

ORIGINAL ARTICLE

INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

# Victim assistance under the Rome Statute: Approach and effectiveness of the Trust Fund for Victims assistance activities

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## Abstract

This paper contributes to an underdeveloped yet critical feature of international criminal law – victim assistance. With the creation of the ICC and the Trust Fund for Victims, the idea of victim assistance in situations of mass criminalities was provided an institutional backbone. However, much of its operational principles remain theoretically ill-defined. Through a methodological study of over a decade of assistance programmes administered by the Fund, this paper sheds light on some of the critical operational principles which have emerged in practice. Additionally, in light of these principles, this paper argues that there exist two major causes of ineffectiveness which hamper the Fund's assistance work – first, the problem of defining its goals in definite, strategic terms, and second, the overlap between assistance mandate of the Fund and reparations regime of the ICC. It concludes by making course-correction suggestions for the Fund to chart a future towards an effective organization building.

**Keywords:** Trust Fund for Victims; ICC; Assistance Mandate; Article 79; Reparations

## 1. Introduction

The International Criminal Court's Trust Fund for Victims (the TFV) embodies the maturity of international criminal justice. Article 79 of the Rome Statute provides for the creation of a trust fund which shall serve for the benefit of the victims and the families of victims of Rome Statute crimes,<sup>1</sup> and Article 75 allows the Court to use this trust fund also as an intermediary<sup>2</sup> for implementation of its reparation orders. The reparations mandate of the TFV, as also of the Court, builds on the restorative conception of criminal justice which permeates the Rome Statute. With its inclusion into the Statute, the drafters opened the possibility for an international court to order

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<sup>1</sup>1998 Rome Statute of the International Criminal Court, 2187 UNTS 38544, Art. 79. For the drafting history of the provision, see W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2016), 1183–4; K. Khan, 'Article 79 Trust Fund', in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2015), 1901 at 1901–3.

<sup>2</sup>The French text of Art. 75(2) uses the term 'l'intermédiaire'.

a convict to compensate and rehabilitate victims directly, without having to rely on states. At the same time, by providing for a second mandate for the TFV under Article 79, the ‘assistance mandate’<sup>3</sup>, the Statute recognizes the limitations of the criminal justice system in achieving full restoration of the rights for victims. Victims require assistance, irrespective of the outcome of an investigation and prosecution, and often long before the criminal process ends and even during that process. International legal documents and practice have long recognized the importance of assistance for victims of criminal acts. The 1985 Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power,<sup>4</sup> as also the 2005 Basic Principles and Guidelines on the Right to Remedy and Reparation<sup>5</sup> call upon the states to implement national programmes of assistance for victims, including legal, medical, social, and financial assistance. International practice too is replete with instances of administrative mechanisms like the UN Voluntary Fund for Victims of Torture; Trust Fund on Contemporary Forms of Slavery; Trust Fund to End Violence against Women. These administrative mechanisms, independent of judicial processes, remain important channels for delivering justice.

However, it is the TFV’s assistance mandate which is of interest for the present inquiry. While the development and operation of a reparations system under the Rome Statute has received significantly more scholarly attention, the assistance mandate of the TFV demands attention of equal measure by virtue of its importance to the overall restorative justice pillar of the Rome Statute. The TFV initiated its first assistance programmes in Uganda and the Democratic Republic of Congo (the DRC) in 2008. Until 2020, these were the only two countries in which the TFV had active running projects. Today, the TFV is operating in seven countries.<sup>6</sup> A significant amount of institutional resources and energy has been invested into implementing the TFV’s assistance mandate. From 2008 to 2014, most of the TFV’s budget was allocated to assistance activities, and even recently in its 2022 budget, the portfolio of assistance activities accounted for 36.90 per cent of the total available funds.<sup>7</sup> More importantly, in all the situation countries, the TFV has become the first face of the ICC. With its direct engagement with victims, civil society, local leadership, and governments, factors like the TFV’s selection of situation countries, victims, locations, implementing partners, kinds of projects, duration of projects, and priorities for resource allocation have all become key to upholding the legitimacy enjoyed by the Rome Statute framework. An ineffective delivery of assistance programmes can risk jeopardizing reconciliation possibilities in society, suppress the urge of victims to seek justice, or merely waste the limited financial resources entrusted to it by the donors. All these eventualities threaten to dilute the image of the potentialities offered by the Rome Statute in the eyes of victims and state parties.

Within this context, this paper studies the effectiveness of the TFV’s approach to its assistance mandate. This work must begin with an admission of its own limitation. The author has not had the benefit of conducting field research of the TFV’s projects. The research, hereinafter, has relied primarily on the TFV’s own reporting on its projects and decision making. At most times the reporting from the TFV has not followed a consistent pattern and at all times has been far from complete.

To undertake an analysis of the TFV’s effectiveness, one must define what is effectiveness. Section 2 tackles this question. Organizational effectiveness as a concept has been extensively

<sup>3</sup>This term does not appear in the Statute, Rules of Procedure and Evidence, or the TFV Regulations and has only emerged in the practice of the TFV to refer to its programmes undertaken outside the context of implementing reparation programmes. However, it has now been suggested that the TFV is intending to move away from the term ‘assistance’. See Summary of Interview with Ms. Franziska Eckelmans, Acting Executive Director of the Trust Fund for Victims (available on file with the author).

<sup>4</sup>UN General Assembly, A/RES/40/34 (29 November 1985), Annex, paras. 14–17.

<sup>5</sup>UN General Assembly, A/RES/60/147 (21 March 2006), Annex, paras.12, 16.

<sup>6</sup>The Democratic Republic of Congo, Uganda, Cote d’Ivoire, the Central African Republic, Mali, Kenya, and Georgia.

<sup>7</sup>The Trust Fund for Victims, Management Brief Q1 & Q2/2022, 1 January–30 June 2022, at 17. Out of the total available funds of EUR 14,516,897, EUR 5,357,260 were allocated for the TFV’s assistance activities.

discussed and developed in management and administrative sciences. Multiple models are available to measure effectiveness and its correlation with different variables. With regard to a non-profit organization like the TFV, the section argues that two organizational features are particularly relevant to be looked at – (i) the TFV’s definition of its assistance goals and strategies, and (ii) the relationship between the TFV assistance activities and the Court’s reparation activities. Section 3 and Section 4 in turn elaborate and evaluate these two factors. Analysis under Section 3 indicates that although the TFV has formulated broad mission goals and some narrow operational goals, its goals largely lack clarity and a strategic outlook. Section 4 looks at the emerging jurisprudence on the Court’s reparation regime to argue that there exists an emerging trend of increasing overlaps between reparations and assistance activities. This has led to some conflicts between the TFV and the Court. Without managing this externality, the TFV’s assistance approach would remain significantly ineffective. The final section concludes with suggestions on the future course of actions required for the TFV.

## 2. The idea of organizational effectiveness

Evaluating whether an organization is effective or not in its work is a challenging task. Such a question could be approached in multiple ways.<sup>8</sup> A profitable fast fashion brand may nonetheless receive huge backlash for its labour abuses. Is that organization effective? A retail store may provide excellent customer satisfaction but exercise no control over its distribution channels. Is that an effective organization? A criminal court may be successful in reducing the pendency of cases and the number of undertrials in prisons while failing to produce a consistent jurisprudence. Can that institution be considered effective? The criteria selected for assessing effectiveness of an organization depend significantly on the nature of the organization, the purpose of the study and the personal preferences of the researcher.<sup>9</sup>

The TFV as an organization is a non-profit organization. Unlike for-profit organizations, financial measures of performance are not suitable for evaluating its work. The TFV’s mandate is to provide assistance and reparations to victims of atrocity crimes and generate positive social impact. It is the victims and their communities which are the core subject of the TFV’s activities. However, evaluating the social impact created by the TFV’s programmes for the victims is also not a straightforward task. How does one evaluate social impact? And even if one does evaluate the extent of impact, what parameters does one use to measure its effectiveness? These questions are made even more challenging by the TFV’s nature and methods of delivering assistance. The TFV operates in situations where thousands of victims are assisted in both direct and indirect form. To evaluate the social impact of each programme would require a comprehensive exercise of collecting and analysing primary data on the physical health, economic conditions, social perception and status of victims, security situation, access to justice, political will for victim redressal, the TFV-community relationships, and the capacities of local civil society organizations. While it is important to assess effectiveness at programme level, the purpose of this study is not to decipher what programmes are effective and under what conditions they perform most effectively. This study rather seeks to understand whether the TFV’s approach to its assistance mandate is an effective approach – in other words, it is intended to focus on the organizational features rather than programmatic features and evaluate if the TFV maximizes its *ability* to generate social impact. Benjamin and others argue that the evolving literature on evaluating effectiveness of non-profit organizations has acknowledged the impact of organizational features on the

<sup>8</sup>See, for instance, B. E. A. Oghojafor, F. I. Muo, and S. A. Aduloju, ‘Organisational Effectiveness: Whom and What Do We Believe?’, (2012) 2(4) *Advances In Management & Applied Economics* 81.

<sup>9</sup>See K. Cameron, ‘The Effectiveness of Ineffectiveness: A New Approach to Assessing Patterns of Organizational Effectiveness’, (September 1982) *National Center for Higher Education Management Systems*, at 2–11.

effectiveness of programmes.<sup>10</sup> The conditions of an organization's field networks, its relationship with government bodies, the robustness of its internal procedures, and its ability to evaluate and monitor programmes are but some instances of organizational features which relate directly to any program's implementation.

As noted above, different theories of organizational effectiveness might influence a researcher to select different organizational features to study. A goals-based approach would focus on the organizations goals, exercise, and its results. A rational systems approach would require consideration of organization's management of human resources, and external relationships among other features. Yet other approaches would argue for a different perspective. None of these approaches are devoid of subjectivity and shortcomings.<sup>11</sup> These models are often helpful in answering if organizations function effectively or not, but rarely answer how organizations may improve their effectiveness. This study, therefore, does not choose to rely on any specific model of effectiveness. Rather, it focuses on two organizational features which inhibit the TFV to function effectively.<sup>12</sup>

The two organizational features under scrutiny here are one concerning the TFV's definition of its goals and strategies to assist victims, and a second regarding the TFV's relationship with one of the most crucial external influencers for its assistance activities, the Court itself.

The two selected features, in the author's opinion, are the most significant factors in determining the TFV's long-term effectiveness. During the preliminary phase of research on the TFV's assistance activities, it was clear that the TFV's defined assistance goals were a constant presence in all aspects of its operations. They impact the TFV's decision making on selection of locations and victim groups, the kinds of assistance programmes, exit strategies, government collaborations, among other things. As the TFV's goals have evolved over the years, so too have its programmes. To test the hypothesis that perhaps, the TFV's understanding and definition of its goals provide the structure to its assistance programmes and in that sense are also the systemic cause of the TFV's present ineffectiveness, it was important to assess this feature. Similarly, an interesting observation about the Court's reparation jurisprudence necessitates its study here, viz. the growing similarity between reparations programmes and assistance programmes. This is an important development for the TFV's assistance programmes. How the Court regulates its reparation regime under the Rome Statute would, now more than ever, have significant implications for assistance programmes as well. At a more fundamental level, this development is about how the TFV and the Court define the relationship between reparations and assistance under the Rome Statute. Something that would influence when, where, and what kinds of assistance programmes the TFV must frame. For instance, should assistance programmes be intended as laying a strong foundation for reparations to be delivered effectively; could reparation be seen as an effective way of ending assistance programmes in situation countries; or would it be cost-efficient and effective to deliver similar assistance programmes and reparation measures in the same situation country.

In the author's opinion, the TFV's approach and understanding on these two organizational features will shape the nature, form, and purpose of its assistance programmes and in turn prove to be significant determinants of its effectiveness.

<sup>10</sup>L. Benjamin, A. Ebrahim, and M.K. Gugerty, 'Nonprofit Organizations and the Evaluation of Social Impact: A Research Program to Advance Theory and Practice', (2023) 52 *Nonprofit and Voluntary Sector Quarterly* 313S (See specifically, section 'What to Evaluate').

<sup>11</sup>For literature on models and systems of organisational effectiveness, see A. Etzioni, *Modern Organizations* (1964); D. Katz and R. L. Kahn, *The Social Psychology of Organizations* (1966 and 1978); P. Goodman and J. Pennings (eds.), *New Perspectives on Organizational Effectiveness* (1977); R. Scott and G. Davis, *Organizations and Organizing: Rational, Natural, and Open System Perspectives* (2007); E. Yuchtman and S. E. Seashore, 'A System Resource Approach to Organizational Effectiveness,' (1967) 32(6) *American Sociological Review* 891; see Oghofofor, Muo, and Aduloju, *supra* note 8.

<sup>12</sup>Defining effectiveness in terms of an organization's ineffectiveness is an approach analyzed in detail by Kim Cameron. For advantages of this approach over others, see Cameron, *supra* note 9.

It is also important to recognize here that assessing the effectiveness of the Court is no substitute for assessing the effectiveness of the TFV's work, more so its assistance related work.<sup>13</sup> In terms of its origination, the TFV owes its existence to the Rome Statute and is indeed connected to the ICC. However, the TFV is not part of the Court. Endowed with a separate Board of Directors and Secretariat which is responsible directly to the Assembly of State Parties, the TFV maintains its own managerial limbs under the TFV Regulations.<sup>14</sup> In fact, the Regulations specify that the Secretariat must maintain its independent character while engaging with the Court's Registry.<sup>15</sup> Its finances too are beyond the control of the Court. The Court's funds are not the TFV's funds, nor does the Court exercise any control on the TFV's funds.<sup>16</sup> More importantly, the TFV has practically complete control over formulating and implementing its assistance operations in situation countries.<sup>17</sup> There is, in this sense, a meaning in assessing the TFV individually as an organization through its organizational attributes. Indeed, in this process, its interaction with the Court would be relevant and are discussed later.

Over the years, the concept of effectiveness has also been used by researchers to assess effectiveness of international legal regimes.<sup>18</sup> It would be an interesting research agenda to assess the effectiveness of assistance regimes in international criminal law through the assistance measures set up by all the different tribunals, although such instances have been far and few until now. The scope of the present study is limited in that it seeks to focus only on the assistance regime set up under the Rome Statute and as implemented by the TFV.

### 3. Assessing the TFV's strategic thinking and goal setting exercise

#### 3.1. Identifying the goals

Article 79 of the Rome Statute provides that a Trust Fund shall be established for the 'benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims'.<sup>19</sup> Similarly, Rule 98 of the Rules of Procedure and Evidence – particularly paragraph (5) in relation to assistance mandate – calls upon the Trust Fund to use its other resources for the 'benefit of victims'.<sup>20</sup> This language is finally translated into Regulation 48 of the TFV Regulations with a few additional details on the idea of 'benefit of victims and their families'. According to this Regulation,

Other resources of the Trust Fund shall be used to benefit victims of crimes . . . , and, . . . their families, who have suffered physical, psychological and/or material harm as a result of these crimes.<sup>21</sup>

These documents set out the broad contours of the TFV's assistance mandate. The mission of the TFV is to provide benefit to the victims potentially falling within ICC's jurisdiction and the

<sup>13</sup>The idea of effectiveness in relations to international tribunals and courts has been discussed by Yuval Shany in his seminal piece on the topic. Y. Shany, 'Assessing the Effectiveness of International Courts: A Goal-Based Approach', (2012) 106(2) AJIL 225.

<sup>14</sup>See, Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3 in Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Fourth Session, The Hague, ICC-ASP/4/32, 28 November to 3 December 2005, Part I.

<sup>15</sup>*Ibid.*, regulation 19.

<sup>16</sup>*Ibid.*, Part II, Chapter I–V. For a detailed discussion on the nature and independence of the TFV, see Section 4, *infra*.

<sup>17</sup>See Section 4, *infra*.

<sup>18</sup>See for example, the works of Arild Underdal and Oran Young, including A. Underdal, 'The Concept of Regime "Effectiveness"', (1992) 27(3) *Cooperation and Conflict* 227; O. Young, *Governance in World Affairs* (1999), at 108–132.

<sup>19</sup>See Rome Statute, *supra* note 1, Art.79.

<sup>20</sup>International Criminal Court, Rules of Procedure and Evidence, Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3–10 September 2002, ICC-ASP/1/3, rule 98.

<sup>21</sup>See TFV Regulations, *supra* note 14, regulation 48.

families of these victims. However, mission goals are usually insufficient in themselves to assist any organization to take its day-to-day decisions and establish a hierarchy of priorities.<sup>22</sup> During the drafting of the ICC Rules of Procedure and Evidence, an NGO submitted a non-paper on the TFV, emphasizing on the critical gaps left in its functioning by the Statute. It raised questions like, should the Fund be restricted to victims of crimes being actively investigated by the Court?; Is 'for the benefit of victims' limited to supplementing reparations awards, or does it include interim relief or other mechanisms to meet the needs of victims?; What types of criteria would apply for implementing partners interested in implementing projects under the Trust Fund?<sup>23</sup> The Rules and Regulations do not provide guidance on these operational details. In fact, the phrase 'benefit of victims' does not encapsulate some critical goals which may be necessary for achieving the overarching goal of benefit for victims including, for instance, the TFV's donor outreach goal.

Our analysis of the TFV's goals must therefore move beyond the stated mission. In its Strategic Plan for the period 2023–25, the TFV identifies four goals for its activities, both under the assistance mandate and the reparations mandate.<sup>24</sup> Goal 1 directs the TFV's programmes to focus on delivering transformative reparations and empowering victims to overcome their harm.<sup>25</sup> Goal 2 emphasizes the TFV's outreach to different stakeholders like the ICC, states, donors, victims, inter-governmental organizations, and civil society for achieving multiple aims including building new partnerships.<sup>26</sup> Goals 3 and 4 articulate the need to infuse feasibility in the TFV's operations. While the former requires the TFV to enhance the efficiency of its programmes through a process of continuous data collection, monitoring and evaluation of outputs, and self-reflection<sup>27</sup>, the latter focuses on the internal structural reforms in the TFV's governance to make its workings efficient.<sup>28</sup>

In its initial years of operations, the TFV also listed six thematic indicators of impact, which were – (i) transitional justice; (ii) gender mainstreaming; (iii) physical and mental health; (iv) economic security, food security, and shelter; (v) social support and integration; and (vi) peace and reconciliation.<sup>29</sup> These statements of intent and purpose provide some flesh to the idea of an effective assistance programme.

Apart from the organizational intent, one must also undertake a careful review of the activities pursued by the organization.<sup>30</sup> A detailed study of the TFV's assistance programmes reveals a clearer picture of how the TFV defines its aims and ambitions in the field. In its programmes, the TFV has internalized two critical operational goals - one, the harm of victims and their families' needs to be addressed in a holistic sense. The clear dichotomies of physical/mental or material harm and communal or individual nature of harm no longer form the basis for effective assistance delivery; and second, feasibility of operations demand a focus on efficiency as part of effective assistance measures.

<sup>22</sup>Y. H. Chun and H. Rainey, 'Goal Ambiguity in U.S. Federal Agencies', (2005) 15(1) *Journal of Public Administration Research and Theory* 1, 3–4, 21.

<sup>23</sup>NGO Non-Paper on Behalf of Certain Members of the Victims Working Group and Financial Regulations and Rules Team: Statement on the Victims Trust Fund, ICC Preparatory Commission, 25 September 2001, available at [www.legal-tools.org/doc/8df009/](http://www.legal-tools.org/doc/8df009/).

<sup>24</sup>See Trust Fund for Victims, Strategic Plan 2023–25, at 5–8. The principles guiding these goals were described in a far more elaborated manner in the Trust Fund for Victims Draft Strategic Plan 2023–25 (on file with the author). It remains unclear why the final version of the document leaves out critical details.

<sup>25</sup>*Ibid.*, at 5.

<sup>26</sup>*Ibid.*, at 6.

<sup>27</sup>*Ibid.*, at 7.

<sup>28</sup>*Ibid.*, at 7–8.

<sup>29</sup>Trust Fund for Victims, Programme Progress Report: Recognizing Victims & Building Capacity in Transitional Societies (Spring 2010), 29.

<sup>30</sup>E. Gross, 'The Definition of Organizational Goals', (1969) 20(3) *The British Journal of Sociology* 277, 285.

### 3.1.1. Holistic, multi-dimensional approach to harm

Over the years, one thematic area which has become a characteristic feature of the TFV's assistance programmes is its understanding of 'harm' within a conflict zone. Even though Regulation 48 of the TFV Regulations categorize the harms as 'physical, psychological and/or material harm' arising from the Rome Statute crimes, the TFV's programmes have evolved beyond this categorical conceptualization of harm.

The initial projects in the DRC focused predominantly on addressing psychological harm to victims of sexual and gender-based crimes (SGBV), and children made vulnerable by the conflict, including child combatants, through the help of counselling, reconciliation activities, and community sensitization programmes.<sup>31</sup> Additional assistance included providing material benefits through vocational training, educational grants, and micro-credit facilities.<sup>32</sup> In Uganda, on the other hand, the TFV activities were centred around providing prosthetic limbs, orthopaedic support, and other reconstructive surgeries and follow-up care.<sup>33</sup> This disparity in the construction of programmes was later reflected in the numbers. In the 2015 Programme Progress Report, the TFV reported the number of direct beneficiaries of psychological rehabilitation in the DRC to be 55,411 compared to 828 direct beneficiaries in Uganda.<sup>34</sup> On the other end of the spectrum, 1246 Ugandans became direct beneficiaries of physical rehabilitation programmes implemented by or through the TFV while only 82 beneficiaries of physical rehabilitation were recorded in the DRC.<sup>35</sup> It is hard to imagine that this disparity was a result of the different victim needs in either situation. It is foreseeable that many in Uganda would be suffering from psychological impacts of the war, and much less debatable is the proposition that many victims would have required medical services in the post-conflict DRC.<sup>36</sup> The course correction from the TFV, however, has been remarkable. By its own words, in the 2014–17 Strategic Plan, the TFV describes that its

activities related to each of the three categories of assistance (physical rehabilitation, psychological rehabilitation, and material support) constitute a relevant response to the major effects of the conflict . . . the integration of multiple forms of support also strengthens the relevance of programme activities in recognizing that the effects of the conflict did not occur in isolation.<sup>37</sup>

More recent programmes indicate that the TFV has tackled the issue of harm redressal with multiple forms of interventions. Apart from assistance through referrals for surgeries and medical materials, and assistance through trauma-based and other forms of psychological counselling, the TFV's activities have included providing agricultural assistance;<sup>38</sup> vocational training for jobs like

<sup>31</sup>See Trust Fund for Victims, Programme Progress Report (2009), at 34–36.

<sup>32</sup>*Ibid.* Amongst the descriptions of all the operational projects, only 2 projects (DRC/2007/R2/40 and DRC/2007/R2/029) included certain elements of medical care, which were ambulance service for emergency care and day care centre for child of girls abducted by armed forces.

<sup>33</sup>*Ibid.*

<sup>34</sup>Trust Fund for Victims, Assistance & Reparations: Achievements, Lessons Learned, and Transitioning – Programme Progress Report (2015), at 18.

<sup>35</sup>*Ibid.*, at 17.

<sup>36</sup>See J. McCleary-Sills and S. Mukasa, 'External Evaluation of the Trust Fund for Victims Programmes in Northern Uganda and the Democratic Republic of Congo: Towards a Perspective of Upcoming Interventions', (November 2013) *International Centre for Research on Women*, 24, 27.

<sup>37</sup>Trust Fund for Victims, Strategic Plan 2014–17, at 19.

<sup>38</sup>See Trust Fund for Victims, *supra* note 29, at 25; Trust Fund for Victims, Programme Progress Report: Learning from the TFV's Second Mandate: From Implementing Rehabilitation Assistance to Reparations (Fall 2010), at 44 (See project numbered the TFV/UG/2007/R2/038); Trust Fund for Victims, Providing Reparative Value to Victims in the Era of COVID-19: Annual Report (2020), at 35.

culinary arts, poultry, sewing, knitting, carpentry, etc.;<sup>39</sup> entrepreneurial kits and start-up capitals;<sup>40</sup> creating village savings groups;<sup>41</sup> initiating insurance schemes;<sup>42</sup> and accelerated education for children.<sup>43</sup> Some of the projects conducted may not even neatly fit into the three categories of harm recognized by the Regulations. For instance, the TFV has recorded instances of providing family mediation and re-unification services to re-integrate victims of SGBV crimes into the families.<sup>44</sup>

Social conditions which prevent healing have also been addressed through the TFV's activities. In the DRC and Uganda, for instance, the implementing partners have introduced psychological support programmes in elementary schools.<sup>45</sup> Through these programmes, manuals are prepared for student support groups to tackle issues of routine absenteeism, substance abuse, child neglect, and issues of gender-based violence, and to assist young children in coping with the psychological causes, or effects, of these occurrences.<sup>46</sup> Arts, music, dramas and story-telling have been used to communicate the message of peace and tolerance amongst communities. *Centre des Jeunes/Missionnaires d'Afrique*, an implementing partner with the TFV in the DRC, had initiated *Ecole de la paix* ('School for Peace') project wherein it had organized workshops in 5,000 schools pushing forward students to display poems, songs, stories, games and art on the theme of peace and tolerance.<sup>47</sup> These works were later displayed to the community through the concept of mobile museums. For other members of the community, it organized open days to discuss, recollect, and analyze the events of the conflict.<sup>48</sup> This example forms a small part of the long list of community-oriented engagements of the TFV. Hosting series of dialogues with community leaders on issues of transitional justice, women rights, truth, reconciliation, and peace have become indispensable aspects of the TFV's programming.<sup>49</sup>

Additionally, the TFV does not consider one form of intervention – let's say psychological assistance – as limited to redressing one category of needs – the psychological rehabilitation needs, in this example. This is for the simple reason that with time harm transforms and changes its shape. In instances where significant time has lapsed since injuries were sustained, physical injuries metamorphosize into deep psychological wounds and trauma. The TFV has even recorded to have faced multiple challenges in mapping, identifying, and referring victims to medical assistance due to victims' fear and social stigma of disclosing their injuries.<sup>50</sup> Such situations have led the TFV to use, in part, psychological services as corollary to medical assistance.<sup>51</sup>

<sup>39</sup>Trust Fund for Victims, Programme Progress Report: Mobilising Resources and Supporting the Most Vulnerable Victims through Earmarked Funding (Winter 2012), 24; Trust Fund for Victims, Annual Report (2017), 36 (See, project number 4 administered by *Association des Mamans Anti-Bwaki*, the TFV's implementing partner).

<sup>40</sup>Trust Fund for Victims, Annual Report (2016), at 20-21, 47, 52, 54.

<sup>41</sup>Trust Fund for Victims, Annual Report (2017), 27-8, 37-8; see Trust Fund for Victims, *supra* note 34, at 19-20, 22.

<sup>42</sup>See Trust Fund for Victims, *supra* note 40, at 52 (See, projects numbered the TFV/DRC/2007/R1/021 and the TFV/DRC/2007/R2/029).

<sup>43</sup>See Trust Fund for Victims, 2017 Annual Report, *supra* note 39, at 60-61 (See project numbered the TFV/DRC/2007/R2/029).

<sup>44</sup>See Trust Fund for Victims, *supra* note 40, 50; see Trust Fund for Victims, 2012 Annual Report, *supra* note 39, at 27.

<sup>45</sup>See Trust Fund for Victims, *supra* note 40, at 15.

<sup>46</sup>*Ibid.*, at 15-16.

<sup>47</sup>See Trust Fund for Victims, *supra* note 34, at 24-25.

<sup>48</sup>*Ibid.*

<sup>49</sup>See Trust Fund for Victims, *supra* note 40, at 16; Trust Fund for Victims, Annual Report (2018), at 36, 42; see Trust Fund for Victims, *supra* note 38, at 33-34, 36.

<sup>50</sup>See Trust Fund for Victims, *supra* note 40, at 18.

<sup>51</sup>For instance, see Trust Fund for Victims, *supra* note 34, at 26-33. As part of description of many projects, measures of medical assistance have been categorized as psychological rehabilitation.

Coupled with these understandings, the TFV has also attempted to emphasize that the impact of its assistance has a certain degree of permanence. Since 2008, the TFV implementing partners have focused on building skills of individuals and community through literacy training,<sup>52</sup> psychotherapy trainings,<sup>53</sup> trainings on impacts of SGBV crimes,<sup>54</sup> and even through workshops on peacebuilding.<sup>55</sup> Programmes administered through international NGOs maintain an especially strong focus on strengthening the capacities of local civil society organizations.<sup>56</sup> Its programmes have also tended to partner with educational institutions to offer diploma level courses on psychological training.<sup>57</sup> The TFV has even theorized this idea in its 2020 Regulation 50 Notification to the Court concerning proposed programmes in the Central African Republic (CAR) where it described imparting psychotherapy training to social counsellors as a part of its 'build, manage and transfer' approach.<sup>58</sup> This is also supported by Ní Aoláin and Dutton's observations in their study of the TFV programmes in northern Uganda that the TFV aims to institutionalize victim empowerment in post-conflict societies.<sup>59</sup>

This brief analysis of the TFV's work demonstrates its conception of harm as a social construct. It has acknowledged the interconnected nature of different kinds of harm and has worked on the assumption that one form of harm may reinforce another form of harm. This also forms the premise for visualizing different assistance programmes as an inter-related group of interventions. In the same vein, it has also accepted that addressing specific harms in isolation of social context could result in only temporary gains for victims. Without making community bonds and social structures as direct subjects of assistance programmes, one can only address victim's needs at a surface level. This constitutes the overall goal of approaching harm in a holistic and multi-dimensional sense.

These observations also help clarify and reject the often-repeated idea that the TFV assistance programmes are intended to cater primarily to the urgent needs of the victims.<sup>60</sup> Categorization of needs as urgent or non-urgent involves a degree of prioritization of certain needs. At the same time, it assumes that certain needs could be addressed in isolation to other needs of victims. The TFV's practice and practical experience with addressing conflict-related victim needs seem to deviate from both these implications.

### 3.1.2. Feasibility in programmes

A competing goal which has emerged as a thematic feature of the TFV's approach to assistance is the TFV's awareness of its own capacities. For a large part of its working history, the TFV has had to operate in only two situation countries. It attempted to expand its operations to the CAR in

<sup>52</sup>For instance, see Trust Fund for Victims, *supra* note 40, at 54-55, 61; see Trust Fund for Victims, 2017 Annual Report, *supra* note 39, at 32, 36-38

<sup>53</sup>See Trust Fund for Victims, *supra* note 40, at 60-63 (See projects numbered the TFV/UG/2007/R1/014b, the TFV/UG/2007/R1/014c); see Trust Fund for Victims, 2017 Annual Report, *supra* note 39, at 18, 35-38.

<sup>54</sup>See Trust Fund for Victims, *supra* note 40, at 52.

<sup>55</sup>See Trust Fund for Victims, 2017 Annual Report, *supra* note 39, at 36.

<sup>56</sup>See Trust Fund for Victims, *supra* note 29, at 27-28, 35 (See projects numbered the TFV/UG/2007/R1/003, R1/005, R1/006, R1/016, R1/020, R1/025, R2/035); see Trust Fund for Victims, 2017 Annual Report, *supra* note 39, at 62-63 (See project numbered the TFV/UG/2007/R1/14(c)); see Trust Fund for Victims, 2018 Annual Report, *supra* note 49, at 36.

<sup>57</sup>See Trust Fund for Victims, *supra* note 40, at 14.

<sup>58</sup>Annex I to the Notification by the Board of Directors in Accordance with Regulation 50 (a) of the Regulations of the Trust Fund for Victims of its Conclusion to Undertake further Specified Activities in the Central African Republic, ICC-01/14-126-AnxI Situation in the Central African Republic II, 15 September 2020, 5 (the TFV/CAR/2020/R1/005).

<sup>59</sup>A. Dutton and F. Ní Aoláin, 'Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate', (2019) 19(2) *Chicago Journal of International Law* 490, 507-509, 512-518.

<sup>60</sup>See Section 4, *infra*.

2009<sup>61</sup> and 2012,<sup>62</sup> but for reasons of security it could not. Logically, therefore, earlier programme selection for the TFV was based predominantly on victims' needs. In the 2014–17 Strategic Plan the TFV categorized 'expand[ing] (the TFV activities) geographically in light of the TFV's increased resources and the expanding number of ICC cases and situations' as one of the opportunities for future.<sup>63</sup> It was also clear in one of the first Regulation 50 Notifications by the TFV that needs of victims were, back then, the predominant and the only focus of the TFV in initiating assistance programmes in situation countries.<sup>64</sup> Fast forward to 2020, the TFV now identifies resource development as a core risk management priority, in light of the growing reparations portfolio and increasing assistance programmes.<sup>65</sup> It now operates in seven countries,<sup>66</sup> and with thousands of victims in each situation, it is no longer possible to select assistance programmes based on victims' needs alone. Hence, the feasibility assessment.

At the operational level, the feasibility assessment is most obviously reflected in the selection of location and victim groups.

The TFV's decision to initiate programmes in the CAR were made unfeasible in 2012 by the security situation. It is also a standard operating procedure for the TFV to assess security feasibility of entering a country.<sup>67</sup>

With respect to victim selection, the 2015 TFV Programme Report is instructive. Therein the TFV published a guiding framework for assisting implementing partners to identify beneficiaries/victims. This provided a matrix of inclusionary criteria for defining a victim for the purpose of the TFV's mandate under the Regulations.<sup>68</sup> It also provided a list of factors making a potential beneficiary ineligible for the TFV assistance. The framework considered the limited capacity of implementing partners and recommended that partners may select most vulnerable victims on the basis of membership of a vulnerable group (children, women, widows, orphans, persons with disabilities, elderly), or harm suffered (sexual and gender-based violence), or based on directness of the harm suffered, urgency of needs, or first time recipients of any assistance.<sup>69</sup> How much this criteria has been given effect by implementing partners is a question for further research. Nevertheless, what is clear is that such criteria, emerging from the need to make programmes feasible, can influence important aspects of the design and implementation of assistance programmes.

Recent calls by the TFV to focus on assistance/reparative complementarity in assistance mandate are also noteworthy developments in the context of this goal. In the 2020 the TFV Event Report, the Programme Manager for assistance programmes in Cote d'Ivoire and Mali is recorded to have said that 'with respect to designing an assistance programme, the primary responsibility is with the State and therefore the the TFV should always first consider what the

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<sup>61</sup>See, Notification from the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims, Pre-Trial Chamber, ICC-01/05-29, Situation in the Central African Republic, 30 October 2009, along with the Annex, ICC-01/05-29-Anx. See its decision, Decision on the Submission of the Trust Fund for Victims dated 30 October 2009, Pre-Trial Chamber, ICC-01/05-30 Situation in the Central African Republic, 16 November 2009, the Pre-Trial Chamber rejected this notification for want of sufficient programme details in the Annex.

<sup>62</sup>Decision on the 'Notification by the Board of Directors in accordance with Regulation 50 (a) of the Regulations of the Trust Fund for Victims to Undertake Activities in the Central African Republic', Pre-Trial Chamber, ICC-01/05-41 Situation in the Central African Republic, 23 October 2012.

<sup>63</sup>See Trust Fund for Victims, *supra* note 37, at 11.

<sup>64</sup>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 with Confidential Annex, Pre-Trial Chamber, ICC-02/04 -114 Situation in Uganda, 25 January 2008, at para.18 onwards.

<sup>65</sup>See Trust Fund for Victims, 2020 Annual Report, *supra* note 38, at 17.

<sup>66</sup>The Democratic Republic of Congo, Uganda, Cote d'Ivoire, the Central African Republic, Mali, Kenya, and Georgia.

<sup>67</sup>See Summary of Interview with Ms. Franziska Eckelmans (available on file with the author).

<sup>68</sup>See Trust Fund for Victims, *supra* note 34, at 12–16.

<sup>69</sup>*Ibid.*, at 13.

State is already doing'.<sup>70</sup> A statement to the same effect was also made by the then TFV Executive Director during the event.<sup>71</sup> In line with these statements, the TFV actually used Cote d'Ivoire's national commission of enquiry's findings on violence affected areas and victim needs to select the locations for initiating its assistance programmes. This can serve as an important tool for workload management for the TFV. Currently, governments in at least three situation countries where the TFV operates have put in place their reparation measures.<sup>72</sup>

Although of recent origin and only sparingly referenced in the TFV's activities, this goal has critical implications for how the TFV operates on the field. This speaks not only for the fact that the TFV's resources are constrained, and its activities stretched, but also because this goal sits paradoxically against the goal of comprehensively addressing victim harms. While one involves scaling up the operations, the other requires keeping the scale and scope of operations within limits. Thus, this forms a crucial second pillar on which lies all the TFV decisions and operations.

### 3.2. Finding the gaps

The preceding analysis argues that the TFV has given shape to its assistance goals through its two paradoxical strategies. Despite that, the TFV's strategy seems to be far from complete given the visible difficulties it has faced in important areas of monitoring and evaluation, exit strategy, and priority setting.

In all the years of the TFV's operations, its annual and progress reports have consistently captured the absolute number of people assisted under various projects, while the overall impact of the TFV's field work remains hard to assess. In 2016 the TFV initiated an overhaul of its evaluation techniques but until last year its performance monitoring plan was still under construction.<sup>73</sup> This is a logical consequence of articulating the macro goals of an institution in such broad terms. Peace, transitional justice, and reconciliation are complex utopias to achieve, especially within a complex social setting. A single actor or stakeholder working in isolation would completely fail to generate credible returns on its work. Effective or even partial realisation of these ideals would require multiple interventions of multiple actors. Even if the TFV comes up with an evaluation index for measures of, let's say, reconciliation, it would always be contested as to how much of the results could be attributed solely to the TFV's contribution in those areas. In this context, effectiveness is directly correlated to the clarity and precision of goal identification.

Lack of a clear evaluation criteria is also clear from the lack of any coherent exit strategy in the TFV's assistance programmes. Consider for instance, the TFV's work in Uganda and DRC. 2023 marks almost 14 years of operation of its projects in these two countries. A 2016 study recorded the levels of unemployment in northern Uganda at 32.5%, a number significantly higher than the national poverty percentage of 19.7%.<sup>74</sup> During the conflict years, armed groups in northern Uganda destroyed land boundaries and demarcations in villages.<sup>75</sup> As a result many districts have faced a chronic issue of violent conflicts over land disputes in post-war period.<sup>76</sup> This has also resulted in land insecurity, financial insecurity, and erosion of culture for vulnerable populations

<sup>70</sup>Trust Fund for Victims et. al., *The Trust Fund for Victims: Now and Into 2021* (14 December 2020), 8.

<sup>71</sup>*Ibid.* at 5 (Peiter de Baan's statement).

<sup>72</sup>Cote d'Ivoire, Uganda, and Mali.

<sup>73</sup>See Dutton and Ní Aoláin, *supra* note 59, at 510. See Trust Fund for Victims, *Strategic Plan 2020-2021 Activity Tracker*, Item 23 ('Ensure the establishment of a Performance Monitoring Plan for assistance and reparations programmes'). The 2023-25 TFV Draft Strategic Plan annexed a non-public performance monitoring plan. The final 2023-25 TFV Strategic Plan, however, omits this monitoring plan altogether. It only notes that the 'current Performance Monitoring Plan... will be expanded into a Comprehensive Performance Monitoring Plan'.

<sup>74</sup>See A. Abaho, S. Asimwe, and M. Mawa, 'The LRA and Its Costs on Economic Security in Gulu District, Northern Uganda', (2019) 7 *Open Journal of Social Sciences* 133, 138.

<sup>75</sup>Z. Slotkin, 'Land Insecurity in Gulu, Uganda: A Clash Between Culture and Capitalism', (2017) *Independent Study Project (ISP) Collection* 2710.

<sup>76</sup>*Ibid.*

in parts of northern Uganda and continues to remain the major source of underdevelopment in the region.<sup>77</sup> The United Nations Development Programme's 2015 Report recorded that northern Uganda region hosted 71% of chronically poor households in Uganda while the contribution to the overall population figures of the region was only 38%.<sup>78</sup> SGBV crimes have persisted and instances of domestic violence increased over the years.<sup>79</sup> The Food and Agriculture Organization's 2019 study of livelihoods recovery in Uganda highlighted that levels of food security among population in northern Uganda have been highly volatile.<sup>80</sup> Even ten years after the end of conflict, the indicators of nutrition have worsened in the northern Uganda and Karamoja, while recovery has stagnated.<sup>81</sup>

It would indeed be naïve to suggest that the TFV's assistance programmes should solve all the problems created due to decades of conflict or even come remotely close to sharing similar responsibility as the government of that state in remedying the situation. Nor are these figures highlighted to imply that the TFV's assistance work has been a failure. Instead, it asks the TFV a question – have your programmes been successful and, if yes, according to what parameters? When should the TFV feel comfortable in ending its assistance programmes? These numbers rebut the inherent bias of presuming that assistance is a per se desirable, altruistic activity where a 'more is merrier' approach holds good. Even assistance must have a direction, a strategy. The TFV's goals and programmes have not engaged with this question and the primary reason that the TFV has not been clear in answering it until now is, in the author's opinion, the TFV's inability to express its assistance goals in clear and definite terms. Using broad indicators like reconciliation and integration without formulating a strategic understanding of them or providing them with some definite boundaries will inhibit the TFV's ability to effectively address this issue. This becomes an important point of discussion, as this gap has and will have adverse effects on the TFV's assistance programmes. A few years ago, for instance, the TFV ended its material assistance programmes in Uganda despite most implementing partners viewing economic support as critical for rehabilitation in Uganda.<sup>82</sup> This example is noteworthy because, without a clear strategy, the TFV would be susceptible to inaccurate assessments of local needs, wasteful expenditure on unnecessary programmes, causing dissatisfaction among assistance beneficiaries, or even inviting critics to raise concerns over the TFV's expansion of assistance operations.

Attention must also be paid to the TFV's record on setting priorities. A clear hierarchy of priorities provides a useful estimation of an organization's goals. For victim selection and prioritization, the TFV considers victims of SGBV, direct victims, victims in urgent needs, and victim groups of women, children, widows, orphans, persons with disabilities, and elderly as the most vulnerable groups.<sup>83</sup> Its programmes have reflected this priority, as many of the reported programmes have focused on SGBV related victimization and rehabilitation for ex-child soldiers, child abductees, and children born out of SGBV.<sup>84</sup> The priority of engagement in other respects, however, still remains unclear. For instance, neither the situations in Sudan and Bangladesh/Myanmar have any assistance or reparation programmes for the victims. The Office of the Prosecutor has also decided to open field offices in these regions. However, the former remains an active case with potential for a reparation order while the latter situation has not yet matured into

<sup>77</sup>United Nations Development Programme, Uganda Human Development Report 2015: Unlocking the Development Potential of Northern Uganda (2015).

<sup>78</sup>*Ibid.*, at 63.

<sup>79</sup>*Ibid.*, at 69.

<sup>80</sup>Food and Agriculture Organization of the United Nations and Tufts University, 'Comparative Analysis of Livelihood Recovery in the Post-Conflict Periods: Karamoja and Northern Uganda', November 2019, 18–20.

<sup>81</sup>*Ibid.*, at 21.

<sup>82</sup>See Dutton and Ní Aoláin, *supra* note 59, at 542–543.

<sup>83</sup>See Section 3.1.2., *supra*. On possible other alternative criteria for prioritizing resources for the TFV, see C. McCarthy, *Reparations and Victim Support in the International Criminal Court* (2012), at 234–8.

<sup>84</sup>See Section 3.1., *supra*.

an active case. Would the TFV prioritize the situation in Sudan to prepare itself better for the reparations phase, or would priority be given to the situation in Bangladesh where the victims must wait for a long time to receive any reparative measures? Similar constructions can be posed to the TFV's other prioritization decisions. Is priority to be given to situations where significant time has passed since the conflict and there exist risks of inter-generationalizing the harm, or to those post-conflict situations where fragile institutions risk re-emergence of violence?

Recently, the TFV has decided to work closely with governments in situation countries and added a complementarity dimension to its assistance mandate.<sup>85</sup> This further raises questions of prioritization for the TFV. In their study of northern Uganda, Dutton and Ní Aoláin observed that implementing partners faced peculiar challenges in collaborating with government officials.<sup>86</sup> Involvement of government officials exposed the programmes to exploitation by political power holders and increased the pressure on implementing partners to assist relatives of government officials even when they did not qualify for those programmes.<sup>87</sup> Relying on government officials also necessitated sharing control over programme implementation and its timelines. Consequently, the failure of government officials to honour their commitments caused delays in the implementation schedule.<sup>88</sup> These challenges indicate that the TFV would be required to define its relationship with governments and their reparative efforts. More precisely, the TFV would have to attribute an appropriate amount of value to government collaborations, delimit the areas where coordination may be indispensable, and establish priorities with respect to engagement with various levels of government.

According to Scott and Davis, prominent researchers in organizational sciences, organizations which are characterized with general or diffused goals face more difficulties in pursuing them.<sup>89</sup> These goals do not provide a solid foundation for operations. With time, either these diffused goals become specific and concrete, or the structure of the organization becomes unstable.<sup>90</sup> In their present form, the TFV's formulation of its goals makes it difficult to pursue them in a strategic manner.

#### 4. Interplay management with the reparations system of the Court

While assessing the TFV's assistance activities, it is important to recognize that the TFV operates as part of a larger machinery which is set in motion when redressal attempts are made for victims of mass atrocities. The TFV's work, and its institutional existence, is deeply connected with the work of the ICC as a court of law.

Writings on assistance mandate of the TFV have defined the *raison d'être* of assistance under the Rome Statute framework as complementing the limitations inherent in delivering reparations under a criminal justice system.<sup>91</sup> Under the existing interpretation and application of the Rome Statute's reparation provisions, the Court's authority to provide reparations is limited to the harm caused by the crimes for which an individual is held guilty.<sup>92</sup> The TFV's assistance work bears

<sup>85</sup>*Ibid.*

<sup>86</sup>See Dutton and Ní Aoláin, *supra* note 59, at 544–5.

<sup>87</sup>*Ibid.*, at 545.

<sup>88</sup>*Ibid.*

<sup>89</sup>See Scott and Davis, *supra* note 11, at 36.

<sup>90</sup>*Ibid.*, at 37.

<sup>91</sup>See, for instance, E. Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (2010), 285–6; C. Stahn, *A Critical Introduction to International Criminal Law* (2019), 401; M. Cohen, *Realizing Reparative Justice for International Crimes: From Theory to Practice* (2020), 142–3. Cf., *Prosecutor v. Thomas Lubanga Dyilo*, Filing on Reparations and Draft Implementation Plan, Trial Chamber, ICC-01/04-01/06-3177-Red, 3 November 2015, paras.157–8.

<sup>92</sup>For an alternative system of reparations, see *Prosecutor v. William Samoei Ruto & Joshua Arap Sang*, Decision on the Request regarding Reparations, Trial Chamber, ICC-01/09-01/11-2038, 1 July 2016, Judge Chile Eboe-Osuji, Dissenting Opinion; T. Hamilton and G. Sluiter, 'Principles of Reparations At The International Criminal Court: Assessing Alternative Approaches', (2022) 25(1) *Max Planck Yearbook of United Nations Law Online* 272.

obvious advantages over the reparations system, in as much as the TFV's interventions need not wait until a conviction, nor do they require a focus on specific kinds of criminal acts. Even the Appeals Chamber of the Court in *Lubanga* suggested to the TFV that its assistance mandate may be used to include members of affected communities in the DRC which do not fit the reparation eligibility criteria.<sup>93</sup> Unfortunately, this relative advantage of the assistance mandate has become a definitional feature of explaining the relationship between assistance and reparation. Dixon's terminology of 'Swiss Cheese' model captures this idea that assistance fills the gap which reparations may have left.<sup>94</sup> The problem with this approach is that it assumes clarity in what results would be produced by the reparations regime, what goals will be achieved through reparations, and what processes would be followed in implementing reparations. However, as Ferstman argues, different Chambers have differed on their approach to the Court's reparations system.<sup>95</sup> A certain Chamber may choose to award individual reparations for a very small category of victims while others may wish to broaden it, for instance. At the same time, this framework is somewhat inconsistent within itself. It considers timeliness of delivery of the assistance programmes as one of its key advantages – and therefore its function – over the reparation system, thereby assuming that in most cases assistance would precede reparations. Nonetheless, to fill the gaps which are left by reparations, the TFV must know what charges are not confirmed at trial, which locations have not been addressed in the reparations award, which victim groups have not been provided with a relief, and which victims have not yet participated in the proceedings. Accordingly, under this conception of the TFV's assistance mandate, the effectiveness of assistance programmes would always and primarily be assessed by their flexibility to address the gaps or even the ineffectiveness produced by the reparations system.

A distinct conception of the Court and the TFV's mandate was put forward in a proposal during the drafting of the Rules of Procedure and Evidence.<sup>96</sup> The proposal intended to make the TFV responsible for providing interim relief for the potential victims in the proceedings before the Court through its assistance mandate. That view was not accepted, and the TFV Regulations instead, as adopted, require the assistance activities to not pre-determine issues of jurisdiction, admissibility, and guilt which may arise before the Court. To see assistance as an interim relief measure would put assistance beyond the scope of a discretionary, non-judicial, case-neutral exercise.

Expressing another view on the relationship between the Court and the TFV's assistance activities, Sehmi has highlighted that continuing socio-economic marginalization of victims imperil their ability to meaningfully participate in the trial and the reparation proceedings.<sup>97</sup> As a mechanism for redressal, she argues, the TFV's assistance mandate should be utilized to address immediate needs of the victims to enhance their participatory capacity.<sup>98</sup>

<sup>93</sup>*Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeals against the 'Decision Establishing the Principles and Procedures to Be Applied to Reparations' of 7 August 2012 with Amended Order for Reparations, Appeals Chamber, ICC-01/04-01/06 AA2A3, 3 March 2015, para. 215.

<sup>94</sup>P. Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo', (2016) 10 *International Journal of Transitional Justice* 88, at 105–6.

<sup>95</sup>C. Ferstman, 'Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness', in C. Ferstman and M. Goetz (eds.), *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making* (2020), 446 at 469–72.

<sup>96</sup>Revised Discussion Paper Proposed by the Coordinator, PCNICC/1999/WGRPE/RT.5/Rev.1/Add.3 (11 August 1999), Rule E(c). The Discussion Paper proposed to include a rule under the Rules of Procedure and Evidence which would allow the Court to 'at any time before it has made a determination relating to reparations, order the Trust Fund to provide interim relief to victims, such as medical or psychological attention or other humanitarian assistance'. See A-M. de Brouwer, 'Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families', (2007) 20(1) *LJIL* 207, 230–1.

<sup>97</sup>A. Sehmi, 'Emphasising Socio-Economic Narratives of Truth, Justice and Reparations in The Prosecutor v. Dominic Ongwen', (2022) 26(6) *The International Journal of Human Rights* 1083, at 1096–7.

<sup>98</sup>*Ibid.*, at 1100.

All these views acknowledge the inter-relationship between assistance and reparations, and attempt to decipher the interactive pattern between the two regimes which would maximize the overall effectiveness of the restorative function of Rome Statute framework. In other words, this exercise of building an effective relationship between reparations and assistance is an exercise of regulating the impact of one regime over the other, with the aim of increasing the positive externalities introduced into the system while reducing the possibilities of negative externalities.

The effectiveness inquiry, thus, directs us towards studying the behavioural patterns of each regime, their effects on each other, and the tools for their management.

#### 4.1 *Reparation-assistance overlap theory*

The analysis of the relationship between the Court and the TFV must begin with the structural linkages between the two institutions, as codified under Regulation 50 of the TFV Regulations.

The first structural linkage is the Regulation 50(a)(ii) 'Notification'. According to this sub-regulation, the TFV shall conduct its activities or projects in execution of its assistance mandate after a determination by a Pre-Trial Chamber that its proposed activities

... would [not] pre-determine any issue to be determined by the Court, including the determination of jurisdiction pursuant to article 19, admissibility pursuant to articles 17 and 18, or violate the presumption of innocence pursuant to article 66, or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>99</sup>

The second structural link is the use of the TFV by the Court for implementation of reparations order. As per Regulation 50(b), a relevant chamber of the Court can seize the TFV when it orders the reparation award to be 'deposited with or made through the TFV in accordance with rule 98 of the Rules of Procedure and Evidence'.<sup>100</sup>

Rather innocuous looking structural bridges created by the drafters between these two Rome Statute institutions have led to debates about the organizational autonomy of the TFV.<sup>101</sup>

On one occasion, the TFV submitted before the Court that it enjoys institutional independence from the Court, with respect to its assistance mandate,<sup>102</sup> arguing that it falls within the supervision and control of the Assembly of State Parties.<sup>103</sup> To an extent, this is supported by the practice and jurisprudence of the Court as well. With respect to Regulation 50 Notifications, the Court has never denied or limited the TFV's decision making authority, except in one instance where the Court requested further details about the proposed programmes to decide on their incompatibility with Regulation 50.<sup>104</sup> Neither has the Court developed any jurisprudence on the specific features of an assistance programme which could be considered as violating the presumption of innocence or pre-determining issues of admissibility or jurisdiction. In that sense, the Regulation 50 requests by the TFV have served as notifications to the Court rather than authorization requests. Ingadottir submitted before the Preparatory Commission of the ICC that distinct budgetary framework for the Court and the TFV under the Rome Statute, along with the absence of any provision for the Court to manage or utilize the Trust Fund, calls for the conclusion that the TFV is an entity of

<sup>99</sup>See TFV Regulations, *supra* note 14, regulation 50(a)(ii).

<sup>100</sup>*Ibid.*, regulation 50(b).

<sup>101</sup>See de Brouwer, *supra* note 96, at 232, footnote 132.

<sup>102</sup>*Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Request for Leave to Submit Observations in Relation to the Issues Raised under the Heading 'Questions Concerning Reparation' in the 'Decision on Defence Applications for Judgments of Acquittal', Trial Chamber, ICC-01/09-01/11-2036, 22 June 2016, para. 6.

<sup>103</sup>*Ibid.*, at para. 6.

<sup>104</sup>*Situation in the Central African Republic*, Decision on the Submission of the Trust Fund for Victims dated 30 October 2009, Pre-Trial Chamber, ICC-01/05-30, 16 November 2009.

its own.<sup>105</sup> The Trial Chamber hit a discordant note in *Lubanga Reparations Order* when it opined that the Court has the authority to direct the usage of funds collected by the TFV through resources other than fines, forfeitures, or reparation awards.<sup>106</sup> The TFV, according to the Trial Chamber, was obliged to supplement the reparations order wherever the convict was found to be indigent.<sup>107</sup> The Appeals Chamber, however, quickly reversed this holding to confirm the autonomy of the TFV and its absolute discretion to finance the reparations order through its secondary resources.<sup>108</sup>

On the other hand, counter arguments have continuously tried to further the viewpoint that ‘one must not forget that in the end the Trust Fund is part of the ICC’.<sup>109</sup> It has been admitted by the TFV itself that victims have often perceived the TFV as operating on behalf of the Court with the consequence that legitimacy, or the lack of it, for the Court in the situation country has been projected on to the TFV and vice versa.<sup>110</sup> While issuing his dissent to the Court’s *Decision on request regarding reparations* in *Ruto & Sang* case, Judge Chile Eboe-Osuji took objection to the TFV’s remark in its submissions which had the effect of presenting the TFV as an independent organization from the Court.<sup>111</sup> He argued that if not for the creation of the Court, the TFV would not have existed.<sup>112</sup> But more importantly, he pointed out that the Rome Statute embodies a restorative conception of criminal justice and the same conception finds its presence in the TFV’s regulations.<sup>113</sup>

These critical voices have in effect brought forth the proposition that the structural linkages between the TFV and the Court are indicative of more functional linkages which exist between them. As highlighted by Judge Chile Eboe-Osuji, the intellectual substructure of the assistance regime and the reparations regime is the same. The function of the TFV’s assistance mandate is to provide benefit to the ‘victims’, and the TFV Regulations import, by reference, the definition of ‘victim’ from rule 85, viz. persons who have suffered harm from the commission of crimes under the Court’s jurisdiction.<sup>114</sup> Therefore, unlike general forms of aid and assistance, the TFV’s activities also remain tied to the criminal justice process<sup>115</sup> and contribute to the restorative justice function of the Rome Statute.<sup>116</sup> The fact that the TFV Regulations provide a mechanism to prevent the TFV’s activities to pre-determine certain legal issues and hamper the Court’s duties indicates that assistance is an element of the criminal justice process.

It is this normative congruity of the two regimes which has now begun to command a greater convergence in practice as well. To understand this, one may look at the jurisprudence produced by the Court on reparations.

<sup>105</sup>T. Ingadottir, ‘The Trust Fund for Victims (Article 79 of the Rome Statute)’, in T. Ingadottir, *The International Criminal Court: Recommendations on Policy and Practice: Financing, Victims, Judges, and Immunities* (2003), 111 at 114–15. This piece was submitted to the seventh session of the Preparatory Commission for the International Criminal Court, February 2001.

<sup>106</sup>*Prosecutor v. Thomas Lubanga Dyilo*, Decision Establishing the Principles and Procedures to Be Applied to Reparations, Trial Chamber, ICC-01/04-01/06-2904, 7 August 2012, at paras. 269–73.

<sup>107</sup>*Ibid.*, at para 273.

<sup>108</sup>See *Lubanga Reparations Order on Appeal*, *supra* note 93, paras.106–14.

<sup>109</sup>R. Rauxloh, ‘Good intentions and bad consequences: The general assistance mandate of the Trust Fund for Victims of the ICC’, (2021) 34 LJIL 203. See also, Dwertmann, *supra* note 91, at 292.

<sup>110</sup>Summary of Interview with Ms. Franziska Eckelmans (available on file with the author); *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber, Transcript, ICC-01/04-01/06-T-368-Red-ENG, 13 October 2016, 39 T4-23.

<sup>111</sup>See *Ruto and Sang*, Judge Eboe-Osuji, Dissenting Opinion, *supra*. note 92. For the TFV Submissions, *Ruto and Sang*, the TFV Request, *supra* note 102, paras. 6–7.

<sup>112</sup>See *Ruto and Sang*, Judge Eboe-Osuji, Dissenting Opinion, *supra* note 92, paras. 30–2.

<sup>113</sup>*Ibid.*

<sup>114</sup>See TFV Regulations, *supra* note 14, regulation 49.

<sup>115</sup>Summary of Interview with Ms. Franziska Eckelmans (available on file with the author); see Cohen, *supra* note 91, at 126–7; see McCarthy, *supra* note 83, at 91, 233–4; see Dwertmann, *supra* note 91, at 291–2.

<sup>116</sup>See Ingadottir, *supra* note 105, at 113.

The first observation relates to the concept of victim's harm. According to the Court's developing jurisprudence, the Court has sought to understand harm as a multi-faceted, cross-dimensional concept, much like how the TFV understands it under the Rome Statute. According to the Trial Chamber in *Ntaganda Reparations Order*, reparations delivered by the Court must redress physical harm, economic harm, psychological or moral harm, intergenerational harm, and loss of life plan.<sup>117</sup> In its latest judgment in *Ongwen Reparations Order*, the Court has undeniably 'incorporated' this understanding of harm as a principle of reparations within the ICC framework.<sup>118</sup> The extent of moral harm assumes an interesting and broad meaning in *Al-Mahdi Reparations Order*. The Trial Chamber therein recognized that the entire Timbuktu community, the State of Mali, and the international community suffered moral harm due to attacks on world heritage sites.<sup>119</sup> The Court drew from the decisions of the Inter-American Court of Human Rights to essentially suggest that a distortion of collective values, represented in that case by cultural objects, is a harm which needs to be addressed by an ideal model of restorative justice.<sup>120</sup> The Court has also recognized loss of opportunities and life plan as another broad segment of harm which has allowed it to particularly address the economic vulnerabilities, lack of education, and social assistance requirements faced by the victims.<sup>121</sup> This form of harm conceptualization becomes particularly relevant in context of certain victim categories like child soldiers, abducted children, victims of forced marriage, forced pregnancies, or other forms of sexual slavery. In much the same way that the TFV has described its assistance activities as producing transformative social changes,<sup>122</sup> the Trial Chamber in *Ntaganda Reparations Order* too has emphasized transformative effects on victims as one of the aims of Court ordered reparations.<sup>123</sup> This shows the Court's practice of embracing a wide concept of harm and, therefore an expanded function of restorative justice.

By opening the possibility of recognizing this, the Court, in turn, has also expanded its authority to order different kinds of programmes within its reparations package. In the Lubanga Draft Implementation Plan, for instance, the TFV noted that many victims of Lubanga's crimes requested educational and professional programmes as part of reparations.<sup>124</sup> The reparations package proposed by the TFV in *Katanga* included: a symbolic compensation of USD 250; educational assistance in the form of payment of school fees for children; an income generating toolkit consisting of one cow with a veterinarian kit and additional services; and housing assistance in the form of monetary compensation.<sup>125</sup> Recently, in *Al-Mahdi* the Court approved the TFV's proposal to establish an Economic Resilience Fund.<sup>126</sup> Although, the operationalization

<sup>117</sup>*Prosecutor v. Bosco Ntaganda*, Reparations Order, Trial Chamber, ICC-01/04-02/06-2659, 8 March 2021, paras. 68–75.

<sup>118</sup>*Prosecutor v. Dominic Ongwen*, Reparations Order, Trial Chamber, ICC-02/04-01/15-2074, 28 February 2024, paras. 167–8.

<sup>119</sup>*Prosecutor v. Ahmad Al Faqi Al Mahdi*, Reparations Order, Trial Chamber, ICC-01/12-01/15-236, 17 August 2017, paras. 86, 90–1.

<sup>120</sup>*Ibid.*, at para. 84, footnote 134.

<sup>121</sup>See *Ntaganda Reparations Order*, *supra* note 117, paras.59, 72; *Prosecutor v. Thomas Lubanga*, Corrected version of the 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable', Trial Chamber, ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017, para. 38; see *Lubanga Reparations Order on Appeal*, *supra* note 93, Annex A, para. 40(d).

<sup>122</sup>See Section 3.1., *supra*.

<sup>123</sup>See *Ntaganda Reparation order*, *supra* note 117, paras.94–5. See also, *Lubanga Reparations Order on Appeal*, *supra* note 93, Annex A, paras. 34, 67.

<sup>124</sup>*Prosecutor v. Thomas Lubanga Dyilo*, Draft Implementation Plan for Collective Reparations to Victims Submitted to the Amended Reparations Order of 3 March 2015, Trial Chamber, ICC-01/04-01/06-3177-Anx A, 3 November 2015, paras.65–6, 69.

<sup>125</sup>*Prosecutor v. Germain Katanga*, Draft Implementation Plan Relevant to Trial Chamber II's Order for Reparations of 24 March 2017, Trial Chamber, ICC-01/04-01/07-3751-Red, paras. 99–103. See also *Prosecutor v. Germain Katanga*, Information Relevant to the Modalities of Implementation of Collective Reparations with Confidential Annex A: Revised Budget, Trial Chamber, ICC-01/04-01/07-3811, 2 October 2018.

<sup>126</sup>*Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision on the Updated Implementation Plan from the Trust Fund for Victims, Trial Chamber, ICC-01/12-01/15-324-Red, 4 March 2019.

of this Fund remains at a planning stage currently, the idea behind this Fund is to bring together the TFV appointed consultants and the victim community of Timbuktu to formulate a plan for structured disbursements of monetary assistance to contribute to the revival of the local economy, including small businesses.<sup>127</sup> These interventions ordered by the Court are similar in both form and substance to the TFV's assistance projects, as detailed in the previous Section. This congruency is also evidenced by the initial draft implementation plan approved by the Trial Chamber in *Ntaganda*. Therein, the Trial Chamber authorized the use of existing assistance programmes for delivery of reparations programmes for a select group of victims in the interim until reparations are finalized.<sup>128</sup>

Intrinsically linked to the definition of harm is also the choice of modality of reparations. In *Katanga Reparations Order*, the Trial Chamber noted that the choice of mode of reparations depends on victims' preferences, scope of damage, loss or injury, the number of victims, and the feasibility of implementing the measures.<sup>129</sup> Cases of mass victimization most often damage multiple aspects of an individual's identity. They alter social structures, authority relations, power dynamics, and perpetuate the direct harm caused by individual acts of criminality. This makes individual reparations alone an insufficient manner for performing reparative function, and the Court has recognized this fact. It has preferred collective reparations as the most appropriate modality of reparations in its reparation proceedings.<sup>130</sup> While the Court has underscored the importance of individual reparations,<sup>131</sup> it has sparingly handed out monetary awards, and only for specific individual harms.<sup>132</sup> Not to mention that number of victims in most cases before the Court would make it impossible to provide individual reparations to every victim. In this regard, it is particularly noteworthy to mention the rationale of *Ongwen Reparations Order* on this point. Therein, the Chamber chose to order collective community-based reparations and instructed the TFV to not have collective reparations with separate individualized components in its plan for the primary reason that the number of victims in this case would make the process of handing out individualized components tedious and significantly time-consuming, based on its past experiences.<sup>133</sup> Additionally, the Court has been cautious of relying heavily on individual reparations for the fear that such awards may create a perception of hierarchy, stigmatization, and further victimization of the victims,<sup>134</sup> thereby contravening the principle of 'do no harm'. If the Court consistently adopts the approach of awarding 'transformative reparations' with an aim of giving long-term structural benefits for the victim community instead of short-term

<sup>127</sup>Summary of Interview with Ms. Franziska Eckelmans (available on file with the author).

<sup>128</sup>*Prosecutor v. Bosco Ntaganda*, Decision on the TFV's Initial Draft Implementation Plan with Focus on Priority Victims, Trial Chamber, ICC-01/04-02/06-2696, 23 July 2021, paras. 18, 24.

<sup>129</sup>*Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, Trial Chamber, ICC-01/04-01/07-3728-tENG, 24 March 2017, para. 266.

<sup>130</sup>See *Al Mahdi Reparations Order*, *supra* note 119, and *Prosecutor v. Al Faqi Al Mahdi*, Judgment on the appeal of the victims against the "Reparations Order", Appeals Chamber, ICC-01/12-01/15-259-Red2, 8 March 2018, paras. 33–43. In *Ntaganda* as well, the Trial Chamber noted that compensation, the most common form of individual reparations, may not be sufficient to redress all kinds of harm. See, *Ntaganda Reparations Order*, *supra* note 117, paras. 84–6. The Trial Chamber in *Katanga*, however, said that collective reparations should be used as a secondary option to redress the harms left unaddressed by individual reparations. See, *Katanga Reparations Order*, *supra* note 129, para. 291. Obviously, this view conflicts with the position that the nature of harm determines the most appropriate method to redress it and has not found favourable treatment in subsequent chambers' rulings.

<sup>131</sup>See *Katanga Reparations Order*, *supra* note 129, paras. 285–6. See also *Ntaganda Reparations Order*, *supra* note 117, para. 194.

<sup>132</sup>The Court has only ordered compensation in *Katanga* and *Al Mahdi* cases. While USD 250 were provided as symbolic compensation for *Katanga* victims, in the *Al Mahdi* the Trial Chamber allowed compensation only for 'those whose livelihoods exclusively depended upon the Protected Buildings'. See, *Katanga Reparations Order*, *supra* note 129, at 118; see *Al Mahdi Reparations Order*, *supra* note 119, para. 83.

<sup>133</sup>See *Ongwen Reparations Order*, *supra* note 118, paras. 577–8.

<sup>134</sup>See *Ntaganda Reparations Order*, *supra* note 117, para. 195; see *Al-Mahdi Reparations Order*, *supra* note 119, para. 140; see *Lubanga Reparations Order on Appeal*, *supra* note 93, Annex A, para. 33. See also, *Katanga Reparations Order*, *supra* note 129, para. 285.

benefits,<sup>135</sup> collective forms of reparation will continue to be the dominant form awarded. This constitutes yet another common characteristic of assistance programmes and reparation programmes. Like reparation programmes, assistance programmes have preferred to redress individual harms primarily through collective measures.

These observations cannot be pushed aside lightly by any meaningful attempt to define the relationship between the assistance mandate and reparations regime of the ICC. The oft repeated distinction between assistance and reparations, that the latter is linked to the criminal responsibility of the convict as compared to the broad nature of assistance, also seems to draw only a thin line between the two. For claiming reparations, the victims must show that ‘but for’ the crimes committed by the convicted individual, they would not have suffered the harm for which they claim reparations.<sup>136</sup> Additionally, the alleged harm must be proven to be closely connected to the acts of the convicted and that such acts are ‘significant enough’ to give rise to liability for such harm.<sup>137</sup> Consequently, acts of the convicted individual need not be solely responsible for giving rise to the alleged harm but must only significantly contribute to its existence and be closely connected. This requirement of causation and nexus is one mechanism for tying the reparations to the crimes found to be committed by the convict. However, as our understanding of harm itself expands, the scope of reparations too expands proportionately, despite an objective and strict application of the causation-nexus test.

Take for instance, the application of this hypothesis to transgenerational harm. Recognition and redressal of this form of harm has been the most significant development to have come out of the corridors of the Court in recent years in context of reparations proceedings. In the words of the Court, this harm denotes the phenomenon wherein a ‘traumatised parent sets in motion an intergenerational cycle of dysfunction, handing down trauma to their child . . . [and thereby] affecting the child’s emotional behaviour, attachment and well-being’.<sup>138</sup> It is significant to note the Court’s observation that transgenerational harm is not limited in its scope to mere psychological trauma.<sup>139</sup> With the passage of time, this harm may degenerate into, for instance, diminished cognitive capacities affecting capacity to study, learn, build, and maintain social relations, or result in introducing unwanted alterations in family structures and a community’s way of life.<sup>140</sup> Thus, following this definition, a large number of individual needs and community problems can be so categorized as emerging from transgenerational harm for which reparations could be claimed from the convict. Moreover, by some scientific arguments, transgenerational harm may even pass onto more than one generation.<sup>141</sup> This would naturally broaden the Court’s view as to what consequences are caused by a criminal act and what sufferings are closely connected to the crimes found to be committed. The fact that the Court in the *Ongwen Reparations* specifically directed the TFV to exercise caution while assessing transgenerational harm and, for now, declined to presume transgenerational harm for any victims<sup>142</sup> also indicates

<sup>135</sup>See *Ntaganda Reparations Order*, *supra* note 117, para. 194; see *Ongwen Reparations Order*, *supra* note 118, para. 613.

<sup>136</sup>See *Ntaganda Reparations Order*, *supra* note 117, para. 132; see *Al-Mahdi Reparations Order*, *supra* note 119, para. 44; see *Katanga Reparations Order*, *supra* note 129, para. 162; see *Lubanga Reparations Order on Appeal*, *supra* note 93, Annex A, para. 59.

<sup>137</sup>*Prosecutor v. Germain Katanga*, Decision on the Matter of the Transgenerational Harm Alleged by Some Applicants for Reparations Remanded by the Appeals Chamber in its Judgment of 8 March 2018, Trial Chamber, ICC-01/04-01/07-3804, 19 July 2018, para. 16.

<sup>138</sup>See *Ongwen Reparations Order*, *supra* note 118, para. 168.

<sup>139</sup>*Prosecutor v. Bosco Ntaganda*, Addendum to the Reparations Order of 8 March 2021, Trial Chamber, ICC-01/04-02/06-2858, 14 July 2023, paras. 184, 188.

<sup>140</sup>*Prosecutor v. Bosco Ntaganda*, Submissions by the Common Legal Representative of the Victims of the Attacks pursuant to the 25 October 2022 Order and 25 November 2022 Decision, Trial Chamber, ICC-01/04-02/06-2820, 30 January 2023, para. 29.

<sup>141</sup>*Ibid.*, para. 12.

<sup>142</sup>See *Ongwen Reparations Order*, *supra* note 118, paras. 195, 197. See also, *Ntaganda Addendum to Reparations Order*, *supra* note 139, para.193.

an awareness in the Court that recognition of transgenerational harm could stretch the ambit of foreseeable consequences of a convict's criminal acts to unknown bounds.

The recognition and definition of such harms in these terms indicates that the scope, nature, and kinds of reparations which can be ordered and implemented will expand, even to the point of mirroring measures that may have been earlier formulated within assistance programmes.

Nonetheless, this analysis must be stopped short of implying that all distinctions between reparations and assistance regimes are fading; critical differences remain. For example, the expressive function of reparations. Reparations are indeed a symbol of justice served and have an element of acknowledgement of the wrong done to an individual and a community, so recognized in the eyes of law. Assistance programmes lack that. Reparations are also a matter of legal right. Without denying such distinctions, this analysis highlights the scope of convergence between assistance and reparations regime. From an operational perspective, it is important to acknowledge this overlap for to ignore it would be to ignore possible externalities which could be introduced into the TFV's work, as explained later. Some of the challenges which the TFV faces today, as highlighted earlier, demand strategically defining its reparation and assistance programmes and to build a strong understanding of its reparation and assistance goals. This would again be possible only through a thorough assessment of differences, and the overlaps, between reparations and assistance.

#### **4.2 Meeting of minds or signs of upcoming conflicts: Navigating the overlap paradigm**

Noting the similarities of its programmes and delivery networks, the TFV can utilize assistance structures for delivering reparations, as is currently being done for *Ntaganda* reparations. Obviously, this would contribute to the cost efficiency of its mandates and delivery time. Additionally, the overlap in the regimes allows the possibility for the TFV to strategically shape the reparation programmes to fulfil – or contribute to – the goals of assistance programmes. For instance, where reparations are implemented years after the operation of assistance programmes in the situation country, they may be delivered in collaboration with the local authorities with a focus on building capacity and undertaking an eventual transition from the TFV operated reparation and assistance programmes to government administered programmes.

At the same time this overlap creates potential threats to assistance work. This became visible in the *Ntaganda* order approving the initial draft implementation plan, wherein the Trial Chamber cautioned the TFV on the need to effectively communicate the distinction between assistance and reparation to avoid diluting the expressive function of reparations ordered by the Chamber.<sup>143</sup> Reparation involves a judicial recognition of the harms suffered by reparations-entitled victims, unlike what assistance involves. For those programmes which involved delivery of medical services through referrals, the Chamber modified the programmes for reparations-entitled victims.<sup>144</sup> It ordered the TFV to provide treatment to reparation-entitled victims 'within the context of the assistance programmes, as opposed to simply referrals to health facilities'.<sup>145</sup> Perhaps the need to express the priority between reparation beneficiaries and assistance beneficiaries led the Chamber to order this modification. With respect to the assessment of eligibility of victims for these programmes, the Chamber further ordered the TFV to not delegate this function to implementing partners and retain strict control over application of the judicially determined criteria for victim eligibility.<sup>146</sup> These observations by the Chamber suggest that the TFV would be required to carve out a separate sphere of operations within the assistance programmes if it were to use assistance programmes for delivering reparations.

<sup>143</sup>See *Ntaganda IDIP Order*, *supra* note 128, para. 26.

<sup>144</sup>*Ibid.*, at paras. 27–8.

<sup>145</sup>*Ibid.*, at para. 27.

<sup>146</sup>*Ibid.*, at paras. 36–7.

In addition to programme modifications, the conflict between the reparations and assistance was starkly presented by the Chamber when it rejected one of the reparation programmes proposed by the TFV. The TFV conceived a reparation programme and an assistance programme for child soldiers and victims of SGBV crimes while only proposing an assistance programme for other priority victims. Interestingly, the Chamber considered this approach to be discriminatory.<sup>147</sup> According to the Chamber, while the former group of victims would receive comprehensive redressal of their harms due to their eligibility for the reparations programme, the latter would receive only assistance for their most urgent needs.<sup>148</sup> Without rigorous assessment of the actual projects conceptualized under assistance and reparation, it seems artificial to draw a distinction between them based on comprehensive versus urgent needs dichotomy.

The entire gamut of effects which reparations regime could have on assistance regime is not yet clear. Early indications lead to the conclusion that overlapping status of these regimes can translate into a synergetic relationship or a conflicting one depending on the behaviour of the relevant actors involved in their operation. What remains a conclusive matter, and a source of serious ineffectiveness, is that the TFV lacks instruments to exert influence over this relationship. The TFV has not attempted to analyze the overlaps between assistance and reparation programmes, let alone define their relationship. Consequently, the operational and strategic linkages between the two mandates have not been formulated. This also undermines the TFV's overall narrative setting authority which is necessary to align its experience on the ground with the Court's understanding of reparations and assistance. Furthermore, the *Lubanga* Trial Chamber observed that the TFV does not have a right to appeal Court's orders at reparation proceedings.<sup>149</sup> Under Article 82 of the Statute, this right was available only to *parties to the proceedings*, generally referring to the Prosecution and the Defence.<sup>150</sup> The TFV may only submit its observations either when the Court calls upon it or when the Court grants an authorization to that effect. This further restricts the TFV's avenues to influence and control the results produced by the Court's reparation systems. Thus, the only avenues available for the TFV to manage the interplay with the Court are the observations and draft implementation plans submitted before the Court.

This highlights the need for the TFV to play a proactive role in shaping the reparation and assistance system. As a pre-requisite, however, the TFV must formulate a clear understanding of the synergies and conflicts between the assistance and reparations regimes; the absence of such a formulation risks underutilising and undervaluing the limited avenues available to the TFV.

## 5. Charting the future course of action

Through a close evaluation of information on the TFV assistance programmes and the Court's jurisprudence, this paper has attempted to reveal some critical gaps in the TFV's understanding of its assistance mandate. It raises questions about the TFV's and Court's understanding of the nature and purpose of the assistance mandate; about the TFV's ability to influence the Court, as a stakeholder, on the TFV's conception of assistance; about the TFV's clarity in choosing situation countries for assistance activities as also in formulating its programmes; about the TFV's inability to define its exit goals and overall success parameters. This paper provides more questions than it does answers. Perhaps this is deliberate. It is tough in the absence of an elaborate field study of assistance programmes and with limited public information about them to provide concrete answers to these issues. To argue that the TFV should prefer large scale community-based programmes focusing on social and economic assistance over physical assistance programmes, or

<sup>147</sup>*Ibid.*, at para. 19.

<sup>148</sup>*Ibid.*, at para. 20.

<sup>149</sup>*Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Request of the Trust Fund for Victims for Leave to Appeal against the Order of 9 February 2016, Trial Chamber, ICC-01/04-01/06-3202-tENG, 4 March 2016, paras.16–17.

<sup>150</sup>*Ibid.*, at paras. 12–14.

that the TFV should prioritize assistance in countries having limited focus of the OTP, is not desirable for another reason. Most of these issues are matter of policy dealing with the complicated situations of post-conflict recovery. Such matters are immune to a ‘one size fits all’ solution and demand flexibility and contextual understanding of the society in which assistance measures are being delivered.

It would also be banal to merely raise factors – like Prosecutor trial strategy, the TFV’s funder’s priorities, the gravity and severity of the conflict in question, – that the TFV should consider to make effective decisions. No doubt these factors are relevant, and one can reasonably assume that the TFV does take such factors in account while taking its decisions even now, however these factors do not provide a direction on moving forward on the critical gaps highlighted. Decision makers may be pulled in many different, and often contradictory, directions, but do not bear sole responsibility for improving the effectiveness of the TFV’s assistance operations.

For this reason, in this section this paper instead seeks to discuss the *approach* with which the TFV must deal with these critical gaps, something that is generic and can be universally adopted by the TFV in seeking a response to the causes of its effectiveness deficit.

### **5.1. Setting strategic and paradoxical goals**

The TFV’s future effectiveness relies on establishing more concrete goals, and this is the most challenging task that the TFV faces. Each conflict requires a tailored response around varying social and cultural ideas of ‘violation’, ‘harm’, and ‘assistance’. However, concrete goals need not be seen as static, pre-determined targets or a simple reduction of broad goals, like peace and reconciliation, into statistics. What is meant by concrete goals is a delineation of a definite strategy on achieving the broad goals. Such strategies, for instance the achievement of economic security or gender mainstreaming, must remain rooted in social, cultural, economic, political, and other realities of situation countries where projects are being implemented. To this end, the TFV should approach its programme structuring in an inter-disciplinary manner. It may draw from sociological studies to understand the social causes of the specific conflicts in hand. Economic strengths of the geography and the specific skills of victim groups may be studied to formulate proper economic models and required interventions. Policy deficiencies contributing to victims’ harm may be identified, and appropriate collaborations with governments may be sought or supported at a policy level.

Additionally, literature supports the proposition that effective organizations reflect a degree of paradox in their goals. Cameron notes that more effective organizations depict stable leaderships while simultaneously and continuously promoting new leaders; support innovation and creativity, while at the same time demanding quick execution of tasks; encourage a high degree of specialization among employees, while also valuing employees with highly generalized skill sets, amongst other competing values.<sup>151</sup> According to her, paradox is not contradiction and therefore need not be resolved as an either-or dilemma.<sup>152</sup> The TFV too may benefit from this approach. In fact, in some ways the TFV’s assistance activities have come to reflect this trait. As noted above, while on one hand the TFV’s activities are characterized with a broad understanding of ‘harm’, on the other, the TFV has remained mindful of its feasibility challenges. Prioritizing the maximization of project impact may reflect a combination of these two paradoxical traits. Similarly, the TFV should consider effective assistance as providing a quick response to current vulnerabilities of victims, but also as a response to the causes of conflict. Intervening programmes should keep individuals and communities at the centre of its definition of restorative justice, while also considering social, economic, cultural, political, and legal structures as areas of assistance leading to indirect yet sustained impact on victims. Reduced demand for assistance programmes

<sup>151</sup>K. Cameron, ‘Effectiveness as Paradox: Consensus and Conflict in Conceptions of Organizational Effectiveness’, (1986) 32(5) *Management Science* 539, 544–50.

<sup>152</sup>*Ibid.*, at 545, 547–49.

may be included within success indicators as much as factors suggesting increased demand for these programmes. The process of setting goals may also be a paradoxical exercise. Strategies and goals may be determined at the Board level based on the needs assessment of the victims, while on the other hand goals may need to be reverse engineered based on the verifiability of success indicators on the ground, hence resulting in a less centralised and more flexible process.

### **5.2. Transparency as a discourse shaping tool**

Much of the TFV's decision making exercise in assistance mandate remains shrouded behind the ominous word 'discretion'. Neither the process of arriving at a decision is entirely clear, nor are the standards applicable to the process available for analysis. The oft repeated justification provided for the TFV's decision on selecting locations and structures of programmes refers to the internal assessment of harms and needs of victims in situation countries. Even the criteria of these assessments, as well as their findings, are not publicly available; as of now, the TFV itself lacks a consistent policy on this internal assessment.<sup>153</sup> This constitutes one of the many areas of decision making which are not public. Some other examples include the TFV's methods of project performance evaluation, engagement with governments and civil society, and cooperation with inter-governmental organizations and scholars. Setting and communicating these standards is important. First, it ensures consistency and coherency within the organization. As the TFV grows older and its work history denser, a consistent pattern of decision making would contribute to an institutional legacy and continuous improvement in understanding its own mandate, even as Board Members and Secretariat staff change. Additionally, the exercise of setting standards provokes a normative discussion on what should be the purpose of the TFV's activities and how should they relate to other Rome Statute structures. Such discussions would help resolve apparent conflicts in operational and strategic interests identified by the organization.

Second, communication of these standards seems to be the TFV's strongest tool for shaping the understanding of its assistance work amongst stakeholders. Opinions which question the reparative value of the TFV's assistance programmes, or those which imply a hierarchy among reparations and assistance with regards to their restorative value, cannot be effectively countered without a clear display of the TFV's activities and approach. The TFV's most significant communication technique has been its annual programme reports. These reports document in some detail the activities conducted by the TFV and its implementing partners. Of late, even this form of communication has undergone a negative change. Recent reports have seen a reduction in the reporting of substantial programmatic information and statistics, as was the case until 2016–17, and the later reports seem to have been prepared with the primary intent of communicating with the TFV's donor community. The TFV also frequently conducts visits and seminars in situation countries with delegations from state parties, but the reports from these visits, seminars, and discussions are again not made public. A more effective future for the TFV demands that the organization formulate policies for different aspects of its functions and be more transparent about its operations.

## **6. Conclusion**

The Trust Fund for Victims of the ICC is a unique experiment in the field of international criminal justice. However, much like the reparations regime at large, the principles of the TFV's assistance mandate remain theoretically ill-defined under the Rome Statute, its rules of procedure and evidence, and the TFV Regulations. Thus, the development of such principles, institutional practice and simultaneous critical evaluation of those practices becomes key.

Since beginning its projects in 2008, the TFV's projects have widened the nature and scope of their interventions in situation countries. Beyond medical referrals and psychological counselling, the

<sup>153</sup>See, Summary of Interview with Ms. Franziska Eckelmanns (available on file with the author).

TFV's activities now include financing village savings groups, supporting entrepreneurship through start-up kits, using arts, music, poetry, and drama for communicating reconciliatory ideas, providing insurance schemes, and easing the access to education for victims of sexual and gender-based violence by providing day care facilities for newborns. Efforts have also been made to expand the interactions with local stakeholders in the delivery process. The TFV has repeatedly pointed out its intent to strengthen the position of civil society and aid workers in situation countries to ensure sustainability of its assistance programmes. Now, the TFV has also begun to see value in complementing government's efforts in providing reparations to victim groups. In Cote D'Ivoire, for instance, the selection of locations for the TFV's projects was based on documentation of human rights violations by National Commission of Enquiry and the Dialogue and Truth and Reparation Commission. These new developments, however, continue to raise questions about the TFV's strategic approach in achieving its goals. The TFV has not established a clear policy on evaluating and assessing the success of its programmes. Levels of underdevelopment in the northern Uganda and the continuous low levels of physical security, economic security, and health security in regions of the DRC where the TFV has operated for more than a decade places the burden on the TFV to prove that its programmes do not suffer from strategic failures. Due to a general lack of strategy, the TFV has also been unable to formulate exit plans from situation countries. With the decision to expand its operations to multiple new situation countries simultaneously, the TFV's limited financial capacity would compel it to close existing programmes. Without a priority of goals, decisions may prove to be arbitrary and wrong, especially with respect to selecting situation countries in which to establish operations.

These gaping holes in the TFV's approach indicate a goal ambiguity problem within the organization. Having set broad goals like peace, gender mainstreaming, and economic security, its inability to transform these goals into strategic action policies have hampered an effective framework of assistance.

There is another area of ineffectiveness within the TFV's assistance framework, that being its relationship with the Court's reparations mandate. Emerging jurisprudence from the Court evinces a growing congruity between reparations and assistance, both at a normative and an operational level. This provides opportunities for the TFV to build a strategic and synergetic bridge between the two mandates. At the same time, this similarity presents a cause for concern. If left undefined, it may lead to conflicting understandings of reparations and assistance among the Court and the TFV. A moment of conflict between the Court and the TFV on this front was visible in the *Ntaganda* Trial Chamber's order approving the initial draft implementation plan. The Court therein allowed the TFV to use existing assistance programmes for delivering reparations to victims of Ntaganda crimes but also attempted to draw a clear distinction between the purposes of reparations and assistance. The Court ultimately rejected one of the proposals all together and imposed certain conditions on the other.

To chart a future towards an effective organization building, the TFV must begin with approaching its goals in a strategic fashion which would include following an inter-disciplinary methodology to conflict related responses and setting paradoxical goals with an aim to strike a balance. Furthermore, the TFV must use communication and transparency regarding its internal decision-making activities as a discourse shaping tool. This would entail framing policies on major areas of operation and moving away from a purely discretionary, managerial approach to decision making.

With all said and done, one must find a degree of truth in the statement that 'the TFV is still a fairly young institution'<sup>154</sup> and must continue to grow.

<sup>154</sup>See, Summary of Interview with Ms. Franziska Eckelmans (available on file with the author).