

## المبررات الفلسفية / الأخلاقية لفرض الالتزامات التعويضية على الدولة

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**THE PHILOSOPHICAL/ETHICAL JUSTIFICATIONS FOR  
IMPOSING REPARATORY OBLIGATIONS ON THE STATE**

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**ABSTRACT**

The provision of reparation for victims of human rights violations is widely considered to be one of the most respected and central of legal principles.<sup>1</sup> The substantive aspect of the right to remedy involves the right of victims of human rights abuses, particularly of the right to life, to reparation for the horrific impact of such criminal acts.<sup>2</sup> The term reparation is regularly used to refer to a variety of measures aiming to correct wrongs created by criminal acts, in other words, to correct injustice by redressing the harm caused to the victim whether physical, material or moral, and, if possible, to restore the victim to his or her position before the occurrence of these acts.<sup>3</sup> This paper argues that the state must take moral and legal responsibility for the reparation of victims of crime whether on the ground of failing in its efforts to deal with real and serious risk to the life of its citizens or for making reparation for, the fact, that damage has occurred.

**Keywords:** Human Rights, Victims Rights, Criminal Justice System, Reparation, State Responsibility.

## الخلاصة:

يعتبر تقديم التعويضات لضحايا الانتهاكات الواسعة النطاق لحقوق الإنسان من أكثر المبادئ القانونية احتراماً ومركزية. وينطوي الجانب الموضوعي للحق في الانتصاف على حق ضحايا انتهاكات حقوق الإنسان ، ولا سيما الحق في الحياة ، في التعويض عن الآثار المروعة لهذه الأعمال الإجرامية. يستخدم مصطلح جبر الضرر بانتظام للإشارة إلى مجموعة متنوعة من التدابير التي تهدف إلى تصحيح الأخطاء الناتجة عن الأفعال الإجرامية ، وبعبارة أخرى ، لتصحيح الظلم عن طريق جبر الضرر الذي يلحق بالضحية سواء كان جسدياً أو مادياً أو معنوياً ، وإذا أمكن ، إعادة الضحية إلى وضعها قبل وقوع هذه الأفعال. يجادل هذا البحث بأن الدولة يجب أن تتحمل المسؤولية الأخلاقية والقانونية لتعويض ضحايا الجريمة سواء على أساس فشل جهودها للتعامل مع خطر حقيقي وخطير على حياة مواطنيها أو تقديم التعويضات فقط على أساس أن الضرر قد حدث. الكلمات المفتاحية: حقوق الإنسان ، حقوق الضحايا، نظام العدالة الجنائية ، جبر الضرر ، مسؤولية الدولة.

<sup>1</sup> Jonathan Doak, Victim's Rights, Human rights and Criminal Justice: Preconceiving the Role of Third Parties (Hart Publishing 2008) 207.

<sup>2</sup> Ibid.

<sup>3</sup> Naomi Roht-Arriaza, 'Reparations Decisions and Dilemmas' (2004) 27 *Hastings International and Comparative Law Review* 157, 160; Doak (n 1); Dinah Shelton, Remedies in International Human Rights Law (2d ed, Oxford University Press 2005) 10.

**INTRODUCTION**

The spread of indiscriminate violence against individuals' right to life in modern times and the legacy of its harmful consequences have shaken the humanitarian conscience, opening up a debate concerning the best ways to repair the damage done. This has revealed the need for the state to take a new role to effectively responding to the harm done to victims and to restore the social equilibrium disturbed by the actions of perpetrators. A sense of justice, from the perspective of victims, requires that all physical, material or moral damages be redressed. This requirement, essentially, should be met by the offenders themselves as they are the ones responsible for the damage to victims.<sup>1</sup> Therefore, it has been argued that there is no need for victims to demand compensation from the state because in many jurisdictions they can take civil action in civil courts against offenders for the damage done to them.<sup>2</sup> However, such civil action cannot be successful in cases where it is difficult to prove the identity of the perpetrators. Even in those rare cases where identification is possible and the perpetrators have been apprehended, they often lack assets to meet any monetary demand for compensation.<sup>3</sup> This means that it becomes impossible for individuals who have lost their life or suffered physical injuries and their families to receive redress from the perpetrators. When this is the case, it appears to be widely acknowledged that the state is obliged to bear the burden of making reparation.

There is a wide variety of unanswered questions concerning the nature and extent of the responsibility of the state to repair the damage caused by criminal acts of non-state actors. Put simply, if the damage caused by criminal acts is a result of errors by state agencies, must the state be responsible for compensating victims? Can the state which has made no error in its actions be held responsible for making compensation for the damage which has occurred? In addition, how has the duty of the state to make just reparation for victims of crime been addressed in accordance with philosophical/ethical principles. In this paper, two fundamental philosophical/ethical justifications for imposing such an obligation may be cited: these are the notions of the state's failure to protect and the social welfare principle.

**1- THE FAILURE TO PROTECT**

One of the main reasons for placing reparatory obligation on the state is that the state in taking upon itself, for the well-being of its society, the right of individuals to protect themselves, has also, therefore, taken upon itself the corresponding duty to protect them from any harm.<sup>4</sup> Failure of the state to prevent harm to its citizens makes it responsible to make reparation for this harm.<sup>5</sup> Individuals have a moral and legal right to have their right to life secured and protected by their state against acts of violence by non-state

<sup>1</sup> M. Cherif Bassiouni, 'International Recognition of Victims Rights' (2006) 6 *Human Rights Law Review* 203, 223.

<sup>2</sup> Harold R. Hanson, 'Compensation for Victims of Crimes of Violence' (1968) 30 *Albany Law Review* 325, 326.

<sup>3</sup> Katharina Buck, 'State Compensation to Crime Victims and the Principle of Social Solidarity: Can Theoretical Analysis Contribute to a Future European Framework?' (2005) 13 *European Journal of Crime, Criminal Law and Criminal Justice* 148, 149.

<sup>4</sup> John Haldane and Anthony Harvey, 'The philosophy of state compensation' (1995) 12 *Journal of applied philosophy* 273, 276.

<sup>5</sup> Pablo J. Drobny, 'Compensation to Victims of Crime: An Analyses' (1971) 16 *Saint Louis University Law Journal* 201, 204.

actors.<sup>1</sup> Relying on this right of protection, many commentators consider that one of the main moral and legal justifications for claiming that the state should be responsible for compensating victims of crime is if it fails in its duty of adequately protecting them.<sup>2</sup> This claim is based on the principles of social contract and the law of tort.<sup>3</sup> The social contract requires that when individuals agree to enter into such a contract with the state and relinquish some of their rights, including that of protecting their right to life against criminal acts, the protection of these rights must then be undertaken by the state.<sup>4</sup> Failure of the state to provide such protection adequately would constitute a breach of its contract with its citizens.<sup>5</sup> This, according to Jeremy Bentham, justifies the placing of responsibility on society to compensate victims of crime when its efforts to protect them have failed.<sup>6</sup> He asks:

“Has a crime been committed? Those who have suffered by it, either in their person or their fortune, are abandoned to their evil condition. The society which they have contributed to maintain, and which ought to protect them, owes them, however, an indemnity, when its protection has not been effectual”.<sup>7</sup>

It has been argued that to assume that society should bear responsibility to control and prevent acts of violence is unfair, because society has not progressed enough to be able to know the fully the causes of these acts or how to prevent many of them.<sup>8</sup> Even in

<sup>1</sup> For further details, see Faris AL-Anaibi, *The Rights of Victims of Violence by None-State Actors in Iraq post-2003* (PhD thesis, Durham University 2018) 9-45.

<sup>2</sup> Betsy J. Grey, ‘Homeland Security and Federal Relief: A Proposal for a Permanent Compensation System for Domestic Terrorist Victims’ (2006) 9 *Legislation and public policy* 663, 683; according to one commentator, ‘a state which has failed to adequately protect its citizens from crime is obligated to provide compensation to those who become victims’. Charlene L. Smith, ‘Victim Compensation: Hard Questions and Suggested Remedies’ (1985) 17 *Rutgers Law Journal* 51, 62; Leslie Sebba, *Third Parties: Victims and the Criminal Justice System* (Ohio State University Press 1996) 241.

<sup>3</sup> Grey (n 10) 684; at international level, victims can also rely on the international and regional human rights instruments to demand redress if the state fails to fulfil its negative or positive obligation to protect them. See Shelton (n 3) 114.

<sup>4</sup> Paul S. Hudson, ‘The Crime Victim and the Criminal Justice System: Time for A Change’ (1984) 11 *Pepperdine Law Review* 23, 31; Andrew Ashworth argues that it is not implied by the reciprocity agreement between citizens to abide by legal rules in the expectation that others will do likewise that the state has a duty to protect every citizen from criminal acts. Andrew Ashworth, ‘Punishment and Compensation: Victims, Offenders and the State’ (1986) 6 *Oxford Journal of Legal Studies* 86, 103.

<sup>5</sup> Smith (n 10) 63; Grey (n 10) 684; Hudson (n 12) 31.

<sup>6</sup> Similarly, Garofalo, the Italian Positivist, took this same position about the responsibility of society to compensate victims of crime. He agreed with another Italian Positivist, namely Ferri, that the state’s responsibility to compensate victims must be acknowledged in any criminal law system, if full justice is to be observed. However, Ferri stated that ‘For us to compare the liability of the criminal to repair the loss caused by his crime with the liability arising from breach of contract is simply immoral’. LeRoy G. Schultz, ‘The Violated: A Proposal to Compensate Victims of Violent Crime’ (1965) 10 *Saint Louis University Law Journal* 238, 238, 240-241.

<sup>7</sup> Robert D Childres, ‘Compensation for Criminally Inflicted Personal Injury’ (1964) 39 *New York University Law Review* 444, 446; Marlene A. Young, ‘The Role of Victim Compensation in Rebuilding Victims’ Lives’ International Organization for Victim Assistance, 1 <<https://www.iovahelp.org/About/MarleneAYoung/RoleOfVictComp.pdf>> accessed 6/7/2021, 2; Hanson (n 5) 325; Schultz (n 14) 239-240.

<sup>8</sup> Schultz (n 14) 241.

those totalitarian states which possess all kinds of electronic devices, it is doubtful that the majority of violent crimes could be prevented.<sup>1</sup> Therefore, compensation of victims of crime should be based on reasons other than society's failure to fulfil its obligation to prevent crime.<sup>2</sup> However, such an argument cannot entirely deny the fact that in cases where evidence indicates that the state, as the representative of society, is unwilling or unable to provide protection to its citizens, it must accept the consequence of this failure by compensating victims of crime.<sup>3</sup> As one commentator states:

"The state has undertaken the protection of the public against crime. It should therefore compensate the victims of crime, for every crime represents a failure by the state to perform its function of protection. In an affluent society ... the case may be even stronger... For an increase in crime seems to be a by-product of the affluent society, perhaps because in such a society the provision of public services on an adequate scale tends to be neglected".<sup>4</sup>

Similarly, another commentator justifies the obligation of the state to compensate victims in the following terms:

"Society owes a duty to all its members to protect them from violence. It has certainly assumed total and complete responsibility for the punishment of criminals. Individual retribution cannot be tolerated in a civilized community. Vigilante groups have been outlawed. We may not carry concealed weapons. We must go unarmed in the streets. With an increasing crime rate and shamefully financed police departments, should we not look to the state for some compensation when injuries arise as a result of crime"?<sup>5</sup>

It has even been asserted that such a responsibility of the state to compensate victims should be understood in a wide sense, because 'Society, in acting in furtherance of its interests of punishing, deterring, and rehabilitating the offender, interferes with the interests of the victim in obtaining compensation for his injury'.<sup>6</sup> This is to say that not only has the state failed in its duty to protect its citizens from criminal acts, but also, after such acts have been committed, the actions of the state continue to violate the right of victims to restitution from offenders.<sup>7</sup> According to Pablo J. Drobny, 'it is submitted

<sup>1</sup> Ibid.

<sup>2</sup> However, according to Schultz, 'this is not to infer that society is not to some degree responsible for violent crime, particularly when it tolerates well established and well-known crime ghettos, narcotics-centered slums, and syndicated crime'. Ibid.

<sup>3</sup> For instance, see the comments of Chief Justice Marshall of the United States Supreme Court in the case of *Marbury v. Madison* concerning the power to provide judicial remedy when victims lack protection. Marshall stated that 'The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection' and that 'the right of coercion is necessarily surrendered to government, and this surrender imposes on government the correlative duty of furnishing remedy'. *Marbury v. Madison*, 5 U.S (1 Cranch) 137, 163 (1803). Shelton (n 3) 29; however, in the case of *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989), the Supreme Court stated that, according to the Due Process Clause of the Constitution against private violence, a right to governmental protection does not exist. Grey (n 10) 685.

<sup>4</sup> P. Brett, 'Compensation for Victims of Crime: New Zealand's Pioneer Statute' (1964) 5 *Australian Lawyer* 21, 23.

<sup>5</sup> E. Bushmann, 'Let's Help the Innocent Victims of Crimes' (1967) 23 *Journal of the Missouri Bar* 18, 20; Drobny (n 8) 205.

<sup>6</sup> Drobny (n 8).

<sup>7</sup> Ibid; Atiyah criticises this argument by stating that 'the State has analogous duties at least to people injured by non-criminal but still unlawful conduct (such as tortious negligence), and that

that having violated its duty of protection, the state should at the very least have an obligation to expedite the victim's receipt of restitution from the offender. Since the state prevents this, it should offer compensation as a substitute'.<sup>1</sup> However, it seems that reliance on the rationale of failure to protect to claim that the state has the duty of insulating its citizens from the consequence of crime has failed to gain any legal acceptance.<sup>2</sup> This may be because such acceptance could imply, that the state's authorities should bear legal responsibility for the compensation of all victims of crime for all damage done to them by acts of others, such as theft and criminal damage.<sup>3</sup> If the state did bear legal responsibility of protection, it has been claimed that it would have exceeded its remit to provide a general condition of public order<sup>4</sup> and, thus, the assumption that the common law system of the state involves the promise to protect all people at all times is unable to be realized.<sup>5</sup> In addition, the intervention of the state to fulfil the duty of prosecuting wrongdoings will bring more benefits to its citizens than they lose.<sup>6</sup> Overall this legal acceptance would lead to the recognition that victims have a *right* to be compensated and, thus, would involve public expenditure running out of political control.<sup>7</sup> Nevertheless, although such a rationale for compensation has never been fully adopted in state compensation systems,<sup>8</sup> it has to a large extent become the basis for arguments that seek to compensate victims as a partial requirement of justice.<sup>9</sup> Similarly, victims of crime have the right to take action in tort against state authorities and would be entitled to receive compensation from them for the damage caused if

victims of crime deserve no better treatment than these others'. Peter Cane, *Atiyah's Accidents Compensation and the Law* (7th edn, Cambridge University Press 2006) 307.

<sup>1</sup> Drobny (n 8) 205.

<sup>2</sup> Editors, *Law Review*, 'Compensation for Victims of Crime' (1966) 33 *The University of Chicago Law Review* 531, 537; Young (n 15) 3; Julie Goldscheid, 'Crime Victim Compensation in a Post-9/11 World' (2004) 79 *Tulane Law Review* 167, 213-214; Ashworth argues that it is implausible to rely on the social contract argument to impose the duty of compensation on the state because 'it is too widely framed, covering not only violent and sexual offences but also property crimes and the whole gamut of offences which find a place in modern systems of criminal law, and because it is well known that it would create a duty which is impossible of performance. A social contract theory can have little value if it seems implausible that its contents would ever have been accepted'. Ashworth (n 12) 103; David Miers upholds this position. David Miers, *State Compensation for Criminal Injuries* (Blackstone Press Limited, 1997) 4.

<sup>3</sup> Robert E. Scott, 'Compensation for Victims of Violent Crimes: An Analysis' (1976) 8 *William and Mary Law Review* 277, 280; Young (n 15); Miers (n 25) 4.

<sup>4</sup> Editors, *Law Review* (n 25).

<sup>5</sup> Miers (n 25); Ashworth (n 12) 103.

<sup>6</sup> Miers (n 25); Ashworth (n 12) 102-104.

<sup>7</sup> Haldane and Harvey (n 7) 280; according to Charlene L. Smith, an ideal of compensating victims as a strict right may not, in practice, be viable as this may demand a state to pay more than it is able to afford. Smith (n 10) 63.

<sup>8</sup> Young (n 15); for instance, Goodey claims that the compensation systems of European states are not provided as a right but as pragmatic way of meeting the needs of victims of crime. Jo Goodey, 'Compensating Victims of Violent Crime in the European Union with a Special Focus on Victims of Terrorism' (2003) the National Roundtable on Victim Compensation Washington, DC: National Centre for Victims of Crime, 12.

<sup>9</sup> It is noteworthy that a *right* to state compensation in the United States is virtually included in its compensation laws. Denmark, England, Wales and Scotland also consider that 'a victim of a violent offence in principle has a *right* to state compensation'. Young (n 15) 3.



these authorities, in taking upon themselves the duty to protect them from criminal acts, have failed to fulfil their duty of protection, which is required as a duty of care in the law of tort.<sup>1</sup> According to Marvin E. Wolfgang, victims have a legitimate right to claim compensation for their injuries if adequate protection by the state's agencies is lacking 'due to negligence, corruption, insufficient appropriations, or simply the obvious inability of the police to be in all places at all times'.<sup>2</sup> This position has previously been taken by the Italian positivist Ferri:

"The State, negligent in not having taken more precautions against the crime and more care for protection of its citizens, arrests the culpable... [and] the State, which must defend the superior interests of absolute justice on behalf of the public does not concern itself with the injured party.... Thus the State cannot prevent crime, cannot repress it, except in a small number of cases, and consequently fails in its duty for the accomplishment of which it receives taxes from its citizens, and then, after all that, it accepts a reward.... It is evident that this manner of administering justice must undergo a radical change. The State must indemnify the individuals for the harm caused them by crimes which it has not been able to foresee or prevent".<sup>3</sup>

However, it is important to note that, even if victims choose to sue the state in accordance with tort law for its negligence in failing to take reasonable measures against the risks of harm by criminal acts,<sup>4</sup> including terrorist acts, the state may rely on its discretionary policy to claim immunity for such negligence.<sup>5</sup> Moreover, from the

<sup>1</sup> Smith (n 10) 62-63; Grey (n 10) 684.

<sup>2</sup> Marvin E. Wolfgang, 'Victim Compensation in Crimes of Personal Violence' (1966) 50 *Minnesota Law Review* 223, 233.

<sup>3</sup> Ferri, *Criminal Sociology* 513-514 (1917) cited by Wolfgang (n 34) 234.

<sup>4</sup> For further details concerning the concept of negligence, see Kenneth W. Simons, 'Negligence' in Ellen Frankel Paul, Fred D. Miller, Jr., and Jeffrey Paul, *Responsibility* (Cambridge University Press 1999) 52-56.

<sup>5</sup> Rianne Letschert and Karin Ammerlaan, 'Compensation and Reparation for Victims of Terrorism', in Rianne Letschert, Ines Staiger and Antony Pemberton, *Assisting Victims of Terrorism: Towards a European Standard of Justice* (Springer Science & Business Media 2010) 251; for instance, it has been claimed that the tort system in the United States is inadequate to hold the federal authorities to account for failure to protect their citizens from criminal acts and compensate them should they become victims of crime, because these authorities are able to rely on the discretionary exemption afforded them by the Federal Torts Claim Act. This exemption would make them immune to claims for negligence in fulfilling their duty of protection. Stephen D. Sugarman, 'Roles of Government in Compensating Disaster Victims' (2006) *the Berkeley Electronic Press* 1, 19-21; Grey (n 10) 688. As an example of this, the Supreme Court of the United States has rejected tort claims in the case of *DeShaney v. Winnebago County Department of Social Services* that state authorities had failed to protect Joshua from serious injuries caused by his father who was known to be a threat to him. *DeShaney v. Winnebago County Department of Social Services* (n 19), para 120. This decision of the Court has been criticised by Justice Brennan because the state 'cannot wash its hands of the harm that results from its inaction'. However, the Court stated that an affirmative duty of protection may be required of a state in certain circumstances, in accordance with the Due Process Clause. This in spite of the statement of Chief Justice William Rehnquist, that this only guarantees negative rights. For example, 'the state owes an affirmative duty to provide reasonable protection and care to individuals whose liberty it has taken away.... A similar duty can arise when the state endangers an individual's liberty or places him or her in a worse position from which to protect his or her own rights and interests'. These two duties have been

perspective of victims, 'tort law litigation often stands for a complicated, challenging, long-lasting, stressful experience, which can—though hard scientific evidence is not yet available – result in secondary victimisation. Due to the fact that some of the compensation issues are related to immediate needs, a long process for meeting those needs seems ill-suited'.<sup>1</sup> Nevertheless, although these difficulties in confronting the state with its negligence to protect its citizens may weaken tort claims to obtain compensation, it has been asserted that such claims of negligence 'still provide a policy rationale for governmental funding of compensation'.<sup>2</sup>

It seems that the notion of the failure to protect in accordance with the social contract and tort claims is insufficient in itself in providing a persuasive argument for the state to acknowledge the moral and legal right of crime victims to compensation or, perhaps, such a notion is unworkable in practical terms because it carries overly broad implications which would prove too expensive for the state to afford in practice.<sup>3</sup> However, it is fair to say that, even if the policy of the state and its judicial system tends to reject or limit its responsibility for compensating victims of crime on the ground of failure to protect, this does not mean that victims have no legitimate right to compensation, especially when evidence indicates that state authorities have contributed effectively to the commission of criminal acts by gross negligence, incompetence or inability to provide protection.

## 2- THE SOCIAL WELFARE PRINCIPLE

An alternative justification to the notion of failure to protect, namely social intervention, has been introduced to support the necessity of paying attention to the victims' needs.

It is often said that in civilized society the state presumably takes upon itself the duty to exact retributive justice for unlawful harm done to its citizens and to provide them with the means of taking civil actions against criminals by suing offenders in accordance with tort before the courts for damages done to them and, also, to afford health and social services. Then, when this is done, the state has no further duty in respect of the victim.<sup>4</sup> If civil action is inadequate in circumstances where the offenders are not apprehended or lack the means to provide compensation, such possibilities are merely part of 'life's lottery'.<sup>5</sup> However, it has been suggested that the application of this policy would be perceived by crime victims as unfair because it does not solve the problem of reparation and, thus, to claim that the state has no obligation to compensate

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used to argue that the government of the United States has an affirmative obligation to protect its citizens against terrorist acts. For further details, see Grey (n 10) 685-686.

<sup>1</sup> Letschert and Ammerlaan (n 37) 252. For instance, many normative arguments were advanced by the Council of Europe in its Explanatory Report on the European Convention on Compensation of Victims of Violent Crimes to justify the duty of the state to compensate victims. First, it was contended that the state is obliged to compensate the victims of crime if it has failed to put in place measures sufficient to prevent such crime. Such failure, including the prevention of acts of personal vengeance, places a duty on the state to provide financial assistance to victims or their dependants. Secondly, when the victim's sense of injustice is relieved, state compensation makes it easier to apply a less punitive, but more effective, criminal policy. Finally, the whole community must take responsibility for the compensation of any injury sustained by citizens who are more vulnerable or unfortunate than others. For further discussion, see Buck (n 6) 150-152.

<sup>2</sup> Grey (n 10) 692.

<sup>3</sup> See Miers (n 25) 4-7; Drobny (n 8) 208.

<sup>4</sup> See Haldane and Harvey (n 7) 276-277.

<sup>5</sup> Ibid 277.

would be in defiance of the idea embedded in the practice of the courts that an element of reparation should, where appropriate, be included in every punishment directed by the state.<sup>1</sup> In addition, an over-concentration on the approach of 'individual responsibility' by civil and criminal courts has been suggested to be insufficient to compensate the majority of victims of criminal acts, especially when offenders are not apprehended or are insolvent.<sup>2</sup> A sense of fairness, therefore, may be said to require the state to meet the needs of crime victims even if there is no actual fault in the administration of its duty of protection.<sup>3</sup>

However, this intervention of a no-fault state to compensate victims of violent crimes should be accepted by society at large, because it involves the expenditure of public money. One rationale for such intervention is so-called of 'wheel of fortune', which is premised on the affirmation that since hazard of and exposure to criminal conduct are inherent in our complex society, then everyone in that society is a potential victim and, thus, the whole society should participate in the mitigation of the harm done to innocent crime victims.<sup>4</sup> Such an assertion continues, 'It [crime] inevitably falls upon someone though the particular victim may be 'selected' by chance, and ... the individual as victim should not have to bear his misfortune alone'<sup>5</sup> and, thereby, compensation is viewed as a 'mechanism by which lucky members of society make it up to the ones who are unlucky'.<sup>6</sup> Accordingly, it is fair to suggest that society as a whole should share with the victim the consequence of crime.<sup>7</sup> This is because, for instance, in the case of terrorist acts, individual may be selected as targets not only by chance, but specifically as symbols of a national government or culture.<sup>8</sup> The terrorists do not care who individually is killed, as long as victims are citizens of the government or culture which are being targeted.<sup>9</sup> Therefore, the compensating victims of terrorism, who have made an involuntary sacrifice 'on behalf of the state'<sup>10</sup> and society, rests on a strong fundamental principle of fairness.<sup>11</sup>

<sup>1</sup> Ibid; for instance, this idea has been legally emphasised by the Criminal Justice Acts 1972, 1982 and 1988 of the United Kingdom. The Criminal Justice Acts, in every case involving death, injury, loss or damage, oblige the courts to make compensation orders. If the courts fail to make such orders, they should reveal the reasons for not doing so. See Luica Zender, 'Reparation and Retribution: Are they Reconciliation' (1994) 57 *Modern Law Review* 228, 231.

<sup>2</sup> Schultz (n 14) 242.

<sup>3</sup> Drobny (n 8) 206.

<sup>4</sup> Thomas G. Feeney, 'Compensation for the Victims of Crime: A Canadian Proposal' (1967) 2 *Ottawa Law Review* 175, 178; Drobny (n 8) 206; Childres (n 15) 457; Smith (n 10) 67.

<sup>5</sup> Feeney (n 46).

<sup>6</sup> Ibid.

<sup>7</sup> Drobny (n 8) 206; Smith (n 10) 67.

<sup>8</sup> Grey (n 10) 690; Letschert and Ammerlaan (n 37) 257, 259.

<sup>9</sup> Grey (n 10) 690; Letschert and Ammerlaan (n 37) 257, 259.

<sup>10</sup> According to the Report of the Special Rapporteur of UNHR, 'There are sound reasons of principle in favour of recognizing that States should now accept a special obligation to victims of terrorism. It is inherent in the nature of terrorism that it involves the use or threat of force aimed at influencing a State or group of States or an international organization. The Special Rapporteur concurs with description put forward by the United Nations Office on Drugs and Crime (UNODC) of victims of terrorism as human beings who have made an involuntary sacrifice on behalf of the State'. UNHR 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism' UN Document A/HRC/20/14, para 54.

<sup>11</sup> Grey (n 10)



However, this trend towards sharing the risk of criminal acts or 'clubbing together for mutual protection' which requires the recognition of victims' need to compensation has been criticised on the grounds that victims of crime are no different from those who suffer other misfortune and, therefore, are not justified to receive special treatment.<sup>1</sup> In reply to this criticism, the supporters of the 'wheel of fortune' concept hold that victims of crime are in the distinctive position of having suffered from a specific danger inherent in collective life.<sup>2</sup> In addition, the victims rely on the government for the protection of their rights, as noted above. Moreover, it has been asserted that 'in our modern system of collective responsibility for sickness and injury, we have evolved a machinery for assuring compensation which could well be extended to injuries criminally caused ....'.<sup>3</sup>

Consequently, an alternative rationale for the intervention of the state is based on the 'social welfare' principle. This principle holds that society should mitigate the damage caused by criminal acts to one of its members in a manner similar to the way it assists the most vulnerable individuals in society, such as those affected by industrial injury, or the unemployed, or the sick and the elderly.<sup>4</sup> Arthur A. Goldberg, the former Supreme Court Justice of the United States, asserts that 'In a fundamental sense, then, one who suffers the impact of criminal violence is also the victim of society's long inattention to poverty and social injustice ...'.<sup>5</sup> The proponents of the social welfare concept indicate that there is a persuasive argument that it is appropriate for the whole of society to share the cost of compensating victims.<sup>6</sup> This is because, as a matter of social efficiency and insurance, it is desirable to spread the cost of crime among the members of the entire society rather than relying on private initiatives to alleviate the harm caused to victims. This means that spreading the risk confronting each member of society to the whole society would ensure the protection of each individual against unexpected misfortune at very small cost to himself.<sup>7</sup> In addition, a sense of justice requires that victims of crime should be provided with compensation<sup>8</sup> similar to those who suffer other misfortune.<sup>9</sup> Indeed, the supporters of the welfare rationale also assert that, because criminals select their victims in a random manner and some of them have the ability to provide for their needs and others have not, the state has a certain interest in enacting a program which ensures assistance to victims who are not able to afford care for their injuries by, for instance, private insurance.<sup>10</sup>

<sup>1</sup> Drobny (n 8) 206

<sup>2</sup> Wolfgang (n 34) 233.

<sup>3</sup> Margery Fry, 'Justice for Victims, reprinted in Compensation for Victims of Criminal Violence: A Round Table' (1959) 8 *Journal of Public Law* 191, 192.

<sup>4</sup> Schultz (n 14) 242; Editors, Law Review (n 25) 539; Smith (n 10) 63.

<sup>5</sup> A.J. Goldberg, 'Preface: Symposium on Governmental Compensation for Victims of Violence' (1970) *Southern California Law Review* 43, cited by Young (n 15) 2.

<sup>6</sup> Editors, Law Review (n 25) 539; Scott (n 26) 281.

<sup>7</sup> Editors, Law Review (n 25); Schultz (n 14) 242.

<sup>8</sup> Editors, Law Review (n 25).

<sup>9</sup> Haldane and Harvey (n 7) 279; it has been asserted that 'just as injured or disabled veterans are entitled to public benefit because they have been victims of external aggression, so also can crime victims be made eligible for public benefits for injuries sustained from internal aggression'. Smith (n 10) 64.

<sup>10</sup> Smith (n 10) 63; Editors, Law Review (n 25) 540; for instance, Professor Childres suggest that compensation is essential because many victims cannot afford private insurance. Childres (n 15) 457.

However, such arguments are open to three main criticisms. First, they disregard the fact that such programmes of compensation for victims of crime do not have a justification for their existence, such as the social programmes, to which they have been compared, possess.<sup>1</sup> For instance, the relationship between the worker and the employer who benefits from the work of the worker provides the basis for the willingness of employer to pay for liabilities as well as for the accumulation of assets. Such a relationship may be said to justify the existence of a social program.<sup>2</sup> However, if a victim is chosen at random, there is no such relationship between victim and criminal.<sup>3</sup> To assume that, in the absence of such a relationship, the victim should not be isolated to suffer the consequence of crime alone and that, therefore, welfare programmes should fill the gap and compensate the victim implies that compensation should be given to other situations in which individuals have suffered misfortune, such as by accident.<sup>4</sup> In addition, welfare programmes tend to be based on the concept of the needs of victims, rather than on the absence of the wrongdoer to provide compensation directly.<sup>5</sup> Secondly, adopting such arguments weakens the notion of individual responsibility and enhances reliance on collective responsibility for victims of crime and on the paternalism of the state.<sup>6</sup> Thirdly, it has been noted that 'because crime rates vary substantially among racial, cultural, and economic groups, it is apparent that every citizen does not run an equal risk of becoming a victim of violence and that compensation would inevitably redistribute the costs of crime from some groups which at present bear a heavy portion of those costs to others on which they fall more lightly'.<sup>7</sup> This redistribution would occur even if compensation were only limited to those unable to attend to their injuries by private insurance.<sup>8</sup>

In spite of these criticisms, there is a strong rationale to support the compensation of crime victims through social legislation.<sup>9</sup> In addition, many commentators assert that, while there are no persuasive justifications to demand the state to compensate victims of crime on the ground of failure to protect, interference with their tort rights, or a sense of fairness, a sufficiently strong case can be made that the state should compensate victims

<sup>1</sup> Smith (n 10) 65.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid; for instance, the decision to single out victims of crime for preferential treatment in the Criminal Injured Compensation Scheme of Great Britain has been criticised by Cane (n 23) 305-309. Also, Ashworth has criticised the limitation of compensation only to victims of crime. He argues that, even if it is true that 'intentional violence may be considered more hurtful and, therefore, harmful by its recipient than negligent or accidental violence', it might be argued that other groups may also have the right to claim compensation from the state. For instance, 'both accident victims and (more especially) the victims of disease and congenital disability are significantly more likely to be 'innocent' (i.e. free of fault in bringing about their condition) than the victims of violent crime, some of whom provoke or otherwise precipitate the offences committed against them'. Ashworth (n 12) 105.

<sup>5</sup> Smith (n 10) 65.

<sup>6</sup> Scott (n 26) 281; it has been asserted that 'to say that since we have cared for or compensated the other groups we should therefore proceed to compensate victims of violent crimes is to indulge in the kind of thinking that could lead us into an abandonment of all notions of individual responsibility and a resort to complete dependence upon governmental paternalism'. Smith (n 10) 65-66.

<sup>7</sup> Editors, Law Review (n 25) 539; Scott (n 26) 281.

<sup>8</sup> Editors, Law Review (n 25) 540.

<sup>9</sup> Scott (n 26) 281.

on the grounds of communal responsibility.<sup>1</sup> However, it is important to note that the state's program of providing compensation in line with the social welfare concept does not mean that the state has a duty to do so and that victims have a right to compensation; it is rather a kind of humanitarian sympathy and solidarity with victims who suffer the serious consequence of crime because of the absence of redress from other sources.<sup>2</sup> Nevertheless, it has been asserted by Haldane and Harvey that human life and dignity are dominant social priorities, and that the various forms of compensation, whether symbolic recognition or monetary reparation, can contribute, to some extent, to improve the quality of life of and restore dignity to the victim.<sup>3</sup> However, since only the state has the resources and ability to adopt the programmes which ensure the provision of such compensation, 'the damaging consequences of violent crime for the life and dignity of the victim lay a positive duty on the government to respond with such means as are available'.<sup>4</sup>

If it is recognised that the state has a duty to provide such compensation, it may lead to the acknowledgement that victims have the right to be compensated, and politicians would be worried that it would lead to public expenditure beyond their control as victims would be legally entitled to whatever level of compensation was determined by the court or other official agency.<sup>5</sup> However, to deny payment of compensation to

<sup>1</sup> Drobny (n 8) 208; Editors, Law Review (n 25) 541.

<sup>2</sup> Feeny (n 44) 178; Drobny (n 8) 207; for instance, the state compensation programmes in most European and others countries have been instituted as pragmatic responses to meet the needs of victims of crime. Goodey (n 31) 11-12; Ilaria Bottigliero, Redress for Victims of Crime under International Law (Martinus Nijhoff Publishers 2004) 31. Also, the 1983 European Convention on Compensation considers that the requirement of the state to make compensation is justified on the grounds of 'social solidarity and equity'. These can be understood as follows. Firstly, 'equity may mean that it is unfair that substantial public expenditure is allocated to the apprehension, conviction and punishment of the offenders of crime while victims have been left to suffer the consequence of such crime. In addition, it is unfair that some groups who suffer from others forms of disadvantage or disability are provided with help and relief unlike victims of crime. Secondly, social solidarity indicates that victim of crime should not leave to bear the harm done to him or her alone but should shares by society as a whole. In this sense, compensation is a means by which the loss is distributed across society as a whole, so recognising the reality of social existence and deepening a sense of community'. See Haldane and Harvey (n 7) 279-280; payment of compensation to victims of crime, for example, in England and Scotland under the 1964 Criminal Injuries Compensation Scheme is still *ex gratia*. When introducing this Scheme, the government expressly denied that it had any obligations to victims. It based this upon 'the more practical ground... that although the welfare state helps victims of many kinds of misfortune, it does nothing for the victims of crimes of violence as such'. See Home Department, *compensation for Victims of Crimes of Violence* Cmd. White Paper No. 2323 (1964) 18; Ashworth (n 12) 99; Cane (n 23) 304. However, Miers asserts that the Scheme based on common law damages does not seem to merely address social welfare which pays benefits to relieve poverty or serious hardship, but moves beyond this to include compensation for losses, such as pain and suffering and loss of amenities. Miers (n 25) 7. Although this Scheme was replaced by a tariff-based system in 1996, the provisions in this are considered to be 'one of most generous of its kind, both with regard to the sums of compensation that are awarded and to its broad scope which gives access to everybody who is a victim of a crime on British territory'. See Buck (n 6) 155.

<sup>3</sup> Haldane and Harvey (n 7) 279.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

victims in such programmes as a *right* is a misunderstanding of the meaning of rights. There is a difference between the existence of a right and the claiming of it.<sup>1</sup> For example, it may be said that every citizen has the right to health care and education, but in order to claim them, applicants should show that they meet the required conditions, such as an illness or the educational qualifications required for a particular course.<sup>2</sup> In addition, the existence of such a right is considered to be limited to that which a state can reasonably afford.<sup>3</sup> Likewise, the right of victims to compensation is 'a right to an equitable share in such provision for compensation as the government can reasonably afford. It is not a blank cheque to be filled in by a Compensation Board'.<sup>4</sup> Accordingly, the lack of the state's obligation to provide such compensation should not, however, 'be confused with absence of a legal right to receive benefits when one has been granted by the legislature to eligible claimant'.<sup>5</sup>

Further rationales for the requirement of the state to adopt compensation programmes, alongside the social welfare view, may be attributed to the necessity of achieving consequential goals.<sup>6</sup> It is argued that in order to promote respectfulness of the administration of justice by individuals and to prevent them from taking the law into their hands to obtain redress, the criminal justice system should guarantee that effective reparation is provided for them.<sup>7</sup> In the same vein, it has been stressed that the lack of compensation programmes may deter victims from reporting offences and cooperating with state authorities in the criminal justice process.<sup>8</sup> Moreover, it has been argued that 'if we make the government responsible for the losses incurred by victims of crime, the government will then have an incentive to make communities safer for its citizens'.<sup>9</sup>

However, such consequential objectives have been criticised by some commentators. Atiyah, for instance, asserts that, with some exceptions, 'taking the law into one's own hands' is generally forbidden and not limited to victims of crimes themselves and, that 'the state accepts no general obligation to make good the lack of a defendant worth suing'.<sup>10</sup> On the other hand, in practice, there is little evidence to indicate that the award of compensation has contributed to convincing victims to cooperate with state

<sup>1</sup> Ibid.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Editors, Law Review (n 25) 541.

<sup>6</sup> Haldane and Harvey (n 7) 279.

<sup>7</sup> Ibid; Cane (n 23) 306; the effect of economic incentives on the criminal justice system is explained by Doerner and Lab as follows. 'Most programmes require that the crime be reported to the police and that the victim cooperate with any law enforcement investigator, including prosecution..... Failure to satisfy these prerequisites makes the victim ineligible for compensation. Thus victim compensation actually amounts to an economic incentive to entice victims into the criminal justice system'. W G Doerner and S P Lab, 'Impact of Crime Compensation upon Victim Attitudes toward the Criminal Justice System' (1980) 5 *Victimology* 61, cited by Smith (n 10) 69.

<sup>8</sup> Young (n 15) 3; Cane (n 23) 305; Para 7 of the Explanatory Report on the European Convention on Compensation presumably, is to be taken in this sense, as it refers to the need 'to quell the social conflict caused by the offence and make it easier to apply rational, effective crime policy'. See Haldane and Harvey (n 7) 280.

<sup>9</sup> Smith (n 10) 68.

<sup>10</sup> Cane (n 23) 306.

authorities in the criminal justice process.<sup>1</sup> One explanation for this is that victims may be dissatisfied with the criminal justice system from their own experiences, and consider that their cooperation has not contributed to the handling of their cases with respect and care. Even if their claims are successful, they will not substantially relieve their suffering.<sup>2</sup> Instead, such involvement of victims in the criminal justice process may lead them to feel 'twice-victimized' as well as creating for them some additional problems including 'lost wages, time away from normal activities, anxiety and feelings of bewilderment as a result of their victimization'.<sup>3</sup> Moreover, the argument that by imposing compensation on the state, it will become more willing to protect its citizens is not sustainable in many cases. Often, the provision of compensation may be preferable to an express acknowledgement that state policies have failed to protect its citizens. This is specifically the case where the compensation program is used as a means to silence objections against the failure of state authorities to protect the right to life of its citizens. Nevertheless, in democratic societies, where state authorities are subject to the rule of law, more pressure may be placed on such authorities to review or even change their policies of protection when both measures making them accountable for their actions and responsible for compensation are supported by the whole community. According to Walker, not only victims are affected by serious acts of violence committed against them, but also the community as a whole can be harmed by such acts because it may shatter the sense of protection of individual members. In this sense, the community bears a heavy responsibility to support and demand reparation for victims,<sup>4</sup> which may make the state more willing to improve its policies of protection. Whatever the nature of the arguments cited to justify the intervention of the state to compensate victims of crime, the fact that the state has acceded to the necessity to play a vital role in addressing the damage done to victims, whether on the grounds of failure to protect the right to life or of social intervention claims, has placed victims in a strong moral and legal position to have their right to reparation observed by the state. While these arguments on the vital role of the state depend for their theoretical justification on more than one philosophical theory, it has been suggested that this does not by any means weaken their increasing force.<sup>5</sup> This is because it is legitimate for moral claims to be supported by different moral theories as 'the resulting moral consensus is often more significant than the different routes by which it is reached'.<sup>6</sup> In the same vein, where this conclusion is reached by both the failure to protect and social intervention rationales, the force of the argument may be considered to be particularly strong.

### **CONCLUSION**

Many rationales have been introduced to justify the placing of a duty on the state to compensate victims of crimes. One rationale is that the state has a social contract with its citizens to protect them in return for their acceptance of limitations to the right of

<sup>1</sup> Smith (n 10) 70; for instance, both the study of Joanna Shapland (1984) in the United Kingdom and that of Doerner and Lab (1980) in the United States found that the awarding of compensation to victims of crime has failed to bring greater cooperation with criminal justice systems. Joanna Shapland, 'Victims, Criminal Justice System and Compensation' (1984) 24 *British Journal Criminology* 131, 140.

<sup>2</sup> Smith (n 10) 70.

<sup>3</sup> Ibid.

<sup>4</sup> Margaret Urban Walker, *Moral Repair: Reconstructing Moral Relations after Wrongdoing* (Cambridge University press, 2006) 7.

<sup>5</sup> Haldane and Harvey (n 7) 280.

<sup>6</sup> Ibid.



individuals to protect themselves against crimes.<sup>1</sup> Similarly, the state may be held responsible for the actions of non-state actors either directly or secondarily since it has the ability to exert 'effective control' over them and/ or 'a sufficiently close connection to the non-state actor to bear secondary responsibility for having failed to prevent them from committing their wrong'.<sup>2</sup> Therefore, the failure of the state to prevent crimes provides a basis for compensation for victims by the state.<sup>3</sup> A second rationale is that the state should bear social responsibility when 'actually producing or inducing crime in the first place. That is, it is claimed that the state helps produce a social environment that is conducive to crime and it therefore produce crime victims'.<sup>4</sup> A third rationale is based on the concept of social intervention which considers crime against members of a community to be a social problem and, therefore, requires solidarity with victims. Moreover, where a state has assumed major control over criminal justice although, historically victims have no legal claim for state assistance, the state nevertheless has a social obligation to make amends.<sup>5</sup> While, not all the above rationales are of equal weight in requiring the state to take upon itself the duty to compensate victims of crime when such compensation has not been made by offenders, taken together they amount to a very strong case, and 'any government today which sought to evade or reduce its responsibility for compensation would properly incur severe moral censure'.<sup>6</sup> Therefore, it can be argued that the state is morally and legally bound to adequately repair the harmful consequences of the violation of the right to life of its citizens whether on the ground of its failure to protect them or whether violation has occurred in spite of the state's adequate provision for their protection according to the concept of social intervention.

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<sup>1</sup> See Daniel W. Van Ness, 'Accountability' in Jenifer J. Llewellyn and Daniel Philpott, *Restorative Justice, reconciliation, and peacebuilding* (Oxford University Press 2014) 129.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid 130.

<sup>4</sup> Ibid.

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