

THE INTERNATIONAL CRIMINAL COURT, ARTICLE 79, AND TRANSITIONAL JUSTICE: THE CASE FOR AN INDEPENDENT TRUST FUND FOR VICTIMS

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I. INTRODUCTION

In a groundbreaking development in the design of institutions of international criminal justice, the Rome Statute of the International Criminal Court (“Rome Statute” or “the Statute”) provided in 1998 for the creation of a fund to benefit victims of crimes within the jurisdiction of the Court – the aptly named Trust Fund for Victims (“TFV,” “the Trust Fund,” or “the Fund”).¹ Established in 2002,² the TFV was largely ignored in the early years of the International Criminal Court (“ICC” or “the Court”), its relative anonymity preserved as the Assembly of States Parties (“ASP”) took time to provide it with the labor force³ and regulatory framework⁴ necessary for action. Indeed, it was not until 2008 that the TFV drew the attention of the judges in The Hague. In January of that year the Fund for the first time asserted its prerogative to act on its own initiative to benefit victims.⁵ At the time, the ICC was far from

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¹ The Rome Statute of the International Criminal Court art. 79, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter *The Rome Statute*].

² Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, ASP Res. ICC-ASP/1/RES/6 (Sept. 9, 2002). [hereinafter *Establishment of a fund for the benefit of victims*].

³ The part-time Board of Directors was elected in 2006, with the Executive Director finally appointed in 2007.

⁴ Regulations of the Trust Fund for Victims, ASP Res. ICC-ASP/4/Res/3 (Dec. 3, 2005).

⁵ ICC, Pre-Trial Chamber I, Case No. ICC-01/04-439, Notification of the Board of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims

ready to exercise its authority under Article 75 to order the payment of reparations⁶ – the Court’s primary judicial mechanism for the assistance of victims. Moreover, the TFV’s proposed projects would assist victims who had suffered crimes perpetrated by unidentified individuals whom the Prosecutor of the ICC had yet to charge and who were – in all likelihood – not even under investigation by his Office.⁷ It was an aggressive first step; after a decade of relative silence since the adoption of the Rome Statute, the Trust Fund for Victims was not shy in announcing itself to the world.

Questions were immediately asked as to whether the TFV had exceeded its mandate, most vociferously by the Office of Public Counsel for the Defence (“OPCD”).⁸ Pre-Trial Chamber I, unmoved by the OPCD’s objections, allowed the Fund to proceed with the proposed action.⁹ However, in so doing the Pre-Trial Chamber also held that the Fund is bound by an obligation to contribute to Court-ordered Article 75 reparations whenever the funds available from the convicted person prove insufficient to pay the reparation deemed appropriate by the Court.¹⁰

This Paper argues that the TFV’s independent initiation of the kind of projects in which it has engaged was (and is) well within the bounds of its legal authority.¹¹ Moreover, not only is such independent action desirable, but, contra the Pre-Trial Chamber, it should not be

with Confidential Annex (Jan. 24, 2008) [hereinafter Notification of the Board of the Trust Fund for Victims Jan. 24, 2008].

⁶ Article 75 reparations are to be provided only upon the conviction of an individual before the Court. See *infra* notes 42, 99-103, 224 and accompanying text. At the time of the TFV’s Notification to the Court, the first trial before the ICC had yet to start and the Court had confirmed charges against just one individual - Thomas Lubanga Dyilo. Prosecutor v. Lubanga, Decision on the Confirmation of Charges, Case No. ICC-01/04-01/06-803 (Jan. 29, 2007). The trial of Thomas Lubanga would not commence until January 26, 2009. <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/Related+Cases/ICC+0104+0106/Democratic+Republic+of+the+Congo.htm> (last visited Feb. 5, 2010). At the time of writing, more than two years on from the TFV’s Notification, the *Lubanga* case is still some way from completion.

⁷ Notification of the Board of the Trust Fund for Victims Jan. 24, 2008, *supra* note 5, paras. 28-29.

⁸ ICC, Pre-Trial Chamber I, Case No. ICC-01/04-458, OPCD observations on the Notification by the Board of Directors of the Trust Fund for Victims (Feb. 20, 2008). For a brief description of the OPCD, see *infra* note 54 [hereinafter OPCD observations on the Notification by the Board of Directors].

⁹ ICC, Pre-Trial Chamber I, Case No. ICC-01/04-492, Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund (Apr. 11, 2008) [hereinafter Decision on the Notification of the Board Apr. 11, 2008].

¹⁰ *Id.* at 7.

¹¹ See discussion *infra* Part III.

limited by the prospect of future Court-ordered Article 75 reparations. Such Court-ordered reparations should be funded only by the wealth of the criminal against whom those reparations are ordered and by other Court-generated resources, such as fines and forfeitures. Neither is the TFV legally obliged to use its “other resources” to supplement Court-generated funds in order to meet the Court’s reparative assessment,¹² nor would such use of the TFV’s resources be optimal.¹³ Instead, the TFV should take full advantage of its legal freedom by engaging in reparative projects that seek to benefit and acknowledge those victims that are unlikely to be reached by the Court’s Article 75 reparations process.¹⁴ This freedom, of course, is not limitless. The governing legal texts require that the TFV restrict its projects to those benefiting victims of crimes that fall within the ICC’s jurisdiction, and as a matter of policy the Fund should direct its activities to situations¹⁵ in which the prosecutor has issued indictments.¹⁶ However, within those confines, the Fund enjoys great discretion, and it is in the interest of transitional justice that it should exercise that discretion without restraints of the kind currently imposed by the Court.

In presenting this argument, the Paper proceeds in five Parts. Part I tracks the development of the right to reparation under international law, paying particular attention to the advances made by the ICC in this area and in the field of victims’ rights more generally. Part II outlines the recent pre-trial debate over the role of the TFV and briefly recaps the Pre-Trial Chamber’s holding and the subsequent actions of the Fund. Part III addresses the three critical legal issues pertaining to the debate over the status and role of the Trust Fund, namely: (1) the locus of legal authority over the Fund, (2) whether the TFV is under obligation to maintain a reserve sufficient to supplement the Court’s reparations orders, and (3) whether the TFV is a judicial body and how its independent actions affect the Court. On each of these issues, this Paper asserts the independence of the TFV from the Court. Part IV then

¹² *Id.*

¹³ See discussion *infra* Part IV.

¹⁴ *Id.*

¹⁵ Under the ICC system of criminal investigation and prosecution, the Prosecutor opens investigations into allegedly crime-laden “situations” within which he or she may then indict any number of individuals for criminal prosecution. At the time of writing there were five open situations before the ICC, namely the situations in Uganda, the Democratic Republic of the Congo, Darfur (in Sudan), Kenya, and the Central African Republic. ICC, Situations and Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Aug. 5, 2010).

¹⁶ See discussion *infra* Part V.

presents the policy argument for an independent Trust Fund. This relies on three factors: the imperative of transitional justice, the requirements of modern fundraising, and the distribution of institutional competence. Finally, Part V defines the proper limits of the TFV's independence and explains why it makes sense for such a body to be institutionally attached to the Court.

I. BACKGROUND ON THE DEVELOPMENT OF THE RIGHT TO REPARATION UNDER INTERNATIONAL LAW

The recent development of victims' rights in international criminal law has deep juridical roots. In 1928, the Permanent Court of International Justice ("PCIJ") held in *Factory at Chorzów* that "[i]t is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form."¹⁷ In that seminal ruling the Court adjudicated a claim brought by Germany against Poland.¹⁸ However, just as international law has evolved to regulate the acts of individual persons,¹⁹ the fundamental principle expressed in *Factory at Chorzów* has expanded to cover individual victims of serious crimes and gross human rights violations. Such victims now have a widely codified and globally recognized right to reparation under international law.²⁰

¹⁷ *Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 9, at 21.

¹⁸ Germany claimed and won damages on behalf of two German companies – Oberschlesische Stickstoffwerke A.G. and Bayerische Stickstoffwerke A.G. – after Poland had liquidated those companies' property rights in violation of its obligations to Germany under the German-Polish Convention concluded at Geneva on May 15th, 1922. *Id.*

¹⁹ This evolution is clear in the area of international criminal law, which originated in earnest with the Nuremberg and Tokyo Tribunals. See Charter of the International Military Tribunal art. 8, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East 1946, T.I.A.S. No. 1589; G.A. Res. 95(1), U.N. Doc. A/RES/95(1) (Dec. 11, 1946). Nuremberg and Tokyo were preceded by failed efforts at international criminal prosecutions following World War I in Leipzig and Constantinople. For a detailed analysis of these early efforts, see GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 58-146 (2000).

²⁰ Universal Declaration of Human Rights (1948) art. 8; International Covenant on Civil and Political Rights (1966) art. 2(3); International Convention on the Elimination of All Forms of Racial Discrimination (1965) art. 6; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) art. 14(1); Convention on the Rights of the Child (1989) art. 39; African Charter on Human and Peoples' Rights (1981) art. 7; American Convention on Human Rights (1969) arts. 25, 63(1); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) arts. 5(5), 13; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, U.N. G.A. Res. 40/34, U.N. Doc. A/40/53

Moreover, reparation in the aftermath of mass atrocity has increasingly been considered of particular importance as a matter of policy. As Judge Claude Jorda²¹ and Jerome de Hemptinne²² explain, “the making of legal reparations for those who have suffered harm constitutes an essential criterion for the restoration of social harmony between communities which have been at war with each other and a *sine qua non* for the establishment of a deep-rooted and lasting peace.”²³ David Donat-Cattin adds, “[t]he impact of victimisation of entire populations . . . cannot be forgotten or underestimated. International justice must provide redress for these victims in the name of securing peace, drawing a line between the present and the past and facilitating the healing and forward movement of society.”²⁴

Nonetheless, despite widespread acknowledgment of these imperatives of both law and policy,²⁵ the statutes of the international tribunals instituted in the 1990s to deal with war crimes and crimes

(Nov. 29, 1985), at 214; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. G.A. Res. 60/147, U.N. Doc A/60/147 (Dec. 16, 2005) (also adopted by the Office of the High Commissioner for Human Rights, Hum. Rts. Res. 2005/35, (April 19, 2005)); David Donat-Cattin, *Article 75: Reparations to Victims*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1399, 1400 (Otto Triffterer ed., 2d ed. 2008) (“Above and beyond all normative standards . . . the right to reparations is an essential part of the inalienable right to an effective remedy . . .”) [hereinafter Donat-Cattin, *Article 75*]; DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 465 (2d ed. 2005) (arguing that there is a customary international law right to reparation for wrongdoing); *but see* Christian Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 TUL. J. INT’L & COMP. L. 157 (2002) (arguing that there is not a customary international law right to reparations).

²¹ Former President of the International Criminal Tribunal for the former Yugoslavia (ICTY) and former judge of the International Criminal Court (ICC).

²² Former legal officer for both the ICTY and the ICC.

²³ Claude Jorda & Jerome de Hemptinne, *The Status and Role of the Victim*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1387, 1398 (Antonio Cassese, Paola Gaeta, & John R.W.D. Jones, eds., 2002).

²⁴ David Donat-Cattin, *Article 68: Protection of Victims and Witnesses and Their Participation in the Proceedings*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1275, 1279 (Otto Triffterer ed., 2d ed. 2008) [hereinafter Donat-Cattin, *Article 68*]; .

²⁵ See sources cited at notes 20, 23-24 and accompanying text; THE HANDBOOK OF REPARATIONS 701-995 (Pablo de Greiff ed., 2006); ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES ix (2000) (noting the “appearance of restitution cases all over the world” in the 1990s and positing the dawn of a “new international morality.”). As early as 1960, Stephen Schafer noted that, in domestic U.S. criminology, “[m]ost modern criminological literature urges that a greater part be allotted to restitution in the operation of the criminal law. If the state sets a norm of conduct, it should, besides punishing breaches of this norm, see that where it is transgressed, any injury caused is repaired.”). STEPHEN SCHAFER, RESTITUTION TO VICTIMS OF CRIME 123 (1960).

against humanity in the former Yugoslavia and Rwanda (the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”), respectively) are silent on the issue of reparations.²⁶ Indeed, the Tribunals have largely ignored victims altogether, except insofar as they can provide valuable witness testimony.²⁷

Although both Judge Jorda and Judge Navanethem Pillay “expressed the need to develop appropriate mechanisms for reparations” during their tenures as President of the ICTY and President of the ICTR respectively, neither desired a mandate to process or appraise such awards, as there was a real concern that engaging in that endeavor would divert the Tribunals from achieving their primary criminal justice objectives.²⁸ Instead, victims have been left to seek remedy in domestic legal fora or, where available, in administrative bodies set up as part of peace agreements.²⁹ Such alternatives are rather perverse, however, since the very need for international criminal tribunals arose because of the lack of will or capacity to address at the domestic level the atrocities that had been perpetrated against the civilian populations. Victims in Rwanda and the Balkans could be forgiven for dismissing the “right to reparation” as an abstract myth. Indeed, with their participation in the criminal process at these two tribunals reduced to performing as instruments of the prosecution,³⁰ victims – particularly in Rwanda – have generally felt detached from and unaffected by the activities of the Court.³¹ In the eyes of some observers, this has considerably undermined the ICTR’s capacity to contribute to reconciliation and a lasting peace.³²

²⁶ Statute of the International Criminal Tribunal for the former Yugoslavia, May 25, 1993, 32 I.L.M. 1192; Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598.

²⁷ Donat-Cattin, *Article 68*, *supra* note 24, at 1277; Jorda & de Hemptinne, *supra* note 23, at 1398.

²⁸ Carla Ferstman, *The Reparation Regime of the International Criminal Court: Practical Considerations*, 15 LEIDEN J. INT’L L. 667, 667, 672-73 (2002).

²⁹ Jorda & de Hemptinne, *supra* note 23, at 1398.

³⁰ Emily Haslam, *Victim Participation at the International Criminal Court: A Triumph of Hope Over Experience*, in THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 315, 325 (Dominic McGoldrick et al. eds., 2004) (noting the view among Rome Statute drafters that under the ICTY and ICTR systems “international criminal law had hitherto objectified victims” by treating them as tools of the prosecution).

³¹ ELIZABETH NEUFFER, THE KEY TO MY NEIGHBOR’S HOUSE: SEEKING JUSTICE IN BOSNIA AND RWANDA 367 (2001) (Rwanda’s victims “had never expected justice to be so confusing, so abstract, and so remote. It wasn’t just that they had lost faith in the tribunal; it was that, for them, the war crimes court had lost its relevance.”); ALISON DES FORGES, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 746, 1277 (1999) (“Rwandans are accustomed to presenting their own complaints to persons in authority . . . Tribunal procedure obliges them to leave the process

It was therefore with some satisfaction that, after advocating strongly for improvement in this area,³³ transitional justice and victims' rights non-governmental organizations ("NGOs") acclaimed the advances made in the Rome Statute, which provided the fledgling ICC with an unprecedented set of tools with which to incorporate victims into the international criminal justice project, including "the first 'reparation regime' ever realised in the history of international criminal jurisdiction."³⁴ The International Center for Transitional Justice ("ICTJ") commends the Statute as "affirm[ing] the importance and centrality of victims in international justice efforts."³⁵ REDRESS³⁶ describes the ICC's mandate as "restorative as well as retributive; it engages victims and affected communities directly and integrally within the process, and seeks to provide victims with a remedy and reparation."³⁷

There are at least four dimensions along which the Rome Statute advances the interests of victims³⁸ from the status they were granted by the ICC's predecessor international criminal tribunals. First, the Statute, through a number of provisions, codifies a wide range of rights of victim participation in the criminal proceedings.³⁹ These rights have been

of accusation and presenting evidence in the hands of professional legal staff with whom most of them have no contact.").

³² See, e.g., NEUFFER, *supra* note 31, at 340, 375-77 ("In fragile, postconflict societies, the perception of justice is often as important as its delivery. Justice must be done, but it must be seen to be done fairly. Neither the Rwanda Tribunal's trials nor those held by the Rwandan government met that test in the eyes of many Rwandans. Increasingly, both Hutu and Tutsi saw themselves as victims of justice, not recipients of it. Collective blame, rather than individual responsibility, still reigned.").

³³ See Amnesty Int'l, *The International Criminal Court: Making the Right Choices*, AI Index IOR 40/11/97, June 26, 1997 (advancing a strong defense of victims' right to full restitution (and even suggesting the institution of a claims commission if the ICC cannot do it itself)).

³⁴ Donat-Cattin, *Article 75*, *supra* note 20, at 1401.

³⁵ Marieke Wierda & Pablo de Greiff, *Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims*, International Center for Transitional Justice (2004).

³⁶ REDRESS is a human rights organization that helps torture survivors obtain justice and reparation. REDRESS, <http://www.redress.org> (last visited Dec. 20, 2009).

³⁷ REDRESS, *Making the ICC Relevant to Affected Communities: Report Prepared for the 6th Assembly of States Parties*, Dec. 2007, http://www.redress.org/publications/REDRESS%20Making_the_ICC_relevant_3_Dec_07.pdf.

³⁸ Defined by Rule 85 as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court." ICC, *The Rules of Procedure and Evidence*, R. 85(a), Doc. ICC-ASP/1/3 (Sept. 2002) [hereinafter *The Rules of Procedure and Evidence*].

³⁹ See The Rome Statute, *supra* note 1, arts. 15(3) ("Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence."); 43(6) ("The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court,

interpreted expansively in the Court's early jurisprudence.⁴⁰ Second, the Statute includes several provisions targeted at ensuring and protecting the well-being of victims during their participation.⁴¹ Third, Article 75 of the Statute furnishes victims with the right to petition for and obtain reparation from the perpetrator(s) of the crimes they suffered.⁴² Fourth, Article 79 of the Statute provides for the creation of the TFV.⁴³

and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.”); 68 (“The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. . . . Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”); 69(3) (“The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”). *See also The Rules of Procedure and Evidence*, supra note 38, R. 87, 88, 89, 90, 91, 92, 93; ICC, *Regulations of the Court*, reg. 50, Doc. ICC-BD/01-01-04 (May 2004) [hereinafter *Regulations of the Court*]. These provisions have been praised as a “major structural achievement,” Carsten Stahn et al., *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT’L CRIM. JUST. 219, 219 (2006), and “a significant step forward,” Adrian Di Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?*, 2 J. INT’L L. & INT’L REL. 25, 26 (2006).

⁴⁰ *See, e.g.*, Prosecutor v. Lubanga, Trial Chamber I, Case No. ICC-01/04-01/06, Decision on Victims’ Participation, para. 103 (Jan. 18, 2008) (granting the victims the capacity to apply to proffer evidence before the Court); Prosecutor v. Katanga, Pre-Trial Chamber I, Case No. ICC-01/04-01/07, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, paras. 128-142 (May 13, 2008) (granting non-anonymous victims an enhanced set of rights over anonymous victims, including the right to access confidential Registry materials and to attend nonpublic hearings; the right to make submissions on the admissibility and probative value of evidence presented by the Parties; and the right to submit oral and written motions); Prosecutor v. Lubanga, Pre-Trial Chamber I, Case No. ICC-01/04-01/06, Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing, 6-7 (Sept. 22, 2006) (granting victims the right to receive notifications of public filings, attend public status conferences, make opening and closing statements at the confirmation hearing, and request a leave to intervene).

⁴¹ The Rome Statute, supra note 1, arts. 43(6) (“The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.”); 68 (1) (“The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.”); 68(2) (“the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.”).

⁴² *Id.* art. 75(2) (“The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and

Though fundamentally distinct, the third and fourth dimensions are intertwined in two respects. Court orders for reparations from convicted criminals pursuant to Article 75 can be executed by the Trust Fund when the Court deems it the optimal mechanism through which to achieve the reparative goal.⁴⁴ Furthermore, the use of the TFFV's "other resources" raised via voluntary contributions for the "benefit of victims" can be characterized as assisting in the reparative effort, even though they are never strictly defined as "reparations" in the Court's legal texts.⁴⁵ The analysis that follows therefore considers the Article 75 regime to the extent that it is relevant to understanding the role and authority of the TFFV under Article 79.

II. THE RECENT DEBATE

On January 24, 2008, as required by Regulation 50 of the Regulations of the Trust Fund for Victims ("TFFV Regulations"),⁴⁶ the

rehabilitation." See also *The Rules of Procedure and Evidence*, *supra* note 38, R. 94-97; *Regulations of the Court*, *supra* note 39, regs. 56, 88.

⁴³ The Rome Statute, *supra* note 1, art. 79. See also *The Rules of Procedure and Evidence*, *supra* note 38, R. 98, 148, 221; *Regulations of the Court*, *supra* note 39, regs. 56, 88.

⁴⁴ The Rome Statute, *supra* note 1, art. 75(2) ("Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79."); *The Rules of Procedure and Evidence*, *supra* note 38, R. 98(2)-(4) ("(2) The Court may order that an award for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim. The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund and shall be forwarded to each victim as soon as possible. (3) The Court may order that an award for reparations against a convicted person be made through the Trust Fund where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate. (4) Following consultations with interested States and the Trust Fund, the Court may order that an award for reparations be made through the Trust Fund to an intergovernmental, international or national organization approved by the Trust Fund.").

⁴⁵ The Rome Statute, *supra* note 1, art. 79(1) ("A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims."); *The Rules of Procedure and Evidence*, *supra* note 38, R. 98(2) ("The award for reparations thus deposited in the Trust Fund shall be separated from other resources of the Trust Fund . . ."); *id.* R. 98(5) ("Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.").

⁴⁶ Regulations of the Trust Fund for Victims, *supra* note 4, reg. 50 ("For the purposes of these regulations, the Trust Fund shall be considered to be seized when:

- (a) (i) the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families; and
- (ii) the Board has formally notified the Court of its conclusion to undertake specified activities under (i) and the relevant Chamber of the Court has responded and has not,

TFV – for the first time in its short history – notified the Court of its intention to use funds it had received through voluntary contributions to pursue an independent project assisting victims.⁴⁷ Specifically, the TFV evaluated a number of strategies for benefiting victims of crimes within the jurisdiction of the Court⁴⁸ before approving a selection of activities designed to respond to the needs of such victims in the Democratic Republic of Congo (“DRC”) for physical rehabilitation, psychosocial rehabilitation, and/or material support.⁴⁹ Simultaneously, the Trust Fund performed a parallel analysis with respect to Uganda, and one day after its Notification to Pre-Trial Chamber I of its intended projects in the DRC, it notified Pre-Trial Chamber II of the actions it planned to undertake in Uganda.⁵⁰ In identifying victim communities,⁵¹ the TFV did not make any finding as to the individuals responsible for the crimes and did not consider crimes allegedly committed by identified individuals

within a period of 45 days of receiving such notification, informed the Board in writing that a specific activity or project, pursuant to rule 98, sub-rule 5 of the Rules of Procedure and Evidence, would 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.

(iii) Should there be no response from the Chamber or should additional time be needed by the Chamber, consultations may be held with the Board to agree on an extension. In the absence of such an agreement, the extension shall be 30 days from the expiry of the period specified in sub-paragraph (a) (ii). After the expiry of the relevant time period, and unless the Chamber has given an indication to the contrary based on the criteria in sub-paragraph (a)(ii), the Board may proceed with the specified activities.”)

⁴⁷ Notification of the Board of the Trust Fund for Victims Jan. 24, 2008, *supra* note 5, paras. 1-4.

⁴⁸ *Id.* paras. 18-19.

⁴⁹ *Id.* paras. 53-59. A more precise description of the projects proposed by the Fund and the victims it hoped to benefit was provided in a confidential annex to the Notification and elaborated in a further confidential filing (ICC, Doc. ICC-01/04-445-Conf., (Feb. 7, 2008)) pursuant to the Chamber’s request for more detail (ICC, Pre-Trial Chamber I, Case No. ICC-01/04-441, Decision on the Time Limit for the Filing of Observations on the Notification of the Board of the Trust Fund for Victims, paras. 1-4 (Feb. 5, 2008)).

⁵⁰ ICC, Pre-Trial Chamber II, Case No. ICC-02/04-114, 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, paras. 3-4 (Jan. 25, 2008) [hereinafter Notification of the Board of Directors of the Trust Fund for Victims Jan. 25, 2008].

⁵¹ Notification of the Board of the Trust Fund for Victims Jan. 24, 2008, *supra* note 5, para. 34 (“In order to fulfill its mandate in such a way that the maximum number of persons could benefit of its assistance, the Board of Directors has decided that the specified activities should benefit groups of victims, and not individually identified victims.”). For more detail, see *id.* paras. 34-52.

facing prosecution before the ICC.⁵² Indeed, the Fund was explicit in stating its competence to consider the full range of international “crimes committed in the situation of DRC [as distinct from the narrow range of] crimes allegedly committed by identified persons.”⁵³

The Office of Public Counsel for the Defence (“OPCD,” or “Office of Public Counsel”)⁵⁴ strongly objected to what it considered *ultra vires* action on the part of the TFV, labeling the initiative “precipitous and premature”⁵⁵ and expressing concern that such action could “jeopardise the overall mandate of the ICC to promote peace and reconciliation through the issuance of impartial judicial findings, which cut through the cycle of propaganda and private retribution.”⁵⁶ In support of this critical assessment, the OPCD advanced a number of arguments. First, asserting that the proposals presented by the TFV were reparations under Article 75, the Office of Public Counsel contended that the Trust Fund was therefore incompetent to determine the “criteria” for the actions it wished to take.⁵⁷ The OPCD emphasized in this regard the Court’s authority under Article 75(1) to “establish principles relating to reparations to, or in respect of, victims”⁵⁸ The Office of Public Counsel then advanced a second argument, claiming that the activity of the TFV should “at a minimum” be guided by four key principles: first, “the jurisdictional and admissibility requirements of the ICC; [second,] the presumption of innocence and the principle of legality (in accordance with which the elements of crimes must be strictly construed); [third,] the fairness and impartiality of the proceedings, which mandates that the Court cannot appear to have prejudged any issues which may be litigated before it in the future; and [fourth,] the rights of future participants in the proceedings to a fair trial, in full equality.”⁵⁹ Under each of these

⁵² *Id.* paras. 28-29; see also Notification of the Board of Directors of the Trust Fund for Victims Jan. 25, 2008, *supra* note 50, paras. 28-29.

⁵³ Notification of the Board of the Trust Fund for Victims Jan. 24, 2008, *supra* note 5, para. 29; see also Notification of the Board of Directors of the Trust Fund for Victims Jan. 25, 2008, *supra* note 50, para. 29.

⁵⁴ “The OPCD’s mandate is to see that there is ‘equality of arms’: that the prosecutor does not have a head start over the defence. Before a suspect is even arrested, the OPCD plans to start identifying areas of concern in order to be able to give proactive advice to the defence teams once they’re assembled, building up their capacity to respond quickly, and so protect the interests of their clients.” Katy Glassborow, *Defending the Defenders*, Global Policy Forum, at 1 (Aug. 21, 2006), <http://www.globalpolicy.org/component/content/article/163/28321.html>.

⁵⁵ OPCD observations on the Notification by the Board of Directors, *supra* note 8, para. 1.

⁵⁶ *Id.*

⁵⁷ *Id.* paras 10-11.

⁵⁸ The Rome Statute, *supra* note 1, art. 75(1).

⁵⁹ OPCD observations on the Notification by the Board of Directors, *supra* note 8, para. 13.

principles, the OPCD contended, the proposed action of the TFV was illegitimate.

Specifically, on the first issue of the “jurisdictional and admissibility requirements,” the OPCD made three distinct arguments. First, that the action might violate the complementarity standard enshrined in Article 17 of the Statute because it is not obvious that the host state is “unwilling or unable” to provide appropriate remedy itself.⁶⁰ Second, that it might undermine both national and international proceedings insofar as it amounts to “offering assistance” to potential witnesses without forcing them to disclose that assistance.⁶¹ Finally, that the TFV, in responding to wrongs that had not yet been adjudicated and recognized as criminal by the Court, had insufficient grounds on which to claim that the acts by which the recipients of TFV assistance were allegedly victimized were in fact crimes within the jurisdiction of the ICC.⁶²

On the second issue of legality and the presumption of innocence, the OPCD contended that in defining the recipients of the assistance as victims without any prior ICC finding to that effect, the TFV prejudiced future cases in which the ICC (or a national court) may need to determine whether the crimes in question occurred and/or whether they were crimes falling within the ICC’s jurisdiction.⁶³ Crucially, the OPCD argued that the TFV is in this respect bound by the criminal standard of proof, namely that all material elements be proved “beyond a reasonable doubt.”⁶⁴ The OPCD pronounced the TFV

⁶⁰ *Id.* paras. 20-21. The complementarity requirement of the Rome Statute is enshrined in article 17, which provides, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.

The Rome Statute, *supra* note 1, art. 17(1). This is in furtherance of the overriding principle that the ICC “shall be complementary to national criminal jurisdictions.” *Id.* tenth preambular para.; *id.* art. 1.

⁶¹ OPCD observations on the Notification by the Board of Directors, *supra* note 8, paras. 15-18.

⁶² *Id.* paras. 22-27.

⁶³ *Id.* paras. 31-40.

⁶⁴ *Id.* para. 34.

incompetent to make such a determination.⁶⁵ The OPCD also commented that a later Court holding contrary to the earlier TFV interpretation would fundamentally undermine the credibility of the TFV's work.⁶⁶

The arguments advanced with respect to the third "fairness and impartiality of proceedings" aspect of the OPCD's claims focused on the basis for the TFV's findings. Specifically, the OPCD questioned the notion that the TFV could base its determination of specific groups' eligibility for assistance on NGO reports, reports from MONUC (the UN Peacekeeping force in the DRC), and ICC Pre-Trial Chamber findings, which could be overturned on appeal.⁶⁷ The OPCD also decried the TFV's decision to use NGOs to implement some of the proposals, since those organizations might later be called to offer evidence before the Court.⁶⁸

Finally, with respect to the rights of future accused individuals to a fair trial, the OPCD argued that recipients of the assistance would have to disclose that receipt in order to participate in any future criminal hearings on the actions that triggered the TFV intervention.⁶⁹

Subsequently, the Office of the Prosecutor ("OTP")⁷⁰ and the legal representative of a number of victims⁷¹ both made submissions supporting the actions of the TFV and placing particular emphasis on the discretion of the Board of Directors to undertake independent projects with the Fund's "other resources." The TFV then responded to the OPCD objections,⁷² stressing the distinction between Article 75 "reparations" and Article 79 action for the "benefit" of victims,⁷³ denying the applicability of the complementarity standard to Article 79 projects,⁷⁴

⁶⁵ *Id.* para. 38 ("The sheer scale of these inquires falls outside of the expertise of the Trust Fund.").

⁶⁶ *Id.*

⁶⁷ *Id.* paras. 41-52.

⁶⁸ *Id.* para. 47.

⁶⁹ *Id.* paras. 53-56.

⁷⁰ ICC, Pre-Trial Chamber I, Case No. ICC-01/04-462, Prosecution's observations on the Notification of the Board of Directors of the Trust Fund for Victims (Feb. 20, 2008).

⁷¹ Observations of the Legal Representative of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06 and a/0228/06 on the Notification of the Board of Directors of the Trust Fund for Victims ICC-01/04-461 (Feb. 20 2008).

⁷² Clarifications and Explanations on the Observations of the Office of Public Counsel for the Defence of 20 February 2008 by the Board of Directors of the Trust Fund for Victims Pursuant to the Decision of Pre-Trial Chamber I of 28 February 2008, ICC-01/04-485 (Mar. 19, 2008).

⁷³ *Id.* ¶¶ 15-21.

⁷⁴ *Id.* ¶¶ 24-27.

and noting the non-judicial nature of its mandate (and its consequent inability to prejudice judicial proceedings).⁷⁵

Having received these submissions, Pre-Trial Chamber I decided not to issue a formal objection to the TFV's actions.⁷⁶ However, despite finding – contra the OPCD – that the TFV is empowered to undertake such projects independent from Court-ordered reparations, the Court held that “the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order pursuant to Article 75 of the Statute[.]”⁷⁷ Indeed, the Chamber reasoned, independent TFV action for the benefit of victims “is, on the one hand, unrelated to Court-ordered reparations, and on the other hand, subject to the responsibility of the Trust Fund to ensure that there are sufficient funds to comply with any reparation order that the Court may make under article 75 of the Statute . . . [.]”⁷⁸ In so doing, the Court formally allowed the TFV to proceed, but with a potentially suffocating proviso.

Despite that apparently problematic restriction, however, the TFV proceeded with an aggressive portfolio of independent projects. In the DRC and Uganda, the TFV commenced thirty-four projects in 2008 for which it budgeted a total of €1.4 million for that year (increased by €250,000 through intermediary matching resources to reach a total of €1.65 million).⁷⁹ It later allocated €650,000 to projects in the Central African Republic (“CAR”) for 2009.⁸⁰ Nonetheless, in an attempt to comply with the Pre-Trial Chamber's ruling, the TFV allocated a “reparations reserve” of €1 million that is not to be used for independent projects, but is instead being saved for the augmentation of Court-ordered Article 75 reparations.⁸¹ Assuming both that the Court issues orders for collective rather than individual reparations and that the TFV has a similar capacity to design the implementation of those orders as it does for its existing projects, the Fund claims that the reserve could be spread across 200,000 victims.⁸²

⁷⁵ *Id.* ¶¶ 32-41.

⁷⁶ Decision on the Notification of the Board Apr. 11, 2008, *supra* note 9, at 10-11.

⁷⁷ *Id.* at 7.

⁷⁸ *Id.*

⁷⁹ International Criminal Court, Current Projects, <http://www.icc-cpi.int/NR/exeres/EC1E83EC-A3B9-451F-8F6D-07D0360D48F5.htm> (last visited Feb. 5, 2010).

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *Id.*

The position advanced in this Paper is that independent TFV action of the kind proposed in January 2008 is both lawful and desirable. Moreover, despite the Pre-Trial Chamber's holding to the contrary, the TFV bears no legal obligation to save funds for Article 75 action. Indeed, to persist with such a policy would be detrimental to the aims of transitional justice.

III. THE LEGAL CONTEXT

There are three legal issues that arise in the context of the debate over the status and role of the Trust Fund as that debate played out before the Court and continued in the Chamber's decision. First, there is the broad question of the locus of legal authority over the TFV. The OPCD argued that the Court retains significant authority over the functioning of the TFV, because the Court has the authority under Article 75(1) to issue principles on reparations. Second is the question of whether the TFV is under obligation – as the Pre-Trial Chamber suggested in its decision – to maintain a reserve sufficient to supplement inadequately resourced reparations orders, pursuant to Article 75(2). The third issue is whether the TFV is a judicial body and how its independent actions affect the Court. This is pertinent to the remaining objections raised by the OPCD, namely the notions that the TFV is bound by the principle of complementarity, that it must follow a criminal standard of proof, and that its decisions could give the appearance that the Court has prejudged an issue. On each of the three legal dimensions enumerated above – legal authority, the obligation to maintain a reserve, and judicial character – this Paper asserts the independence of the TFV from the Court.

A. THE LOCUS OF AUTHORITY OVER THE TFV

The OPCD argued that the Court has ultimate control over the functioning of the Fund, because it has the authority to determine the scope of independent Fund action through the “principles on reparations” that it has yet to promulgate, pursuant to Article 75(1).⁸³ This claim, however, misconstrues the Rome Statute. The TFV is in fact largely

⁸³ The Rome Statute, *supra* note 1, art. 75(1), (“The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.”).

independent from the Court, except with regard to the specific projects on which the two are mandated to cooperate.

Article 79(3) of the Statute offers an initial indication of the locus of authority over the Fund. It provides that “[t]he Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.”⁸⁴ The Statute provides very little further detail on the Fund, other than stipulating that it is to be established “for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims[,]” and that the Court can order resources collected by fines or forfeitures to be transferred to the Fund.⁸⁵

The lack of statutory detail led one commentator to observe not long after its promulgation that the “Rome Statute leaves the Assembly of States Parties quite a substantial latitude as to the scope of the Trust Fund.”⁸⁶ This was no accident. As Mark Jennings reports, “after some debate, delegations . . . agreed that the detailed operation of the Trust Fund should not be provided for in the Statute. Delegations accepted that the operation of the Fund could be addressed by the Assembly of States Parties.”⁸⁷ This conclusion was reached on the grounds that “the criteria were likely to be complex and to need adjustment over time. The stringent amendment requirements for the Statute would make such adjustments difficult.”⁸⁸ Beyond this, Article 79 and the TFFV appear to have been largely absent from the discussions at Rome.⁸⁹

Adopted four years after the Rome Conference,⁹⁰ the Rules of Procedure and Evidence added some detail to the framework provided in the Statute. However, it remained clear that the ASP would define the scope of TFFV action in a separate and specifically tailored text. The Rules essentially divided the Fund’s work into two parts. Sub-paragraphs 2-4 of Rule 98 define ways in which the Court interacts with the Fund –

⁸⁴ *Id.* art. 79(3).

⁸⁵ *Id.* art. 79(1)-(2).

⁸⁶ THORDIS INGADOTTIR, THE TRUST FUND FOR VICTIMS (ARTICLE 79 OF THE ROME STATUTE) 4 (Project on Int’l Courts and Tribunals, Discussion Paper No. 3, Feb. 2001), available at http://www.pict-pcti.org/publications/ICC_paprs/Trust_Fund.pdf.

⁸⁷ Mark Jennings, *Article 79: Trust Fund*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1439, 1440 (Otto Triffterer ed., 2d ed. 2008). See also Amnesty Int’l, *International Criminal Court: Ensuring an Effective Trust Fund for Victims*, AI Index IOR 40/005/2001, at 4, Aug. 31, 2001.

⁸⁸ Jennings, *supra* note 87, at 1442.

⁸⁹ See generally M. CHERIF BASSIOUNI, SUMMARY RECORDS OF THE 1998 DIPLOMATIC CONFERENCE (2005).

⁹⁰ The Rules were adopted by the Assembly of States Parties in New York in September 2002. *The Rules of Procedure and Evidence*, *supra* note 38, R. 98.

98(2) providing that the Court can order that awards for reparation against a convicted person be deposited in the TFV for a period of time, 98(3) enabling the Court to order that a reparations order pursuant to Article 75(2) be executed through the Fund, and 98(4) allowing for and regulating the payment of reparations through the TFV to NGOs.⁹¹ In essence, sub-paragraphs 2-4 of Rule 98 together manage the coordinated action of the Court and the TFV in implementing Article 75. Rule 98, sub-paragraph 5, however, provides that “[o]ther resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79.”⁹² The Rules thus provide for a division between funds earmarked for eventual use for reparations, over which the Court retains authority, and “other resources” over which the TFV appears to have greater control.⁹³ Read in conjunction with Article 79(1), Rule 98(5) provides for a sphere of activity (that which uses the “other resources”) in which the TFV is to act pursuant to the limits defined separately by the ASP, with no basis in the Statute or the Rules for ICC oversight.⁹⁴

The OPCD argued in its submissions on the TFV’s proposed projects that despite the prerogative apparently afforded the TFV by Article 79(1 & 3) as reaffirmed by Rule 98(5), the Court retains an overarching authority over the Fund, pursuant to Article 75(1).⁹⁵ This contention is not substantiated by the statutory text. Article 75(1) provides, “The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, *in its decision* the Court may . . . determine the scope and extent of any damage, loss and injury to, or in respect of,

⁹¹ *Id.* R. 98.

⁹² *Id.*

⁹³ Amnesty Int’l, *supra* note 87 (distinguishing the funds to be used for reparations from those that can be used at the TFV’s discretion to “benefit” victims); Victims’ Rights Working Group, *NGO Principles on the Establishment of the Trust Fund for Victims* 2-3 (June 1, 2002) available at <http://www.vrwg.org/Publications/01/NGOPrinciplesOnTrustFund.pdf> (“The Trust Fund shall be used for: Fulfilling orders of the International Criminal Court to pay reparations through the Trust Fund, in accordance with Rule 98(1) to (4) of the Rules of Procedure and Evidence. The benefit of victims of crimes under the jurisdiction of the Court, and the families of such victims in accordance with Article 79(1) and Rule 98(5) . . . Funds paid to the Trust Fund under Rules 98(1) to (4) shall be used in accordance with the Court’s instructions set out in the order. In the event that the order does not detail the use of the award, the Executive Director shall refer the case to the Board of Trustees. All other funds received by the Trust Fund (hereafter the ‘general funds’) may be used for activities to benefit victims . . .”).

⁹⁴ This, again, was a conscious choice. As Ingadottir observes, “[d]uring the drafting of the Rules of Procedure and Evidence unsuccessful proposals were made to allow the Court to utilize the Trust Fund.” INGADOTTIR, *supra* note 86, at 5 n.3.

⁹⁵ OPCD observations on the Notification by the Board of Directors, *supra* note 8, paras. 10-11.

victims and will state the principles on which it is acting.”⁹⁶ The wording of the italicized portion of the provision is of particular importance here, because it narrowly tailors the functional scope of the “principles” to the regulation of the Court’s “decision” to award reparations under Article 75 at the conclusion of the trial.⁹⁷ Indeed, Article 75(1) details precisely how the envisioned principles are to impact that specific decision.⁹⁸ In stark contrast, no reference is made in Article 75(1) to the impact the principles are expected to have on decisions of the TFV to benefit victims pursuant to Article 79(1). A simple reading of the text of Article 75(1) therefore undermines the OPCD claim that it is via that provision that the Court has the authority to regulate the Fund’s actions to benefit victims per Article 79(1).

The picture is further clarified by opening the aperture of analysis to consider Article 75(1) in broader textual context. In this regard, it is noteworthy that neither the Statute nor the Rules in any provision refers to TFV action for the “benefit of victims” as “reparations.” Indeed, while Article 75 explicitly and directly codifies the Court’s approach to “reparations,” the term is not used at all in Article 79.⁹⁹ Similarly, sub-paragraphs 1-4 of Rule 98, which together regulate Article 75 action, all use the term “reparations.”¹⁰⁰ Rule 98(5), which regulates Article 79 action, makes no such reference.¹⁰¹ This dichotomy has led a number of observers to note that under the statutory understanding of the term, “[t]he *reparative* function of the Court is specifically connected to the criminal liability of individual perpetrators[.]”¹⁰² In other words, the term “reparations,” as used in the Statute, refers to Article 75 compensation paid to victims in association

⁹⁶ The Rome Statute, *supra* note 1, art. 75(1) (emphasis added).

⁹⁷ In the context of the Article 75, the only “decision” to which sub-paragraph 1 could possibly refer here is the Court’s decision to “make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.” *Id.* art. 75(2).

⁹⁸ The principles are to provide the basis for the Court to “determine the scope and extent of any damage, loss and injury to, or in respect of, victims . . .” *Id.* art. 75(1). Indeed, the Court is to “state the principles on which it is acting.” *Id.*

⁹⁹ *Id.* arts. 75, 79.

¹⁰⁰ *The Rules of Procedure and Evidence*, *supra* note 38, R. 98.

¹⁰¹ *Id.*

¹⁰² Carla Ferstman, *The International Criminal Court’s Trust Fund for Victims: Challenges and Opportunities*, 6 Y.B. INT’L HUMANITARIAN L. 424, 426 (2003) (emphasis added). *See also, e.g.*, Redress Trust (REDRESS) and the Forensic Risk Alliance, *The International Criminal Court’s Trust Fund for Victims: Analysis and Options for the Development of Further Criteria for the Operation of the Trust Fund for Victims* 24 (Dec. 2003), <http://www.redress.org/publications/TFVReport.pdf>.

with a Court “order [pronounced] directly against a convicted person.”¹⁰³ Of course, the actions of the TFV in pursuing independent projects to benefit victims have a clearly reparative character, at least insofar as the projects benefit victims qua victims.¹⁰⁴ However, the question here is not whether the Fund’s actions might have reparative value, but how to understand the scope of application of the “principles of reparations” provided for in Article 75(1). The most plausible reading of that provision must surely interpret “reparations” in a way that is consistent with the term’s use elsewhere in the legal texts of the Court. For the above reasons, such a reading precludes the analysis tendered by the OPCD.

The circumstances of the TFV’s creation add additional weight to this assessment. Pursuant to its responsibility under Article 79(1), the Assembly of States Parties brought the Fund into being in 2002.¹⁰⁵ If there had been an understanding that the Article 75(1) “principles” would limit the scope of TFV action, the ASP would have referenced that limitation in describing the scope of TFV activity. Instead, paragraph 7 of the resolution establishing the Fund states, “[t]he [TFV] Board shall, in accordance with the provisions of the Rome Statute, the Rules of Procedure and Evidence, and the criteria to be determined by the Assembly of States Parties, establish and direct the activities and projects of the Trust Fund”¹⁰⁶ The ASP “criteria” had yet to be drafted or enacted, but they were nonetheless recognized explicitly as a forthcoming source of regulation over the TFV. The also undrafted Article 75(1) “principles” on reparations, by contrast, were given no such authoritative status. Indeed, they were not mentioned at all in the resolution establishing the Fund.¹⁰⁷

The ASP “criteria” were finally promulgated in December of 2005, as the “Regulations of the Trust Fund for Victims” (“TFV Regulations”).¹⁰⁸ These Regulations serve only to further confirm the broad independence of the TFV from the Court with respect to the management of the Fund’s “other resources.” Regulation 34 is clear; the TFV must “separate [resources transferred to the Fund by the Court for

¹⁰³ The Rome Statute, *supra* note 1, art. 75(2).

¹⁰⁴ Indeed, insofar as victimhood is a pre-requisite for receipt of these benefits, they would appear to be a form of “compensation for [the] injury or wrong” suffered. BLACK’S LAW DICTIONARY 1325 (8th ed. 2004) (defining reparations).

¹⁰⁵ Establishment of a fund for the benefit of victims, *supra* note 2.

¹⁰⁶ *Id.* para. 7.

¹⁰⁷ *Id.*

¹⁰⁸ Regulations of the Trust Fund for Victims, *supra* note 4.

reparations] from the remaining resources of the Trust Fund in accordance with rule 98 of the Rules of Procedure and Evidence. It shall note the sources and amounts received, together with any stipulations contained in the order of the Court as to the use of the funds.”¹⁰⁹ Regulations 47 and 48 explain what is to be done with the TFV’s “other” funds from which these Court-generated funds are to be “separated.” Specifically:

47. For the purpose of these regulations, “other resources of the Trust Fund” set out in rule 98, paragraph 5, of the Rules of Procedure and Evidence refers to resources other than those collected from awards for reparations, fines and forfeitures.

48. Other resources of the Trust Fund shall be used to benefit victims of crimes as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families, who have suffered physical, psychological and/or material harm as a result of these crimes.¹¹⁰

It is clear from these provisions that the only restriction placed on the Fund’s use of its “other resources” is that the resources “benefit victims” and their families. This is, of course, fully consistent with the Court’s Statute and Rules.¹¹¹

The freedom granted the TFV in this respect is in stark contrast to the restrictions placed on the use of Court-ordered funds that are deposited with or transferred through the TFV (reparations awards, fines, and forfeitures).¹¹² For such resources, the TFV Regulations provide:

43. When resources collected through fines or forfeiture or awards for reparations are transferred to the Trust Fund pursuant to article 75, paragraph 2, or article 79, paragraph 2, of the Statute or rule 98, sub-rules 2-4, of the Rules of Procedure and Evidence, the Board of Directors shall determine the uses of such resources *in accordance with any stipulations or instructions contained in such orders*, in particular on the scope of beneficiaries and the nature and amount of the award(s).

44. *Where no further stipulations or instructions accompany the orders, the Board of Directors may determine the uses of such resources in accordance with rule 98 of the Rules of Procedure and*

¹⁰⁹ *Id.* reg. 34.

¹¹⁰ *Id.* regs. 47-48.

¹¹¹ See *supra* notes 84-104 and accompanying text; *infra* notes 125-149 and accompanying text.

¹¹² Regulations of the Trust Fund for Victims, *supra* note 4, regs. 43, 47 (codifying the dichotomy between reparations awards, fines, and forfeitures on the one hand, and “other resources” on the other).

Evidence, *taking into account* any relevant decisions issued by the Court on the case at issue and, *in particular, decisions issued pursuant to article 75, paragraph 1, of the Statute* and rule 97 of the Rules of Procedure and Evidence.¹¹³

What is evident from these provisions is that the ASP Regulations are explicit in codifying the different sources of limitation on various forms of TFV action. There is a clear distinction between the rules that apply to the TFV's "other resources," over which the Fund has independent control, and those that apply to resources deposited by the Court for use pursuant to Article 75. While the latter resources are subject to direct Court-issued instructions and the requirements delineated in the Article 75(1) "principles," the Court enjoys no such control over the former category of resources.

Instead, the scope of the Court's authority to intervene in the Fund's use of its "other resources" is described in TFV Regulation 50.¹¹⁴ Consistent with the theme presented thus far, Regulation 50 divides the TFV's work into two categories: action initiated by the Fund, which it addresses in sub-paragraph (a), and action initiated by the Court, which it addresses in sub-paragraph (b).¹¹⁵ The capacity of the Fund to act on its own initiative is triggered when the Board of Directors "considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families."¹¹⁶ When the Board makes such a finding, the Court then has forty-five days (seventy-five if it requires an extension) to respond in writing with one of two objections. The Court may object either that a specific activity or project proposed by the TFV would "pre-determine any issue to be determined by the Court" or that it would "be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."¹¹⁷ If the Court does not make such a written objection, "the Board may proceed with the specified activities."¹¹⁸ The questions of pre-determining issues and prejudicing rights are addressed below.¹¹⁹ The key point here is that the Court has no authority to manage the Fund's use of "other resources" or to set guiding principles limiting that use. Instead, its authority over such independent action is strictly limited to objecting to action that might

¹¹³ *Id.* regs. 43-44 (emphasis added).

¹¹⁴ *Id.* reg. 50.

¹¹⁵ *Id.*

¹¹⁶ *Id.* reg. 50(a)(i).

¹¹⁷ *Id.* reg. 50(a)(ii)-(iii).

¹¹⁸ *Id.* reg. 50(a)(iii).

¹¹⁹ *See infra* Part III Section C.

significantly damage the integrity of its own proceedings. As REDRESS articulates, Regulation 50(a) provides “that it is for the Trust Fund to determine its priorities and actions, yet take into account the potential impact that such interventions may have on the ongoing work of the Court.”¹²⁰

In sum, the Statute leaves the regulation of the TFV firmly in the hands of the ASP.¹²¹ The ASP, in turn, has passed regulations that make it explicitly clear that the “other resources” of the TFV are funds over which the Board of the TFV has control and over which the Court itself has no control.¹²² The Court is provided only the limited opportunity to object on very narrow grounds.¹²³ Any amendment to this apportioning of responsibility would require the approval of the ASP.¹²⁴

B. THE PRE-TRIAL CHAMBER’S ASSERTION THAT THE TFV IS RESPONSIBLE FOR SUPPLEMENTING REPARATIONS AWARDS

In its April 11th, 2008 decision, Pre-Trial Chamber I did not adopt the OPCD’s view that the Court has the authority to regulate the TFV’s use of its “other resources” via the promulgation of Article 75(1) principles.¹²⁵ Indeed, the Chamber acknowledged that that the Court’s scope of authority in this regard is limited to objecting to TFV action pursuant to TFV Regulation 50.¹²⁶ However, despite those findings of TFV autonomy, the Pre-Trial Chamber held that the Fund has an obligation to the Court to maintain a balance of funds sufficient to supplement Court-ordered reparations awards when the assets of the convicted individual are inadequate to fund those awards.¹²⁷ In other words, the Chamber found that while the TFV is formally free to use its “other resources” as it sees fit, the scope of that freedom is limited by the Fund’s obligation to ensure a reserve adequate to pay Article 75 reparations. M. Cherif Bassiouni’s commentary on the Rome Statute appears to provide indirect support to the Pre-Trial Chamber’s finding in this regard. Bassiouni claims that Article 75(2) provides the Court with

¹²⁰ REDRESS, *Submissions to the Board of Directors of the ICC Victims’ Trust Fund at their 4th Annual Meeting 5* (Nov. 22, 2007), <http://www.redress.org/reports.html>.

¹²¹ See *supra* notes 84-107 and accompanying text.

¹²² See *supra* notes 108-120 and accompanying text.

¹²³ See *supra* notes 116-120 and accompanying text.

¹²⁴ Regulations of the Trust Fund for Victims, *supra* note 4, reg. 78.

¹²⁵ Decision on the Notification of the Board Apr. 11, 2008, *supra* note 9.

¹²⁶ *Id.* at 8/11

¹²⁷ *Id.* at 7/11.

the authority to order reparations “out of [the Trust] Fund.”¹²⁸ His use of the phrase “out of the Fund,” implies that Court-ordered reparations in these circumstances would be financed by the Fund’s pre-existing resources.¹²⁹ If the Court’s discretion to use these resources in this way were to be at all meaningful, it would surely have to be the case that the TFV would be prohibited from simply emptying its coffers before an opportunity for the Court to issue such a reparations order were to arise.¹³⁰ Thus, if one accepts Bassiouni’s interpretation that the Court has the authority, under Article 75(2) to order the payment of reparations “out of the Fund,” the Pre-Trial Chamber’s ruling is cogent and possibly even persuasive.

The problem, however, is that such an interpretation of the statutory provision is neither plausible nor substantiated. Bassiouni, like the Pre-Trial Chamber, provides no reasoning or evidence (from the *travaux préparatoires*, for example) to support such a reading of Article 75(2). Quite the contrary, Bassiouni’s replacement of “through” (in the original text)¹³¹ with “out of” (in his rephrasing of the provision)¹³² appears to have been a purely discretionary editorial decision. Moreover, the minimal discussion and analysis of the Trust Fund across the three volumes of Bassiouni’s Commentary makes it difficult to extrapolate such reasoning from elsewhere in the text.¹³³

This interpretive dispute can be settled by a plain reading of the Statute. Article 75(2) states that the “Court may make *an* order directly against a convicted person” and that “[w]here appropriate, the Court may order that *the* award for reparations be made *through* the Trust Fund.”¹³⁴ The first part of this sentence suggests strongly that the object of reparations orders under Article 75(2) is the convicted person. Indeed,

¹²⁸ M. CHERIF BASSIOUNI, 1 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT OF THE STATUTE, ELEMENTS OF CRIMES AND RULES OF PROCEDURES AND EVIDENCE 177 (2005).

¹²⁹ This understanding of Article 75(2) would presumably be accompanied by a similar interpretation of Rule 98(3). See *infra* note 142 and accompanying text.

¹³⁰ This rationale appears to be what informed and motivated the Pre-Trial Chamber’s holding. See Decision on the Notification of the Board Apr. 11, 2008, *supra* note 9, at 7, 11.

¹³¹ The Rome Statute, *supra* note 1, art. 75(2) (“Where appropriate, the Court may order that the award for reparations be made *through* the Trust Fund provided for in article 79.”) (emphasis added).

¹³² BASSIOUNI, *supra* note 128, at 177 (“The Court may order reparations to victims *out of* this fund [Article 75(2)].”) (emphasis added).

¹³³ See generally M. CHERIF BASSIOUNI, 1-3 THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT (2005).

¹³⁴ The Rome Statute, *supra* note 1, art. 75(2) (emphasis added).

the standard reading is that “reparations awards can only be made against persons convicted of the crimes.”¹³⁵ Somewhat problematically, given his reading of the subsequent phrase, Bassiouni appears to accept that interpretation, stating that “[t]he Court is powerless to order reparations from anyone other than the individual violator.”¹³⁶ Moreover, reading the provision in its entirety, there is a clear shift from the indefinite article “an” in the first part of 75(2) to the definite article “the” in the second part. The first phrase indicates that the Court may make “an order directly against the convicted person.” The second then refers back to “the award.” There is only one award to which the definite article could refer here, namely the award against the convicted person, referenced in the immediately preceding phrase within the same subparagraph of the Article. In other words, replacing the definite article cross-reference with specific language, the second part of Article 75(2) can be rewritten thus: “the Court may order that the award for reparations *from the convicted person to the victim(s)* be made through the Trust Fund provided for in Article 79.” On this understanding, the Trust Fund is simply the mediator through which the convicted person’s payment is transferred to the victims. The use of “through” rather than “out of” is therefore of great importance.

This reading is bolstered by the French and Spanish versions of the Statute. The former stipulates, “Le cas échéant, la Cour peut décider que l’indemnité accordée à titre de réparation est versée par l’intermédiaire du Fonds visé à l’article 79.”¹³⁷ The TFV, in this text, is described explicitly as an intermediary (*intermédiaire*) through which the Court may funnel reparations to the victims. Similarly, the Spanish provides “Cuando proceda, la Corte podrá ordenar que la indemnización otorgada a título de reparación se pague por conducto del Fondo Fiduciario previsto en el artículo 79.”¹³⁸ “*Por conducto de*” means “through,” and in that sense is similar to the English. However, the principle word in that phrase – namely “*conducto*” – means conduit or

¹³⁵ Amnesty Int’l, *International Criminal Court: Establishing an Effective System for Reparations - Recommendations on the development of the Court-wide Victims’ Strategy* AI Index IOR 40/01/2007, Dec. 20, 2007; Donat-Cattin, *Article 75*, *supra* note 20, at 1400 n.6; Marc Henzelin, Veijo Heiskanen & Guenael Mettraux, *Reparations To Victims Before The International Criminal Court: Lessons From International Mass Claims Processes*, 17 CRIM. L. F. 317, 330 (2006).

¹³⁶ BASSIOUNI, *supra* note 128, at 177.

¹³⁷ Statut de Rome de la Cour Pénale Internationale art. 75(2), U.N. Doc. A/CONF.183/9 (July 17, 1998).

¹³⁸ Estatuto de Roma de la Corte Penal Internacional art. 75(2), U.N. Doc. A/CONF.183/9 (July 17, 1998).

duct, giving “through” a slightly more specific meaning in the Spanish text. The Fund is essentially described as a conduit through which Court reparations may be channeled on their way to the victims. Both *conducto* and *intermédiaire* make it very clear that the TFV is not the *source* of the reparations funds that the Court directs to victims pursuant to Article 75(2), but is simply an available mechanism through which those funds can be disbursed to victims. Against this background, it is plain that Bassiouni’s substitution of “through” with “out of”¹³⁹ fundamentally distorts the meaning of the provision. Article 75(2) simply does not provide for the availability of the TFV’s independently accumulated resources to the Court for the financing of Article 75 reparations.

This is fully consistent with the decision made at Rome to provide for the transfer of Article 75(2) reparations awards “through” rather than “into” the Fund.¹⁴⁰ Both versions were under consideration during the negotiations at Rome¹⁴¹ (unlike Bassiouni’s rewording) and both are clear in indicating that the fundamental source of the Article 75(2) reparative payment is external to the TFV; however, the use of “through” more clearly indicates that the award simply passes to the victims *via* the TFV, rather than combining with the “other resources” of the Fund prior to a final disbursement of payments to victims.

The interpretation of the Fund as an intermediary through which Article 75 reparations can be transferred from convicted persons to victims is given further support by the text of the Rules of Procedure and Evidence. Specifically, Rule 98 states in sub-paragraph 3: “The Court may order that an award for reparations against a convicted person be

¹³⁹ See *supra* notes 128-133 and accompanying text.

¹⁴⁰ The latter was suggested as a possibility by the Preparatory Committee before Article 79 defining the Trust Fund had taken its final shape and then suggested by France and the United Kingdom after Article 79 was drafted in its final and current form. Report of the Preparatory Committee on the Establishment of an International Criminal Court art. 73(2)(a), UN Doc A/Conf.183/2 (Apr. 14, 1998), (“[Where appropriate, the Court may order that the award for reparations be made into the trust fund provided for in article 79]”); Proposal Submitted by the Delegation of France and United Kingdom of Great Britain and Northern Ireland: Article 73, proposed art. 73(3), UN Doc. A/CONF.183/C.1/WGPM/L.28 (June 26, 1998) (“Where appropriate the Court may order that an award for reparations be made into the trust fund provided for in article 79.”); Working Paper on Article 73: Reparations to Victims, proposed art. 73(2), UN Doc. A/CONF.183/WGPM/L.63/Rev.1 (July 11, 1998) (“Where appropriate the Court may order that an award for reparations be made into the trust fund provided for in Article 79.”).

¹⁴¹ Proposal Submitted by the Delegation of France and United Kingdom of Great Britain and Northern Ireland: Article 73, *supra* note 140 (“Where appropriate the Court may order that an award for reparations be made into the trust fund provided for in article 79.”); Working Paper on Article 73: Reparations to Victims, *supra* note 140 (“Where appropriate the Court may order that an award for reparations be made into the trust fund provided for in Article 79.”).

made through the Trust Fund *where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate.*¹⁴² This sub-paragraph of Rule 98 is particularly illuminating, because it speaks to the purpose of the statutory provision on which the interpretive debate turns. According to Rule 98(3), the reason the Court might decide to make the award *against* the individual *through* the Trust Fund, is that the Trust Fund is better placed to distribute the award in a way that accommodates and addresses the complexities raised by a broad scope of different forms and modalities of reparations. The rationale presented is *not* that the convicted person's wealth is insufficient to fulfill the award. Indeed, the latter situation could equally be the case with respect to a basic financial compensation reparation award to be made to a single victim, yet the rule does not provide for channeling the award through the TFFV in such a situation. On the contrary, Rule 98(1) stipulates that "[i]ndividual awards for reparations shall be made *directly* against a convicted person."¹⁴³ As Jorda and de Hemptinne observe, it is a "fundamental point" that there is an "absence of any provision in the Rules for automatic intervention by the Trust Fund in the event of the accused's . . . insolvency"¹⁴⁴ Again, the French and Spanish versions of Rule 98(3) bolster this reading of the provision.¹⁴⁵

In sum, when one considers the plain text of the Rules and the Statute, (particularly when supplemented with versions in other official languages, including the only other working language),¹⁴⁶ it is clear that, in Ingadottir's words, "the Trust Fund is not obliged to make an award of reparations from the Trust Fund. That is to say it does not have to use other funds to supplement insufficient awards of reparations collected from the convicted person."¹⁴⁷ This runs directly against the holding of the Pre-Trial Chamber,¹⁴⁸ but a close and multi-lingual reading of the

¹⁴² *The Rules of Procedure and Evidence*, *supra* note 38, R. 98 (emphasis added).

¹⁴³ *Id.*

¹⁴⁴ Jorda & de Hemptinne, *supra* note 23, at 1415.

¹⁴⁵ Règlement de procédure et de preuve, R. 98(3), Doc. ICC-ASP/1/3 (2002); Reglas de Procedimiento y Prueba, R. 98(3) Doc. ICC-ASP/1/3 (2002).

¹⁴⁶ Spanish, along with Arabic, Chinese, English, French, and Russian is an "official language" of the Court. French and English are the two working languages. *See* The Rome Statute, *supra* note 1.

¹⁴⁷ INGADOTTIR, *supra* note 86, at 15.

¹⁴⁸ *See supra* note 130 and accompanying text.

Court's legal texts offers no alternative but to reject the interpretation of Article 75(2) that undergirded that holding.¹⁴⁹

Ultimately, the Statute left at the discretion of the Assembly of States Parties the question of whether and how to restrict the TFV's use of its "other resources."¹⁵⁰ Indeed, during ASP preparations for the creation of the Fund, members of the Victims' Rights Working Group noted the "broad range of options provided for in the Statute" and commented that it raised certain questions, such as "how much flexibility" the Fund should have "in identifying acceptable uses under [Rule] 98(5)" and whether 98(5) resources should be "limited" to supplementing reparations or should be available to a wider array of projects, including assisting victims of crimes not being adjudicated before the Court.¹⁵¹ The Norwegian delegation at the time insisted that the ASP use the discretion that had been granted by the Statute to preserve "maximum flexibility" in the design of the Fund and its regulations, "since the Court and the Trust Fund may have to deal with very different situations and needs."¹⁵² Others made the "recommendation" that "[t]he limited resources of the ICC Trust Fund for Victims should be primarily allocated to alleviate the harm suffered by individuals who were victimised by the international atrocities adjudicated before the ICC," implicitly acknowledging that the Statute did not itself provide for such an obligation and that the ASP therefore had the choice as to whether to restrict the Fund in that way.¹⁵³

At least with respect to use of the Fund's "other resources," the ASP responded to the Norwegian plea for flexibility. Most importantly, TFV Regulation 56 states,

The Board of Directors shall determine whether to complement the resources collected through awards for reparations with "other resources of the Trust Fund" and shall advise the Court accordingly. Without prejudice to its activities under paragraph 50, subparagraph (a), the Board of Directors shall make all reasonable endeavours to manage the Fund taking into consideration the need to provide adequate resources to complement payments for awards under rule 98, sub-rules 3 and 4 of the Rules of Procedure and

¹⁴⁹ See *supra* notes 134-145 and accompanying text.

¹⁵⁰ See *supra* notes 84-107 and accompanying text.

¹⁵¹ *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*, at 2 (Sept. 25, 2001).

¹⁵² Government of Norway, *Trust Fund for Victims - Norwegian Statement*, para. 1 (Mar. 5, 2001).

¹⁵³ Yael Danieli & David Donat-Cattin, *Trust Fund for Victims: Clarifications and Recommendations Submitted to the VIII Session of the Preparatory Commission for the International Criminal Court (ICC) United Nations*, 2 (Sept. 24, 2001) (emphasis added).

Evidence and taking particular account of ongoing legal proceedings that may give rise to such awards.¹⁵⁴

Under this provision two things are explicitly clear. First, it is the TFV's Board of Directors and *not* the Court that determines whether the TFV's "other resources" shall be used to supplement the funds (generated by fines, forfeitures, or the actual reparation order) for Court-ordered reparations. Second, the TFV is required to endeavor to so supplement the Court-generated funds *only insofar as that supplementation does not impair its proper activities under paragraph 50(a)*. In other words, as long as the TFV is using its "other resources" for projects to "benefit victims" under paragraph 50(a), it is under no legal obligation to cut back on those projects in order to supplement Court-ordered reparations. This runs directly against the Pre-Trial Chamber's mistaken characterization of the preservation of such supplementary funds as the "first and foremost" "responsibility" of the TFV.¹⁵⁵ Whether it is desirable that the TFV *choose* to use its resources to supplement Court-ordered reparations is a question that is taken up in Part IV *infra*. What is clear from the analysis above is that it is firmly within the Fund's prerogative to make that determination.

C. WHAT IS THE TRUST FUND FOR VICTIMS? THE FALLACY OF THE JUDICIAL ANALOGY

The critical arguments regarding the third legal issue addressed here are: (1) the Trust Fund for Victims is not a judicial institution; (2) it does not need to make extensive findings of fact or law in order to fulfill its task; and, (3) it is not associated in any way with the criminal process before the ICC, so its findings cannot taint the impartiality of the Court as it oversees and adjudicates that process.

In the words of Marieke Wierda and Pablo de Greiff, "Courts and Trust Funds . . . represent different approaches to the issue of reparations."¹⁵⁶ Indeed, it is worth emphasizing in this regard that the concept of a trust fund designed to address the issue of benefiting victims of massive wrongdoing was not born with the TFV in Rome. On the contrary, the institutional model was by that point relatively well established. The Declaration of Basic Principles of Justice for Victims of

¹⁵⁴ Regulations of the Trust Fund for Victims, ASP Res. ICC-ASP/4/Res.3, Doc. ICC-ASP/4/Res.3, reg. 56 (Dec. 3, 2005) (emphasis added).

¹⁵⁵ Decision on the Notification of the Board Apr. 11, 2008, *supra* note 9, at 7.

¹⁵⁶ Wierda & de Greiff, *supra* note 35, at 1.

Crime and Abuse of Power, adopted by the UN General Assembly in 1985, states that “[t]he establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.”¹⁵⁷ The history of the concept is important, because the proper role of the TFV and the impact and weight of its decisions can best be understood in light of the tradition of trust funds that predated it rather than with reference to standards of criminal process applicable in an ICC courtroom. In his Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, M. Cherif Bassiouni wrote,

[T]he [Rome] Statute contemplates a trust fund out of which reparations to victims may be made. This idea of an international fund seems similar to the concept of trust funds enunciated in the Declaration of Basic Principles of Justice. In this context, it should be noted that a number of trust funds have been created in connection with certain categories of human rights violations, for example, the United Nations Voluntary Fund for Victims of Torture and the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery.¹⁵⁸

Bassiouni highlights perhaps the most appropriate precedents for the TFV, since both the U.N. Voluntary Fund for Victims of Torture (“Torture Fund”)¹⁵⁹ and the U.N. Voluntary Trust Fund on Contemporary Forms of Slavery (“Slavery Fund”)¹⁶⁰ are, like the TFV,¹⁶¹ international funds aimed at benefiting victims of criminal acts.

Indeed, much like the TFV (in the context of its “other resources”), the Torture Fund receives “voluntary contributions for distribution, through established channels of humanitarian assistance, humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of torture and to relatives of such victims.”¹⁶² Just like the TFV,¹⁶³ the Torture Fund also has an application

¹⁵⁷ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, art.13, U.N. GAOR, 7th Sess., U.N. Doc A/RES/40/34 (Nov. 29, 1985).

¹⁵⁸ U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms*, ¶ 69, U.N. Doc. E/CN.4/1999/65, (Feb. 8, 1999) (prepared by M. Cherif Bassiouni).

¹⁵⁹ G.A. Res. 36/151, U.N. Doc. A/RES/36/151 (Dec. 16, 1981).

¹⁶⁰ G.A. Res. 46/122, U.N. Doc. A/RES/46/122 (Dec. 17, 1991).

¹⁶¹ The Rome Statute, *supra* note 1, art. 79(1).

¹⁶² G.A. Res. 36/151, *supra* note 159, art. 1(a).

procedure through which NGOs can submit project proposals that the Fund will consider before deciding whether to finance the project or not.¹⁶⁴ Most importantly, for individuals or groups to be eligible for the Torture Fund's assistance, they must be victims of torture, as defined in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT").¹⁶⁵

Under the CAT definition, torture involves an "act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."¹⁶⁶ Moreover, pursuant to Article 4(1) of the CAT, "Each State Party shall ensure that all acts of torture are offences under its criminal law."¹⁶⁷ To find that torture occurred pursuant to the CAT, it would appear to be necessary that a number of determinations be made with respect to the torturer. These include the determination that the torturer intentionally inflicted severe pain or suffering on the victim. In such a context, making a finding that an individual is a victim of torture – as is necessary to trigger reparative action on the part of the Torture Fund – might appear to prejudice or predetermine facts to be determined by a criminal court before which the victim's torturer might later appear as a defendant. The situation of the Slavery Fund is not dissimilar in this respect.¹⁶⁸

Such concern, however, is misplaced. The Torture Fund is not a judicial body and it does not use a judicial standard of proof. On the contrary, it utilizes something more akin to an administrative grant approval process.¹⁶⁹ Indeed, funds of this type have no need to use a

¹⁶³ The TFV received 42 such applications for 2008 and went forward with 36 of the proposed projects. ICC, Trust Fund for Victims, Current Projects, <http://www2.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Victims/Trust+Fund+for+Victims/Current+Projects/> (last visited Mar. 14, 2009).

¹⁶⁴ United Nations Voluntary Fund for Victims of Torture, Guidelines, <http://www.unhchr.ch/html/menu2/9/apply.htm#1> (last visited Mar. 21, 2009).

¹⁶⁵ *Id.* para. 3.

¹⁶⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1).

¹⁶⁷ *Id.* art 4(1).

¹⁶⁸ See G.A. Res. 46/122, *supra* note 160; United Nations Voluntary Trust Fund on Contemporary Forms of Slavery, Application for Grant, *available at* <http://www2.ohchr.org/english/about/funds/slavery/beneficiaries.htm> (last visited June 10, 2010).

¹⁶⁹ United Nations Voluntary Fund for Victims of Torture, Guidelines of the Fund, <http://www.ohchr.org/EN/Issues/Pages/TortureFundGuidelines.aspx#1> (last visited May 25, 2010) (stipulating that "only applications by non-governmental organizations are admissible" (para. 1) and that "[t]he Fund does not provide financial compensation to victims," but that "[t]he

heightened standard of proof¹⁷⁰ – the Torture Fund’s role is to determine a victim’s eligibility for receipt of reparative assistance, not to render

list of the victims to be assisted under legal aid should be provided together with the application form.” (para. 5). Organizations are not to engage in a process of legal proof regarding the individual victims, but are instead to submit an application, which is to “(a) provide background information on the organization; (b) include documentary evidence that its staff has relevant experience in providing direct assistance to victims of torture (their curriculum vitae should be attached); (c) explain the aims and justification of the project; (d) provide copy of the statutes of the organization; (e) provide a copy of the legal registration of the organization (if available); (f) provide a minimum of two reference letters from donors, competent organizations or experts in the field of assistance to victims of torture; and (g) provide 10 detailed case studies of victims of torture to be assisted with the Fund’s grant (names may be withheld).” (para. 17). The purpose of the 10 case studies is to “understand, through examples of individual cases, the type of assistance provided by the organization to victims of torture.” (para. 51) The case studies are to include: “(a) The history of the victim (including dates and places, the context in which and by whom the victim was tortured; the physical and psychological after-effects on the victim); (b) When and how the victims was referred to the organization; (c) The type of assistance provided by the organization with the Fund’s grant, including details on the number, type and frequency of consultations; (d) The results expected from or already obtained through the assistance provided with the grant; and (e) The assistance to be provided to the victim in the future.” (para. 50). Finally, “[i]n order to better understand and evaluate the work done and planned, members of the Board or of the Fund’s Secretariat shall visit projects and meet with staff members of the organization implementing the project, as well as with victims of torture or members of their families assisted with the Fund’s grant. The Secretariat will inform in advance organizations concerned when such a visit takes place. All organizations are expected to fully cooperate with the official undertaking the visit. A confidential report on this evaluation will be prepared for consideration by the members of the Board at their annual session.”); UN Voluntary Fund for Victims of Torture, Decision Making, <http://www.ohchr.org/EN/Issues/Pages/TortureFundDecisionMaking.aspx> (last visited Dec. 6, 2009) (describing the nature of the Torture Fund’s decision making thus, “During its annual session, the Board of Trustees reviews the narrative and financial reports on the use of previous grants, adopts recommendations on applications for new grants, hears project leaders, meets with donors, consults with the Special Rapporteur on Torture and the Committee against Torture and adopts other relevant recommendations to the Secretary-General on the activities of the Fund.”).

¹⁷⁰ Consider, for example, the Austrian General Settlement Fund for Victims of National Socialism, for which “[t]he Claims Committee shall review all applications using relaxed standards of proof. In the claims-based process, claimants must as a rule produce supporting evidence to establish eligibility. If no relevant evidence is available, eligibility for payments may also be made credible in some other way.” Bundesgesetz über die Einrichtung eines Allgemeinen Entschädigungsfonds für Opfer des Nationalsozialismus und über Restitutionsmaßnahmen (Entschädigungsfondsgesetz) [Federal Law on the Establishment of a General Settlement Fund for Victims of National Socialism and on Restitution Measures] Bundesgesetzblatt Teil I [BGBl I] No. 12/2001, § 15 para. 2 (Austria), unofficial translation available at http://www.en.nationalfonds.org/docs/GSF-Law_e.pdf. Similarly, the Property Claims Commission of the German Foundation ‘Remembrance, Responsibility and the Future’ applied a “relaxed standard of proof in assessing claims,” though stopping short of accepting “mere allegations” as sufficient. Marc Henzelin, Veijo Heiskanen & Guenael Mettraux, *Reparations To Victims Before The International Criminal Court: Lessons From International Mass Claims Processes*, 17 CRIM. L. F. 317, 329 (2006). See also Pablo de Greiff, *Justice and Reparations*, in REPARATIONS: INTERDISCIPLINARY INQUIRIES 153, 160 (Jon Miller & Rahul Kumar eds., 2007) (“Reparation programs at their best are administrative procedures that, among other things, obviate some of the difficulties and costs associated with litigation [including] the need to gather evidence that might withstand close scrutiny . . .”).

legal findings against defendants.¹⁷¹ Contemplating such mass reparations bodies in societies ruptured by mass atrocity, Pablo de Greiff notes, “[a]lthough reparations are well-established legal measures in different systems all over the world, in transitional periods reparations aim . . . to contribute to the reconstitution or the constitution of a new political community. In this sense . . . they are best thought of as part of a political rather than a judicial project.”¹⁷²

Considered from this perspective, it would not be of great legal concern if, for example, a criminal court were to reject the characterization of an incident as torture for the purposes of a criminal prosecution, despite the victim of that same act being a beneficiary of a Torture Fund project.¹⁷³ Of course, the Torture Fund itself might suffer depreciated credibility if a criminal court exposed its findings as factually or legally flawed when placed under the greater scrutiny of the “beyond a reasonable doubt” standard.¹⁷⁴ Indeed, the OPCD raised a

¹⁷¹ G.A. Res. 36/151, *supra* note 159, para. 7.

¹⁷² de Greiff, *supra* note 170, at 153.

¹⁷³ In common law systems such as the United States it is not considered particularly problematic that an individual might be acquitted of a crime and yet successfully held civilly liable for the same offense. See *Addington v. Texas*, 441 U.S. 418, 422-25 (1979) (discussing the three commonly applied standards of proof in American law). Yet such an outcome is, if anything, more problematic than the hypothetical conflict between the Torture Fund and a criminal court. In the former example, both decisions are made by courts of law adjudicating actions brought against the same individual. In the trust fund example, by contrast, the fund is not a judicial body, and rather than determining the liability of a defendant, it instead determines the eligibility of victims to receive resources that have been voluntarily provided by third parties.

¹⁷⁴ Common law criminal courts and international criminal courts and tribunals require proof “beyond a reasonable doubt.” See, e.g., The Rome Statute, *supra* note 1, art. 66(3); International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 [ICTY], *The Rules of Procedure and Evidence*, R. 87, IT/32/Rev. 42 (Nov. 4, 2008); International Criminal Tribunal for Rwanda [ICTR], *The Rules of Procedure and Evidence*, R. 87(a), (Mar. 14, 2008). Continental civil law states require the lower standard of “initime conviction,” meaning “reasonable conviction; reasonable certainty; state of being satisfied beyond reasonable doubt (personally convinced); personal conviction of the court (after considering all the evidence).” F.H.S. BRIDGE, THE COUNCIL OF EUROPE FRENCH-ENGLISH LEGAL DICTIONARY 173 (2002). E.g., Code de procedure penale [C. PR. PEN.] art. 353 (France), translated in John Rason Spencer, Code of Criminal Procedure 100 (Jan. 1, 2006), available at http://195.83.177.9/upl/pdf/code_34.pdf; Zivilprozeß ordnung [ZPO] [civil procedure statute] Dec. 5, 2005, Bundesgesetzblatt, Teil I [BGBl. I] 3202, § 286(1) (F.R.G.), translated in STEFAN RÜTZEL, GERHARD WEGEN, & STEPHAN WILSKE, COMMERCIAL DISPUTE RESOLUTION IN GERMANY 224 (2005); Strafprozeß ordnung [StPO] [Code of Criminal Procedure] Apr. 7, 1987, Bundesgesetzblatt, Teil I [BGBl. I] 1074, last amended by Gesetz, Oct. 31, 2008, BGBl. I at 2149, § 261 (F.R.G.), available at <http://bundesrecht.juris.de/bundesrecht/stpo/gesamt.pdf>. The Torture Fund requires only the considerably less strenuous grant approval process. See United Nations Voluntary Fund for Victims of Torture, Guidelines of the Fund, *supra* note 169.

similar concern with respect to the TFV.¹⁷⁵ However, this worry is a policy concern for the fund in question, rather than a legal objection to its work.¹⁷⁶ Ultimately, given the fundamentally different objectives of trust funds and criminal courts and the consonant divergence in the appropriate standards of proof for each body, it would not make sense to subordinate the determinations of one to the standards and determinations of the other. Indeed, requiring victims to prove beyond a reasonable doubt that they suffered torture, for example, could further traumatize those individuals¹⁷⁷ in direct contradiction of the goals of the Torture Fund.¹⁷⁸

It is in this tradition that the Trust Fund for Victims should be considered. Consistent with trust funds in general,¹⁷⁹ it is appropriate that the standard of proof used by the TFV would be lower than that used by the ICC, with considerably less evidence required for the former to reach a final decision.¹⁸⁰ As REDRESS contends, “[i]t must be underscored that the Trust Fund [for Victims] is not a criminal court, nor is it a civil court. It is a quasi-judicial institution. The trust fund should therefore not be bound by the same standard of proof as the criminal processes of the

¹⁷⁵ OPCD observations on the Notification by the Board of Directors, *supra* note 8, para. 38.

¹⁷⁶ In any event, it is submitted here that funds have sufficient incentive to self-regulate in this regard, since donations are likely to decline if their determinations are regularly contradicted in the courts.

¹⁷⁷ MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 72 (1998) (emphasizing the advantages of non-judicial fora in treating victims with “a tone of care-giving and a sense of safety.”); Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT’L L. 529, 571 (2008) (noting that “[v]igorous cross-examination can easily re-traumatize victim-witnesses, but at the same time, it is an essential tool for defense attorneys to contest the facts presented by the prosecution [in international criminal trials].”); Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, Paper for a Symposium on the Mental Health Needs of Crime Victims, Office for Victims of Crime and National Institute of Justice, U.S. Dep’t of Justice, June 2000, at 1-2 (noting that some victims may be re-traumatized as a result of testifying in court).

¹⁷⁸ United Nations Human Rights, U.N. Voluntary Fund for Victims of Torture-Assistance, <http://www.ohchr.org/EN/Issues/Pages/TortureFundAssistance.aspx> (last visited Feb. 5, 2010) (emphasizing that one of the goals of the Torture Fund is to “enable victims of torture to overcome the psychological trauma they have experienced.”).

¹⁷⁹ See *supra* notes 169-170.

¹⁸⁰ In order to convict an individual, the ICC must be convinced of the guilt of that individual beyond reasonable doubt. The Rome Statute, *supra* note 1, art. 66(3). The TFV Regulations do not stipulate a standard of proof to be used for the disbursement of the Fund’s “other resources,” providing only that the Board of Directors must “consider[] it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families.” Regulations of the Trust Fund for Victims, *supra* note 4, reg. 50 (a)(i).

Court.”¹⁸¹ Precisely because the Fund uses a lower standard of proof and bases its decisions on less extensive evidence, findings of the Fund cannot pre-determine or prejudice criminal proceedings.¹⁸² It is clear that the Court’s decision is authoritative over the criminal case and there is no strict requirement that the Court and the Fund arrive at the same conclusion. They are different types of institutions addressing different questions using different standards of proof and with good reason.¹⁸³

Ultimately, in deciding to pursue a project to “benefit victims” pursuant to Article 79(1) of the Statute, the TFV makes a determination of limited scope. The 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power specified what is needed to recognize an individual as a victim of a criminal act: “A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted”¹⁸⁴ The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law used the same formulation twenty years later,¹⁸⁵ and during drafting it was made clear that this was considered a codification of pre-existing international human rights law and international humanitarian law.¹⁸⁶

The principle that a victim can be identified independent of any affirmation of a specific perpetrator’s guilt or even final judicial confirmation of the crime is, in fact, essential to the entire ICC system of victim participation in proceedings. As David Donat-Cattin notes, the definition of victims under the Rules of Procedure and Evidence

¹⁸¹ REDRESS, *The International Criminal Court’s Trust Fund for Victims: Analysis and Options for the Development of Further Criteria for the Operation of the Trust Fund for Victims* (Dec. 2003) available at <http://www.redress.org/publications/TFVReport.pdf> (last visited Feb. 5, 2010).

¹⁸² See *supra* notes 169-173.

¹⁸³ See *supra* note 178.

¹⁸⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, *supra* note 20, para. 2.

¹⁸⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* note 20; Office of the High Commissioner for Human Rights, *supra* note 20, para. 9 (“A person shall be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted, or convicted and regardless of the familial relationship between the perpetrator and the victim.”).

¹⁸⁶ U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights, *Civil and Political Rights*, ¶ 1, U.N. Doc E/CN.4/2004/57 (Nov. 10, 2003) (“The principles and guidelines do not create new substantive international or domestic legal obligations. They provide for mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under human rights law and international humanitarian law.”).

(namely, “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”)¹⁸⁷ is “centered on the harm suffered by the victim as a result of the crime, and not on the crime itself.”¹⁸⁸ This is necessary, because, as noted above, the ICC allows significant victim participation in the criminal proceedings and, therefore, must make a determination as to whether an individual is a “victim,” before having made a determination as to the guilt or innocence of the accused.¹⁸⁹ Indeed, a large number of provisions in both the Statute and the Rules pertain to “victims” at points necessarily prior to a judicial finding on whether the crime in question actually occurred.¹⁹⁰ In most of these cases, the “victims” are defined as such by the Court, for the purposes of a criminal trial before the Court, and with respect to the crimes with which the accused is charged.¹⁹¹ This would appear to be far more prejudicial or predeterminative than a determination made by the TFV – an independent non-judicial body, which focuses purely on the victims and avoids reference to any specific perpetrator and even to the specific crimes suffered by the victims.¹⁹²

Moreover, a careful examination of the text and the drafting history of the Rome Statute and the Rules of Procedure and Evidence indicates that the assignation “victim” under the law of the ICC is not limited to victims of the specific crimes that have been charged by the Prosecutor and are under consideration before the Court. On the contrary, the text of Rule 85(a) defines victims as those who have suffered harm from “any crime within the jurisdiction of the Court.”¹⁹³ There is no reason why this definition would not apply to the use of “victims” in Article 79(1), which provides that the TFV will benefit “victims of crimes within the jurisdiction of the Court.”¹⁹⁴ Indeed, it is worth noting that an earlier draft of the provision that became Article 79 had

¹⁸⁷ *The Rules of Procedure and Evidence*, *supra* note 38, R. 85(a).

¹⁸⁸ Donat-Cattin, *supra* note 24, at 1294.

¹⁸⁹ See *The Rome Statute*, *supra* note 1, arts. 15(3), 43(6), 68, 69. See *supra* notes 39-40 and accompanying text.

¹⁹⁰ Consider, in particular, *The Rome Statute*, *supra* note 1, arts. 15(3), 43(6), 53(1)(c), 68, 69; *The Rules of Procedure and Evidence*, *supra* note 38, R. 86-93.

¹⁹¹ Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1432, Judgment on the Appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, ¶ 58 (July 11, 2008).

¹⁹² Notification of the Board of the Trust Fund for Victims Jan. 24, 2008, *supra* note 5, para. 29.

¹⁹³ *The Rules of Procedure and Evidence*, *supra* note 38, R. 85(a) (emphasis added).

¹⁹⁴ *The Rome Statute*, *supra* note 1, art. 79(1).

referenced “victims of *the* crime.”¹⁹⁵ The shift to the ultimate Article 79 version – “victims of crimes within the jurisdiction of the Court” – therefore suggests that the drafters intentionally adopted the broader meaning.¹⁹⁶

In sum, the TFV, consistent with trust funds past and present, is bound by an evidentiary standard that is considerably lower than that applicable to ICC decisions on individual criminal guilt.¹⁹⁷ Moreover, in order to pursue independent projects, the Fund need only make the limited finding that the individuals it seeks to benefit are victims of crimes within the Court’s jurisdiction – a finding that does not require that any perpetrators be identified, let alone indicted, apprehended, or convicted.¹⁹⁸ Against this background, it is difficult to argue that TFV actions to benefit victims pursuant to Article 79(1) would prejudice or predetermine future court decisions.

The only relevant difference between the TFV and the Torture Fund in this respect is that the former has an institutional connection to a criminal court – namely, the ICC – whereas the latter is unaffiliated with any such body. However, as is explained in the sections above, “[t]he ICC and the Trust Fund for Victims, [although] both born out of the Rome Statute, are independent institutions.”¹⁹⁹ While they may collaborate in executing Article 75 orders, the TFV has no role in the

¹⁹⁵ M. CHERIF BASSIOUNI, *An Article-by-Article Evolution of the Statute*, in THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 89, at 571.

¹⁹⁶ It is worth noting that the Appeals Chamber has applied a narrower standard than Rule 85 when considering the issue of victim participation at trial. On that issue, the Appeals Chamber held that the only “victims” that may participate at trial are “victims” of the specific crimes being tried. *Prosecutor v. Lubanga Dyilo*, *supra* note 191. However, if anything, that decision by the Appeals Chamber affirms a broad reading of Rule 85, with the narrowing of the standard limited to the specific issue of victim participation in criminal proceedings, rather than the general definition of “victims” under the Rome Statute. Indeed, the Appeals Chamber held in pertinent part that “whilst the ordinary meaning of rule 85 does not per se, limit the notion of victims to the victims of the crimes charged, the effect of article 68 (3) of the Statute is that the participation of victims in the trial proceedings, pursuant to the procedure set out in rule 89 (1) of the Rules, is limited to those victims who are linked to the charges.” *Id.* Indeed, when considering victim participation in situational proceedings prior to the trial of a specific individual, Pre-Trial Chamber I held that, although it is “necessary to establish that there are grounds to believe that the harm suffered is the result of the commission of crimes falling within the jurisdiction of the Court . . . the Chamber considers that it is not necessary to determine in any great detail at this stage the precise nature of the causal link and the identity of the person(s) responsible for the crimes.” ICC, *Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6*, para. 94, Case No. ICC-01/04-101 (Jan. 17, 2006).

¹⁹⁷ See *supra* notes 169-183 and accompanying text.

¹⁹⁸ See *supra* notes 184-196 and accompanying text.

¹⁹⁹ ICC Trust Fund for Victims, Who We Are, <http://www.icc-cpi.int/NR/exeres/9D33C1B8-6087-4E94-AD90-7A8A03443823.htm> (last visited Feb. 5, 2010).

criminal process.²⁰⁰ Its decisions are not the decisions of the Court and should have no prejudicial impact on cases before the Court. Indeed, it is asserted here that, as a consequence of the TFV's non-judicial status, the Court's authority to object to TFV projects under TFV Regulation 50²⁰¹ should be understood as pertaining only to issues *immediately* before the Court, on which it would be prudent to wait for a judicial determination, and to TFV actions that directly accuse or impugn a specific defendant in a way that could render a fair trial impossible. As long as the TFV maintains its current approach, such concerns are extremely unlikely to arise in most cases.²⁰²

IV. WHY AN INDEPENDENT TFV IS DESIRABLE

In addition to being lawful, the TFV's independent use of its "other resources" is also desirable. Indeed, although the TFV is at present maintaining a balance of €1 million²⁰³ in deference to the Pre-Trial Chamber's April 11th, 2008 demand,²⁰⁴ the optimal use of those saved resources would in fact be in pursuit of further independent projects along the lines of those in which the Fund is already invested.²⁰⁵ For the sake of brevity this proposed policy is hereinafter termed the "independent approach." There are three reasons for adopting the independent approach: the imperative of transitional justice,²⁰⁶ the nature of modern fundraising,²⁰⁷ and the distribution of institutional competence.²⁰⁸

A. TRANSITIONAL JUSTICE

The obvious cost of the independent approach, insofar as it ignores the Pre-Trial Chamber's demand that the TFV supplement reparative funds, is that it undermines the goal of fully repairing the

²⁰⁰ The Rome Statute, *supra* note 1, arts. 75(2), 79(2); Regulations of the Trust Fund for Victims, *supra* note 4.

²⁰¹ Regulations of the Trust Fund for Victims, *supra* note 4, reg. 50.

²⁰² See *supra* notes 47-53, *infra* notes 286-294 and accompanying text.

²⁰³ ICC Trust Fund for Victims, *supra* note 79.

²⁰⁴ Decision on the Notification of the Board Apr. 11, 2008, *supra* note 9, at 7.

²⁰⁵ See *supra* notes 47-53, *infra* notes 286-294 and accompanying text.

²⁰⁶ See *infra* Part IV Section A.

²⁰⁷ See *infra* Part IV Section B.

²⁰⁸ See *infra* Part IV Section C.

victims of persons convicted by the court. In *Factory at Chorzów*, the PCIJ held,

[R]eparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.²⁰⁹

This principle has since been codified in the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the UN General Assembly in 2001²¹⁰ and again in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("Basic Principles"), adopted by the General Assembly in 2005.²¹¹ Moreover, as Thomas Antkowiak observes, the "principle of *restitutio in integrum* has been repeatedly cited by the International Court of Justice, as well as the Inter-American and European Courts of Human Rights."²¹² Given this understanding of the reparative ideal, it is perhaps understandable that organizations such as Amnesty International have called on the ICC to, "as far as possible, award full and effective reparations to victims of crimes where there is a conviction by the Court."²¹³ It was no doubt with such a goal in mind that the Pre-Trial Chamber held that "the responsibility of the Trust Fund is first and

²⁰⁹ *Factory at Chorzów* (Claim for Indemnity), *supra* note 17, at 40.

²¹⁰ G.A. Res 56/10, art. 31(1), U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001) ("The Responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.").

²¹¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* note 20; Office of the High Commissioner for Human Rights, *supra* note 20, para. 15.

²¹² Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT'L L. 351, 361 (2008) (citing *Avena* (Mex. v. U.S.), 2004 I.C.J. 12, 25 (Mar. 31)); *Moiwana Cmty. v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 170 (June 15, 2005); *Barberà v. Spain*, 285 Eur. Ct. H.R. (ser. A) 50, 57 (1994).

²¹³ Amnesty Int'l, *supra* note 135, at 9.

foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order pursuant to article 75 of the Statute.”²¹⁴

However, without dismissing the importance of the ideal of *restitutio in integrum*, it is important to recognize that there is another moral principle at play in the determination of reparations for mass-atrocity. The Basic Principles, for example, also provide that individuals (and, indeed, collectivities)²¹⁵ that have suffered as victims of gross human rights violations or serious violations of humanitarian law must be granted “equal access” to “effective” remedy.²¹⁶ In a similar vein, Amnesty International asserts that “[i]t is vital for the Court’s credibility that it is not seen to be treating one group of victims more favourably than others”²¹⁷ and also emphasizes the importance of the principle that “[v]ictims have equal and effective access to the Court.”²¹⁸ Donat-Cattin notes, in this regard, the value of the fundamental standard of “fairness (‘equality of all before the law’)” in the realm of reparations.²¹⁹

In many continental *partie civile* systems, including France and Germany, equality of all victims before the law is at least formally achieved by granting victims the right to initiate, or at least provide for the initiation of, criminal proceedings to which they may join in order to gain reparations for the crime(s) perpetrated against them.²²⁰ In the ICC, however, no such right of initiation is provided, even within the structure of a “situation” that is already under investigation.²²¹ As Jorda and de Hemptinne observe, “By contrast with the situation prevailing in countries with a civil-law tradition . . . the Security Council has not given individual victims – or, as the case may be, classes of persons deputed to represent victims collectively – any personal right to set a prosecution in

²¹⁴ Decision on the Notification of the Board Apr. 11, 2008, *supra* note 9, at 7.

²¹⁵ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* note 20, para. 13; Office of the High Commissioner for Human Rights, *supra* note 20, para. 13.

²¹⁶ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, *supra* note 20, para. 12.

²¹⁷ Amnesty Int’l, *supra* note 135, at 11.

²¹⁸ *Id.*

²¹⁹ Donat-Cattin, *supra* note 20, at 1405.

²²⁰ Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How the French Do It, How We Can Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 669 (1990); Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d’Assises*, 2001 U. ILL. L. REV. 791, 820 (2001); Jorda & de Hemptinne, *supra* note 23, at 1401-02; Donat-Cattin, *supra* note 24, at 1278.

²²¹ See The Rome Statute, *supra* note 1, arts. 13-15.

motion.”²²² To call attention to this difference is not to say the ICC could have been constituted in any other way. Indeed, Jorda and de Hemptinne continue, “[t]he conferment of such a right would have constituted a serious threat to all that the Prosecutor stands for, namely the authority of the international community, and to its unparalleled discretionary powers.”²²³ However, regardless of whether a *partie civile* system would be desirable or even feasible at the ICC, the absence of such a system has important consequences with respect to the principle that victims should be treated fairly and equally by any scheme of reparation.

Put simply, the situation is as follows: Article 75 reparations are to be triggered only upon the conviction of a specific individual;²²⁴ those reparations can apply only to the victims of that specific individual criminal;²²⁵ and victims of international crimes have no way of obligating the Prosecutor to initiate proceedings against their perpetrators.²²⁶ Consider also that it is the *modus operandi* of the Office of the Prosecutor of the ICC to pursue only an extremely limited number of individuals within any given situation²²⁷ and that the OTP will likely fail

²²² Jorda & de Hemptinne, *supra* note 23, at 1392.

²²³ *Id.*

²²⁴ The Rome Statute, *supra* note 1, art. 75(2); *The Rules of Procedure and Evidence*, *supra* note 38, R. 94-98; Donat-Cattin, *supra* note 20, at 1400 (“article 75 is addressed only ‘against’ individual perpetrators convicted by the Court . . .”). It is for this reason that Rule 97 sub-paragraph 3 provides that in making its assessment of reparations, “[i]n all cases, the Court shall respect the rights of victims and the convicted person.” *The Rules of Procedure and Evidence*, *supra* note 38, R. 97(3). See also *supra* notes 42, 99-103 and accompanying text.

²²⁵ Regulations of the Trust Fund for Victims, *supra* note 4, reg. 46 (“Resources collected through awards for reparations may only benefit victims [and their family members] . . . *affected directly or indirectly by the crimes committed by the convicted person*,”) (emphasis added). This is the necessary and logical consequence of a system that ties reparations to the conviction of a given individual for specific crimes. Indeed, it is based on the same logical premise that the Appeals Chamber held that the only “victims” that may participate at trial are “victims” of the specific crimes being tried. Prosecutor v. Lubanga Dyilo, *supra* note 191. See also *infra* notes 231-232 and accompanying text (reporting that victims’ groups have objected to limited charges on the grounds that the limits on the charges necessarily limit the scope of reparations).

²²⁶ See *supra* notes 220-222 and accompanying text.

²²⁷ Recently, Chief Prosecutor Luis Moreno Ocampo said of his intentions regarding the 2007 post-election violence in Kenya, “When there are massive crimes justice is never enough. I have defined my role very clearly. My role is to define those most responsible, 2 or 3 individuals, 2 or 3 cases.” Andrew Simmons, *Ocampo Talks to Al-Jazeera*, AL JAZEERA, Nov. 7, 2009, <http://blogs.aljazeera.net/africa/2009/11/07/ocampo-talks-al-jazeera>. This is not dissimilar to the prosecutorial strategy in the other situations before the Court – one individual has been charged for crimes committed in the Central African Republic, four for crimes in Darfur, five (now four) for crimes in Uganda, and four for crimes in the DRC. International Criminal Court, Situations and Cases, *supra* note 15. See also Luis Moreno Ocampo, Statement at the Informal Meeting of Legal Advisors of Ministries of Foreign Affairs 6 (Oct. 24, 2005), available at <http://www.icc-pi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A->

to bring before the Court, let alone convict, a portion of the limited number of individuals it does charge.²²⁸ Under these conditions, it is clear that the range of victims in a given situation for whom Article 75 action would be an option would necessarily be severely restricted. Moreover, the problem is not just that a limited number of perpetrators will be tried, but also that they may be tried for only a fraction of the crimes for which they are each responsible. Article 75 reparations, after all, are to be provided only for harm sustained as a result of crimes for which an individual is convicted before the Court.²²⁹ For that very reason, the limited charges brought by the OTP against Thomas Lubanga Dyilo²³⁰

CEA8B6799E37/143836/LMO_20051024_English.pdf (explaining the Prosecutor's strategy of focusing on those most responsible and developing a small number of cases within a situation); International Criminal Court, Proposed Programme Budget for 2009, ¶ 105, ICC-ASP/7/9 (July 29, 2008), available at http://www.icc-cpi.int/iccdocs/asp_docs/ASP7/ICC-ASP-7-9%20English.pdf (emphasizing the importance of carefully selecting only the gravest cases). Contrast this with the approach exemplified by the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR, respectively). 161 individuals have been indicted for international crimes by the ICTY. 40 of those are currently on trial. 61 have been convicted and sentenced. ICTY, Key Figures of ITCY Cases, <http://www.icty.org/sections/TheCases/KeyFigures> (last visited Jan. 28, 2010). In a letter to the U.N. Security Council in May 2009, the President of the ICTR noted that the ICTR has delivered verdicts with respect to 44 of those tried. He reported that 18 were awaiting judgment, 6 were awaiting trial, and 6 were on trial at that time. U.N. Sec. Council, *Letter dated 14 May 2009 from the President of the International Criminal Tribunal for Rwanda addressed to the President of the Security Council*, U.N. Doc. S/2009/247 (May 14, 2009). When he reported to the Security Council in December 2009, the ICTR President reported that 5 first-instance judgments and 1 appellate judgment had been issued in the second half of 2009. Judge Dennis Byron, President ICTR, Address to the United Nations Security Council (Dec. 3, 2009) available at <http://69.94.11.53/ENGLISH/speeches/byron091203.htm>. Even these broader systems of prosecution are tightly constrained in their reach. As former Chief Prosecutor of the ICTY, Richard Goldstone, comments, "The proceedings of the ICTY will never investigate or make public more than a fraction of the history . . ." Richard J. Goldstone, *Advancing the Cause of Human Rights: The Need for Justice and Accountability*, in *REALIZING HUMAN RIGHTS: MOVING FROM INSPIRATION TO IMPACT* 195, 213 (Samantha Power & Graham Allison eds., 2000).

²²⁸ Observe, for example, that the first arrest warrants issued by the Court were for five of the leaders of the Northern Ugandan rebel group, the Lord's Resistance Army. See Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony Issued on 8 July 2005 As Amended on 27 September 2005 (Sept. 27, 2005); Case No. ICC-02/04, Warrant of Arrest for Vincent Otti (July 8, 2005); Case No. ICC-02/04, Warrant of Arrest for Okdot Odhiambo (July 8, 2005); Case No. ICC-02/04, Warrant of Arrest for Dominic Ongwen (July 8, 2005); Case No. ICC-02/04, Warrant of Arrest for Raska Lukwiya (July 8, 2005). Of the five individuals charged, one has died and the other four remain at large. See ICC, Uganda, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0204/Related+Cases/ICC+0204+0105/Uganda.htm> (last visited Feb. 22, 2010).

²²⁹ See *supra* note 224 and accompanying text.

²³⁰ Trial Chamber I recently held that the Court could add fresh charges, including counts of sexual slavery, inhuman treatment and cruel treatment after the Prosecution had already argued its case in chief. *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision Giving Notice to the Parties and Participants that the Legal Characterisation of the Facts May be Subject to Change in

prompted a coalition of NGOs to write a letter to the Prosecutor, which expressed disappointment and concern at the likely “negative[] impact on the right of victims to reparations.”²³¹ REDRESS objected that “[t]he lack of recognition of some of the most heinous and flagrant crimes denies victims their right to justice and reparation.”²³²

In sum, large swathes of victims in each situation in which the Court intervenes will not see their perpetrators charged by the ICC Prosecutor for the crimes of which they are victims. As such, those victims will have no opportunity to obtain Court-ordered Article 75 reparations. For two reasons these individuals are also unlikely to gain reparations domestically. First, under the fundamental principle of complementarity,²³³ the ICC involves itself only in situations in which the domestic system is failing to provide adequate justice.²³⁴ As Donat-Cattin argues, “where national systems have, by definition, been unwilling or unable to administer criminal justice, it is unlikely that those systems will be able or willing to give effect to the victims’ right to reparations.”²³⁵ Second, many states ravaged by the kind of war and atrocity that provokes ICC intervention²³⁶ will often have extreme resource needs as they seek to rebuild in the aftermath of that

Accordance With Regulation 55(2) of the Regulations of the Court (July 14, 2009). However, this decision was subsequently reversed by the Appeals Chamber. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court,” ¶ 41 (Sept. 3, 2009).

²³¹ Letter from Avocats Sans Frontieres et al. to Luis Moreno Ocampo, Chief Prosecutor, International Criminal Court (July 31, 2006), *available at* <http://www.vrwg.org/Publications/02/DRC%20joint%20letter%20english%201-8-2006.pdf> (discussing the narrow scope of the charges brought against Mr. Lubanga).

²³² Press Statement, REDRESS, ICC trial will go ahead, but limited charges may alienate victims in Eastern Congo (Jan. 29, 2007) *available at* <http://www.redress.org/news/Lubanga%20Media%20Advisory%2029-01-2007.pdf>.

²³³ See *supra* note 60.

²³⁴ See The Rome Statute, *supra* note 1, art. 17.

²³⁵ David Donat-Cattin, *The Role of Victims in the Proceedings Before the ICC*, in THE INTERNATIONAL CRIMINAL COURT: COMMENTS ON THE DRAFT STATUTE (F. Lattanzi ed., 1993).

²³⁶ Pursuant to Article 5 of the Rome Statute, the jurisdiction of the Court is limited to the crime of genocide, crimes against humanity, war crimes, and the (as yet inoperative) crime of aggression. The Rome Statute, *supra* note 1, art. 5. As such, the Court has jurisdiction only where there has been an armed conflict, *id.* art. 8, a genocide, *id.* art. 6, or a “widespread or systematic attack directed against any civilian population,” *id.* art. 7. Moreover, Article 17(1)(d) of the Statute provides that only crimes of sufficient “gravity” are admissible before the Court, *id.* art. 17(1)(d), and the preamble motivates the Court’s existence with reference to “unimaginable atrocities that deeply shock the conscience of humanity,” also described as “grave crimes [that] threaten the peace, security and well-being of the world,” *id.* preamble.

devastation.²³⁷ Even with the best intentions towards victims, the imperatives of rebuilding the state will often override the need to redress the wrongs done to victims.²³⁸ For these two reasons, there is a strong likelihood that victims who are not acknowledged and provided some form of reparative assistance by the ICC will be ignored altogether.

One might ask why this should be the ICC's concern. After all, it is accepted that the Court has a limited mandate and will only ever try a small number of individuals, thus providing symbolic rather than comprehensive criminal justice.²³⁹ However, whatever the rationale for prosecuting a narrow range of perpetrators – whether it is to set an example and deter future atrocities,²⁴⁰ to destroy the shield of impunity

²³⁷ See, e.g., Navanethem Pillay, United Nations High Comm'r for Human Rights, Address at the UN Approach to Transitional Justice (Dec. 2, 2009), available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=9663&LangID=e> ("transitional justice is . . . a technical approach to exceptional challenges, such as dealing with massive human rights abuses committed in the course of armed conflict or by repressive regimes, in circumstances of scarce resources, urgently competing demands and frequent institutional breakdown.") (emphasis added); Naomi Roht-Arriaza, *Reparations Decisions and Dilemmas*, 27 HASTINGS INT'L & COMP. L. REV. 157, 181 (2004) ("These situations involving tens or even hundreds of thousands of victims generally occur in poor countries with too few resources and many pressing needs. Often . . . a large number of victims coincide with a civil conflict that devastated the country's infrastructure . . ."); Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development*, 10 YALE HUM. RTS. & DEV. L.J. 141, 164 (2007) (quoting a Peruvian survivor commenting that the competition between development and reparations "pits 'the poor against the poor-victims' in the struggle for limited resources.").

²³⁸ See, e.g., M. Cherif Bassiouni, *International Recognition of Victims' Rights*, 6 HUM. RTS. L. REV. 203 (2006) ("The post-genocide regime change in Rwanda illustrates the difficulty of this question. Can a Tutsi government with no resources be expected to provide compensation to Tutsi citizens for violations committed by a Hutu regime?"); Roht-Arriaza, *supra* note 237, at 187 (reporting on the situation in South Africa following the 1994 transition: "The overall goal of fundamental social transformation is paramount, the government insisted, and the [Truth and Reconciliation Commission's] reparations proposals could only be accommodated within that larger goal."); Pablo de Greiff, *The Role of Reparations in Transitions to Democracy* (May 6, 2004), available at http://www.cceia.org/media/4980_Greiff_Reparations_and_Democracy.pdf ("The first temptation of all governments is to say, 'There is no money for this.' The second temptation is to say, 'There is money for social development and social investment and we are going to call that reparations.'"); Debra Satz, *Countering the Wrongs of the Past: The Role of Compensation*, in REPARATIONS: INTERDISCIPLINARY INQUIRIES 176, 189 (Jon Miller & Rahul Kumar eds., 2007) (noting that "there are competing and sometimes more urgent needs in many of the contexts in which demands for reparatory compensation are made.").

²³⁹ The OTP has been quite explicit in defining the scope of its mandate narrowly. See sources cited *supra* note 227.

²⁴⁰ See, e.g., NO PEACE WITHOUT JUSTICE, INTERNATIONAL CRIMINAL JUSTICE POLICY SER. NO. 1, PROSECUTING VIOLATIONS OF INTERNATIONAL CRIMINAL LAW: WHO SHOULD BE TRIED? 5 (2004), available at http://www.npwj.org/_resources/_documents/Uploaded-Files/File/NPWJProsecutorialPolicy4thASP.pdf ("These types of crimes generally occur as the result of a deliberate choice at the highest levels of decision-making. Increasing the likelihood of criminal prosecution for these decision makers increases the chances of prosecution being a deterrent factor when they make their choices about how to conduct warfare."). It is open to serious question whether this

for the most responsible,²⁴¹ or to provide “symbolic retribution”²⁴² – the same rationale does not simply transpose to the issue of paying reparations to victims. It is not meaningful to speak of choosing certain victims to compensate in full as “examples” for other victims.²⁴³ Such a policy would not achieve what reparation intends to achieve. Quite the opposite, rather than helping the latter group to rebuild their lives and defusing resentment between groups, it would create new and possibly deeper resentment and sow the seeds for future conflict.²⁴⁴ Similarly, there is no obvious rationale for providing reparations only to those who can prove a nexus between their suffering and the *specific crimes of those most responsible* for the atrocities wrought upon a society.²⁴⁵ A more plausible, although still deficient,²⁴⁶ argument could be made that those who have *suffered most* should get paid first. However, even this would not be achieved by the current prosecutorial strategy,²⁴⁷ because there is no natural correlation between those victims able to prove that they suffered from the specific crimes for which the individuals generally

argument is persuasive. See BASS, *supra* note 19, at 290-95; MINOW, *supra* note 177, at 49-50; Tom Dannenbaum, *Crime Beyond Punishment*, 15 U.C. DAVIS J. INT’L L. & POL’Y 189, 203-08 (2009).

²⁴¹ Luis Moreno Ocampo, Op-Ed., *Impunity No More*, N.Y. TIMES, July 1, 2009, at A21 (“During their careers as political leaders, diplomats and negotiators, [the drafters of the Rome Statute] had tried every solution: They shook hands with devils, sent them off to golden exiles, tried to appease them with promises of immunity, power and wealth. Each time they gambled on impunity and each time they lost.”); Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Investigations and Prosecutions of the International Criminal Court (ICC) 6 (Oct. 30, 2008) (“I have visited African and Arab countries in the recent months explaining the focus of my investigation. They are tired of double standards . . . justice for the weak; impunity for the powerful.”); Rena L. Scott, *Moving from Impunity to Accountability in Post-War Liberia: Possibilities, Cautions, and Challenges*, 33 INT’L J. LEGAL INFO. 345, 403 (2005) (“[I]n the African political context, holding those most responsible is necessary because of the nature of African politics since decolonization, a nature firmly rooted in the culture of impunity.”).

²⁴² Noah B. Novogrodsky, *Speaking to Africa - The Early Success of the Special Court for Sierra Leone*, 5 SANTA CLARA J. INT’L L. 194, 213 (2006). See also MINOW, *supra* note 177, at 50 (limited trials can “produce some sense of accountability.”).

²⁴³ This is presumably the analogue of the exemplary deterrence rationale for limited punishment. After all, it is presumably the criminal punishment much more than the possible financial reparations burden that has any chance of deterring perpetrators.

²⁴⁴ See *infra* notes 251-261 and accompanying text.

²⁴⁵ While the most responsible may be more deserving of punishment, a victim raped and killed by a soldier under the command of one of the “most responsible” is surely no more deserving of reparation than a victim raped and killed by a soldier under the command of a less prominent commander.

²⁴⁶ The argument in favor of repairing only those who suffer most is deficient because it fails to understand the importance of an equitable distribution of reparative assistance. This issue is addressed in greater detail below. See *infra* notes 251-261 and accompanying text.

²⁴⁷ Namely that of prosecuting those “most responsible.” See *supra* notes 227, 241 and accompanying text.

considered “most responsible” are criminally liable and those victims who have actually suffered most from the atrocities.²⁴⁸ Finally, symbolic retribution simply is not a meaningful goal for reparative assistance, which focuses on benefiting the victim, rather than punishing the perpetrator,²⁴⁹ and the possibly related notion of symbolically repairing a small number of victims has the same problem as providing reparative assistance to certain victims as “examples” to others.²⁵⁰

The problem of a limited pool of victim recipients – a problem that, for all the reasons enumerated above, is fundamental to the Article 75 reparations regime – is of acute concern in the kinds of situations that will come before the ICC.²⁵¹ It is well understood that transitional justice requires an acknowledgement of victims on *all* sides of an atrocity-laden conflict²⁵² and that one of the primary functions of reparations is to effect

²⁴⁸ International Rescue Committee, Congo Crisis, <http://www.theirc.org/special-reports/congo-forgotten-crisis> (last visited Feb. 3, 2010). It may well be the case that the four individuals indicted by the ICC for crimes committed in the DRC – Thomas Lubanga Dyilo, Mathieu Ngudjolo Chui, Germain Katanga, and Bosco Ntaganda – are those most responsible for the atrocities perpetrated in the DRC. However, this does not mean that those who have suffered most from the war crimes and crimes against humanity that have occurred in the DRC necessarily suffered from the small subset of such crimes for which any of those four men are allegedly criminally liable. For the confirmed charges leveled against Lubanga, Ngudjolo, and Katanga, see *Prosecutor v. Katanga & Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges (Sept. 30, 2008); *Prosecutor v. Lubanga Dyilo*, *supra* note 6. For the arrest warrant issued for Ntaganda, see *Prosecutor v. Ntaganda*, Case No. ICC-01/04-02/06, Warrant of Arrest (Aug. 22, 2006).

²⁴⁹ JANNA THOMPSON, *TAKING RESPONSIBILITY FOR THE PAST* xi (2002) (reparative justice “concerns itself with what ought to be done in reparation for injustice, and the obligation of wrongdoers, or their descendants or successors, for making this repair,” whereas retributive justice concerns itself with “the punishment of wrongdoers.”); de Greiff, *supra* note 170, at 157 (“The most general aim of a program of reparations is to do justice to victims”); *id.* at 153 (“Criminal justice – even if it were completely successful both in terms of the number of perpetrators accused (far from being the case in any transition) and in terms of results (which are always affected by the availability of evidence, and by the persistent weaknesses of judicial systems) – is, in the end, a struggle against perpetrators rather than an effort on behalf of victims.”).

²⁵⁰ See *supra* notes 243-244 and accompanying text.

²⁵¹ As noted above, these are typically situations of armed conflict or mass-atrocity. See *supra* note 236 and accompanying text.

²⁵² See, e.g., Goldstone, *supra* note 227, at 212 (“If [a prospective Bosnian truth commission] were to develop an efficient investigation department and could avoid being used as a political platform, it would help reveal the truth concerning the human rights violations that were committed to different degrees by all sides and therefore would probably be worth pursuing.”) (emphasis added). The South African Truth and Reconciliation Commission (TRC) final report, for example, explicitly acknowledges and discusses the blameworthiness of the African National Congress (ANC) and the United Democratic Front for their endorsement of certain human rights violations during the years of struggle against the apartheid regime, and reserves special criticism for one of the ANC’s primary political leaders, Winnie Madikizela-Mandela, for her leadership of the notorious Mandela United Football Club. See 5 TRUTH & RECONCILIATION COMM’N OF S.

such acknowledgement.²⁵³ Thus, as Wierda and de Greiff note, it is critical “both morally and practically, to repair as many categories of crime as feasible and to deal as comprehensively as possible with the universe of victims that have suffered the relevant crimes.”²⁵⁴ Indeed, for this very reason, the ASP, in establishing the TFCV required that “[t]he Board . . . refuse voluntary contributions whose allocation, as requested by the donor, would result in a manifestly inequitable distribution of available funds and property among the different groups of victims.”²⁵⁵ As TFCV Executive Director André Laperrière explains, if proper recognition and assistance to victims does not occur, “local conflicts will resume, again and again, threatening to destabilize larger regions, undermining development and devaluing hope for the future.”²⁵⁶

It is sobering to consider the legacy of post-atrocity societies in which victims do not feel that wrongs against them have been acknowledged or that wrongs against others were privileged over wrongs against them. In the aftermath of Rwanda’s 1994 genocide, René Lemarchand asked “Why should the genocide of the Tutsi, and their presumptive allies among the Hutu population, mask the countless atrocities committed by the RPF in the course of their military operations in Rwanda? Can one turn a blind eye to the systematic killing of tens of thousands of Hutu refugees in eastern Congo by the RPA?”²⁵⁷ There is reason to take such questions seriously. As Lemarchand explains, one of

AFR., TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 240-49 (1998); ALEX BORAINÉ, A COUNTRY UNMASKED 311-12 (2000). James Gibson finds that “[t]he most puissant characteristic of the collective memory created by South Africa’s TRC was the commission’s willingness to attribute blame to all parties in the struggle over apartheid. Because all sides did horrible things during the struggle, all sides are compromised to some degree, and legitimacy adheres to the complaints of one’s enemies about abuses.” JAMES L. GIBSON, OVERCOMING APARTHEID: CAN TRUTH RECONCILE A DIVIDED NATION? 335 (2004). Indeed, he argues, “[T]his is the most significant and consequential message of the truth and reconciliation process. Accepting the viewpoint that both sides did terrible things is perhaps the first tentative step on the road toward reconciliation.” *Id.* at 329.

²⁵³ Brandon Hamber, *The Dilemmas of Reparations: In Search of a Process-Driven Approach*, in OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS 135, 142 (K. De Feyter et al. eds., 2005) (the “process of reparations is about the recognition . . . convey[ed] and . . . not merely what a victim physically gets from the process.”); de Greiff, *supra* note 170, at 166 (emphasizing the importance of “[t]hinking about reparations in terms of recognition and of the promotion of civic trust and social solidarity”); *id.* at 160-67.

²⁵⁴ Wierda & de Greiff, *supra* note 35, at 13.

²⁵⁵ Establishment of a fund for the benefit of victims, *supra* note 2, para. 10.

²⁵⁶ ICC, A Call to Action, <http://www.icc-cpi.int/NR/exeres/15C47D54-FDD0-441D-A159-A6BE84D1D43F.htm> (last visited June 4, 2010).

²⁵⁷ René Lemarchand, *Genocide in the Great Lakes: Which Genocide? Whose Genocide?*, 41 AFR. STUDS. REV. 3, 4 (1998).

the most important of a range of factors that set the stage for the 1994 genocide in Rwanda was the resentment and fear felt by Hutu civilians after a “reverse” genocide in April to November of 1972 in Burundi, during which 100,000 to 200,000 were killed by the Tutsi-dominated military in Rwanda’s southerly neighbor.²⁵⁸ Such cycles of violence are not uncommon as societies struggle to emerge from periods of atrocity.²⁵⁹ Elizabeth Neuffer crystallizes the concern as it has manifested in the aftermath of the 1994 genocide in Rwanda: “In fragile, postconflict societies, the perception of justice is often as important as its delivery. Justice must be done, but it *must be seen to be done fairly*. Neither the Rwanda Tribunal’s trials nor those held by the Rwandan government met that test in the eyes of many Rwandans. Increasingly, both Hutu and Tutsi saw themselves as victims of justice, not recipients of it.”²⁶⁰ From this comes what this Paper terms “the imperative of transitional justice”: if society devastated by war and atrocity is to be restored to peace and stability, victims must *perceive* the transition to have treated them fairly, to have acknowledged wrongs done unto them in the way that it acknowledges wrongs done to others (and particularly others of different ethnic, religious, racial, social, or political groups).²⁶¹

²⁵⁸ *Id.* at 6. Tom Dannenbaum, *War and Peace in Rwanda*, in STOPPING WARS AND MAKING PEACE: STUDIES IN INTERNATIONAL INTERVENTION 77, 91-93, 102-03 (Kristen Eichensehr & W. Michael Reisman eds., 2009) (noting the importance of popular resentment of past wrongs and atrocities visited upon Hutu civilians by Tutsi governments and armies in motivating and mobilizing the massive civilian participation that was essential to the Rwandan genocide).

²⁵⁹ Referencing the extreme Croatian nationalist group that had collaborated with the Nazis during World War II, Slobodan Milošević deliberately undertook to “radicalize the Serb population [in early 1990s Croatia] with a non-stop bombardment of misinformation and fear-mongering . . . every action of Tudjman’s government was presented as an act of ‘Ustaša’ terror.” NOEL MALCOLM, BOSNIA: A SHORT HISTORY 217 (1996). Even post-Nazi Western Europe – transitional justice’s great success story – did not escape the phenomenon of violence rooted in vengeance. Jon Elster, *Retribution*, in RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY 33, 33 (Jon Elster ed., 2006) (“The number of extralegal executions after World War II [in retaliation against Nazi atrocities] in France and Italy, for instance, was around ten thousand in each country.”). See also ISABEL V. HILL, ABSOLUTE DESTRUCTION: MILITARY CULTURE AND THE PRACTICES OF WAR IN IMPERIAL GERMANY 241 (2005) (exemplifying the rhetorical use of seemingly imbalanced legal blame to motivate nationalist sentiment: “Theobald von Bethmann-Hollweg [stated to the Assembly] ‘Are we forever to talk of nothing but our own sins, even those consisting in the violations of international law, we who stand face to face with an anomaly of international law like England’s blockade through which our people have been relegated to an existence of misery for generations[?]’ (Loud applause from the spectators.)”).

²⁶⁰ NEUFFER, *supra* note 31, at 340 (emphasis added). See also Donat-Cattin, *Article 68*, *supra* note 24, at 1300 (“In order to achieve ‘rehabilitation’ of the victims and their re-integration into society it is vital that justice is not merely done, but also ‘seen to be done’.”).

²⁶¹ The driving force behind this imperative is the importance of answering the “major question,” namely “how all these persons will be capable of living together when the conflict has come to an end, without having to fear revenge.” Martien Schotsmans, *Victims’ Expectations, Needs and*

The ICC is already fighting an uphill battle in this regard, because its pursuit of such a limited number of perpetrators in each situation almost inevitably means that some groups will be over-represented and others under-represented.²⁶² Because it operates in conjunction with this limited criminal process, the Court-ordered reparations system provided for in Article 75 has the potential to create further imbalance.²⁶³ Consider that victims of crimes for which individuals are charged at the ICC have the opportunity to: (1) gain victim status and thus acknowledgement before the Court;²⁶⁴ (2) participate in proceedings in a number of meaningful ways and on their own terms (rather than as tools of the prosecutor);²⁶⁵ (3) receive protection, counseling, and legal representation during that participation;²⁶⁶ (4) gain access to fines and forfeitures levied by the

Perspectives After Gross and Systematic Human Rights Violations, in OUT OF THE ASHES: REPARATION FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS, *supra* note 253, at 105, 108.

²⁶² Consider, for example, those indicted in the Uganda situation, all five of whom are or were leaders of the rebel Lord's Resistance Army (LRA). *See* sources cited at *supra* note 228. Even before the OTP had issued any indictments, many Ugandans – and particularly those of the Acholi ethnic group of which Joseph Kony is a member – were concerned that the prosecutions would be one-sided. PHUONG PHAM ET AL., FORGOTTEN VOICES: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE AND JUSTICE IN NORTHERN UGANDA 18 (2005), available at <http://www.ictj.org/images/content/1/2/127.pdf>. (“Critics of the Court’s intervention, including many Acholi religious and traditional leaders and representatives of international humanitarian organizations . . . have . . . faulted the Prosecutor for announcing the referral in the company of President Museveni and doubt whether he will investigate the UPDF with the same rigor as the LRA.”). The number wishing to see Museveni held accountable was significant. *Id.* at 26 (“When the interviewers probed further to identify those who should be held accountable, approximately 37 percent of 1468 respondents said Kony and other LRA leaders, 29 percent the LRA in general, 16 percent President Museveni and the Ugandan government, 7 percent the government security apparatus (i.e., military, police, and local militias), and 11 percent all those who committed abuses.”). This is not a problem unique to the ICC. As Bill Wringe observes, “[i]n many, if not all, wars, atrocities are committed by both sides. However, when we look at war crimes trials we find that it is almost invariably those on the losing side who are tried and punished.” Bill Wringe, *Why Punish War Crimes? Victor’s Justice and Expressive Justifications of Punishment*, 25 LAW & PHILOSOPHY 159, 164 (2006).

²⁶³ If some groups are over-represented in the criminal dock, the victims of those groups will be over-represented in the population of reparations recipients. Conversely, the victims of those groups that are under-represented in the criminal dock will be under-represented in the population of reparations recipients. Put another way, a reparations regime that is tied closely to the regime of criminal justice necessarily exacerbates the pathologies of that criminal justice system.

²⁶⁴ *The Rules of Procedure and Evidence*, *supra* note 38, R. 89.

²⁶⁵ *See supra* notes 39-40 and accompanying text.

²⁶⁶ The Rome Statute, *supra* note 1, art. 68; *The Rules of Procedure and Evidence*, *supra* note 38, R. 87, 90, 91.

Court against the defendant;²⁶⁷ (5) see “their” perpetrator punished;²⁶⁸ and (6) receive the reparative award ordered by the Court, pursuant to Article 75.²⁶⁹

Is this combination of privileges enough to fully repair these individuals consistent with the *restitutio in integrum* principle established in *Factory at Chorzów* and re-iterated in numerous human rights judgments and U.N. General Assembly resolutions since?²⁷⁰ Of course not. But the notion that supplementing the reparative award with resources from the TFV could achieve that end is equally unrealistic. As Wierda and de Grieff report, “international experience makes it plain that no reparations program has been able to satisfy the criterion of *restitutio in integrum*.”²⁷¹ When one considers that this ubiquitous inadequacy also plagues the UNDP Trust Fund for Rwanda, which between 1995 and 1999 received \$119,536,758 in donations,²⁷² the challenge facing the significantly more modestly resourced TFV is stark indeed.²⁷³

This, however, is part of the point. Transitional justice deals in the inadequate.²⁷⁴ Nothing can return a victim of atrocity to his or her pre-atrocity state.²⁷⁵ The notion that a marginal addition of funds from

²⁶⁷ Regulations of the Trust Fund for Victims, *supra* note 4, reg. 47 (implying that since these funds are not under the control of the TFV, they are instead under the control of the Court, which can only direct them to victims of crimes, pursuant to its reparative mandate established under Article 75 of the Statute).

²⁶⁸ Stephen Schafer notes that “criminal proceedings are, in the last analysis, applied in the interests of [the] individual victim as well as in the interests of the community as a whole.” Formal restitution aside, he argues, the victim gets “spiritual satisfaction” from the punishment of his or her perpetrator. STEPHEN SCHAFER, *supra* note 25, at 122.

²⁶⁹ The Rome Statute, *supra* note 1, art. 75.

²⁷⁰ See *supra* notes 17-20 and accompanying text.

²⁷¹ Wierda & de Greiff, *supra* note 35, at 6.

²⁷² Ingadottir, *supra* note 86, at 20.

²⁷³ See *supra* notes 79-82 and accompanying text.

²⁷⁴ MINOW, *supra* note 177, at 5 (“no response can ever be adequate when your son has been killed by police ordered to shoot at a crowd of children; when you have been dragged out of your home, interrogated, and raped in a wave of ‘ethnic cleansing’; or when your brother who struggled against a repressive government has disappeared and left only a secret police file, bearing no clue to his final resting place. Closure is not possible.”); *id.* at 146-47 (“Genocide, mass murders, torture, and rapes defy comprehension and escape human conventions for making sense and meaning of life.”); Dannenbaum, *supra* note 240, at 219 (“There is no such thing as adequacy in the aftermath of atrocity . . .”).

²⁷⁵ See, e.g., MINOW, *supra* note 177, at 104 (“[N]o market exists for the value of living an ordinary life, without nightmares or survivor guilt. Valuing the losses from torture and murder strains the imagination. . . . Even if small numbers of a nation survive, compensating them for the loss of their entire world defies computation and comprehension”); de Greiff, *supra* note 170, at 166 (“[T]here is no amount of money that can make up for the loss of a parent, a child, a spouse. There is no amount of money that can adequately compensate for the nightmare and the trauma

the TFV would make the difference between fully and partially repairing the victims that have received Article 75 awards is both patently false and potentially offensive.²⁷⁶ Thus, the critical issue for any reparations regime in a transitional society is not whether victims are made whole, but rather how victims are treated *relative* to one another. More specifically, the question is how victims in the same transitional society are treated relative to one another as they try to join forces and reconstruct their shared but shredded social fabric.²⁷⁷ The importance of relativism here is rooted in the central role of *acknowledgement* in transitional justice reparations. As Carla Ferstman notes, in the transitional setting, “[r]eparation is as much about the restoration of dignity and the acknowledgement of the harm suffered, as it is about monetary compensation or restitution.”²⁷⁸ Similarly, Martha Minow observes, “even inadequate monetary payments or an apology without any reparations can afford . . . opportunities for a sense of recognition and renewal for survivors”²⁷⁹ Building on this understanding, the imperative of transitional justice advanced herein²⁸⁰ demands that reparative assistance programs pursue equitable acknowledgement, rather than the chimera of *restitutio in integrum*.

Consider this demand in light of the Article 75 regime. It is important not to overplay the benefits derived by victims whose perpetrators are brought to Court, since there are also costs involved with participating in the criminal justice process as a victim.²⁸¹ Nonetheless,

of torture.”); Schotsmans, *supra* note 261, at 129 (“[C]ompensation can never compensate . . . reparations can never repair. What has been done can never be undone . . .”).

²⁷⁶ MINOW, *supra* note 177, at 93 (“[M]oney can never bring back what was lost. Even the suggestion that it can may seem offensive.”); de Greiff, *supra* note 170, at 166 (arguing that “reparations programs . . . should not even try [to make victims of massive human rights abuses whole], and should always avoid using the vocabulary of proportional compensation.”).

²⁷⁷ Consider de Greiff’s call to “[t]hink[] about reparations in terms of recognition and of the promotion of civic trust and social solidarity . . .” de Greiff, *supra* note 170, at 166. *See also id.* at 156 (“[R]eparations aim, in the last analysis, as most transitional measures do, to contribute to the reconstitution or the constitution of a new political community.”).

²⁷⁸ Ferstman, *supra* note 28, at 668.

²⁷⁹ MINOW, *supra* note 177, at 93. *See also* Brandon Hamber, *supra* note 253, at 149 (“Reparations designed or set up to receive ‘closure’ are starting on the wrong trajectory. At best, reparations, both individual and collective . . . can reframe the debate in terms of hurts being acknowledged, deal with some material and psychological needs, and assist in recreating a sense of social, political and community belonging for the recipient.”).

²⁸⁰ *See supra* note 261 and subsequent text.

²⁸¹ Ferstman, *supra* note 28, at 668. (Describing the costs of engaging in litigation, which “include long delays, high costs, the need to gather evidence that might withstand close scrutiny (which in some cases may be simply unavailable), the pain associated with cross-examination and with

the six benefits listed above far outstrip anything that many other victims (whose perpetrators will never be charged, caught, or convicted and who will never have the opportunity to litigate for *any* reparation) can even hope to attain.²⁸² This imbalance, if it tracks ethnic, religious, political, social, or any other meaningful divisions in society, is potentially deleterious to and even catastrophic for the transitional justice project of which the ICC is a part.²⁸³ If imbalanced retributive justice is accompanied by a similarly imbalanced system of reparative acknowledgement, the problem is only exacerbated. Such a system risks deepening societal divisions by creating resentment in the group that feels that its suffering and the wrongs done unto its members have gone unacknowledged, while members of the ‘other’ group or groups appear to have been showered with the provision of justice in each of its retributive, restorative, and restitutive forms.

There should be no illusion that the TFV alone can solve this imbalance. However, as part of the same institutional framework as the ICC and as an institution representing the international community, it can play an important role in formally acknowledging the suffering of victims who might otherwise go ignored and can do so in a way that assists (albeit inadequately) in their re-building for a new life.²⁸⁴ Indeed, this is precisely the mission that some advocated during the preparatory stages of the creation of the Fund²⁸⁵ and it appears to be the mission that the TFV has charted for itself. As the Fund’s website advertises, “We bring assistance and expertise to *the most vulnerable victims* of genocide, war crimes, and crimes against humanity *in the most forgotten*

reliving sorrowful events, and finally, the very real risk of a contrary decision, which may prove to be devastating, adding insult to injury.”).

²⁸² See *supra* notes 264-269 and accompanying text. But see Charles P. Trumbull, *The Victims of Victim Participation in International Criminal Proceedings*, 29 MICH. J. INT’L L. 777, 778 (2008) (arguing that victims are not likely to benefit from the right to participate).

²⁸³ See *supra* notes 251-261 and accompanying text.

²⁸⁴ See *infra* notes 286-294 and accompanying text.

²⁸⁵ Danieli & Donat-Cattin, *supra* note 153, at 4 (“The Trust Fund should consider victim(s), or groups of victims, of crimes that fall under the ICC jurisdiction when

(a) (i) *there are no proceedings before the ICC or National Tribunals*, even though the Court may legitimately exercise jurisdiction, or (ii) *ICC or National proceedings against alleged perpetrators have not resulted in a conviction* (because the crime was committed, but the accused is found not guilty or the perpetrator is dead),

(b) *there are no resources available in National legal systems or International mechanisms to provide reparations to victims*, even though National jurisdictions have exercised their primary role to prosecute under the principle of complementarity.”) (emphasis added).

communities.”²⁸⁶ Similarly, the Fund’s U.S. advocacy arm explains that the TFV will “help the many victims who would otherwise not receive reparations because the perpetrators have no money or have evaded the reach of the Court altogether.”²⁸⁷ Indeed, the criteria the TFV currently uses for choosing its projects conform tightly to the transitional justice imperative articulated above.²⁸⁸ As Anaga Dalal reports:

Projects must meet the following specific criteria: they should *target the most vulnerable and marginalized* victims; include oversight, monitoring and follow-up mechanisms; *not discriminate between victims or groups* of victims; include an outreach/communication component; actively involve victims and affected communities; *complement, not duplicate, existing projects*; ensure sustainable and lasting results; and select partners with a proven expertise and competency.²⁸⁹

Despite its limited funds, the TFV is reaching a large number of individuals, and, through adopting creative strategies, is reaching them in a meaningful way. The Fund reports that it reached 380,000 individuals in the DRC and Uganda in 2008, spending €1.4 million in the process.²⁹⁰ It estimates that it will reach 130,000 in the CAR in 2009, at a cost of €650,000.²⁹¹ Many of these projects involve the provision of much needed psychological and physical care.²⁹² Dalal also describes a project in northern Uganda assisting the inhabitants of “a village that faced diminishing crops and a decimated infrastructure.”²⁹³ The Fund’s Executive Director, André Laperrière, Dalal reports, “struck a deal with the village chief to pay locals in seeds for repairing roads, thus allowing them to both revitalize their harvest and rush their crops to market on newly paved roads.”²⁹⁴

Though limited in resources, the Fund is making a tangible difference to victims that would be ignored were it not for its action. Of course, the assistance received by these victims can hardly be termed “adequate reparation.” However, focusing on the chimera of adequacy

²⁸⁶ ICC Trust Fund for Victims, Who We Are, *supra* note 199.

²⁸⁷ Victims Trust Fund Campaign, Questions and Answers: The Victims Trust Fund of the ICC, www.iccnw.org/documents/FS-VTFC-FAQ.pdf (last visited June 4, 2010).

²⁸⁸ See *supra* note 261 and subsequent text.

²⁸⁹ Anaga Dalal, *New Head of Trust Fund for Victims Has Sights Set on the Future*, MONITOR – J. COALITION INT’L CRIM. CT., Nov. 2007 – Apr. 2008, at 8 (emphasis added).

²⁹⁰ ICC Trust Fund for Victims, *supra* note 79.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ Dalal, *supra* note 289, at 8.

²⁹⁴ *Id.*

detracts from the more pertinent benchmark – conformity to the imperative of transitional justice. On that measure, the optimal approach is clear. Per the analysis above, the independent approach is better structured to respond to the demands of transitional justice than is a scheme that uses the Fund’s “other resources” to supplement narrow and potentially divisive Court-ordered reparations that will anyway fail to make their recipients whole.

B. MODERN FUNDRAISING

There is also good reason to prefer the independent approach to its alternatives on the ground that it better responds to the exigencies of humanitarian fundraising in the modern philanthropic climate. TFW Regulation 27 provides:

Voluntary contributions from governments shall not be earmarked. Voluntary contributions from other sources may be earmarked by the donor for up to one third of the contribution for a Trust Fund activity or project, so long as the allocation, as requested by the donor,

(a) benefits victims as defined in rule 85 of the Rules of Procedure and Evidence, and, where natural persons are concerned, their families;

(b) would not result in discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or other origin, property, birth or other status, provided that contributions aimed at assisting those enjoying specific protection under international law should not be considered to be discriminatory.²⁹⁵

This provision strikes an important balance. As Carla Ferstman notes, the danger with earmarking is that, taken to an extreme, “it may affect the integrity and neutrality of the Fund, and specifically its ability to reach all eligible victims.”²⁹⁶ Indeed, pursuant to the imperative of transitional justice, it is critical that the TFW preserve its freedom to choose projects so as to distribute reparative assistance equitably among the targeted victim populations.²⁹⁷ For that reason, it is important to place a cap on the portion of a donation that can be earmarked for a specific purpose. On the other hand, earmarking is a feature of modern

²⁹⁵ Regulations of the Trust Fund for Victims, *supra* note 4, reg. 27.

²⁹⁶ Ferstman, *supra* note 28, at 686.

²⁹⁷ See *supra* Part IV Section A.

humanitarian fundraising²⁹⁸ and in such a context, the TFV is placed at a considerable disadvantage to the extent it refuses to embrace the earmarking of donations. A report published by REDRESS reasons, “Donors increasingly wish to see the impact of their contributions, requiring clearly defined projects with measurable objectives. Thus, a greater pool of potential donors would be opened up to the Fund if its capacity to receive earmarked funds is increased.”²⁹⁹ Without entering the debate over precisely how great the TFV’s capacity to accept earmarked donations should be, it can nonetheless be observed that the independent approach allows for a far wider range of projects and project types to which donors can attach the proportion of funds that they are allowed to earmark than would a system that allocates TFV resources to Article 75 reparations orders.³⁰⁰ Given the demand among donors for control over the impact of their donations, this wider range of projects gives the independent approach a fundraising advantage.

Of course, as long as Article 75 reparations are assigned to victims of a variety of crimes or are used to fund projects of different types, donors will have some freedom to earmark even those funds allocated to the augmentation of Article 75 orders.³⁰¹ However, the

²⁹⁸ The online donations page of the International Committee of the Red Cross, for example, allows prospective donors to select the specific program they wish to support, whether a regional focus, such as “North Caucasus,” a state, such as the Democratic Republic of Congo, or a specific project, such as “water programs.” International Committee of the Red Cross, Help the Victims of War: Make a Donation to the ICRC Today, <http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/helpicrc> (last visited June 4, 2010). The broader phenomenon has caused the Nonprofits Assistance Fund to produce a manual for NGOs to assist them in managing earmarked funds. See generally NONPROFITS ASSISTANCE FUND, MANAGING RESTRICTED FUNDS available at http://www.nonprofitsassistancefund.org/files/MNAF/ToolsTemplates/Managing_Restricted_Funds.pdf (last visited Dec. 22, 2009). See also, e.g., The Secretary-General, *United Nations Voluntary Fund for Victims of Torture*, ¶ 18, delivered to the General Assembly, U.N. Doc. A/63/220 (Aug. 5, 2008) (“The Board [of the Torture Fund] highlighted the fact that while it encouraged unearmarked funding to the Office of the United Nations High Commissioner for Human Rights (OHCHR), it believed that the trust funds of the Office had specific needs and that donors should continue to earmark their contributions to them.”). KRISTIAN BERG HARPVIKEN ET AL., SIDA DIVISION FOR HUMANITARIAN ASSISTANCE AND CONFLICT MANAGEMENT, SIDA’S CONTRIBUTIONS TO HUMANITARIAN MINE ACTION: FINAL REPORT 15 (2001) available at <http://www.oecd.org/dataoecd/57/54/35197151.pdf> (“[A] key constraint [on humanitarian de-mining projects] is the availability of funding. Some donors tie funding to particular projects or to particular geographic areas.”).

²⁹⁹ REDRESS, *supra* note 37, at 9.

³⁰⁰ See *infra* notes 301-307 and accompanying text.

³⁰¹ For example, the charges confirmed against Germain Katanga and Mathieu Ngudjolo include, *inter alia*, using children under the age of fifteen to take active part in hostilities, directing an attack against a civilian population as such, sexual slavery, and rape. See *Prosecutor v. Katanga & Ngudjolo Chui*, *supra* note 248. Assuming the two defendants in that case are convicted on

independent projects pursued by the TFV using its “other resources” are more appealing to the modern donor for two reasons. First, the Fund is constantly initiating a diverse array of projects to which a variety of donors may be attracted.³⁰² By contrast, the nature and indeed existence of an Article 75 order will only become apparent at the end of the case.³⁰³ If donors are to select appealing projects before making a partially earmarked donation, the projects to which they might donate must be available for their review. The less frequently a new array of projects can be presented to potential donors, the less frequently they will have the opportunity to find something that inspires them to donate.

Second, the Fund is pursuing a multitude of projects, each addressing a different problem.³⁰⁴ By contrast, an Article 75 order will be strictly limited by the nature of the case. For example, because the case brought against Thomas Lubanga rests exclusively on charges related to the abduction and use of child soldiers,³⁰⁵ there is no way that the Court in that case could make an order under Article 75 that would award reparations to mature victims of sexual violence.³⁰⁶ It is quite natural that certain donors will be particularly interested in certain problems that the Fund might tackle. Because the TFV is able to engage a far wider range of problems with its independent projects than can the Court with Article 75 orders, the independent approach would maximize the range of potential donors that the Fund can attract.

The impact of the TFV’s capacity to attract funds through appealing to the interests of potential donors can be seen by the impressive response it has generated in its recent campaign to assist victims of sexual violence. As *Monitor* reported not long after the campaign’s launch,

each of the above counts, one donor whose contribution would be allocated to the augmentation of Article 75 orders against Katanga and Ngudjolo might earmark a portion of them to the rehabilitation and reintegration of the perpetrators’ former child soldiers; another might earmark a portion of her donation to the rehabilitation of victims of sexual slavery and rape.

³⁰² ICC Trust Fund for Victims, *supra* note 79.

³⁰³ This is a necessary consequence of the fact that Article 75 orders are made against a convicted person with regard to the specific crimes for which he is convicted. *See supra* notes 42, 99-103, 224 and accompanying text.

³⁰⁴ ICC Trust Fund for Victims, *supra* note 79.

³⁰⁵ Prosecutor v. Lubanga Dyilo, *supra* note 6.

³⁰⁶ For this very reason, victims’ rights NGOs objected to the narrow charges when they were first brought. *See supra* notes 230-232 and accompanying text. Victims’ advocates petitioned the Trial Chamber to amend the charges, so as to include crimes of sexual violence. Their petition was initially successful, but the favorable Trial Chamber decision was subsequently overturned on appeal. *See supra* note 230.

On 10 September 2008, during its fifth annual meeting, the Board of Directors of the Trust Fund for Victims (TFV) launched an appeal for 10 million euros (€) to assist 1.7 million victims of sexual violence in the four countries in which the ICC is currently investigating. “Women and girls are most often the primary victims of war and civil disturbance—they are victims of rape, abuse and the destruction of families. Th[is Board] believes administering targeted support for those most vulnerable under the jurisdiction of the ICC is necessary,” said Board Chair Madame Minister Simone Veil. In response to this appeal, the government of Denmark publicly announced its donation of €500,000—the largest donation the TFV has received to date.³⁰⁷

Ultimately, the TFV relies heavily on voluntary donations.³⁰⁸ Given that the funds will always be inadequate to meet the massive need for reparations in the aftermath of atrocity,³⁰⁹ it is essential to maximize the TFV’s fund-raising potential. One mechanism for doing that is to provide the Fund with the best possible platform from which to exploit its license to receive earmarked donations.³¹⁰ For the reasons articulated above, the independent approach would allow the TFV to do that better than would a system under which the Fund must devote a substantial proportion of its resources to supplementing Article 75 reparations.

C. INSTITUTIONAL COMPETENCE

The final reason to prefer the independent approach is that it better distributes responsibility along the lines of institutional competence. The acknowledgement and reparation of victims requires a contextual, nuanced approach.³¹¹ A criminal court with criminal judges

³⁰⁷ *Fund Appeal for Sexual Violence Victims*, MONITOR – J. COALITION INT’L CRIM. CT. Nov. 2008 – Apr. 2009, at 6.

³⁰⁸ Mahnouch H. Arsanjani & W. Michael Reisman, *The Law in Action of the International Criminal Court*, 99 AM. J. INT’L L. 385, 401 (2005) (“It is not at all clear that perpetrators of serious crimes accumulate substantial property or that the violence and number of atrocities correlate with the accumulation of wealth by the perpetrators. . . . A more likely source of revenue for the trust fund is voluntary contributions by governments and private entities.”).

³⁰⁹ See *supra* notes 270-280 and accompanying text.

³¹⁰ Again, this is not an argument for expanding the earmarking limit (see *supra* notes 296-300 and accompanying text) but rather an argument that *within* the limit set by the TFV Regulations, the Fund must be given the tools to take advantage of the fundraising opportunity that earmarking provides.

³¹¹ Pillay, *supra* note 237 (emphasizing as the UN’s fourth guiding principle on transitional justice “the need, when designing and implementing transitional justice mechanisms, for the UN to take into account the particular context of the country situation. . . . There is not a one-size-fits all approach to transitional justice initiatives.”); de Greiff, *supra* note 170, at 168, (“[T]he final details of a program for a particular country will depend on heeding many contextual features”); James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human*

who are limited to repairing only victims of the specific criminal in the dock is simply not designed or equipped to do this work.³¹² For this reason, the Article 75 procedure has already come under critical fire – long before its inaugural application to a case.³¹³ As Henzelin et al. comment,

The International Criminal Court is first and foremost a criminal court and its mandate has been tailored accordingly. It is not a truth and reconciliation commission and, even less, a mass claims resolution body. Its judges have been selected and elected primarily with that mandate and responsibility in mind. Few of them will possess the necessary expertise, or experience, required to deal with mass claims of the sort the Court are likely to be faced with.³¹⁴

By contrast, the TFV is a specialist institution set up specifically for the “benefit of victims.”³¹⁵ Indeed, in defining eligibility for election to the Board of the TFV, the ASP requires, “The members of the Board . . . shall have competence in the assistance to victims of serious crimes.”³¹⁶ Included among the original board members were individuals such as Simone Veil and Archbishop Desmond Tutu, both of whom who lived and suffered under regimes of atrocity and both of whom worked on a number of human rights issues prior to joining the TFV Board.³¹⁷ Most

Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court, 102 AM. J. INT’L L. 768, 777-78 (2008) (considering the reparations regime of the Inter-American Court of Human Rights and finding that “[w]ithout contextual understanding of a country, the court might issue a reparations order to achieve a certain concrete goal, not understanding that the form of the reparations order is likely to provoke societal backlash. Contextual information and an understanding of the local political climate, by contrast, could lead the court to choose another form of reparations order better suited to achieve the same goal, if an alternative form is available[.]”); Carlton Waterhouse, *The Good, the Bad, and the Ugly: Moral Agency and the Role of Victims in Reparations Programs*, 31 U. PA. J. INT’L L. 257, 270 (2009) (acknowledging that “the shape of reparations programs should always reflect the context of the situation and the country in which they take place . . .”).

³¹² First, the Court is problematically limited in terms of the victims it can address. *See supra* notes 224-238, 262-263 and accompanying text. Second, even among those victims who do have standing, criminal courts and criminal judges are not traditionally designed to handle victims with what Martha Minow calls “a tone of care-giving and a sense of safety.” MINOW, *supra* note 177, at 72. *See, e.g.*, Dannenbaum, *supra* note 240, at 191. Third, criminal judges are simply not expert in determining how best to provide reparations in a way that best assists and acknowledges the recipients. *See infra* notes 314-319 and accompanying text.

³¹³ At the time of writing, no case has yet reached the stage of Article 75 proceedings.

³¹⁴ Marc Henzelin et al., *supra* note 135, at 340.

³¹⁵ The Rome Statute, *supra* note 1, art. 79(1).

³¹⁶ Establishment of a fund for the benefit of victims, *supra* note 2, Annex to the Resolution, para. 3.

³¹⁷ More detail on the respective backgrounds of Simone Veil and Desmond Tutu can be found in the following sources: SIMONE VEIL, *A LIFE* (2009); JOHN ALLEN, *DESMOND TUTU: RABBLE-ROUSER FOR PEACE* (2008); DESMOND TUTU, *NO FUTURE WITHOUT FORGIVENESS* (2000). Following the recent elections at the end of 2009, a new TFV Board has been elected, including,

notably, Tutu chaired the South African Truth and Reconciliation Commission – a body that was widely lauded for its approach to victims, even by its dissenters.³¹⁸ Individuals with that kind of professional experience are simply better placed to evaluate and consider how best to approach the question of assisting and acknowledging the victims of atrocity than are criminal judges. This is no accident – certain delegations to the ASP insisted that the TFV be independent from the Court precisely because of the importance of delegating management of the Fund and its projects to those most professionally competent.³¹⁹

The institutional competence gap runs deeper than the difference in personnel. The entire structure of the TFV is better suited to the task at hand. Wierda and de Greiff highlight the Fund's advantages, "including its ability to operate at lower costs than the Court and with a much less cumbersome procedure and with the ability, if need be, to conduct additional and independent needs assessment as a result."³²⁰ Moreover, with ongoing working relationships with organizations on the ground, in

among others, Eduardo Pizarro Leongómez, President of Colombia's National Committee for Reparation and Reconciliation from 2005-2009, Elisabeth Rehn, an expert on peace building, and Betty Kaari Murungi, who has experience managing NGOs and charitable Funds, and who spent some time working with the Truth and Reconciliation Commission of Sierra Leone. See Trust Fund for Victims, Board of Directors, <http://www.trustfundforvictims.org/board-directors> (last visited June 4, 2010).

³¹⁸ Wynand Malan, *Minority Position*, in 5 TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT, *supra* note 252, at 436, 444 ("In hearings, victims often approached the Commission almost in a fetal position as they came to take their seats and relate their stories. They told their stories as they saw them, as they experienced them, as they perceived what had happened to them. And as they left their seats, the image was wholly different. They walked tall. They were reintegrated into their community."). It is true that the reparations system that grew in part out of the Commission's recommendations has been subject to "widespread and even virulent" criticism. GIBSON, *supra* note 252, at 262; *see also* RICHARD WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE 200 (2001). However, it has been the South African government's dereliction in applying the recommendations of the Truth and Reconciliation Commission that has been the source of the frustration, rather than any failing of the Commission to appreciate the needs of victims. GIBSON, *supra* note 252, at 262; Traces of Truth, TRC Category 4 - Reparations, http://truth.wwl.wits.ac.za/cat_descr.php?cat=4 (last visited Apr. 20, 2010) ("In short, the [government's reparations] policy reflected neither the recommendations of the TRC nor the voices of survivors groups and civil society. With regards to individual compensation it was proposed that approximately \$4000 USD be given to survivors in the form of a once off payment. This amounted to less than a quarter the already minimal amount recommended by the [TRC].").

³¹⁹ *See, e.g.*, GOV'T OF NORWAY, TRUST FUND FOR VICTIMS - NORWEGIAN STATEMENT (March 5, 2001) (outlining "certain fundamental requirements for my delegation" including that "[w]e believe this kind of management is of a specialized nature. . . Therefore, we are not convinced that the actual management should be entrusted to the Registrar or other organs of the Court itself.").

³²⁰ Wierda & de Greiff, *supra* note 35, at 10.

addition to operating a number of projects itself, the TFV has a better understanding of the context in which any assistance would be provided than the judges in The Hague possibly could.³²¹

The results of the more flexible and yet more specialized mandate of the TFV can be seen in the number of projects it initiated in its first year of activity.³²² Precisely because it is better positioned to perform this kind of work, some observers have advocated that the Court defer the management and execution of *all* Article 75 orders to the TFV as a matter of course.³²³ That is no doubt a worthwhile suggestion. However, the logic behind it also supports the independent approach with respect to the TFV's "other resources." In other words, the TFV should be able to determine not just how to manage and execute the Article 75 orders made against convicted persons, but also how much of its pool of "other resources" should be devoted to Article 75 activity and how much to other projects that benefit victims.

V. THE BOUNDARIES OF THE FUND'S INDEPENDENCE

The analysis provided above may provoke two closely related questions. First, what are the limits of the Trust Fund's independence and flexibility with respect to the use of its "other resources"? Second, if the Fund is modeled on the likes of the United Nations Voluntary Fund for Victims of Torture and the United Nations Voluntary Trust Fund on Contemporary Forms of Slavery (at least with respect to the projects it undertakes with its "other resources"), why does the TFV retain any institutional link to the Court at all?

An obvious initial response to the second question is that the Fund performs important functions under Article 75 of the Statute, as articulated in Rule 98, subparagraphs 1-4,³²⁴ and is therefore connected to the Court in a number of ways quite apart from its use of its "other resources." However, this simply provokes an amended version of the second question; namely, why should the fund that performs *those* roles

³²¹ See sources cited *supra* note 311 (noting the importance of a contextual approach); Dalal, *supra* note 289, at 8 (reporting on the TFV Executive Director's acknowledgement of the "importance of collaborating with civil society organizations that have already forged trusting and respectful relationship with affected communities on the ground.").

³²² ICC Trust Fund for Victims, *supra* note 79.

³²³ Wierda & de Greiff, *supra* note 35, at 7, 9.

³²⁴ *The Rules of Procedure and Evidence*, *supra* note 38, R. 98.

also be endowed with a seemingly entirely unconnected function under Article 79(1, 3) and Rule 98(5)?

Playing a central role in the answers to both of the questions is the imperative of transitional justice.³²⁵ Before considering that issue, however, it is important to re-emphasize the most fundamental limit to the TFV's independence in distributing its "other resources;" namely, the requirement, articulated explicitly in the Statute,³²⁶ the Rules,³²⁷ and the TFV Regulations³²⁸ that the Fund's resources be used to benefit "victims of crimes within the jurisdiction of the Court" and their families. Though a simple rule, this considerably limits the discretion of the Fund. The message of this stipulation is that the TFV is not simply a humanitarian aid agency. Trust Fund projects, though often humanitarian in nature,³²⁹ must also seek to achieve an important transitional justice goal; namely, the recognition and acknowledgement of those victimized by war crimes, crimes against humanity, and genocide.³³⁰

Moreover, this is not only a limit on the TFV's discretion; it is also an important way in which the Fund and the Court are linked, even with respect to the Fund's use of its "other resources." Indeed, while acknowledging that the "nature of the Trust Fund for Victims is particular" and affirming the importance of preserving its independence from the Court, members of the Victims Working Group during the preparations for the establishment of the TFV nonetheless noted that the Fund "shares many of the objectives of the Court."³³¹ Put simply, they are different mechanisms for addressing the same essential problem of how to enable a society that has undergone mass atrocity to begin to recover – they are mechanisms of transitional justice.³³² This, of course,

³²⁵ See *supra* Part IV Section A.

³²⁶ The Rome Statute, *supra* note 1, art. 66(3).

³²⁷ *The Rules of Procedure and Evidence*, *supra* note 38, R. 98(5).

³²⁸ Regulations of the Trust Fund for Victims, *supra* note 4, reg. 42.

³²⁹ See ICC Trust Fund for Victims, *supra* note 79.

³³⁰ See *supra* note 236.

³³¹ NGO, Victims Working Group & Fin. Regulations and Rules Team, *Statement on the Victims Trust Fund* (Sept. 25, 2001).

³³² Pillay, *supra* note 237 ("transitional justice mechanisms embrace criminal justice [and] reparations. . ."); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 27-67 (2000) (discussing "criminal justice"); *Id.* at 119-47 (discussing "reparatory justice"); *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 335-438 (Neil J. Kritz ed., 1995) (discussing "criminal sanctions"); *Id.* at 489-591 (discussing the "treatment and compensation of victims"); de Greiff, *supra* note 170, at 162 ("[R]eparations contribute to justice not only because they complement transitional justice measures generally, but because they do so in a particular way, namely by helping to keep those other measures [including criminal justice] from fading into irrelevance for most victims.").

does not *require* that the Fund and the Court be institutionally attached, but it does help to make some sense of that attachment.

The second limit is equally important, but it does not appear to be currently provided for under ICC law. This second requirement is that the TFFV should pursue projects with its “other resources” only in situations in which the Court is already actively engaged and, preferably, in which the Prosecutor has already indicted those considered to be the primary suspects.

No provision of the Statute or the Rules explicitly requires that the TFFV limit its projects to active situations. Nor did the TFFV Regulations circumscribe the authority of the Fund in this respect. The closest thing to a legal limitation along those lines is the stipulation in TFFV Regulation 50(a)(ii) that the “*relevant Chamber*” of the Court may respond to a TFFV notification that the Fund intends to pursue an independent project with its “other resources” by noting that such action “would pre-determine any issue to be determined by the Court.”³³³ The implication of this provision is that there exists for any TFFV action a “relevant Chamber” in the ICC, which in turn implies that the action is designed to impact an area in which the Court has already taken an interest. Indeed, the same is also implied by the role that Chamber is to play – namely considering whether the Fund’s proposed actions would pre-determine any issue to be determined by the Court. TFFV Regulation 50(a)(ii), however, does not require that the Fund limit itself to active situations. Rather, at most, it reveals an assumption that the TFFV will in fact concentrate its projects within that realm.

This assumption has thus far proven correct. Consider, for example, the Fund’s debut projects in Uganda³³⁴ and the DRC,³³⁵ both of which were – already at the time of the Fund’s notifications to the Court – active situations³³⁶ in which the Court had issued warrants for the arrest of several alleged war criminals.³³⁷ However, although it has been the

³³³ Regulations of the Trust Fund for Victims, *supra* note 4, reg. 50(a)(ii) (emphasis added).

³³⁴ Notification of the Board of Directors of the Trust Fund for Victims Jan. 25, 2008, *supra* note 50.

³³⁵ Notification of the Board of the Trust Fund for Victims Jan. 24, 2008, *supra* note 5, para. 29.

³³⁶ See Press Release, Int’l Criminal Court, Prosecutor of the International Criminal Court opens an investigation into Northern Uganda, Doc. ICC-OTP-20040729-65 (July 29, 2004); See Press Release, Int’l Criminal Court, The Office of the Prosecutor of the International Criminal Court opens its first investigation, Doc. ICC-OTP-20040623-59 (June 26, 2004) (announcing the opening of investigations into the DRC situation).

³³⁷ In the DRC situation, the charges against one accused had already been confirmed. Prosecutor v. Lubanga Dyilo, *supra* note 6. Arrest warrants had been issued for the remaining three: Prosecutor v. Ngudjolo Chui, Case No. ICC-01/04-01/07-260-tENG, Warrant of Arrest for

Fund's practice thus far to pursue projects in active situations,³³⁸ this hardly shows either that the Fund is bound to act in this way, or even that it understands itself to be so bound. Indeed, hypothetically, if the Fund were to initiate a project assisting victims of Article 5 crimes in Colombia, it would be difficult to argue that such action would be in direct contravention of any ICC legal provision.³³⁹

Yet, if the TFV is to fulfill the transitional justice function advocated in Section 4.1, *supra*, the Fund must be restricted to active situations before the Court. One of the fundamental claims of this Paper is that the TFV is positioned to play an important transitional justice role in counterbalancing the action of the ICC in a given situation.³⁴⁰ The Court alone can prosecute only a small minority of perpetrators and cannot provide acknowledgement to more than a handful of victims.³⁴¹ Prosecutions will almost inevitably be unevenly distributed across ethnic groups, warring factions, and other social cleavages.³⁴² As discussed above, such inequity has the potential to exacerbate existing animosities and narratives of particularist grievance.³⁴³ The Fund can assist in

Mathieu Ngudjolo Chui (July 6, 2007); Prosecutor v. Katanga, Case No. ICC-01/04-01/07-1-tENG, Urgent Warrant of Arrest for Germain Katanga (July 2, 2007); Prosecutor v. Ntaganda, *supra* note 248. The cases against Katanga and Ngudjolo have since been joined, Prosecutor v. Katanga, Case No. ICC-01/04-01/07-257, Decision on the Joinder of the Cases against Germain Katanga and Mathieu Ngudjolo Chui (Mar. 10, 2008), and the charges against the two confirmed, Prosecutor v. Katanga & Ngudjolo Chui, *supra* note 248. For the arrest warrants issued for the five indicted suspects in the situation of Uganda, see *supra* note 228.

³³⁸ The TFV's began its next set of projects in the Central African Republic – another live situation in which an arrest warrant had already been issued for Jean-Pierre Bemba ICC Trust Fund for Victims, *supra* note 79; Press Release, Int'l Criminal Court, Prosecutor opens investigation in the Central African Republic, Doc. ICC-OTP-20070522-220 (May 22, 2007); Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-1-tENG, Urgent Warrant of Arrest for Jean- Pierre Bemba Gombo (May 23, 2008). Pre- Trial Chamber III has since confirmed the charges against Bemba. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean- Pierre Bemba Gombo (June 15, 2009).

³³⁹ The Prosecutor has, of course, shown considerable interest in Colombia and the war crimes and crimes against humanity that may have occurred there, but he has not yet initiated a formal investigation. Lula Arhens, *Ocampo Sees Business for ICC in Colombia*, RADIO NETHERLANDS WORLDWIDE, Aug. 22, 2008, <http://static.rnw.nl/migratie/www.radionetherlands.nl/currentaffairs/region/southamerica/080822-business-columbia-redireceted>; Press Release, Int'l Criminal Court, ICC Prosecutor visits Colombia, Doc. ICC-OTP-20080821-PR347 (2008); *ICC Probes Colombia on War Crimes*, BBC NEWS, Mar. 31, 2005, <http://news.bbc.co.uk/2/hi/americas/4399027.stm>.

³⁴⁰ See *supra* Part IV Section A.

³⁴¹ See *supra* notes 220-232 and accompanying text.

³⁴² See *supra* note 262 and accompanying text.

³⁴³ See *supra* notes 251-261, 277- 283 and accompanying text.

blunting these tendencies by ensuring international (and ICC-associated) recognition and acknowledgement for a much broader array of victims.³⁴⁴

Of course, from a global perspective, the crimes in Colombia should be acknowledged and the victims recognized, just as should the crimes and victims in Uganda, the DRC, and the CAR. However, the Fund is not simply a resource for assisting victims of crimes against humanity, genocide, and war crimes; it is an institution attached to the International Criminal Court. The argument advanced above is that the TFV should be understood as a mechanism by which some of the specific transitional justice pathologies of the International Criminal Court can be mitigated.³⁴⁵ On this view, the Fund's role is to acknowledge the victims whose perpetrators will never stand in an ICC dock, but who live in societies in which the ICC is active.³⁴⁶ True, the Fund would do valuable work if it were to assist victims in situations outside of the ICC's active consideration. However, it would lose all connection to the Court with respect to its "other resources" projects. It is in this sense that the imperative of transitional justice connects the answers to the two questions addressed in this Part – (1) what are the limits of the Fund's freedom? And (2) why is the Fund attached to the ICC? The Fund's freedom to use its "other resources" must be limited by the imperative to mitigate the transitional justice pathologies of the Court, and the Fund is linked to the Court because its role is to mitigate the Court's transitional justice pathologies. This is why it makes sense to provide for the Fund in the Rome Statute and to have it engage with the Court on a number of levels.

Because there is no provision currently in force that explicitly limits the Fund to projects in active ICC situations, the implication of the above argument is that such a provision should be added to the TFV Regulations. This can be achieved by a two-thirds majority vote in the Assembly of States Parties, pursuant to TFV Regulation 78³⁴⁷ and Article

³⁴⁴ Indeed, the Fund has already started to do just that. *See supra* notes 47-53, 286-294 and accompanying text.

³⁴⁵ *See supra* Part IV Section A.

³⁴⁶ It is this internal dynamic of relative acknowledgement within a society emerging from atrocity that is the target of the imperative of transitional justice, not a concern with the global distribution of acknowledgement across such societies. *See supra* notes 251-261, 277-283 and accompanying text. *See also supra* Part IV Section A.

³⁴⁷ Regulations of the Trust Fund for Victims, *supra* note 4, reg. 78 ("Amendments to these Regulations may be proposed by a State Party, by the Court or by the Board of Directors. All proposals to amend these Regulations shall require the approval of the Assembly of the State Parties in accordance with article 112(7) of the Statute.").

112(7)(a) of the Rome Statute.³⁴⁸ In the meantime, the Fund should continue its policy of pursuing projects with its “other resources” only in situations under active investigation by the Office of the Prosecutor.³⁴⁹

CONCLUSION

The Pre-Trial Chamber was correct in its decision of April 11, 2008 to permit the TFV’s pursuit of independent projects funded by its “other resources.”³⁵⁰ The TFV has independent authority to use those funds. The Chamber was wrong, however, to limit that independence by asserting the Fund’s responsibility to maintain a balance sufficient to supplement inadequately resourced reparations awards ordered by the Court, pursuant to Article 75.³⁵¹ There is no legal basis for such an obligation. The TFV has the legal right to allocate its “other resources” to appropriate projects as it sees fit.

Moreover, as a matter of policy, the TFV should not preserve the demanded Article 75 augmentation reserve, but should use its “other resources” to support further independent projects or to expand those it is already operating. It is highly unlikely that any person convicted by the ICC will have personal wealth sufficient to finance a complete reparations program for all of his or her victims. Even Jean-Pierre Bemba is unlikely to be able to afford the sum necessary to do right by the many victims who suffered the devastating crimes of which he is accused,³⁵² despite his extensive riches.³⁵³ This, however, is a fundamental characteristic of post-atrocity justice – it is never enough. Rather than focusing on the chimerical goal of making a narrow concentration of Article 75 victims whole, the TFV should focus on acknowledging and assisting as wide a range of victims as is possible within the limits of the

³⁴⁸ The Rome Statute, *supra* note 1, art. 112(7) (“Each State Party shall have one vote. Every effort shall be made to reach decisions by consensus in the Assembly and in the Bureau. If consensus cannot be reached, except as otherwise provided in the Statute:

(a) Decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting.”).

³⁴⁹ See *supra* notes 334-338 and accompanying text.

³⁵⁰ See Decision on the Notification of the Board Apr. 11, 2008, *supra* note 9.

³⁵¹ *Id.* at 7.

³⁵² Prosecutor v. Bemba Gombo, *supra* note 338 (confirming charges involving two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillage)).

³⁵³ See Profile: Jean Pierre Bemba, BBC NEWS, May 25, 2008, <http://news.bbc.co.uk/2/hi/africa/6085536.stm> (last visited June 4, 2010).

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Court's live situations, paying particular attention to those victims that have no access to participation in ICC proceedings and are not potential Article 75 reparations recipients. In so doing the Fund can make a real difference to the project of transitional justice.