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Good intentions and bad consequences: The general assistance mandate of the Trust Fund for Victims of the ICC

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Abstract

Recognizing the needs of victims in international criminal justice, the International Criminal Court (ICC or the Court) has introduced an innovative reparation scheme including the establishment of the Trust Fund for Victims. Besides the Fund's role to implement reparation orders, a second mandate has been developed to provide immediate help to victims independent from a criminal conviction: the general assistance mandate. Surprisingly, this mandate has to date attracted little attention from scholars and remains vastly under-researched. By exploring in detail the work of the general assistance mandate, this article exposes its structural weaknesses as well as the negative impact it has on the procedures of the Court as a whole. It will demonstrate how the general assistance mandate weakens the legitimacy of the ICC as it undermines the presumption of innocence, risks compromising international and national Court proceedings, and masks the weaknesses of the Court. While there is no doubt that humanitarian assistance is urgently needed in situations that are investigated by the ICC, the mechanism chosen, namely the Trust Fund's general assistance mandate is not an adequate solution. This article argues that general assistance has no place in an international criminal court and should, therefore, be completely separated from the ICC.

Keywords: administrative costs; General Assistance Mandate; ICC; legitimacy; Trust Fund for Victims

1. Introduction

When creating the ICC, the international community was well-aware of the destitution typical for victims of mass atrocities. Not only is the sheer number overwhelming, counted in the tens (and even hundreds) of thousands,¹ but the hardship of each individual victim is multiplied as they typically suffer compound physical, mental, and economic harms. Most survivors have not only been subjected to life-changing physical injuries, including in many cases sexual violence but also have to face the loss of their loved ones, as well as suffer traumatization through witnessing the cruellest forms of violence. In addition, their homes and livelihood have been looted, destroyed or lost through displacement and deportation. Moreover, their families and communities are likely to have suffered the same attacks so that victims lack the necessary social network, such as family or

¹For example, it is estimated that the five year Ituri war in the DRC has killed 60,000 civilians in just two years: UNSC, Special report on the events in Ituri, January 2002–December 2003, UN Doc. S/2004/573 (2004), 4. Over 600,000 people are estimated to have been displaced in the post-election violence in Kenya between December 2007 and February 2008: Human Rights Watch, 'Kenya: Fresh Evidence of Election-Period Abuses', 2018, available at www.hrw.org/news/2018/02/25/kenya-fresh-evidence-election-period-abuses.

village community, to alleviate individual hardship. Furthermore, victims find themselves in a war-torn society while the conflict is still ongoing, or in the immediate aftermath of conflict when the state is still trying to recover from the devastation. In either situation, the state is unlikely to have sufficient resources, or the necessary infrastructures, to deal with the medical, emotional, social, and economic needs of the victims.² Furthermore, the state might not be willing to help a particular group of victims, for example if they belong to the ethnic group that had been targeted by the state in the first place.³

Right from the beginning of the negotiations for the Rome Statute, the question of victims formed a central part of the debate, not least because of the pressure from various NGOs.⁴ At the forefront of this development stands the Trust Fund for Victims of the ICC. While the model of organizing victim redress through a trust fund has been used before,⁵ this is the first time that a trust fund has been attached to a criminal court.⁶ Surprisingly, the Trust Fund of the ICC has to date attracted little attention from scholars and remains vastly under-researched. This article examines the second mandate of the Trust Fund, the *general assistance mandate*. Whereas the problematic overlap between the reparation mandate and general assistance mandate of the Trust Fund has been raised in the literature,⁷ this article will explore how the general assistance mandate actually works, what its weaknesses are and what impact it might have on the Court in general. It will illustrate how the general assistance mandate is draining already scarce resources while the Trust Fund is unable to raise sufficient funds. It will further demonstrate how the general assistance mandate directly weakens the legitimacy of the ICC as it undermines the presumption of innocence, could have a substantial negative impact on both international and national Court proceedings, and (last but not least) mask the weaknesses of the ICC. This article argues that general assistance has no place in an international criminal court and should, therefore, be completely separated from the ICC.

2. The reparation gap

At the Rome Conference, the negotiating parties were all too aware of the shortfalls of the UN *ad hoc* criminal tribunals which did not provide any concrete help to victims.⁸ Consequently, the Rome Statute introduced a completely new regime of victim redress,⁹ including the Court's power to make direct reparation awards (even without an application by victims) and the establishment of a trust fund for victims. Unfortunately, the ICC reparation scheme suffers from a number of problems, which accumulate to such a wide reparation gap that only a handful of sufferers will ever be able to benefit from reparation awards.

²C. McCarthy, 'The Rome Statute's Regime of Victim Redress – Challenges and Perspectives', in C. Stahn (ed.), *The Law and Practice of the International Criminal Court* (2015), at 1215.

³M. Wierda and P. de Greiff, 'Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims, Report for the International Centre for Transitional Justice', 2004, available at ictj.org/sites/default/files/ICTJ-Global-ICC-TrustFund-2004-English.pdf.

⁴P. G. Fischer, 'The Victims' Trust Fund of the International Criminal Court—Formation of A Functional Reparations Scheme', (2003) 17 *Emory International Law Review* 187, at 195.

⁵Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN Doc. A/RES/40/34 (1985), Principle 13. Specific trust funds set up by the UN itself include the UN Voluntary Fund for Victims of Torture, UN Doc. A/RES/36/151 (1981) and the UN Voluntary Fund on Contemporary Forms of Slavery, UN Doc. A/RES/46/122 (1991). An example of a national trust fund is the Austrian General Settlement Fund for Victims of National Socialism, available at www.entschaedigungsfonds.org/home.html.

⁶W. Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (2010), 909.

⁷L. Moffett, 'Reparations for Victims at the International Criminal Court: A New Way Forward?', (2017) 21(9) *International Journal of Human Rights* 1204, at 1209.

⁸P. J. Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Columbia and the Democratic Republic of the Congo', (2016) 10 *IJTT* 88, at 92.

⁹McCarthy, *supra* note 2, at 1215.

First, the number of victims eligible for a reparation award is extremely limited. Besides the fact that only a minority of armed conflicts are investigated by the ICC, even in a conflict selected by the Court, specific atrocities might not be included. For example, the Ongwen investigation is limited to four case locations in northern Uganda, thereby excluding all LRA attacks in the Teso region. Furthermore, the ICC charges very few defendants in each situation and many of the crimes they are accused of are left out of the indictment. For example, despite of the many crimes Thomas Lubanga Dyilo is allegedly responsible for, only the enlisting and conscripting of child soldiers were included in his indictment.¹⁰ The Appeals Chamber famously rejected the victims' application to add new charges of sexual slavery and cruel and inhuman treatment in spite of the fact that there were ample indications that sexual violence was widespread among female child soldiers and was often the main aim of their recruitment.¹¹ Thus, the numerous victims of sexual violence who were not child soldiers are ineligible for any reparation award.¹² Furthermore, even of those victims who are legally qualified, not all might be able to access the ICC in practice. Many victims, for instance, do not have the means to provide the necessary evidence for the harm they have suffered. This applies particularly to victims in rural areas who often have little access to medical care and therefore cannot provide documented evidence for their injuries. Even where a victim belongs to the small group eligible for a reparation award, such a reparation order can only be made subsequent to a conviction. Besides the fact that, so far, few prosecutions have ended in a conviction, the criminal procedure from indictment to reparation award can take many years. So far, while the number of estimated victims in the situations currently under the investigation of the ICC runs in the millions, only three reparation orders have been issued.¹³ Yet, for victims suffering serious physical and psychological injury and having lost their home and means for income, every month counts. Finally, even the limited group of victims who do qualify for a reparation award will not receive adequate reparation from the defendant as hardly any defendants will have the necessary means. This problem is dealt with by Rule 98(5) of the ICC Rules of Evidence and Procedure (RPE), which allows the Trust Fund to complement any reparation award from 'other sources'. Consequently, one of the main functions of the Fund is to raise sufficient funds from voluntary donations to be able to fulfil a reparation order. Complementing the sources for reparation awards does not, however, deal with the other problems, namely the limited number of eligible victims, uncertainty of convictions, and tardiness of any award. Thus, the reparation gap is too wide for the ICC reparation scheme to have any noteworthy tangible impact on the group of victims as a whole. A few victims get too little help, too late.

In order to lessen the problems caused by the reparation gap, the Trust Fund has a second mandate, the so-called general assistance mandate.¹⁴ Being all too aware of the urgent needs of victims on the one hand, and the huge reparation gap on the other, the general assistance mandate is designed to offer immediate help to a larger group of victims,¹⁵ in what Dixon calls the 'Swiss cheese' model, 'where assistance is used to fill in the holes of a legally restricted reparations

¹⁰*The Prosecutor v. Thomas Lubanga Dyilo*, Warrant of Arrest, ICC-01/04-01/06-2-tEN, Pre-Trial Ch. I, 10 February 2006, at 4.

¹¹*The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court', ICC-01/04-01/06-2205, App. Ch., 8 December 2009.

¹²Moffett, *supra* note 7, at 1207.

¹³The Court made three reparation orders in 2017. In *Lubanga*, the Chamber awarded collective reparations of the total amount of US\$10 million; in *Al Mahdi*, the Trial Chamber awarded €2.7 million in expenses for individual and collective reparations for the community of Timbuktu; and in *Katanga*, the reparation order amounted to US\$1 million.

¹⁴N. Roht-Arriaza and K. Orlovsky, 'A Complementary Relationship: Reparations and Development', in P. de Greiff and R. Duthie (eds.), *Transitional Justice and Development - Making Connections* (2009), at 201.

¹⁵Regulations of the Trust Fund for Victims, ICC-ASP/4/Res.3 (2005), Reg. 42.

process'.¹⁶ The general assistance mandate allows the Trust Fund to provide assistance to victims in areas under the jurisdiction of the Court without any link needed to a particular case. In *Lubanga*, for example, the Appeals Chamber explicitly 'urged the Court's Trust Fund for Victims to issue "assistance" measures to victims who fall outside the scope of victimisation at trial' and to include victims of gender-based violence.¹⁷ Rather than redressing the wrong committed by a convicted perpetrator, the general assistance mandate provides, therefore, humanitarian assistance based on the victims' needs. This assistance can take the form of physical, psychological or material support¹⁸ and consists of:

rehabilitation and reinsertion of victims, socio-economic reintegration, healing of memories, support for victims of sexual violence by counselling and micro-credit schemes, holistic community healing, non-formal education, mutual caring activities, addressing stigmatisation and ensuring peace and reconciliation, victim empowerment, livelihood support and more.¹⁹

The Trust Fund itself, however, does not provide this assistance directly to the victims, but instead funds individual programmes that are run by intermediaries,²⁰ in most cases NGOs. This allows a wide spread of projects²¹ and the Trust Fund praises itself for benefitting hundreds of thousands of victims.²² Indeed, before the Court made its first reparation order in 2012, the Trust Fund claims to have already 'provided tangible assistance to over 400,000 victims in the absence of convictions and reparations by the Court'.²³ The exact impact of any of the Trust Fund's supported projects is, of course, difficult to measure and Schabas points out that the 'the word "benefit" is probably being used rather loosely. It might for example include potential listeners of the community radio station'.²⁴

Another concern is that the selection of intermediaries is far from transparent. While the Board of Directors explains that they choose intermediaries 'in consideration of their specialization, experience, local presence and knowledge of local conditions, and their technical expertise',²⁵ it is not clear how specific programmes are selected. It set out:

Through formal surveys, questionnaires, evaluation of existing assessments, and the simple methods used to collect information such as talking to people, walking through communities and observation, the Trust Fund has collected all information needed for being able to program how the "other resources" could be used for the benefit of victims of any crime within the jurisdiction of the Court.²⁶

Yet, it is unclear how this information is used, what the selection criteria are, and how any criteria have been chosen. In addition, there is hardly any oversight of the judges over the general assistance mandate. Neither the Rome Statute nor the Trust Fund Regulations clarify the relationship between the Trust Fund's general assistance mandate and the judicial procedure of

¹⁶Dixon, *supra* note 8, at 102.

¹⁷*Ibid.*, at 88.

¹⁸Situation in Uganda, Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex, ICC-02/04-114, Pre-Trial Ch. II, 25 January 2008, para. 49.

¹⁹*Ibid.*, para. 56.

²⁰Regulations of the Trust Fund for Victims, *supra* note 15, Regs. 67, 71.

²¹The Trust Fund for Victims, 'Programme Progress Report Summer 2012 - Empowering victims and communities towards social change', available at www.trustfundforvictims.org/sites/default/files/imce/TFV%20PPR%20Summer%202012%20ENG%20Final_.pdf, at 33.

²²The Trust Fund for Victims, TFV Strategic Plan 2014–2017 (2014), at 6.

²³The Trust Fund for Victims, Report of the Board of Directors of the Trust Fund for Victims (2017), at 7.

²⁴Schabas, *supra* note 6, at 915.

²⁵Notification of the Board of Directors, *supra* note 18, para. 58.

²⁶*Ibid.*, para. 26.

the Chambers. According to Regulation 50(a)(i), the Trust Fund is seized when ‘the Board of Directors considers it necessary to provide physical or psychological rehabilitation or material support for the benefit of victims and their families’.²⁷ The judges have no say in the question of who should benefit from the assistance, which projects should be funded, or ‘whether the activities and projects identified by the Board of Directors are the most appropriate, timely and effective responses to the needs identified, and/or whether the intended beneficiaries are the most deserving’.²⁸ There is also no judicial review of the identification of victims or selection of implementation partners. Thus, while under the reparation mandate, the Trust Fund is simply implementing a Court order, under the general assistance mandate it works nearly completely independently from the Court.²⁹

At the same time, the link of this mandate to the Rome Statute is rather tenuous. The legal basis commonly given for the general assistance mandate is Rule 98(5) RPE,³⁰ which reads: ‘[o]ther resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79’, in connection with Article 79(1) Rome Statute which reads ‘for the benefit of victims of crimes within the jurisdiction of the Court’.³¹ Article 79 does not, however, mention any assistance for the victims beyond that of the reparation award. Furthermore, this Article is located in Part VII of the Rome Statute, which is entitled ‘Penalties’ and consequently must therefore assume a connection between the Trust Fund activities and a criminal conviction. From reading these provisions in context it becomes clear that initially the Trust Fund was created solely to implement and complement reparation orders, and not to offer assistance beyond a criminal conviction. The idea of an additional assistance mandate was discussed at the first meeting of the Board of Directors (20–22 April 2004) and submitted in their Draft Regulations.³² The Assembly of State Parties approved an amended version on 3 December 2005 and the new Regulation 50(a) allows the Trust Fund to use their resources outside reparation orders.³³ Neither the Board’s draft nor the final regulations mention the expression ‘general assistance’ or ‘second mandate’, but this term is now routinely used by the Trust Fund.³⁴ The Assembly of State Parties has the right to amend the Rome Statute and therefore also to extend the mandate of the Trust Fund beyond its initially envisioned role. Such extension of the Trust Fund, however, impacts negatively on the Court and its legitimacy, as argued in this article. The following two sections will examine the problems of the Trust Fund itself, before addressing the various ways in which the Trust Fund might affect the legitimacy of the ICC.

3. The general assistance mandate

Before exploring the problem of legitimacy, we first have to ask whether the general assistance mandate is actually capable of overcoming the reparation gap by comparing the capability of the Trust Fund to raise sufficient funds with the costs of running the general assistance mandate.

²⁷Regulations of the Trust Fund for Victims, *supra* note 15 (emphasis added).

²⁸Situation in the Democratic Republic of Congo, Observations of the Legal Representative of Victims a/0016/06, a/0018/06, a/0021/06, a/0025/06, a/0028/06, a/0031/06, a/0032/06, a/0034/06, a/0042/06, a/0044/06, a/0045/06, a/0142/06, a/0148/06, a/0150/06, a/0188/06, a/0199/06, and a/0228/06 on the Notification of the Board of Directors of the Trust Fund for Victims, ICC-01/04-461, Pre-Trial Ch. I, 20 February 2008, para. 5.

²⁹Schabas points out that the Trust Fund acts ‘rather like a humanitarian non-governmental organisation in an environment that is largely independent of the judicial process’, see Schabas, *supra* note 6, at 909.

³⁰Schabas, *ibid.*, at 914; The Trust Fund for Victims, ‘Learning from the TFV’s Second Mandate: From Implementing Rehabilitation Assistance to Reparations’, available at www.trustfundforvictims.org/sites/default/files/imce/TFV%20Programme%20Report%20Fall%202010.pdf, at 4.

³¹Moffett, *supra* note 7, at 1205.

³²Report 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), Ann. A.

³³Regulations of the Trust Fund for Victims, *supra* note 15, Ann.

³⁴See www.trustfundforvictims.org/en/about/two-mandates-tfv.

3.1 Weak fundraising

The first problem is that the intended process of fundraising for the Trust Fund has proven to be inadequate to raise sufficient funds. Initially, it was envisioned that the Court could order money and property that had been collected through fines or forfeitures to be transferred to the Fund.³⁵ The expectation that some defendants (for example, warlords in the mineral rich Democratic Republic of Congo)³⁶ would have access to considerable assets proved, however, to be wrong and to date the Trust Fund has received no funds from fines or forfeitures. The only defendant where considerable assets were found, was Jean-Pierre Bemba Gombo (now acquitted) who had initially been found ineligible for legal aid due to his considerable wealth.³⁷ Indeed, over €5 million in assets had been seized,³⁸ but by the end of 2014, he had already spent €2,799,380.94 on legal fees.³⁹ Fortunately, the Fund is permitted to receive voluntary contributions from governments, organizations, individuals, corporations, and other entities.⁴⁰ This means, however, that the Trust Fund is dependent on fund-raising, a task given to the Trust Fund's Board of Directors.⁴¹

The Board has five directors who are elected by the Assembly of State Parties for three years.⁴² They are acting in their personal capacity on a *pro bono* basis⁴³ and report to the Assembly of State Parties.⁴⁴ The NGO Redress expressed that the 'profile of the Board Members provides a unique opportunity to draw greater attention to the plight of victims and family members within the Court's jurisdiction'.⁴⁵ The election of five prominent directors, however, turned out to be more challenging than expected. Although the period of nomination for the first Board in 2003 was open for nearly four months, the Assembly of State Parties struggled to find enough candidates.⁴⁶ Embarrassingly, at its first meeting, the Assembly had to issue an urgent additional invitation for nominations before the closing of the session. Consequently, the nomination was opened for another three days from 8–10 September 2003,⁴⁷ giving the Assembly hardly any time to vet, consider, and discuss any of the candidates before the election on 12 September. One of these last-minute candidates was Her Majesty Queen Rania Al Abdullah, the wife of the childhood friend of then Assembly of State Parties' President Prince Zeid Raad. This potential conflict of interest was probably outweighed by the urgency to find possible candidates and it might not be too farfetched to presume that Queen Rania was asked by her husband's friend to help out as a matter of urgency. Finding Directors continues to be a problem as the number of

³⁵1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, Art. 79(2).

³⁶C. Ferstman, 'The International Court's Trust Fund for Victims: Challenges and Opportunities', (2003) 6 *Yearbook of International Humanitarian Law* 424, at 430.

³⁷*The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, The Presidency, 21 October 2014.

³⁸Moffett, *supra* note 7, at 1209.

³⁹*The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Request for reconsideration of decision ICC-RoC85-01/13-21, ICC-RoC85-01/13-28, The Presidency, 21 October 2014.

⁴⁰International Criminal Court, Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims, ICC-ASP/1/Res.6 (2002), para. 2(a).

⁴¹K. A. A. Khan, 'Article 79 Trust Fund', in O. Triffterer and K. Ambos (eds.), *The Rome Statute of the International Criminal Court – A Commentary* (2016), at 1902.

⁴²Establishment of a fund for the benefit of victims, *supra* note 40, Ann., para. 2.

⁴³Regulations of the Trust Fund for Victims, *supra* note 15, para. 16.

⁴⁴Establishment of a fund for the benefit of victims, *supra* note 40, Ann., para. 11.

⁴⁵REDRESS, 'The International Criminal Court's Trust Fund for Victims: Analysis and Options for the Development of Further Criteria for the Operation of the Trust Fund for Victims', 2003, available at www.vrwg.org/downloads/publications/02/TFVReport.pdf, at 20.

⁴⁶Assembly of States Parties to the Rome Statute of the International Criminal Court, Official Records 8–12 September 2003, ICC-ASP/2/10 (2003), para. 40.

⁴⁷*Ibid.*, para. 41.

extension of nominations of candidates in all but one election shows.⁴⁸ In 2006, for example, the deadline for nomination had to be extended five times.⁴⁹

It was expected that the Board members would use their high profiles to lobby for substantial voluntary contributions. Unfortunately, this hope was not fulfilled. While the first Board included two Nobel Peace Prize winners (Archbishop Desmond Tutu and Óscar Arias Sánchez), looking at all the directors who have served the Trust Fund since, the number of recognizable names is rather small. Most prominent are possibly Vaira Vīķe-Freiberga, former president of the Republic of Latvia and UN Special Rapporteur on the situation of human rights in the Republic of Croatia, FRY, Bosnia and Herzegovina and FYROM and runner-up to the Finish Presidential Election, Elisabeth Rehn. Otherwise the Board consists mainly of former ministers or deputy ministers, ambassadors, human rights and policy advisors, and academics. While no doubt highly qualified and prestigious in their own field, one cannot help suspecting that they were chosen because of their willingness to undertake this role rather than their prominence in the international community and fundraising profile.⁵⁰ There is also disappointingly little activity to be noted. The Board is only required to meet as a minimum once a year, and so far the Board has never exceeded this minimum. Even at the opening meeting, only three of the five members could attend this significant event. While it can be understood that the Assembly of State Parties chose a structure that chooses high profile membership rather than full-time employees, it seems that the role of director of the Trust Fund barely features among the other commitments of the Board members.

Unsurprisingly, success in raising substantial funds has been rather disappointing. Considering the extensive needs for funds for both the reparation awards and the general assistance mandate, the Trust Fund has so far managed to attract only a limited number of donors, consisting mainly of Western European countries.⁵¹ The current average of annual voluntary contributions to the Trust Fund is around €5 million.⁵² From 1 July 2018 to 30 June 2019, the TFV received €3,864,112.33 states' contributions ranging from €5,000 from Portugal to €1,000,000 from the Netherlands.⁵³ The states' contributions compare to just under 2.6 per cent of the annual budget for the ICC.⁵⁴ One could argue that while the Assembly of States Parties has approved an increase of the annual ICC budget of 0.72 per cent in 2020,⁵⁵ an extra 2.6 per cent in voluntary contributions is a substantial amount. On the other hand, in comparison to the UN Development Programme Trust Fund for Rwanda which received between 1995 and 1999 \$119,536,758 in

⁴⁸Data for 2015 nominations is not available.

⁴⁹Dates of extensions can be seen at asp.icc-cpi.int/en_menus/asp/elections/trust%20fund%20for%20victims/2006/Pages/second%20election%20of%20the%20members%20of%20the%20board%20of%20directors%20of%20the%20trust%20fund%20for%20t.aspx.

⁵⁰The TFV's current Board is composed of the following five members: Baroness Helić is a Member of the UK House of Lords and works as a defence and foreign policy advisor. Gocha Lortkipanidze is the Georgian Deputy Minister of Justice. He was involved in the creation of the ICC in the 1990s and early 2000s. Mama Koité Doumbia from Mali is a long-standing trade unionist and is currently a member of the Economic, Social and Cultural Council of the African Union. H.E. Sheikh Mohammed Belal has been serving as Ambassador of Bangladesh as 'Facilitator for the Trust Fund of Victims' for the term 2015–2016. At the time of writing, sadly, Felipe Michelini (Chair) passed away on 20 April 2020. He was an attorney and professor who specialized in human rights and international justice and served as Under-Secretary of State, Vice Minister for Education and Culture, and Former Acting Minister for Education and Culture in Uruguay.

⁵¹Out of 28 states, 24 are European, including small states such as Andorra and Liechtenstein; ICC-ASP, Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims for the period 1 July 2018 to 30 June 2019, ICC-ASP/18/14 (2019), Executive Summary, Ann. I, at 20.

⁵²See www.trustfundforvictims.org/en/financial-information.

⁵³Report to the Assembly of States Parties on the projects and the activities of the Board of Directors of the Trust Fund for Victims, *supra* note 51.

⁵⁴€149,205,600; Resolution of the Assembly of States Parties on the proposed programme budget for 2020, the Working Capital Fund for 2020, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2020 and the Contingency Fund, ICC-ASP/18/Res.1 (2019), at 1.

⁵⁵*Ibid.*

donations, this sum which also covers donations for reparations seems minute. In addition, some of the contributions to the Trust Fund are earmarked for reparations rather than the general assistance mandate, such as Germany's contribution of €300,000 in 2018.⁵⁶ To operate the general assistance programme with this comparatively small amount is only possible because so far it operates the assistance mandate in only three out of 13 situations currently being investigated by the ICC.⁵⁷

3.2 Costly processes

The limited success in fundraising is contrasted by the high running costs of the Trust Fund which keep growing.⁵⁸ The ICC 2020 budget includes €3,226,100 for the Trust Fund,⁵⁹ which is an increase of 71.2 per cent in only five years.⁶⁰ Non-staff resources amount to €646,000 and cover travel, hospitality, contractual services, training, consultants, general operating expenses, supplies, materials, and furniture and equipment.⁶¹ While individual items are not listed in the 2020 budget proposal, in 2019 they included a staggering €63,400 for annual training (with an increase of 96.9 per cent from the previous year)⁶² and €120,000 for consultants.⁶³ The budget for contractual services such as printing, development of fundraising events and materials, external auditor's fees, SAP GM support, translation, and Board meeting costs is €147,000.⁶⁴ Indeed, in the first ten years, the running costs of the Trust Fund equalled more than half of the voluntary contributions. Until 2010, the annual contributions were even lower than the annual running costs.⁶⁵ If it had not been for the fact that the running costs were covered by the ICC general budget,⁶⁶ rather than the voluntary contributions, the fund would not have been viable at all. In the end, both the ICC budget and the voluntary contributions are mainly paid for by national states and the fact that this money is channelled into different budgets should not gloss over the fact that running the Fund is extremely expensive compared with the amount of funding it receives.⁶⁷

What may come as a surprise is that large amounts of the Trust Fund's costs are used up for the general assistance mandate. The reason for this is that its core task, namely allocating voluntary state contributions to individual projects, carries huge administrative costs. In order to guarantee procedural fairness, transparency, and accountability a complex process is required encompassing:

⁵⁶See www.icc-cpi.int/Pages/item.aspx?name=181207-TFVPR1.

⁵⁷Democratic Republic of the Congo, Uganda, and Côte d'Ivoire.

⁵⁸The Trust Fund runs with a comparably small number of 13 staff members, supported by 44 posts of general temporary assistance; ICC-ASP, Proposed Programme Budget for 2019 of the International Criminal Court, ICC-ASP/17/10 (2018), para. 711.

⁵⁹Resolution of the Assembly of States Parties on the proposed programme budget for 2020, the Working Capital Fund for 2020, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2020 and the Contingency Fund, *supra* note 54, at 1.

⁶⁰ICC-ASP, Resolution on the Programme budget for 2016, the Working Capital Fund and the Contingency Fund for 2016, scale of assessments for the apportionment of expenses of the International Criminal Court and financing appropriations for 2016, ICC-ASP/14/Res.1 (2015), at 1.

⁶¹ICC-ASP, Proposed Programme Budget for 2020 of the International Criminal Court, ICC-ASP/18/10 (2019), para. 709.

⁶²See Proposed Programme Budget for 2019, *supra* note 58, at para. 752.

⁶³*Ibid.*, para. 718.

⁶⁴*Ibid.*, para. 711. While the current budget does not explicitly mention the costs of the annual board meetings, it is interesting to note that in the 2017 budget €35,000 were ring-fenced for this purpose. ICC-ASP, Proposed Programme Budget for 2017 of the International Criminal Court, ICC-ASP/15/10 (2016), para. 716.

⁶⁵See www.trustfundforvictims.org/en/financial-information.

⁶⁶Rome Statute, *supra* note 35, Art. 114.

⁶⁷Another concern is that the Trust Fund announced in their strategic plan that they are even 'exploring options to ensure tax deductibility of private donations', which indirectly will deprive the national taxpayers of funds. TFV Strategic Plan 2014–2017, *supra* note 22, at 34.

- establishing project granting and procurement procedures;
- project proposal;
- budgeting and reporting formats;
- project design and planning methodologies and field assessments;
- financial management processes including the design and establishment of SAP Grants Management module and modifications for IPSAS compliance;
- development of project contract and donor agreements;
- design of a Trust Fund logo, branding, website, and video;
- production of bi-annual public programme reports;
- drafting of donor proposals and the launch of the first global donor appeal in 2008;
- and the management of representational events including the Rome Statute Review Conference in Kampala in 2010 and high-level VIP missions with States Parties, CBF members and ICC Principals to northern Uganda and DRC in 2010 and 2013.⁶⁸

Furthermore, all implementing partners are subjected to a capacity needs assessment.⁶⁹ An additional cost factor is public relation work which includes:

developing a communication and outreach strategy for the Trust Fund's mandates; greater coordination with the ICC PIDS team in each situation, and integration into the ICC's outreach and communication strategies; and/or through the assignment of programme communication staff or contractors specifically for the Trust Fund in each situation.⁷⁰

Another aspect of the immense costs of accountability is the extensive review of their own procedures. In order to review the impact of their rehabilitation assistance, the Trust Fund conducted an extensive survey in 2010/2011, which included interviews with 2,500 victim beneficiaries.⁷¹ The claim that lessons learned are helpful for later implementation of reparation awards is questionable. One such lesson, for example, was:

Violence, that is, impacts men and boys differently than it impacts women and girls; and the findings suggested that among the Trust Fund's beneficiaries, female victims had experienced more severe psychological and social consequences. This, in turn, showed that women approach the issues of justice, rehabilitation, reparation and reconciliation differently than men.⁷²

Surely, this insight is far from new. If the aim of external reviews is to learn more about the impact of crimes and of various rehabilitation measures, this would be achieved more easily by an established research centre, which could conduct long-term detailed and widespread empirical research.

3.3 Interim conclusion

The weak fundraising of the Board of Directors illustrates that the attachment of the Trust Fund to the ICC is not sufficient to raise substantial funds. Even with the recent acquittals of Jean-Pierre

⁶⁸*Ibid.*, at 7.

⁶⁹*Ibid.*, at 24.

⁷⁰*Ibid.*

⁷¹*Ibid.*, at 7. In addition, the Trust Fund commissioned an external programme evaluation in 2013 which included not only victim beneficiaries but also implementing partners and representatives of government agencies. TFV Strategic Plan 2014–2017, *supra* note 22, at 8. The Trust Fund also employed a private company (Deloitte Risk Service BV) to establish a 'comprehensive risk management framework of the TFV'. TFV Strategic Plan 2014–2017, *ibid.*, at 5.

⁷²*Ibid.*, at 7.

Bemba, Laurent Gbagbo, and Charles Blé Goudé, the demands on reparations must be expected to rise sharply in the coming years. In 2017, the Chair of the Board of Directors, Motoo Noguchi, estimated that in the next four years the Fund would need €30 million for reparations alone⁷³ while the Court reminded the Fund that its responsibility ‘*is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order*’.⁷⁴ The Trust Fund will struggle to raise sufficient funds to fulfil its reparation mandate and complement reparation orders, let alone to raise enough money to fund further projects as part of the general assistance mandate. Indeed, in 2019 the Assembly of States Parties warned that ‘there is a rapidly widening gap between expected annual revenue and the TFV’s resource need’.⁷⁵ At the same time, the operation of the general assistance mandate is exceptionally expensive. While it is essential to establish robust processes to run the general assistance projects with transparency and accountability, all these procedures create a costly administrative layer between donors and implementing partners, which would not be necessary if the functions of the general assistance mandate would be fulfilled by existing national or international organizations. In addition to this, as will be shown in the following section, the general assistance mandate is also undermining the core functions of the Court and thus undermining its legitimacy.

4. The general assistance mandate and the legitimacy of the ICC

Like other international criminal tribunals, the ICC can be described as a limbless giant⁷⁶ who is dependent on states not only to fund the Court but also to support the investigation, protect witnesses, arrest and surrender suspects to the Court, and provide prison space for convicted offenders. Indeed, the Court cannot operate without the goodwill of its many different stakeholders, including the states parties, UN member states, affected communities, individual victims, human rights NGOs, regional organizations such as the AU, and the international community as a whole. The strongest asset the ICC holds for securing this support is the moral power of its high aspirations and the trust in its fair procedures and judgments. Only in as much as the Court can demonstrate legitimacy of its actions and decisions, will states see themselves bound to provide the Court with the support it needs, human rights groups aid the court with evidence gathering, victims come forward as witnesses, and communities accept the judgments. Legitimacy and justice are interwoven⁷⁷ and as De Hoon states, ‘criminal law trials, function only by the grace of legitimacy’.⁷⁸ Indeed, the ICC ‘must work continually to build legitimacy and evidence its existence to the international community’.⁷⁹

Nevertheless, during its short history the ICC has already faced a number of attacks on its legitimacy,⁸⁰ being accused of political choice of conflicts in which to open investigations, bias selection of defendants, lengthy procedures, and low sentences to name but a few. The main crisis of legitimacy was caused by the arrest warrant of the sitting Head of State in Sudan and later, the indictments of the President and Deputy President of Kenya which led the African Union to

⁷³Report of the Board of Directors of the Trust Fund, *supra* note 23, at 8. Unfortunately, the Report does not explain how this estimate was calculated.

⁷⁴*Ibid.*, para. 7 (emphasis added).

⁷⁵Proposed Programme Budget for 2019, *supra* note 58, para. 709.

⁷⁶A. Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’, (1998) 9 *EJIL* 2, at 13.

⁷⁷J. N. Clark, ‘International Criminal Courts and Normative Legitimacy: An Achievable Goal?’, (2015) 15 *ICLR* 763, at 769.

⁷⁸M. de Hoon, ‘The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC’s Legitimacy’, (2017) 17 *ICLR* 591, at 594.

⁷⁹J. Nicholson, ‘“Too High”, “Too Low”, or “Just Fair Enough”? Finding Legitimacy Through the Accused’s Right to a Fair Trial’, (2019) 17 *JICJ* 351, at 353.

⁸⁰M. deGuzman, ‘The Global-Local Dilemma and the ICC’s Legitimacy’, in N. Grossman et al. (eds.), *Legitimacy and International Courts* (2018).

contemplate a mass exodus from membership⁸¹ and two states to withdraw from the ICC.⁸² Vasiliev states that ‘legitimacy-related anxiety is like a dark cloud hovering over the project [of international criminal justice],’⁸³ and it is no exaggeration to speak of a crisis of legitimacy for the ICC.⁸⁴ Considering the importance of legitimacy as an asset of the Court on the one hand and the manifold challenges to its legitimacy the Court is currently facing on the other, it is even more surprising that the general assistance mandate of the Trust Fund has not been scrutinized as to its impact on the ICC. As will be argued in this section, in addition to the running costs of the mandate, the general assistance mandate undermines the legitimacy of the Court as a whole and is thereby further threatening the already weak standing of the ICC.

4.1 Legitimacy in international criminal law

The concept of legitimacy in international law is widely discussed in the literature⁸⁵ and has fittingly been described as a ‘fluid, adaptable and relative notion which is related to legality, justice and fairness but more easily perceived than measured’.⁸⁶ For the purpose of this article it suffices to use Suchman’s general description of legitimacy as ‘a generalised perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions’.⁸⁷ Within the debate, the scholarship offers various classifications of aspects of legitimacy,⁸⁸ but the main distinction commonly made is between normative and sociological legitimacy.⁸⁹ Normative legitimacy is divided into source legitimacy and process legitimacy. Source legitimacy evaluates whether the court derives the authority to judge individuals from a legal authority.⁹⁰ Process legitimacy asks whether the court follows legal procedure and due process principles.⁹¹ Luban even claims ‘that the legitimacy of international tribunals comes not from the shaky political authority that creates them, but from the manifested fairness of their procedures and punishments’.⁹² It is, therefore, essential that the court works within generally recognized principles of due process.⁹³ Sociological legitimacy (also labelled descriptive, or empirical),⁹⁴ on the other hand, is based on popular attitudes and perceptions about

⁸¹E. Keppeler, ‘AU’s “ICC Withdrawal Strategy” Less than Meets the Eye - Opposition to Withdrawal by States’, 1 February 2017, available at www.hrw.org/news/2017/02/01/aus-icc-withdrawal-strategy-less-meets-eye.

⁸²Burundi in October 2017 and Philippines in March 2019.

⁸³S. Vasiliev, ‘Between International Criminal Justice and Injustice: Theorising Legitimacy’, in N. Hayashi and C. Baillet (eds.), *The Legitimacy of International Criminal Tribunals* (2017), at 71.

⁸⁴A. S. Galand, ‘A Global Public Goods Perspective on the Legitimacy of the International Criminal Court’, (2017) 41 *Loyola of Los Angeles International and Comparative Law Review* 125, at 126.

⁸⁵V. A. Baird, ‘Building Institutional Legitimacy: The Role of Procedural Justice’, (2001) 54 *Political Research Quarterly* 333, at 336; Wolff distinguished two kinds of causes of legitimacy in an institution, namely ‘underlying structural causes and more immediate proximate causes’, S. Wolff, *Ethnic Conflict: A Global Perspective* (2006), 67.

⁸⁶N. Jørgenson, *The Elgar Companion to the Extraordinary Chambers in the Courts of Cambodia* (2018), 361.

⁸⁷M. Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’, (1995) 20 *Academy of Management Review* 571, at 574.

⁸⁸H. Takemura, ‘Reconsidering the Meaning and Actuality of the Legitimacy of the International Criminal Court’, (2012) 4 *Amsterdam Law Forum* 3, at 5; Varaki, for example, offers a threefold examination, distinguishing between a procedural view, a moral view, and a subjective view on legitimacy, see M. Varaki, ‘Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court’, (2016) 27 *EJIL* 769, at 783.

⁸⁹D. Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law’, (1999) 93 *AJIL* 596, at 600–3.

⁹⁰Varaki, *supra* note 88, at 783; with relation to the Trust Fund, the source legitimacy of ICC is irrelevant and is therefore not discussed in this article.

⁹¹Takemura, *supra* note 88, at 5.

⁹²D. Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law’, in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (2010), 569, at 579.

⁹³Clark, *supra* note 77, at 774.

⁹⁴S. Langvatn and T. Squatrito, ‘Conceptualising and Measuring the Legitimacy of International Criminal Tribunals’, in N. Hayashi and C. Baillet (eds.), *The Legitimacy of International Criminal Tribunals* (2017), at 43.

the court and its authority.⁹⁵ While normative legitimacy refers to the right to exert authority, sociological legitimacy ‘entails the belief of the right to rule’.⁹⁶ Sociological legitimacy is ‘rooted in an audience’s shared belief that the actions of an entity are desirable, proper or appropriate within some socially constructed system’.⁹⁷ This means that the court’s legitimacy is not solely based on how it has been established and how it conducts its procedures but also on its ‘resonance with the shared identity of the audiences they address’.⁹⁸ Both process and sociological legitimacy are closely linked, as legitimacy can only be achieved when the fairness of procedures is also comprehended by the stakeholders. As Clark points out ‘courts must not only be legitimate but must also be *seen* to be legitimate, and assessment of their legitimacy will critically centre on the extent to which they are delivering justice’.⁹⁹ Langvatn and Squatrito even argue that ‘a normative conception of legitimacy should include a certain degree of descriptive legitimacy as a necessary criterion’.¹⁰⁰ This section will argue that the general assistance mandate of the Trust Fund poses the risk of undermining both the Court’s normative (in form of process) and sociological legitimacy.

It is the author’s view that both normative and sociological legitimacy require that the Court conducts fair trials. This understanding has been expressed by various international courts and tribunals themselves.¹⁰¹ Former judge and second Vice-President of the ICC Hans-Peter Kaul declared that ‘[f]airness of the proceedings is a cornerstone of the Court’s work which the Judges of the ICC safeguard with great care’¹⁰² and the ICC describes itself as the ‘custodian of a fair trial’.¹⁰³ The ICTY explained that the right to a fair trial goes beyond protecting the fundamental rights of the defendant and in addition is ‘a fundamental interest of the Tribunal related to its own legitimacy’.¹⁰⁴ Described as ‘a key element in enhancing the process legitimacy of international criminal courts and tribunals’¹⁰⁵ some academics even argue that it is one of the most important factors of the ICC’s legitimacy.¹⁰⁶ International criminal justice has many different aims and objectives which go beyond the trial,¹⁰⁷ and a fair trial alone is not sufficient to achieve legitimacy. Without a fair trial, however, no international criminal court can claim legitimacy, no matter how legitimate other aspects are perceived to be. Only through fair trials can the Court achieve its aspirations of promoting reconciliation, restoring peace, preventing revisionism, and deflecting

⁹⁵Takemura, *supra* note 88, at 6.

⁹⁶Varaki, *supra* note 88, at 783.

⁹⁷S. Bernstein, ‘Legitimacy in Global Environmental Governance’, (2005) 1 *Journal of International Law and International Relations* 139, at 156; building on M. C. Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’, (1995) 20 *Academy of Management* 571, at 574.

⁹⁸A. Kiyani, ‘The Antinomies of Legitimacy: On the (Im)possibility of a Legitimate International Criminal Court’, (2015) 8 *African Journal of Legal Studies* 1, at 14.

⁹⁹Clark, *supra* note 77, at 769.

¹⁰⁰Langvatn and Squatrito, *supra* note 94, at 44.

¹⁰¹For a critical analysis to what extent the claim of centrality of fair trial is translated into practice in view of defendants’ rights see D. Jacobs, ‘Neither here nor there – The position of the Defence in International Criminal Tribunals’, in K. J. Heller et al. (eds.), *The Oxford Handbook of International Criminal Law* (2020), at 67–88.

¹⁰²www.icc-cpi.int/NR/rdonlyres/2C496E38-8E14-4ECD-9CC9-5E0D2A0B3FA2/282947/FINAL_Speech_Panel1_HumanRightsandtheInternational.pdf; this follows in the tradition of other international criminal tribunals. The ICTY explained that it ‘intended to give effect to the highest standards of justice’, *Prosecutor v. Tihomir Blaškić*, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*, Case No. IT-95-14-T, T. Ch., 18 July 1997, para. 61; the ICTR aspired to serve as a ‘model of fairness’, *The Prosecutor v. Ntagerura et al.*, Judgement and Sentence, Case No. ICTR-99-46-T, T. Ch. III, 25 February 2004, Separate Opinion of Judge Pavel Dolenc, para. 5.

¹⁰³*The Prosecutor v. Thomas Lubanga Dyilo*, Re-filing Prosecution’s Document in Support of Appeal against Decision to Stay Proceedings, ICC-01/04-01/06-1446, App. Ch., 24 July 2008, para. 23.

¹⁰⁴*Prosecutor v. Vojislav Šešelj*, Decision on Prosecutor’s Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence, Case No. IT-93-676-PT, T. Ch. II, 9 May 2003, para. 21.

¹⁰⁵Nicholson, *supra* note 79, at 353.

¹⁰⁶*Ibid.*

¹⁰⁷De Hoon, *supra* note 78, at 600, argues that the Court has too many objectives.

denial of crimes through producing a historical record.¹⁰⁸ The following sections will demonstrate how the general assistance mandate of the Trust Fund potentially undermines both the process and sociological legitimacy of the Court.

4.2 Impact on the presumption of innocence

Struett explains that the Court's legitimacy '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'.¹⁰⁹ One of these universally accepted core principles of a criminal trial is the presumption of innocence, enshrined in all major human rights and criminal procedure instruments.¹¹⁰ A criminal court facilitating tangible aid to victims before having established that any crime has been committed at all, on the other hand, is difficult to reconcile with the presumption of innocence.¹¹¹ This issue was discussed in 2008 when the Trust Fund notified the Pre-trial Chamber that it intended to start general assistance activities in the DRC. The Chamber rebuffed any concerns arguing that: (i) the investigation in the region had already been initiated; (ii) that the proposed activities were not related to any of the court proceedings; and (iii) that the Trust Fund's notification of planned activities had no impact on the outcome of any specific criminal proceedings.¹¹²

This line of argument has to be rejected. First of all, the fact that an investigation has started does not diminish the importance of the presumption of innocence. The Prosecutor of the ICC has the duty of gathering both incriminating and exonerating evidence.¹¹³ Thus, even though an investigation has been opened, this does not presume any determination that a crime under the Court's jurisdiction has been committed. Approving victim support, on the other hand, does necessarily presuppose that there are indeed victims of crime. Surprisingly, the Court states that the:

[u]sual role of the defence is to demonstrate that the Prosecution has failed to prove the culpability of the accused for specific crimes for which he or she is charged. Consequently, the possibility of prejudice is entirely context and case specific, based upon the particular charges and evidence put forward.¹¹⁴

This argument stands on weak grounds, as it is, of course, not the role of the defence to disprove the prosecution's case. On the contrary, the burden of proof lies solely on the Prosecutor who must prove beyond reasonable doubt that all elements of crime are present.¹¹⁵

¹⁰⁸Vasiliev, *supra* note 83, at 71.

¹⁰⁹M. Struett, 'The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court', in S. C. Roach (ed.), *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (2009), at 107.

¹¹⁰1948 Universal Declaration of Human Rights, UN Doc. A/810 (1948), Art. 11(1); 1955 European Convention on Human Rights, 213 UNTS 221, Art. 6(2); 1976 International Covenant on Civil and Political Rights, 999 UNTS 171, Art. 14(2); 1978 American Convention on Human Rights, 1144 UNTS 123, Art. 7(2); 1986 African Charter on Human and People's Rights, 1520 UNTS 217, Art. 7(1)(b).

¹¹¹Rome Statute, *supra* note 35, Art. 66(1).

¹¹²Situation in the Democratic Republic of Congo, Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund, ICC-01/04-492, Pre-Trial Ch. I, 11 April 2008, at 11.

¹¹³Rome Statute, *supra* note 35, Art. 54(1)(a); see also H. J. Behrens, 'Investigation, Trial and Appeal in the International Criminal Court Statute (Parts V, VI, VII) International Criminal Court', (1998) 6 *European Journal of Crime, Criminal Law and Criminal Justice* 429, at 438–9.

¹¹⁴Observations of the Legal Representative of Victims, *supra* note 28, para. 17.

¹¹⁵Rome Statute, *supra* note 35, Art. 66(2) and (3).

With regards to the second argument, that there is no connection between the Trust Fund sponsored activities and court proceedings, one must not forget that in the end the Trust Fund is part of the ICC. Thus, any activity helping alleged victims demonstrates that parts of the Court, other than the Office of the Prosecutor, have already concluded that crimes under the jurisdiction of the Court have been committed. For example, where a project offers supports to victims of sexual violence under the Trust Fund's general assistance mandate, it is assumed that there are victims of international crimes. While there is usually ample evidence that people in the areas have experienced horrendous suffering, these acts could easily lie outside ICC jurisdiction. In *Lubanga*, for example, the defence counsel argued that some of the alleged acts fell outside the temporal jurisdiction of the Court.¹¹⁶

This links to the third argument, namely that such projects have no impact on the outcome of individual cases and therefore pose no risk of prejudice against individual defendants. One has to remember, however, that acts such as murder, rape or destruction of property are not themselves crimes under Article 5 of the Rome Statute. Such acts only constitute a crime under the jurisdiction of the Court if they meet the very high threshold of genocide, war crimes or crimes against humanity. Thus, even though individual Trust Fund activities might not be directly related to specific court proceedings, the acknowledgement that the beneficiaries are victims of crimes under ICC jurisdiction presumes that these contextual elements are present. The existence of a widespread or systematic attack against a civilian population according to Article 7(1), for example, is essential for all crimes against humanity charges, even if the Trust Fund projects do not 'expressly or impliedly point to the particular guilt of an accused in respect of actual charges in the indictment'.¹¹⁷ The defence in a specific case might, for example, argue that the accused is not guilty of a crime against humanity because the prosecution cannot prove that the act in question has been part of a widespread attack. Such argument would be heavily undermined where a part of the Court, namely the Trust Fund, has been operating the general assistance mandate in the relevant area for a number of years and provided thousands of individuals with support. Thus, even though not related to any specific case, the general judgement of the Trust Fund that the beneficiaries are not just victims of a crime but indeed victims of a crime under the Rome Statute can have a direct effect on an individual case. It, therefore, undermines the presumption of innocence in all specific cases where the general elements are in question. In contrast, the ICTY showed much more caution when it decided that even a general statement by the Registry that a crime had occurred could have the potential to impact on the fairness of the trial where a defendant challenges the existence of that crime.¹¹⁸ To offer general assistance before a criminal conviction prejudices, or, at the very least, creates the perception of prejudice, in all cases in the same situation. This problem is exacerbated by the fact that there are no standards or guidelines to clarify how the Trust Fund establishes whether a crime under the jurisdiction of the Court has occurred and whether the beneficiaries are victims of this crime and not some other atrocity.

4.3 Witness credibility

A further concern is the relationship between the different roles a victim might have at the Court. So far, there is no provision dealing with the question of how to deal with a Trust Fund beneficiary who is later called to give testimony as a witness. Even without the involvement of the Trust Fund, the dual status as witness and victim has been proven to be problematic. In *Lubanga* for example, the Trial Chamber withdrew the victim status from six witnesses whose evidence

¹¹⁶*The Prosecutor v. Kony et al.*, Defence observations on applications for participation in the proceedings a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-01/05-216-tEN, Pre-Trial Ch. II, 5 March 2007, para. 17.

¹¹⁷Observations of the Legal Representative of Victims, *supra* note 28, para. 17.

¹¹⁸*Prosecutor v. Popović et al.*, Transcript, Case No. IT-05-88-T, 26 March 2007, at 9461–5.

was found unreliable.¹¹⁹ The causes of ‘contradictory’, ‘overly inaccurate’, and ‘excessively imprecise’¹²⁰ statements often lie in a lack of witness scrutiny by the prosecution and the overreliance on intermediaries.¹²¹ The question of witness reliability will continue to be exacerbated if victims might be influenced or at least seen to be influenced by the fact that they have been drawing tangible benefits from the Court before giving testimony. Of course, most prosecution witnesses will be interested in a conviction, especially in the ICC where there is a chance of receiving reparations. However, unlike other victims who might benefit from a reparation order after a conviction, Trust Fund beneficiaries will potentially have already received material support before they are asked to give testimony, sometimes for many years. The same concern arises for NGOs who are working on general assistance mandate projects. The Office of Public Counsel for the Defence expressed the concern that NGOs who are receiving funds from the Trust Fund in order to implement projects of the general assistance mandate might later be asked by the Prosecutor to testify before the Court.¹²² Having previously benefited from the Trust Fund would undermine the credibility of the testimony of the NGO.

In part, this problem can be overcome by Article 69(4), which gives the Court discretion to reject evidence as inadmissible where it might cause prejudice to ‘a fair trial or to a fair evaluation of the testimony of a witness’.¹²³ There are so far, however, no criteria to help the Court to evaluate a possible conflict between participation in the general assistance mandate and giving testimony before the ICC. Moreover, where the credibility of a testimony of a victim or an NGO is tainted because they have received money or other benefits from the Trust Fund, this means that the Prosecutor might lose a valuable witness. Since the Trust Fund begins operating in situations irrespectively from specific cases, there is no possibility for either the Prosecutor or the Trust Fund to identify possible overlaps in advance. Furthermore, even where it could be anticipated that an individual or an organization might be called later as witness, it would be difficult to deny them access to the general assistance mandate simply for this reason.

4.4 Wider impact on court proceedings

In addition, there are a number of ways in which the general assistance mandate could impact negatively on both international and national proceedings. First of all, the involvement of the Trust Fund before a conviction might constitute a direct problem in instances where a state or the accused challenges the admissibility of a case under Article 19(2) of the Rome Statute. While the general mandate is not linked to specific cases, so far, the ICC has dealt only with a handful of cases in each situation. Thus, it is not unlikely that a situation arises long after general assistance has begun in a region, there will be one or two defendants and they might challenge the admissibility of their case. Since the ICC has no intention to provide support to victims in cases which are inadmissible before the Court, the previous involvement of the Trust Fund could then be seen as the ICC having already pre-determined that the cases are admissible. If the Court, on the other hand, decides that the case is inadmissible, the question arises as to what happens to the existing general assistance programmes. Either way, the impartiality of the Court will be tainted. This scenario cannot be avoided, since an admissibility challenge in an individual case might occur

¹¹⁹*The Prosecutor v. Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, T. Ch. I, 14 March 2012, para. 479.

¹²⁰*The Prosecutor v. Mathieu Ngudjolo Chui*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-02/12-3-tENG, T. Ch. II, 18 December 2012, paras. 189, 218.

¹²¹International Bar Association, Witnesses before the International Criminal Court (2013), available at www.ibanet.org/Document/Default.aspx?DocumentUid=9C4F533D-1927-421B-8C12-D41768FFC11F.

¹²²Situation in Uganda, OPCD observations on the Notification under Regulation 50 of the Regulations of the Trust Fund for Victims, ICC-02/04-122, Pre-Trial Ch. II, 12 Mar 2008, para. 66.

¹²³Rome Statute, *supra* note 35, Art. 69(4).

only years after the ICC opened investigation into this situation and the Trust Fund began to operate the general assistance mandate.

Likewise, the second aspect of admissibility, namely the requirement of gravity, could be prejudiced.¹²⁴ A large number of beneficiaries of the assistance programmes could influence the Court to find gravity more easily, or at least to be seen to be influenced this way. The Trust Fund's decision to start general assistance in a certain area demonstrates that a section of the Court considers that there is sufficient gravity, long before the judges had the opportunity to make such finding. None of the admissibility challenges, so far, have included concerns regarding the general assistance mandate, but the more the general assistance mandate is run, the more likely will it be that these concerns regarding complementarity and gravity will be raised.

A further, more indirect, obstacle to carrying out its criminal procedures is the cost of running the general assistance mandate as discussed above in Section 3. It has been shown that the general assistance mandate has high running costs without the Trust Fund being able to replenish the Fund's resources sufficiently through fundraising. Any drainage of the already scarce resources of the Court is undermining its ability to fulfil its core functions to its best abilities and thus indirectly weakening the Court's legitimacy. Buchanan and Keohane warn that one must not confuse legitimacy with efficiency but agree that 'if an institution steadfastly remains instrumentally sub-optimal when it could take steps to become significantly more efficient or effective, this could impugn its legitimacy in an indirect way'.¹²⁵ Bassiouni too, sees a clear link between management and costs of an institution and its legitimacy:

The success of the ICC will not be predicated on the simple arithmetic of case numbers but on the regular flow of cases and more particularly, on the fairness, objectivity, and effective management and costs of the institution. This is what will earn the ICC international credibility and legitimacy.¹²⁶

In addition, the general assistance mandate has the potential of having a negative impact on the national criminal procedures, which the ICC is supposed to complement.¹²⁷ In view of the very limited number of selected investigations by the ICC, there might well be national investigations alongside the ICC procedures. The Trust Fund might therefore act in areas connected with domestic procedures without the national authorities being aware of its involvement.¹²⁸ This could easily lead to a domestic criminal case being conducted without the judges, the prosecution or the defence being aware that a witness is a beneficiary of the ICC assistance mandate.¹²⁹ This fear is justified as the Trust Fund is reluctant to reveal details of individual programmes in order to protect the beneficiaries and implementing partners. Despite these concerns, there is no provision for states parties to reject or at least offer observations regarding the Trust Fund undertaking activities on their territory.

Another way in which the general assistance might interfere with domestic procedures is that it undermines the attraction of national reparation schemes. In criminal proceedings, reparations not only serve as a way to compensate victims for their suffering but are also used as a means to encourage victim participation.¹³⁰ Indeed, it is not unknown for states to make compensation

¹²⁴*Ibid.*, Art. 17(1)(d).

¹²⁵A. Buchanan and R. Keohane, 'The Legitimacy of Global Governance Institutions', (2006) 20 *Ethics and International Affairs* 405.

¹²⁶M. C. Bassiouni, 'The ICC - Quo Vadis?', (2006) 4 *IJCL* 421, at 426.

¹²⁷Rome Statute, *supra* note 35, Preamble, para. 10, Art. 17.

¹²⁸OPCD Observations Uganda, *supra* note 122, para. 41.

¹²⁹*Ibid.*, para. 42.

¹³⁰M. C. Bassiouni, 'International Recognition of Victims' Rights', (2006) 6 *HRLR* 203, at 210.

conditional on the victim first reporting the alleged crime to the relevant authorities.¹³¹ In cases related to armed conflict, where witness statements are often the main form of evidence but victims put themselves and their loved ones into considerable danger when testifying, such incentives are even more important. This strategic use of reparations will, however, be undermined where victims are already benefitting from the general assistance mandate without any need to participate in any criminal procedure. The same problem might also affect the willingness for victims to testify at the ICC in the future.

4.5 Diverting from lack of sociological legitimacy

The final major legitimacy issue is the overlooked interplay between the general assistance mandate of the Trust Fund and the justice mandate of the Court. While it has been argued above that a fair trial is an indispensable prerequisite for the Court's legitimacy, there is a distinction between fair trial and justice. Indeed, it has been argued that '[t]he "justice" of the international criminal trial is not generally measured by the fairness of the proceedings, but by the favourable outcome from the victims' perspective',¹³² and this opinion is not only shared by victims but also by those working in the Court.¹³³ Fischer claims that '[t]he only measure for the success of the Victims' Trust Fund, and indeed the ICC itself, is in its ability to provide just restitution for victims'.¹³⁴ While the ICC is expected to serve many different aims, one must not lose sight of the fact that its first and foremost mandate is to bring perpetrators of the gravest crimes to justice,¹³⁵ to end impunity,¹³⁶ and to do so through a fair trial.¹³⁷ So far, the Court has a poor track record in this regard. At the time of writing, only five defendants are in custody of the Court. Eight defendants have had their case against them closed and a further 12 defendants are still at large. Out of the cases that reached the trial stage, four resulted in acquittals.¹³⁸ This means that after 18 years of existence, only four out of 38 surviving indictees have been convicted for crimes under Article 5.¹³⁹ While acquittals and case withdrawals demonstrate the adherence of the Court to fair trial principles, the fact is that in the end only a very small number of perpetrators have been brought to justice so far.¹⁴⁰ From the point of view of the millions of victims who have suffered in the conflicts before the ICC, this is a rather disappointing result.

At the same time, the ICC uses the general assistance mandate of the Trust Fund to promote the Court as having brought relief to the victims. On the ICC website the Trust Fund is even portrayed as one of the three pillars of the ICC (the Court organs and the Assembly of States Parties being the other two),¹⁴¹ playing a main role in promoting the Court. Thus, the general assistance mandate is used to counter-balance the Court's deficiency of sociological legitimacy by glossing over its shortcomings in its justice mandate. The Court should, however, not be able to conceal its failure to provide more justice by bringing more perpetrators to justice behind the

¹³¹Commission of the European Communities, Green Paper: Compensation to Crime Victims, COM(2001) 536 (2001), Sec. 3.5.1.

¹³²Jacobs, *supra* note 101, at 85.

¹³³*Ibid.*, at 86.

¹³⁴Fischer, *supra* note 4, at 201 (emphasis added).

¹³⁵Rome Statute, *supra* note 35, Preamble, para. 4.

¹³⁶*Ibid.*, para. 5.

¹³⁷*Ibid.*, Art. 64(2).

¹³⁸Mathieu Ngudjolo Chui (acquitted 18 December 2012), Jean-Pierre Bemba Gombo (acquitted 8 June 2018), Laurent Gbagbo, and Charles Blé Goudé (acquitted 15 January 2019).

¹³⁹One of which is currently under appeal (*The Prosecutor v. Bosco Ntaganda*, Decision on request for leave to reply, ICC-01/04-02/06-2522, App. Ch., 4 May 2020); five of the total of nine convictions are for offences against the administration of justice according to Art. 70 of the Rome Statute (*The Prosecutor v. Bemba et al.* Case, ICC-01/05-01/13).

¹⁴⁰An analysis for the various reasons such as problems with instigation, prosecution strategies, lack of state co-operation, witness tampering, and others lies outside the scope of this article.

¹⁴¹See www.icc-cpi.int/about/how-the-court-works/Pages/default.aspx#legalProcess.

financial assistance channelled through the Trust Fund. There is a real danger that victims' support for the Court is gained through the promise of tangible assistance instead of earning it through fulfilling its justice mandate. Outside the context of the Trust Fund, the Pre-Trial Chamber itself pointed at the close link between victims' disappointed expectations in the Court and the Court's ability to work. It warned recently of actions of the Court that:

far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.¹⁴²

Rather than buying victims' good will through funding support projects, the Court needs to focus on its core function and do everything it can to raise the sociological legitimacy of its justice mandate. It is not, and never has been, the role of a criminal court to offer general assistance. Distributing money donated from a handful of states to NGOs in the field is not part of the functions of a criminal court.

5. Conclusions

The general assistance mandate reflects the acknowledgement that retributive justice, in the form of the imprisonment of a handful of offenders, is not enough to restore the victims' dignity and rebuild their devastated lives. Even the innovative approach of reparation orders against individuals will never be sufficient to address the manifold needs of thousands of victims. It has been shown in this article that the general assistance mandate, on the other hand, is not in the position to fill this gap, not only because of its own structural weaknesses but moreover due to the negative impact it has on the criminal procedures of the Court.

It could be argued that the general assistance mandate reflects the shift in recent years in international criminal law 'from the rights of the accused to the symbolic objectives of the international community and more particularly the interests of victims'.¹⁴³ It is clear that in the understanding of the Court, a fair trial does encompass more than only protecting the procedural safeguards of the accused, and that the role of the judges is to balance the interests of the different protagonists including the victims.¹⁴⁴ Indeed, the victim is understood to be at the heart of ICL.¹⁴⁵ But this argument overlooks the fact that there must be a clear distinction between victims as protagonists of a trial and victims in the sense of beneficiaries of the Trust Fund's general assistance mandate. This article does not advocate limiting rights of the former, nor does it deny that the survivors of mass atrocities are in dire need of concrete support. What is argued here is that any support coming from the Court needs to be limited to those victims who have been identified by the Court as victims of the specific case. The general assistance mandate on the other hand extends the concept of victim to all those who have severely suffered in the atrocities. This extension which gives non-protagonists support from the Court and which has a negative impact on many aspects of the procedure, as shown above, is highly problematic not at least because the selection of these beneficiaries is completely outside the control of the judges. Moreover, there is an alarming lack of transparency in the identification and selection of the beneficiaries. The Office of Public Counsel for the Defence (OPCD) criticizes the Trust Fund for not revealing 'any formula or criteria, which were used to verify factually and legally that the persons receiving assistance suffered harm as the

¹⁴²Situation in the Islamic Republic of Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, Pre-Trial Ch. II, 12 April 2019, para. 96.

¹⁴³Jacobs, *supra* note 101, at 85.

¹⁴⁴*Ibid.*, at 77.

¹⁴⁵*Ibid.*, at 83.

result of a crime under the Rome Statute'.¹⁴⁶ The Fund does not even reveal the exact crimes the beneficiaries allegedly have suffered from, other than 'crimes within the jurisdiction of the court'. Moreover, it is not clear whether, or how, the Trust Fund assesses whether the victims have already received or will receive compensation from the national authorities. Hence, the selection of beneficiaries is based on information not verified by the Court, nor is it based on the Court's evidentiary threshold of 'beyond reasonable doubt'.¹⁴⁷ This lack of transparency can be partially explained by security concerns. Being associated with a body of the ICC poses a security risk both for the beneficiaries as well as the implementing partners.¹⁴⁸ The Trust Fund acknowledges that in the DRC this problem 'has contributed to a low visibility of the Trust Fund in local communities, as well as to a lack of knowledge with beneficiaries about the legal and institutional framework of the support they are receiving'.¹⁴⁹ Nevertheless, the security risk only explains the lack of transparency with regards to the identity of beneficiaries and implementing partners. It does not explain the obscure selection procedures or the lack of general information available to the public. Indeed, it is increasingly difficult to access information about the work of the Trust Fund with respect to the general assistance mandate. The last Strategic Plan that was made publicly available was for the years 2014 to 2017 and there is only one edition of the so-called newsletter available on the website.¹⁵⁰ While the Trust Fund's website has a contact email address inviting queries, none of the numerous requests for information by this author have been replied to or even acknowledged. The information on the website is often scarce and not regularly updated.

A further drawback of the general assistance mandate is that the link between general assistance and the ICC is not adding any value. The Trust Fund's claim that it is 'a source of operational experience and knowledge about the particularities of providing assistance to victims under conditions of conflict, stigma and chronic vulnerability'¹⁵¹ is far from convincing. First of all, the general assistance mandate operates in only a few situations and not necessarily in those where a reparation order is later given. Furthermore, as the general assistance mandate is run by intermediaries, the Court could easily refer directly to the data available through the operating NGOs. The Trust Fund argues that 'with its non-Court ordered general assistance, the TFV has an established presence on the ground and is well placed to implement such awards',¹⁵² but there is no explanation of exactly what special knowledge or understanding it has gained through its 'presence'. Indeed, looking at the programmes that different NGOs are running, there is nothing the Trust Fund does that would require a link to a criminal court. The Trust Fund is, for example, not privy to any information or insights of the Court other than what is publicly available. Nor is there any reason to believe that the Trust Fund attracts more money because of its link with the Court. On the contrary, as seen above, a link with the Court actually hinders general assistance programmes in some situations because of security concerns. The Trust Fund admits that, because of its connection with the Court, 'victims who will benefit from the specified activities of the Trust Fund would be endangered as seen as having contact with the Court'.¹⁵³ Indeed, in its first notification to the Court regarding the situation in Uganda, the Trust Fund repeatedly refers to the security risks for victims and the importance that the beneficiaries are not visibly linked to the Court.¹⁵⁴ In addition, the Trust Fund is increasingly outsourcing main activities

¹⁴⁶OPCD Observations Uganda, *supra* note 122, para. 48.

¹⁴⁷Rome Statute, *supra* note 35, Art. 66(3).

¹⁴⁸TFV Strategic Plan 2014–2017, *supra* note 22, para. 23.

¹⁴⁹*Ibid.*

¹⁵⁰See www.trustfundforvictims.org/sites/default/files/imce/TFV%20Newsletter%20May%202017%20ENG.pdf.

¹⁵¹The Trust Fund for Victims, *supra* note 30, at 31.

¹⁵²*Ibid.*, at 30.

¹⁵³Notification of the Board of Directors, *supra* note 18, para. 42.

¹⁵⁴*Ibid.*

of the general assistance mandate,¹⁵⁵ which begs the question as to what extent the Trust Fund itself is necessary.

While it is accepted that a wide needs-based approach is needed to alleviate as much suffering as possible and as fast as possible, this broad assistance cannot be part of a criminal procedure with the necessarily narrow remit of a criminal case. Indeed, one of the core principles set out in the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power is that victim support should *not* depend on the perpetrator being convicted.¹⁵⁶ Hence, it is unsurprising that such an extension beyond the criminal case has not been envisioned at the Rome negotiations and cannot be found in either the Rome Statute or the Rules of Procedure and Evidence. It is therefore argued that, in light of the limited reach of the Trust Fund and the high running costs of the general assistance mandate on the one hand, and its negative impact on the ICC on the other, the work of the general assistance mandate should be separated from the Court and given to an external body. In the first place, this assistance should come from states since the suffering caused by mass atrocities goes beyond the victimization of individuals and includes the destruction of wider human and social relations.¹⁵⁷ The state is in a much better position to address the needs of a post-conflict society as a whole rather than a piecemeal approach of individual localized projects. For example, rather than providing training for rape victim counsellors, the state needs to rebuild the whole health, education, employment, and social benefit system. This reconstruction is a political question, not a judicial one, and therefore should be dealt with by the national government and not an international court. In the likely case that a state might not be willing or able to set up a comparable national body, it is then the international community who needs to step in to generate assistance to the victims. Indeed, at the Rome conference it was initially proposed to have the Fund administered by the UN to avoid the risk that it might impair the impartiality of the Court. It was, however, the disillusion with UN administration and the fear that this might lead to increased bureaucracy and less effectiveness that in the end the idea was dropped.¹⁵⁸ The flaws of UN administration are, however, no justification to give the task to a criminal court.

The ICC is only one part in the range of international and national responses to gross human rights violations. Due to its financial and jurisdictional limitations it will only ever be a symbolic court that can only deal with a small part of atrocities.¹⁵⁹ But this symbolic value depends on the legitimacy of the Court and its procedures. The general assistance mandate is not only a drain on scarce resources but more importantly, severely impacts on the legitimacy the Court. Needs-based assistance for victims and the justice mandate of the ICC are incompatible and therefore need to be institutionally separated.

¹⁵⁵ICC Budget 2017, 128. The estimated costs of €1,050,000 will be funded through the voluntary contributions.

¹⁵⁶Declaration of Basic Principles of Justice, *supra* note 5, paras. 2, 14.

¹⁵⁷Wierda and de Greiff, *supra* note 3.

¹⁵⁸Fischer, *supra* note 4, at 210.

¹⁵⁹De Hoon, *supra* note 78, at 611.