of how, of if, they were portrayed as perfectly acceptable.

Criminal justice brings perpetrators of injustice and atrocity to trial on the basis of the violation of international human rights law and international criminal law. Bringing a perpetrator of atrocity to justice sends a strong signal that these actions are not supported by the larger international community or the current regime. Teitel states that, 'the exercise of criminal justice is thought to best undo past state injustice and to advance the normative transformation of these times to a rule-of-law system'.[241] While Teitel refers exclusively to transitional justice, it is quite applicable to the broader field of reparation politics.

The legal process is an important function of restorative justice. Through the aspects of a criminal justice system, one can clearly indicate that the injustice or atrocity which is being tried is illegitimate and thus not accepted – either legally or morally – by either the current regime (through domestic or hybrid trials) or international society (through international trials, tribunals, and the ICC). The legal process demands accountability and acknowledgement of crimes committed. By its focus on proving truth beyond a reasonable doubt, the trials assist in preventing a future reoccurrence and provide a normative transformation within domestic and international society. For example, international trials regarding genocide and crimes against humanity have shown us that the trial verdict can change our understanding of rape from a war crime to a tool of genocide (ICTR: *Prosecutor v Akayesu*),[242] redefine ethnicity (ICTR: *Prosecutor v Kayishema*),[243] and establish that on an international level, following superior orders does not excuse oneself from culpability in a crime

[239] Ellis, "What Should We Do with War Criminals?," p. 107.
[240] Minow, *Between Vengeance and Forgiveness*, p. 25.
[241] Teitel, *Transitional Justice*, p. 28.
[242] *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, 1998.
[243] *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, 1999

(Trial of the Major War Criminals before the International Military Tribunal). Domestically, trials can change societies understanding of segregation such as *Plessy v. Ferguson* (1896) which created the separate but equal doctrine within the United States and *Brown v. Board of Education* (1954) which dictated that separate educational facilities were inherently unequal. In addition, trials and criminal justice can create comprehensive and credible historical documents of the event(s) and play a role in supporting the other aspects of the RRM, as will be discussed in subsequent sections.[244]

In addition to enforcing international criminal law, international human rights law, and international humanitarian law, trials within a restorative justice framework can assist in the psychological healing of a victimised community. Peter Irons in his book *Justice at War: The Story of the Japanese American Internment Cases* interviews Fred Korematsu about his statement in court and his thoughts regarding the *coram norbis* court case:

> "Your Honor," he said, "I still remember 40 years ago when I was handcuffed and arrested as a criminal here in San Francisco." He recalled the "shame and embarrassment" he felt in being escorted to a racetrack to await removal with his family to a "relocation center" in the desert. "The horse stalls that we stayed in were made for horses, not human beings," he said. Fred spoke of the Supreme Court decision he had carried as a personal burden for forty years, "I thought that this decision was wrong and I still feel that way. As long as my record stands in federal court, any American citizen can be held in prison or concentration camps without a trial or a hearing."[245]

Upon the conclusion of the trial, the courts granted a writ of *coram norbis* and the audience, composed of the defendant's friends, family, and others who had been interned and were waiting for confirmation that the government's actions were unjust, were silenced. 'As the historic decision sunk in, silence turned to jubilation and tears.'[246] The courts, by affirming the wrongs afflicted upon the community, helped heal a breach that had been festering for decades, assisted in correcting a legal wrong, corrected the historic memory, and told survivors, that indeed they were not at fault for this injustice and should not have sent to these camps.

Alternatively, the failure to convict can create further psychological damages. Noted scholar Christian Pross argues that the 'failure to punish wrongdoers of criminal regimes has a pathogenic retraumatizing factor for the victims,'[247] i.e., failure of a state

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[244] See Minow, *Between Vengeance and Forgiveness* and Teitel, *Transitional Justice* for analysis of war crime trials.
[245] Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases* (Berkeley: University of California Press, 1983), p. 371.
[246] Ibid. p. 372.
[247] Pross, *Paying for the Past*, p. viii.

to come to terms with its past often leads the victims to be fearful of the future and serves as a continuing trauma to the community as a whole. In *Paying for the Past,* Pross explains that during the German domestic trials of war criminals, the survivors of concentration camps often had violent psychological reactions when they heard that their former guards at the concentration camp guards received an acquittal.[248] Conversely, the trials held after World War II, such as the Nuremberg trials, Adolf Eichmann's trial, and the Auschwitz trial brought a measure of satisfaction to those victimised.[249]

Modern day representations of criminal justice can be found within the establishment of international trials, tribunals and the international criminal court as listed in Appendix 2. Criminal justice restores the judicial system to its proper place of protecting individuals by reasserting legal principles that have been ignored, shunted aside, or misused by the state. It affirms historical memory by establishing the accuracy of an event, preserves memory through the collection of data and facts, and can provide a measure of relief to those who have been victimised. Criminal justice is a vital part of restorative justice and plays a strong component in correcting past wrongs and sends a message that those who commit atrocity will be held responsible.

1.2 Historical Justice

Historical justice can be represented in two ways: through historical accounts and collective memory. Official, i.e. state supported historical accounts can be obtained in multiple ways: the most common are truth commissions, governmental commissions, trials, and tribunals. Unofficial historical accounts, i.e. those not associated with the state, can include academic and archival research, memoirs of both victims and perpetrators, and so forth. These unofficial accounts can be just as important as official, as both can impact the collective memory of society.

Trials and other forms of criminal justice serve to create a comprehensive and credible historical document of the event(s). It can provide an historical record beyond a reasonable doubt. One observation on trials and the historical record is:

> The Eichmann trial brought to public awareness the positive experience of solidarity, camaraderie, and the strength of life forces in the ghetto in the face of death. The trial provided an opportunity for national catharsis. In the sharing of grief and anger, those who had not personally known the Holocaust became aware of the historical facts and no longer cling to the stereotype of survivors as "sheep" ... "heroes," ... or "holy men." The process of consciously dealing

[248] Ibid.
[249] Ibid.

> with the traumatic material served to [further] weaken the needs for denial and distortion.[250]

This quote illustrates how trials can produce positive results outside of a criminal justice framework. Trials can be used to further the historical record, to create public awareness, and a common collective memory of the event. It helps to bring forth the truth and to ease the awareness. It can clarify myth and misinformation, and allow for a codification of an historical narrative.

In order to 'prove' these truths, governmental/international forces go through exacting standards of what happened. Geoffrey Nice, lead prosecutor in the ICTY trial for Slobodan Milosevic, argues that an important function of international tribunals is to create an historical record. He comments that without the need to prove guilt or innocence within the ICTY trials, many of the records would have been lost or destroyed. The need for both the prosecution and defence to prove their cases, created a demand for the records to be recovered, thoroughly analysed and retained. Without the need for the records to be utilised in a criminal proceeding, Nice states that many of these records would likely have been destroyed, or never brought to light.[251] In turn, these quests for an official accounting can help shape collective memory. Collective memory is vital for restorative justice as the memory of the atrocity and injustice - or lack of memory - helps defines a society. Government-sponsored truth commissions illustrate the attempt to establish official historical accounts of atrocity or structured injustice.

Truth commissions are instrumental in obtaining an accurate representation of what happened in society when the possibility of trials is nil, such as when too much time has elapsed (statute of limitations) or when the complicit nature of the regime is so wide-spread that it is impossible to obtain trials for the large numbers of perpetrators. It has been a successful alternative in many countries where, from verification of truth, victims obtain 'significant benefits that may include a sense of closure derived from knowing the fate of loves ones, and a sense of satisfaction from acknowledgement of that fate.'[252] Likewise, the South African government concluded in a legislative memorandum that:

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[250] Quoted in Eva Fogelman, "Therapeutic Alternatives for Holocaust Survivors and Second Generation," in *The Psychological Perspectives of the Holocaust and of Its Aftermath*, ed. Randolph L. Braham (New York: Columbia University Press, 1988), p. 89.

[251] Geoffrey Nice, *War Crime Trials – Should We Bother?*, University of Kent, Open Lecture Series, 1 June 2007.

[252] Pablo De Greiff, "Introduction," in *The Handbook of Reparations*, ed. Pablo De Greiff, (Oxford: Oxford University Press, 2006), p. 2.

> International experience shows that, if we are to achieve unity and morally acceptable reconciliation, it is necessary that the truth about gross violations of human rights must be:
>
> - established by an official investigation unit using fair procedures;
> - fully and unreservedly acknowledged by the perpetrators;
> - made known to the public, together with the identity of the planners, perpetrators and victims.
>
> International human rights norms demand that any newly established government should deal with past gross violations of human rights in a way that ensures that the abovementioned requirements are met.[253]

Thus historical justice can serve several restorative justice functions including the provision of a more accurate collective memory. The primary focus is on the unique facts of what occurred and how to preserve and pass on this memory to future generations. While trials and truth commissions are two of the higher profile types of historical justice, and the presence of such actions reinforces the redress and reparation norm, they are not the only type of restorative justice that contributes to historical memory.

One such form has been the cause of numerous debates within Japan: the representation of the past within educational textbooks. Within Japan the context of state-approved and required textbooks have been frequent topics of debate. The comfort women system has often been represented with one sentence or a single paragraph and more recently the government has considered removing even that mention. Textbooks which ignore any and all human rights abuses by the state fail to educate the youth and provide no historical or collective memory of the event.[254]

Despite the various ways historical memory is passed on to future generations – or not passed on in some cases – the primary purpose for the creation of an historical justice is the demand for acknowledgement. Historical justice requires that the atrocity or actions that were taken are officially recognised by the state and publicly revealed to all citizens. The goal is to re-establish 'a moral framework, in which wrongs are correctly named and condemned, which is usually crucial to restoring the mental health of survivors,'[255] and for some form of reconciliation within society. Historical justice is important, as it will shape the understanding of the events for all future generations.

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[253] "Explanatory Memorandum to the Parliamentary Bill," in *Legal Background to the TRC*, http://www.justice.gov.za/trc/legal/bill.htm, accessed on 10 March 2011.

[254] For an overview of the importance of textbooks in memory transmission, and Japan's treatment of war crimes during World War II see Laura Hein and Mark Selden, *Censoring History: Citizenship and Memory in Japan, Germany and the United States* (London: M.E. Sharpe, 2000).

[255] Minow, *Between Vengeance and Forgiveness*, p. 71.

1.3 Reparatory Justice

Within the restorative justice framework it is this third category, reparatory justice, and in particular reparations, which is perhaps the most well known form of restorative justice; indeed Teitel calls it the leading response in the contemporary wave of political transformation.[256] Reparatory justice, however, is composed of more than just reparations. It also includes restitution, compensation, and rehabilitation. As previously discussed, reparations has been broadly defined. The term conjures up the images of material payments for a variety of wrongs. It has also come to be associated with all forms of restorative justice. Within this thesis, the term reparations is utilised in the strictest sense: 'Some form of material compensation in symbolic redress for violations which cannot in actuality be compensated for'.[257] Restitution will refer to the return of specific belongings or objects which were stolen, seized or confiscated from the original owner(s). Compensation occurs when stolen or lost items cannot be returned.

The focus of reparatory justice is on trying to 'repair' as much of the damage as possible. It ranges from returning items stolen from victims to symbolic gestures of monetary payments. It is linked with the reconstruction of political identity and has been used as a way to regain credibility in the eyes of the international community.[258] Different forms of reparatory justice have included German reparations to Israel and to Holocaust victims, United States reparations to Japanese Americans, and restitution of items such as artwork, ancestral remains, and areas of land to Native Americans.

The function of reparatory justice changes over time. Immediately after the atrocity it takes a necessary economic position, providing compensation and restitution for those who have had monies and possessions that were seized or stolen. As time progresses, I argue, reparations seem to take on a more symbolic nature, often acting in concert with an apology.[259] It is extremely interesting that in the modern redress and reparation movements, it is has become common to see the idea that if a state does not offer reparations then they are not sincere.

De Greiff states that the most general aim of reparations is 'to do justice to victims.'[260] Justice, in and of itself, is a concept which can broadly be defined in a

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[256] Teitel, *Transitional Justice*, p. 127.
[257] Barkan, *The Guilt of Nations*, p. xix.
[258] Teitel, *Transitional Justice*, p. 137.
[259] As evidenced by statements made by victims on the psychological relief that feel upon receiving reparations, see United States and Japanese case studies.
[260] Pablo De Greiff, "Justice and Reparations," in *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford: Oxford University Press, 2006), p. 455.

number of ways, however, reparations within international law have been reflected in the following instruments as primarily compensating for human rights violations, especially in regard to miscarriages of justice or abuse of power by legislative bodies:

Table 4.1: Reparatory Justice within International Law[261]

1948	Universal Declaration of Human Rights, 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.
1950	The European Convention on Human Rights, Article 50	If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from the present convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.
1966	International Covenant on Civil and Political Rights, Article 9	Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.
1978	American Convention on Human Rights, Article 10	Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgement through a miscarriage of justice.
1978	American Convention on Human Rights, Article 63	If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.
1978	American Convention on Human Rights, Article 68	That part of a judgement that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgements against the state.
1984	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, Article 14	Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependents shall be entitled to compensation.

These instruments reflect only legal and judicial answers to reparatory justice. Although it has been argued that states do not provide restorative justice simply because they have been 'legally required to do so by an external third party,' it is important to note several points: First, these treaties - although important normative steps within restorative justice - cannot enforce adherence on the majority of states; these treaties bind only those states which have ratified them and cannot apply retroactively. In addition, despite the codification of international norms, the international community has no enforcement mechanisms. Thus, if a state who has

[261] Sources include: Richard Falk, "Reparations, International Law, and Global Justice: A New Frontier," in *The Handbook of Reparations*, ed. by Pablo De Greiff (Oxford: Oxford University Press, 2006).

signed later decides to ignore the normative commitment that the treaty implies, they can, although they might face international condemnation. Second, while the principle of legal and reparatory justice with exact figures and calculations is appealing for the creation of a standard reparatory model, the application of full compensation for everything that had been lost is impractical. As De Greiff states,

> There is no transitional or postconflict reparations program that has managed to compensate victims in proportion to the harm they suffered, that the very quantification of these harms is problematic, and that even the idea that this should be attempted might generate unfulfillable expectations...[262]

Reparatory justices, like previous forms of justice, are also contested. It has been argued that reparations are not concerned with victims:

> A moral "Wiedergutmachung" was not planned and did not exist. No one bothered to restore the survivors' dignity which was lost during the Holocaust. On the contrary, the procedures, inherent in some of the paragraphs of the Restitution Laws, in and of themselves, inflict indignities upon the claimants.[263]

As will be discussed in Chapter Five, the negotiation of reparations between Israel and West Germany caused riots to break out in Israel. People were appalled at the idea that 'blood money' would be paid and wanted absolutely no communication between the two countries.

Despite the controversies which surround reparations, it is currently one of the most sought after forms of restorative justice, in conjunction with the symbolic justice forms of recognition and apology. Each of the case studies explored in this thesis lobbied for reparations, and success and failure of these movements often hinged on the state providing and the victims accepting reparation payments. It is the most tangible expression of the state's willingness to atone and the linchpin of many movements.

1.4 Legislative Justice

Legislative justice goes one step further in addressing these aspects and is reflected in laws, political measures, and constitutional amendments or protections. Legislative justice is the fourth type of justice, in which I have combined Teitel's concepts of administrative and constitutional categories. The focus of this category is to create legal, administrative, and constitutional changes which should protect against the atrocity or injustice from occurring again. Legislative justice reinforces the separation between old and new regimes. It codifies acceptable behaviour and creates clear signals of what society will allow and will not allow. Representations of legislative justice

[262] De Greiff, "Justice and Reparations," p. 457.
[263] Qtd in Fogelman, "Therapeutic Alternatives for Holocaust Survivors and Second Generation," p. 94.

include Holocaust denial laws, presidential pardons of unjust court convictions, constitutional amendments guaranteeing equality of citizens, etc. The function of legislative justice is two-fold: First, to prevent the denial of, or the reoccurrence of the injustice, and/or the continued rule of perpetrators of the atrocity/injustice; and second, to create effective change in legislation, including constitutional changes.

As will be discussed in Chapter Five and Six, these forms of justice are very important. Germany's regime change included a new constitution that indicated a clear rejection of Nazi legislation and policies. The President of the United States eventually issued presidential pardons and revoked the decrees that the internments were based upon. These types of actions created fundamental legal and administrative changes and sent a clear signal to the victimised groups that these previous actions were now rejected by the state and safeguards had been established against these types of actions.

1.5 Symbolic Justice

The final category, and perhaps the most significant, within the restorative justice typology is symbolic justice. I have proposed the category of symbolic justice to encapsulate the myriad of actions whose focus is to acknowledge and memorialise the past atrocities or injustices. Its primary focus is not rooted in legalism but in interpretation and memory transmission. Symbolic justice can take many forms – apologies are the most predominant, yet other types include days of remembrance, moments of silence, monuments, memorials, and museums commemorating the victims. These types of actions can have significant symbolic meaning to the previously victimised groups.

Of the various types of symbolic actions that a state can take it is the sincere, verbal acknowledgement of responsibility for wrongdoing, i.e. apologies, which I consider to be one of the most important aspects within this category. In *Mea Culpa: A Sociology of Apology and Reconciliation* (1991), the defining text within apology literature, Nicholas Tavuchis states:

> As shared mementoes, apologies require much more than admission or confession of the unadorned facts of wrongdoing or deviance. They constitute – in their most responsible, authentic, and hence, vulnerable expression – a form of self-punishment that cuts deeply because we are obliged to retell, relive, and seek forgiveness for sorrowful events that have rendered our claims to membership in a moral community suspect or defeasible. [sic][264]

[264] Tavuchis, *Mea Culpa*, p. 8.

In addition, Eva Fogelman, in *Therapeutic Alternatives of Survivors,* discusses the importance of symbolism and memorialisation for the survivors' struggles. These survivors of atrocities, often called 'collectors of justice,' are described thus by Fogelman:

> Their sense of responsibility to the dead is actuated in the impulse to bear witness – either by testifying in courts, lecturing, writing memories, or transmitting their legacy to their children and other young people... Memorialisation is of upmost importance in the search for meaning. It permits cathartic expression of rage, grief, guilt, and so on, and allows the survivor to feel those who left a legacy which the survivor is responsible for transmitting.[265]

Apologies, recognition, and other forms of memorialisation serve a distinct purpose, which is different from reparations and other more legalistic forms of restorative justice. It does not attempt to return what was lost, nor does it provide compensation or correct an historical fact. What it does do is recognise that there is nothing which can restore a person to their previous state, but acknowledges that an injustice or atrocity was committed against them. It symbolises the desire of the state to engage in a political reconciliation, to bring the survivors back into dialogue with the state. If the crimes are acknowledged, then survivors can express their rage and sorrow in a way that will permit them to move on with life.[266] Public acknowledgements and various forms of ceremonies, memorials, monuments are collective public expressions, targeted at the group, and are felt deeply on the individual level, assisting in the healing[267] and creating, at the very least, a political reconciliation so that a state of co-existence can be found.

1.6 Revisiting Restorative Justice

Building on Teitel's original five forms of transitional justice, I combined administrative and constitutional to one form, which I call legislative justice, and added a fifth component, one which is central to reparation politics: that of symbolic justice. Symbolic justice, I argue, is one of the cornerstones of reparation politics. The symbolic understanding of the different types of justice is vital to the acceptance or rejection of other forms. As will be discussed in subsequent chapters, the majority of Korean women who had been comfort women rejected Japan's apology and private reparations fund due to the belief that it was not sincere. The reparations offered, and the apology given, thus did not meet the symbolic needs of the group. Similarly, the

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[265] Fogelman, "Therapeutic Alternatives for Holocaust Survivors and Second Generation," p. 85.
[266] Ibid.
[267] Ibid. p. 87.

amount chosen for reparations for the Japanese American reparations in the United States case study was carefully chosen to send a symbolic meaning. The presence or absence of an apology and of other forms of symbolic justice is critical to the examination of success and failure. The following will thus examine the different approaches the state can take to the atrocity or justice and then will be followed with a framework in which relative success and failure can be evaluated.

2 State Recognition

One of the primary factors that I have identified as significant in the measurement of success and failure of redress and reparation movement is the relationship between the state and the group victimised by the state. The state, having victimised a group, either through acts of atrocity or some other form of structured injustice, initially will have a damaged relationship with the group, characterised at the very least as uneasy, leading up to outright hostility. Thus, a necessity to reconcile politically would achieve a positive change in this relationship. A positive change can be indicated by the state's recognition of the event in question and its stance towards both the event and the victimised community.

When individuals or organisations demand recognition of the past atrocity or injustice, the state can assume one of four stances: denial of the event, acknowledgement of the event, statements of regret, or an apologetic stance. As previously discussed, apologies are extremely important for political reconciliation and the presence or absence of an apology is definitive for determining success and failure. The first three stances discussed: denial, acknowledgement, and regret reflect positions that the state can assume, however, as I will argue, the assumption of these stances will result in unsuccessful RRMs. The fourth stance is what I refer to as an apologetic stance. There has been an emergent trend within reparation politics for states to apologise for past events. This trend can be seen in notable apologies such as the United States' 1993 apology to the Native Hawaiians for the overthrow of the Kingdom of Hawaii, the United Kingdom's 1995 apology to the Maori of New Zealand for seizing their lands, and the Belgian 2002 apology for its role in the assassination of the first Prime Minister of the Congo.[268] An apologetic stance, however, is more than

[268] Melissa Nobles, *The Politics of Official Apologies* (Cambridge, Cambridge University Press, 2008), pp. 162-163.

simple words of an apology. It is the transmission of a history that clearly states the wrongdoing. An apologetic stance may be characterised as words, but the words are in memorials, textbooks, actions, and laws. It is ingrained in the collective memory of a group and reflected in the transmission of historical memory. Each of the three case study countries will be examined (Chapters Five through Seven) to determine the government's stance towards the victimised group in this light.

2.1 Denial of the Event

Japan is one of the more illustrative examples for the denial of the atrocity. The government has utilised many forms of denial, also called defensive strategies, to refute the claims of the World War II comfort women exploited by its military. Defensive strategies, according to W. L Beniot, can include a complete denial of wrongdoing, minimising the offence, creating an explanation/excuse/rationalisation, justifying the event for a larger purpose, and even establishing a counterattack.[269] These strategies can be seen woven throughout Japan's treatment and subsequent rhetoric regarding the comfort women. As previously discussed, between 1990 and 1991 Japan denied official military involvement in the comfort women system, illustrating the government's denial of the event. After well-known Japanese historian and researcher Yoshimi Yoshiaki discovered archived Defence Agency records proving that the Japanese military planned, constructed, and operated the 'comfort stations', top officials switched to utilising more subtle forms of denial. The government then attempted to minimise the offence and rationalise their position by arguing that, yes the government was involved in the running of the brothels, however, all the women involved were prostitutes and/or compensated for their 'labour.' Even after the July 1993 report which recognised the possibility of force within the drafting of the comfort women,[270] the government frequently referred to these women as prostitutes. The selection of the term prostitutes, implying choice and payment for services rendered, was a form of counterattack, especially when said women were pursuing reparations and/or legal remedies for the crimes committed against them. The position of denial was reinforced

[269] For a complete accounting of defensive strategies see William L. Benoit, *Accounts, Excuses, and Apologies: A Theory of Image Restorative Strategies* (Albany: State University of New York Press, 1995).

[270] Hyunah Yang, "Revisiting the Issue of Korean "Military Comfort Women": The Question of Truth and Positionality," *Positions* 5, no. 1 (1997), p. 54.

in 2006 when Japan's Prime Minister Abe Shinzō stated that the 'so-called' comfort women were not coerced into becoming sexual slaves.[271]

The denial of atrocity can also be seen in the German case study when applied to the European Roma. The immediate stance of Germany was not to directly deny that Roma were deported to concentration camps, however, the state rationalised the deportations of Roma via the official position of the German government and administration -- that the Roma were persecuted not on racial grounds, but because of their anti-social and criminal behaviour.[272] The government's stance directly contradicted that fact that the Weimar Republic had established a monitoring system for all Roma within German territories and that the Nazi regime created a department whose sole focus was to trace Roma lineage to enable the classification of Roma based on great-grandparents and, that, after the subsequent identification of Roma, they were deported to and exterminated within concentration camps.[273] The government's stance that Roma were criminals and not victims of Nazi persecution was extremely important as it denied Roma access to redress, reparations, and other forms of restorative justice.

2.2 Acknowledgement of the Event

The state can choose to acknowledge that an event happened – i.e. they do not deny, attempt to misrepresent, justify or excuse an event; however, an acknowledgement of the event does not guarantee that a statement of regret or an apology for the atrocity or injustice is forthcoming. One way acknowledgements occur within legalistic countries is through the court processes, for example, when Germany held trials for concentration camp guards, doctors. The convictions that occurred in Germany affirmed that the actions conducted by these individuals were wrong, they re-established a sense of legitimacy for the state, and acknowledged the event that happened, creating an historical record through court trials and convictions.

Germany's reluctance to admit that Roma were victimised based on ethnic heritage, and not on the basis of criminality as previously maintained was finally acknowledged by Germany's Supreme Court in 1963. Prior to this, Germany had denied that Roma were persecuted for racial reasons; this denial excluded them from redress, reparations, and other forms of restorative justice. The acknowledgement

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[271] Colin Joyce, "Japanese PM Denies Wartime 'Comfort Women' were Forced," *Telegraph*, 03 March 2007, http://www.telegraph.co.uk/news/worldnews/1544471/Japanese-PM-denies-wartime-comfort-women-were-forced.html, accessed on 10 March 2010.

[272] Martin Gilbert, *The Second World War: A Complete History* (New York: Henry Holt and Company, 1989), p. 734.

[273] Angus Fraser, *The Gypsies* (Oxford: Blackwell Publications, 1992), p. 254.

through the Courts corrected the judicial, governmental, and historical understandings of Roma persecution. However, acknowledgement of the event cannot be automatically equated with a statement of regret or apology, although it can lead to one or the other.

2.3 Statement of Regret

The concepts of regret and apology are often utilised interchangeably; however, there is a distinct difference between the two within apologia literature. When a state offers statements of regret, it is expressing a desire that the event, i.e. the acts of atrocity of the injustice perpetrated, did not occur or sadness that the event occurred. Expressing regret, however, does not take responsibility for the event[274] nor does it satisfy the symbolic nature of an apology that many groups require. Thus, it does not meet the central (symbolic) requirement of the redress and reparation movement.

The most illustrative example on statement of regret versus apology can be found in the redress and reparation movement within Australia for the removal of Aboriginal children from their families. In 1999, Prime Minister John Howard delivered a statement of regret for the injustices suffered by Aborigines over the last several generations:

> [t]his house ... expresses its deep and sincere regret that indigenous Australians suffered injustices under the practices of past generations, and for the hurt and trauma that many indigenous people continue to feel as a consequence of those practices;[275]

However, he refused to go further in his declaration and apologise for the country's actions, in particular for the removal of aboriginal children from their families and subsequent placement in white foster homes and orphanages. The refusal to apologise frustrated many in the victimised community.[276] Many felt that until further steps were taken by the state, acceptance from the victimised community could not be forthcoming. This point was mooted when on 13 February 2008 Prime Minister Kevin Rudd apologised for the event.

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[274] "Regret vs. Apology: Why Being Sorry it Happened Isn't the Same as Being Sorry." *San Francisco Chronicle*, 8 April 2001, http://articles.sfgate.com/2001-04-08/opinion/17592203_1_apology-fault-civil-cases, accessed on 15 March 2011.

[275] Parliament of Australia, *Motion of Reconciliation*, 26 August 1999, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F23E06%22, accessed on 1 April 2011.

[276] "Regret but no apology for aborigines," *BBC*, 26 August 1999, http://news.bbc.co.uk/2/hi/asia-pacific/430512.stm, accessed on 10 March 2010.

2.4 Apologies

The significance of an apology cannot be underestimated. Tavuchis argued that apologies are a sincere verbal acknowledgement of responsibility for wrongdoing; that apologies speak:

> to an act that cannot be undone but that cannot go unnoticed without compromising the current and future relationship of the parties, the legitimacy of the violated rule, and the wider social web in which the participants are enmeshed.[277]

Apologies are thus a speech act that name the offence and ask for forgiveness.[278]

For the victimised community, apologies are one of the most important aspects of the redress and reparation movement because of the symbolic nature and acceptance of responsibility. Apologies affirm that the actions the state undertook were wrong and frees those individuals who blamed themselves for the atrocity from that particular burden. Apologies provide a measure of psychological relief, as they offer a reassurance that the crime has been acknowledged, that there is remorse and wrongdoing on the part of the oppressor and thus less likely to occur again.[279] A statement of regret does not have the same impact as an apology does due to the lack of responsibility that regret indicates. If the state does not assume responsibility, how can the community be assured that the event will not occur again? Social, moral, and psychological issues demand an apology for the actions that have occurred. The state, however, can be reluctant to issue an apology. States can argue that it is impossible to apologise for an injustice or actions that occurred under a previous regime, as explained by Australian's Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs, in 1998:

> The government does not support an official national apology. Such an apology could imply that present generations are in some way responsible and accountable for the actions of earlier generations, actions that were sanctioned by laws of the time, and that were believed to be in the best interest of the children concerned.[280]

The reluctance of the Australian government continued until 2008 when the government issued an apology. The debate that surrounded the issue, however, and the government's eventual issuance of an apology reflects Australia's engagement with

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[277] Tavuchis, *Mea Culpa*, p. 13.

[278] Forgiveness is an underlying assumption of apologies. One wishes for forgiveness, however the act of forgiveness is independent of the apology and at the individual's discretion.

[279] Brooks, "The Age of Apology," p. 4.

[280] Eleanor Bright Fleming, "When Sorry Is Enough: The Possibility of a National Apology for Slavery," in *The Age of Apology: Facing up to the Past*, eds. Mark Gibney, Rhoda E. Howard-Hassmann, Jean-Marc Coicaud and Niklaus Steiner (Philadelphia: University of Pennsylvania Press, 2008), p. 102.

reparation politics and lends credence to the norm cascade. During the 1990s and 2000s many states issued an apology for their actions in earlier historical eras and as more states apologised, it extended the pressure to states that had not.

Some states however, have argued that earlier historical periods had different norms and values than modern times thus it is not necessary to apologise for past events. The contentious argument concerning a state-issue apology in regard to this respect can be illustrated by the example of slavery and whether or not governments who participated in, or benefited from, the trans-Atlantic slave trade should issue apologies. These stances were illustrated in the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (known as the Durham Racism Conference).

One of the issues on the conference's agenda was reparation for slavery and colonialism. The conference was deeply divided over the issue, with many governments fearing that apologising for the slave trade would allow for future lawsuits regarding reparations and compensation. European and African governments compromised on the issue of apologies; the 15 European Union countries agreed to apologise for the historical slave trade in exchange for the African governments agreeing not to seek financial reparations or a declaration that slavery was a crime against humanity. Although slavery is currently illegal under the Rome Statute, European nations argued 'using the term "crime against humanity" for an historical phenomenon is anachronistic.'[281] The apology:

> We acknowledge that slavery and the slave trade, including the transatlantic slave trade, were appalling tragedies in the history of humanity not only because of their abhorrent barbarism but also in terms of their magnitude, organized nature and especially their negation of the essence of the victims, and further acknowledge that slavery and the slave trade are a crime against humanity **and should have always been so**, especially the transatlantic slave trade[282]... [emphasis added]

was considered a compromise text by each of the 15 countries of the European Union, and according to the Belgian Foreign Ministry's spokesman Koen Vervaeke, it did constitute an apology by the European Union. That this carefully issued apology allowed legal issues to be avoided, however, it also met the normative expectation of the international community that an apology should be offered.

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[281] Stephen Castle and Alex Duval Smith, "Europe's Apology for Slavery Rules out Reparations," *The Independent*, 8 September 2001.

[282] United Nations, *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*, A/CONF.189/12, 2001. p. 11.

2.5 Types of Apologies

It is not only the question of responsibility and possible reactions to apologies that are significant, but also the question of the type of an apology that is issued. Apologies can take one of four modes:

1. Interpersonal apology from one individual to another or *One to One*
2. Apology from an individual to a collectivity, or *One to Many*
3. Apology from a collectivity to an individual, or *Many to One*
4. Apology from one collectivity to another, on *Many to Many*[283]

In order for an apology to be accepted by the community, it must be from one collectivity to another; in other words from the official Japanese government to the comfort women they kidnapped and enslaved. The repercussions of a collectivity's failure to apologise, and the problems which can arise from this refusal, can be seen in the example below of the Japanese government's response to the comfort women.

A senior Japanese official apologised in 1993; however the Diet (Japanese Parliament) has consistently refused to issue an official governmental apology for the comfort women issue. The apology from one member of the government was seen as an individual's apology and not as representative of the Japanese collective. This lack of official recognition was further compounded by the Japanese Prime Minister's statement in 2007 that there was no proof of the coercion. The Prime Minister later apologised for the atrocity from his official position as Prime Minister. The constant contradiction, however, in statements, coupled with the Diet's ongoing refusal to apologise led the community advocating for recognition to believe that Japan was not sincere in its apologies.[284]

How a state responds to the victimised group's demand for recognition is, again, one of the crucial elements of determining success or failure of the RRM. The adoption of an apologetic stance and the issuing of an apology is thus a central element. Without an apology from the collective state to the collective group that has been victimised, restorative justice cannot be said to be functioning successfully. Understanding success and failure, however, is more complex than determining which stance the state has adopted. The following section will outline what I consider to be the crucial aspects to understanding success and failure.

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[283] Tavuchis, *Mea Culpa*, p. 48.

[284] As evidence that the victimised group does not believe in the sincerity see Chapter Seven's discussion on international society and organisations. Comfort women and international organisations have both continued to lobby for a formal, acceptable apology.

The determination of success and failure within redress and reparation movements can be pursued by examining the perception of success on the part of the social movement organisations, the acceptance of restorative justice actions and the reflected historical memory of the victimised group, state, and domestic and/or international society. When determining success and failure, it is important to realise that organisations and individuals rarely come to a complete consensus. In order to determine success and failure then, it is important to examine multiple social movement organisations, informal groups, as well as individuals. In order to do so, I will turn to William Gamson's exploration of the success and failure of social movement organisations (1975), which is still seen as a seminal work within the social movement literature.[285] The following sections briefly explore Gamson's 'Outcome of Resolved Challenges' model and how it will be adapted here.

3.1 Gamson's 'Outcome of Resolved Challenges'

Determination of success and failure, within Gamson, is limited to traditional social movement organisations (SMO), and thus must be adapted for this thesis. Gamson's model utilises the perception of certain groups – including historians and the victimised group – to give a general perception of success. I believe this perception to be the most effective way to determine the overall success of a social movement, and thus will be adapting his model to obtain a general level of understanding regarding the success and failure of the redress and reparation movements. This will allow for both the understanding of how individual social movement organisations operate yet expands the understanding of the movement itself by examining multiple SMOs, the results of court cases, governmental actions, and historical memory of the event.

Gamson defines an organisation's success as being the realisation of a set of outcomes relative to two basic clusters, which he further defined as acceptance and new advantages, in addition to four possible outcomes: full response, co-optation, pre-emption, and collapse. Gamson visualises as such:

Figure 4.1: Gamson's 'Outcome of Resolved Challenges'[286]

		Acceptance	
		Full	None
New Advantages	Many	Full response	Pre-emption
	None	Co-optation	Collapse

[285] William A. Gamson, *The Strategy of Social Protest* (Homewood, Illinois: The Dorsey Press, 1975).
[286] Ibid. p. 29.

Acceptance refers to a positive change in the relationship between the challenging group and the antagonist,[287] which for our purposes here will be referred to as the victimised group and the state that perpetrated the atrocity. The assumption made in this thesis is that the initial relationship between the state and the victimised group following a state-sponsored atrocity would be hostile in nature. A group which had just experienced mass genocide, internment or rape would not be likely to implicitly trust the state which had committed those acts. Thus, acceptance would be a positive change in this relationship, i.e. a movement away from its previous position.[288]

Gamson utilised the term 'New Advantages' which was a composite of four factors: the group's perception of achievement by historians, by the challenging group, and by the antagonist as well as the overall satisfaction level of the group. Success and failure were determined by assigning the following positions: a (+) when one of the sources was satisfied or partially satisfied with the level of success, a (-) when groups were not satisfied or no more satisfied than when they started, or a (0) when information was not available. Each group was then assigned a position based on the combined viewpoints of the historians, challenging group, the antagonist, and the challenging group's level of satisfaction at the conclusion of the challenge[289]

3.2 Adaptation of Model

Gamson's measurement of success and failure will be built upon here by applying it to the third type of social movement I have identified as redress and reparation movements. In the original model, 'advantages' are that which the challenging group is seeking; thus, in the case of RRMs, that which is being sought, i.e. restorative justice will be utilised as the equivalent. Similar to Gamson's definition of 'new advantages' as a combined perception of achievement at the conclusion of the challenge, this thesis will utilise the combined vantage point of four indicators to determine if restorative justice has been successfully achieved (this will be expanded in subsection 3.3):

1. Assessment of historical memory as reflected in the research associated with the redress and reparation movement;
2. State offering of restorative justice;

[287] Ibid. pp. 14-15. The challenging group is the mobilised group attempting to challenge the political system and the antagonist is the group who is being challenged.
[288] Ibid. p. 31.
[289] Ibid. p. 36.

3. Acceptance of restorative justice by victimised group;
4. The victimised group's current level of satisfaction.

This overall perceived value of restorative justice when coupled with the state's formal stance towards recognition, as discussed in the preceding section 2, allows for the visualisation of relative success or failure of redress and reparation movements as such:

Figure 4.2: Analysis of Redress and Reparation Movements

Assessment

Assement of historical memory	
State offering of restorative justice	
Acceptance by victimised group	
Satisfaction of victimised group	
Overall perceived value	

State Recognition

Overall perceived value of restorative justice	Apologetic Stance	Regret/ Acknowledgement	Strategies of Denial
High	RRM Successful	N/A	N/A
Medium	RRM Partially Successful	RRM Partially Failed	Settlement
Low/ None	Not an RRM	Verbal Acknowledgement	RRM Failed

State recognition, again, was discussed in section 2; the assessment factors and the resultant chart will be discussed in subsection 3.3. This model will then be applied to the redress and reparation movements in Germany, the United States, and Japan, (Chapters Five through Seven) to be able to determine an overview of the relative success or failure of each movement.

3.3 Assessment

The first indicator utilised in the assessment of success and failure of reparation politics is the perception of achievement as measured by four indicators: historical memory, the state, the victimised group, and the victimised group's level of satisfaction at the conclusion of the movement. In order to determine the social movement's success and building on Gamson's model, I will assign a (+) to indicate a relative position of success or partial success, a (-) when organisations and/or individuals within the movement are not satisfied or no more satisfied when they started, and a (0) if information is not available. The measurement is, again, conducted on a collective level and focuses on the actions of the state, NGOs representing the victimised group and other forms of collectivities, can be visualised as:

Figure 4.3: Analysis

Non-recognitive Factors	
Assement of historical memory	
State offering of restorative justice	
Acceptance by victimised group	
Satisfaction of victimised group	
Overall perceived value	

Assessment of the historical memory will be based on the academic literature and analysis found in the course of in-depth research for the case studies and the general reception of society to acts of restorative justice being provided by the government, as reflected in Chapters Five to Seven. This societal reaction and academic perspective can lead to a generalised overview – when the historical memory reflects that the redress and reparation movement has been at least partially successful, a (+) will be recorded.

Assessment of the state's perception is based on the offering of some combination of restorative justice actions. Thus when the state offers restorative justice a (+) will be recorded. The actions of the state are independent of the group or their acceptance. The assessment of the victimised group will be based on the collectives' response to the varying acts of restorative justice. Formal acceptance of reparations, restitution, apologies and so forth will indicate the group's acceptance of restorative justice and thus a (+) will be recorded. Accepting some form of restorative justice is independent of their satisfaction with the offering.

Perception of success will be the hardest to measure due to its subjective nature however I would argue that this measurement can be accomplished by examining the actions of the collective following the offering of restorative justice. In order for redress and reparation movements to be successful, the victimised community must agree that success has been achieved. This can be determined through a variety of ways including surveying the literature such as memoirs, historical/academic texts, academic or psychological studies. Other ways to determine the group's satisfaction is to examine the goals and mission statements from NGOs representing the community, evaluating

whether organisations and individuals have ceased lawsuits, challenging the collective memory of society or accepting the presence of memorials and monuments.

Finally, a (+) for each of the four categories listed will result in a determination of 'High' for the overall perceived value of restorative justice. If there are two or more (+)'s in the four categories a determination of 'Medium' for the overall perceived value of restorative justice would be recorded. If there is less then two (+)'s recorded for the perceived value, then that value would be recorded as 'Low' or 'None.' Following the determination of the perceived value of restorative justice, the value will then be fed into the Analysis of Relative Success and Failure Chart to determine relative success and failure as illustrated below:

Figure 4.4: Analysis of Relative Success and Failure Chart

State Recognition

Overall perceived value of restorative justice	Apologetic Stance	Regret/ Acknowledgement	Strategies of Denial
High	RRM Successful	N/A	N/A
Medium	RRM Partially Successful	RRM Partially Failed	Settlement
Low/ None	Not an RRM	Verbal Acknowledgement	RRM Failed

When the overall perceived value of restorative justice is combined with the formal stance the state has taken towards the atrocity there are eight outcomes possible.

- Perceived value of 'High' in addition to the state's assumption of an apologetic stance results in the determination of a relatively successful RRM.
- There cannot be a perceived value of 'High' combined with a statement of regret or denial of the event as without an apology groups do not perceive the RRM as successful. The apology is a key component and required for success.
- Perceived value of 'Medium' in addition to the state's assumption of an apologetic stance results in the determination of a somewhat successful RRM.
- Perceived value of 'Medium' combined with a statement of regret or acknowledgement of the event results in the determination of a partially failed RRM, as again, the apology is a key component and without an apology a movement cannot truly succeed.
- Perceived value of 'Medium' combined with denial of the event, results in the determination of settlement. Similarly to lawsuits, a state can offer some form of

compensation or other type of restorative justice in order to mollify the victimised group, but still take no responsibility or admit that the event occurred. In a lawsuit, this would be called a settlement and thus the terminology has been adopted.

- If there is no apologetic stance and little to no restorative justice offered or demanded, then there is not an RRM to discuss.
- If there is a statement of regret or acknowledgement of the event; however little to no restorative justice offered then the statement is simply a verbal acknowledgement in the state's role of some historical event.
- If there is little to no restorative justice offered and the event has been denied by the state then the RRM has failed.

Chapters Five through Seven will explore three cases of atrocities vis-à-vis minorities and examines the redress and reparation movements that followed the atrocities. These three chapters thus demonstrate the emergence of the norm of redress and reparation and demonstrate, in detail, the development of this movement within three countries: Germany, the United States, and Japan. The chapters will primarily focus upon the emergence of the redress and reparation movement and the subsequent actions of norm entrepreneurs in an effort to meet their goals. The details of the injustices perpetrated in each case are well documented, and are therefore examined only briefly within the chapters. After the redress and reparation movements have been examined the chapters will then apply the success and failure framework discussed above to each case of the case studies to conclude the relative state of each movement. Chapter Eight will then examine the implications of success and failure to determine what trends impact reparation politics.

Chapter Five:
The German Genocides and Subsequent Redress and Reparation Movements

Throughout history, man's inhumanity to man has, far too often, known no bounds. At the same time, there has also always been some means of responding to atrocities. In earlier times, retribution and vengeance were construed as redress, an eye for an eye. In this system, those who remained weaker within society had no means of recourse. There is now widespread agreement – indeed, as I have argued in previous chapters, that a norm has emerged – that, as a whole, it is society's obligation to protect the basic rights of all people, whether they belong to a minority or to a majority, and to compensate victims for their experiences/losses, insofar as possible – as described in Chapter Four.

The genocides and crimes against humanity perpetrated during the Nazi regime during World War II could easily be classified as one of the worst atrocities of the 20th century. The Nazis systematically murdered an estimated 11 million civilians; of which six million were European Jews and half to one and a half million European Roma. Individuals were targeted for a multitude of reasons including, but not limited to: political and religious beliefs, nationality, sexuality, and disability. There were only two groups, however, selected for the complete eradication of culture and life: Jews and the Roma. Both groups were marginalised and then faced extensive legislation including governmental designations of ethnicity based on an assigned lineage by the state. Both groups were incarcerated at concentration camps and ghettos, in addition to being systematically killed independently of the camp system.

This chapter will overview the German genocides and two subsequent redress and reparation movements. The Jewish RRM is the most well known; it emerged first, having mobilised at the beginning of World War II. Upon finding themselves excluded from redress, the Romani RRM began to mobilise during the 1950s. The initial norm entrepreneurs were not concerned with creating a redress and reparation norm for international society. The initial concerns were the proper response to the crimes perpetrated upon the Jewish people by the Nazi regime. The actions taken by the Nazis had been cloaked in a veneer of legality and thus Jewish organisations focused on a primarily legal response. Requests for reparations were repeatedly made, despite the fact that state reparations had never been given to a victimised group. Once the Jewish organisations succeeded with their initial goals, it was, relatively speaking, easier to obtain further measures including symbolic justice.

The initial fight for reparations and redress are central to this thesis. In contrast, however, the Romani RRM is relatively muted. It emerged almost a decade after Jewish organisations began to mobilise and was initially focused on overturning their exclusion from German reparation laws. The Romani RRM is not as well-known and although the group is now included in reparations legislation, it has been seen as less successful than the Jewish RRM. Both RRMs will be explored within this chapter and then analysed to determine their relative success.

1. The German Genocides

The period of time (1933 – 1945) in which Hitler and the Nazi party ruled Germany was characterised by an escalation of violence, the concept of ethnic purity and 'lives unworthy to live', and a continuum of destruction which resulted in 6 million European and German Jews dead, and 500,000 to 1.5 million European and German Roma dead. The genocide, however, did not occur in a vacuum. In order to assess the elements, which contributed to the genocide, we first have to examine Germany's history and their inclusion/exclusion of minority groups.

Prior to World War I (1914-1918), Germany had established that those individuals considered of German nationality and citizenship would have full civil equality regardless of religion.[290] Legal equality was codified in 1871 with the passage of the Constitution of the German Empire (1871-1918):

> Article 3
>
> For the whole of Germany one common nationality exists with the effect that every person (subject, State citizen) belonging to any one of the federated States is to be treated in every other of the federated States as a born native and accordingly must be permitted to have a fixed dwelling, to trade, to be appointed to public offices, to acquire property, to obtain the rights of a State citizen, and to enjoy all other civil rights under the same presuppositions as the natives, and likewise is to be treated equally with regard to legal persecution or legal protection.
>
> No German may be restricted from the exercise of this right by the authorities of his own State or by the authorities of any of the other federated States.
>
> ...

[290] Nationality denotes ones membership in the nation or state, whereas citizenship denotes a legal status and political rights within the state. It is common for one to be both a citizen and a national; however these are two separate concepts. Citizenship, in theory, denotes a legal equality among its members.

Article 4

The following affairs are subject to the superintendence and legislation of the Reich:

I. the regulations as to freedom of movement, domicile and settlement affairs, right of citizenship, passport and police regulations for aliens, and as to transacting business including insurance affairs in so far as these objects are not already provided by for Art. 3 of this Constitution.[291]

In theory, this Constitution guaranteed that all people identified as either subjects or State citizens were to be treated equally under the eyes of the law, and that all such people were equals. The subsequent passage of the *Imperial and State Citizenship Law* on 22 July 1913 developed a unified concept of German citizenship, although Germany itself remained highly federal. The law firmly established the Prussian model of citizenship for the German state: Article 4 stated that 'the legitimate child of a German acquires by birth the citizenship of the father: the illegitimate child of a German woman, the citizenship of the mother.'[292] Thus while unfavourable naturalisation policies and general discrimination existed within German society towards Jews and Roma, there was also discrimination to a lesser extent, towards Poles, Czechs, and Danes.[293]

Emancipation and integration were gradual, with the largest gains for the German Jewish population between 1848 and 1871. In 1848, approximately 50% of the German Jews were poor with one-third to one-fourth in the lowest tax bracket. Of the remainder, just under one-third was considered to have entered the bourgeoisie and were included in the middle and upper tax brackets. In contrast, by 1871 when the German Empire was established, over 60% of all Jews had entered the middle or upper tax brackets. Of the remainder between 5% and 25% of German Jews (depending on the region) were living in poverty or living in the margins of society.[294] Jews could now be found in various professions such as bankers, merchants, trade, lawyers, judges, professors, politicians, and doctors in addition to serving in the military. This rapid

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[291] *Constitution of the German Empire* (April 16, 1871).

[292] Eli Nathans, *The Politics of Citizenship in Germany: Ethnicity, Utility and Nationalism* (Oxford: Berg, 2004), pp. 179-181. The objection had to be based 'only on facts such as justify the fear that the naturalisation of the applicant would imperil the welfare of the Empire or the State.' "German Imperial and State Citizenship Law, July 22, 1913," *The American Journal of International Law, Supplement: Official Documents* 8, no. 3 (July 1914), Article 9, p. 219.

[293] See Nathans, *The Politics of Citizenship in Germany* for a discussion on the racial/national preference hierarchy within Germany.

[294] Michael Brenner, "Between Revolution and Legal Equality," in *German-Jewish History in Modern Times: Volume 2: Emancipation and Acculturation 1780-1871*, ed. Michael A. Meyer (New York: Colombia University Press, 1997), pp. 301-302.

economic rise brought increased social acceptance, and further, albeit not complete, integration.[295]

Even this degree of emancipation and integration, however, did not extend to German Roma. The Roma were continually marginalised throughout Germanic and European history, living on the outskirts of society in abject poverty. In the mid-nineteenth century, German states were still deeply suspicious of nomadic Roma. In 1855, 1871, and 1886, various states passed decrees warning of the dangers that incoming Roma posed to the local population. Bismarck stressed the distinction between foreign Roma and those who held German citizenship. The typical policies of that time were to expel foreign Roma and to make domestic Roma accept a sedentary lifestyle. Targeted discrimination at this time was based not on racial or ethnic grounds, but on the itinerant lifestyle i.e. culture of the Roma.[296]

One anti-Roma measure, which was later utilised by the Nazi regime, was the establishment in March 1899 of the *Information Service on Gypsies* by the Security Police at the Imperial Police Headquarters in Munich. This state-sanctioned and state-supported organisation was created in order to commence surveillance and registration of all Roma, regardless of citizenship. In addition, it served as a clearinghouse to collect and collate data on Roma physiognomy.[297]

In 1905, the Bavarian government carried out a census of all Roma, sedentary and nomadic. The resultant report described the Roma as 'a pest against which society had to defend itself by unrelenting vigilance.'[298] The report dictated that any arrivals, departures, and incidents should be reported to the *Information Service on Gypsies* in Munich. The author of the report identified approximately 3,350 individual Roma listed in the registry and within two years of this report the number of Roma under surveillance grew to more than 6,000.[299] In 1911, six other German states attended a conference whose purpose was to expand the bureau by going through and adding those Roma on file within other German territories. During this time, further laws were passed by individual states to combat the 'Gypsy plague'.[300] The resulting effects of German policies made integration – of either sedentary or nomadic Roma – difficult.

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[295] Ibid. p. 280.
[296] Fraser, *The Gypsies*, pp. 249-250.
[297] Ibid. p. 253.
[298] Jean Pierre Liegeois, *Gypsies: An Illustrated History* (London: Al Saqi Books, 1986), p. 92.
[299] Fraser, *The Gypsies*, pp. 251-252.
[300] Liegeois, *Gypsies*, p. 92.

Legislation was aimed at making traditional occupations difficult or illegal, and created the situation in which they had no legal basis for survival.[301]

1.1 Weimar Republic

Within German society, public opinion began to turn increasingly against minorities; and anti-Semitism began to rise, as the radical right began to blame the loss of World War I on Jewish influences.[302] A scapegoat was needed for the German people, Girard writes:

> The Treaty of Versailles amputated Alsace-Lorraine on the west and a part of Poland on the east. Under military occupation Germany was humiliated and reduced to the rank of a second rate power. The new liberal regime was opposed on all sides and was openly considered to be a *Judenrepubliq*. For the ultra-conservative circles the burning question arose: How was the sudden cruel defeat and its consequences to be interpreted? The answer was quickly found: by a stab in the back. Accomplices of the Bolsheviks and the Allies, the Jews had fomented an immense plot against the Reich by disorganizing things behind the lines and propagating pacifist ideas. Thus reiterating in his own way the theme of the *Dolchstosslegende*, Marshal Ludendorff wrote: "Those who enjoyed and profited from the War were especially Jews ... patriotic circles felt that the German people, who with weapons in hand, fought for liberty, had been sold out and betrayed by the Jewish people."[303]

Evidence of increased anti-Semitism began to surface in other ways as well. In 1920, prominent legal scholar Karl Binding and noted psychiatrist Alfred Hoche published *Die Freigabe der Vernichtung lebensunwerten Lebens,* (The Sanctioning of the Elimination of Lives Unworthy of Living). In this polemic text, the authors argued that there were certain humans that fell into the category as 'life unworthy of life.' This concept was later utilised by the Nazi Regime as an essential foundation for the mass murder of three types of people: Jews, Roma, and the handicapped.[304]

The Nazi party promised to end the political instability and violence that was gripping post-World War I Germany: to bring law, order, and jobs back to the country. In 1920, Hitler outlined the programme of the National Socialist German Workers' Party (NSDAP or Nazi Party) which included the abrogation of the Versailles Treaty, a

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[301] Frank Sparing, "The Gypsy Camps," in *From "Race Science" To the Camps: The Gypsies During the Second World War Volume I*, ed. Gypsy Research Centre of the Universite Rene Descartes (Hertfordshire: University of Hertfordshire Press, 1997), p. 40.

[302] Peter Longerich, *The Unwritten Order: Hitler's Role in the Final Solution* (Stroud, Gloucestershire: Tempus Publishing, 2003), p. 29.

[303] Patrick Girard, "Historical Foundations of Anti-Semitism," in *Survivors, Victims, and Perpetrators: Essays on the Nazi Holocaust*, ed. Joel E. Dimsdale (Washington: Hemisphere Publishing Corporation, 1980), p. 75.

[304] Henry Friedlander, "The Origins of the Nazi Genocide," in *The Holocaust: Theoretical Readings*, eds. Neil Levi and Michael Rothberg (New Brunswick, New Jersey: Rutgers University Press, 2003), pp. 96-99.

demand for land reform and more living space for Germans, more jobs for German citizens, expansion of social welfare, education, and health care.[305] However it also stated that:

> 4. Only a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently no Jew can be a member of the race.
> 5. Whoever has no citizenship is to be able to live in Germany only as a guest...
> 6. ...we demand that every public office, of any sort whatsoever, in the Reich, the county or municipality, be filled only by citizens.[306]

This platform was the basis for the Nuremberg laws issued in 1935 that stripped Jews and Roma of their citizenship.

Meanwhile, the Weimar government increased anti-Roma legislation, further linking the Roma with the criminal element in the minds of the public as well as law-enforcement agencies. In addition, they expanded legislation and programmes making it easier to monitor the Roma; these programmes were later used by the Nazi regime in the identification, collection, and deportation of Roma within Germany to ghettos and concentration camps.

Article 109 of the Weimar Republic's constitution states that: 'All Germans are equal in front of the law. ... Legal privileges or disadvantages based on birth or social standing are to be abolished.'[307] Yet the Roma, on the basis of their ethnic identity, were put under surveillance and tracked through registries. One of the most powerful surveillance and registration tools – the organisational system created by the *Information Service on Gypsies* composed of registration, photographs, fingerprinting, and issuing identification cards to the Roma – had its power and scope expanded during the interwar government. In 1925 the Centre had 14,000 files on German Roma, both individuals and complete families[308] and in April of 1929 the German Criminal Police Commission renamed the *Information Service on Gypsies* the *Central Office for Combating the Gypsy Nuisance* and expanded its investigatory/registry powers to all of Germany.[309]

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[305] "The Program of the NSDAP, proclaimed 24 February 1920," The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/imt/document/nca_vol4/1708-ps.htm, accessed on 8 September 2008.
[306] Ibid.
[307] "The Constitution of the German Reich, August 11, 1919," The Avalon Project at Yale Law School, http://www.yale.edu/lawweb/avalon/imt/document/nca_vol4/2050-ps.htm, accessed on 18 November 2005.
[308] Herbert Heuss, "German Policies of Gypsy Persecution (1870-1945)," in *From "Race Science" To the Camps: The Gypsies During the Second World War Volume I*, ed. Gypsy Research Centre of the Universite Rene Descartes (Hertfordshire: University of Hertfordshire Press, 1997), p. 23.
[309] Fraser, *The Gypsies*, p. 252.

Throughout the interwar period the position of minorities within Germany worsened. The Weimar Republic continually expanded anti-Roma laws, creating a prejudicial and discriminatory framework, which the Nazi regime took over. In addition, the Nazi party platform, the core of which was the concept of racial purity, became more and more popular as Anti-Semitism began to grow stronger within Germany. It is upon this foundation that Hitler came into power and built the stage for his genocides, massacres, and crimes against humanity.

1.2 The Nazi Regime

The Third Reich (1933-1945) came into power on 30 January 1933, when Adolf Hitler was appointed Chancellor of Germany. Hitler quickly began the legal process of stripping away civil rights, using the infamous Reichstag fire[310] to persuade President Hindenburg to invoke Article 48[311] of the Weimer Constitution, which allowed for the suspension of civil rights within Germany. Hindenburg then passed the *Decree of the Reich President for the Protection of People and State*, which stated:

> Sections 114, 115, 117, 118, 123, 124, and 153 of the Constitution of the German Reich are suspended until further notice. Thus, restrictions on personal liberty [114], on the right of free expression of opinion, including freedom of the press [118], on the right of assembly and the right of association [124], and violations of the privacy of postal, telegraphic, and telephonic communications [117], and warrants for house-searches [115], orders for confiscation as well as restrictions on property [153], are also permissible beyond the legal limits otherwise prescribed.[312]

This suspension of general civil rights was Hitler's first step in his rapid ascent into power and his utilisation of the constitution, the Reichstag (parliament), and legislation to assume complete control of the German government. After a new election in which Hitler's coalition government received a slim majority, the Reichstag passed the

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[310] The Reichstag fire was an arsonist fire which occurred at the Parliament. The fire's origins have been long disputed as to whether the arsonist, Marinus van der Lubb, acted alone, acted in conjunction with Communists, or if the fire was planned by the Nazi's to seize power.

[311] Article 48, Paragraph 2 "The Reich President may, if the public safety and order in the German Reich are considerably disturbed or endangered, take such measures as are necessary to restore public safety and order. If necessary he may intervene with the help of the armed forces. For this purpose he may temporarily suspend, either partially or wholly, the Fundamental Rights established in Articles 114, 115, 117, 118, 123, 124 and 153." "The Constitution of the German Reich, August 11, 1919."

[312] Joseph V. O'Brian (n.d) *The Decrees of 1933*. Retrieved 18 November 2005 from John Jay College of Criminal Justice Web Site: http://web.jjay.cuny.edu/~jobrien/reference/ob60.html. The full Decree can be found on the following website: The Adolf Hitler Historical Archives (n.d.) Decree of the Reich President for the Protection of People and State, http://www.adolfhitler.ws/lib/proc/decree330228.html, accessed on 18 November 2005.

Enabling Act, effectively transferring all legislative powers to Hitler's government and effectively abolished the constitution.[313]

The Nazi party inherited a system which, as noted, already had established anti-Roma legislation in place, a registration system where Roma were already identified, fingerprinted, photographed and in general a populace already under surveillance.[314] Jews, however, were integrated into German society and were not yet subjected to overt discriminatory laws. Over the next few years there was a rapid escalation of, first, an anti-Semitic propaganda war leading to the Holocaust and second, enforcement of previous anti-Roma legislation leading to the *Baro Porrajmos*.[315] The following table details key dates and actions taken by the Nazis immediately following Hitler's appointment:

Table 5.1 Third Reich Legislation and Timeline[316]

30 Jan 1933	Hitler appointed Chancellor of Germany
27 Feb 1933	Reichstag fire
28 Feb 1933	*Decree of the Reich President for the Protection of People and State*
24 Mar 1933	Enabling Act
1 April 1933	Boycott of all Jewish shops, goods, and lawyers; SA and SS guards are posted outside Jewish stores to discourage patrons and announcements are posted in newspapers, posters and leaflets.
7 April 1933	*Law for the Restoration of the Professional Civil Service:* authorised the dismissal of civil servants, defined to include direct and indirect employees in all public sectors, who were not of Aryan descent and whose political loyalties were suspect.
11 April 1933	*First Regulation for Administration of the Law for the Restoration of the Professional Civil Service:* Article 3 defined a non-Aryan as a person with at least one non-Aryan parent or grandparent, especially if the parent or grandparent was Jewish.
25 April 1933	*Law Against Overcrowding of German Schools and Higher Institutions:* in essence barred Jewish students from all forms of education.
14 July 1933	*Law for the Prevention of Hereditary Diseased Offspring*: called for the mass sterilisation of certain categories of people, including Roma, the mentally ill, and 'Germans of black colour'.

The Nuremberg laws were one of the more significant pieces of legislation passed during the Third Reich. The first two Nuremberg laws were passed on 15 September 1935. The first, *Law for the Protection of German Blood and German Honour*, established a series of prohibitions meant to isolate Jews from the non-Jewish

[313] Helen Fein, *Accounting for Genocide: National Responses and Jewish Victimization During the Holocaust* (New York: The Free Press, 1979), p. 19.

[314] Donald Kenrick and Grattan Puxon, *The Destiny of Europe's Gypsies* (London: Sussex University Press, 1972), p. 59.

[315] Roma for the Great Devouring; this term denotes the destruction of the European Roma by the Nazis.

[316] Sources include: Yitzhak Arad, Israel Gutman, and Abraham Margaliot, eds. *Documents on the Holocaust: Selected Sources on the Destruction of the Jews of Germany and Austria, Poland, and the Soviet Union* (Lincoln: University of Nebraska Press, 1999); 'Law Against Overcrowding of German Schools and Higher Institutions of 25 April 1933', The Avalon Project at Yale University, http://www.yale.edu/lawweb/avalon/imt/document/nca_vol4/2022-ps.htm, accessed 19 November 2005; and Gisela Bock, "Racism and Sexism in Nazi Germany: Motherhood, Compulsory Sterilization and the State," *Signs: Journal of Women in Culture and Society* 8, no 3 (1983).

German population, forbidding both marriages and sexual relations between Jews and citizens of German or 'Kindred blood.'[317] The second law, and the more damaging of the two, was the *Reich Citizenship Law of 15 Sept 1935*. This law divided citizenship into two distinct classes: subjects and citizens. Article 1.1 put forth: 'A subject of the State is a person who enjoys the protection of the German Reich and who in consequence has specific obligations towards it.'[318] Article 2.1 stated: 'A Reich citizen is a subject of the State who is of German or related blood, who proves by his conduct that he is willing and fit faithfully to serve the German people and Reich'.[319] This law thus redefined who could be classified as a citizen.

Individuals who had previously been considered to be citizens, whether by descent or by naturalisation, could now be deemed subjects and denied the full equality usually associated with citizenship. The wording of the law implied that it created an 'elevated' class of people, but in essence, it was a legal way to strip Jews, and other 'undesirables' such as Roma, of their citizenship and of their political rights. The desire to strip Jewish citizens of their rights was reinforced in the third and final Nuremberg law, the *First Regulation to the Reichs Citizenship Law of 14 November 1935*, stating:

> Article 4
> 1) A Jew cannot be a Reich citizen. He has no voting rights in political matters; he cannot occupy a public office. ...
>
> Article 5
> 1) A Jew is a person descended from at least three grandparents who are full Jews by race...
> 2) A *Mischling* who is a subject of the state is also considered a Jew if he is descended from two full Jewish grandparents
> a) who was a member of the Jewish religious community at the time of the promulgation of this Law, or was admitted to it subsequently;
> b) who was married to a Jew at the time of the promulgation of this Law, or subsequently married to a Jew
> c) who was born from a marriage with a Jew in accordance with paragraph 1, contracted subsequently to the promulgation of the Law for the Protection of German Blood and German Honor of September 15, 1935 (*Reichsgesetzblatt, I, p. 1146);*
> d) who was born as the result if extramarital intercourse with a Jew in accordance with Paragraph 1, and was born illegitimately after July 31, 1936.[320]

In theory, these regulations allowed Jews to remain members of the state and thus entitled to the state's protection, but denied them the rights – primarily political - to

[317] Arad, Gutman, and Margaliot, eds, *Documents on the Holocaust*, pp. 78-79.
[318] Ibid. p. 77.
[319] Ibid.
[320] Ibid. p. 80.

which they had been entitled as citizens. Legal commentaries at the time, when analysing the laws, put forth the argument that 'In Europe generally only Jews and Gypsies are of foreign blood.'[321]

The legal status of the Roma at this time was unclear. They were deemed to be of 'foreign blood' and therefore both a danger to German racial purity and ineligible for citizenship, in addition to already being subjected to sterilisation laws and prohibited from settling and working in many parts of Germany. This did not mean, however, that there was a clear racial definition or understanding of exactly who was or was not a Roma, whereas Jews were clearly defined by the 1935 Nuremberg laws.

Dr. Robert Ritter, a psychologist who had been working on the Roma issue, sought to change this. In 1937, he took over the newly founded *Research Centre for Racial Hygiene and Population Biology* (RHPB) in Berlin, an agency under the jurisdiction of the Reich Department of Health. Ritter's goal was to find a workable criterion to determine the precise racial classification of every individual carrying Roma blood.[322] This classification of Roma lineage was issued by an August 1941 decree which stated that one's genetic classification was to be determined by going back three generations, to one's great-grandparents. There were five levels of classification:

1. Category "Z": Full Roma
2. Category "ZM+": Five or more Roma great-grandparents
3. Category "ZM-": Four Roma great grand-parents
4. Category "ZM": Three or fewer great-grandparents
5. Category "NZ": Non-Roma

In these classifications, two or more Roma great-grandparents (full blooded or mixed) was enough to be classified as a Roma and therefore subjected to the anti-Roma legislation constricting the lives and movements of the Roma including the potential for deportation to a concentration camp.[323]

At the conclusion of World War II, Germany had killed an estimated eleven million civilians though mass murder and genocide. Of those eleven million six million were Jews and an estimated half to one and a half million Roma. These figures are estimates, as murders were not always recorded. We do know that there were six camps

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[321] Quoted in Kenrick and Puxon, *The Destiny of Europe's Gypsies*, p. 59.
[322] Fraser, *The Gypsies*, p. 257.
[323] The decree also incorrectly established six main tribes: Sinti, Rom, Gelderari, Lowari, Lalleri, and Balkan Roma. Himmler recommended that the Lalleri and Sinti which made up 10% of the Roma population to be spared; however, Himmler's recommendation was ignored. Ibid. p. 259.

dedicated solely to killing, and 1,200 to 1,500 labour camps where inmates were frequently killed or died due to neglect and brutality. Auschwitz, known as the most infamous death camp, reported 1.3 million deaths; of those 1.1 million were Jews and 23,000 were Roma.[324] Jews and Roma died not only at concentration camps, but fell victim to the killing squads and the in the ghettos.

2. Transition to Occupation

On 30 April 1945 - with Germany's defeat imminent - Adolf Hitler committed suicide. Hitler's last will and testament appointed Admiral Karl Dönitz as Head of State and Supreme Commander of the Armed Forces. President Dönitz's description of the government's task was to bring the war to a quick conclusion with Germany's surrender:

> The picture of the military situation as a whole showed clearly that the war was lost. As there was also no possibility of effecting any improvement in Germany's overall position by political means, the only conclusion to which I, as Head of the State, could come was that the war must be brought to an end as quickly as possible, in order to prevent further bloodshed.[325]

President Dönitz's government, commonly referred to as the Flensburg government, lasted from 1 May to 23 May 1945 until General Dwight Eisenhower officially dissolved it and the majority of the Cabinet was arrested. Grand Admiral Dönitz was indicted for (1) conspiracy to commit crimes against peace, war crimes, and crimes against humanity; (2) planning, initiating, and waging wars of aggression; and (3) crimes against the laws of war. He was formally tried in the International Military Tribunal at Nuremberg and found guilty of the second and third counts.[326]

On 5 June 1945 the *Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers* was issued stating:

> The Governments of the United States of America, the Union of Soviet Socialist Republics and the United Kingdom, and the Provisional Government of the French Republic, hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal, or local government or authority. The

[324] "The Number of Victims," http://en.auschwitz.org.pl/h/index.php?option=com_content&task=view&id=14&Itemid=13&limit=1&limitstart=1, accessed on 10 March 2011.
[325] Karl Dönitz, *Memoirs: Ten Years and Twenty Days*. Trans. R.H. Stevens. Da Capo Press ed. New York: Da Capo Press, 1997, p. 449.
[326] Dönitz was sentenced to ten years in prison.

assumption, for the purposes stated above, of the said authority and powers does not affect the annexation of Germany.[327]

With the Allies assumption of supreme power, Germany was officially under military government by the Allied Occupational Forces. Germany was divided into four occupational zones – one for each of the four major powers, as previously agreed to at the Yalta Conference (4 – 11 February 1945). Foreshadowing the creation of the Federal Republic of Germany, the American and British zones of occupation merged together on 1 January 1947 (creating the Bizone) and on 3 June 1948 the Bizone merged with the French occupation zone, thus combining all three of the occupational zones of the Western Allies. The remaining fourth zone of occupation – the Soviet Union's zone – remained independent from the other three zones and eventually emerged as East Germany. The evolution of German statehood can be seen as follows:

Table 5.2: German Statehood

30 Jan 1933	The German Reich from 1933-1945, historically referred to as the Third Reich, is created with Hitler's assumption of power.
7 May 1945	German surrender to the Allied Powers
5 June 1945	*Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers*
23 May 1949	The Federal Republic of Germany (West Germany) was founded, merging the American, French, and British zones of occupation.
7 Oct 1949	German Democratic Republic (East Germany) was founded from the Soviet zone of occupation.
26 Feb 1952	Transitional treaty repealing the occupational statute and granting West Germany sovereignty.
20 Sept 1955	Moscow Treaty grants East Germany official sovereignty
3 Oct 1990	German reunification

The emergence of the Cold War, epitomised by the divided Germany,[328] significantly influenced the divergent paths in regard to redress and reparation taken by both the occupational powers as well as by West and East Germany. West Germany strongly engaged in reparation politics such as reparations and memorials, whereas East Germany steadfastly refused to enter into negotiations for reparations or other acts of reparation politics.

3. Mobilisation During World War II

The Jewish RRM involved several stages and a slow evolution to what we now consider to be the redress and reparation movement. It began with an initial

[327] "Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority by Allied Powers," Avalon Project, http://avalon.law.yale.edu/wwii/ger01.asp, accessed on 10 March 2011.
[328] Angelika Timm, *Jewish Claims against East Germany: Moral Obligations and Pragmatic Policy* (Budapest: Central European University Press, 1997), p. 8.

mobilisation of Jewish organisations before, and during, World War II. This phase is distinctly different than the latter stages as the horrific death toll of six million Jews would not be known until after 1945. Thus the language, concerns, and goals of the initial groups are more legalistic in nature and do not encompass the same moral component of later demands. As previously stated, there was no Roma mobilisation during this initial time period, thus the focus of this section is on the initial creation of the Jewish RRM.

Reparations and restitution was an early topic among Jewish organisations and individuals who were fleeing Germany. Before the war even began, civil society had already mobilised over the issues they were aware of – the flight tax and other fines designed to seize the Jewish émigrés' wealth and property. Initial reparation and restitution demands were based on this knowledge and centred on how these discriminatory actions could be addressed. When the war broke out, Jewish organisations continued to organise and collate data in the hopes that Jewish reparation and restitution demands could be pressed upon the war's conclusion.

3.1 Perception of Allied Governments

During the initial phases of the war, western Allied governments were wary about imposing reparations on Germany due to the harsh legacy of the Versailles Treaty. Germany still owed various Allied governments reparations from the First World War, and it was speculated that requiring additional reparations from Germany would cause even more damage to Germany and Western Allied economies, in addition to requiring a long-term occupational commitment.[329]

This viewpoint was not shared by the Soviet Union due the differences between a free-market economy and a planned economy; the Soviet Union could manage large-scale reparations in the form of manufactured and other industrial goods without damaging their economy.[330] The U.S.S.R, from the beginning of the war, demanded that upon winning, reparations should be paid to the Allies in proportion to the amount of reconstruction each country would need. The Soviet Union thus would receive a greater proportion of reparation monies due to the lack of resources it could draw upon and the amount of damage the economy had suffered.[331]

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[329] Nana Sagi, *German Reparations: A History of the Negotiations* (New York: St. Martin's Press, 1986), p. 7.
[330] Manuel Gottlieb, "The Reparations Problem Again," *The Canadian Journal of Economics and Political Science* 16, no. 1 (1950): 22-41, p. 22.
[331] Sagi, *German Reparations*, p. 8.

By 1943, the opinions of the Allied governments began to coalesce. On 4 January 1943 the *Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation of Control* was released. This declaration was signed by 17 governments and gave notice to both Axis countries and neutral countries engaging in commerce with Axis aligned countries that the signatories reserved the right:

> to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect of the Governments with which they are at war, or which belong, or have belonged to persons (including juridical persons) resident in such territories, This warning applies whether such transfers of dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.[332]

This declaration served as notice that the forcible seizure of property from emigrants fleeing Germany, along with flight taxes, levies, other economic manipulations and laws which required individuals to sell bonds, metals or other property could be invalidated by the Allies. In addition, in October 1943 the United States, United Kingdom, Soviet Union, and China issued the *Joint Four Nation Declaration* stating that the powers had received:

> evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces in many of the countries they have overrun ... At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein.[333]

These two statements together gave notice that, in the case of an Allied victory, individuals who committed atrocities would be brought to justice and that property, artwork, gold, and other valuables would be returned to the previous rightful owners.

This emphasis on restitution and prosecution was accompanied by an increased awareness of the destructiveness of the war and an increase in the estimated economic requirements for post-war reconstruction. By the end of 1943 the prominent Allied viewpoint was that reparations would have to be paid to various states; United States

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[332] "Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation of Control," Commission for Looted Art in Europe, http://www.lootedartcommission.com/inter-allied-declaration, accessed 11 March 2011.

[333] "Joint Four-Nation Declaration," the Avalon Project, http://avalon.law.yale.edu/wwii/moscow.asp, accessed on 12 March 2011.

Secretary of the Treasury Henry Morgenthau Jr. signalled this stance when in 1944 he presented a post-war reparations proposal at the second Quebec Conference, which required that Germany surrender all machinery and industrial equipment needed by the Allied governments and that the remainder of German industry be destroyed, thus turning Germany into a non-trading, agricultural country.[334]

Subsequently, the consideration of reparations was raised at both the Yalta Conference (June 1945) and the Potsdam Conference (July 1945), as shown here:

Table 5.3: Allied Reparation and Resolution Acts 1943- 1946[335]

5 Jan 1943	*Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation of Control*
16 Sept 1944	Second Quebec Conference: the 'Morgenthau Plan' is presented
10 Feb 1945	Yalta Conference: first official Allied declaration that Germany must pay reparation; agreement to establish reparations commission consisting of the United States, the United Kingdom and the U.S.S.R.
June 1945	Allied Commission on Reparations begins negotiations in Moscow
16 July – 1 Aug 1945	Potsdam Conference: the Soviets were to secure reparations from their occupation zone, from external assets, were to receive ten percent of the industrial equipment removed from the American, French, and British occupation zones and were to receive an additional fifteen percent for which they were to pay for in an equivalent of food, coal, and other products. Poland was to have its claims met by the Soviet's share, where all other countries would be met from non-Soviet occupation zones; added France to the Allied Commission on Reparations and established that the Allied Control Council would determine the amount and kind of industrial equipment available for reparations
30 Oct 1945	The Allied Control Council assumed control of German assets abroad and the responsibility to divest said assets.
9 Nov to 21 Dec 1945	Allied Reparation Conference (also known as the Paris Reparation Conference) – worked out reparations agreement involving 18 nations.
18 Jan 1946	*Agreement on Reparation From Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold*

The negotiations, conferences, and agreements about reparations, as seen above, followed the traditional negotiations for reparations. The winning nations involved in the war were making demands upon the state which had lost and which was considered 'at fault' for the conflict. The funds being discussed were to compensate the states for economic loss, physical damages to property, and so forth. The debates and negotiations did not concern individual loss of life or damage to an individual's health, economic prospects or impact upon mental state. This transition would occur in 1946 and signalled a shift in the understanding of what reparations meant.

3.2 Mobilisation of Civil Society

One of the key aspects of redress and reparation movements are, as discussed in Chapter 1, section 4 is that the movements mobilise in order to obtain restorative

[334] Frederick H. Gareau, "Morgenthau's Plan for Industrial Disarmament in Germany." *The Western Political Quarterly* 14, no. 2 (1961): 517-534, p. 518.

[335] Sources include: Gottlieb, "The Reparations Problem Again"; and "U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II," University of the West of England, http://www.ess.uwe.ac.uk/documents/tables.htm, accessed on 1 April 2011.

justice. The Jewish RRM began with the early mobilisation of the Jewish community in support of the known injustices, as German Jewish émigrés resettled throughout the world. One of the first of these organisations, the World Jewish Council, was formed in 1936 in Geneva to 'unite the Jewish people and mobilize the world against the Nazi onslaught.'[336] During the initial mobilisation of the redress and reparation movement (1933-1945), various organisations worked towards the initial goal of restitution of property seized and providing assistance to members of the Jewish communities who had been unable to flee Germany and German occupied territories (see Table 5.4). The fate of those left behind was unknown during the initial stages of the redress and reparation movement; the assumption was that those left behind would need help after the war. In preparation for such post-war restitution, the organisations focused primarily on the collection of information regarding property losses and unjust seizures or fines assessed by the Nazis, in addition to lobbying the Allied governments for inclusion into reparation agreements.[337]

As refugees and exiles fled Germany and German-occupied areas, they brought with them knowledge of the massive property losses and economic damages, however, information regarding deaths was not available. Initial estimates were determined regarding seized, destroyed, and damaged property. Other actions were also documented; including the freezing of bank accounts in Germany, Austria, and Czechoslovakia. Jews were forbidden from inheriting property or assets, were required to hand over jewellery and other valuables to the authorities, and subjected to special taxes and fines, including the infamous flight tax.[338] A select overview of the mobilisation can be seen as follows:

Table 5.4: Mobilisation of Civil Society 1933-1945[339]

1936	The World Jewish Council is founded.
July 1938	Évian Conference – Convened at the initiative of President Roosevelt to discuss the increasing numbers of Jewish refugees fleeing from the Nazi regime. Failed to pass any resolutions; however does lead to the creations of the Intergovernmental Committee on Refugees (ICR).[340]

[336] "About the WJC," World Jewish Congress, http://www.worldjewishcongress.org/en/about, accessed on 18 July 2010.
[337] Sagi, *German Negotiations*, p. 2.
[338] Ibid. p. 1.
[339] Sources include: Colonomos and Armstrong, "German Reparations to the Jews after World War II"; and Sagi, *German Negotiations*.
[340] This conference occurred before World War II broke out, however, it passed no resolutions nor did it assist in the passage of any increased refugee quotas with the exception of the Dominican Republic. The conference did lead to the creation of the ICR, which was charged with the responsibility for emigrants from Germany and Austria who were migrating due to political opinions, religious beliefs, or racial origins.

10 Oct 1939	Shalom Adler-Rudel drafts a memorandum containing a proposal for collecting information relating to Jewish demands for compensation; most who received the proposal reject it. [341]
1940	Committee for Peace Studies, established by the American Jewish Committee, begins research on the situation of Jews in Europe and presents proposals for securing compensation following the war.
6 March 1941	Adler-Rudel sends a memorandum to the ICR estimating the damage inflicted upon German and Austrian Jews a 4 billion DM and arguing that this was a unique event due to the nature of the conflict not being a conflict between warring states, but the state declaring war on its own its own citizens.
1941	The World Jewish Congress, the American Joint Distribution Committee and the American Jewish Conference begin actively considering the question of post-war rehabilitation and compensation.
Nov 1941	Pan-American conference in Baltimore organised by the World Jewish Congress to discuss the liberation of occupied countries and payment for property stolen (to follow after Germany's defeat).
1943	Association of Central European Immigrants in the British Mandate of Palestine begins political activity towards reparations.
3 June 1943	Sir Herbert Emerson, head of the Intergovernmental Committee for Refugees, stated that the Allied declaration should apply not only to wartime seizures but those carried out before the war in relation to race, religion or political opinion. This is the first time an international body declared that reparation should be secured for the rehabilitation of individual victims, in particular the Jews.
1944	War Emergency Conference in Atlantic City
Sept 1944	The Association of Central European Immigrants publishes *Jewish Post War Claims*.
1944	Dr. Nehemiah Robinson published *Indemnification and Reparations – Jewish Aspects* in the United States.
26 -30 Nov 1944	Conference of the World Jewish Congress in Atlantic City: Resolution 4 and 5 dealt with reparation issues; creation of the Jewish Agency Executive.
April 1945	American Jewish Conference and the American Jewish Committee submitted proposals regarding German reparations to the United States State Department.
20 Sept 1945	Chaim Williams, on behalf of the Jewish Agency, presented the four Powers with the first post-war Jewish claim for restitution and indemnification.
Oct 1945	The Jewish Agency, the American Jewish Joint Distribution Committee, the World Jewish Congress, and the American Jewish Conference decided to establish a joint committee to lobby for reparations and the American Military Government enact a property restitution law and for heirless property to be transferred to a successor organisation. Presented these proposals to senior United State Department Officials.

Conferences and subsequent publications regarding restitution and reparation claims did not include any statements or claims regarding the horrific loss of life, primarily because it was still unknown. The Jewish Diaspora expected that there would be large-scale reconstruction needed for the communities within the occupied territories who had been unable to flee, in addition to restitution and/or compensation for seized properties, and recompense for the economic and material losses suffered by the Jewish community. Thus, the only type of justice being sought at this time was reparatory, focusing on actual, physical losses of the Jewish community.

During this time period, multiple organisations were preparing reparation and restitution proposals to present at conferences and to the community at large. Several of

[341] As early as 1939, some advocates began speaking out; however, it was not until 1941 that advocacy for this issue became more commonplace.

these organisations argued that the Jews who fled Germany because of its restrictive policies should be considered having fled a nation at war, and thus were entitled to reparation. Other proposals sought to apply minority rights that had emerged in the League of Nations before it was disbanded.

A significant proposal was put forth in *Indemnification and Reparations – Jewish Aspects* (1944), a book published by Dr. Nehemiah Robinson, which proposed that the following principles be adopted for reparation:

(i) Comprehensive indemnification with the objective of restoring Jewish life to what it had been before the Jews were subjected to discriminatory treatment;
(ii) Restitution of property wherever possible – whether confiscated, seized by ostensibly legal means, or sold, frozen or transferred under duress.
(iii) Whatever title to Jewish property had been transferred in exceptional circumstances, it must be assumed that this was done under duress. On presentation of evidence of ownership, such property should immediately be restored to its owners. The process of confirming title must be simple and speedy.
(iv) Restitution of commercial and industrial property must include revenues that had accrued from this property and compensation for any fall in its value.
(v) In cases of property in the form of money, stocks, shares and Government loans, account must be taken of currency depreciation and compensation be claimed in full.
(vi) Property which had been destroyed or otherwise ceased to exist - and thus unable to be restored to its owners – should be compensated for in full.
(vii) The loss and destruction being enormous, all injured parties would not be able to be immediately indemnified. In the order of preferences that would have to be established, Jews should be given priority over other claimants.
(viii) Jewish institutions and concerns should be re-established.
(ix) Jewish public services should be restored.
(x) Persons practicing the liberal professions should be reinstated.
(xi) Compensation should be paid in respect of physical injuries suffered.
(xii) Account should not be taken of the nationality of the injured party claiming compensation, but only of his place of residence at the time he suffered the injury.
(xiii) Indemnification must begin immediately after the cessation of hostilities, even before peace treaties are signed.[342]

Robinson estimated that the value of the property seized was two billion USD and also proposed that claims should also be presented for Jewish properties without heirs. Robinson's proposal was one of the foundations for the redress and reparation movement, as these claims were later adapted as the basis for the Claims Conference negotiation for reparations.[343]

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[342] Sagi, *German Reparations*, p. 23.
[343] Ibid. pp. 23 - 24.

An alternative proposal was drafted and presented to the four Powers immediately after the war (20 Sept 1945) by Chaim Weizmann, on behalf of the Jewish Agency. This memorandum included one of the first mentions of the large loss of life. Weizmann's draft included the following claims:

a) Restitution of property including buildings, installations, equipment, funds, bonds, stocks and shares, valuables, as well as cultural, literary, and artistic treasures. If the owners of the property, whether individuals or institutions, were still alive, their claims for restitution must be dealt with in the same way as those of citizens of the United Nations.
b) Heirless Jewish property remaining in Axis and neutral countries should not revert to those states but should instead be restored to the representatives of the Jewish people, and thus finance the material, spiritual and cultural rehabilitation of the victims of Nazi persecution. Proceeds from such sources earmarked for use in Palestine should be handed over to the Jewish Agency.
c) Since heirless property would not suffice for the enormous task of rehabilitation and resettlement in Palestine, the Jewish people should be allocated a percentage of all reparation to be paid by Germany. This allocation, in the form of installation, machinery, equipment and materials to be utilized in developing the National Home in Palestine, should be entrusted to the Jewish Agency
d) The share of reparation allocated to the Jewish people should include the assets of Germans formerly residing in Palestine.[344]

Weizmann's proposal focused solely on the Jewish Diaspora who had fled to the British Mandate of Palestine and also included a demand that 100,000 survivors currently living in Displaced Persons camps be allowed entry into the British Mandate of Palestine. The memorandum later became the basis of Israel's demand for reparations.[345]

The proposals and books that were written pre-1945 had to be modified once the international community became aware of the magnitude of the Holocaust. The concept of restoration of the Jewish community was originally a central tenet of reparation claims, yet due to the large-scale loss life 'restoration' was an impossible task. At the same time, with the emergent knowledge of the Holocaust, a moral dimension had been added to the demand for restitution and compensation.[346] Reparations were transformed from a legal responsibility into a moral necessity, although the claim was underscored by the knowledge that no amount of material compensation could ever make restitution for the lives lost or for the human suffering

[344] Ibid. pp. 31-32.
[345] Ibid. p. 32.
[346] Ibid. p. 2.

inflicted.[347] Reparation claims were now framed not only on the basis of property loss, but also on the rehabilitation of individuals who had been in camps or hiding and the relocation of Jewish survivors away from the territories they were persecuted.[348]

4. Initial Reparation Demands

The rapid mobilisation and organisation of the Jewish Diaspora in response to Hitler's Germany allowed the documentation and preparation of redress claims well before the end of the war. Various organisations lobbied the Allied governments and presented concrete restitution and compensation proposals to various agencies within the governments. This level of organisation allowed individuals and organisations to present a unified front – with groups often forming umbrella organisations in order to concentrate their political influence.

Despite the pressure by elite allies and prominent individuals; two of the key factors in POS, the initial results were mixed. On the one hand, despite lobbying for inclusion in the Paris Reparation Conference (9 November – 21 December 1945), the Allied governments did not allow representatives of the Jewish Diaspora to participate. Jacob Robinson, representing the World Jewish Congress, attended as an observer only, and the resulting resolutions did not contain any explicit references to Jewish victims.[349] On the other hand, the United States delegate, James Angell, presented a proposal for providing a share of war reparations to victims of the Nazi regime. Part I, Article 8 of the *Agreement on Reparation From Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold*, stated:

> In recognition of the fact that large numbers of persons have suffered heavily at the hands of the Nazis and now stand in dire need of aid to promote their rehabilitation but will be unable to claims the assistance of any Government receiving reparation from Germany ...
>
> 3. A share of reparation consisting of all the non-monetary gold found by the Allied Armed Forced in Germany and in addition a sum not exceeding 25 million dollars shall be allocated for the rehabilitation and resettlement of non-repatriable victims of German action.
> 4. The sum of 25 million dollars shall be met from a portion of the proceeds of German assets in neutral countries which are available for reparation.

[347] Ibid.
[348] Ibid. p. 2 -3.
[349] Ibid. p. 35.

To be eligible for reparations under this agreement, individuals had to first prove they had not acquired citizenship in another country following their emigration. Citizens of foreign countries were to be taken care of by their own country. This reparation fund was only for those who were stateless or refugees from Nazi occupied territory. Second, they had to be either:

(i) Refugees from Nazi Germany or Austria who require aid and cannot be returned to their counties within a reasonable time because of prevailing conditions;

(ii) German and Austrian nationals now resident in Germany or Austria in exceptional cases in which it is reasonable on grounds of humanity to assist such persons to emigrate and providing they emigrate to other countries within a reasonable period;

(iii) Nationals of countries formerly occupied by the Germans who cannot be repatriated or are not in a position to be repatriated within a reasonable time. In order to concentrate aid on the most needy and deserving refugees and to exclude persons whose loyalty to the United Nations is or was doubtful, aid shall be restricted to nationals or former nationals of previously occupied countries who were victims of German concentration camps or of concentration camps established by regimes under Nazi influence but not including persons who have been confined only in prisoners of war camps.[350]

This fund for those not able to be repatriated which, although unusual, did not provide compensation for individual victims. The fund was for the rehabilitation through projects to be implemented by public organisations.[351]

Civil society's mobilisation on the victim's behalf to obtain redress and reparation was unprecedented. Redress and reparation had simply not been given to victimised groups, like international law – reparations was an issue to be dealt with between states, not with civil society nor on an individual basis. The mobilisation of the Jewish Diaspora, the lobbying of Allied governments and, above all, the horrific devastation that the genocide had wrought soon resulted in redress and reparation demands being considered a valid response to the victimised group. The victimised group, however, was seen to be exclusively Jewish, as this was the community who were lobbying for some form of reparatory justice. The absence of a mobilised Roma group, or elite allies lobbying on behalf of the Roma would perpetuate the idea that reparations were due to Jews and not to other victimised groups.

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[350] *Agreement on Reparation From Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold,* (Paris, 14 January 1946).

[351] Sagi, *German Negotiations*, p. 35.

5. Redress and Reparation under Allied Occupation

Redress and reparation demands under occupied Germany continued to be almost exclusively about reparatory justice for Jewish survivors and the Jewish community. Five organisations that were active in the attempt to secure Jewish reparations and restitution – the Jewish Agency, the American Jewish Joint Distribution Committee (AJDC), the World Jewish Congress, the American Jewish Commission, and the American Jewish Congress – decided to create a joint committee in October 1945. The committee's goal was to convince the United States occupational government into enacting a property restitution law and to have Jewish property that was without heirs transferred to a successor organisation representing Jewish interests.[352] The committee was highly successful and the first restitution laws were passed by the United States occupational government in 1947 and were soon followed by the British and French occupational governments as shown in the following table.

Table 5.5: Restitution and Reparation Laws within Allied-Occupied Germany[353]

10 Nov. 1947	Allied (U.S) Law in Occupied Germany	Law Number 59 on Restitution of Property Stolen in the Course of Aryanization of the Economy
10 Nov. 1947	Allied (French) Law in Occupied Germany	Military Law Number 120 regarding restitution
26 April 1949	Allied (U.S) Law in Occupied Germany	Council of States in the U.S. Occupied Zone adopt the 1st standardised state restitution law: Act on the Treatment of Victims of National Socialist Persecution in the Area of Social Security
12 May 1949	Allied (British) Law in Occupied Germany	Law Number 59 on restitution is issued, modelled after the United States law
July 1949	Allied Law in Occupied Germany	Decree on Restitution of Identifiable Property
11 May 1951	German	BWGöD – German law providing restitution for members of the civil service dismissed under Hitler's regime
26 Feb 1952	Transitional Treaty	Transitional treaty repealing the occupational statute and granting West Germany sovereignty requested a uniform federal arrangement for restitution be adopted.

Law Number 59 on Restitution of Property Stolen in the Course of the "Aryanization of the Economy" dealt exclusively with the individual restitution of real estate, factories, and securities that had been bought by Germans from Jewish property owners who had to sell cheaply under pressure. Although German lawyers drafted the law, a political decision was made to enact Law Number 59 as an Allied law rather than a German law,[354] thus allowing for the argument that restitution was an externally

[352] Ibid.

[353] Sources include: "Compensation for National Socialist Injustice," Federal Ministry of Finance, 2009; Colonomos and Armstrong, German Reparations to the Jews after World War II"; Kritz, *Transitional Justice*, Vol. 2; Pross, *Paying for the Past*; and Sagi, *German Negotiations*

[354] Pross, *Paying for the Past*, p. 19.

imposed initiative. German lawyer and reparations advocate Walter Schwarz credited the decision to pass the restitution law as Allied, rather than German, to fear of a negative public reaction in Germany's southern states. Reparations advocate Otto Küster,[355] however, credited the decision as being due to impatience by the military government and a refusal to wait for consensus.[356] Küster, who was the Württemberg state commissioner for reparations, expressed his disappointment in the enactment of this law as Allied rather than German the following day at a press conference: 'It will require desperate efforts if the German people are nevertheless to see restitution as a necessary legal act and not simply a consequence of the lost war.'[357] The problems of restitution legislation being issued as occupational laws rather than German law can be further illustrated by the fact that some restitution agencies dragged out claims, not wanting to grant them while the occupational government was in power, preferring to adopt the approach of waiting to see if restitution laws would be repealed when the German government was granted sovereignty.

The Council of States in the U.S Occupied Zone adopted the first standardised state restitution law on 26 April 1949. This law defined fundamental concepts such as what constituted persecution, who was considered to be persecuted, what harms were suffered, and included displaced persons from Eastern Europe for the first time.[358] The 1949 Allied law became the model for reparations legislation within several German states and served as the basis for federal laws after West Germany was founded.[359] Thus, the elite allies and organisations were responsible for successfully lobbying Allied nations to provide restitution; legally returning belongings back to their original owners and not allowing Germany to retain stolen or unfairly purchased property and assets. Thus, the Jewish RRM obtained one small aspect of reparatory justice. As will be discussed in the subsequent section on Romani mobilisation, however, the initial response to Roma who attempted to obtain restitution under these laws were to deny them on the basis that Roma were persecuted on the basis of being asocial and not for reasons of race. This denial would continue until 1963.

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[355] Otto Küster is considered to be one of the founders of the reparations movement. A German Protestant and judge, he was dismissed from his position in the fall of 1933 for his 'rejection of Nazi leadership.' He strongly supported restitution and reparation for the Jewish community, he was appointed as the Württemberg state commissioner for reparations in 1947, assisted with the drafting of Allied restitution laws, and early drafts of the German laws. Küster was also involved in the Freiburger Rundbrief Group, an organisation of Catholics and Protestants working towards reconciliation between Germans and Jews. Pross, *Paying for the Past*, p. 4.

[356] Pross, *Paying for the Past*, footnote 3, p. 228.

[357] Quoted in Pross, *Paying for the Past*, p. 19.

[358] Pross, *Paying for the Past*, p. 20.

[359] Colonomos and Armstrong, "German Reparations to the Jews after World War II," p. 392.

5.1 Restitution of Heirless Property

The restitution legislation enacted by the Allied nations within Germany enabled survivors whose property was unfairly appropriated to reclaim their property; however, there was an abundance of heirless property. Under normal circumstances, heirless property would revert back to the state and be utilised for the good of the community and citizens. However, as Ayaka Takei argues:

> [i]t was morally and politically unacceptable that the German *Länder* (states), the successors of the Third Reich, fall heir to the assets of the Nazis' victims. The Nazi regime had stripped German Jews of citizenship and property; it would have been a colossal injustice for German states to declare the murdered German Jews – postmortem – "German citizens" and to come forward as the successors to their property.[360]

The resultant stance brought forth the question: who then, were the rightful owners of this property? The answer was found in the creation of Jewish successor organisations, i.e. the second goal of the committee created to influence the American occupational government. The purpose of these organisations – which were created for each occupation zone, excluding the Soviet Union – was to trace and recover Jewish properties that had no heirs due to actions of the Nazi party. The most well known of these three organisations was the Jewish Restitution Successor Organisation (JRSO), established in Nuremberg, Germany and appointed directly by the American military government. The JRSO was comprised of 13 Jewish organisations[361] and was granted governmental agency status in regard to restitution issues within the United States occupation zone.[362] The JRSO received facilities, quarters, transportation, and upon beginning its work in 1948, received approximately 50 million deutschmarks. The JRSO processed tens of thousands of claims to heirless property, utilising the funds for welfare and aid to Jewish communities and to re-establish the German Jewish community's cultural and religious needs.[363] The following table lists each successor organisation:

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[360] Ayaka Takei, "The "Gemeinde Problem": The Jewish Restitution Successor Organization and the Postwar Jewish Communities in Germany, 1947 – 1954," *Holocaust and Genocide Studies* 16, no. 2 (2002), p. 266.

[361] The Jewish Agency, the AJDC, American Jewish Committee, the World Jewish Congress, the Agudat Israel World Organisation, the Board of Deputies of British Jews, the Central British Fund, the Council for the Protection of the Rights and Interests of the Jews from Germany, the Central Committee of Rights and Interests of the Jews from Germany, the *Conseil représentatif des juifs de France*, Jewish Cultural Reconstruction Inc., the Anglo-Jewish Association, and the *Interessenvertretung israelitischer Kulturgemeinden*.

[362] Sagi, *German Negotiations*, p. 41.

[363] Ibid.

Table 5.6: Jewish Successor Organisations[364]

Dates	Location	Organisation	Recovered
1948 - 1967	U.S. Occupied Zone	Jewish Restitution Successor Organisation (JRSO)	$50,000,000 USD recovered in addition to property
1950 - 1967	British Occupied Zone	Jewish Trust Corporation (JTC)	$42,375,000 USD recovered
1952- 1967	French Occupied Zone	Branche française de la Jewish Trust Corporation for Germany	6,888,000 USD recovered

The establishment of successor organisations to heirless Jewish property was a success for the norm entrepreneurs, however, it is important to note that this was an Allied response to the victimised group and not a German response.

5.2 Mobilisation of Civil Society Under Occupation

Additional independent organisations were founded within German and international civil society to aid in the quest for restitution. One such organisation was the United Restitution Organisation (URO), formed primarily by German lawyers who had emigrated during the Third Reich and were familiar with German administrative practises and the legal system. The URO was founded as a legal aid society for individuals who lived outside the territorial borders of Germany and who could not afford a lawyer and thus needed assistance to obtain restitution and compensation.[365] Christian Pross describes the atmosphere that German legal society found itself in and the role that URO carved out:

> The URO was a unique institution; along with Otto Küster, Walter Schwarz, and several others, it managed to do for reparations what the German legal system failed to do – maintain constant debate on and scholarly examination of all legal issues relating to compensation and restitution. No German law professors have made reparations the focus of their research and teaching, and the courts' restitution panels did not train any legal interns. The lawyers, judges, and administrative law experts involved in reparations operated in a type of ghetto; the legal profession as a whole remained completely uninvolved. The URO financed the only journal dealing with the shunned topic, *Rechtsprechung zur Wiedergutmachung*.[366]

Restitution and compensation laws immediately following World War II were advocated by both German governmental and nongovernmental officials and international advocates, including Allied officials. The legislation, however, was enacted as occupational laws, which created a political situation where the transitional

[364] Source: "Jewish Successor Organizations," Jewish Virtual Library, http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0011_0_10155.html, accessed 20 March 2011.
[365] Pross, *Paying for the Past*, p. 4; and "United Restitution Organization," Jewish Virtual Library, http://www.jewishvirtuallibrary.org/jsource/judaica/ejud_0002_0020_0_20210.html, accessed on 15 March 2011.
[366] Pross, *Paying for the Past*, p. 11.

authorities could push the accountability for the enactment of restitution laws away from the German government and onto the Allied occupational governments. The following table lists the work conducted towards the redress and reparation movement during the occupation:

Table 5.7: Mobilisation of State Actors and Civil Society During Allied Occupied Germany and Transition to Sovereignty[367]

Oct. 1945	The Jewish Agency, the AJDC, the World Jewish Congress, the American Jewish Committee, and the American Jewish Conference establish a joint committee to influence the American occupational government regarding restitution and reparation laws.
1 Feb 1946	The World Jewish Congress established a bureau headed by Dr. Nehemiah Robinson to collect information and documentation, promote and initiate international activity regarding reparations, publish materials relating to restitution and reparation and to make recommendations regarding legislation.
1 March 1947	Otto Küster appointed Commissioner for Reparations for the state of Baden-Württemberg; assisted in the drafting of Allied and early German restitution laws.
1948	United Restitution Organisation (URO) founded with the assistance of Kurt May.
14 May 1948	Creation of Israel; Israel declared independence from the British Mandate of Palestine; soon after Israel demands reparations from both East and West Germany.
June 1948	The Jewish Restitution Successor Organisation (JRSO) is founded; comprised of 13 Jewish Organisations.
1949 - 1968	The URO represents approximately 300,000 victims of persecution for more than 450,000 claims. The URO recovered $547 million in compensation (not restitution.)
22 Nov 1949	Reparation and dismantling of industry is terminated in West Germany with an agreement between West Germany and the Allied High Commissioners.
27 Sept 1951	Chancellor Adenauer: Germany has "a duty of moral and material reparations"
26 Oct. 1951	The Conference on Jewish Material Claims Against Germany, more commonly called the Claims Conference, was formed as a federation of 52 Jewish organisations in Western countries to represent the overall interests of Jews living outside of Israel.

The success with the restitution laws illustrates the importance of having mobilised organisations lobbying for reparatory justice. The success of Jewish groups within the Western zones also indicates that the openness of the system is vital. The zone controlled by the Soviet Union was more closed, and as a result restitution laws did not flourish there. Roma, who had no elite allies at this time, were denied restitution within the courts. In addition to reparatory justice, criminal justice also started to be broached during the Allied occupation. A series of military trials in the occupied zones were carried out, including the Nuremberg trials (1945-1946). These trials and other aspects of criminal justice will be explored in a later section.

[367] Sources include: Pross, *Paying for the Past*; and Sagi, *German Negotiations*.

6. Negotiating for Reparation and Restitution with the Federal Republic of Germany

The transition from Allied-occupied Germany to West and East Germany signalled a shift in the redress and reparation movement. Organised groups were no longer negotiating with Allied powers, but with the newly formed German governments. The emergence of Israel as a state created a strong focal point for mobilisation as well, thus dividing the community into survivors represented by the state, and those represented by NGOs. During this transition, the redress and reparation movement would undergo a fundamental transition. By lobbying for reparations paid to individuals – and not restitution of property and assets – a new dimension to the movement would be added. The success of obtaining this new form of reparations would fundamentally alter the concept and would be the foundation that other victimised groups would base their arguments.

6.1 Emergence of Israel

During the Third Reich and following the liberation of the concentration camps, approximately half a million Jews fled to the British Mandate of Palestine. When Israel declared independence in 1948, they had to quickly address both the question of assistance to refugees already present as well as the influx of immigrants from displaced persons camps and other countries throughout the world. Between statehood in 1948 and 1952, approximately 700,000 immigrants, primarily Holocaust survivors, migrated to Israel.[368] In addition to the substantial resettlement, integration, and rehabilitation problems associated with the influx of refugees and survivors, the state of Israel had to address immediate needs such as constructing the state and defence of the nation. The 1948 Arab-Israeli war began the same day that Israel declared independence, with an attack on Israeli territory by Egypt, Iraq, Jordan, Lebanon, and Syria.

Various nongovernmental organisations, and now Israel itself, continued to attempt to influence various Allied nations into pressuring East and West Germany to provide payments that would assist Jewish refugees in resettlement and reestablishment of their lives. East Germany, in a policy that remained consistent throughout its history, refused to consider paying reparation monies. West Germany, however, offered goods

[368] "Aliyah Statistics 1948 – November 1948-November 2009 (Selected Countries)," Jewish Agency for Israel, http://jewishagency.org/JewishAgency/English/About/Press+Room/Aliyah+Statistics/nov30.htm, accessed on 15 March 2011.

worth 10 million DM in November 1949. Israel rejected this offer as a pittance and continued to argue that Germany should provide reparations.[369]

Israel began quietly investigating various options for broaching the reparations issue with Germany directly. Israel encountered difficulties, however, based on the fact that reparation to Israel, or to individual victims of the Holocaust, was not required by the Paris Reparations Agreement; nor was Israel, with its economic and political problems, a highly influential power within international society.[370] Israel, however, feared the forthcoming withdrawal of the Allied Occupational Government from supervising the restitution of Jewish properties. The German court systems tended to be unfavourable towards restitution frequently denying claims. This overzealous denial of claims often required the Allied courts to become involved and reverse these decisions. In addition, numerous political parties had come out in favour of drastic modifications that reduced restitution of Jewish properties, and the domestic society was often hostile to the idea of returning the seized properties to their rightful owners.[371] A British committee investigating the delay in finalising restitution claims found evidence of this hostility. They found that the cause of the delay was due to:

> The belief and hope among the Germans that restitution legislation will be abandoned or drastically modified when the occupation statute was brought to an end; and the creation of associations whose expressed object was to organize opposition to the restitution laws. Their propaganda was calculated to frustrate amicable settlements and to retard the work of the German authority concerned.[372]

Israel in 1951 was still refusing to have direct contact with the West German and East German governments, instead, presenting their demands by sending formal Notes to the Allied Powers with their demands. The 12 March 1951 Note indicated a deep bitterness and hostility towards Germany. It estimated six million Jewish dead, an estimated value of six billion dollars in property seized, including fines, levies, and taxes applied to Jewish persons by the Third Reich. It also repeatedly stressed the idea that Germany could never atone for the genocide, nor would material compensation equate to atonement; what could be done, however, was secure compensation for the heirs of the victims and rehabilitate those who remained alive. The 1951 Note also

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[369] Pross, *Paying for the Past*, p. 22.

[370] The day after Israel declared independence; neighbouring states attacked launching the 1948 Arab-Israeli War. In addition, Israel had to bear the costs of establishing a new state and the massive influx of Jewish immigrants, many who were Holocaust survivors and suffering from mental and physical problems.

[371] Quoted in Sagi, *German Negotiations*, p. 51.

[372] Sagi, *German Negotiations*, p. 52.

argued that failure to provide compensation or restitution allowed Germany to have been enriched at the cost of Jewish lives.[373]

By the end of 1951 and the beginning of 1952, it became obvious that Israel would have to enter into negotiations with West Germany itself. The Allies were terminating the occupational statute and granting West Germany its sovereignty; the FRG was prospering economically, in contrast to Israel's devastated economy. I thus draw the conclusions that Israel was influential as it provided a rallying point for many survivors and organisations. In addition, with statehood, Israel gained the ability to approach other states on a level that civil society was not capable. Israel by itself, however, was not powerful enough or influential enough to pressure West Germany into engaging in reparation politics. Likewise, international society had begun to be divided by the Cold War and West Germany was essential for American politics. This resulted in reluctance on behalf of the United States and other western Allies to bring about pressure on West Germany on behalf of Israel. Thus Israel is important as an elite ally on behalf of the Jewish community; its existence by itself is not a sufficient explanation for the success of reparation politics. As such West Germany's transition to sovereignty and the emergence of elite allies within the transitional government and civil society will be discussed below.

6.2 Key Negotiations

As previously stated, the idea of reparations was not a popular topic within Germany. Large segments of the populace were against paying reparations, however, a small but steady group were dedicated to the idea. This was illustrated by the emergence of a philosophical discourse represented by Karl Jaspers *The Question of German Guilt* (1946) who argued that it was a moral necessity and Thomas Adorno who in 1959 argued that Germany must come to terms with its past. A key element to the actualisation of reparations however, was the 1949 election of Konrad Adenauer as Chancellor of West Germany. Chancellor Adenauer would emerge as one of the most influential allies for the obtainment of reparatory justice as he argued that some form of reparations to Israel was needed in order for Germany to regain both good name and confidence of others within international society:[374] in addition, it would allow Germans to realise the full horrors of the Nazi regime and encourage the understanding about the need for a different future.[375] The support of a leading German politician

[373] Ibid. p. 56.
[374] Sagi, *German Negotiations*, p. 64.
[375] Ibid. p. 65.

opened up the political system to negotiations with both nongovernmental organisations and Israel and would allow legislation supporting reparations to be implemented.

Chancellor Adenauer instructed his Chief Political Adviser, Herbert Blankenhorn, to find a way to implement a comprehensive programme of collective reparations and individual indemnification to the Jewish community. Blankenhorn met with Noah Barou, the chairman of the European Executive of the World Jewish Congress to discuss the issue.[376] Barou laid out the following conditions that had to be met before any official negotiations could be discussed:

1. Before the start of any official negotiations between Federal Germany and the Jewish people, the Chancellor must declare in the *Bundestag* that the Federal Republic accepted responsibility for what had been done to the Jewish people by the Nazis.
2. Germany must promise explicitly that she was ready to make reparation for the material losses caused to the Jews.
3. Representatives of the Jewish people and Israel must be invited officially to conduct negotiations.[377]

Chancellor Adenauer accepted these conditions and, in April 1951, a secret and unofficial meeting took place in Paris between Adenauer and David Horowitz, the Director-General of the Israeli Ministry of Finance, and the Israeli Ambassador to Paris, Maurice Fischer.[378] After months of negotiations, Chancellor Adenauer read a statement to the *Bundestag* (27 September 1951):

> The Federal Government, and with it the great majority of the German people, are aware of the immeasurable suffering inflicted upon the Jews in Germany and in the occupied regions during the Nazi period. The overwhelming majority of the German people abhorred the crimes committed against the Jews and were not involved in them. There were many among the German people during the Nazi period who, despite danger to themselves, showed a willingness to help their Jewish fellow citizens for religious reasons, reasons of conscious, [or] shame at the dishonour to the German name. However, unspeakable crimes were committed in the name of the German people, which create a duty of moral and material reparations ... Initial steps have been taken in this area. But much remains to be done. The Federal Government will ensure rapid adoption of reparations legislation and its just implementation... With regard to the extent of reparations ... we must take account of the limits set on German ability to pay by the bitter necessity of caring for countless victims of war and the refugees and expellees.[379]

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[376] Ibid. pp. 68-69.
[377] Ibid. p. 69.
[378] Ibid. p. 70.
[379] Pross, *Paying for the Past*, p. 22.

The content of the speech was a result of secret negotiations in which Israel had demanded acceptance of German collective guilt, whereas Germany wanted to ensure that reparation payments would be limited.[380]

Nahum Goldmann, the head of the World Jewish Congress and cofounder of the Claims Conference, was then authorised by Israel to have secret meetings with Chancellor Adenauer to see if it was possible to create an agreement acceptable to both parties. Goldmann and Adenauer met secretly on 6 December 1951 in London, and Goldmann later served as a mediator between German and Israel authorities.[381] The inclusion of civil society in the discussion of reparations in negotiations was unique. It was largely due to these actors however, that the negotiations between West Germany and Israeli were opened, paving the way for a new understanding of reparations.

6.3 Transition to Sovereignty

The transitional treaty of 26 February 1952 repealed the occupational statute and granted the Federal Republic of Germany (FRG) sovereignty; however, in this treaty, the Western Allies requested that a uniform federal arrangement for restitution be adopted as soon as possible.[382] Part IV of the treaty required four points:

> (1) effective and accelerated negotiation, decision, and fulfilment of restitution claims with no discrimination against groups or classes of persecutes, (2) a procedural and evidentiary arrangement for restitution that takes account of the difficulties of proof resulting from persecution – loss of documents, disappearance of witnesses, (3) creation of opportunities for reopening claims made under older legal arrangements when newer, more favourable restitution laws were adopted, and (4) appropriation of funds to satisfy restitution claims.[383]

The Allies set forth this requirement, Christian Pross argues, because despite Chancellor Konrad Adenauer's declaration on 27 September 1951 that 'The Federal Government will ensure rapid adoption of reparations legislation,'[384] and that West Germany had a 'duty of moral and material reparations' no progress had been made. Conversely, on 11 May 1951, the Bundestag adopted a law for the reintegration of former members of the Nazi party into civil service under Article 131 of the German Constitution. Referred to as 'the 131 Law', it provided not only for the reintegration of Nazi officials, but gave a legal claim for reemployment, a right to back pay for the time period where the individuals were unable to work, and required that at least 20% of all

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[380] Ibid. pp. 22-23.
[381] Colonomos and Armstrong, "German Reparations to the Jews after World War II," p. 394.
[382] Pross, *Paying for the Past*, p. 21.
[383] Ibid.
[384] Quoted in Pross, *Paying for the Past*, p. 21.

departments within public administration be composed of former Nazis or face a substantial fine equivalent to the salaries 'saved.'[385]

The initial Allied and West German restitution laws established a framework on which later more complex reparation programmes were built. The emphasis was on legal, tangible products; the loss of property, the governmental imposition of flight taxes, and the appropriation of properties and goods with little to no payment. The immediate problems being addressed were how to fairly appropriate heirless property whose owners had been murdered by the state, and the abundance of individuals, who had been liberated from concentration camps and were now resided in Displaced Persons camps.[386] It is important to note that while the Allied transitional treaty requested that West Germany create a uniform restitution law, it did not require that any reparations were to be paid for non-tangible harms. The Allies largely pushed for restitution, reflecting an emphasis of property rights and not on the more symbolic elements that we now consider to be essential to RRMs. This focus on property rights had a side effect of suppressing Roma claims, as the Roma had primarily an itinerant lifestyle and thus little property or documented assets.

6.4 The Luxembourg Agreement

On 21 March 1952, the West German government created history by voluntarily entering into negotiations with both the newly formed state of Israel and the Claims Conference. The state of Israel represented the half-million refugees and survivors which fled Germany and other Nazi occupied territories both prior to statehood and afterwards.[387] Negotiating with Israel was unusual, because Israel was not one of the victorious states of the war – it had been created only after the war and thus was not included in the sphere of normal reparation dynamics (losing state pays winning state). The Claims Conference represented the victims of Nazi persecution who expatriated to countries other than Israel. As an umbrella organisation for 52 smaller groups, it well represented the community as a whole.[388] The voluntary negotiation for reparations with both a non-victorious force in addition to the inclusion of civil society within these negotiations indicated a normative shift that was beginning to occur within domestic allies in Germany in addition to international society.

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[385] Ingo Müller, *Hitler's Justice: The Courts of the Third Reich*, trans. Deborah Lucas Schneider (Cambridge: Harvard University Press, 1991), p. 205.
[386] Sagi, *German Negotiations*, p. 32. Over 100,000 people were in the displaced persons camps as of 1945.
[387] Ibid. p. 3.
[388] Ibid.

The process of negotiating for reparations, however, was a contentious process on both sides of the negotiations. Within Germany, the idea of paying reparations did not have widespread support. Chancellor Adenauer was decisive in transforming reparations from rhetoric to treaty obligation. Within Israel, negotiations were emotionally painful. There were violent demonstrations and vehement attacks against the negotiations.[389] In addition, the Claims Conference was not a state and therefore had additional problems of not being legally able to enter into a binding international state agreement. Six months later, on 10 September 1952, the *Agreement Between the State of Israel and the Federal Republic of Germany* and *Protocol Number One*, and *Protocol Number Two* were signed in Luxembourg. The preamble of the Luxembourg Agreement stated:

> Whereas unspeakable criminal acts were perpetrated against the Jewish people during the National Socialist regime of terror and whereas by a declaration in the Bundestag on September 27, 1951, the Government of the Federal Republic of Germany made known their determination, within the limits of their capacity, to make good the material damage caused by these acts, and whereas the State of Israel has assumed the heavy burden of resettling so great a number of uprooted and destitute Jewish refugees from Germany and from territories formerly under German rule and has on this basis advanced a claim against the Federal Republic of Germany for global recompense for the cost of the integration of these refugees...[390]

Article One of the Luxembourg Agreement obligated Germany to pay Israel 3 billion DM and stated that in accordance to Article 1 of *Protocol Number Two*, West Germany would pay 450 million DM to the Claims Conference, via Israel, and adhere with Protocols one and two.[391] This statement and payment through Israel was necessary since the Claims Conference, as an NGO, could not legally enter into a state agreement. Payments to Israel were to take the form of Deutschmarks, foreign currency, and commodities, and would occur over a period of 12 years. Since East Germany refused to enter into negotiations, it was agreed that Israel had the right to pursue separate claims towards East Germany.[392]

Protocol Number One, drawn up by representatives of the West German government and the Claims Conference stated:

> The Government of the Federal Republic of Germany is resolved to supplement and amend the existing compensation legislation by a Federal Supplementing

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[389] Ibid.

[390] "Luxembourg Agreement and Associated Documents [Excerpts]," in *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford: Oxford University of Press, 2006), p. 886.

[391] Pross, *Paying for the Past*, p. 30.

[392] Frederick Honig, "The Reparations Agreement between Israel and the Federal Republic of Germany," *The American Journal of International Law* 48, no. 4 (Oct 1954), p. 578.

> and Coordinating Law ... to ensure that the legal position of the persecutes throughout the Federal territory be no less favourable than under the General Claims Law now in force in the US Zone.[393]

The Protocol, thus, was requiring West Germany to enact a law which would allow individuals both within Germany and outside of its territory to request reparations for damages inflicted upon them during the Nazi regime. The treaty outlined that compensation should be paid to those who were persecuted, and specifically detailed economic damages to individuals for lost opportunities, damage to vocational or professional training, deprivation of benefits from World War I, deprivation of liberty, health and limb, and compensation for levies paid such as the flight tax. Among the requirements and definitions were the following:

> I. Compensation
> (4) Persecutees who were subject to compulsory labour and lived under conditions similar to incarceration shall be treated as if they had been deprived of liberty by reason of persecution.
> (5) A persecutee who, within the boundaries of the German Reich as of December 31, 1937, lived "underground" under conditions similar to incarceration or unworthy of human beings shall be treated as if he had been deprived of liberty by reason of persecution...
> (12) Persons who were persecuted because of their political convictions, race, faith or ideology... Compensation in accordance with Paragraph I shall also be paid to persecutees who emigrated abroad or settled in the Federal Republic during or after the time the general expulsions took place.

The Luxembourg Agreement was a historic step and redefined expectations not only within Germany, but also among other victimised minorities; setting a new norm of accountability and recompense for states guilty of committing atrocities and creating a foundation for a redress and reparation norm to be established. Whereas previous reparation agreements regulated payments between states following war, the Luxembourg Agreement focused specifically on Jewish victims of the Holocaust. This allowed the programme to compensate for physical injuries and the loss of freedom, property, income, professional, or financial advancement, whether the reason for the loss or injury was due to persecution on political, social, religious, or ideological grounds.[394] The signing of this agreement was the beginning of the redress and reparation process, and subsequent actions building upon and surpassing this agreement would become known as the foundational redress and reparations movement.

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[393] "Luxembourg Agreement and Associated Documents [Excerpts]," p. 890.
[394] For an analysis of this reparations programmes and the application of this programme, see Pross, *Paying for the Past*.

The policy of reparations within Germany was called *Wiedergutmachung* or 'making good again'. West Germany was not required to make reparations, and could have refused, as did East Germany. The achievement of the reparation treaty and subsequent legislation was neither an easy nor an assured process. As previously stated, German domestic society was quite hostile to the idea of Jewish reparations, and the political landscape also reflected strong opposition to the idea.[395] As Pross states, 'The German people did not like the victims, and they certainly did not like paying for them.'[396] Despite this, there was a small percentage of the populace[397] who supported the redress and reparation movement. Again, one of the most influential allies was the German Chancellor Konrad Adenauer. The success of the German RRM is partly due to Chancellor Adenauer's acceptance of what he called 'a duty of moral and material reparations,' although whether his dedication to the movement was based on moral grounds or because of political manoeuvring has been debated. Chancellor Adenauer's influence can be seen within the political landscape – the Bundestag's debates on reparation policy, the negotiation with Israel for a reparations treaty, and the resulting legislation which did not reflect the popular opinion of the voters, but rather can be stated as: 'functioning as the conscience of a nation that had none.'[398] While this statement may be a bit extreme as we also saw a philosophical grappling with coming to terms with the past within philosophy during this time (see Jaspers, Arndt, Adorno) it does signal the shift within the political landscape and at least some allies embracing reparatory justice and a norm of redress.

7. Implementation of Redress and Reparation within the FRG

The debate about what would be included in the federal restitution law involved politicians within the *Bundesrat* and other political offices, activists in West German civil society and was generally seen negatively in the eyes of the domestic populace. Noted reparations advocate Otto Küster drafted the initial proposal for the federal restitution law and presented it before the *Bundesrat's* Special Committee on Reparations in April 1952.[399] A second draft of the restitution law, referred to as the

[395] Pross, *Paying for the Past*, p. 3.
[396] Ibid.
[397] Pross credits the most influential allies as Walter Schwarz, Kurt May, Otto Küster, Frank Böhm, Adolf Arndt, and Martin Hirsch.
[398] Pross, *Paying for the Past*, p. 7.
[399] Ibid. p. 36.

'November Version,' was adopted by the plenary session on 19 December 1952; however, it was postponed until the Finance Ministry, and Finance Minister Fritz Schäffer[400] - a well-known opponent to reparations - could draft their own plan. Schäffer attempted several delaying tactics, however, there was pressure from external observers to adopt some form of reparations law. The Additional Federal Compensation Act was adopted on 18 September 1953 and entered into force on 1 October 1953.[401] According to the current Finance Ministry and noted scholar Christian Pross, this law was inadequate.[402] Among the flaws was:

> The persecutees had to prove they had been targeted by "officially approved measures" (§ 1, para. 3). This was difficult in individual cases, as Nazi measures were directed against all Jews, political opponents, and the like. ... the surviving relatives of the thousands who had committed suicide received nothing unless they could show that this death had been "officially approved." "Official approval" was not automatically assumed even in the case of Jews who chose suicide in the face of impending deportation ...[403]

The law also contained numerous restrictions, clauses and high thresholds that were later reduced. Otto Küster criticised this legislation explaining:

> It categorizes and equates, guarantees percentages of percentages, distinguishes between mandatory, possible, discretionary, and hardship entitlements, invents maximum amounts for every year of persecution as well as for the total claim, and for several claims by one person in total, and for claims by several people somehow joined, in total; it sorts heirs and censors wills, grants claims only if other legal claims are not made simultaneously; it snips and cuts with scissors brandished, and one senses that the legislature is only really satisfied when it arrives at the immense section on hardship compensation, in which everything which it had previously cut, dismembered, and forgotten is mildly cleansed with philanthropic gestures ... All the parties behave as though this were an act of generosity...[404]

Küster's outspoken opposition to the watered-down reparations legislation came with a price: his position was revoked on 30 June 1954, and after he drafted a letter of defence, he was fired for insulting state ministers.[405] The 1953 law resulted in widespread denial of claims, and in 1954 the Claims Conference concluded that the law

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[400] Fritz Schäffer was known to have made anti-Semitic speeches and expressed support for the Nazi ideology before 1922; however, he was also opposed to the Nazi party later and imprisoned in Dachau for three months for connections to the attempted assassination of Hitler in the 20 July plot. He was appointed prime minister of Bavaria in the U.S. occupied zone, but removed for being a Nazi sympathiser and of obstructing the denazification process. He was cleared of these charged in a later denazification process. His policies as Finance Minister, however, show that he was against reparations.
[401] "Compensation for National Socialist Injustice," p. 7.
[402] Ibid.; Pross, *Paying for the Past*, p. 39.
[403] Pross, *Paying for the Past*, pp. 39-40.
[404] Quoted in Pross, *Paying for the Past*, p. 40.
[405] Pross, *Paying for the Past*, p. 43.

hindered the victims from claiming reparations.[406] Examples of how this law was, indeed, hindered are numerous. Some complaints received include: an official who attempted to get restitution for the loss of his library and was told to submit the titles of all 900 books, including the year of purchase, purchase price and receipts; denial of claims for spouses of Jews who went into hiding because they could have divorced their husband or wife; and denial of claims for individuals who were 'accidentally' killed.[407]

The solution to the ineffectiveness of the 1953 law was the creation and implementation of the 1956 BEG (*Bundesentschädigungsgesetz*, or Federal Compensation Act) law.[408] The Federal Compensation Act was adopted on 29 June 1956 and entered into force retroactively from 1 October 1953. According to the federal government: 'This Act fundamentally changed compensation for the victims of National Socialism and introduced a number of amendments improving their situation.'[409] In 1965, the Final Federal Compensation Act (BEG – SG) was passed, also retroactive to 1 October 1953, annulling some of the previous deadlines by which claims had to be submitted.[410] The reparation laws defined a victim of Nazi persecution as:

> [o]ne who was oppressed because of political opposition to National Socialism, or because of race, religion or ideology, and who suffered in consequence loss of life, damage to limb or health, loss of liberty, property or possessions, or harm to vocational or economic pursuits. Treated on a par with persecutees, thus defined, are those persecuted by the Nazis because: 1) their consciences had prompted them to take the risk of opposing actively the regime's disregard of human dignity and destruction of life; 2) they adhered to artistic or scientific beliefs rejected by National Socialism; or 3) they were closely connected to a persecutee.[411]

The court system broadly defined 'political opposition' to include those who refused to participate in activities such as flying the Nazi flag or listening and disseminating foreign radio broadcasts, Members of the Nazi Party, or who aided and abetted the National Socialist regime were excluded from compensation under the BEG laws.[412] The BEG laws did include, however, territorial restrictions. A claim for compensation was tied to one's residence within Germany; however claims were allowed for repatriates, expellees, refugees from the Soviet Zone, and for persecutees in displaced

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[406] Ibid. p. 45.
[407] Ibid. p. 46.
[408] All three reparation laws were abbreviated and referred to as BEG.
[409] "Compensation for National Socialist Injustice," p. 7.
[410] Ibid. p. 8.
[411] Kritz, ed., *Transitional Justice*, vol. 2, p. 50.
[412] Ibid.

person's camps and homeless aliens within the territory of West Germany, providing they were recognised to belong to such a group defined by law.[413] These categories were further defined and subjected to high bureaucratic oversight. Due to reintegration policies, it was often former Nazi party members who made the medical determination of eligibility. For individuals outside of German territory, a series of bilateral agreements were created in order for foreign nationals to submit their claims to their own government (see Appendix 3.)

Leaders in West Germany espoused a **moral** responsibility for reparations thus implying an element of symbolic justice. The approach, however, for both restitution and reparations, was highly legalistic, utilising the rule of law to provide exact requirements for all reparation and restitution policies; I argue the emphasis on rules and regulations emphasised the reparatory justice functions; however minimised symbolism.

Restitution and reparations were provided, again, to Israel for assistance in supporting and relocating Jewish refugees who had fled prior to and during the war, to domestic citizens within Germany, and to survivors of the Holocaust who resided outside of Israel, via the Claims Conference. Most importantly, West Germany also assumed legal and moral responsibility for the prior regime's actions, going so far as to enshrine two clauses into German Basic Law: Article 16, sentence 1: 'No German may be deprived of his citizenship' and Article 116 Paragraph (2) 'Former German citizens who between January 30, 1933 and May 8, 1945 were deprived of their citizenship on political, racial, or religious grounds, and their descendants, shall on application have their citizenship restored.' The restoration of citizenship within the constitution is illustrative of legislative justice. In essence it was restoring the legal identity of those persecuted.

The evolution of West Germany's reparation programmes was highly dependent on the actions of select elite allies among German domestic society, including Chancellor Adenauer and Otto Küster. Other individuals within civil society such as Walter Schwarz who in 1957 took on the editorship of the journal *Administration of Reparations Law*, a critical forum for individuals involved in reparations law, were also highly important to the movement. International allies, such as the various NGOs and other individuals also lobbied the government for the creation and expansion of the reparations movement. Although the international allies were widespread, they represented civil society – and not the Allied countries themselves. The Western Allies,

[413] Ibid.

although favourable to redress and reparations, were not willing to lobby for reparations due to the need for Germany to become allied with the Western nations in the emerging Cold War conflict.

The individuals involved in this movement did not set out to become norm entrepreneurs or to create a paradigm shift in reparations, yet this is exactly what happened. The actions taken by the Jewish NGOs, the elite allies in both international and domestic society and the subsequent actions undertaken by the states spawned the emergence of a new set of norms. This was reinforced by the continuing passage and evolution of redress and reparation legislation (see Appendix 4: German Restitution and Compensation Agreements).

As can be seen from the reparation and restitution laws, reparations payments were made to a variety of victims. The majority of the legislation however, reflects the Nazi targeting of the European Jewish population for genocide and attempts to address some of these wrongs. This has led to the perception within various redress and reparation movements that the German reparations legislation has been successful, but also that it has been Jewish-centric; a viewpoint reinforced by the early denial of non-Jewish claims. As noted earlier, however, other groups had been targeted; specific legislation passed in 1966, 1981, and 1988 provided compensation for non-Jewish groups.

8. Quest for Roma and Sinti Redress

During the Nuremberg trials, Otto Ohlendorf was asked why his subordinates murdered the Roma as well, to which Ohlendorf replied: 'It's just like with the Jews, the same thing. There was no difference between the Jews and Gypsies.'[414] Despite similar statements by other commanders and research clearly indicating that the Roma and Sinti were victims of racial persecution during the Nazi regime, the redress and reparation movement has been met with widespread resistance from politicians, domestic Germany society and Jewish organisations.[415] The reparations programmes previously discussed, agreements reached, and negotiations with various states were almost exclusively for the Jewish victims of the Holocaust. Other groups victimised –

[414] Wolfgang Wippermann, "Compensation Withheld: The Denial of Reparations to the Sinti and Roma," trans. Bill Templer, in *The Gypsies During the Second World War: The Final Chapter*, vol. 3, ed. Donald Kenrick (Hertfordshire: University of Hertfordshire Press, 2006), p. 171.
[415] See Table 4.11 for a partial list of denials the Romani genocide has received.

including the genocide of the Roma, the use of slave labour and the various massacres and murders that are now considered crimes against humanity were not included in the primary reparation agreements following the end of World War II, and individuals were denied when they pressed a claim.

In addition to the denial of reparation claims, Roma and Sinti continued to be persecuted after the conclusion of the war. Noted Roma scholar Ian Hancock stated that following the war:

> [t]he Romani population in Europe was numb. Political activity was minimal, and Gypsies were reluctant to identify their ethnicity publicly or draw attention to it through group effort. No reparations had been forthcoming for the Nazi atrocities committed against them, and no organized attempts had been made by any national or international agency to reorient the survivors, such as were being put into large-scale effect for survivors of other victimized groups. Instead, pre-war anti-Gypsy legislation continued to operate against them. In Germany, until as late as 1947, those who had come out of the camps had to keep well hidden or risk being incarcerated again – this time in labor camps – if they could not produce documentation proving German citizenship. Some of the laws remained into effect into the early 1950's...[416]

The rationale behind the initial denial of reparations to the Roma people was based on West Germany's refusal to recognise that the Roma and Sinti clans had been victims of racial persecution. This initial resistance is illustrated with the 9 May 1950 statement by the Interior Ministry of Württemberg that: 'It should be borne in mind that Gypsies have been persecuted under the Nazis not for any racial reason but because of an asocial and criminal record.'[417] The courts seemed to ignore the fact that every Roma had been classified as having asocial characteristics, including children and individuals with no criminal record. The Roma within the West German territory formed the Committee of German Gypsies to fight for reparations, however, they were largely unsuccessful.[418]

The Committee of German Gypsies pushed for recognition of the genocide of Roma and Sinti at the various Nuremberg trials and, despite a failure to achieve recognition there, continued to utilise the court system in an effort to achieve recognition both as a victimised group and on the individual level. The West German Compensation Claims Office almost always rejected the small amount of claims filed

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[416] Ian Hancock, "The East European Roots of Romani Nationalism," in *The Gypsies of Eastern Europe*, eds. David Crowe and John Kolsti (London: M.E. Sharpe, 1991), p. 143.
[417] Quoted in Gilbert, *The Second World War*, p. 734.
[418] David M. Crowe, "The Roma Holocaust," in *The Holocaust's Ghost: Writings on Art, Politics, Law and Education*, eds. F.C. Decoste and Bernard Schwartz (Alberta: University of Alberta Press, 2000), p. 198.

in the decades following the genocide. The courts upheld these rejections, citing 'security reasons,' 'enemy of the state' status and 'demands of national security.'[419]

The viewpoint that all Roma and Sinti were persecuted on the grounds of their criminal nature was widespread, even among German reparation activists. Otto Küster, as mentioned previously, worked tirelessly to advance the reparations cause, yet in 1955 when commenting on the Federal Identification Law, he wrote that all measures taken against the Sinti and Roma until 1943 were 'in conjunction with policy on crime.'[420] The following year, in 1956, a German court in North Rhine-Westphalia recognised that the plaintiff, a female Rom, had been the victim of the Nazi regime's racial persecution. The West German Supreme Court, however, overturned this ruling, citing that she was not a victim of racial persecution, but that she had been deported due to the demands of national security.[421]

It was not until 1963 that the West German Federal Court of Justice finally acknowledged the racial aspects of the Roma discrimination enforced by the Third Reich as of 1938, thus allowing the Romi and Sinti to file for reparations.[422] The date was chosen to reflect the basic decree by Heinrich Himmler on 8 December 1938, which stated that the policy was aimed at 'resolving the Gypsy Question, proceeding from the basic nature of this race.'[423] Dating the persecution, forced labour, and imprisonment in concentration camps from December 1938, however, excluded a number of Roma victims from reparations – including Roma women who had been forcibly sterilised under the 1933 *Law for the Prevention of Genetically Diseased Offspring*.[424] Also excluded were those who suffered from the application of the Nuremberg Laws to the Roma (1935), the creation of the Racial Hygiene and Population Biology and Research Unit of The Ministry of Health (1936),[425] which scientifically classified the Roma according to their racial characteristics and ancestry, and other related deportations to concentration camps and ghettos.

The classification of Roma and Sinti as criminals rather than racially persecuted persons resulted in the initial disqualification of all Roma from eligibility within

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[419] Ibid.
[420] Wippermann, "Compensation Withheld," p. 175.
[421] Crowe, "The Roma Holocaust," p. 198-199.
[422] Ibid.
[423] Quoted in Wippermann, "Compensation Withheld," p. 174.
[424] Sybil Milton, "Persecuting the Survivors: The Continuity of 'Anti-Gypsyism' in Postwar Germany and Austria," in *Sinti and Roma: Gypsies in German-Speaking Society and Literature*, ed. Susan Tebbutt (New York: Berghahn Books, 1998), p. 39.
[425] Ian Hancock, "Gypsy History in Germany and Neighboring Lands: A Chronology Leading to the Holocaust and Beyond," in *The Gypsies of Eastern Europe*, eds. David Crowe and John Kolsti (London: M.E. Sharpe, 1991), p. 16.

reparation and restitution payments, denied them the return of citizenship status where it had previously been stripped under Nazi rule (Article 116, as noted above, permitted the restoration of citizenship of those who: 'were deprived of their citizenship on political, racial, or religious grounds') and continued the stigmatisation of Roma and Sinti as criminals. It also denied the very real racial policies under which the Roma and Sinti had been persecuted and on the basis of which the majority of the groups were sent to concentration camps. The following table illustrates the various attempts the Roma utilised to obtain a measure of redress and reparation and indicates a much slower – and smaller - mobilisation of the group:

Table 5.8: Romani Mobilisation[426]

1945	Committee of German Gypsies formed
1950s	Association of German Sinti and Central Council of German Sinti and Roma re founded to further reparation claims from World War II
1959 - 1965	The World Gypsy Community is established in France. This organisation was said to have been banned in France in 1965 for pushing for war crimes reparations and creating Gypsy passports.
1959	The International Gypsy Committee was formed to concentrate on issues such as reparations.
8 Apr 1971	First World Romani Congress
April 1978	Second World Romani Congress is held – officially established the International Romani Union.
1979	The UN officially recognised the International Romani Union.
May 1981	The Third World Romani Congress focuses on the fate of Roma/Sinti under the Third Reich; a resolution was made that the issues of reparations should be a priority.
1987	President Ronald Regan appoints the first Romani representative to the Holocaust Memorial Council.
1990	The Fourth World Romani Congress is held – reparations are again discussed.
1990s	The Central Council of German Sinti and Roma is founded as a German Romani rights group.

When the courts decreed on 18 December 1963 that Roma victimisation may have been based on racial and political motives, it opened up access to previously denied restitution and reparations.[427] Roma claims started to be awarded, albeit for modest amounts which were often – unfairly – adjusted downwards for deductions of any previous welfare received. Furthering the discriminatory policies following World War II, citizenship papers, which were often required during the Roma reparation process, were frequently confiscated and other proofs of citizenship, which lie in

[426] Sources include: Crowe, "The Roma Holocaust"; Kenrick and Puxon, *The Destiny of Europe's Gypsies;* and Ian Hancock, "Romani History in Germany and Neighboring Lands," *The Patrin Web Journal: Romani Culture and History,* http://www.radoc.net/radoc.php?doc=art_e_holocaust_chronology&lang=en&articles=true, accessed on 10 April 2009.

[427] Wippermann, "Compensation Withheld," p. 176.

documentation of property transfers, etc. were ignored.[428] Automatic deportation of Roma without citizenship papers (including those classified as displaced persons due to forced labour and internment in concentration camps) was finally revoked in 1965. This continuation of discrimination and denial of civil rights has persisted throughout the redress and reparation movement. I believe these early struggles and decades of denial have also given rise to the belief within the victimised group that the Romani RRM has been less successful than the Jewish RRM. Being continually denied redress and reparations coloured the perception of future achievements and allowed many victims to die without any measures of success. The following table illustrates some of the more illuminating comments regarding the denial of Roma/Sinti genocide and reparations:

Table 5.9: Denial of Romani Memory and/or Reparations[429]

1950	Issued by Interior Ministry of Württemberg: '...Gypsies have been persecuted under the Nazis not for any racial reason but because of an asocial and criminal record.'
1955	Erik Balasz claim is denied; courts cite 'security grounds' as reason for imprisonment and not 'Gypsy heritage.'
1955	Wacslaw Mierzinski claim is denied; courts cite imprisonment based on 'enemy of the state' status because his father was allegedly a member of the Polish underground.
1955	Otto Küster writes Sinti and Roma actions were 'in conjunction with policy on crime.'
1971	Roma are denied compensation under the Bonn government due to Gypsies being a matter of security.
1980	West German government spokesman Gerold Tandler calls Romani demands for war crimes reparations 'unreasonable' and 'slanderous.'
1984	The Chairman of the Holocaust Memorial Council tells the Washington Post that Gypsy demands are "cockamamie" and questions whether the Gypsies really constitute an ethnic people.
1985	German Council of Sinti and Roma asked to be included in memorial services in Darmstadt. The city's mayor refused because it would insult the memory of the Holocaust.
1985	The president of the Jewish Central Council refuses to allow Roma participation in a ceremony commemorating the liberation of Bergen-Belsen.
1986	The Federal Government declared that the mistaken judgement in 1956 had, in practical terms, been relatively minor. The German Ministry of Finance concludes that 'all those victimized by Nazism have been adequately compensated... the circle of those deserving compensation need not be extended any further.'
1986	Romani Union is informed by the Office of Presidential Appointments that none of its eight candidates for membership in the U.S. Holocaust Memorial Center has been appointed.
1990	A member of the Bremen state legislature stated that it was 'a pity that not more of them [Gypsies] were murdered.'

The Federal Government enacted a resolution on 14 December 1979 that Roma and Sinti could file for a one-time claim of up to 5,000 DM. The *Directives on Payment*

[428] Milton, "Persecuting the Survivors," p. 39.

[429] Crowe, "The Roma Holocaust"; Gilbert, *The Second World War;* and Peter Sander, "Criminal Justice Following the Genocide of the Sinti and Roma," trans. Bill Templer, in *The Gypsies During the Second World War: The Final Chapter,* vol. 3, ed. Donald Kenrick (Hertfordshire: University of Hertfordshire Press, 2006); and Hancock, "Romani History in Germany and Neighboring Lands.

to Persecuted Non-Jews to Compensate for Individual Hardships within the Context of Restitution became effective on 26 August 1981, however, expired on 21 December 1982, a mere 16 months later. Meanwhile, many of the initial claims filed by Roma and Sinti in the 1950s had been denied and others had great difficulties finding information for and filling out the claims. The problems with the original legislation were recognised and partially resolved with the *Directives on Payment to Persecuted Non-Jews to Compensate for Individual Hardships within the Context of Restitution of 26 August 1981 as amended on 7 March 1988*; 94% of the subsequent claims were from Sinti and Roma. The perception of unequal access to redress and reparation continued however.

9. Criminal Justice

The exact figures for how many individuals were investigated for some form of war crime, crime against humanity, genocidal act, or murder(s) related to events which occurred during the Nazi regime is not currently known. According to the Simon Wiesenthal Center, named in honour of well-known Nazi hunter Simon Wiesenthal for his work bringing former Nazi perpetrators to justice, 5,025 Nazi perpetrators were convicted between 1945 and 1949 in the American, British, and French occupied zones; figures for trials in the Soviet zone are unknown. In total, approximately 80,000 Germans have been convicted for committing crimes against humanity (including the international tribunal, tribunals within occupied countries, domestic trials within German territory and prosecutions in other countries; figures again exclude East Germany) many of these convictions, however, included minimal sentencing or officials later commuting the sentence.[430] Various Holocaust-related trials continue to this day, such as the John Demjanjuk trial which began on 30 November 2009[431] and the 28 July 2010 indictment of former concentration camp guard Samuel Kunz.[432] Whether justice truly has been achieved, however, has often been debated, given the minimal sentencing of many offenders and the knowledge that by 1948, 30% of the

[430] Simon Wiesenthal Center, "36 Questions About the Holocaust," Museum of Tolerance Multimedia Learning Center, http://motlc.wiesenthal.com/site/pp.asp?c=gvKVLcMVIuG&b=394663#35, accessed on 15 March 2011.
[431] Kevin Cote, "New Trial for Nazi War Crimes Suspect?" *Times*, 6 April 2009, http://www.time.com/time/world/article/0,8599,1889380,00.html, accessed on 10 March 2009.
[432] Kirsten Grieshaber, "Samuel Kunz, Nazi Suspect, Indicted in Germany," *Huffington Post*, 28 July 2010, http://www.huffingtonpost.com/2010/07/28/samuel-kunz-nazi-suspect-_n_661912.html, accessed on 22 April 2011.

presiding judges and at least 80% of the assisting judges at the Country Courts in the British zone of occupied Germany were former Nazi party members and the makeup of the courts was similar in the French and American zones.[433]

9.1 Nuremberg Trials

The most well-known criminal trial post-World War II in regard to Germany was the Trial of the Major War Criminals before the International Military Tribunal in Nuremberg (14 November 1945 – 1 October 1946), which focused on prosecuting the leaders of the Nazi regime. As previously stated in Chapter Two, the London Agreement spelled out three crimes that were to be charged: crimes against peace, war crimes, and crimes against humanity. Of those only war crimes were based on pre-existing laws found within the Geneva Conventions. The trial named 24 men to be tried; these individuals were in leadership positions within the German government, the Nazi party, the Navy, the media, etc. Of the 24 named, 22 were brought to trial; of the remainder, Gustav Krupp was excused due to health and Robert Ley committed suicide.[434] In addition to the Trial of the Major War Criminals, the United States held twelve successor trials from 1946 to 1949. These trials were conducted by the Nuremberg Military Tribunals and focused on the surviving military, political, and economic leadership of the Nazi regime; for example among the 12 trials were the infamous Doctors' Trial, the Judges' Trial and the Einsatzgruppen Trial. The Trial of the Major War Criminals and the subsequent trials held in Nuremberg were covered extensively on the radio and in the press.[435]

The use of media to broadcast the trials and the trials themselves helped to establish an immediate and fairly accurate historical memory. As Jeffrey Herf stated, the trials held in Nuremberg:

> [e]stablished that Hitler and the Nazi regime had launched World War II as a war of aggression and racism, had ordered and implemented the mass murder of European Jewry and millions of others in the concentration camps and death camps, and in so doing had drawn upon the cooperation of tens of thousands of officials in the Nazi government and army.[436]

The United States Office of the Military Government conducted surveys at the conclusion of the Trial of the Major War Criminals, which indicated that 55% of the

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[433] Kritz, ed., *Transitional Justice*, vol. 2, p. 33.
[434] For a more thorough accounting on of the Nuremberg Trials see Eugene Davidson, *The Trial of the Germans: An Account of the Twenty-Two Defendants before the International Military Tribunal at Nuremberg* (Columbia: University of Missouri Press, 1966).
[435] Jeffrey Herf, *Divided Memory: The Nazi Past in the Two Germanys* (Cambridge: Harvard University Press, 1997), p. 206.
[436] Ibid.

German population considered the verdicts to be just, 21% considered the verdicts to be mild, and 9% considered the verdicts to be severe. In addition, 78% considered the trial proceedings as just.[437] The trials established beyond a shadow of doubt that the Nazi regime committed countless acts of war crimes and crimes against humanity; the trial established clear legal precedence and created a foundation for German historical memory.[438]

The trials that took place in Nuremberg created a starting point for criminal justice, not an end point. As previously stated, there were 5,025 Nazi perpetrators convicted between 1945 and 1949 in the American, British, and French occupied zones which was a fraction of those that would eventually be brought to justice. Nuremberg's impact however was the creation and enforcement of crimes that had never before been defined, in particular the idea of crimes against humanity. Domestically, the establishment of a baseline history was important for the victimised groups; however the international impact was even more profound. The Nuremberg Trials represented a fundamental shift in international law and international norms regarding individual accountability and sovereign immunity. It launched a new branch of law – international criminal law and led to the codification of the crimes 'crimes against humanity' and 'genocide'.

The trials occurring at Nuremberg between 1945 and 1949 were significant; however, these trials were conducted during Allied occupation and thus represent only a fraction of the overall criminal justice experience. In addition, the Jewish and Romani experiences with courts in the subsequent years was quite different: in turn, these differential experiences would impact the groups perception of the restorative justice actions undertaken by the state, and their overall satisfaction levels with the redress and reparation movements.

9.2 Roma/Sinti Experiences within the Courts

The perception found in historical memory is that there have been a multitude of trials for crimes against Jews, yet in regard to the Roma there have been none. This does not mean that there were no trials for concentration camps guards where Roma were interned or killed, but that the perception of the victimised community was that the focus of these trials was Jewish victims – not Romani.[439] The lack of information

[437] Ibid.
[438] Ibid. p. 207.
[439] This discrepancy can be partially explained by simply examining numbers – estimates indicate that 6 million Jews were killed compared to the 500,000 to 1.5 million Roma.

regarding trials and the perception of these trials by Roma is discussed by Peter Sander[440] in his work *Criminal justice following the genocide of the Sinti and Roma.* Sander details how in January 1991 the Siegan District Court in North Rhine-Westphalia sentenced Ernst-August König, former SS guard in the Gypsy camp of Auschwitz-Birkenau, to life imprisonment.[441] Perception amongst the German public was that this sentencing was the first in regard to crimes against Roma/Sinti and the well-respected newspaper *Frankfurter Allgemeine Zeitung* reported that it was the: 'one and only German court trial to date dealing with the National Socialist genocide of the Sinti and Roma.'[442] While this trial was not the first trial to consider Roma/Sinti victims, it was the first which allowed Roma/Sinti testimony and whose primary focus was on Roma/Sinti victims. Sander argues that it was easy for a mistaken impression to arise because all previous efforts of the German courts to come to terms with the *Baro Porrajmos* were: 'far more hesitant and ridden with gaps than the pursuit of other crimes by that National Socialists.'[443]. The previous trials, while including some Sinti/Roma victims, were focused on a range of crimes committed against a variety of victims, including Jews, Communists, Roma, and mentally ill.[444] These previous trials, despite lobbying from the Committee of German Gypsies, did not allow testimony from Roma or Sinti survivors.[445]

Despite the inclusion of Roma victims in a few trials, there were still a relatively low number of perpetrators prosecuted for the murders of Roma/Sinti. Sander credits the low number of prosecutions and punishments for Roma/Sinti due to a lack of will to see justice prevail, ongoing anti-Gypsy sentiment and bias, in addition to the judicial system's basic inability to cope with the sheer numbers of perpetrators and accusations.[446] I would add to this list that the political opportunity structure had been closed to the Roma between 1945 and 1963. The exclusion of Roma from reparations and restitution based on the false assumption that Roma were victimised on the basis of criminality allowed a perception to emerge that Roma were not true victims of the Nazis. I would argue that by implying that they were victimised on the basis of their inherent criminality, society in essence was 'blaming' the victim. The German courts did eventually reverse this policy of exclusion, however, the 18-year delay did impact

[440] Sander, "Criminal Justice Following the Genocide of the Sinti and Roma."
[441] The gypsy camp was a separate barracks within Auschwitz. König's judgement was never finalised due to his subsequent suicide after hearing the verdict. Ibid. p. 151.
[442] Ibid.
[443] Ibid.
[444] Ibid. p. 161.
[445] Ibid. p. 158.
[446] Ibid. p. 153.

the Romani understanding of reparations and redress, and cause many Roma to die without seeing justice. In addition, the historical narrative that emerged from the genocides saw the Roma as challenging the ingrained understanding of the genocides as a Jewish event instead of events which were inflicted upon Jews *and* Roma.

The marginalisation of the Roma is also illustrated by the examination of those involved in the race-biological registration. Whereas the more famous – or 'infamous' – of those involved with the Holocaust were either put in trial or have disappeared, those directly working on the classification and registration of Sinti and Roma were not convicted for their part in the genocide. The primary scientists working for the Research Centre for Racial Hygiene, which drafted the racial rules for Roma and assisted in the registration of Roma utilised for deportation – Dr. Robert Ritter and Eva Justin – later worked for the Public Health Office in the Frankfurt municipality office as a medical officer and educational counsellor, respectively.[447]

9.3 Jewish Experiences within the Courts

Public perception of the trials following the end of World War II was that the crimes being prosecuted were primarily crimes against Jewish victims, as evidenced by the *Frankfurter Allgemeine Zeitung* reaction to the Roma/Sinti trial discussed in the previous sub-section. This generalisation is not accurate, however, because the trials often prosecuted individuals who committed murders involving a wide range of victims, although the majority of these victims were Jewish.

A series of trials occurred during Allied occupation, but the early- to mid-1950s were marked by a silence within the judicial community as West Germany devoted itself to reconstruction rather than issues related to coming to terms with the past. The federal German vice-chancellor enforced this view stating: 'that in the view of the legislative branch (Parliament) and the Executive (government), the process of coming to terms with the past in the sphere of criminal justice had been concluded.'[448] The creation of the *Central Office of the Judicial Administrations of the States for Investigation of Nazi Crimes* in 1958, however, marked a turning point in the pursuit of criminal justice. The years between 1958 and 1969 signified a more intensive effort to bring Nazi perpetrators, especially crimes involving the concentration camps, to trial; this period was followed by another resurgence beginning in 1979.[449]

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[447] Ibid. p. 163.
[448] Ibid. p. 152.
[449] Ibid.

Public perception of the trials have also been shaped by 'Nazi hunters', those individuals who, knowing that many Nazi perpetrators fled justice, dedicated their lives to researching the fate of war criminals and then exposing their crimes in order for them to be brought to justice. The most famous of these Nazi hunters was Simon Wiesenthal,[450] who began his work by creating lists of Nazi war criminals for the Allies following the liberation of Mauthausen concentration camp in 1945, where he was incarcerated. Wiesenthal then worked for the Jewish Central Committee for the United States zone. Upon his realisation in 1947 that the Allies would not be able to bring the majority of Nazi war criminals to justice, Wiesenthal - in addition to 30 other survivors - founded the Jewish Historical Documentation Center to gather information and evidence for future war crime trials. Wiesenthal claimed to have contributed to the arrest of over 1,000 individuals and through his tireless research and use of domestic and international pressure kept the idea of bringing Nazis to justice in public debate. Perhaps the most noted result of the hunt for Nazi war criminals was the capture of Adolf Eichmann by Israeli Mossad and Shin Bet agents in Buenos Aires in 1960. The agents subsequently smuggled Eichmann out of Argentina and brought him to Israel to stand charges.[451] This trial was significant in shaping public opinion, spawning books and movies regarding the trials. It also created widespread debate over political matters such as sovereignty and jurisdictional issues.

Although the number of perpetrators is now diminished due to the progress of time, social movement organisations, elite allies, and other individuals are still gathering evidence. The Simon Wiesenthal Center, named after the noted Nazi hunter, but not associated with Wiesenthal himself, was established in 1977. In July 2002, the centre established 'Operation Last Chance', with a press release noting:

> While the necessity of bringing Nazi war criminals to justice is becoming increasingly difficult, there are thousands of individuals who actively participated in the implementation of the Final Solution who have never been brought to justice. As the years pass, the chances of their being held accountable for their crimes is rapidly diminishing.
>
> As a result, the Simon Wiesenthal Center has launched "*Operation Last Chance,*" a program designed to maximize the collection of evidence, which will facilitate the prosecution of Nazi war criminals. Rewards of $10,000 (U.S)

[450] It has been noted that Simon Wiesenthal is a controversial figure. Inconsistencies in his work suggest that as far as his own personal biography he would exaggerate claims, however, his work towards researching and bringing to justice Nazi war criminals is well documented, and as the subject of multiple documentaries, interviews, honours, and books he is the single most well-known Nazi Hunter in history.
[451] "About Simon Wiesenthal," Simon Wiesenthal Center, http://www.kintera.org/site/pp.asp?c=fwLYKnN8LzH&b=242614, accessed on 7 May 2011.

are being offered for information that will lead to the conviction and punishment of Holocaust perpetrators.[452]

When Operation Last Chance started it was restricted only to Lithuania, Latvia and Estonia; it grew to encompass Poland, Romania, Austria, Croatia, Hungary, and Germany.[453]

9.4 Comparative Conclusions

The criminal justice system is not a perfect forum for restorative justice, however, the important psychological, political, legal, and historical aspects cannot be denied. The trials, which continue today, demonstrate that the genocide still haunts survivors and their allies. The indictments tend not to be the result of research conducted by states, but by the members of the redress and reparation movements – the social movement organisations, elite allies, and other individuals who believe that leaving Nazi war criminals unaccountable is unacceptable. It is through their mobilisation and organisation that individuals are still being found and put on trial. The major war crime trials established an historical memory of what happened, and proved without a doubt Nazi crimes against Jewish and Romani victims.

While public perception – both in the general populace and within the victimised community – tends to conclude that the trials have focused more on Jewish victims than other groups – that perception can be attributed partly due to the sheer number of Jewish victims. Six million Jewish dead is a horrifically high number and thus the evidence will be easier to find. Yet the perception that Roma have been denied criminal justice is also supported by the courts' refusal to recognise Roma and Sinti as victims of racial persecution until 1963, and a failure to recognise many of the crimes that occurred between 1933 and 1938. The refusal to allow evidence from Sinti and Roma individuals because of their 'suspect' nature also contributed to the perception that the Roma people could not obtain justice through the courts. Political opportunities were unavailable for them to access. This does not imply, however, that the trials for crimes against Jewish individuals were completely satisfactory. As one sees by the continued presence of trials to this day, many escaped justice and many more who were convicted faced little punishment.

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[452] "Operation Last Chance: Bringing Nazi War Criminals to Justice," Simon Wiesenthal Center, http://www.wiesenthal.com/site/apps/s/content.asp?c=lsKWLbPJLnF&b=4442915&ct=5852219, accessed on 22 April 2011.

[453] "Operation Last Chance," Simon Wiesenthal Center, http://www.operationlastchance.org/Countries.htm, accessed on 22 April 2011.

10. Other Forms of Restorative Justice

The bulk of this chapter has focused on reparatory and criminal justice, as this was the focus of the initial Jewish RRM. As discussed earlier, the initial norm entrepreneurs were working in an unknown environment. They were aware of the Flight Tax and the Nazi seizure of Jewish assets; however they were not aware of the large-scale devastation and loss of life until the conclusion of the war. In an international society where reparations had always meant fines paid to states, norm entrepreneurs were visionary in an attempt to obtain reparations and restitution on behalf of their victimised group. The immediate aftermath of the war came with the realisation of 6 million dead and a focus on bringing perpetrators to justice. The decades following the war continued to focus primarily on the reparatory and criminal justice forms of restorative justice. As these goals were increasingly met, the focus began to shift to include other forms of justice such as laws prohibiting Holocaust denial, the creation of memorials and monuments, and an increase of states apologising for their individual roles that contributed to the genocide.

10.1 Legislative Justice

The legislative actions on behalf of the Jewish redress and reparations movement are extensive. As previously discussed, citizenship was restored and guaranteed by West Germany's constitution. The most notable legislative actions, however, were the extensive Holocaust denial laws enacted. A number of countries throughout the world, primarily European, have enacted legislation which criminalises both denying the Holocaust and promoting Nazi ideology. Among the countries which do so are: Germany, Austria, Belgium, the Czech Republic, France, Liechtenstein, Lithuania, the Netherlands, Poland, Romani, Slovakia, Spain, Switzerland, and Israel. While enforcement of these laws can be sporadic, Germany itself strictly enforces the laws. Within Germany, the Nazi party has been designated a criminal organisation, thus the party itself, the insignia, and all materials relating to the party are banned.[454] Meanwhile the German Penal Code Section 130 Public Incitement prohibits the denial of, or playing down of, the Jewish genocide, specifically:

> (3) Whoever publicly or in a meeting approves of, denies or belittles an act committed under the rule of National Socialism of the type indicated in Section

[454] Michael J. Bazyler, 'Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism.' *Insights and Perspectives from Holocaust Researches and Historians*. Yad Vashem, http://www1.yadvashem.org/yv/en/holocaust/insights/podcast/holocaust_denial_laws.asp, accessed on 28 December 2010, p. 1.

6 subsection (1) of the Code of Crimes against International Law, in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or a fine.

(4) Whoever publicly or in a meeting disturbs the public peace in a manner that assaults the human dignity of the victims by approving of, denying or rendering harmless the violent and arbitrary National Socialist rule shall be punished with imprisonment for not more than three years or a fine.

Section 130 was passed in 1985 and revised in 1992, 2002, and 2005. Holocaust denial is deemed to be an insult to personal dignity, a fundamental concept in the German Constitution, and, as such, is illegal.[455] Holocaust denial laws are strictly enforced in Germany; however, there are no comparable prosecutions for laws regarding the Romani genocides – in fact it is not uncommon for Germans to deny that genocide occurred in regard to the Roma.[456]

10.2 Symbolic Justice

The previous forms of redress and reparations discussed within this chapter have centred largely on legal forms of redress within Germany: reparations, restitution, laws, and trials are all based on legislative acts and/or interpretations of law. Restorative justice, however, is not restricted to what has been legislated, and as outlined in Chapter Four, it can also take the form of symbolic redress. The following table highlights some important events and those that have had the most historical impact:

Table 5.10: Symbolic Justice[457]

1945	Karl Jaspers begins his debates over collective guilt in a class at Heidelberg University. This leads to the 1947 publication of *The Question of German Guilt* creating a discourse in which collective guilt can be debated and acknowledged.
19 Oct 1945	Stuttgart Declaration of Guilt issued by the Council of the Evangelical Church in Germany stating: 'We have caused immeasurable suffering in various countries and peoples.' The declaration was not well received by the population.
Nov 1945	British Army dedicates a memorial at Bergen-Belsen concentration camp.
11 Sept 1956	Memorial at Dachau concentration camp.
1963 - 1965	Auschwitz trial and numerous other concentration camps crimes became a focal point for social debates.
7 Dec 1970	West German Chancellor Willy Brandt kneels at the memorial to the victims of Warsaw Ghetto Uprising, expressing German sorrow and responsibility for the Holocaust. Brandt stated, 'I wanted on behalf of our people to ask for a pardon for the terrible crime that was carried out in Germany's misused name.'

[455] Ibid.

[456] See Table 5.9: Denial of Roma Memory and/or Reparations for both German and other denials. In addition, this claim is based on informal interviews in Berlin - January 2009.

[457] Sources include: Kritz, ed., *Transitional Justice*, vol. 2; Nobles, *The Politics of Official Apologies*; James E. Young, *At Memory's Edge: After-Images of the Holocaust in Contemporary Art and Architecture* (New Haven, CT: Yale University Press, 2000); James E. Young, *Holocaust Memorials and Meaning* (New Haven, CT: Yale University Press, 1993). Stefan Berg, 'A Project in Jeopardy: The Unending Battle over Berlin's Sinti and Roma Memorial,' *Spiegal*, 28 December 2010, http://www.spiegel.de/international/germany/0,1518,736716,00.html, accessed on 2 January 2011.

1979	The airing of the United States television series *Holocaust* generated strong public interest. The crimes became a more frequent topic within the school system and marked the emergence of a stronger historical consciousness within Germany.
1976 – 1981	The final concentration camp trial, the Maidanek trial sparked outrage for its length, behaviour of the prosecutor, and final sentencing. It is seen as more important as an historical reminder for Germans, rather than as punishment for the perpetrators.
7 October 1980	President Carter signs Public Law 96-388 establishing the United States Holocaust Memorial Council. 65 members are appointed however there are no Romani representatives. One of the purposes of the Memorial Council is to 'plan, construct, and oversee the operation of, a permanent living memorial museum to the victims of the Holocaust.'
August 1984	German President Roman Herzog stated, 'I ask for forgiveness for what has been done too you by Germans' following the laying of a wreath at a Warsaw uprising memorial.
1987	Sol Lewitt's *Black Form Dedicated to the Missing Jews* was installed in Münster; demolished that year and rebuilt in Hamburg in 1989.
1989	German journalist Lea Rosh organised a group to support the creation of a Holocaust memorial in Berlin – this will eventually result in the creation of the *Memorial to the Murdered Jews of Europe*.
1991 – 1996	Shimon Attie's European installation/exhibition *Acts of Remembrance* is displayed in various European cities.
1992	German government promised to create a memorial for the murdered Roma and Sinti; as of 28 December 2010; this still has not been completed.
22 April 1993	The *United States Holocaust Memorial Museum* is dedicated in Washington D.C.
March 1995	Lithuanian President Algirdas Brazauskas asks the Israeli Knesset for forgiveness: 'I, the president of Lithuania, bow my head in memory of the more than 200,000 Lithuanian Jews who perished. I ask for your forgiveness for the deeds of those Lithuanians who cruelly killed, shot, expelled and plundered the Jews.'
16 July 1995	French President Jacques Chirac issues an apology for the Vichy government's collaboration with the Nazis in deporting 320,000 French Jews to death camps.
1995	The International Red Cross issues an apology for its moral failure in not denouncing Nazi atrocities during World War II.
15 Jan 1997	Swiss President Jean-Pascal Delamuraz issues an apology for calling various Jewish organisations that were seeking compensation for Holocaust survivors as blackmailers.
16 March 1997	Opening of the *Documentation and Cultural Centre of German Sinti and Roma*
30 Sept 1997	The French Roman Catholic Church issues in apology for the role it played during the Holocaust and its silence during the Vichy Regime.
16 Mar 1998	The Vatican issues an apology for its silence and inaction during the Holocaust.
10 July 2001	Polish President Aleksander Kwasniewski issues an apology on behalf of himself and the Polish people, for the participation of Polish citizens in the massacre of Jewish citizens during World War II.
April 2003	Construction of the *Memorial to the Murdered Jews of Europe* is started in Berlin.
10 May 2005	*Memorial to the Murdered Jews of Europe* is inaugurated in Berlin.
2005	The United Nations and the European Union established 27 January as the International Holocaust Remembrance Day.

As we can see, there are many ways that symbolic and historical memory has been reflected both within Germany and within the larger international community. The above table is only a small selection of acts that have been implemented to memorialise the atrocity, as a complete accounting would take an entire thesis by itself. The *Topography of Terror Foundation* in Berlin has attempted a comprehensive list of Holocaust monuments, memorial sites, institutions, and museums in commemoration of

Nazi victims; their comprehensive database list 81 sites in Germany alone.[458] Of those listed in the database the majority are for victims at specific locations such as memorials for the victims of various concentration camps such as Dachau, Bergen-Belsen, and Buchenwald; of the other memorials six are labelled as Jewish and one as Roma/Sinti.

Each creation, installation, memorial, apology, etc. has a tendency to be contested and often evokes fierce public debate from all parties involved. For example, the group lobbying for the *Memorial to the Murdered Jews of Europe* went through two design competitions (one in 1995 and one in 1997), several controversies regarding design, language, materials, and the focus solely on Jewish victims. Building of the memorial did not begin until 2003 and was inaugurated in 2005. One controversy is of a comparative narrative; the Roma memorial, which had been promised in 1992 and located nearby in Tiergarten Park, has had its completion date postponed several times due to continual arguments regarding the language on the memorial, and other issues. As of Spring 2011 the memorial is not yet complete,[459] and unlikely to be finished in the near future.

Other ways that the Holocaust is remembered is through the variety of remembrance days that countries observe. The United Nations and the European Union recognise 27 January as the *International Day of Holocaust Remembrance Day*. This joins other various countries such as Israel, Czech Republic, France, Germany, Italy, the Netherlands, Poland, United Kingdom, the United States, and Romania who all have various remembrance days based on dates significant to them. Other countries mandate educational curriculum that educates the populace concerning the Holocaust.

The Jewish and Romani genocides have found representation in literature, films, academic works, and memorials. They often overlap as plaques have been erected at various concentration camp memorials commemorating both the Jewish and Romani victims, in addition to others who died under the Nazi regime. Perhaps one of the most important elements to consider when evaluating symbolic representation is that one reason that it is perceived that Jewish victims receive more recognition than others is due to the controversies that erupt over the memorials. When other victim groups are excluded from memorials and museums it creates further feelings of exclusion and persecution.

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[458] "Holocaust Memorials," Topography of Terror Foundation, http://www.memorial-museums.net, accessed on 15 April 2011.
[459] Berg, 'A Project in Jeopardy.'

11. Success and Failure of Redress and Reparation Movements

When the term reparations come to mind, most individuals tend to think of the Jewish reparations and redress movement. As the first comprehensive reparations programme it is the most well known, and held up as the defining understanding of what a reparations programme can and should include. This viewpoint is affirmed in Roy Brooks' summary of the German reparations programme: 'By most accounts, the post-war German redress program has been a success.'[460] This statement will be examined by an exploration of the model proposed in Chapter Four:

Figure 5.1: Analysis of Relative Success and Failure

Overall perceived value of restorative justice	State Recognition: Apologetic Stance	State Recognition: Regret/ Acknowledgement	State Recognition: Strategies of Denial
High	RRM Successful	N/A	N/A
Medium	RRM Partially Successful	RRM Partially Failed	Settlement
Low/ None	Not an RRM	Verbal Acknowledgement	RRM Failed

The following subsections will review the arguments that Germany has entered an apologetic stance towards the Jewish and Romani genocides and reiterates the argument that the overall perception of success in regard to the Jewish RRM is high, whereas the Romani RRM is seen as comparatively less successful.

11.1 State Recognition

West Germany has recognised the atrocities committed against the European Jewish population since its assumption of statehood. As previously stated, Chancellor Konrad Adenauer declared on 27 September 1951 that Germany had 'a duty of moral and material reparations.' This duty was carried out in the 1952 Luxembourg Agreements and subsequent redress and reparation legislation. Recognition of these

[460] Roy L Brooks, "A Reparations Success Story?" in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustices*, ed. Roy L. Brooks (New York: New York University Press 1999), p. 17.

horrific acts was also present in 1970 when Chancellor Willy Brandt knelt at the Warsaw Ghetto memorial and the opening of the *Memorial to the Murdered Jews of Europe* in 2005. It can be concluded from these events, in addition to the numerous other actions discussed during this chapter, that in regard to the Jewish reparations and redress movement, Germany has taken an apologetic stance and thus has officially recognised the Holocaust.

West Germany's recognition of the Romani genocide took a more convoluted route. From 1945 to 1962 the German courts and reparation boards continually denied that Romani populace were discriminated against on the basis of race – thus denying the genocide. In 1963 the West German Federal Court of Justice finally acknowledged the racial aspects of Romani discrimination enforced by the Third Reich as of 1938, thus allowing the Roma and Sinti to file for reparations and acknowledging that the Roma and Sinti were victims of the Nazi regime based on racial reasons. The inclusion of Roma in concentration camp memorials, plaques, and other symbolic representations indicates that within the reintegrated Germany the state has moved to an apologetic stance.

Table 5.11: German Stance towards Victimised Groups

	Denial	Acknowledgement	Statement of Regret	Apologetic Stance
German Genocide of European Jews				X
German Genocide of European Roma	X	X		X

Thus, this chapter illustrates by multiple acts of restorative justice and by the apologies issued that Germany is currently situation in an apologetic stance for both Jewish and Romani victims.

11.2 Perception of Restorative Justice

As discussed in Chapter Four, in order to determine the overall perceived value of restorative justice one has to examine four factors: historical memory, the offering of restorative justice by the state, acceptance of restorative justice by the victimised group, and the victimised group's satisfaction of the restorative justice received.

Historical Memory

The literature reviewed and discussed throughout this chapter indicates that Germany has established a fairly accurate historical memory. The state has done this through a wide variety of restorative justice actions discussed including domestic trials, reparation and restitution legislation, anti-denial legislation, memorials, and

monuments. These actions in addition to the extensive academic and biographical literature on the Holocaust - and to a lesser extent the *Baro Porrajmos* - reflect a common understanding and societal memory. This memory, I argue, as reflected throughout this chapter, would hold that the redress and reparations movement for Jewish and Romani survivors have been relatively successful. Thus, I have recorded a plus (+) in Figure 5.2 for both groups; indicating that history, in general, reflects that the reparations and redress movement has been at least partially successful in meeting their goals.

State Offering

As reviewed in various sections, West Germany has implemented restitution and reparation programmes (Appendix 4), created memorials, monuments, and publicly issued apologies such as Willy Brandt kneeling at the Warsaw Ghetto Uprising memorial. Although Roma were initially denied reparations and redress this position was eventually overturned and the state has included Romani memorials and/or plaques at concentration camp sites. I have demonstrated throughout this chapter that the state has offered varying acts of criminal, historical, reparatory, legislative, and symbolic justice. A plus (+) therefore has been recorded in Figure 5.2 for both groups; indicated that at the best the states had offered some form of restorative justice to the two groups discussed.

Acceptance by Victimised Group

As previously outlined, the Jewish victimised group was represented by Israel and the Claims Conference in 1952; on behalf of the victimised group they entered into negotiation, accepted a reparation treaty, and received said reparations. Norm entrepreneurs that had achieved reparation and restitution goals then either ceased mobilisation efforts, shifted their focus to administrating these funds, or lobbying for victims who have been excluded from these funds.[461] In addition, many members of the Jewish community participated in the design of and creation of memorials and monuments throughout Germany and have visited these sites. I thus conclude that the majority of individuals within this movement have accepted the redress and reparations as having been at least partially successful, and have recorded a plus (+) in Figure 5.2 for the Jewish RRM. Although there are differences in what has been offered, members of the Roma and Sinti community have accepted the reparations payments given by the

[461] See Conference on Jewish Material Claims Against German, http://www.claimscon.org, accessed on 16 March 2010.

state and have been successful in lobbying for inclusion in memorial sites. Therefore, I have recorded a plus (+) for the Romani as well.

Satisfaction of Victimised Group

As previously stated, the delay in restorative justice and the perceived inequality is reflected in the satisfaction levels of the victimised groups. Members of the Jewish RRM would seem to be at least partially satisfied with the redress and reparation movement from the literature and actions described throughout this chapter. The community has lent support and credence to the building of Holocaust memorials and monuments. Organisations once dedicated to obtaining redress and reparations have either ceased to exist, having met their initial goals and purposes, or have transformed into organisations who focus on other tasks and goals. Individuals, for the most part, have accepted redress and reparation payments. Thus, a plus (+) has been recorded in Figure 5.2 to indicate my conclusions that the Jewish community was at least partially satisfied with the redress and reparation movement.

Roma have successfully lobbied for and received acts of restorative justice; however, as previously stated I argue that overall the group is not as satisfied with the restorative justice actions undertaken by West Germany due to the disparity between the two groups. The denial of the atrocity until the 1960s, the silence of many historians regarding the Romani genocide, and for instance, the proposed Memorial to the Murdered Roma and Sinti, which began to be debated in 1993, and has been scheduled to be built since at least 2002, has not yet been built. Thus the perceived inequality and reluctance to recognise the Romani genocides, has lead the group to be unsatisfied and thus a negative (-) has been recorded for the Roma column. These scores are reflected:

Figure 5.2: German Reparation Programme Evaluation

Non-recognitive Factors	Jewish	Roma
Assement of historical memory	+	+
State offering of restorative justice	+	+
Acceptance by victimised group	+	+
Satisfaction of victimised group	+	−
Overall perceived value	High	Medium

Again this leads to the conclusion that the Jewish RRM has been relatively successful, whereas the Romani RRM has only been partially successful.

12. Political Opportunity and Differential Success

Having established that there has been a differential level of success in regard to the Jewish and Romani redress and reparation movement, I turn to the question of why there has been a difference. In Chapter One, I propose that there are four factors that affect the chances of success and failure: 1) increasing normative expectations of the domestic and international community that states will engage in reparation politics; 2) the presence or absence of influential allies, whether either domestic or international; 3) the openness of the political system; and 4) the inclusion of surviving victims within the membership of a strong political community. I will briefly examine each of these factors, relating them to the redress and reparation movement aspects already discussed throughout this chapter, to illustrate how they affected the success of each movement. Broader trends and the implications of this research will be discussed in Chapter Eight.

12.1 International Analysis: Normative Expectations

Prior to World War II, international society did not have redress and reparations norms in which different forms of restorative justice would be offered to a victimised group. Reparations were simply a function of states, in which losing states would have to compensate the victorious following war. Despite the state not being required to, Chancellor Adenauer entered into negotiations with Israel and representatives from civil society, with the negotiations culminating with the Luxembourg Agreement.

During the war, individuals and organisations throughout the world began to work towards restitution for German and European Jews during World War II. At this time, the extent of the fate of European Jews was still largely unknown. The new activists were aware of discriminatory treatment, as many were German nationals who had fled and, therefore, had been subjected to the Flight Tax, which included seizure of properties and revocation of citizenship. The main focus of these early norm entrepreneurs[462] was to submit a collective claim for seized assets. Following the end of

[462] In this particular case, the norm entrepreneurs were individuals and organisations who were familiar with the persecution in Germany, often refugees and emigrants themselves, who fled and had been subjected to the so-called Flight taxes and seizure of property by the German government.

the war, and with the realisation of the genocidal crimes that had been committed by the Nazi regime, these norm entrepreneurs broadened their claims to include the modern concept of reparations. Once the Luxembourg Agreement was signed, Germany implemented the first reparations law within Germany and provided reparations to Israel and the Claims Conference. Following the implementation of this law and with providing reparations to these two entities, all obligations under the reparations treaty had been met and a precedent for addressing the claims of a victimised group had been established.

Once domestic legislation had been passed and claims started to be awarded, legal and normative precedents were created. It is logical to conclude that individuals who were not included in the initial reparatory framework would then expect their needs to be addressed; this reasoning is strengthened by the fact that West Germany continued to pass reparations and restitution legislation, decades after its legal obligations had been met. The Jewish redress and reparations movement and Germany's response to the movement created the framework in which a normative trend could emerge.

As discussed in Chapter Two, the international community experienced several paradigm shifts including the emergence of international criminal law, international human rights, and the understanding of state responsibility for its own citizens in addition to the citizens of other states. The 1970s and the 1980s were increasingly marked with the question of how to come to terms with state crime, abuse, and injustice following regime change. Following these transitions from the authoritarian to a more democratic regime, a plethora of actions were taken by the state, as shown in Appendix 1, ranging from truth commissions to trials and purges. The more states engaged in these actions, the more it reinforced a normative idea that some form of redress and reparation was needed in order to come terms with the past and promote political reconciliation between the victimised populations and the state. Thus transitional justice and then reparation politics was the emergence of a field that examined this normative shift, which arose in direct response to German crimes upon their domestic populations.

When the first reparations and restitution programmes were being developed in West Germany, the norm entrepreneurs involved did not intend to create a shift within international society. Once the precedent was established, however, and the number of states engaging in reparation politics increased, it in turn increased the expectations of communities that had been victimised at the hands of the state. In addition, this

expectation would eventually work in the favour of the Romani population. Germany, despite its initial denial of redress and reparations for the Roma, would also be subject to this increasing normative expectation that redress demands would be met.

The Jewish RRM began mobilisation in the 1930s and achieved the first of their demands immediately after World War II. Once the Jewish RRM began to have its demands met other groups came forward such as the Romani and victims of forced labour.[463] Although these claims were initially denied, as time progressed the normative expectations of both the victims and the states that Germany should respond increased. In response to these expectations and continued mobilisations, Germany signed reparations legislation for the Roma in 1981, expanded this legislation in 1988, in addition to other measures discussed throughout this chapter.

12.2 Domestic Analysis: Elite Allies, Political Opportunities, and Inclusion

The differential application of success for the Jewish and Romani redress and reparation movement was heavily influenced by the presence of elite allies on both the domestic and international levels in addition to the openness of the system to the groups and the inclusion of these groups in the wider international community. When discussing the openness of the political system, I refer here to the individual group's access, in addition to the overall openness of the system. The survivors of both the Holocaust and the *Baro Porrajmos* were not, in general, former German citizens. The majority of both German Jews and German Roma were killed under Hitler's regime, thus the bulk of the survivors came from other European countries. Strong Diasporas throughout the world represented the Jewish community whereas the Romani community was a more fragmented community viewed through an extremely discriminatory lens. The Jewish community, represented by Israel, and those outside of Israel represented by the Claims Conference, were invited by the West German government to participate in negotiations for the reparations treaty. There was neither a similar invitation to the Romani representatives, nor to any other victimised group.

As previously discussed, Chancellor Adenauer was a driving force behind West Germany accepting responsibility for the Holocaust and engaging in reparation politics. Without the Chancellor's continued support and drive to enter negotiations, sign the reparations treaty, and persuade his own government that it was in their duty to offer redress and reparations, the Jewish RRM would not have succeeded. In addition, elite

[463] See Brooks, *When Sorry Isn't Enough;* and "Forced Labour Compensation Programme, Germany," International Organization for Migration, http://www.iom.int/jahia/Jahia/activities/by-theme/reparation-programmes/forced-labour-compensation-programme, accessed on 1 May 2011.

allies who mobilised the Jewish community and worked towards the achievement of RRM goals, including negotiating on behalf of Israel were extremely important, as were those who operated within German domestic society to convince people that Germany should come to terms with their past. The Romani RRM had access neither to these same elite allies nor to the political system. Many of those allies who worked on behalf of the Jewish RRM were not concerned with the Romani population, at least in part because some, such as reparations advocate Otto Küster, felt that the Roma were not persecuted on racial grounds, but because they were criminals.[464]

As previously discussed, the Jewish RRM began to mobilise in the 1930s following Adolf Hitler's accession to power. The crux of the mobilisation, however, was not in Germany but throughout the countries where there were strong migration of the Jewish Diaspora. Thus the United States, Mexico, Palestine, United Kingdom, and Geneva were home to organisations advocating reparations and restitution be paid at the conclusion of the war. The Jewish Diaspora who influenced the mobilisation of the community were also highly educated and trained in various disciplines such as law. They brought their knowledge and their expertise to organisations, lobbied potential allies in Allied governmental positions and in general utilised communication tools of the day to coordinate activities. When the war concluded, the elite allies within the Jewish community and the elite allies that emerged within German domestic society were poised to negotiate for redress and reparation.

The evolution of the Romani RRM and the elite allies within the organisations supporting redress and reparation were not as well organised and in regard to the timeline, took much longer to mobilise. The first organisations for redress and reparation did not begin their mobilisation until 1945, at the conclusion of the war. The movement, started in Allied occupied Germany began with the creation of a single organisation which had little success in meeting its goals. Additionally, whereas anti-Semitism is now met with international disapproval, anti-Gypsyim still remains prevalent throughout international society[465] and obtaining recognition of the event can still can be quite difficult.[466] In addition, while the Nazi legislation was largely overturned, the Roma were persecuted largely under legislation passed during the

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[464] Wippermann, "Compensation Withheld," p. 175.

[465] For example in 2010, large-scale deportations of Roma were carried out in France. Kim Willsher, "France's Deportation of Roma Shown to be Illegal in Leaked Memo, Say Critics," *Guardian*, 13 September 2010.

[466] Ian Hancock, "Romani Victims of the Holocaust and Swiss Complicity," in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustices*, ed. Roy L. Brooks (New York: New York University Press 1999), p. 74.

Weimar Republic. Roma were considered to be criminals. Thus, any allies would first have to overcome public perception before they could make substantial progress towards redress. Finally, as previously discussed, Roma were marginalised in society, they were often excluded from professions and education, or their nomadic lifestyle excluded middle and upper class professions and educational opportunities. As time progressed, integration in some Roma Diasporas has led to this trend no longer being applicable to the groups; however, in the immediate aftermath, there were not many leaders with experience in law or higher education available to assist in redress and reparations.

The factors of allies, openness, and inclusion can thus partially explain the differential success between the two groups. The Jewish RRM began to mobilise in 1933; it had 12 years to explore reparation and redress options before the war ended. The inclusion of the victimised group in broader and stronger communities throughout international society, gave rise to educated leaders of the movement who were highly influential and gained both domestic and international allies. The Romani however, were excluded from these allies and were not mobilise until 1945. In addition, Roma were excluded from the court systems. The reparations legislation and those who charge of reparations were hostile to the idea of Romani claims. Even after Roma won the right to be included as those victimised by race, they were still excluded by those who would as previously discussed, lose their citizenship papers and property papers. It then took 18 years for the German government to acknowledge that the group was persecuted on the basis of race and not on inherent criminal behaviour. Anti-Gypsyim is still strong today, although the Romani Diasporas have more international support than before, their RRM does not have a comparable support network.

I conclude that, while measuring success and failure is necessarily subjective to some extent, we can nonetheless say that the Jewish reparations and redress movement has been more successful than the Romani reparations and redress movement. The Jewish victimised group had more inclusion in the international community, more access to the political structure, and more access to elite allies than the Roma and this differential access is reflected in their success rate.

Chapter Six:
Redress and Reparation Movements following the United States Internments

In the case of the German genocides, it is clear that the Allied governments played an important role in promoting redress and reparations; however, one Allied government – the United States – had its own wartime atrocity to address. Although the crimes in this case are by no means the extreme and horrendous display of the Holocaust, today they would be defined as crimes against humanity, according to the Rome Statute. The forcible transfer of a population (i.e. the internment process) was widespread and systematic, targeted a civilian population, and persecuted this population on the basis of ethnicity. Although the United States supported the idea of redress and reparations in West Germany, the subsequent redress and reparation movement for crimes committed by their own government during World War II was not well received and, I would argue, was not successful until 1988.

There was, I argue, an emergence of a redress and reparation norm following the success of Israel and the Claims Conference in obtaining a reparations agreement; however, this success was initially isolated to West Germany. With the emergence of the Cold War, the international system's regard for human rights particularly with respect to redress to victims arguably froze. Redress and reparations was simply not a priority among either the superpowers or the neutral states. It was not until the 1970s and 1980s that the idea of reparations and redress began to re-emerge as part of a transitional justice framework. As states, particularly in South America, began the transition to more democratic regimes, they utilised a variety of methods such as truth commissions, trials, and reparations depending on the event(s) and locale. Thus, there was a precedent for redress and reparations. Restorative justice actions, however, normally occurred following the transition from an authoritarian regime to a democratic regime; West Germany was certainly not an exception to this trend, whereas the United States in 1988 was.

This chapter will examine two redress and reparation movements which emerged from the United States: that of the Japanese American internments and the Japanese Latin American internments.[467] These two groups were interned based solely on their ethnicity. Ultimately, the Japanese American redress and reparation movement was more successful than the Japanese Latin American redress and reparation

[467] There were other groups interned, however, these individuals were selected based on alleged guilt, or in the case of the Aleuts, a genuine military necessity. Within the Latin American internees, I will focus primarily on those from Peru as 80% of the internees came from this country.

movement, while several lawsuits seeking equal recognition and reparations for the Japanese Latin American internees remain pending. The success (or partial success) of these movements is significant because it represents a major power within international society offering redress and reparations without a regime change. I would argue that the United States' embrace of the redress and reparation norm has caused a tipping point, allowing a norm cascade to begin.

1. Japanese American Internments

The Japanese American redress and reparation movement discussed in this chapter sought restorative justice for the violation of civil liberties inflicted upon both US citizens and permanent residents of Japanese ancestry beginning with President Roosevelt's issuance of Executive Order 9066 in 1942 through the conclusion of the internment programme in 1946.[468] The Japanese Latin American redress and reparation movement did not emerge as a separate redress and reparation movement until they were denied reparations and apologies in 1988 on the basis that members of this victimised community were not United States citizens when the internments occurred and thus ineligible for redress.

During World War II, Japanese Americans and Japanese permanent residents were forcibly relocated and interned on the basis of ethnicity alone. Japanese Americans, as will be discussed, fought the internments in court, arguing that United States citizens should not be denied their civil and political rights on the basis of their ethnic or racial identity. The courts denied them their rights, upholding the right of the United States government to intern approximately 120,000 Japanese Americans without trials or proof of wrongdoing. This however, had not been the first time citizenship rights had been denied to the group on the basis of race. Citizenship policies prior to World War II will briefly be examined to illustrate the previous inclusion/exclusion policies of minority groups within the United States.

1.1 Citizenship and Naturalisation Laws

Prior to the American Civil War (1861-1865), citizenship within the United States was granted on the basis of skin colour. While the United States Constitution did not explicitly define who was or was not a citizen, the Articles of Confederation (1777) did state: 'the free inhabitants of each of these States, paupers, vagabonds, and fugitives

[468] The internment ended in 1944; however, the War Relocation Authority closed the last camp in 1946.

from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States.'[469] In addition, the first naturalisation law in 1790 restricted the right to become a citizen to 'free White persons.'[470] This colour bias was reaffirmed in the 1857 Supreme Court case *Dred Scott v. Sanford.*

The *Dred Scott* case argued that Scott as a free person who was born in the United States was, by law, a citizen.[471] Chief Justice Taney delivered the court's opinion that those who had been brought to the United States as slaves and their descendants were ineligible for citizenship because, although the Constitution did not explicitly state the requirements for citizenship, the implicit understanding of the Articles of Confederation and naturalisation laws was that citizenship could only be granted to the 'white race,' regardless of birth within the territorial boundaries of the United States.

This implicit understanding of citizenship changed in 1868, when citizenship within the United States shifted to being based on the principle of *jus soli*, or place of birth. The 14th amendment set forth a clear definition of a citizen: 'All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' This amendment is based, not upon the United States as an immigration country, but upon the inclusion of the African American population as citizenry in the post-Civil War reconstruction and was intended to safeguard the principles stated in the 1866 Civil Rights Act (which first set forth the position of citizenship via birth within the United States). Likewise, in 1870, Congress amended the naturalisation law to extend citizenship to 'aliens being free white persons, and to aliens of African nativity and to persons of African descent,'[472] as part of the post-war reconstruction since the abolition of slavery in 1865. This meant that citizenship and the rights inherent within were supposedly for those born within the territory of the US and aliens who were black or white according to the governmental offices; however it left interpretation for races which the United States deemed to be neither.[473]

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[469] "Articles of Confederation: March 1, 1781", The Avalon Project, http://avalon.law.yale.edu/18th_century/artconf.asp, accessed on 14 March 2011.
[470] "A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 - 1875." Washington DC: Library of Congress, 1 May 2003.
[471] *Dred Scott v. Sanford*, 60 U.S. 393, 1857.
[472] Quoted in *Ozawa v. United States*, 260 U.S. 178, 1922.
[473] Asians born in the United States continued to be denied citizenship until the 1898 Supreme Court Case *United States v. Wong Kim Ark*. The courts found that the 14th amendment applied to all those born in the United States, regardless of race and ethnicity. Thus, 30 years after the introduction of *jus soli*, it truly became the case. See *United States v. Wong Kim Ark*, 169 U.S. 649, 1898.

Although the 14th Amendment allowed for Asians born within the United States to be considered American citizens, naturalisation laws continued to exclude Asians. Japanese citizens, who were neither black nor white, were banned from naturalising within the United States. This ban was upheld in the Supreme Court case, *Ozawa v. United States* (1922) which ruled that 'the words "white persons" were meant to indicate only a person of what is popularly known as the Caucasian race' and since Ozawa was 'clearly of a race which is not Caucasian'[474] he therefore was ineligible for naturalisation. Further, it was the opinion of the court that the original naturalisation laws provided:

> [n]ot that Negroes and Indians shall be excluded but it is, in effect, that only free white persons shall be included. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.[475]

The results of this court case effectively denied the right of naturalisation to any race deemed to not be Caucasian.[476] Japanese citizens were not granted the right to naturalise until 1952, in the form of the McCarran-Walter Act. This act eliminated racial considerations in regard to naturalisation, however, set strict quotas on immigration, allowing only 2,000 Asians to immigrate annually, a restriction which remained in place until 1965.[477]

Discrimination against Japanese immigrants to the United States encompassed more actions than the exclusion of the group from citizenship. Prior to the outbreak of World War II, individual states passed legislation that discriminated against both Japanese immigrants and those of Japanese ancestry who were citizens. Various states crafted laws stating that aliens who were unable to naturalise were prohibited from purchasing land or obtaining certain business licenses. Laws were also passed in many states forbidding inter-racial marriages between whites and Asians. In addition, societal discrimination often led to individuals being refused bank loans, educational opportunities, and jobs.[478]

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[474] *Ozawa v. United States.*
[475] Ibid.
[476] *United States v. Thind*, clarified that individuals deemed Caucasian but not White were also ineligible for naturalisation. *United States v. Thind*, 261 U.S. 204, 1923.
[477] Comparatively, 2/3 of the yearly quota was given to Great Britain, Germany, and Ireland. Eric K. Yamamoto, Margaret Chon, Carol L. Izumi, Jerry Kang, and Frank H. Wu, *Race, Rights and Reparation: Law and the Japanese American Internment* (New York: Aspen Law & Business, 2001), pp. 262-263.
[478] Ibid. pp. 37-38.

1.2 The Internment Process

The United States entered World War II following the surprise bombing of Pearl Harbor by the Japanese on 7 December 1941. Steps towards the internment process were quickly taken the following month as representatives attending the *Conference of Foreign Ministers of the American Republics*, held in Brazil, offered to pay full costs for the deportation, transportation, and detention of Axis nationals. This was done with the stated intention of trading these nationals in exchange for American citizens.[479] This agreement was the basis for the Japanese Latin American internments. On 19 February 1942, President Roosevelt issued Executive Order 9066, which authorised the Secretary of War and military commanders selected by the Secretary of War, to prescribe military areas from which individuals designated by the commander could be excluded.[480] Executive Order 9066 served as the legal basis for the Japanese American internments. Whereas Executive Order 9102 ordered the creation of the War Relocation Authority (WRA) – a governmental civilian agency – on 18 March 1942 to plan, implement, and supervise the internment of those designated by the military commander as necessary. The internment process was not gradual, it happened fairly quickly with the majority of laws, Public Proclamations, and population transfers happening March of 1942. The following table illustrates the procession of the internments:

Table 6.1: Evolution of Japanese American Internment Process[481]

7 Dec 1941	Japan bombed Pearl Harbor.
Jan 1942	Conference of Foreign Ministers of the American Republics
19 Feb 1942	President Roosevelt issued Executive Order 9066.
20 Feb 1942	The Secretary of War designated Lt. General J. L. DeWitt as the Military Commander of the Western Defence Command.
2 Mar 1942	Public Proclamation Number One issued: designated all areas along the West Coast, including the states of California, Washington, Oregon, and Arizona to be Military Areas One and Two.
16 Mar 1942	Public Proclamation Number Two expanded the Military Areas (Three through Six) to include Idaho, Montana, Nevada, and Utah.
18 Mar 1942	Executive Order 9102 ordered the creation of the War Relocation Authority.
21 Mar 1942	Congress unanimously enacted section 1383 of Title 18 of the U.S. Code - Public Law 503 - which made obedience of the military orders mandatory, and failure to comply with said orders subject to criminal penalties.
24 Mar 1942	Public Proclamation Number Three issued, to be effective as of 27 March 1942.

[479] Mitchell T. Maki, Harry H. L. Kitano, and S. Megan Berthold, *Achieving the Impossible Dream: How Japanese Americans Obtained Redress*, ed. Roger Daniels (Chicago: University of Illinois Press, 1999), p. 33.

[480] "Transcript of Executive Order 9066: Resulting in the Relocation of Japanese (1942)," *Our Documents*, http://www.ourdocuments.gov/doc.php?flash=false&doc=74&page=transcript, accessed on 9 September 2006.

[481] Sources include: Maki, Kitano, and Berthold, *Achieving the Impossible Dream*; *Gordon Hirabayashi V. United States* 320 US 81, 1943; *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians* (Seattle: University of Washington Press, 1982).

23 Mar – 22 July 1942	General Dewitt issued 108 Civilian Exclusion Orders; each exclusion order gave individuals with Japanese ancestry a few days in which to dispose of their possessions and to report to a Civil Control Station.
29 Mar 1942	Public Proclamation Number Four forbade anyone with Japanese heritage to leave the military zones.
27 June 1942	Public Proclamation Number Eight stated that evacuees could not leave the assembly centers or relocation centers without authorisation from DeWitt's office.
17 December 1944	Public Proclamation Number 21 was issued ending officially ending the internment as of 2 January 1945.
25 June 1946	Executive Order 9742 officially terminated the War Relocation Authority as of 30 June 1946

Following General Dewitt's designation of the West Coast and neighbouring states as military areas, Dewitt issued a proclamation that would begin the process of isolating those with Japanese ancestry, regardless of their citizenship status. Public Proclamation No. 3, declared:

> [a]ll alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1 . . . shall be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M.[482]

Additionally, the proclamation restricted the free movement of Japanese Americans, forbidding them from travelling more than five miles from their homes and places of work during non-curfew hours.[483] The curfew, in addition to being unfair in its targeting of Japanese Americans, also had an adverse effect on the many business owners who found it extremely difficult to be confined to their homes during periods when they would usually be working.

Between March and July 1942, General Dewitt issued 108 different Civilian Exclusion Orders. These orders forbade 'all persons of Japanese ancestry, both alien and non-alien' from remaining in the specified areas and instructed them to report to a specific Civil Control Station. The exclusion orders often gave a short period of time in which those of Japanese ancestry had to vacate their homes and often led to families losing their homes, businesses, and possessions or having to sell everything at a fraction of the cost. Additionally, Public Proclamation Number Four, issued a week after the first exclusion order, forbade all persons with Japanese ancestry from leaving the military areas. These two orders, in conjunction, meant that Japanese Americans and resident aliens had no option other to report to the authorities for relocation to an assembly centre. The assembly centres – often constructed hastily at fairgrounds and racing tracks with entire families assigned to a single stall – were merely an

[482] *Gordon Hirabayashi V. United States* quoting Public Proclamation No. 3. 7 Federal Register 2543.
[483] Irons, *Justice At War*, p. 70.

intermediary step between exclusion and internment. From these assembly centres, Japanese Americans were sent out to one of ten designated internment camps. By 1 November 1942, the government held over 106,770 individuals within the internment camps.[484]

Contradicting the government's position that the exclusion was necessary due to an inability to distinguish the loyal from disloyal, the War Relocation Authority (WRA) established a loyalty review programme and began to administer it in February of 1943. The resulting answers were utilised to separate those perceived as loyal from those perceived to be disloyal. Those designated as loyal, however, were not automatically granted leave – they were still excluded from returning to Military Areas, and for those willing to live in areas other than their previous homes, they had to meet stringent requirements, which was often a guaranteed sponsorship including jobs and/or school, in addition to needing WRA approval for said leave.[485]

In addition to those processed through the WRA camps and pursuant to the agreement made at the *Conference of Foreign Ministers of the American Republics*, Japanese Latin Americans were detained in Latin America and transported to detention centres in Panama and the United States. As well as the above-mentioned conditions of the camps in general, many of the Peruvian arrivals were abducted from their homes, despite the lack of credible evidence showing that they were a threat to either the Latin American countries or to the United Sates. There were no warrants issued, no hearings, and no appeals. The United States ordered their American consuls in Latin America to refuse to issue any visas to anyone who was being deported. Passports and citizenship documents were confiscated before arrival and upon entry into the United States; the Latin Americans were placed into Department of Justice (DOJ)[486] camps administered by the Immigration and Naturalization Services, for illegal entry.[487]

Overall, the exclusion orders and continued detention affected the majority of the Japanese Americans and Japanese permanent residents. During the internment,

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[484] *Personal Justice Denied*, p. 149.
[485] *Personal Justice Denied*, pp. 180 – 212.
[486] The Department of Justice camps were administered by the Immigration and Naturalization Services and dealt with enemy aliens. Japanese Latin Americans were processed through these camps as they entered the United States, even though they were transported to the US against their will.
[487] United Nations Economic and Social Council, *Question on the Human Rights Of All Persons Subjected to any Form of Detention or Imprisonment: Arbitrary Detention of Latin Americans of Japanese Ancestry*. E/CN.4/1998/NGO/90; C. Harvey Gardiner, *Pawns in a Triangle of Hate: The Peruvian Japanese and the United States* (Seattle: University of Washington Press, 1981), p. 29; *Mochizuki v United States*, 43 Fed. Cl. 97, 97 (Fed. Cl. 1999); and *Personal Justice Denied*, p. 308.

there were 120,313 people processed through the War Relocation Authority camps.[488] Comparatively in 1940, there were 126,947 people residing within the United States who were classified as Japanese, 79,642 being native-born citizens.[489] The internment of the Japanese Americans and permanent resident aliens thus represented the majority of those with Japanese ancestry who lived in the United States. Some 93% of individuals of Japanese ancestry lived in three of the exclusion states: California, Oregon, and Washington. In addition, thousands more were processed in camps administered by the Department of Justice including more than 2,264 Japanese Latin Americans with 1,800 individuals received from Peru, and the Native Aleuts processed through the Office of Intergovernmental Affairs (OIA).[490]

The internment officially ended on 17 December 1944, however, reintegration proved to be a long and tedious problem as the experience had left deep wounds on the victimised community. The 'all-camp conference' – a conference of the community's leaders and representatives – led to the identification of three major problems facing the community: the complete destruction of all financial stability, mental suffering caused by the evacuation and internment, and harsh living conditions in the internment camps themselves. These issues contributed directly to a problem not anticipated by the WRA authorities. The harsh psychological conditions of the camp created a dependency for many of the internees. Many refused to leave the perceived safety of the camp, especially the older foreign-born generation. Having no homes, no businesses, and fearing the public's reaction to an influx of people, many were fearful of how they would survive if they were to leave. Rumours concerning the difficulty of relocation filtered back to the camps further frightening the population. Thus, as of August 1945, there were still 44,000 people who had not left the internment camps. When many

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[488] The WRA camps consisted primarily of Japanese Americans or Japanese permanent residences; however, some non-Asian spouses joined their families in the internment camps. Of the 120,313 people under the control of the War Relocation Authority, there were 1,118 individuals from Hawaii, 1,735 individuals from INS camps, and 219 voluntary residents (primarily non-Japanese spouses). For input-output data see Roger Daniels, "The Forced Migrations of West Coast Japanese Americans, 1942-1946: A Quantitative Note," in *Japanese Americans: From Relocation to Redress*, eds. Roger Daniels, Sandra C. Taylor, and Harry H.L. Kitano (Seattle: University of Washington Press, 1986), p. 74.

[489] *U.S. Census of Population and Housing, 1940: Summary Population and Housing Characteristics* (Washington: Government Printing Office, 1942). Of the 126,947 people residing within the United States in 1940 who were classified as Japanese; 93% lived in three of the exclusion states: California, Oregon, and Washington; 79,642 of those were native born citizens. This excludes the territory of Hawaii whose ethnic Japanese population comprised 32% of the populace. Hawaii's population was not interned, with the exception of approximately 2,000 people who were brought in immediately following Pearl Harbor. Hawaii was however, under martial law after Pearl Harbor.

[490] Native Aleuts from the territory of Alaska were processed though the OIA camps. The Aleuts were interned for their protection and safety, as 42 Aleuts had previously been captured and held as prisoners of war by the Japanese. Their treatment, however, was deplorable and they also received reparations and apologies in 1988.

refused to leave, the authorities conducted a final eviction from the camps with a three-day notice. Those who had not left by such time were escorted to the train station.

The Peruvian Japanese, as non-US citizens, were in an even more problematic situation. Peru, who had transported 80% of the deported, refused to take anyone back, regardless of citizenship status. With the United States having already declared the abductees illegal aliens, and with the refusal by the countries of origin to allow abductees to return, the United States began to deport the 'illegal aliens' to Japan. The American lawyer Wayne Collins, who filed on behalf of the remaining Japanese, brought this practise to an end. The courts declared that it was illegal to deport people to a country from which they had not originated.[491]

The abducted were now stateless citizens. Peru refused to allow them to return and it was illegal for the United States to deport them to Japan against their will. Under pressure from the United States, Peru agreed to allow approximately 80 people return, all of whom were Peruvian citizens or married to Peruvian citizens. Of the 2,264 sent to the United States, only 200 returned back to the countries from which they originated[492] whereas a total of 1,500 to 1,600 were sent to Japan. The question then arose of what to do with the remaining people. By this time there were approximately 300 remaining in the United States. In August 1946, with the assistance of Collins, they were 'paroled' to Seabrook, New Jersey. It was not until June 1951 that Public Law 414 made them eligible for U.S. citizenship.[493]

2. Civil Society Reacts to Interment Laws

The Japanese American Citizens League (JACL) was one of the most influential organisations within the redress and reparation movement within the United States and took an early role as a norm entrepreneur. Founded in 1929 for the purposes of fostering good citizenship and civic participation within the Japanese American community, the JACL was the first organisation created to address concerns specifically related to Japanese Americans.[494] Before 1942, the organisation was, for the most part, composed of a loose confederation of local chapters primarily on the West

[491] Saito, "Crossing the Border," pp. 12-13.
[492] United Nations Economic and Social Council, *Question on the Human Rights Of All Persons Subjected to any Form of Detention or Imprisonment.*
[493] C. Harvey Gardiner, "The Latin-American Japanese and World War II," in *Japanese Americans: From Relocation to Redress*, eds. Roger Daniels, Sandra C. Taylor, and Harry H.L. Kitano (Seattle: University of Washington Press, 1986), p. 145.
[494] "History of the Japanese American Citizens League," *JACL: Japanese American Citizens League*, http://www.jacl.org/about/jacl-history.htm, accessed on 10 March 2010.

Coast of the United States.[495] The JACL had little political power and, due to membership being restricted only to citizens, the group held only a minor role in most communities.[496] Due to the restrictive naturalisation policies at the time, first-generation Japanese immigrants, or *Issei*, could not become US citizens. They were, however, the primary leadership within the Japanese American community and held the majority of the communities' wealth.

The shift in political power was rapid. Following the bombing of Pearl Harbor the FBI picked up over a thousand prominent *Issei*. Organisations with connections to Japan, such as language schools, were shut down and thousands of second-generation Japanese Americans, those born in the United States and therefore US citizens, or *Nisei*, were dismissed from their jobs because of their Japanese ancestry; the result of these arrests, and subsequent actions, such as freezing 'enemy alien' bank accounts, led to a political and leadership vacuum.[497] The JACL, as the only established organisation for Japanese American citizens, was thrust into a leadership role, and as such was pivotal to guiding public opinion and reaction to the laws and decrees which established the Japanese American internment.

The JACL was initially opposed to the evacuation of Japanese Americans and Japanese permanent residents from the West Coast. Under pressure, and assurance that the evacuation would occur regardless of the JACL's support or opposition, the national board agreed to cooperate with the evacuation orders. Mike Masaoka, liaison between the JACL and the World War II government, reflected in his 1987 memoir *They Call Me Moses Masaoka*:

> Our government was asking us to cooperate in the violation of what we considered to be our fundamental rights. The first impulse was to refuse, to stand up for what we knew to be right.
>
> But on the other hand there were persuasive reasons for working with the government.
>
> First of all was the matter of loyalty. In a time of great national crisis the government, rightly or wrongly, fairly or unfairly, had demanded a sacrifice. Could we as loyal citizens refuse to respond? ... to defy our government's orders was to confirm its doubts about our loyalty.
>
> There was another important consideration. We had been led to believe that if we cooperated with the Army in the projected mass movement, the government would make every effort to be as helpful and humane as possible. Cooperation

[495] Mike Masaoka and Bill Hosokawa, *They Call Me Moses Masaoka: An American Saga* (New York: William Morrow & Co, 1987), p. 61.
[496] Ibid. p. 59.
[497] Ibid. p. 75.

> as in an indisputable demonstration of loyalty might help to speed our return to our homes. Moreover, we feared the consequences if Japanese Americans resisted evacuation orders and the Army moved in with bayonets to eject the people forcibly. ... At a time when Japan was still on the offensive, the American people could well consider us saboteurs if we forced the Army to take drastic action against us. ... I was determined that JACL must not give a doubting nation further cause to confuse the identity of Americans of Japanese origin with the Japanese enemy.[498]

The JACL voted in March of 1942 to cooperate fully with the exclusion orders and to assist Japanese Americans with this transition. Masaoka, however, also points out several times in the memoir that the JACL stance was to support the evacuation, not knowing that the evacuation would turn into a 'semipermanent confinement behind barb wire'.[499] The JACL later became one of the more influential and successful political groups that lobbied for Japanese American redress and reparation.

Other civil society organisations, including West Coast branches of the American Civil Liberties Union (ACLU), spoke out against the civil liberties violations. The ACLU's involvement in two of the court cases is discussed below. Organisations such as the *Pacific Coast Committee on American Principles and Fair Play Record*, the *American Friends Service Committee*, and the *Fellowship for Reconciliation* were also active. However, because they did not have much political clout, they tended to either assist Japanese Americans and permanent residents with jobs, relocation and assistance, or to raise funds for legal test cases rather than to become active with lobbying. In addition, it is important to note, that at this time civil society was not trying to obtain redress and reparations, but was rather concerned about securing rights for Japanese American citizens with an eye to reintegration in the future.

3. Legal Challenges to Internment

During the period of internment, there were four legal test cases for civil liberties violations. These challenges covered the constitutionality of each stage of the internment process (the curfew orders, exclusion, and the internment itself) and are as follows:

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[498] Ibid. p. 92.
[499] Ibid. p. 353.

Table 6.2: Legal Challenges to Internment

Initial Date	Final Court Case	Basis of Complaint	Decision Issued	Final Verdict
28 Mar 1942	*Minoru Yasui v. United States, 320 U.S 115*	Criminal: Violation of Public Proclamation Number Three	21 June 1943	Upheld conviction and constitutionality of curfew
16 May 1942	*Hirabayashi v United States 320 U.S. 81*	Criminal: Violation of Public Proclamation Number Three and Civilian Exclusion Order 57	21 June 1943	Upheld conviction and constitutionality of curfew; ignored exclusion order
30 May 1942	*Korematsu v. United States 323 U.S. 214*	Criminal: Violation of Exclusion Order 34	18 Dec 1944	Upheld conviction and constitutionality of exclusion order
12 July 1942	*Ex Parte Endo, 323 U.S. 283*	Civil: writ of *habeas corpus*[500]	18 Dec 1944	Endo entitled to unconditional release

These four cases served as the legal basis for challenges that gathered the support of independent actors and lawyers, legal entities such as local chapters of the ACLU, and became historically significant, eventually reaching the Supreme Court. While the Supreme Court held that the curfew and exclusion orders were valid and thus the challenge failed, the cases formed a segment of the redress and reparation movement in the 1980s with the filing of a writ of *coram nobis* for each case.

3.1 *Minoru Yasui v. United States*

The first legal challenge to the internments was in response to Public Proclamation Number Three, issued on 24 March 1942 to be effective as of 27 March. The proclamation mandated a curfew for: alien (i.e. non-US citizens) Germans, Italians, Japanese and all persons of Japanese ancestry. The curfew required 'enemy aliens' and everyone of Japanese descent who lived in a designated military zone to remain in their residences between the hours of eight pm and six am.[501] The curfew in conjunction with the passage of Public Law 503 on 21 March meant that those breaking the curfew would become subject to criminal penalties.

Minoru Yasui, JACL member, lawyer and army officer by training, had anticipated the upcoming internment and evacuation orders, and believed that the curfew order was unconstitutional. Yasui stated his belief that the problem laid not in the curfew itself or the targeting of enemy aliens:

> But Military Order Number 3 applied to all persons of Japanese ancestry. I said, "There the general is wrong, because it makes distinctions between [US] citizens on the basis of ancestry." That order infringed on my rights as a citizen.[502]

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[500] A writ of *habeas corpus* (Latin for 'You have the body') which summons the officials who have custody of a prisoner to appear in court to determine the legality of the prisoner's confinement.
[501] *Gordon Hirabayashi V. United States* 320 US 81, 63 s.ct. 1375 (1943).
[502] Quoted in Irons, *Justice At War*, p. 84.

The result of this belief was the attempted challenge to the internment. Yasui felt that if he challenged the curfew and won, the resulting legal statute could be utilised to block the upcoming internment of Japanese American citizens based on the sole rationale of ethnic heritage. Thus, on 28 March 1942, the day after the curfew was established, Yasui attempted to get arrested, including walking up to a policeman and showing his birth certificate. After failing to be arrested on the street, he resorted to walking into a police station and demanded arrest for violation of curfew order.[503] The delay in arrest was due to the relative newness of the law; however, within a few months, those of Japanese ancestry were excluded from the territory; thus subsequent arrests would have been for violations of the exclusion orders.

The initial court case was heard in the U.S. District Court in Oregon, where Judge James Alger Fee ruled that the curfew was unconstitutional when applied to U.S. citizens; however, Yasui had renounced his citizenship due to his work for the Japanese consulate. This was not true, however, simply the judge's inaccurate interpretation of consulate work. Yasui was thus found guilty and fined $5000 in addition to a one-year prison sentence.[504] The decision was appealed and reached the Supreme Court where the judges found he had not renounced his citizenship by simply working at the consulate. However, in conjunction with *Hirabayashi v. United States*, discussed below, the conviction for violating the curfew order was upheld.

The first test case for the internment process as a whole was disregarded by the JACL. The JACL had previously discussed creating a test case to challenge the constitutionality of the orders, and several members had volunteered to go to jail in order to create a legal test. However, they decided that there was no prospect of winning until after the crisis was past, and such a legal test demanded more resources than the JACL currently held.[505] The JACL, having promised their support to the government, reacted negatively to Yasui's decision to create a test case, and labelled his resistance activities as treacherous. Furthermore the JACL made clear it would not support any test cases by stating in the 7 April 1941 JACL bulletin: 'National Headquarters is unalterably opposed to test cases to determine the constitutionality of military regulations at this time.'[506] The local West Coast branches of the ACLU considered lending support to the case. However, the ACLU's national board decided that since Yasui had already secured a lawyer, and the lawyer had not approached the

[503] Irons, *Justice At War*, pp. 81 – 84.
[504] Maki, Kitano, and Berthold, *Achieving the Impossible Dream*, p. 35.
[505] Masaoka and Hosokawa, *They Call Me Moses Masaoka*, p. 96.
[506] Irons, *Justice At War*, p. 85.

ACLU with a request for assistance, and more importantly to the board, Yasui had worked at the Japanese consulate in Chicago before Pearl Harbor, the ACLU was not interested in pursuing the offer of any form of assistance.[507]

The JACL and ACLU's failure to support the test case is illustrative of the division within Japanese American society and civil society in general. While the majority of Japanese Americans complied with curfew, evacuation, and internment, a handful resisted, and four of the resisters' legal challenges went on to the Supreme Court as challenges to the constitutionality of each order, with the challengers receiving assistance from the legal community as needed.

3.2 *Hirabayashi v. United States*

The second challenge to the legality of the internment process occurred approximately six weeks after the hearing of the *Minoru Yasui* case, on 16 May 1942. The purpose of this challenge was to test the legality of the exclusion process. Similar to Yasui's plan, the defendant in this case – Gordon Kiyoshi Hirabayashi – decided to purposefully defy the law and then turned himself in to be arrested. Both individuals did not originally have support from civil society or other individuals, with the exception of friends and advice from lawyers sympathetic to their cause. Hirabayashi, a college student who had strong moral convictions, was an active member and leader within the local community. He was a YMCA officer, a leader within the Japanese Student's Club at the University of Washington, a member of the JACL, and active within the Quaker community.[508] Through the American Friends Service Community, he assisted Japanese Americans who were already subject to the exclusion order to find storage space for their belongings and transportation to the assembly points.[509] After discussion with friends and family, Hirabayashi decided to refuse to comply with the Civilian Exclusion Order to report to an assembly centre for relocation to an internment camp. In addition, he continued to refuse to comply with both the curfew and registration for relocation to an assembly centre.

During Hirabayashi's consultation with friends and legal counsel, rumour of his plans to challenge the evacuation orders reached the local chapter of the American Civil Liberties Union (ACLU). The ACLU quickly offered their assistance in turning a moral stand into a legal test case in order to attack the constitutionality of the exclusion

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[507] Ibid. p. 114.
[508] Ibid. pp. 89-90.
[509] The American Friends Service Committee (AFSC) is a Quaker organisation that includes people of various faiths who are committed to social justice, peace and humanitarian service. "American Friends Service Committee," http://afsc.org/about, accessed on 10 March 2010.

orders.[510] Hirabayashi, who had already typed up a document stating his moral and religious objections to the treatment Japanese Americans were being subjected to, agreed to allow the local branch of the ACLU to represent him, with the expectation that the case would eventually reach the Supreme Court. Hirabayashi then arranged for his lawyer to accompany him to the FBI office in order to turn himself in.[511] Among his reasons for resisting, he stated:

> This order for the mass evacuation of all persons of Japanese descent denies them the right to live. It forces thousands of energetic, law-abiding individuals to exist in a miserable psychological and a horrible physical atmosphere. This order limits to almost full extent the creative expression of those subjected. It kills the desire for a higher life. Hope for the future is exterminated. Human personalities are poisoned. ...
>
> If I were to register and cooperate under these circumstances, I would be giving helpless consent to the denial of practically all of the things which give me incentive to live. I must maintain my Christian principles. I consider it my duty to maintain the democratic standards for which this nation lives. Therefore I must refuse this order for evacuation.[512]

The FBI drove Hirabayashi to the registration office where he refused to fill out the registration forms for evacuation. Hirabayashi was then arrested for violation of Civilian Exclusion Order Number 57 and, after going through his paperwork and finding his personal journal, the FBI added failure to comply with the curfew order to his crimes. At this time, the exclusion process was approximately halfway completed as the last Civilian Exclusion Order – Number 108 – was issued in July. The U.S. District Court convicted him of both counts and sentenced him to 90 days in jail for each count, to be served concurrently.[513] The ACLU immediately appealed the case, with the lawyers arguing that the curfew was an 'unconstitutional delegation by Congress of its legislative power'[514] and that 'the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment.'[515] The Supreme Court utilised the concurrent sentences to examine the curfew issue only, stating: 'it is unnecessary on review to consider the validity of the sentence on both the counts if the sentence on one of them is sustainable.'[516] The court then ruled on the constitutionality of both the *Yasui* and *Hirabayashi* cases, upholding

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[510] Irons, *Justice At War*, pp. 92, 116.
[511] Ibid. p. 88.
[512] quoted in Irons, *Justice At War*, p. 88.
[513] Ibid. p. 159.
[514] *Gordon Hirabayashi V. United States.*
[515] Ibid.
[516] *Hirabayashi V. United States*, Art 1.

the constitutionality of the curfew in accordance with Executive Order 9066[517] and ignoring the question of the exclusion orders, thus postponing the legal debate on whether the United States could exclude an ethnicity, regardless of citizenship, without any evidence of individual disloyalty.

3.3 *Korematsu v. United States*

The third case that emerged was not, as were the previous two, originally planned as a test case. On 30 May 1942 Fred Toyosaburo Korematsu was arrested for violation of Civilian Exclusion Order No. 34, which forbade any person with Japanese ancestry from residing within the designated military zone. Korematsu was apprehended in San Leandro, California, three weeks after the exclusion order for that area had been issued. Korematsu stated that he remained in the area because he needed to earn money to take his fiancée – an Italian American – to the Midwest so that they could be together.[518]

At the same time that Korematsu was in jail, Ernest Besig, the director of the San Francisco branch of the ACLU, was attempting to find a candidate to challenge the constitutionality of the exclusion orders. Besig decided to visit three individuals who were currently in jail for violating the orders, and of the three, only Korematsu was willing to volunteer due to the public scrutiny that an anticipated challenge to the Supreme Court would produce. According to an FBI record, Korematsu 'stated that he believed that the statute under which he is imprisoned was wrong ... and that he intended to fight the case even before being approached by the Civil Liberties Union.'[519] Whereas the previous test candidates found support from their family and friends, Korematsu found little; however, his dedication to seeing the test case through the Supreme Court was reported to only increase throughout his sentence and internment.[520]

The federal judge assigned to the trial, Judge St. Sure, found Korematsu guilty and sentenced him to five years' probation and then declined to impose the sentence. When Korematsu's lawyer, Wayne Collins, announced that he wanted to file an appeal, St. Sure set bail at $2,500, which the ACLU promptly paid. Korematsu was then technically free to remain at liberty however military police took him into custody

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[517] Ibid.
[518] Irons, *Justice At War*, pp. 94-96.
[519] Ibid. p. 97.
[520] Ibid.

before he could leave the courtroom and escorted him under armed guard to the Presidio stockade prison to await transfer to the internment system.[521]

At this point, the national ACLU sent orders that the organisation needed to be disassociated from any appeals that objected to the constitutionality of President Roosevelt's Executive Order 9066. After debate between the local branch, which wanted to continue with the appeals process, and the national board, who did not wish to be associated with the appeal, a compromise was reached in which Wayne Collins would represent Korematsu as a private lawyer only and the ACLU's role would be limited to *amicus curiae*.[522]

The Supreme Court decision on the case found that the exclusion was deemed necessary due to the inability to determine disloyal individuals from the loyal, and as such the military needed to segregate those of Japanese origin.[523] Justice Roberts's dissenting opinion summarised the problem Japanese Americans and permanent residents faced:

> The predicament in which the petitioner thus found himself was this: he was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the program of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document -- and, in the light of the above recitation, I think it is not, -- that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.[524]

The *Korematsu* judgement was argued and delivered at the same time as the *Endo* judgement (discussed in the next section) – the day after the internment officially ended in 1944.

3.4 *Ex Parte Endo*

The final legal challenge was to the constitutionality of the continued detention of Japanese American citizens. This challenge differed from the previous test cases, as it was based on a civil procedure rather than the result of a criminal charge. The case began before any curfew or evacuation orders were issued, and resulted from a January 1942 phone call by JACL president Saburo Kido to San Francisco lawyer James Purcell in response to rumours that Japanese American state employees were going to be

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[521] Ibid. p. 154.
[522] 'Friend of the court' – organisation submits briefs and other information to the court, however, is not directly involved with the case. Irons, *Justice At War*, p. 168.
[523] *Toyosaburo Korematsu v. United States* 324 US 885, 65 s.ct. 674 (1944).
[524] *Korematsu v. United States*, 323 U.S. 214, 1944.

fired.[525] Purcell was working on a suit to challenge the unfair dismissals when the evacuation orders were issued, and his clients were required to report to the Tanforan assembly centre, located on a converted racetrack near San Francisco. Purcell visited his clients and was appalled by the conditions in which he found them: 'They'd put a family in a stall big enough for one horse, with whitewash over the manure. Guards with machine guns stood at the gates. I couldn't understand why innocent citizens were being treated this way.'[526] Purcell shifted his suit from the unjust purges of state employees of Japanese descent to attempting to locate an interned state employee on whose behalf he could file a habeas corpus petition in the federal court. Purcell created a questionnaire that was circulated among the more than 100 individuals who had been state employees and were confined to the centre. He chose 22-year-old Mitsuye Endo as a perfect test case and secured her permission via correspondence.[527]

Endo had been subjected to the 7 May 1942 Civilian Exclusion Order Number 52 which stated: 'all persons of Japanese ancestry, both alien and non-alien be excluded from Sacramento, California, beginning on May 16, 1942.' On 12 July 1942 Purcell filed the habeas corpus petition stating that Endo was a 'loyal and law – abiding citizen of the United States, that no charge has been made against her, that she is being unlawfully detained, and that she is confined in the relocation centre under armed guard and held there against her will.'[528] The writ was denied in July of 1943 and reached the Supreme Court in 1944. The Supreme Court opinion was 'whatever the power of the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.' The courts concluded that the military might have reason for the initial evacuation and initial detention at the relocation centres; however once the initial purpose had been served, i.e. the evacuation and initial determination of loyalty, then a civilian agency, such as the WRA, had no right to continue to detain loyal citizens. As such, Misuye Endo was to be granted unconditional release.[529]

The favourable ruling of the Endo petition was a hollow victory for two reasons. Although Endo was granted her freedom, the courts declined to address the constitutionality of the orders. Her freedom was granted based on administrative and statutory laws while ignoring the overall constitutional argument of whether the

[525] Irons, *Justice At War*, p. 100.
[526] quoted in Irons, *Justice At War*, p. 102.
[527] Irons, *Justice At War*, p. 102.
[528] *Ex parte Endo*, 323 U.S. 283 (1994).
[529] Ibid.

internment was valid. This, in theory, held out the solution that all of the interned could in fact gain their freedom by the same individual petition. The ruling did not address, however, whether it was acceptable to violate a group's constitutional rights, since each individual could be granted freedom through the same type of petition. The second reason that Endo was considered to be a hollow victory was due to its timing. The timing of the announcements suggests that the courts, in conjunction with government officials, deferred making a decision regarding the internment until after Roosevelt's November election, and then further delayed releasing their decision until Monday, December 18, 1944. It is notable that the day before, on a Sunday, the WRA announced that the internment was over.[530]

4. 1948 Japanese American Evacuation Claims Act

The first step towards redress and reparations was the 1948 Japanese American Evacuation Claims Act. The Claims Act was a form of reparatory justice as the intent was to compensate for property lost during the wartime exclusion and internment. Under this act, approximately $37 million was paid out in claims.[531] The act was a good step towards redress and reparation and yet, an inherently flawed process due to the bureaucratic imperfections inherent in the programme. Additionally and more fundamentally, it failed to address issues other than direct property loss, and therefore, I will argue, the programme failed to achieve substantial success in repairing the harm to the community. It is also important to note that compensation, i.e. payments for actual items lost due to the internment – was a legal concept the United States was comfortable with. The implementation of compensation was not unusual and did not require the United States adoption of new norms and if repairing the harm done to the community was the key aim; it did not succeed due to several key flaws outlined below.

The first problematic issue was that any property claims filed for had to be supported by substantive documentation such as receipts for each item claimed.[532] Normally such a request does not produce a burden upon a claimant; however, those interned often had little to no notice that they were being sent away, and thus had

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[530] *Personal Justice Denied*, pp. 227-236; Yamamoto, et. al, *Race, Rights and Reparation*, p. 232; and Irons, *Justice At War*, p. 276

[531] Irons, *Justice At War*, p. 348.

[532] Ibid.

trouble finding storage for important items, much less documentation and paperwork. Further, after four years of internment, much of the required documentation had been lost, and others now occupied some homes and businesses. Additionally, the documentation had to be corroborated with oral testimony.[533]

The second problematic issue was that the scope of the programme was insufficient. By the filing deadline there were 23,689 claims filed totalling close to $132 million, yet as previously stated, the Claims Act only paid out $37 million, or just over one-quarter of the amount sought.[534] In contrast, the Federal Reserve Bank had estimated that Japanese Americans lost $400 million in property alone,[535] while the Commission on Wartime Relocation and Internment of Civilians estimated property losses between $810 million and $2 billion at 1942 prices.[536] This does not include loss of earning and profits for businesses sold under duress of evacuation, nor were these types of claims included in the category property loss.[537]

A third issue was that the implementation of the programme was slow and expensive. The end of 1950 saw only 210 claims cleared, with a mere 73 individuals receiving money. An average of four claims was processed each month, and even a small monetary claim such as $450 cost an average of $1000 for the government to settle. By August 1951, an amendment to the law was passed which allowed claims under $2,500 to be processed without lengthy investigation. This caused lawyers to advise clients to settle for the compromise of $2,500 regardless of their claim, because compensation was being made on pre-war prices and many of the older generation would not be alive long enough to see the investigation conclude. Indeed the last claim was not settled until 1965.[538] To qualify for this programme, one had to be an United States citizen, thus the Japanese Latin Americans, who were removed from various Latin American countries to be interned by the United States, were excluded from the programme.

The act of compensation for property loss was severely flawed, and did not begin to compensate for the deprivation of constitutional rights, yet no other forms of redress or reparations gained political backing until the Commission on Wartime Relocation and Internment of Civilians in 1980.[539] This was largely due to the fact that

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[533] *Personal Justice Denied*, pp. 240-243.
[534] Masaoka and Hosokawa, *They Call Me Moses Masaoka*, p. 208.
[535] Irons, *Justice At War*, p. 348.
[536] Masaoka and Hosokawa, *They Call Me Moses Masaoka*, p. 209.
[537] Irons, *Justice At War*, p. 348.
[538] Ibid. p. 54; Yamamoto, et. al, *Race, Rights and Reparation*, pp. 240-241.
[539] Irons, *Justice At War*, p. 348.

the offering of minimal compensation for actual physical losses did not require an adoption of the new redress and reparations norm which had emerged. Further engagement would, however, especially in regard to the offering of reparations.

5. Actions Leading Towards a Redress and Reparation Movement

President Truman was responsible for commissioning the *President's Committee on Civil Rights*. The committee declared: 'The most striking mass interference since slavery with the right to physical freedom was the evacuation and exclusion of persons of Japanese descent from the West Coast during the past war.'[540] The Committee created several recommendations regarding the events, including further study on the subject,[541] which was not implemented until 1980, and was independent of this Committee's report. In addition, the report found that:

> 7. A review of our wartime evacuation and detention experience looking toward the development of a policy which will prevent the abridgment of civil rights of any person or groups because of race or ancestry. [original bolded]
>
> We believe it is fallacious to assume that there is a correlation between loyalty and race or national origin. The military must be allowed considerable discretionary power to protect national security in time of war. But we believe it is possible to establish safeguards against the evacuation and detention of whole groups because of their descent without endangering national security. The proposed permanent Commission on Civil Rights and the Joint Congressional Committee might well study this problem.
>
> 8. Enactment by Congress of legislation establishing a procedure by which claims of evacuees for specific property and business losses resulting from the wartime evacuation can be promptly considered and settled. [original bolded]
>
> The government has acknowledged that many Japanese American evacuees suffered considerable losses through its actions and through no fault of their own. We cannot erase all the scars of evacuation; we can reimburse those who present valid claims for material losses.[542]

President Truman subsequently signed the Japanese American Evacuation Claims Act of 1948, a measure for which the JACL had also been lobbying.[543] However, once the Claims Act was signed, most members of Congress believed that justice had been

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[540] *To Secure These Rights: The Report of the President's Committee on Civil Rights*, Truman Library, https://www.trumanlibrary.org/civilrights/ srights1.htm#contents, accessed on 1 September 2010, p. 30.
[541] Ibid. p. 31.
[542] Ibid. pp. 158 – 159.
[543] Masaoka and Hosokawa, *They Call Me Moses Masaoka*, p. 207.

served and the matter was now closed.[544] This viewpoint illustrates the dangers of relying strictly on compensation as it addressed none of the symbolic issues, offered no apologies, and did not take into account the feelings of the victimised community. The following shows the slow movement towards redress and reparations, between 1946 and 1969:

Table 6.3: Movement towards Redress and Reparations (1946 – 1969)[545]

1946	The national JACL convention adopts a post-war programme which includes reparations, researching the constitutionality of the internment process, and challenging the deportation of Japanese nationals.
Dec 1947	The *President's Committee on Civil Rights* report.
2 July 1948	Japanese American Evacuation Claims Act of 1948
27 June 1952	Immigration and Nationality Act of 1952 (also known as the McCarran-Walter Act) made Japanese eligible for citizenship.
15 July 1952	Public Law 82-545 (also known as the Nisei Civil Service Workers Act) restored seniority rights to Japanese Americans who were discriminated against during World War II.
21 Aug 1959	Hawaii becomes the 50th state.
14 Sept 1960	Public Law 86-782 expanded the Nisei Civil Service Workers Act.

As one can see, there was very little achieved in the years leading up to 1970. The focus of civil society was on securing equal rights, such as citizenship, and of rebuilding lives after the internments. The most important event during this time period was Hawaii's adoption of statehood. The admission of Hawaii as the fiftieth state brought a broadening of the political opportunity structure to include Asian Americans. With 65% of Hawaii's population either Asian or Pacific Islander,[546] political representation in the House of Representatives and Senate became a political reality: subsequently, Daniel Inouye became both the first United States Representative from Hawaii and the first Japanese American Representative. After one term in the House, Inouye was elected the first Japanese American in the Senate. Senator Inouye introduced the *Commission on Wartime Relocation and Internment of Civilians Act* (S.1647) in 1979 to Congress and be an extremely influential ally within the government.

It was not until the 1970s that the idea of seeking redress and reparation started to solidify within the Japanese American community, and subsequently two questions emerged: should they seek redress, and if so, what form of redress should they seek?[547] Several suggestions emerged including monetary reparations and the revocation of

[544] Ibid. p. 208.
[545] Source: Maki, Kitano, and Berthold, *Achieving the Impossible Dream;* "History of the Japanese American Citizens League."
[546] According to the *U.S. Census of Population and Housing, 1960: Summary Population and Housing Characteristics.*
[547] Maki, Kitano, and Berthold, *Achieving the Impossible Dream*, p. 65.

Executive Order 9066. The movement is generally considered to have been founded when Edison Uno introduced a redress and reparations resolution at the national bi-annual JACL convention. The initial resolution called for reparations for Japanese Americans or their heirs who were subject to the exclusion and internment orders during World War II and a $400 million dollar fund for community projects. The JACL adopted the proposal; however, no further action was taken. It seemed that the overall attitude within the general community was a feeling of reluctance to pursue the issue.[548]

The 1972 national JACL convention affirmed the previous redress resolution and demanded that evacuees be paid $5 for each day that they were interned – the amount was derived from that paid to American prisoners of war; however, it also limited the total reparations payments to the $400 million property loss previously estimated.[549] The JACL during this time period was the main proponent for Japanese American rights and for recognition and reparations for the internments. As shown below, the JACL acknowledged the idea of reparations several times over the next decade, with new organisations being formed to consider the redress and reparation issue in 1970 and 1980:

Table 6.4: Actions Undertaken by Civil Society (1970 – 1983)[550]

1970	Edison Uno made the first formal proposal for redress at the biannual JACL national convention, and the proposal is adopted.
1970	Bay Area Attorneys for Redress is founded in San Francisco. The organisation will later become Committee to Reverse the Japanese American Wartime Cases, and handle the *coram norbis* cases.
1972	JACL affirms the 1970 redress resolution at the national JACL meeting.
1973 – 1975	The Seattle Evacuation Redress Committee created the so-called 'Seattle Plan' in 1973 (revised 1975) calling for a payment of $5,000 per individual excluded or interned and $10 for each day of internment. This plan did include the Japanese Latin American internees as well as the Japanese American internees.
26 April 1975	E.O. 9066, Inc. formed in Los Angeles to educate the public and fight for redress. The organisation merged with the JACL programme in 1979.
May 1975; March 1976	The JACL Political Educational Committee recommended creating a separate committee for lobbying for reparations. The JACL then creates the National Committee for Redress (NCR).
1976	The JACL convention adopts a resolution calling for monetary reparations.
July 1978	The JACL adopts a resolution at its biannual convention calling for redress payments of $25,000 per individual and an apology by Congress acknowledging the wrong.
May 1979	National Council for Japanese American Redress (NCJAR) founded in opposition to the upcoming JACL decision to support a commission. The NCJAR goal is to obtain monetary redress for Japanese American victims of internment.
2 June 1979	JACL advocates establish a federal commission in order to investigate the internment of Japanese Americans during World War II and to make

[548] Ibid.

[549] Ibid. p. 66.

[550] Sources include: Maki, Kitano, and Berthold, *Achieving the Impossible Dream* and "History of the Japanese American Citizens League," LegiSchool Project, *The Japanese- American Internment During WWII: A Discussion of Civil Liberties Then and Now*, California State Capitol, May 2, 2000, http://bss.sfsu.edu/internment/history.html, accessed on 1 March 2011.

	recommendations to the Congress.
12 July 1980	National Coalition for Redress and Reparations (NCRR) established.
16 Mar 1983	NCJAR files a class action lawsuit seeking $200,000 in damages for internees.

Thus, one can see that the JACL was the main norm entrepreneur who had emerged; however other organisations stepped forward as well to work towards the obtainment of their goals. The major successes of the redress and reparations movement were the overturning of the World War II convictions (1983 – 1986) (i.e. criminal justice), the establishment of the Commission on Wartime Relocation and Interment of Civilians (1980-1983) (i.e. historical justice), and the Civil Liberties Act of 1988 (i.e. symbolic and reparatory justice). Each of these will be addressed in subsequent sections. It is important to note that the focus of the redress and reparation movement was Japanese Americans and permanent residents as these were the primary victims; however the idea of Japanese Latin Americans receiving redress was not excluded until the Civil Liberties Act of 1988.

6. Revisiting the Legal Challenges to Internment

With the wartime internment cases having been appealed to the highest court available – the Supreme Court - and the appeals having been lost, the constitutionality of the curfew, exclusion, and initial internments orders were a legal precedent and a matter of historical record. It implied that those who fought against the internment process were legally in the wrong and, in three of the cases; they were criminally liable for their protest actions. Furthermore, the United States court system is arranged according to the judicial principle of finality. One cannot, normally, secure a reversal of a decided case. The only option is to wait for a subsequent case to be presented, following which the previous case can be discredited.[551] There is one option that is a rare and seldom successful legal petition, the writ of *coram nobis*. The writ is only allowed under compelling circumstances to correct a grave injustice against an individual already convicted of a crime and having served his or her sentence.[552]

The three internment test cases that resulted in a conviction, - *Korematsu*, *Hirabayashi*, and *Yasui* - were re-examined in the 1980s by filing the above petition. The crux of the petitions was the argument that the government intentionally suppressed evidence at both the local courts and at the Supreme Court level, which

[551] Irons, *Justice At War*, p. 366.
[552] Ibid.

ultimately resulted in an unjust conviction. A measure of criminal justice could be achieved, if the petitioners could file *coram nobis* petitions and successful argue that these convictions were not justified and as such the internment process was not justified. The petitions identically stated that the 'Petitioner has recently discovered evidence that his prosecution was tainted, both at trial and during the appellate proceedings that followed, by numerous and related acts of governmental misconduct'[553] and argued the claims discussed below.

Claim one: 'Officials of the War Department altered and destroyed evidence and withheld knowledge of this evidence from the Department of Justice and the Supreme Court.'[554] The crux of the first issue was that General DeWitt, General of the Western Defence Zone, submitted an official report regarding the basis for his orders concerning the curfew and exclusion process. The report *Final Report: Japanese Evacuation from the West Coast 1942* was originally transmitted to the War Department on 15 April 1943. The Justice Department officials requested access to the Final Report for use in the *Hirabayashi* and *Yasui* briefs; however, when the War Department discovered that the report contained contradictory statements prepared for the court, the previous copies were ordered burned[555] and 'they subsequently concealed records of the report's receipt, destroyed record of its preparation, created records that falsely identified a revised version as the only report, and withheld the original version from the Justice Department.'[556] The government then submitted the altered copy to the Supreme Court. The alteration of this report was discovered by a government archivist in response to a request by Peter Irons when he was researching the internment cases published in his book *Justice At War*.

Claim two: 'Officials of the War Department and the Department of Justice suppressed evidence relative to the loyalty of Japanese Americans and to the alleged commission by them of acts of espionage.'[557] The second charge rested on the fact that the War Department suppressed evidence regarding Japanese loyalty and the refutation of alleged aspects of espionage. While researching the Supreme Court cases in the early 1980s, Peter Irons discovered documents that had been suppressed at the trial and subsequently misfiled. These were the Federal Communications Commission letter that debunked General DeWitt's claims that the Japanese were using radio to transmit

[553] Ibid. p. 370.
[554] Reprinted in Yamamoto, et. al, *Race, Rights and Reparation*, p. 290.
[555] Ibid. p. 294.
[556] Ibid. p. 290.
[557] Ibid.

sabotage orders. A memo from the Federal Bureau of Investigation debunking General DeWitt's claims of Japanese espionage, and a memo from the Office of Naval Intelligence which stated that the Japanese within the United States should be treated on an individual basis regardless of citizenship.[558]

Claim three: 'Government officials failed to advise the Supreme Court of the falsity of the allegations in the Final Report of General DeWitt.'[559] This point of the petition related to the fact that originally there was a footnote detailing that some facts may not be accurate within the report, however it was deleted before it reached the courts. Furthermore, the Solicitor General stated that 'every line, word and syllable' was correct, which, as previously stated, was known to be incorrect.'[560] Claims four discussed in the *Korematsu* brief had to do with the racial elements of the orders: '...Justice Department officials decided to utilize the doctrine of judicial notice in presenting "evidence" that the "racial characteristics" of Japanese Americans predisposed them to disloyalty.' [561] Again, this ignored or suppressing all contradictory information otherwise, and that the racial classification which the military orders were contingent upon, failed to meet guidelines of strict scrutiny that subsequent Supreme Court cases had found.

The government filed identical motions to dismiss the indictments, vacate the convictions and dismiss each petition as moot.[562] In *Korematsu* and *Hirabayashi* the courts denied the governmental request to vacate the convictions due to the right of the victims to have their cases held in court and the wartime convictions corrected on record. The judge in the *Yasui* case sided with the government and vacated the conviction, thus getting the legal relief of the conviction, but denying him the chance to provide a revised factual record. The final reflection is as follows:

Table 6.5: Revisiting the Legal Challenges to Internment[563]

Supreme Court Case	Original Basis of Complaint	Decision Issued	Final Verdict on *Coram Norbis*
Minoru **Yasui** v. United States, 320 U.S 115	Criminal: Violation of Public Proclamation No. 3 (Curfew Order)	Oct 1985	Judge vacated the conviction and dismissed the petition; the dismissal is appealed; however Yasui's death in 1986 caused the courts to dismiss the appeal as moot.
Hirabayashi v United States 320	Criminal: Violation of Public	1986	Court decided in favour on the evacuation, but not on the curfew charge.

[558] Ibid. pp. 300-309.
[559] Ibid. p. 290.
[560] Ibid. p. 290, 310-316.
[561] Ibid. p. 291.
[562] Yamamoto, et. al, *Race, Rights and Reparation*, p. 318.
[563] Sources include: Irons, *Justice At War;* Yamamoto, et. al, *Race, Rights and Reparation;* and Irons, *Justice At War.*

U.S. 81	Proclamation No. 3 and Exclusion Order 57		On appeal, Hirabayashi won on both counts.
Korematsu v. United States 323 U.S. 214	Criminal: Violation of Exclusion Order 34	11 Nov 1983	Writ of *coram norbis* granted.

Eric Yamamoto, a member of Korematsu's legal team, described the impact that re-opening these court cases had on individuals who had been interned: 'One woman in her sixties stated that she always felt the interment was wrong, but that, after being told by the military, the President, and the Supreme Court that it was a necessity, she had come seriously to doubt herself. Redress and reparations and the successful court challenges, she said, had not freed her soul.'[564]

7. Congressional and Presidential Actions

The first major success of the redress and reparation movement took place in 1976 in a public ceremony at the White House. President Gerald R. Ford stated in Proclamation 4417: 'We now know what we should have known then--not only was that evacuation wrong, but Japanese-Americans were and are loyal Americans.'[565] The Proclamation officially rescinded Executive Order 9066, which as previously stated, was the basis for the curfew, exclusion, and internment orders. This was not an apology, but it was an acknowledgement that the event was wrong and would set the stage for future actions. Other small actions were taken throughout the 1970s; however, as one can see on the following table, the major legislative and executive actions relating to the redress and reparation movement occurred from 1980 to 1983 with the inception and hearings relating to the Commission on Wartime Relocation and Internment of Civilians, and the signing of the Civil Liberties Act of 1988.

Table 6.6: Congressional and Presidential Actions (1970 -1982)[566]

30 Oct 1972	Public Law 92-603 granted social security credits for privately employed adults who were confined in World War II internment camps.
28 June 1974	Representative George E. Danielson sponsors the Relocation Benefits Act (H.R. 15717), while this bill was unsuccessful it was the first redress legislation introduced to Congress.
20 Feb 1976	President Ford issues Proclamation 4417, officially rescinding Executive Order 9066.
1976	Representative Mineta remarks at JACL function that he would take the lead in the

[564] Yamamoto, et. al, *Race, Rights and Reparation*, p. 280.
[565] Gerald H. Ford, *Proclamation 4417, Confirming the Termination of the Executive Order Authorizing Japanese-American Internment During World War II*, 19 February 1976.
[566] Sources include: Maki, Kitano, and Berthold, *Achieving the Impossible Dream;* LegiSchool Project, *The Japanese- American Internment During WWII;* and U.S. Senate, *Commission on Wartime Relocation and Internment of Civilians Act*, 96th Congress, S.1647.

	House of Representatives to obtain redress.
22 Sept 1978	Public Law 95-382 granted civil service retirement credit for federal service employees who had been interned.
2 Aug 1979	Senator Daniel K. Inouye introduces the Commission on Wartime Relocation and Internment of Civilians Act (S.1647) to Congress.
28 Sept 1979	Representative James C. Wright, Jr. introduced the Commission on Wartime Relocation and Internment of Civilians Act (H.R.5499) to Congress as a companion bill to S.1647.
28 Nov 1979	Representative Mike Lowry introduces the WWII Japanese American Human Rights Violations Act (H.R. 5977) into Congress which directed 'the Attorney General to locate those individuals of Japanese ancestry who were interned, detained, or forcibly relocated by the United States at any time during the World War II internment period and pay them $15,000 plus $15 multiplied by the number days such individual was so interned or detained. Provides for payments due deceased individuals to go to family members.'[567] The bill was influenced by the NCJAR.
31 July 1980	Commission on Wartime Relocation and Internment of Civilians (CWRIC) (Public Act 96-317) is signed.
8 Dec 1982	Representative Mervyn Dymally introduces two bills which are unsuccessful: H.R. 7383, which called for the restoration of the economic, social, and cultural well being of those excluded during WWII and H.R. 7384, which called for individual monetary reparations for the Japanese American and Aleut Americans.

During this timeframe, there was a precedent for redress and reparation for victims of authoritarian regimes, but reparations had not been offered to a victimised group in a country that had not undergone regime change. The establishment of the CWRIC would thus expand upon the pre-existing norm, creating a tipping point in which a norm cascade would emerge.

7.1 Commission on Wartime Relocation and Internment of Civilians

The 96th United States Congress, in 1979-1980, saw the beginnings of a fundamental shift in the redress and reparation movement with the introduction of three different bills to address the Japanese American internments. The timing and presentation of the bills were heavily influenced by the JACL. In 1979, five JACL officials met with Japanese American Congressmen - United States Representatives Mineta and Matsui and Senators Inouye and Matsuyama - to discuss redress and reparations, hoping to recruit them as norm entrepreneurs within Congress.[568] The JACL was prepared to discuss a variety of proposals; however, Senator Inouye proposed a congressional committee instead. The decision to support a bill for a Commission was reflected in an interview with John Tateishi, chair of the JACL National Committee for Redress (NCR):

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[567] U.S. House, *World War II Japanese-American Human Rights Violations Redress Act*, 96th Congress, H.R. 5977.

[568] This included four out of the five Japanese Americans who were serving in Congress; the fifth Senator Hayakawa was outspoken against redress and reparations; Hayakawa was not interned due to his living in Chicago. Maki, Kitano, and Berthold, *Achieving the Impossible Dream*, p. 85.

> Japanese Americans really didn't know much about [the redress movement], and certainly members of the Congress didn't know and weren't convinced that the internment was wrong ... before we could do anything we needed to educate the public. My feeling then was that [Inouye] is a ranking member of the United States Senate, one of the most powerful men in the United States government. ... He just said, "Think about it [a commission]." ... [when we left] I turned to Clifford [Uyeda] and I said, "I think we got our walking orders. [sic][569]

The NCR then submitted the following plan to the national JACL board 1) advocate for a federal commission to study the exclusion and internment of the Japanese Americans during World War II, and 2) Utilise the findings of the commission to draft a formal redress and reparations bill.

Senator Inouye's reflection regarding the meeting between the Congressmen and JACL was:

> I recall a pitch being made for the immediate consideration by Congress. When I was called upon I said I think it is premature, I don't think it will fly. I suggested first an educational program, not only to educate the non-Japanese of the United States but the Nikkei members also of the United States. ... Needless to say, the JACL officials were very much disturbed and disappointed. They were hoping that all of us would come in flags waving and say let's make the charge up the hill. I think for a moment they were ready to take away my membership card.[570]

The Representatives were not convinced that redress was a viable legislative idea, and in fact could be a political liability.[571] *Achieving the Impossible Dream* calls the idea for a commission a 'hedged bet'. If the commission was created and they found that a wrong had been committed, then subsequent redress proposals would be strengthened; however, if the commission was voted down or if the findings not favourable to redress, then Japanese American legislators could not be accused of supporting special interests.[572] An unexpected ally was found with the addition of Senator Stevens from Alaska, who urged that the investigations should also include the government's treatment of the Aleutian and Pribilof Islanders, who had been interned by the OIA due to actual military necessary, however, they were treated deplorably. With the addition of the Aleuts within the scope of the commission, Alaska's Senators and Representatives joined support for the forthcoming bill.

On 2 Aug 1979 the Commission on Wartime Relocation and Internment of Civilians Act (S.1647) was introduced to Congress,[573] and then, on 31 July 1980, the

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[569] Quoted in Maki, Kitano, and Berthold, *Achieving the Impossible Dream*, p. 86.
[570] Quoted in Maki, Kitano, and Berthold, *Achieving the Impossible Dream*, p. 86.
[571] Maki, Kitano, and Berthold, *Achieving the Impossible Dream*, p. 86.
[572] Ibid. p. 87.
[573] U.S. Senate, *Commission on Wartime Relocation and Internment of Civilians Act.*

Commission on Wartime Relocation and Internment of Civilians Act Public Act 96-317 was signed into law by President Carter who stated: 'I don't believe anyone would doubt that injustices were done, and I don't think anyone would doubt that it is advisable now for us to have a clear understanding, as Americans, of this episode in the history of our country.'[574] The bill itself reads:

> Establishes the Commission on Wartime Relocation and Internment of Civilians to: (1) review the facts and circumstances surrounding the relocation and internment of thousands of American civilians during World War II under Executive Order Numbered 9066 and the impact of that Order on American citizens and resident aliens; (2) review directives of United States military forces requiring the relocation and internment of American citizens, including Aleut civilians and permanent resident aliens of the Aleutian and Pribilof Islands; and (3) recommend appropriate remedies.
>
> Directs the Commission: (1) to hold public hearings in appropriate cities of the United States; and (2) to report its findings and recommendations to Congress within one year after its first meeting. Terminates the Commission 90 days after such report is submitted.[575]

The JACL and NCRR worked with the community, assisting those who agreed to testify to prepare, a task that was extremely hard for the majority of the community; indeed the first 15 people who attempted to prepare via a mock hearing, all broke down and were unable to finish.[576] The Commission held 11 hearings in 10 cities between July and December of 1981. More than 750 witnesses testified before the committee and hundreds of observers.[577] Those who testified included individuals who had been subjected to internment, military officials, historians with archival evidence, statements of officials, and advocates from the NCRR, JACL, and NCJAR who spoke out for the need of reparations, among others; it included both Japanese Americans and Japanese Latin Americans.

In February 1983 the commission released its 467 page unanimous report entitled *Personal Justice Denied*. The report contained a detailed report of the internment processes with a 9-page appendix detailing the Japanese Latin American internment. The report found:

> In sum, Executive Order 9066 was not justified by military necessity, and the decisions that followed from it – exclusion, detention, the ending of detention and the ending of exclusion – were not founded upon military considerations. The broad historical causes that shaped these decisions were race prejudice, war

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[574] John T. Woolley and Gerhard Peters, *The American Presidency Project*, http://www.presidency.ucsb.edu/ws/?pid=44855, accessed on 1 March 2010.
[575] U.S. Senate, *Commission on Wartime Relocation and Internment of Civilians Act*.
[576] Maki, Kitano, and Berthold, *Achieving the Impossible Dream*, p. 99.
[577] Ibid. p. 99.

> hysteria and a failure of political leadership. Widespread ignorance about Americans of Japanese descent contributed to a policy conceived in haste and executed in an atmosphere of fear and anger at Japan. A grave personal injustice was done ... [578]

The Commission waited to release the recommendations so that the media would focus on the historical narrative investigated in the main findings of the report. The recommendations were then released in a separate publication on 16 June 1983.[579]

Part II of the Final Report made the following five recommendations: 1) Congress pass a joint resolution to be signed by the President, recognising that a grave injustice was done and offering the apologies of a nation for exclusion, removal, and detention; 2) The President pardon individuals who were convicted of violating curfew and exclusion laws; 3) Allow Japanese Americans to apply for restitution of positions, status or entitlements that were lost because of the events between 1941 and 1945; for example cases should be reviewed where Japanese Americans were dishonourably discharged from the armed services because of race, etc.; 4) Creation of a fund for educational and humanitarian purposes relating to the wartime events. The fund should sponsor research and public educational activities so that the events will be remembered and comparative studies could be undertaken 5) Congress should appropriate $1.5 billion in order to make a one-time payment of $20,000 to the approximately 60,000 survivors.[580] Finally, it is important to note that while the findings were vital to the redress and reparation movement, the Commission did not have the authority itself to institute any measures.[581]

Although the passing of the legislation was a legislative victory for the redress and reparations movement; the impact of this measure was largely historical and psychological. As Mas Fukai stated in an interview following the release of the recommendations: 'It is not what it means so much to me, but it is what it will mean to my grandchildren. The history books will show what happened. And my grandchildren will now grow up in the mainstream of America without being stereotyped as enemies during time of war.'[582] The findings were significant because they clearly documented the injustices during World War II; they dispelled the myth of military necessity, and

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[578] *Personal Justice Denied*, p. 459.
[579] Maki, Kitano, and Berthold, *Achieving the Impossible Dream*, p. 114.
[580] *Personal Justice Denied*, pp. 462-463.
[581] The Aleuts were found to have been relocated out of actual necessity however that the treatment and conditions that they had been subjected to had been substandard. They recommended a smaller amount of individual compensation for losses occurred during their relocation along with several other actions. Maki, Kitano, and Berthold, *Achieving the Impossible Dream*, p. 12.
[582] quoted in Irons, *Justice At War*, p. 114.

clearly showed that the internments were a violation of civil liberties and fuelled by racism and hysteria. It created a strong foundation for reparations legislation and gave voice to many who remained silent after being told for so long that they were in the wrong.[583]

7.2 The Civil Liberties Act of 1988

From 1983 to 1986 a continuing battle was waged to win support within Congress for the redress and reparations movement. Three bills were introduced in 1983, all of which died in subcommittee. Congressmen, activists, and lobbyists all utilised different strategies and slowly won over various allies within both the House and the Senate. At the same time, other aspects of the redress and reparations movement were playing out – the *coram norbis* cases, Days of Remembrance being organized, and other activities, some of which failed– like the NCJAR lawsuit – and others succeeded – such as the raising of awareness and the affirmation of a correct historical record. Finally, after years of fighting, as seen below, a reparations and apologies bill passed, in large part due to the openness of the political opportunities and elite allies within Congress and the Senate.

Table 6.7: Congressional and Presidential Actions (1983 -1998)[584]

Feb 1983	The CWRIC released its findings in a 467-page report entitled Personal Justice Denied.
16 June 1983	The CWRIC issues its recommendations.
22 June 1983	Senator Alan Cranston introduced S.R 1520 to Congress seeking redress; it fails. Representative Mike Lowry introduced H.R. 3387 to Congress.
6 Oct 1983	Representative Jim Wright introduced H.R. 4110 to Congress seeking implementation of CWRIC findings.
17 Nov 1983	Senator Spark Matsunaga introduced S.R. 2116 as a companion bill to H.R. 4110.
3 Jan 1985	Representative Wright introduced H.R. 442 for redress.
10 Apr 1987	Senator Matsunaga introduced S. 1009
3 August 1988	H.R. 442 passed
10 Aug 1988	President Reagan signed The Civil Liberties Act of 1988 (Public Law 100-383) requiring payment of $20,000, an apology to an estimated 60,000 survivors of the interment, created The Civil Liberties Public Education Fund (CLPEF), and the Office of Redress Administration (ORA).
21 Nov 1989	President Bush signs appropriation bill H.R. 2991, which guarantee funds for redress payments.
9 Oct 1990	First letters of apology signed by President Bush are presented to the oldest survivors of internment, with redress payment of $20,000.
24 Mar 1992	Representative Richard Gerhardt introduced H.R. 4551, which increased redress appropriations due to the fact that there were 80,000 estimated eligible internees, rather than 60,000 as previous thought; in addition to new categories of eligibility and exclusion from income tax for the reparations. Passed on 16 Sept 1992.
27 Sept 1952	President George Bush signed the Civil Liberties Act Amendments of 1992 (Public Law 102-371).

[583] Irons, *Justice At War*, p. 115.

[584] Maki, Kitano, and Berthold, *Achieving the Impossible Dream, Personal Justice Denied*, LegiSchool Project, *The Japanese- American Internment During WWII.*

On 10 August 1988, President Ronald Regan signed The Civil Liberties Act of 1988. The issue was then sent to the appropriations committees where the promise to pay seemed to be out of reach. The initial appropriations would have taken 60 years to fund redress payments, whereas an approximate 200 formerly interned individuals were dying each month.[585] The fight within the appropriations committee carried on until 21 November 1989 when President George Bush signed into law H.R. 2991 which guaranteed the funds in which to pay reparations. Finally, on 9 October 1990 a ceremony was held in the Great Hall of the Justice Department where the first nine Japanese Americans were presented with the following letter of apology from President George Bush in addition to a check for $20,000.[586]

> A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II.
>
> In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality, and justice. You and your family have our best wishes for the future.[587]

The Civil Liberties Act of 1988 (CLA) criteria for eligibility stated that the individual applying for redress had been alive on the day the Act had passed, had been a US citizen or permanent resident alien during the internment period, and had been evacuated, relocated, interned or otherwise deprived of liberty or property by the United States solely because of his or her ancestry. This effectively excluded the heirs of approximately half of those interned because they had passed away before the redress bill had been signed in 1988. It also excluded all but 189 of the Japanese Latin Americans who were interned by the United States.[588] The 189 Japanese Latin Americans who were not excluded from the redress had all been born in the internment camps, or had been granted retroactive citizenship before the CLA had passed.[589]

A flurry of lawsuits challenged various 'eligibility' criteria, and the Civil Liberties Act Amendments of 1992 was signed to include some previous ineligible

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[585] Maki, Kitano, and Berthold, *Achieving the Impossible Dream*, p. 200.
[586] Ibid. p. 211.
[587] Ibid. p. 214.
[588] Sean D. Murphy, "Contemporary Practice of the United States Relating to International Law," *The American Journal of International Law* 93, no. 3 (1999): 628-67.
[589] *Campaign for Justice: Redress Now for Japanese Latin Americans!* http://www.campaignforjusticejla.org/resources/brochure/CFJ_Brochure_eng.pdf, accessed on 1 March 2010.

categories, but not all. There were numerous forgotten victims and individuals denied on technicalities. In total 82,219 individuals were granted redress, 28 individuals refused to accept their redress payments, and the Department of Justice was unable to locate less than 1,500 individuals who, according to their rolls, were eligible for redress payment.[590]

The offering of redress and reparations to Japanese Americans was a significant step in the proliferation of a redress and reparation norm. As previously stated, redress had previously been focused on transitional justice i.e., providing criminal, legislative, and reparatory justice following a shift from an authoritarian regime to a democratic regime. I argue that providing restorative justice to a victimised group in a country that did not undergo a regime change, and in fact was a major world power, created a tipping point for redress and reparations. A norm cascade began to occur – that is an increasing trend for countries to adopt a redress and reparation norm, independent of domestic pressure and for reasons relating to identity and acceptance of the new norm. The United States was not required to adopt redress and reparations for its Japanese American population. They were not undergoing a regime change and the event being redressed had occurred approximately four decades previously. Yet in doing so, they sent a signal to the international community that redress and reparations was independent of a regime change and reinforced the ideas that all states should be accountable for their past.

8 Quest for Japanese Latin American Redress and Reparations

One of the groups excluded from redress and reparations as outlined in the Civil Liberties Act (CLA) was the Japanese Latin Americans who were forcibly removed from their homes and detained within United States internment camps. Although the abduction of Japanese Latin Americans directly violated the laws and customs of war as previously recognised by the United States in the 1863 General Order 100 of the United States Army, which stated: 'private citizens are no longer murdered, enslaved, or carried off to distant parts'[591] little attention was paid to them either during the course of the Japanese American redress and reparation movement. They were included in the Seattle plan, interviewed as part of the CWRIC hearings, and a single chapter

[590] Maki, Kitano, and Berthold, *Achieving the Impossible Dream*, p. 225.
[591] Natsu Taylor Saito, "Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States," *Yale Human Rights & Development Law Journal* 1, (1999), p. 73.

was included as the appendix of *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians*, however, this reflects a general inclusion of the group within the Japanese American redress and reparation movement, not a significant part of the movement itself. It was not until the Japanese Latin Americans were denied redress on the basis of a lack of citizenship in the 1988 Civil Liberties Act that a separate movement began to emerge.

The *Japanese Peruvian Oral History Project* was the first organisation created to educate the public about the Japanese Latin American internments and to provide information regarding redress; it was started in 1991 in San Francisco. The primary organisation attempting to obtain redress and reparations is Campaign for Justice: Redress Now for Japanese Latin American Internees! This organisation was founded in 1996 as a collaborative effort between the Japanese Peruvian Oral History Project, the National Coalition for Redress/Reparations (NCRR),[592] the Southern California branch of the ACLU, former internees, their families, and other interested parties. The redress and reparation movement and Campaign for Justice has two primary goals: secure 'proper' redress for former Japanese Latin American internees and to educate the public about the internments themselves.[593]

In addition, the international community became involved in the debate when an NGO report submitted to the United Nations condemned the Japanese Latin American internments; the United Nations Commission on Human Rights report found:

> International humanitarian law clearly forbade wartime abduction, incarceration and deportation of civilians from friendly countries. Exchange of civilians from a friendly country to an enemy third party was viewed as particularly serious and, in this case, met the criteria for hostage-taking: detention or exchange of persons for reasons unconnected with criminal matters or other justifiable cause.[594]

The UNHCR report continued that the conditions and forced labour that the inmates were subjected to in the Panama camps met the clearly defined prohibitions against slavery and forced labour.[595]The Japanese Latin American redress and reparation movement is currently pursuing two methods to obtain equal reparations.

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[592] In 2000, the NCRR would change its name to Nikkei for Civil Rights & Redress as they felt it better reflected their current activities of 'active participation in the broad areas of civil rights as well as continued commitment to redress for Japanese Americans and Japanese Latin Americans.' See "About NCRR," Nikkei for Civil Rights & Redress, http://www.ncrr-la.org/about.html, accessed on 1 March 2010.

[593] *Campaign for Justice: Redress Now for Japanese Latin Americans!*

[594] United Nations Economic and Social Council Commission on Human Rights, Fifty-Fourth Session, *Question on the Human Rights Of All Persons Subjected to any Form of Detention or Imprisonment: Arbitrary Detention of Latin Americans of Japanese Ancestry*, E/CN.4/1998/NGO/90, p. 2.

[595] Ibid.

8.1 Pursuit of Legal Remedies

The emergence of the redress and reparation movement as a separate entity developed, again, as a result of the Civil Liberties Act denial of reparations and apologies to the Japanese Latin American internees. In 1996, as a response to the denial, a class-action lawsuit was filed in order to challenge the exclusion of the Japanese Latin American internees from the CLA. *Mochizuki v United States* argued that the eligibility provision which stated that all eligible internees had to be US citizens or permanent resident aliens during the internment period, as applied to Japanese Latin Americans, denied redress to the victimised group and continued the mental anguish and humiliation. Thus, the plaintiffs were seeking 1) a declaration that the eligibility provision, when applied to said group, violated the US constitution and international law and 2) the internees were seeking an injunction that they be eligible for reparation under the CLA in order to restore full Fifth Amendment rights to the Japanese Latin Americans. *Mochizuki v United States* also argued that the mass arrests, deportations, and imprisonments, without hearings, of the Japanese Latin Americans, violated international law.[596]

Mochizuki v United States reached a settlement in June 1998. The settlement concluded: 'persons of Japanese ancestry who were living in Latin America before World War II and who were interned in the United States'[597] during World War II were now eligible to receive a reparation payment of $5,000 and a general apology from President Bill Clinton. The settlement restrictions, however, stipulated that reparations could only be provided if all other eligible Japanese American internees had received reparations and if there were sufficient funds to pay the Japanese Latin American internees.[598] It did, however, contain a provision that allowed the internees to opt-out of the settlement and to continue to pursue redress through other means such as legislative and lawsuits.

The settlement was extremely controversial within the victimised community because it was seen as further inequality. Carmen Mochizuki, the plaintiff whom the class-action lawsuit was named for, declared:

> I support the decision to settle the class action lawsuit of *Carmen Mochizuki vs. the United States of America*, however, with reservations. Although my family and others suffered the loss of liberty, freedom and assets as a direct result of the

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[596] *Mochizuki v United States*.
[597] Ibid.
[598] Eric K. Yamamoto, "Reluctant Redress: The U.S. Kidnapping and Internment of Japanese Latin Americans," in *Breaking the Cycles of Hatred: Memory, Law, and Repair*, ed. Nancy L. Rosenblum (Princeton: Princeton University Press, 1999), p. 135.

> action of the United States of America, we can never be adequately repaid. The United States government has seen fit to compound the travesty by offering to settle this case for less than was deemed necessary for others interned under the same conditions.
>
> The United States government has issued an official apology and determined a set amount as redress to its citizens whom it illegally and wrongfully deprived of freedom and livelihood. Why would the people, although not citizens of the United States of America at that time, who were kidnapped from their own country, and interned in the United States by the United States, be entitled to any less?[599]

Many former internees, such as Mochizuki, accepted the redress settlement, despite their beliefs that it did not fully acknowledge the severity of the human rights violations.[600] In addition, it was widely seen as further discrimination. Japanese Americans were guaranteed a reparation check of $20,000 whereas Japanese Latin Americans would get a $5,000 reparation check only if all Japanese Americans were paid, and if funds were still available. The inequality was compounded with the short allotment of filing time (two months); the depletion of funds after only 145 individuals had been paid;[601] and the initial announcement that no more compensation would be given for those who had filed in time, but not processed before the funds were depleted.[602] Pressure from the victimised group and advocates ensured that the Congress passed special appropriations legislation to secure funding for the remaining individuals who accepted the settlement;[603] however, the perception that the Japanese Latin American redress was the result of a settlement and not as a means of providing justice had already been cemented.

Many of the eligible victims refused to accept the reparations check and apology, seeing it as further discrimination. The symbolic representation of $5,000 compared to $20,000 seemed to many to be further degrading; implying that their suffering was somehow less than those who had held US citizenship. Thus, in 1998, one of the plaintiffs in *Mochizuki v. United States* who rejected the settlement filed *Shima v. United State*s, seeking equitable reparations citing constitutional and international law. In 1999, three brothers who also opted out of the settlement filed

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[599] *Mochizuki v United States.*
[600] Yamamoto, "Reluctant Redress, p. 135.
[601] *Campaign for Justice: Redress Now for Japanese Latin Americans!;* ACLU of Southern California, *Japanese Latin Americans Imprisoned By US During WWII Win Bittersweet Victory From Department of Justice*, 12 June 1998, http://www.aclu-sc.org/releases/view/100003, accessed on 1 March 2010; and *Check for Compensation and Reparations for Evacuation, Relocation and Internment.* National Archives. http://www.archives.gov/research/japanese-americans/redress.html, accessed on 1 March 2010.
[602] Eric K. Yamamoto, "Reluctant Redress," pp. 135-136.
[603] *Campaign for Justice: Redress Now for Japanese Latin Americans!*

Shibayama v. United States, stated that the United States had committed crimes against humanity and the inequality of the redress violated both international and domestic law.[604] Both suits failed.

The Shibayama brothers and the Japanese Peruvian Oral History Project, now believing that the Japanese Latin Americans would never obtain redress through the United States court systems, filed a petition with the Inter-American Commission on Human Rights on 13 June 2003. On 16 March 2006, the Inter-American Commission issued a report stating that the petition was admissible and they would investigate the issue.[605] A decision is still pending.

8.2 Pursuit of Legislative Remedies

Being largely denied equal redress and reparation through the courts, the redress and reparation movement moved its fight to the legislative. The first attempt to gain redress through Congress was in 2000 with Representative Xavier Becerra introduced H.R. 4735, the *Wartime Parity and Justice Act of 2000*: 'To allow certain individuals of Japanese ancestry who were brought forcibly to the United States from countries in Latin America during World War II and were interned in the United States to be provided restitution under the Civil Liberties Act of 1988, and for other purposes.'[606] The bill never became law and was reintroduced in 2001, 2003, and 2005; each bill subsequently failed.

In 2006, Representative Becerra and Senator Daniel Inouye introduced H.R. 4901 to the House and to the Senate S.2296; this bill, entitled *Commission on Wartime Relocation and Internment of Latin Americans of Japanese Descent Act* proposed a commission:

> To establish a fact-finding Commission to extend the study of a prior Commission to investigate and determine facts and circumstances surrounding the relocation, internment, and deportation to Axis countries of Latin Americans of Japanese descent from December 1941 through February 1948, and the impact of those actions by the United States, and to recommend appropriate remedies, and for other purposes.[607]

This bill failed to come to a vote; however, it was reintroduced in 2007 and 2009 and is currently pending as of Spring 2011.

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[604] Ibid.

[605] *Isamu Carlos Shibayama et al. v. United States*, Case 434-03, Report No. 26/06, Inter-Am. Commission Human Rights, OEA/Ser.L/V/II.127 Doc. 4 rev. 1 (2007).

[606] U.S House, *Wartime Parity and Justice Act of 2000*, 106th Congress, H.R. 4735.

[607] U.S. Senate. *Commission on Wartime Relocation and Internment of Latin Americans of Japanese Descent Act*. 109th Congress. S.2296.

The forms of reparations and redress discussed within this chapter centred largely on the legal forms of redress within the United States: trials, reparations, and restitution. However, as previously stated, restorative justice is more than laws, is also fundamentally about symbolism and the transmission of a memory. It is this symbolic representation of the comparative movements that has caused the Japanese American and Japanese Latin American movements to diverge. It is not the monetary sum - $20,000 versus $5,000 that has caused the divergence, but the symbolism behind the differences in the amounts. The inequality fails to acknowledge the suffering of the group and seems to imply that one group is more worthy of reparation than the other.

While the United States did offer redress and reparations to both groups, thus fulfilling expectations created by the normative trend, differential levels of success clearly remain. The different success rates in meeting their goals of equal treatment can be partially explained by the varying levels of access to political opportunities. Despite the fact that both groups reside in the United States, there is a clear difference in the treatment of those who hold citizenship versus those who do not. The primary concern of the Senate and the House is for those who were interned while holding American citizenship. Those with citizenship were also represented and could vote, whereas those who were not citizens did not have the same representation – yet endured the same, if not worse, sufferings. In addition, many of the elite allies who obtained redress and reparations ceased their efforts once the CLA had been signed. Very few continued to work on the Japanese Latin American RRM; it was of lesser significance to them.

9. Symbolism in Restorative Justice

Forms of restorative justice that could be obtained through legislative actions – such as governmental mandated reparations and official governmental apologies – correspond with the initial goals that the various members of the redress and reparation movement utilised. Through the efforts of the elite allies in Congress, the Commission on Wartime Relocation and Internment of Civilians became a reality. The passage of this bill and establishment of the Commission was a lynchpin in the RRM as it carefully researched findings and created an historical narrative which could not be doubted. Once the narrative was established, further goals such as reparations could be argued from a much stronger position. Once the initial goals had been met, including

the apology and reparations, new goals emerged including memorialisation and education.

The Civil Liberties Act of 1988 recognised that furthering education would be an important function of restorative justice and authorised the creation of an educational foundation with a funding of $50 million – the Civil Liberties Public Education Fund (CLPEF). Although the funding had been authorised, by 1994 only $5 million had been appropriated to fund the CLPEF. The first board members were then appointed in 1998.[608] The board was then given the following mission:

> To sponsor research and public educational activities, and to publish and distribute the hearings, findings, and recommendations of the Commission, so that the events surrounding the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry will be remembered, and so that the causes and circumstances of this and similar events may be illuminated and understood.[609]

The CLPEF closed its operations in August of 1998. During its existence, it issued 135 grants totalling $3.3 million for projects designed to educate the public concerning the internments and included landmarks/exhibits, art/media, community development, research, research resources, and national fellowships.[610] A selection of activities designed to educate on the internments or which have symbolic meaning to the internees are as follows:

Table 6.8: Selection of Historical and Symbolic Actions[611]

1967	First academic conference on Japanese American internments held at UCLA.
1972	Manzanar internment camp (California) is given historical status.
1978	First Day Of Remembrance held over Thanksgiving weekend.
1979	Minidoka internment camp is declared a National Historical Site and Tule Lake internment camp is declared a California Historical Landmark.
1972	Photographic exhibit on the exclusion and internment sponsored by the JACL and California Historical Society.
19 Feb 1976	President Ford issues Proclamation 4417 stating that the evacuation was wrong and Japanese Americans were loyal.
1984	California state legislature declares 19 February to be recognised as 'A Day of Remembrance' for the internments.
10 Aug 1989	ACR 37 adopted by California state legislature that urged adoption of textbooks that accurately reflects the internments.
1992	The Japanese American National Museum opened and frequently hosts exhibits regarding the Japanese American internments. The museum seeks to preserve

[608] Eric K. Yamamoto and Liann Ebesugawa, "Report on Redress: The Japanese American Internment," in *The Handbook of Reparations*, ed. Pablo De Greiff (Oxford: Oxford University Press, 2006), p. 275.
[609] Quoted in *Personal Justice Denied*, p. xi.
[610] "CLPEF Background," *CLPEF Network*, http://www.momomedia.com/CLPEF/backgrnd.html, accessed on 1 March 2010.
[611] Sources include: Maki, Kitano, and Berthold, *Achieving the Impossible Dream;* "History of the Japanese American Citizens League; Ford, *Proclamation 4417;* LegiSchool Project, *The Japanese-American Internment During WWII;* "History of the Japanese American National Museum," Japanese American National Museum, http://www.janm.org/about/history/, accessed on 1 March 2011; "CLPEF Background," *CLPEF Network*.

	history before, during, and after internments.
Jan 1988	Fred Korematsu received the Presidential Medal of Freedom.
1998	Ellis Island Exhibit of *America's Concentration Camps: Remembering the Japanese-American Experience*.
1998	Public Service Announcements aired before 19 February to educate the public about the internments and the National Day of Remembrance.
19 Feb 1998	National Day of Remembrance held in Washington DC.
28-30 June 1998	A national conference for all CLPEF recipients in San Francisco; panel discussion on the *coram nobis* cases held in the Smithsonian museum.
2001	The ten internment camps are announced in the 2001 of the United States budget were to be preserved as historical landmarks.
2002	All-Camps Conference at the Japanese American National Museum which focused on bringing survivors and their family members, scholars, government officials, etc together to discuss the lessons learned from the unconstitutional internment of the Japanese Americans.
8-9 April 2005	Assembly on the Wartime Relocation and Internment of Civilians.
23-25 September 2005	Camp Connections: A Conversation about Social Justice and Civil Rights in Arkansas.
3-6 July 2008	Whose America? Who's American? Diversity, Civil Liberties, and Social Justice", held in Denver, Colorado which included several panels devoted to the CLA.

As one can see, the 1970s were a fight for recognition whereas the 1980s were spent lobbying the legislature for redress and reparations. This time period corresponds with a rise in international society of truth commissions following regime change and, indeed, a norm shift. Thus the idea of a commission corresponded with other redress and reparation norms of this time period. What was unusual and signalled a broadening of the norms – was the fact that this commission was occurring within a state that was a major power and was not the result of a regime change. This would signal a tipping point and allow more and more states to contemplate redress and reparation.

The 1990s brought implementation of the CWRIC's findings and a push on educating the general populace. The exclusion of the Japanese Latin Americans from redress and reparations however, caused former internees and associated allies to form a new RRM whose goal would be either inclusion within the Civil Liberties Act of 1988 or to obtain separately, redress and reparations for their group. Following *Mochizuki v United States* in 1998, redress and reparation movement goals focused on education and the inclusion of victims who had previously been left out. The 'forgotten' victims were the focus of the 2005 Assembly on the Wartime Relocation and Internment of Civilians, a public testimonial event in 2005 at Hastings College of Law in California. The event documented stories of those who had been interned during World War II and drew comparisons to the experience of minorities who are often seen today as the enemy within modern society.[612]

[612] "History," *Campaign for Justice*. http://www.campaignforjusticejla.org/ history/index.html, accessed on 1 March 2010.

10. Success and Failure of Redress and Reparation Movements

The United States reparations and redress movement for the Japanese American internments is one of the few RRMs within the United States which can be classified as relatively successful.[613] The comparative Japanese Latin American internment cannot be similarly classified, due to the widespread perception that the *Mochizuki v United States* settlement was unfair, and taking the ongoing litigation and legislations (as of Spring 2011) aimed at receiving an equitable reparation and apology into account. As above, the relative success of the Japanese American and Japanese Latin American redress and reparation movement will be examined to determine relative success and failure on the following chart:

Figure 6.1: Analysis of Relative Success and Failure

State Recognition

Overall perceived value of restorative justice	Apologetic Stance	Regret/ Acknowledgement	Strategies of Denial
High	RRM Successful	N/A	N/A
Medium	RRM Partially Successful	RRM Partially Failed	Settlement
Low/ None	Not an RRM	Verbal Acknowledgement	RRM Failed

The following subsections will review my arguments that United States has entered an apologetic stance towards the Japanese American and Japanese Latin American internments and reiterate the argument that the overall perception of success in regard to the Japanese American internments is high, whereas the Japanese Latin American RRM is seen as comparatively less successful due to the inequality of the redress and reparations offered by the state.

[613] Roy L. Brooks, "Japanese American Redress and the American Political Process: A Unique Achievement?" in *When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustices*, ed. Roy L. Brooks (New York: New York University Press 1999), p. 160. The African American redress and reparation movement is another well-known RRM; however, has largely been unsuccessful in obtaining its goals. Lesser known movements include a Native American movement, the Japanese Latin American movement and smaller movements for Italian and German Americans who were interned during World War II.

10.1 State Recognition

I have shown that during the internment process the United States utilised the denial strategies of misrepresentation, rationalisation, and justification. The US government suppressed documentation that indicated there was no military necessity for the internments. These actions were a form of denial as it proved their arguments false and if submitted to the courts would have proven that internment was based on political motive and war hysteria. The discovery of this documentation would serve as the foundation for the writ of *coram nobis* being filed.

Table 6.3 illustrates ways that the United States acknowledged that the internment was wrong with the *President's Committee on Civil Rights* acknowledging the wrong in 1948, and various restitution legislation being passed which provided minimal compensation for losses and a restoration of government benefits for employees who had been interned. It was not until 1976, however, with President Ford's statement that the internment was wrong that we could see the United States moving towards an apologetic stance. The signing of the Commission on Wartime Relocation and Internment of Civilians in 1980, its subsequent findings, governmental reparations and apology firmly indicates the United States acceptance of fault, its assumption of responsibility, leads me to argue that the US has demonstrated an apologetic stance for the Japanese American internment.

The Japanese Latin American internments, however, when spoken about, were traditionally discussed in conjunction with the Japanese Americans. There was not a separate movement until the CLA denied redress and reparation. This, however, was not a denial of the event. The event was acknowledged both in the CWRIC hearings and in the subsequent report. Insofar as state recognition goes in 1988 the United States did acknowledge the event. Likewise, in *Mochizuki v United States* the state assumed an apologetic stance with reparations and apologies offered. This can be represented as such:

Table 6.9: United States Stance towards Victimised Groups

	Denial	**Acknowledgement**	**Statement of Regret**	**Apologetic Stance**
Japanese American Internment	X	X		X
Japanese Latin American internment		X		X

Thus, I argue, that although several stages have emerged throughout the course of the movement, the United States is now in a state of apologetic stance for both the Japanese American and Japanese Latin American internments.

10.2 Perception of Restorative Justice

As discussed in Chapter Four, section three, in order to determine the overall perceived value of restorative justice, I examine four factors: historical memory, the offering of restorative justice by the state, acceptance of restorative justice by the victimised group, and the victimised group's satisfaction of the restorative justice received.

Historical Memory

The literature reviewed and discussed throughout this chapter indicates that the United States has established an accurate historical memory through the success of the political battle that played out within the United States Congress and through the judicial system. As previously discussed, the creation of the CWRIC established an in-depth examination of the wartime experiences, the motives behind it and allowed the historical narrative to be transformed from the belief that it was a wartime necessity to a more accurate reflection – a wartime injustice fuelled by racism and hysteria. These actions have clearly established a baseline memory (as reported in *Personal Justice Denied*) and have led me to record a plus (+) in the historical memory column for the Japanese Americans. This emergence of an accurate historical narrative, however, is barely reflected within the United States internment of Japanese Latin Americans. There are very few texts detailing the history of this injustice; when this author started researching the topic there was a total of 3 books one could easily locate on the subject, one being a memoir. The information is gradually increasing within society, however, and although the material available is nowhere as comprehensive as that for the Japanese American internments, it does exist and thus I now record a plus (+) in the historical memory section.

State Offering

As reviewed in various sections, the United States passed the Civil Liberties Act which offered $20,000 in reparations to each internee and a presidential apology. In addition the State created the CLEPF, which funded research, projects, and other educational opportunities relating to the Japanese American Internments. In addition, following *Mochizuki v United States*, the state offered $5,000 in reparations and an apology to each Japanese Latin American who accepted the settlement. While there is a

differential level of success in what has been offered, some form of redress and reparation has been offered to both groups, thus leading me to record a (+) in both state offering categories.

Acceptance by Victimised Group

The Office of Redress Administration (ORA) issued reparations and a check to 82,219 Japanese Americans or permanent residents.[614] This far exceeded the initial estimates in 1989 were that there would be approximately 60,000 eligible for redress and reparation.[615] Although we cannot know the exact numbers of individuals who refused the payment, the estimates, and the number of people who filed claims for the redress indicate that a high majority of those eligible accepted the reparations check and apology. In regard to the Japanese Latin American movement, 45 individuals were initially paid under the ORA before funding ran out. Following the appropriations of funding approximately 400 more individuals were paid. Thus, I argue, the group at least partially accepted the redress and reparation payment. However, portions of the group did not and this will be reflected in the satisfaction rating (discussed below). The state has issued redress and reparation to both groups and the group members have largely accepted these reparation payments. This leads me to record a (+) in the acceptance sections.

Satisfaction of Victimised Group

The literature reviewed and organisations such as the Japanese American National Museum have indicated that the group is in general satisfied and considers the movement a success. This also is the reason that many of the organisations have ceased to function or have moved to different goals, they have achieved their initial aims. Thus I record a (+) in the satisfaction of the Japanese American RRM. Although as discussed, the United States did offer reparations and apologies to the Japanese Latin Americans and a large number of individuals accepted the reparations (leading to a (+) in both categories); however, many rejected the reparations and many who accepted expressed grave dissatisfaction with the offering. The perceived injustice and inequality of the settlement, clearly demonstrates that the group itself is not satisfied and thus a (-) is recorded in the last column. The scores are thus reflected:

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[614] Department of Justice, *Ten Year Program to Compensate Japanese Americans Interned During World War II Closes its Doors*, 19 February 1999.

[615] Yamamoto and Ebesugawa, "Report on Redress," p. 272.

Figure 6.2: United States Reparation Programme Evaluation

Assesment	Japanese American	Japanese Latin American
Assement of historical memory	+	+
State offering of restorative justice	+	+
Acceptance by victimised group	+	+
Satisfaction of victimised group	+	–
Overall perceived value	High	Medium

Again, this leads to the conclusion that the Japanese American RRM has been relatively successful, whereas the Japanese Latin American RRM has only been partially successful.

11. Political Opportunity and Differential Success

Having established that there has been a differential level of success in regard to the Japanese American redress and reparation movement, I turn to the question of why there has been a difference.

11.1 International Analysis: Normative Expectations

The field of reparation politics first emerged following World War II with Germany's negotiation with Israel and the Claims Conference and the subsequent signing of the Luxembourg Agreement in 1952. Once this normative and legal precedent had been established the field stagnated, partly due to Cold War politics; however, it began to re-emerge as transitional justice following the flurry of regime changes from authoritarian regimes to more democratic regimes in the 1970s and 1980s. Some form of redress and reparation was then becoming a standard response and a normative expectation as a way to come to terms with the former regime's unjust actions) toward a victimised population. The 1980s increasingly saw a flurry of activity within transitional justice as a multitude of truth commissions began to discover the

facts behind forced disappearances and human rights abuses in Latin American and Africa.[616]

It is within this framework of increasingly successful transitional justice actions, in which redress and reparation norm entrepreneurs began to work within the United States. The movement, as previously stated, in considered to have been founded during the 1970s with a redress proposal given during a JACL bi-annual conference. Redress and reparation at this point in time would have been again common for states which had undergone a regime change, but not for states which had not had a regime change, which was not considered to be an authoritarian regime and was not a state which had the previous war. Thus obtaining redress and reparation still had barriers to overcome.

A large part of the Japanese American RRM's success was the creation of the CWRIC. The commission followed an international trend of truth commissions. It guaranteed nothing but an investigation and an uncovering of facts which were not tainted by wartime hysteria. Once the facts had been uncovered however, it was proven that the Japanese American internments were based on race and not on military necessity. The truth commission and finding of irrefutable facts gave the movement a significant advantage in the quest for physical reparations and a governmental apology.

The German reparations case changed the meaning of what reparations were and created a precedent. The truth commissions in the 1980s reinforced the idea of coming to terms with the previous regimes actions. It was not, however, until the United States redress and reparation movement, that a country, which, had not undergone a revolution, lost a war or changed regimes, and began a reparations programme, that a tipping point occurred and subsequently we moved into the next stage of the norm life cycle that of norm cascade.

Once the Civil Liberties Act of 1988 was signed, the tipping point had been created and the idea of redress and reparations was not isolated to transitions between regimes. It reinforced normative expectations of other groups that redress and reparations would be provided following state injustice. The exclusion of the Japanese Latin Americans was thus in violation of this expectation of redress. *Mochizuki v United States,* the lawsuit that challenged the Japanese Latin American exclusion from the CLA was filed in 1996 and settled in 1998. This met international expectations of redress by providing an apology and reparations check. The subsequent fights over redress then would centre not on the refusal to pay redress but on the refusal to provide equal redress to other victims.

[616] See Appendix 1.

11.2 Domestic Analysis: Elite Allies, Political Opportunities and Inclusion

The presence of domestic allies, the victimised groups' access to the political system and inclusion into the wider community heavily influenced the differential application of success for the Japanese American and Japanese Latin American redress and reparation movement. The RRM originally was composed of a single group, i.e. those interned solely on the basis of Japanese ancestry within the United States. It was not until the Civil Liberties Act of 1988 was passed that the group splintered into two movements: those who were Japanese American (i.e. United States citizens) and those who originated from Latin America. Thus, both groups benefited from international factors, but domestic factors made the difference here. Thus those who were included in the wider community of citizens or US nationals gained successful access to the reparation payments and governmental apologies whereas those who were interned during World War II, but had not been granted citizenship for that time period were excluded from redress measures obtained.

As previously discussed, the success of the redress and reparation movement was due partially to the work of norm entrepreneurs and elite allies. Individuals such as Hawaiian Senator Daniel Inouye and Alaskan Senator Stevens were key in introducing, lobbying, and the eventual passage of legislation relating first to the creation of the CWRIC and later to reparation legislation. The JACL, Peter Irons, and other legal teams were vital to obtaining factual data regarding the internments, gaining symbolic victories, and influencing the Congressional members to introduce the bills into the House and Senate. Their work created a factual accounting that contradicted the United States governmental position that the internments were a wartime necessity and illustrated the fact that there was a legal and normative basis for the redress and reparation claims. Once successful progress had been made toward these goals, exclusion of non-citizens became important. Japanese Latin Americans were excluded from redress and reparations initially on the basis of citizenship and their access to the political system was restricted due to their initial alien status.

The factors of allies, openness, and inclusion can partially explain the differential success between the two groups. The Japanese American RRM benefited from having access to the JACL from the very beginning of the internment process. While their goals were not always compatible with other organisations, there was an initial organisation to form around and to begin lobbying for Japanese American rights. Since the two groups were considered to be one RRM until the CLA was signed, there

was no need to form separate groups. Once the Japanese Latin American exclusion from redress became reality, they had to form new organisations and structure the goals of the movement. Thus I conclude that the Japanese American RRM was more successful than the Japanese Latin American RRM due to the inequality of the reparations and lack of satisfaction on the part of those in the RRM. The Japanese Americans as citizens were included in a wider community, had more access to the political system and more domestic allies than non-citizens.

Chapter Seven: Redress and Reparation Movements in Response to the Japanese Comfort Women System

During the Asia Pacific War (1931 – 1945),[617] the Japanese Imperial Army, with knowledge and support from the Japanese government, systematically detained and enslaved approximately 200,000 women, primarily from Korea, but also from China, Malaysia, Burma, Taiwan, the Philippines, East Timor, and the Dutch East Indies.[618] These women, including girls as young as age 12, were called *jugun ianfu* or comfort women. The women were removed from their homes by a variety of methods – including kidnapping and trickery - and then forced to serve as sex slaves for the Japanese Imperial Army, both for the soldiers and civilians associated with the Army.[619]

Life as a sex slave was terrifying; the women were often shipped from their homelands to Japanese occupied areas, imprisoned in facilities known as comfort houses, and subjected to daily rapes, beatings, abuse, and threat of murder. Many women died from these varied cruelties, or indirectly through sickness, improper medical care, suicide, starvation, and malnutrition.[620] Karen Parker and Jennifer F. Chew state that of the approximate 200,000 women enslaved only one-quarter survived their captivity, and of these survivors only 2,000 women were still alive in 1994.[621]

The comfort women system came to an end in 1945 with the surrender of Japan to the Allied forces. The survivors of the comfort women system, however, remained silent for almost 50 years, largely due to extreme social stigma and shame, which attached itself to the act of being raped, regardless of the circumstances.[622] The majority of the women were Asian and, in Asia, women who admitted to being raped were often blamed for the events that had transpired, with family and society attributing shame and

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[617] The term 'Asia –Pacific War' represents an attempt among scholars to select a new nomenclature which more accurately reflects the events taken place prior to and before World War II in regard to the war waged by Japan. The Asia-Pacific war dates from 18 September 1931 when Imperial Japan attacked and occupied Manchuria in Northern China until Japan's surrender to Allied forces in 1945. Marc Gallicchio, "Introduction," in *The Unpredictability of the Past: Memories of the Asia-Pacific War in U.S. - East Asian Relations*, ed. Marc Gallicchio (London: Duke University Press, 2007), p. 7.

[618] Karen Parker and Jennifer F. Chew, "Compensation for Japan's World War II War-Rape Victims," *Hastings International and Comparative Law Review* 17, (1994), p. 498; and Christine M. Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery," *The American Journal of International Law* 95, no. 2 (2001), p. 336.

[619] Parker and Chew, "Compensation for Japan's World War II War-Rape Victims," p. 498.

[620] Ibid, pp. 499, 507-509.

[621] Ibid. p. 499.

[622] Parker and Chew, "Compensation for Japan's World War II War-Rape Victims," p. 502.

dishonour to the victim.[623] Thus, with this attitude being common, victims of the comfort women system often refused to acknowledge what had happened.

In addition to the general stigma attached to being raped, the disorganised nature of the comfort women system meant that there were neither widespread acts of liberation, nor an organised system of release. Women who had been kidnapped, forcibly recruited or tricked into service were subjected to the whims of the retreating, and then the defeated, Japanese Imperial Army. Thus, the fate of the women was random. Some comfort women stations were liquidated with the women being killed by retreating Japanese soldiers, whereas other stations were victims of Allied bombings in the last moments of the war. Other stations were simply abandoned, the women suddenly allowed to leave one day. While those who were imprisoned within their own country could make their way home, others were abandoned overseas without means to obtain transportation.[624] Many of the women remained permanently exiled, unable to and sometimes unwilling to return where they would be shunned.[625] Yet, life was not any easier for those who did return home. Those who returned often isolated themselves, never telling anyone of their experiences including their husbands and children. Victims who did speak out were often publicly humiliated, labelled as 'dirty,' 'unworthy of marriage' or 'barren' in addition to facing extreme poverty, poor physical heath and mental illness that many former comfort women – silent or not - experienced.[626] Although the fate and treatment of comfort women was shrouded in silence for almost 50 years, the narrative seemingly exploded into both domestic and international society in 1991, when three of the former comfort women filed a lawsuit against Japan in the Tokyo courts.[627]

As discussed in previous chapters, the redress and reparation movements for the German genocides and the United States internments are as well known as the events themselves. As a result of these events, among others discussed in Chapter Two, we see a trend, a norm cascade where it has become almost an expectation the states will

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[623] Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery," p. 341.
[624] Margaret Stetz and Bonnie B. C. Oh. "Introduction," in *Legacies of the Comfort Women of World War II*, eds. Margaret Stetz and Bonnie B. C. Oh (New York: M.E. Sharpe, 2001), p. xi; "War Victimization and Japan: International Public Hearing Report," (Osaka-shi, Japan: The Executive Committee International Public Hearing, 1993), p. 15. Some of the Korean comfort women were assisted in returning home with the help of the United States Army.
[625] Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery," p. 337.
[626] Hiromi Yamazaki, "Military Slavery and the Women's Movement," in *Voices from the Japanese Women's Movement*, edited by AMPO - Japan Asia Quarterly Review (New York: M.E. Sharpe, 1996), p. 95.
[627] Yoshiaki Yoshimi, *Comfort Women: Sexual Slavery in the Japanese Military During World War II*, trans. Suzanne O'Brien (New York: Columbia University Press, 2000), p. 33.

engage in reparation politics. As such, when the issue emerged in 1991, we had already seen successful resolutions in the Jewish RRM and in the Japanese American RRM; however, this success would not translate into success with the comfort women redress and reparation movement. This movement currently has not succeeded, and while there currently is only one movement and not separate movements for each state, I will pay particular note to women from Korea and Dutch women from the former Dutch East Indies as there is a differential rate of restorative justice offered and applied. Thus, this chapter will explore how this narrative came to light, the subsequent fight for redress and reparation, and in what ways the movement has succeeded in meeting some goals, yet failed to obtain its major goals.

1. Development of Japanese Identity

It was during the Meiji Restoration (1868 – 1912) that Japan began to emerge as a strong, modern state. The development of Japanese national identity, and subsequent identity policies, are tied together with the arrival of the Western powers. The threat of European colonial and political expansion during this period caused the Meiji government to unite people within its territory and fostered a strong national identity that transcended previous local and regional identities with which people self-associated.[628] In the case study of the comfort women, the Japanese military chose women based on ethnicity and identity. This chapter will thus examine Japanese imperialism and regional identity.

The creation of a strong national Japanese identity was linked with the development of Japanese imperialism and the underlying desire for equality and status within international society. An article in *Jiji Shimpō* illustrates this desire for equality and the subsequent social and political shifts:

> We want our learning independent, not licking up the lees and scum of the westerners. We want our commerce independent, not dominated by them. We want our law independent, not held in contempt by them. We want our religion independent, not trampled underfoot by them. ... We cannot wait for our neighbour countries to become so civilized that all may combine together to make Asia progress. We must rather break out of formation and behave in the same way as the civilised countries of the West are doing.[629]

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[628] Chikako Kashiwazaki, "*Jus Sanguinis* in Japan: The Origin of Citizenship in a Comparative Perspective," *International Journal of Comparative Sociology* 39, (1998), p. 282.
[629] Fukuzawa Yukichi quoted in W. G. Beasley, *Japanese Imperialism 1894 - 1945* (Oxford: Clarendon Press, 1987), p. 31.

To achieve this, Fukuzawa wrote, Japan would have to stand aside from Asia to provide the leadership that Asia was unable to provide for itself and to utilise Western style strength to accomplish these tasks.[630]

Japan signed its first genuinely reciprocal foreign treaty in 1894, creating disparities between Japan and its neighbours,[631] which lent itself to viewpoint of Japanese superiority and reinforced imperialistic tendencies. During this time period, Japan entered into a series of wars and subsequently gained colonies from among its Asian neighbours. Victory in the First Sino-Japanese War (1894-1895) gave Japan a measure of international respect that previous policies had not. Many saw this as a sign that Japan should use it new-found strength to establish domination within their sphere of influence, not only for the advantages Japan would gain in security, economic and enhanced reputation, but to bring civilisation to East Asia.[632] As a result of the war, Japan gained Taiwan as a colony in 1895. The Russo-Japanese War (1904-1905) over Manchuria and Korea furthered Japanese imperialistic aims. The war left Japan in a strong position on the Chinese mainland, and, having defeated a Western power, within international society. Following the war, Japan decided to make Korea a formal protectorate in 1905 and then annexed Korea as a colony in 1910.[633]

W.G Beasley argues that, 'Many Japanese genuinely believed *both* that saving Asia from the West was a crusade *and* that it could only be accomplished by asserting Japanese authority over other Asians' [emphasis in original].[634] The ideological justification was rooted in the burgeoning belief that Japanese culture was superior to the culture of its neighbouring countries. Individuals from the colonised area were recognised as Japanese subjects under the law, however, citizenship was conditional on the abandonment of one's ethnic and cultural identity, demanding complete assimilation and embracing a Japanese identity to the extent that until 1985, those wishing to naturalise had to adopt Japanese names.[635]

Beasley argues that the belief in Japanese cultural and racial superiority was reinforced by the importation of scientific racism from the West and the publication of Darwin's *Origin of the Species*. Imperialism was seen as an extension of this belief and their historical, scientific, and divine right. The seemingly backwards countries of

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[630] Beasley, *Japanese Imperialism 1894 – 1945*, p. 31.
[631] Ibid. pp. 33-34.
[632] Ibid. p. 32.
[633] Ibid. pp. 85 -91.
[634] Ibid. p. 243.
[635] Catherine Lu, Toshihiro Menju, and Melissa Williams, "Japan And "The Other": Reconceiving Japanese Citizenship in the Era of Globalization," *Asian Perspective* 29, no. 1 (2005), pp. 100-101, 113.

Korea and China for example, could be despised because of their inability to modernise and rise to the challenge of the West. This mindset lent further credence to the idea that Japan was the sole country within Asia with the ability to negotiate on equal terms with the West; thus Japan bared a cultural imperialistic burden, similar to the Western belief of 'white man's burden.'

Japanese society and identity reflected a strong national identity that was inclusive of members of society and exclusive of outsiders. Japanese society and identity reflected a strong national identity that was inclusive of members of society and exclusive of outsiders. The colonisation process that the Japanese embarked upon, similar to Western colonisation, instituted racism in practise. Additionally, the historical subjection of women is reflected in the evolution of increasingly discriminatory treatment towards women and especially foreign women. What was unique, and horrifying, was the application of these twin problems of racism and inequality of women into a state-supported system of sexual enslavement involving up to 200,000 women, mainly from the Japanese colonies and China.

2. Emergence of the Comfort Women System

The following table shows the evolution of the comfort women system, which by its nature of enforced sexual slavery to the military, is tied to the evolution of the Asia – Pacific War and the expansion of Japanese hostilities within Asia.

Table 7.1: Establishment of the Comfort Women System

18 Sept 1931	Japan attacked and occupied Manchuria in Northern China, thus beginning a series of conflicts known as the Asia-Pacific War.
28 Jan – 3 Mar 1932	First Shanghai Incident – Conflict erupts between Japanese and Chinese troops in Shanghai, which was designed to distract international society from Manchuria's transition to Manchukuo, a puppet state of Japan.[636]
1932	The first confirmed military comfort station was established soon after the First Shanghai Incident however the system was initially a type of licensed prostitution.[637]
7 July 1937	The Second Sino-Japanese War between China and Japan began.
Dec 1937 – Feb 1938	The Nanking Massacre, also known as the Rape of Nanking, occurred; following this event, the comfort women system becomes widespread.
7 Dec 1941	Japan bombs Pearl Harbour, thus beginning the Pacific War, which refers to the parts of World War II which took place in the Pacific theatre.
14 Aug 1945	Surrender of Japan

[636] Sandra Wilson, *The Manchurian Crisis and Japanese Society, 1931-33* (London: Routledge, 2002), p. 1

[637] Yoshimi, *Comfort Women*, p. 44.

2.1 The Relationship between the Ministry of War and the Comfort Stations

During the Second Sino-Japanese War, a transition began to occur between the existent licensed prostitution industries and what the United Nations later called a system of military sexual slaves. It was in 1937, after the Nanking Massacre, where 20,000 to 80,000 women were raped in approximately six weeks,[638] and partially in response to this event, that the systematic mobilisation of women and comfort stations became widespread.[639] The majority of comfort women were forcibly recruited from 1937 to 1945 as the war continued to rage and escalate. With 3.5 million Japanese troops stationed abroad, the supposed need for prostitutes grew in proportion and the number of women recruited involuntarily and held against their will grew as well.

Archival research by Yoshimi Yoshiaki has proven that the Japanese government gave full support to the creation and maintenance of the comfort women system. One such document, which confirms the desire of the Ministry of War to create these comfort stations, is *Measure to Enhance Military Discipline in Light of the Experiences of the China Incident*, which stated:

> It is necessary to restore order in the areas affected by the China Incident, give careful consideration to the setting up of comfort facilities, and attend to restraining and pacifying savage feelings and lust ... The emotional effects of sexual comfort stations on soldiers should be considered the most critical. It must be understood that the competence or lack thereof in overseeing {the operation of the comfort stations} has the greatest influence on the promotion of morale, the maintenance of military discipline, and the prevention of crimes and sexually transmitted diseases.[640]

In addition, according to Japanese Imperial Army documents from the North China Area Army and Central China Expeditionary Force, the Ministry of War was aware the civilians entrusted by army units to collect women were resorting to methods such as kidnapping.[641]

> There have also been instances where a lack of proper consideration resulted in the selection of inappropriate people to round up women, people who kidnap women and are arrested by the police. ... In the future, armies in the field will control the recruiting of women and will use scrupulous care in selecting people to carry out this task.

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[638] See Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (New York: Penguin Books, 1997) for an account of the Nanking Massacre.

[639] "War Victimization and Japan: International Public Hearing Report," p. 11; and Parker and Chew, "Compensation for Japan's World War II War-Rape Victims," p. 503. The Second Sino-Japanese War took place from 7 July 1937 to 9 September 1945.

[640] Quoted in Yoshimi, *Comfort Women*, p. 60; The China Incident is the contemporary Japanese term for the expansion of hostilities in China into full-scale war in August 1937.

[641] Yoshimi, Comfort Women, p. 59.

The problem, according to military and governmental documents, was not in the kidnapping of women for the comfort stations, but the kidnapping of the wrong sort of women (i.e. women of a higher social class and/or of high standing) who would rouse police intervention and bring dishonour upon the military. Other archival documents proving the support of the Japanese government have been uncovered and reproduced in *Comfort Women: Sexual Slavery in the Japanese Military During World War II*, and includes official documents, reports, letters, and diaries.

Due to lack of documentation, the ethnic diversity of women enslaved is only estimated, however, former soldiers and army doctors have reported that up to 80% of the women were Korean, and most were from very poor families with little to no education.[642] Korean women were also preferred by the government and the military because of wide-spread belief of superiority based on a racial hierarchy, partially determined by the skin colour of the women and the proximity of their homeland to Japan. Japanese women were the most highly prised, tended to be actual professional prostitutes, and reserved for high-ranking officers. Okinawans and Koreans were next in this hierarchy followed by Taiwanese, Chinese, and Philippines.[643] Ironically Dutch women, although forcibly recruited in small numbers, were considered to be off-limits because the Japanese government was afraid of violating international law, as discussed in subsequent sections.

2.2 Considerations of International and Domestic Law

The Japanese government was aware that certain actions taken could be considered to be trafficking in women. The Japanese government, as a member of the international community, was cognisant of international regulations that forbade the trafficking of women and children, forced labour, and slavery including knowledge of, or being a signatory of the following international treaties, conventions, and customary international law as illustrated:[644]

Table 7.2 International Conventions on Slavery and Trafficking[645]

Treaty Date	International Treaty	Japan Signed
1904	International Agreement for the Suppression of the White Slave Traffic	1925
1907	The Hague Convention on Land Warfare and its Regulations	1911
1910	International Convention for the Suppression of the White Slave	1925

[642] "War Victimization and Japan: International Public Hearing Report," p. 12.
[643] Bonnie B. C Oh, "The Japanese Imperial System and the Korean "Comfort Women" Of World War II," in *Legacies of the Comfort Women of World War II*, eds. Margaret Stetz and Bonnie B. C. Oh (New York: M.E. Sharpe, 2001), p. 10.
[644] United Nations Office of the High Commissioner for Human Rights, *The "Comfort Women" Issue*, An NGO Shadow Report to CEDAW (New York: United Nations, 2009), p. 7.
[645] Ibid.

	Traffic	
1921	International Convention for the Suppression of the Traffic in Women and Children	1925
1926	1926 Slave Convention	Customary law
1930	International Labour Organisation Convention Concerning Forced Labour (ILO Convention No 29).	1932
1937	International Convention for the Suppression of Traffic in Adult Women and Girls	N/A

As one can see, Japan was a 1925 signatory to three international agreements regarding trafficking of women and children and of the 1932 convention regarding forced labour. The *International Convention for the Suppression of the Traffic in Women and Children* defined a person as underage if they were younger than 21 years. Upon ratification, Japan defined a minor as younger than 18 and stated that the Convention was not applicable to Japan's colonies, specifically Korea, Taiwan, and Kwantung.[646] Despite revoking the age restriction in 1927, Japan utilised minors in the comfort women system, violated customary international law regarding human rights and violated the rights of women regardless of whether they were/were not technically covered by the trafficking conventions.

The government's awareness of these conventions was reflected in the regulations established by The Home Ministry's Chief of the Police Bureau who stated that on the occasion that Japanese women were sent to be comfort women that: 'the women must be currently working as prostitutes, at least twenty-one years of age, and free from sexually transmitted and other infectious diseases...'[647] The women from Japan consented to being sent overseas to work in a military brothel, were given contracts and told that if they died their souls would be enshrined at Yasukuni Shrine (the National Shrine for Japanese war dead).[648] Further,

> If the recruitment of these women and the regulation of agents is improper, it will not only compromise the authority of the empire and damage the honor of the Imperial Army, it will exert a baleful influence on citizens on the home front, especially on the families of soldiers who are stationed overseas. Also we cannot be assured that it is not contrary to the spirit of international treaties relating to the traffic in women and girls.[649]

The notice sent by the Home Ministry's Chief of the Police Bureau clearly stated that Japanese women who were not prostitutes should not be considered as potential comfort women. The Ministry's belief was that if Japanese women were recruited -

[646] *International Convention for the Suppression of the Traffic in Women and Children*, Geneva, 30 September 1921.
[647] quoted in Yoshimi, *Comfort Women*, p. 100.
[648] Yoshimi, *Comfort Women*, p. 101.
[649] quoted in Yoshimi, *Comfort Women*, p. 154.

sisters, wives or acquaintances of the soldiers stationed overseas –it would destroy the soldiers' sense of trust in the military and the state.[650] In addition, improper adherence to regulations would violate international law and treaties. Yet, this consideration of women was only in regard to Japanese women and as will be discussed in subsequent sections, Dutch women. Forced 'recruitment' of women from Japan's colonies, in the opinion of the governmental and military, would not be considered to be trafficking under then current international law, and this belief was reflected in the fact that the memo regarding age limits and so forth was not sent to Korea or Taiwan.[651] Experts have agreed that despite Japan's exclusion of colonial women from the protection of the 1921 convention, the comfort women system violated the rights of non-colonial women since forced recruitment occurred in all occupied territories.[652]

The International Commission of Jurists report, *Comfort Women: An Unfinished Ordeal*, argues however, that the system violated the rights of women from the colonies as well. The argument is based on the fact that Japanese ships primarily transported Korean comfort women. While the kidnapping occurred within colonial territory, the Japanese military ships themselves are legally considered to be equivalent to Japanese territory and thus trafficking treaties covered the women once they boarded the ships.[653] The Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organisation (a United Nations agency) also argues that the comfort women system violated the Convention Concerning Forced or Compulsory Labour ratified in 1932 by Japan.[654] Finally, the 1906 Hague Convention on Land Warfare and its Regulations required that signatories respect family honour and rights which would protect the women in occupied territories from rape.[655]

That Japan's actions could be construed as violating international law were also evidenced in the fact that in order to 'recruit' Dutch women from the Japanese-led internment camps in the former Dutch East Indies, permission had to be granted from the Headquarters of the 16th Army.[656] The military officials, fearing an international

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[650] Yoshimi, *Comfort Women*, p. 155.
[651] Ibid. p. 155
[652] United Nations Office of the High Commissioner for Human Rights, *The "Comfort Women" Issue*, p. 7.
[653] This report is unavailable; however several sources report that this has been agreed including Yoshimi, *Comfort Women*, pp. 160 – 161.
[654] The Committee of Experts on the Application of Conventions and Recommendations, *Observation Concerning Convention No. 29, Forced Labour, 1930 Japan (Ratification: 1932)* (International Labour Organisation, 1997), 061997JPN029, p. 2.
[655] Yoshimi, *Comfort Women*, pp. 160 – 161; and United Nations Office of the High Commissioner for Human Rights, *The "Comfort Women" Issue*, p. 7.
[656] Yoshimi, *Comfort Women*, p. 164

incident following the end of the war, warned that military officials should 'take special care that only freely consenting people were employed at the comfort stations.'[657] The Office Candidate Corps ignored these orders, and like their Asian counterparts, many Dutch women were forcibly recruited and sexually enslaved.

A 2009 Shadow NGO report to the United Nations Office of the High Commissioner for Human Rights argues that in addition to being in violation of international laws, the comfort women system also violated then-current Japanese domestic laws. The report points out that: Official Order No. 295 of 1872 forbid trafficking in people and the Penal Code of 1907 forbid the 'confinement and trans-border transportation against their will, be it by force or threat, or by deception or use of "sweet words."'[658] Thus all major methods utilised to recruit comfort women for the Japanese military were illegal under domestic law, and the system itself illegal under international law. This law was enforced as evidenced in 1937 when the Supreme Court of Imperial Japan found guilty several recruiters who had kidnapped and enslaved Japanese women by forcing them to serve as comfort women in Shanghai.[659]

3. Issues of Redress and Reparations Under Allied Occupation

The comfort women system was not a state secret, and the records pertaining to the system were neither buried in obscurity nor destroyed. Instead it was regarded as rather a routine part of wartime, and neither the records nor the actions of the military officials were highly publicised. The norms of the time prohibited rape during war, yet prosecution for these crimes seldom occurred. Report Number 49 illustrates the derogatory opinion of the women who were 'recruited' as comfort women. The United States Office of War Information, Psychological Warfare Team attached to the U.S. Army Forces India-Burma Theatre compiled a report on 1 October 1944, which stated:

> This report is based on the information obtained from the interrogation of twenty Korean "comfort girls" ... A "comfort girl" is nothing more than a prostitute or "professional camp follower" attached to the Japanese Army for the benefit of the soldiers ... Other reports show the "comfort girls" have been found wherever it was necessary for the Japanese Army to fight.[660]

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[657] quoted in Yoshimi, *Comfort Women*, p. 165.
[658] United Nations Office of the High Commissioner for Human Rights, *The "Comfort Women" Issue*, p. 8.
[659] Ibid.
[660] United States Office of War Information, *Japanese Prisoner of War Interrogation Report No. 49*, 1 October 1944.

Report Number 49 also indicates that the Allies knew about the comfort women, and in this particular instance, that those 'recruited' for 'comfort service' were not told the true nature of type of work that they would be expected to perform. The report states that the women were often tricked into service and told that they were going to be laundresses or nurses. Thus women who had expected to work in hospitals or laundry service were thrust into prostitution with no recourse other than obedience.[661] Instead of expressing sympathy or outrage for these women, they were viewed as prostitutes who had chosen to 'work' their profession. The women within these stations, although primarily composed of foreign born women and women who had been under Japan's occupation during the war, were simply ignored at best, or classified as 'uneducated, childish, and selfish.'[662] In other words unimportant and perhaps deserving of their fate.

3.1 Occupational Policies

The following timeline indicates initial negotiations between the Allies and Japan:

Table 7.3: Negotiations between the Allies and Japan

26 July 1945	Potsdam Declaration
28 July 1945	Japan rejects the Potsdam Declaration
10 Aug 1945	Following the atomic bombings of Hiroshima (6 Aug) and Nagasaki (9 Aug) the Japanese government decides to accept the Potsdam Declaration on the condition that the Emperor remains the sovereign ruler of Japan.
14 Aug 1945	Surrender of Japan
28 Aug 1945	Occupation begins
2 Sept 1945	*Instrument of Surrender* is signed by Japan

The Allied strategy in regard to Japan was to blame the war on the military leaders, thus absolving -- and winning -- the support of the general population. Two reports issued by the United States shortly before the Potsdam Declaration (June 1945) illustrates this. In April 1945 a report was issued by the Psychological Warfare Branch of the US Army stating: 'If people could be made to believe that they themselves are not to blame for disaster but rather that it is the fault of the military clique, it will ease their mental burden.'[663] The US Foreign Morale Analysis Division concurred with this philosophy stating in June 1945 that:

> While making it perfectly clear to the Japanese that we are going to eliminate the militarists because they went to war with us, we may point out how the militarists have harmed the Japanese and we may make it clear that we have no intention of punishing the Japanese people once the militarists are overthrown. In this manner, *the military may be effectively used as a scapegoat*, with the

[661] Ibid.
[662] Ibid.
[663] quoted in James J. Orr, *The Victim as Hero: Ideologies of Peace and National Identity in Postwar Japan* (Honolulu: University of Hawaii Press, 2001), p. 17.

> double result of weakening their hold and leading other people to feel that there is something to hope for in surrender. [Emphasis added in Orr][664]

The result of this policy lead to the 1945 Potsdam Declaration (also known as the Proclamation Defining Terms for Japanese Surrender) issued by the United States, the United Kingdom, and the Republic of China stated:

> 4. The time has come for Japan to decide whether she will continue to be controlled by those self-willed militaristic advisers whose unintelligent calculations have brought the Empire of Japan to the threshold of annihilation, or whether she will follow the path of reason.
>
> 6. There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.
>
> 10. We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. ...[665]

Jennifer Lind has argued that the Potsdam Declaration helped to create a military clique thesis, which absolved the Japanese people of guilt and, in addition to later policies, would help to nurture a national sense of victimisation.[666] This sense of victimisation, she continues, was enabled by the United States' occupational policies.[667]

On 14 August 1945, General Douglas MacArthur was designated as the Supreme Commander of the Allied Powers, and appointed to supervise the occupation of Japan's main islands and the immediate surrounding islands.[668] The Psychological Warfare Officials and the General MacArthur's occupational administration created a mythology of Japanese victimhood where the military had run amok and was thus responsible for both implementing-- and losing - the war against the West. The primarily American occupation thus seemed to be directed at fostering Japanese amnesia regarding the most horrific of the war crimes rather than remembrance and responsibility for said crimes.[669] Additionally, the American narrative of occupational textbooks downplayed Japanese culpability and deflected attention from Japan's worst

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[664] Ibid.

[665] *Proclamation Defining Terms for Japanese Surrender* (Potsdam, July 26, 1945).

[666] Jennifer Lind, *Sorry States: Apologies in International Politics* (London: Cornell University Press, 2008), pp. 30-31.

[667] For more on the relationship between United States Occupational Policies and Japan's sense of victimisation see Lind, *Sorry States*; Orr, *The Victim as Hero*; and Franziska Seraphim, *War Memory and Social Politics in Japan, 1945-2005* (Cambridge: Harvard University Press, 2006).

[668] For a comprehensive examination of how General MacArthur's role in the occupation see Howard B. Schonberger, *Aftermath of War: Americans and the Remaking of Japan, 1945-1952* (London: Kent State University Press, 1989).

[669] Lind, *Sorry States*, p. 30.

atrocities.[670] As a result of these policies, conflict before the bombing of Pearl Harbor was ignored (i.e. periods of warfare occurring between 1931 and 1941), in addition to the myriad of crimes committed against Asians.[671]

In evaluating the Allied influence on historical justice, I concur that the Allies policies and influence led to forgetting rather than remembering, especially in regard to Asian victims of the war. Within Germany and the United States, however, civil society had begun its mobilisation and lobbying for recognition of the victimised group and/or reparations and restitution even before the war had ended, and a large portion of this initial lobbying was carried out in countries, while at war, had not been invaded.[672] The areas the comfort women hailed from however, was occupied or colonised territories. The ability or political opportunities to mobilise could not be afforded to the comfort women and the victimised group would not garner enough normative or political support until nearly 50 years after the war had ended.

3.2 War Crime Trials

War crime trials, instead of illuminating the various injustices perpetrated by the military, avoided the majority of human rights violations that could have been addressed. The Allied focus during the implementation of war crime trials was for the more conventional charge of war crimes and the newly created crimes against peace. The most well known trial was the International Military Tribunal for the Far East, hereafter referred to as the Tokyo Trials, held between 3 May 1946 and 12 November 1948.[673] The primary trial conducted for major war criminals, the Tokyo Trials did not address major human rights violations such as the forced conscription of Koreans and Taiwanese, the comfort women system of enslavement and forced rape, or the horrific medical experimentations conducted by Unit 731.[674] The trials are generally considered to have failed in regard of establishing an accurate and well-documented historical record similar to that created by the Nuremberg trials.

Ustinia Dolgopol, a member of the investigative mission sent by the International Commission of Jurists to Japan, the Philippines, and Korea speculates that

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[670] Ibid.

[671] Orr, *The Victim as Hero*, p. 16.

[672] The initial RRM movements for the German genocides were in the United States, Mexico, the United Kingdom, and the British Mandate of Palestine. Regarding the United States RRM, the only attacks recorded was in Alaska and Hawaii.

[673] Tim Maga, *Judgment at Tokyo: The Japanese War Crimes Trials* (Lexington, KY: The University Press of Kentucky, 2001), p. xi.

[674] Lind, *Sorry States*, p. 31. Unit 731 was the secret biological warfare unit established in China following the Japanese invasion; immunity was given in exchange for the research.

failure of the Allies to prosecute individuals for the comfort women system can be attributed to the prevailing attitude towards rape and women:

> In most of the countries making up the Allied forces, rape convictions were difficult to secure; women were often blamed for having brought it upon themselves. It is possible that some officers believed it would be better not to pursue these crimes because of the great shame it could bring upon the women. Certainly there were overtones of this attitude in Australian military documents.[675]

Dolgopol continues her argument that the result of criminal justice created immense problems for the former comfort women:

> However, what occurred was the forced silencing of these women which led to years of emotional and psychological suffering. Their pain could not be voiced, unlike that of the civilian and military prisoners of war. Although no outward recognition was given to their suffering, people knew that something had happened. Rumours abounded which meant that some women were treated harshly by their own societies.[676]

Dolgopol argues that colonialism and racism also played their parts; that the Allied countries prosecuted Japan for actions that affected their own nationals and excluded crimes that affected other individuals of Asian descent.[677] This argument is supported by the fact that the only trial to occur in regard to the comfort women system was for comfort stations in the former Dutch East Indies (Indonesia) where the Dutch military court held trials for the kidnapping and enslavement of approximately 35 Dutch women. The military courts were held by the Netherlands (an Allied nation) in Batavia, Indonesia. The courts utilised testimony from Indonesian women who were also enslaved, yet only prosecuted on behalf of their own citizens; despite the fact that they had been the colonial power prior to the invasion.

There were 13 defendants – seven military officers and four comfort station operators (i.e. civilian military employees) -- the charges centred on the mistreatment of Dutch prisoners ranging from forced prostitution to rape:

Table 7.4: War Crimes Prosecuted in the Ad Hoc Trials in Batavia[678]

Charge 1	Rounding up women and girls for the purpose of forced prostitution	3 Army officials found guilty.
Charge 2	Forcing girls and women to engage in prostitution	4 Army officials found guilty -- including the 3 found guilty on the previous charge and 4 comfort station operators are found guilty.
Charge 3	Rape	3 Army officials found guilty and 1 Army doctor.

[675] Ustinia Dolgopol, "Women's Voices, Women's Pain," *Human Rights Quarterly* 17, no. 1 (1995), p. 149.
[676] Ibid.
[677] Ibid.
[678] Yoshimi, *Comfort Women*, p. 172.

Charge 4	Mistreating internment camp inmates	1 Army official found guilty and 2 Army doctors.

Two of the 13 defendants were found not guilty on all charges. The primary officer in charge – an Army major – who was responsible for establishing the comfort stations received the death penalty for his actions.

As previously stated, the war crime trials utilised testimony obtained from Indonesian women as evidence in the trials for the Dutch women; however, no charges were ever brought for the similar actions of kidnapping and enslavement of the Asian women. This illustrates the importance of identity in the conflict and subsequent acts of justice. The Netherlands held trials for the kidnapping of their citizens, yet not for those who were in their protectorate. Additionally, Japan was clearly cognisant of international laws prohibiting the trafficking in women and minors; however, the Home Office only sent memos ordering the military to not forcibly recruit Japanese and Dutch women. The comfort women system, despite its criminal nature, did not feature in any other criminal trials and although provided guilty convictions for officers involved in the event; did not significantly impact historical or symbolic memory.

3.3 International Treaties and Reparations

Similar to the initial German reparation plans, the initial plans for Japan were quite harsh. From 1945 to 1946, the United State reparations commissioner, Edwin Pauley, recommended dismantling Japanese industry and redistributing equipment to other East Asian nations as reparations. Subsequent reports, however, warned that dismantling industry within Japan would substantially burden the American taxpayer and undermine the objectives of U.S. Occupation.[679]

The Allied Powers and Japan signed the San Francisco Peace Treaty on 8 September 1951; neither China nor Korea were signatories. The following table illustrates the treaties:

Table 7.5: Peace Treaties[680]

8 Sept 1951	The Treaty of Peace with Japan (also known as the San Francisco Peace Treaty) is signed.
28 April 1952	San Francisco Peace Treaty enters into force; Japan is officially an independent state.
28 April 1952	Treaty of Peace between the Republic of China and Japan (also known as the Treaty of Taipei) is signed.
5 August 1952	Treaty of Taipei entered into force.
1955	Bilateral Treaty with Burma
1956	Bilateral Treaty with the Philippines
1958	Bilateral Treaty with Indonesia

[679] Lind, *Sorry States*, p. 32

[680] Source: *Treaty of Peace with Japan*, www.taiwandocuments.org/sanfancisco01.htm, accessed on 1 March 2011.

1959	Bilateral Treaty with South Vietnam
1963	Bilateral Treaty with Thailand

Article 14 of the San Francisco Peace Treaty stated:

> It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations. ...
>
> 1. Japan will promptly enter into negotiations with Allied Powers so desiring, whose present territories were occupied by Japanese forces and damaged by Japan, with a view to assisting to compensate those countries for the cost of repairing the damage done ...
>
> b. Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the war, prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.[681]

The United States waived its own right to reparations and waived the right for states not participating in the San Francisco Peace Treaty. The two countries most victimised by Japan during the war – Korea and China – were denied reparations by the Allied Powers: Korea, as a former Japanese colony until 1945, was deemed part of the Japanese Empire and thus an enemy combatant ineligible for reparations. The People's Republic of China, a communist regime, was established in 1949. Although China and Japan had fought the Sino-Japanese War from 1937 to 1945, and China, despite being one of Japan's primary targets during the war, including events such as the Nanking Massacre, was blocked by the United Stated from participation in the 1951 San Francisco Peace Treaty as part of American anti-communist policies.[682] The subsequent treaty signed between China and Japan in 1952 made no mention of reparations. The result of these treaties and policies is that Japan had argued that the peace treaties and bilateral treaties have terminated all possible claims.[683]

Japan's reparations policies, unlike Germany's stance, did not reflect an apologetic stance toward any victimised group nor remorse for the wartime atrocities. The bilateral treaties and reparation monies were not linked to any specific wrongdoings and since the monies were in the form of grants, loans, products, and services, it was widely perceived that the reparations were a way to gain an economic

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[681] Ibid.
[682] Lind, *Sorry States*, p. 32.
[683] Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery," p. 335.

foothold in Southeast Asia, and not as a form of atonement. Again, the monies that were given were to the state while individual victims of Japanese atrocities received nothing.[684]

The Allied occupation of Japan thus resulted in little to no acts associated with restorative justice. The trials which were held either did not address the victims of the comfort women system, or prosecuted for Dutch citizens only. The subsequent sealing of the record, however, did not allow for the establishment of an historical record and thus even the little which was done did not meet the goal of restorative justice principles. The comfort women issue would be fairly quiet for 50 years before it would return to a public forum. Thus where Germany and the United States victim groups steadily worked on the issue, the comfort women issue would mobilise much later, severely limiting the number of victims who would still be alive.

4. Initial Steps Toward a Redress and Reparations Movement

One key difference between the comfort women redress and reparation movement, and the movements found in Germany and the United States, has been that the associated social movement organisation were mobilised primarily by those outside of the victimised group, i.e. by allies; in addition, the acceptance and denial of reparations by the victims have been heavily influenced by said organisations. Stetz and Oh state that:

> If the effect of nearly fifty years of public silence on the subject of these war crimes was isolation and alienation for the victims, the result of breaking the silence has been a burgeoning network of alliances.[685]

The organisations were composed primarily of women's groups and dedicated elite allies throughout Japan, Korea, and other states. Due to the nature of the crimes, and the shame that society still places on these crimes, many women have not been willing to come forth and publicly identify themselves as former comfort women.[686] The first tendrils of research began to emerge within Japan in 1962, when journalist Senda Kako began to investigate the comfort women issue; he subsequently published his results in 1973. Several books then emerged in the 1980s, and a radio interview was conducted

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[684] Lind, *Sorry States*, p. 34.
[685] Stetz, and Oh, "Introduction," p. xv.
[686] Jane W. Yamazaki, *Japanese Apologies for World War II: A Rhetorical Study* (New York: Routledge, 2006), p. 29.

with former comfort woman Shirota Suzuko in 1986.[687] As one can see in the following table, little action was taken between prior to the 1990s when the very first books and interviews began to be recorded and published. Thus, I argue, a comfort women redress and reparation movement did not begin until the beginning of the 1990s. This could be in part because the redress and reparation norm did not hit a tipping point until 1988 thanks to the Japanese American RRM, and therefore there was less pressure on Japan to engage in reparation politics.

Table 7.6: Initial Actions Taken By Civil Society, Elite Allies, and Governmental Officials[688]

1973	Journalist Senda Kako published research on the comfort women.
1980s	A small selection of books began to be published.
1986	Radio interview conducted with Shirota Suzuko.
1988	Women NGOs in South Korea begin to mobilise and demand investigations.
12 – 21 Feb 1988	Comfort women survey conducted by members of Korea Church Women United.
1990	Foundation of Japanese Honorary Debts (JES) established in the Netherlands to demand that the Japanese government recognise legal responsibility for the Dutch internments and pay compensation. Comfort women issue secondary focus (AWF).
22 May 1990	Press conference held by Korea Women's Associations United and Korean Council of University Women regarding the comfort women issue.
June 1990	Senator from the Socialist Party – Motooka Shoji – demands that the government investigate the issue of military sexual slavery.
17 Oct 1990	Open letter to the Japanese government sent by Korean Women's Association demanding an apology, a memorial, and investigation.
16 Nov 1990	37 groups form The Korean Council for the Women Drafted for Military Sexual Slavery by Japan.

Initially the Japanese government denied any official involvement or coercion in the establishment and operation of comfort stations, instead insisting that it was the responsibility of private entrepreneurs.[689] Gradually, the government has been forced to acknowledge its role in the atrocity, however, the acknowledgement itself is controversial and the government has maintained its stance that all claims arising out of World War II were settled by various treaties, including the Agreement on the Settlement of Problems Concerning Property and Claims and on Economic Cooperation Between Japan and the Republic of Korea,[690] and the San Francisco Peace Treaty. Unlike the post-war actions of both Germany and the United States with respect to its wartime atrocities, Japan has gone to great lengths to suppress information regarding the comfort women themselves and the involvement of the Japanese government. Museums, memorials, and textbooks have little to no mention of historical

[687] Oh, "The Japanese Imperial System and the Korean "Comfort Women"", p. 15.
[688] Sources include: "History," Washington Coalition for Comfort Women Issues, http://www.comfort-women.org/history.html, accessed on 1 March 2010; Oh, "The Japanese Imperial System and the Korean "Comfort Women""; and "History," The Korean Council, http://www.womenandwar.net/english/menu_012.php, accessed on 1 March 2010.
[689] Parker and Chew, "Compensation for Japan's World War II War-Rape Victims," p. 500.
[690] Ibid. p. 501.

events such as the comfort women system or the Nanking Massacre, but focus on memorialising Japanese war-dead while giving scant attention to those they victimised.[691] I argue the acknowledgement that Japan has given is unsatisfactory to the victims, and seems to have been as a result of international pressure. By offering a version of reparations and apologies Japan appear to be conforming to the international redress and reparation norm, however, the state has not truly embraced reparation politics.

4.1 Mobilisation and Government Denial

The creation of *The Korean Council for Women Drafted for Sexual Slavery By Japan* (Korean Council) in 1990 indicated a launching point for civil society and their role in the redress and reparation movement. Prior to the inception of this organisation, the comfort women issue was an obscure historical fact, known primarily to a handful of women's groups in Korea; there were neither dedicated organisations nor umbrella organisations attempting to coordinate efforts. The first action of the Korean Council was to begin centralising data collection by conducting in-depth interviews with former comfort women, establishing a phone bank to capture information from individuals who had not yet come forth, and collecting reports that were being forwarded from other organisations such as the *Pacific War Bereaved Association* and the South Korean government.[692] The Korean Council then assisted three elderly Korean women in filing a lawsuit in the Tokyo District Court on 6 December 1991. The three comfort women were part of a class-action suit involving 35 South Koreans with an additional seven comfort women joining the lawsuit. The litigation demanded an official apology from the Japanese government and compensation for damages arising from the Japan's wartime actions.[693] The lawsuit was vital for the redress and reparation movement, due to this being the first instance that many within Japan had heard about the comfort women. The filing of this suit launched an official discourse about the comfort women within domestic Japanese society and the issue then dispersed itself into the international conscience through the actions and awareness raising ventures of human rights organisations. Similarly to the Japanese American redress and reparation movement; the comfort women RRM is considered to be a single RRM. Although NGOs tend to focus on assisting survivors within their own country, they do not tend to lobby for a particular nationality, but for the victimised group in entirety.

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[691] Michael Weiner, *Race and Migration in Imperial Japan* (New York: Routledge, 1994), p. 2.
[692] "War Victimization and Japan: International Public Hearing Report," p. 9.
[693] Yamazaki, *Japanese Apologies for World War II*, p. 58.

Since the filing of the lawsuit, survivors and former perpetrators have recorded their testimonies through memoirs, interviews, public hearings, and tribunals. Many of the survivors work with NGOs and other allies in an effort to obtain some sort of justice. One such survivor, Maria Rosa Henson, stated:

> Many have asked me whether I am still angry with the Japanese. Maybe it helped that I have faith. I had learned to accept suffering. I also learned to forgive. ... Half a century has passed. Maybe my anger and resentment were no longer as fresh. Telling my story has made it easier for me to be reconciled with the past. But I am still hoping to see justice done before I die.[694]

The Japanese government's response was initially negative, stating in June 1990 that there was no military or governmental involvement in the comfort women system. In April 1991, in response to an open letter from the Korean Women's Association, the government reiterated that there was no evidence of forced drafting of Korean women and thus there would be no apologies, memorials or disclosures. The government stated that comfort women had been voluntary prostitutes.[695]

In response to these government denials, the Korean Council listed seven demands, variations of which became the core demands of the comfort women redress and reparation movement and illustrate the importance of both physical and symbolic justice:

> ... the Korean Council demands the followings of the Japanese government to restore the victims' dignity and to correct the distorted relationship between Korea and Japan.
>
> 1. That the Japanese government admits the crime of the compulsory drafting of Korean women as "comfort women".
> 2. That all the barbarities be fully investigated.
> 3. That an official apology be made through the resolution of the Japanese Diet.
> 4 That legal compensations be made for the survivors and their bereaved families
> 5 That all the facts and truth about Military Sexual Slavery by Japan be recorded in the Japanese history textbook
> 6 That a Memorial and a Museum be built
> 7 That those responsible for the crime be punished [sic][696]

The Korean Council became instrumental in maintaining public awareness and political pressure regarding recognition. As one can see below, the actions taken by civil society in 1991 alone were almost equal in number to the entirety of actions taken from 1945 to

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[694] Maria Rosa Henson, *Comfort Women: Slave of Destiny* (Manila: Philippine Center for Investigative Journalism, 1996), p. 147.
[695] "History," Washington Coalition for Comfort Women Issues; Oh, "The Japanese Imperial System and the Korean "Comfort Women", pp. 15 - 16.
[696] "History," The Korean Council.

1990. The majority of the actions had links to the Korean Council either directly or indirectly through lobbying. Again, where the Korean Council was focused primarily on Korean women, as this was approximately 80% of the victims and the nationality of the members of the organisation, they did not exclude other nationalities in their quest for apologies and reparations.

Table 7.7: Actions Taken By Civil Society, Elite Allies, and Governmental Officials in 1991[697]

8 Jan 1991	Korean Council held demonstration march and issued statement when the Japanese Prime Minister visited South Korea.
April 1991	The Japanese government denied that there was any government involvement in the comfort women system and affirmed that there would be no possibility of apologies, formal recognition or compensation.
14 Aug 1991	Former Korean comfort women, Kim Hak-soon, testifies in public that she had been forcibly taken by the Japanese military and forced to serve as a comfort woman.
18 Sept 1991	Korean Council opened hot line to gather data and information regarding the former comfort women.
Nov 1991	The former mobilisation director of the Yamaguchi prefecture confirms in *Hokkaido Shimbun* that comfort women were forced and/or tricked into becoming comfort women by the Japanese military.
Nov 1991	The Press Director of the Japanese Ministry of Affairs – Mr. Watanabe – states on television that there is insufficient evidence to warrant an investigation.
6 Dec 1991	First lawsuit filed in Japanese courts regarding comfort women.
Dec 1991	The Republic of Korea requests Japan conduct an investigation into the issue.
12 Dec 1991	Japan initiates an investigation.

As one will see on subsequent tables, the Korean Council continued its actions though the 1990s and 2000s – their actions include the lobbying of Korea, other Asian countries, Western democratic nations, and the United Nations in an effort to raise awareness and obtain redress and reparation from Japan.

4.2 Initial Apologies and Further Denials

In the midst of Japan's denial of the comfort women, well-known Japanese historian and researcher Yoshimi Yoshiaki discovered archived Defence Agency records (January 1992) proving that the Japanese military planned, constructed, and operated the comfort stations. Yoshimi subsequently published the documents in *Asahi Shimbum*, a well-known Japanese newspaper. The documents thus refuted the previous statements by the government claiming that there was no official involvement in the comfort women system.[698] The irrefutable evidence prompted Cabinet Secretary Kato Koichi to call a press conference in 1992, which he stated that the military had been involved in maintaining the comfort stations.[699] An official cabinet memorandum stated:

[697] Sources include: "History," Washington Coalition for Comfort Women Issues; and "History," The Korean Council

[698] Yoshimi, *Comfort Women*, p. 7.

[699] Yamazaki, *Japanese Apologies for World War II*, p. 59.

1. When we consider the suffering experienced by the so-called comfort women from the Korean peninsula, it is heartbreaking (*mune ga tsumaru).*

2. Materials in the Defense Agency support the fact that military authorities were involved ...

4. The Japanese government has expressed deep regret and apologies before concerning the past acts of Japan that caused unbearable suffering for the people of the Korean peninsula, but in this case, *we want to again express our sincere apology and regret to those who endured suffering beyond description (hitsuzetsu ni tsukushigatai).* The Japanese government is resolved that this should never happen again.

5. We have been conducting an investigation since the end of last year and will pursue vigorously the facts of the situation. [emphasis in original][700]

The apology made by Kato had been referenced by current politicians as proof that Japan had apologised for the comfort women system; however, as will be shown, the apology was not well received by the victimised group and subsequent refutations by other politicians would create a point of contention on whether Japan had truly apologised for its actions, with both the victimised group and international society arguing that it has not.

Prime Minister Miyazawa's statement included the following: 'Recently the issue of so-called military comfort women has been raised; this is truly painful to the heart and is inexcusable.'[701] The Korean Council, on behalf of the victims, rejected this statement as insufficient:

> We opposed the visit to South Korea by Prime Minister Miyazawa ... However, having visited South Korea, he has left, still avoiding the issue of substantive compensation, merely reiterating specious expressions of deceitful apology. We sternly admonish Japan that such an attitude, unchanged from the past, desecrates our nation in its demand for the liquidation of colonialism, and the souls of those who have been sacrificed. ... We declare again that we cannot accept an apology unaccompanied by the disclosure of all the barbarities and the willingness to pay compensation.[702]

Thus, in the case of the Japanese comfort women system, organisations and individuals have rejected the initial apology as insincere; insisting a truly remorseful nation will give not only some form of compensation for the World War II atrocities, but also full disclosure of the event. This illustrated a linkage, at least from the perspective of those victimised, between formal reparations or redress and symbolic justice; that an apology in of itself is not enough, but that an apologetic stance must be assumed in which we

[700] quoted in Yamazaki, *Japanese Apologies for World War II,* p. 59.
[701] Yamazaki, *Japanese Apologies for World War II,* p. 60.
[702] quoted in Yamazaki, *Japanese Apologies for World War II,* p. 63.

see actions reinforcing the words uttered by politicians. In each of the previous case studies deemed the most successful – the Jewish RRM and the Japanese American RRM – we saw not only an apology, but also varying amounts of reparations, museums, monuments, and symbolic days of remembrance to name a few of the restorative justice acts.

Following these initial statements regarding the comfort women, Japan opened an investigation into the matter. Subsequently, the 6 July 1992 report officially acknowledged Japan's involvement in the comfort women system, however, found 'no evidence' that women were forcibly drafted to be sex slaves. The report ignored previously established testimony and records from both perpetrators and victims of the comfort women system and the government did not interview anyone who had been involved. Many individuals felt the report was insufficient and being utilised as another form of denial – by arguing that there was no evidence of being forced, the implication is that they choose to engage in prostitution.

The response to the governmental report was quite negative. As a direct result, several organisations banded together to form *The Executive Committee of the Public Hearings*. The purpose of the Committee was to hold an international public hearing, like a truth commission, where research from academics, lawyers, and organisations could be presented and where survivors and other interested parties could attend. The result of the committee was that the *International Public Hearing Concerning Post-War Compensation in Japan* was held in Tokyo on 9 December 1992.[703] The report of the hearing, in addition to various testimonies, was subsequently published in *War Victimization and Japan* (1993) and clearly outlined Japan's role in the comfort women system.

International norms in the early 1990s encouraged states to take responsibility for their actions and to engage in various forms of reparation politics. Although this norm is now becoming more prevalent within international society, it cannot force a state to embrace it. Two such notable examples are Japan's reluctance to engage in redress and reparations and Turkey's adamant denial of the Armenian genocide. This is more than balanced however, by the plethora of apologies that occurred in the 1990s and 2000s. Facing this international pressure however, in addition to litigation, negative press, and an increase in civil society pressure has led Japan to carry out further investigations into the comfort women system. The second investigation included

[703] "War Victimization and Japan: International Public Hearing Report," p. vi.

interviews with former comfort women and concluded with a second report being issued in August 1993. Cabinet Secretary Kono Yohei stated:

> The then Japanese military was, directly or indirectly, involved in the establishment and management of the comfort stations and the transfer of comfort women. The recruitment of the comfort women was conducted mainly by private recruiters who acted in response to the request of the military. The Government study has revealed that in many cases they were recruited against their own will, through coaxing, coercion, etc., and that, at times, administrative/military personnel directly took part in the recruitment. They lived in misery at comfort stations under a coercive atmosphere...
>
> Undeniably, this was an act, with the involvement of the military authorities of the day, that severally injured the honor and dignity of many women. The Government of Japan would like to take this opportunity once again to extend its sincerest apologies and remorse to all those, irrespective of place and origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women.[704]

This apology came under heavy criticism for the use of qualifiers such as 'in general' and 'in many cases' and again, for the refusal to consider compensation as part of the apologetic stance. It was considered a positive step forward – as the apology is inclusive of all comfort women and not those from a single country.[705] The following table demonstrates further actions taken by civil society between 1992 and 1996:

Table 7.8: Further Actions Taken By Civil Society[706]

8 Jan 1992	The first demonstration for Military Sexual Slavery Issues began in front of the Japanese Embassy in Seoul. This would evolve into weekly Wednesday demonstrations.
10 – 11 Jan 1992	Yoshimi Yoshiaki discovered and published wartime documents that proved military involvement with the comfort women system.
13 Jan 1992	Chief Cabinet Secretary Kato admits that the Japanese Imperial Army was involved in maintaining military brothels.
6 July 1992	The Japanese government released its initial report stating that there was no evidence that women were forced to become comfort women.
10 – 11 Aug 1992	The 1st Asian Solidarity Conference for Military Sexual Slavery by Japan is held (hereafter referred to as the Asian Solidarity Conference). Conference attended by delegates from six countries including Taiwan and the Philippines.
9 Dec 1992	International Public Hearing Concerning Post-War Compensation in Japan is held in Tokyo.
Dec 1992	The Washington Coalition for Comfort Women Issues is formed in the United States.
Apr 1993	Yoshimi Yoshiaki forms the Center for Research and Documentation on Japan's War Responsibility (JWRC).
May 1993	Japanese government states that all claims have been settled under bilateral treaties and that Japan is not required legally to pay compensation to individual victims.
June 1993	The Korean Council participated in the Vienna World Human Rights Conference
22 – 25 Oct 1993	The 2nd Asian Solidarity Conference agreed to use the term 'Japanese Military Sexual Slavery by Japan.'

[704] quoted in Yamazaki, *Japanese Apologies for World War II*, p. 64.
[705] Yamazaki, *Japanese Apologies for World War II*, pp. 64 – 65.
[706] Sources include: "History," Washington Coalition for Comfort Women Issues; "History," The Korean Council; Yamazaki, *Japanese Apologies for World War II;* "War Victimization and Japan: International Public Hearing Report.

2 Sept 1994	The International Commission Jurists issued a report, which urged the Japanese government to provide full rehabilitation and restitution to former comfort women.
Mar 1995	The Korean Labor Union sent a letter to the International Labor Organization that requested confirmation that the comfort women system had violated the regulation against forced labour.
Sept 1995	The comfort women issue was included in the International Women's Conference at Beijing.
4 Mar 1996	The International Labor Organization confirmed the comfort women issue violated the regulation against forced labour.

5. The Failure of Criminal Justice

During the same time period that investigations were being conducted and apologies drafted, a series of lawsuits were being filed in the Japanese courts. The first lawsuit was filed on 6 December 1991 in the Tokyo District Court. This was the first of ten comfort women lawsuits that would be filed in Japan. Unlike Germany or the United States where victims have received some measure of success in the courts, the Japanese plaintiffs have generally been unsuccessful, with many cases thrown out of the court, ruled against, or dismissed because the statute of limitations have expired or because the bilateral treaties signed with the plaintiffs country of origin disallowed individuals future reparation claims.[707] The table below illustrates the various court cases filed on behalf of former comfort women and includes women from multiple countries including South Korea and the Netherlands:

Table 7.9: Seeking Redress and Reparations through the Courts[708]

Petition Filed	Court Case	Notes
6 Dec 1991	The Case of Korean victims of the Asia-Pacific War claiming reparations.	• District Court dismissed claims (26 March 2001). • High Court (22 July 2003) and Supreme Court (29 November 2004) appeals are also dismissed.
25 Dec 1992	The Case of Pusan (South Korean) comfort women and Women's Labour Corps members claiming official apology, etc.	• The District Court ruled that Japan should compensate former comfort women 300,000 yen, confirmed historical facts and government's legal responsibility (27 April 1998). • Both the High Court (29 March 2001) and Supreme Court (25 March 2003) overruled the decision.
2 Apr 1993	The Cases of Philippine comfort women claiming compensation.	• District Court dismissed claims (9 October 1998). • High Court (6 January 2002) and Supreme Court (25 December 2003) appeals are dismissed.
3 Apr 1993	The Case of SONG Shin-do claiming apology, etc.	• The District Court dismissed all claims, however, it did agree that a breach of international law occurred. • High Court (30 November 2000) dismissed appeal,

[707] Lind, *Sorry States*, p. 66.

[708] All court cases are filed within Japan unless otherwise noted. Sources include: "Court Cases," Violence Against Women in War-Network Japan, http://www1.jca.apc.org/vaww-net-japan/english/sexualslavery/courtcase.html, accessed on 1 March 2010. "Lawsuits in Japanese Courts," Asian Women's Fund, http://www.awf.or.jp/e4/lawsuit.html, 1 March 2011; and Niksch, Larry. *Congressional Research Service Memorandum: Japanese Military's "Comfort Women" System*. April 3, 2007.

		but recognised breaches of international law had occurred. • Supreme Court (28 March 2003) dismissed claims.
24 Jan 1994	The Case of Dutch prisoners of war and civilian detainees claiming compensation	• District Court dismissed claims (30 November 1998). • High Court dismissed appeal, however did recognise damage to plaintiffs (11 October 2001).
07 Aug 1995	The Case of Chinese comfort women claiming compensation, etc.	• The District Court dismissed the claims (30 May 2001).
23 Feb 1996	The Case of Chinese comfort women claiming compensation, etc. (*Ko Hanako et al. v. Japan*)	• The District Court dismissed all claims, however, it did recognise factual information and that survivors suffer from PSTD (March 2002). • High Court (March 2005) and Supreme Court (27 April 2007) dismissed claims.
30 Oct 1998	The Case of victims of sexual violence in Shan-xi Province, China, claiming compensation, etc.	• District Court dismissed all claims, however, it did recommend redress through legislation (24 April 2003). • High Court dismissed claims (November 2005).
14 July 1999	The Case of Taiwanese comfort women claiming compensation and written apology	• District Court dismissed claims (15 Oct 2002). • High Court (9 February 2004) and Supreme Court (25 February 2005) dismissed all claims.
Sept. 2000	Joo vs. Japan (15 comfort women from China, Taiwan, South Korean and the Philippines file in US Court under US Alien Tort Statute.	• US District Court dismissed all claims. • US Court of Appeals for the District of Columbia ruled against the women (June 2005). • US Supreme Court deferred to the judgement of the US Executive Branch (21 February 2006).
16 July 2001	The Case of Hainan Island comfort women seeking written apology, etc	• District Court determined the historical information was accurate; however the statute of limitations had expired.

Although the table illustrates that there has been some attempts at obtaining criminal justice for the comfort women, the attempts have met overwhelmingly with failure. There have been some attempts by the courts to recognise the historical events, i.e. the factual details, however, the overwhelming message by the courts is that neither the individuals involved nor the state would ever be held responsible for the crimes committed.

The most successful claim was filed in December 1992. The resulting decision by the Yamaguchi District Court in 1998 said that the Japanese government failed to enact laws to accommodate the payment of compensation to sex slaves and ordered the government to pay a total of 900,000 yen ($7,260 at the time) in damages to three South Korean women. The survivors appealed the amount, saying it was too small and the Japanese government appealed, refusing to pay compensation. However in 2001, this ruling – which was the first and only compensation award made to comfort women – was overturned by Hiroshima's High Court: 'Presiding judge Toshiaki Kawanami said abducting the women to use them as forced labourers and sex slaves was not a

serious constitutional violation.'[709] Japanese redress scholar William Underwood has concluded that, although victims were unlikely to ever receive compensation, he does believe that the litigation has helped to establish an invaluable historical record on World War II human rights violations.[710]

6. Mobilisation and Organisation of International Society

The years between 1990 and 1994 signified the first stage in the redress and reparations movement for the sexual servitude enforced on women during World War II. While the first stage was signified initially by governmental denial and then the victimised community's rejection of apologies without compensation, the second stage is signified by strong political pressure from international society. This second stage of the redress and reparation movement operates within an international society that has already begun to see a redress and reparation norm cascade, but has not yet internalised this norm. There are some elite allies within Japan's domestic government, but the primary pressure for adherence to this norm is coming from outside of Japan.

The comfort women redress and reparation movement went from relative obscurity in the 1980s to extremely active in the 1990s. To outside observers, it seemed to simply explode on the international scene with a series of lawsuits filed, demonstrations, and international lobbying. The RRM was truly a transnational movement as the victims hailed from six different countries, and the organisations dedicated to the issue were even more diverse including NGOs dedicated to this movement located in Washington DC and Australia. The following section will explore the use of international organisations and international pressure by norm entrepreneurs in an attempt to achieve their goals.

6.1 International Organisations

A technique for lobbying that is being utilised by redress and reparation movements is the extensive lobbying of IGOs such as the United Nations and the European Union in addition to the lobbying of foreign governments such as the United States and Canada. This is being done to create political pressure on Japan, so that they will provide redress and reparations for the World War II crimes.

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[709] BBC News, "Japan Overturns Sex Slave Ruling," 29 March 2001, http://news.bbc.co.uk /2/hi/asia-pacific/1249236.stm, accessed on 1 March 2010.
[710] William Underwood, Mitsubishi, p. 18.

The comfort women issue began to be presented before the United Nations in the Commission on Human Rights, the Working Group on Contemporary Forms of Slavery, and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1992 and again in 1993. The issue received significantly more attention, however, in 1994 when Radhika Coomaraswamy was appointed the Special Rapporteur on Violence Against Women by the Commission on Human Rights and given a special brief to investigate the comfort women issue. The Sub-commission on the Prevention of Discrimination and Protection of Minorities appointed Linda Chaves as Special Rapporteur on Sexual Slavery During Wartime with the task of undertaking an in-depth study on the situation of systematic rape, sexual slavery, and slavery-like practises during wartime, including internal armed conflict.

As a result of the mandate to investigate the comfort women issue, Special Rapporteur Coomaraswamy submitted *Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime* on 4 January 1996. The report investigated the comfort women issue as it had taken place in Korea and recorded the historical findings in addition to finding: 'the practice of "comfort women" should be considered a clear case of sexual slavery and a slavery-like practice in accordance with the approach adopted by relevant international human rights bodies and mechanisms.'[711] The Special Rapporteur also acknowledges that the Japanese government disputes the latter term, stating that the:

> application of the term "slavery" defined as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised" in accordance with article 1 (1) of the 1926 Slavery Convention, is inaccurate in the case of "comfort women" under existing provisions of international law.[712]

Special Rapporteur Coomaraswamy further argues:

> the Special Rapporteur concurs entirely with the view held by members of the Working Group on Contemporary Forms of Slavery, as well as by representatives of non-governmental organizations and some academics, that the phrase "comfort women" does not in the least reflect the suffering, such as multiple rapes on an everyday basis and severe physical abuse, that women victims had to endure during their forced prostitution and sexual subjugation and abuse in wartime. The Special Rapporteur, therefore, considers with

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[711] United Nations Economic and Social Council. *Report of the Special Rapporteur on violence against women, its causes and consequences: mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime.* E/CN.4/1996/53/Add.1 4 January 1996.paragraph 8, p. 4.

[712] Ibid. paragraph 7, p. 4.

conviction that the phrase "military sexual slaves" represents a much more accurate and appropriate terminology.[713]

The United Nations report thus outlined not only the Special Rapporteur's view that the crimes against the comfort women were a system of sexual slavery, but also presented the demands for apologies and compensation from North and South Korea as well as various nongovernmental agencies, but discussed Japan's position on the issue as well. The report demonstrates that Japan has taken a moral responsibility for the issue – but many victims are demanding that Japan take a legal responsibility and thus provide reparations for the crimes committed.[714] The Special Rapporteur concurred that Japanese government has both a legal and a moral obligation to the former comfort women of World War II.[715]

While Japan has responded to the United Nations, they have continued to argue that they have discharged all of their obligations under international law. As one can see on the following table however, is that the international community is not happy with this response and various other committees, sub-committees, and UN Special Agencies have gone on record demanding that Japan address the comfort women issue and provide both reparations and sincere apologies:

Table 7.10: Seeking Redress and Reparations through the United Nations[716]

1992	The Comfort Women issue (CWI) is raised in the Commission on Human Rights, the Working Group on Contemporary Forms of Slavery, and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.
1993	CWI is raised again in the Commission on Human Rights, the Working Group on Contemporary Forms of Slavery, and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.
April 1994	Commission on Human Rights appointed Radhika Coomaraswamy as Special Rapporteur on Violence Against Women.
August 1994	Sub-commission on the Prevention of Discrimination and Protection of Minorities appointed Linda Chaves as Special Rapporteur on Sexual Slavery During Wartime.
March 1995	United Nations Commission on the Status of Women NGO workshop adopted resolution supporting the CWI.
31 May 1995	Committee of the Elimination of Discrimination against Women (CEDAW) report 'encourages' the Japanese government to address the CWI.
September 1995	United Nations' 4th World Conference on Women in Beijing adopts resolution supporting the CWI despite intense lobbying by Japanese government representatives.
1996	Special Rapporteur Radhika Coomaraswamy submits and report is adapted by the United Nations Commission on Human Rights recognising the comfort women system as slavery and argues that Japan should acknowledge the event, pay compensation, fully disclose information, apologise, educate the populace, and punish perpetrators.
22 June 1998	Special Rapporteur Gay McDougal for Systematic Rape, Sexual Slavery and

[713] Ibid. paragraph 10, p. 4.
[714] Ibid. p. 22.
[715] Ibid. p. 22.
[716] Sources include: "History," Washington Coalition for Comfort Women Issues; Yoshimi, *Comfort Women;* United Nations Office of the High Commissioner for Human Rights, *The "Comfort Women" Issue.*

	Slavery-like Practises During Armed Conflict submitted report to the UN sub-commission on Prevention and Discrimination and Protection of Minorities recognising the comfort women system as a system of military slavery.
10 Aug 1998	Special Rapporteur Gay McDougal urges the Japanese government to compensate comfort women victims.
2000	Special Rapporteur Gay McDougal issues an update to the final report stating that Japan has not met its obligations under international law regarding the CWI.
2001	Special Rapporteur Radhika Coomaraswamy issues report stating that Japan should take criminal and legal responsibility for the CWI.
2001	Committee on Economic, Social and Cultural Rights strongly recommends that Japan compensate comfort women victims.
2003	CEDAW report recommends that Japan find 'a lasting solution' the CWI.
2003	Special Rapporteur Radhika Coomaraswamy argues that Japan still has not accepted legal responsibility for the CWI.
2006	Special Rapporteur Doudou Diène for Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and related Intolerance recommends Japan to include the CWI in textbooks.
2007	Committee Against Torture argues that Japan take measures to educate about and rehabilitate comfort women.
2008	Human Rights Committee states that Japan should accept legal responsibility and apologise for the comfort women system.

Thus there is continued international pressure for Japan to conform to the redress and reparation norm; however, Japan is currently ignoring this pressure.

6.2 A People's Tribunal[717]

At the 5th Annual Asian Solidarity Conference (1998) it was decided to hold the *Women's International War Crimes Tribunal on Japan's Military Sexual Slavery*. From 8 December to 12 December 2000, the *Women's International War Crimes Tribunal 2000* sat in Tokyo, Japan.

> These failures must not be allowed to silence the voices of survivors, nor obscure accountability for such crimes against humanity. [The tribunal] was established to redress the historic tendency to trivialize, excuse, marginalize and obfuscate crimes against women, particularly sexual crimes, and even more so when they are committed against non-white women.[718]

The tribunal was established to consider the criminal liability of leading high-ranking Japanese military officials and the separate responsibility of the state of Japan for rape and sexual slavery as crimes against humanity.[719] The tribunal arose out of the work of various women's NGO's across Asia because survivors were frustrated by the lack of effective response and awareness that many survivors are dying. The primary instigator was Violence Against Women in War Network, Japan. The prosecutors

[717] A People's Tribunal is a hearing put on by a social movement, victimised group, or other organisation. It can be similar to trials or truth commissions and can be used to bring attention to human rights.
[718] Prosecutors and Peoples of Asia Pacific Region v. Hirohito; Prosecutors and Peoples of Asia Pacific Region v. Japan, Summary of Findings and Preliminary Judgement, quoted in Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery," p. 336.
[719] Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery," p. 335.

argued that trials post-World War II with respect to Japanese conduct during the war were incomplete as they had inadequately considered rape and sexual enslavement and had failed to bring charges for the detention of women for sexual services. The tribunal was three days with over 75 survivors in attendance. Many survivors gave evidence, along with providing video interviews and affidavits. In addition, the prosecution presented documentary evidence and expert evidence that linked those atrocities to the Japanese state and the Emperor. Two former soldiers gave testimony and *amicus* briefs were presented including a draft outline of a legislative framework for redress.[720]

Japan was notified of the tribunal on 9 November 2000 and invited to participate. Japan did not respond to the invitation, and in the spirit of Article 53 of the Statute of the International Court of Justice on nonappearance, the tribunal sought to engage the arguments of Japan for its denial of responsibility. They received briefs from Isomi, Suzuki, Koga and Partners, a Japanese firm appointed as *amicus curiae*, and Imamura Tsuguo, an attorney at law setting out these arguments, including analysis of the decision by the Tokyo District Court denying responsibility for the Philippine Comfort Women. The panel of judges who issued the report was from various countries and an equitable gender balance.[721]

Christine Chinkin, in response to the usefulness of the tribunal argued that the People's Tribunal serves as an example of the developing role of civil society as an international actor. It was founded on the conviction that states cannot use legal methods such as treaties to ignore – or forgive – crimes against humanity committed against individuals. Additional benefits included that it sat in Japan, it was a women's tribunal and grassroots organisations and the victimised communities established it.[722] The purpose of the tribunal was also to raise awareness, the allocation of responsibility, assigning individual criminal culpability and state responsibility for wrongful acts under international law and reparations for atrocities committed.

6.3 Foreign Pressure

The redress and reparation movement for the comfort women system entered a new phase in 2007 when the governments of several Western nations engaged in political actions to bring the Japanese comfort women system to light and to provide pressure on the Japanese government to apologise and accept historical responsibility to the victimised group.

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[720] Ibid. p. 337.
[721] Ibid. p. 338.
[722] Ibid. p. 339.

On 4 April 2006, Representative Lane Evans introduced H.Res.759 to the United States House of Representatives, International Relations Committee with 58 cosponsors. The resolution stated:

> Expressing the sense of the House of Representatives that the Government of Japan should formally acknowledge and accept responsibility for its sexual enslavement of young women, known to the world as `comfort women', during its colonial occupation of Asia and the Pacific Islands from the 1930s through the duration of World War II, and for other purposes. ...
>
> Whereas the Government of Japan did not fully disclose these war crimes during negotiations for reparations with its former enemies and occupied countries;
>
> Whereas some textbooks used in Japanese schools minimize the `comfort women' tragedy and other atrocities, and distort the Japanese role in war crimes during World War II; and
>
> Whereas Japanese Government officials, both elected and career, as recently as June 2005, praised the removal of the term `comfort women' from Japanese textbooks: Now, therefore, be it
>
> *Resolved*, That it is the sense of the House of Representatives that the Government of Japan—
>
> (1) should formally acknowledge and accept responsibility for its sexual enslavement of young women, known to the world as `comfort women', during its colonial occupation of Asia and the Pacific Islands from the 1930s through the duration of World War II;
>
> (2) should educate current and future generations about this horrible crime against humanity;
>
> (3) should publicly, strongly, and repeatedly refute any claims that the subjugation and enslavement of comfort women never occurred; and
>
> (4) should follow the recommendations of the United Nations and Amnesty International with respect to the `comfort women'.[723]

H.Res.759 was passed by the House International Relations Committee on 13 September 2006; however the full House of Representatives failed to vote on it before the House adjourned.

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[723] U.S. House. *Expressing the sense of the House of Representatives that the Government of Japan should formally acknowledge and accept responsibility for its sexual enslavement of young women, known to the world as "comfort women", during its colonial occupation of Asia and the Pacific Islands from the 1930s through the duration of World War II, and for other purposes.* 109th Congress. 2nd session. H.Res. 759.IH.

H.Res.121 was then introduced on 31 Jan 2007 to the House of Representative Foreign Affairs Committee by Representative Michael Honda; the bill had 167 cosponsors. This bill was similar to H.Res.759; however, included:

> Whereas Japanese public and private officials have recently expressed a desire to dilute or rescind the 1993 statement by Chief Cabinet Secretary Yohei Kono on the `comfort women', which expressed the Government's sincere apologies and remorse for their ordeal ...
>
> Whereas the House of Representatives commends those Japanese officials and private citizens whose hard work and compassion resulted in the establishment in 1995 of Japan's private Asian Women's Fund;
>
> Whereas the Asian Women's Fund has raised $5,700,000 to extend `atonement' from the Japanese people to the comfort women; and
>
> Whereas the mandate of the Asian Women's Fund, a government initiated and largely government-funded private foundation whose purpose was the carrying out of programs and projects with the aim of atonement for the maltreatment and suffering of the `comfort women', comes to an end on March 31, 2007, and the Fund is to be disbanded as of that date: Now, therefore, be it
>
> *Resolved,* That it is the sense of the House of Representatives that the Government of Japan ...
>
> (2) should have this official apology given as a public statement presented by the Prime Minister of Japan in his official capacity; ...
>
> (4) should educate current and future generations about this horrible crime while following the recommendations of the international community with respect to the `comfort women'.[724]

H.Res.121 was passed from the Foreign Affairs Committee to the House of Representative on 30 July 2007 where it was passed unanimously.[725] The evolution of the resolution, in addition to other foreign pressure is displayed below

Table 7.11: Foreign Government Pressure[726]

16 Feb 2005	United States: H.Con.Res.68 introduced
4 April 2006	United States House of Representatives, International Relations Committee introduced H.Res.759.

[724] U.S. House. *A resolution expressing the sense of the House of Representatives that the Government of Japan should formally acknowledge, apologize, and accept historical responsibility in a clear and unequivocal manner for its Imperial Armed Forces' coercion of young women into sexual slavery, known to the world as "comfort women", during its colonial and wartime occupation of Asia and the Pacific Islands from the 1930s through the duration of World War II.* 110th Congress. H.Res.121

[725] VanderHeide, Jennifer. *House Passes Comfort Women Resolution.* 30 July 2007. http://www.house.gov/apps/list/press/ca15_honda/comfort_women.html, accessed on 1 March 2010.

[726] Sources include: United Nations Office of the High Commissioner for Human Rights, *The "Comfort Women" Issue;* H.Res. 759.IH; AFP. "Japan should acknowledge 'comfort women' pain: MPs." 29 Nov 2008, http://www.google.com/hostednews/afp/article/ALeqM5icoY5tRQW_rzTolZOrKp6-3njdAQ, accessed on 1 March 2010; Friends of "Comfort Women" in Australia, "Action Summary," http://fcwa.org.au/, accessed on 1 March 2010.

31 Jan 2007	United States: H.Res.121 introduced to the House of Representatives, Foreign Affairs Committee.
28 Feb. 2007	Australia introduced motion to Parliament.
30 July 2007	United States: H.Res.121 passed to House, and the House unanimously passed the resolution.
8 Nov. 2007	Motion in Dutch Parliament passed.
28 Nov 2007	Canadian Parliament unanimously passed motion 291.
13 Dec 2007	European Union Parliament passed a resolution.
8 Oct. 2008	South Korea passes Bill No. 1125.
Nov. 2008	The Foreign Affairs Committee of the United Kingdom Parliament issued a statement in the "Global Security: Japan and Korea" report that Japan should acknowledge its role in the comfort women system.
5 Nov 2008	Taiwan introduced motion to Parliament.
March 2009	Two cities introduced resolutions at the local government to acknowledge the CWI.

2007 was the year for foreign governments to raise the issue in their respective legislative bodies. On 28 February 2007 a Green Party member in Australia raised a motion in the parliament that the Japanese government should formally apologise and to 'establish a system of payment and reparation to 'Comfort Women' and to accurately teach history in schools;'[727] this motion failed.

Other Western countries had more success, as recounted above the United States motion passed on 30 July 2007; however, the successful passage of House Resolution 121 has resulted in a rise in Japanese denial. The congressional debate over the resolution resulted in Prime Minister Abe denying the Japanese government's culpability in the forcible kidnapping and enslavement of the comfort women. The time period leading up to and under Abe's leadership in Japan (Chief Cabinet Secretary 2005-2006 and Prime Minister 2006-2007) was one of severe backlash for the comfort women redress and reparation movement, as will be discussed in following subsections.

7. The Asian Women's Fund

The comfort women issue is controversial because of Japan's unwillingness to meet the demands of the RRM. The comfort women redress and reparation movement has responded with several high-profile awareness raising events, and extensive lobbying within international society including both the United Nations and foreign governments. Japan's reaction reflects several stages of acknowledgement and denial. I have already outlined Japan's first stage of denial and misrepresentation of facts. The following subsections will examine a second phase of Japan's reaction, the creation of and implementation of the Asian Women's Fund. The third stage is a reverse course

[727] Friends of "Comfort Women" in Australia, "Action Summary."

within the Japanese government, including an upsurge of denial and removal of the comfort women issues from textbooks and will be discussed in a subsequent section.

The Asian Women's Fund is considered to be highly controversial because of its reliance on private funds rather than governmental funds and the view that Japan was insincere with its apologies. The government's initial idea of creating funds in lieu of compensation came into fruition with the establishment of the Asian Women's Fund as announced by Prime Minister Tomiichi Murayama on 31 August 1994.

> Next year will mark the 50th anniversary of the end of the war. ... I would like to say a few words of explanation on the basic thinking behind Japanese external policy to make the historic anniversary truly significant.
>
> 1. Japan's actions in a certain period of the past not only claimed numerous victims here in Japan but also left the peoples in neighbouring Asia and elsewhere with scars that are painful even today. ...
>
> 2. In keeping with the view, I would like to announce the "Peace, Friendship, and Exchange Initiative" to start in the 50th anniversary, 1995. I see this as a two-part Initiative.
>
> One part consists of support for historical research, including the collection and cataloguing of historical documents and support for researchers, to enable everyone to face squarely to the facts of history. ...
>
> 3. On the issue of wartime "comfort women," which seriously stains the honor and dignity of many women, I would like to take this opportunity to once again to express my profound and sincere remorse and apologies.
>
> With regard to this issue as well, I believe that one way of demonstrating such feelings of apologies and remorse it to work to further promote mutual understanding with the countries and areas concerned as well as to face squarely to the past and ensure that it is rightly conveyed to future generations. This initiative, in this sense, has been drawn up consistent with such belief.
>
> Along with the Initiative by the government, I would like to find out, together with Japanese people, an appropriate way which enables a wide participation of people so that we can share such feelings. ...[728]

The coalition government then launched *Project to Deal with Issues Occasion of on the Fiftieth Years After the War*. The report was released 7 December 1994 and after reiterating the governmental stance that all reparation obligations were discharged under previous treaties, went on: 'But in light of past events and the current situation, Japan must, from a moral standpoint, take the opportunity offered by the 50th

[728] Tomiichi Murayama, "Statement by Prime Minister Tomiichi Murayama on the "Peace, Friendship, and Exchange Initiative" 31 August 1994," in *The "Comfort Women" Issue and the Asian Women's Fund*. Asian Women's Fund Archive, pp. 52-53.

anniversary of the end of the war to fulfil its responsibility for the wartime comfort women issue.'[729] Prime Minister Murayama formally introduced the Asian Women's Fund (AWF) at an 18 July 1995 conference. The AWF had four 'pillars' of its foundation:

1. Support will be given to the establishment of a fund that invites the people of Japan to atone for the institution of "comfort women."
2. The Government will contribute funds to the welfare and medical care of these women.
3. The Government will express remorse and apologize.
4. Historical documents and materials will be collated that will help make this a lesson to be drawn on. [sic][730]

The AWF then made a public appeal for donations; Japanese citizens would donate these monies as 'an offer of atonement' to comfort women and to support other programmes directed at preventing violence against women.[731] Each survivor was then eligible for compensation in the amount of 2 million yen (about USD $17,000), which would come from the private donations, and a letter from the Japanese Prime Minister expressing 'apologies and remorse.'[732] In addition, 'atonement projects' were scheduled such as building a retirement home in Indonesia.

The establishment by the Japanese government of the Asian Women's Fund in 1995, has been highly criticised by both survivors and nongovernmental organisations. A review of an NGO report responding to Japanese claims and other comfort women literature finds the fund is severely flawed. First the Asian Women's Fund is not reparations from the state that survivors have lobbied for. By providing private compensation, the state fails to engage with the issue of legal responsibility[733] and is perceived to be providing sympathy money not reparations. This belief is illustrated by the Korean Council's website which stated in June 1995: 'the Japanese government announced the name of the sponsors for the private fund of "Asian Women's Fund" to avoid its legal responsibility in compensating the survivors.'[734] The majority of the survivors have maintained that they must have direct payment from the Japanese

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[729] Sub-committee to Address the Wartime Comfort Women Issue, "First Report on the So-called Wartime Comfort Women Issue, 7 December, 1994," in *The "Comfort Women" Issue and the Asian Women's Fund*. Asian Women's Fund Archive, p. 55

[730] "An Appeal for Donations for the Asian Women's Fund, 18 July, 1995," in *The "Comfort Women" Issue and the Asian Women's Fund*. Asian Women's Fund Archive, p. 58.

[731] Ibid. pp. 58-59.

[732] Lind, *Sorry States*, p. 66.

[733] Chinkin, "Women's International Tribunal on Japanese Military Sexual Slavery," p. 335.

[734] "History," The Korean Council.

government together with official apologies.[735] Dutch Survivor Jan Ruff O'Herne explained: 'This Fund was an insult to the "Comfort Women"... [We] refused to accept it. This fund was a private fund; the money came from private enterprise, and not from the government. Japan must come to terms with its history, and acknowledge their war time atrocities.'[736] On a governmental level, Taiwanese and South Korean governments were not welcoming of the Asian Women's Fund.[737]

Other criticisms include that the Asian Women's Fund was not in actuality directed at all survivors. Despite the presence of comfort stations, women in the areas of North Korea, China, and Malaysia were not provided with redress.[738] Dutch survivors have been outspoken against the Fund and the Netherlands passed a resolution in November 2006 stating that compensation needs to be direct.[739] Indonesia, which had an atonement project and not direct reparations found that not one former comfort women benefited from the retirement home nor have they achieved any form of redress.[740] Apologies for any group members were contingent upon accepted the reparations monies.

The controversy regarding the AWF has also led to the splitting of several organisations. As one rebuttal stated: 'As the critics have claimed, the AWF certainly lacks the power of parliamentary reparations; however, Tokyo's support of the foundation, the official apologies that accompanied the compensation, and the educational efforts associated with it demonstrate more contrition toward the sex slave victims than in the past.'[741] During the life cycle of the Asian Women's Fund – 1995 to 2007 – there have only been 285 individuals from the Philippines, the Republic of Korea, and Taiwan who have received atonement monies. In addition, 79 Dutch citizens – 75 comfort women and 4 men who had experienced horrific events at the hands of the Japanese – received medical and welfare support as part of an atonement project. On 6 March 2007, the Asian Women's Fund announced the closure of the Fund as of 31 March 2007.

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[735] Goodman, Grant Kohn. "Comfort Women: Sexual Slavery in the Japanese Military During World War II, And: Japan's Comfort Women: Sexual Slavery and Prostiution During World War II and the Us Occupation." *The Journal of Japanese Studies* 30, no. 1 (2004), p. 186.
[736] U.S. House Committee on Foreign Affairs, *Statement of Jan Ruff O'Herne AO Friends of "Comfort Women" in Australia: Hearing on Protecting the Human Rights of "Comfort Women,"* 110th Congress, 15 February 2007.
[737] United Nations Office of the High Commissioner for Human Rights, *The "Comfort Women" Issue* Shadow Report, p. 2.
[738] Ibid.
[739] Ibid. p. 3.
[740] Ibid.
[741] Lind, *Sorry States*, p. 66.

8. Governmental Positions

As previously stated the first phase of redress was marked by denial and the second phase was marked by the pseudo-reparations Asian Women's Fund. However, even during the time period in which the AWF was in operation, the Japanese government continually shifted positions on the comfort women issue, some times apologising and others denying the event. This can be illustrated below:

Table 7.12: Governmental Statements Regarding Comfort Women Issue through the 90s.[742]

June 1990	The Japanese Government stated that the Comfort Women issue was the work of private entrepreneurs.
April 1991	The Japanese government denied that there was any government involvement in the comfort women system and affirmed that there would be no possibility of apologies, formal recognition or compensation.
Nov 1991	The Press Director of the Ministry of Affairs states on television that there is insufficient evidence to warrant an investigation.
11 Jan 1992	Chief Cabinet Secretary Kato admits that the Japanese Imperial Army was involved in maintaining military brothels.
13 Jan 1992	Chief Cabinet Secretary Kato issues official cabinet memorandum.
17 Jan 1992	Prime Minister Miyazawa apologises during South Korean visit.
6 July 1992	The Japanese government released its initial report stating that there was no evidence that women were forced to become comfort women.
May 1993	Japanese government states that all claims have been settled under bilateral treaties; thus Japan is not legally required to pay compensation to victims.
July 1993	The Japanese government released a second report in which the government recognised the possibility that some women may have been forced to be comfort women.
August 1993	Chief Cabinet Secretary Kato extends 'sincerest apologies' to comfort women.
4 Aug 1993	The Cabinet Councillors' Office on External Affairs stated the Japanese government admitted that military authorities were in constant control comfort women.
31 Aug 1994	Prime Minister Tomiichi Murayama: 'On the issue of wartime "comfort women," which seriously stains the honor and dignity of many women, I would like to take this opportunity to once again to express my profound and sincere remorse and apologies.'
1995	Education Minister Shimamura Yoshinobu maintains it makes little sense to apologise for past event because 2/3 of the Japanese people were born after the war.
July 1995	Prime Minister Tomiichi Murayama apologises for the comfort women system and announces the establishment of the Asian Women's Fund.
June 1996	Conservative opinion leaders continue to misrepresent the atrocity. One such leader, Okuno Seisuke argues that the government did not coerce the women, but they worked for financial reasons.
Jan 1997	Japanese chief cabinet secretary, Kajiyama Seiroku, argued that comfort women and military rape victims willingly engaged in prostitution.

In addition, one can also examine the occurrence of comfort women in Japanese textbooks. In 1993, there were no references to the comfort women system and by 1997 all 7 Japanese textbooks had some reference, albeit very little, to the World War II enslavement.

[742] Sources include: "History," The Korean Council; Yang, "Revisiting the Issue of Korean "Military Comfort Women"; Lind, *Sorry States;* Yamazaki, *Japanese Apologies;* and Chang, *The Rape of Nanking*.

As evidenced in the rejection of the previous apologies, the concept of apologies was coupled with the idea of reparations. Tanabe Makoto of the Japan Socialist Party stated this coupling as: 'Apology without compensation is insincere; compensation without apology is bribery.'[743] In addition, the *Asahi Shimbum* wrote: 'Self-criticism and apology can only be accepted when accompanied by positive evidence of redress.'[744] The quotes demonstrate the idea that words alone are not satisfactory. The government must do something to demonstrate their sincerity.[745] The problem with apologies can be seen in Jennifer Lind's summation of apologetic rhetoric:

> In the past, Japan sought to cloud the wrongs of its colonial and war legacy with ambiguous phraseology. Repeatedly, one heard opaque references to a "sense of painful regret," "aggressive conduct," "a sense of reflection," or "profound apology," all of which seemed an exercise in word games. As if these circumlocutions were not enough, Japan has come up with one rationale after another to excuse its past actions. ... Japan's evasive attitude toward the war has incurred the wrath, rather than the understanding of the world community. This is the root of why reconciliation between Japan and the rest of Asia remains as remote as ever.[746]

In 2002 four of the seven textbooks had dropped any reference to the comfort women, and a newly formed eighth textbook made no reference.[747] This is indicative of the beginnings of a strong backlash regarding Japan's previous apology to the comfort women and movement to revise, or refute, the original apology statement. The movement towards refutation had strong governmental support as it was the ruling party (Liberal Democratic Party) within the Diet who established the *Committee to Consider Japan's Future Historical Education* and it was Nakagawa Shoichi, head of the Liberal Democratic Party's Policy Research Council, who stated on 9 March 2007 that: 'There currently is no evidence that permits us to declare the military, the strongest expression of state authority, took women away and forced them to do things against their will.'[748] The *Committee to Consider Japan's Future Historical Education* unveiled its proposal on 1 March 2007, which proposed to add statements to the Kono apology that would in essence revoke the military involvement and thus deny that

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[743] quoted in Yamazaki, *Japanese Apologies*, p. 65.
[744] Ibid.
[745] Yamazaki, *Japanese Apologies*, p. 65.
[746] Lind, *Sorry States*, p. 86.
[747] By 2006, only two textbooks mentioned the comfort women, the adoption rate for both of these texts combined was only 17.3% of schools. See United Nations Office of the High Commissioner for Human Rights, *The "Comfort Women" Issue*.
[748] Niksch, *Congressional Research Service Memorandum*, p. 2.

Japan was in involved in the system. These statements are only a small selection of statements put forward in 2007, as shown below:

Table 7.13: Governmental Statements Regarding Comfort Women Issue during the 2000s.[749]

June 2005	Japanese Government officials praised the removal of the term comfort women from Japanese textbooks.
Oct. 2006	Deputy Chief Cabinet Secretary Shimomura called for a new study on the comfort women issue.
31 Oct 2006	Leading newspaper Yomiuri Shimbun stated that the 1993 apology by Kono was not supported by sufficient evidence.
2007	The Liberal Democratic Party established the Committee to Consider Japan's Future Historical Education.
20 Feb 2007	Aso Taro, who would serve as Prime Minister from 2008 to 2009 questioned the military involvement, and thus state collusion, with the comfort women system during World War II.
1 Mar 2007	Committee to Consider Japan's Future Historical Education unveils draft proposal.
5 March 2007	Prime Minister Abe stated that testimony regarding 'hunts' for comfort women were a 'complete fabrication.'
9 March 2007	Influential politician Nkagawa stated that there was no evidence of Japan's complicity in the comfort women system.
11 March 2007	Prime Minister Abe stated that he endorsed the previous letters sent by the Asian Women's Fund and stated that he carried the same sentiment.
16 March 2007	Japanese Cabinet statement that the Kono statement had not been formally endorsed.
26 March 2007	Prime Minister Abe refused to comment on whether testimony from former comfort women constituted as proof of coercion.

The backlash can also be seen in the mobilisation of Japan's Diet to refute the information presented in the United States congressional sessions, the mobilisation to refute the previous apology by Japanese politicians, and the most controversial of these statements, those issued by the Prime Minister Abe Shinzo. A Congressional Research Service Memorandum, drafted by Larry Niksch overviewed the main elements of denial issued by Japan's head of government:

> - "There is no evidence to back up that there was coercion as defined initially" in the role of "the Japanese military or government" in recruiting comfort women.
>
> - There were apparent cases of coercion by private recruiters for the military, but "it was not as though military police broke into people's homes and took away like kidnappers," and "testimony to the effect that there had been a hunt for comfort women is a complete fabrication."[750]

Prime Minister Abe also refused to comment about whether the previous testimony of former comfort women that they were abducted by military police and that there had been hunts for comfort women was insufficient.

Following the resolution by the United States, and taking into consideration of Japan's engagement in denial, subsequent governments issued their own opinions in the

[749] Sources include: Niksch, *Congressional Research Service Memorandum;* and Yamazaki, *Japanese Apologies*.
[750] quoted in Niksch, *Congressional Research Service Memorandum*, pp. 4-5.

form of resolutions: a motion passed in the Dutch Parliament (19 November), in the Canadian Parliament (28 November), and in the European Union Parliament (13 December 2007). The European Union's resolution called for many legal and symbolic actions to take place:

> 4. Welcomes the Japanese Government's initiative to establish, in 1995, the now-dissolved Asian Women's Fund, a largely government-funded private foundation, which distributed some "atonement money" to several hundred "comfort women", but considers that this humanitarian initiative cannot satisfy the victims" claims of legal recognition and reparation under public international law, as stated by the UN Special Rapporteur Gay McDougall in her above-mentioned report of 1998;
> 5. Calls on the Japanese Government formally to acknowledge, apologise, and accept historical and legal responsibility, in a clear and unequivocal manner, for its Imperial Armed Forces' coercion of young women into sexual slavery, known to the world as "comfort women", during its colonial and wartime occupation of Asia and the Pacific Islands from the 1930s until the end of World War II;
> 6. Calls on the Japanese Government to implement effective administrative mechanisms to provide reparations to all surviving victims of the "comfort women" system and the families of its deceased victims;
> 7. Calls on the Japanese parliament (the Diet) to take legal measures to remove existing obstacles to obtaining reparations before Japanese courts; in particular, the right of individuals to claim reparations from the government should be expressly recognised in national law, and cases for reparations for the survivors of sexual slavery, as a crime under international law, should be prioritised, taking into account the age of the survivors;
> 8. Calls on the government of Japan to refute publicly any claims that the subjugation and enslavement of "comfort women" never occurred;
> 9. Encourages the Japanese people and government to take further steps to recognise the full history of their nation, as is the moral duty of all countries, and to foster awareness in Japan of its actions in the 1930s and 1940s, including in relation to "comfort women"; calls on the government of Japan to educate current and future generations about those events;[751]

Although foreign governments had passed motions and resolutions, Japan stood resolute in its refusal to engage further with the victims. Japan has ignored all motions and has not issued a formal apology. Prime Minster Abe would later qualify his denial of the comfort women system by stating he would stand by the previous administration's statement; however, no new apologies would be forthcoming. Governmental statements contradicting themselves would often be issued within the same week – these statements would lend itself to the redress and reparation norm entrepreneurs' argument that Japan was not sincere in its apologies.

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[751] European Parliament, *European Parliament resolution of 13 December 2007 on Justice for the 'Comfort Women' (sex slaves in Asia before and during World War II)*, P6_TA(2007)0632.

9. Success and Failure of Redress and Reparation Movements

As previously stated, the comfort women redress and reparation movement is currently one movement, although dominated by the Korean nongovernmental organisations. It is estimated that 80% of the victims originated from Korea, however, the movement encompasses women from the territories that Japan either colonised or occupied during the Asia Pacific War; including women holding Dutch nationality who were enslaved within the Dutch East Indies. Despite the fact that the comfort women RRM does not argue for the inclusion or exclusion of particular nationalities, there have been differential rates of success for the different nationalities. These success rates can be contributed largely due to the efforts of nongovernmental organisations within the countries and the areas on which the Asian Women's Fund concentrated. Looking at our matrix for success, in this case,

Figure 7.1: Analysis of Relative Success and Failure

Overall perceived value of restorative justice	State Recognition: Apologetic Stance	State Recognition: Regret/ Acknowledgement	State Recognition: Strategies of Denial
High	RRM Successful	N/A	N/A
Medium	RRM Partially Successful	RRM Partially Failed	Settlement
Low/ None	Not an RRM	Verbal Acknowledgement	RRM Failed

leads us to conclude that the RRM has achieved neither success nor even partial success. The comfort women redress and reparation movement can be classified as 'RRM Partially Failed' or 'RRM Failed.'

9.1 State Recognition

As previously discussed, Japan initial denied any official involvement or coercion in the establishment and operation of the comfort stations and that all comfort women involved in this system were voluntary prostitutes. When Yoshimi Yoshiaki discovered evidence that proved that the Japanese military planned, constructed, and operated the comfort stations, and subsequently published this proof, the government had to acknowledge the state's role. This statement, which the government has deemed

an apology and the victims' have deemed, not an apology has been both supported and rejected by other members of the government. The international community does not recognise this statement as sincere since many government officials later denied the event.

With Japan's continual shifting between an apology and various denial strategies, it is obvious that Japan has not yet reached an apologetic stance. Thus I have recorded the following:

Table 7.14: Japan's Stance towards Victimised Groups

	Denial	Acknowledgement	Statement of Regret	Apologetic Stance
Japanese Comfort Women System	X	X	X	

Unless Japan issues a more sincere apology, engages in governmental reparations, corrects textbooks, and takes other similar steps the government will not be seen as having an apologetic stance. Without engaging in this stance, the RRM will not be viewed as successful or partially successful.

9.2 Perception of Restorative Justice

As discussed in Chapter Four, in order to determine the overall perceived value of restorative justice I examine four factors: historical memory, the offering of restorative justice by the state, acceptance of restorative justice by the victimised group, and the victimised group's satisfaction of the restorative justice received. Although there is technically only one movement, I will still discuss differences between redress and reparations that Korean and Dutch women received as these differences do exist.

Historical Memory

Japan's historical memory of the event is shaped by the continual denial of and then acknowledgement of the comfort women issue. With Prime Minister Abe denying in 2006 that coercion took place, in addition to the removal of comfort women issue from textbooks, one can conclude that historical memory does not adequately reflect the event within Japan and thus a negative (-) has been recorded in both the Korean and Dutch comfort women cases.

State Offering

Although there has been argument over the form and nature of the reparation payments, the state has contributed funds to the Asian Women's Fund. Thus a positive (+) has been recorded in both columns of reparations offered by the state.

Acceptance by Victimised Group

The Korean women, upon advice from domestic NGOs largely rejected the payments from Asian Women's Fund and thus, rejected the state's offering of apologies as it stood. A negative (-) is thus recorded for this group. The Dutch women, however, largely accepted reparation monies from the Asian Women's Fund on the advisement of local NGOs. Thus a positive (+) is recorded.

Satisfaction of Victimised Group

Neither group has exhibited any indications of acceptance or satisfaction, largely due to the lack of an apologetic stance. Consistently denying, acknowledging and then blaming the victims for the atrocity has led credence to the viewpoint that the Japanese government is insincere. Thus a negative (-) is recorded for both groups satisfaction level.

Figure 7.2: Japan Reparation Programme Evaluation

Assessment	Korean	Dutch
Assement of historical memory	−	−
State offering of restorative justice	+	+
Acceptance by victimised group	−	+
Satisfaction of victimised group	−	−
Overall perceived value	Low	Medium

These indicators demonstrate that although the Dutch comfort women RRM has slightly more achievement of redress and reparations goals, both groups have failed to obtain their goals.

The comfort women redress and reparation movement has failed, despite international pressures and an emergent reparations norm. Yet it does illustrate the importance of civil society in the mobilisation of a movement and the differential rate of redress obtained. The case also carried implications of citizenship – there were trials for individuals involved in the kidnapping of Dutch women, but no charges were laid for those individuals involved in the kidnapping of Asian women.

10. Political Opportunity and Differential Success

Having established that the comfort women redress and reparation movement has failed although there has been some differential success between the Dutch and Korean, I turn to the question of why there has been a difference.

10.1 International Analysis: Normative Expectations

It is clear by the reactions of the international community that a redress and reparation norm has emerged and that states are now expected to engage in reparation politics. As shown throughout this chapter, the international community has strongly supported the idea of redress and reparations for the comfort women system. The United Nations, through several different committees and subcommittees has passed numerous resolutions calling for the Japanese government to respond in a satisfactory way to the redress and reparations movement. In addition, a variety of countries – including the United States and the Netherlands – have applied political pressure through resolutions which affirm Japan's need to engage in reparation politics and unequivocal demonstrating that the apology and establishment of the Asian Women's Fund was not a satisfactory answer to the comfort women RRM.

Japan's frequent denial of the atrocity – in both words and deeds – demonstrates that although there is an international norm for redress and reparation, it is not yet internalised. Japan **has** responded to international pressures to engage in reparation politics. When the RRM first began to articulate their demands, Japan denied that the event occurred. It was not until archival evidence was uncovered which proved the Japanese government's culpability in the establishment of comfort stations. Although the government conceded that the government did have a role in the establishment of these stations, they continued to deny that innocents were kidnapped or that there was any coercion in the recruitment. This denial of the essential victimhood of the comfort women is a form of denial that the Japanese government has utilised consistently since the earliest acknowledgement of the comfort stations. By blaming the victims, they seemingly dodge a responsibility to provide reparations for the government and military's actions.

The international community has pressured Japan into responding to the comfort women system. The denials that Japan issued were countered by the United Nations Commission on Human Rights Special Rapporteur Coomaraswamy whose

investigation clearly found that the comfort women system was slavery and argued that Japan should acknowledge the atrocity, pay reparations, fully disclose the historical facts, apologise, educate the populace and punish any remaining perpetrators. The Japanese government eventually responded to this pressure by enacting the Asian Women's Fund which, in theory, would provide reparations and an apology. The majority of these funds however, were not accepted or not even offered to comfort women in several territories. Thus, I argue, that the AWF could not be considered to be successful as reparatory justice towards the victimised group as a collective.

The comfort women RRM is still currently underway, with foreign governments and various organisations such as the United Nations, continuing to pressure Japan into providing the victims of the comfort women system a satisfactory apology and reparations. Japan, however, has not been extremely resistant if not hostile to the idea of correcting the domestic memory or providing satisfactory reparations to the remaining comfort women. However, I argue that with Japan's continual reluctance and the occasional out-right denial of the victimhood of the comfort women, it would be likely that if not for an international norm in redress and reparations, and the pressure of international society to conform to that norm, Japan would likely have ignored the issue all together.

10.2 Domestic Analysis: Elite Allies, Political Opportunities, and Inclusion

The differential application of success between Dutch and Korean former comfort women centre on two reasons: first, a general delay in the creation of the movement by almost 50 years due to the comfort women's general exclusion from political systems and exclusion from society due to social status of women and cultural stigmas attached to being raped. Second, the greater criminal and reparatory success that Dutch women had was largely due to their inclusion within Dutch citizenship in regards to the trial and the active role that NGOs played in convincing Dutch women that they should accept reparation monies from the Asian Women's Fund.

The comfort women RRM again, is composed of women from several differnt nationalities, thus the movement involves multiple state actors and multiple civil society actors. Organisations within a state do tend to focus on their own citizens; however, they do not tend to exclude other comfort women from the RRM. The Asian Women's Fund, however, offered reparation payments or projects based on country of origin, and war crime trials were held on the basis of harm to the state's members (i.e. citizens).

Chapter Eight Conclusion: Reparation Politics and the Question of Differential Success

This thesis has argued that a norm has developed on the international level which to some extent, obligates states to compensate victims of atrocities in some way. Taking the development of this norm into account, I have sought to examine why, in some cases, the justice achieved by one group is different from that achieved by another group, especially when both have been subjected to similar atrocities/injustices. In order to examine these two key components, this thesis explored the historical background of three atrocities and/or structured injustice (genocide, internment, and sexual slavery) committed by state actors (Germany, United States, and Japan respectively). These events occurred primarily during World War II; however, each event was foreshadowed by discriminatory actions such as laws targeting ethnic groups and societal norms that devalued the victimised communities legally and/or socially. Six groups were then examined -- two from each country/region -- to examine the question of why it is that different groups, having experienced similar treatment by the state, achieved a varying amount of restorative justice following the efforts of redress and reparation movements.

'Success,' as discussed in Chapter Four, is a difficult term to define; however, it is precisely the subjectivity of that term that this thesis drew on – relative success is not only a reality in survivors' perception, but can also be measured, even if in a broad way. In order to do so, I examined the following four factors: historical memory, the measures of restorative justice the state offered, the acceptance of the restorative justice actions on behalf of the victimised group, and the stated satisfaction level of the victimised group. These four factors enabled me to determine an overall perceived value of success as low, medium or high, as illustrated below:

Figure 8.1: Overall Assessment of RRMs

Assessment	Jewish	Roma	Japanese American	Japanese Latin American	Korean	Dutch
Assement of historical memory	+	+	+	+	–	–
State offering of restorative justice	+	+	+	+	+	+
Acceptance by victimised group	+	+	+	+	–	+
Satisfaction of victimised group	+	–	+	–	–	–
Overall perceived value	High	Medium	High	Medium	Low	Medium

When the assessment factors are then coupled with the state's stance towards the atrocity/injustice, the following typology can be applied:

Figure 8.2: Analysis of Relative Success and Failure

Overall perceived value of restorative justice	State Recognition: Apologetic Stance	State Recognition: Regret/ Acknowledgement	State Recognition: Strategies of Denial
High	RRM Successful	N/A	N/A
Medium	RRM Partially Successful	RRM Partially Failed	Settlement
Low/ None	Not an RRM	Verbal Acknowledgement	RRM Failed

Again, it is worth repeating that, although 'success' may be difficult to determine, my typology allows for an effective determination of 'relative success.'

Chapters Five through Seven then determined the relative success or failure of the redress and reparation movements examined via case studies. These chapters argued that the Jewish RRM was relatively successful whereas the Romani RRM was only partially successful. Likewise, the Japanese American RRM was relatively successful in comparison to the Japanese Latin American RRM which, again, was only

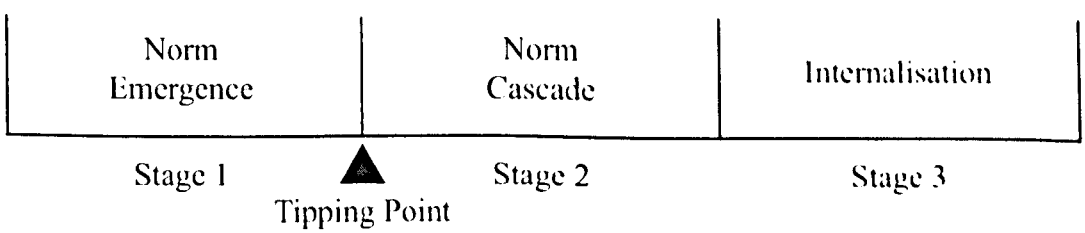
a partial success. The third case study differed from examining relative success, as neither group has yet to obtain a successful resolution; however the Dutch comfort women have achieved more criminal and reparatory justice then their Korean counterparts.

Having examined the redress and reparation movements within each case study chapter and why these movements succeeded or failed, the question then turned to what trends can be identified within reparation politics itself and what explained the overall differential levels of success and failure? I argue that this differential success can be explained by a two-fold argument: first, a normative trend has emerged and proliferated throughout international society. This trend has, in turn, facilitated the emergence of various redress and reparation movements due to increasing normative expectations, both domestically and internationally, that states will engage in reparation politics with previously victimised groups. Second, taking that trend into account, the thesis has argued that there are both domestic and international factors that have led to the differential achievement of success and/or failure of the RRMs examined. These three factors are: the presence or absence of influential allies, whether domestic or international; the openness of the political system; and the inclusion of surviving victims within the membership of a strong political community.

1. Emergence and Cascade of Redress and Reparation Norms

The first component of my argument is that a redress and reparation norm has emerged within international society. As noted in Chapter One, Finnemore and Sikkink have argued that one way to understand the proliferation of international norms is through the norm life cycle and can be visually represented as such:

Figure 8.3: Norm Life Cycle



As will be reviewed, the redress and reparation norm first emerged following World War II, with West Germany's engagement of reparation politics with representatives of the Jewish community. The norm gradually proliferated through international society,

and reached a tipping point internationally when the United States drafted the Civil Liberties Act of 1988 offering the Japanese American community redress and reparations. The redress and reparation movement then entered into, and is currently in, a norm cascade period. It is during this timeframe that norm entrepreneurs on behalf of the comfort women began to mobilise and actively lobby for recognition and redress. The following subsections will outline this norm emergence and cascade as discussed and expanded upon in previous chapters.

1.1 Emergence of Norm

The emergence of redress and reparations norms started to codify following the conclusion of World War II in Europe. As discussed in Chapter One, this normative shift expressed itself in two ways: one, the emergence and institutionalisation of international criminal law that established legal concepts of crimes against humanity and genocide; and second, the emergence and subsequent cascade of a prescriptive element in which states that have committed atrocities against a population are now expected to engage in reparation politics with the communities who have been violated.

As outlined in Chapter Two, prior to World War II, there were no laws that forbade the state from committing genocide or perpetrating other inhuman acts upon its domestic citizens. The shifts in international law began to occur in 1945 when the London Agreement defined crimes against humanity and the first individuals were tried and found guilty during the Nuremberg Trials. This creation and expansion of individual and state responsibility was furthered once again in 1948 when the United Nations passed Resolution 260: *The Prevention and Punishment of the Crime of Genocide*.[752] These international laws/conventions established a criminal and individual responsibility for one's actions, even when those actions were carried out by order of the state or during peacetime.

Changes in international law by itself, however, did not alter perception of reparations or encourage states to engage in reparation politics. International norms, as pointed out by Finnemore and Sikkink, tend to begin as domestic norms and then expand into the regional and international arenas through the efforts of norm entrepreneurs.[753] The actions undertaken by West Germany, as outlined in Chapter Five, and in particular by West German Chancellor Adenauer, were key to the emergence of redress and reparations norms. Once the redress and reparations norm was introduced by West Germany, other victimised communities would build upon the

[752] The Genocide Convention came into force in January 1951.
[753] Finnemore and Sikkink, "International Norm Dynamics and Political Change," p. 893.

precedent. Thus, a redress and reparation norm emerged that strongly encouraged states to engage in reparation politics for state-sponsored atrocities and other forms of structured injustice.

The emergence of a redress and reparation norm can be seen with the signing of the 1952 Luxembourg Agreement between West Germany, Israel, and the Claims Conference. The Luxembourg Agreement was significant for several reasons and set several precedents for reparations and reparation politics. The actors involved in the negotiations were quite unusual. Israel achieved statehood in 1948, three years after the conclusion of the war. Prior to its formation, it was part of the British Mandate for Palestine and thus any war reparations should have been negotiated with Great Britain immediately following the war. Yet Israel, a country which did not formally exist during World War II, and thus was not 'owed' reparations following World War II, and, furthermore, was not considered to be powerful, engaged in negotiations. Israel again represented Jews who had resettled to, escaped to, or immigrated to the British Mandate of Palestine due to Nazi persecution beginning in 1933 and continuing after the war with an influx of Holocaust survivors.

The Claims Conference was a nongovernmental organisation representing Jews who resettled outside of Israel and who had also been subject to Nazi persecution. The Claims Conference inclusion in negotiations was extremely unusual as international law was considered to be binding upon states, not individuals or organisations; the inclusion of an organisation, especially one that represented a victimised group, thus signified a shift in thinking, an allowance that the victimised group should have a voice in the negotiations, regardless of their location or support from a state. Israel and the Claims Conference demanded reparations from both East and West Germany. East Germany refused to enter into negotiations, thus leaving West Germany as the final actor in the negotiations.

West Germany, the legal successor of Nazi Germany, was only half the size of the Weimer Republic and did not obtain statehood until 1949. Negotiations for reparations were concluded shortly after World War II; there were no further legal obligations for Germany, and certainly not for a country that had not existed during the conflict, nor for an NGO that would normally be excluded from international agreements and treaties. Yet despite the unprecedented inclusion of civil society actors, newly formed state actors, and no requirements or precedents to engage in reparation negotiations, West Germany **voluntarily** entered into negotiations that culminated in the historic signing of the 1952 Luxembourg Agreement. With the signing of the

Luxembourg Agreement on a voluntary basis and the subsequent establishment of legislation giving Jewish victims reparations for persecution created a paradigm shift.

The subsequent establishment and expansion of reparation laws within West Germany demonstrated the state's willingness to engage in reparation politics with Jewish survivors of the and eventually expanded to include Romani and other survivors. The Luxembourg Agreement and subsequent legislation thus was the foundation of reparation politics, which future movements reference. Redress and reparation began as a domestic norm within West Germany and include other victimised groups such as the Romani and German slave laborers following their demands for inclusion within reparation politics; but it also expanded to include transitional justice following regime changes. Although the reparations and redress norm did emerge in 1952 with the finalisation of the Luxembourg Agreement and subsequent passages of redress and reparation laws within Germany, the norm did not immediately proliferate throughout international society. The norm became frozen by Cold War politics and remained static for several decades. The following subsections detail its submergence during the Cold War period and then its reemergence and subsequent proliferation, i.e. norm cascade in the late 1980s and through the 1990s.

1.2 Submergence of Redress and Reparation Norms

As discussed in Chapter Two, the time period following World War II, with an estimated 250 conflicts and 70 million casualties, seemed to be devoid of international criminal justice or human rights interventions. In addition, numerous human rights treaties were adopted or entered into force, which including the 'right to a remedy' for individuals targeted under genocidal or crimes against humanity policies. These included:

Table 8.1: Human Rights Instruments

Date Adopted or Entered into Force	**Instruments**
10 December 1948	Article 8 of the *Universal Declaration of Human Rights*
12 August 1949	Article 91 of the Protocol Additional to the Geneva Conventions of 12 August 1949
Entry into force 23 March 1976	Article 2 of the *International Covenant on Civil and Political Rights*
Entry into force 4 January 1969	Article 6 of the *International Convention on the Elimination of All Forms of Racial Discrimination*
29 November 1985	*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*
Entry into force 26 June 1987	Article 14 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
Entry into force 2 September 1990	Article 39 of the Convention on the Rights of the Child

With the establishment of human rights conventions and international criminal law, one would expect that, if atrocities were not to diminish, then redress and reparation should flourish. The rise of Cold War politics however, gave primacy to the conflict between the United States and the Soviet Union and froze efforts to either intervene or bring any form of justice to aggrieved victims of state atrocity. Jackson Nyamuya Maogoto argued that during the Cold War:

> Tremendous advances were made in the codification and broadening of international criminal law, but East-West rivalries effectively prevented any enforcement at the international level. Bipolar politics rendered the United Nations powerless to deal with many of the humanitarian crises accompanied by gross human rights violations. At the municipal level, States ever wary of the implications to sovereignty that a viable international justice regime entailed did not do much in enshrining norms of international criminal law or developing its jurisdiction.[754]

Thus, while numerous international treaties and conventions were passed during the Cold War era, enforcement of said treaties did not exist. This is unsurprising due to the composition of the Security Council: both superpowers involved in the Cold War -- the Soviet Union and the United States -- are permanent, veto bearing members. With the United Nations Security Council locked into an East-West ideological conflict, it was unsurprising that neither side could gain enough support to address the question of criminalising perpetrators of bloody conflicts taking place throughout the world or encouraging states to engage in redress and reparation measures.

As discussed in Chapter Two, both the United States and the Soviet Union were involved in the creation of and prosecution of the architects of the German genocides during the 1945 Nuremberg trials. The Cold War began almost immediately after the end of World War II and can be seen in the 12 March 1947 Truman Doctrine, the 1948-1949 Berlin Blockade, and the creation of the North Atlantic Treaty Organization.

Despite both superpowers signing the Genocide Convention[755] and the numerous atrocities that occurred during the Cold War, there were no international trials or declarations of genocide or crimes against humanity until 1993 (Yugoslavia) and 1994 (Rwanda). This lack of intervention or strong international condemnation was not due to a lack of bloody events: as previously mentioned, the Indonesian massacres (1965-1966), the Burundi genocide (1972), and the Cambodian genocide/massacres

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[754] Maogoto, "The Concept of State Sovereignty and the Development of International Law," p. 292.
[755] The United States and the Soviet Union signed the Genocide Convention in 1948 and 1949 respectively. The United States did not ratify the treaty until 25 November 1988. The US, however, tends to be reluctant to sign international treaties in general. The Soviet Union ratified the treaty on 3 May 1954.

(1975-1978) are notable violations of international criminal law that occurred during the Cold War. Despite the genocide convention's requirement 'to prevent and to punish,' and the passage of other human right conventions little to no action was taken by the United Nations. The 1993 and 1994 genocides resulted in the ICTY and ICTR respectively and the Rome Statute of 1998 resulted in the 2002 creation of the International Criminal Court. Thus punishment for atrocities did eventually resume – all three courts, however, followed the end of the Cold War.[756]

In addition to paralysing international criminal law, the emergence of the Cold War brought forth an abandonment of reparation policies in an effort to gain strong international allies who could block Soviet expansion into the Western world. Both West Germany and Japan were seen as potential blocks to Soviet expansion and thus reparation demands were not central to the United States foreign policy interests. The United States, as early as 1948, began to protect Japan from the traditional reparation demands by other Allied states, and by 1952 it was clear that the United States would not tolerate any restitution or reparation agreements that might endanger Japanese economic development.[757] The United States position towards West Germany was similar; while they were sympathetic to Jewish norm entrepreneurs and Israeli spokespersons, they were not willing to advocate for reparations and potentially lose West Germany to the Soviets.[758]

Even the more symbolic forms of restorative justice, including apologies and recognition, remained fairly frozen during this time period. The ideological divide and conflict between United States and the Soviet Union constructed an international society in which former state atrocities were considered better buried than acknowledged. As John Torpey asserts,

> *Realpolitik* argued against airing out these old wounds, and heroic images of a prosperous capitalist or an egalitarian communist tomorrow helped keep eyes fixed firmly on the future. The dynamics of the Cold War thus banished much discussion of what meanwhile have come to be known as the crimes of the past to the murky twilight of the struggle between Communism and the Free World.[759]

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[756] The dates of the Cold War are subjective. I will use the Fall of Berlin Wall in 1989 as the end as many scholars due, others however, argue that the Cold War was not officially over until 1991 when the Soviet Union ceased to be.

[757] Hein, Laura, "War Compensation: Claims against the Japanese Government and Japanese Corporations for War Crimes," in *Politics and the Past: On Repairing Historical Injustices*, ed. John Torpey (New York: Rowman & Littlefield Publishers, 2003), p. 132.

[758] see Timm, *Jewish Claims against East Germany*.

[759] Torpey, *Making Whole What Has Been Smashed*, p. 24.

Aside from a scant few political apologies, it was not until the 1970s that states other than Germany attempted restorative justice (see Appendix 1). The actions, however, were not widespread, nor considered to be interlinked. There was not a common framing to these situations, nor was the language utilised the same that would later associated with 'coming to terms with the past.' Aside from a few scant political apologies from Japan, events tended to be in response to domestic pressures and domestic mobilisation of social groups.

The Cold War began to thaw in the mid to late 1980s under the leadership of Ronald Regan and Mikhail Gorbachev. The shifting political climate that accompanied the conclusion of the Cold War created a space in which a discussion of the past could emerge.[760] Thus, as many authoritarian regimes in Eastern Europe, Africa and South America began to undergo regime changes, the field of transitional justice began to flourish. The 1980s saw a revitalisation of transitional justice, again, the study of how autocratic, authoritarian or totalitarian regimes transition to more democratic regimes. One popular technique of redress and reparation during this period was the truth commission (see Chapter Two and Appendix). As the increase in transitional justice continued through the 1980s, many sought its practices as a technique to gain legitimation in the eyes of international community, however, transitional justice still only focused on this transition from authoritarian regimes to more democratic regimes and focused primarily on human right violations.

1.3 Re-emergence and Tipping Point

It was not until the 1980s that the concept of 'coming to terms with the past' began to emerge as a common paradigm, including a shared language and perceived normative framing. The trend began to emerge with a flurry of truth commissions in South America, Africa and the United States. Following Finnemore and Sikkink's model, we can say that, once enough states or leaders have accepted the new norms, a 'tipping point' occurs, which transitions into a norm cascade. This tipping point is the point at which there is no turning back – other states are, in essence, pressured into accepting the changed norm. The norm cascade continues as more and more countries begin to adopt the norms without domestic pressures. With regards to redress and reparation, a state which was not undergoing a regime change needed to occur in order for the norm to become firmly established, i.e. for it to meet its tipping point and transition to the norm cascade phase of the norm dynamics model. This is precisely what happened in 1988 when the United States, both as a country not undergoing a

[760] Ibid. p. 25.

regime change and as a major superpower, signed the Civil Liberties Act granting an aplogy and reparations to Japanese Americans; thus catapulting the redress and reparations norm into a norm cascade.

Beginning in the 1980s, the number of states engaging in reparation politics began to increase. The trend centred primarily along the idea of truth commissions with commissions being created in South American, Africa and the United States (see Appendix 1). There were at least six truth commissions in the 1980s, with overlapping dates, given this there was always at least one truth commission being hosted somewhere in the world.

As Cold War tensions began to decrease, truth commissions increasingly flourished. It is hard to determine exactly when the tipping point occurred, i.e. when the norm went from being an emergent norm to its current wide proliferation throughout international society; however, a case can be made that the redress for United States internments, specifically the signing of the 1988 Civil Liberties Act, is extremely significant. The CLA signified the first non-transitioning regime to engage in reparation politics, while the provision of reparations and apologies to a victimised group from a superpower seemed to create a shift in coming to terms with the past. After the United States engaged in reparation politics, more and more states engaged in this practice and the 1990s and 2000s signalled a norm cascade in regards to redress, reparations, and apologies.

1.4 Norm Cascade

Throughout the 1990s and 2000s an increasing number of states have engaged in reparation politics, to the point where as Torpey stated: 'Reparations seemed to have become the demand *de jour* in progressive circle during the 1990s.'[761] This cascade can be seen in the increasing number of international and hybrid trials for crimes against humanity, the increase in international tribunals, in truth commissions, reparation programmes, UN declarations and international statutes,[762] and the sharp rise in recognition and apologies for past crimes perpetrated by the state. Perhaps the most significant, however, as evidence of an international norm was the United Nations adoption on 16 December 2005 of the General Assembly resolution 60/147 -- *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of*

[761] Ibid. p. 2.

[762] Including Article 75 of *Rome Statute* (2002), which stated The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which outlined victims rights to obtain reparation and redress following atrocity/injustice.

The norm cascade has had a profound effect on reparation politics. As an increasing number of redress and reparation movements are successful, other RRMs operating within a reparation politics framework model their behaviours. In addition, due to the normative trend, legal precedents, and increased expectations, RRMs find it easier to operate within international society. For example, a more general willingness to recognise and apologise for historical atrocity / injustice has led not only to an increase in official and unofficial apologies, but also to an expectation that these events will be acknowledged and that states will engage in some form of reparation politics. The success of the Jewish redress and reparation movement for Holocaust related crimes and the success of Japanese American RRM for the internment period has reinforced this norm. In addition, the United Nations has played an active role in establishing the idea that individuals have a standing in international law as well as the right to gain redress and reparations.[763] In summary, a norm cascade has emerged, and in turn, as the redress and reparation norm has proliferated throughout international society it has increased the expectations of both the international community and the victimised group that the state will engage in some form of reparation politics.

2. Elements of Political Opportunity

The norm life cycle helps to explain the strong normative element within reparation politics that increasingly encourages states to engage in redress and reparation, however, it does not, by itself, explain success and failure and, still less, differential success and failure. Taking the trend towards reparation politics into account and the proliferation within international society of the redress and reparation norm, I have argued that there are both domestic and international factors that have led to the differential achievement of success and/or failure of the RRMs examined. These three factors are: 1) the presence or absence of influential allies, whether domestic or international; 2) the openness of the political system; and 3) the inclusion of surviving victims within the membership of a strong political community. I will briefly examine each case study in order to draw out those elements that have contributed to the relative success or failure of the various redress and reparation movements.

[763] Hein, "War Compensation," p. 134.

Germany

The presence of influential allies, the access to political opportunities and inclusion in a strong political community were essential to the early success of the Jewish redress and reparation movement, while the lack of these factors equally played a role in the delayed response to the Romani redress and reparation movement.

Within the Jewish RRM for Holocaust related crimes, the mobilisation of civil society -- including émigrés from Germany and other members of the Jewish Diaspora -- shortly after Hitler assumed power was essential. By mobilising early and lobbying the Allied nations, the representatives from civil society established that wrongs had been committed by Nazi Germany and that these wrongs should be addressed by means of restitution. Civil society was directly responsible for the initial restitution laws passed in the territories occupied by the Western Allies. Civil society was also the first to enter negotiations with West Germany, as Israeli governmental officials did not want to engage the FDR in dialogue. Civil society thus was extremely important both in the initial stages of the redress and reparation movement and during early negotiations. The Claims Conference, as an umbrella organisation which negotiated on behalf of Jewish Holocaust survivors living outside of Israel, was included in the Luxembourg Agreement, in addition to the West Germany and Israel. These representatives from various organisations, including the Claims Conference and others who continually lobbied for reparations and restitution for Jewish Holocaust victims were significant and illustrate the importance of elite allies from civil society. At the same time, these elite allies were focused on obtaining redress and reparations for Jewish Holocaust victims. Those individuals who fell outside of this definition – Roma, disabled, victims of slave labour, political prisoners, and so forth were not included in redress and reparation legislation, nor did they have significant allies within international society until after Cold War tension started to decrease and the normative pressure to engage in redress and reparations re-emerged within international society.

Mobilisation of the Romani remained sporadic throughout the Cold War, with many being behind the so-called 'Iron Curtain,' and thus not a priority for redress and reparations. In addition, the fragmented nature of the Roma community led to difficulty in mobilisation. It was not until 1971 when the First World Romani Conference would be held, and 1978 when the International Romani Union would be formed (formally recognised in 1979 by the United Nations.) Even after organisations began to form, inclusion in a wider community was difficult due to the societal prejudices: for

example, it was not until 1987 that a Romani representative was allowed to sit on the United States Holocaust Memorial Council.

Perhaps even more important than influential allies within civil society were those allies found within the German government and legislature. The role of Chancellor Adenauer was invaluable to the redress and reparation movement. Many within the government were resistant and, at times, hostile to the idea of reparations. Thus, Chancellor Adenauer's belief that: 'unspeakable crimes were committed in the name of the German people, which created a duty of moral and material reparations'[764] was a position that was controversial, yet his dedication to redress was essential to the creation of these programmes. By sending representatives to engage in dialogue with civil society members who represented Jewish victims of the Holocaust and later with Israeli representatives, it sent a clear signal that Germany was serious regarding the unprecedented idea of providing reparations to a victimised group. Without a prominent politician, and other influential members of society taking an active role in the redress and reparation movement, it is very unlikely that the Luxembourg Agreement and subsequent legislation would have been signed.

Although it might be assumed that the influence of Israel would be a significant factor in the redress and reparations movement, the emphasis placed on Israel's role in the redress and reparation movement is overstated. Israel achieved statehood in 1948 following the dissolution of the British Mandate of Palestine; however, Israel did not emerge as a strong world power. With severe economic problems and immediate threats to territory and sovereignty, Israel was **not** in a position to heavily influence West Germany or World War II Allied nations. In addition, Cold War politics made West Germany highly prized as a block against Soviet advances and as an influential ally to the United States. The US, mindful of the need to keep both West Germany and later Japan as an ally would not risk loosing these countries as allies over reparations – especially with the lessons learned from the Versailles Treaty. West Germany voluntarily entered into negotiations and, as East Germany demonstrated, could have easily refused to provide reparations to victimised groups. In addition, as both East Germany and Japan argued, they could have simply stated that all reparation obligations were finalised by treaty after World War II and there were no further legal obligations.

Although Israel was not powerful, or particularly influential, statehood did have an initial benefit for the redress and reparation movement. International law and

[764] quoted in Pross, *Paying for the Past*, p. 22.

negotiations traditionally occurred between states, not individuals or civil society. Thus, the fact that Israel was a state made it easier for negotiations to occur, i.e.: signing an international agreement between two states was common; signing an international agreement with an organisation was not. The Claims Conference, which also participated in the negotiations had to, in fact, allow West Germany to make reparation payments to Israel. Israel was then responsible for dispersing the payment to the Claims Conference. Thus the presence of Israel, while not being a significant influential ally, did allow broader access to the international political system.

Governmental officials such as West German Chancellor Adenauer and Württemberg state commissioner for reparations Otto Küster played a vital role in the quest for redress and reparations; not only were they extremely influential allies in key positions of the government, but they also granted stronger access to political opportunities. Adenauer by supporting redress, allowed representatives of the state to engage in negotiations with both civil society and later Israel, supported reparations and restitution legislation in the *Bundestag* and allowed for greater debate within the government with pressure applied for some form of agreeable resolution to be decided. Küster was directly responsible for the drafting of many and restitution and reparations laws. His vocal support, while not always popular was felt in both the government and throughout society. His lack of support, in particular his refusal to believe that Roma were victims of racial persecution, and instead insisting that they were criminals, closed off political opportunities and access to both the court system and legislative laws that had been passed.

The presence of elite allies and a broader access to international politics and domestic legislation directly contributed to the success of the redress and reparation movement for Jewish Holocaust survivors. This success also was benefited by the inclusion of surviving Holocaust victims in a strong political community. The initial mobilisation of civil society was a direct result of individuals who had been persecuted mobilising to obtain justice (i.e. individuals who fled Nazi Germany became the first norm entrepreneurs). Countries where there were strong Jewish Diasporas gained redress and reparations sooner then countries, which for example, were behind the Iron Curtain.

The Roma, however, were again a fragmented community with no strong ties to other Romani clans or to any particular state / homeland. Roma continue to be excluded from both international and domestic society. Elite allies, emerging Romani organisations, and individuals within the community, have fought for the victories they

have had in obtaining recognition, redress and reparations including Roma inclusion in memorials and monuments. The 1963 German Supreme Court case where the courts admitted that Roma were persecuted on racial grounds was vital as it allowed for Roma to access political opportunities which had been closed to them, however, it was not until 1981 that legislation was passed to provide reparations to Roma/Sinti. Thus there have been partial successes in the Romani redress and reparation movement. However, the initial exclusion from a strong political community and the insistence that they were criminals still haunt redress and reparation debates today.

United States

The increasing expectations within international and domestic society for redress and reparation, in addition to the presence of influential allies, access to political opportunities and the inclusion of survivors into a strong political community were likewise essential to the success of the Japanese American redress and reparation movement for them. The exclusion of the Japanese Latin Americans from the 1988 Civil Liberties Act due to citizenship issues, however, created the need for a separate redress and reparation movement. Suddenly barred from redress, the group had to gain new influential allies to support their cause and find new ways to access the political system. The results of this re-negotiation with the state have resulted in some obtainment of success, however, not to the extent that many survivors believe is fair.

Within the United States, the presence of certain key elite allies was essential to the obtainment of redress and reparations for the Japanese American RRM. The JACL was perhaps the most significant player within civil society. From the beginning of the internment process, leaders within the organisation were working with the United States government to make the transitions easier for Japanese Americans. While the immediate post-war effort was on gaining equality within civil rights, the JACL in 1970 began to include redress and reparation debates in their national meetings. The JACL was directly responsible for the recruitment of elite allies within the United States legislature and in turn, members of the United States House of Representatives and Senate would introduce redress and reparation bills into Congress.

Political opportunities for Asian Americans on the Congressional level were non-existent until Hawaii gained statehood in 1959, thus allowing for an increase in minority representatives and Japanese Americans to be elected to Congress. Daniel Inouye, the first Japanese American representative elected to Congress, helped to establish widespread support and gained further Congressional allies for the Japanese American redress and reparation movement. The resultant bill led to the creation

Commission on Wartime Relocation and Internment of Civilians, which focused on the internment experience in general. Although primarily centred on Japanese Americans, the Commission also conducted research into the experience of German Americans, Japanese Latin Americans, and Native Aleuts from Alaska, thus being inclusive of the majority of individuals interned.

It was not until after the conclusion of the CWRIC and the subsequent creation of the Civil Liberties Act of 1988 that a difference in the treatment of Japanese Americans and Japanese Latin Americans was seen. These differences can be directly attributed to the openness of the political system and the inclusion of surviving victims within the membership of a strong political community. The Civil Liberties Act of 1988, as previously stated, outlined apologies and reparations for Japanese Americans and a reduced amount to Native Aleuts. Thus, providing reparations to two groups which had been treated unjustly and who were United States citizens at the time of the internments, i.e. victims who were members of a strong political community as US citizens. It excluded Japanese Latin Americans by virtue of non-citizenship during the internments, despite the fact that they had been forcibly brought to the United States, interned and inclusion in the initial CRWIC research and reports.

Japanese Latin Americans have attempted to fight exclusion from redress and reparations through both the legislature and the court system. Having to gain new elite allies or re-gain previous allies, Japanese Latin Americans began to organise – including the filing of a class-action lawsuit against the United States for the exclusion from redress and the creation of Campaign for Justice. A reoccurring problem however, was that the majority of elite allies who had previously supported the CWRIC and the CLA considered reparation and redress for World War II internments to have been completed satisfactory; thus distancing the Congressional allies and major organisations from the new RRM and closing political opportunities for Japanese Latin Americans. The United States eventually offered a settlement which consisted of an apology and $5,000 per person as reparation; this was accepted by many members of the community and rejected by others. Regardless of the partial acceptance of the group, many continued to fight for equality in redress and reparation legislation.

The Japanese Latin Americans have made progress in obtaining new allies and within the legislature. As previously stated there are a few members of Congress who continue to introduce legislation, although as of Spring 2011, it has not passed. In addition, norm entrepreneurs have turned to regional and international organisations such as the *Organization of American States, Inter-American Commission on Human*

Rights, and the United Nations to gain allies/judgments originated from outside of the United States. Increasing normative expectation thus favour redress and reparation, and the United Nations has been favourable towards equitable reparations; however, the gaining of international allies has thus been ineffective. Despite international recognition of the event, the United States continues to maintain that the issue was settled by *Mochizuki v United States* and the political system remains closed. As this in an ongoing movement, however, it is possible for more elite allies to join the movement, which would broaden the political opportunities and potentially led to a more successful resolution.

Japan

As previously argued, not all groups which attempt to gain redress and reparations from a state that inflicted atrocities on the group have been successful, or even partially successful, despite the normative trend towards redress and reparation. The redress and reparation movement that centres on the comfort women issue has not yet achieved its goals its influential allies. It can be argued that the actions Japan has taken – such as the Asian Women's Fund and apologetic statements – have been achieved because of the allies gained; however, Japan's political system remains quite closed and, thus, opportunities have been closed at the domestic level for both the former comfort women and their allies. It is, again, important to note that despite the fact that women were kidnapped from at least six different countries, there is only one redress and reparation movement.

The approximate 50-year delay in the establishment of a comfort woman redress and reparation movement, is largely due to a complete lack of allies who could assist with the mobilisation and representation of the group, a lack of political opportunities, and to a lack of inclusion in a wider community interested in such mobilisation. Immediately after the war, the various Allied governments did not prosecute for Japanese sex crimes, despite being aware of the comfort women system. The sole exception to this was the Dutch government who held a single trial for the kidnapping and enslavement of Dutch citizens. Despite using testimonies from Indonesian women, the trial was inclusive only of Dutch women and exclusive other Asian nationalities. This trial resulted in convictions for members of the Japanese military and civilian operators of the comfort women stations, however, was not widely known and thus while being some measure of criminal justice, did not contribute to historical memory or symbolic justice.

The former comfort women were, in general, excluded from society and thus had little political opportunities immediately following World War II. Societal norms of the time tended to blame the victim of rape, regardless of the forced nature of servitude. Those who spoke out faced stigmatisation and a lack of both family and societal support. In addition to facing societal shame, women's roles in society were shaped by gender norms which gave primacy to men's role in society and contribution to the war effort. Thus while women were included in their larger political communities, thus who spoke out regarding the comfort women system were shamed and excluded from society. This gradually began to change as gender norms became more equalised; however, again, the comfort women did not begin to speak out until the late 1980s and did not emerge on the international scene until the 1990s.

Influential allies within Japanese society have been scarce; there are academics and civil society members who emerged in the 1990s, however, they have made little impact compared to the more influential anti-redress and reparations contingent who include members of the government and former Prime Minister Abe (considered to be a denier of the comfort women system due to his controversial statements regarding the historical accuracy of the event.) Former Allied nations have signified their support for redress and reparations in the mid- to late- 2000s by means of governmental resolutions and intergovernmental organisations such as United Nations have passed numerous resolutions and reports in support of redress and reparations, yet despite the strong international pressure to provide redress and reparations the Japanese government has resisted, arguing that all reparation agreements have been satisfied by the San Francisco Peace Treaty and that the private Asian Women's Fund was satisfactory to meet the demands of the victimised group. Without strong **domestic** allies this position is unlikely to change despite the presence of international allies and international pressure.

Yet, the pattern would indicate that the redress and reparations offered by Japan such as the Asian Women's Fund and the apologies given, were only achieved as a result of international pressure to conform to the normative trend which was brought upon Japan by influential allies of the comfort women. Japan continued to deny the event, until researchers provided archival evidence of the state's complicity in the comfort women system, representatives of the state since they have taken a variety of denial strategies including blaming the victim. Japan does not seem to take the initiative in offering redress and reparations, but seems to make its offer(s) reluctantly. The majority of former comfort women, however, consider the offerings to be

insufficient. The Asian Women's Fund was often called private welfare and not state reparation and apologies often rejected as being insincere. Victims still continue to lobby for state reparation, an accurate historical accounting, and sincere apologies.

Redress and reparation for the comfort women system thus did not have influential allies, political opportunities, or were included in a strong political community until the 1980s when the movement started to form, launching itself in the 1990. By this time, many of the former comfort women had died, and obtaining redress and reparations seems to have grown more difficult. Japan, having offered some measure of redress and reparations in response to international pressure, claims to have met its legal and moral obligations of redress and reparation; however, the continual dissatisfaction of the victimised group demonstrates a lack of agreement within the victimised group itself.

3. Implications and Conclusions

Reparation politics has become so much more common that it is now notable if a state does not apologise to groups who have been wronged or against whom crimes against humanity have been perpetrated or engage in reparation politics. The papers presented at a 2011 conference at Rutgers University – *Forgotten Genocides: Silence, Memory, Denial* – illustrate this point. The conference explored states' refusal to engage with the victimised group, to acknowledge the event, and/or to provide redress and reparations in the case of lesser-known genocides and other acts of atrocity and/or injustice. Such refusals are now viewed as exceptions to the norm and are thus interesting to explore: in a society where it is expected that states will address historical wrongs, why are there those that seem to be 'forgotten?' Among the papers at the Rutgers conference was a presentation on the exclusion of Roma from reparation programmes in the Czech Republic.[765] That paper's discussion of the legalities of reparations legislation complements this thesis; however, as the research was still preliminary, conclusions cannot yet be drawn. The conference itself opened with the impact of the United States congressional debates on the question of the recognition of the Armenian genocide on international relations and on the victimised group.

In addition to the clear development that it is now it notable when states are not engaging in reparation politics, a second question is also key. It is often not a question

[765] Krista Hegburg, *What the Law Does Not Recall: Repair, 'Historical Reality,' and the Legal Order in the Czech Republic*, Rutgers University, Forgotten Genocide: Silence, Memory, Denial, 29 March 2011.

of whether states will provide restorative justice, but whether the restorative justice offered by either international society, such as international trials, or within domestic structures is effective and adequate. This development is illustrated in a 2004 Human Rights Watch report:

> Mechanisms for legal redress have disappointed women who were raped during the genocide. ...Disappointed with the failure to effectively prosecute perpetrators of sexual violence, Rwandan women raped during the genocide urgently seek and require reparations for past abuse in the form of assistance that would enable them to meet their basic survival needs. The Rwandan government has not met its international obligation to provide adequate remedies for human rights violations during the genocide.[766]

As the above quote shows, a prominent NGO is arguing not that Rwanda should provide redress and reparations, but rather that Rwanda has not provided adequate redress or reparations. The debate has shifted. My thesis has argued that there are factors which play a key role in helping to determine which groups receive what they perceive as sufficient redress, and which do not. The role of key allies is clear; a next area of research might be to look further into the factors which play a role in determining who those allies are. My research already suggests that social status of groups, as most clearly demonstrated in the case of the Roma, plays a key role. This further suggests that the role of civil society and of others in changing the public perception of such groups will likewise be important. My research could be extended to look at such groups currently seeking some form of redress, such as the Armenian genocide, and the trans-Atlantic slave trade. A comparison between these and more contemporary events, such as the Cambodian and Rwandan genocides would likewise be fruitful.

[766] Human Rights Watch, *Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda*, September 2004 Vol 16. No. 10 (A), pp. 2-3

Glossary

Apology:
Admission of wrongdoing, recognition of its effects, and often an acceptance of responsibility with an obligation to the victims.

Compensation:
Payment for damages or loss that can be quantified and returned such as loss of wages, property and so forth; in theory, compensation will make the injured person whole.

Coram nobis:
A writ that allows one to reopen a criminal court case after the sentence has been served on the basis that there was a fundamental error and/or manifest injustice in the original conviction.

***Ex post facto*:**
An *Ex post facto* law is one that retroactively changes the legal consequences of acts committed or the legal status of facts and relationships that existed prior to the enactment of the law.

Habeas corpus:
A writ that summons the officials who have custody of a prisoner to appear in court to determine the legality of the prisoner's confinement.

Internalisation:
The third stage of the norm life cycle where the norm is no longer seen as new, but had become widely accepted and few diverge from it.

International Society:
International society as a group of states that are aware of common interests and values and who perceive themselves to be 'bound by a common set of rules in their relations with one another, and share in the working of common institutions.'[767]

Norm cascade:
Occurs as more countries being to adopt new norms without domestic pressure and for reasons relating to identity.

Norm emergence:
Categorized by norm entrepreneurs attempting to convince a critical mass of states to embrace new norms.

Norm entrepreneurs:
Specialists who campaign to change particular norms.

Norms:
Standards of appropriate behaviour for actors with a given identity.

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[767] Hedley Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd ed. (New York: Columbia University Press, 1977), p. 13.

***Nulla poena sine lege*:**
The legal principle that one cannot be penalised for doing something, which at the time is not prohibited by law.

(Political) Reconciliation:
A form of reconciliation that focuses not on forgiveness and acceptance, but on the creation of a political space in which members of a victimized group are now seen to be part of the political community in addition to the state reasserting itself s a legitimate actor. Political reconciliation implies recognition of the historical facts and a dialogue between the actors involved.

Redress and reparation movements:
Social movements that focus on obtaining some form of restorative justice.

Reparation politics:
The broad field in which actors, primarily states, attempt to address past wrongs and encompasses transitional justice, apologies and various other forms of reparations, redress, and restitution.

Reparations:
Some form of material recompense for that which cannot be returned, such as human life, a flourishing culture and economy, and identity.

Restitution:
The return of specific actual belongings which were confiscated, seized or stolen, such as land, art, ancestral remains and so forth.

Restorative justice:
Any state-supported action that attempts to redress historical atrocities and injustices.

Tipping Point:
The point in the norm life cycle where states transition from norm emergence to norm cascade.

Transitional Justice:
The study of how autocratic, authoritarian or totalitarian regimes transition to a more democratic regime, and how successor governments respond to the atrocities and injustices of the previous regime.

Vergangenheitsbewältigung:
German roughly translates coming to terms with the past.

Appendix 1:
Redress and Reparation Movements within International Society

Country	Dates Covered	Events	Victimised Group	Dates of Attempted RRM	Selected Forms of Restorative Justice
Germany	1933-1945	• Genocide • Revocation of Citizenship • Seizure of Assets	German and European Jews	1945 - on	• 1945 – 1949: Nuremberg Tribunals • 1945 – on: Various criminal trials • 1951: Formal recognition of crime by Chancellor Adenauer • 1952: *Reparations Agreement between Israel and West Germany* • 1953, 1957: Restitution laws • 1956, 1965: Reparation laws • 1970: Chancellor Brandt kneels at the Warsaw Ghetto Memorial, afterwards stated: 'I wanted on behalf of our people to ask for pardon for the terrible crime that was carried out in Germany's misused name.' • 1985: Holocaust Denial Law • 2003 – 2005: Memorial to Murdered Jews of Europe in Berlin is constructed.
Germany	1933 – 1945	• Genocide • Revocation of Citizenship • Seizure of Assets	German and European Roma		• Memorial to the Destruction of the Roma/Sinti by the Nazis (Planned 2002-current; however still has not been built)
Japan	1910 –1945	• Colonization and War	Korea	1965, 1984	• 1965: Foreign Minister Shinna Etsusaburo announces at Kimpo airport (South Korea) that he "wishes to express his 'sincere regret' for an 'unfortunate period' in relations between the two countries for which he felt deep remorse." • 1984: Emperor to South Korean president. "it is regrettable that there was an unfortunate period in this century." • Emperor Akihito and Prime Minister Obuchi apoligize to South Korean President for occupation of Korean Peninsula from 1910 to 1945

Japan	1931 – 1945	• World War II; Acts of War	China, UN, United States; United Kingdom	1965 – on	• 1965 – 1997: Ienaga Saburo has filed 3 major challenges to the Japanese Ministry of Education's system of textbook screening. (Censorship of such issues such as the Nanjing Massacre and the military sex slaves) • 1972: Prime Minister Kakuei Tanaka tells visiting Chinese Premier "Japan realizes her heavy responsibility in causing enormous damage to the Chinese people in the past through the war." • 1985: United Nations address in which Prime Minister Yasuhiro Nakasone apologies for Japan's role in WWII • 1991: Foreign Minister Michio Watanabe expresses "deep remorse" for the wartime suffering that followed the attack on Pearl Harbor. • 1993: Prime Minister Morihiro Hosokawa publicly states that WWII was a mistake and an act of aggression a week later he states at Parliament "a feeling of deep remorse and apologies for the fact that our country's past acts of aggression and colonial rules caused unbearable suffering and sorrow for so many people." • 1993: Prime Minister Morihiro Hosokawa to British Prime Minister John Major "I took this opportunity to express my deep remorse as well as to apologize for the fact that Japan's past action had inflicted deep wounds on many people, including former prisoners of war." • 1995: "Heartfelt apology" for Japan's aggression. • 1998: Prime Minister "Heartfelt apology" to the British government and expresses "deep remorse" for Japan's treatment of British POW's.
Uganda	1971 – 1974	• Forced Disappearance	Political Opponents	1974 – 1975	• 1974: Commission of Inquiry into the Disappearance of People in Uganda since 25th January, 1971

					• 1975: *Report of the Commission of Inquiry into the Disappearance of People in Uganda since the 25th January, 1971*
United States	1932 – 1972	• Medical experimentation	African American men	1972 – 1974; 1992	• 1972: Advisory panel to review study. (Panel ordered termination of project) • 1974: settled a lawsuit by survivors for $10 million. • 1997: President Clinton: "...on behalf of the American people, what the United States government did was shameful and I am sorry. To our African American citizens, I am sorry that your federal government orchestrated a study so clearly racist"
United States	1942 – 1946	• Evacuation • Internment	Japanese Americans	1976 – on	• 1976: President Gerald Ford states that the internment of Japanese Americans was wrong and officially revokes President Roosevelt's exclusion order. • 1980 – 1983: Commission on Wartime Relocation and Internment of Civilians • 1982: *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians.* • 1984: Korematsu v. United States, 584 F. Supp. 1406, 1420 (D.C. Cal, 1984). • 1987: Hirabayashi, 828 F. 2d 591, 593 (9th Cir. 1987) • 1988: Civil Liberties Act of 1988 providing individual reparations of $20,000 and an apology letter. • 1992: Civil Liberties Act of 1992 provided additional funds to meet obligations of CLA of 1988 • 2001: former internment camps will be preserved as historical landmarks.
United States	1942 – 1945	• Forced Deportation from home country in Latin America to the United States • Forced deportation from United States to Japan • Internment	Aleuts	1980 – on	• 1980 – 1983: Commission on Wartime Relocation and Internment of Civilians (Primary focus was on Japanese Americans) • 1982: Appendix of *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians.*

United States					• 1980 – 1983: Commission on Wartime Relocation and Internment of Civilians (Primary focus was on Japanese Americans) • 1982: Part II of *Personal Justice Denied: Report of the Commission on Wartime Relocation and Internment of Civilians.*
Bolivia	1967 – 1982	• Forced Disappearance	Political Opponents	1982 – 1984	• 1982 – 1984: Aborted Truth Commission – *National Commission of Inquiry into Disappearances* (did not complete the process) • Criminal Trials
Argentina	1975 – 1983	• Forced Disappearance • Detention • Torture	Political Opponents	1983 – 2002	• 1983 – 1984: National Commission on the Disappearance of Persons • 1984: *Never Again* (Publication of Commission Report • 1983 – 2004: A series of reparation laws • 1984 – on: Prosecution of high ranking military officers • 2002: Congress declared 24 May the Day of Remembrance for Truth and Justice • 2006: Day of Memory declared a national public holiday
Uruguay	1973 – 1982	• Forced Disappearance	Political Opponents	1985	• 1985: Investigative Commission on the Situation of Disappeared People and Its Causes. • 1985: *Final Report of the Investigative Commission on the Situation of Disappeared People and Its Causes*
Zimbabwe	1983	• Governmental repression of dissidents	Political Opponents	1985	• 1985: Commission of Inquiry (report kept confidential)
Uganda	1962 – 1986	• Violations of Human Rights • Arbitrary arrest and detention • Torture • Murder	Political Opponents	1986 – 1995	• 1986 – 1995: Commission of Inquiry into Violations of Human Rights. • 1994: *The Report of the Commission of Inquiry into Violation of Human Rights: Findings, Conclusions, and Recommendations.*
Turkey	1915 – 1923	• Massacres / Genocide	Armenians	1988	• 2005 – on: Article 301 of the Turkish Penal

					Code is utilized to prosecute individuals who argue that the massacres of Armenians in 1915 – 1923 was genocide. • 2006: France passes law that denial of Armenian genocide is a crime.
Canada		• Internment	Japanese Canadians	1988	• Prime Minister apologizes; Japanese Canadians are eligible for $21,000 reparations.
Nepal	1961 – 1990	• Forced Disappearance	Political Opponents	1990 – 1991	• 1990 – 1991: Commission of Inquiry to Locate the Persons Disappeared during the Panchayet Period • 1994: Public release of *Report of the Commission of Inquiry to Locate the Persons Disappeared during the Panchayet Period*
Soviet Union	1939 – 1956	• Massacres • Internments	Prisoners of War	1990, 1993	• 1990: President Mikhail Gorbachev admits responsibility for 1940 massacre of Polish POW in Katyn Forest massacre. The government issues a statement expressing "profound regret over the Katyn tragedy," describing it as: one of the gravest crimes of Stalinism." • 1993: President Yelstin apologizes for the internment of 600,000 Japanese POWs (1945 – 1956)
Chile	1973 – 1990	• Human rights violations • Forced disappearance • Executions • Torture	Political Opponents	1990 – 2003	• 1990 – 1991:National Commission on Truth and Reconciliation aka "The Rettig Commission" • 1990 – 1991: Presidential Apology (President Aylwin) • 1991: *Report of the National Commission on Truth and Reconciliation* • Reparations for families of those killed or disappeared (excluded torture)
Chad	1982 – 1990	• Violation of Human Rights • Forced Disappearance • Torture • Acts of Barbarity …	Political Opponents	1991 – 1992	• 1991 – 1992: Commission of Inquiry on the Crimes and Misappropriates Committed by the Ex-President Habré, His Accomplices and/or Accessories • 1992: *Report of the Commission*
South Africa (African	1979 – 1991	• Detention camp abuses • Acts of Cruelty and	Former Prisoners & Detainees	1992 - 2000	• 1992: Commission of Enquiry into Complaints by Former African National Congress

National Congress)		Human Rights Abuses			Prisoners and Detainees aka "The Skweyiya Commission" • 1992: *Report of the Commission of Enquiry into Complaints by Former African National Congress Prisoners and Detainees* • 1993: Commission of Enquiry into Certain Allegations of Cruelty and Human Rights Abuse against ANC Prisoners and Detainees by ANC Members aka "The Motsuenyane Commission" • 1993: *Report of the Commission of Enquiry into Certain Allegations of Cruelty and Human Rights Abuse against ANC Prisoners and Detainees by ANC Members* • 1993: Nelson Mandela apologizes for atrocities committed by the African National Congress against suspected enemies.
Australia	1788 – on	• Colonialism	Indigenous Australians	1992 – on	• 1992: Prime Minister Paul Keating acknowledging the wrongs to Aboriginals: "We took the traditional lands and smashed the traditional way of life. We committed the murders." • 1997: Australia Federal parliament tables a report on forced removal of Aboriginal children which recommends an apology. Nearly all state parliaments offer one; however the prime minister and the Northern Territory Parliament refused • 1999: Prime Minister John Howard and the Federal Parliament express regret for past mistreatment • 2008: Prime Minister Rudd issued a public apology to the "Stolen Generation" on behalf of the government
El Salvador	1980 – 1991	• Serious acts of violence to include killings, disappearance, torture, rape and massacres	Political Opponents	1992 – 1993	• Truth Commission
Germany	1949 – 1989	• Practices of East Germany including human rights	Dissidents	1992 – 1994	• Truth Commission

		violations			
Former Yugoslavia	1991-2001	• Genocide, Crimes Against Humanity, War Crimes	ethnic groups in the Former Yugoslavia	1993	• International Tribunal for Yugoslavia
United States	1893	• Forced Regime Change	Native Hawaiians	1993	• U.S. Public Law 103-150 apologizes to Native Hawaiians for the overthrow of their native government
South Africa	1960 – 1994	• Apartheid • Massacres • Killings • Torture • Detainment • Discrimination	Victims of Apartheid Violence	1993 – 2000	• 1993: President F.W. de Klerk apologizes for apartheid • 1995– 2000: Truth and Reconciliation Commission
German	1939 – 1945	• Atrocities	Polish	1994	• President Herzog after laying a wreath at a memorial for the failed Warsaw uprising: "It ask forgiveness for what has been done too you by Germans."
Sri Lanka	1988 – 1994	• Forced Disappearance	Political Opponents	1994 – 1997	• Truth Commission
Rwanda	1994	• Genocide	Tutsi	1994 – current	• International Criminal Tribunal for Rwanda
Lithuania	1940 – 1944	• Complicit in Genocide	Lithuanian Jews	1995	• President Brazauskas: "I the president of Lithuania, bow my head in memory of the more than 200,000 Lithuanian Jews who perished. I ask forgiveness for the deeds of those Lithuanian who cruelly killed, shot, expelled and plundered the Jews."
France	1940 – 1944	• Complicit in Genocide	French Jews	1995	• President Chirac apologizes for the help the Vichy • government gave the Nazis in deporting 320,000 French Jews to concentration camps.
United Kingdom	1863	• Seizure of land	Maori of New Zealand	1995	• Queen Elizabeth II approves legislation that apologies unreservedly to the Maori for taking their land in 1893 and includes a payment of $112 million and the return of 39,000 acres to the Tainui people
Japan	1931 – 1945	• Sex Slaves	"Comfort Women"	1995 – on	• Prime Minister Muryama apologizes to women who were forced to serve as sex slaves

					for the Japanese Army. • Asian Women's Fund is created to deal with reparations
Haiti	1991 – 1994	• Human Rights Violations	Political Opponents	1995 – 1996	• Truth Commission
Burundi	1993 – 1995	• Acts of genocide • Massacres	Ethnic Conflict between Hutu and Tutsi	1995 – 1996	• Truth Commission
Ecuador	1979 – 1996	• Human Rights Violations • Massacres	Anticommunist forces and counterinsurgency violence	1996 – 1997	• Truth Commission (did not complete the process)
Swiss	1997	• Slander / WWII	Jewish Organisations	1997	• President Delamuraz apologized for deriding as "blackmailers" the Jewish organizations seeking compensation for Holocaust survivors whose assets were held by Swiss banks
United Kingdom	1845 – 1852	• Potato Famine	Irish	1997	• British Prime Minister Tony Blair expresses regret for English indifference to the plight of the Irish people
Norway		• Injustice towards native populations	Sami	1997	• King Harald: "Today we deplore the injustices committed in the past against the Sami people by the Norwegian state through harsh policies of Norwegianization"
United Kingdom	1912	• Massacre	Indian	1997	• Queen Elizabeth silent homage and contrition in recognition of the 1912 Amritsar massacre
Guatemala	1962 –1996	• Human Rights Violations • Acts of Violence • Massacre	Anticommunist government forces and URNG	1997 – 1999	• Truth Commission
United States	1921	• Race Riot	African Americans	1997 – 2001	• 1997 – 2001: Tulsa Race Riot Commission • 2001: *Final Report of the Oklahoma Commission to Study the Tulsa Race Riot of 1921*
United States		• Slavery	Africans	1998	• During visit to Uganda, President Clinton repents for American participation in the African slave trade
United States	1994	• Inaction during genocide	Rwandans	1998	• President Clinton apologises for US inaction during the genocide

Argentina	1982	• War	Britain	1998	• President Menem expresses regret over the Falklands War
Canada		• Injustice	Indigenous populations	1998 – 2003	• 1998: Formal governmental apology for the historic treatment of indigenous persons and establishes a "healing fund." • 2003: Premier Gordon Campbell pf the provincial government of British Colombia apologises to Aboriginal peoples stating that provincial institutions have "failed aboriginal people across our province."
United States	1999	• Support of murderous regime	Guatemala	1999	• President Clinton expresses remorse for US support of right-wing governments in Guatemala that killed tens of thousands rebels and Mayans
United States	1941 – 1948	• Forced removal from home/host country and deportation to foreign land • Internment	Japanese Latin Americans	1999 – on	• 1980 – 1983: Commission on Wartime Relocation and Internment of Civilians • 1999: Court settlement including $5000 in reparations and an apology letter. • 2009: H.R. 49 , Commission on Wartime Relocation and Internment of Latin Americans of Japanese Descent Act (As of 11 Feb 2009 sent to subcommittees for consideration)
Nigeria	1962 –1996	• Gross Violations of Human Rights	Political Opponents	1999 – 2000	• Truth Commission
United States		• Racism and inhumanity	Native Americans	2000	• Head of the US Federal Bureau of Indian Affairs, Kevin Giver apologizes for the bureau's "legacy of racism and inhumanity."
Sierra Leone	1991 – 1999	• Atrocities	Government and RUF fighters	2000 – 2001	• Truth Commission
Japan	1953 – 196	• Permanent Internment • Forced sterilization • Forced Abortions	Leprosy patients	2001	• 2001: Court ruling for $15 million to 127 plaintiffs • 2001: Prime Minister Koizumi apologized on behalf of the government to lepers "for the pain and suffering patients were forced to endure."
Poland	1939 – 1945	• Massacres	Polish Jews	2001	• President Kwasniewski apologizes on behalf of himself and the Polish people, for the participation of Polish citizens in the massacre of fellow Jewish citizens during WWII
United States	1917 – 1983	• Eugenics laws/ Sterilization	Eugenics program targeting: mental	2001 – 2003	• 2001: The Virginia General Assembly "profound regret over the Commonwealth's

			illness, mental retardation, epilepsy, alcoholism and criminal behaviour and 'ne'er-do-wells'		role in the eugenics movement in this country and over the damage done in the name of eugenics." (1924 – 1979) • 2002: Virginia Governor Mark Warner "Today, I offer the commonwealth's sincere apology for Virginia's participation in eugenics" (1924 – 1979) • 2002: Oregon Governor John Kitzhaber apologizes for sterilizations "performed under the authority of state law between 1917 and 1983 • 2003: South Carolina Governor Jim Hodges apologizes for the state's forced sterilization program of women and blacks (1930s – 1960s) • 2003: California Governor Gray Davis apologizes for the state's forced sterilization program dating from 1909 to late 1940s
Belgium	1961	• Assassination	Congo	2002	• "Profound and sincere regrets and its apologies" for its "role in the assassination of Patrice Lumumba, the first Prime Minister of its former colony Congo" • $3.5 million fund to promote democracy in the Congo.
New Zealand		• Treaty breaches	Ngati Ruanui (Indigenous populations of New Zealand)	2003	• Treaty Negotiations Minister Wilson offered a formal Crown apology got Treaty breeches.
Germany	1904 – 1907	• Massacres	Herero people (Indigenous populations of Namibia)	2004	• 2004: Germany's ambassador to Namibia tells the Herero people that "he wished to express how deeply we regret this unfortunate past." • 2000: Reparations lawsuit
Cambodia	1975-1978	• Genocide • Crimes Against Humanity	'Enemies' of the state including intellectuals and religious members	2006 - ongoing	• Extraordinary Chambers in the Courts of Cambodia
United States		• Slavery, treatment of Natives	Africans and Native Americans	2007	• Virginia General Assembly expresses "profound regret" for slavery and treatment of Native Americans.

Appendix 2:
Notable International and Domestic Trials

Date	Event(s)	Name
1945	German World War II crimes such as (Crimes against humanity, crimes against peace, war crimes and so forth.	• Trial of the Major War Criminals before the International Military Tribunal (Allied tribunal 1945-1946) • The Belsen trials (U.K. – 1945-1946) • Dachau trials (U.S military trials 1945-1948) • Trials of War Criminals before the Nuremberg Military Tribunals (U.S. military tribunals 1946-1949) • The Hamburg Ravensbrück Trials (U.K. 1946 -1948) • The Auschwitz trial (Poland – 1947) • Eichmann Trial (Israel – 1961) • The Frankfurt Auschwitz Trials (German 1963-1965; 1977) • Various trials throughout the years up to the trial of John Demjanjuk (German 2009)
1946	Japanese World War II crimes such as (Crimes against humanity, crimes against peace, war crimes and so forth.	• The International Military Tribunal for the Far East (Allied 1946-1948) • Chinese War Crime Tribunals (13 tribunals established by Chinese government to try Japanese military 1946) • Khabarovsk War Crime Trials (Soviet Union 1949) • Indonesian Trials (British – 1949)
1984 / 1987	United States World War II internments (overturning convictions related to the Internment)	• Korematsu v. United States, 584 F. Supp. 1406, 1420 (D.C. Cal, 1984) • Hirabayashi, 828 F. 2d 591, 593 (9th Cir. 1987)
1993	Genocide, Crimes Against Humanity, and War Crimes in the former Yugoslav	• International Criminal Tribunal for the former Yugoslavia
1994	Genocide, Crimes Against Humanity, and War Crimes in Rwanda	• International Criminal Tribunal for Rwanda
2000	Serious crimes (such as murder, rape and torture) in East Timor	• Special Panel for Serious Crimes
2002	Genocide, Crimes Against Humanity and War Crimes occurring after 2002 (first permanent court for crimes of this nature)	• International Criminal Court
2002	Serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.	• Special Court for Sierra Leone
2003	Serious crimes committed during the Khmer Rouge regime 1975-1979	• Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea

Appendix 3:
Bilateral Agreements for Compensation (in DM)

Date of Agreement	Agreement	Amount given in DM
11 July 1959	Luxembourg	18 million
7 Aug 1959	Norway	60 million
24 Aug 1959	Denmark	16 million
18 Mar 1960	Greece	115 million
8 April 1960	The Netherlands	125 million
15 July 1960	France	400 million
28 Sept 1960	Belgium	80 million
2 June 1961	Italy	40 million
29 June 1961	Switzerland	10 million
27 Nov 1961	Austria	95 million
9 June 1964	United Kingdom	11 million
3 Aug 1964	Sweden	1 million
1992	Foundation for German-Polish Reconciliation in Poland	500 million
1993	Foundation for Understanding and Reconciliation (Russian Federation, Belarus and the Ukraine)	100,000 million
Varies	Various Baltic states	2 million
1995	German-American Comprehensive Agreement on Compensation for Victims of National Socialism	3 million
21 Jan 1997	German-Czech Future Fund	140 million
25 Jan 1999	Supplementary Agreement of 25 January 1999 to the Comprehensive Agreement on Compensation with the United States of America	34.5 Million -

Date of Agreement	Agreement	Amount as of:	Amount given:	Notes
26 July 1951	Compensation settlements for victims of pseudo-medical experiments	April 2009	186 million DM	Cabinet decision
10 Sept 1952	West-Germany Israel Reparations Treaty (Luxembourg Agreement)	31 Dec 2008	3,450 million DM	3 billion DM to Israel and 450 million DM to Claims Conference
Various	Under state laws before 30 Sept. 1953 and under state regulations outside the BEG	1 Jan. 1986	1,835 million DM	Estimated 1,935 million DM through the year 2000
1 Oct 1953	The Federal Supplementary Law for the compensation of Victims of National Socialist Persecution	N/A	N/A	The 1956 BEG law supersedes this law
29 June 1956	Federal Act for the Compensation of the Victims of National Socialist Persecution (BEG)	31 Dec 2008	45,725 million EUR	Referred to as Federal Compensation Act - Compensated individuals persecuted for political, racial, religious, or ideological reasons
19 July 1957	Federal Act for the Settlement of the Monetary Restitution Liabilities of the German Reich and Legal Entities of Equal Legal Status (BRüG)	31 Dec 2008	2,023 million EUR	Referred to as the Federal Restitution Act; the total sum the Federal Republic was liable for limited to 1.5 billion DM. All claims were to be satisfied at least 50% of claim.
5 Nov 1957	General Act Regulating Compensation for War Induced Losses	31 Dec 2007	117,092,086.10 EUR	
1964	Amendment of the Restitution Law of 1957	N/A	N/A	Removed the liability limits, raised the claim limit to 100% of claim and provided a 800 million DM hardship fund for those who did not file in time.
14 Sept 1965	Final Federal Compensation Act (BEG-SG)	N/A	N/A	Provided 1.2 billion DM to individuals who are not covered by either the BEG laws are the bilateral agreements.
15 Sept 1966	Hardship Fund for Non-Jewish Victims of National Socialism	31 Dec 2008	39 million EUR	50 million EUR budgeted; This fund included payments to non-Jewish spouses and family members who were adversely affected by Nazi directives such as the Nuremberg laws and deportation.
Varied	Payments under the BWGöD and to the victims of experiments and the like	1 Jan. 1986	6,500 million DM	Estimated 9,100 million DM through the year 2000

3 Oct 1980	Federal Government Directive on Payments to Persecuted Jews to Compensate for Individual Hardships	31 Dec 2003	754,331,227 USD	Also known as the Hardship Fund; administered by the Claims Conference
26 Aug 1981	Directives on Payment to Persecuted Non-Jews to Compensate for Individual Hardships within the Context of Restitution	31 Dec 2008	34,599,747 EUR	Originally gave only 16 months for filing claims. Allowed Sinti/Roma to file for a one time financial support claim of up to 5,000 DM
7 Mar 1988	Directives on Payment to Persecuted Non-Jews to Compensate for Individual Hardships within the Context of Restitution of 26 August 1981 as amended on 7 March 1988	31 Dec 2008	14,496,828 EUR	94% of the claims are of Sinti and Roma Origin
3 Oct 1990	Act on the Settlement of Open Property Matters		N/A	Entered into force with the Unification Treaty
3 Oct 1990	Article 2 of Agreement on the Enactment and Interpretation of the Unification Treaty	31 Dec 2003	1,373,583,591 USD	Also known as the Article 2 Fund; fund is administered by the Claims Conference
1 May 1992	Act on Compensation for Victims of National Socialism in the Regions Acceding to the Federal Republic (ERG)	31 Dec 2008	776 million EUR	Also known as the Compensation Pension Act
27 Sept 1994	Federal Act for the Compensation of the Victims of National Socialist Persecution of 27 September 1994	31 Dec 2008	1,556 million EUR	
1999 – 2008	Central and Eastern European Fund (CEEF)	31 Dec 2003	157,694,813 USD	Agreement with the Claims Conference
2 Aug 2000	Act on the Creation of a Foundation for Remembrance, Responsibility and the Future[768]	31 Dec 2008	2,556 million EUR	Compensation for forced labourers

Sources: Data complied from *Compensation for National Socialist Injustice* published in December 2009; Pross, *Paying for the Past*; Claims Conference, Transitional Justice Vol 2

[768] The foundation was a result of a settlement for compensation of forced labour; 10.1 billion DM was given to the foundation by the German Economy Foundation Initiative and the Federal Government. http://www.auswaertiges-amt.de/diplo/en/Aussenpolitik/InternatRecht/Entschaedigung.html

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