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## From Prosecutorial to Reparatory: A Valuable Post-Conflict Change of Focus

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## ARTICLES

### FROM PROSECUTORIAL TO REPARATORY: A VALUABLE POST-CONFLICT CHANGE OF FOCUS

Nancy Amoury Combs\*

INTRODUCTION .....	219
I. INTERNATIONAL CRIMINAL PROSECUTIONS: THREE KEY CHALLENGES .....	226
A. <i>Obtaining Custody Over Defendants</i> .....	227
B. <i>Finding Accurate Facts</i> .....	234
C. <i>Selectivity</i> .....	238
D. <i>Summary</i> .....	239
II. REPARATIONS AS A VIABLE ALTERNATIVE .....	239
A. <i>Obtaining Funds for Reparations</i> .....	243
B. <i>Finding Accurate Facts</i> .....	257
III. THE NORMATIVE CASE FOR SHIFTING FOCUS FROM THE PROSECUTORIAL TO THE REPARATORY .....	262
A. <i>The Benefits of Reparations: Victims' Perspective</i> ....	263
B. <i>Reducing Conflict Through Reparations</i> .....	266
C. <i>Shifting to Save: The Precarious Present Position of     International Criminal Justice</i> .....	267
CONCLUSION .....	275

#### INTRODUCTION

The ICC is well known in international legal circles. Indeed, everyone who knows anything about international law knows that the ICC is the acronym for the International Criminal Court, the body charged with prosecuting international crimes around the globe. Created in 2002, the ICC was intended to “put an end to impunity” for the perpetrators of international crimes” and to affirm “that the most serious crimes of concern to the international community as a whole must not go unpunished.”<sup>1</sup> Imagine, however, a world where the “ICC” instead was an acronym for the International Compensation Court. That is, what if the ICC were a body charged with providing financial reparations to victims of mass violence? What if, instead of devoting millions upon millions of dollars to

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1. Rome Statute of the International Criminal Court preamble, July 17, 1998, 2187 U.N.T.S. 38544 [hereinafter Rome Statute].

prosecuting those who commit international crimes, the international community used those resources to compensate victims of international crimes?

Such a thought experiment probably seems fanciful largely because, for the last two decades, criminal trials have occupied center stage in the international community's panoply of responses to mass atrocities. Certainly, it is well understood that a variety of transitional justice measures serve a variety of valuable ends. Indeed, individuals and societies emerging from widespread repression and violence have so many needs that no single post-conflict mechanism can address all of them; thus, it has become customary to consider various transitional justice mechanisms to complement one another and to provide different but equally crucial benefits to societies seeking to heal following mass atrocities.<sup>2</sup>

However, despite the recognition that a multipronged and holistic approach to post-conflict transitions offers optimal benefits, most international law scholars and policy makers nonetheless view criminal trials as the centerpiece response to mass atrocities, the gold standard, if you will, of transitional justice mechanisms.<sup>3</sup> Yes, truth commissions may disseminate a richer, more nuanced history than that which emerges from a criminal trial.<sup>4</sup> Yes, financial compensation may provide victims with tangible

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2. See CHRISTINE EVANS, *THE RIGHT TO REPARATION IN INTERNATIONAL LAW FOR VICTIMS OF ARMED CONFLICT* 135–37 (2012); Pablo de Greiff, *Introduction to THE HANDBOOK OF REPARATIONS* 11 (Pablo de Greiff ed., 2006) [hereinafter de Greiff's Introduction]; Pablo de Greiff, *Justice and Reparations*, in *THE HANDBOOK OF REPARATIONS*, *supra* at 451, 461; Naomi Roht-Arriaza, *The New Landscape of Transitional Justice*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY* 1, 8 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006); Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?* 38 *GEO. J. INT'L L.* 251, 259–60 (2007); Anja Seibert-Fohr, *Reconciliation Through Accountability*, 9 *MAX PLANCK Y.B. U.N. L.* 555, 569 (2005).

3. See MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 3–6 (2007); Laurel Fletcher & Harvey Weinstein, *Violence and Social Repair*, 24 *HUM. RTS. Q.* 573, 577–79 (2002); Tom Syring, *Truth Versus Justice: A Tale of Two Cities?*, 12 *INT'L LEGAL THEORY* 143, 208–09 (2006). See also Luc Huyse, *Justice After Transition: On the Choices Successor Elites Make in Dealing with the Past*, in 1 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, GENERAL CONSIDERATIONS* 337, 339–41 (Neil J. Kritz ed., 1995) (describing the need for post-transition trials).

4. Martha Minow observes:

The task of making a full account of what happened, in light of the evidence obtained, requires a process of sifting and drafting that usually does not accompany a trial. Putting narratives of distinct events together with the actions of different actors demands materials and the charge to look across cases and to connect the stories of victims and offenders. Truth commissions undertake to write the history of what happened as a central task. For judges at trials, such histories are the by-product of particular moments of examining and cross-examining witnesses and reviewing evidence about the responsibility of particular individuals.

MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* 59–60 (1998). See also PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* 29–30 (2002). But see Jaime E. Malamud-Goti & Lucas Sebastián Grosman, *Reparations and Civil Litigation: Compensation for Human Rights Violations in Transitional Democracies*, in *THE HANDBOOK OF REPARA-*

assistance crucial to rebuilding their shattered lives. But despite the established benefits of these measures, each of them, separately or together, are considered to fall considerably short if they are not coupled with criminal trials.<sup>5</sup> When non-prosecutorial mechanisms are the only response, it is believed, many important goals will not be attained,<sup>6</sup> and there will exist an untenable justice gap.<sup>7</sup>

It is largely for this reason that criminal prosecutions have become the main focus of the international community—politically, ideologically, and financially—following mass atrocities, and other responses, including reparations, occupy a less-important place. To be sure, modern international criminal law emerged only two decades ago with the somewhat surprising creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Other tribunals soon followed, however. The Special Court for Sierra Leone (SCSL) prosecuted atrocities occurring during that country's brutal civil war. The Special Panels for Serious Crimes in East Timor (Special Panels) prosecuted crimes committed in the aftermath of East Timor's independence referendum. The Special Tribunal for Lebanon (STL) recently began prosecuting those allegedly responsible for the assassination of Lebanese President Hariri and nearly two dozen others, and the call for criminal justice is so strong that it persists nearly forty years following the brutal reign of the Khmer Rouge, as the Extraordinary Chambers in the Courts of Cambodia (ECCC) race to prosecute the Khmer Rouge's octogenarian leaders before they die of old age. Finally and most importantly—as noted at the outset—the international community looked to the

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tions, *supra* note 2, at 539, 552 (contending that judicial fact-finding can be more reliable than truth-commission fact-finding because at trial “witnesses render their testimony under oath and can be cross-examined,” and because trials are conducted pursuant to “a vast array of procedural institutions devised to guarantee the fairness of the fact-finding process”).

5. See AFGHANISTAN INDEP. HUMAN RIGHTS COMM'N, *A CALL FOR JUSTICE: A NATIONAL CONSULTATION ON PAST HUMAN RIGHTS VIOLATIONS IN AFGHANISTAN* 18 (2005), available at <http://www.refworld.org/pdfid/47fdad50.pdf> (explaining that for many victims “a transitional justice strategy without a criminal justice component is likely to be viewed as unsatisfactory”) [hereinafter *A CALL FOR JUSTICE*].

6. Yael Danieli, *Massive Trauma and the Healing Role of Reparative Justice*, in *REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING* 41, 45 (Carla Ferstman et al. eds., 2009) (citing studies showing that victims' wounds are not as likely to heal if their perpetrators are not identified and punished for their crimes); Richard Goldstone, *Living History Interview with Judge Richard Goldstone*, 5 *TRANSNAT'L L. & CONTEMP. PROBS.* 373, 376 (1995) (“If there is not justice, there is no hope of reconciliation or forgiveness . . .”); Hassan B. Jallow, *Justice and the Rule of Law: A Global Perspective*, 43 *INT'L LAW.* 77, 79 (2009) (“The consolidation and maintenance of peace could not be achieved without judicially addressing the grievances arising from the genocide.”). See generally Timothy William Waters, *A Kind of Judgment: Searching for Judicial Narratives After Death*, 42 *GEO. WASH. INT'L L. REV.* 279, 285–87 (2010) (discussing the importance of post-conflict justice).

7. See Amnesty Int'l, *Amnesty International Report 2010: State of the World's Human Rights* 11, 37 (2010) (bemoaning the continued failure to prosecute many atrocities), available at <http://reliefweb.int/report/world/amnesty-international-report-2010-state-worlds-human-rights>.

future in 2002 to establish a permanent international criminal court with prospective jurisdiction to prosecute those who commit international crimes all over the globe.

Domestic courts likewise have become a locus for the prosecution of international crimes. Courts throughout Europe and beyond have prosecuted Rwandans accused of participating in that country's 1994 genocide,<sup>8</sup> as well as alleged offenders from the states of the former Yugoslavia.<sup>9</sup> Indeed, although recent efforts to expand the reach of universal jurisdiction have largely been unsuccessful,<sup>10</sup> human rights organizations continue to initiate proceedings where they can<sup>11</sup> and they continue to steadfastly pressure governments to undertake prosecutions.<sup>12</sup> In short, prosecutions for international crimes now take place in more locations than ever before,

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8. See, e.g., *R. v. Munyaneza*, [2009] O.C.C.S. 4865 (Can.); *German Court Sentences Rwandan Ex-mayor on Genocide Charges*, DEUTSCHE WELLE, Feb. 18, 2014, available at <http://www.dw.de/german-court-sentences-rwandan-ex-mayor-on-genocide-charges/a-17439554>; *Norway Jails Rwandan for 21 Years over Role in 1994 Genocide*, THE GUARDIAN, Feb. 14, 2013, available at <http://www.theguardian.com/world/2013/feb/14/norway-jails-rwandan-genocide>.

9. See *Entscheidungen Des Bundesgerichtshofes in Strafsachen [BGHST]* [Federal Court of Justice] *Prosecutor v. Nikola Jorgić*, April 30, 1999 (Ger.), available at [http://www.asser.nl/upload/documents/20120611T032623-Jorgic\\_Urteil\\_30-4-1999.pdf](http://www.asser.nl/upload/documents/20120611T032623-Jorgic_Urteil_30-4-1999.pdf); *Bayerisches Oberstes Landesgericht [BayObLG]* (Bavarian Higher Regional Court) *Prosecutor v. Djajic*, May 23, 1997 (Ger.); *Tribunal Militaire de Division 1 [Military Court Division]* *In re G*, April 18, 1997 (Switz.).

10. Spain enacted far-reaching legislation authorizing the exercise of universal jurisdiction over defendants with little connection to Spain. A. Hays Butler, *The Growing Support for Universal Jurisdiction in National Legislation*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 67, 73 (Stephen Macedo ed., 2004). On this basis, it initiated cases against approximately 100 suspects in Chile and Argentina, including Chilean General Augusto Pinochet. In addition, it investigated the conduct of Chinese, American, Salvadoran, Congolese, Israeli, and Guatemalan defendants. BETH VAN SCHAACK & RONALD SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 137 (2d ed. 2010), and thereby provoked great controversy. Consequently, in 2009, Spain sharply limited its universal jurisdiction law. See Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 26 (2011). It introduced further restrictions in January 2014. Ashifa Kassam, 'Superjudge' Condemns International Justice Curbs, THE GUARDIAN, Feb. 15, 2014, available at <https://listserv.buffalo.edu/cgi-bin/wa?A2=ind1402&L=JUSTWATCH-L&F=&S=&P=99939>; cf. Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888 (2003) (describing Belgium's unsuccessful foray into expansive universal jurisdiction); Franck Petit, *Genocide: Electric Shock in Denmark*, INT'L JUST. TRIB. June 6, 2011, available at <http://www.rnw.nl/international-justice/article/genocide-electric-shock-denmark>.

11. See, e.g., *Oberlandesgericht [OLGST]* [Regional Appeal Court] *Center for Constitutional Rights et al. v. Donald Rumsfeld et al.*, Apr. 21, 2009 (Ger.).

12. See, e.g., *Senegal War Crimes Court Starts Work on Habré Trial*, AGENCE FRANCE-PRESSE, Feb. 8, 2013 (noting that human rights activists pressured Senegal for many years before it agreed to prosecute Hissene Habré, the former dictator of Chad who had resided in Senegal for more than two decades).

and international crimes are now routinely met by swift and insistent calls for criminal prosecutions.<sup>13</sup>

On the one hand, it is easy to understand—indeed to celebrate—the international community’s desire for criminal justice. As a retributive matter, perpetrators of mass atrocities unquestionably deserve criminal sanctions. Genocide, war crimes, and crimes against humanity visit extraordinary harms on victims and their families—harms that destroy lives and rupture communities, often for generations. The scope and sadistic brutality of many of these crimes scream out for the imposition of severe punishment. Thus, it is understandable that a post-conflict package that does not include criminal trials might be seen to be woefully inadequate, a package that lacks a key ingredient.<sup>14</sup>

At the same time, recent scholarship has compellingly questioned the ability of international trials to attain the long-term goals frequently attributed to them. Consequently, it is now a matter for debate whether criminal trials are capable of deterring future atrocities,<sup>15</sup> satisfying victims,<sup>16</sup> or advancing peace-building efforts following large-scale violence.<sup>17</sup> Indeed, as a result of this newfound skepticism, some scholars have called for a diversification of transitional justice mechanisms.<sup>18</sup> This Article makes a significant contribution to that literature by suggesting that the international community consider shifting its focus to one particularly tangible post-conflict response—financial reparations for victims.

What sort of change-of-focus should we consider? Certainly, if I were to limit myself to suggesting that individuals and societies emerging from

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13. See, e.g., Vanessa Allen, *UN Wants Leaders Brought to Justice for Atrocities*, DAILY MAIL, Feb. 17, 2014, available at <http://www.dailymail.co.uk/news/article-2561201/North-Korea-categorically-totally-rejects-U-N-human-rights-report-details-starved-prison-camp-mothers-forced-drown-newborn-children.html>; Peter Clotey, *ICC Could Investigate South Sudan Conflict After UN Resolution*, VOICE OF AMERICA, Feb. 5, 2014, available at <http://www.voanews.com/content/icc-could-investigate-south-sudan-conflict-after-un-resolution/1845325.html>; Nick Cumming-Bruce, *New Inquiry on Sri Lanka Points to Possible War Crimes*, N.Y. TIMES, Feb. 4, 2014, available at [http://www.nytimes.com/2014/02/05/world/asia/new-inquiry-on-sri-lanka-points-to-possible-war-crimes.html?\\_r=0](http://www.nytimes.com/2014/02/05/world/asia/new-inquiry-on-sri-lanka-points-to-possible-war-crimes.html?_r=0); Paul Richter, *U.N. Report on Syria Gas Attack Fuels Calls for Assad’s Prosecution*, L.A. TIMES, Sept. 17, 2013, available at <http://articles.latimes.com/2013/sep/17/world/la-fg-syria-accountability-20130918>.

14. Malamud-Goti & Grosman, *supra* note 4, at 557.

15. See, e.g., Martti Koskeniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 8–11 (2002); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006).

16. DRUMBL, *supra* note 3, at 13, 42–44; ERIC STOVER, *THE WITNESSES: WAR CRIMES AND THE PROMISE OF JUSTICE IN THE HAGUE* (2005).

17. Fletcher & Weinstein, *supra* note 3, at 580; Marie-Bénédicte Dembour & Emily Haslam, *Silencing Hearings? Victim-Witnesses at War Crimes Trials*, 15 EUR. J. INT’L L. 151 (2004).

18. Mark Drumbl, for instance, advocates a shift from measures that are “narrowly oriented to incarceration following liberal criminal trials” toward the inclusion of “meaningful restorative initiatives, indigenous values, qualified amnesties, reintegrative shaming, the needs of victims, reparations, collective or foreign responsibilities, distributive justice or pointed questions regarding the structural nature of violence.” DRUMBL, *supra* note 3, at 147. See also Fletcher & Weinstein, *supra* note 3, at 625.

violent conflict would benefit from a greater quantity and range of financial reparations, I would be making a patently uncontroversial suggestion. Ideally, a host of mechanisms would be employed following an episode of mass atrocity: offenders would be prosecuted, victims would be compensated, truth would be told, and a variety of other symbolic and tangible measures would be undertaken to right to the maximum degree possible the many wrongs that victims suffered. Consequently, my thesis would be self-evident if I advanced only the obvious proposition that the international community should make greater efforts to compensate victims of international crimes. Of course it should, and even the more empirically grounded question of whether international community *could* do a better job of compensating victims can almost certainly be answered in the affirmative.

The problem, of course, is that the resources that the international community can devote to transitional justice measures are necessarily limited, so some form of prioritization is required. Currently, as discussed above, the international community prioritizes the prosecution of those who commit international crimes. Prioritizing criminal justice may well be normatively appropriate theoretically, and I am willing to postulate for purposes of this Article that criminal trials are both normatively required as a retributive matter and better able than other transitional justice mechanisms to advance the goals that the international community considers most important. But even if we assume that prioritizing criminal justice is normatively appropriate as a theoretical matter, it is appropriate as a *practical* matter only if the international tribunals can do a plausibly good job of carrying out their day-to-day business: prosecuting offenders.<sup>19</sup>

Whether they can is a question that Part I explores. It does so by considering three grave challenges confronting international tribunals. First, international tribunals often find it tremendously difficult, if not impossible, to obtain custody over their indictees. Second, even when a tribunal does get its defendants in the dock, it will often have considerable difficulty finding accurate facts about the crimes those defendants are alleged to have committed. Both of these obstacles are in some sense prosaic; however, each has the capacity to fundamentally undermine the tribunals' ability to carry out their primary functions. Finally, even if we assume (contrary to considerable evidence) that the international tribunals can gain custody over a sufficient proportion of their indictees and can find sufficiently accurate facts about the crimes in question, the cost of international trials is so high that only a small proportion of offenders can be prosecuted. This necessary selectivity has the potential to further reduce both the retributive and consequentialist benefits provided by international criminal trials.

The challenges facing international criminal tribunals are sufficiently grave that one might wonder if the international community has been too

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19. I focus on international tribunals, but my analysis applies in very similar ways to domestic courts that prosecute international crimes pursuant to universal jurisdiction.

ambitious in its ostensible quest for international criminal justice. This question is difficult to answer without assessing the international community's ability to implement other post-conflict measures.

To that end, Part II considers one important and respected transitional justice mechanism—financial reparations—and it evaluates the international community's capacity to provide them to victims. One thing we know without further investigation is that obtaining the resources necessary to *adequately* compensate victims would be impossible. Mass atrocities typically give rise to massive numbers of victims who sustain massive physical and emotional injuries. Many such injuries cannot be “repaired” in any meaningful sense of that term, and even providing non-trivial aid often will be prohibitively expensive given the number of victims and the scale of the losses. Reparatory efforts, therefore, necessarily will be inadequate in an absolute sense.<sup>20</sup> Part II's primary focus, by contrast, is on relative adequacy; in particular, it asks whether the international community can more effectively compensate victims than it has been able to criminally prosecute offenders. Although no one can answer this question with certainty, Part II generates a cautious and qualified “yes.”

Part III considers the implications of that conclusion. One possibility is that there are no useful implications because the comparison itself is not useful. That is, the fact that one post-conflict mechanism can be implemented more efficaciously than another is relevant only if the two mechanisms are equally valuable. But if, as we have postulated, prosecutions are more valuable than other post-conflict mechanisms, then our only task is to figure out how to improve prosecutions so as to overcome the near-disabling challenges that they currently confront.

The above analysis is valid, however, only if it is possible to substantially improve prosecutions at this point in time. An alternative conclusion, and one that Part III presents, is that the challenges confronting international prosecutions are sufficiently grave, and the short-term prospects for substantial improvement are sufficiently grim, that we should consider temporarily shifting focus to another highly beneficial post-conflict mechanism that we are more capable of implementing. In Part III, I cautiously suggest that, for the immediate future, we may be better off pursuing less ambitious goals, such as reparations, that we are more likely to achieve rather than continuing to aim for the gold standard of prosecutions, knowing that our current capacity to carry out prosecutions satisfactorily is quite limited. In doing so, I detail both the benefits of the less-ambitious goals as well as the corrosive effects of continuing to aim for—and failing to achieve—the more ambitious agenda.

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20. Lisa J. Laplante & Kimberly Theidon, *Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru*, 29 HUMAN RIGHTS Q. 228, 245 (2007) (noting that “economic reparations in the case of massive human rights violations can usually at most be a modest amount that cannot truly indemnify the personal harm suffered from political violence,” but that reparations may have at least symbolic value to victims).



I. INTERNATIONAL CRIMINAL PROSECUTIONS:  
THREE KEY CHALLENGES

The international community's first foray into criminal trials—at Nuremberg and Tokyo following World War II—raised expectations that the promulgation of international prohibitions could deter the kinds of atrocities perpetrated during World War II and that international criminal prosecutions were a potent response to such conduct when it did occur. Consequently, states came together to conclude the Genocide Convention and the Geneva Conventions,<sup>21</sup> and the International Law Commission began drafting both a comprehensive code of international crimes<sup>22</sup> and a statute establishing a permanent international criminal court.<sup>23</sup> The Cold War derailed these codification efforts,<sup>24</sup> and so it was not until the Cold War ended that modern international criminal law emerged. When it did—with the creation of the ICTY and the ICTR—it was greeted with intense enthusiasm. Richard Goldstone, the first prosecutor of the ICTY and ICTR, deemed those tribunals “a tremendous and exciting step forward,”<sup>25</sup> while Payam Akhavan lauded them for radically departing from “the traditional realpolitik paradigm which has so often and for so long ignored the victims of mass murder and legitimized the rule of tyrants in the name of promoting the purported *summum bonum* of stability.”<sup>26</sup> Other commentators expressed similarly effusive views.<sup>27</sup>

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21. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, 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, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

22. Rep. of the Int'l Law Comm'n, 6th Sess., June 3–July 28, 1954, U.N. Doc. A/2693; GAOR, 9th Sess., Supp. No. 9 (1954), reprinted in [1954] 2 Y.B. INT'L L. COMM'N 140.

23. Rep. of the Comm'n on Int'l Criminal Court Jurisdiction, 3rd Sess., Aug. 1–Aug. 31, 1951, U.N. Doc. A/2136; GAOR Supp. No. 11, ¶¶ 21–25 (1952).

24. See M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 12–13 (1991).

25. Richard Goldstone, *Conference Luncheon Address*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 1, 2 (1997).

26. Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325, 327 (1997).

27. See e.g., The Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, delivered to the Security Council*, ¶ 39, U.N. Doc. S/2004/616 (Aug. 23, 2004); Richard J. Goldstone, *50 Years after Nuremberg: A New International Criminal Tribunal for Human Rights Criminals*, in CONTEMPORARY GENOCIDES: CAUSES, CASES, CONSEQUENCES 215, 215–16 (Albert J. Jongman ed., 1996); Richard May & Marieke Wierda, *Evidence Before the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK McDONALD 249, 252–53 (Richard May et al. eds., 2001); MINOW, *supra* note 4, at 40; RUTI G. TEITEL, TRANSITIONAL JUSTICE 56 (2000); Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 9–10 (1998); Antonio Cassese, *Reflections on Inter-*

In the intervening years, criminal trials have unquestionably become the international community's centerpiece response to mass atrocities. As noted in the introduction, the international community created a series of *ad hoc* tribunals and a permanent international criminal court, international non-governmental organizations (NGOs) encourage domestic courts to undertake complex prosecutions on the basis of universal jurisdiction, and the prevailing view is that perpetrators of international crimes must be criminally punished or justice has not been done. The international community has reinforced this view by bestowing massive resources on the international tribunals. By 2013, the ICC, ICTY, ICTR, SCSL, ECCC, and the STL had spent a whopping \$6 billion<sup>28</sup> to prosecute a mere 285 defendants.<sup>29</sup> Whether those resources can be considered well-spent depends on a variety of considerations, but one of the most crucial is whether the international tribunals can carry out their prosecutions in a satisfactory way. This Part now considers that question.

#### A. Obtaining Custody Over Defendants

Perhaps the most substantial obstacle impeding those seeking to prosecute international crimes is their frequent inability to obtain custody over their indictees. This challenge became apparent at the inception of the first modern international tribunal—the ICTY—that initially was unable to convince either the states of former Yugoslavia to surrender its indictees<sup>30</sup> or the international community to take meaningful steps to assist the tribunal in its enforcement efforts.<sup>31</sup> As time passed, however, the enforce-

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*national Criminal Justice*, 61 MOD. L. REV. 1, 6–9 (1998); Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions*, 59 LAW & CONTEMP. PROBS. 81, 83 (1996).

28. By the Spring of 2014, the ICTY had spent approximately \$2.2 billion and the ICTR approximately \$1.6 billion. ICC proceedings have cost more per year than either of the above two tribunals, with the ICC spending approximately \$1.5 billion between 2003 and 2014. The hybrid tribunals have spent less. Costing a mere \$56 million during its approximately 5 year lifespan, the Special Panels delivered the least expensive justice. The ECCC has run up a \$157.2 million bill since it opened, and the SCSL spent \$212.7 during its 10 years in existence. Finally, the STL has only just begun its first trial, but it had already cost the international community nearly \$288 million by the Spring of 2014.

29. The following are the number of defendants prosecuted at each international tribunal as of February 2014: ICTY: 112; ICTR: 75; SCSL: 10; Special Panels: 84; ECCC: 1; and ICC: 3.

30. See Gabrielle Kirk McDonald, *Problems, Obstacles and Achievements of the ICTY*, 2 J. INT'L CRIM. JUST. 558, 563 (2004).

31. See *id.* at 562 (noting that although successive ICTY Presidents presented numerous reports to the Security Council complaining about lack of cooperation from the states of the former Yugoslavia, the Security Council “failed to respond in a meaningful way”). States that were performing peacekeeping functions in the region likewise provided the ICTY little meaningful enforcement assistance. Gabrielle Kirk McDonald, *Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia*, 24 HASTINGS INT'L & COMP. L. REV. 155, 160 (2001); see also THEODOR MERON, *WAR CRIMES LAW COMES OF AGE* 281 (1998); Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 795–96 (1998); Minna Schrag, *The Yugoslav War Crimes Tribunal: An Interim Assessment*, 7 TRANS.

ment record of international tribunals appeared to improve. The ICTR, for instance, obtained custody over most of its defendants soon after it opened, but it did so only because Rwanda's post-genocide government desired prosecutions and was willing to apprehend indictees and encourage other states to apprehend indictees.<sup>32</sup> The SCSL likewise was able to try virtually all of its indictees, but again, only because Sierra Leone approved of prosecutions. As for the ICTY, although its indictments were utterly ignored for several years after the tribunal's creation, European states eventually conditioned European Union (EU) membership for the states of the former Yugoslavia on those states' willingness to surrender indictees to the tribunal,<sup>33</sup> and this pressure enabled the tribunal to obtain custody over all of its indictees.

Although some of these statistics are encouraging, they must be balanced by those that are less positive. For instance, although the ICTR did obtain custody over virtually all of its indictees very early on, that was only because it issued indictments exclusively against Hutu perpetrators. The tribunal's jurisdiction also encompassed the retaliatory crimes against hu-

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NAT'L L. & CONTEMP. PROBS. 15, 22 (1997). Worse still, the NATO-led peacekeeping force apparently "went out of its way to avoid arresting suspects, reportedly waving Karad\_ic and other suspects through NATO checkpoints." DIANE F. ORENTLICHER, OPEN SOCIETY JUSTICE INITIATIVE & INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE, THAT SOMEONE GUILTY BE PUNISHED: THE IMPACT OF THE ICTY IN BOSNIA 28 (2010); see also PIERRE HAZAN, JUSTICE IN A TIME OF WAR: THE TRUE STORY BEHIND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 92 (James Thomas Snyder trans., 2004).

32. For instance, in January 1995, the leaders of Burundi, Kenya, Rwanda, Tanzania, Uganda, Zaire, and Zambia agreed to transfer defendants to the ICTR. Stuart Beresford, *In Pursuit of International Justice: The First Four-Year Term of the International Criminal Tribunal for Rwanda*, 8 TULSA J. COMP. & INT'L L. 99, 109 (2000). As a consequence of this kind of cooperation, Ignace Bagilishema was arrested in South Africa. *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgement, ¶ 8 (June 7, 2001). Clément Kayishema and Jean Paul Akayesu were arrested in Zambia. *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Judgement, ¶ 14 (May 21, 1999) [hereinafter *Kayishema Judgement*]; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, ¶ 9 (Sept. 2, 1998). Also, Obed Ruzindana was arrested in Kenya. *Kayishema Judgement*, Case No. ICTR-95-1-T, ¶ 15. See also Press Release, ICTR, Priest, Musician, and Minister Arrested for Genocide, ICTR/INFO-9-2-277.EN (July 12, 2001), available at <http://www.unict.org/tabid/155/Default.aspx?id=338> (reporting on the arrests of three defendants in Switzerland, The Netherlands, and Belgium); Press Release, ICTR, Captain Sagahutu Pleads Not Guilty, ICTR/INFO-9-2-254.EN (Nov. 25, 2000), available at <http://www.unict.org/tabid/155/Default.aspx?id=365> (reporting the arrest of defendant Sagahutu in Denmark); Press Release, ICTR, Lieutenant Colonel Muvunyi Transferred to ICTR Arusha, ICTR/INFO-9-2-247.EN (Oct. 30, 2000), available at <http://www.unict.org/tabid/155/Default.aspx?id=369> (announcing that Tharcisse Muvunyi was arrested, detained, and transferred by the United Kingdom). But see Press Release, ICTR, Prosecutor Outlines Future Plans, ICTR/INFO-9-2-254.EN (Dec. 13, 2000), available at <http://ictr-archive09.library.cornell.edu/ENGLISH/PRESSREL/2000/254.html> (reporting the Prosecutor's belief that the "arrests of some indicted individuals was [sic] being hampered by two African countries which were harbouring them").

33. DIANE F. ORENTLICHER, OPEN SOCIETY JUSTICE INITIATIVE & INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE, SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA 33-35 (2008); CARLA DEL PONTE, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 316-20 (2009).

manity that the Tutsi-led Rwandan Patriotic Front perpetrated against the Hutu, but the ICTR's efforts to prosecute those crimes ran into insurmountable resistance from Rwanda.<sup>34</sup> Thus, although the ICTR might at first glance appear to constitute an enforcement success because it apprehended most of those whom it indicted, the Tribunal was too weak even to indict (let alone apprehend) Tutsi offenders. Similarly, although the SCSL apprehended virtually all of its indictees, that court indicted a mere thirteen individuals, two of whom died before proceedings could commence.<sup>35</sup> Finally, although the ICTY's enforcement record did improve dramatically as a result of the pressure the EU exerted on the states of the former Yugoslavia,<sup>36</sup> the two men widely considered most culpable for the Bosnian atrocities, Radovan Karadžić and Ratko Mladić, were not arrested until thirteen and sixteen years after their indictments, respectively.<sup>37</sup> Moreover, for the ICTY to achieve the results it has, the EU has been forced to spend a great deal of diplomatic and political capital, which some believe has undermined its ability to advance other important goals in the region.<sup>38</sup>

Turning to other tribunals, the Special Panels were unable to obtain custody over any of its high-level indictees,<sup>39</sup> and pessimism about the STL's ability to obtain custody over its indictees was so acute at the tribunal's very creation that the international community authorized it to con-

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34. See generally Leslie Haskell & Lars Waldorf, *The Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences*, 34 HASTINGS INT'L & COMP. L. REV. 49, 75–79 (2011).

35. Prosecutor v. Foday Saybana Sankoh, Case No. SCSL-2003-02-PT, Withdrawal of Indictment (Dec. 8, 2003) (Sierra Leone); Prosecutor v. Sam Bockarie, SCSL-2003-04-PT, Withdrawal of Indictment (Dec. 8, 2003) (Sierra Leone).

36. Carla Del Ponte, Chief Prosecutor of the ICTY, Address at the Policy Briefing for the European Policy Centre (July 3, 2007), available at [http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/070603\\_del-ponte.pdf](http://www.icty.org/x/file/Press/Statements%20and%20Speeches/Prosecutor/070603_del-ponte.pdf).

37. Prosecutor v. Karadžić & Mladić, Case No. IT-95-5-I, Indictment (Int'l Crim. Trib. for the Former Yugoslavia July 24, 1995); Press Release, ICTY, Tribunal Welcomes the Arrest of Ratko Mladić, OTP/1412-e (May 26, 2011), available at <http://www.icty.org/sid/10671>; Press Release, ICTY, Tribunal Welcomes the Arrest of Radovan Karadžić, NJ/MOW/1275e (July 21, 2008), available at <http://www.icty.org/sid/9952>.

38. See, e.g., *Netherlands Stands Firm in Opposing Deal for Serbia*, AGENCE FRANCE-PRESSE, Jan. 16, 2008, available at <http://web.archive.org/web/20070811181428/http://www.eu-business.com/news-eu/1200499324.24>; *Serbia Could Have EU Candidacy Status in 2008*, DALJE, Mar. 7, 2007, available at <http://dalje.com/en-world/serbia-could-have-eu-candidacy-status-in-2008/24729>; Mark John, *Belgium Vows to Block EU Shift on Serbia*, REUTERS, Feb. 28, 2007, available at <http://www.reuters.com/article/2007/02/28/us-serbia-belgium-idUSL2746615720070228>.

39. AMNESTY INTERNATIONAL & JUDICIAL SYSTEM MONITORING PROGRAMME, INDONESIA & TIMOR-LESTE, JUSTICE FOR TIMOR-LESTE: THE WAY FORWARD, ASA 21/006/2004, §§ 3.3, 4.1 (2004), available at <http://www.amnesty.org/en/library/asset/ASA21/006/2004/en/c0488a40-d62b-11dd-ab95-a13b602c0642/asa210062004en.pdf>; JUDICIAL SYSTEM MONITORING PROGRAMME, THE FUTURE OF THE SERIOUS CRIMES UNIT 10 (2004).

duct its trials *in absentia*.<sup>40</sup> This pessimism was well founded. The STL has not obtained custody over any of its indictees, and consequently it was forced to commence a trial *in absentia* in January 2014.<sup>41</sup> At the ECCC, three defendants have been convicted, but Cambodia's opposition to subsequent trials puts their likelihood in grave doubt, despite the strength of the evidence against those alleged to be their targets.<sup>42</sup> Perhaps of greatest concern for the future of international criminal prosecutions is the enforcement difficulties of the ICC, a permanent body that has considerable control over the atrocities it prosecutes. Not only has the ICC felt the need to skew its prosecutorial decisions in response to its enforcement weakness, but it has been largely unsuccessful in obtaining custody over high-level offenders even after the skewing.

ICC prosecutors maintain that they select their cases and situations without regard to political considerations,<sup>43</sup> but it is unlikely coincidental that all of the ICC's current investigations and prosecutions stem from conflicts in Africa, where states tend to have less global influence and fewer powerful allies. Admittedly, most of the ICC's situations were referred by the states in question, or by the Security Council.<sup>44</sup> However, the one situation that the prosecutor initiated via his *proprio motu* powers also stems from an African conflict, and the prosecutor strongly encouraged some of the African self-referrals that the court ultimately received.<sup>45</sup>

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40. Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, art. 22, U.N. Doc. S/RES/1757 (May 30, 2007); Special Tribunal for Lebanon, Rules of Procedure and Evidence, R. 105 *bis*, U.N. Doc. STL/BD/2009/01/Rev. 3 (Nov. 10, 2010).

41. Press Release, Special Tribunal for Lebanon, Ayyash et al. Case Opens at the Special Tribunal for Lebanon (Jan. 16, 2014), available at <http://www.stl-tsl.org/en/media/press-releases/16-01-2014-ayyash-et-al-case-opens-at-the-special-tribunal-for-lebanon>.

42. Mike Eckel, *Groups Fear Khmer Rouge Tribunal May Halt Trial*, ASSOCIATED PRESS, May 4, 2011, available at <http://www.foxnews.com/world/2011/05/04/groups-fear-khmer-rouge-tribunal-halt-trials/>; Colin Meyn, *Political Will Lacking as Much as KRT Funding*, THE CAMBODIA DAILY, Sept. 3, 2013, available at <http://www.cambodiadaily.com/archives/political-will-lacking-as-much-as-krt-funding-41567/>; Robert Carmichael, *Cambodia's Khmer Rouge Tribunal Facing Credibility Crunch*, DEUTSCHE PRESSE-AGENTUR, May 7, 2011, available at [http://www.robertcarmichael.net/Robert\\_Carmichael/Articles/Entries/2011/5/7\\_Cambodias\\_Khmer\\_Rouge\\_tribunal\\_facing\\_credibility\\_crunch.html](http://www.robertcarmichael.net/Robert_Carmichael/Articles/Entries/2011/5/7_Cambodias_Khmer_Rouge_tribunal_facing_credibility_crunch.html).

43. See, e.g., Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 CASE W. RES. J. INT'L L. 215, 224 (2008).

44. Uganda, the Democratic Republic of the Congo, Central African Republic, Ivory Coast, and Mali each referred the situations in their countries to the ICC. Otilia Anna Maunganzide & Antoinette Louw, *Implications of Another African Case as Mali Self-refers to the ICC*, INSTITUTE FOR SECURITY STUDIES (July 24, 2012), available at <http://www.issafrica.org/iss-today/implications-of-another-african-case-as-mali-self-refers-to-the-icc>. The Security Council referred the Darfur and Libyan situations to the ICC. S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005) (Darfur); S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011) (Libya).

45. See Paola Gaeta, *Is the Practice of 'Self-Referrals' a Sound Start for the ICC?*, 2 J. INT'L CRIM. JUST. 949, 949 (2004); Andreas Th. Müller & Ignaz Stegmüller, *Self Referrals on Trial: From Panacea to Patient*, 8 J. INT'L CRIM. JUST. 1267, 1268, 1269 n.13 (2010); Svebor Kranjc, *ICC Prosecutor Wants Ivory Coast Atrocities Referred*, REUTERS, Apr. 5, 2011, availa-

Thus, the prosecutor has played a role in selecting most of the situations currently before the Court.

That all of the ICC's situations hail from Africa is not intrinsically problematic. Many of the world's most brutal conflicts are occurring in Africa, and the situations presently before the court unquestionably feature sufficiently grave crimes to justify the ICC's attention. As Martin Ngogo, prosecutor general of Rwanda, put it: "There is not a single case at the ICC that does not deserve to be there." But Ngogo likewise pointed out that "there are many cases that belong there, that aren't there,"<sup>46</sup> and it is naïve to think that this fact has nothing to do with the ICC's enforcement impotence.

Legally speaking, the ICC's enforcement powers are even weaker than those of the ICTY,<sup>47</sup> and its political capital is likewise less robust. So, the ICC's exclusive focus on Africa makes perfect sense. By targeting crimes committed in globally weak states, the ICC increases the likelihood of enforcement success both because the international community is more apt to assist in apprehending perpetrators from those states and because the states themselves are more easily convinced (or coerced) to self-refer their situations to the ICC.

Although targeting African crimes increases the odds that the ICC will obtain custody over its indictees, it creates other problems. Most notably, the ICC's focus on Africa has persuaded many African states that the ICC applies a discriminatory double standard,<sup>48</sup> at best, or that it promotes "colonialism, slavery and imperialism,"<sup>49</sup> at worst. Indeed, the African Union (AU) has become so convinced of the ICC's partiality that it not only called for a Security Council deferral of the Darfur<sup>50</sup> and Kenyan situations,<sup>51</sup> but it also instructed member states not to assist the ICC in the arrest of indictee Omar al-Bashir, the President of Sudan.<sup>52</sup> Perhaps as

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ble at <http://www.reuters.com/article/2011/04/05/us-ivorycoast-icc-idUSTRE7346HM20110405>.

46. Robert Marquand, *African Backlash Against International Courts Rises*, CHRISTIAN SCI. MONITOR, Oct. 6, 2009, available at <http://www.csmonitor.com/World/Global-News/2009/1006/african-backlash-against-international-courts-rises>.

47. See NANCY AMOURY COMBS, *GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH* 31–35 (2007).

48. Marquand, *supra* note 46.

49. Mary Kimani, *Pursuit of Justice or Western Plot? International Indictment Stirs Angry Debate in Africa*, AFRICAN RENEWAL, Oct. 2009, at 12 available at <http://www.globalpolicy.org/component/content/article/164-icc/48439-pursuit-of-justice-or-western-plot.html>. See also David Kaye, *Who's Afraid of the International Criminal Court*, 90 FOREIGN AFF., May/June 2011, at 118, 125.

50. *Communiqué on the 3 February 2010 Judgment of the International Criminal Court Appeals Chamber on Darfur*, AFRICAN UNION (Feb. 4, 2010), available at <http://www.issafrica.org/uploads/4FevcommEng.pdf>.

51. Argaw Ashine, *Kenya Wins AU Support Over ICC Trials*, AFRICA REVIEW (Feb. 1, 2011, 9:48 AM), available at <http://www.africareview.com/News/-/979180/1099394/-/i65pmnz/-/index.html>.

52. African Union, Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/DEC.270(XIV) on the Second Ministerial Meeting of

a consequence, al-Bashir has been able to travel to several ICC states parties in Africa without fear of arrest.<sup>53</sup>

Finally, and perhaps most worryingly, even though the ICC has targeted conflicts in states that are more likely to willingly surrender defendants or bow to pressure to surrender them, as of Spring 2014, the ICC nonetheless had failed to obtain custody over more than half of its indictees,<sup>54</sup> and most of those who were in ICC custody had offered no resistance. In particular, of the eight defendants in ICC custody by the Spring of 2014, three voluntarily surrendered to the court,<sup>55</sup> and two were already in domestic custody when the ICC issued its indictments.<sup>56</sup> Similarly concerning is the fact that the Security Council, which referred the Sudan and Libya situations to the ICC, has shown little willingness to back up its referrals with enforcement assistance,<sup>57</sup>

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the Rome Statute of the International Criminal Court (ICC), ¶ 5, Assembly/AU/Dec.296(XV) (July 27, 2010).

53. See *Bashir Warrant: Chad Accuses ICC of Anti-Africa Bias*, BBC NEWS, July 20, 2010, available at <http://www.bbc.co.uk/news/world-africa-10723869>; *Court Worry at Omar Al-Bashir's Kenya Trip*, BBC NEWS, Aug. 28, 2010, available at <http://www.bbc.co.uk/news/world-africa-10723869>; *ICC reports Djibouti to UN Over al-Bashir Visit*, FOX NEWS, May 12, 2011, available at <http://www.foxnews.com/world/2011/05/12/icc-reports-djibouti-al-bashir-visit/>; *Sudan's President Al-Bashir to Visit Egypt Tuesday*, SUDAN TRIBUNE, Mar. 7, 2011, available at <http://www.sudantribune.com/spip.php?article38214>; *Why Arab Leaders Embrace Sudan's Indicted President*, CHRISTIAN SCIENCE MONITOR, Mar. 30, 2009, available at <http://www.csmonitor.com/World/Middle-East/2009/0330/p06s04-wome.html>; *Zambia 'Won't Surrender Bashir to ICC'*, AFRICA REVIEW, Dec. 12, 2010, available at <http://www.africareview.com/News/-/979180/1071076/-/i7jfdqz/-/index.html>. But see *ICC Indictment Forcing Bashir to Stay at Home*, VOA NEWS, Oct. 29, 2009, available at <http://www.voanews.com/english/news/a-13-2009-10-29-voa45.html> (discussing states that threatened to arrest al-Bashir if he travelled there).

54. By the Spring of 2014, the ICC had not gained custody over the following defendants: Charles Blé Goudé, Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al-Rahman, Omar Al-Bashir, Walter Barasa, Saif al-Islam Gaddafi, and Sylvestre Mudacumura. See ICC (Jan. 6, 2015), [http://www.icc-cpi.int/en\\_menus/icc/Pages/default.aspx](http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx) (describing each of these defendants as “at-large”).

55. See Jeffrey Gettleman, *Wanted Congolese Rebel Leader Turns Himself In to US Embassy*, N.Y. TIMES, Mar. 18, 2013, available at [http://www.nytimes.com/2013/03/19/world/africa/wanted-congolese-rebel-leader-turns-himself-in.html?\\_r=0](http://www.nytimes.com/2013/03/19/world/africa/wanted-congolese-rebel-leader-turns-himself-in.html?_r=0); *Sudan: Darfur Rebel Leaders Surrender to Hague Court*, BBC NEWS, June 16, 2010, available at <http://www.bbc.co.uk/news/10329167>.

56. Human Rights Watch, *ICC/DRC: New War Crimes Suspect Arrested*, REF WORLD, Feb. 7, 2008, available at <http://www.unhcr.org/refworld/docid/47b1bf9a20.html>.

57. Maryam Jamshidi, *The Enforcement Gap: How the International Criminal Court Failed in Darfur*, AL JAZEERA, Mar. 25, 2013, available at <http://www.aljazeera.com/indepth/opinion/2013/03/201332562714599159.html>. David Kaye notes, for instance, that the Security Council “could have increased the cost of doing business with Bashir by imposing sanctions on fugitive Sudanese officials and governments that flout the arrest warrant,” but after making the initial referral, the Security Council now “appears uninterested in giving the court the kind of support it needs.” Kaye, *supra* note 49, at 122-23. See also *Security Council Must Urgently Take Action to End Impunity in Darfur- ICC Prosecutor*, U.N. NEWS CENTRE, June 5, 2012, available at <http://www.un.org/apps/news/story.asp?NewsID=45090#.Ulv9U47PVZ4>; Bruno Stagno Ugarte, *Strengthening the Rule of Law Through the Security Council 3* (Austra-

despite repeated calls for it to do so.<sup>58</sup>

Even when international prosecutors can get their hands on indictees, serious problems of perception arise if the indictees are not the high-level officials deemed most culpable for the atrocities. The Special Panels, for instance, prosecuted more than seventy offenders, which is a respectable number by international tribunal standards; nonetheless, the Panels are largely considered a failure because they were not able to try any of the high-level Indonesians who orchestrated the crimes. Indeed, some NGOs continue to press the international community to establish an ICTY-type tribunal to bring these high-level Indonesian offenders to justice,<sup>59</sup> but it is widely understood that establishing such a tribunal would be pointless because Indonesia is no more willing to surrender offenders today than it was ten years ago, and the international community is no more willing to force Indonesia to do so. The ICC is in a somewhat similar position; although it has apprehended some high-level defendants, most of its most senior indictees are at-large and are apt to remain so.

Although this Part primarily aims to detail the difficulties that impede the tribunals in carrying out their day-to-day tasks, I will note that the tribunals' enforcement challenges also have the capacity to undermine the very legitimacy of international criminal law. International offenders are many, and international resources few; thus, only a tiny proportion of those who commit international crimes can be prosecuted. This necessary selectivity is a point I return to in Section C, but here I will also note that, when that necessary selectivity is deployed in seemingly unprincipled ways, it becomes especially corrosive.

In particular, when prosecutions feature only low-level offenders or only atrocities occurring in globally weak states, the credibility of international criminal justice as a whole suffers. Note, as just mentioned, that commentators do not praise the Special Panels for convicting seventy-odd offenders who otherwise would have suffered no penalties for their serious criminal activities. Rather, they label the Special Panels an abject failure for having convicted only low-level Timorese militia members.<sup>60</sup> Likewise, commentators do not praise the ICC for shining its light on a part of the

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lian Civil-Military Centre & the Australian Nat'l Univ. Centre for Int'l Governance and Justice, Working Paper No. 6.2, 2012).

58. *ICC Critical of Security Council's "Inaction" on Darfur*, SUDAN TRIBUNE, June 5, 2013, available at <http://www.sudantribune.com/spip.php?article46846>; *Efforts by Libya, International Partners Vital to Close Impunity Gap, Says ICC Prosecutor*, U.N. NEWS CENTRE, Nov. 14, 2013, available at <http://www.un.org/apps/news/story.asp?NewsID=46491#.VBpuefldUmN>; Rebecca Lowe, *Security Council Must Sanction Libya over al-Senussi Trial, Says Top Barrister*, INT'L B. ASS'N, Oct. 1, 2013, available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e08b9908-ade2-49ba-83f3-e76e3c74558c>.

59. See, e.g., Elizabeth F. Drexler, *The Failure of International Justice in East Timor and Indonesia*, in TRANSITIONAL JUSTICE: GLOBAL MECHANISMS AND LOCAL REALITIES AFTER GENOCIDE AND MASS VIOLENCE 49, 51 (Alexander Laban Hinton et al. eds., 2010).

60. David Cohen, *Accountability in the Balance: Trials Before the Special Panels for Serious Crimes in East Timor 1999–2005*, in CRITICAL ASSESSMENTS OF INTERNATIONAL CRIMINAL COURTS 103, 126 (Magda Karagiannakis ed., 2009).



world where impunity for brutal atrocities has reigned for centuries. Instead, they criticize the court for targeting Africa when more globally powerful states pass under the court's gaze.<sup>61</sup> These criticisms may be misguided; it may be that we cannot reasonably expect the international criminal justice system to be sufficiently powerful and principled so soon after its inception to enforce its indictments everywhere in the world. But misguided or not, the inability of international criminal justice systems to gain custody over their indictees substantially undermines both their day-to-day functioning and their theoretical appeal as transitional justice's enforcement centerpiece.

### B. Finding Accurate Facts

The foregoing Section explored the key pre-trial challenge facing international tribunals: gaining custody over indictees. Even when the tribunals have their defendants in the dock, however, their difficulties do not end. This Section, therefore, will explore the key trial-related challenge facing international criminal tribunals: finding accurate facts. Finding facts accurately is a challenge even in domestic criminal justice systems, where fact-finders occasionally acquit the guilty,<sup>62</sup> convict the innocent,<sup>63</sup> and convict the guilty but for different crimes than those which they committed.<sup>64</sup> Unfortunately, accurate facts are even harder to find when the crimes are international, and this unhappy truth has the potential to further undermine the efficacy of international trials as the centerpiece transitional justice mechanism.

Why are the facts of international crimes so hard to find? For one thing, charges of genocide, war crimes, and crimes against humanity frequently encompass conduct that spans considerable time and space. Thus, instead of asking fact-finders to determine whether a defendant robbed one bank at one location on one date, international fact-finders frequently must determine facts about a series of events spanning months, if not years, and hundreds, if not thousands, of miles. These facts can include not only acts that the defendant himself performed, but also the acts of his subordinates, his superiors, and his collaborators. Additionally, international fact-finders frequently must find facts concerning the defendant's official position in the relevant organization, his *de facto* role therein, his

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61. See, e.g., MAX DU PLESSIS, *THE INTERNATIONAL CRIMINAL COURT THAT AFRICA WANTS* vi–vii, 13–14 (2010).

62. See Daniel Givelber, *Lost Innocence: Speculation and Data About the Acquitted*, 42 *AM. CRIM. L. REV.* 1167, 1167–68 (2005).

63. For instance, the Innocence Project has identified 317 post-conviction DNA exonerations in the United States. *The Innocence Project – DNA Exonerations Nationwide*, INNOCENCE PROJECT, available at [http://www.innocenceproject.org/Content/DNA\\_.php](http://www.innocenceproject.org/Content/DNA_.php) (last visited Aug. 23, 2014). See generally Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 *RUTGERS L. REV.* 1317, 1321 (1997) (arguing that “America’s criminal justice system creates a significant risk that innocent people will be systematically convicted”).

64. See Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 *GEO. L.J.* 1567, 1569–70 (2011) (discussing intrajury negotiations that result in compromise verdicts).

relationship to other individuals in that organization, and his mental state regarding his own actions and the actions of his subordinates and co-perpetrators.<sup>65</sup>

To be sure, international crimes are not the only crimes to require fact-finding about such complicated sets of relationships and series of events. Domestic fact-finders in cases involving large-scale drug transactions or organized crime networks must wade through similar complexity. However, although these crimes may be as wide-ranging and complicated as international crimes, they typically are prosecuted soon after their occurrence, and they are investigated by means of sophisticated and reliable techniques, including wiretapping or other electronic surveillance.<sup>66</sup> International crimes, by contrast, frequently are not prosecuted until years or even decades after their occurrence, and international fact-finders are typically assisted by neither electronic nor documentary evidence.<sup>67</sup> Unlike Nazi offenders who documented their every move, modern-day international offenders, particularly those hailing from Africa, leave little, if any, paper trail,<sup>68</sup> and any written records that do exist are often difficult for prosecutors to obtain.<sup>69</sup> Consequently, the vast bulk of the evidence presented to the current international tribunals comes in the form of witness testimony, virtually all of which is provided by fact witnesses. With the exception of ICTY witnesses, only a tiny percentage of prosecution witnesses at the international tribunals are experts<sup>70</sup>

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65. Michelle Fitzpatrick, *Khmer Rouge Tribunal Faces Uphill Struggle with Second Trial*, AGENCE FRANCE-PRESSE, Sept. 18, 2010, available at <https://listserv.buffalo.edu/cgi-bin/wa?A2=ind1009&L=JUSTWATCH-L&H=1&P=135348> (describing the tremendous complexity of the ECCC's second trial).

66. See Daniel Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264, 1265–67, 1271 (2004).

67. See Carla Del Ponte, *Investigation and Prosecution of Large-Scale Crimes at the International Level: The Experience of the ICTY*, 4 J. INT'L CRIM. JUST. 539, 552 (2006) (describing the difficulty of gathering evidence of large-scale crimes without the use of contemporaneous wiretaps or surveillance).

68. See Kayishema Judgement, Case No. ICTR-95-1-T, ¶ 65.

69. See Prosecutor v. Blaškić, Case No. IT-95-14, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 13 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997); see also President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, *Assessments of the President and of the Prosecutor of the International Tribunal for the Former Yugoslavia, Pursuant to Paragraph 6 of Security Council Resolution 1534* (2004), transmitted by Letter to the President of the Security Council, Annex II, ¶¶ 71–73, 75, U.N. Doc. S/2010/588 (Nov. 19, 2010) (reporting that the prosecution's long-standing request to Croatia for military documents regarding Operation Storm remains outstanding).

70. The ICTY stands as an outlier in this regard because its proceedings do feature more than a tiny proportion of expert witnesses. See Caroline Davidson, *Explaining Inhumanity: When Should Courts Use Experts to Help Define International Crimes?*, VAND. J. TRANSNAT'L L., (forthcoming 2015). During the SCSL's first two cases, the prosecution introduced only three expert witnesses out of seventy-five and fifty-nine prosecution witnesses, respectively. Prosecutor v. Fofana & Kondewa, Case No. SCSL-04-14-T, Judgement, Annex F, ¶ 21 (Aug. 2, 2007); Prosecutor v. Brima et al., Case No. SCSL-2004-16-T, Judgement, ¶¶

and their testimony typically does not bear directly on the guilt of the defendants.<sup>71</sup>

Studies of domestic proceedings have shown that fact witness testimony is frequently unreliable,<sup>72</sup> and my research on international fact-finding brings to light the additional difficulties associated with eyewitness testimony at the international tribunals. As I do not wish to rehearse that detailed treatment here, I will confine myself to summarizing the conclusions I drew after reviewing thousands of pages of international criminal transcripts. The most important conclusion is that witnesses at international trials frequently are unwilling or unable to provide the kinds of information that fact-finders need in order to make accurate factual determinations. For instance, many witnesses have trouble answering questions that require them to provide dates, distances, duration, and numerical estimations.<sup>73</sup> Additionally, many witnesses have trouble answering compound questions and making sense of maps and other two-dimensional representations that are often useful in explicating and clarifying their testimony.<sup>74</sup> Other witnesses speak in indirect forms, and their answers appear (at best) to beat around the bush and (at worst) to be unresponsive or evasive.<sup>75</sup> Finally, what clear testimony witnesses do provide is often contradicted by the witnesses' own pre-trial statements.<sup>76</sup> My study of SCSL and ICTR cases revealed that approximately 50 percent of

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10, 149 (June 20, 2007) [hereinafter AFRC Judgement]. Like the SCSL, some early ICTR cases featured a few expert witnesses. *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness (Mar. 9, 1998) (providing one of only a few examples of expert witnesses involved in the Akayesu case); Kayishema Judgement, Case No. ICTR-95-1-T, ¶¶ 29, 73–74, 275, 277, 321, 325 (highlighting how few experts were involved in the Kayishema case), but in many later cases, no expert witnesses have appeared.

71. At the ICTR, expert witness testimony was used in the early cases primarily to establish that a genocide had taken place against the Tutsi. *See* Akayesu Transcript, *supra* note 70, at Feb. 11, 12, 13, 18, 21, 1997; Kayishema Judgement, Case No. ICTR-95-1-T, ¶¶ 34–54. More recent ICTR and SCSL trials have featured more diverse expert witness testimony. For instance, experts will occasionally testify about the command structure of a particular military force, *see, e.g.*, Prosecutor v. Sam Hinga Norman et al., Case No. SCSL-2004-14-T, Transcript, June 14, 2005; Prosecutor v. Brima et al., Case No. SCSL-2004-16, Transcript, Oct. 14, 2005, or the powers wielded by a particular defendant, Prosecutor v. Semanza, Case No. ICTR-97-20-T, Judgement, ¶¶ 295–298 (May 15, 2003); Prosecutor v. Ntagerura et al., Case No. ICTR-99-46-T, Transcript, Sept. 19, 2001, or those who held the same position as that of the defendant, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶ 73 (Sept. 2, 1998). However, the testimony of these experts is frequently derived from information provided to them by the fact witnesses, *see, e.g.*, AFRC Judgement, Case No. SCSL-2004-16-T, ¶ 549.

72. NANCY AMOURY COMBS, *FACTFINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS* 14–15 (2010).

73. *Id.* at 24–36.

74. *Id.* at 36–38, 46–48.

75. *Id.* at 49–60.

76. *Id.* at 106–29.

witnesses testified in ways that were seriously inconsistent with their pre-trial statements.<sup>77</sup>

The causes of these difficulties range from the innocent—which can include educational deficiencies, translation errors, and cultural divergences—to the gravely worrying—which can include witness mendacity. Because it is impossible in most instances to pinpoint a particular reason for a particular testimonial deficiency, my study concluded that modern-day international tribunals operate in a fact-finding fog of inconsistent, vague, and sometimes incoherent testimony that leaves them unable to say with any measure of certainty who did what to whom.<sup>78</sup> Perhaps a Rwandan defendant coordinated a massacre at Nyange church, as the prosecutors allege, but the only evidence that he did comes from alleged eyewitnesses, and the defense can present a bevy of its own witnesses who claim that the defendant was with them, far from the massacre site. No forensic evidence is available to assist judges, and the judges' ability to evaluate a witness's credibility is limited due to the linguistic and cultural differences that are so prevalent at the international tribunals. My study revealed that:

[international] witnesses frequently fail to answer questions, but we cannot know whether it is because they do not know the answers, or because they do not wish to provide them. International witnesses often testify haltingly and dance around relevant topics, but we cannot know whether they do so because that is the typical pattern of speech for their group, because they do not understand the questions they have been asked, because they have in fact answered directly but a mistranslation has created a seeming divergence between question and answer, or because they purposely wish to evade the question. And Lord only knows what to make of the many inconsistencies between witness testimony and pre-trial statements that pervade international criminal proceedings. Witnesses attribute these inconsistencies to investigators' errors. Defense counsel attribute them to witness mendacity. And each explanation, along with a host of others, is plausible."<sup>79</sup>

My empirical research led me to conclude that, because the facts of international crimes are so difficult to find, international tribunals, as a *de facto* matter, are forced to engage in a variety of sub-optimal fact-finding techniques to fill the gaps left by inadequate witness testimony. These include drawing inferences from defendants' official positions and institutional affiliations and employing a variable standard of proof.<sup>80</sup> Although I do not believe that the international tribunals' testimonial deficiencies

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77. *Id.* at 118–22.

78. *Id.* at 174.

79. *Id.* at 175.

80. *See generally* COMBS, *supra* note 47, at 235–72 (discusses drawing inferences from defendants' official positions), 343–64 (discusses employing a variable standard of proof).

and the tools used to ameliorate them result in frequent miscarriages of justice, they do impair the tribunals' ability to carry out one of its core functions—accurate fact-finding.

### C. Selectivity

This Part has canvassed the challenges the tribunals face in obtaining custody over indictees and finding facts accurately, but even if these difficulties did not exist, international criminal justice is characterized by a necessary selectivity that substantially impairs its efficacy. International crimes are typically perpetrated by large numbers of offenders, and the prosecution of these offenders costs vast sums of money. Section A revealed that most of those who are indicted will not be apprehended, but even if we confronted no enforcement difficulties, that is, even if we could apprehend 100 percent of those we indict, we could prosecute very few because each prosecution costs so much. As noted in the introduction, the international community has spent approximately \$6 billion to prosecute 285 offenders, creating a per-offender cost of approximately \$21 million.<sup>81</sup> Certainly, we could increase the number of prosecutions by employing more efficient procedures and by shifting more prosecutions to less-expensive domestic courts.<sup>82</sup> But prosecutions for international crimes are so extraordinarily expensive—under any circumstances—that such cost-saving measures would not alter the fundamental fact that criminal courts—whether domestic or international—possess the financial capacity to prosecute only a token number of those who commit international crimes.<sup>83</sup>

The selectivity that characterizes international criminal justice substantially undermines the ability of international criminal justice to advance the ends typically attributed to it. Space constraints prevent explicating this point in detail, but suffice it to say here that a criminal justice system that can prosecute only a miniscule proportion of criminals

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81. This calculation could be seen to underestimate the actual cost of international prosecutions because it includes the 84 defendants who were prosecuted far more inexpensively than is customary (or optimal) in the now-defunct Special Panels. See David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?*, 61 ASIA PAC. ISSUES 1 (2002). Alternatively, the calculation could be seen to overestimate the actual cost because it includes the high start-up costs for the ICC, which that court has probably not yet realized.

82. Also, we could eliminate waste. See Guénaél Mettraux, *The Cost of Justice – Is the ICC Living Beyond Its Means*, INT'L CRIM. L. BUREAU (Aug. 6, 2009), <http://www.internationalallawbureau.com/index.php/the-cost-of-justice-is-the-icc-living-beyond-its-means/>.

83. Rwanda stands as an exception to that rule because it has imposed criminal accountability on a substantial proportion of the hundreds of thousands who perpetrated genocide-related crimes; however, most of its prosecutions were conducted through an alternative – and frequently criticized – system known as gacaca. See, e.g., Lars Waldorf, *Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice*, 79 TEMP. L. REV. 1, 3 (2006); Timothy Longman, *Trying Times for Rwanda: Reevaluating Gacaca Courts in Post-Genocide Reconciliation*, HARV. INT'L REV. 48, 49, 51–52 (Summer, 2010).

in its jurisdiction cannot effectively deter, incapacitate, or reconcile.<sup>84</sup> Nor can it effectuate retribution. As Mark Drumbl notes, the tribunals' "retributive function is hobbled by the fact that only some extreme evil gets punished, whereas much escapes its grasp."<sup>85</sup>

#### D. Summary

The foregoing Sections show that those seeking to prosecute international crimes confront serious challenges. International tribunals frequently are unable to obtain custody over their indictees and even when they do, they frequently have difficulty finding accurate facts about the crimes their indictees allegedly committed. Further, the cost of prosecuting international crimes renders prosecutions a post-conflict mechanism that can be used only infrequently. And infrequent justice is justice that does not readily advance the goals to which it is aimed. Most discussions of these and other problems confronting international criminal law conclude with suggestions for improving the international criminal justice system. The Security Council is exhorted to assist the international tribunals with apprehending indictees,<sup>86</sup> for instance, or the tribunals are encouraged to take perjury more seriously.<sup>87</sup> This Article takes a different tack. Skeptical about the likelihood that dramatic improvements can be realized, and cognizant of the opportunity costs inherent in the (expensive) pursuit of international criminal justice, this Article asks whether post-conflict goals would be better effectuated if we reduced the scope of international criminal justice and re-directed resources and energy to another post-conflict mechanism, namely financial reparations. There is no point considering that question, however, until we confirm that we can implement an international reparations system with reasonable effectiveness. That is, if our efforts to provide reparations are apt to confront the same debilitating challenges that currently frustrate the international criminal tribunals, then shifting course makes little sense. Consequently, the next Part considers the international community's capacity to provide reparations to victims.

## II. REPARATIONS AS A VIABLE ALTERNATIVE

The right of crime victims to reparations is well established in both domestic and international law.<sup>88</sup> Various international bodies have con-

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84. See COMBS, *supra* note 47, at 47–48. However, some goals can be advanced with only a few prosecutions. See, e.g., Margaret deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 270 (2012).

85. DRUMBL, *supra* note 3, at 151.

86. See Kaye, *supra* note 49, at 122–23; DAVID KAYE ET AL., THE COUNCIL AND THE COURT: IMPROVING SECURITY COUNCIL SUPPORT OF THE INTERNATIONAL CRIMINAL COURT 17–24 (2013), available at <http://councilandcourt.org/files/2013/05/The-Council-and-the-Court-FINAL.pdf> (recommending ways for the Security Council to better support the ICC).

87. See COMBS, *supra* note 72, at 282–83.

88. For a discussion of state codes mandating a right of reparations for domestic crime victims, see ILARIA BOTTIGLIERO, REDRESS FOR VICTIMS OF CRIMES UNDER INTERNA-

firmed and developed these rights,<sup>89</sup> and in 2005, the United Nations (U.N.) General Assembly adopted *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which proclaim a right for victims of international crimes to receive “adequate, effective, and prompt” remedies.<sup>90</sup> These and other laws, along with political and diplomatic pressures, have occasionally motivated states and the international community to provide victims with financial reparations. Some states that have engaged in large-scale human rights viola-

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TIONAL LAW 26–28 (2003); Frédéric Mégret, *Justifying Compensation by the International Criminal Court’s Victims Trust Fund: Lessons from Domestic Compensation Schemes*, 36 BROOK. J. INT’L L. 123, 130–32 (2010) (providing a discussion of state codes mandating a right of reparations for domestic crime victims). See also European Convention on the Compensation of Victims of Violent Crimes, art. 2, Feb. 1, 1988, E.T.S. 116 (establishing guidelines for victim compensation in the member states of the Council of Europe and for nationals of those member states). Numerous treaties also provide a right of reparation to crime victims. See, e.g., Hague Convention Regarding the Laws and Customs of Land Warfare, 1907 Hague Convention IV, art. 3; Additional Protocol I to the 1949 Geneva Conventions, art. 91, June 8, 1977; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 41, Dec. 10, 1949; American Convention on Human Rights, art. 63(1), Nov. 22, 1969. See generally DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 114–43 (2d ed. 2005). One can distinguish between the right of reparation found in humanitarian law treaties and that found in human rights treaties for, whereas the rights appearing in human rights treaties are owed to individuals, the rights appearing in humanitarian law treaties are arguably owed only to states. See BOTTIGLIERO, *supra* at 82–89. But see Riccardo Pisillo Mazzeschi, *Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights: An Overview*, 1 J. INT’L CRIM. JUST. 339, 341–42 (2003) (arguing that article 3 of Hague Convention No. IV and article 91 of Protocol I should be “interpreted as rules providing for an obligation of reparation in favour both of states and of injured individuals”). For a discussion of whether a right to a remedy for state abuses can be considered to reflect customary international law, see SHELTON, *supra* at 465 (yes); Christian Tomuschat, *Reparations for Victims of Grave Human Rights Violations*, 10 TUL. J. INT’L & COMP. L. 157, 183 (2002) (no).

89. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131 ¶¶ 152–53 (July 9); *Factory at Chorzów (F.R.G. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17 at 47 (Sept. 13); *Factory at Chorzów (F.R.G. v. Pol.)*, Jurisdiction, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26) (“It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.”). See also Richard Falk, *Reparations, International Law and Global Justice: A New Frontier*, in THE HANDBOOK OF REPARATIONS, *supra* note 2, at 478, 491; Liesbeth Zegveld, *Victims Reparations Claims and International Criminal Courts*, 8 J. INT’L CRIM. JUST. 79, 82 (2010) (“This fundamental principle [of reparations] is established in virtually all domestic legal systems. This principle is equally applicable in international law.”). Human rights bodies have also been active in this realm. See, e.g., Velásquez-Rodríguez Case, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 ¶¶ 133–34 (1988). See also U.N. Hum. Rts. Comm., *Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. DOC. CCPR/C/21/REV.1/ADD.13, ¶ 16 (MAR. 29, 2004); Arturo J. Carrillo, *Justice in Context: The Relevance of Inter-American Human Rights Law and Practice to Repairing the Past*, in THE HANDBOOK OF REPARATIONS, *supra* note 2, at 525.

90. G.A. Res. 60/147, ¶¶ 13–15, U.N. GAOR, 60th Sess., Supp. No. 147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

tions, for instance, have established domestic reparations schemes.<sup>91</sup> Other states have elected (or have been forced) to participate in bilateral or international claims commissions that award compensation to victims of international crimes.<sup>92</sup> Still other states have been brought before the International Court of Justice (ICJ),<sup>93</sup> regional human-rights courts,<sup>94</sup> and even domestic courts,<sup>95</sup> where they have been ordered to pay compensation to individual victims or victim states. And although the ICC is not authorized to make reparations orders against states, it has become the first international criminal tribunal authorized to order convicted defendants to pay reparations to victims.<sup>96</sup>

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91. See, e.g., María José Guembe, *Economic Reparations for Grave Human Rights Violations: The Argentinean Experience*, in THE HANDBOOK OF REPARATIONS, *supra* note 2, at 21; Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile*, in THE HANDBOOK OF REPARATIONS, *supra* note 2, at 55–56; Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. MEM. L. REV. 367, 367 (2003).

92. For a survey of various historical and modern claims commissions, see, respectively, David J. Bederman, *The United Nations Claims Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT'L L. & POL. 1, 1 (1994); HOWARD M. HOLTZMANN & EDDA KRISTJÁNSDÓTTIR, INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES 136, 138–39 [hereinafter INTERNATIONAL MASS CLAIMS PROCESSES]. The Eritrea-Ethiopia Claims Commission (EECC) is an example of a body that was voluntarily created by the states in question to adjudicate international humanitarian law claims, whereas the United Nations Claims Commission (UNCC) was imposed on an unwilling Iraq. Some claims commissions, including some addressing Holocaust claims, have awarded funds directly to individual victims or victims' groups. See INTERNATIONAL MASS CLAIMS PROCESSES, *supra* at 138–39. Others, such as the UNCC, have paid states that thereafter distributed the appropriate sums to their nationals. See generally Linda A. Taylor, *The United Nations Compensation Commission*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING, *supra* note 2, at 203. Still other claims commissions, such as the EECC, are given no enforcement authority. Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.–Eri., Dec. 12, 2000, art. 5 ¶ 16, 40 I.L.M. 260.

93. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 1, ¶ 1 (Feb. 26) [hereinafter Genocide Judgment]; Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 168, ¶ 252 (Dec. 19) [hereinafter DRC v. Uganda].

94. Among human rights bodies, the Inter-American Court of Human Rights has taken the lead in hearing cases involving large-scale, grave human rights violations and in awarding compensation therefor. See Carrillo, *supra* note 89, at 506.

95. For instance, individual victims can also claim compensation from individual perpetrators through the US Alien Tort Claims Act and the Torture Victims Protection Act, which permit American courts to issue monetary judgments against foreign nationals found to have engaged in gross human rights abuses. See, e.g., BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN US COURTS 1–88 (2d ed. 2008); BOTTIGLIERO, *supra* note 88, at 52–66; SHELTON, *supra* note 88, at 160–72.

96. Rome Statute, *supra* note 1, at art. 75; see also Elizabeth Odio-Benito, *Foreword to REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING*, *supra* note 6, at 1–2; *Reparations for Victims*, ICC (Jan. 6, 2015), [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/victims/reparation/Pages/reparation%20for%20victims.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/reparation/Pages/reparation%20for%20victims.aspx).



Although the foregoing shows that victims of international crime are legally entitled to reparations, and that some states provide them, most do not,<sup>97</sup> and therefore, most victims of modern international crimes receive no financial reparations.<sup>98</sup> This fact is unsurprising given that most recent atrocities have occurred during internal armed conflicts in desperately poor states.<sup>99</sup> However, reparations mechanisms are an under-utilized post-conflict mechanism additionally because the international community has chosen to prioritize international criminal justice and consequently has devoted the bulk of its economic, political, and diplomatic capital to prosecutions. “[R]eparations are often an afterthought” to many transitional justice scholars and policymakers, Lars Waldorf maintains,<sup>100</sup> while Liesbeth Zegveld similarly notes that “[r]eparations for victims of serious violations of international criminal law has always been treated as a subject of secondary importance in international law.”<sup>101</sup> Richard Falk agrees, noting that “[r]eparations have received less attention than efforts at criminalizing the perpetrators of gross wrongs.”<sup>102</sup>

When we provide reparations to victims, we must grapple with a host of practical and theoretical questions. Among the theoretical are questions concerning the ontological nature of reparations,<sup>103</sup> the way in which reparations derive from both moral and legal principles,<sup>104</sup> and the micro and macro dimensions of reparations.<sup>105</sup> Even more importantly, providing reparations requires us to consider a host of practical questions, including

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97. See BOTTIGLIERO, *supra* note 88, at 99–103; EVANS, *supra* note 2, at 8; Falk, *supra* note 89, at 495.

98. See EVANS, *supra* note 2, at 2; Emanuela-Chiara Gillard, *Reparations for Violations of International Humanitarian Law*, 85 INT’L REV. RED CROSS 529, 549 (2003).

99. Most of the historical claims processes were established following international armed conflicts that featured a clear victor state that could impose a compensation mechanism on a clear losing state. See, e.g., Bederman, *supra* note 92, at 1–15.

100. Lars Waldorf, *Goats & Graves: Reparations in Rwanda’s Community Courts*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING, *supra* note 6, at 515.

101. Zegveld, *supra* note 89, at 79.

102. Falk, *supra* note 89, at 495. See also EVANS, *supra* note 2, at 9 (“Approaches to post-conflict analysis have tended to be short-sighted and have failed to pay due consideration to an aspect crucial for the victims: namely, the right to reparation.”).

103. See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 119 (2000).

104. Chris Cunneen, *Exploring the Relationship Between Reparations, the Gross Violation of Human Rights and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE: A GLOBAL PERSPECTIVE 355, 356 (Dennis Sullivan & Larry Tifft eds., 2006); George Ulrich, *The Moral Case for Reparations: Three Theses About Reparations for Past Wrongs*, 2001 HUM. RTS. DEV. Y.B. 369, 371 (2001).

105. Brandon Hamber, *Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition*, in THE HANDBOOK OF REPARATIONS, *supra* note 2, at 560, 560–61. For efforts to construct theoretical frameworks for the provision of reparations, see generally Ernesto Verdeja, *A Normative Theory of Reparations in Transitional Democracies*, in GENOCIDE’S AFTERMATH: RESPONSIBILITY AND REPAIR 166 (Claudia Card & Armen T. Marsoobian eds., 2007); David C. Gray, *A No-Excuse Approach to Transitional Justice: Reparations as Tools of Extraordinary Justice*, 87 WASH. U. L. REV. 1043 (2010); Mégret, *supra* note 88, at 127 (exploring rationales for the work of the ICC’s Trust Fund for

who should receive reparations,<sup>106</sup> who should pay reparations,<sup>107</sup> and what form should the reparations take.<sup>108</sup>

Although these issues are of tremendous significance, most of them do not concern us at this juncture because they arise after the decision to provide reparations has already been made. This Part instead considers that foundational question—whether to provide reparations—and asks, as a preliminary matter, whether we could implement an international reparations scheme with reasonable effectiveness. Effectiveness, like everything else in life, must be assessed relatively, so this Part compares the international community’s capacity to provide reparations with its capacity to conduct prosecutions. Consequently, this Part tracks Part I by first asking whether the international community is better able to obtain money for reparations than to obtain custody over individual offenders. Secondly, this Part asks whether the international community is better able to engage in accurate fact-finding with regard to reparations awards than with regard to criminal convictions. The tentative conclusions outlined in this Part pave the way for a discussion of their implications in Part III.

#### A. Obtaining Funds for Reparations

Before beginning our comparative analysis, various questions must be considered and assumptions made. First among the assumptions is that the international reparations body that we are postulating can order reparations without a predicate criminal conviction. This is crucial, for if a predicate criminal conviction were required, then the international community would confront the same challenges described in Part I. Because most reparations schemes discussed above have provided reparations without mak-

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Victims “in an attempt to build one of the first theoretical frameworks of its work”); Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4 (1992).

106. Theo van Boven, *Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING, *supra* note 6, at 19, 34–36; Edda Kristjánsdóttir, *International Mass Claims Processes and the ICC Trust Fund for Victims*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING, *supra* note 6, at 167, 179–83; Ellen L. Lutz, *After the Elections: Compensating Victims of Human Rights Abuses*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, GENERAL CONSIDERATIONS, *supra* note 3, at 551, 557–59; Wendy Orr, *Reparation Delayed is Healing Retarded*, in LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 239, 244 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000); Carla Sandoval-Villalba, *The Concepts of ‘Injured Party’ and ‘Victim’ of Gross Human Rights Violations in the Jurisprudence of the Inter-American Court of Human Rights: A Commentary on Their Implications for Reparations*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING, *supra* note 6, at 243, 247–78.

107. TEITEL, *supra* note 103, at 138–39; Lutz, *supra* note 104, at 559–61; Alexander Segovia, *Financing Reparations Programs: Reflections From International Experience*, in THE HANDBOOK OF REPARATIONS, *supra* note 2, at 650, 655.

108. Danieli, *supra* note 6, at 59–63; de Greiff, *supra* note 2, at 467–71; Hamber, *supra* note 105, at 570–80; Orr, *supra* note 106, at 244.

ing any criminal law determinations,<sup>109</sup> that is a reasonable assumption to make. First among the questions is from what source would reparations funding be sought? Funding could be obtained from non-culpable or culpable sources; if it is obtained from non-culpable sources, it could be obtained through voluntary contributions or assessments, and if it is obtained from culpable sources, it could be obtained from culpable individuals, culpable states, or both. Each of these funding sources necessitates a different analysis, so each will be addressed in turn.

I will begin by considering an international reparations body funded by non-culpable sources through voluntary donations. Such bodies already exist. The United Nations administers trust funds to benefit victims of torture and slavery,<sup>110</sup> and the states parties to the ICC also created a Trust Fund for Victims (TFV) to provide reparations for crimes within the court's jurisdiction.<sup>111</sup> A cursory look at these bodies reveals a key problem with voluntary donations: they are an unstable—and frequently inadequate—source of funding. For instance, between July 2011 and July 2012, the United Nations Voluntary Trust Fund for the Victims of Torture received \$8.1 million, but donations had decreased by thirty percent during the previous three years,<sup>112</sup> and a whopping seventy percent of the total donations came from one nation, the United States.<sup>113</sup> Other trust funds have generated fewer resources, and their budgets were equally unstable. For instance, in the last few years, the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery has been receiving annual donations of approximately \$500,000, but annual donations were nearly double that in 2008 and less than half that in 2007.<sup>114</sup> The ICC's TFV, for its part,

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109. *But see* Rome Statute, *supra* note 1, at art. 75(2) (authorizing the ICC to “make an order directly against a convicted person specifying appropriate reparations”).

110. *See, e.g.*, United Nations Voluntary Fund for Victims of Torture, G.A. Res. 36/151, U.N. GAOR, 36th Sess., U.N. Doc. A/RES/36/151 (Dec. 16, 1981); United Nations Voluntary Trust Fund on Contemporary Forms of Slavery, G.A. Res. 46/122, U.N. GAOR, 46th Sess., U.N. Doc. A/RES/46/122 (Dec. 17, 1991).

111. Rome Statute, *supra* note 1, at art. 79(1). Up until now, these trust funds have not provided reparations to individual victims but rather have funded projects designed to assist victims and communities in which crimes have taken place. Catherine E. Sweetser, Note, *Providing Effective Remedies to Victims of Abuse by Peacekeeping Personnel*, 83 N.Y.U. L. REV. 1643, 1668–69 (2008); *see also, e.g.*, TRUST FUND FOR VICTIMS, LEARNING FROM THE TFV'S SECOND MANDATE: FROM IMPLEMENTING REHABILITATION ASSISTANCE TO REPARATIONS, FALL 2010 PROGRAMME PROGRESS REPORT 5–7 (2010), available at <http://www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall%202010.pdf> [hereinafter TRUST FUND FOR VICTIMS].

112. U.N.G.A., *United Nations Voluntary Fund for Victims of Torture: Rep. of the Secretary General*, ¶¶ 9, 12 A/67/264 (Aug. 7, 2012).

113. *Id.* ¶ 12.

114. U.N. Secretary-General, *United Nations Voluntary Trust Fund on Contemporary Forms of Slavery: Rep. of the Secretary General*, ¶ 11, U.N. Doc. A/67/269 (Aug. 8, 2012); *see also* U.N. Secretary-General, *United Nations Voluntary Trust Fund on Contemporary Forms of Slavery: Rep. of the Secretary General*, 5, U.N. Doc. A/67/306 (Aug. 18, 2009).

raised about €7.3 million (approximately \$9.1 million) between 2004 and April 2011.<sup>115</sup>

Assessed funding eliminates the instability inherent in voluntary funding, and it also finds precedent in international and domestic law. The ICTY and ICTR, for instance, are funded through the United Nations' regular budget,<sup>116</sup> and states typically fund their domestic compensation schemes through their general budgets.<sup>117</sup> Stable funding does not mean adequate funding, however, and the international community almost certainly would be unwilling to devote considerable resources to an international reparatory body if it were at the same time spending hundreds of millions dollars on prosecutions for international crimes. Thus, voluntary or assessed funding can become an adequate source for reparations only if some funds currently devoted to prosecutions are diverted to reparations.<sup>118</sup> Space constraints prevent me from carefully analyzing just how much money would be required to provide a minimally acceptable quantity of reparations to a minimally acceptable proportion of victims, but given the vast sums currently spent on prosecutions, it seems plausible to conclude that, if the international community made compensating victims a considerably higher post-conflict priority, and diverted sums accordingly, it could do a creditable job of providing reparations to victims.

Although this is an encouraging conclusion, funding from non-culpable parties gives rise to one key disadvantage: it severs the link between the violation and the reparations. Reparations that are derived from culpable states or individuals, by contrast, not only provide victims with tangible assistance but also impose much-needed accountability on offenders. Such accountability is desirable under any circumstances and would prove all the more valuable in a world featuring fewer criminal trials because it would advance to some degree the retributive and deterrence goals that

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115. INTERNATIONAL CRIMINAL COURT, REGISTRY AND TRUST FUND FOR VICTIMS FACT SHEET 5 (2011).

116. INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, UPDATED STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, art. 32 (Sept. 2009), originally established by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY STATUTE]; S.C. Res. 955, Annex, art. 30, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR STATUTE].

117. For a discussion of these schemes, see, for example, MARTIN WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS: A RESTORATIVE RESPONSE TO CRIME 43–45 (1996).

118. Some victims and commentators have suggested such a diversion. See, e.g., Aloys Habimana, *Judicial Responses to Mass Violence: Is the International Criminal Tribunal for Rwanda Making a Difference Towards Reconciliation in Rwanda*, in INTERNATIONAL WAR CRIMES: MAKING A DIFFERENCE? 83, 86 (Steven R. Ratner & James L. Bischoff eds., 2004); Rachel Kerr & Jessica Lincoln, War Crimes Research Group, Department of War Studies, Kings College London, *The Special Court for Sierra Leone: Outreach, Legacy and Impact Final Report*, at 23 (Feb. 2008); Vincent O. Nmehielle & Charles Chernor Jalloh, *International Criminal Justice: The Legacy of the Special Court for Sierra Leone*, 30 FLETCHER F. WORLD AFF., Summer 2006, at 107, 109–10.

trials also seek to further.<sup>119</sup> Consequently, this Part now considers reparations funding from culpable sources. In particular, it explores whether an international reparatory body would be better able to enforce its awards than a criminal body its indictments? The Section concludes that a reparations body would have greater success because states and individuals are more likely to voluntarily pay a reparations award than to surrender to an indictment.

Turning first to culpable states, numerous precedents suggest that states would be more inclined to voluntarily comply with orders requiring reparations than with orders requiring the surrender of indictees. For one thing, the fact that many states voluntarily undertake reparations obligations at the same time that they steadfastly prevent the imposition of criminal penalties shows that states often find compensating victims more politically palatable than punishing offenders. Several South American countries provide clear examples of this phenomenon, as they shielded from criminal prosecution virtually all of the individuals responsible for the widespread torture and forced disappearances that characterized their Dirty Wars.<sup>120</sup> At the same time, however, these countries established

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119. For the view that reparations serve to deter atrocities, see HUMAN RIGHTS WATCH, COMMENTARY TO THE SECOND PREPARATORY COMMISSION ON RULES OF PROCEDURE AND ELEMENTS OF CRIMES 36 (1999); Gillard, *supra* note 98, at 530.

120. Argentina initially prosecuted some high-level members of the former government. See generally Paula K. Speck, *The Trial of the Argentine Junta*, 18 INTER-AM. L. REV. 491 (1987). However, these leaders and others awaiting prosecution were soon pardoned following strong military protests. See CARLOS SANTIAGO NINO, RADICAL EVIL ON TRIAL 103–104 (1996). Prosecutions of lower-level defendants were also initiated but, when military unrest grew as a result, the new democratic government of Raúl Alfonsín tried to limit the remaining prosecutions. NINO, *supra* at 90–95; José Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, GENERAL CONSIDERATIONS, *supra* note 3, at 3, 25. These measures failed to stem the unrest, however, and the government eventually felt compelled to pass a “due obedience” law that effectively provided amnesty to virtually all defendants. NINO, *supra* at 94–95, 100–01; Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 449, 459 (1990). Soon after taking office in 2003, President Néstor Kirchner championed the abolition of amnesty laws and pardons. Larry Rohter, *Now the Dirtiest of Wars Won't be Forgotten*, N.Y. TIMES, June 18, 2003, available at <http://www.nytimes.com/2003/06/18/international/americas/18LETT.html>. Later that year, the Senate voted to repeal the amnesty, and the Supreme Court struck down the pardons as unconstitutional. Mayra Pertossi, *Argentine Court Revokes Dirty War Amnesty*, ASSOCIATED PRESS, June 14, 2005, available at <http://www.freerepublic.com/focus/news/1423004/posts>. Prosecutions began again in 2006 and have targeted high-level former government officials. Larry Rohter, *After 30 Years, Argentina's Dictatorship Stands Trial*, N.Y. TIMES, Aug. 20, 2006, at A3; *Argentina Starts “Dirty War” Trial of an Ex-Officer*, N.Y. TIMES, Oct. 19, 2007, at A14; *Trial Begins for a Former President of Argentina*, N.Y. TIMES, Nov. 2, 2009, at A5; Charles Newbery & Alexei Barrionuevo, *25 Years for Leader of Argentine Dictatorship*, N.Y. TIMES, Apr. 21, 2010, at A8. Similarly, Chile, while still under the rule of Augusto Pinochet, passed blanket amnesties that shielded the military from prosecutions. See, e.g., ALEXANDRA BARAHONA DE BRITO, HUMAN RIGHTS AND DEMOCRATIZATION IN LATIN AMERICA: URUGUAY AND CHILE 105 (1997); William W. Burke-White, *Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation*, 42 HARV. INT'L L.J. 467, 482–83 (2001). In the

government reparations schemes to compensate victims, and some even permitted victims to initiate civil actions seeking compensation from offenders.<sup>121</sup> Similarly, South Africa never seriously contemplated prosecuting apartheid-era officials because it was understood that doing so would unleash violent resistance to the democratic transition.<sup>122</sup> By contrast, plans to pay financial reparations to victims not only elicited no controversy, but the South African Truth and Reconciliation Commission Act expressly contemplated reparations.<sup>123</sup> Admittedly, South Africa faced political and economic obstacles that delayed the payment of reparations and necessitated smaller reparations awards than had initially been hoped for,<sup>124</sup> but these obstacles paled in comparison to the difficulty South Africa would have confronted had it attempted to prosecute offenders.<sup>125</sup> As Malamud-Goti and Grosman observe:

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early 2000s, however, Chilean courts began to allow prosecutions of former military officials despite the amnesties. See Sebastian Brett, *Justice a Step Closer in Chile*, THE OBSERVER, May 30, 2004, available at <http://www.theguardian.com/world/2004/may/30/pinochet.chile>; Louise Egan, *Victims: Chile's Human Rights Plan Soft on Military*, N.Y. TIMES, Aug. 13, 2003. Brazil, for its part, has resisted prosecutions to this day. Alexei Barrionuevo, *Amnesty for Brazil Dictatorship is Challenged*, N.Y. TIMES, Dec. 16, 2010, available at <http://www.nytimes.com/2010/12/16/world/americas/16brazil.html>. See NINO, *supra*, at 33–34 (providing an early discussion of Brazil's amnesty law).

121. See Lira, *supra* note 91, at 86–90 (discussing Chile); CYNTHIA G. BROWN, HUMAN RIGHTS AND THE “POLITICS OF AGREEMENTS”: CHILE DURING PRESIDENT AYLWIN'S FIRST YEAR 9 (1991) (featuring a review of Chile's amnesty law of April 18, 1978, in part III of the book); see also Burke-White, *supra* note 120, at 497 (Argentina's amnesty law “does not preclude civil means of redress.”). See Guembe, *supra* note 91, at 21 (discussing Argentina); HORACIO VERBITSKY, THE FLIGHT: CONFESSIONS OF AN ARGENTINE DIRTY WARRIOR 166 (1996) (describing the reparations plan in the afterward by Juan E. Méndez). See Ignacio Cano & Patrícia Salvão Ferreira, *The Reparations Program in Brazil*, in THE HANDBOOK OF REPARATIONS, *supra* note 2, at 102 (discussing Brazil).

122. KENNETH CHRISTIE, THE SOUTH AFRICAN TRUTH COMMISSION 135 (2000) (describing his interview with Commissioner Mgojo, who opined that “if amnesty had not been given during the negotiations, . . . South Africa would have seen a blood bath”).

123. Promotion of National Unity and Reconciliation Act, No. 34 of 1995, at Ch. 2, ¶¶ 3(1)(c) and 3(2)(c) (S. Afr.).

124. Brandon Hamber, *Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland*, 26 FORDHAM INT'L L.J. 1074, 1079 (2003); Ginger Thompson, *South Africa to Pay \$3,900 to Each Family of Apartheid Victims*, N.Y. TIMES, Apr. 16, 2003. Some also complained about the government's failure to consult with relevant stakeholders before deciding on the amount for reparations. See Oupa Makhalemele, *Still Not Talking: The South African Government's Exclusive Reparations Policy and the Impact of R30,000 Financial Reparations on Survivors*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING, *supra* note 6, at 541, 542. For a detailed discussion of the effort to provide reparations in South Africa, see Daly, *supra* note 91.

125. Indeed, South Africa offered official amnesty only to those offenders who applied before the country's Truth and Reconciliation Commission. Although South Africa did conduct a few high-profile trials, COMBS, *supra* note 47, at 42, it abandoned these efforts largely because it lacked the financial resources to continue them, *id.*, and may also have lacked the political will, DAVID DYZENHAUS, JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER 119–20 (1998).

[many new democracies] lack the power to conduct criminal trials against the perpetrators. Civil proceedings, however, are a different story. They usually do not give rise to the kind of uneasiness among the group of perpetrators that the threat of criminal trials involves, and therefore the transitional government may be able to cope with them.<sup>126</sup>

Admittedly, not every state favors reparations over prosecutions. A few, such as Uganda and Rwanda, have not provided reparations while they have promoted prosecutions either at the domestic or international level. Such states are rare, however, and typically use prosecutions as a means of repressing dissent, maintaining control,<sup>127</sup> or gaining the upper hand in an on-going conflict.<sup>128</sup> Because reparations to victims provide these governments no similar benefits, they are not undertaken.<sup>129</sup> Other states, such as Peru, both prosecute offenders<sup>130</sup> and compensate victims,<sup>131</sup> but these typically undertake only a very small number of prosecutions.<sup>132</sup> For instance, although Peru admirably did prosecute its former President, Alberto Fujimori,<sup>133</sup> the remainder of its planned prosecutions

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126. Malamud-Goti & Grosman, *supra* note 4, at 553.

127. See, e.g., Longman, *supra* note 83, at 49, 51–52; Brian Walsh, *Resolving the Human Rights Violations of a Previous Regime*, 158 *WORLD AFF.* 111, 113 (1996).

128. Uganda's request for ICC investigations, for instance, was widely viewed as an effort to target rebel forces while reducing the likelihood that the ICC would investigate Uganda's own crimes. DRUMBL, *supra* note 3, at 144; see also William Burke-White & Scott Kaplan, *Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 79, 80 (Carsten Stahn & Göran Sluiter eds., 2009) ("For Museveni, referral of the situation in Uganda to the ICC was essentially a political calculation that offered several advantages."). Further, when ICC indictments began to impede Uganda's ability to negotiate with LRA rebels, Uganda sought withdrawal of the indictments. See Burke-White & Kaplan, *supra* at 82–83; Michael Sung, *Uganda Wants ICC Review of LRA Rebel Indictments*, *PAPER CHASE*, June 21, 2007, available at <http://jurist.org/paperchase/2007/06/uganda-wants-icc-review-of-lra-rebel.php>.

129. See Waldorf, *supra* note 100, at 519–23 (discussing the issues that regimes, especially new regimes, have with reparations). Also, whereas Cote d'Ivoire President Outtara asked the ICC to launch investigations into the violence that followed that country's disputed November 2010 election, he has not made efforts to pay reparations. See ICC Press Release, *Situation in Côte d'Ivoire assigned to Pre-Trial Chamber II*, ICC-CPI-20110520-PR672, May 20, 2011; *Victims in Cote d'Ivoire Meet on Right to Reparation*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (Aug. 8, 2013), available at <http://ictj.org/news/victims-cote-d'ivoire-meet-right-reparation>.

130. Jo-Marie Burt, *Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations*, 3 *INT'L J. TRANSITIONAL JUST.* 384, 390–95, 397–99 (2009).

131. Milagros Salazar, *At Last, Reparations for Civil War Victims*, *GLOBAL POLITICS AND POLITICAL ECONOMY*, Feb. 9, 2011, <http://globalgeopolitics.net/wordpress/2011/02/09/rights-peru-at-last-reparations-for-civil-war-victims>.

132. Walsh, *supra* note 127, at 113 ("Even in countries where prosecutions have occurred, only a minuscule sampling of the guilty have been prosecuted.").

133. See generally, Burt, *supra* note 130 (analyzing the Fujimori trial and highlighting its implications for Peruvian politics).

stalled due to political obstructions.<sup>134</sup> In sum, although there is no post-atrocity blueprint followed by every state, it can be fairly said that states establishing transitional justice mechanisms usually find it easier to compensate victims than to prosecute offenders.

This conclusion is reinforced by statistics concerning state compliance with the judgments of human rights courts. The Inter-American Court of Human Rights (IACtHR), for instance, routinely orders various forms of reparations for large-scale human rights abuses;<sup>135</sup> in particular, not only does it order states to provide victims with monetary compensation,<sup>136</sup> it frequently orders the provision of other tangible reparations, such as medical and psychological treatment,<sup>137</sup> and educational benefits.<sup>138</sup> The IACtHR also orders intangible reparations, such as public apologies, days of remembrance,<sup>139</sup> and the naming of streets and public institutions after victims.<sup>140</sup> Finally, and most relevantly, the IACtHR also orders states to prosecute alleged offenders, but it is these latter orders that meet the

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134. Laplante and Theidon observed:

Although Peru did not offer political amnesty as was done in South Africa, it nevertheless faces the reality of a judicial system that cannot be reformed overnight, preventing timely and workable trials. Upon terminating its work, the TRC transferred forty-three of the most emblematic and substantiated criminal cases to the Minister of the Interior for further investigation. Yet more than two years later, twenty-four had still not been open for investigation and only one had resulted in a final sentence: acquittal. In actuality, even in the absence of amnesty, political influence delays and even obstructs criminal investigations and trials. A recent report from the Peruvian Ombudsman's office reveals a myriad of suspicious obstacles presented by the military such as refusing to share evidence, thus undermining the handful of criminal investigations opened pursuant to the TRC's recommendations.

Laplante & Theidon, *supra* note 20, at 243–44.

135. Carrillo, *supra* note 89, at 506 (reporting that the Court was “[a]t the forefront of [a] legal revolution” by issuing the first judgment “to articulate the duty to prevent, investigate and punish human rights violations alongside the state’s separate duty to make moral and material reparations to individual victims”); Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 355–64 (2007–2008). The European Court of Human Rights, in particular, has lagged behind the Inter-American court when it comes to remedies. See Christian Tomuschat, *Reparations for Victims of Grave Human Rights Violations*, 10 TUL. J. INT’L & COMP. L. 157, 161–65 (2002).

136. See, e.g., Velásquez-Rodríguez, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 33–34; Godínez-Cruz v. Honduras, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 8 (July 21, 1989).

137. See, e.g., Case of Children’s Rehabilitation v. Paraguay, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 112, ¶¶ 318–20 (Sept. 2, 2004); Case of Plan de Sánchez Massacre v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 105, ¶¶ 107–08 (Apr. 29, 2004); Case of Cantoral-Benavides v. Peru, Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 51.e (Dec. 3, 2001); Case of Serrano Cruz Sisters v. El Salvador, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 120, ¶¶ 197–200 (Mar. 1, 2005).

138. “Cantoral-Benavides,” Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 80.

139. “Serrano Cruz Sisters,” Inter-Am. Ct. H.R. (ser. C) No. 120, ¶ 196.

140. Case of Myrna Mack-Chang v. Guatemala, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101, ¶ 286 (Nov. 25, 2003).



greatest state resistance. Indeed, compensation has been paid in compliance with a great many IACtHR decisions; Peru and Guatemala alone have paid millions of dollars in compensation pursuant to IACtHR decisions.<sup>141</sup> Likewise, states often comply with orders requiring other measures; thus, they frequently release prisoners found to be illegally detained,<sup>142</sup> they amend or invalidate laws deemed to violate the American Convention on Human Rights,<sup>143</sup> they adopt legislation necessary to implement the Convention's substantive provisions,<sup>144</sup> and they make public apologies.<sup>145</sup> In virtually every case, however, the Court also orders the state to investigate, prosecute, and punish the individuals responsible for the human rights violation, yet these orders are rarely fulfilled.<sup>146</sup> Indeed, scholars report that whereas states are most likely to comply with orders to pay compensation,<sup>147</sup> they are least likely to comply with orders to investigate and prosecute offenders.<sup>148</sup>

Although the foregoing precedents strongly suggest that states are more willing to relinquish money than offenders, another recent precedent could appear to point in the opposite direction. Unlike previous international criminal tribunals, the ICC can order convicted persons to pay financial reparations to victims.<sup>149</sup> During the negotiations regarding this

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141. See REDRESS, ENFORCEMENT OF AWARDS FOR VICTIMS OF TORTURE AND OTHER INTERNATIONAL CRIMES 38 (May 2006) [hereinafter ENFORCEMENT OF AWARDS], available at [http://www.redress.org/downloads/publications/master\\_enforcement%2030%20May%202006.pdf](http://www.redress.org/downloads/publications/master_enforcement%2030%20May%202006.pdf).

142. See, e.g., *Loayza Tamayo v. Peru (Merits)*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 33, ¶ 84, op. ¶ 5 (Sept. 17, 1997).

143. See, e.g., *Suarez Rosero v. Ecuador*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 44, ¶ 80 (Jan. 20, 1999).

144. "Street Children," Inter-Am. Ct. H.R. (ser. C), No. 77, ¶ 29.

145. See ENFORCEMENT OF AWARDS, *supra* note 141, at 39.

146. *Id.*; see also Fernando Basch et al., *The Effectiveness of the Inter-American System of Human Rights Protection: A Quantitative Approach to its Functioning and Compliance with its Decisions*, 7 SUR INT'L J. H.R. 9, 19, 22 (2010).

147. Basch et al., *supra* note 146, at 20–21.

148. *Id.* at 19–24; James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 781 (2008) ("While states generally pay monetary damages, there are very few cases of full compliance, which is notably lacking as regards the obligation to bring perpetrators of violations to justice."); Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 43 (2005) ("From our survey of the IACHR's cases, it appears that while states routinely ignore the requirement that they punish offenders or change their laws, they have often paid financial compensation."); see also Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT'L L. & INT'L REL. 35, 57–58 (2010); Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1, 24–25 (2013) (noting that like the Latin American states, Russia "has paid just compensation . . . but has failed to investigate").

149. Rome Statute, *supra* note 1, at art. 75. Rule 105(A) of the ICTY's and ICTR's Rules of Procedure and Evidence authorize a Trial Chamber to "hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof," but to my knowledge no such hearing has ever been convened. See Rules of Procedure and Evidence,

provision, some delegations proposed allowing ICC Trial Chambers also to order or request states to provide reparations to victims, but this proposal was defeated.<sup>150</sup> According to a delegate from the United Kingdom, Christopher Muttukumaru, the most cogent argument raised against the inclusion of state responsibility for reparations was that “the Court was intended to be a court dealing with individual criminal responsibility. If awards of reparations could be made against states, the principle of individual responsibility would have become meaningless,” and many of the jurisdictional and admissibility provisions of the Rome Statute would have required revision.<sup>151</sup>

Muttukumaru’s explanation suggests that the delegations that opposed state responsibility for reparations did so primarily because they did not consider a body charged with determining the criminal liability of individuals to be an appropriate forum for determining the civil, reparatory obligations of states. Certainly, some states might have opposed the proposal—alternatively or additionally—because they did not wish to subject themselves to potential reparations orders, but I could find no written negotiating history in which that view was expressed. Consequently, the precedents involving domestic reparations schemes and compliance with the orders of human rights courts indicate that we can expect an international reparations body to benefit from a great deal more voluntary compliance than the international criminal tribunals receive.

The foregoing analysis centered on states and their likely compliance with reparations orders, but the same conclusions should apply to individuals. Admittedly, we have less information to support our analysis. Whereas states frequently are ordered both to prosecute offenders and compensate victims, individuals are not typically placed under such dual obligations, and more importantly, individuals, unlike states, are less frequently imbued with the *de facto* power to decide whether or not to comply with judicial orders. But studies show—unsurprisingly—that

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I.C.J. Acts & Docs., 107, U.N. Doc. IT/32/Rev/ 49 (May 22, 2013), available at [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032Rev49\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev49_en.pdf) (adopted by Int’l Crim. Trib. for Rwanda). The Presidents of both tribunals asked the Security Council to establish victims’ trust funds similar to that of the ICC, but the Security Council did not do so. Letter from President of the International Criminal Tribunal for the Former Yugoslavia to the Security Council (May 12, 2011), U.N. Doc. S/2011/316, [http://www.icty.org/x/file/About/Reports%20Publications/CompletionStrategy/completion\\_\\_\\_.pdf](http://www.icty.org/x/file/About/Reports%20Publications/CompletionStrategy/completion___.pdf); Letter from the Secretary-General to the President of the Security Council (Dec. 15, 2000), 5, U.N. Doc. S/2000/1198, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/801/55/PDF/N0080155.pdf?OpenElement>.

150. See David Donat-Cattin, *Article 75: Reparations to Victims*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1399, 1406 n.34 (Otto Triffterer ed., 2d ed. 2008); Christopher Muttukumaru, *Reparation to Victims*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 262, 267–69 (Roy S. Lee ed., 1999).

151. Muttukumaru, *supra* note 150, at 268. See also Fiona McKay, *Are Reparations Appropriately Addressed in the ICC Statute?*, in INTERNATIONAL CRIMES, PEACE AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 163, 168–70 (Dinah Shelton ed., 2000).

individuals consider a fine to be less a severe penalty than imprisonment,<sup>152</sup> so we can assume that, were such a choice to exist, individuals would be more likely to voluntarily relinquish their money than their freedom.

The fact that an international reparations body would benefit from more voluntary compliance than an international criminal tribunal is significant, but it would also be useful to consider whether a reparations body would have greater success in enforcing its compensation awards against non-compliant states and individuals than the international criminal tribunals have had in enforcing their indictments. On the one hand, it is hard to tell because the international community has only rarely used its muscle either to obtain reparations for victims or to enforce civil judgments. Indeed, the U.N. Charter expressly contemplates a role for the Security Council in enforcing ICJ judgments when a party to a judgment does not voluntarily comply,<sup>153</sup> but the Security Council has almost never been asked to assist in enforcing ICJ decisions.<sup>154</sup>

Commentators have nonetheless described a range of powerful enforcement measures that are available to the Security Council should it desire to enforce an ICJ judgment. They note, for instance, that the Security Council could enlist the assistance of U.N. specialized agencies, such as the World Bank or the International Civil Aviation Organization, to use the means at their disposal to pressure the delinquent state;<sup>155</sup> it could call on member states to apply sanctions against the state,<sup>156</sup> or it could order member states to attach or seize assets in their territory belonging to the state for purposes of satisfying the state's obligations under the judgment.<sup>157</sup> Presumably, the Security Council would be able to implement these same measures to enforce the awards of a reparations body, so long as it found non-enforcement to threaten international peace and security. Marc Henzelin, for instance, describes the robust role the Security Council

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152. See Leslie Sebba & Gad Nathan, *Further Explorations in the Scaling of Penalties*, 23 BRIT. J. CRIMINOLOGY, 221, 231 (1984).

153. U.N. Charter, art. 94(2).

154. Conor McCarthy, *Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING, *supra* note 6, at 283, 304 n.76. Most states that initially filed complaints with the Security Council subsequently abandoned them. CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 39 (2004). In the few remaining instances, the Security Council failed to provide any assistance. *Id.*; McCarthy, *supra* at 304 n.76.

155. Mary Ellen O'Connell, *The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment against the United States*, 30 VA. J. INT'L L. 891, 910-11 (1990).

156. *Id.* at 909.

157. Oscar Schachter, *The Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1, 22 (1960).

could play in enforcing the ICC's reparations orders, including by confiscating state assets to ensure the availability of reparations.<sup>158</sup>

Most compellingly, the Security Council's creation of the United Nations Compensation Commission (UNCC) in the aftermath of the 1991 Gulf War provides particularly probative evidence of the international community's substantial capacity to compensate victims. The crimes in question took place during Iraq's 1990 invasion of Kuwait. After allied forces expelled Iraq from Kuwait, the Security Council found Iraq liable for all direct loss, damage, or injury that resulted from its unlawful invasion and occupation of Kuwait.<sup>159</sup> The Security Council then established the UNCC to administer compensation claims for these losses.<sup>160</sup> Although certain aspects of the UNCC generated controversy,<sup>161</sup> it unquestionably proved a highly effective means of compensating victims. The UNCC received more than 2.7 million claims, the vast majority of which were submitted by individuals who had been forced to leave Kuwait or who had suffered serious mental or bodily injury due to Iraq's invasion and occupation,<sup>162</sup> and it awarded \$11.7 billion in compensation to individual claimants, all of which was paid from the UNCC's compensation fund.<sup>163</sup> Resources to pay the compensation awards were derived from Iraq's oil revenues.<sup>164</sup>

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158. Marc Henzelin et al., *Reparations to Victims Before the International Criminal Court: Lessons Learned from International Mass Claims Processes*, 17 CRIM. L. FORUM. 317, 330 (2006).

159. S.C. Res. 687, ¶ 16, U.N. SCOR, 46th year, U.N. Doc. S/RES/687 (Apr. 8, 1991).

160. *Id.* ¶ 18.

161. For example, some questioned the Security Council's authority to impose automatic liability on Iraq based only on its illegal invasion and occupation of Kuwait. See Frederic L. Kirgis, Jr., *Claims Settlement and the United Nations Legal Structure*, in THE UNITED NATIONS COMPENSATION COMMISSION 103, 104–08 (Richard B. Lillich ed., 1994); Rex J. Zedalis, *Gulf War Compensation Standard: Concerns Under the Charter*, 26 REVUE BELGE DE DROIT INTERNATIONAL 333, 334 (1993). Some questioned the Security Council's authority to establish a subsidiary organ that exercises legislative and quasi-judicial powers. Bernhard Graefrath, *Iraq: Reparations and the Security Council*, 55 HEIDELBERG J. INT'L L. 1, 65 (1995); see also Peter Malanczuk, *International Business and New Rules of State Responsibility? The Law Applied by the United Nations (Security Council) Compensation Commission for Claims Against Iraq*, in PERSPECTIVES OF AIR LAW, SPACE LAW AND INTERNATIONAL BUSINESS LAW FOR THE NEXT CENTURY 117, 128–29 (K. Böckstiegel ed., 1996). *But see* Hans van Houtte et al., *The United Nations Compensation Commission*, in THE HANDBOOK OF REPARATIONS, *supra* note 2, at 321, 327 (asserting that “the competence of the Security Council to establish the UNCC as its subsidiary organ has been accepted by the majority of scholars”). Finally, some critiqued the UNCC for failing to provide Iraq a meaningful role in the claims process. See Elyse J. Garmise, *The Iraqi Claims Process and the Ghost of Versailles*, 67 N.Y.U. L. REV. 840, 871 (1992); van Houtte et al., *supra* at 351–52.

162. Taylor, *supra* note 92, at 200–01, 213; van Houtte et al., *supra* note 161, at 335–38.

163. Taylor, *supra* note 92, at 198, 214.

164. See S.C. Res. 692, ¶¶ 6–7, U.N. SCOR, 46th year, U.N. Doc. S/RES/692 (May 20, 1991); van Houtte et al., *supra* note 161, at 363–64. Funds to pay UNCC awards derived from the “oil for food” procedure, which authorized Iraq to sell oil to fund its humanitarian needs. S.C. Res. 986, ¶ 8, U.N. SCOR, 50th year, U.N. Doc. S/RES/986 (Apr. 14, 1995).

The UNCC provides an especially powerful example of the Security Council's capacity to compel the payment of compensation to war victims, but precedents involving individual states show that they can possess a similar capacity. In particular, following an armed conflict, stronger states often have compelled weaker states to participate in claims commissions through which the stronger state's claims for war losses are adjudicated.<sup>165</sup> Those stronger states additionally or alternatively could have pressed for criminal prosecutions, but virtually none ever did.<sup>166</sup> Their failure to do so likely stems in part from the fact that most post-war claims commissions were established before the recent emergence of international criminal law and thus at a time when there was less expectation that the authors of mass atrocities would be subject to criminal sanctions. In addition, some of the conflicts that formed the subject matter of these claims commissions probably did not feature the kinds of brutal crimes that are being prosecuted in today's international criminal tribunals. But Iraq's invasion of Kuwait and its repression of Iraqi citizens did. Indeed, at the time the Security Council established the UNCC to compensate the victims of Iraq's criminality, a variety of domestic and international groups—including the United States Senate and the European Community—were lobbying for the creation of an international criminal tribunal to prosecute Iraqi leaders.<sup>167</sup> That those calls went unheeded<sup>168</sup> suggests that the international community, like domestic states, often finds it more politically feasible to pursue reparatory measures than criminal justice measures.

The history of claims commissions, and especially the creation of the UNCC, could be understood to demonstrate the international community's robust capacity to compensate victims of international crimes. At the least, these bodies show that the Security Council and individual states

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165. Bederman, *supra* note 92, at 3; Garmise, *supra* note 161, at 844. Although many claims commissions were nominally reciprocal, such that they appeared to envision each party compensating the other party for its losses, in most cases, only the weaker party compensated the stronger. Bederman, *supra* note 92, at 3–4.

166. Of course, after World War I, Allied forces sought both compensation and prosecutions from Germany, Treaty of Peace Between the Allied and Associated Powers and Germany, arts. 227–28, 231–263, June 28, 1919, 2 Bevans 43 [hereinafter Versailles Treaty], but did not get either.

167. See Persian Gulf War Criminals Prosecution Act, S. 253, 102d Cong. (1991); Richard L. Berke, *Senate Urges War-Crimes Trials*, N.Y. TIMES, Apr. 19, 1991, at A8; *U.N. to Assess Call for Trial of Iraqi Leader*, WASH. POST, Apr. 17, 1991, at A24; *Lawyers Ask Trial of Hussein Before War Crimes Tribunal*, N.Y. TIMES, June 6, 1991, at A9. See American Bar Association Standing Committee on Law and National Security Standing Committee on Environmental Law, *Section of International Law and Practice Report to the House of Delegates: Iraqi War Crimes*, 26 INT'L LAWYER 274 (1992); Henry T. King, Jr. *The Limitations of Sovereignty from Nuremberg to Sarajevo*, 20 CAN.-U.S. L.J. 167, 171 (1994); James S. Robbins, *War Crimes: The Case of Iraq*, 18 FLETCHER FORUM WORLD AFF. 45, 54–56 (1994).

168. In his memoir, former President George H.W. Bush identified a series of serious difficulties that would have attended any attempt to remove Saddam Hussein from power while Bush was President. See GEORGE H.W. BUSH & BRENT SCOWCROFT, *A WORLD TRANSFORMED* 489 (1998); see also Harry M. Rhea, *The United States and International Criminal Tribunals: An Historical Analysis*, 16 ILSA J. INT'L & COMP. L. 19, 29 (2009).

sometimes have the means to compel compensation, particularly where the offending state possesses a certain level of material resources. But other factors suggest that this history should not be viewed too optimistically. For one thing, because historical claims commissions typically were one-sided, they generated reparations for only a subset of war victims. More importantly, because most of today's international crimes are committed during non-international armed conflicts, the inter-state victor-vanquished model no longer applies, and the "victors" of today's conflicts have less ability and incentive to compel reparations. Of course, if the Security Council wanted to ensure that victims of non-international armed conflicts were compensated, it could do so, as it did when it created the UNCC, but the creation of the UNCC was itself unprecedented. Not only was it the first and only time that the Security Council established a compensation mechanism for the victims of war, but the Security Council did so only after taking the rare step of authorizing military action against Iraq.<sup>169</sup> Thus, the creation of the UNCC followed an overwhelmingly successful military campaign launched to repel a clear act of aggression. It was nearly universally accepted that Iraq had breached fundamental norms of international law, and Iraq itself (reluctantly) accepted liability for its violations.<sup>170</sup> Equally significant was the availability of natural resources to fund the UNCC's compensation orders. As U.N. diplomat Jean-Claude Aime put it, claims against Iraq were brought "because Iraq has oil. If Iraq didn't have oil, there would be no claims."<sup>171</sup> Thus, although the Security Council probably has the power to obtain a great deal of compliance with compensation orders, its past inaction in this realm gives us reason to fear that it would prove unwilling to use that power, just as it has been unwilling to assist in the capture of international criminal indictees.

Individual states could assist in enforcing of reparations orders, but here again we should not expect too much. On the one hand, individual states and the international community increasingly cooperate to seek the return of stolen assets. The United Nations Convention Against Corruption (UNCAC), for instance, came into force in 2005, and it delineates mechanisms for the tracing, freezing, seizing, forfeiture, and return of stolen assets.<sup>172</sup> To this same end, in 2007, the World Bank and the United Nations Office on Drugs and Crime launched the Stolen Assets Recovery Initiative (StAR), which is intended "to help developing countries recover assets stolen by corrupt leaders."<sup>173</sup> StAR has assisted in efforts to recover

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169. See S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

170. See van Houtte et al., *supra* note 161, at 325, 325 n.13.

171. Neil King Jr., *Battle Plan: Firms World-Wide Seek Billions to Cover Their Gulf War Losses – A U.N. Panel Is Inundated By Voluminous Claims; Some Just Make No Sense – Can the Iraqis Pay the Bill?*, WALL ST. J., Aug. 18, 1997, at A1.

172. G.A. Res. 58/4, arts. 51–59, U.N. Doc. A/RES/58/4 (Oct. 31, 2003).

173. *World Bank and UNODC to Pursue Stolen Asset Recovery*, UNODC (Sept. 17, 2007), <http://www.unodc.org/unodc/en/frontpage/world-bank-and-unodc-to-pursue-stolen-asset-recovery.html>.

funds stolen from Haiti, Mexico, and Trinidad and Tobago.<sup>174</sup> These initiatives show that the international community is aware of the grave damage wrought by corrupt leaders<sup>175</sup> and is increasingly committed to finding their stolen resources and returning them to their rightful owners. That increased commitment notwithstanding, obstacles remain. The StAR Initiative frankly acknowledges that “[o]nce stolen funds, whether public or private, have been transferred abroad, they are extremely difficult to recover.”<sup>176</sup> The difficulty stems in part from the fact that many states do not have non-conviction based asset forfeiture laws, so stolen assets can be returned only if the leader who stole them is criminally convicted of their theft.<sup>177</sup> Thus, when offenders have died, have fled the jurisdiction, or otherwise have *de facto* or *de jure* immunity from prosecution, then no asset recovery can take place. In addition, developing nations seeking the return of stolen assets frequently possess only meager financial resources along with limited legal, investigative, and judicial capacity,<sup>178</sup> and these limitations likewise impede their ability to recover their assets.

Efforts to obtain compensation from individuals who commit international crimes have confronted similar obstacles. In the United States, the Alien Tort Claims Act and the Torture Victims Protection Act allow victims of large-scale human rights abuses to obtain civil judgments against individual offenders.<sup>179</sup> Many have, but virtually none of the prevailing plaintiffs have been able to enforce their judgments.<sup>180</sup> Certainly, if defendants have assets in the United States, then collection is relatively straightforward,<sup>181</sup> but defendants typically remove their assets from the United States while litigation is pending,<sup>182</sup> and attempts even to find these assets in foreign jurisdictions (let alone to enforce judgments against them) face tremendous challenges.<sup>183</sup> Obtaining and enforcing compensatory judgments against states proves even more difficult, as states are typi-

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174. See Mark V. Vlasic & Gregory Cooper, *Fast Cash: Recovering Assets from Corrupt Leaders*, AM. Q., Fall 2010, at 48.

175. The World Bank estimates that approximately \$20 to \$40 billion is stolen from developing and transitional countries every year. Mark V. Vlasic, Op-Ed., *Justice for Haiti, Via the Swiss*, N.Y. TIMES, Oct. 3, 2010.

176. THEODORE S. GREENBERG ET AL., *STOLEN ASSET RECOVERY (STAR) INITIATIVE, STOLEN ASSET RECOVERY: A GOOD PRACTICES GUIDE FOR NON-CONVICTION BASED ASSET FORFEITURE 1* (2009).

177. *Id.* at 13.

178. *Id.* at 1.

179. Unfortunately for victims, the Supreme Court recently curtailed the reach of the Alien Tort Claims Act. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 U.S. 1659 (2013).

180. SHELTON, *supra* note 88, at 171–72.

181. For instance, plaintiffs in an Alien Tort Claims Act suit against Carl Dorélien collected nearly \$600,000 out of state lottery proceeds that Dorélien had won. *Jean v. Dorélien, Haiti: The High Command and the Raboteau Massacre*, CTR. FOR JUSTICE & ACCOUNTABILITY, <http://www.cja.org/article.php?list=type&type=78> (last visited Sept. 28, 2014).

182. SHELTON, *supra* note 88, at 172.

183. STEPHENS ET AL., *supra* note 95, at 536–37.

cally immune from suit in foreign jurisdictions,<sup>184</sup> and even where they are not, their property is typically immune from process.<sup>185</sup>

The foregoing analysis suggests that an international reparations body would confront serious obstacles in enforcing its awards against non-compliant states or individuals. It is true that the Security Council possesses some enforcement powers, and it is likely that the Council would be more inclined to use those powers to enforce reparations orders than criminal indictments. But the fact remains that the Security Council is frequently paralyzed by a permanent member's veto, so we can expect frequent Security Council inaction. Other states could help with enforcement, but in most cases they will have neither the motivation nor the ability to be of great practical assistance. These caveats notwithstanding, I nonetheless believe that an international reparations body would have greater enforcement success than an international criminal body, primarily by virtue of the greater likelihood of voluntary compliance with reparations awards.

#### B. *Finding Accurate Facts*

My research on fact-finding at international criminal tribunals has shown the tremendous difficulties involved in establishing the criminal liability of individuals to a beyond-a-reasonable-doubt standard, as that standard has been traditionally defined. Defendants are convicted despite these difficulties, but I have questioned both the bases for these convictions and the standard of proof actually applied by the tribunals. A body adjudicating civil reparations claims will almost certainly be a more effective fact-finder, but how much more effective depends on the tasks it is required to perform. Some reparations bodies, for instance, are asked only to ascertain the claimants' entitlement to reparations and the appropriate quantity of those reparations,<sup>186</sup> whereas others also are charged with determining a state's or an individual's liability for the acts necessitating reparations.

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184. *See id.* at 89.

185. *Id.* at 97; *see also* Andrea K. Bjorklund, *Arbitration and National Courts: Conflict and Cooperation: Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes*, 21 AM. REV. INT'L ARB. 211, 211–12 (2010); Giuliana Cane, *The Enforcement of ICSID Awards: Revolutionary or Ineffective?*, 15 AM. REV. INT'L ARB. 439, 452 (2004) (discussing the difficulty of satisfying ICSID awards due to states' immunity from execution); Susan Choi, *Judicial Enforcement of Arbitration Awards Under ICSID and New York Conventions*, 28 N.Y.U. J. INT'L L. & POL. 175, 180–81 (1995–1996) (same).

186. Rajesh Singh, *Raising the Stakes: Evidentiary Issues in Individual Claims Before the United Nations Compensation Commission*, in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES 61, 64 (Perm. Ct. Arb. ed., 2006) (observing that the UNCC's fairly limited task was to decide "whether, given the over-arching state responsibility of Iraq that had been pre-determined by the Security Council, claimants had, in fact suffered any direct loss and, if so, the financial extent of that loss").



The fact-finding required of bodies that have no jurisdiction to consider questions of liability is fairly straightforward,<sup>187</sup> for these bodies must determine only whether a claimant is entitled to reparations and what is the appropriate amount of reparations. To be sure, these questions can be hard to answer, as claimants often find it difficult to gather evidence in the chaos that follows international crimes.<sup>188</sup> To meet these challenges, some claims commissions have applied an even “less stringent standard of proof” than that which typically prevails in civil litigation.<sup>189</sup> Others, additionally or alternatively, have redistributed burdens of proof by requiring respondents to assist in evidence gathering and authorizing tribunal staff and arbitrators to engage in independent research in order to substantiate claims.<sup>190</sup> Finally, to simplify the valuation of injuries, a few commissions have used mass claims processing techniques by which certain fixed amounts are paid for certain types of injuries.<sup>191</sup> In summary, it has been common for reparations bodies that adjudicate claimant eligibility and losses to reasonably adapt their fact-finding processes to meet the challenges confronting claimants, and future, similar bodies can easily do the same.<sup>192</sup>

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187. Domestic reparations schemes fall into this category, for they are only established after the state in question acknowledges its liability. Similarly, in the international context, the Security Council found Iraq to be liable for all direct losses resulting from its unlawful invasion and occupation of Kuwait, so the UNCC did not have to pass on Iraq’s liability. S.C. Res. 687, *supra* note 159, ¶ 16. Finally, some states are adjudged liable to pay war reparations by virtue of their launching an aggressive war. See Zedalis, *supra* note 161, at 334.

188. John J. Chung, *The United Nations Compensation Commission and the Balancing of Rights between Individual Claimants and the Government of Iraq*, 10 U.C.L.A. J. INT’L L. & FOR. AFF. 141, 153–56 (2005).

189. Howard M. Holtzmann, *Mass Claims*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 16 (Rüdiger Wolfrum ed., 2008); Heike Niebergall, *Overcoming Evidentiary Weaknesses in Reparation Claims Programmes*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING, *supra* note 6, at 155; Jacomijn J. van Haersolte-van Hof, *Innovations to Speed Mass Claims: New Standards of Proof*, in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES, *supra* note 186, at 13. Rep. of U.N. Compensation Commission, Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category B Claims)*, at 34, U.N. Doc. S/AC.26/1994/1 (May 26, 1994) (citing DURWARD D. SANDIFER, EVIDENCE BEFORE INTERNATIONAL TRIBUNALS 22 (Rev. ed. 1975)); Eritrea’s Damages Claims, Eritrea-Ethiopia Claims Comm’n, 37 (Perm. Ct. Arb. 2009) (rejecting a heightened standard for damages because it would “often—perhaps almost always—preclude any recovery” and instead deciding to make the “best estimates possible on the basis of available evidence . . . even if the process involves estimation, or even guesswork, within the range of possibilities indicated by the evidence”).

190. Niebergall, *supra* note 189, at 151–55.

191. *Id.* at 161. For a discussion of the UNCC’s use of mass-claims processing techniques, see van Houtte et al., *supra* note 161, at 341–59; Veijo Heiskanen, *Virtue Out of Necessity: International Mass Claims and New Uses of Information Technology*, in REDRESSING INJUSTICES THROUGH MASS CLAIMS PROCESSES, *supra* note 186, at 25.

192. Rep. of U.N. Compensation Commission, Governing Council, *Report and Recommendations Made by the Panel of Commissioners Concerning the First Installment of Individual Claims for Damages up to \$100,000 (Category “C” Claims)*, at 26, 46th Sess., U.N.

If a reparations body also must determine a respondent's liability for the crimes in question, then its fact-finding task becomes more challenging, but it is nonetheless apt to carry out that task more effectively than the international criminal tribunals can, particularly if it is adjudicating state responsibility and not individual responsibility. This is because establishing group liability is easier than establishing individual liability. When a claimant seeks financial compensation from a state for an international crime, the claimant need only prove that some organ of the state committed the acts in question. Thus, when the ICJ was considering the DRC's claim that Uganda had "perpetrated wide-scale massacres" of DRC civilians,<sup>193</sup> it was sufficient for the ICJ to conclude that "massive human rights violations and grave breaches of international humanitarian law were committed by [the Ugandan military] on the territory of the DRC."<sup>194</sup> The court did not need "to make findings of fact with regard to each individual incident alleged" by the DRC,<sup>195</sup> and it certainly did not need to establish which individuals were responsible for any given set of atrocities. Indeed, the broader conclusion—that the Ugandan military perpetrated grave humanitarian law violations—could be established merely by reviewing a series of U.N. reports documenting the atrocities. Similarly, when the IACtHR concludes that a state is responsible for the disappearance of a given individual, it need only find that the individual was abducted by state agents or even that the individual disappeared in the context of a widespread pattern of disappearances perpetrated by state agents.<sup>196</sup> Indeed, the IACtHR specifically noted that unlike in a criminal case, the IACtHR need not

determine the perpetrators' culpability or intentionality in order to establish that the rights enshrined in the Convention have been violated, nor is it essential to identify individually the agents to whom the acts of violation are attributed. The sole requirement is

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Doc. S/AC.26/1994/3 (Dec. 21, 1994) (taking into account "the general emergency conditions prevailing in Kuwait and Iraq under which many thousands of individuals were forced to flee or hide or were held captive, without safely securing their possessions or retaining documents that later could be used to substantiate their losses"). *See also* Rep. of U.N. Compensation Commission, Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning Individual Claims for Serious Personal Injury or Death (Category "B" Claims), at 33–34, 46th Sess., U.N. Doc. S/AC.26/1994/1 (May 26, 1994); Rep. of U.N. Compensation Commission, Governing Council, Report and Recommendations Made by the Panel of Commissioners Concerning Part I of the First Installment of Individual Claims for Damages Above \$100,000 (Category "D" Claims), at 21, 50th Sess., U.N. Doc. S/AC.26/1998/1 (Feb. 3, 1998).

193. DRC v. Uganda, 2005 I.C.J. 168, at 232, ¶ 183.

194. *Id.* at 239, ¶ 207.

195. *Id.* at 239, ¶ 205. Similarly, the EECC did "not see its task" as determining liability "for each individual incident of illegality suggested by the evidence. Rather, it [wa]s to determine liability for serious violations . . . which are usually illegal acts or omissions that were frequent or pervasive and consequently affected significant numbers of victims." Prisoners of War, Eritrea's Claim, Eritrea-Ethiopia Claims Comm'n, 17, ¶ 56 (Perm. Ct. Arb. 2003).

196. *See* Velásquez-Rodríguez, Inter-Am. Ct. H.R. (ser. C) No. 4.

to demonstrate that the State authorities supported or tolerated infringement of the rights recognized in the Convention.<sup>197</sup>

Establishing state responsibility, then, is far easier than establishing individual criminal responsibility, even if the only basis for that liability is witness testimony because witnesses are better able to accurately identify a group of individuals as state soldiers or police agents—based on their uniforms, weapons, and other circumstances—than to identify a particular soldier or police agent.

Even a reparations body charged with adjudicating both state and individual liability will sport a fact-finding advantage over the international criminal tribunals because it will adjudicate civil claims and consequently can employ a lower standard of proof and more relaxed evidentiary rules than those in use at the criminal tribunals. Admittedly, bodies adjudicating civil claims involving large-scale violence have employed more stringent standards of proof than preponderance-of-the-evidence, but none are as stringent as the beyond-a-reasonable-doubt standard in use at the international criminal tribunals.<sup>198</sup> The Eritrea-Ethiopia Claims Commission, for instance, required facts to be proved by clear and convincing evidence,<sup>199</sup> and the IACtHR, similarly, requires claimants to submit evidence “capable of establishing the truth of allegations in a convincing manner.”<sup>200</sup> The ICJ decides many different kinds of claims, and it applies a higher standard when the claims involve “charges of exceptional gravity.” In particular, such claims must be proved by “evidence that is fully conclusive.”<sup>201</sup> The ECtHR goes so far as to ostensibly apply a beyond-a-reasonable-doubt standard in some cases,<sup>202</sup> but the standard has been resisted by

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197. Paniagua Morales et al. Case, Judgment of May 8, 1998, Inter-Am. Ct. H.R. (ser. C) No. 37, ¶ 91 (1998).

198. ICTR Rules of Procedure & Evidence, Rule 87; ICTY Rules of Procedure & Evidence, Rule 87; Rome Statute, *supra* note 1, at art. 66. The Special Panels’ procedural rules failed to specify a standard of proof, but the Panels applied a beyond-a-reasonable-doubt-standard. *See, e.g.*, Prosecutor v. Julio Fernandez, UN-ETTA, Case No. 2/2000, Judgment at 9 (Feb. 27, 2001).

199. Prisoners of War, Eritrea’s Claim, Eritrea-Ethiopia Claims Comm’n, 17, ¶¶ 45–46 (Perm. Ct. Arb. 2003).

200. Velásquez-Rodríguez, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 129. *See also* Lutz Oette, *Bringing Justice to Victims? Responses of Regional and International Human Rights Courts and Treaty Bodies to Mass Violations*, in REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING, *supra* note 6, at 217, 229 (noting that the Inter-American Court of Human Rights has “adopted a more flexible standard of proof that takes the nature of the violations into account”).

201. Genocide Judgment, 2007 I.C.J. 1, ¶ 209.

202. *See* Gobind Singh Sethi, *The European Court of Human Rights’ Jurisprudence on Issues of Forced Disappearances*, 8 HUM. RTS. BRIEF 29 (2001) (asserting that the ECtHR effectively applies a lower standard of proof in cases alleging right-to-life violations), available at [http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1507&context=hr\\_brief](http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1507&context=hr_brief).

numerous members of the court<sup>203</sup> and criticized by scholars.<sup>204</sup> More importantly, some suggest that the ECtHR's standard cannot "be equated to the standard applied in criminal proceedings in the common law system."<sup>205</sup> Finally, regardless of the applicable standard of proof, all of these civil bodies utilize more relaxed evidentiary rules than those governing evidence at the criminal tribunals, and they consequently allow claimants to prove their claims primarily through the use of documentary evidence.<sup>206</sup>

Given the above precedents, an international reparations body would almost certainly utilize a lower standard of proof and less rigorous evidentiary rules than those the international criminal tribunals employ. That fact, in itself, is not indicative of the compensation body's likely success in fact-finding, for a standard of proof serves to allocate errors, not ameliorate them. That is, adopting a high standard of proof does not reduce the number of erroneous decisions that a fact-finder will make<sup>207</sup> but rather allocates the errors in favor of the defendant by making it more likely that errors will result in acquittals rather than convictions.<sup>208</sup> With that fact in mind, we can see that the international criminal tribunals confront difficulties not because they are incompetent at fact-finding but because they must employ a standard of proof that ill-fits the evidence they receive. Specifically, the evidence submitted to prove a defendant's culpability for an international crime is frequently so vague, inconsistent, and contradictory that it cannot support a factual finding beyond a reasonable doubt, as that standard has traditionally been defined. In theory, that fact poses no problem for an international criminal tribunal for it can simply deter-

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203. See *Labita v. Italy*, App. No. 26772/95, Eur. Ct. H.R., ¶ 1 of dissent (Apr. 6, 2000) (Judges P. Ridruejo, Bonello, Makarczyk, Tulkens, Stránická, Butkevych, Casadevall & Zupancic, dissenting) *Vezenaroglu v. Turkey*, App. No. 32357/96, Eur. Ct. H.R., ¶¶ 1-19 (Apr. 11, 2000) (Bonello, J., dissenting in part).

204. See PHILIP LEACH ET AL., INTERNATIONAL HUMAN RIGHTS AND FACT-FINDING: AN ANALYSIS OF THE FACT-FINDING MISSIONS CONDUCTED BY THE EUROPEAN COMMISSION AND COURT OF HUMAN RIGHTS 16 (2009), available at [http://www.academia.edu/1315823/INTERNATIONAL\\_HUMAN\\_RIGHTS\\_and\\_FACT-FINDING](http://www.academia.edu/1315823/INTERNATIONAL_HUMAN_RIGHTS_and_FACT-FINDING); Sethi, *supra* note 202, at 30; THOMAS BUERGENTHAL & DINAH SHELTON, PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS 223 (4th ed. 1995); Loukis Loucaides, *Standards of Proof in Proceedings under the European Convention on Human Rights*, in PRÉSENCE DU DROIT PUBLIC ET DES DROITS DE L'HOMME: MÉLANGES OFFERTS À JACQUES VÉLU, 1431, 1431-1443 (Bruylant ed., 1992).

205. LEACH ET AL., *supra* note 204, at 16; Jochen A. Frowein, *Fact-Finding by the European Commission of Human Rights*, in FACT-FINDING BEFORE INTERNATIONAL TRIBUNALS 237, 248 (Richard Bonnot Lillich ed., 1992).

206. Christine Van den Wyngaert, *International Criminal Courts as Fact (and Truth) Finders in Post-Conflict Societies: Can Disparities with Ordinary Criminal Courts Be Avoided?*, 100 ASIL PROCEEDINGS 63, 66 (2006).

207. Indeed, as Erik Lillquist has pointed out, raising the standard of proof can increase the overall number of errors depending on the ratio of guilty to innocent defendants in the pool of defendants to be prosecuted. See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 102 (2002).

208. COMBS, *supra* note 47, at 345-46.

mine—repeatedly—that the prosecution has not met its burden of proof. Acquitting a large proportion of international criminal defendants gives rise to other difficulties, however, and perhaps partially as a consequence, the international criminal tribunals have chosen not to do so. Instead, I have contended, the tribunals have engaged in a very different form of fact-finding than that which they publicly acknowledge.<sup>209</sup> By contrast, an international reparations body that applies a lower standard of proof will have less need to manipulate its fact-finding processes because the evidence it receives will be more likely to meet the lower standard it adopts.

Finally, an international reparations body would not be required to employ many of the procedural rules that protect defendants' due process rights but that undermine accurate fact-finding. As just one example, the ICJ and human rights courts routinely draw adverse inferences against a state that fails produce evidence or otherwise does not respond to allegations. For instance, in finding against Honduras in the landmark *Velásquez-Rodríguez* case, the IACtHR observed that “[t]he manner in which the Government conducted its defense would have sufficed to prove many of the Commission’s allegations by virtue of the principle that the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law.”<sup>210</sup> Such a principle would be an anathema to the international criminal tribunals, which guarantee the defendants’ right not to testify against themselves.<sup>211</sup> Although that guarantee is clearly appropriate in an international criminal tribunal, it equally clearly impairs the judges’ ability to find accurate facts.<sup>212</sup>

### III. THE NORMATIVE CASE FOR SHIFTING FOCUS FROM THE PROSECUTORIAL TO THE REPARATORY

The foregoing Parts answered affirmatively the question: would the international community have more success in efforts to compensate victims than it is currently having in its efforts to prosecute offenders? This answer is important because—so far as I know—the question has never been either asked or answered. But the answer does not tell us whether the international community’s relative success in compensatory efforts justifies shifting focus from the prosecutorial to the reparatory. Indeed, as noted above, this Article assumes for the sake of argument that prioritizing prosecutions is normatively appropriate as an abstract matter. That is, this Article assumes that if we had our choice, we would prosecute those

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209. *Id.* at 224–72

210. Velásquez-Rodríguez, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 138.

211. ICTY Statute, *supra* note 116, at art. 21(4)(g); ICTR Statute, *supra* note 116, at art. 20(4)(g); Rome Statute, *supra* note 1, at art. 67(1)(g); Statute of the Special Court for Sierra Leone, art. 17(4)(g), U.N. Doc. S/2002/246, App. II Attachment, at 29, 39 (Mar. 8, 2002); STL Statute, *supra* note 40, art. 16(4)(h).

212. LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW 158 (2006).

who commit international crimes because prosecutions advance various important goals more effectively than any other transitional justice mechanism, including reparations.

Despite those assumptions, this Part suggests that, at this moment in history, the international community might do well to shift a considerable portion of its resources to reparatory efforts. First, Section A summarizes the real and tangible benefits that victims gain from financial reparations in order to show that, even though we might believe that prosecutions can better advance the most pressing transitional justice goals, reparations are also valuable to victims in a host of important ways. In other words, money spent on reparations may not be money spent in the most advantageous way, but it is unquestionably money well spent. Section B considers the role that financial inequality plays in generating and sustaining armed conflict. It seems no coincidence that most recent mass atrocities have occurred in desperately poor countries that not only feature extremely low income levels but also high rates of inequality between rich and poor. To the extent that financial reparations can minimize that inequality and raise economic standards overall, we have reason to hope that they can reduce the incidence of mass violence.

Finally, Section C details the geo-political skepticism that currently threatens international criminal law. In particular, Section C observes that the field is at a reputational low and is currently facing the most robust challenges of its short existence. We could respond to this troubling state of affairs by redoubling our efforts to improve the functioning and results of international criminal tribunals, but this may be a risky strategy, for if it fails, we are not likely to see renewed efforts at international criminal justice for many decades to come. An arguably safer route would be to temporarily divert some of our energy and resources to financial reparations—a valuable post-conflict mechanism that we are more likely to satisfactorily implement. Once the international community has achieved some success in that less-ambitious endeavor, it might be more willing to use the power it has to pursue the more ambitious, normatively desirable endeavor—international criminal trials.

#### A. *The Benefits of Reparations: Victims' Perspective*

So as not to re-tread the literature that already extols reparations,<sup>213</sup> I will here focus primarily on one less-examined aspect: victims' attitudes towards reparations. In sum, victims of international crimes both want and

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213. See REPARATIONS: INTERDISCIPLINARY INQUIRIES (Jon Miller & Rahul Kumar eds., 2007) (praising reparations as a “potent tool for social justice”); Carla Ferstman et al., *Introduction to REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING*, *supra* note 6, at 7 (providing a comprehensive examination of reparations in order to advance their “effective implementation”); de Greiff’s Introduction, *supra* note 2, at 2 (extolling reparations as “the most tangible manifestation of the efforts of the state to remedy the harms they have suffered” for many victims).

expect reparations.<sup>214</sup> In a study of Afghan victims, for instance, eighty-eight percent expressed the belief that reparations should be awarded to victims of past crimes.<sup>215</sup> Similarly when Ugandans were asked “what should be done for” the Northern Ugandan victims of armed conflict, the majority responded that they should be provided with some form of reparations.<sup>216</sup> Even more notably, a large-scale study of victim attitudes involving nearly 1000 victims across eleven regions found high levels of support for reparations through the entire sample. These victims considered monetary compensation to be the most important form of reparations,<sup>217</sup> and they valued compensation not only for its capacity to benefit victims but for the accountability it can impose on offenders.<sup>218</sup> For instance, when asked what punishment they considered most appropriate for offenders, thirty-six percent of victims said imprisonment, but a very close thirty-four percent said payment of money to victims.<sup>219</sup> Victims also see reparations as an effective way to benefit entire communities, not just individuals.<sup>220</sup>

That victims desire reparations should come as no surprise both because most victims of international crimes desperately need financial assistance<sup>221</sup> and because reparations benefit victims both tangibly and intangibly. The world’s most ambitious reparations scheme—that which Germany implemented to compensate victims of the Nazis—is considered to have been enormously successful and to have transported many thousands of refugees from a life “[of] abject poverty [into] a dignified life

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214. Numerous studies that feature direct interviews of victims of mass atrocities show that reparations are one of their key priorities. EVANS, *supra* note 2, at 136.

215. A CALL FOR JUSTICE, *supra* note 5, at 33.

216. INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE & HUMAN RIGHTS CENTER, FORGOTTEN VOICES: A POPULATION BASED SURVEY ON ATTITUDES ABOUT PEACE AND JUSTICE IN NORTHERN UGANDA 36 (2005), available at <http://ictj.org/sites/default/files/ICTJ-HRC-Uganda-Voices-2005-English.pdf> [hereinafter *Forgotten Voices*]. Whereas fifty-two percent of respondents said that victims should receive financial compensation only eight percent said justice, nine percent said apologies, and six percent said reconciliation. *Id.*

217. ERNESTO KIZA ET AL., VICTIMS OF WAR: AN EMPIRICAL STUDY ON WAR-VICTIMIZATION AND VICTIMS’ ATTITUDES TOWARDS ADDRESSING ATROCITIES 119 (2006).

218. *Id.* at 112. Ugandan victims surveyed in another study likewise “identified compensation as the primary response to harm,” valuing it both for imposing accountability on perpetrators and for improving the material conditions of affected communities. Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and the Secretary-General, U.N. Doc. A/HRC/7/38/Add.2, at 19, ¶ 57 (Jan. 25, 2008).

219. KIZA, *supra* note 217, at 112. At the same time, because attitudes varied from region to region, the authors concluded that “the implementation of reparative measures has to be adapted to the particular setting of the conflict.” *Id.* at 121.

220. See A CALL FOR JUSTICE, *supra* note 5, at 34; *Forgotten Voices*, *supra* note 216, at 36; TRUST FUND FOR VICTIMS, *supra* note 111, at 36.

221. ICTJ, UNFULFILLED EXPECTATIONS: VICTIMS’ PERSPECTIVES OF JUSTICE AND REPARATIONS IN TIMOR-LESTE 12–13 (2010). See KIZA, *supra* note 217, at 80–90 (discussing the various impacts of victimization, including loss of income, deprivation, and displacement).

with modest security.”<sup>222</sup> Latin American victims of enforced disappearances and torture also received crucial help in rebuilding their lives through their receipt of pension payments, educational supplements, and medical and psychological assistance.<sup>223</sup> Most of the more recent victims of international crimes live in desperately poor regions, so they are all the more in need of financial assistance. For example, the ICC’s Trust Fund for Victims (TFV), which currently works in Uganda and the DRC, has assisted victims through physical rehabilitation, psychological rehabilitation, and by providing financial support. An evaluation of victims who have received corrective surgery, prosthetics, and physiotherapy indicates that this assistance “invariably provided victim survivors with an extensive degree of physical healing” that enabled them to participate in community-based activities and to resume their productive roles in society.<sup>224</sup> Psychological and financial assistance have proven equally valuable. Victims receiving psychological assistance reported adopting a more optimistic outlook and having greater confidence, which enabled them to re-engage in community activities and to address their problems in more effective ways.<sup>225</sup> The TFV also provides material support for victims who suffer financial losses due to destruction of property, displacement and, loss of income-earning family members.<sup>226</sup> This financial assistance enabled victims to borrow, save and invest, pay school fees, and afford emergency medical care. Victims reported that these economic gains contributed significantly to improvements in their mental health and sense of security,<sup>227</sup> and commentators have opined that, for many victims, the

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222. Kurt Schwerin, *German Compensation for Victims of Nazi Persecution*, 67 *Nw. U. L. Rev.* 479, 522–23 (1972).

223. Arturu J. Carrillo and Jason S. Palmer, *Transnational Mass Claim Processes (TMCPs) in International Law and Practice*, 28 *Berkeley J. Int’l L.* 343, 359, 407 (2010). *See generally*, Guembe, *supra* note 91, at 25–45 (describing different types of reparations and different classes of beneficiaries); Lira, *supra* note 91, at 56.

224. JENNIFER McCLEARY-SILLS & STELLA MUSAKA, *INT’L CENTER FOR RESEARCH ON WOMEN, EXTERNAL EVALUATION OF THE TRUST FUND FOR VICTIMS PROGRAMMES IN NORTHERN UGANDA AND THE DEMOCRATIC REPUBLIC OF CONGO: TOWARDS A PERSPECTIVE OF UPCOMING INTERVENTIONS* 24–25 (2013), [http://www.icrw.org/sites/default/files/publications/ICRW%20TFV%20%20Evaluation%20Report\\_0.pdf](http://www.icrw.org/sites/default/files/publications/ICRW%20TFV%20%20Evaluation%20Report_0.pdf) [hereinafter *EXTERNAL EVALUATION*]. After receiving physical rehabilitation, many victims reported that they were able “to live a normal life again, to make plans for the future, to resume school and gardening, the confidence to participate in community gatherings again, social independence and self-reliance.” *Id.* at 25.

225. *Id.* at 28–29; VICTIMS’ RIGHTS WORKING GROUP, *THE IMPACT OF THE ROME STATUTE SYSTEM ON VICTIMS AND AFFECTED COMMUNITIES* 19 (2010) (noting that “[t]he implementation of the activities funded by Trust Fund for victims of the ICC developed hope, trust, confidence and a sense of belonging by the victims,” and that “[f]amilies and communities appreciated the projects because they brought both psychosocial and physical healing”) [hereinafter *IMPACT ROME STATUTE*].

226. *EXTERNAL EVALUATION*, *supra* note 224, at 31.

227. *Id.* at 8. *See also* THE TRUST FUND FOR VICTIMS, *LEARNING FROM THE TFV’S SECOND MANDATE: FROM IMPLEMENTING REHABILITATION ASSISTANCE TO REPARATIONS* 17 (2010).



TFV's material assistance is likely "the most tangible impact" they experience from the ICC.<sup>228</sup>

Less well known are the intangible benefits that victims gain through reparations, but these can be equally important. Offender-derived reparations frequently provide victims with the satisfaction of seeing the offender "paying back" what the victim had lost,<sup>229</sup> and they can help deter future violations<sup>230</sup> and promote reconciliation.<sup>231</sup> Moreover, reparations from any source serve as a vital acknowledgement of the injustice the victim has suffered.<sup>232</sup> As Brandon Hamber puts it: "[F]inancial reparations have the potential to play an important role in any process of healing, coping with bereavement, and addressing the impact of violence for victims. They can symbolically acknowledge and recognize the individual's suffering."<sup>233</sup> Yael Danieli agrees, noting that reparations "*concretise* [ ] for the victim . . . [that] he is not guilty, and somebody cares about it. . . . Just a letter of apology doesn't have the same meaning and even if it is a token it adds."<sup>234</sup> Finally, the process through which victims gain reparations often allows them to exercise autonomy and thereby to "remedy the powerlessness and subjugation they may have suffered" during the conflict.<sup>235</sup>

### B. Reducing Conflict Through Reparations

For decades, social scientists have sought to isolate the factors and conditions that lead to mass violence. Therefore, scholars have considered, among other topics, the relationship between large-scale violence and a state's ethnic makeup,<sup>236</sup> its form of government,<sup>237</sup> and the cultural and

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228. IMPACT ROME STATUTE, *supra* note 225, at 19.

229. KIZA, *supra* note 217, at 65.

230. For instance, Nowak and McArthur opine that "[i]f states provided effective remedies ensuring that the individual perpetrators are held accountable to pay all the costs of long-term rehabilitation for torture victims, this would probably have a stronger deterrent effect than criminal punishments." MANFRED NOWAK & ELIZABETH MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A COMMENTARY* 483 (2008).

231. See Pascale Chifflet, *The Role and Status of the Victim*, in *INTERNATIONAL CRIMINAL LAW DEVELOPMENTS IN THE CASE LAW OF THE ICTY* 75, 98 (Gideon Boas & William Schabas eds., 2003); Roy L. Brooks, *Getting Reparations for Slavery Right – A Response to Posner and Vermeule*, 80 *NOTRE DAME L. REV.* 251, 275 (2004).

232. KIZA, *supra* note 217, at 65; see also IMPACT ROME STATUTE, *supra* note 225, at 19.

233. Hamber, *supra* note 105, at 566.

234. Danieli, *supra* note 6, at 60.

235. 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, 261 (2009).

236. See, e.g., Paul Collier & Anke Hoeffler, *On Economic Causes of Civil War*, 50 *OXFORD ECON. PAPERS* 563 (1998).

237. See, e.g., R.J. RUMMEL, *POWER KILLS: DEMOCRACY AS A METHOD OF NONVIOLENCE* (1997) (arguing that democracy can act as a practical solution to end war and all other collective political regime violence); William Easterly et al., *Development, Democracy, and Mass Killings*, 11 *J. ECON. GROWTH* 129 (2006) (analyzing the causal effect between democracy and GDP and mass killing).

individual features that characterize it.<sup>238</sup> Further, and most relevantly to this discussion, social scientists have also explored whether a state's economic status can help to predict whether it will descend into violence; not surprisingly, they have found that it can. In particular, studies show a negative correlation between a state's economic development and the likelihood of mass killings occurring therein.<sup>239</sup> In addition, research shows a strong relationship between inequality and mass atrocities. The earliest studies centered on inequality in land distribution and showed that such inequality correlated with political violence.<sup>240</sup> Later studies revealed that unequal land distribution was only indirectly correlated with political violence; rather, "the more important direct cause in the variation in rates of political violence . . . is inequality in the distribution of income," of which maldistribution of land can be a component.<sup>241</sup>

Providing financial assistance, job training, and other services to affected individuals and communities can help to eliminate some of the underlying causes of mass atrocities by raising income levels, either across the board, or in a way that ameliorates some of the state's underlying inequalities. To be sure, post-conflict reparations will never be so generous as to dramatically alter a state's overall income levels. Nor will reparations necessarily reduce inequality, because the reparations may not be provided to those with the lowest incomes. But given the recent prevalence of mass atrocities in desperately impoverished states featuring unequal income distributions,<sup>242</sup> we can expect reparations to reduce to some degree the mass-atrocity risk factors described above. Certainly, they will have some effect on these risk factors whereas prosecutions, which provide no financial assistance to victims or their communities, have none.

### C. *Shifting to Save: The Precarious Present Position of International Criminal Justice*

Because reparations offer many benefits, they would constitute a desirable post-conflict response regardless of the international community's

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238. See ERVIN STAUB, *THE ROOTS OF EVIL: THE ORIGINS OF GENOCIDE AND OTHER GROUP VIOLENCE* 51–66 (1989) (describing the influence of culture and individual characteristics, such as cultural self-concept, self-esteem, and world view, as well as moral value orientation and unconscious motivations on the occurrence of genocide and mass killings).

239. Easterly et al., *supra* note 237, at 141. See generally DOUGLAS A. HIBBS, JR., *MASS POLITICAL VIOLENCE: A CROSS NATIONAL CAUSAL ANALYSIS* 188 (1973) (finding that economic development tends to decrease levels of violence).

240. See generally Bruce M. Russett, *Inequality and Instability: The Relation of Land Tenure to Politics*, 16 *WORLD POL.* 442, 449 (1964) (noting that inequality of land distribution bears a relation to political instability); Raymond Tanter & Manus I. Midlarsky, *A Theory of Revolution*, 11 *J. CONFLICT RESOL.* 264, 277 (1967) (indicating that revolutions occurred in those societies with a higher degree of income inequality).

241. Edward N. Muller & Mitchell A. Seligson, *Inequality and Insurgency*, 81 *AM. POL. SCI. REV.* 425, 427, 443 (1987).

242. Countries such as Rwanda, DRC, Central African Republic and Uganda have relatively sharp income inequality. See WORLD BANK, *GINI INDEX*, <http://data.worldbank.org/indicator/SI.POV.GINI>.

capacity to satisfactorily carry out criminal prosecutions. But this section suggests that reparations may stand as a particularly valuable alternative to criminal trials—at this point in time—precisely because—at this point in time—international criminal justice is foundering.

It is no exaggeration to say that international criminal law is at an all-time reputational low. The ICTY—long considered the crown jewel of the international tribunals—has recently suffered a series of reputational blows involving controversial acquittals,<sup>243</sup> allegations of undue influence exerted by the United States and Israel,<sup>244</sup> the high-profile disqualification of a judge just six weeks before his Chamber was to issue its judgment in an extraordinarily long-running case,<sup>245</sup> and the continuation of the case with a new judge,<sup>246</sup> in arguable contravention of ICTY rules.<sup>247</sup> Most of the hybrid tribunals have also faced debilitating challenges. The Special Court for Sierra Leone stands as a bright star in this constellation, but the other hybrid tribunals have either been deemed failures or are well their way to being so deemed. Starved for resources and lacking the most basic support from the international community, the Special Panels for Serious Crimes was consigned to prosecute only low-level Timorese militiamen in proceedings that frequently ignored due process standards.<sup>248</sup> Inadequate and unstable funding likewise substantially impedes the ECCC,<sup>249</sup> which also must contend with a host-government—Cambodia—that interferes with its proceedings and is dead-set against future prosecutions despite their justification.<sup>250</sup> Consequently, the ECCC will probably end its life

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243. See Prosecutor v. Stanišić & Simatović, Case No. IT-03-69-T, Judgement (Int'l Crim. Trib. For the Former Yugoslavia May 30, 2013); Prosecutor v. Gotovina & Markač, Case No. IT-06-90-A, Judgement (Int'l Crim. Trib. For the Former Yugoslavia Nov. 16, 2012); Prosecutor v. Perišić, Case No. IT-04-81-A, Judgement (Int'l Crim. Trib. For the Former Yugoslavia Feb. 28, 2013).

244. See E-mail from Frederik Harhoff, Judge, Int'l Crim. Trib. for the Former Yugoslavia, to multiple recipients (June 6, 2013), available at <http://www.bt.dk/sites/default/files-dk/node-files/511/6/6511917-letter-english.pdf>.

245. Prosecutor v. Šešelj, Case No. IT-03-67-T, Decision on Defence Motion for Disqualification of Judge Frederik Harhoff and Report to the Vice President (Int'l Crim. Trib. For the Former Yugoslavia Aug. 28, 2013).

246. Prosecutor v. Šešelj, Case No. IT-03-67-T, Order Assigning a Judge Pursuant to Rule 15 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 31, 2013); Prosecutor v. Šešelj, Case No. IT-03-67-T, Decision on Continuation of Proceedings (Int'l Crim. Trib. For the Former Yugoslavia Dec. 13, 2013).

247. See Kevin Jon Heller, *The Final Nail in the ICTY's Coffin*, OPINIO JURIS (Dec. 16, 2013, 6:37 AM), <http://opiniojuris.org>; Megan Fairlie, *W(h)ither now the reputation of the ICTY?*, OPINIO JURIS (Jan. 1, 2014, 12:20 PM), <http://opiniojuris.org>.

248. See generally David Cohen, *Indifference and Accountability: The United Nations and the Politics of International Justice in East Timor*, E.-W. CENTER SPECIAL REPTS., No. 9, June 2006, at 1–4.

249. See Colin Meyn, *Unpaid National Staff at KR Tribunal Strike for a Second Time*, THE CAMBODIA DAILY, Sept. 2, 2013, available at <https://www.cambodiadaily.com/archives/unpaid-national-staff-at-kr-tribunal-strike-for-second-time-41547/>.

250. See generally INT'L BAR ASS'N, THE ECCC – A FAILURE OF CREDIBILITY (2012) 12, available at <http://jurist.org/paperchase/Cambodia-1.pdf>.

having prosecuted a measly three individuals. As for the STL, it has had to resort to a questionable procedural device—the trial in absentia—even to begin prosecutions.<sup>251</sup> Thus, no matter how closely STL trials adhere to other due process norms, they will inevitably be considered largely illegitimate due to the defendants' absence from trial.

Most importantly, the fact-finding and enforcement challenges summarized in Part I are reaching a crisis point at the ICC—the institution that stands as the future of international criminal justice. Part I revealed that the ICC has not obtained custody over more than half of its indictees, but that statistic tells only part of the story. Equally concerning for the future of the ICC is the battle it is currently losing to prosecute Kenya's sitting President, Uhuru Kenyatta and Vice President, William Ruto. Indicted before they were elected to their current political offices, Kenyatta and Ruto have used every means at their disposal to obstruct the ICC's efforts to prosecute them. Kenyatta not only has refused to turn over key financial documents,<sup>252</sup> but evidence suggests that he and his associates both intimidated and bribed witnesses to induce them to withdraw from testifying.<sup>253</sup> Numerous witnesses have done just that,<sup>254</sup> and the ICC's case against Kenyatta is in shambles. In December 2013, the ICC Prosecutor had to ask for another trial postponement, acknowledging that—due to the many witness withdrawals—she had “insufficient evidence to proceed to trial.”<sup>255</sup> The court gave her more time;<sup>256</sup> however, most commentators, including the Prosecutor herself, believe that the ICC “has

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251. Ian Black, *Lebanon 'Must Boost Efforts to Arrest Hariri Assassination Accused'*, THE GUARDIAN, Jan. 10, 2014, available at <http://www.theguardian.com/world/2014/jan/10/lebanon-arrest-hariri-assassination-accused-trial-prosecutor>.

252. See *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, Prosecution Application for a Finding of Noncompliance Pursuant to Article 87(7) against the Government of Kenya (Dec. 2, 2013).

253. See Nicholas Kulish & Marlise Simons, *Setbacks Rise in Prosecuting the President of Kenya*, N.Y. TIMES, July 19, 2013, available at [http://www.nytimes.com/2013/07/20/world/africa/dwindling-witness-list-threatens-case-against-kenyan-president.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/20/world/africa/dwindling-witness-list-threatens-case-against-kenyan-president.html?pagewanted=all&_r=0) (discussing allegations of intimidation). As for bribery, the ICC recently issued an arrest warrant against Kenyan journalist, Walter Barasa, accusing him of “corruptly influencing” witnesses to refuse to testify for the prosecution. *Prosecutor v. Barasa*, Case No. ICC-09-01/13, Warrant of Arrest for Walter Osapiri Barasa (Aug. 2, 2013).

254. *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, Prosecution Notification of Withdrawal of Witnesses (July 16, 2013); *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, Notification of the Removal of a Witness from the Prosecution's Witness List and Application for an Adjournment of the Provisional Trial Date (Dec. 19, 2014).

255. *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, Notification of the Removal of a Witness from the Prosecution's Witness List and Application for an Adjournment of the Provisional Trial Date, ¶ 3 (Dec. 19, 2014).

256. *Prosecutor v. Kenyatta*, Case No. ICC-01/09-02/11, Order vacating trial date, ¶ 6 (Jan. 23, 2014).

no realistic chance of successfully prosecuting” Kenyatta unless Kenya stops its obstructionist tactics.<sup>257</sup>

Kenyatta has not confined those obstructionist tactics to his own case or his own country. Rather, he has marshaled the assistance of the AU, which as discussed above, was already critical of the ICC’s focus on Africa. Following Kenyatta’s appeal, in October 2013, the AU increased its opposition to the court by adopting a resolution calling for immunity from ICC jurisdiction for any sitting AU head of state.<sup>258</sup> Although this extreme demand has not been met,<sup>259</sup> the ICC’s Assembly of States Parties did capitulate to Kenyatta’s and Ruto’s desire not to be present at their trials. After the ICC’s Appeals Chamber refused to excuse Ruto (and by implication Kenyatta) from his obligation to attend trial,<sup>260</sup> the Assembly of States Parties amended the ICC’s Rules of Procedure and Evidence to permit the absence of an accused “who is mandated to fulfill extraordinary public duties at the highest national level.”<sup>261</sup> The failure of these defendants to attend trial almost certainly will impede later efforts to incarcerate them (should they be convicted), and for the present, it sends yet another message to the ICC that it lacks the international community’s support.

The witness credibility issues that Part I summarized have also reached crisis proportions at the ICC. My earlier research on international criminal fact-finding, which centered on the ICTR, SCSL, and Special Panels, drew conclusions that were worrisome enough. Even a cursory examination of ICC proceedings, however, suggests that the problem is all the more devastating there. The ICC’s first trial, in the *Lubanga* case, featured witness after witness who was later judged to be lying or otherwise not credible.<sup>262</sup> Witness testimony proved even more problematic in the ICC’s second case, for there the Trial Chamber had to acquit the defendant, Mathieu Ngudjolo Chui, because the prosecution’s three key witnesses were not credible and could not be relied upon.<sup>263</sup> Witness

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257. Thomas Escritt, *Kenyatta Trial Doomed Unless Kenya Helps - ICC Prosecutors*, REUTERS, Feb. 5, 2014, available at <http://in.reuters.com/article/2014/02/05/kenya-icc-hearing-uhuru-kenyatta-idINDEEA1408N20140205>.

258. African Union Dec., *Decision on Africa’s Relationship with the International Criminal Court (ICC)*, AU Doc. Ext/Assembly/AU/Dec.1, ¶ 10 (Oct. 12, 2013).

259. See, e.g., Michelle Nichols, *Africa Fails to Get Kenya ICC Trials Deferred at United Nations*, REUTERS, Nov. 15, 2013, available at <http://www.reuters.com/article/2013/11/15/us-kenya-icc-un-idUSBRE9AE0S420131115>.

260. Prosecutor v. Ruto & Sang, Case No. ICC-01/09-01/11, Judgement (Oct. 25, 2013), <http://www.icc-cpi.int/iccdocs/doc/doc1669852.pdf>.

261. Assembly of States Parties Resolution, Case No. ICC-ASP/12/Res.7 (Nov. 27, 2013), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP12/ICC-ASP-12-Res7-ENG.pdf). The prosecution has challenged the ASP amendments as inconsistent with the Rome Statute. Prosecutor v. Ruto, Case No. ICC-01/09-01/11, Public Prosecution Response to Defence Request Pursuant to Article 63(1) and Rule 134*quater* for excusal from attendance at trial for Wiliam Samoei Ruto (Jan. 8, 2014).

262. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgement, ¶¶ 482–83, 499–502 (Mar. 14, 2012).

263. Prosecutor v. Ngudjolo, Case No. ICC-01/04-02/12, Judgement, ¶¶ 157–59, 181–90, 218–19 (Dec. 18, 2012).

testimony in the *Bemba* case, moreover, is looking no better. The court recently issued an arrest warrant for the defendant—Jean-Pierre Bemba—along with his lawyer and two others, charging them with witness tampering and presenting false testimony. According to the judge issuing the warrant, the prosecution submitted “a remarkable quantity” of evidence,” including money transfer receipts, telephone call records and transcripts, text messages and emails, all of which left the judge “firmly satisfied” that the defendants were engaged in a criminal scheme that consisted of presenting false and forged documents, coaching witnesses to give false testimony, and transferring money to witnesses.<sup>264</sup> Finally, even in a trial that has not yet begun—in the *Kenyatta* case—witnesses have confessed to lying in their initial statements to the prosecution.<sup>265</sup>

The difficulties just described have left the ICC—and international criminal justice—reeling. Some commentators now portray the court as an institution in crisis,<sup>266</sup> and international criminal justice as a field that may have a shorter-than-expected life span.<sup>267</sup> These doom-and-gloom forecasts may be overstated; moreover, even if they are accurate, the path forward is not self-evidently clear.

One response would be to dramatically increase our efforts to bolster, strengthen, and legitimize international criminal justice so as to ensure its continued viability. That is, we might believe that, if the efforts we have put forth thus far have not been sufficient to create a functioning international criminal justice system, then we must re-double those efforts until we have in fact created a credible and legitimate system about which we can be proud. That could be a reasonable course of action and one that I firmly support, but because it is hard to have confidence that efforts will be re-doubled or that substantial improvements will be realized even if they are, I tentatively put forth an alternative—and somewhat counterintuitive—path for advancing international criminal justice. Namely, I suggest that the most efficacious way to preserve the international criminal justice system may be temporarily to minimize it, dial back our expectations for it, and re-focus our primary energy and resources on implementing a post-conflict mechanism that we can more efficaciously implement.

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264. Prosecutor v. Bemba et al., Case No. ICC-01/05-01/13, Warrant of arrest for Jean-Pierre Bemba-Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido, ¶¶ 12–14 (Nov. 20, 2013).

265. Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Notification of the Removal of a Witness from the Prosecution’s Witness List and Application for an Adjournment of the Provisional Trial Date, ¶ 2 (Dec. 19, 2013).

266. See Thomas Escritt, *Congo Militia Leader Ordered Rapes, Massacres: Prosecutor*, REUTERS, Feb. 10, 2014, available at <http://www.reuters.com/article/2014/02/10/us-congo-war-crimes-icc-idUSBREA190KR20140210>; Maryam Jamshidi, *The Enforcement Gap: How the International Criminal Court Failed in Darfur*, AL JAZEERA, Mar. 25, 2013.

267. See Eric Posner, *Assad and the Death of the International Criminal Court*, SLATE, Sept. 19, 2013, available at [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2013/09/failing\\_to\\_prosecute\\_assad\\_will\\_be\\_the\\_death\\_of\\_the\\_international\\_criminal.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2013/09/failing_to_prosecute_assad_will_be_the_death_of_the_international_criminal.html).

Why might I think that reducing the scope of and expectations for the international criminal justice system will help ultimately to preserve it? For one thing, the stunning ambition inherent in the current international criminal justice system indicates that it is an idea that came too soon. Seventy years ago, before the creation of the Nuremberg Tribunal, international criminal justice did not exist. That is, for the several millennia of human history prior to 1946, there was no expectation that the perpetration of mass atrocities would be followed by criminal sanctions. A hope for such an expectation began to emerge following World War I, when Allies sought to prosecute Kaiser Wilhelm and other German war criminals,<sup>268</sup> but the utter failure of those efforts showed that the world was not yet ready for them.

The Nuremberg Trial, then, stood as a watershed moment, but even it was hopelessly inadequate by today's standards. Its eleven skeletal procedural rules do not come close to providing the kind of due process that we now consider essential.<sup>269</sup> Its prosecution of aggression and crimes against humanity violated the principle of *nullem crimen sine lege*,<sup>270</sup> and most importantly, its jurisdictional provisions excluded the Allies from prosecution.<sup>271</sup> In fact, not only did the drafters of the Nuremberg Charter exclude the Allies from prosecution, they did so reflexively and unquestioningly. Admittedly, some contemporaneous commentators criticized the Tribunal for dispensing "victor's justice,"<sup>272</sup> but they assumed that the remedy for that violation was abandoning the international criminal justice project, not prosecuting a more balanced group of offenders. Indeed, the very idea that the Allies would subject themselves to international criminal prosecutions along with the Germans and Japanese would have been nothing short of unthinkable.<sup>273</sup>

Yet, fifty short years later, when the ICTY opened its doors, the unthinkable had become the expected. Victors' justice was by then an anathema; justice, if it was to be considered justice, must be even-handed, apolitical, and unbiased. Applying those new and improved expectations, we castigated the states of the former Yugoslavia when they refused to surrender their indicted political and military leaders to the ICTY.<sup>274</sup> We

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268. Versailles Treaty, *supra* note 166, arts. 227–28.

269. See M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 408 (2003); Gerry J. Simpson, *War Crimes: A Critical Introduction*, in *THE LAW OF WAR CRIMES* 1, 11–16 (Timothy L.H. McCormack & Gerry J. Simpson eds., 1997).

270. See DAVID LUBAN, *LEGAL MODERNISM* 349–52 (1994).

271. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, art. 6, Aug. 8, 1945, 54 Stat. 1544, 82 U.N.T.S. 280.

272. Herbert Weschler, *The Issues of the Nuremberg Trial*, 62 *POL. SCI. Q.* 11 (1947) (critically analyzing the Nuremberg trial as dispensing "victor's justice").

273. LUBAN, *supra* note 270, at 361 ("[O]f course it is absurd to imagine that the victorious Allies would have tried their own heads of state.").

274. See Gabrielle Kirk McDonald, *Problems, Obstacles and Achievements of the ICTY*, 2 *J. INT'L CRIM. JUST.* 558, 564 (2004).

condemn Rwanda for obstructing ICTR prosecutions of RPF soldiers,<sup>275</sup> Indonesia for sheltering Special Panels indictees,<sup>276</sup> and Cambodia for protecting aging Khmer Rouge leaders from near-death prosecutions.<sup>277</sup> And we find it reasonable to expect that political leaders, such as Omar al Bashir and Uhuru Kenyatta, who allegedly obtained or retained power through the perpetration of brutal crimes against humanity, will voluntarily surrender themselves to a toothless international court—just because it asks them to.

Although I may appear to scoff at these expectations, I hold them myself. I agree wholeheartedly that if “justice” is to prove worthy of its dictionary definition, then it must be applied in a non-self-interested, non-discriminatory, even-handed way. But desiring justice is not the same as achieving it, and failing to recognize the extraordinary ambition inherent in the current international criminal justice is dangerous. Mirjan Damaška observes that the “endogenous powerlessness of international criminal courts and the special difficulties they face” would lead one to expect their ambitions “to be rather modest. In fact, however, they are almost grandiose.”<sup>278</sup> Ambitious, even “grandiose,” aims can be appropriate, even desirable, but not where the opportunity costs of pursuing them grow too high; and certainly not where their failure to be achieved threatens the continued existence of the system as a whole.

In some sense, my argument boils down to this: in making criminal prosecutions its centerpiece response to mass atrocities, the international community may have bitten off more than it can chew. Seemingly in one bold step, we leapt from a world in which the international community did not even consider imposing criminal sanctions following mass atrocities to a world in which the international community is expected to impose criminal sanctions wherever they are appropriate, and regardless of the geopolitical standing of the state or individual involved. The international community made that leap, but because its reach so vastly exceeded its grasp, it now finds itself presiding over a criminal justice system that it is not able satisfactorily to implement and that may be in danger of imploding. For that reason alone, retrenchment should be considered. To be sure, once such bold steps have been taken, retrenchment can look like defeat, but retrenchment that is carefully constructed and well-calculated to ad-

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275. Victor Peskin, *Victor's Justice Revisited: Rwandan Patriotic Front Crimes and the Prosecutorial Endgame at the ICTR*, in REMAKING RWANDA: STATE BUILDING AND HUMAN RIGHTS AFTER MASS VIOLENCE 173 (Scott Strauss & Lars Waldorf eds., 2011).

276. See MEGAN HIRST & HOWARD VARNEY, INT'L CTR. FOR TRANSITIONAL JUST., *JUSTICE ABANDONED? AN ASSESSMENT OF THE SERIOUS CRIMES PROCESS IN EAST TIMOR* 16 (2005), <http://ictj.org/sites/default/files/ICTJ-TimorLeste-Justice-Abandoned-2005-English.pdf>.

277. Joel Brinkley, *Justice Squandered: Cambodia's Khmer Rouge Tribunal*, WORLD AFF., Sept./Oct. 2013, available at <http://www.worldaffairsjournal.org/article/justice-squandered-cambodia's-khmer-rouge-tribunal>.

278. Mirjan Damaška, *The International Criminal Court Between Aspiration and Achievement*, 14 UCLA J. INT'L L. FOREIGN AFF. 19, 22 (2009).



vance other fundamental goals may offer the best hope of preserving—for future attainment—the goals that we are unable to reach today.

As is evident from the preceding pages, the retrenchment that I have in mind involves shifting some of our focus from the (probably too ambitious) prosecutorial to the (probably more realistic) reparatory. Interestingly, certain historical precedents suggest that the international community may have done better to emphasize civil reparations over criminal prosecutions in the first place. In particular, before the thirteenth century, in both England and on the Continent, criminal acts did not give rise to criminal sanctions; they instead gave rise to civil compensatory obligations. That is, before the thirteenth century, a murderer was not sentenced to prison or the gallows but rather was required to make a compensation payment—a *wergild*—to the victims' family.<sup>279</sup> These compensation payments were designed to eliminate the need for blood feuds that otherwise would have erupted between the families and tribes of victims and the families and tribes of perpetrators. Although compensation payments were clear improvements over blood feuds, they were by no means an optimal response to criminal activity. But at that point in history, “the kings were too weak to centralize the control of judicial functions in their own hands”<sup>280</sup> and as such, they also were too weak to gain custody over offenders and impose criminal sanctions thereon. Later, when King Henry II gained control over the government from the feudal lords and concomitantly gained control over the administration of justice, there followed “a strong shift away from Anglo-Saxon feud and *wergild* to Angevin public prosecution”<sup>281</sup> and from “predominantly private prosecution through monetary compensation to predominantly capital punishment at the hands of the crown.”<sup>282</sup> As Clarence Jeffrey put it:

The king was now a territorial king and his peace extended throughout the land. . . . He had jurisdiction in every case. The State, and not the family or the lord, now was the proper prosecutor in every case.<sup>283</sup>

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279. JOHN HOSTETTLER, *A HISTORY OF CRIMINAL JUSTICE IN ENGLAND AND WALES* 14–15 (2009); JOHN HUDSON, *2 THE OXFORD HISTORY OF THE LAWS OF ENGLAND* 178 (John Baker ed., 2012). Occasionally, the offender also would be required to make payment to the King. Clarence Ray Jeffery, *The Development of Crime in Early English Society*, 47 *J. CRIM. L., CRIMINOLOGY & POLICE SCIENCE* 647, 655 (1957).

280. Jeffery, *supra* note 279, at 659. “Thus developed a court of common law as a result of the growth of a strong centralized government.” As the crown grew in strength it reserved to itself the right to hold court and dispense justice. *Id.* at 660.

281. HOSTETTLER, *supra* note 279, at 46.

282. Thomas A. Green, *A Retrospective on the Criminal Trial Jury*, in *TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND, 1200–1800*, 358, 359 (J.S. Cockburn & Thomas A. Green eds., 1988).

283. Jeffery, *supra* note 279, at 662.

Thus, by the end of King Henry II's reign, the old tribal system had been replaced by a strong centralized court that was beginning to make rules for all of England.<sup>284</sup>

Though the analogy is by no means perfect, the development of domestic criminal law enforcement is suggestive of a similar evolution that may take place in the context of international criminal law. In particular, whereas medieval victims had to content themselves with compensation payments because medieval authorities did not possess the kind of robust, centralized power that would enable them to obtain custody over offenders and impose criminal sanctions thereon, modern victims of international crimes find themselves similarly placed. Because, at present, the international community lacks the power to apprehend and prosecute many international criminals, compensation awards may stand as the most efficacious and realistic response that victims can hope for. Moreover, just as domestic control grew and became more centralized over time, international law has been gaining in power and influence, particularly in the twentieth century, as the Westphalian paradigm has declined, and as international law has extended its reach and influence both inter-state and over a variety of non-state actors and intrastate situations.<sup>285</sup> Thus, although much of this Article has called attention to the international community's relative powerlessness and inefficacy, the rapid growth in international law during the twentieth century can give us hope that any international criminal retrenchment that may take place will be short-lived and that the international community soon will possess sufficient influence and authority to be able to implement the international criminal justice project in the way that it should be implemented.

#### CONCLUSION

When in 1872, Gustav Moynier, the first President of the International Committee of the Red Cross, proposed the creation of an international criminal tribunal to prosecute those who committed war crimes, he also suggested that it be authorized to provide compensation for victims.<sup>286</sup> Both proposals were shocking for their day, and neither garnered support. But, as Bottiglierio observes, whereas "the notion of individual criminal responsibility for grave violations of human rights and humanitarian law developed over the years and gained legal specificity and support, States did not grant similar recognition to the ancillary idea of compensating victims of crimes under international law by way of an international mechanism."<sup>287</sup> As a consequence, the international community constructed a

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284. 2 W. S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 173 (3d ed. 1923).

285. Yishai Blank, *Localism in the New Global Legal Order*, 47 *HARV. INT'L L.J.* 263, 265–66 (2006); *see also* Oona Hathaway, *International Delegation and State Sovereignty*, 71 *LAW & CONTEMP. PROBS.* 115, 115 (2008).

286. Christopher Keith Hall, *The First Proposal for a Permanent International Criminal Court*, 322 *INT'L REV. RED CROSS* 57 (Mar. 31, 1998).

287. BOTTIGLIERO, *supra* note 88, at 195.

legally sophisticated international criminal justice system and ignored reparations almost entirely.<sup>288</sup> That might be a normatively appropriate path, for resources are always limited, and we might reasonably expect that the benefits to be derived from a well-functioning criminal justice system will far exceed the benefits to be derived from a well-functioning financial reparations system. But no matter how reasonable that abstract calculation might have been, in practice, we got it backwards. We got it backwards because we failed to consider our (in)capacity to implement a well-functioning international criminal justice system at this point in time. In fact, our legally sophisticated international criminal justice system barely functions in the real world, and if its downward trajectory continues, it soon may no longer exist in the real world.

Although a shift of focus to the reparatory may represent international criminal law's best hope for continued survival, I nonetheless find it difficult to advocate. When modern international criminal justice burst onto the scene in the 1990s, it was welcomed exuberantly and wholeheartedly. International criminal law was seen as ushering in a new era of fairness and accountability, and era in which violence would be reduced, formerly warring peoples would be reconciled, and world would become a safer and more just place.<sup>289</sup> Although two decades later, most commentators retain little of that early, starry-eyed enthusiasm, advocating a large-scale change of focus away from criminal justice can appear to smack of failure and capitulation. However, in other legal contexts, it has been advised that ambitious goals are more readily reached via a series of small, measured steps than via a few bold leaps.<sup>290</sup> Thus, although the international community leapt into international criminal justice with the best of intentions, the grave challenges that it currently faces should convince us to backtrack, retrench and start stepping slowly.

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288. As noted above, the Rome Statute does authorize the ICC to order convicted defendants to pay reparations to victims, but reparations are unlikely to become a substantial portion of the court's work. See *infra* text accompanying note 95. See also Alison Bottomley & Heather Pryse, *The Future of Reparations at the International Criminal Court: Addressing the Danger of Inflated Expectations*, CIGI JUNIOR FELLOWS POL. BRIEF, June 2013, at 1, 3.

289. COMBS, *supra* note 47, at 45.

290. For instance, the Supreme Court's rush to proclaim a constitutional right to abortion has been negatively contrasted with its slow, incremental jurisprudence involving gender discrimination, with commentators noting that opponents of abortion rights capitalized on the very breadth and boldness of the decision in *Roe v. Wade*. See, e.g., Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1204-05 (1992).