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SUPPORTING THE VICTIMS OF ATROCITY CRIMES: HOW THE U.S. GOVERNMENT CAN LEGALLY CONTRIBUTE TO THE TRUST FUND FOR VICTIMS

*Prepared by the
Public International Law & Policy Group
and
Debevoise & Plimpton LLP*



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EXECUTIVE SUMMARY

The Public International Law & Policy Group (“*PILPG*”) and Debevoise & Plimpton LLP have prepared this paper assessing the domestic legal framework governing financial contributions by the United States to the Trust Fund for Victims (“*Trust Fund*”).

The Trust Fund was created by the Assembly of State Parties (“*ASP*”) to the Rome Statute and exists independently of the International Criminal Court (“*ICC*” or “*Court*”). The Trust Fund’s mandate is to implement Court-ordered reparations and to provide additional assistance to victims through implementing partners. It is administered by a separate Secretariat and Board of Directors, its accounts are kept separately from those of the Court, and its programmatic funding comes primarily from voluntary contributions solicited without the involvement of the ICC, which can be used only for victims and their families. The Trust Fund for Victims has faced chronic underfunding since its creation and has announced fundraising to be a central priority.

Three federal laws shape the U.S. government’s ability to contribute to the ICC: (1) the 2002 American Servicemembers’ Protection Act (“*ASPA*”), (2) the Admiral James W. Nance & Meg Donovan Foreign Relations Authorization Act, FY 2000-2001 (“*FRAA*”), and (3) the Consolidated Appropriations Act of 2023 (“*2023 CAA*”). The first two of these statutes define the ICC as the court created under the Rome Statute – a definition that arguably excludes the Trust Fund for Victims – and are guided by the fundamental goals of protecting U.S. persons and allies from ICC prosecution, and preserving U.S. sovereignty. Given this legislative intent, and the Trust Fund’s functional independence from the ICC, these laws arguably do not constrain the U.S. government’s ability to contribute to the Trust Fund for Victims.

Even if the restrictions in those statutes were interpreted to extend to the Trust Fund for Victims, a provision in the 2023 Consolidated Appropriations Act explicitly carves out permission for the United States to render assistance to the ICC related to the “Situation in Ukraine”, “including to support victims and witnesses,” notwithstanding the restrictions established by the Foreign Relations Authorization Act. This provides a basis on which the U.S. government can contribute to ICC victims’ assistance programs related to Ukraine, including through the Trust Fund for Victims.

Recent developments, including the Russian invasion of Ukraine, have highlighted the need to support victims of international atrocity crimes. Should it make a political decision to do so, the U.S. government could contribute to the Trust Fund for Victims without contravening any domestic law.

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Statement of Purpose

The purpose of this paper is to assess whether the United States (“*U.S.*”) may contribute to the Trust Fund for Victims (“*Trust Fund*”) in accordance with U.S. domestic law.

Factual Background

Articles 1-4 of the Rome Statute establish the International Criminal Court (“*ICC*” or “*Court*”) as “a permanent institution” seated in The Hague, with “the power to exercise its jurisdiction over persons for the most serious crimes of international concern ... complementary to national criminal jurisdictions.”¹ Separately, the Rome Statute provides for the establishment of the Trust Fund for Victims in Article 79 through a decision of the Assembly of State Parties (“*ASP*”), to be “managed according to criteria to be determined by the Assembly of State Parties.”² The Trust Fund was created in 2002 by the Assembly of States Parties pursuant to this provision.³ This section provides additional information on the Trust Fund’s (1) governance and administration, (2) mandate, (3) fundraising, and (4) practice.

Governance and Administration

The Trust Fund for Victims is governed by the ICC’s Rules of Procedure and Evidence,⁴ and a series of Regulations,⁵ and is administered separately from the Court by a Board of Directors with support from a Secretariat. This part discusses (1) the Trust Fund for Victims’ Secretariat, (2) the Trust Fund for Victims’ Board of Directors, and (3) the relationship between the Trust Fund for Victims and the ICC.

¹ UN General Assembly, *Rome Statute of the International Criminal Court*, (July 17, 1998) [hereinafter “Rome Statute”], Art. 1.

² Rome Statute, Art. 79.

³ Assembly of States Parties, *Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims*, UN DOC. ICC-ASP/1/Res.6, (Sept. 9, 2002) [hereinafter “TFV Establishment Resolution”].

⁴ International Criminal Court, *Rules of Procedure and Evidence*, UN DOC. PCNICC/2000/1/Add.1 (2000) [hereinafter “ICC Rules of Procedure and Evidence”].

⁵ Assembly of States Parties, *Regulations of the Trust Fund for Victims*, UN DOC. ICC-ASP/4/Res.3, Dec. 3, 2005 [hereinafter “TFV Regulations”].

The Trust Fund for Victims' Secretariat

The Assembly of State Parties established the Trust Fund for Victims Secretariat to provide administrative support to the Trust Fund in 2004.⁶ The Trust Fund Secretariat's 28 staff members are based at ICC headquarters or country offices, and are subject to the same benefits and rules as the ICC staff, including those related to remuneration, insurance, and administrative and human resource policies.⁷ This consistency increases administrative efficiency and ensures that the Trust Fund for Victims Secretariat staff benefit from the same privileges and immunities afforded to the staff of the ICC.⁸ Despite these shared policies, the Trust Fund for Victims' Secretariat has no overlapping members with the Assembly of State Parties' Secretariat.⁹ According to the Proposed Programme Budget for 2022 of the International Criminal Court ("**2022 Proposed Budget**"), the "management layer" of the Trust Fund's Secretariat has been "fully in place ... since the start of 2020," including an Executive Director, a "Legal Advisor, who also acts as deputy to the Executive Director, and three Programme Managers based in situation countries."¹⁰ The Trust Fund Secretariat receives support from the ICC's Registry on administrative matters, including procurement and finance, security, human resources, and in-house legal services.¹¹ The Trust Fund's regulations provide that it shall consult with the Registrar "on all administrative and legal matters for which it receives the assistance of the Registry," "[b]earing in mind the independence of the [Trust Fund for Victims] Secretariat."¹²

Trust Fund for Victims Board of Directors

The Trust Fund for Victims is overseen by a Board of Directors whose key functions include, *inter alia*, the "allocation of funds for assistance programmes,"

⁶ Assembly of States Parties, *Establishment of the Secretariat for the Trust Fund for Victims*, UN DOC. ICC-ASP/3/Res.7, (Sept. 10, 2004) [hereinafter "Secretariat Establishment Resolution"].

⁷ Katharina Pesche, *Trust Fund for Victims: International Criminal Court (ICC)*, MAX PLANCK ENCYCLOPEDIA OF INTERNATIONAL LAW, (Sept. 2019), available at <https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3103.013.3103/law-mpeipro-e3103%20> [hereinafter "MPIL"], para.19. See also IER Final Report, para.50.

⁸ Secretariat Establishment Resolution, para.2.

⁹ The ASP Secretariat was established as an "integral part of the International Criminal Court" and is attached to the Registry of the Court for administrative purposes. See Assembly of States Parties, *Establishment of Permanent Secretariat of the Assembly of States Parties to the International Criminal Court*, UN DOC. ICC-ASP/2/Res.3, (Sept. 12, 2003)

¹⁰ Assembly of States Parties, *Proposed Programme Budget for 2022 of the International Criminal Court*, UN DOC. ICC-ASP/20/10, (Aug. 16, 2021) [hereinafter "2022 Proposed Budget"], para.744.

¹¹ IER Final Report, para.945. See also *Secretariat Establishment Resolution*, para.3; *2022 Proposed Budget*, para.789 (The TFV also "relies on the services of the Registry to help assess, anticipate and mitigate security challenges which pose a threat to the implementation of assistance programmes and reparation awards.").

¹² TFV Regulations, para.19.

the “start of assistance programmes,” and “approval of lists of eligible beneficiaries.”¹³ Members of the Trust Fund Board of Directors are nominated by States Parties and elected by the Assembly of State Parties;¹⁴ they serve on a pro bono basis for three year terms, with the capacity to be re-elected once.¹⁵ In addition to appointing the Trust Fund for Victims’ Board, the Assembly of State Parties retains significant control over the Trust Fund.¹⁶ The Trust Fund Regulations ensure that the Assembly of State Parties is the only body within the ICC framework with power to change the Regulations, with amendments requiring approval by a two-third majority of those present and voting in the Assembly of State Parties.¹⁷ Amendments, however, can be proposed by a State Party, by the Court, or by the Board of Directors.¹⁸ The Trust Fund is also mandated to provide annual reports to the Assembly of State Parties “on the activities and projects of the Trust Fund and on all offered voluntary contributions, regardless of whether they were accepted or rejected.”¹⁹

Relationship with the ICC

The Trust Fund for Victims exists as a functionally independent entity. Indeed, according to the resolution establishing the Trust Fund for Victims Secretariat, the Assembly of State Parties is “mindful of the independence of the [Trust Fund for Victims] Board and the Secretariat.”²⁰ This functional independence has also been recognized by the 2020 Independent Expert Review of the International Criminal Court and the Rome Statute System’s Final Report (“*IER Final Report*”).²¹

¹³ Doc. TFV-AP-01-v1.0, *Working methods of the Board of Directors of the Trust Fund for Victims*, (Sept. 2, 2021) [hereinafter “Board Working Methods”], §§ 3.1.1, 3.1.3. See also *TFV Establishment Resolution*, Annex para.7.

¹⁴ Assembly of States Parties, *Procedure for the nomination and election of members of the Board of Directors of the Trust Fund for the benefit of victims*, UN DOC. ICC-ASP/1/Res.7, (Sept. 9, 2002).

¹⁵ TFV Establishment Resolution, Annex para.2-3. See also MPIL, para.14-15 (The distribution of seats aims to account for geographical, gender, and legal system representation).

¹⁶ See e.g., REDRESS, *No Time to Wait: Realising Reparations for Victims Before the International Criminal Court*, (Jan. 2019), available at <https://redress.org/publication/no-time-to-wait-realising-reparations-for-victims-before-the-international-criminal-court/> [hereinafter “REDRESS Report”] (Co-author Lorraine Smith van Lin describes the ASP as having “direct oversight” over the functioning of the TFV).

¹⁷ TFV Regulations, para.78. See also MPIL, para.12.

¹⁸ MPIL, para.13.

¹⁹ TFV Establishment Resolution, Annex para.11.

²⁰ Secretariat Establishment Resolution, para.3.

²¹ Assembly of States Parties, *Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report*, (Sept. 30, 2020) [hereinafter “IER Final Report”], para.50. See also *id.* para.58, 364, 929 (recognizing TFV Secretariat as functionally independent).

The ICC Registry has several separate trust funds it maintains and manages directly,²² and the ICC has its own organs tasked with victim engagement.²³ The Trust Fund for Victims works closely with these entities, especially in the context of administering reparations awards.²⁴ The Trust Fund also relies on the ICC’s Finance Section “for the disbursement of awards and other amounts, and to ensure proper financial reporting to relevant stakeholders,” and on the ICC’s Procurement Unit and the Registry’s Legal Office “for procurement and contracting matters.”²⁵

The Trust Fund for Victims thus stands separate from, but operating closely with, the ICC. As Minou Tavárez Mirabal, Chair of the Trust Fund Board of Directors, recognized, “the Trust Fund needs to work conceptually, programmatically and operationally in a way which is as integrated with the Court as possible. Both are, after all, the Court and the Fund, an integral part of the Rome Statute, and the Fund is ultimately embedded in the Court’s administrative structure.”²⁶

Mandate

As described on its website, “the Trust Fund for Victims has a two-fold mandate: (i) to implement Court-Ordered reparations and (ii) to provide physical, psychological, and material support to victims and their families.”²⁷ This divides

²² These include the “Special Fund for Relocations,” the “Trust Fund for Family Visits for Indigent Detainees,” the “Trust Fund for the Least Developed Countries,” and the “Trust Fund for the Travel of Candidates from Least Developed Countries to the Venue of the Interviews Conducted by the Advisory Committee on Nominations of Judges.” Unlike the TFV, these are managed directly by the Registrar. See Assembly of States Parties, *Programme budget for 2011, the Working Capital Fund for 2011, scale of assessments for the apportionment of expenses of the International Criminal Court, financing appropriations for 2011 and the Contingency Fund*, UN DOC. ICC-ASP/9/Res.4, (Dec. 10, 2010), § X; Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, UN DOC. ICC-ASP/9/Res.3, (Dec. 10, 2010); Assembly of States Parties, *Establishment of a trust fund for the participation of the least developed countries in the activities of the Assembly of States Parties*, UN DOC. ICC-ASP/2/Res.6, (Sept. 12, 2003); Assembly of States Parties, *Strengthening the International Criminal Court and the Assembly of States Parties*, UN DOC. ICC-ASP/15/Res.5, (Nov. 24, 2016).

²³ MPIL, para.5 (These include the Victims Participation and Reparations Section, which is responsible for assisting victims in the process of applying for participation in trials and reparations proceedings, the Office of Public Counsel for Victims, which provides legal representatives to victims, and assistance to external lawyers appointed by victims, and the Victims and Witnesses’ Section, which provides support and protection of victims testifying as witnesses before the Court).

²⁴ 2022 Proposed Budget, para.786. See also MPIL, para.20.

²⁵ 2022 Proposed Budget, para.788.

²⁶ Minou Tavárez Mirabal, *Reparations: a Critical Aspect of Justice at the ICC*, Intervention of Minou Tavárez Mirabal, Chair of the Board of Directors for the Trust Fund for Victims for the Commemoration of the 20th Anniversary of the International Criminal Court, (Jul. 6, 2022), <https://www.trustfundforvictims.org/en/news/trust-fund-victims-commemorates-20th-anniversary-international-criminal-court> [hereinafter “Mirabal Statement”].

²⁷ International Criminal Court, *The Trust Fund for Victims*, “Home”, available at <https://www.icc-cpi.int/tfv>

the Trust Fund’s mandate into two broad categories: reparations programs, which are tied to individual convictions and court-ordered damages, and assistance programs in situation countries.²⁸ For programs under both mandates, the Trust Fund works with implementing partners. The vast majority of these implementing partners are local, in-country non-governmental organizations, but several, including the Center for Victims of Torture, Health Right International, and World Relief, are U.S.-based non-governmental organizations.

Reparations Mandate

Under its reparations mandate, the Trust Fund for Victims is empowered by the Trial Chamber and Appellate Mechanism to implement reparations orders through an implementation plan which is approved by the Trial Chamber.²⁹ The ICC has awarded reparations to victims through the Trust Fund in all four of the Court’s final convictions.³⁰ In the context of its reparations mandate, the Trust Fund has described its relationship with the ICC as a “partnership covering three different dimensions – as an independent expert body (during juridical proceedings), and as the implementing and (potential) funding agency, depending on the Court’s needs.”³¹ The Trust Fund also works closely with ICC Legal Representatives and the Registry to ensure the availability of relevant data and information from victims.³²

Assistance Mandate

Under its assistance mandate, the Trust Fund for Victims is empowered to implement assistance programs designed to aid victims of crimes and their family members “who have suffered physical, psychological and/or material harm”

²⁸ See International Criminal Court, *The Trust Fund for Victims*, “Assistance Mandate” available at <https://www.trustfundforvictims.org/node/50> (“The TFV’s assistance mandate enables victims of crimes (as defined in Rule 85 of the Rules of Procedure and Evidence) and their families who have suffered physical, psychological and/or material harm as result of war crimes, to receive assistance separately from, and prior to, a conviction by the Court. This assistance relies upon resources the Trust Fund has raised through voluntary contributions, and is distinct to reparations awards, in that it is not linked to a conviction. The key difference between the assistance and reparations mandates is that reparations are linked to accountability, arising from individual criminal responsibility of a convicted person, whereas the assistance mandate is not.”)

²⁹ See, e.g. International Criminal Court, *Lubanga Case*, available at <https://www.icc-cpi.int/drc/lubanga>; International Criminal Court, *Katanga Case*, available at <https://www.icc-cpi.int/drc/katanga>; International Criminal Court, *Ntaganda Case*, available at <https://www.icc-cpi.int/drc/ntaganda>.

³⁰ Mirabal Statement.

³¹ International Criminal Court, *The Trust Fund for Victims*, “Observations pursuant to rule 103 of the Rules of Procedure and Evidence,” UN DOC. ICC_01/04-01/06-3430, para.19.

³² REDRESS Report, at 35.

resulting from “the commission of any crime within the jurisdiction of the Court.”³³ Programs under this mandate do not require a conviction,³⁴ but the scope of the mandate is limited by the definition of “victim.” Under Rule 85 of the ICC’s Rules of Procedure and Evidence, “victim” extends to persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court,³⁵ *i.e.*, victims of “situations” being investigated by the Office of the Prosecutor “for the purpose of finding evidence of a suspect’s innocence or guilt.”³⁶ Trust Fund Regulation 50(a) provides that the Board of Directors can initiate assistance programs provided that the Court issues a statement in writing “that a specific activity or project ... would [not] pre-determine any issue to be determined by the court ... or violate the presumption of innocence. ... or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”³⁷

Funding

The Trust Fund for Victims Regulations provide that the “[b]ank account(s) of the Trust Fund shall be opened in conformity with rule 108(1) of the Financial Regulations and Rules,” which designates the ICC Registrar with the power to establish official bank accounts, and sets guidelines for operating those accounts.³⁸ While the Trust Fund relies closely on the ICC Registrar for financial management support,³⁹ the Trust Fund has accounting provisions which establish that its accounts are separate from the accounts of the ICC.⁴⁰ The Trust Fund for Victims’ expenses can be categorized as administrative and programmatic. This section will discuss each in turn, before turning briefly to the Trust Fund’s funding challenges.

³³ See <https://www.trustfundforvictims.org/node/50>; International Criminal Court, Rules of Procedure and Evidence, ICC-ASP/1/3, Sept. 3, 2002, R. 85.

³⁴ International Criminal Court, *The Trust Fund for Victims*, “Assistance Mandate,” <https://www.trustfundforvictims.org/node/50>.

³⁵ ICC Rules of Procedure and Evidence, R. 85.

³⁶ Rome Statute, Arts. 13-14 (giving the ICC jurisdiction with respect to a “situation” in which one or more of the crimes enumerated in the statute “appears to have been committed” when referred to the Court by a State Party or the U.N. Security Council). See also International Criminal Court, *Situations under investigations*, available at <https://www.icc-cpi.int/situations-under-investigations>; MPIL, para.42, 47.

³⁷ TFFV Regulations, § 50(a)(i)-(ii). See also IER Final Report, para.925 (explaining that exercise of the TFFV’s assistance mandate is only “possible once a situation is under investigation that the Fund notifies the Pre-Trial Chamber of its decision to undertake special assistance or projects.”); MPIL, para.52.

³⁸ International Criminal Court, *Financial Regulations and Rules*, UN DOC. ICC-ASP/7/5 (Part. II-D), (Nov. 21, 2008).

³⁹ See *supra*, at 5-6, 11.

⁴⁰ TFFV Regulations, §§ 37-41.

Administrative Expenses

Funding for administrative expenses comes primarily from an allocation from the ICC's annual program budget, raised through the assessed contributions of States Parties. Funds are allocated by resolution of the Assembly of State Parties, with a separate line item for "Secretariat of the Trust Fund for Victims."⁴¹ The Trust Fund's allocation from the ICC's annual program budget has historically been small. In 2008, the first year in which the Trust Fund had an allocation in the ICC budget, the Trust Fund received roughly one million euros, or 1.1 percent of the ICC's total budget.⁴² For 2023, the proposed budget for the Trust Fund is 4.3 million euros, representing an increase of just over 33 percent compared to the 2022 approved budget of 3.23 million euros.⁴³ Even with this increase, however, the Trust Fund's proposed budget comes to just over 2.4 percent of the ICC's total budget of roughly 175 million euros.⁴⁴

Programmatic Expenses

The Trust Fund for Victims' programmatic funding comes from two sources: (1) individual awards for reparations made directly against a convicted person, and (2) voluntary donations from private individuals, foundations, corporations, and States.⁴⁵ The Trust Fund's reparations mandate is funded in part by individual awards for reparations made directly against a convicted person. However, the amount actually collected through such awards has proven inadequate largely because all convicted persons to date have been considered indigent by the Court.⁴⁶ This has led to significant challenges in obtaining proceedings from fines, forfeiture

⁴¹ See, e.g., Assembly of States Parties, *Resolution of the Assembly of States Parties on the proposed programme budget for 2019, the Working Capital Fund for 2019, the scale of assessment for the apportionment of expenses of the International Criminal Court, financing appropriations for 2019 and the Contingency Fund*, UN DOC. ICC-ASP/17/Res.4, (Dec. 12, 2018) [hereinafter "2019 Proposed Budget"].

⁴² Assembly of States Parties, *Programme budget for 2008, the Working Capital Fund for 2008, scale of assessments for the apportionment of expenses of the International Criminal Court and financing appropriations for the year 2008*, UN DOC. ICC-AP/6/Res.4, (Dec. 14, 2007).

⁴³ Assembly of States Parties, *Proposed Programme Budget for 2023 of the International Criminal Court*, UN Doc. ICC-ASP/21/10, (Aug. 19, 2022) [hereinafter "2023 Proposed Budget"].

⁴⁴ Assembly of States Parties, *Proposed Programme Budget for 2023 of the International Criminal Court*, UN Doc. ICC-ASP/21/10, (Aug. 19, 2022) [hereinafter "2023 Proposed Budget"].

⁴⁵ ICC Rules of Procedure and Evidence, R. 98 ("(1) Individual awards for reparations shall be made directly against a convicted person. ... (5) Other resources of the Trust Fund may be used for the benefit of victims subject to the provisions of article 79."). See also International Criminal Court, *The Trust Fund for Victims, Our Donors*, available at <https://www.trustfundforvictims.org/index.php/en/about/our-donors>. See also Coalition for the International Criminal Court, *Victims could lose out with states' double-standard on International Criminal Court resources*, (Mar. 30, 2022), available at https://www.coalitionfortheicc.org/news/20220330/OpenLetter_ICCresources.

⁴⁶ See, e.g., REDRESS Report, at 33-34.

or reparation payments: while reparation orders to date have a value of nearly 38 million euros, the Trust Fund has received only 330,000 euros through these collections.⁴⁷ Therefore, reparations activities have primarily been funded by voluntary contributions.⁴⁸

The Trust Fund’s reparations and assistance programs can be funded by “[v]oluntary contributions from governments ... in accordance with relevant criteria adopted by the Assembly of States Parties.”⁴⁹ The criteria are focused on ensuring that voluntary contributions will not affect the independence of the Court, and do not require that contributing States be party to the Rome Statute.⁵⁰ Since 2004, when the Trust Fund received its first voluntary contribution, 45 States, all parties to the Rome Statute, have contributed to the Trust Fund.⁵¹ Between 2004 and 2020, the Trust Fund received roughly 37.5 million euros in voluntary contributions.⁵²

According to the original Trust Fund Regulations, voluntary contributions from governments could not be earmarked.⁵³ In 2007, however, the Board adopted a Resolution amending this prohibition and establishing an exception: funds can be earmarked if they have been raised at the initiative of the Board or the Executive Director of the Secretariat, and as long as the contributions (1) benefit victims and their families, and (2) would not result in discrimination on a range of grounds.⁵⁴ Currently, earmarked funding “constitutes an important component of the Trust

⁴⁷ Mirabal Statement. *See also* IER Final Report, para.888-89.

⁴⁸ 2022 Proposed Budget, para.747.

⁴⁹ TFV Regulations, § 21.

⁵⁰ Assembly of States Parties, *Relevant criteria for voluntary contributions to the International Criminal Court*, UN Doc. ICC-ASP/1/Res.11, (Sept. 3, 2002).

⁵¹ International Criminal Court, *The Trust Fund for Victims*, Our Donors, available at <https://www.trustfundforvictims.org/index.php/en/about/our-donors> (including Andorra, Australia, Austria, Bangladesh, Belgium, Chile, Colombia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Ireland, Italy, Japan, Jordan, Latvia, Liechtenstein, Luxembourg, Mali, Mexico, Netherlands, New Zealand, Nigeria, Norway, Philippines, Poland, Portugal, Republic of Congo, Republic of Korea, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, and Uruguay.)

⁵² International Criminal Court, *The Trust Fund for Victims*, Our Donors, available at <https://www.trustfundforvictims.org/index.php/en/about/our-donors> (including Andorra, Australia, Austria, Bangladesh, Belgium, Chile, Colombia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Ireland, Italy, Japan, Jordan, Latvia, Liechtenstein, Luxembourg, Mali, Mexico, Netherlands, New Zealand, Nigeria, Norway, Philippines, Poland, Portugal, Republic of Congo, Republic of Korea, Senegal, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, and Uruguay.)

⁵³ TFV Regulations, § 27.

⁵⁴ Assembly of States Parties, *Amendment to the Regulations of the Trust Fund for Victims*, UN Doc. ICC-ASP/6/Res.3, (Dec. 14, 2007). Notably, the TFV Regulations provide that “contributions aimed at assisting those enjoying specific protection under international law should not be considered to be discriminatory.” TFV Regulations, para.27(b).

Fund for Victims’ resources under the assistance mandate,”⁵⁵ and “States providing voluntary contributions to the Trust Fund for Victims are more frequently earmarking and setting conditions for the use of their contributions.”⁵⁶ Earmarked funds may be used only for a specific project according to the terms set by the donor, and past contributions have been conditioned on periodic reporting by the Trust Fund on the use of funds.⁵⁷

Current State of Funding

As of December 31, 2021, the Trust Fund’s portfolio had assets totaling just under 18.3 million euros.⁵⁸ According to the ICC’s Proposed Budget for 2023 (“**2023 Proposed Budget**”), the total current investment – in reparation and assistance programs – is roughly 17.8 million euros and the total projected investment is just under 31.7 million euros.⁵⁹ The Fund’s 2023-2025 Strategic Plan highlights the need for “communication and visibility” in order to expand beyond “its current donor base, reaching out to the multilateral level, including the United Nations and the European Union.”⁶⁰ Indeed, according to the 2023 Proposed Budget, “[r]esource development and visibility ... will be of the highest priority for the [Trust Fund for Victims] Secretariat in 2023.”⁶¹

Practice

Reparations Mandate Practice

The Trust Fund for Victims’ reparations mandate begins with a reparations award, issued by the Trial Chamber and approved by the Appellate Chamber, awarding individual and/or collective reparations. Upon the issuance of such an award, the Trust Fund begins the process of creating an implementation plan, including designing a mechanism to assess individual eligibility for reparations.⁶²

⁵⁵ International Criminal Court, *The Trust Fund for Victims*, Assistance Mandate, available at <https://www.trustfundforvictims.org/node/50>.

⁵⁶ 2022 Proposed Budget, para.748.

⁵⁷ See, e.g., Trust Fund for Victims, *Lithuania Makes First Voluntary Contribution to the Trust Fund for Victims, in Support of the Assistance Programme in Georgia*, Press Release, (Jan. 17, 2022), available at <https://www.trustfundforvictims.org/en/news/lithuania-makes-first-voluntary-contribution-trust-fund-victims-support-assistance-programme>.

⁵⁸ Assembly of States Parties, *Financial statements of the Trust Fund for Victims for the year ended 31 December 2021*, UN DOC. ICC-ASP/21/13, (Aug. 22, 2022).

⁵⁹ 2023 Proposed Budget, para.844.

⁶⁰ Trust Fund for Victims, *Strategic Plan, 2023-2025* [hereinafter “2023-25 Strategic Plan”], at 12.

⁶¹ 2023 Proposed Budget, para.855.

⁶² TFV Regulations, para.54 *et seq.*

Given the intricacy and complexity inherent in these tasks, delays have been common.⁶³

Recognizing these issues, the Trust Fund has taken steps to increase its efficiency and efficacy in recent years. In 2020, the Trust Fund and the ICC Registry established a Procurement Task Force which has facilitated expansion of the number of contracts and increased efficiency in the growth of the Trust Fund’s programs.⁶⁴ In its 2020-2021 Strategic Plan, the Trust Fund highlighted the improvements made to “the procurement process in relation to the selection of implementing partners for reparations and assistance programmes, leading to a considerable increase in active projects in the second half of 2020.”⁶⁵ Indeed, as the 2023 Proposed Budget highlighted, there has been “significant growth since 2020 of the volume and complexity of the Trust Fund for Victims’ activities.”⁶⁶

The Trust Fund is currently implementing reparation awards in four cases: Lubanga (DRC), Katanga (DRC), Ntaganda (DRC), and Al Mahdi (Mali).⁶⁷ A reparations award is also expected in the case against Dominic Ongwen.⁶⁸

- **Lubanga:** Thomas Lubanga Dyilo was convicted of war crimes for the enlisting and conscripting of child soldiers on March 14, 2012.⁶⁹ The Trial Chamber issued a decision on December 15, 2017 setting the amount of Mr. Lubanga’s liability at USD 10 million, finding that 425 individuals were eligible for collective reparation, and directing the Trust Fund to screen new applications for eligibility for reparations.⁷⁰ Taking note of Mr. Lubanga’s indigence, the Court invited the Trust Fund to use its other resources to fund and implement the collective reparations award. By September 2020, the Trust Fund had found 854 beneficiaries eligible for reparations,⁷¹ and the identification and

⁶³ IER Final Report, para.879 (“profound delays exhibit the whole process”), 883.

⁶⁴ 2022 Proposed Budget, para.738, 740.

⁶⁵ Trust Fund for Victims, *Strategic Plan, 2020-2021* [hereinafter “2020-21 Strategic Plan”], at 3.

⁶⁶ 2023 Proposed Budget, para.837.

⁶⁷ International Criminal Court, *The Trust Fund for Victims*, TFV Management Brief Q3/2021, (Jul. 1 – Sept. 30, 2021) [hereinafter, “2021 Q3 Management Brief”], at 2.

⁶⁸ 2023 Proposed Budget, para.840(a).

⁶⁹ International Criminal Court, *Lubanga Case*, available at <https://www.icc-cpi.int/drc/lubanga>.

⁷⁰ International Criminal Court, *Trust Fund for Victims: The Lubanga Case*, available at <https://www.trustfundforvictims.org/what-we-do/reparation-orders/lubanga>. See also *In the Case of The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber II, No. ICC-01/04-01/06, “Decision on the Request Made by the Trust Fund for Victims on 21 October 2020,” (Dec. 14, 2020) [hereinafter “Lubanga Decision”], para.1.

⁷¹ International Criminal Court, *Lubanga Case*, available at <https://www.trustfundforvictims.org/what-we-do/reparation-orders/lubanga>; See also Lubanga Decision, para.5-6.

eligibility determination process continued through 2021.⁷² On March 4, 2021, the Trust Fund announced that it would start implementation of the collective service-based component of the reparation award following a competitive bidding process by local implementing partners. According to the Trust Fund’s website, “implementing partner[s] will offer the beneficiaries and their families individualised care and support services in Ituri,” aiming “to address comprehensively the psychological, physical and material harm suffered.”⁷³ This effort is ongoing.⁷⁴

- **Katanga:** Germain Katanga was convicted of war crimes and crimes against humanity on March 7, 2014.⁷⁵ The Trial Chamber issued a USD 1 million reparations award on March 24, 2017, awarding individual reparations – symbolic compensation of USD 250 per victim to 297 victims – and collective reparations in the form of support for housing, income-generating activities (IGAs), education aid and psychological support.⁷⁶ The Court took note of Mr. Katanga’s indigence and therefore invited the Trust Fund to use its other resources to fund and implement the collective reparations award. According to the Trust Fund, it has continued to pay reparations to victims through the purchase of land and the construction of houses, and has initiated training programs for psychological rehabilitation.⁷⁷
- **Ntaganda:** Bosco Ntaganda was convicted of war crimes and crimes against humanity, including murder, rape, sexual slavery, persecution, forcible transfer and deportation, and conscripting child soldiers, on July 8, 2019.⁷⁸ On March 8, 2021, the Chamber found that Mr. Ntaganda is liable for USD 30 million but also found Mr. Ntaganda to be indigent for the purposes of reparations, once more inviting the Trust Fund to support the award with its available resources as well as engage

⁷² Q3 2021 Management Brief, at 11; 2022 Proposed Budget, para.762(b).

⁷³ International Criminal Court, *Trust Fund for Victims*, Factsheet (4 March 2021), available at <https://www.trustfundforvictims.org/en/news/factsheet-4-march-2021-collective-reparations-form-services-victims-crimes-which-thomas>.

⁷⁴ See Q3 2021 Management Brief, at 11.

⁷⁵ International Criminal Court, *Katanga Case*, available at <https://www.icc-cpi.int/drc/katanga>.

⁷⁶ International Criminal Court, *Katanga Case: ICC Trial Chamber II Awards Victims Individual and Collective Reparations*, Press Release, (Mar. 24, 2017), available at <https://www.icc-cpi.int/news/katanga-case-icc-trial-chamber-ii-awards-victims-individual-and-collective-reparations>.

⁷⁷ Trust Fund for Victims, *Highlights of Trust Fund for Victims Activities*, Q3 2022 (01 July – 30 September 2022), [hereinafter “2022 Highlights”], at 3.

⁷⁸ International Criminal Court, *Ntaganda Case*, available at <https://www.icc-cpi.int/drc/ntaganda>.

in additional fundraising to complement it.⁷⁹ The Chamber ordered “collective reparations with individualised components,” and instructed the Trust Fund to design a draft implementation plan and submit it to the Chamber by September 8, 2021.⁸⁰ On July 23, 2021, the Chamber approved two projects proposed in the initial draft implementation plan, extended the deadline for the final draft implementation plan, and requested the Trust Fund to develop the mechanism through which to determine victim eligibility in cooperation with the Court’s victims protection units.⁸¹ The two approved projects were (1) increasing by up to 150,000 euros one of the existing assistance projects in order to assist victims with urgent physical, psychological, and material needs; and (2) increasing by up to 150,000 euros another assistance project to benefit child mothers and their children born out of SGBV to extend its geographic scope. However, on September 12, 2022, the Appeals Chamber issued a judgment instructing the Trial Chamber to issue a new Reparations Order. The Trial Chamber’s ruling is still pending, after which the Trust Fund will draft a new implementation plan.⁸²

- **Al Mahdi:** Ahmad Al Faqi Al Mahdi, was convicted in September 2016 as a co-perpetrator of the war crime of intentionally directing attacks against religious and historic buildings.⁸³ On August 17, 2017, the Trial Chamber found Mr. Al Mahdi liable for 2.7 million euros for individual and collective reparations for three categories of harm: damage to the attacked historic and religious buildings, consequential economic loss, and moral harm.⁸⁴ The Appeals Chamber confirmed and finalized the reparations order on March 8, 2018, adding that victims had the right to contest their eligibility determination by the Trust Fund before the Trial Chamber.⁸⁵ Mr. Al Mahdi was also found

⁷⁹ International Criminal Court, *Ntaganda Case: ICC Trial Chamber VI Orders Reparations for Victims*, Press Release, (Mar. 8, 2021), available at <https://www.icc-cpi.int/news/ntaganda-case-icc-trial-chamber-vi-orders-reparations-victims>.

⁸⁰ International Criminal Court, *Ntaganda Case: ICC Trial Chamber VI Orders Reparations for Victims*, Press Release, (Mar. 8, 2021), available at <https://www.icc-cpi.int/news/ntaganda-case-icc-trial-chamber-vi-orders-reparations-victims>.

⁸¹ 2021 Q3 Management Brief, at 12.

⁸² *2022 Highlights*, at 3.

⁸³ International Criminal Court, *Al Mahdi Case*, available at <https://www.icc-cpi.int/mali/al-mahdi>.

⁸⁴ International Criminal Court, *Al Mahdi Case: ICC Trial Chamber VIII Issues Reparations Order*, Press Release, (Aug. 17, 2017), available at <https://www.icc-cpi.int/news/al-mahdi-case-icc-trial-chamber-viii-issues-reparations-order>.

⁸⁵ International Criminal Court, *Al Mahdi Case: Reparations Order Becomes Final*, Press Release, (Mar. 8, 2018), available at <https://www.icc-cpi.int/news/al-mahdi-case-reparations-order-becomes-final>.

to be indigent and the Trust Fund encouraged to use its other resources to implement the award. Under the Court’s direction, the Trust Fund undertook several field missions to Mali to identify individual victims and collect applications by individuals seeking reparations; eligibility determinations have focused on individuals who are direct descendants of a Saint of one of the attacked mausoleums or whose economic activity exclusively depends on the mausoleums. The payment of individual reparations awards began in January 2021,⁸⁶ and as of July 12, 2022, the Trust Fund reported that individual reparations have been completed with more than 880 victims having received awards.⁸⁷ In summer 2022, the Trust Fund turned its attention to collective reparations, including (1) the restoration of cultural heritage, partnering with UNESCO; (2) commemorations to address the moral harm caused to the community, partnering with a local organization, and (3) an economic resilience facility to address the damage caused to the Timbuktu economy, also with a local implementing partner.⁸⁸

As these examples indicate, the Court’s few convictions have led to the creation of only a handful of reparations programs. Even in these instances the amount granted to victims was low and funds remain unallocated.

Assistance Mandate Practice

Under the assistance mandate, the Trust Fund for Victims’ is engaged in projects in Northern Uganda, the DRC, Cote d’Ivoire, the Central African Republic (“*CAR*”), Mali, Georgia, and Kenya. Assistance programs include physical rehabilitation, physiological rehabilitation, and material support initiatives offered through implementing partners. Since 2008, the Trust Fund has developed programs in the CAR and Cote d’Ivoire that focus specifically on addressing the harm to victims of sexual violence.⁸⁹

⁸⁶ 2022 Proposed Budget, para.738.

⁸⁷ International Criminal Court, *Trust Fund for Victims: Ahmad Al Faqi Al Mahdi Case: Collective Reparations are Launched Upon Completion of the Individual Reparations*, (Jul. 12, 2022), available at <https://www.trustfundforvictims.org/en/news/ahmad-al-faqi-al-mahdi-case-collective-reparations-are-launched-upon-completion-individual>.

⁸⁸ International Criminal Court, *Trust Fund for Victims: Ahmad Al Faqi Al Mahdi Case: Collective Reparations are Launched Upon Completion of the Individual Reparations*, (Jul. 12, 2022), <https://www.trustfundforvictims.org/en/news/ahmad-al-faqi-al-mahdi-case-collective-reparations-are-launched-upon-completion-individual>; 2022 Highlights, at 4.

⁸⁹ 2020-21 TFV Strategic Plan, at 7.

- In Northern Uganda, Trust Fund projects were derailed by strict in-country travel restrictions due to the COVID-19 pandemic. However, operations resumed in late July 2021 as the Trust Fund has offered counselling via telephone, medical treatment, and livelihood support through implementing partners.⁹⁰ “Between 2008 and 2021, over 68,000 Ugandan victims have been rehabilitated and directly benefited from the Trust Fund’s projects.”⁹¹
- In the DRC, the Trust Fund will continue its assistance program “with 10 implementing partners for the benefit of about twenty thousand direct beneficiaries and about fifty thousand beneficiaries attending peacebuilding sessions.”⁹² These ten programs are interconnected with the reparations programs discussed above,⁹³ and are focused in the provinces of Ituri, North Kivu, and South Kivu.⁹⁴ Through these programs, more than 5,200 people received support in 2021.⁹⁵
- In Cote d’Ivoire, implementing partners have engaged in consultations with communities to implement symbolic and community measures.⁹⁶ In 2021, Trust Fund partners engaged with hundreds of victims to provide psychological support and initiated symbolic community-based measures to acknowledge the harms suffered.⁹⁷ The Trust Fund expects the program will conclude in 2023.⁹⁸
- In CAR, five implementing partners were contracted to implement programs in six provinces focused on providing mental health care to survivors of sexual violence, rape, and abductions.⁹⁹ Implementing partners have also trained social workers and health auxiliaries to offer long-term support to the community. The Trust Fund also expects “to closely engage with international partners and national authorities ... in order to advance reparations programmes that will feed into reparations

⁹⁰ 2020-21 TFV Strategic Plan, at 15-16.

⁹¹ Trust Fund for Victims, *Realising Reparative Programmes in Challenging Times – Annual Report 2021* [hereinafter “2021 TFV Annual Report”], at 39.

⁹² 2022 Proposed Budget, para. 766(b).

⁹³ 2021 TFV Annual Report, at 26.

⁹⁴ 2020-21 TFV Strategic Plan, at 16.

⁹⁵ 2021 TFV Annual Report, at 31.

⁹⁶ 2020-21 TFV Strategic Plan, at 16.

⁹⁷ 2021 TFV Annual Report, at 24.

⁹⁸ 2022 Proposed Budget, para.766(d).

⁹⁹ 2020-21 TFV Strategic Plan, at 17.

order which may be issued in relation to the ongoing prosecution of the accused in the CAR II situation.”¹⁰⁰ Additionally, the Trust Fund has been running a separate pilot program in CAR based on an earmarked voluntary contribution from the Netherlands. The program has provided customized psychosocial therapy and trauma-based counselling to at least 212 beneficiaries. Three psychosocial centers have also been created and equipped to serve as training centers and to provide mental health support,¹⁰¹ provide medical support and nutritional and dietary supplements for sexual violence survivors who tested positive for HIV/AIDS, pay school fees for dependants of victim survivors, and contribute to housing costs for displaced survivors.¹⁰² By December 2021, the assistance program provided direct services to almost 4,000 people, opened 20 collective psychotherapy centers, and trained 94 social workers and health auxiliaries.¹⁰³

- In Mali, the assistance program started this year is focused on “victims of crimes committed outside of Timbuktu, where the *Al Mahdi* (ongoing reparations) and *Al Hassan* (prospective reparations) cases have their origin.”¹⁰⁴ In March 2021, the Trust Fund hosted a high-level ceremony in which the Chair of the Trust Fund “handed over the symbolic euros to the Government of Mali for moral harm suffered by the Malian people and the UNESCO for moral harm suffered by the international community.”¹⁰⁵ In 2021, the Trust Fund issued issued reparations to almost 800 people.¹⁰⁶
- In Georgia and Kenya, the Trust Fund’s assistance programs are scheduled to start this year, once procurement and contracting processes are complete. According to the 2023 Proposed Budget, the Georgia program is expected to cost roughly 620,000 euros, while the Kenya program is expected to cost roughly 300,000 euros.¹⁰⁷

¹⁰⁰ 2022 Proposed Budget, para.76(c).

¹⁰¹ 2020-21 TFV Strategic Plan, at 16.

¹⁰² 2020-21 TFV Strategic Plan, at 17.

¹⁰³ 2021 TFV Annual Report, at 19.

¹⁰⁴ 2022 Proposed Budget, para.766(e).

¹⁰⁵ 2021 TFV Annual Report, at 36.

¹⁰⁶ 2021 TFV Annual Report, at 37.

¹⁰⁷ 2023 Proposed Budget, para.844.

Relevant U.S. Law

Based on our research, three statutes directly constrain the U.S. Government’s ability to make contributions to the ICC: *first*, the American Servicemembers’ Protection Act, *second*, the Foreign Relations Authorization Act (FRAA), and *third*, the 2023 Consolidated Appropriations Act. We discuss each statute below.

American Servicemembers’ Protection Act of 2002

The American Servicemembers’ Protection Act, 22 U.S.C. § 7421-7433, seeks to protect Americans from the jurisdiction of the ICC and constitutes the most significant piece of U.S. legislation focused on the Court.¹⁰⁸ The American Servicemembers’ Protection Act was passed shortly after the United States decided to withdraw its signature from the Rome Statute, citing the need to protect U.S. service members, nationals, and sovereignty more broadly.¹⁰⁹ Secretary of State Colin Powell justified the U.S. withdrawal by saying, “the sovereign state is best positioned to balance the interest of peace, justice, democratic principles and societal stability against the need for prosecution.”¹¹⁰ Indeed, as Bava and Ireland describe, U.S. policymakers opposed the joining of the ICC in large part based on “concerns about the risk the Court would pose to U.S. soldiers or policymakers involved in military actions on foreign soil.”¹¹¹

Among other things, the statute restricts “support to” the ICC. *Id.* § 7423(e). For the purposes of the American Servicemembers’ Protection Act, the ICC is defined as “the court established by the Rome Statute,” *id.* § 7432(6), and “support” is defined as “assistance of any kind, including financial support, transfer of property or other material support, services, intelligence sharing, law enforcement cooperation, the training or detail of personnel, and the arrest or detention of individuals.” 22 U.S.C. § 7432(12).

¹⁰⁸ Julian Bava & Kiel Ireland, “The American Service-Members’ Protection Act – Pathways to and Constraints on U.S. Cooperation with the International Criminal Court,” 12 *Eyes on the ICC* 1 (2016-2017) [hereinafter, “Bava & Ireland”], at 5 (“ASPA is a response to concerns that the International Criminal Court would exercise jurisdiction over U.S. nationals even if the United States were not a party to the court. Its purpose, as demonstrated by the statute’s name and its numerous references to ‘U.S. citizens’ and ‘members of the Armed Forces of the United States,’ is to safeguard ‘protections to which all Americans are entitled under the Bill of Rights’ and ensure that ‘members of the Armed Forces of the United States [are] free from risk of prosecution by the International Criminal Court.’”) (citing ASPA 22 U.S.C. §§ 7421(8)-(8), 7423(d), 7423(f), 7421(7)-(8)).

¹⁰⁹ Bava & Ireland, at 2.

¹¹⁰ Bava & Ireland, at 2.

¹¹¹ Bava & Ireland, at 4.

The Act includes two waiver provisions at Sections 7422 and 7430:

- Section 7422 authorizes the President to waive the American Servicemembers' Protection Act's restrictions for a single period of one year provided that the President (1) notifies appropriate congressional committees, and (2) determines that the ICC has entered into a binding agreement that (a) prohibits the ICC from seeking to exercise jurisdiction over covered U.S. or allied persons, and (b) ensures that no covered U.S. or allied persons will be arrested, detained, prosecuted, or imprisoned by or on behalf of the ICC. *Id.* §7422(a).
- More broadly, Section 7430 provides that the prohibitions “shall not apply to any action or actions with respect to a specific matter involving the International Criminal Court taken or directed by the President on a case-by-case basis in the exercise of the President’s authority as Commander in Chief...”. *Id.* § 7430.

An amendment introduced in 2002 by then-Senator Christopher Dodd established another exception to the blanket prohibition on assistance to the ICC, stating, “[n]othing in this subchapter shall prohibit the United States from rendering assistance to international efforts to bring to justice ... other foreign nationals accused of genocide, war crimes or crimes against humanity.” 22 U.S.C. § 7433. This is referred to as the “**Dodd Amendment**.” Notably, this carve out shaped the Obama administration’s engagement with the ICC.¹¹²

According to the Office of Legal Counsel’s currently effective interpretation of the statute, as embodied in the 2010 Memorandum for National Security Council Legal Adviser Mary DeRosa regarding Engagement with the International Criminal Court (“**OLC Memo**”), there was disagreement among government departments and agencies as to whether the Dodd Amendment qualifies or clarifies the restrictions of the American Servicemembers’ Protection Act.¹¹³ The Office of Legal Counsel’s binding interpretation¹¹⁴ of the Dodd Amendment, based on the text, purpose, and

¹¹² See, e.g., American Society of International Law, *ASIL Task Force on Policy Options for U.S. Engagement with the ICC*, (Apr. 2021) [hereinafter “ASIL Task Force”].

¹¹³ OLC Memo, at 6 (“there is disagreement as to whether the Dodd Amendment should be read to qualify those prohibitions so that they do not bar United States assistance to particular ICC efforts to bring to justice foreign nationals accused of genocide, war crimes, or crimes against humanity, or whether, instead, the Dodd Amendment should be construed merely to clarify that the ASPA’s prohibitions, while fully applicable to the ICC, do not limit the United States in assisting *other* international efforts, such as ad hoc tribunals established by the United Nations, to bring to justice foreign nationals accused of the enumerated crimes.”).

¹¹⁴ OLC’s legal advice is considered binding on the Executive Branch. See, e.g., Office of Legal Counsel, *Memorandum for Attorneys of the Office*, (Jul. 16, 2010), at 1 (“OLC’s central function is to provide ... controlling legal advice to Executive Branch officials”).

legislative history of the American Servicemembers' Protection Act,¹¹⁵ is that it *qualifies* the Act, creating a carve out to permit specific assistance to the ICC in cases involving foreign nationals accused of genocide, war crimes, or crimes against humanity.¹¹⁶

As Julian Bava and Kiel Ireland describe in their article on the subject, the Dodd Amendment “frees the government from ASPA’s prohibitions” when five requirements are met:

- the United States is “rendering assistance,”
- the assistance is provided to “international efforts,”
- the international efforts are aimed at “bringing to justice” certain individuals,
- the target of the international efforts is a foreign national, and
- the foreign national is accused of “genocide, war crimes or crimes against humanity.”¹¹⁷

While “international efforts” is not defined in the Dodd Amendment, the ICC is included within the plain meaning of the phrase, and nothing in the text of the Dodd Amendment specifically exempts the ICC from its coverage. There is, however, disagreement over whether the provisions require a formal indictment in order to enable U.S. assistance.¹¹⁸

The Office of Legal Counsel also rejects the contention that the Dodd Amendment would render Sections 7422 and 7430 superfluous.¹¹⁹ Indeed, then-

¹¹⁵ The legislative history also supports the conclusion that the Dodd Amendment should be construed as qualifying ASPA’s prohibitions. The Amendment was adopted after extensive debate during which its sponsors identified its precise consequences as qualifying. Then-Senator Dodd made clear that he intended “international efforts” to include those of the ICC, and as the sponsor, his views are entitled to interpretive weight. Senator Warner, the sponsor of the ASPA, likewise indicated that he understood the Amendment as covering ICC efforts. Meanwhile, Senator Leahy, who was involved in the negotiations, was clear that the Amendment’s qualifications apply notwithstanding the waiver possibility provided for in Section 7430. Prior to the bill’s final passing, the Congressional Research Service publicly expressed the view that the Amendment applied to cooperation with the ICC. *See* OLC Memo, at 14-16.

¹¹⁶ OLC Memo, at 7-17.

¹¹⁷ Bava & Ireland.

¹¹⁸ Compare Bava & Ireland, at 9 (asserting that the United States “likely cannot contribute to an investigation unless there is a formal indictment that complies with the fourth and fifth requirements.”) with ASIL Task Force (suggesting that the inclusion of “Al Qaeda” opens the possibility for U.S. support before a formal indictment has been filed).

¹¹⁹ OLC Memo, at 12.

Senator Dodd asserted that his Amendment was necessary in part because the waiver provision in Section 7422 was too onerous, making it virtually impossible to use in many instances. Therefore, Section 7422 still remains effective with respect to any effort to provide assistance in a case that does not fall in the scope of the Dodd Amendment, including cases involving U.S. nationals and/or the crime of aggression.

Thus, under the Office of Legal Counsel's interpretation, the Dodd Amendment qualifies the American Servicemembers' Protection Act's prohibition on support for the ICC, permitting the United States to provide assistance in cases involving "international efforts to bring to justice... other foreign nationals accused of genocide, war crimes or crimes against humanity."

Foreign Relations Authorization Act for Fiscal Years 2000 and 2001

The Foreign Relations Authorization Act of 2000 and 2001 provides that "[n]one of the funds authorized to be appropriated by this or any other Act may be obligated for use by, or for support of, the International Criminal Court unless the United States has become a party to the Court pursuant to a treaty." 22 U.S.C. § 7401(b). The statute defines the ICC as "the court established by the Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998."

Notably, the provision contains two separate prohibitions: (1) no funds may be obligated "for use by" the ICC, and (2) no funds authorized to be appropriated by any act may be obligated "for support of" the ICC. *Id.* According to the OLC, the limitation on funds "for use by" the ICC prohibits only the appropriation of funds to the ICC which the Court could then spend in a self-directed way.¹²⁰ This could include funds used to meet institutional expenses and to pay any costs associated with a specific case. In this respect, the prohibition is more restrictive than the Dodd Amendment; although it is limited, it is categorical and applies regardless of the way the ICC uses the funds.

While the limitation on funds "for support of" the ICC could be read to encompass nearly anything, the Office of Legal Counsel asserted a narrower construction. As an initial matter, the Office of Legal Counsel determined that Congress did not intend the American Servicemembers' Protection Act's broad definition of "support" to shift the interpretation of Section 7401(b) – the American

¹²⁰ OLC Memo, at 18.

Servicemembers' Protection Act includes other cross-references to Section 7401, suggesting the failure to align the definitions of "support" was not inadvertent.¹²¹ The Office of Legal Counsel's narrower reading of "support" under the Foreign Relations Authorization Act is also buttressed by subsequently enacted legislation concerning the ICC, which, when read together, indicates a Congressional understanding that Section 7401 did not impose a sweeping bar on support to the ICC.¹²² Instead, according to the Office of Legal Counsel, Section 7401(b) prohibits the provision of any kind of aid, including but not limited to financial contributions, used to support the ICC as an institution, rather than in aid of a certain case.¹²³ The Office of Legal Counsel Memo cites as examples of "institutional support," "donating a computer system, constructing a building, or detailing personnel for non-case-specific functions."¹²⁴

As the Office of Legal Counsel Memo summarizes, "the United States may not obligate for use by the ICC funds that Congress has authorized to be appropriated, whether the funds would be used by the ICC for institutional maintenance or case-specific expenses, and that the United States also may not provide non-monetary institutional support for the ICC."¹²⁵

¹²¹ OLC Memo, at 19.

¹²² Most significant in this regard is the Hyde Amendment to the Department of Defense Appropriations Act for Fiscal Year 2002, which provided: "None of the funds made available in division A of this Act may be used to provide support or other assistance to the International Criminal Court or to any criminal investigation or other prosecutorial activity of the International Criminal Court." Pub. L. 107-117 § 8173. The Hyde Amendment suggests that § 7401(b) had not already imposed a sweeping bar on support to the ICC. Relatedly, the ASPA imposes restrictions that would not make sense if § 7401(b) had already created a sweeping bar. Indeed, in enacting the ASPA, Congress repealed the Hyde Amendment, suggesting that the ASPA provided more detail as to what was prohibited, but it did not repeal § 7401(b), presumably because Congress saw its scope as different to that of the ASPA. That Congress took care in both the Hyde Amendment and ASPA to specify when case-specific support is prohibited indicates a congressional understanding that after the enactment of § 7401(b), there is a difference between institutional support on the one hand, and assistance for particular cases on the other. *See* OLC Memo, at 20.

¹²³ OLC Memo, at 22.

¹²⁴ OLC Memo, at 21.

¹²⁵ OLC Memo, at 22. *See also id.* at 25-26 (detailing that (1) "the United States may not provide the ICC with any funds that Congress has authorized to be appropriated, even for case-specific activities"; (2) the U.S. may provide "intelligence, law enforcement information, diplomatic reporting, investigative actions, and testimony ... to the ICC for particular investigations or prosecutions of foreign nationals accused of genocide, war crimes, or crimes against humanity"; (3) the U.S. can sometimes provide personnel training "for cases involving foreign nationals accused of genocide, war crimes, or crimes against humanity" under the Dodd Amendment and section 7401(b) depending on the facts of the case; (4) "the United States may, consistent with ASPA and subsection 7401(b), detail personnel for an ICC investigation or prosecution of a foreign national covered by the Dodd Amendment as long as the personnel would not furnish institutional support to the ICC"; and (5) "the United States may encourage foreign governments to materially assist the ICC.")

Consolidated Appropriations Act of 2023

The 2023 Consolidated Appropriations Act (“**2023 CAA**”), § 7073(b), amends the Dodd Amendment to the American Servicemembers’ Protection Act, providing:

Nothing in this title shall prohibit the United States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Queda, leaders of Island Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity, or from rendering assistance to the International Criminal Court to assist with investigations and prosecutions of foreign nationals related to the *Situation in Ukraine, including to support victims and witnesses*.¹²⁶

The provision extends the Dodd Amendment’s carve-out to the restrictions established by the American Servicemembers’ Protection Act to the “Situation in Ukraine”. The provision continues that this assistance can be made available “notwithstanding” the Foreign Relations Authorization Act prohibitions on funding “for use by, or for support of, the International Criminal Court,” and that in order to obligate funds, the Secretary of State must notify the House and Senate Committees on Appropriations, the Senate Committee on Foreign Relations, and the House Committee on Foreign Affairs.¹²⁷ Notably, the provision maintains the fundamental intent of the American Servicemembers’ Protection Act and the Foreign Relations Authorization Act by providing that funds may not “be made available for the purpose of supporting investigations or prosecutions of U.S. service members or other covered United States persons or covered allied persons[.]”¹²⁸

Unfortunately, there is no legislative history and no guidance issued by the Executive Branch related to this specific provision. Regardless, the plain text of the provision creates a carve-out for funding assistance to the ICC related to the situation in Ukraine, “including to support victims.” This authorizes the United States to contribute to ICC victims’ assistance programs related to Ukraine, including through the Trust Fund for Victims.

¹²⁶ Consolidated Appropriations Act (2023), Pub. L. No. 117-328, § 7073(b) (emphasis added).

¹²⁷ Consolidated Appropriations Act (2023), Pub. L. No. 117-328, § 7073(b) (emphasis added).

¹²⁸ Consolidated Appropriations Act (2023), Pub. L. No. 117-328, § 7073(b) (emphasis added).

Legal Analysis

Under the 2023 Consolidated Appropriations Act, the U.S. government is authorized to make financial contributions to the Trust Fund programs related to the Situation in Ukraine. As described above, both the Foreign Relations Authorization Act and the American Servicemembers' Protection Act *restrict* contributions to the ICC, defined as the court created by the Rome Statute.¹²⁹ Under this definition of the ICC, the Trust Fund is arguably excluded from this restriction as it is not the court created by the Rome Statute. Unlike the American Servicemembers' Protection Act and the Foreign Relations Authorization Act, however, the 2023 Consolidated Appropriations Act *authorizes* assistance to the ICC, which it does not define, including specifically "to support victims and witnesses ... related to the Situation in Ukraine". The Trust Fund is the mechanism through which the ICC supports victims and witnesses. Therefore, the 2023 Consolidated Appropriations Act enables contributions to the Trust Fund for its assistance programs related to the Situation in Ukraine.

Looking beyond Ukraine, the United States may be able to contribute financially to the Trust Fund's programs for other victims as well, based on the legal distinction between the Trust Fund for Victims and the ICC as the court created by the Rome Statute. While the Rome Statute provides for the establishment of the Trust Fund for Victims, it does not establish the Trust Fund itself, and it defines the Trust Fund as separate and apart from the ICC.¹³⁰ Indeed, the Trust Fund is a creation of the Assembly of State Parties in accordance with the Rome Statute.¹³¹

This distinction between the ICC and the Trust Fund for Victims is further evidenced by the functioning of the Trust Fund. The Trust Fund maintains an independent Secretariat and Board of Directors, and functions under regulations adopted by the Assembly of State Parties.¹³² In addition to separate governance structures, the Trust Fund and ICC maintain separate fundraising efforts, funds, and bank accounts. The accounting provisions of the Trust Fund establish that its accounts are separate from those of the ICC, and money allocated to the Trust Fund for programmatic expenses can only be used for victims and their families.¹³³

¹²⁹ 22 U.S.C. § 7432(6); 22 U.S.C. § 7401(c).

¹³⁰ *See supra* at 4. *See also* Rome Statute, Art. 79.

¹³¹ TFV Establishment Resolution; Rome Statute, Art. 79.

¹³² *See supra* at 4-6; *see also* <https://www.icc-cpi.int/tfv> ("Though the Trust Fund for Victims is separate from the Court..."); <https://www.trustfundforvictims.org/en/about/vision> ("The Rome Statute of 17 July 1998 forms the basis for two bodies: the International Criminal Court (ICC), created in 2002, and the Trust Fund for Victims (TFV), created in 2002 by the Assembly of States Parties (ASP).").

¹³³ TFV Regulations, §§ 37-41.

Indeed, voluntary contributions are kept in separate bank accounts and cannot be used by other parts of the ICC.¹³⁴ These voluntary contributions are the result of fundraising efforts led by the Trust Fund, typically without the involvement of the ICC.¹³⁵ While the Trust Fund relies on the ICC's Registry for administrative assistance, the Trust Fund operates and oversees its own programs under the leadership of its Board of Directors. Furthermore, as discussed above, the Trust Fund accomplishes its mandate through implementing partners. These practices all further support the assertion that a contribution made to the Trust Fund is not a contribution made to the ICC.

This distinction between the ICC and the Trust Fund for Victims has been widely recognized. The Assembly of State Parties describes itself as “mindful of the independence” of the Trust Fund for Victims.¹³⁶ The Trust Fund for Victims Regulations, adopted by the Assembly of State Parties, likewise “[b]ear[] in mind the independence of the [Trust Fund for Victims] Secretariat.”¹³⁷ The Trust Fund for Victims Board of Directors describes the Trust Fund as “not an organ of the Court,”¹³⁸ but rather in “partnership” with the ICC.¹³⁹ External experts have also highlighted the distinction between the ICC and the Trust Fund. The Independent Expert Review Final Report repeatedly recognizes the functional independence of the Trust Fund,¹⁴⁰ and the American Society of International Law describes the Trust Fund as “an entity that is distinct from the organs of the Court,” citing that it was created by a decision of the Assembly of State Parties, and is governed by an independent five-member Board of Directors and not by the Court personnel.¹⁴¹

The Trust Fund for Victims has thus been recognized as distinct from the ICC, and operates in a functionally independent way. Recognizing this, contributions to the Trust Fund are not proscribed under the plain meaning of U.S. law.

¹³⁴ ICC Rules of Procedure and Evidence, R. 98.

¹³⁵ See, e.g., TFV Regulations, § 21.

¹³⁶ Secretariat Establishment Resolution, para.3.

¹³⁷ TFV Regulations, para.19.

¹³⁸ Assembly of States Parties, “Overall Response of the International Criminal Court to the ‘Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report’; Preliminary Analysis of the Recommendations and Information on Relevant Activities Undertaken by the Court,” UN Doc. ICC-ASP/20/2, June 11, 2021 [hereinafter “Response to IER Final Report”], *Annex IV: Observations by the Board of Directors of the Trust Fund for Victims for the Attention of the Assembly of States Parties via the Review Mechanism*, para.2.

¹³⁹ International Criminal Court, *The Trust Fund for Victims: Observations pursuant to rule 103 of the Rules of Procedure and Evidence*, UN DOC. ICC_01/04-01/06-3430, para.19.

¹⁴⁰ IER Final Report, para.50, 58, 364, 929

¹⁴¹ ASIL Task Force, at 66.

The legislative intent of the American Servicemembers’ Protection Act and the Foreign Relations Authorization Act further support this interpretation.¹⁴² Both statutes were primarily motivated by concerns regarding the prosecution of U.S. persons or U.S. allies, and the attendant threat to U.S. sovereignty.¹⁴³ As the Office of Legal Counsel Memo points out with regard to the American Servicemembers’ Protection Act, “[t]he title of the Act is the American Servicemembers’ Protection Act ... and the design of the Act is to protect Americans – in particular servicemembers and Government officials – from the ICC’s jurisdiction”¹⁴⁴ Contributions to the Trust Fund for Victims do not contravene this purpose as they do not support ICC prosecutions of U.S. persons or U.S. allies; many are unrelated to prosecutions at all. Instead, all funds must be used for victims’ assistance.

In these ways, contributions to the Trust Fund contravene neither the letter nor the purpose of U.S. law restrictions on support to the ICC.

Assistance for Ukrainian Victims

If the United States were to make a political decision to do so, it could contribute funds to the Trust Fund for Victims earmarked for assistance to victims of atrocity crimes in Ukraine.

As discussed above,¹⁴⁵ contributions to the Trust Fund are increasingly earmarked, and contributions can be earmarked if they are given at the solicitation of the Board of Directors or its Executive Director. The ICC Prosecutor has initiated an investigation into possible war crimes and crimes against humanity in Ukraine, and States Parties expedited the investigation by referring the situation to the ICC Prosecutor.¹⁴⁶ Therefore, Ukraine is now a “situation” country under the rules of the ICC, such that the Trust Fund can initiate assistance programs in the region.

¹⁴² See generally *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 861 (2005) (“Examination of purpose is a staple of statutory interpretation”).

¹⁴³ See *supra* at 15-16, 18-19. See also, e.g., ASPA, 22 U.S.C. § 7421(8) (finding “Members of the Armed Forces of the United States should be free from the risk of prosecution by the International Criminal Court, especially when they are stationed or deployed around the world to protect the vital national interests of the United States. The United States Government has an obligation to protect the members of its Armed Forces, to the maximum extent possible, against criminal prosecutions carried out by the International Criminal Court.”); FRAA, 22 U.S.C. § 7402 (prohibiting extradition or transfer of United States citizens to the International Criminal Court).

¹⁴⁴ OLC Memo, at 12.

¹⁴⁵ See *supra*, at 9-10.

¹⁴⁶ International Criminal Court, *Statement of the ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: ‘I have Decided to Proceed with Opening an Investigation,’* Statement, (Feb. 28, 2022), available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening>; International Criminal Court, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, (Mar. 2,

The Trust Fund for Victims Board has “call[ed] upon the international community ... to be mindful of the plight of victims in the situation in Ukraine and to recognise their inalienable rights to justice, redress and reparations.”¹⁴⁷ This arguably constitutes a solicitation of funds for Ukrainian victims,¹⁴⁸ such that the United States could contribute earmarked funds without violating domestic prohibitions or the Trust Fund for Victims’ regulations.

2022), available at <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states>.

¹⁴⁷ International Criminal Court, *Trust Fund for Victims: The Board of Directors of the Trust Fund for Victims (TFV Board) at the International Criminal Court (ICC) is Deeply Concerned About the Harm Being Suffered by the Population of Ukraine as a Consequence of the On-Going Conflict in that Country*, (Mar. 9, 2022), available at <https://www.trustfundforvictims.org/index.php/en/news/statement-tfv-board-directors-situation-ukraine>.

¹⁴⁸ There are no guidelines in place for what constitutes a solicitation of funding except for a provision which states that once the TFV Board has decided to undertake an assistance program, the TFV Board “may issue a communique” and a “call for voluntary contributions may accompany the communique.” See TFV Regulations, para.51-52. While the TFV Regulations instruct the TFV to promulgate guidelines on how to solicit financial contributions from *private* institutions, see *id.* para.24, such guidelines have not been adopted.

About the Authors

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