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Reparations for international crimes and the development of a civil dimension of international criminal justice

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CHAPTER 4: PAVING A NEW ROAD FOR REPARATION FOR VICTIMS OF INTERNATIONAL CRIMES: THE ICC TRUST FUND FOR VICTIMS AND BEYOND

I. INTRODUCTION

With the advent of the ICC, a new mechanism for providing redress for victims of international crimes within the jurisdiction of the ICC was created: the Trust Fund for Victims (“TFV”)⁴¹¹. Its inclusion in the international criminal justice scene is both as unprecedented⁴¹² as it is significant.

The TFV is a novel enterprise of the States Parties to the ICC to set out a unique mechanism, within the realm of the ICC framework, dedicated solely to victims, providing assistance and implementation of Court-ordered reparation for victims in relation to the harm caused by international crimes within the jurisdiction of the ICC. It is an important creation as it works towards ensuring that victim redress is part of international criminal justice.

With a very promising purpose, the TFV is bound, nevertheless, to encounter many challenges ahead. Its nature, mandate and objectives will dictate the scope of reparations

⁴¹¹ The TFV has gained much attention in the literature in recent years. For examples of essays about the TFV, see Peter G. Fischer, “The Victims' Trust Fund of the International Criminal Court-Formation of a Functional Reparations Scheme”, *Emory International Law Review* 17 (2003), p.187; Pablo De Greiff & Marieke Wierda, “The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints”, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Violations of Human Rights*, Koen de Feyter et al., Intersentia, 2005; Heidy Rombouts et al., “The Right to Reparation for Victims of Gross and Systematic Human Rights Violations of Human Rights”, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Violations of Human Rights*, Koen de Feyter et al., Intersentia, 2005; Linda Keller, “Seeking Justice at the International Criminal Court: Victims' Reparations”, *Thomas Jefferson Law Review* 29 (2007), p. 189; Tom Dannenbaum, “The International Criminal Court, Article 79, and Transitional Justice: The Case for an Independent Trust Fund for Victims”, *Wisconsin International Law Journal* 28 (2010). See also on the Trust Fund, Sam Garkawe, “Victims and the International Criminal Court: Three Major Issues”, *International Criminal Law Review* 3 (2003), pp. 345-367; Marc Henzelin et al., “Reparations To Victims Before The International Criminal Court: Lessons From International Mass Claims Processes”, *Criminal Law Forum* 17 (2006); David Boyle, “The Rights of Victims Participation, Representation, Protection, Reparation”, *Journal of International Criminal Justice* 4 (2006), pp. 307-313.

⁴¹² Pablo de Greiff & Marieke Wierda, “The Trust fund for Victims of the International Criminal Court: Between Possibilities and Constraints”, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Violations of Human Rights*, Koen de Feyter et al. (eds.), Intersentia, 2005, p. 225.

for victims. These challenges are highlighted by the fact that other international criminal tribunals, as discussed in the previous chapters, did not provide for victim reparation, and less so, reparations through an administrative mechanism linked with a judicial procedure, such as the TFV. In this context, I argue that much can be learned from the experience of other similar administrative reparation mechanisms and mass claims processes⁴¹³.

In previous chapters, this study discussed whether a legal basis for an individualized approach to reparations can be construed and operationalized within the setting of international criminal courts. Thus, it analysed the legal basis and contents of reparations within international criminal proceedings.

In this chapter, this dissertation turns attention to another form of addressing the question of reparation to victims of international crimes: the use of administrative mechanisms (linked with judicial processes). The aim of this chapter is to examine the principled question of whether and to what extent an administrative mechanism linked with a judicial process may provide a path to deal with mass claims of reparation pertaining to international crimes. Thus, this chapter address the following specific sub-questions:

- Should reparations for international crimes be the object of another mechanism, such as an international administrative mechanism (linked with a judicial mechanism)?
- What role can international administrative mechanisms play in relation to reparations for victims of international crimes?

The goal of this chapter fits within the broader aim of this study, which is to examine different approaches to victim reparation in international criminal justice, administrative mechanisms linked with a judicial body, and to question whether a mixture of criminal and civil dimensions (or a *sui generis* system) makes sense at the international level. The TFV is a unique example of such a mechanism. As such, this chapter studies the endeavour of administrative mechanisms linked with a judicial processes as a possible route for civil redress for international crimes, and in this light, examines the TFV of the ICC.

⁴¹³ The International Bureau of the Permanent Court of Arbitration, *Redressing Injustices Through Mass Claims Processes: Innovative Responses to Unique Challenges*, Oxford University Press, 2006; Marc Henzelin et al., “Reparations To Victims Before The International Criminal Court: Lessons From International Mass Claims Processes”, *Criminal Law Forum* 17 (2006), pp. 317-344.

In order to examine whether the TFV should play a leading role in the ICC context⁴¹⁴, and in broader terms, the contribution that similar mechanisms may have on the quest for civil redress for international crimes, it is important to first briefly consider the legal framework of the TFV, and its connection with a judicial mechanism (the ICC Chambers). Following this, various rationales for reparations through the TFV are examined, along with the role of the TFV vis-à-vis the Chambers of the Court and the challenges ahead of the TFV. After the descriptive overview, this chapter discusses the measures taken by the TFV and their impact on victims at different stages of cases. It also explores the important role of the TFV in the reparation phase of the *Lubanga* case. As well, it critically examines in this regard how the budget has been spent. This chapter engages in a critical discussion of the pros and cons of administrative versus judicial mechanisms. In this respect, this chapter builds on critical scholarship pertaining to the detrimental effects that criminal justice may produce for victims.

In order to extract some lessons learned, this chapter considers various examples of other mechanisms that deal with mass claims for civil redress with a view to pulling together common themes that can shed light on some of the questions the TFV may have to grapple with. In the final part of the chapter, the question whether the TFV can pave the way for the creation of other administrative mechanisms in the international plane for redress for victims of international crimes is dwelt upon.

This chapter inquires whether the TFV should play a leading role in the award of reparation for victims of ICC crimes. It is argued that it should remain connected to the Court (the judicial proceedings) in the sense that the Court (the Chambers) should establish the principles of reparation, as stipulated in the Rome Statute. As Peter Dixon argues, it is imperative to have “close involvement by the Trial Chamber throughout the targeting process”⁴¹⁵.

⁴¹⁴ See e.g., Pablo de Greiff and Marieke Wierda, “The Trust fund for Victims of the International Criminal Court: Between Possibilities and Constraints”, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Violations of Human Rights*, Koen de Feyter et al., Intersentia, 2005, arguing for a greater role for the TFV in the reparations mandate of the ICC.

⁴¹⁵ Peter J. Dixon, “Reparations and the Politics of Recognition”, in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Carsten Stahn et al., Cambridge University Press, 2015, pp. 327-328.

The Court will have a huge burden with the criminal proceedings. As such, the TFV might be better placed to deal with reparation awards swiftly and more appropriately due to its expertise and focused mandate. Nevertheless, it should be noted that the TFV should remain linked with judicial proceedings to ensure that the Court is playing its role of principle in the reparation proceedings.

It will also be demonstrated in this chapter that, while it is an important achievement to create an administrative mechanism that focuses on victims of the crimes under the jurisdiction of the ICC, it is also true that many victims of international crimes will necessarily be left out of the reparation scheme. Accordingly, this chapter analyses whether a link to criminal proceedings is desirable. In this regard, it is important to ponder about the question of whether linking trust funds with the international criminal justice process is desirable given the potential of further victimization that criminal trials may produce on victims⁴¹⁶. Thus, in this chapter, the TFV will provide the main case study and will also be a lens through which the question as to whether administrative mechanisms may be a viable possibility for civil redress claims for international crimes will be assessed.

II. THE ROAD TO THE TFV AND ITS LEGAL FRAMEWORK

As already discussed, the award of reparations directed to perpetrators to the benefit of individual or collective victims is new in international law⁴¹⁷. Historically, under international law, contrary to domestic law, there has been a significant divide between State reparation for wrongful conduct and reparation paid by the individual⁴¹⁸. The

⁴¹⁶ Concerning the creation of perceptions and constructions of victims by international criminal justice, see Laurel Fletcher, “Refracted Justice: The Imagined Victim and the International Criminal Court”, in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Carsten Stahn et al., Cambridge University Press, 2015, pp. 302-325.

⁴¹⁷ See discussion in Part 2, chapter 1 of this study for a detailed overview of this question. See also, Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010, pp. 22-23; Christine Evans, “Reparations for Victims in International Criminal Law”, *Raoul Wallenberg Institute of Human Rights and Humanitarian Law*, (2012).

⁴¹⁸ Article 58 of the ILC Draft Articles. See also, Christian Tomuschat, “Reparation for Victims of Grave Human Rights Violations”, *Tulane Journal of International and Comparative Law* 10 (2002), p. 181.

breakthrough of individual *criminal* responsibility dates from the Second World War trials, as already discussed; however, the time then was not ripe to develop individual criminal as well as *civil or tort* responsibility for international crimes⁴¹⁹. The evolution of the position of the individual in international law has brought about changes to this scenario. This divide between the State's and the individual's *civil* responsibility is becoming blurred at this point of international law, as it has already been discussed. Crimes are committed by individuals, who, admittedly, often operate behind the machinery of the State⁴²⁰. Now, they not only face criminal responsibility for their crimes, but they can also engage civil liability at the international level. In this light, the ICC Statute enables an international Court, for the first time in international criminal law, to order a perpetrator of an international crime to give reparation to the victims, as already discussed.

Against this context, the background to the inclusion of reparation for victims of international crimes within the jurisdiction of the ICC was not uncontroversial. One author who studied the reparation system of the ICC in detail, has suggested that “[i]n the formation of the Rome Statute there were widely varying views about the role of victims in the international criminal process, rooted in the different approaches varying national systems take to victims in criminal procedure.”⁴²¹

⁴¹⁹ See discussion in Part 2, chapter 1 of this study.

⁴²⁰ I subscribe however to the theory that individual and State responsibility for international crimes are not always disconnected, and may complement each other in cases where the State may have been involved in the international crime: see in this regard, *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgment, 3 February 2012, Dissenting Opinion of Judge Cançado Trindade, paras. 57-59, and references cited therein; Antônio Augusto Cançado Trindade, “Complementarity between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited”, in *International Responsibility Today - Essays in Memory of Oscar Schachter*, Maurizio Ragazzi, Nijhoff, 2005, pp. 253-269; Pemmaraju Sreenivasa Rao, “International Crimes and State Responsibility”, in *International Responsibility Today - Essays in Memory of Oscar Schachter*, Maurizio Ragazzi, Nijhoff, 2005, pp. 76-77; R. Maison, *La responsabilité individuelle pour crime d’État en Droit international public*, Bruxelles, Bruylant, Éds. de l’Université de Bruxelles, 2004, pp. 24, 85, 262-264 and 286-287.

⁴²¹ Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010, p. 25, citing William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 2nd ed., 2004, p. 171 and Christopher Muttukumaru, “Reparation to Victims”, in *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results*, Roy S.K. Lee, Kluwer Law International, 1999, pp. 262 et seq.

In this light, the ICC Statute is not only innovative because it has incorporated the possibility for victims of the crimes within the jurisdiction of the ICC to claim reparation within international criminal justice; but also because of its approach to the reparation mechanism, by the creation of an independent administrative mechanism connected to the Court, the TFV.

1. Relevant legal provisions

The TFV was established under the auspices of the ICC. As such, the main legal texts governing the ICC – that is, the ICC statute, the Rules of Procedure and Evidence, and the Regulations of the Assembly of States Parties (ASP) – also govern the operation of the TFV to some extent. In order to discuss legal issues surrounding the operation of the TFV, I will refer to the legal basis for the TFV; for ease of reference, relevant parts of legal provisions are cited hereunder.

In the ICC Statute, Article 75 concerns reparations to victims, and provides, in relevant part:

“1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79. [...]”⁴²²

As for the TFV, under the terms of Article 79 of the ICC Statute,

“1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.

⁴²² For a commentary on Article 75, see e.g. David Donat-Cattin, “Article 75 – Reparations to Victims”, in *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article*, Otto Triffterer, Baden-Baden, 1999; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, Article 75.

2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.”

Additionally, the Rules of Procedure and Evidence provide further guidance about the two mandates of the TFV. Rule 98(1-4) concerns reparations awarded by the Court against a convicted person; Rule 98(5) concerns the TFV’s assistance mandate with regard to the use of “other resources” for the benefit of victims, subject to Article 79. Rule 98 reads as follows:

- “1. Individual awards for reparations shall be made directly against a convicted person.
2. The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible.
3. The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.
4. Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.
5. Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79”.

The Regulations of the TFV were adopted by the Assembly of States Parties at the 4th plenary meeting on 3 December 2005. Their aim is to ensure the proper and effective functioning of the TFV. They regulate many areas; the TFV official website explains the provisions of the Regulations in the following terms:

“Regarding the TFV's activities and projects, the Regulations specify that all resources of the Trust Fund shall be for the benefit of victims within the jurisdiction of the Court as defined by Rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families. The Regulations provide a detailed legal regime for the Trust Fund's two mandates:
Under the TFV's Reparation mandate, the Regulations contain detailed provisions on awards for reparations by the Court, referring to individual awards (Rule 98 (2) of the Rules of Procedure and Evidence), collective

awards (Rule 98 (3)), and awards to an intergovernmental, international, or national organization (Rule 98 (4)).

With respect to the TFV's assistance mandate, the Regulations specify that before undertaking activities to provide physical rehabilitation, psychological rehabilitation, and/or material support to victims, the Board is required to formally notify the Court of its intentions⁴²³.

Additionally, some of the Resolutions of the Assembly of States Parties which concern the TFV. These include ICC-ASP/1/Res.6, ICC-ASP/3/Res.7, ICC-ASP/4/Res.3, ICC-ASP/4/Res.5, ICC-ASP/4/Res.7, ICC-ASP/6/Res.3. These Resolutions address some important aspects of the functioning of the TFV, for example, the voluntary contributions, and the term of office of members of the Board of Directors, among others. These texts together govern the operation of the TFV.

The conception of “victims” in the framework of the ICC has already been discussed in previous chapters of this study. At this juncture, it appears useful to recall the definition of victims contained in Rule 85 of the Rules of Procedure and Evidence of the ICC. In this sense, Rule 85(1) provides a broad definition of victims as including “natural persons who have suffered harm as a result of the commission of any crimes within the jurisdiction of the Court”. Rule 85(2) states the victims may include “organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.”

Reparation proceedings are not in principle limited to those who have suffered directly from the criminal acts of the accused. Article 75 of the ICC Statute refers clearly to victims of crimes and the families of such victims as potential beneficiaries of the reparation system⁴²⁴.

⁴²³ Available at: <http://trustfundforvictims.org/legal-basis>.

⁴²⁴ See also, Christopher Muttukumaru, “Reparations to Victims”, in *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, Roy S. K. Lee, Kluwer Law International, 1999, pp. 262 et seq., referring to a footnote inserted in the Report of the Working Group on Procedural Matters of 13 July 1998 (UN Doc. A/CONF.183/C.1/WGPM/L2/Add.7) to the effect that: “[Article 75 of the Statute] refers to the possibility for appropriate reparations to be granted not only to victims but also to victims’ families and successors. For the purposes of interpretation of the terms ‘victims’ and ‘reparations’, definitions are contained in the text of article 44, paragraph 4 of the Statute, article 68, paragraph 1, and its accompanying footnote [...], the Declaration of Basic Principles of Justice for Victims of

From the above-mentioned provisions, it stems clearly that the TFCV is not a judicial mechanism that defines reparation beneficiaries, but rather an administrative mechanism linked to a judicial procedure (the ICC proceedings). It is a kind of complementary organ of the Court and an integral part of the reparative scheme established by the ICC⁴²⁵. The TFCV is however independent from the Court⁴²⁶.

By its nature, structure and reach of activities, the TFCV is not a mechanism set up to provide for reparations for all victims of international crimes, but rather only to “natural persons who have suffered harm as a result of the commission of any crimes within the jurisdiction of the Court”, pursuant to Rule 85 of the Rules of Procedure and Evidence⁴²⁷. Thus, the TFCV has a limited scope in the redress it can afford to victims of international crimes, the principal limitation being the confines of international crimes within the jurisdiction of the Court. It is also limited by practical considerations such as the resources available.

Crimes and Abuse of Power [...] and the examples in paragraphs 12-15 of the revised draft basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law” – cited in Marc Henzelin et al., “Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes”, *Criminal Law Forum* 17 (2006), pp. 323-324.

⁴²⁵ Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010, p. 265.

⁴²⁶ See *Resolution of the Establishment of the Secretariat of the Trust Fund for Victims*, ICC-ASP/3/Res.7 (2004).

⁴²⁷ On the jurisprudential construction of the definition of victims, see ICC, Situation in the Democratic Republic of Congo, “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, 17 January 2006, ICC-01/04-101-tEN-Corr, Pre Trial Chamber I, para. 79; ICC Bemba, “Fourth Decision on Victims' Participation”, 12 December 2008, ICC-01/05-01/08-320, Pre-Trial Chamber III, para. 30; ICC, Situation in Kenya, “Decision on Victims' Participation in Proceedings”, 3 November 2010, ICC-01/09-24, Pre-Trial Chamber II, para. 19. See also, E.g., ICC, Kony, Otti, Odhiambo & Ongwen, “Decision on Victims' Applications for Participation a/0014/07 to a/0020/07 and a/0076/07 to a/0125/07”, 21 November 2008, ICC 02/04-01/05-356, Pre-Trial Chamber II, para. 7. ICC, Muthaura, Kenyatta and Ali, “Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, 26 August 2011, ICC-01/09-02/11-267, Pre-Trial Chamber II, para. 40.

2. Mandates of the TFV

Having reviewed the legal basis for the existence and operation of the TFV, it is now important to discuss the mandates of the TFV. On the basis of the framework provided in the Statute, the TFV can act in two ways: first, it can act as an institution through which the Court can order reparation awards or it can use its “other resources” for the benefit of the victims pursuant to rule 98 (5).

The TFV has a double role, both of which are aimed at providing support to victims of crimes under the jurisdiction of the ICC: it performs, on the one hand, a reparations mandate, and on the other, an assistance mandate to the victims. While this study is concerned with reparations for victims of international crimes, and thus more closely linked with the reparations mandate of the TFV, it is also relevant to examine the second mandate of the TFV, and critically analyze their differences in terms of practical implications.

Concerning the *reparations mandate*, according to Rule 98, the Court may order an award for reparations against a convicted person to be made through the TFV, if at the time of making the order, it is impossible or impracticable to make individual awards directly to each victim. Reparations to victims can be individual or collective, and can include restitution, compensation and/or rehabilitation. Reparations may be provided in collective or symbolic measures that can help to promote peace and reconciliation within divided communities.

The *assistance mandate* stems from Rule 98 (5) which concerns “other resources” of the TFV. The assistance mandate is not linked to a conviction of accused persons, and it can happen prior to the end of trial proceedings, and prior to any conviction. The assistance mandate provides physical and psychological rehabilitation and material support as a means to assist victims in their recovery. This assistance mandate provides the TFV the autonomy to give support to victims outside the scope of Court-ordered reparations.

The TFV itself has expressed the view that the two mandates are separate and that support provided under Rule 98 (5) (the “assistance mandate”) is actually broader than the

reparations, and is the “provision of assistance to victims in general through the use of other resources”⁴²⁸.

While it seems that the assistance mandate can reach a greater number of victims and affected societies in a more timely fashion, (since it is not connected to the cases before the Court, and can affect victims of broader situations), the programs demonstrate that both mandates aim at repairing the harm suffered due to international crimes within the jurisdiction of the Court. The actual measures taken are not diametrically different: both mandates provide forms of reparation, and aim at providing some form of redress to victims. Collective reparations after a conviction and the assistance mandate will likely have similar impacts on victims, and the measures will also likely fall under one of the three categories of physical, psychological rehabilitation and monetary support.

More fundamentally, this study refers to the analysis of Peter Dixon in relation to these two mandates where he posits that “[m]orally, reparations are given to a recipient because she has been wronged, not because she is in need or is vulnerable. Politically, reparations are awarded because a recipient’s rights have been violated”⁴²⁹. Similarly, the distinction between reparation and assistance “is the moral and political content of the former, positing that victims are entitled to reparations because their rights have been violated”⁴³⁰.

In the context of the reparations mandate, how does the TFV fit within the dimensions discussed in the first chapter of this study? Chapter 1 referred to the report by the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence. It is relevant to mention this report again in relation to the mandate of the TFV. One significant conclusion of the report is the “scandalous” gap in the

⁴²⁸ ICC, *Situation in Uganda*, “Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims”, 25 January 2008, ICC-02/04.

⁴²⁹ Peter J. Dixon, “Reparations and the Politics of Recognition” in *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Carsten Stahn et al., Cambridge University Press, 2015, pp. 331-332.

⁴³⁰ Naomi Roht-Arriaza & Katharine Orlovsky, “A Complementary Relationship: Reparations and Development”, in *Transitional Justice and Development: Making Connections*, Pablo de Greiff & Roger Duthie, Social Science Research Council, 2009, p. 179.

implementation of reparations⁴³¹. In this regard, the TFV has much to contribute to breach this gap by designing and implementing programmes to victims of crimes within the jurisdiction of the Court. In the words of the report, which are worth quoting in full here:

“While well-designed reparation programmes should primarily be directed at victims of massive violations, they can have positive spillover effects for whole societies. In addition to making a positive contribution to the lives of beneficiaries and to exemplifying the observance of legal obligations, reparation programmes can help promote trust in institutions and the social reintegration of people whose rights counted for little before”⁴³².

Thus, in fulfilling its mandate, it is argued that the TFV should bear in mind the analysis and conclusions of this report.

3. Functioning of the TFV, budget and programs

The TFV is administered by a Board of Directors, with five members originating from each region of the world. They shall be nominated and elected by the Bureau of the Directors, the Assembly of States Parties. Each member shall serve for a mandate of three years with the possibility of re-election⁴³³. The Members serve in a *pro bono* and individual capacity.

The TFV counts on contributions from countries. It is reported that from 2004 to October 2014, the total of contributions from countries amounted to over €20.4 million euros, with over €5 million euros from 2014 alone⁴³⁴. The contributions are divided in two kinds: the earmarked contribution and the general contributions. The first category is for specific purposes, such as for victims of sexual and gender-based violence or child

⁴³¹ United Nations, General Assembly, “Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence”, A/69/518, 14 October 2014.

⁴³² *Ibid.*, para. 82.

⁴³³ See *Resolution on the Establishment of a Fund for the Benefit of Victims of Crimes within the Jurisdiction of the Court, and the Families of such Victims*, ICC-ASP/1/Res.6 (2002), which established the Board of Directors. See also, *Resolution on the Procedure for the Nomination and Election of Members of the Board of Directors of the Trust Fund for the Benefit of Victims*, ICC-ASP/1/Res.7 (2002), 9 September 2002.

⁴³⁴ See <http://trustfundforvictims.org/financial-information>.

soldiers, for example⁴³⁵. The conditions for the acceptance of these earmarked contributions are set out in Regulations 27-30 of the TFV, with the exception of assets acquired for the purposes of Court ordered reparations. In this regard, it is also interesting that the TFV has a reserve fund which is held for the purposes of payment of Court reparations in case the accused is declared indigent. In 2015, the amount of the reserve was at €3.6 million euros⁴³⁶. It is important to note that the TFV also receives funds from private donors, in addition to States Parties. The cost of functioning is included in the budget of the Court and the members of the Board of Directors act on a *pro bono* capacity, according to Regulation 16 of the Regulations of the TFV.

In 2015, the TFV received over €8.000 in individual donations and over €2.9 millions in donor state donations. It is reported that contributions have continuously risen since 2004, totalling 34 donor States in 2015. In 2016 the TFV has accumulated over €12.8 million and US\$61.300. Some of the allocations of the budget include: €1 million for current projects in Uganda and the Democratic Republic of the Congo; €600,000 for assistance mandate activities in the Central African Republic. The TFV also carries a reparation reserve of €5 million from which the Board of Directors allocated €1 million to implement reparations in the *Lubanga* case⁴³⁷.

Having reviewed the budget of the TFV, the question is how the budget is used for the benefit of victims. I shall now examine the programs and decisions of the TFV regarding victims. The programs in Northern Uganda and the Democratic Republic of the Congo were approved by the Pre-Trial Chamber in 2008. The programs provide assistance to victims as defined under Rule 85 of the Rules of Procedure and Evidence. The TFV partners with local organizations and provides services such as psychological rehabilitation, material support, medical referrals and physical rehabilitation⁴³⁸. In 2014,

⁴³⁵ See <http://trustfundforvictims.org/financial-information>.

⁴³⁶ See <http://trustfundforvictims.org/financial-information>.

⁴³⁷ The Trust Fund for Victims, “The Year 2015 in Donations”, Newsletter No. 1/2016, 15 February 2016. See also, Trust Fund for Victims Board of Directors, 14th Annual Meeting, The Hague 18-21 April 2016.

⁴³⁸ Some of the programs are: “Treating the Mental Health Needs of Ugandan Victims of War Crimes: A Service and Capacity Building Approach”, “*Capacity Building, Advocacy and Medical Rehabilitation of Northern Uganda’s Victims of War*”, (Northern Uganda); “Accompagnement socioéconomique et psychosocial des victimes des Violences Sexuelles dans le

the Board of Directors approved assistance assessment missions for Kenya and Côte d'Ivoire⁴³⁹.

In its most recent 2015 “Programme Progress Report” some of the activities of the TFV are reported, including both the implementation of the assistance and the reparations mandate. The programmes of the TFV focus on psychological and physical rehabilitation and material support – the reported summary of achievements is as follows⁴⁴⁰:

Global Programme Indicators	DRC	Uganda	Total
Physical rehabilitation			
Number of beneficiaries received Physical Rehabilitation assistance and during the reporting period	82	1,246	1,328
No. of victims fitted with prostheses or orthotics	0	207	207
Number of victims receiving reconstructive or corrective surgery	1	0	1
Number of victim survivors of SGBV referred for specialized medical care	6	0	6
Number of mutilated victims referred for physical rehabilitation services	75	35	110
Psychological rehabilitation			
Number of direct beneficiaries received Psychological Rehabilitation during the reporting period	55,411	828	56,239
Number of individuals referred to a specialized mental health care	5	0	5
Number of TFV direct beneficiaries participated in facilitated community therapy sessions	786	0	786
Number of victim testimonies collected, translated and published for the Memory Project	150	0	150
Number of new counsellors trained in mental health care	0	37	37
Number of community workers trained in psychosocial care	47	16	63
Material support			
Number direct beneficiaries (adults and children) provided with IGA's and MUSO's support	2,700	0	2700
Number of literacy centres supported by the TFV	33	0	33

Territoire de Beni, au Nord Kivu”, “Réintégration communautaires des jeunes victimes des conflits armés en Ituri pour la lutte contre toutes formes des violences”, “Accompagnement psychosocial des victimes des violences sexuelles à Bunia et 8 localités périphériques”, « *Projet de Réinsertion Socio-économique des victimes des violences sexuelles dues à la guerre* », « *A l'école de la paix* » (in the DRC).

⁴³⁹ See Record of the 11th Annual Meeting, March 2014.

⁴⁴⁰ Trust Fund for Victims, “Assistance and Reparation: Achievements, Lessons Learned, and Transitioning – Programme Progress Report 2015”, available at: http://Ibid..trustfundforvictims.org/sites/default/files/media_library/documents/FinalTFVPPR2015.pdf

Number of learners registered at literacy centres supported by the TFV	662	0	662
Number of children provided direct support by the TFV to attend school (former child soldier, other victim, child of victim)	1806	0	1,806
Number of radio programs conducted to talk about peace and reconciliation	29	0	29

A review of the assistance programs currently in place demands some important remarks. The TFV partners with organizations in order to fulfill its assistance mandate and provide support to victims. It is crucial that the TFV play an active role on the type of support that is granted to victims. It has to avoid a situation where it becomes a mere fund contributor by engaging in decision-making and maintaining control of its activities. In this regard, further reporting would be appropriate. How is the TFV ensuring that all victims are being helped by the assistance programme? How are the needs of victims being met by the programmes in place? What lessons can be learned from experience? These are some of the questions that are raised and for which further reporting would be beneficial.

Furthermore, it is important to assess whether other situations within the jurisdiction of the Court also require the TFV to act under its assistance mandate. In addition to actually implementing the assistance programmes, the TFV needs to act proactively and assess situations that may fall under its assistance mandate. It is important that the TFV set out clear guidelines on how to prioritize programmes and how to attend to urgent requests. It may also be a good idea to report some best practices to inform future assistance programmes.

The next section will discuss the role of the TFV in the reparations stage and will examine specifically the implementation of reparations in the *Lubanga* case.

III. THE ROLE OF THE TFV VIS-À-VIS THE COURT IN THE REPARATIONS STAGE

An important question concerning reparations at the ICC pertains to how the Court will approach its reparation mandate and more specifically, the role of the TFV in this regard. Will the Court have an active role in the adjudication and administration of reparation awards, making the procedure similar to domestic litigation of civil claims? Or, will the TFV play a leading role in the implementation of awards of redress for victims?

In this regard, the Court and the TFV function in a kind of hierarchical system. This is so based on the provisions governing reparations within the ICC. The Court has discretion on whether or not to award reparations and it is the one to devise principles on reparation⁴⁴¹. The Court is also to decide whether an individual or collective award should be ordered (or both)⁴⁴². The Court furthermore determines whether the reparation award should be made through the TFV⁴⁴³. This latter situation occurs when the Court deems it “appropriate”, according to the terms of Article 75(2) of the Rome Statute, or when it is “impossible or impracticable to make individual awards directly to each victim”⁴⁴⁴. Alternatively, awards “should be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate”⁴⁴⁵.

From the foregoing and the provisions just mentioned, it seems that the Court’s role is important and encompasses the establishment of principles of reparation: the use of the verb “shall” under Article 75 of the ICC Statute makes it clear that the Court must establish the principles under which the Court, or the TFV, will act in relation to reparations. As regards the actual award of redress and designing programmes for reparations, under Article 75, either the Court may award reparations to victims itself - directly through judicial Court proceedings - or it may order that the TFV take charge of the award of redress⁴⁴⁶.

⁴⁴¹ See Article 75(1) of the ICC Statute.

⁴⁴² See Article 75(2) of the Rome Statute and Rules 97(1) and 98(1)-(4) of the RPE.

⁴⁴³ Article 75(2) of the Rome Statute.

⁴⁴⁴ Rule 98(2) of the RPE.

⁴⁴⁵ Rule 98(3) of the RPE.

⁴⁴⁶ See generally for a commentary: Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Nijhoff, 2010, pp.

In this context, it is argued that the Court should have a limited role in the management of awards of reparation to victims. More specifically, the Court should have a supervisory role. In my view, such a role has two aspects. The first one is the establishment of principles of reparation, as stated in the Rome Statute. In this context, I have argued that the Court should look at the experiences of other institutions that have similar tasks. The second one should be the monitoring of the implementation of reparations, as more fully discussed below.

In the author's view, the Court's plenary should establish the principles of reparation that apply in all cases and situations. This approach would provide clarity and uniformity. It is submitted that the plenary deciding on reparation principles, rather than each Chamber deciding on principles applicable to each case (which are subject to review by the Appeals Chamber) would ensure that there is cohesion across cases in terms of principles of reparation. This is positive since it would avoid the creation of categories of victims depending on the situation and would ensure transparency and fairness. Moreover, it could be argued that the text of the Statute, Article 75, provides that it is for "the Court" to adopt the principles of reparation, and thus, it could be argued that it is for the plenary of the Court. This would ensure that reparation principles are applied evenly across the board, such that there is no disparity. Then each Chamber, in light of the specific circumstances of each case, could adapt the principles, or apply those principles, to the particularities of each case. For example, a case bearing a sexual violence component should be guided by principles of reparation that concern sexual crimes⁴⁴⁷.

As discussed in the previous chapter, the recent Judgment of the Appeals Chamber in the *Lubanga* case developed some principles of reparations⁴⁴⁸. The principles laid out by the Appeals Chamber provide useful guidance. However, considering that the TFV will be in charge of implementing the reparations mandate, the TFV should have concrete

265-271. Thordis Ingadottir, "The Trust Fund for Victims (Article 79 of the Rome Statute)", in *The International Criminal Court – Recommendations on Policy and Practice – Financing, Victims, Judges, and Immunities*, Thordis Ingadottir, Ardsley, 2003, pp. 111 et seq.

⁴⁴⁷ See on this Anne-Marie De Brouwer, "Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families", *Leiden Journal of International Law* 20 (2007), pp. 207-237.

⁴⁴⁸ See *Lubanga Reparations Appeals Judgement*, discussed in the previous chapter.

guidance as to how to implement the reparations decision. While the Judgment is already a step forward in establishing rules that will ensure that some basic principles are met, more specific and direct guidance should have been given in relation to the role of the TFV. While there should be some freedom as to how the TFV will work with victims for reparation purposes, certain issues, such as deadlines for implementation and reporting on activities, should have been detailed in the Judgment. It is submitted that the reparation function of the TFV will be a learning process for everyone involved.

This second, more subsidiary aspect of the role of the Court, would entail supervision of the reparations designed by the TFV in order to ascertain that the programme meets the principles the Court previously set out. It is to be recalled that the TFV is an administrative mechanism, run by a Board of Directors. It is important in this light that it remains continuously attached to the judicial arm of the ICC, the Chambers. The TFV does not exist in a vacuum. While I argue for an active and leading role for the TFV in the reparation scheme of the ICC, I shall also underscore the key judicial role of the Court in ensuring the proper design of reparation programmes and implementation of reparation awards by the TFV.

It is thus submitted that this proposed approach would provide a uniform system of reparations, across cases and situations, and it would provide the “judicial” arm necessary in a reparation programme, through the Court’s Chambers. The guidelines provided by the Court will enable the TFV to ensure that reparations follow the framework of the Statute, and to remain consistent in its administration of reparations.

This does not seem, however, to be the way in which the ICC has decided to proceed thus far. As already discussed, it was not the Court’s plenary that adopted, upon study of the question, principles of reparation. Rather, an individual Chamber, upon reviewing the arguments of Parties and participants, established brief principles to guide the implementation of reparation by the TFV. It remains to be seen whether this will be the approach of each Trial Chamber, and how the jurisprudence on principles of reparation applicable in each individual case will be formed.

At the time of the writing of this study, the activities of the TFV were at an infant age, given that only one decision on reparation from Trial Chamber 1 in the case of

Prosecutor v. Thomas Lubanga Dyilo is available to date⁴⁴⁹. This decision is very telling as to the role that it is envisaged for the TFV concerning reparations.

The decision of Trial Chamber I, as the first decision in the history of the ICC concerning the award of reparation for victims, unfortunately left some questions unanswered. While the Decision of Reparation from Trial Chamber I dedicated much attention to the arguments of the Parties and participants (including NGOs), the principles on reparation have been treated more cursorily and superficially. One could expect that the Trial Chamber would accord more importance to its pivotal role of establishing the principles of reparation to be applied in the *cas d'espèce*.

Be that as it may, it was clear however that the Trial Chamber set up a major role for the TFV in the award of reparations. This is a positive development in my view, especially in the case of victims of Mr. Thomas Lubanga Dyilo, who was declared indigent⁴⁵⁰, and thus he would not have any financial resources to contribute to compensation to victims. The Appeals Chamber Judgment in *Lubanga*, already discussed in the previous chapter, further clarified the principles on reparations and further strengthened the role of the TFV in the reparations mandate.

In fact, it is part of the two-fold mandate of the TFV that it not only implement the reparations ordered by the Court but also that it provide physical, material and psychological support for victims and their families⁴⁵¹. The TFV has in place a few programmes that are not derivative of the Appeals Chamber Judgment on reparation in the

⁴⁴⁹ ICC, Trial Chamber I, *Prosecutor v. Thomas Lubanga Dyilo*, “Decision Establishing the Principles and Procedures to be applied to Reparations”, 7 August 2012, ICC-01/04-01/06 (hereinafter: “Decision on Reparations”). At the time of the writing of this article, the Decision on Reparations is pending of appeal: Defence, “Acte d’appel de la Défense de M. Thomas Lubanga à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparation’ rendue par la Chambre de première instance I le 7 août 2012”, 6 September 2012, ICC-01/04-01/06; Legal Representatives of Victims, “Acte d’appel contre la ‘Decision establishing the principles and procedures to be applied to reparation’ du 7 août 2012 de la Chambre de première instance I”, 3 September 2012, ICC-01/04-01/06; Office of Public Counsel for Victims and Legal Representatives of Victims, “Acte d’appel à l’encontre de la ‘Decision establishing the principles and procedures to be applied to reparation’ délivrée par la Chambre de première instance I le 7 août 2012”, 24 August 2012, ICC-01/04-01/06-2909. See in this regard, chapter 3 which analyses in more detail this decision.

⁴⁵⁰ Decision on Reparations, para. 269.

⁴⁵¹ See TFV website at Ibid..trustfundforvictims.org

Lubanga case, and thus, are not part of the reparations for the victims in the case. Nevertheless, they provide assistance to victims of situations, before the trial proceedings are finished and there is a convicted person. As discussed above, the programs in the assistance mandate can provide some guidance for the implementation of the Court ordered reparations in the *Lubanga* case.

In relation to the implementation of collective reparations in the *Lubanga* case the TFV reported consultations in Ituri District between May and July 2015 in order to assess the current location of direct and indirect victims for purposes of reparation in accordance with the Appeals Chamber Judgment mentioned above. The TFV also held consultations in 22 localities in Ituri to assess the damages suffered and collect views of victims concerning reparations. The TFV however reported that “is still lacking important information required to address comprehensively the tasks set by the Appeals Chamber. In particular, the Trust Fund considers that in order to assist the Trial Chamber with establishing the liability of the convicted person and to create the draft implementation plan, it is necessary to have access to reliable data on the direct victims as defined by the Court currently held by third parties in the DRC”⁴⁵².

Significantly, the TFV submitted to Trial Chamber II on 3 November 2015 a “Draft Implementation Plan” for implementing the collective reparations in the *Lubanga* case⁴⁵³. On 9 February 2016, in the exercise of its monitoring and supervisory function, Trial Chamber II, after examining the Draft Implementation Plan decided that it was incomplete and that it could not rule on the proposed plan⁴⁵⁴. According to the Chamber the plan did not include sufficient information on: the victims potentially eligible to benefit from the reparations, including the requests for reparations and the supporting material; the extent of the harm caused to the victims; proposals regarding the modalities and forms of reparations; the amount of the convicted person’s liability. In response to the Trial

⁴⁵² TFV, “Assistance and Reparation: Achievements, Lessons Learned, and Transitioning – Programme Progress Report 2015”, at p. 54, available at: http://Ibid.trustfundforvictims.org/sites/default/files/media_library/documents/FinalTFVPPR2015.pdf

⁴⁵³ TFV, “Filing on Reparations and Draft Implementation Plan”, 3 November 2015, ICC-01/04-01/06-3177-Red, and its two annexes, ICC-01/04-01/06-3177-AnxA, and “Annex I”, ICC-01/04-01/06-3177-Conf-Exp-AnxI.

⁴⁵⁴ Trial Chamber II, “Order instructing the Trust Fund for Victims to supplement the draft implementation plan”, 9 February 2016, ICC-01/04-01/06.

Chamber's Order, on 7 June 2016, the TFV provided a detailed explanation of the various issues and concerns arising from the Chamber's Order. In particular, the TFV:

“respectfully request[ed] the Trial Chamber to accept its request for reconsideration made in the Victim Dossier Filing, to revise its current procedural approach and to instead consider approving the Draft Implementation Plan of 3 November 2015 in its entirety”⁴⁵⁵.

As explained in the previous chapter, it was only very recently (in October 2016) that the process seems to have moved along (see discussion above). It follows that the TFV's plan for the first reparation order in the *Lubanga* case is, at the time of the writing, still in process of being implemented. It is thus premature to take any conclusions regarding the actual role of the TFV in the actual reparations awarded within the ICC.

While it has been submitted that other institutions can inform reparation measures at the ICC - such as the IACtHR⁴⁵⁶, which has immense experience with victims of grave human rights abuse in terms of resources for the purpose of compensation, the ICC, unlike a human rights Court, does not have the power, nor the mandate, to hold States accountable for crimes committed under its jurisdiction and to order them to pay compensation. Even when the offender may have the assets to contribute to reparation awards⁴⁵⁷, there seems to be no reason for the TFV to stay out of the equation⁴⁵⁸.

⁴⁵⁵ TFV, “Additional Programme Information Filing”, 7 June 2016, ICC-01/04-01/06-3209.

⁴⁵⁶ See chapter 3.

⁴⁵⁷ See Pablo de Greiff & Marieke Wierda, “The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints”, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Koen de Feyter et al., Intersentia, 2005, p. 237, concerning the international experience recovering funds from perpetrators.

⁴⁵⁸ Other authors have defended a more central role for the TFV, see e.g. Pablo de Greiff & Marieke Wierda, “The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints”, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Koen de Feyter et al., Intersentia, 2005.

IV. JUSTIFICATIONS FOR CHANNELLING REPARATIONS THROUGH THE TFV

Having reviewed the legal framework of the TFV within the legal documents of the ICC, the innovation that the TFV represents, and the intertwine between the TFV and the Court, at this juncture, it is important to turn attention to the rationale, or justification, for having an administrative mechanism within the auspices of the ICC - but also independent from the administration of the Court⁴⁵⁹ - that may have a major role in the provision of reparation for victims.

In addition to the question specifically referring to the TFV within the ICC framework, the broader question that in my view is prompted by an analysis of the TFV mechanism is whether administrative procedures, connected to a judicial function, may prove to be an efficient way to tackle mass claims of reparation for international crimes.

As to the inquiry of setting up an administrative mechanism for which a major part of its mandate relates to victims reparation, it has been argued that there are advantages to the TFV and further, that it should have an expansive role in the fulfilment of the reparations mandate for victims. For example, it has been posited that

“given the freedom of the TFV from narrowly defined legal principles – a freedom unavailable to the Court itself – it will be more feasible for the TFV than for the Court to design reparations programs that attain whatever goals could be attained by a reparations program at this level.”⁴⁶⁰

It can also be argued that including an administrative mechanism such as the TFV within the ICC framework will provide an efficient way to implement reparations. This may be so because the Court’s Judges will be concerned with the trial proceedings and it will be arguably more efficient to have an administrative mechanism to handle the administration of the reparation order, with the Court’s supervision. The question is where

⁴⁵⁹ Thordis Ingadottir, “The International Criminal Court: The Trust Fund for Victims (Article 79 of the Rome Statute), A Discussion Paper”, ICC Discussion Paper #3, PICT, February 2001.

⁴⁶⁰ Pablo de Greiff & Marieke Wierda, “The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints”, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Koen de Feyter et al., Intersentia, 2005 p. 235.

to draw the line between implementation of the reparations and the TFV own-decision making. This demonstrates the importance of having clear pronouncements as to what kinds of decisions are for the TFV to make, and what decisions are for the Court to make.

At the outset, the governing texts of the TFV establish criteria that must be taken into account. For example, concerning the reparations mandate in relation to Court ordered reparations, Regulation 55 stipulates specific factors that the TFV shall take into account in determining the nature and/or size of awards when the Court does not stipulate how reparations are to be distributed. These include: the nature of the crimes, the size and location of the beneficiary group of victims, the particular injuries to the victims and the type of evidence to support such injuries. In relation to the assistance mandate pursuant to Rule 98 (5), the TFV enjoys more flexibility than with Court ordered reparations since it is less linked to the Court's judicial function, and the governing texts of the TFV do not set out specific factors to be taken into account⁴⁶¹. Despite this larger discretion, Article 79 (3) of the Statute states that the TFV "shall be managed according to the criteria to be determined by the Assembly of States Parties", which in practice, are the TFV Regulations established by the resolution ICC-ASP/4/Res.3. Of particular relevance to the assistance mandate of the TFV, Regulation 48 states that "[o]ther resources of the Trust Fund shall be used to benefit victims of crimes ... who have suffered physical, psychological and/or material harm as a result of these crimes". In addition, Regulation 50 (a) stipulates that the TFV shall be considered seised in relation to assistance to victims when "the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families". Thus, the assistance mandate, while broader than Court ordered reparations, still needs to benefit victims of the crimes under the jurisdiction of the Court who have suffered harm as a consequence of these crimes, as opposed to the general humanitarian and socio-economic needs of victims not connected with said crimes.

It is argued that due to the nature of the TFV (i.e. an administrative mechanism linked to a judicial body) there is a clear line of division between decision-making powers of the Court and the TFV. The Court is a judicial body that has a thorough knowledge of the legal aspects of the cases it encounters. It should be for the Court to make all decisions

⁴⁶¹ Connor McCarthy, *Reparations and Victims Support in the International Criminal Court*, Cambridge University Press, 2012, pp. 232-233.

in relation to the categories of victims and the classification of victims, since they are defined in a legal text, according to legal criteria, as discussed above. The decision on what is the harm for the purposes of reparation should also be left to the Court for the same reasons.

The types of reparation (e.g. symbolic or material reparations) should also be defined in broad terms by the Court, leaving the TFV with some autonomy so as to devise the reparation programs. For instance, the Court should decide in a given case whether collective reparations are allowed, and whether it is a case that rehabilitation or compensation are possible forms of reparation. From this point, with the assistance of broad guidelines, the TFV can decide how to actually implement the reparations program. While it is claimed that the Court should still hold all judicial definitions and guide the TFV in implementing reparations, the latter should be given a large degree of autonomy to ensure that reparations are appropriate for victims. The TFV has eyes on the ground, has experience with reparations programs, and has knowledge of the needs of victims. It is thus better placed to devise reparation programs for the full benefit of victims.

In this line of reasoning, it is within the nature of international crimes that a large number of victims will come before the Court for every case, and whom will be possible claimants of reparations⁴⁶². In order to fulfil the need of victims for reparation, the ICC reparations system has to operate at a different level than that of human rights mechanisms where usually a limited number of victims appear before the Court or the human rights mechanism. At the ICC, many victims will be eligible to participate in proceedings, and then later claim reparation. Additionally, many other victims who do not qualify to participate in Court proceedings may still be real “victims of crimes within the jurisdiction of the Court”, to use the language of Article 79 of the Rome Statute.

Thus, this study argues, as already stated above, that the approach to the conception of the kind of reparations available should be broad. More specifically, it should not be focused on compensation awards to individual victims, but also on symbolic reparations

⁴⁶² For example, in the *Lubanga* case, there were 120 victims participating the case; in the *Germain Katanga/Mathieu Ngudjolo Chui* case, there were 364 victims participating, see Eleni Chaitidou, *Recent Developments in the Jurisprudence of the International Criminal Court*, available at: http://Ibid..zis-online.com/dat/artikel/2013_3_740.pdf

and collective reparations⁴⁶³ that will reach more victims by overcoming the issue of available funding to pay compensation. As the Trial Chamber in the *Lubanga* case has affirmed, “a community-based approach, using the TFV’s voluntary contributions, would be more beneficial and have greater utility than individual awards, given the limited funds available.”⁴⁶⁴ I have discussed this question in more detail in previous chapters; the point to be made here is that the TFV has a flexible mandate, and will likely be in a better position than the Judges to assess what kind of reparation will best assist victims of crimes within the jurisdiction of the ICC. This is, in my opinion, a testament to the argument that reparations should be channelled through the TFV.

Repairing victims of international crimes presents unique challenges, not only due to the multiplicity of victims, but also because it is impossible to repair what is irreplaceable. Mass suffering creates an emptiness not only for victims, but for society and humanity as a whole. A sum of money - which is likely to be modest, considering the usual lack of resources of the accused and limited sources available⁴⁶⁵ - to isolated, individual victims, it is submitted, will certainly not correspond to the international law standard of *restitutio ad integrum* and will fall short of victims’ needs. This is one of the reasons supporting the argument made in this chapter, and underpinning this study, that while it may be easier to address individual complaints with sums of money, this is not the best approach to redress in the aftermath of international crimes; compensation and the award of sums of money should be limited to attending to victims’ special needs in light of the crimes they have suffered (e.g. victims of sexual crimes). This does not suggest that there should be a hierarchy or classes of victims in the sense that some victims have greater entitlements than others; victims shall be treated equally in terms of entitlement to receive reparation. It is simply posited that reparation programmes should take into account the needs of victims

⁴⁶³ See Frédéric Mégret, *The Case for Collective Reparations before the ICC* (November 15, 2012). Available at SSRN: <http://ssrn.com/abstract=2196911> or <http://dx.doi.org/10.2139/ssrn.2196911>. The author argues, *inter alia*, that “collective reparations will in many cases be superior not only on pragmatic grounds but also because they make most sense from the point of view of transitional justice. Most importantly, collective reparations are the most faithful to a construction of most international crimes as crimes that target groups (e.g.: the Genocide Convention groups) or categories (e.g.: civilians) rather than individuals as such”.

⁴⁶⁴ Decision on Reparations, p. 274.

⁴⁶⁵ Frédéric Mégret, *The Case for Collective Reparations before the ICC* (November 15, 2012). Available at SSRN: <http://ssrn.com/abstract=2196911> or <http://dx.doi.org/10.2139/ssrn.2196911>, p. 7.

and thus be a sort of “custom-made” reparation. In this regard, hearing the voices of victims and attending to their needs is crucial.

It is in this line of argument that it can be hoped that members of the TFV will have expertise in mass claims processes and mass reparation for victims which can be used to design reparation programs that will, in pragmatic terms, make the most of the limited funds available to the victims. The Court’s Judges, in all likelihood, will not have the resources or needed knowledge or expertise of victims’ issues in order to establish and assess reparation programmes that will meet the needs of the many victims of crimes within the jurisdiction of the ICC. Designing programmes that will benefit a larger number of victims has the advantage of more holistically dealing with the question of redress in the aftermath of international crimes and minimizes the possibility of involuntary discrimination among victims.

Furthermore, the TFV, as outlined above, may also act in assisting victims before a reparation award is ordered against a convicted person. In this light, it also makes sense to have an organ that operates within the Court responsible for questions of reparation such as, for example, raising funds for reparation awards and assistance programs. The funds raised through the convicted individual may not be sufficient, even if one departs from the idea of reparation as monetary compensation, to fulfil reparation initiatives. Thus, the fund-raising possibilities of an administrative reparation mechanism such as the TFV should not be overlooked⁴⁶⁶.

Having an administrative mechanism such as the TFV can also provide “eyes on the ground”, which may be difficult for the Chambers to have. The TFV may be in a position, in light of its role and mandate, to design programs tailored to a number of victims, rather than individual victims, and direct such reparation initiatives to the reality on the ground⁴⁶⁷.

⁴⁶⁶ For example, recently in 2013, the United Kingdom contributed £500,000 to the ICC Trust Fund for Victims as part of G8 Initiative on Preventing Sexual Violence in Conflict, see: <http://Ibid.trustfundforvictims.org/news/united-kingdom-donates-%C2%A3500000-icc-trust-fund-victims-part-g8-initiative-preventing-sexual-viol>

⁴⁶⁷ See Pablo de Greiff & Marieke Wierda, “The Trust Fund for Victims of the International Criminal Court: Between Possibilities and Constraints”, in *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations*, Koen de Feyter et al. (eds.), Intersentia,

In sum, it can be argued that channelling reparation efforts through the TFV meets many concerns. The TFV has a link with the judicial branch of the ICC (the Court's Chambers) as already discussed, and yet, they present more flexibility in their mandate and more opportunities to raise resources for reparation programmes, especially in cases where the accused is impecunious. The TFV will also have added expertise, in light of its core mandate, to design programmes that will address the needs of victims in a given specific case (e.g. sexual crimes as opposed to the use of child soldiers). This is due to its ability to act on the ground with projects that will assist victims, and act with the Fund's "other resources".

One may now turn to the important question of the justification for having a mechanism that operates within the ICC framework, rather than leaving the task of reparation to national courts or other kinds of procedures, as is the case with the Special Tribunal for Lebanon, for example.⁴⁶⁸ History has shown us that the consequence of setting up an international tribunal that deals solely with the criminal responsibility of offenders and leaves the civil liability to domestic courts results in most victims not receiving any reparation⁴⁶⁹. Thus, while national courts have a significant role to play in the quest for civil redress, as will be discussed, there is also an important role for administrative mechanisms at the international level which focuses on victim redress. In the following section, domestic schemes are examined to inform the practice of the TFV, as an administrative mechanism linked with a judicial branch. Specialized domestic proceedings are also discussed in order to determine their level of efficiency. As well, the following section will discuss a variety of lessons learned from other situations.

2005, pp. 239-240.

⁴⁶⁸ See chapter 2.

⁴⁶⁹ See discussion on this issue in chapter 2 above.

V. CHALLENGES AHEAD: THE TFV IN UNCHARTERED GROUND

The mandate of the ICC and the TFV in relation to reparations is a noble one, providing victims with the possibility of obtaining redress for international crimes. In saying this, it is also an ambitious one, including a civil dimension in international criminal justice. As it has been noted, “[t]he challenging and ambitious mandate assigned to the International Criminal Court under article 75 to ensure reparations for victims of crimes is in stark contrast with the embryonic structure put in place to ensure the fulfilment of that mandate.”⁴⁷⁰

Especially due to the fact that the TFV mechanism for reparation is a novelty in international criminal law, it will face many difficult questions. Additionally, there are undoubtedly countless challenges that the TFV will face in the pursuit of its mandate. These will range from practical to symbolic challenges.

The most obvious challenge is the availability of funds and resources to provide redress for the large number of individuals that may unfortunately become victims of the crimes under the jurisdiction of the ICC. As explained above, the TFV may obtain funds from: (1) voluntary contributions of governments, international organizations, individuals, corporations and other entities (in accordance with criteria established by the ASP; (2) money and property gathered through fines or forfeitures transferred to the TFV by a Court order according to Article 79 of the ICC Statute; (3) resources gathered by awards for reparations if ordered by the Court; and (4) such resources other than assessed contributions as the ASP may decide to allocate to the TFV.

The funds of the TFV will thus necessarily be limited. As such, fund-raising should be an important aspect of the activities of the TFV so as to ensure that it has the available financial resources to fulfil its tasks⁴⁷¹. In this light, the TFV should also focus attention on

⁴⁷⁰ Marc Henzelin et al., “Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes”, *Criminal Law Forum* 17 (2006), pp. 338-339.

⁴⁷¹ See Peter G. Fischer, “The Victims’ Trust Fund of the International Criminal Court-Formation of a Functional Reparations Scheme”, *Emory International Law Review* 17 (2003), pp. 191-192 (concerning fund-raising).

gathering voluntary contributions that will ensure the fulfilment of reparation awards. As an example, according to the website of the TFV,

“The total TFV income by November 2009 was € 4.5 million. Out of these, approximately € 2.2 million were obligated for grants in the Democratic Republic of the Congo and Uganda. Another € 600,000 were allocated for activities to start in 2010 in the Central African Republic. In addition, a current reserve of € 1 million is available for potential reparations.”⁴⁷²

The financial limitations of the TFV do not however mean that the ability of the TFV to implement reparation awards will be completely hampered. In this scenario, the meaning and scope of redress becomes ever more important. Indeed, financial compensation is not the only means of reparation to victims of crimes within the ICC jurisdiction, as already discussed. Symbolic and collective reparations should be an important aspect of reparations through the TFV. The financial resources of the TFV should be used bearing in mind victims that need specific and urgent assistance as a consequence of the crimes committed against them, such as victims of sexual violence⁴⁷³.

The number of victims of international crimes of the kind the ICC will prosecute will likely always be very high, and as a consequence, the potential claimants of reparation will also be of a high scale. As an example, in the *Lubanga* case, 120 individuals were recognized as victims. Similarly, in the *Germain Katanga/Mathieu Ngudjolo Chui* case, there were 364 victims participating in the case⁴⁷⁴. It is certainly important that victims get reparation for the crimes they have suffered; this however should not stand in the way of the Court’s mandate of prosecuting serious international crimes and determining the guilt or innocence of the accused.

⁴⁷² Trust Fund for Victims website, available at: <http://Ibid..trustfundforvictims.org/financial-info> (accessed on 7 March 2013). This stands in contrast for example with the United Nations Compensation Commission which approved the payment of more than US\$3.2 billion in compensation for more than 860.000 successful “A” claimants, see <http://www2.unog.ch/uncc/clmsproc.htm>

⁴⁷³ Anne-Marie De Brouwer, “Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and their Families”, *Leiden Journal of International Law* 20 (2007), pp. 207-237.

⁴⁷⁴ See references on <http://icc-cpi.int>.

It is in this light that I argue that the Court should be coherent with the principles of reparation to be applicable across the framework of reparations within the ICC, with the necessary modifications in relation to each case, and then perform a supervisory role of the administration of reparations by the TFV. This approach would lighten the burden of the Court, which has limited resources and is primarily in charge of criminal trials of accused persons. It is important, certainly, that the Court does not completely divorce itself from the TFV, but rather should have a more limited role. The TFV staff will also likely count on staff with expertise in administering the reparation award under the guidance of the principles of the ICC. The TFV should have the mandate of a true reparations body⁴⁷⁵.

Another challenge refers to the practical implementation of the reparations principles the Appeal Chamber has established. As reviewed above, the Chamber has set out principles rather abstractly. The TFV will have to grapple with the principles when implementing the reparation for victims in the *Lubanga* case. The TFV thus has a significant responsibility to implement reparations, within the available budget, while keeping in line with the principles stated by the Court⁴⁷⁶. The TFV may consider taking a comprehensive approach in this first implementation which can inform future cases. In this sense, the TFV itself can establish principles to be followed in a transparent manner, within the limitations of the principles set out by the Court and the constraints imposed by the governing texts as explained above. For example, it may decide to set out some specific guidelines in terms of reporting on the implementation of the reparations, and timelines for implementing the order of the Court, which will not only apply in one case, but rather provide some transparent guidelines for future court-ordered reparations.

Furthermore, as reviewed above, the TFV has already acquired significant experience in programs for the benefit of victims of crimes in different situations under the jurisdiction of the Court. These experiences have given the TFV some specific knowledge and expertise in terms of what works and what needs victims may have. The TFV may consider using these experiences to inform the reparations for victims. In my view, the most important criterion however is determining the views of victims and following their needs in every reparation program.

⁴⁷⁵ Marc Henzelin et al., “Reparations to Victims Before the International Criminal Court: Lessons from International Mass Claims Processes”, *Criminal Law Forum* 17 (2006), p. 342.

⁴⁷⁶ For the time being, the principles are those stated in the *Lubanga* case.

The challenges and difficult questions that the Court and the TFV will face in the implementation of the reparations mandate make it crucial for a concerted effort between the Court and the TFV so as to have an efficient reparations mechanism. It has been argued that the task of the Court in deciding thousands of claims for reparation may well be more difficult than deciding on several different cases for each situation⁴⁷⁷, especially considering that the expertise of the Members of the Court will possibly be more focused on criminal law and procedure than on mass civil claims.

Having discussed some of the many challenges the TFV will likely face in the coming years, I turn next to the examination of lessons that can be learned by looking at mechanisms also in charge of reparation for mass victimization.

VI. CONCLUDING REMARKS: TRAILBLAZING A NEW REPARATION MECHANISM FOR INTERNATIONAL CRIMES?

As already discussed, the inception of reparation into international criminal justice came about in a more recent phase of international criminal justice. Previous international criminal justice enterprises, such as the *ad hoc* criminal tribunals, did not have a scheme for victim reparation⁴⁷⁸. Importantly, the ICC represents a major step towards providing redress for victims of international crimes, alongside the TFV. The ICC is unique in its conception of and activities in international criminal justice. An interesting question in this context is whether the TFV may be a trailblazer for similar initiatives in respect to reparations for international crimes or violations of international humanitarian law outside the scope of the ICC.

The ICC does not, unfortunately, have yet a global reach in respect of all international crimes that are committed worldwide. Limitations concerning the jurisdiction

⁴⁷⁷ Gilbert Bitti & Gabriela Gonzalez Rivas, “The Reparations Provisions for Victims Under the Rome Statute of the International Criminal Court”, in *Redressing Injustice Through Mass Claims Processes: Innovative Responses to Unique Challenges*, The International Bureau of the Permanent Court of Arbitration, Oxford University Press, 2006, p. 321.

⁴⁷⁸ Michael Bachrach, “The Protection of Rights and Victims Under International Criminal Law”, *International Law* 34 (2000).

of the Court⁴⁷⁹ make the scope of the activities of the TFV also limited to the victims of crimes under the jurisdiction of the ICC. This means that many victims of international crimes will remain outside the civil dimension of international criminal justice. As Jann Kleffner and Liesbeth Zegveld argues, “while the ICC may, either upon request or on its own motion, afford reparations to victims of war crimes, these are reparations afforded within the individual responsibility framework of the ICC”⁴⁸⁰.

Thus, it is submitted that the model of TFV could be a trailblazer for similar mechanisms competent to consider civil claims from individual victims of international crimes. The TFV provides a promising model of an administrative mechanism dealing with mass victimization in the aftermath of international crimes.

Thus, I argue that the TFV, and its potential success as a mechanism to foster reparation for victims of crimes within the ICC, may serve as a model for other similar approaches to provide reparation for victims of international crimes and in this sense, its message and example may stand as a catalyst for other similar reparations schemes for victims of international crimes. Such efforts could be on an individual basis, for example, in relation to victims of a specific conflict. Alternatively, they could be in a more global aspect⁴⁸¹, geared towards victims of international crimes in general, and with a view to

⁴⁷⁹ In general terms, the ICC has jurisdiction over the crimes of genocide, crimes against humanity, war crimes and the crime of aggression. The ICC has jurisdiction over natural persons, over the age of 18 years old at the time the crime was perpetrated. A crime falls within the jurisdiction of the ICC if it is perpetrated in a State Party to the ICC (or in a State having otherwise accepted the jurisdiction of the Court), by a national of a State Party (or of a State having otherwise accepted the jurisdiction of the Court), or if the Security Council has referred the case to the Court, irrespective of the nationality of the perpetrators) or the place of the crime. The ICC has jurisdiction for crimes committed after the entry into force of its Statute (1 July 2002); in the case of a State having joined the Court after 1 July 2002, the Court only has jurisdiction after its Statute entered into force for that State in question, unless the State accepts the jurisdiction of the Court for the period before the Statute’s entry into force. On the jurisdiction of the ICC, see William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, 4th ed., 2011, chapter 3.

⁴⁸⁰ Jann K. Kleffner & Liesbeth Zegveld, “Establishing an Individual Complaints Procedure for Violations of International Humanitarian Law”, *Yearbook of International Humanitarian Law* 3 (2000), p. 384.

⁴⁸¹ Such fund, with a global reach, could be established for the benefit of all victims of international crimes. The trust fund would receive, like the TFV, voluntary contributions from individuals, international/regional organizations, nongovernmental organizations and States. As already discussed, the main source of funding of the TFV comes from voluntary contributions, as opposed to the accused. Such trust fund could be based on the example of the TFV and could

bridging the gaps of the TFV, which unfortunately does not have a universal reach due to its link with the ICC which does not have jurisdiction over all conflicts.

In this chapter, I reviewed the legal framework, challenges and possibilities of the TFV within the ICC framework. The aim was to both highlight this innovative perspective of the civil redress dimension of the ICC, and to provide a window into broader questions, such as the usefulness of administrative mechanisms linked with a judicial process as a new frontier for redress for victims of international crimes. In this sense, the TFV was the leading protagonist of the analysis.

It is reiterated in this chapter, in line with the overall theme of this study, that civil redress should be a part of the model of modern international criminal justice; the question, in my view, should not be whether or not victims' reparation should be included in international justice, but rather how to make it feasible. This is the real question to which this thesis hopes to make a contribution to enlighten, by referring to diverse models where victims can claim reparation for international crime. Thus, the TFV is another piece in the fabric of international justice, weaving the civil dimension within international criminal justice.

In this light, it is argued that the TFV should play a leading role in the administration of reparation to victims of crimes within the jurisdiction of the Court. Pragmatic reasons such as the larger degree of flexibility in terms of reparation programmes and the centrality of its mandate (i.e. the TFV was created for the benefit of the victims) stand for the argument that the Court's Judiciary should play a supervisory role and trust the TFV with the design of reparation programmes. The TFV could operate in this sense as the administrative arm of the ICC for the purposes of reparation awards.

The present chapter thus aimed at demonstrating that the reparation system at the ICC should move away from a complete reliance on the Court's judicial arm for the purpose of reparation, and that there should be a division of decision-making powers. As posited in a previous chapter, international criminal trial proceedings do not seem to be the most appropriate forum for decision-making on all kinds of reparation questions. It is my

contention that the ICC's Chambers' role should be to decide on principles of reparation and the beneficiaries of reparation in a given case. The administration of the reparation award should be given to the TFV.

Furthermore, the study of the TFV has been undertaken as a lens through which the broader question of the use of administrative mechanisms to deal with civil redress for victims of international crimes has been considered. It is thus argued that the TFV, alongside other comparable initiatives reviewed herein, can pave the way for similar initiatives in areas where the TFV cannot act for certain victims of international crimes due to its jurisdictional limitations. The argument is thus made that while there are some obscure areas for the TFV to grapple with at this stage, it may still provide useful lessons, or at least inspiration, for the creation of similar initiatives. Such initiatives may be used to address specific conflicts, such as the Rwandan genocide, or, for a broader purpose, comparable to the Fund for torture victims reviewed above.