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### Contested Justice

The Politics and Practice of International Criminal Court Intervention

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### Chapter

14 - Beyond the restorative turn: the limits of legal humanitarianism

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## Beyond the restorative turn

### The limits of legal humanitarianism

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#### Introduction

International criminal law has been historically concerned with individual accountability, informed by a punitive conception of justice designed to hold perpetrators accountable for crimes. As a sub-field within the broader discipline of public international law, with its focus on the agency of states, international criminal law's emphasis on the individual has been interpreted as indexing a shift from a paradigm of state sovereignty to human security, in terms of both accountability (of perpetrators) and rights (of victims).<sup>1</sup> This shift has been furthered by an emerging recognition of the figure of the victim, with links to the broader conflict-affected communities to which individual victims belong. In the case of the permanent International Criminal Court (ICC), the moral call to alleviate suffering is translated into participatory rights for individual victims before the Court, as well as the mandate of its affiliated Trust Fund for Victims to provide medical and livelihood assistance to conflict-affected communities. As an ICC guidebook explains, 'victims at the ICC enjoy rights that have never before been incorporated in the mandate of an international criminal court'.<sup>2</sup>

Yet the Court's claim to alleviate suffering brings its work into a relationship with other humanitarian discourses and practices outside of international law. How might this inclusion of relief to conflict-affected communities be related to shifts in governance and development

I thank Christian De Vos, Nesam McMillan and Sarah Nouwen for their comments on this chapter, as well as the Netherlands Organisation for Scientific Research (NWO) for funding the field research that informs this account.

<sup>1</sup> R. Teitel, *Humanity's Law* (Oxford: Oxford University Press, 2011).

<sup>2</sup> 'Victims Before the International Criminal Court: A Guide for the Participation of Victims in the Proceedings of the Court', [www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSSBookletEnglish.pdf](http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSSBookletEnglish.pdf).

beyond the juridical field, as with development aid and the provision of medical assistance? Can a body of law that has been traditionally oriented towards accountability through punishment – ‘ending impunity’ – be recast as a site of restorative justice, and with what expressive and material effects?

This chapter locates the restorative work of the ICC against the backdrop of humanitarianism: the transformation of moral sentiment into material practices that seek to reduce suffering.<sup>3</sup> Such a reading draws upon critiques of humanitarianism from beyond the legal field, including anthropology, history and political theory, which seek to diagnose its theoretical and material effects. International criminal law’s restorative turn harbours common sentiments that link it to broader forms of humanitarian government, which anthropologist Didier Fassin defines as ‘the set of procedures established and actions conducted in order to manage, regulate, and support the existence of human beings’.<sup>4</sup> The ICC’s practices of victim participation and aid provision operate as forms of what can be termed ‘legal humanitarianism’, which seeks to alleviate conflict-affected suffering and assert rights claims through international criminal law. Legal humanitarianism routes its governance objectives through humanitarian logics, yet it is limited by the framework of law, which provides jurisdictional constraints that other humanitarian forms do not encounter to the same degree.

The chapter seeks to illustrate the limits of routing restorative justice practices through a historically punitive legal field. These limits – and the injustices they produce – are not necessarily a product of the ICC as an institution, but are rather a by-product of trying to bend a retributive field to suit restorative aims. Asking a field oriented around judgment and punishment to provide recognition and redress to conflict-affected communities leads to a form of justice that might be better described as *liminal* rather than transitional, unintentionally producing exclusions, deferrals and marginalisations that have been largely neglected in the literature on the ICC’s restorative mandate. In this sense legal humanitarianism operates as a form of governance, mobilising ICC states parties

<sup>3</sup> See generally M. Barnett, *Empire of Humanity: A History of Humanitarianism* (Ithaca, NY: Cornell University Press, 2011); D. Fassin, *Humanitarian Reason: A Moral History of the Present* (Berkeley: University of California Press, 2012); and I. Feldman and M. Ticktin (eds.), *In the Name of Humanity: The Government of Threat and Care* (Durham: Duke University Press, 2010).

<sup>4</sup> Fassin continues: ‘government includes but exceeds the intervention of the state, local administrations, international bodies, and political institutions more generally’. Fassin, *Humanitarian Reason*, 1.

and in-country donor states, non-governmental and community-based organisations and the Court itself in projects of classifying and categorising conflict-affected populations through legal logics.

The chapter first takes up the contested figure of the human in international law, which carries resonances in contemporary legal humanitarianism. It then locates international criminal law's 'restorative turn' in relation to the broader rise of human rights discourse towards the end of the twentieth century. Reading legal humanitarianism in relation to other critiques of humanitarian practice, the following section brings international criminal law's restorative turn into dialogue with historical and anthropological literature. Moving from a theoretical consideration of legal humanitarianism, the two sections that follow draw upon empirical material, both from official ICC literature and from observations of Court practice, to consider the Court's victim participation regime and the ICC Trust Fund's assistance mandate. The chapter concludes by considering the implications of reading international criminal law's restorative turn as a novel form of post-conflict governance, and what the risks and limitations may be of routing restorative justice through a retributive legal frame.

### Between triumph and scepticism

Despite more than half a century separating them from our 'humanitarian present',<sup>5</sup> two claims mark competing poles in contemporary debates about the role of international law in securing the figure of the human. On one side of the spectrum, the Nuremberg Military Tribunal declared that '[h]umanity can assert itself by law', already suggesting the foundational role that will be ascribed to post-World War II trials by contemporary proponents of international criminal tribunals.<sup>6</sup> Here the tribunal conflates its own agency in prosecuting those suspected of international crimes with another actor, 'humanity', which can now 'assert itself by law' and enforce its own (inherent) human rights. On the other side, Hannah Arendt's well-known account of the vulnerability of refugees and stateless people continues to inform sceptics who question the viability of human rights claims in a world where rights are still largely civil and

<sup>5</sup> See E. Weizman, *The Least of All Possible Evils: Humanitarian Violence from Arendt to Gaza* (London: Verso, 2011).

<sup>6</sup> *United States v. Ohlendorf* (The Einsatzgruppen Case), reprinted in 4 *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, 411 (1946–1953) 112. As cited in Teitel, *Humanity's Law*, 77.

political creatures, existing between a state and its citizens rather than inherent to humanity itself.<sup>7</sup>

Half a century later, scholarship on international criminal law and human rights continues to inhabit a spectrum between these poles of triumph and scepticism, moving between a 'utopian' cosmopolitan vision of law and an 'apologist' deference to state sovereignty.<sup>8</sup> The main points of contention have remained more or less the same, focusing on the extent to which human rights can be protected at the international level through prosecuting international crimes. What has changed is a developing claim that different sub-fields of international law, such as human rights law and international humanitarian law, are growing closer together at a normative level and in legal practice.<sup>9</sup> This normative convergence is explained in different ways, though increasingly the ideal of 'human security' and related references to humanity or humanitarianism have appeared within the discourse of international criminal law.<sup>10</sup> In its landmark jurisdictional decision in *Tadic*, for example, the International Criminal Tribunal for the Former Yugoslavia (ICTY) claimed that the dichotomy between interstate and intrastate conflicts was being broken down in international law, and 'the State-sovereignty-oriented approach . . . has been gradually supplanted by a human-being-oriented approach'.<sup>11</sup> Distinctions between conflict and peacetime and between international and internal conflicts have been unsettled by an international criminal law jurisprudence that at times overtly references humanity both as its beneficiary and as its ground.

Expressions of humanitarian sentiment in the discourse of international criminal law have become commonplace. They are threaded throughout official ICC statements as well as in commentary from civil society organisations and diplomats who promote the ICC's work. Even representatives from the United States, a state not party to the ICC, have linked humanitarianism with state security in expressing support for

<sup>7</sup> H. Arendt, *The Origins of Totalitarianism* (San Diego: Harcourt, 1968), 279.

<sup>8</sup> M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2006).

<sup>9</sup> T. Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006).

<sup>10</sup> For links between human security and international criminal law, see L. Axelworthy, 'Human Security and Global Governance: Putting People First', *Global Governance*, 7 (2001), 19–23.

<sup>11</sup> Appeal on Jurisdiction, *Prosecutor v. Tadic*, IT-94–1-AR72, Appeals Chamber, ICTY, 2 October 1995.

international criminal legal institutions.<sup>12</sup> Others have pressed farther, contending that this traditionally retributive field works to alleviate the suffering of conflict-affected populations. A representative from a European state's claim to the president of the ICC's Assembly of States Parties offers a telling example of how criminal justice's traditional concerns with accountability and deterrence have become bound up with the more abstract aims of human security and social repair:

A substantial number of victims have already been uplifted because they believe in your ability to deliver justice. And more victims will benefit in the future, not only thanks to the Court's reparative mandate, but mainly because of its firm effect to deter grave crimes against humanity.<sup>13</sup>

This claim from a state representative reflects a common sentiment expressed by other states supporting what is referred to as the ICC's 'restorative mandate'.<sup>14</sup> In this account of the Court's work, victims are 'uplifted' through a belief in the form of justice that the ICC dispenses, which is seen to be both reparative and deterrent. Court proponents frequently describe accountability, deterrence and reparation as forming a constellation of objectives that are thought to be attainable through the field of international criminal law.

In addition to linking the field to human and state security, tribunal observers and officials have claimed that international criminal law institutions can lessen the suffering brought about through mass conflict. The language of bearing witness has been supplemented with claims about 'giving voice', rehabilitating and repairing the harms done to victims of international crimes through criminal processes. These claims suggest that the field has turned towards restorative forms of justice to supplement its objectives of holding individual perpetrators of grave crimes to account.

<sup>12</sup> Harold Koh has claimed that 'the United States has long recognized that international criminal justice, and accountability for those responsible for atrocities, is in our national security interests as well as in our humanitarian interests'. H. Koh, 'International Criminal Justice 5.0', New York City, 8 November 2012, available online at [www.state.gov/s/l/releases/remarks/200957.htm](http://www.state.gov/s/l/releases/remarks/200957.htm).

<sup>13</sup> Statement by Swedish Ambassador Per Sjögren, Deputy Director-General, Ministry for Foreign Affairs, at the 12th Session of the Assembly of States Parties to the Rome Statute, The Hague, 21 November 2013.

<sup>14</sup> For example, at the 12th ASP, the representative from Finland noted that 'reparations are at the heart of the restorative mandate of the Court'. Victim plenary, 12th Session of the Assembly of States Parties to the Rome Statute, 22 November 2013, author's notes.

### International criminal law's 'restorative turn'

Understanding the contemporary interest in restorative justice and the figure of the victim in international criminal law entails placing it in the broader historical context of this retributive legal field. Proponents of what is now called international criminal law draw a line back to the post-World War II military tribunals constituted by the allied powers at Nuremberg and Tokyo.<sup>15</sup> The field of international criminal law expanded in the period following the Cold War, contributing to the 'tribunalisation' of conflict.<sup>16</sup> As critics have noted, however, privileging criminal accountability comes at the expense of alternate political values, such as inclusion and membership.<sup>17</sup> Negotiated political settlements would permit perpetrators to become part of a new regime, whereas the logic of international criminal law entails casting perpetrators as criminals and excluding them from the future formation of a polity. The field privileges punishment over reconciliation, producing what Sarah Nouwen and Wouter Werner have referred to as a kind of Schmittian distinction between 'friends' and 'enemies' of the 'international community'.<sup>18</sup>

It would seem that such a focus on the figure of the criminal in need of punishment cuts against more transitional objectives of reconciliation and repair, as accountability begins from a premise of isolating individuals and attributing blame rather than reconciling communities. In this sense the restorative turn, emerging through the Rome Statute negotiations of the mid-1990s, harbours more of a humanitarian objective than an alignment with the aims of transitional justice. As the reach of international criminal law has extended, the field has become increasingly bound up with humanitarian logics and a focus on the figure of the victim in need of care. In her contribution to this volume, anthropologist Kamari Clarke explains that the UN General Assembly's 1985

<sup>15</sup> Most standard textbooks of the field typically begin from Nuremberg, though these origin myths are unsettled by an emerging strand of literature on this field's history; see for example K.J. Heller and G. Simpson, *The Hidden Histories of War Crimes Trials* (Oxford: Oxford University Press, 2013).

<sup>16</sup> On what she terms the 'tribunalization of African violence', see K. Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (New York: Cambridge University Press, 2009).

<sup>17</sup> M. Mamdani, *Saviors and Survivors: Darfur, Politics, and the War on Terror* (New York: Doubleday, 2010); A. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford: Oxford University Press, 2011).

<sup>18</sup> S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal in Uganda and Sudan', *European Journal of International Law*, 21 (2010), 941–965.

'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' provided a foundation for Rome Statute negotiations concerning victims' participatory and reparative rights at the ICC. When the Security Council invoked 'the responsibility to protect' in its resolution referring the Libyan conflict to the ICC, the growing relationship between humanitarian discourse and criminal accountability was made explicit.<sup>19</sup>

As restorative aims become formalised, international criminal law is now regarded as a site of humanitarian practice as well as a means of accountability and deterrence. Recent scholarship has argued that different bodies of law have become more consolidated around a notion of 'humanity' as a legal subject – a subject that, in the words of the Nuremberg Military Tribunal, 'is able to assert itself by law'. David Luban points out the plurality of meanings now attributed to the work of international criminal law:

in addition to the familiar quartet of retribution-deterrence-incapacitation-rehabilitation, ICL recognizes other purposes, and these raise problems of their own. The curious feature about ICL is that in it the emphasis shifts from punishments to trials. Thus it is often said that the goal of ICL lies in promoting social reconciliation, giving victims a voice, or making a historical record of mass atrocities to help secure the past against deniers and revisionists.<sup>20</sup>

The ICC has gone the farthest among hybrid and international courts and tribunals in institutionalising restorative objectives. It has adopted statutory provisions establishing participatory and reparatory rights for victims of international crimes, thus formalising the presence of humanitarian objectives in this retributive legal frame.<sup>21</sup>

Court proponents invoke conflict-affected communities and what Kamari Clarke calls 'the specter of the victim' as normative justifications for their work.<sup>22</sup> ICC prosecutor Fatou Bensouda has claimed that 'the sole *raison d'être* of the Court's activities . . . is the victims and the justice they deserve',<sup>23</sup> suggesting that the *telos* of the ICC's work is oriented towards restorative rather than retributive purposes. Meanwhile, the

<sup>19</sup> UNSC Res. 1970, 26 February 2011.

<sup>20</sup> D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', *Georgetown Law Faculty Working Papers*, 67 (2008), 8.

<sup>21</sup> Article 63, Rome Statute. Article 75(2) empowers the Court to make a reparations order against a convicted person; Article 79 establishes the Trust Fund for Victims. These rights are taken up in greater detail in Chapter 13 by Dixon in this volume.

<sup>22</sup> Clarke, *Fictions of Justice*, 22–23. <sup>23</sup> OTP Press Release, 20 July 2013.



ICC's president has stated that 'the Rome Statute and the ICC bring retributive and restorative justice together with the prevention of future crimes'.<sup>24</sup>

Within international law there have been some efforts to account for a more sanguine reading of the rise of the figure of the human. For example, Ruti Teitel has argued that there is a legal conception of humanity at play in the overlapping spaces between the law of war, human rights law and international criminal law. Building upon the ICTY appellate chamber's assertions in the *Tadic* decision, Teitel claims that '[t]he normative foundations of the international legal order have shifted from an emphasis on state security – that is, security as defined by borders, statehood, territory, and so on – to a focus on human security: the security of persons and peoples'.<sup>25</sup> Elaborating upon what she terms a nascent 'humanity law', Teitel's work offers an extended argument about the growing commonalities between these legal fields since World War II.<sup>26</sup> The ICC features in this account as a vehicle through which international criminal law is brought into a closer relationship with conflict management, forging connections between punishment and international security.<sup>27</sup> This account of the ICC does not take up other humanitarian aspects of its work, however, such as the role of victim participants and the Court's Trust Fund, but instead claims a growing convergence between different bodies of law. Read through the 'humanity law' frame, victim redress amounts to holding individual perpetrators criminally accountable for human rights violations and violations of international humanitarian law. Punishment itself is seen as a form of redress.

In international criminal law more specifically, dominant interpretations of including restorative justice regard it as a progressive legal development – a shift to incorporating victims' needs within a field that has historically relegated them to its margins. Much like progressive histories of the field itself, this interpretation presumes a kind of humanitarian teleology, where these practices are taken as signs that

<sup>24</sup> Statement of President Song, 10 December 2012. <sup>25</sup> Teitel, *Humanity's Law*, 4.

<sup>26</sup> Richard Ashby Wilson also uses the 'humanity law' appellation to describe a cosmopolitan universalist jurisdiction; see 'When Humanity Sits in Judgment: Crimes Against Humanity and the Conundrum of Race and Ethnicity at the International Tribunal for Rwanda', in Feldman and Ticktin, *In the Name of Humanity*, 27–57.

<sup>27</sup> Teitel argues that the ICC is 'aimed at managing conflict worldwide' – an objective that 'links it to the prevailing interstate security regime', particularly through the use of UN Security Council referrals as a trigger for ICC jurisdiction. Teitel, *Humanity's Law*, 89–90.

international criminal law is becoming more responsive to conflict-affected communities. In this account, victims have been traditionally excluded from international criminal trials, with the ICC offering something of a paradigm shift in the recognition of victims' rights and the inclusion of restorative justice.<sup>28</sup> As some observers have argued, the involvement of victims 'not only is a "right" but also appears indispensable if post-conflict justice processes are to be restorative and capable of building the foundations for a strong transition through empowerment of those who were victimized during conflict'.<sup>29</sup>

Rather than reading the emergence of these practices as they relate to the field's development, I contend that the ICC's restorative dimension should be interpreted within a wider frame, in relation to the rise of humanitarian discourse across a range of different fields of knowledge and sites of engagement. The discourse of restorative justice before the ICC stretches beyond the framework of positive law. Claims about hearing the voices of victims, restoring lost dignity and reconciling populations in the wake of conflict through the vehicle of international criminal law exceed the terms available through the very law that supposedly sustains these objectives.

### Restorative justice in the humanitarian continuum

The ICC's framework of restorative justice can be related to what has been described above as 'humanitarian government'<sup>30</sup> and elsewhere as 'humanitarian compassion'<sup>31</sup> that may be deployed through various 'regimes of care'.<sup>32</sup> These terms have been used to refer to a diverse set of practices, including pardons from truth commissions and the provision of medical assistance to asylum seekers, but these disparate practices

<sup>28</sup> Conor McCarthy's work on the role of victims at the ICC notes that 'the idea of bringing "justice to victims" was not of central concern to international criminal law at the formative stage of its development'. See C. McCarthy, 'Victim Redress and International Criminal Justice: Competing Paradigms, or Compatible Forms of Justice?', *Journal of International Criminal Justice*, 10 (2012), 351–372; and C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (Cambridge: Cambridge University Press, 2012).

<sup>29</sup> M. Pena and G. Carayon, 'Is the ICC Making the Most of Victim Participation?', *The International Journal of Transitional Justice*, 7 (2013), 519, 518–535.

<sup>30</sup> Fassin, *Humanitarian Reason*.

<sup>31</sup> R. Meister, *After Evil: A Politics of Human Rights* (New York: Columbia University Press, 2011), 73.

<sup>32</sup> M. Ticktin, *Casualties of Care: Immigrants and the Politics of Humanitarianism in France* (Berkeley: University of California Press, 2011), 3.

share underlying commonalities with the restorative turn in international criminal law. Adequately grasping the stakes of the restorative turn and its relation to humanitarianism thus requires taking up scholarship that has addressed its historical emergence and its manifestation in other fields, such as humanitarian assistance to conflict-affected populations and the provision of medical care to refugees. The restorative turn can be seen as another site where humanitarian sentiment assumes institutional and material forms. This wider optic helps to illustrate some of humanitarianism's presumptions and unintended consequences, providing a way of viewing restorative justice in international law as part of a constellation of activities – what we might think of as a humanitarian continuum.<sup>33</sup>

Humanitarianism can be understood as the manifestation of compassionate or moralising sentiments as political forces that appear through practices, such as the provision of medical care to conflict-affected communities. These practices produce effects among populations that are perceived as vulnerable, whether due to their exposure to armed conflict, poverty or repressive governments. Humanitarian sentiments appear explicitly at the nexus of legal and policy discourse through doctrines authorising the use of armed force, such as 'humanitarian intervention' and the 'responsibility to protect', which permit military intervention where a state is seen to be manifestly failing to protect its population.<sup>34</sup> These justifications for intervention are a more extreme consequence of routing humanitarian logics through international law, but legal humanitarianism also assumes more subtle forms, such as regimes of care directed at conflict-affected populations. At all points on the continuum, from military intervention to care provision, humanitarianism operates as a form of governance: evaluating, deciding and implementing its objectives, and producing divisions between selected and 'untreated' populations.

<sup>33</sup> As with Michel Foucault's notion of the 'carceral continuum', which contended that the disciplinary techniques developed in prisons expanded throughout society, we might think of a humanitarian continuum as the expansion of humanitarian logics into other areas, such as international criminal law. See M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1977). I thank Nesam McMillan for her insights on this point.

<sup>34</sup> See generally A. Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011). For a historical account of humanitarian intervention, see B. Simms and D.J.B. Trim (eds.), *Humanitarian Intervention: A History* (Cambridge: Cambridge University Press, 2011).

The historical rise of humanitarianism predates the post-Cold War expansion of international criminal law. Some accounts have located its emergence in the late eighteenth and early nineteenth centuries, when what was previously taken as private acts of compassion emerged into the public realm, animated by Enlightenment notions of progress and the idea that the human condition could be taken as an object of improvement.<sup>35</sup> As Michael Barnett writes, '[w]hat distinguishes humanitarianism from previous acts of compassion is that it is organized and part of governance, connects the immanent to the transcendent, and is directed at those in other lands.'<sup>36</sup>

Humanitarianism is torn between the desire to universalise on the one hand and the attention to particular circumstance on the other. For example, reports of the ICC's Trust Fund emphasise the importance of context in its work at the same time as they portray an abstract 'African victim'. The reports proclaim a kind of emancipation through the Trust Fund's regime of care – restoring dignity, acquiring knowledge about rights – while also requiring individuals to accept and submit themselves to the Trust Fund's logic for targeting individuals and conflict-affected communities, as Peter Dixon's contribution to this volume illustrates in greater detail.

While there is much emphasis on the emancipatory potential in Court discourse and in the language of its proponents, international criminal law's restorative turn has hardly been considered as a form of governance in the scholarship of international criminal law. Most work on the inclusion of victims and conflict-affected communities in ICC jurisprudence and practice regard it as falling somewhere along a spectrum of efficacy, ranging from a welcome development for the field through extending victims' rights on one end, to generating policy problems and fair trial rights concerns on the other.<sup>37</sup> Understanding the ways in

<sup>35</sup> On the emergence of humanity as 'sentiment', see T. Laqueur, 'Bodies, Details and Humanitarian Narrative', in L. Hunt (ed.), *The New Cultural History* (Berkeley: University of California Press, 1989), 176–204; and T. Laqueur, 'Mourning, Pity, and the Work of Narrative in the Making of "Humanity"', in R. A. Wilson and R. Brown (eds.), *Humanitarianism and Suffering: The Mobilization of Empathy* (Cambridge: Cambridge University Press, 2009), 31–57.

<sup>36</sup> M. Barnett, *Empire of Humanity*, 21. The work of Didier Fassin and Miriam Ticktin tracks how humanitarianism is deployed domestically as well, thus challenging Barnett's claim that it is directed outward as a form of governance.

<sup>37</sup> See generally L. Moffet, *Justice for Victims before the International Criminal Court* (London: Routledge, 2014); C. van den Wyngaert, 'Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', *Case Western*

which it governs individual survivors of mass violence as well as the conflict-affected populations to which they belong calls for a broader contextual view, locating its rootedness in liberal forms.

Our humanitarian present is marked by a liberal form of humanitarianism that closely meshes with the discourse of human rights.<sup>38</sup> Barnett argues that contemporary humanitarianism is a 'liberal humanitarianism' that began in the wake of the Cold War, characterised by efforts to protect vulnerable populations and to prevent conflict through extending democratic governance. The post-Cold War ascendance of international criminal law can then be located in relation to its contemporary form of liberal humanitarianism, both of which developed against the backdrop of a particular human rights discourse that emerged during the Cold War period.<sup>39</sup> As Kamari Clarke's contribution to this volume elaborates, the field expanded in conjunction with a liberal understanding of legality, accompanied by 'rule of law' and 'good governance' initiatives. International criminal law's restorative turn sits within a broader field of humanitarian activity, with links to concrete practices of intervention, such as the 'responsibility to protect' and development agendas of donor states.

This broader humanitarian continuum has also been subject to critique. Alex de Waal's work on the paradoxes of humanitarianism illustrates how 'the impulse to ameliorate suffering leads humanitarian workers into the unwelcome situation of acting cruelly. While professional standards are increasing, thereby reducing suffering, some cruelties are intrinsic to the humanitarian predicament – hence the humanitarians' tragedy.'<sup>40</sup> De Waal elaborates that the 'tragedy' results from irreconcilable goals and the constraints brought by the conditions in which humanitarianism is carried out; cruelty is inevitably tied to

*Reserve Journal of International Law*, 44 (2011), 425; S. Vasiliev, 'Article 68(3) and personal interests of victims in the emerging practice of the ICC', in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Leiden: Brill, 2009).

<sup>38</sup> Barnett, *Empire of Humanity*, 167. David Chandler makes a similar claim, arguing that the 'transformation of humanitarianism from the margins to the centre of the international policy-agenda has been achieved through the redefinition of humanitarian policy and practice and its integration with the fast growing agenda of human rights'. See D. Chandler, 'The Road to Military Humanitarianism: How the Human Rights NGOs Shaped A New Humanitarian Agenda', *Human Rights Quarterly*, 23 (2001), 678, 678–700.

<sup>39</sup> See S. Moyn, *The Last Utopia: Human Rights in History* (Harvard: Harvard University Press, 2012); as well as Meister, *After Evil*.

<sup>40</sup> A. de Waal, 'The Humanitarians' Tragedy: Escapable and Inescapable Cruelty', *Disasters*, 34(2) (2010), 130, 131–37.

decision-making in the face of suffering, where some lives will be saved and others will be lost. Sarah Nouwen picks up this point specifically in relation to the field of international criminal law when she argues that it also harbours a certain cruelty: it overstates its own ability to bring about an end to conflict; it operates according to logics of selection that belie its presumed political neutrality; and it necessarily privileges accountability over negotiated settlement, an aim that may itself beget further violence.<sup>41</sup>

As the following sections illustrate, the gap between the rhetorical promise and material practice of international criminal law as a form of restorative justice produces new divisions: between court-recognised victims and general (unrecognised) victims of a conflict, and between beneficiaries of ICC ‘targeting’ and those whose suffering falls outside selected categories of assistance. By extension, such divisions may form the basis for new forms of grievance when they are mapped across conflict-affect communities.

### Victim participation as legal humanitarianism

The most apparent forms of legal humanitarianism at the ICC appear in the Court’s efforts to engage with victims. Here the link between international criminal law and human rights law is made explicitly, as some commentators have claimed that the appearance of victims’ rights in the ICC statute shows a ‘complementarity between international criminal law and international human rights law’.<sup>42</sup> The restorative mandate of the ICC’s work, considered in the following section, provides another location for an emergent legal humanitarianism. Here recognition by and inclusion within the legal process is presented as a form of empowerment – indeed, as a right – as well as a humanitarian practice of alleviating suffering. As one ICC representative suggested publicly, victim participation can be regarded a form of reparation or redress.<sup>43</sup>

<sup>41</sup> S. Nouwen, ‘Justifying Justice’, in J. Crawford and M. Koskeniemi (eds.), *The Cambridge Companion to International Law* (New York: Cambridge University Press, 2012), 327–351.

<sup>42</sup> FIDH, ‘Enhancing Victims’ Rights Before the ICC: A View from Situation Countries on Victims’ Rights at the International Criminal Court’ (November 2013), 8, referencing ICJ Judge A. Trinidad, *The Access of Individuals to International Justice* (Oxford: Oxford University Press, 2011), 201–204.

<sup>43</sup> Paolina Massida, Head of the ICC Office of Public Counsel for Victims, presentation at conference ‘Reparations before the International Criminal Court’, The Hague, 12 May 2011, author’s notes.

Yet the field of potential beneficiaries of the ICC's restorative work is circumscribed from the moment the Court intervenes in a situation country. When the prosecutor determines what crimes to investigate and what arrest warrants to issue, there are effects at the level of jurisdictional criteria and evidentiary assessments. For the Court's restorative mandate, or what some official ICC documents have termed 'its mandate regarding victims',<sup>44</sup> this manifests as restrictions on who qualifies as a court-recognised victim for purposes of participation. This leads to a form of 'juridified victimhood' – namely, the use of legal criteria to determine an individual's status as a victim.<sup>45</sup> Victimhood in this sense becomes an identity that is regulated through jurisdictional standards, such as time and place and the subject matter of crimes. When charges are dropped, as was the case against Uhuru Kenyatta in the Kenyan situation, this has broader implications for victim participation: former 'case victims' are then regarded as 'situation victims', with fewer participatory rights. From the standpoint of conflict-affected communities, the use of legal categories to determine one's qualification as a victim may seem arbitrary at best, and quite possibly as manifesting an institutional indifference to suffering.

Some critical scholarship has noted the shortcomings of the Court's victim participation regime.<sup>46</sup> Others have welcomed victim participation in principle, offering suggestions for greater inclusion.<sup>47</sup> To be sure, there could be ways of modifying the ICC's practices within its existing legal frameworks that may assist it in achieving greater recognition of those who have suffered the effects of the crimes it seeks to prosecute. However, what I contend here is that the Court's very point of departure – its work within legal and jurisdictional categories – produces institutional limitations to the recognition that it might grant.

<sup>44</sup> ICC-ASP/11/38, 'Court's Revised Strategy in Relation to Victims', 5 November 2012, 2.

<sup>45</sup> See generally S. Kendall and S. Nouwen, 'Representational Practices at the International Criminal Court: The Gap Between Juridified and Abstract Victimhood', *Law and Contemporary Problems*, 76(3–4) (2014), 235–262.

<sup>46</sup> See note 37 for examples of this literature.

<sup>47</sup> J. Wemmers, 'Where Do They Belong? Giving Victims a Place in the Criminal Justice Process', *Criminal Law Forum*, 20 (2009), 395–416; M. Pena, 'Victim Participation at the International Criminal Court: Achievements Made and Challenges Lying Ahead', *ILSA Journal of International and Comparative Law*, 16 (2010), 497–516; S. Garkawe, 'Have Recent Changes Designed to Benefit Victims of International Crimes Added to the Legitimacy of International Criminal Justice?', in G. Boas, W. Schabas, and M. Scharf (eds.), *International Criminal Justice: Legitimacy and Coherence* (Cheltenham: Edward Elgar, 2012), 269–303.

The way in which victim participation is enacted in practice illustrates some of these shortcomings, which are not only matters of policy but also inherent to the juridical form.

Implementing the Rome Statute's victim participation provisions has involved a considerable amount of reflexivity among actors, who have adjusted and re-adjusted their practices in relation to resource constraints and other challenges that they have faced *sur le terrain*. In order to be granted status as victim participants, conflict-affected individuals must first be informed of the possibility that they may seek recognition before the Court. This assumes a number of prior interventions: interaction with the Court's outreach section, for example, as well as contact with members of the ICC's Victim Participation and Reparations Section (VPRS) or their 'intermediary' partners.<sup>48</sup> It is only through these channels that the conflict-affected individual will come into contact with the participation forms that will enable his or her claim to the participatory rights to be adjudicated before the Court. As the head of VPRS has noted, '[a] major challenge is how to inform victims about the ICC in general as well as about their own possible role as participants', and 'how to process potentially large numbers of application forms from victims'.<sup>49</sup> Judges in the Kenyan situation instituted an alternative model for attaining recognition as a victim participant, which they claimed they made 'for practical reasons';<sup>50</sup> however, as the majority of situations to date require the adjudication of individual victim participation forms, most individuals receive (or are denied) recognition by the ICC through the process described here.

Victim participation forms must be filled out in such a way that the individual is able to establish a nexus between the harms she or he has suffered and the charged crimes.<sup>51</sup> Forms work as 'actants' in the sense that they produce effects;<sup>52</sup> through the very act of filling in a form,

<sup>48</sup> On the role of intermediaries in the ICC's work, see Dierdre Clancy's contribution to this volume.

<sup>49</sup> F. McKay, 'Victim Participation in Proceedings Before the International Criminal Court', *Human Rights Brief*, 15(3) (2008), 4–5.

<sup>50</sup> Decision on Victims' Representation and Participation, *The Prosecutor v. William Samoi Ruto and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Trial Chamber V, ICC, 3 October 2012, para 30.

<sup>51</sup> For an elaboration of the role of the form in the production of victimary identity at the ICC, see S. Kendall, 'Archiving Victimhood: Practices of Inscription in International Criminal Law', in S. Motha and H. van Rijswijk (eds.), *Law, Memory, Violence: Uncovering the Counter-Archive* (London: Routledge, 2016).

<sup>52</sup> B. Latour, *Politics of Nature: How to Bring the Sciences into Democracy* (Harvard: Harvard University Press, 2004).



conflict-affected individuals are brought into a state of waiting. The Court's Rules of Procedure and Evidence requires that applications must be submitted to the prosecution and the defence before a judicial determination is made, and sometimes the relevant chamber can take years to provide applicants with a response. The VPRS section has publicly explained that '[v]arying types of application form and application process [*sic*] have been adopted by different Chambers. Responding to these is, in the short term, having an impact on the workload of the section as it involves designing different forms and processes and modifying the reporting system and database each time.'<sup>53</sup> As one experienced commentator who worked extensively with VPRS has noted, 'the application process has been long and cumbersome for all parties involved, including victims'.<sup>54</sup> Backlogs are widely reported by Court staff, and are even noted in official Court documents.<sup>55</sup> These backlogs can have chilling effects on the efforts by potential participants to exercise their participatory rights under the Rome Statute. For example, the inability to process and adjudicate forms before significant events on the judicial calendar has resulted in hundreds of individuals not receiving a determination from the Court before the confirmation of charges hearing in the *Mbarushimana* case in 2011.<sup>56</sup>

In the Ugandan situation, over eight years after arrest warrants were issued as of the time of writing, Court-recognised victims have not been able to actively exercise their participatory rights apart from at a confirmation of charges hearing in 2008. Many applicants for participant status have not heard back about their applications after years of waiting. In December 2013, field office staff members undertook a 'mission' to northern Uganda for several weeks to engage with conflict-affected communities. Before the trip, an outreach officer described this as a 'commemoration ceremony' in northern Uganda for all individuals who had applied for victim participant status or had communicated with the Court. The term was later abandoned, as some judges

<sup>53</sup> Proposed programme budget for 2014 of the International Criminal Court, ICC-ASP/12/10, Included in Assembly of States Parties to the Rome Statute of the International Criminal Court, Twelfth Session, Official Records Volume II, para 537.

<sup>54</sup> Pena, 'Victim Participation', 511.

<sup>55</sup> For example, a 2012 ASP resolution noted '*with continued concern* reports from the Court on the persistent backlogs the Court has had in processing applications from victims seeking to participate in proceedings'; see Resolution ICC-ASP/11/Res.7, 'Victims and Reparations', 21 November 2012.

<sup>56</sup> REDRESS, 'Hundreds of Victims Prevented from Participating in Crucial Court Hearings Due to lack of Resources at the International Criminal Court', Press Release, 15 July 2011.

purportedly did not think the language of ‘commemoration’ was appropriate. Another staff member who had participated in the meetings said that they were intended to ‘celebrate [the victims] resilience in this process’, but that the purpose of the meeting was primarily directed toward clarifying the Court’s ‘maintenance strategy’ as it decreased its field presence in Uganda rather than towards commemorating victims.<sup>57</sup> Meanwhile, intermediaries were discouraged from submitting more participation forms although the Court was technically still required to accept new participant applications. There was a general impression that the Court was at capacity, unable to take on more potential victim participants in the Ugandan situation in light of the other contexts where it had intervened.

In conversations over the past several years, members of civil society organisations have noted the frustrations of conflict-affected communities who had been hearing the same messages since the Court had started working in Uganda – the promise of participatory rights, assistance and reparation that were always over the horizon and rarely materialising in practice. Meanwhile, in the Kenyan context, changes to the system of victim participation have resulted in the creation of a two-tiered system of Court-recognised victims: those entitled to participate, as in other situations, and those whose details are noted in a ‘register’ maintained by the Court, which operates rather like a closed archive. Inaccessible to relief agencies and to the Court’s affiliated Trust Fund, the register contains identifying details of individuals as well as information about their suffering. Common legal representatives for victims have access to information from registered victims and may use this as a basis for identifying potential victim participants; the information gathered about individuals who are not candidates for participation form part of a mass of information to be used by legal representatives in making general claims regarding victims’ interests and concerns. Ultimately, however, the language used by the decision renders even this information potentially irrelevant; in specifying that ‘all victims, regardless of whether they have registered or not, will be represented through common legal representation’<sup>58</sup> while the case is at trial, the decision at least discursively collapses the distinction between registered and non-registered victims. While individuated guilt remains at the centre of international criminal

<sup>57</sup> Interview with ICC field office staff, Kampala, 6 February 2014.

<sup>58</sup> Proposed programme budget for 2014 of the International Criminal Court, ICC-ASP/12/10, para 52.

law, it would seem that individuated suffering – a premise of legal humanitarianism – is more tenuous than it may appear in claims made through ICC documents.

Official texts reveal the tensions in translating the ambitions of legal humanitarianism into practice. For example, the ICC's 2012 'revised strategy in relation to victims' maintains that it incorporates a 'rights based perspective' that 'reconfirms and empowers the victim as a vital actor in the justice process rather than a passive recipient of services and magnanimity'.<sup>59</sup> The text contains an extensive annex listing the 'rights and prerogatives' of victims at various stages of the Court process, enumerated under a heading entitled 'right or possibilities'. The list of nearly 100 items reinforces the difficulty of carrying out the 'strategic objective' of communicating 'rights as victims in relation to the elements of the ICC system and at all steps of the judicial process'.<sup>60</sup> Furthermore, given the Court's shifting jurisprudence on precisely these rights and prerogatives/possibilities, how can the ICC ensure that the individual victim remains a vital actor rather than a passive recipient of legal recognition and assistance?

Such observations are not meant to diminish the extensive efforts by some members of Court staff to produce a system in line with this rights-based perspective, nor the efforts by non-governmental organisations and ICC 'intermediaries' to improve the system through Court channels or through informal attempts to compensate for formal shortcomings. The overarching issue is more systemic, in the sense that the legal field itself is bound by restrictions that undergird its efforts to engage in humanitarian practices. This is more evident with the Court's most overt attempts to engage in legal humanitarianism through the work of its Trust Fund.

### Producing productive subjects: the ICC Trust Fund's assistance mandate

Even more than victim participation, which is largely articulated as a matter of rights grounded in the Rome Statute, the ICC's Trust Fund serves as an exemplary instance of legal humanitarianism, providing selective assistance to conflict-affected individuals and populations that

<sup>59</sup> ICC/ASP/11/38, 'Court's Revised strategy in relation to victims', 5 November 2012, para. 6.

<sup>60</sup> *Ibid.*, para. 18.

fall broadly within the Court's jurisdiction. The Trust Fund is not technically located within the ICC's institutional structure; rather, the ICC and TFV are regarded as 'complementary institutions'.<sup>61</sup> The Trust Fund claims its institutional mission is 'to support programs, which address the harm resulting from the crimes under the jurisdiction of the ICC by assisting victims to return to a dignified and contributory life within their communities', with an overarching goal 'to relieve the suffering of victims'.<sup>62</sup> This relief is carried out through two distinct mandates: first, through implementing reparations awards (not considered here, but taken up in Peter Dixon's contribution to this volume); and second, 'to provide victims and their families in situations under Court jurisdiction with physical rehabilitation, psychological rehabilitation, and/or material support'.<sup>63</sup>

Taken together, the contributions from Kamari Clarke, Laurel Fletcher and Peter Dixon in this volume cover significant aspects of the Trust Fund's work in practice, including the kinds of programmes it supports in select ICC situation countries as well as the politics of 'targeting' beneficiaries. They illustrate the risks of re-inscribing categories of identity by privileging certain communities over others, a concern that was also voiced by non-governmental organisations working in the Democratic Republic of Congo, whose representatives claimed that among the local population the Court was seen to be favouring certain communities.<sup>64</sup> Building upon the observations from previous chapters, this section seeks to show how the provision of assistance to conflict-affected communities, as a form of legal humanitarianism, is constrained by juridical logics that limit its work. If the Trust Fund is 'like a donor',<sup>65</sup> in the words of one of its representatives, what kind of donor might it be? Reading the Trust Fund's work in relation to critical literature on the provision of humanitarian assistance reveals the ways in which legal humanitarianism works to govern conflict-affected populations.

Anthropologists studying the practices of humanitarianism have shown how efforts to alleviate suffering are bound up with relations of power and interest. Didier Fassin's scholarship provides a grounded account of the work of the humanitarian organisation Médecins sans Frontières (MSF), illustrating the unintended consequences of decisions to prioritise certain forms of assistance over others (the provision of food

<sup>61</sup> TFV Programme Progress Report, Summer 2014, 3, emphasis added. <sup>62</sup> *Ibid.*, 4.

<sup>63</sup> *Ibid.* <sup>64</sup> Interview with representatives of an INGO, Kinshasa, 20 June 2011.

<sup>65</sup> Interview with Trust Fund representative, Kampala, 25 October 2011.

over medical treatment, for example) and valuing certain lives over others (those of the humanitarian care providers over the populations they are treating). Fassin points to a paradox that he claims is embedded within humanitarianism:

Humanitarianism is founded on an inequality of lives and hierarchies of humanity. This profound contradiction between the noble goals of humanitarian action (saving endangered others and alleviating suffering everywhere in an indiscriminate manner) and the concrete terms under which humanitarian agents have to operate (producing inequalities and hierarchies) is not the result of dysfunction of the humanitarian organizations or the misbehavior or their agents: it is an aporia of humanitarian governmentality.<sup>66</sup>

Fassin's critique of humanitarianism begins from noting its point of departure within a framework of inequality. Those who carry out the work of humanitarianism are structurally separated from those who are thought to benefit from this work, a fact that is most starkly illustrated when the lives of humanitarian aid providers are prioritised over those they treat when situations relapse into conflict. This has been the case at the ICC, as when staff members have ceased implementing Trust Fund assistance in the Central African Republic at various points due to security concerns. In Kenya the Trust Fund's presence has been deferred for years, with prospects of a preliminary 'assessment mission' discussed as early as 2011 and slated for early 2012,<sup>67</sup> whereas a 2014 programme progress report asserted that 'an assessment mission to Kenya is planned for 2015 depending on security protocols and travel guidelines'.<sup>68</sup> A representative of the Trust Fund explained that the delay was first due to jurisdictional issues and then continued due to security concerns, noting that Kenya has become a very dangerous environment for human rights defenders.<sup>69</sup> Meanwhile, domestic civil society partners have continued to work in support of the ICC's presence in Kenya, with one member of a leading non-governmental organisation remarking that 'everybody's life in the Court becomes more precious than is ordinarily the case'.<sup>70</sup>

<sup>66</sup> D. Fassin, 'Inequality of Lives, Hierarchies of Humanity: Moral Commitments and Ethical Dilemmas of Humanitarianism', in Feldman and Ticktin, *In the Name of Humanity*, 239.

<sup>67</sup> Interview with Trust Fund representative, Kampala, 25 October 2011.

<sup>68</sup> TFV Programme Progress Report, Summer 2014, 35.

<sup>69</sup> Interview with Trust Fund representative, Kampala, 6 February 2014.

<sup>70</sup> Interview with member of Kenyan NGO, Nairobi, 30 November 2012.

In addition to privileging some lives over others, humanitarian actors further inscribe the division between themselves as agentic subjects and the suffering populations whom they seek to treat through making the very assessments that are necessary for targeting beneficiaries. By classifying and categorising populations based upon treatment priorities, humanitarianism produces hierarchies and inequalities that belie its egalitarian ambitions, as the work of Alex de Waal and Didier Fassin has shown. Fassin claims that rather than a product of individual decision-making ('dysfunction' or 'misbehavior'), this contradiction between humanitarianism's 'noble goals' and its work in practice is instead an 'aporia', an impasse or doubt, intrinsic to humanitarian governance. Relatedly, Ilana Feldman and Miriam Ticktin have argued that 'humanitarian organizations often find themselves in the business of governing – managing, servicing – the populations they seek to aid'.<sup>71</sup>

Much like humanitarian aid provision, the restorative turn in international criminal law also harbours a contradiction between its ambitious goals of redressing wrongs on a broad scale and its relatively limited manifestations at the level of practice. To be sure, some issues arise from limitations that appear as products of institutional practice, particularly among large multi-sited institutions like the ICC, with field offices maintaining reporting relationships with The Hague, where most policy decisions are taken. As Trust Fund representatives have pointed out, the process of selecting proposals for recipients of funding is 'bureaucratic' and time-consuming.<sup>72</sup> For example, the Trust Fund's activities in the Democratic Republic of Congo does not have a physical rehabilitation mandate because it was not originally requested from the chamber; to attempt to add one would take considerable time.<sup>73</sup> However, what Fassin notes regarding the work of MSF holds for the ICC as well: rather than merely a product of bureaucratic dysfunction or staff decisions within the Court, the contradiction between legal humanitarianism's ambitious goals and limited practices is intrinsic, arising from a more fundamental tension between international criminal law and restorative conceptions of justice. Just as the universalist sentiment undergirding humanitarian assistance – to aid all those who suffer – runs up against

<sup>71</sup> I. Feldman and M. Ticktin, 'Government and Humanity', in Feldman and Ticktin (eds.), *In the Name of Humanity*, 13.

<sup>72</sup> Interview with Trust Fund representative, Kampala, 6 February 2014.

<sup>73</sup> To add a physical rehabilitation mandate would require filing a request with the Court, which would then have 45 days to decide on the proposal, and observations would need to be made by all parties. Interview with Trust Fund representative, Kampala, 12 July 2012.

practical constraints, producing hierarchies and exclusions along the way, the restorative sentiment at play in the ‘victims’ mandate’ of the ICC meets the juridical constraints of a field that is fundamentally designed to classify and categorise.

In international criminal law, such acts of classification and categorisation typically entail affixing criminal labels to forms of behaviour and locating individuals within hierarchies of command. Juridical classification ascribes modes of liability, differentiates forms of crime and determines what subjects, acts and periods of time fall within the scope of an institution’s jurisdiction. The form of governance performed here entails sorting and differentiation, distinguishing which deeds amount to ‘crimes of greatest concern to the international community’ and which bodies will appear before the law. When directed at the level of the population, however, these categories perform additional forms of governance. Borrowing from Michel Foucault, we can conceptualise such governance as a kind of ‘biopower’, intervening at the collective level (here, among conflict-affected populations) to promote life and health.<sup>74</sup> Unlike other theorisations of ‘biopower’ that would regard it as a repressive form of power, such as the sovereign power to suspend the law,<sup>75</sup> Foucault regarded biopower as productive power, in the sense that it was oriented towards producing greater vitality in the populations towards which it was directed.<sup>76</sup> Eighteenth- and nineteenth-century forms included developing biopolitical strategies for intervening to improve birth rates and control epidemics; we might regard twentieth- and twenty-first-century humanitarian practices that seek to alleviate suffering through providing medical care and livelihood support as contemporary forms. Generally biopower sought to ‘produce and regulate ways of maximizing the capacities of both the population and the individual as the target of power’;<sup>77</sup> similarly, according to the official Trust Fund narrative, the purpose of physical rehabilitation is ‘to address the care and rehabilitation of those victims who have suffered physical injury, in

<sup>74</sup> See M. Foucault, *The History of Sexuality, Vol. 1: The Will to Knowledge* (London: Penguin, 1978); and M. Foucault, *Society must be defended: Lectures at the Collège de France, 1975–76* (New York: Picador, 2002).

<sup>75</sup> G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, CA: Stanford University Press, 1998).

<sup>76</sup> Foucault’s work historicises this form of power, beginning with its emergence in the seventeenth century and consolidation in the nineteenth century. There is a vast secondary literature on Foucault’s notion of biopower and biopolitics, and addressing it is beyond the scope of this chapter.

<sup>77</sup> P. Rabinow and N. Rose, ‘Biopower Today’, *Biosocieties*, 1 (2006), 199, 195–217.

order to recover and resume their roles as productive and contributing members of their societies'.<sup>78</sup>

Through reading Trust Fund interventions in this light, as forms of governance, we can see the ways in which legal humanitarianism seeks to support and manage the lives of those who fall within its jurisdiction. A telling example is the case of Mary, a pseudonym used to designate a woman from northern Uganda, whose narrative is recounted in a Trust Fund annual report. According to the report, Mary 'became actively involved in economically-productive activities' following Trust Fund-supported counselling.<sup>79</sup> Here the Trust Fund's embeddedness in a liberal conception of subjectivity – the norm of the productive, self-reliant subject – reveals the broader backdrop of 'liberal humanitarianism', in Barnett's words, in which Trust Fund interventions transpire. This focus on economic productivity is coupled with an emphasis on psychic well-being: '[e]ngaging herself in defence of her own rights has strengthened her sense of purpose and happiness and has been an important part of her remarkable recovery'.<sup>80</sup> All Trust Fund interventions include a 'psychosocial' dimension, such as counselling, in addition to medical or livelihood support.<sup>81</sup> In this way the Trust Fund draws upon therapeutic discourse, casting suffering as trauma and thereby extending the reach of psychological responses to material harm.

Finally, as Peter Dixon's chapter recounts, the Trust Fund operates through practices of 'targeting' that direct care towards particular individuals and communities. In the case of the Trust Fund's medical interventions, a representative explained that the Trust Fund tries to address individuals who have injuries that are 'emblematic of the conflict', such as burn victims and amputees in the context of northern Uganda.<sup>82</sup> A Gulu-based observer of the Trust Fund's work noted that the Trust Fund was known for supporting reconstructive surgery and prosthetics, but was not well known for treating other conflict-related conditions.<sup>83</sup> Here conflict-related suffering is placed on a spectrum of what can be regarded as most 'emblematic', and treatment priorities are determined in relation to that spectrum. As a second Trust Fund staff member observed, 'we are not a humanitarian body';<sup>84</sup> legal humanitarianism faces the constraints of the juridical form. Even the Trust Fund, whose work is not restricted

<sup>78</sup> TFV Programme Progress Report, Summer 2014, 5. <sup>79</sup> *Ibid.*, 32. <sup>80</sup> *Ibid.*

<sup>81</sup> Interview with Trust Fund representative, Kampala, 9 December 2011. <sup>82</sup> *Ibid.*

<sup>83</sup> Interview with Justice and Security Research Programme researcher, Gulu, 8 February 2014.

<sup>84</sup> Interview with Trust Fund representative, Kampala, 12 July 2012.



by the need to establish a nexus to charged crimes, still regards its interventions as responding to harms rather than to needs.

### Conclusion: beyond humanitarian governance

The globalization of compassion meant a view of humanity based on the figure of the victim.<sup>85</sup>

In *Discipline and Punish*, Michel Foucault argued that '[t]oday, criminal justice functions and justifies itself only by this perpetual reference to something other than itself, by this unceasing reinscription in non-judicial systems'.<sup>86</sup> In the case of international criminal law, this 'something other' appears increasingly as the figure of the victim, the object of legal humanitarianism. It would seem that the logic of punitive justice is not enough to legitimate the political and material investments of states in the field of international criminal law, requiring a humanitarian supplement to the objectives of institutions such as the ICC.

As a form of humanitarian governance, the ICC's victim mandate produces a regime of care – an institutionalisation of what Judith Butler calls 'precarious life', which is then governed and managed and attended to (or not).<sup>87</sup> Governance is not always carried out by states (or by the Court), but also by non-state actors, by technologies of inscription such as victim participation forms, and through practices of adjudication, with their associated deferrals in line with the slow pace of juridical time. The conduits of legal humanitarianism are diverse, as the Court describes:

A wide range of actors including States Parties, local authorities, non-governmental and community based organisations, as well as international organisations have been and continue to be instrumental in bringing about an increased awareness of victims' rights, as well as in enabling them to realise their rights. Wherever possible the Court seeks to identify a common approach and to coordinate with the above actors.<sup>88</sup>

A plurality of actors participate in implementing the Court's 'victim mandate' and, by extension, in disseminating its associated views about

<sup>85</sup> Weizman, *The Least of All Possible Evils*, 38.

<sup>86</sup> M. Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage Books, 1977), 22.

<sup>87</sup> Judith Butler, *Precaious Life: The Powers of Mourning and Violence* (London: Verso, 2004).

<sup>88</sup> ICC-ASP/11/38, 'Court's Revised Strategy in Relation to Victims', 5 November 2012, 4.

the utility of routing restorative justice through retributive law. As this chapter has illustrated, these interventions are consequential: they produce expectations about what the field of international criminal law enables; expectations that are to be 'managed', according to official ICC documents,<sup>89</sup> but which nonetheless may be experienced as a form of institutional indifference bordering on cruelty. Staff working for the VPRS section must explain that specific forms of suffering will not be compensated, as when an aspiring victim participant requests compensation for lost livestock in response to a query on the participation form. Some applicants for victim participation in the Ugandan situation have filed forms in 2006 and continue to await formal recognition.<sup>90</sup> Others in the Kenyan situation must be informed by Court staff that their status has changed from case to situation victim, with an attendant loss of participatory rights.

These practices of participation and assistance, animated by humanitarian sentiments and seeking to carve out a space for restorative justice within a retributive legal framework, are themselves modes of governance. They classify conflict-affected populations; for example, into groups with participatory rights at the ICC and those who fall outside its jurisdiction, and those whose wounds are regarded as emblematic and those whose are not. The Court has recognised the perils of implementing victims' rights through the Rome Statute, arguing that it needs to exceed the Hippocratic imperative to 'do no harm' and address the conflict-affected individual as 'a rights-holder to whom the duty-bearer – in this case, the Court, the TFV, and the Rome Statute system – owes an obligation it must fulfil'.<sup>91</sup> Yet in spite of these aspirational sentiments, the Court is constrained by its innate identity as a legal institution, bound to perpetually reinscribe the categories and classifications that inform its very being. To overcome this requires a step beyond the positivism of the Rome Statute system towards a broader notion of equity and responsiveness to the communities who most directly experienced the suffering wrought through the crimes the Court seeks to adjudicate – a step that may not be possible within the juridical frame of the ICC.

<sup>89</sup> A policy document on external relations includes among its goals 'managing expectations'; see ICC, 'Integrated Strategy for External Relations, Public Information and Outreach'.

<sup>90</sup> Interview of VPRS staff member, Kampala, 6 February 2014.

<sup>91</sup> ICC/ASP/11/38, 'Court's Revised strategy in relation to victims', 5 November 2012, 3.