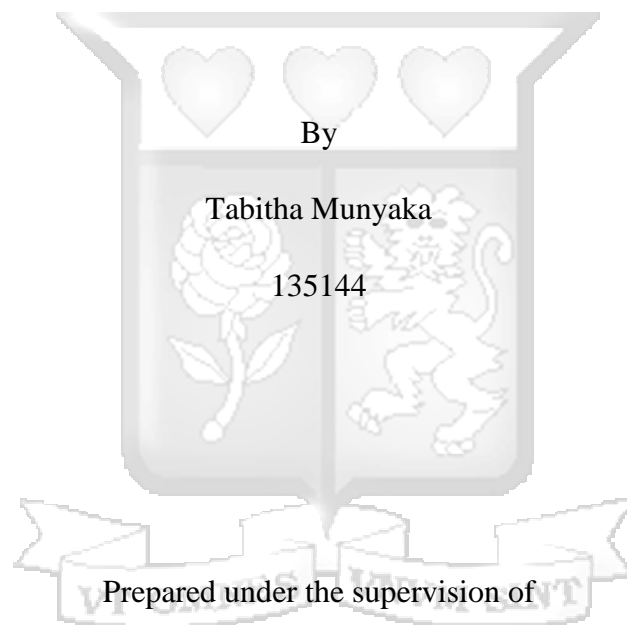


**More Harm Than Good: The Exclusion of Moral Harm in the TFV's Assistance
Mandate Emanating from its Restrictive Definition of a 'Victim' of International
Crimes**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School



Dr. Josephat Kilonzo

January 2024

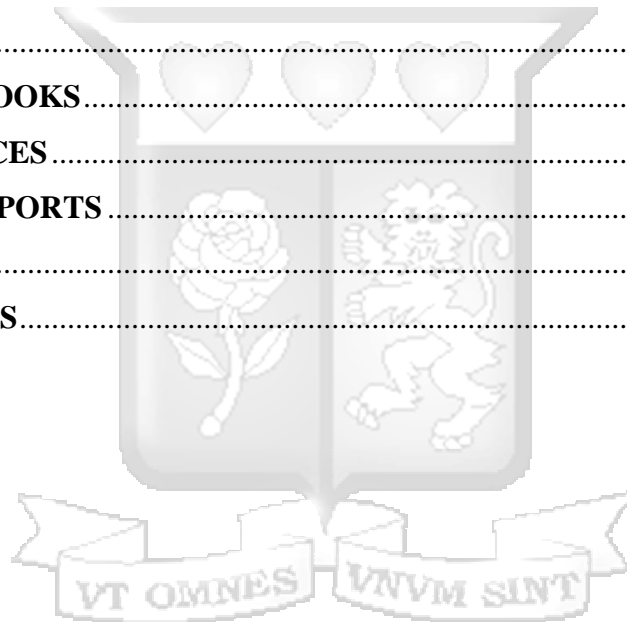
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Thank you.




DECLARATION

I, TABITHA MUNYAKA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

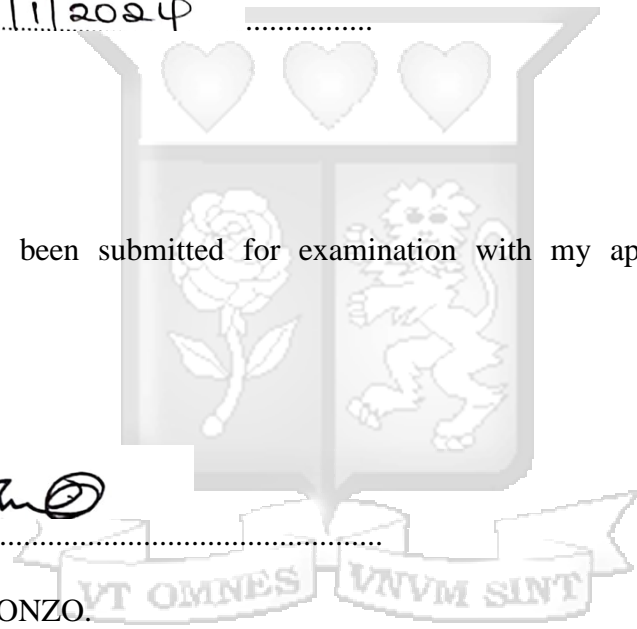
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This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: 

DR. JOSEPHAT KILONZO.



ABSTRACT

The TFV is a *sui generis* mechanism under the ICC, with a dual mandate: implementation of court-ordered reparations for the ICC and, most importantly, its assistance mandate. Its assistance mandate has been hailed for its promptness in assisting victims with their harm, due to its independence from the ICC. Nevertheless, following an analysis of ICC cases on the psychological, physical, material, and moral harm suffered by victims of international crimes, it reveals that the TFV's assistance mandate does not render any support to victims for moral harm. This is a crucial problem at the core of its understanding of 'victims', by rendering support for only 'ongoing harm', and harms assessable in their nature: through medical assistance for psychological and physical harm, and socio-economic support for material harm. This finding underscores that the TFV's assistance mandate has restricted its understanding of victims of international crimes. Following this, the study makes the case for a monetary compensation mechanism to remedy victims' moral harm. To do so, four rationales are drawn from regional and domestic monetary compensation schemes, critically chosen due to their similarity in their purpose and work done by the TFV. It recommends for the TFV to set up a procedural and substantive criterion for identifying victims suffering from moral harm. Furthermore, a mechanism for individual, collective and symbolic monetary compensation. Noting that the TFV currently lacks sufficient fundings to assist victims, it advocates for 'earmarking of funds', considering a monetary compensation mechanism will strain its resources further. Finally, amendment of the TFV's Regulations to include moral harm and monetary compensation as a form of support.

LIST OF ABBREVIATIONS

ACHPR African Commission on Human and Peoples' Rights

ACtHR African Court on Human and People's Rights

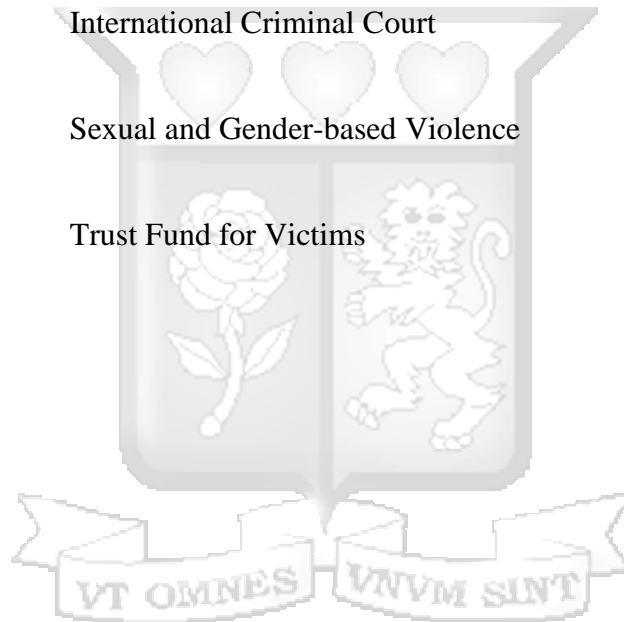
ECHPR European Court of Human Rights

IACHR Inter-American Court of Human Rights

ICC International Criminal Court

SGBV Sexual and Gender-based Violence

TFV Trust Fund for Victims



LIST OF CASES

African Commission on Human and Peoples' Rights v The Republic of Kenya, App. no. 006/2012, African Court on Human and Peoples' Rights, 15 March 2013

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010

Cyprus v. Turkey, 25781/94, European Court of Human Rights, 10 May 2001

ICC, The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15

ICC, The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06

ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07

ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08

ICC, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06

Kichwa Indigenous People of Sarayaku v. Ecuador, Inter-American Court of Human Rights (IACHR), (Merits, Reparations, Costs) Series C No 245, 27 June 2012

Neumeister v. Austria, European Court of Human Rights, judgement, 27 June 1968, 22–25

Río Negro Massacres v. Guatemala, Inter-American Court of Human Rights, 4 September 2012

LIST OF LEGAL INSTRUMENTS

Council of Europe, European Convention on Compensation of Victims of Violent Crime, 1983.

Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission 53rd Report, UN Doc A/56/10, 2001.

Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, 9 September 2002, ICC-ASP/1/Res.6.

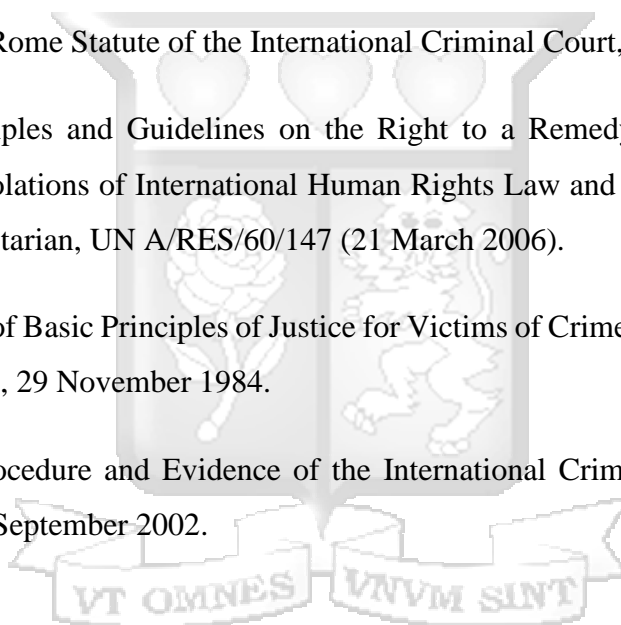
The Regulations of the Trust Fund for Victims, 3 December 2015, ICC-ASP/4/Res.3.

The United Nations Rome Statute of the International Criminal Court, 17 July 1998.

UNGA, 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, UN A/RES/60/147 (21 March 2006).

UNGA, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Resolution 40/34, 29 November 1984.

UNGA, Rules of Procedure and Evidence of the International Criminal Court UN (Doc. PCNICC/2000/1/) 9 September 2002.



CHAPTER 1: INTRODUCTION

1.1 Background to the Problem

The Trust Fund for Victims (TFV) was an unprecedented *sui generis* mechanism in international criminal proceedings created in 2002 by the Assembly of State Parties pursuant to Article 79 of the Rome statute,¹ the International Criminal Court's (ICC) founding treaty.² It has a two-fold mandate: (i) Implements Court-ordered reparations³ and (ii) assists victims and their families suffering from ongoing physical, material and psychological harm.⁴ Therefore, aid to victims under the ICC's jurisdiction, varies depending on whether the TFV is executing its reparation mandate or its assistance mandate.⁵

Under international law, reparations are actions taken to address diverse harms arising from specific crimes or violations of state responsibility.⁶ The Rome Statute imposes a compulsory duty on the ICC to establish principles regarding reparations (including restitution, compensation, and rehabilitation),⁷ either by the convicted individual or through the TFV.⁸ While the statute makes elaborative provisions on reparations, it remains silent on the definition of assistance in the TFV's mandate.⁹ Notwithstanding, the TFV interprets its discretionary mandate over the 'use of other resources for the benefit of the victims' as bestowing it sole

¹ *Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims*, 9 September 2002, ICC-ASP/1/Res.6.

² Article 1, *The United Nations Rome Statute of the International Criminal Court*, 17 July 1998, vol. 2187, No. 38544.

³ Articles 75(1), 75(2), 75(2)(2) and 79, *Rome Statute of the International Criminal Court*. See, Regulation 46, *The Regulations of the Trust Fund for Victims*, 3 December 2015, ICC-ASP/4/Res.3.

⁴ Regulation 48, *The Regulations of the Trust Fund for Victims*.

⁵ Article 79 (3), *Rome Statute of the International Criminal Court*.

⁶ 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries', ILC 53rd Report, UN Doc A/56/10, 2001. See, UNGA, *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*, UN A/RES/60/147, March 2006.

⁷ Article 75(1), *Rome Statute of the International Criminal Court*. See, UNGA, *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*.

⁸ Article 75(1) & 2, *Rome Statute of the International Criminal Court*.

⁹ Asaala E, 'Towards an effective ICC Assistance Program in Kenya for the Victims of 2007/8 Post-Election Violence' in Bernard Ntahiraja, Gerhard Kemp (eds) *International Criminal Justice in Africa*, Konrad Adenauer Stiftung, 2020, 67-86.

authority over assistance.¹⁰ For instance, in 2008, the TFV rolled out an assistance program in Uganda with no conviction made until 2021.¹¹ The TFV's assistance mandate is the focus of this study.

The link between the TFV's assistance mandate to the Rome statute and victims of crimes in locations where the ICC has jurisdiction,¹² adds a material level that implies the recognition of the beneficiaries as victims of the worst crimes of humanity to bring about transitional justice efforts; with aim that justice is only garnered at punishing convicted perpetrators but addressing the victims' needs.¹³ Thus, pursuant to Article 79 of the Rome statute,¹⁴ Regulation 50 of the Regulations of the TFV adopts 3 forms of support: physical rehabilitation, psychological rehabilitation (trauma care), and material support (socio-economically based).¹⁵ Nevertheless, the TFV's assistance mandate has not evolved in a manner that enables it to identify and share good practice among the victims.¹⁶

Concerns have been raised regarding the TFV's lack of understanding of situations many victims find themselves in, how and what type of assistance is most needed.¹⁷ This is owing to the fact that while on the one hand, its reparations mandate under the ICC's ambit covers a range of forms such as material, social, or financial benefits, to encapsulate components such

¹⁰ Regulation 48 and 49, *The Regulations of the Trust Fund for Victims*.

¹¹ *Annex 1 to the Notification by the Board of Directors in accordance with regulation 50 (a) of the Regulations of the Trust Fund for Victims of its conclusion to undertake further specified activities in the Republic of Kenya*, 29 April 2022, ICC-01/09-171-Anx1.

¹² Regulation 48, *The Regulations of the Trust Fund for Victims*. See, ICC, *Trust Fund for Victims (TFV)*, August 2008, 10.

¹³ Peschke K, 'The Role and Mandates of the ICC Trust Fund for Victims' in Thorsten Bonacker, Christoph Safferling (eds) *Victims of International Crimes: An Interdisciplinary Discourse*, T.M.C. Asser Press, 2013, 317.

¹⁴ Article 79(1), *The United Nations Rome Statute of the International Criminal Court*.

¹⁵ Regulation 48 and 50, *The Regulations of the Trust Fund for Victims*. See, [-<Assistance Mandate | The Trust Fund for Victims>](#) On 5 January 2023.

¹⁶ Rauxloh R, 'Good intentions, and bad consequences: The general assistance mandate of the Trust Fund for Victims of the ICC' 34(1) Cambridge University Press, Cambridge, 2020, 213. See, Cohen M, *Realizing Reparative Justice for International Crimes: From Theory to Practice*, Cambridge University Press, Cambridge, 2020, 76.

¹⁷ Kenya Human Rights Commission, 'The victims' mandate of the International Criminal Court: disappointments, concerns, and options for the way forward', *Observations and recommendations for the Independent Expert Review*, 2020, 37.

as symbolic awards;¹⁸ categorized as moral reparations aiming to restore the dignity of victims.¹⁹ On the other hand, it limits its discretionary assistance mandate to addressing ongoing mental health, medical interventions, and socio-economic issues through programs.²⁰

The definition used by this study on what constitutes moral harm is a specific trauma that arises when people face situations that deeply violate their core values and their human dignity.²¹ This is further expounded on in chapter 3 of this study.

1.2 Statement of the problem

The TFV has the discretion in its assistance mandate to address harm suffered by victims of international crimes under the ICC jurisdiction. As a result, it addresses only the physical, psychological, and/or material harm of the victims. This limited *temporal* and substantive nature of the TFV's definition of a victim, fails to address the moral harm that victims within the ICC's jurisdiction suffer from. It presumes that if a victim's harm (physical, mental and/or material) has ceased, there is no need for an assistance program. This is despite the ICC recognition of moral harm as harm suffered by victims of international crimes.²² Additionally, such a definition draws it away from its mission, which is to respond to victims' harm resulting from the crimes under the ICC's jurisdiction; leading to the disqualification of a plight of victims, premised on the fact that they do not have ongoing injuries. This study therefore examines whether the TFV's assistance mandate should be reformed, through incorporation of moral harm, as a harm, supported by monetary compensation.

1.3 Statement of objectives

This research aims to:

¹⁸ ICC, 'Decision establishing the principles and procedures to be applied to reparations,' ICC-01/04-01/06-2904, 2012.

¹⁹ UNGA, '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'. See, Dwertmann E, 'The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations', *Martinus Nijhoff Publishers*, Leiden, 2010, 126-128.

²⁰ -<<https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>> On 3 January 2023.

²¹ Haight, W, Sugrue, E, Calhoun, M, Black, J, 'Basically, I look at it like combat': Reflections on moral injury by parents involved with child protection services' *Children and Youth Services Review*, 82, 2017, 477. See, Currier J, Holland M, Malott J, 'Moral injury, meaning making, and mental health in returning veterans', *Journal of Clinical Psychology*, 71, 2014, 229.

²² *Prosecutor v Al Mahdi (Ahmad Al Faqi)*, Decision, ICC-01/12-01/15, 2016.

- (i.) To assess the difference between a ‘victim’ under the TFV’s Court-ordered reparations mandate, and a ‘victim’ under its assistance mandate.
- (ii.) To identify the forms of harm, including moral harm, suffered by victims of international crimes under the ICC’s jurisdiction and assess whether the TFV’s assistance mandate is well guided by the said harms.
- (iii.) To assess existing rationales for international victim compensation schemes and determine how the existing rationales support a monetary compensation scheme for moral harm, under the TFV’s assistance mandate.
- (iv.) To propose how the TFV’s assistance mandate can adopt a broader understanding of a ‘victim’ through the incorporation of monetary compensation, as a form of support, to capture moral harm suffered by victims of international crimes.

1.4 Research Questions

This paper primarily focuses on the subsequent questions:

- (i.)
 - a) What is the understanding of a ‘victim’ under the TFV’s court-ordered reparations?
 - b) What is the understanding of a ‘victim’ under its assistance mandate?
 - c) What implication does the difference in (i) (a) & (b) have on the TFV’s understanding of harms suffered by the said victims?
- (ii.)
 - a) What are the forms of harm suffered by victims of international crimes under the ICC’s jurisdiction and is moral harm one of the said harms?
 - b) How has the TFV’s assistance mandate understood moral harm as a harm under the ICC’s jurisdiction?
- (iii.)
 - a) What are the existing rationales for a monetary compensation scheme under the TFV’s assistance mandate?
 - b) Why is a monetary compensation scheme best suited to remedy victims’ moral harm?
- (iv.) How can the TFV’s assistance mandate, adopt and incorporate a monetary compensation as a form of support, to capture moral harm suffered by victims of international crimes?

1.5 Hypothesis

The adoption of a restrictive definition of a victim under the TFV's assistance mandate has led to the exclusion of moral harm. This is owed to the fact that it offers forms of support that are ongoing and assessable in nature. For instance, in the case of psychological harm, the TFV is able to offer cost-effective psychological, social and other health benefits, where the victims note that they are able to move on with life, for instance, by returning to work.²³ For physical harm, the TFV assist victims in achieving a significant level of physical recovery, allowing them to reintegrate into their communities with as much normalcy as possible.²⁴ While in the case of material harm, through the improvement of the economic status of the victim, it funds rebuilding of property and meeting their basic needs.²⁵ Therefore, such a restrictive approach excludes moral harm as a harm and as a result, lacks any form of support under the TFV's assistance mandate.

1.6 Justification of the Study

With the plight of victims in post- conflict situations, remedy of victims' moral harm remains within the realm of the ICC's court-ordered reparations (in form of monetary compensations),²⁶ with the ICC issuing its first award in 2017,²⁷ and thus far, in 3 cases since its inception in 2002.²⁸ This is despite the inimical effects of international crimes to the well-being of a great number of victims. However, the TFV's assistance mandate has recorded assistance to over 400,000 victims in Democratic Republic of Congo and northern Uganda in the last 5 years alone.²⁹ Despite its success, these records only represent assistance afforded to victims for their

²³ International Center for Research on Women, 'Towards a Perspective of Upcoming Interventions', 2013 - <<https://www.icrw.org/wp-content/uploads/2016/10/ICRW-TFV--Evaluation-Report.pdf>> on 1 March 2023.

²⁴ Towards a Perspective of Upcoming Interventions' 2013 <<https://www.icrw.org/wp-content/uploads/2016/10/ICRW-TFV--Evaluation-Report.pdf>> on 1 March 2023.

²⁵ Towards a Perspective of Upcoming Interventions' 2013 -<<https://www.icrw.org/wp-content/uploads/2016/10/ICRW-TFV--Evaluation-Report.pdf>> on 1 March 2023.

²⁶ Åberg M, 'The Reparation Regime of the International Criminal Court', *Digitala Vetenskapliga Arkivet*, 2015, 10 -< <https://www.diva-portal.org/smash/get/diva2:801293/FULLTEXT01.pdf>> on 3 January 2023.

²⁷ *Prosecutor v Germain Katanga*, judgement, ICC-01/04-01/07.

²⁸ *Prosecutor v Al Mahdi (Ahmad Al Faqi)*. See, *Prosecutor v Germain Katanga*, Judgement, ICC-01/04-01/07. See, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment.

²⁹ <<https://www.icc-cpi.int/fr/news/icc-trust-fund-victims-assists-over-80000-victims-raises-reparations-reserve>> On 15 January 2023. See, <<https://www.justiceinfo.net/en/46199-icc-trust-fund-black-hole.html>> on 8 March 2023.

psychological, physical, and material harm; excluding moral harm. This study is therefore important from a victim centered perspective, rendering focus on the moral harm suffered by victims.

While the ongoing literature agrees on the potential of the TFV's assistance mandate compared to the ICC's reparation awards, there is lack of proposals on how this is to be affected. Consequently, this study is unique in making the argument for the incorporation of moral harm as a harm to be supported by the TFV's assistance mandate, due to its wider access to victims of international crimes, compared to its court-ordered reparations. This will be useful to the TFV's stakeholders such as its board of directors on why the revamping of the TFV is important to help it meet its transitional justice aim. Moreover, it may aid prospective funders such as governments and organizations, in understanding the importance of rendering support to the victims of international crimes through funding. The ICC may also benefit from this study on how the TFV is to conduct its assistance mandate without conflicting it with the court-ordered reparations. Additionally, for researchers working on the TFV's dual mandate.

1.7 Conceptual Framework: The Status of a Victim

This concept, drawing on Schwöbel-Patel and Vianno's attributes of an 'ideal victim' and adapting them slightly,³⁰ identifies two attributes that define the status of a victim of international crimes: the victim as a harmed and (legally) dependant person. Conjunctively, it advances that the said attributes form critical elements in identifying a victim and their needs, and therefore, should inform the measures and policies taken to support victims of international crimes.

1.7.1 *The victim as a harmed person*

A fundamental component within the definition of victims, observed in many victim-centered institutions or frameworks related to different categories of victims,³¹ is that they must have

³⁰ Viano E, 'Victimology today: Major issues in research and public policy', in Viano Emilio (ed) *Crime and its victims: International research and public policy issues*, Hemisphere: New York, New York, 1989, 14. See, Schwöbel-Patel C, 'The 'Ideal' Victim of International Criminal Law' 29(3), *The European Journal of International Law*, 2018, 705.

³¹ Victims of gross violations, victims of crime, victims of abuse of power in relation to the international human rights law and of serious violations of international humanitarian law, victims of enforced disappearance, victims of violation of international criminal law, and finally, victims of terrorism and many others.

suffered ‘harm’.³² The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the ICC’s Rules of Procedure and Evidence, offer a succinct definition of ‘victims’ as ‘*persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights...*’³³ What is equally significant in their definitions is that element of harm paves way for various avenues of redress through, for instance, access to the mechanisms of justice and social support for the harm that they have undergone.³⁴

Consequently, serving as a pre-requisite victim component, it gives rise to certain rights. It is for this reason that most human rights and humanitarian law treaties provide the right to a remedy or support to victims.³⁵ For instance, in the UN basic principles on remedy and reparation, the understanding of a ‘victim’ or ‘injured party’ is considered to ensure that all types of harm envisaged in it are considered in determining whether someone holds rights as a victim or injured party, in relation to the criminal proceedings.³⁶

Nevertheless, even with the existence of harm, international crimes require a crucial causal link between the harm and the specific crime. There must be a ‘but/for’ relationship, indicating that the crime was the direct cause of the harm.³⁷ Such a legal parameter substantially narrows rights afforded to victims of international crimes as some are disqualified because their predicament is not recognized due to lack of a chain of causation. This selection reflects what Rajagopal



³² Robins S, ‘Challenging the Therapeutic Ethic: A Victim-Centred Evaluation of Transitional Justice Process in Timor Leste’ *International Journal of Transitional Justice* 2012, 83–105.

³³ UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Resolution 40/34, 29 November 1984. See, UNGA, *Rules of Procedure and Evidence of the International Criminal Court* UN (Doc. PCNICC/2000/1/) 9 September 2002.

³⁴ Boven T, ‘The Administration of Justice and the Human Rights of Detainees, Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law’ *United Nations Audiovisual Library of International Law*, 2010, 2< https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf> on 27 February 2023.

³⁵ *Neumeister v. Austria*, ECtHR judgement of 27 June 1968, 22–25.

³⁶ UNGA, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN Resolution 40/34, 29 November 1984.

³⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment, 124–129.

describes as the ‘*somewhat tragic reality that resistance must work, to some extent, within the parameters established by that which is being resisted.*’³⁸

1.7.2 The victim as a (legally) dependant person

The importance of the element of dependency is that the recognition of a victim provides a social capacity for their harms to be redressed. This is evident in cases concerning international crimes, where there is a circular relationship between representative (social institutions, judicial bodies etc) and the represented (the victim) that is recognized in legal contexts. The representative depends on the represented entity to grant authority, and, in turn, the represented entity depends on the representative to represent it effectively.³⁹ Thus, representation of the victim and their needs is built on the presumption that the represented is dependent on the representative for the redress of their harm.

Consequently, recognition of victims plays an important part in recognizing that the victim has suffered, and their harm must be addressed. Through judicial system, victims anticipate more than just a guilty verdict and compensation for the harm from the system,⁴⁰ but also the essence of the procedure itself, involving respect, information, and active participation in the criminal proceedings.⁴¹ This is reinforced by Strang’s five fundamental needs for victims that require the element of dependency on the criminal justice system for the redress of their harms.⁴²

Furthermore, recognizing the increasing understanding that transitional justice procedures must address the needs of victims,⁴³ the victims are not victims of the perpetrator, they are primarily victims of ‘a crime’. Consequently, their status is anchored on the need to redress the harm

³⁸ Rajagopal B, *International Law from Below: Development, Social Movements, and Third World Resistance*, Cambridge University Press, Cambridge, 2003, 10.

³⁹ Nouwen S, Kendall S, ‘Representational practices at the international criminal court: the gap between juridified and abstract victimhood’ 76(3/4) *Law and Contemporary Problems*, 2013, 237.

⁴⁰ In *Prosecutor v. Katanga*, ICC stated, ‘*They (victims) have waited for more than six years so that this Chamber can ensure that international justice will finally allow them to understand*’.

⁴¹ Carriere R, Malsch M, ‘‘Victims’ wishes for compensation: the immaterial aspect’, *Journal of Criminal Justice*, 3(1999), 1999, 239.

⁴² Strang H, ‘*Repair and Revenge: Victims and Restorative Justice*’, Oxford University Press, Oxford, 2002, 134.

⁴³ Mendez J, ‘National Reconciliation, Transnational Justice, and the International Criminal Court’, 15(1) *Ethics & International Affairs*, 2001, 25. See, Zunino M, Frame F, ‘A Genealogy of Transitional Justice’ *Cambridge University Press*, Cambridge, 2019, 36–37.

suffered. As a result, several recommendations at the international level,⁴⁴ and European regional arena,⁴⁵ continue to place victims of crimes at the centre of the international and regional community's decision-making process and concerns,⁴⁶ thus emphasizing that dependency by victims serves as a prerequisite for receiving social, judicial, or institutional support.

This concept on the status of the victim as a harmed and dependent person will be used to critique the TFV's definition of a victim as one with ongoing harm, by assessing whether there is an area of disconnection between its definition and the said characteristics of a victim. Firstly, it will be used to examine whether the TFV's has fixed a specific understanding of the victim through the use of a straightforward method for assessing the harms suffered by victims. This will aid the study in determining whether such an approach sufficiently acknowledges the victim as a person with a wide range of harms: to include moral harm. Secondly, the status of a victim as a dependent person will be useful in assessing whether the TFV's current form of supports (psychological, physical, and material) sufficiently correspond to the needs of a victim as a dependant person in consideration of the varying harms they have suffered. This will therefore be useful in examining whether the TFV's current form of support needs rethinking, to include monetary compensation, so to better align it to its transitional justice aim.

1.8 Literature Review

So far, the literature on the current restrictive approach by the TFV's assistance mandate has mostly focused on the need for maximization of the TFV's assistance in recognizing the various harms suffered by victims,⁴⁷ analysis on the ICC's structural weaknesses in addressing victims'

⁴⁴ 'UN Office on Drugs and Crime published the Guide for Policy Makers on the Implementation of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power', 1999. See, Resolution 2003/30, 'The Economic and Social Council set up an Intergovernmental Expert Group', 2003.

⁴⁵ Council of Europe, European Convention on Compensation of Victims of Violent Crime, 1983. See, the recommendations of the Council of Europe R (85) 11, 1985. See, Council of Europe, 'Framework Decision of the Council of the European Union', Journal of the European Communities, 2001.

⁴⁶ Teitel R, 'Transitional Justice', *Oxford University Press*, Oxford, 2000, 127. See, UNODC, Handbook on Restorative Justice Programmes, 2nd ed, March 2020.

⁴⁷ Åberg M, 'The Reparation Regime of the International Criminal Court' *Digitala Vetenskapliga Arkivet*, 2015, 48 -< <https://www.diva-portal.org/smash/get/diva2:801293/FULLTEXT01.pdf>> on 3 January 2023.

harms that makes the TFV's assistance mandate a vital intermediate engagement,⁴⁸ suggestions that reparations approach should be applied in the design and implementation of assistance projects by the TFV in recognition of their rights⁴⁹ and proposal for a complete separation of the TFV's assistance to the ICC.⁵⁰ Although Asaala's research identifies the same research problem this study addresses,⁵¹ her claim is inadequate to distill the ramifications of a restrictive definition, while her analysis fails to suggest ways in which the TFV's assistance mandate should be construed in order to overcome its limited *temporal* definition of 'victim' in redressing victims moral harm(s).

1.8.1 On the blurred relationship between Reparations and Assistance

The scholar, Dixon, asserts that the connection between reparations and assistance reveals essential conflicts within transitional justice: the tension between inclusive and exclusive approaches to reparative justice; the clash between legal frameworks for redress and the intricate realities of violence; and ultimately, the balance between the symbolic power of reparative justice and the practical experience of reparations for victims.⁵² It is what largely drove the attachment of the TFV within the ICC, which, as stated by Davidovic *et al*, creates concerns regarding the clear differences between reparations and assistance.⁵³

⁴⁸ Wierd M, Grief P, 'Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims' International Center for Transitional Justice, 2004, 7. See, Peschke K, 'The Role and Mandates of the ICC Trust Fund for Victims', 317. See, Dwertmann E, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Martinus Nijhoff Publishers, Leiden, 2010, 127.

⁴⁹ 'Comments to the Trust Fund for Victims on the Progressive Realisation of its Mandate' REDRESS, 2010, 14 <https://redress.org/wp-content/uploads/2018/01/Mar-10-Comments-to-the-Trust-Fund-for-Victims.pdf> On 10 January 2023.

⁵⁰ Rauxloh R, 'Good intentions, and bad consequences: The general assistance mandate of the Trust Fund for Victims of the ICC', 213. See, Cohen M, *Realizing Reparative Justice for International Crimes: From Theory to Practice*, Cambridge University Press, Cambridge, 2020, 76.

⁵¹ Asaala E, 'Towards an effective ICC assistance program in Kenya for the Victims of 2007/8 post-election Violence', 67-86.

⁵² Dixon P, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' 10(1) *International Journal of Transitional Justice*, 2015, 5.

⁵³ Davidovic J, 'International Criminal Court, the Trust Fund for Victims, and Victim Participation' in Larry May Elizabeth Edenberg (ed) *Jus Post Bellum and Transitional Justice*, Cambridge University Press, 2013, 232. See, Rauxloh R, 'Good intentions, and bad consequences: The general assistance mandate of the Trust Fund for Victims of the ICC', 213. See, Åberg M, 'The Reparation Regime of the International Criminal Court' *Digitala*

Fischer and Dixon seem to assume that reparations and assistance are distinct.⁵⁴ Where the theory of assistance is proffered to exhort that “victims’ necessary material, psychological, physical and social assistance’ is provided in response not to injuries, but needs, targeting wider range victims of grave crimes and gross violations.”⁵⁵ However, Wierd and Grief add that this does not signify justice for the victim.⁵⁶ On the other hand, reparations entail assigning criminal responsibility to the perpetrator/convict;⁵⁷ where the absence of reparations and the impunity of perpetrators are interconnected issues.

Hence, leading scholars such as Bachrach conclude that initiatives directed towards fortifying the normative framework in the pursuit of peace must emphasize the evident connection between the impunity of wrongdoers, and the imperative of delivering fair and sufficient reparations to the victims.⁵⁸ It for this precise reason that motivates Fisher to be wary of blurring the lines between the two in transitional justice, with assistance as the least desirable since, without conviction, it does not meet the justice element for the victims.⁵⁹ However, the ultimate outcome of this strategy is a tenuous link between the demands for reparations and the legal responsibility of the convicted individual towards all victims of international crimes. Moreover, Fisher undergirds his whole argument on one of the victims’ needs, failing to

Vetenskapliga Arkivet, 2015, 6 -< <https://www.diva-portal.org/smash/get/diva2:801293/FULLTEXT01.pdf>> on 3 January 2023.

⁵⁴ Fisher K, ‘Messages from the Expressive Nature of ICC Reparations: Complex-Victims in Complex Contexts and the Trust Fund for Victims’ 20 (2020) *International Criminal Law Review*, 2020, 342.

⁵⁵ Dixon P, ‘Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo’ 10(1) *International Journal of Transitional Justice*, 2015, 90. See, also, Fisher K, ‘Messages from the Expressive Nature of ICC Reparations: Complex-Victims in Complex Contexts and the Trust Fund for Victims’ 20 (2020) *International Criminal Law Review*, 2020, 325. See, -<<https://beyondthehague.com/2016/01/14/reparations-and-assistance-whats-the-difference/>> on 18 January 2023. See, Åberg M, ‘The Reparation Regime of the International Criminal Court’, *Digitala Vetenskapliga Arkivet*, 2015, 10 -< <https://www.diva-portal.org/smash/get/diva2:801293/FULLTEXT01.pdf>> on 18 January 2023.

⁵⁶ Zegveld L, ‘Victims as a Third Party: Empowerment of Victims?’, 19 (2019) *International Criminal Law Review*, 2019, 340.

⁵⁷ Wierd M, Grief P, ‘Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims’ International Center for Transitional Justice, 2004, 2.

⁵⁸ Bachrach M, ‘The Protection and Rights of Victims under International Criminal Law’ 34(1) *The International Lawyer*, 2000, 11.

⁵⁹ Fisher K, ‘Messages from the Expressive Nature of ICC Reparations: Complex-victims in Complex Contexts and the Trust Fund for Victims’ 20 (2020) *International Criminal Law Review*, 2020, 342.

advance how to address the victims' needs when perpetrators are not convicted for their harm. Consequently, to some extent, in practice, there must exist a blurry line between assistance and reparations.⁶⁰

Dixon argues that assistance and reparation can be both be a useful tool: '*there will always be forms of harm, types of violence and immediate needs that fall outside the boundaries of reparations programs*' therefore, '*assistance measures are a useful and necessary tool to help reparations overcome these shortcomings.*'⁶¹ Moreover, in certain situations, it is not just about problem within the reparation programs, but also about the reparations programs being a challenge within the realm of transitional justice due to their requirement for symbolic significance: a conviction. Mani also favors a broad understanding of assistance by the TFV to address the 'sensitive nature of offences and their impact on victims'.⁶²

It also appears that in practice, the TFV is unable to separate its assistance mandate and its court-ordered reparative mandate. Moffet, Using the *Lubanga case* as a concrete illustration demonstrates the impact of blurring the lines between reparations and assistance. It highlights that while the TFV initiated collective reparations projects involving socio-economic development programs, psychological and physical rehabilitation, and the implementation of symbolic measures like mobile memorialization initiatives and commemoration centers,⁶³ these measures closely resemble assistance programs already operated by the TFV.⁶⁴ This raises doubts about their reparative value for victims. Consequently, the TFV's involvement in reparations poses a risk of diluting victims' right to reparation by merging it with assistance.⁶⁵ Although Kirch refrains from framing his argument in this way, one can gain some insight into

⁶⁰ <<https://beyondthehague.com/2016/01/14/reparations-and-assistance-whats-the-difference/>> on 5 February 2023.

⁶¹ Dixon P, 'Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo' 10(1) *International Journal of Transitional Justice*, 2015, 89.

⁶² Mani R, 'Reparations as a Component of Transitional Justice: Pursuing 'Reparative Justice' in the Aftermath of Violent Conflict' in Feyter K and Parmentier S (eds) '*Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations*', Antwerp, 2005, 73.

⁶³ The Prosecutor v. Thomas Lubanga Dyilo, Judgment, ICC-01/04-01/06-2842, TC1, 222.

⁶³ <<https://www.icc-cpi.int/fr/news/icc-trust-fund-victims-assists-over-80000-victims-raises-reparations-reserve>> On 15 January 2023.

⁶⁴ Moffett L, 'Reparations for victims at the International Criminal Court: a new way forward?' 21(9) *The International Journal of Human Rights*, 2017, 1208.

⁶⁵ Moffett L, 'Reparations for victims at the International Criminal Court: a new way forward?' 1209.

their causation approach: a deliberate ‘constructive ambiguity’ stemming from the Article governing formation of the TFV in the reparative regime,⁶⁶ causes expansion of the ICC's restorative mandate is hindered by the incorporation of the TFV's assistance mandate within the ICC.⁶⁷ Recognizing the importance of the TFV's assistance to victims' needs, Kirch asserts that, ultimately, it impairs the ICC's capacity to fulfill its fundamental mandate; in this case, reparations.⁶⁸

In conclusion, according to the scholars, there seems to be blurring of lines between the assistance mandate of the TFV and its court-ordered mandate.

1.8.2 On whether Monetary Compensation is sufficient to remedy Victims' harm

As asserted by Roche, the concept of allocating a value to an asset to remedy an injury has been used in long history, and been linked to justice.⁶⁹ However, its status in remedying victims' harms still attracts contrary views. Boven and Alshamaileh posit that the main idea behind decisions not to allow damages for harm that is not assessable and therefore,⁷⁰ cannot be expressed in monetary terms, nor can it restore one to a pre-harm condition.⁷¹ Generally, Fischer has argued that while ‘money may help to rebuild a life or pay off debts incurred as a

⁶⁶ Kirsch P, ‘The International Criminal Court: A New and Necessary Institution Meriting Continuing International Support’ 28(2) *Fordham International Law Journal*, 2004, 292–307.

⁶⁷ Davidovic J, ‘International Criminal Court, the Trust Fund for Victims, and Victim Participation’ in Larry May Elizabeth Edenberg (ed) *Jus Post Bellum and Transitional Justice*, Cambridge University Press, 2013, 236.

⁶⁸ McDermott Y, ‘Victims and International Law: Remedies in the Courtroom?’ 4(3) *Hague Justice Journal*, 2010, 211. See, Davidovic J, ‘International Criminal Court, the Trust Fund for Victims, and Victim Participation’ in Larry May Elizabeth Edenberg (ed) *Jus Post Bellum and Transitional Justice*, Cambridge University Press, 2013, 238.

⁶⁹ Roche D, ‘Restorative Justice and the Regulatory State in South African Townships’, 42(1) *British Journal of Criminology*, 2002, 520.

⁷⁰ Boven T, ‘The Administration of Justice and the Human Rights of Detainees, Revised Set of Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law’ *United Nations Audiovisual Library of International Law*, 2010, 4- <
https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf> on 27 February 2023.

⁷¹ Alshamaileh N, ‘The right ability to compensation for moral damage for the transfer in Civil Law jurisprudence’ 6(3) *Journal of Positive School psychology*, 2022, 9843.

result' of harms caused, 'money cannot reverse the clock and eliminate the after-effects of crimes'.⁷²

On the contrary, Hyenhjelm opines that different functions of monetary compensation have emerged that seek to maximize its potential.⁷³ For instance, Feinberg and Hamber argue that compensation 'serves not just to mend the injuries' but also to 'reestablish the moral balance,' akin to an apology or an expression of remorse.⁷⁴

Goodin's perspective on compensation involves a restoration to the original status quo ante, to the extent feasible, reinstating the conditions preceding the loss or damage. This can be achieved by providing comparable resources to achieve the same objective or by offering resources to attain a different yet equally valuable objective.⁷⁵

While Lang concurs, that monetary compensation is not enough, he contends that it should be coupled with an apology from the wrongdoer to rectify the harm endured.⁷⁶ Consequently, it is most suitable under court-ordered reparations as it ensures criminal responsibility. However, Basenko *et al*, posit that where victims cannot secure reparation from the alleged perpetrator, alternative means to provide monetary compensation can be afforded to the victims. This, according to Basenko, can be accomplished by establishing and ensuring its effective operation through a fund supported by the state or organizations.⁷⁷

⁷² Fisher K, 'Messages from the Expressive Nature of ICC Reparations: Complex-Victims in Complex Contexts and the Trust Fund for Victims' 20 (2020) *International Criminal Law Review*, 2020, 323. See, Hamber B, 'Repairing the Irreparable: Dealing With Double-Binds of Making Reparations For Crimes of the Past' *INCORE*, 9 -< <http://www.incore.ulst.ac.uk/research/projects/thepast/repair.html>> on 12 February 2023.

⁷³ Hyenhjelm M, Compensation as Moral Repair and as Moral Justification for Risks, *Ethics, politics & society*, 2019, 34 -<<file:///C:/Users/tabit/Downloads/HAYCAM-3v1.pdf>> on 15 February 2023.

⁷⁴ Feinberg J, 'Justice and Personal Desert. In Doing and Deserving' *Princeton University Press*, 1970, 74 <https://philpapers.org/rec/FEIDD> See, Goodin R, 'Theories of compensation' in Frey R, Morris C (Eds), *Liability and Responsibility: Essays in Law and Morals*, Cambridge University Press, 1991, 257.

⁷⁵ Chapman B, 'Wrongdoing, welfare, and damages: recovery for nonpecuniary loss in corrective justice' in Owen David (ed), *Philosophical foundations of tort law*, Oxford University Press, 1995, 409.

⁷⁶ Lang P, 'Justice and Rectification: A Taxonomy of Justice' In Roberts Rodney (ed), *Injustice and Rectification*, Theology and Philosophy, New York, 2005, 17.

⁷⁷ Basenko R, Avanesian H, Strilko D, 'Institute of compensation for moral damage: international legal experience and legislative innovations,' *civil law and process*, 2022, 7.

Griseri proposes that compensation is frequently sought as an alternative to total nullification, especially when achieving complete rectification is not possible.⁷⁸ In line with Nozick's perspective, complete compensation occurs when the victim is positioned on the same indifference curve as before the harm transpired.⁷⁹ Considering these viewpoints, it seems to insinuate that wrongful harms are actions that, on one hand, result in injury or loss and, on the other hand, convey a disregard for the rights of the other party. Consequently, leading Hyenhjelm to conclude that compensation aims to address both the incurred losses and counteract the expressed disregard to nullify the harm.⁸⁰

In summary, scholars seem to believe that there exists a place for monetary compensation for not assessable harms suffered by victims, where such an approach requires that as a minimum, it must aim to repair the harm and bring the victim closer to their previous *status quo ante*.

1.8.3 On the concept of Moral Harm

The concept of moral harm is widely discussed in the field of psychology, where currently, the literature that exists can fittingly be described as lacking a concrete definition. In essence, such harm is to the very self-conception of ethical beings, which is a core aspect of a persons' identity. As Shay states, moral harm 'deteriorates their character; their ideals, ambitions, and attachments begin to change and shrink.'⁸¹

From Shay's perspective, for moral harm to be said to have occurred, three circumstances must be present: 'a betrayal of what's right, by someone who holds legitimate authority, in a high-stakes situation.'⁸² As elucidated by Litz, Stein and Delaney et al's definition of moral harm based on work done in Iraq and Afghanistan,⁸³ moral harm requires that the individual has experienced a potentially injurious event by 'perpetrating, failing to prevent, bearing witness to, or learning about acts that transgress deeply held moral beliefs and expectations', where

⁷⁸ Griseri P, 'Punishment and Reparation', 35 (141) *The Philosophical Quarterly*, 1985, 402.

⁷⁹ Nozick R, 'Anarchy, State, and Utopia. Malden' Acumen Publishing, 2006, 57.

⁸⁰ Hyenhjelm M, Compensation as Moral Repair and as Moral Justification for Risks, *Ethics, politics & society*, 2019, 11 -<<file:///C:/Users/tabit/Downloads/HAYCAM-3v1.pdf>> on 15 February 2023.

⁸¹ Shay J, Moral injury. *Psychoanalytic Psychology*, 31(2), 2014, 182-191.

⁸² Shay J, Moral injury. *Psychoanalytic Psychology*, 31(2), 2014, 182-191.

⁸³ Litz T, Stein N, Delaney E, et al, *Moral injury and moral repair in war veterans: a preliminary model and intervention strategy*, *Clinical Psychological Review*, 29, 2009, 695–706. See, Hodgson J, Carey B, Moral injury, and definitional clarity: betrayal, spirituality and the role of chaplain, *Journal of Religion and Health*, 2017, 1212.

such moral violations have led to ‘lasting psychological, biological, spiritual, behavioral, and social impact’.⁸⁴

According to Hodgson and Carey, the primary indicators leading to the emergence of moral harm involve self-blame, challenges with trust, and spiritual/existential concerns.⁸⁵ Because morally injurious events can encompass a wide array of possibilities, numerous researchers have categorized these events based on individual responsibility. These categories include perpetration, failure to prevent harm, or other forms of responsibility, as well as witnessing disproportionate violence and experiencing betrayal by trusted individuals. This approach aims to enhance the understanding of the pathological effects associated with each type of event.⁸⁶

In summary, according to the said scholars, the concept of moral harm is generally understood as the disruption of one’s core values, that results in the infringement of their human dignity.

1.8.4 Contribution

The existing authorities recognize that the TFV, through its assistance, should adopt a more flexible approach to the TFV’s assistance mandate,⁸⁷ however there is lack of analysis on the difference between victims under its court-ordered reparative mandate and the TFV’s assistance mandate. Moreover, there is no furtherance of how a wider form of assistance by the TFV is to be actualized. Consequently, this study contributes to the existing literature by

⁸⁴ Haight, W, Sugrue, E, Calhoun, M, Black, J, ‘Basically, I look at it like combat’’: Reflections on moral injury by parents involved with child protection services’ *Children and Youth Services Review*, 82, 2017, 477.

⁸⁵ Hodgson J, Carey B, Moral injury, and definitional clarity: betrayal, spirituality, and the role of chaplains, *Journal on Religious Health*, 2017, 50. See, Schorr Y, Stein R, Maguen S, Sources of moral injury among war veterans: a qualitative evaluation. *Journal on Clinical Psychology*, 2018, 74.

⁸⁶ Frankfurt B, DeBeer B, Morissette B, ‘Mechanisms of moral injury following military sexual trauma and combat in post-9/11 US war veterans’ *Front Psychiatry*, 2018, 15. See, Jordan H, Eisen E, Bolton E, ‘Distinguishing war-related PTSD resulting from perpetration- and betrayal-based morally injurious events’ *Psychol Trauma*, 2017, 68.

⁸⁷ Asaala E, ‘Towards an effective ICC assistance program in Kenya for the victims’ of 2007/8 post-election Violence’, 67-86. See, Åberg M, ‘The Reparation Regime of the International Criminal Court’ *Digitale Vetenskapliga Arkivet*, 2015, 48 -< <https://www.diva-portal.org/smash/get/diva2:801293/FULLTEXT01.pdf>> on 3 February 2023. See, Wierd M, Grief P, ‘Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims’ *International Center for Transitional Justice*, 2004, 7. See, Peschke K, ‘The Role and Mandates of the ICC Trust Fund for Victims’, 317. See, Dwertmann E, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Martinus Nijhoff Publishers, Leiden, 2010, 127.

broadening the TFV's assistance mandate to encapsulate monetary compensation, as a form of support for moral harm suffered by victims of international crimes. It will do so by drawing a nexus between current forms of harms covered by the TFV's assistance mandate and moral harm, while drawing justification from its other weaker mandate; court-ordered reparations.

This study will add to the ongoing discussion by social, and criminal justice policy makers on the psychological effects of crimes to victims, who may find amenable the way this study makes appeal to studies on victimology, to cultivate an approach that recognizes moral harm support as a victim's need. This work further complements that of scholars such as Asaala, Fisher and Åberg,⁸⁸ suggest expanding the TFV's discretionary mandate: assistance.

1.9 Research Design and Methodology

The subject of inquiry is multi-angled and is explored using two broad outlooks: philosophical and doctrinal. Woven together, these present a considerable portion of understanding how the TFV's assistance mandate is exercised. All in all, this study relies on desktop research.

On the one hand, the doctrinal approach is largely based on interpreting and regulating the legal framework of the TFV's assistance regime, Regulations of the TFV, to incorporate moral harm as harm supported through monetary compensation. While on the other hand, the philosophical approach provides arguments on why offering support for moral harm through monetary compensation meets victims' needs. Consequently, this study benefits from qualitative evidence from secondary sources. It also utilizes an inductive approach in the third chapter, to make the claim that moral harm is a harm under the ICC, considering the types of harm covered by it. The deductive approach is useful for the second and fourth chapter in setting out the premise to show the critical difference between the TFV's dual mandate its understanding of a victim, and rationales for a monetary compensation scheme for the TFV's assistance mandate. This heavily relies on philosophical arguments for monetary compensation (drawn from domestic and regional compensation schemes), to help ground support for moral harm through monetary compensation. This lays the foundation for the fifth chapter to craft recommendation on how the TFV's assistance should incorporate moral harm to their forms of support.

⁸⁸ Åberg M, 'The Reparation Regime of the International Criminal Court', *Digitala Vetenskapliga Arkivet*, 2015, 10 -< <https://www.diva-portal.org/smash/get/diva2:801293/FULLTEXT01.pdf>> on 3 January 2023. See, Asaala E, 'Towards an effective ICC assistance program in Kenya for the Victims of 2007/8 post-election Violence', 67-86. See, Fisher K, 'Messages from the Expressive Nature of ICC Reparations: Complex victims in Complex Contexts and the Trust Fund for Victims' 20 (2020) *International Criminal Law Review*, 2020, 344.

1.10 Assumptions

This paper assumes that the definition of victims under the TFV's assistance mandate is temporally and substantively limited.

1.11 Limitations

The research may be impeded by the lack of extensive research on moral harm and monetary compensation as a remedy. Consequently, this research will have to rely on justifications for monetary compensation in other types of harms and draw the link to moral harm.

1.12 Chapter Breakdown

Chapter one: It serves as the introduction to this study. It details, among others, the research objectives, research questions, hypothesis, justification for this study and the conceptual framework, the status of a victim, which provides the lens to which the subsequent chapters are anchored on.

Chapter two: It assesses the difference between a victim under the TFV's court-ordered mandate and its assistance mandate. This sheds light on the TFV's understanding of harm suffered by the said victims, making the case that the TFV's assistance mandate holds great potential in supporting victims' harms.

Chapter three: It focuses on establishing the forms of harm that are suffered by victims of international crimes under the ICC's jurisdiction. Most importantly, it establishes that moral harm is one of the said harms. Nevertheless, it concludes that the TFV's assistance mandate is currently not cognizant of this. Thus, proving the hypothesis.

Chapter four: It analyzes the existing rationales for a victim compensation scheme, with the aim of supporting monetary compensation as a form of support. The study assesses 4 existing rationales; a rights rationale based on a moral obligation; a practical rationale driven by the limitations suffered by the court-ordered reparation mandate; a welfarist rationale based on the idea of 'solidarity'; and a humanitarian rationale justified by the 'need' for assistance. These rationales are further supported by approaches drawn from domestic and regional monetary compensation schemes redress victims' harms. It concludes by showing why monetary compensation is best suited for to remedy moral harm.

Chapter five: It offers conclusion and recommendations as to how the TFV can adopt monetary compensation, as a form of support for moral harm for victims of international crimes.

CHAPTER 2: TFV'S DUAL MANDATE: COURT-ORDERED REPARATIONS MANDATE VIS-À-VIS ASSISTANCE MANDATE

2.1 Introduction

The existence of the TFV is anticipated by one provision in the Rome Statute: Article 79.⁸⁹ One of the key characteristics is that it adapts a hybrid mechanism, where on the one hand, it acts as an occasional adjunct to the ICC. In this regard, the TFV acts as an implementing agency, a para-judicial administration, mandated to implement the reparation orders made by the ICC.⁹⁰ This is what this chapter refers to as the 'Court-Ordered Reparations Mandate'.

On the other hand, the TFV has an autonomous role that is 'largely' independent from the ICC's influence.⁹¹ This role is characterized by the TFV's ability to issue assistance in 3 forms; physical, material, psychological manner.⁹² To do so, it has established a different source of monies, different beneficiaries (victims), and a different logic for rendering assistance. This role is what this chapter refers to as the 'Assistance Mandate'.

Consequently, this chapter seeks to characterize the operation of the TFV, in relation to victims' harm when it comes to its 2 roles; defined above.

2.2 Victims under the TFV's Court-Ordered Reparations Mandate

2.2.1 TFV's role as Intermediary

As previously discussed, the ICC seeks not only to punish wrongdoers (retributive justice) but also to restore justice by offering compensation to victims (restorative justice).⁹³ Hence, those who have suffered harm can pursue compensation. Following a trial and a conviction, the ICC has two choices for providing reparation to victims: it can issue a compensation directive directly against the convicted individual,⁹⁴ or order compensation to individual victims through

⁸⁹ Article 79, *Rome Statute of the International Criminal Court*.

⁹⁰ Rule 98, *The Rule of Procedure and Evidence of the International Criminal Court*.

⁹¹ The author notes that it is debatable how independent the TFV's assistance mandate is to the ICC. This shall be extensively discussed later in this chapter.

⁹² Regulation 48 and 49, *The Regulations of the Trust Fund for Victims*.

⁹³ Muttukumaru C, 'Reparation to Victims', in R. S. Lee (ed.), *The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results*, 1999, 263–4. See, Boven T, 'The Perspective of the Victim', in Danieli Y, Stamatopoulou E, Dias C (Eds) *The Universal Declaration of Human Rights*, 1ed, Routledge, 2018 22.

⁹⁴ Article 75(2), *Rome Statute of the International Criminal Court*. See, Rule 98(1), *Courts' Rules of Procedure and Evidence*.

the TFV.⁹⁵ The ICC's authority in carrying out this task, via the court-ordered mandate of the TFV, 'ultimately depends on its capacity to persuade observers that the exercise of its powers to investigate, prosecute, and punish violations of international criminal law is consistent with the application of rules that are universal in nature.'⁹⁶

Furthermore, when the ICC directs the transfer of funds from the TFV, obtained through fines, forfeitures, or reparations awards, the TFV's Board of Directors must adhere to the ICC's directives regarding reparations and the utilization of these resources. The ICC's order is supposed to specify the beneficiary group, the type and form of reparations in detail, and the Board is expected to implement measures in accordance with the order.⁹⁷ From Rule 98 of the ICC Rules of Procedure and Evidence and Practice, it follows that where individual reparations are awarded, the ICC prefers for them to be transferred to the beneficiaries directly; when it comes to collective awards, the preference leans toward leveraging the TFV's intermediary function.⁹⁸

However, the language of Article 75(2) lacks clarity regarding the scope of the authority to order reparations through the TFV. One interpretation suggests that the ICC can direct reparations using the TFV's 'other resources'.⁹⁹ A more restrictive interpretation would mean that the TFV only dispenses the assets of the convicted individual to the victims, granting the TFV exclusive discretion to determine whether its 'other resources' supplement its court-ordered reparations.¹⁰⁰ Examination of the drafting notes of the said ICC Rules reveals that the delegates effectively rejected giving the ICC the power to instruct the TFV to complement its

⁹⁵ Article 75(2), *Rome Statute of the International Criminal Court*. See Rule 98(2) (3), *Courts' Rules of Procedure and Evidence*. See, Regulation 59-72, *Regulations for the Trust Fund for Victims*.

⁹⁶ Struett M, 'The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court', in Roach R (ed.), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (2009), Oxford University Press, 2009, 107.

⁹⁷ Draft Regulations of the Trust Fund for Victims, paras. 46-49.

⁹⁸ Rule 98 (2) (3) (4), *Courts' Rules of Procedure and Evidence*.

⁹⁹ McCarthy, 'Reparations Under the Rome Statute of the International Criminal Court and Reparative Justice Theory', *International Journal of Transitional Justice*, 3(2), 2009, 265.

¹⁰⁰ McCarthy, 'Reparations Under the Rome Statute of the International Criminal Court and Reparative Justice Theory', *International Journal of Transitional Justice*, 3(2), 2009, 265.

awards.¹⁰¹ Consequently, in alignment with the court-ordered mandate of the TFV, it functions solely as an intermediary. The allocation of reparations to victims, as directed by the ICC, typically transpires through the TFV, adhering to the ICC's specified procedure.¹⁰²

In addition, the TFV may 'identify partners, or invite proposals for the implementation of the award'.¹⁰³ In this procedure, the ICC, after discussions with involved state parties and the TFV, is empowered to seek assistance from intergovernmental and international entities, or domestic organizations endorsed by the TFV to execute tasks on its behalf.¹⁰⁴

Consequently, the TFV's Court-ordered mandate is merely intermedial.

2.2.2 Legally Restricted Approach to Victims by TFV's Court-ordered Mandate

Under the ICC's jurisdiction, victims must meet many requirements to get court-ordered reparation award. Relying on criminal responsibility presents numerous challenges to the reparation mechanism of the ICC, including TFV's court-ordered mandate.

First, participation of victims should be weighed against conflicting interests and rights. In this context, some authors suggest that there is limited victim participation within the ICC due to the vast number of participants, which further curtails procedural efficiency to safeguard the accused person's rights.¹⁰⁵ This is based on Article 68 of the Rome Statute concerning victim participation and the necessity to maintain a balance with the rights of the accused.¹⁰⁶

Second, the ICC Prosecutor must prosecute an alleged perpetrator, and a conviction made by the ICC. Further, for victims to benefit from court-ordered reparation awards, they must be victims in accordance with the provisions outlined in Rule 85 of the ICC Rules of Procedure and Evidence.¹⁰⁷ This is to mean that for one to be recognized as a victim, the causal link

¹⁰¹ Åberg M, 'The Reparation Regime of the International Criminal Court', Digitala Vetenskapliga Arkivet, 2015, 10 -< <https://www.diva-portal.org/smash/get/diva2:801293/FULLTEXT01.pdf>> on 3 December 2023.

¹⁰² Regulations 59, 60, 69, *Regulations for the Trust Fund for Victims*.

¹⁰³ Reg. 67, 71, *Regulations for the Trust Fund for Victims*.

¹⁰⁴ Rule 98 (4), *Courts' Rules of Procedure and Evidence*. See, Regulation 73-75, *Regulations for the Trust Fund for Victims*.

¹⁰⁵ Zappala S, 'The Rights of Victims v. the Rights of the Accused', 8 *Journal of International Criminal Justice* (2010) 164. See, Moffett L, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court', 26 *Criminal Law Forum*, 2015, 289.

¹⁰⁶ Article 68, *Rome Statute of the International Criminal Court*.

¹⁰⁷ Rule 98, *The Rule of Procedure and Evidence of the International Criminal Court*.

between their harm and the crime allegedly committed by the perpetrator must be made.¹⁰⁸ For instance, in the *case of Lubanga*, the accused was charged with the war crime of enlisting and conscripting children below 15 years and forcing them to participate in crimes. This case is critical as it delves into the theoretical aspects and significance of reparations, illustrating the complexities involved in addressing the collective nature of mass atrocities, particularly when the connection between the victim and the accused is called into question.¹⁰⁹

In the mentioned instance, despite numerous crimes attributed to Mr. Lubanga, his indictment solely encompassed the charges related to recruiting and conscripting child soldiers.¹¹⁰ Thus, in the first instance, there was exclusion of a large number of victims from participating in the proceedings. Furthermore, even where victims became eligible for reparations, the ICC underscored the need for victims seeking reparations to establish a connection between the harm and the defendant's conduct. Consequently, individuals who fell victim to child soldiers in the conflict were not eligible for compensation unless the occurrences were planned, directed, or orchestrated by the defendant.¹¹¹ This is what the scholar Hazan terms as 'justice divorced from the victims' realities.'¹¹² This is to mean that victims appearing before the ICC face an additional unsettling realization that, despite their initial recognition as victims in the early stages of the proceedings by the ICC,¹¹³ depending on the charges filed against the accused, many victims lose this status. As earlier alluded to, in the *Lubanga case*, most victims who were part of the case in its early stages in 2006, were not victims of the crimes that Thomas Lubanga nor part of the reparation awarded issued by the ICC.¹¹⁴ This leads to dissatisfaction among individuals initially granted victim status during the 'situation' stage, only to find

¹⁰⁸ Dwertmann E, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations*, Martinus Nijhoff Publishers, Leiden, 2010, 285.

¹⁰⁹ Fisher K, 'Messages from the Expressive Nature of ICC Reparations: Complex-Victims in Complex Contexts and the Trust Fund for Victims' 20 (2020) *International Criminal Law Review*, 2020, 320.

¹¹⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, 2006, 4.

¹¹¹ Novak A, *The International Criminal Court: An Introduction*, Springer International Publishing, 2016, 15. See Fisher K, 'Messages from the Expressive Nature of ICC Reparations: Complex-Victims in Complex Contexts and the Trust Fund for Victims' 20 (2020) *International Criminal Law Review*, 2020, 328.

¹¹² Hazan P, 'La justice face à la guerre, De Nuremberg à La Haye', Stock, Paris, 2007, 15.

¹¹³ Moffett L, 'Reparations for Victims at the International Criminal Court: A New Way Forward?', 21(9) *International Journal of Human Rights*, 2017, 1207.

¹¹⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-172, 29 June 2016.

themselves excluded from participation in the process and any subsequent awards as the case progresses.¹¹⁵

Furthermore, due to the lengthy proceedings within the ICC, it poses a problem for the victims to get their needs addressed: ‘the various pre-trial stages sometimes spread themselves over several years after the act that prompted them’.¹¹⁶ This is due to the ICC cautious approach in balancing the rights of the victims and those of the accused, by being particular in the analysis of evidence, and providing both sides ample opportunity to present their case.¹¹⁷ Thus, timescale for the judicial process is therefore not necessarily always in tune with victims’ needs.¹¹⁸

In conclusion, the intermediary role of the TFV, through implementation of court-ordered reparations, has the potential to cause certain victims to view their suffering as less significant than that of others, thus, inherently becoming a means of isolation that intensifies sentiments of victimization.¹¹⁹ It is therefore safe to say that the disparity in reparations is substantial for the TFV’s court-ordered mandate to have noteworthy effect on victims, since only a few victims get help, and way too late.

2.3 Victims under the TFV’s Assistance Mandate

In understanding the victims subject to the TFV’s assistance mandate, first, this study must provide for the definition of the TFV’s ‘assistance mandate’ and how this impacts its understanding of victims. Secondly, to be able to make a claim for compensation of moral harm suffered by victims of international crimes under the TFV’s assistance mandate, it must consider to what extent its mandate is independent from the ICC.

¹¹⁵ Scalia D, Rauschenbach M, ‘Victims and international criminal justice: a vexed question?’ 90(870) *International Review of the Red Cross*, 2008, 454.

¹¹⁶ Moffett L, ‘Reparations for Victims at the International Criminal Court: A New Way Forward?’, 21(9) *International Journal of Human Rights*, 2017, 1207.

¹¹⁷ Bloomfield D, Barnes T, Huyse L, ‘Reconciliation after a Violent Conflict. A Handbook’, International Institute for Democracy and Electoral Assistance (IDEA), Stockholm, 2003.

¹¹⁸ Scalia D, Rauschenbach M, ‘Victims and international criminal justice: a vexed question?’ 90(870) *International Review of the Red Cross*, 2008, 452.

¹¹⁹ Fisher K, ‘Messages from the Expressive Nature of ICC Reparations: Complex-Victims in Complex Contexts and the Trust Fund for Victims’ 20 (2020) *International Criminal Law Review*, 2020, 339.

2.3.1 Defining TFV's 'Assistance Mandate'

It is noteworthy that the connection between the assistance mandate and the Rome Statute is fragile. The legal foundation for the TFV's 'general assistance' mandate stems from Rule 98(5) of the ICC Rules of Procedure and Evidence. It stipulates that beyond the TFV's mandate to implement reparation orders of the ICC, '*other resources of the Trust Fund may be used for the benefit of victims subject to Article 79(of the Rome Statute)*'.¹²⁰ Article 79(1) of the Rome Statute emphasizes that these measures are implemented '*for the well-being of victims of crimes falling under the jurisdiction of the ICC*'.¹²¹

However, Article 79 does not allude to any assistance for victims beyond the scope of the reparation award. Moreover, being situated in 'Part VII' of the Rome Statute, titled 'Penalties', one naturally infers a connection between the TFV's activities and convictions rendered by the ICC. The concept of an additional role, the assistance mandate, was conceived, debated, and officially legislated in 2004 by the Board of Directors, culminating in its submission in the Draft Regulations.¹²² After approval by the ICC's Assembly of State Parties, Regulation 50(a) became an important Regulation in authorizing the TFV's assistance mandate to use its resources outside implementing the ICC's reparation orders.¹²³

While the Board's draft and the final regulations neither utilized nor supplied the expressions 'general assistance' or 'second mandate,' these terms have nevertheless become ingrained.¹²⁴ The Regulations on the TFV's assistance mandate proposes that the funds be used to provide only assistance for psychological rehabilitation, material, or physical harm to benefit victims.¹²⁵

One must take note of the fact that the term reparation was initially in Regulation 48 during drafting, however, the Board was deliberate in excluding it in the final version. This indicates

¹²⁰ Regulation 47, 48, *Regulations for the Trust Fund for Victims*.

¹²¹ Moffett L, 'Reparations for Victims at the International Criminal Court: A New Way Forward?', 21(9) *International Journal of Human Rights*, 2017, 1205.

¹²² 'Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims 2003-2004', ICC-ASP/3/14, 2004.

¹²³ Regulation 50(a), *Regulations of the Trust Fund for Victims*.

¹²⁴ TFV 'Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims', 4.

¹²⁵ Regulation 50 and 56, *Regulations for the Trust Fund for Victims*.

an intention to conceptually distinguish the TFV's reparations mandate as defined in Article 75 of the Rome Statute from the TFV's 'other resources' (its assistance mandate), which are intended to benefit victims, despite lack of conviction.

Evidently, from its conception, the TFV's assistance mandate fundamentally differs to its court-ordered mandate in its purpose.

2.3.2 Is the TFV's Assistance Mandate truly Independent from the ICC?

While the TFV's support can be accessed in the initial phases of proceedings for the well-being of all victims within the ICC's jurisdiction, a regrettable deviation from the draft Regulations occurred during the fourth session by the ASP. This deviation entails the potential for the ICC to impede the TFV from utilizing the funds. A division was evident among states, with some asserting that the TFV should operate independently of the ICC (e.g., 'Belgium, the DRC, Cyprus, France, Kenya, Sierra Leone, Tanzania, and Uganda'), while others argued for ICC control to safeguard the integrity of its criminal proceedings (e.g., 'Australia, Canada, New Zealand, Norway, Peru, Sweden, and the United Kingdom').¹²⁶

A compromise was reached where the TFV was to apply to the ICC before it used its voluntary contributions, 'so as to enable the ICC to evaluate the impact of the fund's activities on the proceedings'.¹²⁷ More specifically, on the basis of Regulation 50, the Board of Directors was empowered to 'provide physical or psychological rehabilitation or material support for the benefit of victims and their families' if,

*'(ii) the Board has formally notified the Court of its conclusion to undertake specified activities under (i) [to provide rehabilitation or support] and the relevant Chamber of the Court has responded and has not, 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 (...)'*¹²⁸

Thus, the Regulations leaves some room for the ICC to curtail or veto, the Board of Directors of the TFV's decision to exercise its assistance mandate in the use of its funds.

¹²⁶ASP Plenary Session, 'Working Group on the Victims Trust Fund', 29 Nov. 2005. See, FIDH, 'Recommendations to the Fourth Session of the Assembly of States Parties to the International Criminal Court', 2005, 5.

¹²⁷FIDH, 'Recommendations to the Fourth Session of the Assembly of States Parties to the International Criminal Court', 2005, 5.

¹²⁸ Regulation 50(a)(i)(ii), *Regulations of the Trust Fund for Victims*.

However, the ICC lacks authority in determining the beneficiaries, selecting funded projects, and deciding on the activities and projects deemed most suitable: these responsibilities lie with the Board of Directors.¹²⁹ Moreover, the ICC does not control access to victims or the choice of partners with whom the TFV collaborates on its projects. Consequently, while adhering to the reparation mandate involves the TFV simply executing ICC directives, its independent actions under the assistance mandate operate autonomously from the ICC.¹³⁰ This aligns with the former chair of the Board of Directors, Simone Veil, address:

*'The Fund's (TFV) independence must be guaranteed. As your Assembly recalled last year in resolution ICC-ASP/3/Res.7 (Establishment of the Secretariat of the Trust Fund for Victims'), it has always been accepted that the TFV should be complementary and independent organ of the Court, (...) not dependent upon it.'*¹³¹

2.4 Implication of the Conceptual Differences in the Dual Mandate of the TFV on Victims' Harm

It is unavoidable that certain victims will not receive reparations.¹³² This oversight primarily stems from the ICC's dual goals of retribution and restitution collaborating to administer justice to victims, constrained by the limitations of the retributive system and the complex contexts of mass atrocities. While the idea of reparations for victims is praiseworthy, it seems that the efficient execution of the TFV's court-ordered mandate to redress victims' harms is under scrutiny. Where in the case of assistance mandate of the TFV, there seems some hope that due to its discretionary nature and its goal to aid victims in their healing, may better suited to meet victims' needs.¹³³

¹²⁹ Situation in the Democratic Republic of Congo, 'Observations of the Legal Representative of Victims on the Notification of the Board of Directors of the Trust Fund for Victims', ICC-01/04-461, Pre-Trial Ch. I, 2008, 5.

¹³⁰ Schabas W, 'The International Criminal Court – A Commentary on the Rome Statute', 2ndEd, Oxford University Press, 2010, 909.

¹³¹ Address by Simone Veil, Chair, Board of Directors, Trust Fund for Victims, Assembly of States Parties, fourth Session, 28 Nov. 2005. See Brouwer A, Reparation to Victims of Sexual Violence: Possibilities at the International Criminal Court and at the Trust Fund for Victims and Their Families, Leiden Journal of International Law, 2007, 233.

¹³² Balta A, Bax M, Letschert R, 'Trial and (Potential) Error: Conflicting Visions on Reparations Within the icc System', 29(3) International Justice Review, 2019, 228.

¹³³ Scalia D, Rauschenbach M, 'Victims and international criminal justice: a vexed question?' 90(870) International Review of the Red Cross, 2008, 451.

Nevertheless, one cannot ignore the fact that ‘assistance’ is quite different than reparations. Assistance does not bring with it justice in the form of a conviction. It is wholly lacking this expressive form of justice.¹³⁴ This makes it somewhat a benign feature.

The scholar, Dixon rightly contends that in some case, assistance and reparations can be used together since ‘there will always be forms of harm, types of violence and immediate needs that fall outside the boundaries of reparations programs’ therefore, ‘assistance measures are a useful and necessary tool to help reparations overcome these shortcomings.’¹³⁵ Given the pressing needs of victims on one side, and the difficulties associated with the reparation mandate on the other, the TFV's discretionary assistance mandate aims to offer support to numerous victims,¹³⁶ ‘where assistance is used to fill in the holes of a legally restricted reparations process’.¹³⁷

A rather restrictive role of the TFV, as an intermediary role in implementing the ICC’s reparations orders, would arguably not have the same utility. Given that only a few individuals are convicted, under its restrictive role, victims who have been recognized by the ICC and their harm linked with the crimes of convicted persons, are eligible for such an award.¹³⁸ Evidently, the TFV’s assistance mandate is preferable since it is independent to the ICC and has the potential to address various harms suffered by the said victims. Thus, perhaps the TFV’s assistance, tied to its commitment to alleviation of victims’ harm, is better suited as it is ‘sensitive to the impact of crimes to victims’.¹³⁹

2.5 Conclusion

The relationship between the dual mandate of the TFV can be characterized by the great potential the assistance mandate holds in addressing different harms suffered by victims of

¹³⁴ Fisher K, ‘Messages from the Expressive Nature of ICC Reparations: Complex-Victims in Complex Contexts and the Trust Fund for Victims’ 20 (2020) *International Criminal Law Review*, 2020, 342.

¹³⁵ Dixon P, ‘Reparations, Assistance and the Experience of Justice: Lessons from Colombia and the Democratic Republic of the Congo’, 10 *International Journal of Transitional Justice*, 2016, 89.

¹³⁶ Regulations 42, *Regulations of the Trust Fund for Victims*.

¹³⁷ Dixon P, ‘Reparations, Assistance and the Experience of Justice: Lessons from Columbia and the Democratic Republic of the Congo’, 10 *IJTJ* 88, 2016, 102.

¹³⁸ Ferstman C, *The International Criminal Court's Trust Fund for Victims: challenges and opportunities*, Yearbook of International Humanitarian Law, 2003, 434.

¹³⁹ Mani R, ‘Reparations as a Component of Transitional Justice: Pursuing ‘Reparative Justice’ in the Aftermath of Violent Conflict’ in Feyter D and Parmentier S (eds) *‘Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations’*, Intersentia, Antwerp, 2005, 73.

international crimes. This is because the TFV's court-ordered mandate currently holds little expressive power as it is merely intermediary: has little to no say how victims' harms are addressed. Furthermore, the ICC's few convictions, affecting the number of reparation awards issued, limits the TFV's court-ordered mandate. More importantly, assistance carries a significant communicative impact compared to that of reparations, making it arguably the preferable mandate.



CHAPTER 3: TFV'S ASSISTANCE MANDATE: UNDERSTANDING OF HARMS SUFFERED BY VICTIMS OF INTERNATIONAL CRIMES

3.1 Introduction

As established in chapter 2, despite the TFV's assistance mandate being discretionary from the ICC, it is guided by the harms that fall within the ICC's jurisdiction. Therefore, to be able to understand the forms of harm that the ICC deals with and thus, the TFV's assistance mandate should address, this study must provide an analysis of the harms covered under the ICC.

It is worth noting that a definition of victims by the ICC is found in Rule 85 of the ICC Rules of Procedure and Evidence. The said provision defines 'victims' as the '*natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court*'.¹⁴⁰ Accordingly, the crimes under the ICC's jurisdiction are provided for under Article 5 of the Rome Statute,¹⁴¹ and their elements are elucidated further under the Rome Statute as: Crimes of Genocide;¹⁴² Crimes Against Humanity;¹⁴³ War Crimes;¹⁴⁴ and the Crime of Aggression.¹⁴⁵ Furthermore, from the said Rule, it is clear that a component integral to defining victims' of the said crimes is the experience of 'harm'. However, the concept of harm lacks a specific definition within the procedural and substantive statutory frameworks that predominantly govern the ICC, namely, the Rome Statute and its Rules of Procedure and Evidence.

To aid with this, the ICC has used the UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law, as legitimate source of definition of 'harm'.¹⁴⁶ Principle 8 of the said Guideline provides that harm as '*(...)physical or mental injury, emotional suffering, economic loss or substantial*

¹⁴⁰ Rule 85, *Courts' Rules of Procedure and Evidence*.

¹⁴¹ Article 5, *Rome Statute of the International Criminal Court*.

¹⁴² Article 6, *Rome Statute of the International Criminal Court*.

¹⁴³ Article 7, *Rome Statute of the International Criminal Court*.

¹⁴⁴ Article 8, *Rome Statute of the International Criminal Court*.

¹⁴⁵ Article 8bis, *Rome Statute of the International Criminal Court*.

¹⁴⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, 2006.

impairment of their fundamental rights (...)'.¹⁴⁷ This is the provision that this chapter critically deals with.

Consequently, the first part of this chapter aims to provide for the ICC's understanding of the various harms suffered by victims of international crimes. The second part will show that moral harm is a harm covered under the ICC's jurisdiction. The third part establishes that the TFV's assistance mandate has adapted a restrictive definition of 'victims' that excludes moral harm, as a harm suffered by victims of international crimes.

4.1 The Form of Harms Suffered by Victims of International Crimes under the ICC's Jurisdiction

As stated, Rule 85(a) of ICC Rules of Procedure and Evidence establishes the standard for defining victims before the ICC as those who have 'suffered harm because of the commission of any crime within the jurisdiction of the Court'.¹⁴⁸ According to this Rule's wording, there needs to be a clear link between the harm experienced by the potential victim and a criminal act. It is important to highlight that the ICC's interpretation of the breadth or specificity of this causal relationship, affects the range of victims eligible to participate in ICC proceedings.¹⁴⁹

For instance, in the *Lubanga case*, the ICC Appeals Chamber held that '*... it is required that the crimes for which Mr. Lubanga was convicted were the 'proximate cause' of the harm for which reparations are sought.*' The Trial Chamber in the *Katanga case* reached a similar outcome, supporting the definition of 'harm' as embraced by the Appeals Chamber in *Lubanga*. This definition entails 'hurt, injury, and damage'.¹⁵⁰ In the case of individuals, the harm doesn't necessarily have to be direct, but it must have had a personal impact on the victim, introducing the concept of indirect victims.¹⁵¹

¹⁴⁷ Principle 8, *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*, E/CN.4/RES/2005/35, 19 April 2005.

¹⁴⁸ Rule 85, *The Rule of Procedure and Evidence of the International Criminal Court*.

¹⁴⁹ Milaninia N, 'Conceptualizing Victimization at the International Criminal Court: Understanding the Causal Relationship between Crime and Harm', 127, <file:///C:/Users/tabit/Downloads/HRLR-50.2-Milaninia_Conceptualizing-Victimization-at-the-International-Criminal-Court.pdf>

¹⁵⁰ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

¹⁵¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

Furthermore, in the Pre Trial-Chamber I's hearing of the *Lubanga case*, the ICC went further to set out that 'psychological harm', 'physical harm' and 'material harm' are all forms of relevant harm.¹⁵² However, it did not go so far as to establish what is meant by '*substantial impairment of the victim's fundamental rights*.'¹⁵³

With this understanding in mind, the analysis of the harms that the ICC has covered since its inception shall be analyzed below.

4.1.1 Physical Harm

The primary and evident impact of crimes on victims is the physical harm they endure. Those who become victims of violent offenses, such as assault, torture or any other form of ill treatment, may experience physical injuries that span from bruises and cuts to broken bones or internal harm.¹⁵⁴ Physical harm can also encompass disabilities arising from incidents like beatings or shootings, as well as the infliction of incurable diseases, such as HIV resulting from acts like rape and sexual torture.¹⁵⁵ These injuries may require medical attention and result in long-term physical disabilities or chronic pain. In the *Lubanga case*, during the trial, several witnesses testified that there had been sexual abuse of child soldiers.¹⁵⁶

Furthermore, victims affected by international crimes suffer from health difficulties stemming from the physical injuries they endured. These health requirements are ongoing, demanding consistent and specialized medical care. In certain instances, victims who have undergone severe mutilation, their harms necessitate intricate reconstructive surgical procedures.¹⁵⁷ For instance, in the *Katanga case*, Trial Chamber II noted that some civilians sustained bullet or

¹⁵² *The Prosecutor v. Thomas Lubanga Dyilo*. See, Gurmendi A, 'Definition of Victims and General Principles', in Lee R (ed), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001) 432.

¹⁵³ *The Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, ICC-01/04-01/06-2-tEN, Pre-Trial Ch. I, February 2006.

¹⁵⁴ Jamuna K, Anuroop M, Thomas T, Reddy C, Rajan Y, Sharma R, 'A Study on Psychological Impact of Crime on Victims', 11(2) *The International Journal of Indian Psychology*, 2023, 1.

¹⁵⁵ Ruvebana E, Victims of the genocide against the Tutsi in Rwanda. In: Letschert R et al (eds) *Victimological approaches to international crimes: Africa*, 1ed. Intersentia, Cambridge, 2011, 107.

¹⁵⁶ *The Prosecutor v. Thomas Lubanga Dyilo*.

¹⁵⁷ *The Prosecutor v. Dominic Ongwen*.

bladed- weapon wounds in the attack on Bogoro: wounds meaning some survivors had limbs amputated and others continued to suffer from physical disability.¹⁵⁸

4.1.2 *Psychological Harm*

International crimes commonly cause mental distress,¹⁵⁹ with some individuals facing heightened psychological impacts such as acute stress disorder and post-traumatic stress disorder.¹⁶⁰ The International Center of Transitional Justice further establishes that victims experience ‘mental trauma, because they keep recalling these scenes, leading to depression, substance abuse, and in some cases, suicide.’¹⁶¹ Moreover, physical injuries like sexual violence result in profound mental health repercussions. As stated by the Trial Chamber IX, in *the Dominic Ongwen* and affirmed in the *Katanga case*, many victims had suffered ‘post-traumatic stress disorder, insomnia, anxiety, headaches, low self-esteem, and thoughts of self-harm and suicide’.¹⁶²

In the *Bemba case*, Trial Chamber III scrutinized the notion of an indirect victim. The chamber looked at studies on the psychological transmission of harm across generations, caused by the anxiety and depression disorders observed in the grandchildren of Holocaust survivors. Following this, Trial Chamber II in the *Lubanga case* expanded on the differentiation between direct and indirect victims. It underscored that the harm acknowledged by the ICC, causing suffering to victims, need not be direct but necessitates the personal experience of harm by the victim.¹⁶³

The Reparations Order in the *Katanga case* marked a pivotal moment in the ICC's legal interpretations, as Trial Chamber II introduced the term ‘transgenerational harm’ for the first time, as a form of psychological harm between generations.¹⁶⁴ In this context, attention was

¹⁵⁸ *The Prosecutor v. Germain Katanga*.

¹⁵⁹ Danieli Y, ‘Massive trauma and the healing role of reparative justice’, Letschert R et al (eds) *Victimological approaches to international crimes: Africa*, 2009, 239.

¹⁶⁰ Danieli Y, ‘Massive trauma and the healing role of reparative justice’, 240. See, De Brouwer M, Romkens R, Ka Hon Chu S, ‘Survivors of Sexual Violence in Conflict: Challenges in Prevention and International Prosecution,’ in Letschert R, Haveman R, De Brouwer M. and Pemberton A (eds) *Victimological Approaches to International Crimes: Africa* Cambridge: Intersentia, 2011, 537.

¹⁶¹ *The Prosecutor v. Dominic Ongwen*.

¹⁶² *The Prosecutor v. Dominic Ongwen*. See, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

¹⁶³ *The Prosecutor v. Thomas Lubanga Dyilo*.

¹⁶⁴ Rincón A, Oyola V, Gutiérrez D, Agudelo A, Vélez L, ‘Intergenerational and Transgenerational harm’, *Law Clinic International*, 2022, 7.

given to the advancements in scientific studies about how trauma can be passed down through generations: transgenerational harm. Two main ideas were explored: one related to biology called ‘epigenetic transmission’, and the other focused on learned behaviour, known as ‘social transmission’.¹⁶⁵ The Chamber scrutinized reparations requests, taking into account a legal principle demanding a distinct connection between alleged harm and criminal act. It also stated that the tie between an action and its consequences can be broken if something happens after the initial act, which adds to the suffering of the people involved.¹⁶⁶

Consequently, transgenerational harm under the ICC’s jurisdiction, is a harm falling under the broader categorization of psychological harm.

4.1.3 Economic Harm

Economic harm, often referred to as material harm, consists of loss of or damage to goods, or property.¹⁶⁷ For instance, in the case where victims’ houses are burnt and shops are looted during the attacks lose their livelihoods, capital and means of production.¹⁶⁸ This results in the loss of life chances/living standards/opportunities.

In *Al Mahdi*, when addressing the economic impact resulting from Mr. Al Mahdi's actions, the Trial Chamber granted individual reparations to those ‘whose livelihoods solely relied upon the Protected Buildings.’ This included individuals engaged in the maintenance and safeguarding of the buildings, as well as owners of businesses exclusively dedicated to selling ‘holy’ sand from the protected sites.¹⁶⁹ To illustrate consequential economic harm, the Chamber cited victims who asserted their exclusive dependence on donations and gifts from pilgrims for their economic sustenance.¹⁷⁰

While in the *Katanga case*, the judges granted compensation to 297 victims for harm arising from property destruction and pillaging. Each victim received a symbolic compensation of 250

¹⁶⁵ *The Prosecutor v. Germain Katanga*.

¹⁶⁶ ICC < [Katanga case: Trial Chamber II dismisses the reparations applications for transgenerational harm | International Criminal Court \(icc-cpi.int\)](#)> on 18 September 2023.

¹⁶⁷ Pérez-León-Acevedo J, Pinto T, ‘Freedom of Religion or Belief in Cases Involving Attacks Against Buildings Dedicated to Religion: The Al Mahdi Case at the International Criminal Court’, 37(3) *Berkeley Journal of International Law* (BJIL), 2020, 474.

¹⁶⁸ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

¹⁶⁹ *The Prosecutor v. Al Mahdi (Ahmad Al Faqi)*.

¹⁷⁰ *The Prosecutor v. Al Mahdi (Ahmad Al Faqi)*.

US dollars, alongside collective reparations in the form of assistance for housing and income-generating activities.¹⁷¹

4.1.4 Moral Harm

Thus far, the ICC has only dealt with one case on moral harm: the *Al Mahdi case*. Due to this, for this study to make a convincing case that moral harm should generally be treated as harm that victims of international crimes suffer from, one must prove that moral harm falls squarely within the ICC's understanding of harm. This section endeavors to do so.

4.1.4.1 Application of the principle of *eiusdem generis*

As earlier stated, the reading of Rule 85 of the ICC Rules of Procedure and Evidence, nor in the *Lubanga case*, has the ICC gone to establish what the general term, 'a substantial impairment of the victim's fundamental rights', could constitute a harm.¹⁷² However, evidently, the ICC has expounded, through various cases, what the specific terms 'psychological harm', 'material harm' and 'physical harm' mean in the context of international crimes. Thus, the principle of *eiusdem generis* will be used to decipher the term 'a substantial impairment of the victim's fundamental (human) rights', showing that moral harm falls within the same general category as the harms specifically listed.

The understanding of moral harm as a harm that violates or impairs a victim's fundamental human right to dignity, influences the normative interpretation of the three harms analyzed above. This is because they are all predominantly acts that violate the human condition physically, mentally, and spiritually. If a rather strict wording of the ICC's Rules of Procedure and Evidence was adopted, to exclude serious injuries to the human dignity from the possible harms suffered by victims of international crimes, this would be an approach that is devoid of justice.

Consequently, sources in international human rights law have examined and recognized the presence of psychological, emotional, and notably, moral harm in instances involving severe infringements on freedom of belief and religion.¹⁷³ Specifically, regional human rights has set

¹⁷¹ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*.

¹⁷² Rule 85, *The Rule of Procedure and Evidence of the International Criminal Court*.

¹⁷³ *Río Negro Massacres v. Guatemala*, Inter-American Court of Human Rights (IACHR), 4 September 2012. See, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Inter-American Court of Human Rights (IACHR), (Merits, Reparations, Costs) IACHR Series C No 245, 27 June 2012. See, *African Commission on Human and Peoples' Rights v The Republic of Kenya*, App. no. 006/2012, African Commission on Human and

precedent on issuing reparations in cases related to attacks on communities, their places of worship, or sacred sites, acknowledging that moral harm can be caused where, for instance, there is violation of both cultural rights and freedom of religion or belief.¹⁷⁴

For example, the Inter-American Court of Human Rights (IACHR) has interpreted moral harm as an injury extending beyond the individual realm, impacting both the family and the communal structure. This may lead to psychosocial harm stemming from events, manifesting through the fragmentation of the community, disruption of family roles, erosion of the community's cultural identity and a sense of cultural void, shifts in community mourning practices, and modifications to the traditional social fabric of the community.¹⁷⁵

Thus, it is evident that the depiction of moral harm suffered by victims can be fragmented, where sparse and mediated references to trauma symptoms may oversimplify its understanding.

4.1.4.2 Analysis of the Al Mahdi case

The *Al Mahdi case* signifies the first and only time the ICC has granted reparations for victims of crimes against cultural heritage. This decision is particularly noteworthy for acknowledging the moral harm inflicted upon the victims due to the destruction of Timbuktu's monuments.¹⁷⁶

Notably, the Trial Chamber cited the legal precedents of the IACHR to affirm that international human rights law recognizes an association between diverse forms of moral harm and the

Peoples' Rights (ACHPR), 15 March 2013. See, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010.

¹⁷⁴ *Plan de Sánchez Massacre v. Guatemala, Judgment (Reparations)*, ('Sánchez Reparations Judgment'), Inter-American Court of Human Rights (IACtHR), Series C No. 116, 19 November 2004. See, *Río Negro Massacres v. Guatemala*, Inter-American Court of Human Rights (IACtHR). See, *Cyprus v. Turkey*, 25781/94, Council of Europe: European Court of Human Rights (ECHR), 10 May 2001. See, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 276/2003, African Commission on Human and Peoples' Rights.

¹⁷⁵ *Plan de Sánchez Massacre v. Guatemala, Judgment (Reparations)*, ('Sánchez Reparations Judgment'), Inter-American Court of Human Rights (IACtHR). See, *Yakye Axa Indigenous Community v. Paraguay, Judgment (Merits, Reparations and Costs)*, Inter-American Court of Human Rights (IACHR), Series C No. 125, IHR 1509, 17 June 2005.

¹⁷⁶ Pérez-León-Acevedo J, Pinto T, 'Freedom of Religion or Belief in Cases Involving Attacks Against Buildings Dedicated to Religion: The Al Mahdi Case at the International Criminal Court', 474.

disruption of cultural elements.¹⁷⁷ While the ICC Judges did not go as far as the said regional human rights court in assessing moral harm, the transcribed witness statements provide a further understanding of moral harm suffered by victims of international crimes.

For example, in their statements, victims claimed, that:

- a. *'I was completely emotionally devastated by the destruction of the mausoleums'*;
- b. *'(M)y faith (was) shattered, and my belief unsettled'*;
- c. *'I lost everything and all my faith'*; *'(T)he whole city suffered on the day the mausoleums were destroyed . . . (W)e were in great pain . . . The saints are all important to us . . . We used to seek blessings from them and make offerings to them at every milestone in our lives'*;
- d. *'My family, my friends, and all people of Timbuktu suffered . . . The Saints of Timbuktu are the descendants of Allah. When we used to ask for their blessings, they would be given . . . (E)ven if the saints protect us still, it's not the same as before'*; (and)
- e. *'(T)he destruction of the sacred shrines of my ancestors caused me suffering . . . (I)t was the only place in which we gathered and prayed for protection.'*¹⁷⁸

Unfortunately, the Trial Chamber VIII did not give a working definition nor flesh out the elements that should be used to assess moral harm under the ICC's jurisdiction. However, it ordered individual reparations for moral harm suffered by victims whose ancestors' burial sites were damaged in the attack, since these people were regarded as 'descendants of the saints' who 'ha(d) a different kind of emotional connection to the destroyed sites than the rest of the Timbuktu population.'¹⁷⁹ Furthermore, it gave the importance to the ICC ability to address moral harm, thus giving public recognition of victims' fundamental rights, especially those in the Timbuktu community.

¹⁷⁷ *The Prosecutor v. Al Mahdi (Ahmad Al Faqi)*. See, Inter-American Court of Human Rights ('IACtHR'), *Plan de Sánchez Massacre v. Guatemala*, Judgment (Reparations). See, *Yakye Axa Indigenous Community v. Paraguay*, Judgment (Merits, Reparations and Costs).

¹⁷⁸ *The Prosecutor v. Al Mahdi (Ahmad Al Faqi)*.

¹⁷⁹ *The Prosecutor v. Al Mahdi (Ahmad Al Faqi)*.

4.2 A Restrictive Definition of ‘Victims’ by the TFV’s Assistance Mandate

As established in this chapter, the harms suffered by victims of international crimes include physical, psychological, material, and most importantly, moral harm. Nevertheless, Regulation 50 of the Regulations of the TFV only adopts 3 forms of support for 3 types of harms: physical rehabilitation for physical harm, psychological rehabilitation (trauma care) for psychological harm, and material support (socio-economically based) for material harm.¹⁸⁰ Thus, failing to provide any means of support for victims’ moral harm.

This is worrying considering that Regulation 48 of the TFV,¹⁸¹ explicitly refers to Rule 85 on the Rules of Procedure and Evidence as the working definition for a ‘victim’ and therefore, its understanding of ‘harm’ should be guided as ICC is by the same Rule.¹⁸² Evidently, following this legal connection, moral harm can be covered by the TFV’s assistance mandate.

Furthermore, by limiting its discretionary assistance mandate to addressing ongoing mental health, medical interventions, and socio-economic issues through programs,¹⁸³ it adopts a restrictive definition of ‘victims’ and their harm, due to lack of recognition of moral harm and providing support for it. This is owed to the fact that the current 3 forms of support it offers are assessable in their nature, and therefore they can be remedied to stop them: ceased to be ongoing for the victim. This inference is drawn from the logic that if a victim and their injury have been addressed then presumably, they no longer need that same injury rehabilitated. For instance, in the case of psychological harm, the TFV is able to offer cost-effective psychological, social and other health benefits, where the victims have noted that they are able to move on with life, for instance, by returning to work.¹⁸⁴ In cases of physical harm, the TFV offers victims substantial support for their physical recovery, allowing them to reintegrate into their communities and resume normal functioning as much as possible.¹⁸⁵ While in the case of

¹⁸⁰ Regulation 48 and 50, *The Regulations of the Trust Fund for Victims*. See, -<[Assistance Mandate | The Trust Fund for Victims](#)> On 5 January 2023.

¹⁸¹ Regulation 48, *The Regulations of the Trust Fund for Victims*.

¹⁸² Rule 85, *The Rule of Procedure and Evidence of the International Criminal Court*.

¹⁸³ -<<https://www.trustfundforvictims.org/en/what-we-do/assistance-programmes>> On 3 January 2023.

¹⁸⁴ International Center for Research on Women ‘Towards a Perspective of Upcoming Interventions’ November 2013 -<<https://www.icrw.org/wp-content/uploads/2016/10/ICRW-TFV--Evaluation-Report.pdf>> on 1 March 2023.

¹⁸⁵ International Center for Research on Women ‘Towards a Perspective of Upcoming Interventions’ November 2013 -<<https://www.icrw.org/wp-content/uploads/2016/10/ICRW-TFV--Evaluation-Report.pdf>> on 1 March 2023.

material harm, through the improvement of the economic status of the victim, it funds rebuilding of property and meeting their basic needs.¹⁸⁶ However, moral harm cannot be treated as such since one cannot assess whether they have restored the dignity of a person were harmed, nor restore their faith where a ‘sacred’ building has been destroyed. The only plausible approach for moral harm is acknowledgement, not one that can be assessed through the criteria of ‘ceasing to exist’ or not ‘ongoing’.

The main issue with such a restrictive approach by the TFV is that it leaves the challenges faced by victims in post-conflict scenarios continue to fall under the domain of retributive justice approaches, with the ICC as the only mechanisms to protect victims through reparations (monetary compensation) for moral harm.¹⁸⁷ This is further coupled by the tedious prosecution process,¹⁸⁸ where the ICC prosecutor must first make the decision for prosecution of alleged perpetrator, the victims to further qualify as ‘victims’ within Rule 85 of the ICC’s Rules,¹⁸⁹ conviction made, and reparations for compensation ordered for moral harm.¹⁹⁰

As a result, the TFV’s restricted definition of victims to ongoing injuries in the exercising of its assistance mandate, continues to leave victims’ support for moral harm unattended; strictly under the TFV’s court-ordered reparations mandate, despite its limited (intermediary role) and linear relationship to convictions.

4.3 Conclusion

The importance of this chapter is establishing that material, psychological, physical, and moral harm are well established by the ICC as harms suffered by victims of international crimes. Where moral harm is guided by the UN principles, Guideline 8 and further addressed in *Al Mahdi case*, the first ICC case to recognize and remedy moral harm suffered by victims of

¹⁸⁶ International Center for Research on Women ‘Towards a Perspective of Upcoming Interventions’ November 2013 -<<https://www.icrw.org/wp-content/uploads/2016/10/ICRW-TFV--Evaluation-Report.pdf>> on 1 March 2023.

¹⁸⁷ Åberg M, ‘The Reparation Regime of the International Criminal Court’, *Digitala Vetenskapliga Arkivet*, 2015, 10 -< <https://www.diva-portal.org/smash/get/diva2:801293/FULLTEXT01.pdf>> on 3 January 2023.

¹⁸⁸ Clarke K, ‘We Ask for Justice, You Give Us Law’ in Carsten Stahn, Sara Kendall, Christian De Vos (eds), *The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, 2015, 272-301.

¹⁸⁹ Rule 85, *Courts’ Rules of Procedure and Evidence*, 9 September 2002, ICC-ASP/1/3- Corr.1.

¹⁹⁰ Dwertmann E, ‘The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations’, *Martinus Nijhoff Publishers*, Leiden, 2010, 285.

international crimes. Since the TFV's assistance mandate is guided by the harms falling within and covered by the ICC's jurisdiction, it should offer assistance for all the said harms.

Despite this, the TFV's assistance mandate currently only offers assistance for material, psychological and physical harm: not moral harm. This is worrying, considering its commitment to addressing victims' harms.



CHAPTER 4: FOUR RATIONALES: SEEKING JUSTIFICATION FOR A MONETARY COMPENSATION MECHANISM FOR MORAL HARM UNDER THE TFV'S ASSISTANCE MANDATE

4.1 Introduction

As established, the Rome Statute, through the TFV's assistance mandate, has unprecedentedly crafted a system of offering aid to victims that goes far beyond simply executing ICC's reparation awards. Nevertheless, the central challenge facing the TFV's assistance mandate is in developing how it can leverage this expanded mandate to its fullest extent, ensuring that support not only maximally benefits victims, but also offering support for the harm they have specifically endured.

Having established that moral harm is a harm suffered by victims of international crimes, this chapter seeks to provide rationales for why it is important for the TFV's assistance mandate to develop a monetary compensation mechanism. It will do so by analyzing four rationales that, currently guide the ICC's compensation mechanism, through its reparation mandate, and other international victim focused compensation schemes.

It is worth noting that current scholarship on the TFV's assistance mandate seem driven by attention to detail on how the TFV should use its fund,¹⁹¹ or who it should render assistance to.¹⁹² Therefore, identifying rationales for the ICC compensation mechanism is not typically treated by scholars when discussing the ICC nor the TFV's work. The first part of this chapter shall endeavor to identify 4 rationales that justify compensation mechanisms, suggesting the said rationales are sufficient in justifying a monetary compensation scheme under the TFV's assistance mandate. The second part makes the claim that a monetary compensation scheme, under the TFV's assistance mandate, should remedy moral harm.

¹⁹¹ 'Comments to the Trust Fund for Victims on the Progressive Realisation of its Mandate' REDRESS, 2010, 14 <<https://redress.org/wp-content/uploads/2018/01/Mar-10-Comments-to-the-Trust-Fund-for-Victims.pdf>> On 24 2023.

¹⁹² Asaala E, 'Towards an effective ICC assistance program in Kenya for the Victims of 2007/8 post-election Violence' in Bernard Ntahiraja, Gerhard Kemp (eds) *International Criminal Justice in Africa, 2020*, Konrad Adenauer Stiftung, 2020, 67-86.

4.2 Identifying Rationales for a Monetary Compensation Scheme under the TFV's Assistance Mandate

Drawing from the ICC's reparations decisions, its compensation approach is relatively consistent, mainly involving symbolic and collective compensation. As of now, there have been only four ICC decisions on victim compensation: in the *Al Mahdi case*, the *Katanga case*, the *Lubanga case*, and the *Ntaganda case*. The limited number of ICC compensation rulings provides minimal material for studying how compensation are theorized and work. Thus, this study shall further rely on other domestic and regional victim compensation schemes.

4.2.1 A Right Rationale

The lens of human rights is becoming progressively vital for evaluating the functionality of international organizations, such as institutions in the field of international criminal law.¹⁹³ Currently, most victim compensation schemes, under institutions, base their form on a human right.¹⁹⁴ The importance of this rationale is that it is based on the recognition of victims' rights: a moral, not legal, obligation that such institutions have to victims. This moral obligation is pegged on a commitment to adequate response to victims' needs.

The TFV being such an institution that magnifies the sense of need for assistance, it seems right to guarantee that the right to compensation for harms suffered by victims of international crimes. Such compensation is further grounded on a moral obligation as it has an important symbolic function for victim. For instance, as evidenced by domestic monetary compensations scheme, one of the main reasons for victims to seek compensation is their desire for acknowledgment of their status as victims of crimes.¹⁹⁵ By providing assistance in form of monetary compensation, it conveys the recognition of individuals as innocent victims, while acknowledging their harm.¹⁹⁶ Thus, it will be difficult for the international institution such as the TFV, immersed in all the best intentions of International Criminal Law, to claim that it has no role in guaranteeing an internationally protected right to compensation. Such a claim would ultimately deny the fundamental purpose to which it was intended for.

¹⁹³ Ferstman C, 'International Organizations and the Fight for Accountability: The Remedies and Reparations Gap,' *Oxford University Press*, 2017, 456.

¹⁹⁴ Fry M, Justice for the Victims, 8 *Journal of Public Law*, 1959, 191.

¹⁹⁵ Kunst M, Koster N, Van Heugten J, 'Performance Evaluations and Victims' Satisfaction with State Compensation for Violent Crime: A prospective study' 32(19) *Journal of Interpersonal Violence*, 2017, 3027.

¹⁹⁶ Parmentier S, Weitekamp E, 'Sociology of Crime, Law, and Deviance', *Crime and Human Rights*, Amsterdam, Elsevier, 2007, 56.

One current weakness with the TFV's assistance mandate and thus, this rationale, is that it uses voluntary contributions from donors to aid victims.¹⁹⁷ This is something too discretionary about the operation of the TFV's assistance mandate that poses a limitation in the realization of this moral right to monetary compensation. Moreover, if there is a right to compensation, an argument must still be produced to show why the TFV's assistance mandate should be a guarantee of a monetary compensation mechanism: hence, the practical rationale that provided hereinafter.

In concluding on the rights rationale, it is important in theorizing a monetary compensation mechanism for moral harm because it grounds why institutions such as the TFV are founded in the first place: to meet a moral obligation pegged on assisting victims who have suffered moral harm.

4.2.2 A Practical Rationale

This rationale makes the case that a monetary compensation scheme under the TFV's assistance mandate is essentially filling a void, complementing, or replacing its flawed court-ordered reparation mechanism. As already established, the TFV's assistance mandate aims to provide aid to victims where the ICC faces limitations, due to the criminal reparatory system in cases where the accused is not convicted. However, the practical rationale must still make the case for the extent to which a monetary compensation mechanism under the TFV's assistance mandate replaces or complements the court-ordered reparation mechanism.

The reason why its assistance mandate has become appealing for victims of international crimes, is driven by the limitations suffered by its court-ordered reparation mandate. To assess this, this rationale is guided by how 'effective' the TFV's court-ordered mandate currently is in offering monetary compensation through its reparation awards. In this study, the evaluation of 'effectiveness' should not solely focus on the innovations within the TFV's assistance framework, but also consider its ability to adjust and respond to challenges encountered in fulfilling its other mandate. The question of 'effectiveness' of the compensation mechanism is therefore assessed from the perspective of the TFV's court-ordered mandate in twofold: procedural and substantive matter.

First, the ICC reparations mandate suffers from an ineffective procedural matter, where the process is hard to pursue because of the huge number of victim applicants compared to the

¹⁹⁷ Chapter II (Regulation 22-30), *The Regulations of the Trust Fund for Victims*.

ICC's capacity, and further contributes to lengthy proceedings.¹⁹⁸ Additionally, even in the case where reparation awards for compensation are issued, it takes a long period of time for the victims to receive monetary compensation. For instance, in the *Ntaganda case*, it took over 3 years for the 297 victims to receive 250 USD each.¹⁹⁹

Second, on the substantive matter, its primary purpose is to benefit victims of crimes for which a perpetrator has been convicted.²⁰⁰ Additionally, the group of beneficiaries, which consists of the victims, is restricted to individuals who have previously submitted applications to participate in the proceedings. This limitation is due to the impracticality of opening the process to unidentified victims, as it would result in significant delays.²⁰¹ Another constraint is that the judges cannot assess the evidentiary value of each victim's harm in determining whether the defendant is guilty or not.²⁰² In some cases, the nature of the crime makes it challenging for victims to provide the necessary proof to satisfy the ICC regarding their harm using conventional standards of evidence.²⁰³ For instance, in the *Lubanga case*, the prosecutor failed to bring any sexual and gender-based violence (SGBV) charges, due to lack of sufficient evidence, despite it being non-contentious that SGBV crimes had been committed.²⁰⁴

By establishing a compensation mechanism under the TFV's assistance mandate, it ensures victims ineligible to receive compensation through reparations awards, still get assistance. For instance, despite the ICC only issuing monetary compensation for 297 victims in the *Ntaganda case*, the TFV, through the Democratic Republic of Congo's Assistance Mandate Programme Cycle, assisted 58,439 direct victims. In 2020, it launched the second phase of Programme,

¹⁹⁸ Vasiliev S, 'Victim Participation Revisited: What the ICC is Learning About Itself' in Stahn C (ed) *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, 21.

¹⁹⁹ *The Prosecutor v. Germain Katanga*, Order for Reparations pursuant to Article 75 of the Statute, March 2014, 300.

²⁰⁰ *The Prosecutor v. Thomas Lubanga Dyilo*, 'Judgment on the appeals against the 'Decision establishing the principles and procedures to be applied to reparations' of 7 August 2012 with amended order for reparations (Annex A) and public annexes 1 and 2, 3rd March 2015, 65.

²⁰¹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Expert Report on Reparation, 2017, 41 – 51.

²⁰² Funk T, 'Victims' Rights and Advocacy at the International Criminal Court,' Oxford University Press, 2015, 469.

²⁰³ Funk T, 'Victims' Rights and Advocacy at the International Criminal Court,' Oxford University Press, 2015, 469.

²⁰⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, 10 February 2006, 4.

targeting over 20,000 direct beneficiaries.²⁰⁵ Furthermore, since such Programmes can commence as early as the prosecutor commences an investigation, the TFV's assistance mandate can operate in this way without any conviction.²⁰⁶

To say the least, by adapting a monetary compensation scheme for moral harm, the TFV's assistance mandate aligns with its unique victim-centered approach. It identifies areas that need focus, for instance moral harm, acting as a catalyst by highlighting the specific requirements of victims in particular communities. This includes drawing increased attention to the need to offer assistance for moral harm and facilitating the fulfillment of the victims' need.

Thus, the point remains that it is anything but evident why it is practical for the TFV's assistance mandate to have a monetary compensation scheme of its own; to assist in remedying moral harm.

4.2.3 A Welfarist Rationale

Welfare is based on the sense of obligation to address needs of the victims.²⁰⁷ For instance, the United States Victims Compensation Fund, established in the aftermath of the September 11, 2001 (9/11) terrorist attack, financially assists civilians who suffered loss of loved ones or those who were injured, irrespective of who caused the harm: invoking a sense of solidarity with the victims.²⁰⁸ While in France, the Victims Guarantee Fund was established 'in the name of national solidarity, to accompany each victim on the road to their reconstruction.'²⁰⁹ The European Convention on the Compensation of Victims of Violent Crimes also speaks of 'social solidarity' as a ground for compensation.²¹⁰ It advances that assistance is neither criminal nor civil based but social: a sense of responsibility without the need of finding individual fault.²¹¹ It is worth noting that the welfarist approach does not create a substantive right,²¹² however, it

²⁰⁵ <<https://www.trustfundforvictims.org/en/locations/democratic-republic-congo>> on 6 January 2024.

²⁰⁶ < [Assistance programmes | The Trust Fund for Victims](#)> on 6 January 2024.

²⁰⁷ Elias R, 'Victims of the System', 20 *Transaction Publishers*, 1984, 25.

²⁰⁸ Macleod S, 'September 11 Victim Compensation Fund' in Macleod S and Hodges C (eds) in *Redress Schemes for Personal Injuries*, Harts, Oxford, 2017, 348.

²⁰⁹ < <https://www.fondsdegarantie.fr/en/acting-on-behalf-of-victims-in-the-name-of-national-solidarity/>> on 7 January 2024.

²¹⁰ European Convention on the Compensation of Victims of Violent Crimes, 2 January 1988.

²¹¹ Miers D, 'Offender and State Compensation for Victims of Crime: Two Decades of Development and Change' 20(1) *International Review of Victimology*, 2014, 145.

²¹² Fry M, 'Justice for Victims' 8 *Journal of Public Law*, 1957, 192-193.

recognizes that there may exist an expectation of victims receiving assistance. In relation to the TFV's assistance mandate, it is instructed and compelled to assist all who come within its ambit: victims under the ICC's jurisdiction.

There is nothing simple about transposing the welfarist argument to the international plane, considering that it lies in a more distant relationship compared to domestic monetary compensation mechanisms. Nevertheless, several scholars writing in relation to international law, have used the term 'solidarity' while describing what lies at the head of compensation to victims,²¹³ with others drawing its link to international criminal law.²¹⁴

The solidarist ethos is anchored to the welfarist rationale in expressing that compensation must be rooted in an idea of 'living together' and 'caring for one another'.²¹⁵ It is an appealing ground to rest justification for the TFV's assistance mandate to adapt a compensation scheme, since it lies at the intersection of the idea that crimes under the ICC's jurisdiction are committed against *humanity qua humanity*, even though certain victims within it are specifically targeted.

Furthermore, solidarity suggests a novel concept towards victims since international crimes are the very product of international society: existence of international crimes connoting a sense of international co-existence within international criminal law. Thus, a compensation scheme under the TFV's assistance mandate can be viewed as an expression of a radical form of recognition of how the fundamental interdependence of global social life also creates conditions for its undermining. This accounts for why the TFV's assistance mandate should be headed in a welfare-oriented direction by providing monetary compensation as a form of support.

The limitation currently facing the TFV assistance, and consequently suffered by the welfarist rationale, is that unlike domestic and regional welfare scheme,²¹⁶ it is not financed on a compulsory basis: rather voluntarily.²¹⁷ This is extensively addressed in chapter 5 of this study.

²¹³ Bassiouni M, 'International Recognition of Victims' Rights', 6 *Human Rights Law Review*, 2006, 28.

²¹⁴ Nyst C, 'Solidarity in a disaggregated world. Universal jurisdiction and the evolution of sovereignty', 8 *Journal of International Law & International Relations*, 2012, 61.

²¹⁵ Schultz S, 'The violated: A proposal to Compensate victims of violent crime', 10 *Saint Louis University Law Journal*, 1965, 242.

²¹⁶ Montrose J, 'Compensation for Victims of Criminal Violence: A Round Table', 8 *Journal of Public Law*, 1965, 208.

²¹⁷ Chapter II (Regulation 22-30), *The Regulations of the Trust Fund for Victims*.

All in all, the application of the welfarist rationale in international criminal law, implies that victims of international crimes do not have a substantive right to monetary compensation for moral harm. However, their expectation of receiving assistance stems from the solidarity thesis. Consequently, by adapting monetary compensation mechanism for moral harm, the TFV's assistance mandate will align with the 'solidarity' ethos, that continues to take root in arena of International Criminal Law.

4.2.4 A Humanitarian Rationale

Humanitarianism involves the sense of moral obligation to those suffering, where 'need' is the determining variable in assessing whether to issue compensation.

Humanitarian justification of victim's compensations schemes emphasizes the need of victims and their urgency. Perhaps the strongest argument here is that victims of international often cannot afford to wait to obtain reparations awards and therefore, should be given assistance. The sense of emergency about needs is magnified when the TFV's assistance mandate is able to assist, without the need of the ICC issuing an award. This is an important part of its purpose as originally conceived: ensuring that it assists the most vulnerable victims with immediate needs that cannot wait for the conclusion of a reparations award.²¹⁸ Thus far, its assistance mandate has focused on specific vulnerable groups, including victims of rape, individuals with disfigurements, children, and the elderly.²¹⁹

Most humanitarian organization are often described as expressing generosity through charity,²²⁰ however, under the TFV's assistance mandate, it is hard to depict how compensation as form of charity. This is because the TFV has adamantly held that it is not a 'charity'.²²¹ That is, the TFV's 'other resources' only acknowledge the victims' harm. The scholar McCarthy expresses that if the TFV's assistance mandate was to provide other type of assistance, be in through a compensation scheme, there would be a risk of melding the TFV with charity

²¹⁸ Ferstman C, 'Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness' <<https://repository.essex.ac.uk/25308/1/Carla%20Ferstman%20ICC%20chapter.pdf>> 25.

²¹⁹ [https://www.law.ox.ac.uk/sites/default/files/migrated/iccba - oxford publication 30 november 2020 .pdf](https://www.law.ox.ac.uk/sites/default/files/migrated/iccba_-_oxford_publication_30_november_2020_.pdf) 16, on 7 January 2024.

²²⁰ Hunt M, Pringle J, 'Humanitarian Action', Encyclopedia of Global Bioethics, 2016, 3.

²²¹ 'Board of Directors of the Trust Fund for Victims, Report to the Assembly of States Parties on the activities and projects of the Board of Directors of the Trust Fund for Victims for the period 1 July 2006 to 30 June 2008', ICC ASP/7/13, 2008.

organization, working in the same area. Thus, according to him, the TFV's work must be distinct from humanitarian organizations.²²²

However, this argument should not be viewed as weakening this rationale, since the similarity of the TFV's assistance mandate to other humanitarian organization is merely functional as they have the same intended end: offering support to victims who are suffering. Additionally, one of the ways in which the TFV comes close to a 'charity' agency is by seeking and accepting donations from private individuals.²²³

Furthermore, from a practical perspective, while its reparation mandate of the TFV provides the justice component tied to a perpetrator, its assistance mandate cannot be disconnected from the humanitarian component,²²⁴ as it is primarily concerned with the victim. This is an important and strict assessment of its rather independent mandate to the humanitarian rationale. This justification is further supported by the TFV's assistance current approach through psychological, physical, and material support. These three types of support mechanisms recognize that systematic violations of human rights and humanitarian law lead to individual and collective physical, emotional, and social harms.²²⁵

This therefore aligns with the purpose of monetary compensation programs, that is, providing humanitarian relief by helping victims recover and heal from the devastating effects of harm they have suffered.

Evidently, TFV's assistance mandate is committed to offering humanitarian assistance, however, currently, the major problem is that it continues to neglect its role in offering assistance for moral harm for victims of international crimes, through a monetary compensation mechanism.

²²² McCarthy C, 'Reparations under the Rome Statute of the International Criminal Court and Reparative Justice Theory', *The International Journal of Transitional Justice*, Vol. 3, 270. See, Åberg M, 'The Reparation Regime of the International Criminal Court', 10.

²²³ Regulation 27, *The Regulations of the Trust Fund for Victims*.

²²⁴ Kristjansdottir E, 'International Mass claims Processes and the ICC Trust Fund for Victims', in C Fertman, M Goetz and A. Stephens (Eds) *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity: Systems in Place and Systems in the Making*, Martinus Nijhoff, 2009, 168.

²²⁵ Mohatt N, 'Historical Trauma as Public Narrative: A Conceptual Review of How History Impacts Present-Day Health', 106 *Social Science and Medicine Journal*, 2014, 128.

4.3 Monetary Compensation is the Proper Form of Assistance for Moral Harm

The four rationales suggest that the TFV's assistance mandate should adopt a monetary compensation scheme as form of support to victims of international crimes. However, it is worth addressing why monetary compensation is a suitable form of assistance to remedy moral harm. There are several pragmatic points in its favour.

The first trait, as discussed in chapter 3 of this study, is that moral harm is considered as insusceptible of repair, restoration, recapture, or treatment. That is, a detriment to values that hold great significance for the victims, which once endured, become difficult to remedy. This makes moral harm a non-pecuniary harm. Nevertheless, despite it being difficult to recover the pre-perpetration condition of the victim, in such a gross violation of a non-pecuniary harm, compensation still the most justified form of assistance or remedy.²²⁶ This is because, compared to other types of harms such as material, physical and psychological, moral harm cannot be addressed through physical or psychological rehabilitation (surgeries or counselling), nor through restoration of the economic losses made.²²⁷ This is the general consensus by the ICC's *Al Mahdi case* that first dealt with moral harm,²²⁸ and the regional human rights courts who have extensively dealt with monetary compensation for moral harm.²²⁹

Second, compensation for moral harm with money is aimed to achieve satisfaction for the injured victims, and not to achieve any lucrative goal. For instance, it can be used as a form of acknowledgement of victims' harm and re-establish stronger emotional and spiritual ties, that were violated. This is in line with the social purpose of compensation because moral harm cannot be commercialized. Third, compensation for moral can be considered practical in its effort to return the victim to the state they would have been in, had the crime never occurred.²³⁰

²²⁶ Alshamaileh N, 'The right ability to compensation for moral damage for the transfer in Civil Law jurisprudence' 6(3) *Journal of Positive School psychology*, 2022, 9843.

²²⁷ <<https://www.trustfundforvictims.org/en/about/two-mandates-tfv/assistance>> on 8 January 2024.

²²⁸ *The Prosecutor v. Al Mahdi (Ahmad Al Faqi)*.

²²⁹ Inter-American Court of Human Rights ('IACtHR'), *Plan de Sánchez Massacre v. Guatemala*, Judgment (Reparations).

²³⁰ Compensation Victims of Crimes, 21 <<https://www.lawreform.ie/fileupload/consultation%20papers/LRC%20CP%20672022%20Compensating%20Victims%20of%20Crime.pdf>> on 2 January 2024.

Monetary compensation under the TFV's assistance mandate, further differs from the remedy of reparation (the ICC's mechanism), by separating compensation from reparations, the former requires blameless persons (whether a person or an institution), to assist victims who have suffered harm; in this case, a moral one.²³¹ Consequently, monetary compensation is a suitable means of support to victims for their moral harm, since there is lack of any other suitable remedy: the nature of moral harm fundamentally differs from other forms of harm.

4.4 Conclusion

This chapter's aim was to explore the rationales for compensation mechanisms such as those under the ICC's reparation mandate and in the alternative, in other international compensation schemes for victims. It concludes that the TFV can and should take its cue from what is, in fact, been established under the ICC's reparation mandate and other international compensation schemes for victims: monetary compensation as a right, practical, welfarist and humanitarian rationale for addressing victims' moral harm.

The author acknowledges this proposal may encounter opposition based on the TFV's assistance mandate current system's conceptual clarity and practicality. Nevertheless, the intended purpose is for the TFV's assistance mandate to address victims' moral harm since its purpose is assisting victims. While this reason may seem almost anti-intellectual in its breadth, the next chapter aims at grounding how the TFV's assistance mandate should restructure itself to accommodate monetary compensation as a mechanism to support moral harm.

²³¹ Basenko R, Avanesian H, Strilko D, 'Institute of compensation for moral damage: international legal experience and legislative innovations,' *civil law and process*, 2022, 7.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

The previous chapter sought to provide the theoretical rationale for a compensation mechanism for moral harm under the TFV's assistance mandate. Following suit, this chapter acts as the recommendation section on how the compensation scheme, for moral harm, should be actualized.

Seemingly, the ICC's primary aim is to investigate, arrest and try alleged criminals.²³² However, broader concepts of justice include 'transformative justice' that operate on the beyond the Rome Statute system, in this instance, through the TFV. The ICC president mentions that the TFV's aim is to create and achieve a comprehensive concept of justice within the Rome Statute system.²³³ Thus, the TFV seeks transformative justice by aiming to improve the situation of victims and alleviate their harm.²³⁴ Considering this, the idea of transformative justice, through the TFV's assistance mandate, must be situated within the wider body of literature concerning transitional justice.²³⁵ This should speak to the understanding of the kind of support it offers, by adding the objectives of monetary compensation under the ICC's reparation mandate, with broader ideals of affirming the need to redress victims' moral harm. Consequently, this chapter concludes this study by expounding on the conclusions arrived at during the study. It further offers recommendations that will help actualise a monetary compensation support mechanism under the TFV's assistance mandate, to remedy moral harm suffered by victims of international crimes.

5.2 Conclusion

Chapter One provided the introduction to this study by detailing, among others, the research objectives and questions, hypothesis, and justification for this study. Furthermore, the literature

²³² Fulford A, 'The reflecting on a Trial Judge', 22 *Criminal Law Forum*, 2011, 216. See, Chung C, "'Victims' participation at the International Criminal Court: Are concessions of the Court Clouding the Promise?" 6 *Northwestern Journal of International Human Rights*, 2008, 552.

²³³ Speech by Judge President Song, 'Speech: Remarks at the Opening of the Tenth Meeting of the Board of Directors of the TFV' delivered on 19 March 2013.

²³⁴ Trust Fund for Victims' First Report on Reparations, Lubanga (ICC-01/04-01/06-1803-red), Trial Chamber I, 2011, 34.

²³⁵ Ullrich L, Hoyle C, 'New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court', 12 *Journal of International Criminal Justice*, 2014, 694.

review provided for existing scholarship on the TFV's dual mandate, monetary compensation for harm and the concept of moral harm. Most importantly, it provided 'the status of a victim' as the conceptual framework that emphasizes that a victim is a harmed and 'legally' dependent person, thus, providing the lens to which the subsequent chapters were anchored on.

Chapter Two sought to explore the fundamental difference in the dual mandate of the TFV: court-ordered mandate and rendering assistance. On the one hand, it concluded that the normative role played by the TFV's court-ordered mandate is fundamentally 'handicapped' by the ICC as it plays a rather intermediary role to the ICC, that is, simply implementing reparations as ordered. On the other hand, it showed that the TFV's assistance mandate in assisting victims of international crimes, is pertinent in filling in a gap that ICC cannot fill as it is primarily mandated to function in a manner that creates a balance of rights between the said victims and the perpetrator. These differences proved fundamental in informing the conclusion that the TFV's assistance mandate should ensure that it offers assistance for all harms suffered by victims of international crimes.

Chapter Three was fundamental for this study as it sought to prove that psychological, material, physical, and most importantly, moral harm are harms that are suffered by victims under the ICC's jurisdiction. It further went to prove the hypothesis that the TFV's regulations do not provide any form of assistance for victims' moral harm. This arises because moral harm is not assessable in nature and, cannot be considered an ongoing harm, whose remedying will lead to its 'curing'. Noting this restrictive definition by TFV of 'victim' as one suffering from ongoing and assessable harm, there exists no assistance for moral harm, leaving many victims with lack of support. This is despite TFV's commitment to addressing the needs of the said victims: transitional justice. Consequently, this Chapter proved this study's hypothesis.

Noting this, Chapter Four provided a right, practical, welfarist and humanitarian rationale that supported and advocated for a compensation mechanism for moral harm under the TFV's assistance mandate. Furthermore, it offered justifications for why monetary compensation is the best suitable remedy for moral harm, arguing that any other form of support is intended to be assessable and alleviate the harm: to mean moral harm cannot be treated like psychological, physical, or material harm as it is not assessable and cannot be alleviate or its alleviation cannot be determined.

5.3 Recommendations

5.3.1 Method for determining Victims Suffering from Moral Harm

5.3.1.1 Procedural method: An eligibility criterion

An eligibility criterion is essential to ensure that compensation is awarded in line with the TFV's assistance purpose. However, determining who is a victim is perhaps the most difficult task of any compensation scheme. The criteria must be neither too narrow (source of aid to only a few victims) nor too broad (to avoid misuse of funds), if monetary compensation scheme is to accomplish its purpose in assisting victims suffering from moral harm. Hence, the solution is to address victim's harm primarily based on the level of urgency.

Additionally, the TFV's assistance mandate already offers psychological, physical, and material support to both direct and indirect victim. In this scenario, direct victims refer to individuals or entities who have directly experienced harm, whereas indirect victims pertain to natural persons affected by the harm suffered by the direct victims. These indirect victims are recognized as members of the families of those directly affected.²³⁶ Thus, the proximity of the relationship to the victim will be a relevant determination for the TFV in issuing monetary compensation for moral harm to indirect victims.

In conclusion, all large-scale crimes, regardless of the form of violation, are likely to be included in principle since moral harm can be found where other forms of harm are present.²³⁷ For instance, regarding psychological and moral harm, there is a presumption that once the violation of rights is established, moral harm is assumed to have taken place and does not require additional proof due to the causal relationship.²³⁸

5.3.1.2 Substantive method

The function of the TFV would be to provide financial compensation to victims. This would be, as a substantive remedy to moral harm, through direct transfers to victims.

²³⁶ Regulation 42, *The Regulations of the Trust Fund for Victims*.

²³⁷ *The Prosecutor v. Al Mahdi (Ahmad Al Faqi)*.

²³⁸ 'Principles on court-ordered reparations: A guide for the International Crimes Division of the High Court of Uganda' 26 <https://asf.be/wp-content/uploads/2017/01/ASF_UG_Court-OrderedReparations_201610_PP_Low.pdf> on 2 January 2024.

Operationally, the TFV's assistance mandate for its current 3 forms of support works through partners and other intermediaries.²³⁹ Hence, crucially, ensuring a meaningful financial redress for moral harm necessitates leveraging the skills and local engagement of entities capable of identifying and disbursing funds to victims experiencing moral distress. Non-Governmental Organizations specializing in victim-related concerns, such as experts in psychology, faith-based associations, women or youth organizations, and private sector entities, emerge as apt collaborators with the TFV in the identification of these affected individuals.

Through this system, the TFV will have to provide oversight, financial and technical assistance to implementing partners involves challenges such as selecting suitable organizations and addressing potential conflicts of interest with intermediaries. Nevertheless, these difficulties are inherent in the implementation of a monetary compensation scheme.

The objective of this proposal is to optimize the proficiency of individuals engaged in the daily alleviation of the distress faced by victims of international crimes. This involves active participation from organizations that are in close proximity to these victims.

5.3.2 Mechanism for issuing Monetary Compensation for Moral Harm

5.3.2.1 Two Approaches to Compensation: Collective and Individual

The prevailing question is whether to adapt a collective or individualist monetary compensation method for moral harm.

Collective monetary compensation may be favored in the instance where there is a large-scale crime that has affected a large number of victims. The use of collective financial compensation can thus circumvent complex procedures and tasking responsibilities for the TFV. For instance, in scenarios where destruction of monumental buildings that had a religious or cultural connection to the victims, result to victims suffering from moral harm, collective monetary compensation may be suitable, since the moral harm suffered by the victims will be the same: one based on violation of their religious or cultural beliefs.

In instances where an individual's moral harm cannot sufficiently be addressed collectively, they may be eligible for individual monetary compensation that can be granted by the TFV issuing monies through its intermediaries.

²³⁹ Garijo F, 'Redressing victims of international crimes: the International Criminal Court and the Trust Fund for Victims', *International Journal of social work and Social Sciences*, July 2011, 95.

This is essentially an application of the flexibility of the TFV's assistance mandate in issuing monetary compensation, guided by an assessment of what is best suitable for the victims suffering from moral harm.

5.3.2.2 *Symbolic Monetary Compensation*

Offering symbolic financial compensation can serve as a meaningful way to recognize the losses and injuries endured by victims. This is especially relevant for moral harm, which is irreversible and cannot be equitably compensated in material or other forms. For instance, as illustrated in the *Al mahdi case*, in the calculation for liability for the moral harm suffered by the victims, the ICC was hesitant in constructing a solid foundation for quantifying moral harm incurred, following the observation that 'there is an inherent difficulty in addressing and measuring monetary values for moral harm.'²⁴⁰

So, compensation should consider the unique aspects of each case. For example, financial reimbursement might involve supporting 'memorials, commemorations, or forgiveness ceremonies',²⁴¹ publicly acknowledging the moral harm endured by victims in a community. This situation is drawn from the *Al Mahdi case*.

Overall, the TFV, through its intermediaries, may need to create dialogues with the victims to assess which approach better supports them.

5.3.3 *Source of Funding for Monetary Compensation as a Form of Support*

Currently, the TFV is funded through four different channels: First, the TFV acquires voluntary contributions from governments, international organizations, individuals, corporations, and various entities, following criteria established by the Assembly of State Parties—the ICC's governing, supervisory, and legislative body. Additionally, the TFV obtains funds and assets derived from fines or forfeitures, as directed by an ICC order. Thirdly, it secures resources generated from reparations awards issued by the ICC if the ICC mandates the deposit of such awards with the TFV. Lastly, the TFV may receive additional resources allocated by the Assembly of State Parties.²⁴²

Funding for its assistance mandate is drawn from any of the previously mentioned sources, excluding funds obtained from reparations awards, fines, and forfeitures. In practical terms,

²⁴⁰ *The Prosecutor v. Al Mahdi (Ahmad Al Faqi)*.

²⁴¹ *The Prosecutor v. Al Mahdi (Ahmad Al Faqi)*.

²⁴² Chapter II (Regulation 22-30), *The Regulations of the Trust Fund for Victims*.

this implies that assistance funds will primarily rely on voluntary contributions. The voluntary nature of this funding poses challenges for the predictability of the TFV's assistance mandate funding, subsequently impacting its strategic and operational planning. Moreover, it has garnered support from a restricted group of donors, primarily comprising of states from Western Europe.²⁴³ Considering that a monetary compensation scheme will cause further strain in its current funding problem, it must look towards increasing its funding.

A potential remedy for this issue lies in 'earmarked' funding. This is an interesting aspect of voluntary contributions that allows donors to designate their funds to the TFV, specifying their allocation to particular projects or groups of victims. The concept of earmarking is based on the belief that potential donors are more inclined to contribute if they can direct their funds. This tendency is particularly noticeable among NGOs, foundations, or other institutions with a mission to aid, support, assist, or advocate for victims.²⁴⁴

Over time, there may be a need to expand the license to earmark the donations depending on the TFV's assessment of potential demand for monetary compensation needed to support victims' moral harm. For instance, voluntary contributions may be earmarked for up to one third of the contribution for monetary compensation for support, specifically, moral harm. This is depending upon the stipulation that the distribution of funds, as specified by the donor, positively impact victims and their families while avoiding any form of discrimination based on factors such as race, gender, religion, or other statuses.²⁴⁵

Moreover, the regulations of the TFV do not articulate a requirement to uphold a minimum balance in its reserve. Given the many budgetary demands that it will now face due to the introduction of monetary compensation for moral harm, it may be of interest to be prudent with planning and for the TFV's assistance mandate to start keeping emergency reserves.

The author notes that the full scope, limits, and priorities of the TFV's fund requires further research beyond the purpose of this study.

²⁴³ Rauxloh R, 'Good intentions, and bad consequences: The general assistance mandate of the Trust Fund for Victims of the ICC', 213.

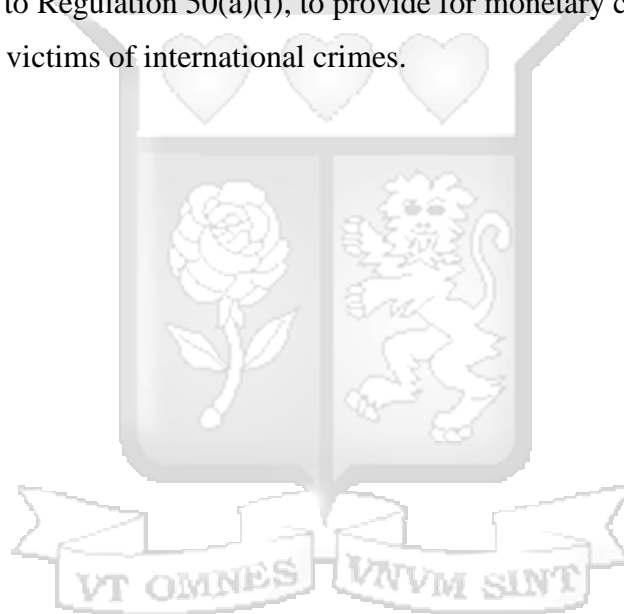
²⁴⁴ Garijo F, 'Redressing victims of international crimes: the International Criminal Court and the Trust Fund for Victims', 2011, 89, <[file:///C:/Users/tabit/Downloads/Dialnet-RedressingVictimsOfInternationalCrimes-3850126%20\(1\).pdf](file:///C:/Users/tabit/Downloads/Dialnet-RedressingVictimsOfInternationalCrimes-3850126%20(1).pdf)> on 30 December 2023.

²⁴⁵ Regulation 27, *The Regulations of the Trust Fund for Victims*.

5.3.4 *Amendment of the TFV's Regulations*

Considering that currently moral harm is not legislated anywhere in the TFV's regulations, there is need for amendment of Regulation 48, to provide for moral harm as a harm that results from international crimes under the jurisdiction of the ICC. It is worth noting that the absence of such an explicit provision does not mean that moral harm is not implicitly referred to through reference to Rule 85 of the Rules of Procedure and Evidence, that provide for harm that leads to '*a substantial impairment of the victim's fundamental (human) rights*':²⁴⁶ aligning with this study's definition of moral harm as the damage to values that are of great importance to a victim's dignity. Reference to the said Rule can be found under Regulation 49 and 50, in guiding the TFV's assistance mandate.

Further amendment is to Regulation 50(a)(i), to provide for monetary compensation as a form of support rendered to victims of international crimes.



²⁴⁶ Rule 85, *The Rule of Procedure and Evidence of the International Criminal Court*.

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