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## Justifying Compensation by the International Criminal Court's Victims Trust Fund: Lessons from Domestic Compensation Schemes

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# JUSTIFYING COMPENSATION BY THE INTERNATIONAL CRIMINAL COURT'S VICTIMS TRUST FUND: LESSONS FROM DOMESTIC COMPENSATION SCHEMES

*Frédéric Mégret, PhD\**

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## INTRODUCTION

The International Criminal Court (ICC) has been hailed as the first international criminal tribunal to give serious consideration to the role of victims.<sup>1</sup> In particular, the Rome Statute proposes to set up a complex victim compensation system, involving the Court itself but also a more intriguing body, the Trust Fund for Victims (“TFV”).<sup>2</sup> What should such a system be doing exactly, who will pay for it and, most importantly, what should be its rationale?

The Rome Statute stands for an unprecedented attention to this dimension of criminal justice, after much neglect internationally. The Court can, for the first time in the history of international criminal justice, order money and other property collected through fines or forfeiture to be paid to victims.<sup>3</sup> This part of what the ICC can do, although novel by the standards of international criminal law, is perhaps the most familiar to both criminal and international lawyers. For international lawyers, issues of reparation evoke elements of thinking that have long been a hallmark of state responsibility. For criminal lawyers, the idea of the individual being ordered to pay reparations is evocative of an evolution towards restorative justice that has also become quite significant in many jurisdictions around the world.<sup>4</sup>

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1. See Sam Garkawe, *Victims and the International Criminal Court: Three Major Issues*, 3 INT'L CRIM. L. REV. 345, 352 (2003).

2. Rome Statute of the International Criminal Court art. 79, opened for signature July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3. *Id.* arts. 77.2, 79.2.

4. Burt Galaway & Leonard Rutman, *Victim Compensation: An Analysis of Substantive Issues*, 48 SOC. SERV. REV. 60, 60 (1974); see also Burt Galaway & Joe Hudson, *Introduction to CRIMINAL JUSTICE, RESTITUTION, AND RECONCILIATION* 1, 1–3 (Burt Galaway & Joe Hudson eds., 1990). See generally DANIEL VAN NESS & KAREN HEETDERKS STRONG, *RESTORING JUSTICE* (1997) (discussing the underpinnings of restorative justice and its applications to the criminal justice system).

But the Rome Statute presents a system of victim compensation that goes far beyond simply allowing the Court to order reparation awards against those convicted. One might describe this complexity as a double hybrid. The system is hybrid, first, because the Rome Statute creates not one but two institutions, the Court and the TFV. Typically less attention has been paid to the TFV, a new institution that, though independent, bears many organic links to the Court. The TFV is headed by the Executive Director of the Secretariat, André Laperrière, and a five-member Board of Directors.<sup>5</sup> It has been shrouded in relative mystery: its existence is anticipated by a single article in the Rome Statute,<sup>6</sup> its regulations took a long time to be adopted by the Assembly of State Parties, and it has been quite discrete about its activities, to the point of keeping its “strategic plan”<sup>7</sup> confidential for a long time.

Second, perhaps the core characteristic of the TFV is that it is itself a hybrid mechanism. On the one hand, it operates like an occasional adjunct to the ICC, whenever the Court will decide (and it need not always or often decide) that because not all victims have been identified, or because there are too many of them, it is more opportune to instruct the Fund to administer reparation orders.<sup>8</sup> In that respect, the TFV acts as a sort of implementing agency, a para-judicial administration acting under close scrutiny of the Court. Its prevailing logic, as an adjunct of the Court, is that of reparations.

On the other hand, the TFV also has a very crucial autonomous role that is largely independent from the operation of the ICC. This role is characterized by a different source of monies, different beneficiaries, and a different logic for dispensation. The TFV receives “voluntary contributions from governments, international organizations, individuals, [and] corporations,”<sup>9</sup> which are stored in a separate account from that of Court

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5. *Who We Are*, INT’L CRIMINAL COURT, <http://www.icc-cpi.int/NR/exeres/9D33C1B8-6087-4E94-AD90-7A8A03443823.htm> (last visited August 5, 2010).

6. Rome Statute, *supra* note 2, art. 79(1) (“A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.”).

7. TRUST FUND FOR VICTIMS, GLOBAL STRATEGIC PLAN 2009–2012 (2008) (unpublished draft, version 1) (on file with author).

8. Rules of Procedure and Evidence, Int’l Criminal Court, R. 98, Sept. 9, 2002, ICC-ASP/1/3 [hereinafter ICC Rules of Procedure and Evidence], *available at* <http://www.icc-cpi.int/Menu/ICC/Legal+Texts+and+Tools/Official+Journal/Rules+of+Procedure+and+Evidence.htm>.

9. Regulations of the Trust Fund for Victims para. 21(a), Dec. 3, 2005, ICC-ASP/4/Res.3, *available at* [http://www.icc-](http://www.icc-cpi.int/NR/exeres/9D33C1B8-6087-4E94-AD90-7A8A03443823.htm)

directed reparation orders and which may be awarded at the Fund's discretion.

This Article seeks to characterize the operation of the TFV in relation to victims when it comes to these autonomous resources emanating from the "international community." Are they a form of charity? Or, do they represent an entitlement on the part of victims? On what grounds should victims be compensated internationally in addition to what the convicted may be able to pay? These issues are typically not treated in the literature on the ICC even though they raise very profound questions about the nature of international criminal justice. Studies of the Fund thus far seem driven by attention to details and a rush to answer concrete questions about operations (e.g., who should it compensate and by how much) rather than paying attention to the development of a solid theory of the TFV's compensation regime.<sup>10</sup> This arguably creates a risk of confusion, a confusion that may ultimately be paid by the frustration of victims, and various assorted problems for international criminal justice.

In practice, the TFV is promoted through a mixture of pragmatism and appeal to emotions.<sup>11</sup> On the one hand, the TFV adopts the language of project management and good governance.<sup>12</sup> On the other hand, such is the power of appeals to "victims" in international criminal justice that the Fund may be tempted to simply invoke the fundamental moral legitimacy of its work to defer theoretical inquiry.<sup>13</sup> Talk of victims by TFV authori-

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[cpi.int/menus/icc/legal%20texts%20and%20tools/official%20journal/regulations%20of%20the%20trust%20fund%20for%20victims](http://www.ictj.org/cpi.int/menus/icc/legal%20texts%20and%20tools/official%20journal/regulations%20of%20the%20trust%20fund%20for%20victims) [hereinafter TFV Regulations].

10. For example, the website of the TFV cautiously outlines its immediate legal basis but little else. See *Legal Basis*, TRUST FUND FOR VICTIMS, <http://www.trustfundforvictims.org/legal-basis> (last visited Sept. 21, 2010).

11. The logic of emotions as one of the natural orientations of international criminal justice is highlighted in Leslie Vinjamuri & Jack Snyder, *Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice* (2004).

12. See, e.g., *The Two Roles of the TFV*, TRUST FUND FOR VICTIMS, <http://www.trustfundforvictims.org/two-roles-tfv> (last visited Sept. 21, 2010) ("TFV is learning valuable lessons about the unique role that a legal institution can play in addressing the needs of victims of genocide, war crimes, and crimes against humanity. Through regular monitoring and evaluation and targeted research, the TFV is documenting and sharing these lessons to inform its work.").

13. This has long been apparent in domestic discussions on compensation schemes. For example, in parliamentary debates preceding the adoption of the British scheme, Lord Shawcross rejected the need for "an elaborate theoretical or philosophical speculation as to why the State should intervene in a matter of this kind" and recommended that one merely rely on "public instinct." P.S. ATIYAH & PETER CANE, *ATIYAH'S ACCIDENTS, COMPENSATION AND THE LAW* 255 (5th ed. 1993).

ties is rife with emotion, in ways that seem to sidestep the need for fundamental justification.<sup>14</sup>

In between managerial pragmatism and emotional empathy with victims, nonetheless, real questions arise that are not currently being addressed. For example, how different is the TFV from a variety of international institutions and NGOs involved in the transitional justice efforts and support to victims on the ground? To what extent should the Fund's embeddedness in the apparatus of international criminal justice make it a specific institution whose mandate is like no others'? Why should victims of only certain international crimes benefit from the fund, or victims of crimes as opposed to a range of other catastrophic life events (say, natural catastrophes)? How and to what extent should victims be helped? These questions hold tremendous significance in an international system where millions suffer daily of various maladies from crass poverty to preventable diseases, and where it is unclear why victims of international crimes should "jump queue" (not to mention victims of certain international crimes rather than others). Neither pragmatist nor emotional appeals provide us with an understandable account of the construction of a "legitimate victim" and his/her relation to the international community.

This Article proposes to explore different, although not necessarily exclusive, rationales for the TFV's work in an attempt to build one of the first theoretical frameworks of its work. Scattered emerging research on the TFV has explored two types of analogies.<sup>15</sup> One has been collective claims processes,<sup>16</sup> typically those related to the commission of mass crimes, such as Holocaust-related litigation. This is an interesting analogy but Holocaust claims were largely disconnected from the operation of

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14. See, e.g., Ambassador Altangerel, Trust Fund for Victims, Address at the Assembly of States Parties (Nov. 2009) (transcript available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/ASP8/Statements/ICC-ASP-ASP8-statements-TFV-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-statements-TFV-ENG.pdf)).

15. See generally REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING (Carla Ferstman, Mariana Goetz & Alan Stephens eds., 2009) (analyzing the implementation of reparations for victims through an examination of Holocaust and other mass claims in international and regional courts, as well as reparations schemes at the national level).

16. See generally DINAH L. SHELTON & THORDIS INGADOTTIR, CTR. ON INT'L COOPERATION, THE INTERNATIONAL CRIMINAL COURT REPARATIONS TO VICTIMS OF CRIMES (ARTICLE 75 OF THE ROME STATUTE) AND THE TRUST FUND (ARTICLE 79): RECOMMENDATIONS FOR THE COURT RULES OF PROCEDURE AND EVIDENCE (1999), available at [http://www.pict-pecti.org/publications/PICT\\_articles/REPARATIONS.PDF](http://www.pict-pecti.org/publications/PICT_articles/REPARATIONS.PDF) (analyzing the theoretical underpinnings of the reparations model and the structure of the TFV).

international or domestic criminal justice.<sup>17</sup> The alternative route is to look at existing domestic and international trust funds occasionally created to deal with episodes of mass criminality or particularly horrendous crimes.<sup>18</sup> This can help capture the fact that compensation of the sort envisaged by the TFV is fundamentally donor driven and public in character, rather than a response to private litigation. However, unlike the TFV, these trust funds also operate largely outside the framework of criminal justice, and are themselves in need of better theoretical justification.<sup>19</sup>

If one lets go of the intuition that the answer is to be found in the context of mass criminality and transitional justice, the better analogy is that the TFV takes its cue from what is in fact an already remarkable history—the development of domestic victim compensation schemes designed to deal with ordinary, particularly violent crimes. These schemes have existed for about half a century and are now a permanent feature of many justice systems.<sup>20</sup> Furthermore, where the creation of the potentially far more ambitious TFV seems to give rise only to a muted and theory-deficient dialogue between NGOs, government, and international technocrats, the justifications proffered for domestic victim compensation schemes have often sparked passionate theoretical, jurisprudential,

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17. For example, litigation against Swiss banks was unconnected (at least directly) to the operation of the process of prosecuting Nazis for crimes after the Second World War. See Lawrence Collins, *Reflections on Holocaust Claims in International Law*, 41 *ISR. L. REV.* 402, 404–408 (2008). In fact, most “Holocaust litigation” has been directed at states and corporations in ways that were largely dissociated from the criminal law. See generally *id.*

18. See, e.g., Peter G. Fischer, *The Victims’ Trust Fund of the International Criminal Court—Formation of a Functional Reparations Scheme*, 17 *EMORY INT’L L. REV.* 187 (2003) (arguing that the VTF should look to international human rights tribunals and domestic compensation schemes such as the September 11th Fund as models); Tom Dannenbaum, *The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims*, 28 *WIS. INT’L L.J.* 234 (2010).

19. For example, it is often unclear whether they operate on the basis of recognition of responsibility or as charitable schemes—some of the same problems raised, as we will see, by the TFV’s existence.

20. See Maxine D. Kersh, *The Empowerment of the Crime Victim: A Comparative Study of Victim Compensation Schemes in the United States and Australia*, 24 *CAL. W. INT’L L.J.* 345, 345 (1994); Desmond S. Greer, *A Transatlantic Perspective on the Compensation of Crime Victims in the United States*, 85 *J. CRIM. L. & CRIMINOLOGY* 333, 333 (1994); Julie Goldscheid, *Crime Victim Compensation in a Post-9/11 World*, 79 *TUL. L. REV.* 167, 181–83 (2004); ROBERT ELIAS, *VICTIMS OF THE SYSTEM: CRIME VICTIMS AND COMPENSATION IN AMERICAN POLITICS AND CRIMINAL JUSTICE* 26 (1983) [hereinafter ELIAS, *VICTIMS OF THE SYSTEM*].

and political debates.<sup>21</sup> In particular, the emergence of compensation schemes raises fundamental questions about the relationship of crime to community and the very nature of community.<sup>22</sup> These questions take on an even greater degree of relevance internationally, where notions of community are inherently problematic and where the emergence of a compensatory logic may be profoundly transformative and contentious.<sup>23</sup>

The hypothesis, therefore, is that international criminal justice can draw inspiration from some of these domestic ideas. The challenge is to discern the extent to which domestic rationales for victim compensation can be transposed to the international sphere. This will, by necessity, be an exercise in reflection both on criminal justice and international law, a particular institution (the TFV) and others like it, and, ultimately, the nature of obligations to victims in any system. It requires one to draw on interdisciplinary tools at the intersection of criminal law, international law, criminology, victimology, jurisprudence, political theory, history, and international relations. Needless to say, the questions envisaged here are not only of considerable theoretical tenor, they also have a very concrete dimension. The theory on which any system bases compensation of victims will determine, in turn, what form that compensation should take, who should be responsible for it, and for what amount. For the TFV to develop, such a theory will be crucial to its success and its ability, among others, to convince donors to fund it generously.

The Article begins by briefly presenting the basic analogy between domestic compensation schemes and the ICC compensation regime, particularly as represented by the TFV (I). On the basis of long-running discussions on the proper rationale of domestic compensation schemes, it will then seek to highlight some of the better justifications for the nature of victim compensation by the TFV (II).

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21. See, e.g., DANIEL MCGILLIS & PATRICIA SMITH, NAT'L INST. OF JUSTICE, COMPENSATING VICTIMS OF CRIME: AN ANALYSIS OF AMERICAN PROGRAMS, at v (1983) (noting that "considerable national attention" and "extensive congressional debate and investigation" engendered by the development of crime victim compensation programs in the United States made the study necessary).

22. See Andrew Ashworth, *Punishment and Compensation: Victims, Offenders and the State*, 6 OXFORD J. LEGAL STUD. 86, 91–99 (1986).

23. See generally Bruno Simma & Andreas L. Paulus, *The 'International Community': Facing the Challenge of Globalization*, 9 EUR. J. INT'L L. 266 (1998) (examining the concept of "international community" and associated challenges among various schools of thought).



I. THE ICC AND DOMESTIC VICTIM COMPENSATION SCHEMES: BASIC ANALOGY AND ISSUES

A. *The Emergence and Record of Domestic Victim Compensation Schemes*

Although this has been little commented upon in the context of the ICC/TFV, the idea of domestic victim compensation schemes is in fact an ancient one.<sup>24</sup> Some of its oldest antecedents include a mention in the Hammurabi code that if a person was robbed and the robber escaped, the victim could expect the city where the robbery occurred to compensate him.<sup>25</sup> Grand Duke Leopold of Tuscany set up one of the earliest schemes in 1786. In the modern era, the idea of victim compensation schemes was rediscovered by utilitarians, keen on maximizing the utility of the criminal justice system. These utilitarians cautioned against a traditionally excessively retributivist focus in criminal justice and were naturally inclined to think that correcting the harm done to both society and victims should be a part of the process. Bentham, as a representative of that current, took up the idea in *Principles of Penal Law* by suggesting that “if the delinquent have no fortune,” satisfaction “ought to be made at the expense of the public treasure, because it is an object of public benefit; the security of all is concerned.”<sup>26</sup> Italian 19th century criminologists endorsed the concept enthusiastically,<sup>27</sup> and the issue was discussed in several international penological congresses.<sup>28</sup>

Compensation schemes can be described as schemes involved in “[t]he granting of public funds to persons who have been victimized by a crime of violence and to persons who survive those killed by such crimes.”<sup>29</sup>

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24. For a recent synthesis of that history, see Michael O’Connell, *Criminal Injuries Compensation: Revisiting the Rationale for State Funded Compensation for Crime Victims 2–7* (unpublished paper presented at the Innovation: Promising Practices for Victims and Witnesses in the Criminal Justice System national conference in Canberra on June 23–24, 2003) (available at <http://www.victimsupport.act.gov.au/res/File/O'Connell.pdf>).

25. Robert D. Childres, *Compensation for Criminally Inflicted Personal Injury*, 39 N.Y.U. L. Rev. 444, 444 (1964).

26. 1 JEREMY BENTHAM, *Principles of Penal Law*, in THE WORKS OF JEREMY BENTHAM 365, 386 (Russell & Russell Inc. 1962) (1843), available at [http://oll.libertyfund.org/index.php?option=com\\_staticxt&staticfile=show.php%3Ftitle=2009&Itemid=99999999](http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=2009&Itemid=99999999).

27. See ENRICO FERRI, *CRIMINAL SOCIOLOGY* 110 (Kessinger Publishing 2004) (1884).

28. International Prison Conference, Paris, 1885; General Assembly of the International Criminalistic Society, 1890.

29. HERBERT EDELHERTZ & GILBERT GEIS, *PUBLIC COMPENSATION TO VICTIMS OF CRIME* 3 (1974).

The important thing is that the funds are public; in other words, they come from a source external to the crime and are awarded on the basis of a particular account of the needs of victims or of the interest of the public good.<sup>30</sup> Their emergence ranks as one of the most significant criminological developments in the Western world and beyond of the last four decades.<sup>31</sup> The inspiration for the first experiments came from the UK, more specifically from a famous article first published in 1957 in the *Observer* by Margaret Fry, a member of the Howard League of Penal Reform.<sup>32</sup> New Zealand enacted the very first comprehensive compensation scheme, which took effect in 1964.<sup>33</sup> Almost simultaneously, similar schemes emerged in the UK<sup>34</sup> (today, the world's largest) and California,<sup>35</sup> soon followed by New York.<sup>36</sup> Today, all US states have one,<sup>37</sup> and there is even a scheme at the federal level.<sup>38</sup> In Canada, victim compensation prevails at the provincial level, such as the Province of Québec's *Loi sur l'indemnisation des victimes d'actes criminels* and the

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30. For an early overview of such programs, see generally *id.*

31. See LORRAINE WOLHUTER, NEIL OLLEY & DAVID DENHAM, *VICTIMOLOGY: VICTIMISATION AND VICTIMS' RIGHTS* 1 (2009).

32. Margery Fry, *Justice for Victims*, 8 J. PUB. L. 191 (1959), originally published in *THE OBSERVER* (London), July 7, 1957, at 8.

33. B.J. Cameron, *Compensation for Victims of Crime: the New Zealand Experiment*, 12 J. PUB. L. 367, 367–68 (1963) (Parliament enacted the Criminal Injuries Compensation Act “on 24 October 1963, to become effective on 1 January 1964.”); Kent M. Weeks, *The New Zealand Criminal Injuries Compensation Scheme*, 43 S. CAL. L. REV. 107, 107–108 (1970).

34. See Joanna Shapland, *Victims, the Criminal Justice System and Compensation*, 24 BRIT. J. CRIMINOLOGY 131, 137–40 (1984) (discussing the justifications and parameters of the British compensation scheme).

35. Willard Shank, *Aid to Victims of Violent Crimes in California*, 43 S. CAL. L. REV. 85, 85 (1970); James E. Culhane, *California Enacts Legislation to Aid Victims of Criminal Violence*, 18 STAN. L. REV. 266, 266 (1965); Gilbert Geis & Herbert Edelhertz, *California's New Crime Victim Compensation Statute*, 11 SAN DIEGO L. REV. 880, 880 (1974).

36. Michael J. Novack, *Crime Victim Compensation: The New York Solution*, 35 ALB. L. REV. 717, 724 (1971).

37. EDWIN H. SUTHERLAND, DONALD R. CRESSEY & DAVID F. LUCKENBILL, *PRINCIPLES OF CRIMINOLOGY* 299 (11th ed. 1992). For a full list and links to specific information about each state's program, see *State Links*, NATIONAL ASSOCIATION OF CRIME VICTIM COMPENSATION BOARDS, <http://www.nacvcb.org/index.asp?sid=6> (last visited Nov. 10, 2010).

38. This was advocated early on. See MONIKA B. REED, TENN. CORR. INST. & NAT'L INST. OF JUSTICE, *VICTIM COMPENSATION AND THE FEDERAL GOVERNMENT* (1980) (“advocat[ing] national victim compensation legislation using the legislation established in the state of Tennessee as a guide”); see also 42 U.S.C. § 10601 (2006) (establishing a Crime Victims Fund).

Victims' Justice Fund in Ontario.<sup>39</sup> Sweden adopted a state compensation program, the Criminal Injuries Compensation Act, in 1978.<sup>40</sup> Funds have also been created in France,<sup>41</sup> Germany,<sup>42</sup> Italy,<sup>43</sup> and numerous other European countries.<sup>44</sup> Indeed, the issue became a pan-European one with the adoption, first, of the Convention on the Compensation of Victims of Violent Crime in 1983 by the Council of Europe and, subsequently, of a European Union Council Directive of 2004.<sup>45</sup> The directive contemplates that "[a]ll Member States shall ensure that their national rules provide for the existence of a scheme on compensation to victims of violent intentional crimes committed in their respective territories."<sup>46</sup> A majority of Council of Europe states now implement this obligation.<sup>47</sup> Some compensation funds now even have an extra-territorial reach, covering citizens who have suffered harm abroad, particularly as a result of terrorist attacks.<sup>48</sup>

The United Nations also takes a strong stance in favor of victim compensation schemes. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power anticipates that "[w]hen compensation is not fully available from the offender or other sources, States

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39. *An Overview of Victim Services Across Canada*, FEDERAL OMBUDSMAN FOR VICTIMS OF CRIME, <http://www.victimsfirst.gc.ca/serv/ov-ap.html> (follow hyperlinks for "Ontario" and "Quebec") (last modified Feb. 26, 2009).

40. Council of Europe, Hans-Joerg Albrecht & Michael Kilchling, *Victims of Terrorism—Policies and Legislation in Europe: an Overview on Victim-Related Assistance and Support*, in VICTIMS—SUPPORT AND ASSISTANCE 240 (Sept. 2006), available at <http://www.coe.int/t/dghl/standardsetting/victims/6041-6-ID3996-Victims%20-%20Support%20and%20assistance.pdf>.

41. *Id.* at 218.

42. *Id.* at 220.

43. *Id.* at 224.

44. *See id.* at 211–45 (discussing regulations relating to victims in the member states of the Council of Europe).

45. Convention on the Compensation of Victims of Violent Crime art. 2, Nov. 24, 1983, 24 XI.1983, E.T.S. 116 [hereinafter European Convention on the Compensation of Victims of Violent Crimes], available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=116&CM=1&DF=03/09/2010&CL=ENG>; Council Directive 04/80, art. 2, 2004 O.J. (L 261) 15, 16 (EC) [hereinafter Council Directive].

46. Council Directive, *supra* note 45, art. 12, para. 2.

47. *Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee*, at 4, COM (2009) 170 final (April 20, 2009).

48. *E.g.*, Ann Riley, *UK Introduces Compensation Scheme for Victims of Overseas Terrorist Attacks*, JURIST (Jan. 19, 2010, 11:29 AM), <http://jurist.law.pitt.edu/paperchase/2010/01/uk-introduces-compensation-scheme-for.php>.

should endeavour to provide financial compensation.”<sup>49</sup> Indeed, the UN established some of its own victim compensation funds. The first was the UN Trust Fund for Chile, a voluntary fund “to receive contributions and distribute . . . humanitarian, legal and financial aid to persons whose human rights have been violated by detention or imprisonment in Chile.”<sup>50</sup> This transformed into the UN Voluntary Fund for Victims of Torture, which is still active today and distributes funds to non-governmental organizations providing humanitarian assistance to victims of torture and their family members.<sup>51</sup> The UN also maintains a Voluntary Trust Fund on Contemporary Forms of Slavery established by the General Assembly in 1991<sup>52</sup> to, *inter alia*, “extend, through established channels of assistance, humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of contemporary forms of slavery.”<sup>53</sup>

Typically, funds emerged to compensate grave violent crimes, specific categories of crime, or even specific incidents. In the US, for example, special funds have been created to compensate victims of notorious “terrorist” acts such as the Iran Hostage Crisis of 1979,<sup>54</sup> the Oklahoma City bombing,<sup>55</sup> and most recently, the attacks of September 11, 2001.<sup>56</sup> The

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49. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, Annex ¶ 12, U.N. Doc. A/Res/40/34/ (Nov. 29, 1985) [hereinafter UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power].

50. Establishment of the United Nations Trust Fund for Chile, G.A. Res. 33/174, ¶ 1, U.N. Doc. A/RES/33/174 (Dec. 20, 1978).

51. United Nations Voluntary Fund for Victims of Torture, G.A. Res 36/151, ¶ 1(a), U.N. Doc A/RES/36/151 (Dec. 16, 1981) [hereinafter United Nations Voluntary Fund for Victims of Torture].

52. United Nations Voluntary Trust Fund on Contemporary Forms of Slavery, G.A. Res. 46/122, U.N. Doc. A/RES/46/122 (Dec. 17, 1991).

53. United Nations Office of the High Comm’r for Human Rights, United Nations Voluntary Trust Fund on Contemporary Forms of Slavery Guidelines for the Use of Organizations, ¶ 1, <http://www.ohchr.org/Documents/Issues/Slavery/GuidelinesFund.pdf> (last visited Sept. 3, 2010); *see also* United Nations Voluntary Trust Fund on Contemporary Forms of Slavery, *supra* note 52, art. 1(b).

54. Victims of Terrorism Compensation Act, Pub. L. No. 99–399, §§ 801–808, 1986 U.S.C.A.N. (100 Stat. 853) 1926, 1954 (1986) (codified as amended at 5 U.S.C. § 5569 (2003)).

55. Emergency Supplemental Appropriations for Additional Disaster Assistance, for Anti-Terrorism Initiatives, for Assistance in the Recovery from the Tragedy that Occurred at Oklahoma City, and Rescissions Act, 1995, Pub. L. No. 104–19, 109 Stat. 194 (1995).

56. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107–42, §§ 401–409, 115 Stat. 230, 237 (2001) (codified at 49 U.S.C. § 40101) (establishing the “September 11th Victim Compensation Fund of 2001”) [hereinafter A.T.S.S.S.A.]. The

trend is towards general terrorism compensation funds, dissociated from any particular incident. For example, the Anti-Terrorism and Effective Death Penalty Act<sup>57</sup> in the US allows for compensation of both international and domestic terrorism. The French Guarantee Fund has a special compensatory regime for victims of terrorist attacks.<sup>58</sup> Moreover, some schemes have begun to appear that grant compensation for all serious violent offenses. The UK Criminal Injuries Compensation Scheme, for example, provides compensation to victims of violent crime, such as physical assault or sexual offenses.<sup>59</sup>

Although victim compensation schemes have occasionally been criticized for inadequately compensating some victims or attending to too small a portion of their needs,<sup>60</sup> there is also no doubt that they are well established, robust means of dealing with compensation, that distribute millions in compensation every year.<sup>61</sup> In a sense, victim compensation schemes offer the best of both worlds in that they isolate the criminal process from the treatment of victims (thus ensuring that the interests of the victims do not compromise the fairness of the trial), but still allow for significant compensation. Indeed, the emergence of victim compensation schemes has considerable implications for the conceptualization of crime, criminal repression, and victimhood. They nudge criminal justice in a more restorative direction (where the satisfaction of the victim is

A.T.S.S.S.A. indicates that the purpose of this Fund is "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001." *Id.* § 403. Further sections in the A.T.S.S.S.A. list criteria for eligibility and require the Fund to evaluate the harm to each claimant before determining the amount of compensation. *Id.* § 405; *see also* LLOYD DIXON & RACHEL KAGANOFF STERN, *COMPENSATION FOR LOSSES FROM THE 9/11 ATTACKS* 21 (2004).

57. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

58. Loi 90-589 du 6 juillet 1990 modifiant le code de procédure pénale et le code des assurances et relative aux victimes d'infractions [Law 90-589 of July 6, 1990, amending the Code of Criminal Procedure and the Code of Insurance and on Victims of Crime], *available at* <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006076154&dateTexte=20100921#LEGISCTA000006093953> (Fr.) (establishing the Guarantee Fund for Victims of Acts of Terrorism and Other Offences).

59. CRIMINAL INJURIES COMPENSATION AUTHORITY, *THE CRIMINAL INJURIES COMPENSATION SCHEME* (2008), ¶ 9 (2008), <http://www.cica.gov.uk/Documents/publications/Criminal%20Injuries%20Compensation%20Scheme%202008.pdf> (last visited Sept. 3, 2010) (U.K.).

60. Duncan Chappell, *Providing for the Victim of Crime: Political Placebos or Progressive Programs?*, 4 *ADEL. L. REV.* 294, 303 (1972).

61. *See* William E. Hoelzel, *A Survey of 27 Victim Compensation Programs*, 63 *JUDICATURE* 485, 486, 488 (1980).

seen as key),<sup>62</sup> and they “socialize” the cost of crime where traditionally states were quite willing to simply pocket fines.<sup>63</sup>

As with the TFV, one of the crucial tensions that nonetheless characterizes victim compensation schemes is between ideas of reparation, compensation, and assistance. Reparations are primarily owed by a legal subject found liable for harm caused. They are awarded on the basis of that harm, as a matter of right, and ideally, aim to put the victim in the situation in which she was before the crime was committed. Their amount is based on the gravity of the harm suffered, and they are typically awarded, once and for all, following a judicial decision. Although they can be part of orders made after a criminal verdict or even a sentencing, their fundamental logic is inspired by the law of torts.<sup>64</sup> Compensation is often used to refer to a form of public complement or substitute to reparations. Authorities provide funds as a sort of “back up” solution whenever the guilty party is unable to pay the full amount ordered. The State (or society in general) therefore, act as “guarantors” of the right to reparation, and the amount offered in compensation is, in theory, the same as the amount of the original reparation order. Sometimes, as in the case of the ICC, victim compensation schemes act in close coordination with the justice system by implementing its decisions.<sup>65</sup> At times though, compensation will become entirely dissociated from the criminal trial and reparations that might hypothetically be paid by the accused.<sup>66</sup> In such cases, “there is a ‘victim of crime’ without the elements of a crime having been established by a criminal court.”<sup>67</sup> In some cases, the funds may try to recoup the money from the accused or have at least part of it funded by fines or through a tax levied on prisoners,<sup>68</sup> but this is not always the case. Providing compensation separate from a criminal trial

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62. HEATHER STRANG, *REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE* 17 (2002).

63. See SUSAN KISS SARNOFF, *PAYING FOR CRIME: THE POLICIES AND POSSIBILITIES OF CRIME VICTIM REIMBURSEMENT* 69, 80 (1996).

64. See Alan T. Harland, *Monetary Remedies for the Victims of Crime: Assessing the Role of the Criminal Courts*, 30 *UCLA L. REV.* 52, 52–56 (1982).

65. See, e.g., *Regina v. Criminal Injuries Compensation Board, ex parte Lain*, (1967) 2 Q.B. 864 at 876 (Eng.) (describing the Criminal Injuries Compensation Board of the UK as “a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown.”).

66. DEBORAH M. CARROW, *NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, CRIME VICTIM COMPENSATION* 2 (1980); see also Chappell, *supra* note 60, at 299 (arguing against linkage between compensation and criminal courts).

67. Leslie Sebba, *Victims of Offenses*, in *CRIMINAL LAW IN ACTION* 379 (Jan van Dijk et al. eds., 1986).

68. Hoelzel, *supra* note 61, at 492–93.

signals a move away from strict reparatory logic and manifests a more general departure from fault that is evident in other areas, such as product liability or work safety, where old tortious remedies sometimes seem unsuited to the problem.<sup>69</sup> More specifically, this shift coincides with the distancing of victim compensation schemes from the judicial system, so that victims become victims of “crime” rather than any one particular “criminal.” Thus, at least theoretically, compensation could function in ways entirely unrelated to criminal justice or tortious liability.

Moving even further from the logic of reparations, some victim compensation schemes do not offer compensation *strict sensu* as much as “assistance” (although it is still sometimes confusingly referred to as compensation). Typically, “assistance” is designed to help victims cope with the consequences of crime, but not with a view to actually compensate them for the occurrence of the crime. Assistance is provided to victims on the basis of their current needs, independently of an evaluation of the actual prejudice they may have suffered as a result of the crime. It is in essence palliative and can be awarded entirely independent of a judicial decision. Assistance schemes are aimed at mitigating the experience of victimhood, rather than repairing the consequences of crime. As has been emphasized:

[T]he moral, psychological and financial support that can be provided through the health and social services, and in particular through *Victim Support*, offers genuine resources, at relatively little cost, for healing the trauma caused by violent crime, and there is a strong case for saying that generous provision of these services for victims is a better use of public money than a system of monetary compensation that will seldom have any real equivalence with the hurt actually suffered.<sup>70</sup>

The general feeling in such cases is that payment is not made as a result of the recognition of any strict legal obligation or responsibility. Typical assistance measures include medical assistance, psychological counseling, payment of lawyers' fees, rehabilitation, etc. This assistance trend is also evident internationally. The UN Torture Fund, for example, which from its inception moved away from financial compensation for victims of torture, prefers to fund NGOs that provide direct “psychologi-

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69. John G. Culhane, *Tort, Compensation, and Two Kinds of Justice*, 55 RUTGERS L. REV. 1027, 1085 (2003).

70. John Haldane & Anthony Harvey, *The Philosophy of State Compensation*, 12 J. APPLIED PHIL. 273, 278 (1995).

cal, medical, social, legal . . . economic,” humanitarian, or other forms of assistance “to victims of torture and their families.”<sup>71</sup>

To make matters more complicated, closely tracking the distinction between reparation and assistance is the tension between funds that are conceived as based on a right to compensation and those whose operation is more discretionary. Reparation is typically considered a right (although not necessarily always a right that the state is supposed to guarantee), whilst assistance is typically seen as discretionary. However, it is not impossible to conceive of a “right to assistance” and, possibly, only a loose “claim” to reparation. This tension between reparation oriented models of victim compensation and assistance oriented ones, on the one hand, and rights and discretion based models, on the other, is crucial in shaping victim compensation schemes. It is particularly alive in the case of the ICC because all of these logics, potentially, coexist: the ICC can order reparations, the TFV can use some of its own resources to “guarantee” compensation as a substitute to convicted reparations, and it can engage in “assistance” that is not strictly compensatory. Which model a compensation scheme evolves towards, in turn, is dependent on its rationale. Of the many potential rationales for compensation funds, not all are likely to be equally useful in assessing potential scenarios for the TFV.

### *B. The Rome Statute’s Victims Compensation Regime: A Brief Overview*

The ad hoc tribunals historically did little for victims of international crimes. At best, victims who also happened to be witnesses (a very small minority) were eligible for some degree of protection and assistance before, during, and to a lesser extent, after their testimony. The Nuremberg and Tokyo tribunals did not have an institutionalized witness and victims protection regime, although this situation was improved in the 1990’s with the setting up of specialized units at the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and International Criminal Tribunal for Rwanda (“ICTR”).<sup>72</sup> For the most part, however, international criminal justice has long been considered by its leading practition-

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71. OHCHR: *Call for 2011 Applications UN Voluntary Fund for Victims of Torture*, UN NON-GOVERNMENTAL LIAISON SERVICE, [http://www.un-ngls.org/spip.php?page=article\\_s&id\\_article=1789](http://www.un-ngls.org/spip.php?page=article_s&id_article=1789) (last visited Nov. 1, 2010).

72. See, e.g., *Witnesses*, INT’L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/158> (last visited Oct. 15, 2010); see also Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 22 (Sept. 2009), available at [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf). The ICC itself will of course continue to protect victims who testify in a way that minimizes any adverse impact to them. See ICC Rules of Procedure and Evidence, *supra* note 8, R. 87–88.



ers to be, fundamentally, about the accused. This focus was justified either on retributivist grounds, invoking the importance of punishment over all else, or on liberal grounds, foregrounding the importance of liberties and, in particular, the presumption of innocence and assorted guarantees.<sup>73</sup> The assistance that victims qua witnesses received was in no way directly connected to the harm they had suffered, nor did it have any reparatory ambition, except perhaps in terms of compensating for the trouble occasioned by the testimony itself. To put it crudely, it served to ensure that victims were fit physically and psychologically to withstand courtroom pressures or, at worst, to entice skeptical victims to testify. The weak and anecdotal reparations regimes of the ad hoc tribunals were hardly ever used,<sup>74</sup> and “internationalized courts” fared little better.<sup>75</sup>

The limits of a model interested only in victims for instrumental reasons began to appear in the 1990's. Victim witnesses were confused when much needed material or psychological assistance was discontinued after they testified. More generally, victims' associations in the Former Yugoslavia and, especially, in Rwanda clamored for the integration of a compensatory element in international criminal justice. At about the same time, as the excitement surrounding their creation had settled down, international criminal tribunals began to enter a crisis of legitimacy, which made a novel focus on victims an attractive possibility. The ICTR sought to make moves in this direction, for example, by giving limited assistance to some victim-oriented NGOs.<sup>76</sup> However, with very limited funding, fear by donors of “mission-creep,” and no real legal mandate,

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73. Brianne N. McGonigle, *Bridging the Divides in International Criminal Proceedings: An Examination into the Victim Participation Endeavor of the International Criminal Court*, 21 FLA. J. INT'L L. 93, 100–01 (2009).

74. The sole means of reparation provided for by the ad hoc tribunals' statutes involves restitution of stolen property. *See, e.g.*, S.C. Res. 955, ¶ 23(3), U.N. Doc. S/RES/955 (Nov. 8, 1994); *see also* Rules of Procedure and Evidence of the Special Court for Sierra Leone, R. 104(C), 105(B), May 28, 2010, <http://www.scs-sl.org/LinkClick.aspx?fileticket=xTBQdsmEuic%3d&tabid=176> (addressing return of unlawfully acquired property and victim compensation). However, the tribunals have never actually made such an order. The individual victim of someone convicted by the ICTR or the ICTY was otherwise to claim reparations through the national courts, once the accused had been convicted and the judgment transmitted to the national authorities. *See* Rules of Procedure and Evidence, Int'l Tribunal for the Prosecution of Pers. Responsible for Serious Violations of Int'l Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, R. 106, Dec. 10, 2009, IT/32/Rev. 44. This method of potential redress seems to have had almost no impact in practice.

75. Cesare P. R. Romano, *The Price of International Justice*, 4 L. & PRAC. INT'L CTS. & TRIBUNALS 281, 301 (2005).

76. *See Peace Village for Rwandan Genocide Survivors in Construction*, AFROL NEWS (Sept. 27, 2000), [http://www.afrol.com/html/News/rwa008\\_victim\\_initiative.htm](http://www.afrol.com/html/News/rwa008_victim_initiative.htm).

such efforts never truly flourished and, if anything, actually made things worse by creating a few privileged victims at the expense of the great mass of others.

The stage was set for a major change of attitude vis-à-vis victims at the Rome Conference in 1998,<sup>77</sup> which manifested itself spectacularly in two respects. First, the Rome Statute proclaims, for the first time in the history of international criminal justice, a principle of victim participation “[w]here the personal interests of the victims are affected.”<sup>78</sup> At every stage where their interests are implicated, victims are considered as participants, although not quite parties.<sup>79</sup> Second, and most importantly for our purposes, the Rome Statute marks the emergence for the first time in the history of international criminal justice of the ambitious regime of victim compensation that is the subject of this Article.

The ICC/TFV regime is quite unique in that it manages to combine all the different elements that exist in domestic victim compensation schemes. First, the regime has a strong reparations component, which flows from its fundamental judicial nature. Reparations can be awarded by the ICC where a person prosecuted by the Court has been found guilty.<sup>80</sup> Reparations are funded in large part through fines, forfeitures, and reparations ordered by the Court against convicted individuals.<sup>81</sup> Contrary to the regime of the ad hoc tribunals, reparations are not outsourced to domestic courts but are very much centralized within the hands of the Court itself.<sup>82</sup> Although reparations raise all kinds of complex issues in and of themselves,<sup>83</sup> there is little doubt about their fundamental nature in the context of the ICC: they are ordered against the accused and for the benefit of his/her victims with a view to compensating the harm caused.

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77. See Fischer, *supra* note 18, at 195–97.

78. Rome Statute, *supra* note 2, art. 68(3).

79. See *id.* arts. 15(3), 19(3), 53(1)(c), 53(2)(c), 65(4) & 68(3).

80. See Rome Statute, *supra* note 2, art. 75(2); ICC Rules of Procedure and Evidence, *supra* note 8, R. 94–99.

81. See TFV Regulations, *supra* note 9, para. 21.

82. See Rome Statute, *supra* note 2, art. 75.

83. Frédéric Mégret, *Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice*, BUFF. HUM. RTS. L. REV. (forthcoming 2010) (manuscript at 9–18), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1403929](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403929); Marc Henzelin, Veijo Heiskanen & Guénaél Mettraux, *Reparations To Victims Before The International Criminal Court: Lessons From International Mass Claims Processes*, 17 CRIM. L.F. 317, 338–43 (2006).

The regime is complicated by the fact that the Court, in its reparation-awarding function, can be seconded by the TFV.<sup>84</sup> In that particular role, the TFV acts as the implementer of select reparations awards ordered by the Court.<sup>85</sup> It is required to take a variety of factors into account when “determining the nature and/or size of awards,” such as “the nature of the crimes [and] the particular injuries to the victims.”<sup>86</sup> The Board of Directors of the TFV must devise an “implementation plan” supervised by the relevant Chamber, even though the Board clearly retains a measure of autonomy.<sup>87</sup> One stated rationale for this situation is that it would be impractical for the Court to take care of every detail of every reparations award, and that the TFV may be especially more suited to making collective awards. In that capacity, the TFV will very much be working under a strict reparations logic, under close judicial scrutiny. This regime would not in itself be exceptional<sup>88</sup> if it were not complemented by a further dimension of the TFV. In addition to receiving funds to implement reparation awards on the Court’s behalf, the TFV receives voluntary contributions from governments, intergovernmental organizations, and non-governmental organizations.<sup>89</sup> From the outset, it has been quite unclear as a matter of policy whether these funds can and, most importantly, should be set aside to fill-in for the lack of resources of the accused<sup>90</sup> or whether they should be used for an entirely different purpose.

In a relatively surprising decision allowing the TFV to proceed with some of its assistance initiatives, an ICC pre-trial chamber held that “the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order pursuant to Article 75 of the Statute.”<sup>91</sup> This decision, which has been soundly criticized,<sup>92</sup> seems in tension with the TFV’s own understanding of its role<sup>93</sup> and may be challenged in the future. Relegating the TFV to

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84. Rome Statute, *supra* note 2, art. 75(2).

85. See ICC Rules of Procedure and Evidence, *supra* note 8, R. 98.

86. TFV Regulations, *supra* note 9, para. 55.

87. See *id.* para. 57.

88. Payment of awards via trust funds is also the rule in other jurisdictions. See Jo M. Pasqualucci, *Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure*, 18 MICH. J. INT'L L. 1, 52 (1996).

89. See TFV Regulations, *supra* note 9, para. 5.

90. *Id.* para. 56.

91. ICC, *Decision on the Notification of the Board of Directors of the Trust Fund for Victims in Accordance with Regulation 50 of the Regulations of the Trust Fund*, at 2, ICC-01/04-492 (April 11, 2008).

92. Dannenbaum, *supra* note 18, at 247.

93. See TFV Regulations, *supra* note 9, para. 56 (“The Board of Directors shall determine whether to complement the resources collected through awards for reparations

that singular purpose pushes it in the direction of an orthodox compensation scheme, guaranteeing reparations rather than engaging in a program to more broadly assist crime victims. The TFV, up until now, set aside about a quarter of its budget for the purposes of future reparations.<sup>94</sup> However, it remains to be seen to what extent it is preemptively obliged to set aside money for reparations. The scenario raises many questions: what happens if it does not have enough funds? Should it always prioritize this function as opposed to any other possible uses of its funds?

As it happens, the ICC Rules of Procedure and Evidence provide for an alternative destination for the TFV's own resources. These can "be used for the benefit of victims,"<sup>95</sup> in particular whenever the Board of Directors of the TFV "considers it *necessary* to provide physical or psychological rehabilitation or material support for the benefit of victims and their families."<sup>96</sup> Already, the TFV has been remarkably active and successful in spending funds towards assistance programs, sponsoring thirty four projects, and reaching more than 200,000 victims and family members in northern Uganda and the DRC.<sup>97</sup> These include a veritable hodgepodge of activities: community support, micro-credit, vocational training, counseling, social events, workshops, medical and orthopedic support, reconstructive surgery, reintegration, peace and reconciliation, shelters, etc.

Money spent as assistance to victims follows a regime quite distinct from reparations. TFV funded programs on behalf of victims may be disbursed before a verdict has been rendered or regardless of whether anyone is even prosecuted. Additionally, all victims of crimes falling within the jurisdiction of the Court, rather than only victims of crimes committed by individuals who have been found guilty, are eligible for assistance.<sup>98</sup> This is something that the TFV has already done by financing projects in Uganda and the DRC, even as prosecutions were pending (in-

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with "other resources of the Trust Fund" and shall advise the Court accordingly." (emphasis added)). This language clearly suggests that complementing reparations is only one policy option among many.

94. See *Financial Info*, THE TRUST FUND FOR VICTIMS [hereinafter *Financial Info*], <http://www.trustfundforvictims.org/financial-info> (last visited September 20, 2010) (Out of a budget of €4.5 million, "a current reserve of €1 million is available for potential reparations.").

95. ICC Rules of Procedure and Evidence, *supra* note 8, R. 98(5).

96. TFV Regulations, *supra* note 9, para. 50(a)(i) (emphasis added).

97. *Projects*, THE TRUST FUND FOR VICTIMS, <http://www.trustfundforvictims.org/projects> (last visited Sept. 20, 2010).

98. See TFV Regulations, *supra* note 9, para. 42. However, funds can only be given for victims of a crime within the jurisdiction of the Court and in relation to a "situation" investigated by the Prosecutor. See ICC Rules of Procedure and Evidence, *supra* note 8, R. 85; TFV Regulations, *supra* note 9, para. 42.

deed, in the case of Uganda, before anyone was even arrested).<sup>99</sup> The requirement that the TFV ask the Court's permission to launch an assistance program<sup>100</sup> does not change the fundamental character of what is at stake, nor is it an attempt by the court to fundamentally control when and where assistance money is spent; it merely reflects a concern with the risk that awarding assistance might affect the rights of the accused.

In other words, whilst the role of the Court in relation to reparations is quite clear, the role of the TFV is much more complex, at least when its hands are not bound by a Court order. The TFV's ability to control funds of its own, in particular, gives it a unique potential to shape the overall ICC victim compensation regime. There is no doubt that the two models it could espouse are in tension—one is based on reparations and the other on assistance; one is backward-looking and guilt-oriented, the other more forward-looking and need-oriented. Specifically, their coexistence raises issues about what a proper theoretical justification for this dual system would look like and especially how one might best account for the attempt to “share” the costs of crime between the accused and society at large.

These problems are quite clearly reminiscent of earlier debates on the proper role of domestic victim compensation schemes. The challenge, of course, is that these debates, although clearly illuminating, were never conclusive domestically, and their transposition to the international plane creates an additional hurdle. The danger, if one is not careful, is to reason on the basis of a misleading “domestic analogy.” At the very least, the ICC and the TFV operate in an environment that is fundamentally different from that of domestic society, even as they may be part of an effort to emulate some of its features.<sup>101</sup> The international system is traditionally one without sovereign that is arguably a society only in a loose sense, marked by a high degree of decentralization. The more ambitious forms of compensation schemes, by contrast, have often taken hold at the intersection of the late development of criminal justice and social welfare in advanced industrialized societies, exhibiting relatively high levels of social solidarity. The challenge, therefore, is to understand how the two—a

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99. See generally Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 T. JEFFERSON L. REV. 189 (2007).

100. See TFV Regulations, *supra* note 9, para. 50(a)(ii)–(iii).

101. The entire enterprise of international criminal law can be viewed as an attempt to construct the international legal system in the image of domestic (criminal) law. See Frédéric Mégret, *The International Criminal Court and State Sovereignty: the 'Problem of an International Criminal Law' Re-examined*, in INTERNATIONAL HUMANITARIAN LAW: CHALLENGES AHEAD (John Pritchard & Bill Dunlap Carey, John Pritchard, & William Dunlap eds., 2006).

still largely decentralized system of states, on the one hand, and the institutional by product of highly solidaristic systems—can be paired together. The answer, as will become clear, may well be that the international system is in fact changing considerably, or at least that the ambition of a strong victim compensation regime before the ICC presumes that it has or will.

## II. IN SEARCH OF A RATIONALE: WHAT IS THE TFV'S FUNDAMENTAL JUSTIFICATION?

The form a victim compensation scheme takes will often hinge on how it has been conceived and its fundamental purpose. But, apart from the fact that victims may be pleased to receive compensation, there is nothing obvious about the existence of such schemes. As one author put it, “since individuals are expected to bear the consequences of many kinds of misfortune,” proponents of compensation schemes need to adduce a proper rationale as to why victims of crime—indeed, of particular crimes—should see their harm partly absorbed by the collectivity.<sup>102</sup> The same is arguably even truer at the international level, where it has long been evident that individuals suffer all kinds of misfortunes without so much as a minimal expectation that the international community should shoulder the cost of harm incurred. This makes it even more crucial to articulate a proper rationale for the existence of an international victim compensation scheme, and in particular, the TFV. This Part will explore a series of possible rationales for the role of the TFV taken from domestic experience, each in its own way problematic. These accounts are (A) criminal, (B) political, (C) consequentialist, (D) practical, (E) legal, (F) political theoretical, (G) charitable/humanitarian, (H) moral and equitable, or (I) welfare/solidarist. In the conclusion, the article suggests ways in which an overall account of the justification of victim compensation in the international context might one day be produced that draws on some of the above.

### *A. Criminal Justice Rationale: The TFV as a Corrective to the Limitations of Retributive Justice*

The emergence of victim compensation schemes is often, first and foremost, conceptualized as a development endogenous to criminal justice, and the evolution of the place and role of the victim within the lat-

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102. Comment, *Compensation for Victims of Crime*, 33 U. CHI. L. REV. 531, 532–33 (1966).

ter.<sup>103</sup> As is well known, modernity gradually excluded the victim not only from the criminal process itself, but from any prospect for reparation as a result of the criminal trial.<sup>104</sup> This is in contrast to the position in pre-modern days, where punishment and reparations had been confused and criminal justice and torts were little distinguished. In other words, harm was effectively conceived as committed primarily against the victim as opposed to “society” or “the state;” the role of the state consisted, at best, of mediating between the parties in an effort to avoid “blood feuds.” In ancient Romano-Germanic law, the “composition” (i.e. compensation) was typically paid either as “bot” to a victim who sustained injuries or as “wergild” (literally, a man’s value) to the family of a deceased victim.<sup>105</sup> Punishment was only subsidiary, mandated in cases where the guilty could not afford to pay.<sup>106</sup> This was consonant with a view of criminal justice as essentially a form of private justice in which even the apprehension of criminals was often left to the victims.<sup>107</sup>

With heightened state centralization and the idea that the criminal law could serve to protect the public order, fines (as they became known) began to be paid to the state rather than victims.<sup>108</sup> Victims might, of course, turn to civil remedies, but these were often neatly excluded from the criminal trial (except in European continental systems with a tradition of *parties civiles*, which allows victims to “piggyback” on the state’s prosecution as parties).<sup>109</sup> Criminal justice became a branch of public

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103. S. Walther, *Reparation and Criminal Justice: Can They Be Integrated?*, 4 EUR. J. CRIME CRIM. L. & CRIM. JUST. 163, 172 (1996).

104. ROBERT ELIAS, VICTIMS OF THE SYSTEM, *supra* note 20, at 20; *see also* Bruce R. Jacob, *Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 152, 155, 157 (1970).

105. *See* JOHN HOSTETTLER, A HISTORY OF CRIMINAL JUSTICE IN ENGLAND AND WALES 15 (2009).

106. *See id.* at 29.

107. William F. McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 664, 651–52, 663–64 (1976).

108. *See* STEPHEN SCHAFER, THE VICTIM AND HIS CRIMINAL 27 (1968).

109. The “parties civiles” procedure that exists in some criminal law systems allows for participation of victims as, literally, parties to the criminal case with a triggering role, a say in prosecutorial policy, and the ability to claim compensation in the case of a guilty verdict. *See generally* C. Howard, *Compensation in French Criminal Procedure*, 21 MOD. L. REV. 387 (1958) (outlining the *partie civile* system in France); Jean Larguier, *The Civil Action for Damages in French Criminal Procedure*, 39 TUL. L. REV. 687 (1965). *See also* Mireille Delmas-Marty, *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, 1 J. INT’L CRIM. JUST. 13, 21 (2003) (“[A]cceptance of the right of victims to be represented by counsel [in the I.C.C. Statute] . . . approach[es] the situation of *parties civiles* in civil law systems.”).

law, one devoted to the protection of a certain minimum social order. It developed a rich apparatus, including specialized courts, a highly specific procedure and, of course, a powerful enforcement arm in the form of professional police forces. Thus emerged what has sometimes been described as the “modern ideology of criminal justice,” one in which “[t]he victim is useful to the system primarily as an information source and a witness, and his interests . . . are not important to the operation of the system.”<sup>110</sup> Thus, the State largely excluded the victim from participating in criminal procedures and reaped the full fine levied against the criminal.<sup>111</sup>

A slow effort to reverse this state of affairs emerged in the twentieth century.<sup>112</sup> In a classical criminal justice configuration, the operation of the criminal system, for the most part, prevented the victim from making a substantial recovery.<sup>113</sup> However, if that system was to be broadly maintained (to vindicate the state, to protect the rights of the accused), the state owed it to victims who had been historically dispossessed of their primary role in the process to provide them with an alternative.<sup>114</sup> The problem was made worse by the fact that the state collected a fine first, long before the victims obtained a remedy, thus making it even more unlikely that they would obtain reparation. The state’s appetite for punishment, in other words, deprived victims of a full chance for personal recovery, except through the pursuit of tort remedies at their own expense.<sup>115</sup>

The classical Italian criminologist Ferri was prompt to point out that often “the State cannot prevent crime, cannot repress it, except in a small number of cases, and consequently fails in its duty for the accomplishment of which it receives taxes from its citizens, and then, after all that, it

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110. Paul S. Hudson, *The Crime Victim and the Criminal Justice System: Time for a Change*, 11 PEPP. L. REV. 23, 24 (1984).

111. In particular, victims can typically not effect a private settlement with the offender in cases where public prosecutions have been launched, on the grounds that the prosecution is primarily in the interest of the state and public order, and only incidentally for the benefit of the victim.

112. It should also be pointed out that the trend was not in equal need of reversal everywhere in the world. Many countries beyond the West had never developed such a rigid distinction between public and private, criminal and tortious actions.

113. ROBERT REIFF, *THE INVISIBLE VICTIM: THE CRIMINAL JUSTICE SYSTEM’S FORGOTTEN RESPONSIBILITY* 136–38 (1979).

114. See David L. Roland, *Progress in the Victim Reform Movement: No Longer the “Forgotten Victim,”* 17 PEPP. L. REV. 35, 53–58 (1989).

115. Martin Wasik, *The Place of Compensation in the Penal System*, 1978 CRIM. L. REV. 599, 600 (1978).



accepts a reward.”<sup>116</sup> Schafer has also emphasized that there is something “absurd” about a system in which “the state undertakes to protect the public against crime and then, when a loss occurs, takes the entire payment and offers no effective remedy to the victim.”<sup>117</sup> This situation is arguably made worse by the tendency of the state to criminalize areas traditionally occupied solely by torts, thereby further removing the prospect of reparation.<sup>118</sup>

Compensation schemes, in light of all this, are justified in that they correct the historical injustice resulting from states interposing between offender and victim.<sup>119</sup> In recent decades, following substantial criminological and penological evolutions, the goal has increasingly shifted to a desire to ensure that the person who committed the crime is required to pay reparation (sometimes called “restitution” or “indemnification”).<sup>120</sup> The notion that the offender should contribute to repair the harm caused is seen in the restorative justice movement as a progressive step that can help to mend some of the social bonds destroyed by crime<sup>121</sup> and, ideally, restore a sense of moral equity between victim and offender. Those who emphasize victim participation in the design of remedies insist that it may foster a worthwhile sense of victim agency.<sup>122</sup> Moreover, a particular line of thought specifically ties together restitution and offender rehabilitation,<sup>123</sup> whilst some would even replace punishment entirely by

116. ENRICO FERRI, *CRIMINAL SOCIOLOGY* 514 (Joseph I. Kelly & John Lisle trans., William W. Smithers ed., Little, Brown, & Co. 1917) (1884). The “reward” is, of course, the fine.

117. STEPHEN SCHAFER, *THE VICTIM AND HIS CRIMINAL* 27 (1968) (quoting EDWIN H. SUTHERLAND, *PRINCIPLES OF CRIMINOLOGY* 576 (4th ed. 1947)).

118. Galaway & Rutman, *supra* note 4, at 61–62.

119. See Marvin E. Wolfgang, *Victim Compensation in Crimes of Personal Violence*, 50 MINN. L. REV. 223, 240–41 (1965).

120. See Tom Campbell, *Compensation as Punishment*, 7 U.N.S.W.L.J. 338, 338 (1984).

121. Barnett, *supra* note 127, at 293–94 (1977); STRANG, *supra* note 62, at 17. *But see* Kate Warner & Jenny Gawlik, *Mandatory Compensation Orders for Crime Victims and the Rhetoric of Restorative Justice*, 36 AUSTL. & N.Z. J. CRIMINOLOGY 60, 73–75 (2003) (concluding that a system of compulsory compensation orders in Tasmania was ineffective as a restorative justice measure and acted more as a “political placebo for crime victims”); Chappell, *supra* note 60, at 299–300 (pointing out that the focus on restitution as punishment paradoxically continues to marginalize victims).

122. Carlton Waterhouse, *The Good, The Bad, and The Ugly: Moral Agency and the Role of Victims in Reparations Programs*, 31 U. PA. J. INT'L L. 257, 257–59 (2009).

123. See Joe Hudson, Bert Galaway & Steve Chesney, *When Criminals Repay Their Victims: A Survey of Restitution Programs*, 60 JUDICATURE 313, 314 (1977); Stephen Schafer, *Restitution to Victims of Crime: An Old Correctional Aim Modernized*, 50 MINN. L. REV. 243, 248–250 (1965). On the link between restitution and probation or suspended sentences, see Harland, *supra* note 64, at 72–73.

compensation and thus eradicate the distinction between crime and tort.<sup>124</sup> Some law and economics scholars have also made the case that the obligation to pay compensation might be a further deterrence to criminals, especially in cases where the amount of such compensation is significantly higher than the level of a fine.<sup>125</sup>

The possibility of reparations in the context of criminal justice can thus be understood as a development internal to the fundamental physiognomy of the criminal justice process, moving from a retributive<sup>126</sup> to a restitutive model of criminal justice (that is no longer so distinctly “criminal”).<sup>127</sup> This development is inherently linked to the more general increase in victim participation, and the ability for victims to weigh in on both procedure and sentencing.<sup>128</sup>

A similar argument can no doubt be made in the ICC context, where the Assembly of States Parties arguably has even less of a claim to collect fines for itself, even though it theoretically could have (at least for the Court’s operating budget). Historically, the international criminal justice system is certainly guilty of a preoccupation with the primacy of criminal justice, which sometimes obscured alternative mechanisms that might have been more victim centered.<sup>129</sup> Given the disparity of means between state parties and victims, an international criminal justice system that finances itself through fines and restitution might be hard to justify.

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124. See generally Barnett, *supra* note 127 (arguing that adopting a paradigm of restitution in place of punishment would solve the crisis in the criminal justice system).

125. KATRI K. SIEBERG, CRIMINAL DILEMMAS: UNDERSTANDING AND PREVENTING CRIME 27–29 (2001).

126. Although there is of course an argument that reparations add an element of punishment and prevent the criminal from enjoying the fruits of his crime. J. D. McClean, *Reparation by the Offender*, 34 MOD. L. REV., 436, 436–37 (1971). Moreover, the retributive and restitutive effects can be tied up in certain systems where fines are partly or wholly paid to funds that guarantee compensation. See Office for Victims of Crime, *Victims of Crime Act: Crime Victims Fund Fact Sheet*, NAT’L CRIMINAL JUSTICE REFERENCE SERV., <http://www.ncjrs.gov/txtfiles/cvfund.txt> (last visited Oct. 17, 2010) (noting that the federal Crime Victims Fund allocates a significant portion of its deposits to administrative costs and investigatory programs, in addition to victim compensation).

127. See generally Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977).

128. See generally MARION ELEONORA INGEBORG BRIENEN & ERNESTINE HENRIËTTE HOEGEN, VICTIMS OF CRIME IN 22 EUROPEAN CRIMINAL JUSTICE SYSTEMS (2000); MARTIN WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS (1991).

129. For example, international criminal justice is often thought to be in tension with mechanisms of transitional justice such as truth and reconciliation commissions that are often considered to be more victim compensation friendly. G. Stevens, *Truth, Confessions and Reparations: Lessons from the South African Truth and Reconciliation Commission*, A JOURNAL OF INJURY AND VIOLENCE PREVENTION 23 (2005).

Whilst the suggestion that offender restitution might have a deterrent effect internationally is clearly not convincing,<sup>130</sup> the ICC compensation regime is certainly driven by a basic trend towards making international criminal justice more restorative<sup>131</sup> in a way that is responsive to criticisms of its excessive retributivism. The Rome Statute indicates that fines may be paid to the TFV for the purposes of reparation.<sup>132</sup> The Court itself emphasizes that its “restorative function, complementing its punitive function, is a key feature of the system established in Rome.”<sup>133</sup>

In that respect, international criminal tribunals are in a productive tension with alternative mechanisms, such as truth and reconciliation commissions,<sup>134</sup> and traditional justice mechanisms<sup>135</sup> that offer a more explicitly restorative framework for transition. One cannot help thinking that the objective competition of such bodies may have helped gear the ICC itself in a more restorative direction. The idea that victims benefit from receiving reparations directly from the convicted, and that reparations may even be rehabilitative of the offender, also makes sense before international criminal tribunals. Such restorative inclination will certainly be seen as more in line with what many populations who have suffered from international crimes may come to expect from criminal justice.<sup>136</sup>

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130. Arguments based on deterrence are already the object of general skepticism in the international context. See David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473 (1999) (outlining the obstacles to achieving deterrence through the international criminal justice system). Surely the prospect of having to pay reparations will not deter those who are not otherwise deterred by the prospect of long prison sentences.

131. See MARK FINDLAY & RALPH HENHAM, *TRANSFORMING INTERNATIONAL CRIMINAL JUSTICE: RETRIBUTIVE AND RESTORATIVE JUSTICE IN THE TRIAL PROCESS* 284–85 (2005).

132. Rome Statute, *supra* note 2, arts. 75(2), 79(2); ICC Rules of Procedure and Evidence, *supra* note 8, R. 98(2), 98(4).

133. International Criminal Court, Draft I.C.C. Strategy in Relation to Victims para. 5.1, Aug. 18, 2008, available at <http://criminologie.univpau.fr/Biblio/Bibliographie/Victims%20Strategy%20draft%20for%20consultation180808.doc> [hereinafter Draft I.C.C. Strategy in Relation to Victims].

134. See generally Carrie J. Neibur Eisnaugle, *An International “Truth Commission” Utilizing Restorative Justice as an Alternative to Retribution*, 36 *VAND. J. TRANSNAT'L L.* 209 (2003) (arguing for the use of restorative justice principles, as seen in the South African Truth and Reconciliation Commission, in the international criminal justice context).

135. See generally Peter Uvin & Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 *GLOBAL GOVERNANCE* 219 (2003) (describing the benefits of the Rwandan gacaca system as compared to the International Criminal Tribunal for Rwanda and the formal domestic justice system).

136. See generally Chris Cunneen, *Exploring the Relationship Between Reparations, the Gross Violation of Human Rights, and Restorative Justice*, in DENNIS SULLIVAN & LARRY TIFFT, *HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE* 355 (2006).

The problem of course, both domestically and internationally, is linked to the limitations of restitution and reparations. In an ideal world, the convicted person would indeed pay for the harm caused. It is he or she, after all, who has been found guilty of an offense which, although presented as an offense against the state throughout the history of criminal law, also remains a crime (or an intentional tort) committed against a particular victim.<sup>137</sup> The biggest problem with relying on the accused for reparations, as highlighted in the 1950's by Margery Fry, was that in many cases it was very unlikely that the person condemned would have the means to pay.<sup>138</sup> Moreover, given the prevailing rates of crime resolution and conviction, it was even less likely that the person responsible would ever be apprehended or convicted.<sup>139</sup> In addition, in the domestic context, persons who have committed significant violent crimes are often imprisoned for substantial lengths, making it even more implausible that they will gather the necessary resources.<sup>140</sup> Forcing the convicted to work and transferring the product of their labor to victims is a solution that is problematic in its own right and is only likely to be partial.

Problems associated with this model of relying on the accused are, if anything, magnified in the context of international criminal justice. Historically, many international crimes go unresolved, many accused never or very tardily get apprehended, and trials are very drawn out when they occur at all.<sup>141</sup> In addition, many of the accused before contemporary tribunals are indigent and the international community pays for their lawyers.<sup>142</sup> If lack of financial means was a problem domestically, then it is an even bigger one internationally. The ability and appetite of individuals to commit mass atrocities generally far outweighs their ability to pay for them. The ICC itself recognized that it will have an expectation management problem in relation to victims given the fact that “[t]he types of

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137. Edward Veitch & David Miers, *Assault on the Law of Tort*, 38 MOD. L. REV. 139, 148 (1975) (“Patently, any victim of a crime of violence against the person is also a victim of an international tort to the person, but the traditional division between crime and tort seems to have obscured this elementary fact in the matter of compensation.”); see also Patrick Elias & Andrew Tettenborn, Case & Comment, *Crime, Tort and Compensation in Private and Public Law*, 40 CAMBRIDGE L.J. 230 (1981).

138. Fry, *supra* note 32, at 192.

139. Roland, *supra* note 114, at 42.

140. Charlene L. Smith, *Victim Compensation: Hard Questions and Suggested Remedies*, 17 RUTGERS L.J. 51, 58–59 (1986).

141. On the general problem of impunity for atrocities under international law, see IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza ed., 1995).

142. See Mark S. Ellis, *Defense Counsel Appearing Before International Tribunals: Past Experiences and Future Challenges*, 4 J. HUM. RTS. 491, 492 (2005).

crimes dealt with by the Court cause loss and suffering on a massive scale” and that “[t]he resources of individuals that might be convicted of having committed crimes and of the Trust Fund for Victims will be limited in comparison.”<sup>143</sup> Moreover, the ICC adds its own limitations in terms of reparations, not least of which is its extreme selectivity in terms of who it prosecutes. This risks creating a class of “super victims”—those select few who happen to be the victims of an individual condemned by the Court with, possibly, a special emphasis on those who choose and manage to participate in proceedings as victims of the accused.<sup>144</sup> Finally, there may be a concern that international criminal justice will disrupt victims’ attempts to obtain civil justice; although, since there never was much of an avenue for that internationally or domestically, it is hard to argue that there has been a negative impact on international civil remedies.<sup>145</sup>

What should the solution be? Should it be left to chance whether one is a victim of someone who happens to be known, found, convicted, and able to “repair” the harm done? The domestic solution to this problem, as incarnated by victim compensation schemes, is to externalize the cost of crime to the whole community—what Jeremy Bentham described as “subsidiary satisfaction at the public expense.”<sup>146</sup> In other words, victim compensation schemes also emerged to remedy what was, in essence, or at least primarily conceived as, a deficiency of the criminal system. The general inspiration for the schemes is, almost by definition, recognition that the consequences of certain crimes should be “absorbed” by the community and the costs spread so that all victims end up being compensated.<sup>147</sup> But this is truly a radical break from reparations that follow from guilt and this evolution cannot be entirely explained from within the dynamics of criminal justice, unlike offender/victim reparations.

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143. Draft I.C.C. Strategy in Relation to Victims, *supra* note 133, para. 5.3.

144. TFV Regulations, *supra* note 9, para. 42 (indicating that TFV resources “shall be for the benefit of victims of crimes within the jurisdiction of the court”).

145. However, one might think that if anything the added enforcement power of international criminal tribunals might also mean that someone like Radovan Karadzic, against whom an important civil award had been obtained in New York, *see Doe I v. Karadzic*, No. 93 Civ. 0878, 2001 WL 986545 (S.D.N.Y. Aug. 21, 2000), could at least be arrested. This could in due course make him vulnerable to (at least partial) execution of the civil judgment. However, this is very indirect, and obviously in such a case reparation is not truly obtained as a result of the operation of international criminal justice.

146. JEREMY BENTHAM, *THEORY OF LEGISLATION* 317 (Etienne Dumont ed., Richard Hildreth trans., London, Trübner & Co. 4th ed. 1882) [hereinafter BENTHAM, *THEORY OF LEGISLATION*].

147. *See* H. Donnie Brock, Student Comment, *Victims of Violent Crime: Should They Be an Object of Social Effection?*, 40 *Miss. L.J.* 92, 100–01 (1968).

Compensation schemes, although they draw on the reparatory intuition, also affect a fundamental shift away from reparations emanating from the accused to a more socialized mode of compensation.<sup>148</sup> Identifying the basic justificatory core of compensation schemes as correcting some limitations of the criminal system tells us something about the internal coherence of criminal justice; however, it seems to presume something which cannot be taken for granted, namely that the cost of this deficiency should be borne by the community. There is nothing in the logic of criminal justice—in its simplest expression, that the guilty should answer for their crimes—that suggests a larger societal responsibility to victims.

It thus remains unclear why the state—not to mention the “international community” or any of its varied instantiations—should step in to provide compensation if the guilty cannot. The fact that the state proposes to do so is no substitute for a theory of why such a scheme is desirable, nor what form it should take. One argument is that lack of reparation, apart from being the fortuitous result of the impecunious nature of the guilty, is in a very specific way *the state’s doing*, since it is the state that displaced torts in creating criminal justice machinery geared towards retribution. Internationally, the argument might accordingly be that the “international community” or “state parties” have a responsibility to victims because the monopolizing thrust of international criminal justice displaces a variety of other efforts.<sup>149</sup> This rationale is helpful, but far from conclusive. The mere fact that criminal justice displaces alternative modes of regulation of complex social problems does not by itself assign liability to the entity responsible for the displacement. After all, every social poli-

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148. See Harland, *supra* note 64, at 67.

149. These include both other international law remedies and more restorative domestic ones. State responsibility in particular appears to be the big “loser,” although it is of course not excluded per se by the rise of international criminal justice. See generally NINA H. B. JØRGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* (Ian Brownlie ed., 2003); Markus Rau, *State Liability for Violations of International Humanitarian Law—The Distomo Case Before the German Federal Constitutional Court*, 7 GERMAN L.J. 701 (2006) (discussing a German court decision that “expressly adhered to the view that under international law as it stands today, there is no exception to immunity from adjudication that allows for private suits against foreign states for violations of international law”); Liesbeth Zegveld, *Remedies for Victims of Violations of International Humanitarian Law*, 85 INT’L REV. CROSS 497, 507–12 (2003). On the relationship of international criminal justice and traditional justice, see Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT’L L. & POL. 355 (2002); Peter Uvin & Charles Mironko, *Western and Local Approaches to Justice in Rwanda*, 9 GLOBAL GOVERNANCE 219 (2003); see also Bruce Baker, *Popular Justice and Policing from Bush War to Democracy: Uganda 1981-2004*, 32 INT’L J. SOC. L. 333, 333–48 (2004) (discussing the evolution and functioning of popular justice and policing methods in Uganda).

cy has costs, and the state is not obliged to compensate for every side-effect of a shift in regulatory focus.

Domestically, such doubts have given rise to some of the most fertile reflections about the limits of criminal justice, and clarification can only be sought in further multi-disciplinary inquiries that locate criminal justice within a larger constellation of theories and institutions. Although the international community has been slow to provide alternatives, there is also a sense that international criminal justice and alternative modes of reparation are not a zero sum game and that other avenues, including domestic and international civil litigation,<sup>150</sup> are being explored. If anything, this makes the debate even more complex as the question becomes why the TFV is the best mechanism, as opposed to any number of other routes through which remedies can be obtained. Further, the ultimate rationale for a victim compensation scheme, such as the TFV, must be sought beyond the confines of criminal justice theory alone.

#### *B. Political Rationale: The TFV as a By-Product of Interest*

At a certain level, one can reduce the creation of domestic compensation schemes as well as the TFV, with its autonomous powers, to a manifestation of the converging political will of various actors and constituencies. Domestically, the rise of victims' movements and certain shocking episodes of criminality played a big role. For example, the New York compensation scheme was created following the deadly stabbing, in front of his wife and infant daughter, of Arthur F. Collins by a drunken man after Collins tried to stop the man from bothering an elderly woman on the subway.<sup>151</sup> The perception that Collins acted as a Good Samaritan and the particularly horrendous nature of the crime was instrumental in the adoption of the 1966 Executive Law that set up the fund.<sup>152</sup>

Public campaigns often launch to redress a perceived imbalance between the state's treatment of the accused and of victims,<sup>153</sup> sometimes

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150. See generally Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 HARV. INT'L L.J. 141 (2001) (exploring and defending victims' efforts to bring civil human rights cases in domestic courts); Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142 (2006).

151. EDELHERTZ & GEIS, *supra* note 29, at 21.

152. See Novack, *supra* note 36, at 724 & n.54.

153. See ANDREW KARMEN, *CRIME VICTIMS: AN INTRODUCTION TO VICTIMOLOGY* 30–31 (2nd ed. 1990).

with explicit, often conservative, political agendas.<sup>154</sup> As has been pointed out, “[f]undamentally, programs designed to compensate persons injured by crimes of violence are attempts to placate a public opinion often unnerved and resentful of what is viewed as a rising tide of aggressive criminal activity.”<sup>155</sup> Indeed, these regimes have even been rationalized as part of an effort by policy-makers to reduce the “demoralization costs” of leaving victims without compensation in a context where the perception is that the State ought to be involved.<sup>156</sup> Some scholars also argue that compensation should be seen as part of a “labeling process” that designates and therefore constructs “proper” victims,<sup>157</sup> possibly with a view to symbolically reject criminological ideas that seek to construct the offender himself as a victim.<sup>158</sup> In a more critical vein, compensation schemes are also, arguably, a way of deflecting attention from real issues of crime and distributive justice.<sup>159</sup> Finally, compensation funds may be created for much more immediate and mundane reasons, such as helping sustain affected industries.<sup>160</sup>

Internationally, the emergence of the TFV might be considered a manifestation of a rising international victims’ rights movement, made possible by greater overtures by the international system to non-state actors. Undoubtedly, the Rome process and the evolution of the treaty institutions in its aftermath owe much to the increasing organization of transnational civil society.<sup>161</sup> The existence of a very specialized NGO such as

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154. See Shirley S. Abrahamson, *Redefining Roles: The Victims’ Rights Movement*, 1985 Utah L. Rev. 517, 524–25, 531–32 (1985); Lynne N. Henderson, *The Wrongs of Victim’s Rights*, 37 Stan. L. Rev. 937, 948–49 (1985).

155. EDELHERTZ & GEIS, *supra* note 29, at 4.

156. A. I. Ogus, *Do We Have a General Theory of Victim Compensation?*, 37 C.L.P. 29, 37–40 (1984).

157. David Miers, *Victim Compensation as a Labelling Process*, 5 VICTIMOLOGY 3 (1980).

158. See David R. Miers, *Compensation and Conceptions of Victims of Crime*, 8 VICTIMOLOGY 204, 209–11 (1983); see also Richard Quinney, *Who is the Victim?*, 10 CRIMINOLOGY 314, 321–22 (1972).

159. Robert Elias, *The Symbolic Politics of Victim Compensation*, 8 VICTIMOLOGY 213, 214 (1983) [hereinafter Elias, *The Symbolic Politics of Victim Compensation*].

160. For example, the September 11th Compensation Fund was created in no small measure to protect the airline industry against a cascade of litigation. Matthew Diller, *Tort and Social Welfare Principles in the Victim Compensation Fund*, 53 DEPAUL L. REV. 719, 723–24 (2003). It was also “seen as a statement about the unity of the United States” in the face of terror. *Id.* at 724.

161. See generally MARLIES GLASIUS, *THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT* (2006) (discussing the establishment of the ICC as a revolutionary example of the influence of global civil society on international decision-making).



the "Victims' Rights Working Group" suggests a strong linkage between civil society and victims' rights issues.<sup>162</sup> Indeed, the TFV itself, in its operation, purports to work as a participatory institution, one that claims to be inspired in its day-to-day activities by encounters with victims.<sup>163</sup>

A view of the TFV as somehow a manifestation of an international democratic ethos and the profound wishes of victims, however, is only partly convincing. Who is a "victim" is a contested terrain, and the notion is by and large constructed by international criminal justice rather than the other way round. There cannot be said to exist an international "victims' rights movement" of the sort that has sprung up in the West during the last half-century and which is at the origin of most domestic victim assistance schemes.<sup>164</sup> Institutional groups such as the Victims' Rights Working Group, a network of 300 civil society groups, *speak on behalf* of victims worldwide, rather than being composed of them. This may be because victims of international crimes belong to a category too vast and dispersed to ever see themselves as "international" victims, not to mention the sheer difficulty of organizing such a movement across borders. Rather, a group of mostly Western NGOs defended a focus on victims based on the transitional justice critique that international criminal justice was too retributivist and internationalist for its own good.<sup>165</sup> The actual level of participation of victims in TFV is difficult to assess given the paucity of information available, but the Fund is, ultimately, very much in charge of how it uses its funds.

State interest is, of course, an alternative paradigm to explain the emergence of the TFV. Domestically, victim compensation schemes serve definite political agendas of governments who are intent on portraying themselves as "victim-sensitive." Similarly, the support of state parties was essential in the creation of the TFV and its fortunes may depend on how much it is deemed worthy of support by the Assembly of States Parties.<sup>166</sup> Doubtless, some states likely see the TFV as a way of

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162. See generally VICTIMS' RIGHTS WORKING GROUP, <http://vrwg.org> (last visited Oct. 18, 2010).

163. See *Partners*, TRUST FUND FOR VICTIMS, <http://trustfundforvictims.org/partners> (last visited Oct. 18, 2010) ("Our projects emphasize participation by victims in programme planning, sustainability of community initiatives, transparent and targeted granting, and accessibility for those who have traditionally lacked access to funding.").

164. See VALIANT R. W. POLINY, A PUBLIC POLICY ANALYSIS OF THE EMERGING VICTIMS' RIGHTS MOVEMENT 158–62 (1994).

165. See José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 438–40 (1999).

166. It is the Assembly that created the Trust Fund and which determines the criteria by which it is governed (article 79. 3 of the Rome Statute). This means that although

enhancing their liberal reputation through generous “donations,” which provide a high visibility vehicle for certain donor initiatives. However, the fact that states cannot earmark their donations<sup>167</sup> also limits their ability to use the TFV for targeted political reasons. Moreover, it would be quite reductionist to suggest that the TFV was created merely to showcase donor generosity, even if that is one of its side-effects.

If there is a politics behind the TFV, it lies, rather, in the larger political needs of international criminal justice, from which it is inseparable. Perhaps more than a “victims’ movement,” there has been a political sensitivity in diplomatic circles to the role of victims in legitimizing a nascent institution like the International Criminal Court.<sup>168</sup> Certainly, in an international system where societal interest still seems relatively thin (despite all aspirations to the contrary) and which is deprived of a global sovereign, the traditional criminal law appeal to “public order” as the backbone of international criminal justice has little resonance and would elicit strong adverse reactions. In a context where many claims about international criminal justice are routinely challenged (e.g., that justice leads to peace), and where victims may in fact also become collateral victims of its operation (e.g., where a state expels humanitarian organizations as a result of the head of state having been indicted by the Court),<sup>169</sup> there is much need for symbolic counterweights. Although victims may conceivably be able to live with some of the international decisions that adversely affect them if they advance justice overall, it would add insult to injury if the Court were to further neglect them by not providing any compensation. A strong and visible stand for victims of international crimes may be the international community’s best bet at establishing a solid vantage point from which to promote international criminal justice.<sup>170</sup>

More concretely, there is little doubt that the emergence of a relatively strong reparation regime results, at least partly, from the difficulties that international criminal tribunals encountered in the 1990’s. The ad hoc tribunals, especially, were seen as excessively focused on prosecutions,

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states certainly do not have a tactical hand in how funds are disbursed, they could exert some strategic control over the direction of the Fund if they so decide.

167. TFV Regulations, *supra* note 9, para. 27.

168. On the “sacralization” of victims, see Frédéric Mégret, *Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure*, 14 *UCLA J. INT’L L. & FOREIGN AFF.* 37, 57 (2009).

169. Khaled Abdelaziz, *Sudan’s Bashir Threatens More Expulsions in Darfur*, *REUTERS*, Mar. 8, 2009, [http://www.reuters.com/article/idUSL8628578\\_CH\\_2400](http://www.reuters.com/article/idUSL8628578_CH_2400).

170. See Mark Findlay, *Activating a Victim Constituency in International Criminal Justice*, 3 *INT’L J. TRANSITIONAL JUST.* 183, 183–86 (2009).

to the detriment of their larger transitional goals.<sup>171</sup> Victim movements in Rwanda and Bosnia (in particular, Srebrenica) were often appalled by the way in which they were neglected, with often very dramatic consequences for the tribunals in terms of state cooperation.<sup>172</sup> International criminal lawyers know that justice cannot afford to appear careless about victims. The argument that international criminal justice serves victims' merely by prosecuting their tormentors will only go so far. A strong victim oriented regime, then, can be redeeming of the general abstraction of international criminal justice and may help dispel the perception of indifference to victims. The TFV might be conceived as, or turn into something, that helps reconcile local populations with international criminal tribunals. A cynic might therefore argue that a relatively strong victim compensation regime is the "acceptable face" of international criminal justice, a way of helping grease the wheels of the system by better "selling" it to its "stakeholders."

There are several limitations with this explanation, however. To begin with, the TFV shows no sign of wanting to serve as the "acceptable face" of the ICC vis-à-vis victims. In fact, it seems quite keen to distance itself from the Court.<sup>173</sup> The TFV, thus, cannot really be explained as a sweetener for the occasional bitter pill of international trials. Purely political explanations of why the TFV exists provide us with a context but fail to provide us with a *normative* account of its emergence, despite the fact that the victims' reparations regime is clearly construed by many of the actors involved as a normative enterprise. The same sort of argument could be made about international criminal tribunals in general: although they may have been created for various circumstantial political reasons, they have typically evaded these reasons and have been justified by reference to certain fundamental legal principles. Thus, a purely political account is necessarily lacking and a more complete analysis of the rationale behind victims' compensation regimes must delve into a more normative register.

### *C. Consequentialist Rationale: The TFV and Transitions*

Another species of arguments about the creation of compensation schemes emphasizes, quite apart from the moral, legal, or social merit of

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171. See Alvarez, *supra* note 165, at 479–80.

172. See, e.g., VICTOR PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS 202–06 (2008).

173. There may be several reasons for this, including fears about security or even the risk of adversely affecting the work of the Court by impinging on the presumption of innocence. At any rate, the TFV seems keen to stress its independence and may appear as a quite distinct institution to victims on the ground.

granting something to victims, the extent to which such schemes have positive, secondary effects. These consequentialist arguments run the gamut from basic to sophisticated, but the underlying idea is utilitarian, going as far back as Bentham, that victim compensation is justified by—and therefore also awarded on the basis of—what it might achieve, rather than by an entitlement or by the strict degree of harm suffered.<sup>174</sup> Can the TFV be explained in such terms? Traces in the emergence of the regime indicate that it may be designed not simply as the acceptable face of international criminal justice, but as something that is fundamentally conducive to certain goals of international law, for example, transitional justice.<sup>175</sup>

The problem then becomes, as is often the case with consequentialist reasoning, how to determine what the “ulterior goals” of victim compensation should be. Perhaps one of the simplest lines of argument domestically is the idea that victim compensation schemes create a stake for victims in criminal justice and thus encourage them to cooperate with the judicial process in what might otherwise be a context of apathy or indifference, amplified by fears of “double victimization” at the hands of prosecutors and a careless criminal system.<sup>176</sup> Some domestic systems even make compensation conditional upon cooperation with police and prosecuting authorities.<sup>177</sup> Some law and economics scholars even argue that, given the right level of restitution or compensation incentive, victims might well invest their own resources to have the criminals apprehended.<sup>178</sup> However, domestically, the results of this sort of simple eco-

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174. See JULIA MIKAELSSON & ANNA WERGENS, REPAIRING THE IRREPARABLE: STATE COMPENSATION TO CRIME VICTIMS IN THE EUROPEAN UNION 176 (2001).

175. The TFV regularly touts its role in bringing about peace and reconciliation. See *The Two Roles of the TFV*, TRUST FUND FOR VICTIMS, <http://trustfundforvictims.org/two-roles-tfv> (last visited Sept. 25, 2010) (“Countries emerging from long-term violent conflict are troubled societies that may develop destructive social and political patterns. In such cases, fundamental psychological adjustments in individual and group identity—aided by reconstruction processes—are essential to reconciliation. If we do not get it right through justice, reparations and rehabilitation initiatives, we will not be able to secure peace, security and development for future generations.”).

176. See Rachele K. Hong, *Nothing to Fear: Establishing an Equality of Rights for Crime Victims Through the Victims’ Rights Amendment*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 207, 219–20 (2002); SIEBERG, *supra* note 125, at 29–30.

177. MIKAELSSON & WERGENS, *supra* note 174, at 205–206 (“The 1983 European Convention states that the compensation may be reduced or refused on the ground of . . . [the victim’s] failure to report the crime to the police or to co-operate with the legal authorities”).

178. Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 13–15 (1974).

conomic incentive have been decidedly mixed<sup>179</sup> in that the decision to cooperate with judicial institutions seems largely unrelated to prospects for compensation.<sup>180</sup>

The experience of the international community in the 1990's demonstrated that tribunals need to mobilize stakeholders, particularly witnesses, a process often fraught with difficulties and misunderstandings.<sup>181</sup> Ideally, this may be accomplished by creating a rough quid pro quo, or at least a system of positive incentives to encourage cooperation. The strategy was attempted in the limited context of witness protection but, with the advent of the ICC, arguably extends to a vast number of victims seeking reparations or assistance. The eagerness with which victims participate in ICC proceedings thus far may have to do with a desire to be well positioned to make claims for reparation. The TFV, however, certainly does not go as far as to require cooperation by relevant victims, and assistance seems largely disconnected from even the existence of a proceeding.<sup>182</sup> It is unlikely that the prospect of compensation would greatly change victim attitudes towards the judicial process in view of the fact that victims will most likely seek to participate on other grounds.

A second "ulterior goal" is that victim compensation is, essentially, a way of limiting violence by reducing victims' feelings of despair and alienation.<sup>183</sup> The reasoning is that un-assisted crime victimization will come back to haunt society by feeding a desire for vengeance and violence. Compensation money, then, is money well spent in that it can avoid breaches to public order and peace and is often seen as a form of

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179. See William G. Doerner & Steven P. Lab, *The Impact of Crime Compensation Upon Victim Attitudes Toward the Criminal Justice System*, 5 VICTIMOLOGY 61, 62 (1980) ("The net impact of these [domestic] studies is to contradict the assertion that victim compensation programs have important macrolevel ramifications for the criminal justice system.").

180. Shapland, *supra* note 34, at 140, 147 (pointing out that victims' attitudes toward the criminal justice system are affected by the treatment they receive from its personnel, rather than by compensation); Deborah P. Kelly, *Victims' Perceptions of Criminal Justice*, 11 PEPP. L. REV. 15, 17-18 (1984) (pointing out that some participation in the trial is what is most likely to make victims participate).

181. See ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* 148-54 (2005).

182. See ICC Rules of Procedure and Evidence, *supra* note 8, R. 89 (providing the opportunity for victims to apply to participate in proceedings). Talk of undeserving victims might conceivably one day be used to exclude those that were obstructionist in the proceedings, but there is no suggestion at this stage that this will be the case.

183. The point is often made in relation to victim recognition generally. See Sam Gar-kawe, *Enhancing the Role and Rights of Crime Victims in the South African Justice System—an Australian Perspective*, 14 S. AFR. J. CRIM. JUST. 131, 134, 136 (2001).

“crime prevention,” almost an auxiliary to the criminal justice system.<sup>184</sup> A compensated victim is less likely to take justice in her own hands, or at least to seek alternative modes of justice.<sup>185</sup> Ferri has already cautioned against the “law itself becom[ing] the breeding ground of personal revenge” if nothing is done for victims to break cycles of violence.<sup>186</sup>

These arguments may, in fact, be more relevant in the sort of perilous transitional contexts that the ICC deals with than they ever were domestically. Domestically, after all, this idea that victim compensation will prevent mob justice is something of a fiction; for many centuries victims did not receive any compensation from the state, yet only in exceptional circumstances did they resort to extreme measures. In complex and volatile transitional contexts, however, the opposite may be true, and the temptation to take justice into one’s own hands is ever present, as shown by episodes of brutal transition involving summary executions and savage *épuration*.<sup>187</sup> In this context, the TFV might be properly viewed as an institution devoted to the process of normalization of societies after atrocities by addressing needs of victims and ensuring that the system is not letting them down. Indeed, one might argue that in transitional contexts, criminal justice is never just pursued for its own sake, and its success is necessarily measured by how it helps to accomplish peaceful transitions. Victim compensation, then, might be seen as a prolongation of criminal justice, allowing it to truly deliver on its promise of pacification. For example, upon announcing a donation of 500,000 Euros by his government to the TFV, the Danish ambassador emphasized that:

[H]elp[ing] the victims of these crimes regain their dignity and enable them to return to a normal life . . . is an absolutely necessary element in ending a conflict and reconciling the different sides without which conflict will soon erupt again. In this way the Trust Fund for Victims, as a part of the overall framework of the ICC, complements the judicial

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184. See D. D. N. Nsereko, *Compensating the Victims of Crime in Botswana*, 33 J. AFR. L. 157, 157–58, 171 (1989).

185. See generally David Miers, *Taking the Law into their own Hands: Victims as Offenders*, in INTEGRATING A VICTIM PERSPECTIVE WITHIN CRIMINAL JUSTICE: INTERNATIONAL DEBATES 77 (Adam Crawford & Jo Goodey eds., 2000).

186. ENRICO FERRI, *THE POSITIVE SCHOOL OF CRIMINOLOGY* 106 (Ernest Untermyer, trans., 1913).

187. See 2 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 71–126 (Neil J. Kritz ed., 1995).

activities of the Court and plays a very important role in ending impunity and preventing the most serious crimes.<sup>188</sup>

Another interesting view on domestic compensation schemes emanating from a law and economics angle is that “if we make the government responsible for the losses incurred by victims of crime, the government will then have an incentive to make communities safer for its citizens.”<sup>189</sup> The criminal justice system, albeit nominally in charge, is always a little suspect of wanting to combat crime “on the cheap.” In other words, the system never fully internalizes the overall cost of crime and is happy to leave its personal costs to victims, absorbing only a fraction of its overall social cost (the judicial trial and punishment). As a result, the state ends up treating the problem of victim harm as an unfortunate private one beyond its reach; the cost of crime is “dumped” on private citizens that end up indirectly subsidizing the state. Conversely, as one author pointed out in the 1950’s, if Margery Fry’s scheme was transposed to the US, social compensation of victims would cost “\$20,000,000,000, or about seven percent of the national income of the United States”—surely an amount that would strikingly convey the actual cost of crime.<sup>190</sup> In this interesting twist, it is not the victim/witness that is made to pay attention to the benefits of the criminal justice system, but the system itself which is forced to take into account the real cost of crime. There is probably some sense in suggesting that if the true cost of international crimes were to be factored into international policy (and at least the emphasis on the TFV supplementing reparation orders suggests this sort of direction), then it might create some renewed awareness by the international community of what is at stake and the urgency of bringing it to an end.<sup>191</sup> However, in practice this is very theoretical since contributions to the fund are voluntary and donors can effectively refuse to shoulder the full cost of crime and still bask in the relative generosity of their donations.

The third and more sophisticated line of domestic arguments about what can be achieved through compensation emphasizes the extent to which crime “ruptures” faith in the institutions of the state, the law, and

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188. Ambassador Kirsten Biering, Statement at the ICC Press Conference in The Haag (Sept. 10, 2008) (transcript available at [www.um.dk/NR/rdonlyres/2B532704-3AC1-4869-8159-A7EEC458A7D3/0/StatementbyAmbassadorKirstenBiering.pdf](http://www.um.dk/NR/rdonlyres/2B532704-3AC1-4869-8159-A7EEC458A7D3/0/StatementbyAmbassadorKirstenBiering.pdf)).

189. Smith, *supra* note 140, at 68.

190. Gerhard O. W. Mueller, Comment on the Proposal, *Compensation for Victims of Criminal Violence: A Round Table*, 8 J. PUB. L. 191, 230 (1959).

191. Interestingly, genocide prevention is sometimes discussed in terms of creating prohibitive costs to the use of genocide as a policy tool. See generally Samantha Power, *Raising the Cost of Genocide*, DISSENT, Spring 2002, at 85.

society.<sup>192</sup> Crime provokes alienation and undermines public trust. The rationale for providing either assistance or a complement to reparation, then, is to encourage respect for and trust in the criminal justice system and, additionally, in the institutions of the state. Crime, quite literally, shatters the bonds of society. As David Miers puts it, “to experience crime is to experience a failure in civic trust; that is, in the trust that citizens have (and are encouraged to have) in the capacity of the criminal justice system to protect them.”<sup>193</sup> To the extent that crime is typically associated with a breakdown of society’s structures, the solidarity expressed through victim compensation schemes serves to reinstate society as organized, caring, and responsible. “Civic trust” in this context “may be thought to require that the law ought not only show a concern for the victim’s injury but also take concrete measures to restore the harm done to public trust and confidence.”<sup>194</sup> The civic trust argument provides a justification for “special treatment” of victims by the state in that “unlike other forms of hardship such as those caused by road accidents, industrial accidents and diseases, congenital disabilities, or even another’s negligence, crime victims have, stereotypically, suffered injuries that were inflicted ‘deliberately,’ or more precisely, intentionally or recklessly.”<sup>195</sup> This focus on victims as “the target of another’s ill-will and not just of another’s inadvertence”<sup>196</sup> is what justifies state intervention to remedy a fundamental breach of trust in the institutions of society.<sup>197</sup>

The last ulterior goal of setting up compensation schemes is less intuitive in the international context compared to the domestic setting, but it does yield some interesting suggestions. The starting point, one might argue, is startlingly different from the domestic setting in that the international community is in many ways marked by abysmal levels of civic trust.<sup>198</sup> It is probably fair to say that after the failure to bomb the

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192. Lirieka Meintjes-van der Walt, *The Rights of Victims of Violent Crimes in South Africa: Emergent or Forgotten?*, 7 TILBURG FOREIGN L. REV. 144, 144–45 (1998).

193. David Miers, *Looking Beyond Great Britain: The Development of Criminal Injuries Compensation*, in HANDBOOK OF VICTIMS AND VICTIMOLOGY 337, 340 (Sandra Walklate ed., 2007) [hereinafter Miers, *Looking Beyond Great Britain*].

194. *Id.*

195. *Id.*

196. *Id.*

197. Domestically, however, the theory has been challenged in practice on the grounds that victim compensation may have exactly the opposite effect and, in that it is “an admission of hopelessness and helplessness on the part of the authorities regarding their ability to protect citizens[,] . . . may contribute to social malaise.” EDELHERTZ & GEIS, *supra* note 29, at 6.

198. See Allison Stewart, *The International Community in Bosnia: Enduring Questions of Legitimacy*, 5 CHINESE J. INT’L L. 753, 755 (2006).



Auschwitz railroad, the pulling out of UNAMIR in Rwanda, or UN peacekeepers helping Mladic sort out able men from the rest of the population in Srebrenica, victims' expectations of the international community are rather low. Ad hoc international criminal tribunals, from Nuremberg to the Hague, have probably not made very good impressions on most victims.<sup>199</sup> International society, one might argue, suffers chronically, not so much from a rupture of faith in its judicial institutions as from a permanent crisis of trust in them. Still, there is no doubt that international crimes have often left victims even further alienated from and profoundly disillusioned with the international society, more so probably than is the case domestically. The Inter-American Court of Human Rights ("IACHR") emphasized that grave human rights violations are not like an ordinary tort in that they fundamentally alter a person's belief in the possibility of a secure life.<sup>200</sup> The fact that levels of international civic trust are generally low, then, militates in favor of trying to restore confidence in international institutions and the rule of law, and victim compensation can be a part of this process.

Finally, there is also a sense in which compensation in the context of atrocity serves a broader role that it need not serve domestically. Domestically, compensation has the goal of averting the alienation of victims but, aside from maintaining a certain public confidence in the notion of a just society, it is in no way meant to more generally reconstruct or mend societies from the ground up. Conversely, international compensation arguably has such a role in that it is more broadly about building the foundations of a lasting peace, based on the integrity of victims and the rule of law.<sup>201</sup> TFV authorities are clearly quite aware that they are also, in assisting victims, striving towards this more long-term goal. The Fund's draft strategic plan specifically emphasizes that "[t]he interna-

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199. See Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 544 (2004)

200. In the *Loayza Tamayo v. Peru (Reparations)* decision, the IACHR pointed out that the very existence and conditions of the life of a person are altered by unfairly and arbitrarily imposed official actions taken in violation of existing norms and of the trust that is placed in the hands of public power, whose duty is to protect and provide security in order for individuals to exercise their rights and satisfy their legitimate personal interests. *Loayza Tamayo v. Peru, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 42*, ¶ 150 (Nov. 27, 1998), available at <http://www1.umn.edu/humanrts/iachr/C/42-ing.html>.

201. See Lutz Oette, *Reparació En Períodes De Transició Incerta. Lliçons Des Del Sudan [Reparation in Times of Uncertain Transition. Lessons from Sudan]*, in DRETŞ HUMANS I JUSTICIA TRANSICIONAL: GESTIONANT EL PASSAT 180, 180, 187–88 (Helena Oliván et al. eds., 2009).

tional community can and must help [victims] to consolidate peace, ensure justice and overcome the legacies of war.”<sup>202</sup>

There is a sense that consequentialist rationales account for part of the existence of the TFV, but their normative status is open to question. Even though the TFV may achieve some or all of these goals, chances are that it will do so indirectly without specifically intending to. In other words, some of the results indicated above are results that would flow naturally from most dynamic compensation policies and that cannot be directly engineered. There is not much evidence that these rationales featured prominently when victim compensation was discussed in Rome and beyond, largely because reparations discourse dominated, emphasizing issues of principle rather than consequence. Consequentialist reasoning also does not help us much to understand the type of compensation that the Fund should engage in. It remains difficult, in fact, to envisage the TFV’s role in exclusively consequentialist, “spill-over” terms. If that were its fundamental rationale, then any number of alternative mechanisms might be up to the task and perhaps better suited to it.<sup>203</sup> For example, reparations and assistance might be delegated to truth and reconciliation mechanisms that would have a more explicit mandates to facilitate transition. The TFV still needs to be able to make a claim that it will execute its functions better than these competing programs or mechanisms.

#### *D. Practical Rationale: the TFV as a Substitute to Other Mechanisms*

A fourth type of justification for domestic victim compensation schemes emphasizes the extent to which they are essentially filling a void and replacing faulty or insufficient alternatives. These arguments, which are often joined with others explored in this Article, are practical in that they do not deduce the need for compensation schemes from any principled higher ground. Rather, assuming the need for some sort of compensation, they point out the optimality of a socialized scheme given the dearth of alternatives. As previously mentioned, victim compensation schemes, almost by definition, aim to provide an answer to the limitations of the criminal-reparatory system in cases where the accused either cannot be apprehended or are insolvent. The case that still needs to be made is the extent to which compensation schemes also replace or complement other mechanisms that might conceivably step in to assist victims.

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202. GLOBAL STRATEGIC PLAN, *supra* note 7, at 13.

203. See Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission*, 49 U. TORONTO L.J. 355, 355–56 (1999).

Domestically, the classic argument is that compensation schemes are a substitute to two possible alternatives: insurance and torts.<sup>204</sup> The first issue, insurance, might seem of largely theoretical interest in the international context, were the argument not made so strongly domestically. The idea is that the state, in providing victim compensation, substitutes for the absence or failure of insurance mechanisms when it comes to violent crime, for which specific insurance may not be available or accessible to everyone given its high cost.<sup>205</sup> Even if insurance is theoretically available, the “argument is that the risk of injury from criminal attack is so remote that it would be impractical to insure against that risk.”<sup>206</sup> Moreover, the fact that one may insure oneself against being a victim of crime but not against being guilty of one, limits, in contrast to civil liability, the extent to which economically optimal insurance schemes can be put in place.

One might thus analyze compensation schemes as a form of government intervention in a dysfunctional insurance market. Insurers have occasionally been required to form “risk pools” to guarantee against such events as terrorist attacks, for which ordinary insurance schemes may be of limited utility.<sup>207</sup> The argument draws on the theory of “market failures”—9/11 provides the starkest example to date—to suggest that the state should intervene in cases where the market will not, of itself, provide adequate mechanisms.<sup>208</sup> In cases of major catastrophes, the government will act as a reinsurer of risk through public-private partnerships that minimize the risk of default.<sup>209</sup> In fact, victim compensation will sometimes be loosely referred to as “crime insurance” (although not

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204. See Schafer, *supra* note 123, at 243 (“Present schemes are little more than tort (or insurance) law propositions placed into a criminal law environment.”).

205. See Darius Lakdawalla & George Zanjani, *Insurance, Self-Protection, and the Economics of Terrorism* 26–35 (RAND Inst. for Civil Justice, Working Paper No. WR-171-ICJ 2004). The US Federal Crime Insurance program is a good example of this possibility. See Chappell, *supra* note 60, at 301–03.

206. ATIYAH & CANE, *supra* note 13, at 254.

207. Rianne Letschert & Karin Ammerlaan, *Compensation and Reparation for Victims of Terrorism*, in ASSISTING VICTIMS OF TERRORISM 215, 249–50 (Rianne Letschert et al. eds., 2010); see generally Jeffrey Manns, *Insuring Against Terror?* 112 YALE L. J. 2509 (2003) (examining the Terrorism Risk Insurance Act and arguing that a strong economic argument can be made for this type of government intervention).

208. For skeptical reviews of this argument, see Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism—and Crime*, 102 MICH. L. REV. 268 (2003); Anne Gron & Alan O. Sykes, *Terrorism and Insurance Markets: A Role for the Government as Insurer?*, 36 IND. L. REV. 447 (2003).

209. Véronique Bruggeman, Michael G. Faure & Karine Fiore, *The Government as Reinsurer of Catastrophe Risks*, 35 GENEVA PAPERS ON RISK & INSURANCE—ISSUES & PRAC. 369, 369–70 (2010).

quite adequately, since it is not typically financed by specific individual contributions as much as general taxation, and the sums awarded will often not match what might have been obtained under insurance policies had they existed).<sup>210</sup>

When it comes to international crimes, insurance failure seems largely inadequate to rationalize the TFV. This is not only because there is a dearth of insurance (there will indeed most often be none at all)<sup>211</sup> but that the TFV is not a substitute to a system that has failed, as much as its own, *sui generis* source of compensation.<sup>212</sup> It may, in fact, be next to impossible to insure oneself against mass crimes in the first place, as a result, for example, of a quite widespread “war exclusion” in insurance contracts.<sup>213</sup> In many cases, obtaining insurance against the risk of genocide or crimes against humanity might be the equivalent of obtaining a health insurance policy as one is showing the first signs of cancer. The outcome is that, as is the case domestically, those most likely to need crime insurance and least able to afford it will be those for whom it will be most expensive. Perhaps some states could, in theory, insure themselves and their population against the consequences of international crimes, although probably not many of those where mass crimes are likely to be committed will do so. Making insurance compulsory, moreover, does not seem like an option because the international community is obviously in no position to require it. There may also be something morally awkward about insuring or being made to insure oneself against genocide or crimes against humanity in the same way one might be expected to ensure oneself against car accidents, loss of work, or ill health (especially if the state is insuring itself). Asking individuals to insure themselves

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210. See Timothy V. Clark & D. Robert Webster, *Indiana's Victim Compensation Act: A Comparative Perspective*, 14 IND. L. REV. 751, 753 (1981).

211. The absence of insurance, private or social, against crime in many countries has been emphasized as an element increasing the costs of victimization and the justifiability of an organ like the TFV. JO-ANNE WEMMERS, REPARATION AND THE INTERNATIONAL CRIMINAL COURT: MEETING THE NEEDS OF VICTIMS 12 (2006).

212. For an interesting discussion of both the improbable character of insurance against international events and its desirability, see Josiah Royce, *War and Insurance*, 10 CONN. INS. L.J. 5 (2003).

213. Sidney I. Simon, *The Dilemma of War and Military Exclusion Clauses in Insurance Contracts*, 19 AM. BUS. L.J. 31, 31 (1981). I leave aside the issue of whether the crimes entering the ICC's jurisdiction would fall under such a war exclusion, but it seems likely since most atrocities that the ICC will deal with will have some armed conflict element. The same issue typically affects victims of acts of terrorism, providing an interesting analogy for victims of other international crimes. See generally Daniel James Everett, *The “War” on Terrorism: Do War Exclusions Prevent Insurance Coverage for Losses Due to Acts of Terrorism*, 54 ALA. L. REV. 175 (2002).

against crime (even on a subsidized basis) might suggest a “normalization” of crime and even that the State has given up on preventing it (or that society has given up on the State).<sup>214</sup>

A second practical justification of victim schemes, which is more appealing in the international context, is that they are an alternative to civil remedies, which victims might otherwise have to seek and which are either unavailable, very hard to pursue, or generally inadequate to the needs of victims.<sup>215</sup> In practice there is much evidence that victims of crime often never seek tortious remedies.<sup>216</sup> The fundamental logic behind a scheme such as the UK victim compensation scheme, for example, is to “meet the gap between the ‘ideal world’” in which “it should be the offender who compensates the victim” and the “reality of the victim’s theoretical civil remedy.”<sup>217</sup> Indeed, there seems to be almost universal agreement about the difficulty of collecting civil reparations in cases of crimes, for essentially the same reason that there is skepticism about the criminal system obtaining reparations from the convicted.<sup>218</sup> The tendency to move beyond torts altogether through mechanisms “socializing responsibility” is one that has been considered seriously in limited areas, such as medical malpractice, environmental pollution, or automobile accidents.<sup>219</sup>

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214. For the links between such a view and the philosophy of libertarianism, see R. A. Childs, Jr., *The Invisible Hand Strikes Back*, in ANARCHY AND THE LAW: THE POLITICAL ECONOMY OF CHOICE 218 (Edward P. Stringham ed., 2007).

215. Ironically, it is the availability of these tort remedies that has often served as a justification for ignoring the needs of victims as part of the criminal justice process. See L. Shaskolsky Sheleff, Main Paper, *The Victim of Crime*, 1975 ACTA JURIDICA 192, 194 (1975).

216. ALLEN M. LINDEN, THE REPORT OF THE OSGOODE HALL STUDY ON COMPENSATION FOR VICTIMS OF CRIME 20–23 (1968).

217. Miers, *Looking Beyond Great Britain*, *supra* note 193, at 339.

218. See Allen M. Linden, *Victims of Crime and the Tort Law*, 12 CAN.B.J. 17, 17, 20–22 (1969); James Brooks, *The Case for Creating Compensation Programs to Aid Victims of Violent Crimes*, 11 TULSA L.J. 477, 492–94 (1976). If the convicted person is impecunious, there will be no more prospect of obtaining reparations from him in tort than there was as a result of a criminal conviction. In addition, in many countries fines take precedence over civil awards, so that the State stands a better chance of collecting money than victims do of collecting compensation.

219. D. M. Studdert et al., *Can the United States Afford a “No-Fault” System of Compensation for Medical Injury?*, 60 LAW AND CONTEMPORARY PROBLEMS 1–34 (1997); D. S. Starr, *The No-Fault Alternative to Medical Malpractice Litigation: Compensation, Deterrence, and Viability Aspects of a Patient Compensation Scheme*, 20 TEXAS TECH LAW REVIEW 803 (1989); R. L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MARYLAND LAW REVIEW 951 (1993). R. S. Miller, *An Analysis and Critique of the 1992 Changes to New Zealand’s Accident Compensation Scheme*, 52 MARYLAND LAW REVIEW 1070 (1993).

Civil remedies are of little use when those responsible are either unknown or un-apprehended, as will frequently be the case. Moreover, many victims may simply be discouraged by the prospect of pursuing civil remedies (particularly because of costs), although such a problem is attenuated in jurisdictions that allow the possibility of victim participation in criminal proceedings (e.g., the institution of *parties civiles* in some continental-European legal systems)<sup>220</sup> or where a criminal verdict binds civil jurisdictions.<sup>221</sup> Compensation schemes are, thus, sometimes presented as expedients that save victims from the cost and effort of civil proceedings. In fact, opting into these schemes may render victims ineligible to sue those they consider responsible, as is the case under the Air Transportation Safety and System Stabilization Act.<sup>222</sup> In cases where the victims choose to forgo suit in order to benefit from compensation, the public authority will then be subrogated to the rights of the victim against the perpetrator, thus ensuring that the victim does not doubly recover.<sup>223</sup> These sorts of schemes fall under the “offender surrogate model” in that the state essentially pays the reparation that the convicted person might otherwise pay.<sup>224</sup> Indeed, until 1996 the amount that one could claim under the British scheme used to be calculated on the basis of what one would have received in a successful civil action against the offender.<sup>225</sup> Claims that one is the victim of a crime generally have to be proved on a balance or preponderance of probabilities, the civil stan-

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220. See Patrick Campbell, *A Comparative Study of Victim Compensation Procedures in France and the United States: A Modest Proposal*, 3 HASTINGS INT'L & COMP. L. REV. 321, 323–32 (1980); see also Harland, *supra* note 64, at 99–100 & n.288.

221. The principle “le penal tient le civil en l'état” (criminal decisions bind civil courts) is well known in French law, but the common law often adopts the opposite view, requiring victims to sue in tort for the same acts for which someone has already been convicted.

222. A.T.S.S.S.A., *supra* note 56, § 405(c)(3)(B). In some cases the opposite may be true, in that victims may be encouraged to use some of the public compensation money they are awarded to press claims. However, this depends on whether the compensation was granted as substitute reparation or assistance, a distinction discussed at length in the following Sections of this Article.

223. Galaway & Rutman, *supra* note 4, at 70.

224. Miers, *supra* note 193.

225. CRIMINAL INJURIES COMPENSATION AUTHORITY ANN. REP. & ACCOUNTS 2009–10 at 5 (2010), available at <http://www.cica.gov.uk/en-gb/TopNavigation/Publications/?Category=Reports>; see also Peter Duff, *The Measure of Criminal Injuries Compensation: Political Pragmatism or Dog's Dinner?*, 18 OXFORD J. LEGAL STUD. 105, 112 (1998).

dard.<sup>226</sup> In some cases the state or an agency in its name will seek to recover the expenses incurred from the convicted, for example in Florida and Illinois.<sup>227</sup>

Nonetheless, even domestically the “compensation as substitute to tort” argument is not very convincing. Reluctance to engage in civil suits is a general problem (i.e., even outside situations of crime) that does not normally militate in favor of the state simply replacing private litigants. One still needs to explain why victims of certain torts should be treated differently, merely because these torts also happen to be crimes.<sup>228</sup> There are plenty of social harms for which society offers no compensation, leaving it entirely to victims to shoulder the cost of either litigation in torts or the cost of the harm when legal redress is not possible. If anything, moving to a “no-fault” compensation scheme in case of crime is less likely than for other ordinary social harms, given the extent to which crime seems predicated on fault, a point that risks being lost when the state decides to shoulder a significant part of the harm.

On the other hand, looking at the experience and limitations of domestic and transnational litigation, one can see the merit of the “civil litigation alternative” in the international context. The international system is one where civil remedies hardly exist, especially if they are not available in the forum where the crimes were committed. The Alien Tort Claims Act (“ATCA”) is the only remedy of its kind internationally, allowing victims of violations of international law to seek compensation in the US regardless of where the harm was incurred.<sup>229</sup> The number of victims of atrocities, at any rate, makes transnational civil remedies a very costly and long process to obtain reparations and has, in practice, raised all kinds of collective action problems.<sup>230</sup> Maybe the exceptional lack of tort

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226. Weeks, *supra* note 33, at 113; Garkawe, *Enhancing the Role and Rights of Crime Victims in the South African Justice System—An Australian Perspective*, *supra* note 183, at 139.

227. See FLA. STAT. ANN. § 960.293, –.297 (2009) (West, Westlaw through 2010 Second Regular Legis. Sess.); 1997 Ill. Legis. Serv. P.A. 90–85 (S.B. 508) (West); 1993 Ill. Legis. Serv. P.A. 88–378 (S.B. 418) (West).

228. ATIYAH & CANE, *supra* note 13, at 254. (“The [S]tate accepts no general obligation to make good the lack of a defendant worth suing.”).

229. See *The Alien Tort Claims Act: Promoting Accountability and Limiting Impunity for Serious Human Rights Violations*, HUMAN RIGHTS FIRST (Mar. 2004), [http://www.humanrightsfirst.org/cah/ij/w\\_context/w\\_cont\\_13.aspx](http://www.humanrightsfirst.org/cah/ij/w_context/w_cont_13.aspx).

230. See Margaret G. Perl, *Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations*, 88 GEO. L.J. 773, 788–97 (2000); Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI. LEGAL F. 279, 327–28 (2003).

remedies is an argument for the TFV, as a sort of substitute to protracted ATCA-type litigation or various other mass claims.<sup>231</sup>

But there is little evidence that the TFV will act as a substitute to non-existent tort remedies, or that it will be operating under the “offender surrogate model.” To do so, it would need to commit to systematically “complement” insufficient reparations by the convicted, something which at present does not seem likely.<sup>232</sup> It is certainly not anticipated that the TFV will exercise any sort of subrogation rights against either the accused or any other entity (such as the state that committed the crimes) to recoup the sums expended in favor of victims. Nor is there any suggestion that the TFV contributing to reparation might disqualify victims from suing responsible parties, especially if they are other than the accused.<sup>233</sup> Finally, the point remains that it is not obvious why the international community should fund compensation as an alternative to civil litigation, simply because civil litigation is complicated. Domestically, the argument might be that the state is answerable for some of the deficiencies and limitations of its own judicial system (so that compensation schemes are a way of correcting the inadequacy of civil remedies for a particular kind of “meritorious” victims). But this reasoning is harder to sustain internationally because the “international community” does not have a civil law system of its own and it is effectively relying on states’ judicial systems.

All of these arguments as to how victim schemes might act as a complement or substitute to alternative mechanisms help explain the environment domestically and internationally. However, that explanation is not entirely conclusive. The fact that neither insurance, nor tortious responsibility, nor state programs will be present or sufficient is certainly an argument for why the TFV, in most cases, will not be duplicating existing initiatives; but it does not explain why the “international community” should fundamentally assume the cost of the externalization of victim harm, nor does it tell us much about how it should do so, and according to what logic. The simple availability of funds and willingness of the “international community” to give is obviously something that makes the

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231. See generally Elizabeth J. Cabraser, *Human Rights as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 VAND. L. REV. 2211 (2004) (discussing complications faced in mass tort actions brought by victims of human rights violations).

232. The Court is trying to push in that direction, but the TFV seems keen on using its own resources for assistance projects “here and now” for the greater number, rather than to “top” compensation for relatively smaller numbers in the future.

233. Although conceivably problems may arise if some victims have been very successful in obtaining awards before civil courts, given the limited resources of the TFV.



scheme conceivable, but not a very satisfactory answer as to why it exists in the form that it does.

*E. Legal Rationale: The TFV as an Admission of Responsibility*

Among the arguments militating in favor of the creation of victim compensation schemes domestically, some are clearly more law-oriented and suggest that victim compensation is based on, or at least owed, in cases where the public authorities have, or would have, incurred liability. Jeremy Bentham, one of the first persons to suggest the creation of victim compensation schemes, suggested that the state should compensate victims whenever “evils result[ed] from unintentional mistakes of the ministers of justice,”<sup>234</sup> or in other words, when they acted negligently. In that case, Bentham argued:

[O]ught not the public to follow the same rules of equity which it imposes upon individuals? Is it not an odious thing that the government should exert its power to exact severely all that is due to it, and should avail itself of the same means to refuse the payment of its own debts?<sup>235</sup>

This is clearly not as radical a concept now as it was when first suggested by Bentham. The basis, then, might be a form of liability for negligence. The state, in compensating victims, would be more or less formally acknowledging its status as a “tortfeasor where its negligence in preventing criminal activity causes citizens to be injured.”<sup>236</sup> There have long been attempts in certain countries, despite doctrines of sovereign immunity,<sup>237</sup> to bring cases against the authorities as “secondary tortfeasors” for failure to offer reasonable protection,<sup>238</sup> at least in cases where the occurrence of crime is specifically tied to a police failure.<sup>239</sup> This

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234. BENTHAM, *THEORY OF LEGISLATION*, *supra* note 146, at 320.

235. *Id.* at 321.

236. Miers, *Looking Beyond Great Britain*, *supra* note 193, at 339.

237. See generally Edwin M. Borchard, *Government Liability in Tort*, 59 AM. L. REV. 527 (1925) (discussing grounds for and applications of sovereign immunity in various contexts).

238. See David Cohen, *Suing the State*, 40 U. TORONTO L.J. 630, 630–31, 637–41 (1990).

239. See generally Michael S. Vaughn, *Police Civil Liability for Abandonment in High Crime Areas and Other High Risk Situations*, 22 J. CRIM. JUST. 407 (1994); Laura S. Harper, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After Deshaney v. Winnibago County Department of Social Services*, 75 CORNELL L. REV. 1392 (1990); Elizabeth Handsley, *Suits Against the Police for Failure to Protect Victims of Violent Crime: A Feminist Perspective on the Use of Dichotomies*, 26 ANGLO-AM. L. REV. 37 (1997); Joseph M. Pellicciotti, *Police Civil Liability for Failure to Protect: The Public Duty Doctrine Revisited*, 8 AM. J. POLICE 37 (1989); Gerald P. Krause, Comment,

trend has only been reinforced in recent years by human rights discourse<sup>240</sup> and is much more familiar to continental systems of law than to common law systems. Some have linked it explicitly to the emergence of victim compensation schemes.<sup>241</sup>

However, when providing compensation schemes, most states do not view the program as preemptive of potential cases that might be brought against them, for example, pursuant to administrative law.<sup>242</sup> Compensation funds typically do not have a mandate to examine the record of states' behavior, even though dismal levels of protection of individuals may influence the amount of compensation given. There have been few suggestions that compensation schemes involve any change to doctrines of sovereign immunity.<sup>243</sup> If there is to be a strong legal obligation to compensate, it seems, it will be only of the sort that states have assumed as a matter of political choice,<sup>244</sup> rather than one that flows from recognition of responsibility.<sup>245</sup> States will thus grant compensation even in cases where they are not at fault, and they will also resist attempts to specifically tie disbursements to a finding of fault. In fact, in some cases, victim schemes involve an explicit bypassing of the idea of state responsibility altogether: victims are often offered a quick settlement in exchange for waiving any attempt to sue the state or, indeed, a number of private third parties.<sup>246</sup>

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*Municipal Liability: The Failure to Provide Adequate Police Protection—the Special Duty Doctrine Should be Discarded*, 1984 WIS. L. REV. 499 (1984); Mayo Moran, Case Comment, *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto*, 6 CAN. J. WOMEN & L. 491 (1993); Neville McClure, *Duty to All and Duty to None: Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto*, 48 U. TORONTO FAC. L. REV. 168 (1990).

240. See G. Monti, *Osman v. UK—Transforming English Negligence Law Into French Administrative Law?*, 48 INT'L & COMP. L.Q. 757, 774 (1999). On the “duty to protect” and its potential to profoundly reshape the common law of negligence liability of public authorities, see generally *id.*; Conor A. Gearty, *Unravelling Osman*, 64 MOD. L. REV. 159 (2001).

241. See Joan M. Covey, *Alternatives to a Compensation Plan for Victims of Physical Violence*, 69 DICK. L. REV. 391, 392–94, 404–05 (1965) (discussing municipal liability as one example of poor redress to victims and advocating state compensation programs as an alternative).

242. All compensation schemes, it seems, are based on a rejection of any strict state liability theory. See Brock, *supra* note 147, at 98, 113.

243. O'Connell, *supra* note 24, at 12–13.

244. For example, by proclaiming a strong victims' rights statute.

245. DAVID MIERS, STATE COMPENSATION FOR CRIMINAL INJURIES 4–7 (1997).

246. See, e.g., A.T.S.S.A., *supra* note 56, § 405. This is not to say that such an outcome is necessarily optimal from the viewpoint of the victims themselves. See, e.g., Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645 (2008) (noting that

Responsibility in any strict sense is also largely unrelated to the TFV's efforts. It is true that the failure by the international community to prevent genocide or crimes against humanity comes closest to the few traditionally actionable torts on a domestic level that involve the state in the field of protection from crime<sup>247</sup> (such as failure to prevent a civil riot).<sup>248</sup> Nonetheless, there is not a trace in the ICC/TFV regime of linking compensation to some sort of "international community responsibility" for failure to prevent international crimes. NGOs have cautioned against linking compensation to the notion of responsibility, out of fear that the latter may be hard to establish or perpetually unclear following mass atrocities.<sup>249</sup> This should not come as a surprise: the international community is merely a conceit, it does not have a legal personality, and it would probably benefit from a host of immunities if it did.<sup>250</sup> If anything, the ICC and the TFV are generally represented by their supporters as heroic attempts to fly to the rescue of victims, not acts of penitent contrition by the international community for its faults in allowing victims to become victims.

Nor is there any suggestion that the TFV might have as one of its bases the liability of some states for failure to prevent international crimes. It is true that the idea of the "responsibility to protect" in international human rights law now increasingly makes states responsible not only for the acts of previous governments, but also for the harm inflicted by non-state actors which they failed to prevent.<sup>251</sup> The drafters of the Rome Statute swiftly excluded proposals that would have tied the TFV to findings of state responsibility,<sup>252</sup> and there is at present no clear indication that

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9/11 victims who chose to forgo litigation in favor of compensation sacrificed important nonmonetary goals).

247. See, e.g., Robert. S. Ondrovic, *Municipal Tort Liability for Criminal Attacks Against Passengers on Mass Transportation*, 12 FORDHAM URB. L.J. 325 (1984).

248. See generally Susan S. Kuo, *Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence*, 79 IND. L.J. 177 (2004).

249. SULIMAN BALDO & LISA MAGARRELL, INT'L CTR. FOR TRANSITIONAL JUSTICE, REPARATION AND THE DARFUR PEACE PROCESS: ENSURING VICTIMS' RIGHTS 15 (2007), available at <http://www.ictj.org/images/content/8/8/886.pdf>.

250. Although attempts to "sue" the international community via some of its representatives have existed, in a register that is perhaps closer to political agitation than serious litigation. See generally OLIVIER RUSSBACH, *ONU CONTRE ONU: LE DROIT INTERNATIONAL CONFISQUÉ* (1994).

251. For an application in the case of Sudan, see BALDO & MAGARRELL, *supra* note 249, at 12–14.

252. SHELTON & INGADOTTIR, *supra* note 16, at 26 n.32; Michael Bachrach, *The Protection and Rights of Victims Under International Criminal Law*, 34 INT'L L. 7, 18 (2000).

states should “assume any shortfall if perpetrators are insolvent.”<sup>253</sup> The operation of the Court itself is entirely bound to the notion of individual criminal responsibility, and no link is anticipated with an institution of state responsibility such as the ICJ. The TFV clearly has no power to order states to pay compensation, and it is hard to see how “voluntary contributions” by such states to the TFV could be seen as an admission of responsibility unless—which is highly unlikely—a state were to explicitly say as much. In practice, were there to be suggestions that voluntary contributions are a back door to responsibility, states would probably do everything they could to dispel that idea. This, of course, does not exclude state or even international institutions’ responsibility, but these will have to be sought in other fora, and are distinct from what the Rome institutions are about.<sup>254</sup>

If the issue were one of responsibility, the international community would most likely direct attention away from itself and towards the state that either committed international crimes or allowed them to be committed. In fact, it is already quite clear that responsibility has no more real role to play in compensation internationally than it did domestically. The ICC/TFV regime might even limit victim actions in responsibility (under tort, administrative, or international law) by providing them with enough compensation to take their attention away from the responsible state.<sup>255</sup> What is striking is how small a role strictly legal principles seem to play in the genesis and functioning of the TFV.

*F. Rights Rationale: The TFV and the Right to Reparation and/or Assistance*

An alternative to seeing victim compensation based on some form of even implicit negligence liability is to see it as flowing from a “right,” even a human right. The reasoning is that regardless of fault, the state should act as the ultimate guarantor of a victim’s right to compensation. The focus is not on liability and the very complex problems it raises, but on the harm and the absolute need for some sort of remedy. The beauty of rights reasoning, therefore, is that it may open the way to an absolute

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253. Ioana-Alina Apreotesei, *The Victims of the Crimes Under the Jurisdiction of the International Criminal Court—Some Aspects of Legal Responsibility*, 4 MISKOLC J. INT’L L. 95, 103 (2007).

254. There is no provision in the Rome Statute that would allow the Court to discuss state responsibility for the crimes involved, even though dealing with former heads of state may indirectly have that effect.

255. If victims obtain a satisfying level of compensation from the TFV, one might expect that this would relieve some of the pressure bearing on the state, a somewhat strange situation given the statute’s position in favor of complementarity.

responsibility of the state (or whatever state substitute) to either guarantee reparations or provide assistance, whilst avoiding complex and politically sensitive issues of liability. Margery Fry notably relied on rights arguments to justify the implementation of victim compensation programs.<sup>256</sup> Some scholars have argued that a “justice model,” emphasizing victims’ rights to compensation, is preferable to the voluntary “needs-based” approach.<sup>257</sup> There is occasional talk of a “right not to be a victim,”<sup>258</sup> and rights discourse has had powerful effect in shaping the political side of victims’ efforts at recognition.<sup>259</sup>

Some jurisdictions—New Zealand and Northern Ireland, for instance—have compensation schemes that recognize a duty to compensate victims based on a victim’s rights.<sup>260</sup> Some also argue that New Jersey, because of its Crime Victims Bill of Rights, is the state that comes closest to recognizing a right to a remedy against the state for the commission of crimes.<sup>261</sup> Courts occasionally recognize that the fact that the

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256. Fry, *supra* note 32, at 193–94.

257. See generally R. I. Mawby, *Victims’ Needs or Victims’ Rights: Alternative Approaches to Policy-Making*, in *VICTIMS OF CRIME: A NEW DEAL?* 127 (Mike Maguire & John Pointing eds., 1988).

258. See generally Richard L. Aynes, *Constitutional Considerations: Government Responsibility and the Right Not to Be a Victim*, 11 *PEPP. L. REV.* 63 (1984).

259. See Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims’ Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 *BAYLOR L. REV.* 1 (1997) (assessing campaigns to adopt constitutional amendments protecting victims’ rights at the state and federal level); Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah’s Victims’ Rights Amendment*, 1994 *UTAH L. REV.* 1373 (1994) (sympathetically reviewing Utah’s Victims’ Rights Amendment); Paul G. Cassell, *Barbarians at the Gates? A Reply to the Critics of the Victims’ Rights Amendment*, 1999 *UTAH L. REV.* 479 (1999) (analyzing objections to a federal Victims’ Rights Amendment and concluding they are unsupported); Sue Anna Moss Cellini, *The Proposed Victims’ Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 *ARIZ. J. INT’L & COMP. L.* 839 (1997) (arguing for the adoption of a Victims’ Rights Amendment to the U.S. Constitution); Ken Eikenberry, *The Elevation of Victims’ Rights in Washington State: Constitutional Status*, 17 *PEPP. L. REV.* 19 (1989) (describing the achievements of the crime victims’ movement in Washington State, including a state constitutional amendment); Robert P. Mosteller, *Victims’ Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 *GEO. L.J.* 1691 (1997) (arguing against adoption of a Victims’ Rights Amendment to the U.S. Constitution); Marlene A. Young, *A Constitutional Amendment for Victims of Crime: The Victims’ Perspective*, 34 *WAYNE L. REV.* 51 (1987) (explaining the trauma of victimization and the need for a federal Victims’ Rights Amendment as one reform effort that could help alleviate such trauma).

260. See LeRoy L. Lamborn, *The Propriety of Governmental Compensation of Victims of Crime*, 41 *GEO. WASH. L. REV.* 446, 448–49, 463 (1973).

261. See Elias, *The Symbolic Politics of Victim Compensation*, *supra* note 159, at 217, 220.

state offers compensation creates a right to such compensation for victims who fit the criteria.<sup>262</sup> Moreover, some US states, such as Hawaii, anticipate an annual appropriation for awards already made, which again suggests something close to a guarantee.<sup>263</sup> The fact that in some jurisdictions victim compensation schemes are administered by courts (e.g., Northern Ireland, Massachusetts, New South Wales, and Queensland), also reinforces the sense that public compensation is, by nature, an entitlement.<sup>264</sup>

However, overall, rights-based approaches have not fared very well domestically and are considered to generally offer a poor rationale for compensation schemes.<sup>265</sup> As Kent Roach put it, rights discourse has been used “as both a rhetorical and a legal device,” but “the assertion of rights is not the whole or perhaps the most important part of recognizing and respecting crime victims.”<sup>266</sup> States are often fearful of opening the floodgates and resist attempts to legally rigidify the grounds of compensation.<sup>267</sup> Moreover, strong fears have been expressed, more generally, about framing the position of victims in the criminal justice system as one of rights,<sup>268</sup> which unavoidably affects the way compensation itself

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262. *Criminal Injuries Comp. Bd. v. Gould*, 331 A.2d 55, 71 (Md. 1975); Elias, *The Symbolic Politics of Victim Compensation*, *supra* note 159, at 217, 220.

263. HAW. REV. STAT. § 351–70 (2010).

264. See Duncan Chappell, *The Emergence of Australian Schemes to Compensate Victims of Crime*, 43 S. CAL. REV. 69, 69 (1970) (noting that at the time, New South Wales and Queensland were the only compensation jurisdictions with provisions for court administration).

265. Smith, *supra* note 140, at 63 (“Very few [American] states have adopted the rights theory as the basis of their compensation scheme. . . . [Perhaps] because the adoption of a rights theory as a rationale for a victim compensation program would not allow for the realities of implementing such a program.”); Chappell, *supra* note 264, at 76–82 (exploring critiques of the Australian rights-based compensation schemes).

266. KENT ROACH, *DUE PROCESS AND VICTIMS’ RIGHTS: THE NEW LAW AND POLITICS OF CRIMINAL JUSTICE* 231 (1999).

267. Smith, *supra* note 140, at 63.

268. See Andrew J. Karmen, *Who’s Against Victims’ Rights? The Nature of the Opposition to Pro-Victim Initiatives in Criminal Justice*, 8 ST. JOHN’S J. LEGAL COMMENT 157 (1992) (examining the bases for opposition to a rights-based victims movement); Rachel King, *Why a Victims’ Rights Constitutional Amendment Is a Bad Idea: Practical Experiences from Crime Victims*, 68 U. CIN. L. REV. 357 (2000) (arguing that a federal Victims’ Rights Amendment would be a step down a slippery slope back toward a system dominated by personal vengeance); Robert P. Mosteller, *The Unnecessary Victims’ Rights Amendment*, 1999 UTAH L. REV. 443 (1999) (arguing that a federal Victims’ Rights Amendment is both unnecessary and dangerous to essential procedural protections for defendants); Robert P. Mosteller & H. J. Powell, *With Disdain For The Constitutional Craft: The Proposed Victims’ Rights Amendment*, 78 N.C. L. REV. 371 (2000) (arguing that the federal Victims’ Rights Amendment is a poorly developed measure not worthy of

is understood. "Assistance" is even less susceptible to analysis in terms of rights,<sup>269</sup> although it is not inconceivable that some victims would come to see it as such.

Internationally, the situation, or at least the normative starting point, is different and, perhaps a little paradoxically, more dominated by notions of rights. This is because of the way in which the international victims' regime<sup>270</sup> was constructed: not so much as a prudent move towards recognizing the legitimacy of certain legislative claims based on available resources, as a full-blown trumpeting of a "right to reparation," especially in cases of grave human rights violations (which international crimes generally entail). The UN, in particular, laid the groundwork for a strong international regime, recognizing a right to an effective remedy.<sup>271</sup> One of the corollaries of such a right, outlined in several key UN soft law instruments, is an increasingly recognized right to reparation.<sup>272</sup>

The question is, of course, who is to be the guarantor of that right to reparation? In a sense, it was relatively easy for international institutions to encourage the logic of a "right to reparation" since the duty to com-

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constitutional recognition); Ahmed A. White, *Victims' Rights, Rule of Law, and the Threat to Liberal Jurisprudence*, 87 KY. L.J. 357 (1998) (arguing that the victims' rights agenda contradicts and undermines the rule of law); cf. Richard E. Wegryn, *New Jersey Constitutional Amendment for Victims' Rights: Symbolic Victory?*, 25 RUTGERS L.J. 183 (1993) (predicting that although the New Jersey Constitutional Amendment for Victims' Rights creates the opportunity to interfere with the rights of criminal defendants, its actual effect will be merely symbolic).

269. Existing "humanitarian" funds providing assistance typically do not include formal claims processes or judicial review. See THE REDRESS TRUST & FORENSIC RISK ALLIANCE LTD., THE INTERNATIONAL CRIMINAL COURT'S TRUST FUND FOR VICTIMS: ANALYSIS AND OPTIONS FOR THE DEVELOPMENT OF FURTHER CRITERIA FOR THE OPERATION OF THE TRUST FUND FOR VICTIMS 35 n.134 (2003), available at <http://www.redress.org/downloads/publications/TFVReport.pdf>.

270. In this context "international victims' regime" is meant to refer not only to victims of international crimes but also to victims of ordinary crimes and of human rights violations. See *infra* note 272.

271. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 8, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("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.").

272. See generally UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 49; UN 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, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Mar. 21, 2006); U.N. Econ. & Soc. Council, Comm'n on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, ¶¶ 31-34, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005) (Diane Orentlicher).

pensate is assumed primarily by the state. However, proclaiming a right to reparation might also bind the international community when it creates its own institutions of international criminal justice, especially when the state most directly concerned defaults on its obligation. In the context of international criminal justice, if the convicted individual cannot pay the ordered reparation, a glaring gap appears that in theory, should be filled by the state that was involved in or tolerated the crimes. The problem is that the state is often not willing or able to prosecute the person in the first place, and is probably therefore also unwilling or unable to pay reparation to victims.<sup>273</sup> Perhaps, having proclaimed reparation as a human right and set up an institution such as the Court that magnifies a sense of entitlement to reparation and assistance, pressure will come to bear on the state parties to the Rome Statute to guarantee that the right to reparation is not turned into a mockery by the cumulative indigence of defendants and unwillingness of the state concerned. At any rate, it may be difficult for an international institution like the TFV, which is immersed in all the best intentions of international law, to claim that it has no role in guaranteeing an internationally protected right.

The idea of the “international community” acting as a “super-guarantor” of a right to reparation, in the same way some domestic victim compensation schemes were originally conceived, is interesting but hardly the most plausible way to describe the TFV’s role. It is true that the TFV has provisioned money to complement reparations made by the convicted in order to respond to the full amount of the harm suffered by victims,<sup>274</sup> in accordance with emerging ICC priorities. However, as has been pointed out, it is also difficult to see what the TFV will do if reparations are ordered which go far beyond monies provisioned for that purpose, or even beyond its budget. If the TFV does not consider itself bound to provide compensation on the basis of reparation logic, then it is probably even more unlikely that it would be willing to do so merely on the basis of rights. The argument in that case would probably be that the right should be exercised against the state normally responsible for guaranteeing rights. The idea that assistance, as opposed to reparation, might be a matter of right is even less convincing, especially given the absence of any recourse to victims if such assistance is denied. There is something too discretionary about the operation of the TFV to see it as a strictly rights-based institution.

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273. On the rather perverse logic of relying on the state to effect compensation when the whole point of international criminal justice is that the state is not fulfilling its role, see Dannenbaum, *supra* note 18, at 295–96.

274. See *supra* note 94.



*G. Political Theory Rationale: The TFV as Honoring a Social Contract*

Given the failure, or at least the severe limitations, of a legal responsibility or rights-based theory of publicly funded compensation schemes, more general theoretical grounds for compensation have been sought. The advantage of seeking a ground for the obligation that is more abstract in nature is that it avoids the legal pitfalls inherent in framing the issue as one of responsibility or right. One common justification of this sort relies on social contract theory and the idea that the state, having bound itself to guarantee security within its borders, is liable for any breach of that contract.<sup>275</sup> Given that “the king usurped the right of the citizen to restore equilibrium after a crime had been committed,”<sup>276</sup> the state should endorse that responsibility to the fullest extent. The idea of the social contract as a foundation for security against crime is not purely theoretical since, for example, citizens pay taxes which in part go to essential aspects of fulfilling this contract, such as law enforcement.

It follows that the state should shoulder the costs of crime, regardless of whether actual negligence by it or its agents was involved, simply by virtue of having usurped alternative means of dealing with crime.<sup>277</sup> Another way of looking at it is that the right to compensation, if it exists, results from a strong representation by the state about its ability to provide security. “After all,” suggests Margery Fry, “the State which forbids our going armed in self-defence cannot disown all responsibility for its occasional failure to protect.”<sup>278</sup> The idea is that the state is liable for all its failures to provide security because otherwise, citizens might be better served by seeking justice themselves. It is perhaps no surprise that amongst the most enthusiastic defenders of victim compensation were nineteenth century Italian criminologists, who were little impressed by the emerging Italian state’s ability to protect society from crime.<sup>279</sup>

The argument is made more potent by the fact that provision of security against interpersonal violence goes to the heart of the state’s traditional significance. For example, the state is obviously not guaranteeing people against earthquakes or even against all forms of private criminality, but it might at the minimum be able to protect them against particular-

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275. Childres, *supra* note 25, at 456; Hudson, *supra* note 110, at 31–32.

276. Stephen Schafer, *Victim Compensation and Responsibility*, 43 S. CAL. L. REV. 55, 58 (1970) (internal quotation marks omitted).

277. ELIAS, VICTIMS OF THE SYSTEM, *supra* note 20, at 24.

278. Fry, *supra* note 32, at 193.

279. See *supra* note 27 and accompanying text.

ly rampant forms of crime.<sup>280</sup> This is because the state, having claimed a legitimate monopoly of the means to deal with violence, is in a sense always broadly “responsible,” even if by omission, for the occurrence of crime.<sup>281</sup> For example, in the US context, Childres has pointed out as a justification for compensation schemes, “the remarkable unresponsiveness of American institutions to the causes of crime, whether they be minority group ghettos, other slums, dope-addiction, organized crime, or an irrational tradition of violence.”<sup>282</sup> The move, for the purposes of compensation, to a notion of absolute liability for the occurrence of crimes in some contexts also suggests that one has moved away from a traditional liability model to the triggering of a sort of “guarantee.”<sup>283</sup> The European Convention on the Compensation of Victims of Violent Crimes, for example, introduces “the principle of State responsibility for crime” as one of its cornerstones, suggesting that “the State is bound to compensate the victim because . . . it has failed to prevent the crime by means of effective criminal policy” or “it introduced criminal policy measures which have failed.”<sup>284</sup>

It should be noted that these arguments have been criticized as not necessarily implying anything like a right to remedy. As David Miers puts it, “[a]llowing that the state has an obligation to protect its citizens says no more than that it should provide a fair share of what might reasonably be allocated to such public goods . . . as law enforcement.”<sup>285</sup> Moreover, one might make the argument that absolute liability goes too far and that the obligation can only be one of means (doing everything reasonably possible) and not one of result (guaranteeing that no crime is committed). In other words, the mere occurrence of crime does not imply a violation of the State’s basic duties in the absence of some significant shortcoming.<sup>286</sup> One might also argue that overall, citizens are better off having

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280. Obligations taken on by the state to protect its citizens often have constitutional implications. See generally Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 *Duke L.J.* 507 (1991).

281. See ELIAS, *VICTIMS OF THE SYSTEM*, *supra* note 20, at 24–25.

282. Childres, *supra* note 25, at 456.

283. For a discussion of several regimes making public authorities liable for crime and the link to victim compensation, see Aynes, *supra* note 258, at 110–15.

284. Council of Eur., Explanatory Report for the Convention on the Compensation of Victims of Violent Crimes, ¶ 9 (1984), available at <http://conventions.coe.int/treaty/en/Reports/Html/116.htm>.

285. Miers, *Looking Beyond Great Britain*, *supra* note 193, at 339.

286. For example, the Home Office Working Party that investigated the creation of a British compensation scheme describes the idea as “a ‘fallacious and dangerous doctrine’” on the grounds that “‘the State could not possibly protect its citizens from attack at all times and all places.’” ATIYAH & CANE, *supra* note 13, at 253. Similarly, the British

relinquished means of private self-defense, and thus, the state does not particularly owe them anything.<sup>287</sup> Still, broad brush social contractarian arguments in favor of compensation schemes do capture the unique political responsibility of those entities that purport to provide security to others.

Are such theories applicable to the international context and, specifically, that of the Rome institutions' efforts towards victims?<sup>288</sup> This is a slightly speculative matter, and one that must draw on the registers of both jurisprudence and policy. There is nothing obvious about the idea of an international social contract. One might even want to stay away from the idea as much as possible as smacking too much of the domestic, not to mention the problematic liberal, conceptual baggage.<sup>289</sup> The difference from a domestic social contract argument (if one were to push it a little) is that the international community is obviously not a state and has not "taken over" in terms of security (at least far from comprehensively). Even if one could discern the contours of a theoretical contract (or, perhaps more precisely, a compact), one would still be faced with a distribution of power and responsibility that is much more complicated than the most complex of federal arrangements.

Still, one key element of the idea behind the social contract conceit is that a representation is being made to citizens that certain fundamentally harmful events will not happen, or at least that everything possible will be done to prevent them from happening. There are inklings that suggest the international community has made, over the years, such a representation. In addition to the UN Charter and the Universal Declaration of Human Rights and a resounding "never again" after the Holocaust, most states have made a solemn undertaking to "prevent and to punish" genocide<sup>290</sup> and to "respect and ensure respect" of the Geneva Conventions.<sup>291</sup>

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Government insisted that "there is a distinction between compensation for the consequences of civil riot, which the forces of law and order may be expected to prevent, and compensation for injury by individual acts of personal violence, which can never be entirely prevented." Brock, *supra* note 147, at 99 (quoting HOME OFFICE, COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, 1961, Cmnd. 1406 (U.K.)).

287. See Brock, *supra* note 147, at 99 n.34.

288. See, e.g., Rome Statute, *supra* note 2, arts. 75, 79.

289. See Martha C. Nussbaum, *Beyond the Social Contract: Capabilities and Global Justice*, 32 OXFORD DEV. STUD. (2004) (discussing the problematic character of social contract theories in the global realm).

290. Convention on the Prevention and Punishment of the Crime of Genocide, art. 1, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

291. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 1, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Ship-

Even if it is not, and does not want to be, a substitute for the state, the “international community” has arguably assumed a role as a last-resort guarantor of human security, especially (if not only) when it comes to international crimes.

This is increasingly evident in such internationally promulgated concepts as the “Responsibility to Protect” (“R2P”).<sup>292</sup> The idea is that human beings’ fundamental security should not depend, ultimately, on the state one happens to be under the jurisdiction of, and that the international system will transcend its own reluctance to intervene in extreme circumstances where not to do so would lead to severe human destruction.<sup>293</sup> The international community came close on several occasions to recognizing a form of systemic and residual responsibility for atrocities that were committed but could have been averted.<sup>294</sup> The case is particularly strong where the general promise to avoid the commission of crimes was renewed to the victims themselves, sometimes on the ground, and where the international community grossly failed those who entrusted their security in its hands.<sup>295</sup> It is made particularly dramatic if the victims, trusting the international community to intervene on their behalf, have relinquished other efforts to protect themselves from harm.<sup>296</sup>

A link, nonetheless, needs to be established between something that the international community did or failed to do and the commission of international crimes. Can the mere occurrence of genocide or war crimes on a mass scale reflect, to use the language of Childres, something like a “remarkable unresponsiveness”<sup>297</sup> by the international community? This is a

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wrecked Members of Armed Forces at Sea, art. 1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

292. See generally Gareth Evans & Mohamed Sahnoun, *The Responsibility to Protect*, FOREIGN AFF., Nov./Dec. 2002, at 99.

293. See RICHARD H. COOPER & JULIETTE VOÏNOV KOHLER, *Introduction to RESPONSIBILITY TO PROTECT: THE GLOBAL MORAL COMPACT FOR THE 21ST CENTURY* 1, 2–5 (Richard H. Cooper & Juliette Voïnov Kohler eds., 2009).

294. INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* 19–20 (2001).

295. See, e.g., DAVID ROHDE, *ENDGAME: THE BETRAYAL AND FALL OF SREBRENICA, EUROPE’S WORST MASSACRE SINCE WORLD WAR II* 46 (1997) (describing General Morillon’s famous promise to the Bosnians of Srebrenica in 1993 that they were “under the protection of the United Nations” and would “never [be] abandon[ed].”).

296. See Alan J. Kuperman, *The Moral Hazard of Humanitarian Intervention: Lessons from the Balkans*, 52 INT’L STUD. Q. 49 (2008) (discussing Bosnia and Kosovo as two examples of the moral hazard created by the emerging “Responsibility to Protect” norm).

297. Childres, *supra* note 25, at 456.

complex debate, but there is no doubt that the international community itself is deeply aware of its own limitations and responsibilities in the field of crime prevention<sup>298</sup> and that genocides have occurred as a result of all sorts of contextual factors for which international criminal tribunals do not begin to do justice.<sup>299</sup> The international community has, despite progress, failed in its meager efforts at both prevention and repression, and there remains a big gap between the theory and the reality of R2P.

It remains to be seen whether this sense of honoring a commitment to human security—defined minimally here as freedom from the worst type of crimes—will in any way frame contributions to the TFV. For example, if the Assembly of States Parties moved towards a more mandatory form of contribution (such as a fixed percentage of the court budget), then it might be seen as taking a step towards endorsing a notion of international communal responsibility. One can also imagine more subtle scenarios in which the state where the crimes were committed would, in the course of a transition, make a donation to the TFV that could be interpreted as the expression of a “moral obligation to contribute to the reparation of certain crimes” in a situation where it is nonetheless “not legally responsible under the Rome Statute.”<sup>300</sup>

The truth, though, seems to be that the state parties, not to mention the international community at large, seem far from endorsing a strong commitment to guarantee reparation on the basis of some form of implicit global social contract.<sup>301</sup> There has been no suggestion that donations should be anything but voluntary. If anything, despite its failings in Con-

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298. See *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, 30–52, in U.N. Secretary-General, Letter dated Dec. 15, 1999 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/1999/1257 (Dec. 16, 1999) (Ingvar Carlsson, Rufus M. Kupolati & Han Sung-Joo); U.N. Secretary-General, *Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica*, ¶¶ 488–506, U.N. Doc. A/54/549 (Nov. 15, 1999).

299. It is quite clear that although no genocide is ever committed without the decisions of a few locally situated individuals, a larger societal and systemic responsibility always exists. For example Srebrenica might be seen mostly as the doings of Karadzic (ICTY), or of Serbia (ICJ), of the Dutch contingent (Dutch parliamentary commission), or of the UN, or of the international community at large.

300. SHELTON & INGADOTTIR, *supra* note 16, at 19.

301. There is an increasing recognition of the international community's responsibility in ensuring that grave crimes are prosecuted, but this is a sort of functional responsibility rather than one that is based on recognition of the role of the international community in allowing these crimes to happen in the first place.

go, the UN has acted quite defiantly towards the ICC<sup>302</sup> and has not contributed anything to the TFV. The TFV does not, in fact, “guarantee” anything and the belief is that major crimes are committed first and foremost by individuals who are allowed to follow their course by particular states (rogue or collapsed), and the crimes are not the international community’s fault.<sup>303</sup>

#### *H. Humanitarian Rationale: the TFV as a “Public Charity”*

Some victim compensation schemes can be seen as manifesting a compassionate ethos, not so different from that of a charitable agency.<sup>304</sup> As one author put it in the Australian context, “The most satisfactory justification for a [victim compensation] scheme is a purely pragmatic one—that on humanitarian grounds the State should provide assistance to victims of crimes of violence, just as it helps the victims of other forms of misfortune.”<sup>305</sup> It has also been said that “the basis . . . probably of all compensation plans, is a charitable impulse to assist those who suffer misfortune.”<sup>306</sup> Early payments by compensation schemes were analyzed as “gratuities” or “public bounty.”<sup>307</sup>

Such a humanitarian inspiration may draw on general feelings of empathy towards victims, particularly after much publicized crimes. Humanitarianism goes a little further than mere charity in that it typically involves a sense of moral obligation to those suffering. Victim compensation schemes inspired by a humanitarian rationale are most likely to distance themselves from a strict reparations logic, in that the idea that one is granted reparations on the basis of charity is a contradiction in terms. Humanitarian justifications of victim compensation schemes emphasize

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302. For a discussion around some of the problems created by the UN’s reluctance to render certain information public in the context of ICC prosecutions, see Elena Baylis, *Outsourcing Investigations*, 14 *UCLA J. INT’L L. & FOREIGN AFF.* 121 (2009).

303. This is consonant with the view that the international “responsibility to protect” is only loosely so-called and does not create any actionable duty that would translate in something as concrete as guaranteed compensation. See Carsten Stahn, Note, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 *AM. J. INT’L L.* 99, 101–02 (2007).

304. Although generally deplored, the placement of victim compensation funds within welfare departments has often led to this perception. See, e.g., Gilbert Geis, *Experimental Design and the Law: A Prospectus for Research on Victim-Compensation in California*, 2 *CAL W. L. REV.* 85, 89 (1966).

305. Duncan Chappell, *Compensating Australian Victims of Violent Crimes*, 41 *AUST. L.J.* 3, 5 (1967).

306. Comment, *Compensation for Victims of Crime*, *supra* note 102, at 540.

307. See *id.* at 541.

the moral obligation of donors, whether private or public. There is no right to assistance, but it is good if some is provided.

It is plausible that some existing victim compensation schemes could be described as primarily humanitarian in purpose. The argument is sometimes made that “victims of crime quite frequently belong to a population stratum that can least afford the economic loss from crime.”<sup>308</sup> In particular, the less permanent schemes that receive funding on the basis of an outpouring of empathy provide handouts based primarily on generosity.<sup>309</sup> Giving to victims is not seen as an obligation in any strongly normative or formal sense, but as an act of virtue by donors. Some victim compensation funds, such as the September 11th Fund (not to be confused with the September 11th Victim Compensation Fund) set up by the New York Community Trust and United Way of New York City, collected more than \$500 million from more than two million donors and could be described as essentially an outpouring of ad hoc charity.<sup>310</sup> Responding to criticism that compensation following the July 7 attacks in London was insufficient, defenders of the scheme argued that the sums received should not be seen as representing the value of the lives lost but as merely expressing “a token of public sympathy.”<sup>311</sup> The fact that in some cases judicial review of the awards given through compensation schemes is excluded (e.g., in New York and Maryland) reinforces the sense that contributions are *ex gratia* and not susceptible to challenges.<sup>312</sup> Several US state legislatures have underscored that they hold, at most, “a moral responsibility” to assist crime victims while rejecting any stricter form of liability.<sup>313</sup> Internationally, it is noteworthy that the preamble to

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308. Mueller, *supra* note 190, at 234.

309. For example, several 9/11 initiatives were clearly charitable, *see* DIXON & STERN, *supra* note 56, at 68–69, 78–79, although whether they can be construed as part of a victim compensation paradigm is debatable.

310. THE SEPTEMBER 11TH FUND, <http://www.september11fund.org/press.php?id=120804> (last visited Sept. 25, 2010). The same can be said of the London Bombings Relief Charity Fund, which attracted £8m. *London Bombings Relief Fund Approaches £8m*, GREATER LONDON AUTHORITY (Aug. 3, 2005), [http://www.london.gov.uk/media/press\\_releases\\_mayoral/london-bombings-relief-fund-approaches-%C2%A38m](http://www.london.gov.uk/media/press_releases_mayoral/london-bombings-relief-fund-approaches-%C2%A38m).

311. *London Victims Compensation Row*, BBC NEWS (Aug. 3, 2005, 3:57 PM), [http://news.bbc.co.uk/2/hi/uk\\_news/4741579.stm](http://news.bbc.co.uk/2/hi/uk_news/4741579.stm) (internal quotation marks omitted).

312. Frederick Chandler Bragdon, *State Appellate Court Interpretations of Victim Compensation Statutes*, 10 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 87, 107–108 (1994) (noting that New York and Maryland do not recognize a right to judicial review if the statute grants compensation as a “matter of grace”).

313. *See, e.g.*, FLA. STAT. ANN. § 960.02 (West, Westlaw through 2010 Second Regular Legis. Sess.) (“[I]t is the intent of the Legislature that aid, care, and support be

the UN Voluntary Fund for Victims of Torture “recogniz[es] the need to provide assistance to the victims of torture *in a purely humanitarian spirit*.”<sup>314</sup> In a way, that provision seems designed to deny any sense of donor obligation.

The humanitarian rationale is, nonetheless, an insufficient characterization of most domestic compensation schemes. As one author put it “[c]haritable institutions have never adopted a consistent policy toward victims of crime and, in light of the competing demands for their funds, to expect them to provide an effective solution to the problem is optimistic.”<sup>315</sup> Although victim compensation schemes may draw loosely on public generosity, they are not reducible to it. They are, to begin with, mostly publicly funded schemes and, therefore, integrated within the workings of the state. Although the public may support the work and think it falls within the duties of an empathetic state, compensation schemes are financed by taxation or public income, not donations from the general public. However incomplete compensation may be, and although it may not be quite what victims might expect, it is typically granted on the basis of rules that emphasize the equality of all victims and their equal claim in case of equal harm to the resources of the scheme. In other words, unlike in a purely charitable arrangement, there is an “air of entitlement” about the assistance given.<sup>316</sup> In fact, suggesting that victims receive charity may be “demeaning, unreliable, and inequitable.”<sup>317</sup> The existence of public compensation funds is also generally held to be in tension with private charitable initiatives, in those rare cases where the two co-exist.<sup>318</sup>

The idea of charity is a more plausible explanation for the TFV than it is in the domestic setting, because naturally, it is less expected internationally for an entity to assume the role of the state in relation to the consequences of crime. First and foremost, contributions to the TFV are voluntary.<sup>319</sup> There is no “international community” budget that would be

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provided by the state, as a matter of moral responsibility, for such victims of adult and juvenile crime.”).

314. United Nations Voluntary Fund for Victims of Torture, *supra* note 51, pmb. (emphasis added).

315. Lamborn, *supra* note 260, at 456.

316. See, e.g., Peter Burns & Alan M. Ross, *A Comparative Study of Victims of Crime Indemnification in Canada: British Columbia as Microcosm*, 8 U. BRIT. COLUM. L. REV. 105, 124 (1973); Weeks, *supra* note 33, at 119 (indicating that the New Zealand scheme is structured in part upon the principle of comprehensive entitlement).

317. ELIAS, VICTIMS OF THE SYSTEM, *supra* note 20, at 22.

318. See Robert A. Katz, *Too Much of a Good Thing: When Charitable Gifts Augment Victim Compensation*, 53 DEPAUL L. REV. 547 (2003).

319. See *supra* note 9 and accompanying text.



regularly set aside to compensate victims of atrocities. The fact, as discussed above, that it is hard to tie compensation to a theory of obligation (on the part of the donors) or entitlement (on the part of the victims), makes it tempting to characterize compensation as the expression of a fundamental generosity of donors and the TFV. The TFV falls quite close to a charity, moreover, by accepting donations from private individuals,<sup>320</sup> donations which are probably not that different from the ones the same actors might make to, for example, UNICEF or Oxfam. The TFV is, for all intents and purposes, already profiling itself on the donor market and objectively competing with other aid distributors.<sup>321</sup> The fact that private donors (unlike public ones) can earmark a third of their contributions for specific projects of the TFV suggests that donor priorities are given relatively strong recognition, a feature characteristic of charitable arrangements.<sup>322</sup> Moreover, not only is donating *to* the TFV discretionary, but so are donations *by* the fund. The TFV has considerable discretion, which suggests it might emerge as a sort of benevolent but perhaps somewhat capricious patron.

However, there is something problematic about portraying the TFV as a “charity.” First, the TFV board is itself quite adamant that it is not a “charity.”<sup>323</sup> What it means by that is not clear, but the impression is that the Board sees the Fund as more solemn, public, and institutional than a charity would be. Assistance by the TFV is, if not a right, given as a form of fundamental institutional recognition of harm. Moreover, it is granted

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320. See *Make a Donation to the Trust Fund for Victims*, INT'L CRIMINAL COURT, <http://www.icc-cpi.int/NR/exeres/FF1F3D9E-9830-46F5-8D37-7AA2217F8359.htm> (last visited Aug. 6, 2010).

321. For example, there are countless NGOs in the Democratic Republic of Congo involved in transitional justice or humanitarian work that is geared, in part at least, at victims of international crimes. The work of these organizations may in practice be hard to distinguish from that of the TFV. Moreover, it was recommended early on that a fundraising officer be appointed to the Trust Fund's Secretariat and that the Assembly of States Parties should make regular appeals to governments and other entities, a move very reminiscent of a private charity. *Coalition for the International Criminal Court's Budget and Finance Team Submission to the Second Session of the Assembly of States Parties (8-12 September 2003)*, COALITION FOR THE INT'L CRIMINAL COURT, ¶ 71–72, [http://www.iccnw.org/documents/Budget\\_ASP\\_Paper\\_2003.FINAL.pdf](http://www.iccnw.org/documents/Budget_ASP_Paper_2003.FINAL.pdf) (last visited Oct. 31, 2010).

322. By contrast, it is obviously not possible for tax payers to elect how their taxes are spent, except through the very general mechanisms of democracy.

323. *Report to the Assembly of States Parties on the Activities and Projects of the Board of Directors of the Trust Fund for Victims for the Period 1 July 2007 to 30 June 2008*, Trust Fund for Victims, 7th Sess., Nov. 14–22, 2008, ¶ 21, ICC-ASP/7/13 (Sept. 3, 2008), available at [http://www2.icc-cpi.int/iccdocs/asp\\_docs/ASP7/ICC-ASP-7-13%20English.pdf](http://www2.icc-cpi.int/iccdocs/asp_docs/ASP7/ICC-ASP-7-13%20English.pdf).

by an institution that is embedded in (even as it is independent from) the functioning of international criminal justice.<sup>324</sup> Although the Fund is typically discreet about whether it will use some of its funds to complement reparation awards, this remains a possibility that tinges its activities in a more rights oriented direction than the language of charity suggests. States themselves have not particularly framed their donations as charity (although it is true they have not framed their donations as much at all). Finally and perhaps most importantly, victims' groups in various countries where the TFV operates typically do not see themselves as "begging," but as expressing, in various complex ways, a loose entitlement to assistance even outside the legal framework of reparation.<sup>325</sup> Had the TFV merely been created as a further means of manifesting international donor virtue, it would no doubt have met a certain amount of ambivalence by victims and NGOs alike. In fact, if the TFV were entirely viewed as a charity, then it might as well have been created entirely independently of the Court and its existence within the Rome Statute framework would be harder to justify.

*I. Moral and Equitable Rationale: The TFV as Redresser of Imbalances*

One traditional justification for the creation of victim compensation schemes is simply a "moral, realistic concern for the welfare of the injured citizen."<sup>326</sup> That argument is sometimes expressed, particularly by victims' rights groups, as the need to redress the balance between the accused and the victims.<sup>327</sup> Although that argument can sometimes be injected with a taint of demagoguery, it rests on quite solid conceptual foundations and does raise complex questions, especially in an environment where the victim is wholly ignored. As Adolphe Prins famously put it at the Paris Prison Congress in 1895:

The guilty man lodged, fed, clothed, warmed, lighted, entertained, at the expense of the State in a model cell, issued from it with a sum of money lawfully earned, has paid his debt to society; he can set his vic-

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324. The TFV is formally an independent institution, but it has many organic links to the ICC. For example, the Fund may only disburse funds in relation to victims of crimes that fall within the jurisdiction of the Court and once the Prosecutor has opened an investigation. See TFV Regulations, *supra* note 9, para. 42.

325. For an analysis of victim attitudes to assistance generally, see Marlies Glasius, 'We Ourselves, We Are Part of the Functioning': *The ICC, Victims, and Civil Society in the Central African Republic*, 108 AFR. AFF. 49, 62–63 (2009).

326. LeRoy G. Schultz, *The Violated: A Proposal to Compensate Victims of Violent Crime*, 10 ST. LOUIS U. L.J. 238, 242 (1966).

327. See James E. Starrs, *A Modest Proposal to Insure Justice for Victims of Crime*, 50 MINN. L. REV. 285, 288–89 (1965).

tims at defiance; but the victim has his consolation; he can think that by taxes he pays to the Treasury, he has contributed towards the paternal care, which has guarded the criminal during his stay in prison.<sup>328</sup>

Typically, some victims protest that considerable resources are being spent on behalf of the accused to ensure a fair trial, while only very minimal resources are being spent on them, except, for example, to the extent that their protection needs to be guaranteed for the purposes of the criminal trial.<sup>329</sup> While victims may, more or less, gladly recognize the needs of the criminal trial and therefore the legitimate expenses associated with protecting the rights of the accused, they argue that this is no reason to deny them various forms of compensation and argue in favor of more equitable budget allocations.<sup>330</sup>

Another more profound rationale in the context of reparation is that there is no “moral merit” to having been the victim of a “rich” convict as opposed to a “poor” one and that all victims are equally deserving of reparation.<sup>331</sup> The fundamental inequity of not receiving reparation because one’s tormentor is insolvent suggests a strong ethical case for sharing that burden to “smooth out” the differences that would result otherwise. This is also an argument in favor of extracting the quest for reparation from the tortious context, where victims’ hopes might otherwise lie. In doing so, the system intends to signal that obtaining reparation for harm suffered as a result of crime differs from seeking civil remedies for ordinary harm. Rather than simply a private and relational issue between individuals, it involves more fundamental concerns of fairness, so that the usual justifications for victims shouldering the cost of tort litigation do not apply. As Garofalo once noted, “we are dealing here not with a question of private law, but with a matter of justice and social security.”<sup>332</sup> Victims seeking compensation for crimes, in other words, are entitled to such compensation without having to go through the nuisance of litigating, as if their harm was a purely private issue.

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328. STEPHEN SCHAFER, COMPENSATION AND RESTITUTION TO VICTIMS OF CRIME, at xiii (Patterson Smith Publ’g Corp. 1970) (1960) (quoting PARIS PRISON CONGRESS, SUMMARY REPORT (1895)).

329. See *Are Crime Victims Neglected by the Penal System?*, BBC (July 20, 2010, 10:27 AM), [http://www.bbc.co.uk/blogs/haveyoursay/2010/07/are\\_crime\\_victims\\_neglected\\_by.html](http://www.bbc.co.uk/blogs/haveyoursay/2010/07/are_crime_victims_neglected_by.html).

330. Evelle J. Younger, *Commendable Words: A Critical Evaluation of California’s Victim Compensation Law*, J. BEVERLY HILLS B.A., Mar.–Apr. 1973, at 12, 15.

331. For a discussion of this rationale in the context of punishment, see generally David D. Friedman, *Should the Characteristics of Victims and Criminals Count?: Payne v. Tennessee and Two Views of Efficient Punishment*, 34 B.C. L. REV. 731 (1993).

332. BARON RAFFAELE GAROFALO, CRIMINOLOGY 434–35 (Robert Wyness Millar trans., 1914).

Perhaps more fundamentally, being a victim means that one is, in most cases, innocent of anything that befell one. This fundamental innocence reinforces the moral case that the community should repair the inequity placed on a target of crime.<sup>333</sup> Whoever else is responsible for a crime (apart from the accused or the state), it is certainly not the victims' fault. The argument is further reinforced by the randomness of being a victim of violent crime (the "roulette" of crime).<sup>334</sup> Violent crime is in the order of a calamity, one that could befall any of us, with potentially ruinous consequences. To suggest otherwise might lead to an implication that one somehow contributed to being victimized, which is, in most cases, unfathomable. Crime is, in other words, a cruel sort of lottery that is particularly bereft of any moral meaning, except that by not seeking to correct it the state, in a sense, ratifies the injustice and gives it a sort of imprimatur.

This reasoning paves the way to the so-called "shared risk" rationale for having victim compensation schemes. Advocates of this approach point out that "[r]ather than force individuals to pay for having been victimized . . . everyone should share the risk engendered by society's ineptitude."<sup>335</sup> This position is sometimes analogized with the regime of products liability: "under modern products liability theory, the manufacturer is in the best position to absorb a loss by spreading it among all consumers by increasing prices. Similarly, the government is in the best position to disburse by taxation the losses incurred by victims of crimes."<sup>336</sup> More concretely, publicly financed victim compensation schemes might have a socially redistributive rationale in that they share the cost of crime with the whole of society where, in practice, certain groups are disproportionately vulnerable to it.<sup>337</sup>

Without going into any details, one could probably make a Rawlsian argument that behind a veil of ignorance (i.e., not knowing how susceptible to crime we might be), we would all opt for a system that compensated us for the consequences of crime.<sup>338</sup> Moreover, the moral case for

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333. Schultz, *supra* note 326, at 241–42.

334. *Id.* at 242.

335. Smith, *supra* note 140, at 67.

336. James Polish, *Rehabilitation of the Victims of Crime: An Overview*, 21 UCLA L. REV. 317, 348 (1973) (footnote omitted).

337. This is unlike tort litigation, which is often criticized for "deliberately reproduc[ing] the existing distribution of wealth and income." Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 799 (1990).

338. The "veil of ignorance" is occasionally mentioned in relation to debates about victim compensation. See Hayden P. Smith, *Violent Crime and Victim Compensation: Implications for Social Justice*, 21 VIOLENCE & VICTIMS 307, 314–15 (2006); Douglas E. Beloof, *Crime Victims' Rights: Critical Concepts for Animal Rights*, 7 ANIMAL L. 19, 24

compensation is made even stronger by the fact that whereas the harm to victims is considerable, the cost to spread across society is arguably not that great.<sup>339</sup> According to Bentham, for example:

This obligation of the public to furnish satisfaction is founded upon a reason that has the evidence of an axiom. A pecuniary charge divided among the mass of individuals is nothing to each contributor, in comparison with what it would be to an individual or a small number. . . . [I]t seems impossible to give too much extension to a means so ingenious, which renders real losses so slight, and which gives so much security against eventual evils.<sup>340</sup>

These equitable arguments undeniably had an impact in the ICC/TFV context. If the disproportion between the resources expended on the accused at the expense of victims is glaring domestically, it is even more so internationally. Certainly, in the context of the ICC the ratio of spending is deeply skewed against victims, even in the context of the current, relatively progressive scheme. For example, the average budget spent by international criminal tribunals on one accused runs in the hundreds of thousands of dollars,<sup>341</sup> while the TFV recently proudly heralded that it had spent on average five dollars on each victim.<sup>342</sup> Equitable arguments are bound to be taken up more frequently internationally, especially as victims increasingly organize themselves and become better informed. The argument that there is no merit to having been a victim of a “poor” as opposed to a “rich” convicted person also militates in favor of the TFV occasionally supplementing reparation payments by the con-

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(2001). This makes the creation of retrospective compensation funds, where the victims are already known, that much more exceptional. See Diller, *supra* note 160, at 738–39 (“This retrospective aspect of the [September 11th Victim Compensation] Fund sharpens the conflicts within it because there is no Rawlsian veil of ignorance that can be drawn over the entire matter. Every decision yields an identifiable set of winners and losers.”).

339. Fry, *supra* 32, at 193.

340. BENTHAM, THEORY OF LEGISLATION, *supra* note 146, at 317–18.

341. See David Wippman, Note, *The Costs of International Justice*, 100 AM. J. INT'L L. 861, 862 & n.11 (2006) (“Dividing the ICTY budget by the number of trials concluded produces a figure of some \$18 million per trial, but that figure omits the costs of proceedings related to individuals indicted but not tried and the costs related to cases now in progress.”).

342. See INT'L CRIMINAL COURT, TRUST FUND FOR VICTIMS (TFV) BACKGROUND SUMMARY 8–9 (2008), available at [http://www.icc-cpi.int/NR/rdonlyres/E582AE21-D718-4798-97ED-C6C9F0D9B42D/0/TFV\\_Background\\_Summary\\_Eng.pdf](http://www.icc-cpi.int/NR/rdonlyres/E582AE21-D718-4798-97ED-C6C9F0D9B42D/0/TFV_Background_Summary_Eng.pdf) (“According to the total budget and number of direct and indirect victims reached—the total costs per victim is €4.”).

victed.<sup>343</sup> The TFV also clearly has an internationally distributive dimension, in a context where, so far, all of the ICC's prosecutions center on Africa (which arguably suffers disproportionately from atrocity crimes) and the vast majority of state donors are Western countries.<sup>344</sup> Moreover, in the context of the ICC, the risk of such discrepancies also militates in favor of a policy of assistance rather than reparations-oriented compensation. Reparations have the disadvantage that they are only payable to the victims of the person convicted.<sup>345</sup> For example, one author has already warned against the risk in Uganda that "[m]any victims . . . stand to be excluded from the ICC reparations process for having suffered the 'wrong' crimes, committed by the 'wrong' perpetrators or at the wrong time."<sup>346</sup> Alternatively, assistance can be distributed to victims of "crimes" entering the Court's jurisdiction, rather than victims of criminals prosecuted by it.

Finally, the idea of the fundamental lack of victims' blameworthiness for their fate is quite cardinal in the context of international criminal justice. The fact that one lives in a region of the world where mass crimes are committed is entirely irrelevant to assessing whether one "deserves" compensation. There is, furthermore, an extra moral argument in the ICC/TFV context, which has to do with the hyper-selectivity of the Court's prosecutions and the fact that only very few accused will be tried.<sup>347</sup> Needless to say, there is nothing particularly morally relevant about having been a victim of a person convicted by the Court as opposed to any other person. At least when it comes to its autonomous resources, the TFV will probably see itself as having a clear mandate to "equalize circumstances" that will militate in favor of providing assistance to the many rather than reparations to the few. Indeed, moves to use its relatively scarce autonomous resources to supplement reparation orders in favor of a minority of "super-victims" might create strong resistance.

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343. *Victims Compensation and Participation: Judges' Report of 13 September 2000*, INT'L CRIMINAL TRIB. FOR THE FORMER YUGOSLAVIA, ¶ 3, <http://www.un.org/icty/pressreal/tolb-e.html> (last visited June 4, 2009).

344. See *Financial Info*, *supra* note 94.

345. See Mina Rauschenbach & Damien Scalia, *Victims and International Criminal Justice: A Vexed Question?*, 90 INT'L REV. RED CROSS 441, 452–53 (2008).

346. Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?*, 2 J. INT'L L & INT'L REL. 25, 27 (2005).

347. For an in-depth analysis of this selectivity, see ROBERT CRYER, *PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME* 191–326 (2005).

There is merit to this “equitable” account of the rationale for the TFV, but there are also problems with it. The argument that too many resources are being spent on the accused as opposed to victims is problematic because it suggests a zero-sum game, one where money spent on the criminal process is money taken away from victims. In practice, the arbitrage is much more complex, and victims may understand that procedural safeguards afforded to the accused, however costly they may be, ultimately protect their own interests. If anything, to properly assess whether the international community’s distributive priorities are indeed skewed in favor of the accused, the right framework should be that of overall international spending. For example, one would need to compare judicial spending on the accused with the *overall* international and domestic spending related to victim welfare and dignity in the same context.<sup>348</sup> The TFV itself, while it clearly seems to occupy a certain moral high ground (as exemplified, in particular, by the selection of a board composed of eminently respected individuals)<sup>349</sup> does not particularly portray itself in equitable terms.

*J. Welfarist Rationale: The TFV as an Expression of Solidarity*

In view of the fact that states are unlikely to recognize contributions to the TFV as a form of acknowledgment of responsibility or victim rights, or as a form of charity or moral compulsion, a middle ground rationale is the idea of welfare. Welfare is based on a sense of obligation, but one that results neither from the virtue of the donor or the complications associated with the language of legal responsibility. Rather, the fundamental logic of welfarist justifications might lie in an emphasis on the *needs* of victims.<sup>350</sup> Welfare oriented compensation schemes, in other words, are typically more associated with assistance than with reparations. Perhaps the strongest argument in this respect is that although full reparations may be ideal in theory, victims of grave crimes often cannot afford to wait to obtain those and should therefore be given assistance earlier rather than later.<sup>351</sup>

Domestically, there is no doubt that “social welfare theory” has featured strongly as a ground for compensating victims. It has been described by at least one author as “the most widely advocated basis for

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348. In practice, the TFV is obviously not the only actor involved in victim support in the contexts where it operates.

349. See *Board of Directors*, TRUST FUND FOR VICTIMS, <http://www.trustfundforvictims.org/board-directors> (last visited Nov. 2, 2010).

350. See Schafer, *Victim Compensation and Responsibility*, *supra* note 276, at 60–61.

351. See REIFF, *supra* note 113, at 162–63.

victim compensation.”<sup>352</sup> It is typically anchored in a strong concept of social solidarity which expresses the idea that compensation derives from the idea of “living together” and a collective assumption of risks (“clubbing together” as Margery Fry described it;<sup>353</sup> “communitarization” and “shared risk” as others have put it).<sup>354</sup> After the oft quoted passage that compensation is *ex gratia* and the insistence on absence of responsibility, the authors of the 1964 British compensation program noted, “[t]he public does, however, feel a sense of responsibility for . . . the innocent victim, and it is right that this feeling should find practical expression in the provision of compensation.”<sup>355</sup> The European Convention speaks of “social solidarity” as a ground for compensation.<sup>356</sup> The sense is that although the terms “responsibility” and “duty” may be used quite widely, “these responsibilities and duties derive from the conditions of modern society and the grace of the state, not from a legally recognized liability in the relationship between the state and its citizenry.”<sup>357</sup>

At a certain level, this view of compensation can be seen as taking seriously the idea that crime is committed against the *collectivity*. Where criminal justice traditionally uses that idea to craft a notion of crime as primarily an offense against the state which marginalizes victims, one can reverse the reasoning to suggest that it is precisely because crime affects the whole of society that society owes compensation.<sup>358</sup> As the British Home Office explained when the UK victim compensation scheme was being implemented, the

focus of concern is upon the common good and the idea that in the person of the victim a harm is done to society which he or she has no duty to bear alone. Accordingly compensation is a means by which the loss

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352. ELIAS, VICTIMS OF THE SYSTEM, *supra* note 20, at 25.

353. Fry, *supra* note 32, at 192.

354. Schultz, *supra* note 326, at 242 (“[C]ommon sense calls for grouping together for mutual protection through a system of shared risk in the area of victims of criminal violence.”).

355. HOME OFFICE, SCOTTISH HOME AND HEALTH DEPARTMENT, COMPENSATION FOR VICTIMS OF CRIMES OF VIOLENCE, 1964, Cmnd. 2323, ¶ 8 [hereinafter HOME OFFICE] .

356. European Convention on the Compensation of Victims of Violent Crimes, *supra* note 45, pmbl.

357. Galaway & Rutman, *supra* note 4, at 63.

358. Interestingly, Jeremy Bentham identified one of the “cases in which satisfaction ought to be a public charge. . . . [as] losses and misfortunes in consequence of hostilities.” He went on to argue that “[t]hose who have been exposed to the invasions of a public enemy have so much the clearer right to a public indemnity, since they may be considered as having sustained a shock which threatened all the citizens.” BENTHAM, THEORY OF LEGISLATION, *supra* note 146, at 320.



is distributed across society as a whole, so recognizing the reality of social existence and deepening a sense of community.<sup>359</sup>

This sort of rationale makes the most of an “embodied” concept of the common good, rather than considering that it always necessarily coincides with the interests of the state in having certain crimes punished.

Such a rationale is consistent with a view that sees crimes as an attack on society, but it then follows through by ensuring that all those affected (not personally, but as members of society) receive compensation (unlike traditional criminal law which used the conceit that crime was an attack on society and then avoided imposing any obligation on society in terms of assisting the victim). A central idea is that living in society involves risks that must be shared for the greater good of all. The welfare foundation of victim compensation schemes also draws on a quite different but related, paradoxical idea. This idea is that crime is not only meted against society but that it is in a sense also *produced* by social life itself—“the idea that to some considerable extent we as members of society make possible the conditions under which crimes are committed.”<sup>360</sup> Ascribing the occurrence of crime to society in general sets aside the vexed problem of state agency (Was the state negligent? Should it be liable merely as a result of a “social contract”?). There is something awkward, anyhow, about the social contract idea that the state “causes” the criminality that it fails to prevent.

The “social” origin of crime is both more plausible and fairer as a construct. It is, of course, tempting to say that crime is only the product of criminally-minded individuals but, without going into the whole freedom/determinism quarrel, it is fair to say that in a very literal sense, crime is produced by the fact of man living in society in a condition of perpetual interaction. This is the “sociological view” of crime, one that sees crime as being “the fault of society in general.”<sup>361</sup> If one endows society with a sense of agency, the claim becomes that in a fundamental sense, one “who suffers the impact of criminal violence is also the victim of society’s long inattention to equality and social justice.”<sup>362</sup> The result is that compensation is not simply a humanitarian or moral duty, but is

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359. HOME OFFICE, *supra* note 355, ¶ 8.

360. Frank W. Miller, Comment on the Proposal, *Compensation for Victims of Criminal Violence: A Round Table*, 8 J. PUB. L. 191, 208 (1959); J. L. Montrose, Comment on the Proposal, *Compensation for Victims of Criminal Violence: A Round Table*, 8 J. PUB. L. 191, 197–201 (1959).

361. ROGER E. MEINERS, VICTIM COMPENSATION: ECONOMIC, LEGAL, AND POLITICAL ASPECTS 2 (1978).

362. BHARAT B. DAS, VICTIMS IN THE CRIMINAL JUSTICE SYSTEM 66 (1997); *see also* Childres, *supra* note 25, at 456.

more generally an expression of public interest—of a society that in caring for those who have been victimized, cares for itself.

The welfare argument also accounts for why victims of crime specifically should be taken care of by society, as opposed to other categories of the population who are typically not protected from the ordinary vicissitudes of life, such as natural catastrophes. Victims of crime stand in the company of a number of other special categories created by welfare ideology, be they veterans, the unemployed, or the aged, who have been deemed worthy of solicitude for a variety of reasons.<sup>363</sup> An analogy is sometimes drawn, for example, between victim compensation schemes and worker compensation programs (“affording equal benefits to the man who falls from a ladder at work and the man whose enemy pushes the ladder from under him at home,” as Margery Fry reasoned with her characteristic wit).<sup>364</sup> The idea may be that one is being compensated for a man-made disaster (crime, unemployment) for which society, unlike natural catastrophes, feels at least minimally responsible.

There are several signs that this welfare logic has been very significant domestically in the development of victim compensation schemes. This is reflected, first, in the nature of what is contributed to victims. As in the humanitarian logic, the emphasis in many domestic compensation schemes is on assistance rather than reparation. However, assistance is often of the sort associated with welfare rather than charity and relief, and might include rehabilitation, training, or loans.<sup>365</sup> What matters is less the cause of the victim’s predicament (as with reparations), than the vulnerability of victims as persons, taking into account not just their present but also their future needs. In some cases, in a way reminiscent of many welfare schemes, compensation is “means tested,” so that the only victims who receive assistance are those facing, for example, “serious financial hardship.”<sup>366</sup> The idea is to help victims cope with expenses arising out of injuries, for which they are not already covered by any existing welfare services.<sup>367</sup> This also means that collateral recovery is generally prohibited so that one may not be compensated, for example,

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363. Galaway & Rutman, *supra* note 4, at 63.

364. Fry, *supra* note 32, at 192.

365. See Letschert & Ammerlaan, *supra* note 207, at 237.

366. This is the case, for example, in New York, Michigan, California, and Maryland. George E. Rejda & Emil M. Meurer, Jr., *An Analysis of State Crime Compensation Plans*, 42 J. RISK & INS. 599, 603–04 (1975); Greer, *supra* note 20, at 368–70.

367. See EDELHERTZ & GEIS, *supra* note 29, at 3–4, 13; Diller, *supra* note 160, at 728–31.

through both a public scheme and insurance payments.<sup>368</sup> This is quite different from the logic of reparations as of right, which are owed regardless of the means of the victim.

Second, the idea of welfare is also a ground for giving, which is not strictly humanitarian or compassionate. Victim compensation schemes stand somewhere between the idea of charity as a manifestation of donor generosity and reparation as a victim entitlement. Assistance flows neither from criminal, civil, or administrative responsibility, but from a sense of social obligation. Even though it will often be the case that “victims of crime do not have a substantive right to the benefits created,” they will typically have “an expectation of receiving those benefits” to the extent available.<sup>369</sup> For example, the New Jersey Crime Victim’s Bill of Rights is typical in stating that a victim has a right to compensation “wherever possible.”<sup>370</sup> Moreover, the tendency is for the community obligation towards victims to manifest itself in regular budgetary appropriations financed through some form of “involuntary” contribution, such as a tax.<sup>371</sup> Margery Fry pointed out as early as 1957 that “the logical way of providing for criminally inflicted injuries would be to tax every adult citizen . . . to cover a risk to which each is exposed.”<sup>372</sup> The state is in a unique position to absorb the cost of compensating victims through taxes, almost in the same way that under products liability theory the manufacturer will pass on the cost of liability through increased prices to consumers.<sup>373</sup> Almost all victim compensation schemes are financed out of the state’s budget, whilst some are financed through direct levies. The French terrorist compensation fund (which is, characteristically, de-

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368. “Collateral recovery” refers to the situation where a person recovers the same loss several times, under different schemes. See Michael R. McAdam, *Emerging Issue: An Analysis of Victim Compensation in America*, 8 URB. LAW. 346, 364 (1976).

369. *McComas v. Criminal Injuries Comp. Bd.*, 594 A.2d 583, 585 (Md. Ct. Spec. App. 1991).

370. N.J. STAT. ANN. § 52:4B–36 (West 2009).

371. This is the case in the British scheme, which has been funded entirely since its creation by a grant from general tax revenues. See Criminal Injuries Compensation Act 1995, 1995, c. 53, § 1(1) (Gr. Brit.), available at [http://www.legislation.gov.uk/ukpga/1995/53/pdfs/ukpga\\_19950053\\_en.pdf](http://www.legislation.gov.uk/ukpga/1995/53/pdfs/ukpga_19950053_en.pdf); CRIMINAL INJURIES COMPENSATION AUTHORITY, CORPORATE BUSINESS PLAN 2008–09 ¶ 1.3 intro. (2008), available at <http://www.cica.gov.uk/Documents/publications/Reports/Business%20plan%202008-11.pdf>.

372. Fry, *supra* note 32, 193.

373. See Polish, *supra* note 336.

scribed as a fund “in the name of national solidarity”), for example, is financed by a levy on property insurance contracts.<sup>374</sup>

Third, compensation is, unlike a purely charitable scheme, awarded in a systematic and consistent way, characteristic of the welfare state. Funding in favor of victims may be made *ex gratia*, but that does not mean it is capricious. Board members of the British scheme, for example, are “instructed and compelled to make payments to all who come within the ambit of the Scheme.”<sup>375</sup> The technocratic leanings of many schemes are reinforced by the fact that awards are typically limited and standardized, rather than following the exact amount of harm, as would be the case in civil suits.<sup>376</sup> Compensation is administered bureaucratically, for example, by a board rather than the courts,<sup>377</sup> and the trend has been towards severance of obvious ties with the judiciary.<sup>378</sup> Finally, the welfare orientation of several victim compensation programs is also underscored anecdotally by reference to programs in such terms. For example, certain federally supported victim programs are derogatorily referred to as “the Department of Justice ‘Food Stamp’ program,” and elicit the occasional hostility by those who see it as abrogating individual responsibility (e.g., to get insurance) and a “welfare attitude,”<sup>379</sup> or even creating a risk of “moral hazard” (i.e., that victims knowing that they will be compensated will put themselves in danger’s way more willingly).<sup>380</sup>

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374. Loi du 9 septembre 1986 relative à la lutte contre le terrorisme et aux atteintes à la sûreté de l’Etat (Law of the 9 September 1986 on the fight against terrorism and attacks against the safety of the State).

375. CRIMINAL INJURIES COMPENSATION BOARD, FIRST REPORT AND ACCOUNTS, 1965, Cmnd. 2782, ¶ 5 (Gr. Brit.).

376. Many compensation schemes include “tariffs” compensating victims at a fixed rate for certain broad categories of harm. See CRIMINAL INJURIES COMPENSATION AUTHORITY, THE CRIMINAL INJURIES COMPENSATION SCHEME ¶ 26 & tariff of injuries (2008) (Gr. Brit.), available at <http://www.cica.gov.uk/Documents/publications/Criminal%20Injuries%20Compensation%20Scheme%202008.pdf>.

377. See, e.g., CAL. GOV’T CODE § 13960 (West 2005).

378. For example, the State Attorney General’s office handled investigations in the early years of the California Victims Compensation & Claims Board, but since 1977 the process for obtaining compensation rests in the hands of the Board itself. *Id.* § 13962.

379. See Fred E. Inbau, Comment on the Proposal, *Compensation for Victims of Criminal Violence: A Round Table*, 8 J. Pub. L. 191, 202 (1959) (warning against the risk of “an abandonment of all notions of individual responsibility and a resort to complete dependence upon governmental paternalism”); Mueller, *supra* note 190, at 231 (suggesting that “[c]rime loss insurance is the sedative of self-protection and an invitation to risk taking, especially in shady dealings”).

380. On the theory of moral hazard, particularly in the context of international crime prevention, see generally Kuperman, *supra* note 296.

The solidarist ethos, the idea that compensation is owed on the basis of a shared experience of living in society, is certainly an appealing ground on which to rest the foundation of the TFV compensation regime, not least because it lies somewhere at the intersection of advanced thinking about both criminal justice and the nature of the international system. Indeed, solidarity has been a buzz word in international legal circles for quite some time and was perhaps used most famously by Georges Scelle to describe the rising tide of international interdependence and its potential to change the nature of the international game.<sup>381</sup> Several authors writing in the international reparation field have begun using the term “solidarity” as describing what lies at the heart of compensation to victims.<sup>382</sup>

Solidarity also suggests a novel concept of international obligations towards victims, relevant when the international community cannot possibly be held directly liable, but where it is always at least a little responsible—whether by omission, acquiescence, or insufficient resolve. In many ways, international crimes are the very product of international society: whether it be the cover traditionally provided by sovereignty, support for criminal regimes, the legacy of colonialism, economic dislocation brought about by the international economic and financial architecture, or global indifference. International crime is both the antithesis of international society and a poisonous substance it seems to secrete at every turn. There is a very real way in which international crime is a consequence of international coexistence.

Contributions to the TFV, then, rather than being seen as simply “generous,” might be viewed as an expression of a radical form of supranational, transnational, and cosmopolitan solidarity—a recognition of how the fundamental interdependence of global social life also creates conditions for its undermining. Moreover, rather than being entirely *sui generis*, TFV efforts should be seen as a specialized and somewhat idiosyncratic part of a much larger trend towards international community provided “welfare” in various fields (development, health, food, water, environment, etc).<sup>383</sup> The solidarity thesis seems the most adept at explaining how the TFV can derive resources not only from states and international

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381. 1 Georges Scelle, *Précis De Droit Des Gens* 2–5 (1932). See also Martti Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, at 266–352 (2002) (discussing French conceptions of “solidarism”).

382. M. Cherif Bassiouni, *International Recognition of Victims’ Rights*, 6 HUMAN RIGHTS L. REV. 203, 206 (2006).

383. The expression “international welfare” is associated with the work of Wolfgang Friedmann. See Wolfgang Friedmann, *The Changing Dimensions of International Law*, 62 COLUM. L. REV. 1147, 1148, 1162–65 (1962).

organizations, but also private entities whose contribution is hard to subsume under anything resembling a responsibility model. This is consonant with and reflective of the deeper logic presiding over international criminal justice, namely that international crimes affect the whole of humanity and not just, for example, the “international community” as a loose, somewhat theoretical superstructure.<sup>384</sup> It is thus morally and jurisprudentially logical to allow not only states but also individuals, NGOs, and IGOs to contribute in ways that express that basic solidarity.

The formulation of the TFV’s rationale in terms of welfare solidarity suggests that there could be a legitimate expectation of assistance, within the limits of the Fund’s resources, to cope with the consequences of crime. In this context, conservative warnings of “governmental paternalism” and the abandonment of “individual responsibility” may sound particularly hollow on a global level, where there is simply very little that individuals could do to protect themselves from crime in advance. It may be that TFV generosity, especially if it is badly implemented, will lead to some of the negative effects that are at times associated with aid-dependency (although the risk seems minimal given the ad hoc nature of the compensation provided). But it is unlikely that an international victim scheme would be fundamentally abused in the sense that people would expose themselves to serious crime simply to obtain compensation.<sup>385</sup> As to the idea of a “moral hazard,” while perhaps of marginal relevance in the context of petty property crimes domestically,<sup>386</sup> it seems truly unlikely internationally that someone would risk being a victim of genocide because of an expectation of compensation.

There is some evidence that the TFV might be headed in a broad welfare oriented direction. For example, it has been suggested by the Coalition for the International Criminal Court that “[a]lthough the assistance mandate is separate and different from the reparations mandate, a reparations perspective must be applied in the design and implementation of

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384. See David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 90 (2004).

385. This is distinct from the more administrative risk that in cases of mass crimes, individuals will come forward claiming to have been the victims of atrocities when they are not. Such a risk seems inevitable, but there are ways to alleviate it, for example by resorting to collective forms of compensation that minimize the risk of undue awards (a community is much less likely to be able to claim harm as a result of a crime fraudulently).

386. Although even this has been challenged. See Samuel Cameron, *Victim Compensation Does Not Increase the Supply of Crime*, 16 J. ECON. STUD. 52 (1989) (concluding that there is no statistical evidence to support the claim that victim compensation schemes increase the level of crime).

assistance projects by the Trust Fund.”<sup>387</sup> In the same vein, it is sometimes suggested that “[a]s with reparations granted by the Court, the assistance received by the victim should, as far as possible, also be a recognition of their rights.”<sup>388</sup> While this conclusion may be based on a simplistic analogy with reparation and is not very clear in its reasoning, it suggests, quite characteristically, that assistance is in the nature of an entitlement, something similar to its status in the welfarist model.<sup>389</sup> It is also revealing that there were at least discussions as to the possibility of the Assembly of States Parties making regular donations to the Fund.<sup>390</sup> This creates an interesting symbolic connection between the group of states from which most crimes entering the Court’s jurisdiction will emanate, and the issue of victim compensation.

The principal limitation of the TFV from the point of view of the welfare rationale is that unlike a proper victim welfare scheme, the international regime is not presently—nor does it seem that it will be any time

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387. VICTIMS’ TRUST FUND TEAM, COAL. FOR THE INT’L CRIMINAL COURT, COMMENTS ON THE TRUST FUND FOR VICTIMS’ GLOBAL STRATEGIC PLAN FOR 2009–2011 (2009), *available at* [http://www.iccnw.org/documents/CICC\\_TFV\\_Team\\_Comments\\_on\\_TFV\\_Strategic\\_Plan\\_2009-2011\\_March\\_2009.pdf](http://www.iccnw.org/documents/CICC_TFV_Team_Comments_on_TFV_Strategic_Plan_2009-2011_March_2009.pdf).

388. REDRESS, COMMENTS TO THE TRUST FUND FOR VICTIMS ON THE PROGRESSIVE REALISATION OF ITS MANDATE 14 (2010), *available at* [http://www.redress.org/downloads/publications/REDRESS\\_Paper\\_for\\_TFV\\_Board\\_22March2010.pdf](http://www.redress.org/downloads/publications/REDRESS_Paper_for_TFV_Board_22March2010.pdf).

389. Unlike reparations, however, the entitlement is to be reasonably considered for assistance on the basis of equality, not an entitlement to a certain hypothetically fixed amount equal to harm suffered. It thus introduces much more leeway for those backing the compensation scheme.

390. *See* Preparatory Comm’n for the Int’l Criminal Court, Working Grp. on Rules of Procedure & Evidence Concerning Part 7 of the Statute, *Proposal Submitted by France Concerning Part 7 of the Rome Statute of the International Criminal Court, on Penalties*, PCNICC/1999/WGRPE(7)/DP.1 (Nov. 19, 1999) (“(X) per cent of the annual contribution of States Parties to the budget of the Court shall be transferred each year to the Fund established pursuant to article 79, paragraph 1.”) [hereinafter *Proposal Submitted by France Concerning Part 7 of the Rome Statute*]; Preparatory Comm’n for the Int’l Criminal Court, Working Grp. on Fin. Regulations & Rules, *Proposal by France Concerning Regulation 5 of the Draft Financial Regulations Contained in Document PCNICC/2000/WGFIRR/L.1*, PCNICC/2000/WGFIRR/DP.24 (Nov. 28, 2000) (“Each year, the Assembly of States Parties shall allocate a portion of the Court’s financial resources to the fund for victims referred to in article 79 of the Statute.”); *see also* Preparatory Comm’n for the Int’l Criminal Court, *Report on the International Seminar on Victims’ Access to the International Criminal Court*, 8, PCNICC/1999/WGRPE/INF/2 (July 6, 1999) (“With regard to the Trust Fund, consideration ought to be given to allocating to the Fund a percentage of the assessed State Party contributions to the Court.”).

soon—one that is financed on a compulsory or tax basis.<sup>391</sup> This does not mean that there could not be a certain expectation that the “international community” would consistently rise up to the occasion and fund the TFV commensurate with the needs of victims of crimes entering the Court’s jurisdiction. But, failing that, the TFV’s financial fortunes risk uncertainty, perhaps resembling more a public charity than the manifestations of a global system of welfare security in the making.

#### CONCLUSION

One of the lessons of domestic victim compensation schemes is that while the first years are often spent in relative anonymity and free of polemic, the system invariably comes under pressure as the funds and the TFV’s mission became better known and demands for compensation grow.<sup>392</sup> It is probably the case that the TFV is going through a rather blessed early period. But for all its victim-friendly mandate and efforts to portray it as such, there will come a point where the gap between available funds and existing needs, as well as the glaring disparities between different victim communities, will create calls for greater transparency and accountability. At that point, the TFV will have to rest its action on clearer theoretical footing than it has done so far.

In the foreseeable future, and partly as a result of pressures from various constituencies (the Assembly of States parties, donors, international and domestic victims rights’ organizations), the TFV will continue to fluctuate between the polar opposites of reparation and assistance, donor generosity, and victim entitlement—especially if a strong conceptual

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391. Interestingly, some scholars have already pointed out the possibility that the scheme could one day be “upgraded” to one based on a sort of international tax revenue. Jean-Baptiste Jeangène Vilmer, for instance, has suggested the financing of the TFV through a tax on weapons, in application of a sort of international crime equivalent of the “polluter pays” principle. See JEAN-BAPTISTE JEANGÈNE VILMER, RÉPARER L’IRRÉPARABLE—LES RÉPARATIONS AUX VICTIMES DEVANT LA COUR PÉNALE INTERNATIONALE 150 (2009). This is of course a little implausible in the international context (and there would be many other candidates for revenues if an international taxation system existed), but one can, along the lines of a French suggestion within the working group that adopted the TFV rules of procedures, imagine that a compulsory share of contributions to the Court could be attributed to the TFV. See *Proposal Submitted by France Concerning Part 7 of the Rome Statute*, *supra* note 390. Another, simpler, possibility is that the TFV would negotiate with states certain long term commitments to funding, with a view to stabilizing its budget.

392. For example, in the UK the Criminal Injuries Compensation Authority came under attack after the July 7 suicide bombings in London for providing inadequate levels of payment. *Crime Victim Compensation Changes Unveiled*, INDEPENDENT (Dec. 7, 2005), <http://www.independent.co.uk/news/uk/crime-victim-compensation-changes-unveiled-518508.html>.



map remains absent. Neither of these polarities are exclusive in theory, of course, but it is open to question whether the TFV will ever have the funds to both complement reparation orders and develop an assistance policy worthy of that name. Moreover, although having the TFV is certainly an improvement over a regime with only reparations ordered by the Court, one of the lessons of even welfare-oriented victim compensation schemes is that these have not escaped some of the very criticisms that are levied at the judicial system, including selectivity in the choice of victims and lack of clarity in the logic of disbursements.<sup>393</sup>

This Article reviewed the emergence of domestic victim compensation funds in search of clues as to the proper theoretical foundation of the TFV. It concludes that some are clearly more relevant than others, but that ultimately, the TFV is very much a *sui generis* organ. Its justification should be understood as a mix of rationales, allowing for the fact that the TFV can, at this stage, engage in a variety of policies and strategies. The TFV, like domestic compensation schemes, is a reaction to limitations of the criminal system and is inclined towards restorative justice, even as it seeks to correct the fact that the convicted will often not have the capacity to compensate the harm caused by their crimes. The TFV is certainly a product of political forces and can be put to political uses, but that is a more factual than normative judgment. The TFV is a substitute to other mechanisms, such as insurance or tort, not so much because these might fail as because they do not seem to exist or have their place in the current international system.

At any rate, none of the above explains why the Fund and its international sponsors should take on the responsibility of compensating victims. The idea of "state" or "international community" responsibility as a ground for compensation is interesting, but the practice of the Fund suggests no assumption of responsibility for the occurrence of international crimes. Internationally, the idea of a "right to reparation" was certainly very influential in the emergence of a strong compensation regime and is important in the context of the ICC. It remains to be seen, however, whether the TFV will see its proper role as guaranteeing a certain level of reparation, as opposed to pragmatically distributing rehabilitative services to large victim groups. In practice, the TFV has already begun actively spending its meager budget on assistance and one wonders, given the present needs of victims, about the wisdom of provisioning funds to guarantee reparation awards beyond what the accused can pay. Reserving funds for reparations may have the effect of freezing them for substantial

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393. For an early critique of the limitations of compensation schemes in the U.S., see Alan T. Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203 (1978).

amounts of time at the expense of projects that could be undertaken here and now.

Social contract theory provides a broad and elegant rationalization for compensation, but its transposition to the international plane is a conceptual stretch. The international community is certainly taking on more responsibilities in terms of guaranteeing a certain level of security, but it is difficult to say the failure to protect populations against certain international crimes now creates a political obligation to provide reparations and assistance. Humanitarian arguments make too much of the notion of charity, and victims are likely to want assistance in the wake of mass atrocities to be more than a manifestation of donor virtue. There is certainly some sense to the moral argument that victims should not shoulder the cost of crime alone, but this only explains how, not why, the TFV should spend its funds. Welfarist arguments are perhaps the most convincing, especially in understanding the sort of “assistance” provided by the Fund to victims, but are limited by the fact that for all intents and purposes, the States Parties to the ICC cannot be said to assume the role of a welfare state in relation to victims.

The resolution of the tension between these potential rationales for the work of the TFV will partly depend on evolving concepts of international criminal justice and compensation. From a criminal justice point of view, the TFV is the first international consecration of a rising domestic trend to take victims into account; at the same time, it also cruelly underlines the inherent limits of criminal justice and the extent to which both criminal and tortious responsibility are ultimately unsuited to the enormity of the reparatory task. The effort to uncover a satisfying rationale for the work of the Fund underscores a fundamental tension between reparations and assistance: the more law, justice, and rights oriented models see compensation as primarily about reparations; the more morality, politics, or welfare oriented models see compensation as primarily about assistance. Given the TFV’s mandate to engage in both, but mindful of the limits on its resources, choices will have to be made at some point in the Fund’s existence.

Beyond the issue of how the TFV should use its resources, the effort to uncover a rationale for its work also underscores the importance of who should give resources and on what basis. From the point of view of international justice, the TFV is a manifestation of, but also crucially dependent on, a feeling of international solidarity. The international community is somewhat stuck between an increasing assumption of powers and representation that it will guarantee a certain minimum public order devoid of mass crimes, yet tempted to see the issue of compensation as one of merely generosity. The TFV will test the international community’s

commitment to victims as one of the crucial indicators of successful international and transitional justice. Thinking about the proper rationale for compensation will be crucial to orient TFV practices in the right direction.